SOME ETHICAL CONSIDERATIONS REGARDING THE PHENOMENON OF MIGRATION AND ITS MANAGEMENT IN THE EU

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Abstract: The European Union's policy toward migration issues, especially after the peak of the crisis in 2015 is a contentious question among the Member States. Adopted legislation refers to different aspects of this policy area aiming to manage the highly complex reality of the phenomenon of migration. This article seeks to sketch a framework for the ethical evaluation of migration-related policy choices and regulation from a theoretical perspective. After identifying the general context and some tensions of this policy area, a tentative matrix is introduced offering some angles for ethical evaluation.

Key words: migration management, European Union, ethics, policy choices

1   INTRODUCTION

The immigration policy has become of significant importance after the crisis of 2015 in Europe; some even think that this issue will shape the future of the European Union.[1] A wide range of literature has been published regarding the phenomenon of irregular migration that the European continent experienced, from the legal-political-sociological implications to the re-actions implemented by the European Union, so far. Even the focus of the research agenda has shifted significantly, according to the new approaches discussing the possible solutions of the emerged problem.[2] It is a cliché that a highly complex issue is at stake and the basis of any policy implementation is a result of sensitive, sometimes even contradictory interests. This paper tries to analyse and theorise the ethical basis of policy choices concerning irregular migration at EU level. The scope of this paper is inevitably limited given a multi-faced problem map, the shared competence between the EU and the Member States in this area and the highly complex issue itself. Yet, an attempt to theorise decision-making from an ethical perspective might deserve some scholarly attention.

2   THE ETHICAL PERSPECTIVE

The migration phenomenon is a highly complex reality that might be subject to different scientific approaches; nevertheless, human decisions, as well as complex policy choices, could be analysed from an ethical perspective, too. The question arises: what way are we able to evaluate a certain

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[1]   See at: <https://www.theguardian.com/world/2018/jun/28/future-of-eu-hinges-on-solving-migration-issue-says-merkel> [q. 2019-01-30].

[2]   PIJKERBOER, T. Changing paradigms in migration law research. In GRÜTTERS, C., MANTU, S., MINDERHOUD, P. (eds.) Migration on the move. Nijhoff: Brill, pp. 13 – 26.

reality, quite remote from individual human decisions, instead being a result of a complex, multidimensional and institutional decision-making process? What circumstances need to be assessed as a prerequisite of such an investigation? What are the changing characteristics that might influence the outcome of any such inquiry? Is it possible to provide a general matrix that is applicable for ethical consideration in a comprehensive area of migration policy choices? In this paper I try to answer these questions hereinafter, first 1) by reviewing the basis of policy choices at a strategy making level, then 2) by exploring the theoretical tensions behind policy choices regarding migration management, and finally 3) sketching up a general matrix that could serve as a tentative reference factor for assessing certain policy choices of migration management.

3   A BRIEF OVERVIEW OF THE STRATEGIC STAGES OF EU LEGISLATION REGARDING MIGRATION

The European Council declared in its conclusions as of 18 October 2018 that while the number of detected illegal border crossings into the EU has been brought down by 95% from its peak in October 2015[3], still, some internal and recent external flows warrant sustained attention.[4] Indeed, the overall policy-making of migration management has become a keystone issue within the Union in the last years, and massive policy-making and legislative efforts have been made in order to overcome the crisis.

Without providing a detailed overview on the EU legislation in the area of free movement of persons, asylum and immigration[5] as it works within the framework of the area of justice, freedom and security,[6] I would hereby like only to draw the attention to the shifting emphasis of the EU's general approach to immigration, by referring to the five-years programmes adopted as basis of this policy area after the Treaty of Amsterdam.[7] First, after the European Council meeting in October 1999, the Tampere Programme was adopted.[8] In the Tampere Programme, the European Council sets a rather ambitious aim before the Member States, focusing mainly on the integration of third-country nationals residing legally in the EU territory. The Hague Programme[9], however, adopted in November 2004 in the wake of September 11, is less ambitious and places security-related questions into the foreground. Later on, the Stockholm Programme[10] titled "An open and secure Europe serving and

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[3]   Conclusions – European Council meeting (18 October 2018), EUCO 13/18.

[4]   Ibid.

[5]   Available at: https://eur-lex.europa.eu/summary/chapter/justice_freedom_security/2301.html?root=2301 [2019-01-30].

[6]   The creation of the area of freedom, security and justice is based on the Tampere (1999-04), Hague (2004-09) and Stockholm (2010-14) programmes. It derives from Title V of the TFEU, which regulates the "Area of freedom, security and justice". For an overview of the relevant legislation visit:<https://eur-lex.europa.eu/summary/chapter/justice_freedo_security.html?root_default=SUM_1_CODED=23> [2019-01-30].

[7]   Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10.11.1997, p. 1 – 144.

[8]   Tampere European Council 15-16 October, 1999, Presidency Conclusions. See at: < http://www.europarl.europa.eu/summits/tam_en.htm > [2019-01-30].

[9]   Council of the European Union, Brussels, 13 December 2004, The Hague Programme: strengthening freedom, security and justice in the European Union, 16054/04.

[10]   Council of the European Union, Brussels, 2 December 2009, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 17024/09.

protecting the citizens" and related communication from the European Commission[11] tries to strike a balance between the Tampere Programme – that focuses mainly on the rights of third-country nationals and puts the emphasis on human rights –, and the security-oriented Hague Program. By doing so, the Stockholm Programme, accepted in December 2009, focuses on the interests of citizens – even third-country nationals – and declares that the EU ensures rights to whom it owes responsibility. Also, the Stockholm Programme tends to put more emphasis on freedom and ensuring human rights instead of security issues. After the Stockholm Programme, the European Council determined the agenda[12] for the period between 2014 and 2020 in its summit, held on June 2014, regarding legislation and operative programmes within the area of justice, freedom and security.

After Jean-Claude Juncker took his office in November 2014 as president of the European Commission, he nominated a distinct commissioner for migration-related issues, Dimitris Avramopoulos from Greece. Somewhat later, the migration crisis of 2015 put the Commission into action, and it adopted the European Agenda on Migration[13] as a comprehensive answer to challenges. Implementation of the European migration Agenda is still in progress with several secondary legislative instruments.[14]

4 THE THEORETICAL CONTEXT TO EVALUATE EU MIGRATION MANAGEMENT

4.1 Sovereignty of state versus international legal environment

In the history of the international relations theory, debates arise from time to time on whether the privileged position of the international system belongs to the (nation)state or rather the importance of the international institutions are rising significantly as the more essential actors of the international system, due to the deepening interdependence and cooperation in the international arena. Traditionally, neorealism emphasises the first and neoliberalism put more attention to the second.[15] These two different approaches of international relations have a radically different view even on human nature, and this will lead to different conclusions on progress, development, the possible cooperation within the society and at an interstate level. Also, these two standpoints fundamentally differ in considering the importance to maintain state sovereignty and thus subserving to act unilaterally and entering into an agreement on a bilateral basis, or the general belief in solving significant challenges at international level through extensive cooperation and by reaching international agreements on a multilateral basis. These different approaches certainly have significant implications for identity-management related issues as well. Chantal Thomas observes that migration, including unauthorised migration, appears to be an inescapable dimension of a globalising economy. Consequently, as Chantal Thomas continues, it is unsurprising that there is an

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[11] COM(2005) 184 final – Official Journal C 236 of 24.9.2005. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l16002&from=RO > [2019-01-30].

[12] European Council, Conclusions, 26/27 June 2014. EUCO 79/14.

[13] A European Agenda on Migration, Brussels, COM(2015) 240 final 13.5.2015.

[14] Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package_en [2019-01-30].

[15] JACKSON, R., SORENSEN, G. Introduction to International Relations, Theories and approaches. Oxford: Oxford University Press, pp. 42 – 46.

increased attention to the matter of what laws, rights, remedies, and regulations should pertain to migrants. An emerging body of international law inscribing rights of migrants appears to be challenging what has conventionally been thought a cornerstone of statehood, the 'plenary power' over the determination of rights of aliens.[16] In his observation, Chantal Thomas investigates the legal and philosophical aspects and the relationship between sovereignty, the notion of 'biopower', liberalism and international law on migration and introduces a new concept of 'new organicism' by proposing to reframe the discourse of ethics.[17]

Joseph H. Carens distinguishes between a realistic and an idealistic approach from a moral perspective. Carens uses these terms as two different ways of understanding morality on migration. Further, Carens suggest that a realistic approach wants to avoid a gap too large between what 'ought to be' and what 'is' and focuses on what is possible in a given reality. The idealistic approach, in contrast, requires us to assess current reality in light of our highest ideals. Carens also points out the weaknesses of both approaches. The realistic one, he says, inhibits us from challenging fundamentally unjust institutions and policies, while idealists may not help us answer the question of how to act in a non-ideal world.[18] Carens moreover identifies three kinds of realities for the evaluation of policy choices regarding migration, namely the institutional, the behavioural and the political.[19] Institutional reality refers in Carens' understanding to the modern state that is, at least formally, sovereign and independent. Behavioural reality is connected to the admission of refugees, and political reality expresses the power and interest-based decisions primarily. It is interesting to observe how the collision of these different narratives has recently been expressed again by a phenomena like Brexit, the rising importance of a strong man approach in state leadership, and the fact that certain states are leaving the discussion of UN Global compact for migration.[20]

4.2   Security issues versus a humanitarian approach

The tension between securing the safety and lifestyle of a certain political community and to respect "others" in an inclusive way, by offering them access to the advantages of the community, could lead to some contradiction in a theoretical and practical level as well. On a theoretical level, the notion of solidarity among the members of the political community and the ability to integrate new members will emerge. By articulating mainly security-related issues in connection with migration, suggests that the scope of solidarity is limited to the members of the political community; moreover, this implies, that this solidarity needs to be protected. According to this view, refugees and third-country nationals considered as a challenge to the internal solidarity of the political community. In addition, their possible integration into the society is seen as a difficult, if not an impossible task. On the other hand, the humanitarian approach emphasizes the same human dignity of all human beings and refers to the essential solidarity among humans that commands us to treat others as we wish

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[16]   THOMAS, CH. What Does the Emerging International Law of Migration Mean for Sovereignty? In Cornell Law School research paper No. 13, p. 72.

[17]   Ibid.

[18]   CARENS, J. H. Realistic and Idealistic Approaches to Ethics of Migration. In The International Migration Review. 30/1. 1996. p. 156.

[19]   Ibid., p. 158.

[20]   Available at: https://refugeesmigrants.un.org/migration-compact> [2019-01-30].

to be treated ourselves. The ethical responsibility derived from these two different approaches will result in rather different policy choices and practical answers as well regarding the first admission of the migrant people.

By interpreting the meaning of solidarity, especially within the EU, to provide access for the social security for a migrant worker, Wolfram Lamping emphasizes the significance of the concept of 'welfare state'.[21] The core consisting elements of a welfare state are the benefits that the state provides for its citizens through reallocation systems and public services. These welfare services cannot be equally available to everyone, since this would have a specific financial cost, but only to the members of a specific solidary community. In the welfare state, however, the collective identity is taken for granted given the language, the cultural and historical heritage; thus, citizens undertake to pay the additional costs of maintaining the social benefit systems. However, as Lamping points it out, overemphasising the social element of the EU might imply some risk, given that the EU is aiming to achieve some social-oriented development at the same standard that characterises the welfare state itself, yet without having the same cohesion within the EU[22] and that would need some substantial justification. Similarly, the understanding of the scope of solidarity with regards to third-country nationals will occurs even more sharply by the adjudication of the admission system both in the case of granting international protection or allowing entry on a different ground to the EU.

On the other hand, there is a remarkable initiative implemented, first in Italy, based on the humanitarian approach. According to a Memorandum of Understanding, signed by the Italian government and several religious and non-governmental organisations, a humanitarian corridor was established for highly vulnerable refugees to directly enter Italy. A small number of refugees with safe travel and visas were evacuated directly to Italy, along with housing and resettlement assistance upon arrival. The initiative aims to integrate refugees into the society[23] and is a subject of scholarly research, as well.[24]

4.3   A need for a normative map on EU migration management

Ricard Zapata-Barrero notes that human mobility and migration toward liberal democratic states have significantly increased in the recent decades and that patterns of migration are becoming more complex and diversified, involving more and more countries.[25] Accordingly, Zapata-Barrero finds it essential to develop a normative map in a world in motion, and he proposes an ethical code of practice regulating state behaviour.[26] Zapata-Barrero identifies three levels of state behaviour that needs to be addressed in such guidance with respect the EU countries: admission policies, diplomatic relations with sending states, and inter-European state relations.[27] Under the first ethical context, Zapata-Barrero raises the issue of first admission practices of the states with selective migration

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[21]   LAMPING, W. Limits and Perils of Institutionalising Post-National Socal policy. In ROSS? M., PREBIL, Y. B. (eds.) Promoting Solidarity in the European Union. Oxford: Oxford University Press, 2010, pp. 46 – 48.

[22]   Ibid.

[23]   Available at: https://www.ecre.org/humanitarian-corridors-for-vulnerable-refugees-to-italy-opening/ [2019-01-30].

[24]   Available at: https://kellogg.nd.edu/ford/humanitarian-corridor-initiative [2019-01-30].

[25]   ZAPATA-BARRERO, R. European Migration Governance: From „Anything Goes" to the Need for an Ethical Code. In American Behavioral Scientist, 59/9, p. 1184.

[26]   Ibid.

[27]   Ibid.

policies, in order to attenuate the need of labour force in specific sectors or by defining skill-based distinctions. He argues that these laws are substantially related to discriminatory and utilitarian approaches.[28] The second ethical context raised by Zapata-Barrero is diplomatic relations. His main concern here is the rapidly growing number of agreements with nonliberal democratic states that contains state practices to externalize the tension of migration policy. Also, the third ethical context is the internal EU Member States relation, eventually, to support the Member States that are most exposed to migratory pressure, accordingly Zapata–Barrero refers here to the solidarity among member states.[29] By analysing these given realities and referring to the international institutions and the global civil society as the possible normative source thereof, Zapata-Barrero proposes an Ethical code of practice and demonstrates its basic concepts.

5   AN ATTEMPT TO REACH A SYNTHESIS FOR ETHICAL EVALUATION

Several policy choices and legislative acts have been introduced since the peak of the migration crisis in 2015 in the EU. In the framework of the European Agenda on Migration, extensive legislation work aims to manage the crises. Already in the first implementation of the package, decisions were taken on the following issues: relocation schemes to give support for Italy and Greece,[30] resettlement,[31] EU Action Plan against migrant smuggling,[32] guidelines of obligatory fingerprinting[33], a public consultation on the EU Blue Card and the EU's labour migration policies[34] and even a new operation plan for Operation Triton. There is no place here to refer all the legislative acts adopted by the EU so far in the framework of the European Migration Agenda and the accompanying fierce debates, driven mainly at Member State level. The last communication issued by the European Commission is titled "Managing migration in all its aspects: Progress under the European Agenda on Migration".[35] The document quotes Jean-Claude Juncker's speech on the State of the European Union 2018: "Member States have not yet found the right balance between the responsibility each must assume on its own territory (…). We cannot continue to squabble to find ad-hoc solutions each time a new ship arrives. Temporary solidarity is not good enough." To find the balance is a still a challenge for the EU and the Member States to effective and ethically appropriate migration management. This paper obviously cannot provide a comprehensive ethical tool, but as a tentative step, the following figure tries to provide one possible matrix to evaluate the ethical aspects of migration-related policy choices.

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[28]   Ibid., p. 1188.

[29]   Ibid., p. 1191.

[30]   Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, COM/2015/0286 final – 2015/125 (NLE).

[31]   Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection, Brussels, 22 July 2015, 11130/15.

[32]   COM(2015) 285 final, Brussels, 27.5.2015 (between the period 2015 – 2020).

[33]   Commission Staff Working Document on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints Brussels, 27.5.2015. SWD(2015) 150 final.

[34]   Available at: https://ec.europa.eu/home-affairs/what-is-new/public-consultation/2015/consulting_0029 [2019-01-30].

[35]   COM(2018) 798 final, Brussels, 4.12.2018.

idealistic

| development | | humanitarian universalism |

international development
integral human development
solidarity

human dignity
absolute justice

closed border ———————————————————— **open border**

exclusion   **inclusion**

population management
biopower
border control

economical outcome [labour force]
identity

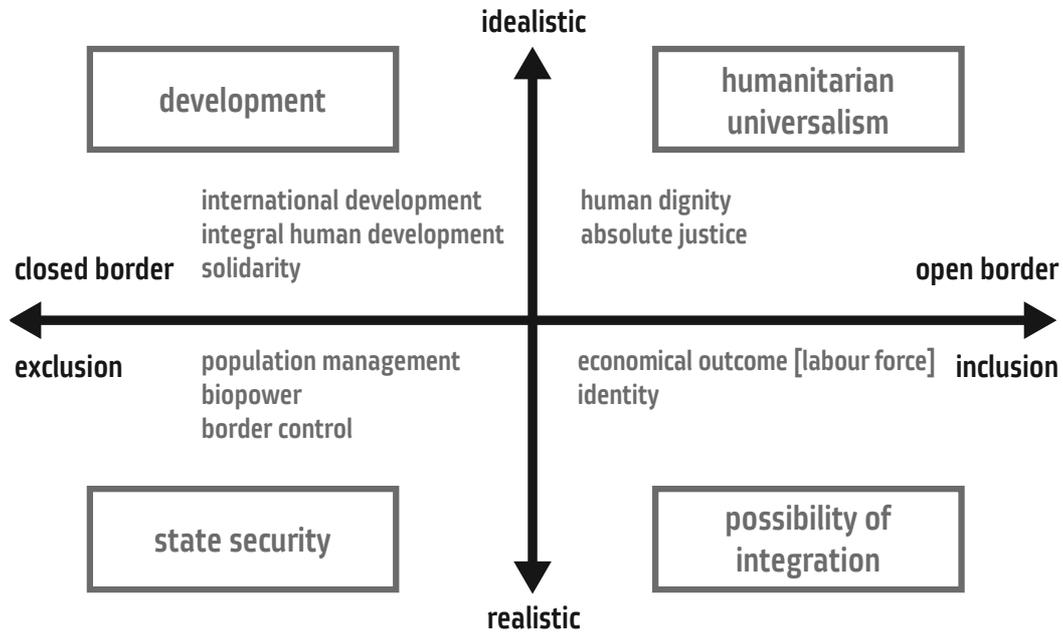| state security | | possibility of integration |

realistic

Chart 1: Ethical evaluating matrix of migration management related policy choices

In this graph, the vertical axis refers to the idealistic-realistic ethical narrative, and the horizontal axis refers to the outcome of policy choices, whereas the determining issues are listed in the relevant section of the coordinate system

6   CONCLUSION

The phenomenon of migration and the adequate answer thereto on the European level is still a challenge the EU faces. Given the highly complex reality of regular and irregular migration and the different policy choices of individual Member States', this issue will plausibly remain an important aspect of European politics in a medium term. This article focuses on the ethical aspect of the migration-related policy choices, and by doing so, tries to determine the different narratives that shape policy choices of this area, and some of the main tensions. The article introduces a matrix that provides some angles for evaluating the policy choices from an ethical perspective. The most significant specifics that shapes the ethical narrative are indicated with the vertical and horizontal axis of the matrix, namely, the dichotomy of idealistic and realistic approach and the reception or exclusion shown by the society toward migrant persons. Further factors of the ethical evaluation are placed in this context, whether and to what extent policy choices correlate with state security, support international development especially in the region from mass migration originates, respect human dignity, and take into account the host society's capacity to integrate migrant persons.

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