

# Chapter 1

## Migration on the move: An Introduction

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### 1.1. *Background*

In the autumn of 1994, a couple of staff members of the Law Faculty of Radboud University (Nijmegen, The Netherlands) organised a meeting to investigate the feasibility of a structured form of cooperation on the issue of migration. At least a dozen or so staff members from different departments within the Law Faculty were working on this topic and were interested in some form of cooperation. As a result, a formal request was sent asking for permission to create a research centre. In January 1996, the Faculty Board approved this idea. Consequently, the informal cooperation became official and the *Centre for Migration Law* (CMR) was founded.<sup>1</sup> In 2016 the Centre for Migration Law celebrated its 20<sup>th</sup> anniversary. On that occasion the CMR organised an international conference, which testified to the relevance of our research field, its complexity and societal relevance. We were overwhelmed by the interesting and valuable contributions presented during that day and decided to elaborate on the themes discussed there in a book format.

*Migration on the Move* examines the developments of European migration and asylum law over the past two decades. Bringing together experts with different backgrounds, the book sketches the development of European policies and legislation in the field from 1996, the start of negotiations in the EU to grant competence to the EU for immigration and asylum law, to date (2016) including the refugee crisis of 2015/16 and the role of Turkey. The book is divided into three sections representing different angles on the subject. The first session examines the changing focus of immigration and asylum law from a national competence to an EU one, assessing the changing paradigm of law and practice in the area. The second section focuses on Europe in the world, i.e. how does the EU engage with the world on issues of migration and asylum, and with what kinds of

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<sup>1</sup> The Dutch terminology is: Centrum voor Migratierecht (CMR).

consequences. The third section develops the idea of people's Europe: to whom does Europe 'belong'?

### 1.2. *Section one: Changing focus*

Some twenty years ago, two distinct but important measures were taken in Europe that were of profound influence on the issue of migration: (a) the implementation of the 1990 Schengen Implementing Agreement lifting intra-state border controls on the movement of persons (26 March 1995), and (b) the signing of the Treaty of Amsterdam (2 October 1997). The first Schengen Agreement of 1985 was the start of the gradual abolition of border checks between member states and the realisation of one of the 'basics' of Europe: the free movement of people within its borders. The Amsterdam Treaty created a separate body of law: European immigration and asylum law by collapsing the former Third Pillar regarding borders, immigration and asylum into EU law and by incorporating the Schengen acquis. From this perspective, this was a period of transition from nationally oriented intergovernmental cooperation to a common European approach focusing on implementation and compliance with Union Law.

This first section takes its inspiration from the past in order to analyse the major developments that we witness in the field of migration. Particular attention is paid to the Europeanization of migration law and policy, and its consequences on a national level for the legislation, administration, the courts, and the migrants themselves. In that context a diminishing significance of national sovereignty on the one hand and an increased meaning of Union law on the other hand, can be described as the organising principles. The shift in political weight and influence from the national to the European level – and vice versa – has led to different types of adjustment by public bodies or authorities within the administration, legislature, and judicature.

In the first contribution (chapter 2), **Thomas Spijkerboer** traces the major shifts that have taken place in respect of migration law and policy in the past decades. He argues that in the framework of the Europeanization of migration law, three distinct developments occurred: proliferation, denationalization, and securitization. The combined effects of these three developments have led to a shift from migration control to migration management: from reactive to proactive; from an individual orientation towards an orientation on populations; and from a public policy towards a private, commercially oriented approach. Spijkerboer argues that this shift needs to be analysed from the perspective of its effects on the rights of individuals, while taking more seriously the role of

individual rights in this process. Moreover, his analysis shows that the shift towards migration management has consequences for how researchers understand and engage with the object of their research. Spijkerboer invites us to think systematically about what is taken into account and what is left out of our analyses, as well as broaden the scope of migration research in terms of geography, social fields and methodology.

**Betty de Hart** (chapter 3) addresses the relationship between migrant sexuality and migration policy by relying on a discourse analysis of media reporting in relation to sexual violence supposedly performed by refugees and migrants. The chapter takes as a starting point the manner in which the media have reported on the events of Cologne, Germany, on New Year's Eve (2015) and then goes to discuss the impact of these discourses on the development of migration policy and management in Europe. De Hart's analysis shows that there are similarities between the discourses on sexual assault by asylum seekers in present-day Europe and earlier discourses on black male sexuality in Europe and its colonies, especially those circulating during the interwar period. The representation in several newspapers after the Cologne attacks of the nation and of Europe as a (white) woman under attack by black men elevates the threat stemming from the sexuality of migrant or refugee men to a threat for the nation and for Europe, therefore no longer only a sexual threat, but also a cultural one. The historical analysis undertaken highlights that in several colonies belonging to European states, black male sexuality was perceived as a threat to European white women requiring specific policy measures. Moreover, at the beginning of the 20<sup>th</sup> century these threats travelled to the metropolis alongside the colonies' struggles for independence. As a result, sexual relations between European women and racialized men were increasingly regulated by the state through laws and reinforced through social norms. De Hart underlines that after the Second World War, racial thinking was rejected as an explanation for social issues. In her view, this makes the resurgence of sexualized and racialized depictions of refugee men remarkable in itself as well as a weak point for EU antiracism and gender equality laws.

**Paul Minderhoud's** contribution (chapter 4) discusses the free movement of EU workers from the perspective of recent developments in this field of law. The chapter examines Directive 2014/54, which is a new piece of legislation introduced by the EU Commission to strengthen the rights of EU workers on the ground and ensure the effectiveness of the principle of non-discrimination between national and EU workers. The need for such an instrument was highlighted by the monitoring reports produced by the CMR as part of the

network it coordinated in the field of free movement of workers' legislation in all 28 Member States.<sup>2</sup> Minderhoud's analysis identifies a number of weaknesses that have the potential to undermine the Directive's aims. The lack of effective enforcement tools means that the success of the Directive will depend largely on Member States' willingness to take the new legislation seriously – the UK and Dutch examples show this to be a real problem. Moreover, the failure to include posted workers in the Directive's scope is seen as an equally problematic aspect, since it is precisely this group of EU workers that causes great concern for national administrations. Finally, the chapter ends with a discussion on future challenges that the EU and its Member States will have to address. The progressive displacement of (traditional) EU workers by posted EU workers doubled by a changing definition of the notion of EU worker itself bring new challenges for the EU and for the legal framework designed around the fundamental right to freedom of movement. Brexit and the EU response prior to the actual referendum add yet another layer to an already complex discussion.

In the final chapter of this section, **Tineke Strik** examines (chapter 5) two decades of EU migration law for third country nationals (TCN) from the perspective of integration, which the EU defines as one of its main policy objectives in relation to legal migration. The chapter questions to what extent the objective of integration has been met in relation to two legislative instruments: (1) the family reunification directive, and (2) the long-term residence directive. Her analysis shows that Member States behave antagonistically towards EU legislation by using the transposition of the two directives to introduce more restrictive policies that have a detrimental effect upon TCNs and their claiming of EU law based statuses. In practice, the procedures designed to implement the two directives and their application by national administrations raise a number of challenges from the perspective of integration as an objective to be met. The overall picture that emerges is one where EU statuses function less as an integration measure and more as proof of the TCN's integration. The chapter highlights that it is at the level of practical implementation where the effectiveness of EU rights is best observed and that more efforts need to be made by all actors involved in this process to ensure that TCNs benefit from the rights they are entitled to. Strik examines several proposals to address the current situation: from the abolition of labour market tests for intra-EU TCN mobility, to the establishment of a full right to free movement for TCNs, and the introduction of a new status resembling the now abandoned concept of 'civic citizenship'.

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2 See, for an overview of all reports: < <http://www.ru.nl/law/cmr/research/projects/fmow-1/>>.

### 1.3. *Section Two: Europe in the World*

In this section the changing position of the EU vis-a-vis the rest of the world is under examination. How does the EU develop its policies on migration and asylum, and in light of what international consequences both among states and people? The authors reflect on EU's efforts in the field of asylum, migration and mobility and the extent to which we can describe the EU as a global player in the current asylum and migration crisis. Although migration has been on the agenda for quite some years, current developments regarding the refugee crisis require (more) coherent and effective responses. These responses should cover both the issue of protection of those in need, and the equally important issue of borders and safety. This raises two questions. On the one hand, what is the impact of increasing numbers of asylum seekers and refugees that go to Europe, and what can be said about the selection criteria for relocation of asylum seekers and resettlement of refugees? On the other hand: why has the project on safety of the EU citizen resulted in the reintroduction of controls at the internal and closing of external borders?

**Jens Vedsted-Hansen** starts this section (chapter 6) with an analysis of the costs of internal safety in terms of fundamental rights and solidarity. After reviewing where the Common European Asylum System (CEAS) started and where it is now, attention is paid to the complex relations between the two European courts (ECtHR and CJEU). The need to ensure that the two courts are working in tandem has resulted in a very close reading in both courts of the legal reasoning of the other and a high degree of respect for the underlying legal approaches. Subsequently, some legal challenges of the Dublin system are analysed, such as the systemic risk issue in *Tarakhel*<sup>3</sup> and subsequent cases. The chapter closes with some thoughts on the practical and substantive meaning of the EU-Turkey statement.

Subsequently, this subject is described from an external perspective by **Jim Hollifield** and **Rahfin Faruk** (chapter 7) focussing on migration in an age of globalization. The authors argue that, while international trade and migration are often looked at in isolation in terms of their impact on development, it is critical to understand the relationship between trade, foreign direct investment, and migration to get a complete picture of globalization. In their view, migration is both a cause and a consequence of political and economic change: a fundamental feature of the post-war liberal order. Throughout the chapter, the authors highlight that although the 'necessary conditions for migration to occur may be

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3 ECtHR 4 November 2014, Appl. 29217/12, GC, *Tarakhel v. Switzerland*.

social and economic, the necessary conditions are political and legal'. This makes the state an important element of any analysis attempting to understand migration in the 21<sup>st</sup> century. The authors propose an examination of the role of the state in migration governance from a 'public goods' approach which allows them to engage with questions concerning the effectiveness of international migration regimes. In their view, global migration governance should become a public good regulated through an international migration regime that would be based on a number of generalized principles of conduct. An examination of a number of already existing attempts in this field stemming from the UN, GATS, the EU or NAFTA exposes the underlying difficulties in establishing a truly international migration regime. The authors suggest that the field of migration governance will be shaped by the position of the more powerful liberal states that have the capacity and willingness to act as trend setters.

The topic of 'Europe in the World' is narrowed down to managing migration by selection in the contribution of **Marie Laure Basilien-Gainche (chapter 8)**. Basilien-Gainche elaborates on the so-called 'Hotspots approach', which – according to the European Commission – provides a platform for the agencies to intervene rapidly and in an integrated manner, in frontline Member States when there is a crisis due to specific and disproportionate migratory pressure at their external borders. She argues that this approach has been presented as a short-term policy response: a quick fix. However, it seems that it does not fix anything and could generate even more critical issues with domino effects in the long term. Her analysis shows how the identification process and the fingerprinting registration lead to the creation of hierarchy between refugees based on their nationality, whereas the relocation and resettlement programmes coupled with an emphasis on improving the effectiveness of return are based on an underlying assumption that all refugees are undesirable. The Hotspot approach proposed by the Commission is seen as failing in its purpose and leading to the return of a large number of refugees to unsafe places without proper consideration of their asylum claims and the encampment of increasing number of refugees in the hotspots of Italy and Greece. In this process, the Member States and the EU institutions are failing in their human rights and non-refoulement related obligations under international, EU and national laws. The designation of Turkey as a safe country and the so-called EU-Turkey deal are seen as part of an EU policy of 'industrialised and institutionalised selection of refugees' that enables the Member States to pick and choose which migrants they want to welcome while also legalizing the refusal to protect all refugees.

This section is closed with a chapter by **Margarite Zoetewey and Ozan Turhan** (chapter 9) in which they analyse the relation between the EU and Turkey. Their focus is on irregular migration to the EU from and through Turkey. Lately, Turkey has been given a central role to play in EU's policies to combat irregular migration. Zoetewey and Turhan's contribution contends that by entrusting Turkey with the execution of a significant part of the EU migration policy, the EU does not only deliberately make itself dependent on the goodwill of Turkey, it also indirectly takes on responsibility for the migration law and policy of Turkey. Their concern is that this signals a new phase in the management of migration towards the EU, where the EU will rely on Turkey and other third-countries to deal with migration flows while disregarding its human rights obligations. This chapter reviews from the perspective of EU human rights obligations a number of tools that have been agreed as part of EU-Turkey relations, such as: (a) the EU-Turkey readmission agreement and visa liberalization roadmap, (b) the new Turkish asylum and migration law and (c) the 2016 EU-Turkey deal. These instruments should satisfy on the one hand EU's need to manage migration flows that pass-through Turkey, and on the other hand Turkey's desire for visa free travel to the EU and accelerated EU accession talks. Zoetewey and Turhan argue that political and legal developments in Turkey make it an ill-chosen partner in the management of EU migration policy since returns to Turkey violate human rights standards and requirements that are fully applicable within the EU and which are required of EU candidate countries. In their view, EU migration management policy should rely on partnerships with third countries in as much as those partnerships and their application stay within the boundaries of human rights protection to which the EU subscribes.

#### 1.4. *Theme Three: People's Europe*

The third section elaborates on the question: To whom does Europe belong and how do we identify those people? The people of Europe are not only EU citizens, but also those who are in the process of acquiring rights, claiming rights and contesting state actions to deny them rights. Discussing and differentiating people according to the developing EU law on migration and asylum has also brought with it new cleavages and challenges, which are examined in this section. Citizens, migrants and refugees have been brought within the scope of EU law but more effort is needed in order to understand how the legal framework impacts the experiences and lives of individuals. Along with Brexit, the question then arises what changes are needed in Europe in the wider context of enlargement or the neighbourhood policies of the EU and the sustainability of the EU.

Firstly, **Elsbeth Guild** elaborates (chapter 10) on the transformation of the objective of free movement: from workers to citizens to people. The chapter starts by examining how workers have gradually extended and consolidated their rights entering into prolonged struggles with some Member States. These struggles have centred around social security and benefit rights, third country national family members and protection from expulsion. Her analysis shows how the choices made at the beginning of the EU in 1957 in respect of the free movement of workers seem strange in light of current thinking on the issue and the increasingly restrictive policies adopted by various states. Yet those choices set the EU on a course that would see the adoption of the status of EU citizenship as a natural continuation. Guild's chapter highlights the struggles that have occurred in law around the emancipation of EU citizenship from nationality of the Member States and the vacillating attempts to confer EU citizenship the same qualities as nationality under international law. She points out that a number of issues remain unsettled as EU citizenship falls short of offering a right to live and enter one's country of nationality, while allowing for its citizens to be expelled. Guild argues that the most important aspect of EU citizenship – the move away from an economic conceptualisation of the rights of the people – may nevertheless turn out to weaken the notion itself, since it is unclear what is the EU response to allegiance as the glue that holds the nation together. The EU adopting its own Charter of Fundamental Rights is examined as another step towards the extension and consolidation of rights in the EU, although the benefits of Charter rights for EU citizens per se are less clear. The attempts that are made to reduce the rights of EU citizens especially in the Brexit context may make the Charter a very valuable instrument for the retention of rights.

The chapter by **Sandra Mantu** (chapter 11) takes a closer look at EU citizenship and some of the contradictions inbuilt in its legal framework and their implications for EU citizenship viewed as a fundamental status. Mantu proposes an analysis of EU citizenship and social rights that builds on the notions of the 'Other', biopolitics and difference. The politicized discourse on EU mobility cannot be explained through legal analysis alone, which is why the chapter proposes these alternative frames of reference for understanding what is at stake in discourses that challenge EU mobility. Her analysis of EU citizenship and social rights from the perspective of the 'Other' shows that those who are legally included may nevertheless be symbolically excluded. This opens the path to articulate claims that mobile EU citizens are dangerous 'Others' whose mobility needs to be controlled. The chapter explores how denial of welfare rights for mobile EU citizens is meant to perform something akin migration management for EU citizens, filtering out desirable EU migrants and excluding undesired-able

ones (i.e. the unemployed, the poor, the Roma). The chapter argues in favour of seeing EU citizenship as a 'momentum concept' that needs to be constantly reworked to reach its inclusionary potential. Mantu suggests moving beyond economic activity as the only axis of differentiation in the economy of EU citizenship's legal framework and engage with issues such as ethnicity, gender, age, class. Shifting the lens to these issues helps understand why EU citizenship is not experienced in the same way by all those who are mobile. The question of how difference is incorporated in legal rules is an important one and needs to be explored beyond discrimination on the basis of nationality.

**Ashley Terlouw's** chapter addresses the very topical issue of access to justice or the lack thereof for asylum seekers (chapter 12). Since the increase of asylum seekers from Syria to Europe, a parallel development of restrictions on rights can be detected. By using a sociology of law approach to the issue of access to justice, Terlouw points towards the need to develop a specific access to justice theory for asylum seekers that takes into account the following elements: (a) access to territory, (b) access to an asylum procedure, and (c) access to a fair and durable solution. These three issues are used as entry points to highlight the obstacles that asylum seekers face when attempting to find justice in Europe while seeking protection against persecution. Although in her view the EU is – currently – 'not in the mood' for solidarity or accepting the need for closer cooperation, access to justice can and needs to be improved. This would require ensuring that asylum seekers can safely reach Europe through legal pathways and that they have access to a fair procedure. The latter requires from Member States closer collaboration, acceptance of solidarity and of responsibilities that stem from the externalisation of EU policies. The chapter also identifies a number of promising options, such as the joint processing of claims within the EU and the strengthening of humanitarian and development assistance to respond to large movements of people.

The chapter by **Asuncion Fresnoza-Flot** (chapter 13) investigates migrants' experiences of and interactions with state policies and provides insights into how state policies structure individual lives and aspirations as well as how individuals respond to such policies. The chapter urges us to view the relationship between people and state as neither static nor straightforward, but rather mutually constructed. The case studies presented focus on Filipino and Thai migrants in Europe and are broken down into 3 micro-level studies of maternal migration, marriage migration and children's migration. The analysis of migrants' responses to state governmentality is part of a growing literature that examines migrant agency as an important element of migration regimes. It shows that despite EU

states investing in the creation of ‘immobility regimes’ and ‘enclave societies’, migrants are not passive actors; they can live with, navigate or contest migration policies designed to keep them out as well as use a number of tactics, including ‘legal consciousness’, to find alternative ways to realize their own migration projects. The groups investigated by Fresnoza-Flot - undocumented Filipino mothers in France, Thai women who migrate to Belgium using the ‘intimate route’ and Filipino children who migrate to unite with their parents in Europe - all navigate migration laws, both ‘here’ and ‘there’ and rely on alternative migration channels to reach Europe. Often this leads to expensive migration fees, family separation and long periods of irregular status in their destination countries in Europe. The chapter argues that policy makers should pay more attention to the ways in which the subjects of migration policies react to the laws and policies that are supposed to discipline them, and to the long-term effects of such policies on migrants.

In the final contribution of the book, **Kees Groenendijk** discusses Brexit and its consequences for the free movement of Union citizens and the rights of third-country nationals (chapter 14). He focuses on the Decision that the Heads of State and Government agreed on prior to the British vote on Brexit. This agreement is, according to Groenendijk, an informal agreement between the 28 Member States aiming at changing elements of Union law without amending the Treaties. Thus, the Decision is a piece of international law not an instrument of Union law. The chapter examines in detail the changes proposed by the Decision in the area of social rights and free movement: the introduction of an emergency brake on in-work benefits and the indexation of child benefits for EU workers; limiting EU citizen’s security of residence by expanding the interpretation of the public policy exception in allowing for expulsion; and the reduction of the right to family reunification for EU citizens with TCN family members. Groenendijk shows that for the first time since 1961, the Member States had agreed to reduce the right to free movement of Union citizens, which will also have consequences for the interpretation of the rights of TCNs and Turkish nationals due to increasing interlinkages between these legal regimes. The manner chosen by the Member States to deal with UK demands - the intergovernmental method - lacked transparency, ignored constitutional arrangements concerning the changing of EU law, and minimized the role of the European Parliament. Although, as a result of the Brexit vote, the Decision will never enter into force, both its preparation and contents raise fundamental questions on the reduction of rights of Union citizens and TCNs, and highlight attempts to ‘renationalize’ the free movement of persons.