

# Chapter 1

## Introduction

The harmonization of national asylum laws and policies has primarily been conceived as a way of limiting the “secondary movement” of asylum-seekers, namely, the migration to that Member State where they could enjoy the most generous conditions and higher probability of recognition and legal status of refugee or other form of international protection. Hence, EU asylum law has mainly aimed at reducing the incentive to move and encourage asylum-seekers to remain in the first Member State in which they could seek protection. In recent years, as an increasing number of protection-seekers are coming to the EU to be granted some form of international protection, asylum can no longer be considered only in terms of management but also requires Member States to balance the achievement of efficiency in regulation with granting a set of basic rights for protection-seekers.

After more than 10 years of existence of CEAS, it is apposite to examine its key characteristics and, in this context, look at how it has influenced the nature of refugee protection. This volume, therefore, intends to critically examine key EU legislative instruments adopted in the field of asylum in order to evaluate the standard of protection afforded to asylum-seekers. The core of the book comprises an examination of the reform of existing legislative instruments as well as the case-law of the European Courts. In particular, this volume is set out to assess whether the EU provides an adequate framework for protecting those seeking international protection from the (opposing) perspectives of effectiveness and fairness and shows that, in spite of some changes ensuring a stronger level of protection of asylum-seekers, the reform fails to provide the basis for ensuring an equal standard of protection across all EU Member States. The volume does not aim to present a comprehensive analysis of all amendments made to existing legislation but seeks to examine the most significant changes addressing issues which are of a particularly problematic nature from a human rights perspective.

As the book will go on to show, the first phase of CEAS did not fully achieve the expected results of coherence, uniform interpretation and application of EU asylum law. To date, measures adopted in this field display so-called “common denominator” solutions and have given Member States ample discretion. The strong focus on securitization has eroded the distinction between refugee

protection and migration control in asylum law and policy and has legitimized the pursuit of restrictive asylum policies, even though it fundamentally contradicts the international obligations of the EU and its Member States with international refugee and human rights law. To remedy to this state of affairs, the European Commission had originally proposed an ambitious recasting programme of the main legislative measures with the aim of changing the nature of the legislation. In particular, the original aim was to introduce mandatory obligations for the Member States together with the abolition of opt-out clauses and a full harmonization of both procedures and standards, which were also in line with the changes made by the ToL. However, in the course of the various negotiation stages most of the original drafts were significantly watered down especially by the amendments introduced by the Council of Ministers. For this reason as we shall see, the reform process has not resulted in a major overhaul of the EU asylum system.

The research is grounded in a human rights framework of inquiry, combined with a so-called “de-constructivist approach,”<sup>1</sup> which is used to unravel and critically examine the normative inconsistencies inherent in the EU’s “securitized” approach to asylum. In particular, by drawing on the above methodology the book intends to unpack and evaluate the incongruence’s engendered by the persistence in relying on a dichotomic approach to asylum, namely, one based on migration control/management and the officialised overarching objective of developing a CEAS truly founded on a rights-based approach to protection.

The rights-based approach embraced in this volume presupposes the existence of high quality EU asylum standards concerning in particular the conditions and criteria for determining asylum in the EU. The latter are reflected in the totality of procedural and substantive aspects of the standards governing the examination of asylum application, including the definition of beneficiaries of international protection.<sup>2</sup> The quality of these asylum standards can be meaningfully assessed by reference to three parameters,<sup>3</sup> which is here posited, a truly rights-based and refugee protection approach should aspire to:

- the likelihood that asylum applicants with comparable case background will receive *identical decisions* on their application in different Member States and consequently reduced secondary movements;

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<sup>1</sup> I loosely rely on Derrida’s approach to “deconstructivism.” See Ref. [1]. As intended here, deconstruction involves a process made up of various stages. First, it is necessary to overturn a hierarchy of oppositions, both logical and axiological, which are at work in all the measures adopted in the context of CEAS. This will help to expose the way oppositions work and how meaning and values in the law are produced. Overturning is not intended as surpassing oppositions because they are structurally necessary in any given policy area. What it means is that they need to be subjected to thorough analysis and critique. In this way, the deconstructivist approach exposes the differences and eternal interplay between oppositions and helps to formulate new concepts and ideas in relation to the proper functioning of CEAS.

<sup>2</sup> See Ref. [2].

<sup>3</sup> Idem.

- the effective fulfilment across Member States of the *minimum standards* for the identification and protection of refugee and beneficiaries of subsidiary protection as well as reception standards for asylum-seekers and the procedural guarantees for asylum applications, laid down in EU asylum law;
- the *conformity* of the standards developed at EU level as well as implementing measures of the Member States with international refugee and human rights law.

The book draws extensively on official EU documentation as well as policy analysis, policy briefs and studies commissioned by the European Parliament and the European Commission. It also relies on position papers, reports and studies of the United Nations High Commissioner for Refugees (UNHCR), the European Council on Refugees and Exiles (ECRE) and selected non-governmental organizations (NGOs) such as Amnesty International (AI) and Statewatch, all of which closely monitor the developments in EU asylum law.

At the time of writing, CEAS has just entered into its second phase. The recast instruments represent a notable improvement but they still fall significantly short of full compliance with human rights obligations at international and European levels. The research findings of this volume point to a gap between the Union's commitment to the equal treatment and protection of the rights of asylum-seekers and the ability and willingness of the legislative institutions to make that commitment a reality. The legislative deadlock of the second phase of CEAS and the lack of intra-state trust and solidarity stifled progress in truly reforming the CEAS legal system. Against this backdrop, the analysis also intends to look at whether the European Courts with their respective rights-based policy agenda may overcome the limitations of existing EU asylum measures. In this context, the broader aim is to unravel the complex and evolving constitutional relationship between the EU and the overall system of the ECHR from the perspective of effective legal and judicial protection of fundamental rights for protection-seekers. In so doing, it concentrates largely on the ECHR and the EU Charter, which provide the basis for the jurisprudential analysis of asylum cases.

The book's main argument is that, in spite of the existence of certain limitations in both of the European Courts' jurisprudence, the role of the ECtHR and the ECJ as "regional refugee courts" is central to the effective guarantee of protection-seeker's fundamental rights, particularly in consideration of the piecemeal progress achieved through the reform of EU asylum legislation. By way of conclusion, it puts forward a tentative proposal for the creation of an *ad hoc* EU asylum court.

The book starts by examining key elements and characteristics of CEAS, both of a legal and non-legal nature, including a critique of the various conceptions of sovereignty which, is here posited, is an "essentially contested concept." This analysis is necessary to unfold some of the underlying tensions at the basis of CEAS, which explain the internal contradictions and inconsistencies and the gap between the EU's purported aim of promoting human rights and its security-based (or state-centred) approach to EU asylum law. The book then proceeds to a detailed critical analysis of the recast legislative instruments and illustrates the extent of substantive continuity with the first phase of CEAS and some positive

changes from the perspective of protection-seekers' human rights, which in contrast constitute a break from past legislation. It subsequently evaluates the role of the European Courts and the nature of their relationship through jurisprudential analysis of key asylum cases and assesses the degree of reciprocal "osmosis" and the extent to which this mutual engagement may strengthen the protection of protection-seekers' rights within the EU asylum system. The concluding chapter to the book reflects on the legislative and judicial developments at European level examined in the previous chapters and looks at future prospects, including the possibility of setting up an *ad hoc* EU asylum court.

## References

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## Chapter 2

# The Road to the Common European Asylum System: From Amsterdam to Lisbon and Beyond

### 2.1 Harmonization in Asylum and, Sovereignty as an Essentially Contested Concept

Any investigation of the EU asylum system and the creation of CEAS necessarily requires an analytical approach which unpacks its inherent tensions.<sup>1</sup> The multi-faceted conflict that underlies this area of EU law results from a rather uneasy cohabitation between intergovernmentalism and supranationalism and opposing objectives and discourses, namely, economic, efficiency/management and securitization goals versus human rights protection, fairness and justice.<sup>2</sup> The main challenges concerning the development of CEAS are only partially explained by the significant institutional and socio-economic differences between Member States. Key to a true understanding of the nature of the problems concerning asylum law and policies is their strong connection to ideas of the (primacy of) nation state, state sovereignty and state territory and borders which still play a central and determining role in the way Member States adopt measures in this field. What this tells us is that the nature and function of sovereignty is not a jaded question—far from it. This per se is seemingly a paradox in the current multi-polar system of policy-making and is counterintuitive to post-*Westphalian* societal

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<sup>1</sup> The term “essentially contested concept” was first developed in the philosophy of language, see Ref. [1]; in the EU context, Besson defines it as ‘a concept that not only expresses a normative standard and whose conceptions differ from one person to the other, but whose correct application is to create disagreement over its correct application or, in other words, over what the concept itself is.... It is [the concept’s] nature not only to be contested, but to be contestable in [its] essence, so that not only [its] applications, but also [its] core elements or criteria are contestable;’ see Ref. [2], at 6, available at <http://eiop.or.at/eiop/texte/2004-015a.htm>.

<sup>2</sup> It should be noted that these tensions extend to the whole AFSJ. Walker maintains that ‘these fundamental value dilemmas are compounded by problems of political feasibility and implementation,’ Ref. [3], at p. 25.

structures. However, the importance placed on national sovereignty and statehood in the imagery of many Europeans constitutes a major obstacle to the objective of harmonization so strongly advocated at European level. And yet it matters.<sup>3</sup> Indeed, the refugee in international law occupies a legal space characterized by the principle of state sovereignty and the related principles of territorial supremacy and self-preservation.<sup>4</sup> In a similar vein, Diez<sup>5</sup> effectively describes the classical understanding of state sovereignty as a “trinity of unity,” that is, a unitary territory, a unitary force and a unitary people. However, the emergence of new collective actors ‘working within, across and above state lines’ such as for example the EU has exposed the legal fiction of states’ sole centrality in world politics.<sup>6</sup> Nevertheless, state borders are decisive in determining the status of refugee as it is only ‘by crossing borders of sovereignty out of and into territories that they come into existence.’<sup>7</sup> It is precisely the border of state sovereignty that defines who is a refugee and thus enables individuals to be granted a status of international law entitlements and rights.<sup>8</sup> Hence, sovereignty is used to constitute societies but also to exclude from societies,<sup>9</sup> as embodied in the populist rhetoric of “We” versus the “Other.”

One solution to this conundrum which may be more apposite to contemporary reality is to embrace what Kostakopoulou coins as a “floating” conception of sovereignty,<sup>10</sup> namely, one that rather than being premised on a dichotomic and fallacious thinking centred on retention/obliteration of sovereignty and the ‘nihilism of its irrelevance and the equally unhelpful view of its ubiquity’<sup>11</sup> acknowledges that it is an open-ended concept which reflects how states themselves are subject to constant change in line with mutating global, regional and local exigencies and environments.<sup>12</sup> After all, as Krasner pithily puts it ‘there may

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<sup>3</sup> It matters because sovereignty and statehood are inextricably intertwined with identity, i.e. who we are, who is a friend, who is an enemy, and who is a stranger, and history, i.e. where we came from, how we became friends, how we got here, where we are, and where we are going in the future. It therefore provides the ontological and legitimating mooring of state intervention and regulation, see Ref. [4].

<sup>4</sup> See Ref. [5].

<sup>5</sup> See Ref. [6].

<sup>6</sup> See Ref. [7], at 136; for a polycentric conception of sovereignty which does not entail the demise of the state, see Ref. [8, 9].

<sup>7</sup> See Ref. [10].

<sup>8</sup> Ibidem, 414.

<sup>9</sup> See Ref. [11], at 1118.

<sup>10</sup> See Ref. [7], see footnote 6.

<sup>11</sup> I have borrowed this expression from French who examines similar issues in relation to the role of autonomy in international environmental law, see Ref. [12], at 263.

<sup>12</sup> By the same token, Besson refers to the necessary “reflexive” nature of sovereignty, in that its correct use requires a process of perpetual contestation of one’s conceptions of the concept and therefore one’s exercise of sovereignty; see Ref. [2], see footnote 1.

still be a modal tendency that pulls actors back to conventional sovereignty.’<sup>13</sup> In this context, the EU should no longer be viewed or portrayed as akin to a ‘behemoth that is completely beyond the purview of the state,’<sup>14</sup> but rather as providing the locus for seamless interplay between different layers of policy-making, that is, shared sovereignty.<sup>15</sup> In this way we acknowledge the polycentric nature of the European polity as well as rejecting an etiolated version of the state.<sup>16</sup> Hence, the linear relations among rules are replaced by “circular or looped hierarchy” of law.<sup>17</sup> In this regard, Besson<sup>18</sup> refers to the cooperative nature of sovereignty which combined with the principle of subsidiarity ensures the allocation of power to those authorities that are best placed to ensure the protection of shared sovereign values and principles, such as the values of democracy and fundamental rights. Hence, cooperative sovereignty provides the normative framework for the development of a dynamic and reflexive form of constitutionalism. At this juncture, it is apposite to reproduce a passage from Krasner’s article on sovereignty<sup>19</sup> for his acute and lucid analysis of state sovereignty in contemporary world politics:

there is an inescapable tension in the sovereign state system. Rulers have often decided that they are better off violating Westphalian/Vattelien sovereignty than honouring it. In some cases, they have voluntarily ceded some of the autonomy of their own state. In other cases, leaders of powerful states have used coercion to compromise the autonomy of weaker states. The willingness of political leaders to violate Westphalian/Vattelien sovereignty is not surprising, given the absence of any final authoritative decision maker in the international system, and differences in power, interests, and values across states.

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<sup>13</sup> See Ref. [13], at 1078.

<sup>14</sup> See French (2009), see footnote 11, at 267.

<sup>15</sup> In a similar vein, “inclusive sovereignty” conceives power as an ability to maintain control over some decisive factors as well as influencing other agents (e.g. states) acting within a wider structure of governance such as for example global financial markets, international relations, and international organizations. Hence, inclusion and influence replace exclusion and autonomy. Additionally, the centres of such power do not necessarily coincide with traditional states. See e.g. Refs. [14, 15].

<sup>16</sup> Sarooshi cogently maintains that the essentially contested nature of sovereignty remains the same whether we talk about national or international sovereignty. This unity of identity provides a compelling reason for international organizations’ existence and, linked to that, a rationale for the construction of the normative framework that governs international organizations in the exercise of their delegated powers of government. This two-fold claim is substantiated by the fact that organizations provide a forum, transcendental to the state, where conceptions of sovereignty- and more specifically the content of sovereign values- can be contested on the international plane. This—according to Sarooshi- will be effectively achieved through the application of domestic administrative or public law principles to the definition of an international organization’s normative framework of competence and use of delegated powers. See Sarooshi (2003–2004), see footnote 9.

<sup>17</sup> A “looped hierarchy” is defined as an interaction among various levels of decision-making (within the hierarchical order) in which the highest level directs back to the lowest level and influences it while at the same time the highest level is determined itself by the lowest one, see Ref. [16].

<sup>18</sup> See Besson (2004), see footnote 1.

<sup>19</sup> Ibidem, 1084.

Thus, *there is a hole in the whole of the sovereign state system*.<sup>20</sup> One of the system's basic norms, the expectation that each state will be autonomous—not subject to any higher authority within its own borders—has and will continue to be transgressed.

This form of “organised hypocrisy”<sup>21</sup> is not unsurprising. Brunsson argues that hypocrisy is a response to or a means to handle conflict, especially for and within organizations which are constantly the subject of and subjected to conflict.<sup>22</sup> While hypocrisy may be considered part of life and is thus inescapable in the international state system, the unwanted consequence is a legal system where it is not possible to adopt a coherent set of norms or, more generally, body of law.<sup>23</sup> In a nutshell: an unhappy and unstable situation where tension is inescapable.

The foregoing analysis of sovereignty, highlighting its multiple readings and essentially contested connotation, explains why in the EU asylum system law performs two main functions: an instrumental/control and a protective function. In particular, European asylum policies have come to incorporate means and elements of migration policy, in particular, migration control, which is mostly visible in the asylum procedure but is also highly present in the external aspects of asylum policy.<sup>24</sup> This close interconnection between offering protection to those seeking asylum and controlling immigration can also be seen in the language used in official documents such as the Stockholm Programme where there is reference to legally safe and efficient asylum procedures and at the same time the need to combat illegal migration.<sup>25</sup> The protective function of asylum law is in essence the *non-refoulement* principle as per Article 33 of the 1951 Geneva Convention and Article 3 ECHR.<sup>26</sup> In the context of EU asylum law it manifests itself in a two-fold way: one of reinforcement and one of mere acknowledgment.<sup>27</sup> The reinforcing effect can be seen in the right to asylum becoming a genuine residential right of territorial asylum within the Member States of the EU, namely, those who are granted refugee status or in need of subsidiary protection being given a residence permit.<sup>28</sup> The mere acknowledgment of existing legal obligations can be seen in

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<sup>20</sup> Emphasis added.

<sup>21</sup> See Ref. [17].

<sup>22</sup> See Ref. [18], at pp. 201 and 203.

<sup>23</sup> See Ref. [17], see footnote 21, at 1084.

<sup>24</sup> Securitization theory is pivotal for the understanding of the restrictive trajectory characterizing EU asylum measures, see further Refs. [19–21].

<sup>25</sup> See Ref. [22].

<sup>26</sup> This principle is examined in further detail in the next section and in [Chap. 4](#).

<sup>27</sup> See Ref. [23].

<sup>28</sup> E.g. Article 24 of the Qualification Directive; see also the Long-term Residents Directive which in the amended version extends long-term resident status to refugees and beneficiaries of subsidiary protection on a similar basis as other third country nationals legally living in the EU for more than five years. In particular, they will enjoy a number of rights such as the right to free movement within the EU, including the right to become a resident in another EU Member State, and under certain conditions, equality of treatment in relation to education, access to the labour market and social security benefits, see Council Directive 2003/109/EC of 25 November 2003



the limited application *ratione personae* of the Qualification Directive with the consequence that those who fall within the scope of the absolute prohibition of *refoulement* in Article 3 ECHR may not qualify for asylum under EU asylum law. This is not to say that substantial progress has not been achieved in many respects. However, as noted by Goodwin-Gill, there is a strong disjuncture between what is still often asserted to be a matter of sovereign state prerogative, and what is, as a matter of fact and law, structured and constrained by fundamental principles of protection.<sup>29</sup>

These fissures and fractures underlying the adoption and implementation of asylum law and policy have made the task of harmonization very difficult for the EU, at a time when the legitimacy of EU action is vigorously called into question and the ‘stock exchange listings of the idea of Europe are down.’<sup>30</sup> The controversies surrounding the “ownership” of the policy priority-setting and legislative planning of the Stockholm Programme is a case in point.<sup>31</sup> The transition from the “classical” setting of the JHA institutional framework centred in the Council of Ministers to the extant post-Lisbon pluralist institutional landscape has not been a smooth one. The actual contours and implementation of the Stockholm Programme were subject to heated discussions between the Council and the Commission. Soon after its adoption, an Action Plan implementing the Stockholm Programme was published,<sup>32</sup> which was subject to severe criticism by the Council as it was deemed to go beyond the policy priorities envisaged by the Council’s Stockholm Programme rather than using the latter as a frame of reference for programming.<sup>33</sup> The said Action Plan constitutes a departure from securitization towards the protection of fundamental rights and the values of human dignity and solidarity, providing a principled legislative agenda similar to the 1999 Tampere Programme.

As regards secondary legislation, the Qualification Directive well-illustrates the difficulties in reaching full harmonization in the field of asylum. It is the result of a long negotiation process among the Member States who have come to agree on a minimum common interpretation of the notions of refugee and persons in need of subsidiary protection. The Commission’s proposals and the European Parliament’s amendments in the consultation process stressed the need to ensure protection to

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(Footnote 28 continued)

concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23 January 2004, as amended by the Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, OJ L32/1, 19 May 2011.

<sup>29</sup> See Ref. [24], at p. 33.

<sup>30</sup> See Ref. [25].

<sup>31</sup> See Ref. [26].

<sup>32</sup> See Ref. [27].

<sup>33</sup> See Ref. [28].

asylum-seekers<sup>34</sup> whereas the Council focused largely on the prevention of abuse and even the limitation of asylum. The end result has been compromise also in view of the then unanimity requirement within the Council with a vague and unclear wording of several provisions such as the one contained in Article 15(c) of the Qualification Directive. The ECJ has been called to clarify the meaning and relationship of the two terms “individual threat” and “indiscriminate violence” as they appeared to be in conflict with one another.<sup>35</sup> The ruling of the Court not only clarified the relationship between the two notions but also strengthened the protective function of EU asylum law by providing that the interpretation given therein was compatible with the ECtHR case-law on Article 3 ECHR.

After having unravelled some of the most significant tensions underlying the process of Europeanization in the field of asylum—to a great extent centred around the essentially contested nature of the concept of sovereignty— the examination proceeds to an evaluation of key legal notions and principles in the international refugee regime and developments in the setting up of a fully-fledged CEAS. In so doing, it will seek to provide a preliminary assessment of the extent to which measures adopted within the EU meet the purported goals established at European level and whether they may be conflated with an EU asylum policy and, in this context, the standard of protection afforded to asylum-seekers.<sup>36</sup> What this first analysis will show is that CEAS is influencing and moulding the meaning of sovereignty in unexpected ways and, changing the way in which governance operates in respect of individuals.<sup>37</sup>

### ***2.1.1 Refugee Protection and International Refugee Law in the EU***

The legal duty of EU Member States to offer protection to refugees can be found in a combination of refugee, human rights and humanitarian law. The Geneva

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<sup>34</sup> See European Commission, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM (2001) 510 final; European Parliament, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Committee Report on the proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM (2001) 510—C5-0573/2001—2001/0207 (CNS)), PE 319.971/A5-0333/2002.

<sup>35</sup> See Case C-465/07, *Elgafaji v Staatssecretaris van Justitie*, [2009] ECR I-921, examined further below in Chap. 4.

<sup>36</sup> The critical appraisal will comprise two types of goals: *procedural goals*, namely, those concerning “who” adopts/implements and “how” asylum policies are or should be adopted and implemented; and, *substantive goals* concerning what rights constitute the “public good” to which asylum-seekers have access.

<sup>37</sup> See Ref. [29].

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