PART III

Area of freedom, security, and justice
15
EUROPEAN IMMIGRATION AND ASYLUM POLICY

Alexander Caviedes

Introduction
One cannot address the issue of European migration and asylum without acknowledging that European Union (EU) policy governs this area of public policy unevenly and incompletely. While there has been tremendous growth in EU competence in the past 25 years, member states still wield substantial autonomy and discretion in determining policy. Section II begins by examining the development of national policies in the post-War period in order to provide the context for presenting the leading explanatory frameworks for European migration policy. Knowledge of the historical and theoretical background is essential for appreciating the EU’s present system of migration and asylum. Sections III and IV provide a survey of the development of EU policy in migration and asylum followed by a discussion of the roles of its central institutional actors – Council, Commission, and European Parliament – to set the stage for Section V’s consideration of policy across four realms: legal migration, unauthorized migration, asylum, and integration. The examinations of the institutional framework and the individual policy realms will allow us to assess the validity of theories positing that states have lost control over the migration process or that national European policies are converging upon a single model.

European immigration policies: history and theories
To understand European Union policy in the realm of immigration and asylum, it is helpful to first distinguish Europe’s historical developments in this area. Through World War II European countries remained primarily sites of emigration. As such, immigration policy was not highly developed, with the exceptions of France and the UK, where economic prosperity and colonial ties promoted immigration (Castles & Miller, 2013). During the period of reconstruction following World War II, economic growth and demographic shifts related to warfare losses provided the impetus for public policy responses that varied depending on national circumstances. More recently, economic and political transformation has set the tone for immigration patterns continuing into the new millennium.

One can consider that the postwar period has seen four distinctive phases of migration (Messina, 2007). The first is characterized by the spontaneous migration of refugees and displaced
persons, passing largely from East to West, with a substantial portion (re-)settling in Germany. National immigration policy played a limited role during this period, with the UN’s 1951 Refugee Convention establishing who should be considered a refugee or asylum seeker as well as delineating state obligations toward such individuals. By contrast, the second phase, from the mid-fifties onward, was the product of public policy, as efforts to rebuild the economic base of key European societies led countries to recruit foreign labor. The central magnet for foreign workers became West Germany, which saw its industrial potential left unrealized in part due to wartime casualties. Countries such as France, Austria, Belgium, and the Netherlands also attracted ‘guest-workers’ through a series of bilateral agreements, and, subsequently, through more informal channels. While the initial agreements brought in workers in from neighboring countries, over time the net was cast ever wider, extending first to Southern European countries such as Italy, Greece, and Portugal, and subsequently to Yugoslavia, Turkey, and the Northern African trio of Tunisia, Morocco, and Algeria.

The intended non-permanent, circulatory nature of this migration meant that beyond recruitment, there were not that many changes in immigration law or efforts to further the integration of the foreign population. This began to change in the early 1970s as economic stagnation attendant to the oil shocks prompted mass unemployment that spelled the end of worker recruitment. Still, millions of ‘guest’ workers remained in Europe, serving integral roles within the labor force or preferring unemployment in Western Europe to a return home. During this third phase, which began in the early to mid-1970s, policies tended toward the restriction of migration, even as the number of immigrants within European societies continued to rise as family reunion became the key mode of migration to Europe. This led to a transition in focus from immigration to integration policy as countries sought to adjust to the permanence of immigrant populations whose incorporation into society was not previously contemplated.

The end of the Cold War triggered the final phase in European migration. Political instability in Eastern Europe in the wake of the fall of communism led to an increase in migration in the early 1990s. Many of these migrants came seeking asylum or fleeing war, yet economic opportunity was undoubtedly a lure as well, and by the dawn of the new millennium, European countries themselves encouraged such migration through a new generation of labor migration programs designed to satisfy the demands of particular sectors such as agriculture, hospitality, construction, and information technology (Caviedes, 2010). The large number of migrants who continue to arrive, either due to recruitment or the freedom of movement extended to workers from new European Union Member States joining in 2004 and 2007, coupled with a surge of refugees from the Middle East and Africa, have ensured that immigration and integration policy remain key political concerns.

**Theoretical explanations**

The resurgent salience of European immigration has attracted a large and diverse body of research. The literature can be divided into two broader strands. The first is concerned with the loss of state control over migration. In particular, the continued rise in the foreign-born percentage of the population, even during a period of restrictive policy such as that of the 1970s and 1980s, suggests that this occurs against the will of European host countries. The central explanations for this erosion of sovereignty either trace to an increase in the circulation of workers due to growing globalization (Hollifield, 1992), international norms shielding immigrants from deportation and mandating greater permanence of status (Jacobson, 1996; Sassen, 1998), or liberal legal norms that have developed domestically (Joppke, 2001).
The loss of control thesis has been challenged for setting unreasonable goals concerning states’ ability to restrict in the first place (Schain, 2009) or failing to note heightened border control (Bigo & Guild, 2005), but it has spawned copious strands of research about how states do respond to perceived challenges to their migration control sovereignty. One commonly identified response has been securitization, which involves recasting immigrants as threats and the ensuing justification of increased surveillance and policing methods (Huysmans, 2006; Bigo & Guild, 2005). A second trend has seen states seeking to augment their capacity to monitor and control immigration by outsourcing policy competence to the European level, where restriction-minded governments can avoid liberal domestic constraints and lock in their preferences via binding international agreements (Guiraudon, 2000). A third tendency has been the re-evaluation of immigrant and minority integration policies, especially multiculturalism, which is criticized either for being too laissez-faire or for reifying differences between groups (Vertovec & Wessendorf, 2010). This has fueled initiatives requiring immigrants to demonstrate knowledge of the language, history, and customs of the host country. Finally, at the heart of essentially all research on EU migration policy is the examination of the degree to which member states cede authority over immigration policy to European, sub-national, or non-governmental actors to produce multilevel governance (Guiraudon & Lahav, 2000).

The second broader strand of research overlaps with the previous question, and in addition seeks to ascertain the degree to which European policies are converging. Many of those forces said to be undermining state authority – economic globalization, international law, liberal norms – are also imputed as directing policy down common paths (Joppke, 2007; Chebel d’Appollonia & Reich, 2008; Caviedes, 2010). The European Union plays a role here by promulgating formal rules and standards for the member states. The dynamics of the convergence resulting through the process of European integration is captured in the concept of Europeanization, which contemplates the transmission of common obligations and practices concerning migration and asylum throughout Europe (Rosenow, 2009; Menz, 2010). Bringing together the two strands, this chapter’s discussion of EU migration and asylum policy revisits the question of what motivates national and EU policy and the degree to which the latter shapes the former.

The development of EU migration policy

Before considering EU migration policy toward non-EU citizens, it is worth recounting that the Coal and Steel Community and European Economic Communities already granted free movement of labor to nationals of the member states. Freedom of movement of workers, included in both the Treaty of Paris (1951) and the Treaty of Rome (1957), has expanded over time through a combination of directives and European Court of Justice decisions that have incrementally granted this right to a larger circle of individuals (such as the self-employed, students, and eventually anyone who has the means to provide for themselves), while prohibiting states from differentiating between EU nationals with regard to work conditions, salary, and unemployment, social, and tax benefits. In particular, the legislation of 1968 was crucial in taking most administrative discretion out of the hands of the member states (Maas, 2007). Today, with the exception of those who can be excluded for public policy reasons such as security or welfare tourism, all EU citizens enjoy free movement.

Therefore, the policies that deal with third-country nationals are generally considered the EU’s immigration and asylum policy. The European Communities lacked authority to legislate in this area, so other than the Commission’s advocacy of policy harmonization, it was not until the Maastricht Treaty’s formation of the EU that this area became subject to European authority.
The third pillar within the Treaty on European Union, known as Justice and Home Affairs (JHA), provided EU authority to act in the areas of legal immigration, irregular migration, asylum, and external border control. However, since member states had the sole right of legislative initiative and reserved veto rights, while the European Parliament (EP) was only granted consultation rights and the European Court of Justice (ECJ) remained without jurisdiction (Luedtke, 2006, 423), this intergovernmental setup was not initially viewed as wresting control away from the individual states.

The Maastricht Treaty grants the EU competence in migration matters, yet it was the 1997 Amsterdam Treaty that tilted policy prerogative toward supranationalism. Within the first pillar, it designated an ‘Area of Freedom, Security, and Justice,’ housing immigration and asylum matters over which the Commission now held the joint right of initiative (sole since 2005). Amsterdam was also important since it incorporated Schengen – a 1985 agreement between several European countries that created an area without borders for countries that agreed to meet common standards and expectations on their external border controls – into EU law. However, to preserve their sense of sovereignty, Denmark, Ireland, and the UK only consented to these reforms in exchange for the ability to opt-out of any legislation or initiatives covered by the initial Justice and Home Affairs pillar.

In terms of generating legislation, Amsterdam has been the crucial step in EU migration policy development, even if the volume of directives and regulations passed up to the present day has been modest. Institutional change advanced one last step in 2009 through the Lisbon Treaty, which pressed immigration and asylum policy further into the mode of the Community Method by making it subject to the co-decision process and providing that all national courts could request preliminary rulings from the ECJ (renamed Court of Justice of the European Union in the Lisbon Treaty). This empowerment of the EP (which enjoys a veto right under co-decision) and ECJ suggests a weakening of the member states’ capacity to control migration. The following review of the key actors in EU migration policy revisits this question.

The institutional actors

The intergovernmental roots of immigration within the Justice and Home Affairs pillar of the Maastricht Treaty have predetermined a strong role for the Council – and member state preferences – on immigration (Lavenex, 2010, 464), even as subsequent treaty changes have incrementally communitarized the policy-making framework by facilitating the Commission with the right of initiative and inviting the EP and ECJ into the process. Intergovernmentalism is evident in the European Council practice of promulgating five-year action plans for policy goals in justice and home affairs in 1999 (Tampere), 2004 (The Hague), and 2009 (Stockholm), effectively setting priorities for EU activity. The Justice and Home Affairs Council meets bi-monthly, but the Strategic Committee on Immigration, Frontiers, and Asylum, composed of senior national officials tasked with discussing issues in depth in support of the Coreper that prepares the Council for its meetings, meets monthly, allowing policy to develop continuously and strategically (Boswell & Geddes, 2011).

One particularly active area for the JHA Council is the ‘external’ dimension of EU migration policy, which contemplates cooperation and coordination with third countries, thereby bringing together EU Home Affairs and Foreign Policy Council concerns. Known as the Global Approach to Migration, this system of partnerships with third countries is carried out in large part by the Council’s High Level Working Group on Asylum and Immigration, created by the Council in 1998 to prepare cross-pillar action plans for the individual countries. Tensions between foreign policy and migration priorities lead the resulting agreements to largely reflect
individual third country interests and capabilities, hampering the long-term development of a coherent body of policy (Wunderlich, 2013). Further policy instruments where the member states remain central are Migration Missions for fact-finding about third countries, which are co-chaired by the Presidency and the Commission, and Cooperation Platforms, where member states and the Commission collaborate to achieve agreements with sending countries designed to stem irregular migration (Cardwell, 2013).

Commission efforts to ‘catch up’ have been extensive. Following the institutional changes of the Treaty of Amsterdam, the Task Force dealing with JHA was upgraded to Directorate General (DG) status and subsequently renamed twice, transforming from Justice, Freedom, and Security to the current DG Migration and Home Affairs, which deals with visas, legal and irregular migration, and asylum (along with Europol-type issues). This transformation has seen a ten-fold staffing increase and a doubling of funding within fifteen years (European Commission, 2014), granting it the resources to assume its intended leading role in advancing legislation. Still, rather than leading, the Commission consciously attunes its policy proposals to member state preferences. Even this cautious approach has not always yielded success, as illustrated by the 2000 attempt to introduce a soft law process where the Commission issues non-binding guidelines, which the Council declined to endorse due to member state desires for independence (Caviedes, 2004).

The European Parliament (EP) – still excluded from the policy process before the Lisbon Treaty’s designation of the co-decision process – has been involved in legislation since the passage of the 2008 Return Directive. The Court of Justice has likewise benefited from the Lisbon Treaty, as it can now receive preliminary ruling requests from national courts at all levels. Thus far, the Court has been cautious in support of the human rights agenda propounded by the Commission through its migration policy (Boswell and Geddes, 2011, 63), but in December of 2014, the Commission assumed the power to bring infringement cases against countries that have not complied with their JHA obligation, so it is likely that the Court will be asked to bring actions in the future. Thus, the pieces are in place for policy to develop along classic Community Method lines.

This abbreviated discussion of the EU institutions suggests that, de facto, member states have not relinquished significant control over immigration policy, an assertion reinforced through the following section’s survey of policy domains. Nonetheless, the EU continues to assume new policy competences, even if not always through its principal institutions, but rather, agencies such as FRONTEX or the European Asylum Support Office. Though intended to simply coordinate information exchanges between countries, their ability to plan and initiate operations throws assertions of state primacy into question (Carrera, den Hertog, & Parkin, 2013). In closing, one can contend that member states have the ultimate say over policy choice and implementation, but European public administrative decision-making is increasingly taking its cues from the EU and its supranational institutions.

**EU migration and asylum policy**

The consequence of EU competence since Maastricht has been new policies across a breadth of issue areas, as contemplated by the treaties. A positive interpretation would note the administrative infrastructure that has developed within 25 years and the passage of a growing body of directives since the beginning of the millennium. A less generous reading would contend that EU policy is largely supplementary, satisfied with harmonizing different national policies through reference to minimum standards. Member states retain considerable control over individual admissions and what types of entry opportunities they offer, and they remain responsible
for policy implementation. Comparing the concrete migration provisions that exist at the EU level to individual national systems exposes tremendous gaps. Yet, despite its patchwork nature, we should remember that many member states only established comprehensive policies regarding legal migration, asylum, and integration in the past few decades. EU migration policy is a work-in-progress, but since this is also the case in most member states, the impact of EU policy stands to be uneven across the EU, being more pronounced in those countries with less established systems.

**Legal migration**

Third-country nationals seeking to migrate to the EU must avail themselves to the individual member states whose policies vary considerably. The spur for post-war European immigration was economically based, and labor migration – outside of mobility for EU citizens – remains essentially a national matter. Recognizing national trends in the early 2000s of creating labor migration visas for workers through sector-specific programs to meet labor and skills shortages, the Commission promoted legislation that followed a sectoral logic. However, economic slowdown and member state reluctance to enter into any binding agreement on admitting migrants quashed these efforts. Only the ‘Blue Card’ Directive of 2009, limited to facilitating the mobility of highly skilled labor within the EU, has been passed. Progress was made through directives that create common standards for seasonal workers’ entry and stay (2014), create common streamlined procedures for intra-corporate transfers of the highly skilled (2014), or mandate the member states to establish one single application process and permit that grants both residence and employment authorization (2011).

Thus, existing labor migration policies are subject to some standardization, but there is no imposition of obligations in terms of numbers or qualifications, or what type of visa should be available, so there is little concrete surrender of sovereignty. The Family Reunification Directive of 2003, which creates minimum standards for how quickly permanent residence permits must be granted to family members of third country nationals and the lowest possible age at which a country may place conditions upon the right of reunion to children, seems to constitute a greater imposition upon member states. However, the Commission received strong support from key member states such as Belgium and France whose standards were already higher (Luedtke, 2011), while countries with more restrictive stances, such as Germany, Austria, and the Netherlands were granted discretion to preserve mandatory integration measures and the like (Menz, 2010). In the end, as in the case of labor migration, there is no right to family migration, but rather, as Article 1 of the Directive explains, its provisions simply determine the conditions under which the right to family reunion may be exercised.

**Irregular migration**

It is argued that the EU has had limited success in passing legislation on legal migration, but instead has devoted greater attention to law and order and security (Givens & Luedtke, 2004; Schain, 2009). The Return Directive of 2008 standardizes expulsion procedures by setting minimum levels of protection. Concentrated EP efforts during the drafting process ensured provisions such as six months maximum detention times, even greater protection for children, and the provision of legal aid for which an EU fund was established. A 2007 directive proposal on employer sanctions has languished due to lack of member state support. The focus on deportation appears to confirm the securitization thesis, as the labor market conditions that foster irregular migration remain unaddressed. However, the imposition of minimum
European immigration and asylum policy

standards can be framed as constraining member states’ ability to expel, and a protection of individuals from securitizing behavior.

Limiting one’s focus on the legislative quanta does not insinuate securitization. Rather, one should look to the 2005 creation of the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) or the obligations regarding border controls within the Schengen acquis, incorporated into EU law in 1997. FRONTEX, which was designed to coordinate member states’ measures on external borders, can be viewed as simply engaging in risk analysis and research dissemination designed to support common missions (Neal, 2009), but the establishment of rapid border intervention teams and a number of missions in the Mediterranean where FRONTEX’s role was less passive implicate an independent and at times lead role in buttressing border security (Carrera, den Hertog, & Parkin, 2013). In 2016, FRONTEX was superseded by the European Border and Coast Guard Agency, doubling the number of permanent staff and adding the ability to purchase and deploy its own equipment and draw on a pool of 1,500 border guards, thereby extending the agency’s reach and independence. Considered together with the Global Approach to Migration’s insistence of partnering with sending countries to reduce emigration, these developments confirm that stemming irregular migration is a principal EU concern.

Asylum

The Stockholm Programme goal of having a Common European Asylum System in place by 2012 has not been met, yet there is substantial national policy convergence on asylum due to EU legislation. A core element is the 2013 Dublin Regulation (based on the initial 1990 Convention), through which EU countries agree that asylum applicants must submit their claims in the EU country of initial entry. A series of Directives have also established common minimum standards as to Reception Conditions (2003), Asylum Procedures (2005), and Qualifications (2004). All three have been revised as of 2013, and greater EP involvement in the recast versions has produced higher levels of protection. The year 2015 saw member states including Italy, Greece, and Hungary – which were experiencing tremendous increases in migrants arriving at their borders – pleading for greater solidarity in the final resettlement of asylum. Commission attempts to encourage burden sharing solely generated a voluntary agreement, the Emergency Relocation Mechanism, through which countries pledged to resettle 160,000 migrants, but after one year less than 5,000 migrants had actually been relocated, with roughly 24,000 relocated by the end of July 2017. With regard to countries whose borders expose them to larger refugee flows shouldering greater responsibility, one can fault EU asylum policy’s lack of coherence. Notwithstanding this major point, the minimum standards advanced by the trio of directives have generated policy convergence, particularly on the part of countries with less developed infrastructures and lower legal protections for whom these directives create concrete obligations bearing financial and political costs (Kaunert & Léonard, 2012). In addition, the European Asylum Support Office, which has been fully operational since 2011, provides information and aid in preparing reception facilities. Together with EURODAC, which pools and shares fingerprint operations to prevent multiple applications, we see an administrative structure that complements the nascent legal framework to constitute a comprehensive, if incomplete, system.

Immigrant integration

The EU policy on the integration of immigrants has been described as following a ‘soft’ mode of coordination (Lavenex, 2015, 382). Some if its primary instruments are the Handbook on
Integration for Policy-Makers and Practitioners published by the Commission to illustrate best practices and the Agency for Fundamental Rights, which attempts to exert pressure on countries by monitoring discrimination within the EU and issuing reports. The most concrete element within the EU policy landscape is the 2003 Directive on Long-Term Residents. This provides that third-country nationals who have been resident in a member state for five years are entitled to the same privileges and protections as EU nationals in areas including access to employment, education and vocational training, welfare benefits, and social assistance, as well as the ability to reside in other EU countries, provided they can support themselves.

The Commission has questioned the actual impact of the Directive, citing incomplete transposition and difficult acquisition conditions in many member states for the fact that less than 5 percent of third-country nationals had achieved long-term resident status (European Commission, 2011). Possibly, the twin 2000 Directives on Equal Treatment, which include the categories of race and ethnicity, provide greater discrimination protection, while the various EU initiatives that combat social exclusion offer greater capacity for affirmative action in favor of immigrants. This variety of approaches signals that the meaning of ‘integration’ is still contested, with the Commission focusing on legal stability, while member states are concerned with civic integration, where they have successfully added provisions onto family reunion and asylum directives. Regardless, operating together, even if not in coherence, these policies have collectively strengthened the position of third-country nationals (Rosenow, 2009).

Conclusion

European immigration policy has been labeled as acephalous (Feldman, 2012), and this chapter confirms such an interpretation. The EU remains far from demonstrating a uniform, coherent, comprehensive system of policies across its member states. Unlike in the case of free movement, where countries accord a common set of benefits and protections to nationals from fellow EU states, in the area of migration considerable discretion is reserved for the member states. It is difficult to answer simple questions such as what labor migration policies exist across Europe, where can asylum applicants expect to be resettled, or whether there are common standards for immigrant integration. This strong sense of subsidiarity – allowing policy to remain in the hands of member states unless they agree that an issue is better resolved under supranational leadership – has created an ad hoc system. In particular, labor migration and family reunion rest squarely within the national purview, while asylum and irregular migration have been subject to greater supranational involvement (Caviedes, 2016). Nonetheless, it is a system, with member states’ immigration and asylum regimes being supplemented by European policy that often imposes actual obligations, while their governments face a constant bombardment of rhetoric and ideas from the EU-level (Boswell & Geddes, 2011).

The EU may have initially been theorized as helping security-minded governments escape domestic liberal democratic constraints (Guiraudon, 2000), but as the EU legislative process has become more communitarized, countries are encountering an EP that is equally set upon championing individual rights and a Court that is empowered to do just that. The rise of radical-right populism and rejuvenated nationalism may push governments to skirt such demands by referring policy decisions to the EU level. The development of EU migration policy has been incremental, and policy areas such as labor migration, integration, or asylum-seeker resettlement still represent a bridge too far, but the EU’s impact in this area, whether through its legislation, institutions, or ability to construct narratives as to what constitutes best practices, continues to expand.
European immigration and asylum policy

**Note**


**References**


