DE GRUYTER OPEN

Nordic Journal of Migration Research

Article • DOI: 10.1515/njmr-2017-0002 NJMR • 7(1) • 2017 • 47-55

MORALS AND THE RIGHT TO FREE MOVEMENT

Insiders, outsiders and Europe's migration crisis

Abstract

This article examines the right to free movement in the European Union (EU) and discusses the moral questions related to refugees in light of the current migration context. More specifically, in this article, I discuss the right to free movement in terms of its development into an EU citizenship right and assess the grounds for its validity. I argue that free movement was developed in a manner that puts too much emphasis on external threats coming from outside the EU borders. I also claim that the right to free movement is an exclusive concept that adds to the alienation between EU-citizens and the rest, which is also visible in the ongoing so-called migration crisis.

Keywords

right to free movement • European Union integration • moral theories • migration • fundamental rights

Received 24 March 2015; Accepted 8 August 2016

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Introduction

In this article, I demonstrate how free movement in the European Union (EU) based on open internal borders and the attempt to close external borders is morally unbearable. I argue that the current policy of free movement as part of the area of freedom, security and justice puts emphasis on the exclusion of others, reflecting the view that people crossing the borders of the Union are a source of threat. This is in contradiction with the European Union's fight against racism and xenophobia, as even the European fundamental principle of free movement concentrates on keeping out the 'Other', which are mainly the people who cross the borders to the Union to seek asylum or a better life. At the same time, as more and more migrants seek to enter the Union and the immigration rates are rising, the European unity based on such a 'Fortress Europe' divides people into two classes: EU citizens with the right to free movement and the rest.

In simplified terms, free movement in the EU has evolved from an economic principle concerning the workers towards a moral right for all 'persons' based on the EU citizenship. In other words, the freedom of movement was originally a central premise of the Internal Market in the European Coal and Steel Community (1952). However, especially the Court of Justice of the European Union (CJEU) has striven to turn free movement into the most fundamental right of the European Union citizenship, established in the Maastricht Treaty in 1992 (see also Shaw 2007: 45). The situation, when the free movement was originally drafted in the 1950s, was much different from the current one, where the multicultural Europe is attracting an increasing numbers of migrants, not to speak of the current migration numbers in Europe. In this article, I refer to the right to free movement as the right to work, study, seek work and reside in other countries. Thus, I separate it from the Schengen area with no internal border control, which is a more recent arrangement and currently under threat, as countries are introducing internal border controls. Originally, free movement was a principle demanded by Italian politicians to be able to send (low-skilled) workers to other countries, while it currently appears to be encouraged for high-skilled workers and students, namely the so-called 'Eurostars' (Favell 2008).

The right based on EU citizenship[1] is already problematic, for example, if we compare the EU situation of free movement to the movement inside a state, where the right to free movement generally applies to all.[2] Currently, the EU Member States have very divergent practices with regard to granting citizenship that entitles free movement, and the manner in which the decision on who receives the right to free movement is made is morally arbitrary. In the European Union, the third country nationals get an opportunity to stay a maximum of three months in another Member State. Only after residing for five years in one Member State, such nationals may reside in another country more permanently, but only for the purposes of study, vocational training or employment, as defined in the Article 14 of the Directive 2003/109/EC. Moreover, the right to permanent residence may be lost after six years of absence or by acquiring a permanent residence permit in another state (see also Strumia 2013: 96-99). In contrast, the EU citizens have more extensive rights, in the sense that they have unlimited right to residence in case they are self-sufficient, and economic reasons cannot be the ground for their

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expulsion from a Member State. However, some countries (such as Italy) have interpreted the requirement of self-sufficiency provided in the EU Free Movement Directive to mean that a person must have a certain level of wage, social insurance and sufficient housing; and lack of registration after three months is considered as a security issue justifying expulsion (see e.g. Domnar 2009: 36).

The structure of the article is as follows: firstly, I have outlined how the free movement norms progressively developed from an economic principle to the fundamental right of the EU citizens, namely the 'insiders'. Currently, the right to free movement is a fundamental right stipulated in the European Union Charter of Fundamental Rights, and its legal evolution from an economic principle to a fundamental right is discussed in the article.

Second, I have outlined the relation of the area of free movement to the question of 'outsiders' in terms of the policies of Schengen (removal of border controls) and Dublin (asylum applications). Although the Common European Asylum System (CEAS) is established, there are still diverging practices. The CEAS sets out binding provisions for receiving and processing asylum applications and criteria for international protection, but the interpretation is not similar in all countries. Instead of focusing on the legal conditions of asylum, this article focuses on how the free movement policies connect to common immigration and asylum policies.

In the third section of the article, I have discussed the moral responsibility towards refugees. I have not outlined the legislation concerning refugees, such as the 1951 Refugee Convention – the feasibility of which has also been questioned by some European politicians (e.g. Kingsley 2016). Instead, I have concentrated on the question of the states' responsibility to accept refugees in Europe and utilized moral views discussing open borders that highlight the problems related to refugee questions.

The evolution of the right to free movement with an economic logic

Free movement is related to the general discussion about global justice – an issue that is becoming increasingly acute with people crossing the external borders of the Union, and then being able to move freely without internal border controls. Hence, we have to differentiate the two issues related to free movement. First, there is the right to free movement of the EU citizens, including the right of residence and the right to social security. The second issue is the possibility of everyone in the Schengen area to physically cross the internal borders without border control. Currently, some internal border controls have been re-established due to uncontrolled number of migrants, but in general, once a person has entered the Schengen area, no systematic border controls apply.[3]

The understanding of free movement, as there is an absence of border controls, is what that has been put under scrutiny in the European Union during the migration crisis, while the right of EU citizens to move and reside in other Member States is generally accepted, although there are doubts with regard to the social security of EU movers. Free movement and social benefits of EU citizens were also a major decision for Britain to vote for leaving the European Union in June 2016. When I discuss the right to free movement, I am thus referring to the right of EU citizens. For the sake of simplicity, I have employed the term 'EU citizens', although the citizens of EEA countries (Iceland, Liechtenstein and Norway) and the long-term residents also have a right to free movement (in a limited form). Even though people entering the Union have the possibility to cross borders, they do not thus have the right to free movement as the EU citizens have. In addition, if they have been registered as asylum-seekers in one country, they may be returned to that country based on the Dublin Regulation of the Union as discussed below (see also Sidorenko 2007: 51-57). However, the states are not obliged to return them, and the entire Dublin system has also been deemed unfair and unsustainable by some authors (e.g., Carrera & Guild 2015). The Schengen and Dublin systems are discussed in the following section, while the present one focuses on the right to free movement of EU citizens.

Although currently included in the Charter of Fundamental Rights of the European Union, the origin of the right to free movement is in the economic integration, founded in the Treaty establishing the European Coal and Steel Community (ECSC) in 1951. Its Article 69 states that:

> The Member States bind themselves to renounce any restriction based on nationality against the employment in the coal and steel industries of workers of proven qualifications for such industries who possess the nationality of one of the Member States; this commitment shall be subject to the limitations imposed by the fundamental needs of health and public order (Article 69, Treaty establishing the European Coal and Steel Community 1951).

The emphasis on equal rights for workers in the founder states was thus a central principle already in the early stages of European integration. Free movement was something pushed forward by the Italian politicians of the time in particular, with the intention of enabling Italian workers to emigrate. However, they had to accept the restriction clause based on public health and order, which still exists in the EU legislation concerning free movement (Recchi 2013: 42; Maas 2007: 16). Thus, free movement was originally a principle aimed at creating a common market for the coal and steel industry in the 1950s, but it has been developed towards a more comprehensive principle inside the Union.

Free movement is the product of a supranational economic agreement, namely, the founding treaty of the European Coal and Steel Community, and later the Treaty establishing the European Economic Community (1957), which enlarged the right for workers in all fields. The more comprehensive character of the right was already visible in the 1960s, when politicians significantly enlarged this freedom with regulation 1612/68/EC to cover all persons and their family members. The role of the Court of Justice of the European Union (CJEU) was also considerable in this decision. The reason for this was that although the EEC Treaty discussed free movement of 'persons' in addition to services and capital, it was evident that the treaty referred to economic actors and not any persons (O'Keeffe 1998: 20-21). In addition, Joseph Weiler has argued that the Court of Justice has even contributed to the democratic deficit of the Union with the power taken in its case law, not based on EU Treaties (Weiler 2012: 137-164). It was also claimed that the construction of the 'Fortress Europe' began with the Council Regulation 1612/68, which defined free movement as a right of only Member State citizens (Ugur 1995: 977; Huysmans 2006: 66).

In this manner, one could argue that the right to free movement was constructed the other way around than most fundamental rights; there was first a legal right based on economic logic, which was later complemented with the status of fundamental right and the logic of freedom. However, the economic logic of free movement is still relevant in the current free movement legislation. Free movement was first a legal principle based on economic interests, and was later

a central individual right of the European Union citizenship created in the Treaty of Maastricht (1992). After that, the Treaty of Amsterdam (1997) centred on security issues related to free movement, and incorporated in the EU the legal framework of the Schengen area, in place since 1995. One of the recitals of the Amsterdam Treaty explicitly states the connection between security and free movement:

> Resolved to facilitate the free movement of persons, while ensuring the safety and security of their people, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty (Recital, Treaty of Amsterdam amending the Treaty on European Union 1997).

After the Amsterdam Treaty, the right to free movement became a legally binding fundamental right codified in the Charter of Fundamental Rights (Article 45, Freedom of movement and of residence) with the Lisbon Treaty signed in 2007, and enforced since 2009.[4] The Charter of Fundamental Rights of the European Union states that 'Every citizen of the Union has the right to move and reside freely within the territory of the Member States' (Art. 45(1), Charter of Fundamental Rights of the European Union). The second paragraph adds that 'Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State' (Art. 45(2), Charter of Fundamental Rights of the European Union), but it is thus not an automatic right. Indeed, the EU legislation only provides free movement for third country nationals who have the status of a long-term resident, which means that they have been resident in the EU for at least five years, as defined in the Directive 2003/109/EC.

The right to free movement is classified under Chapter V of the Charter concerning citizens' rights, further emphasizing it as a right of only EU citizens. Although the Charter was drafted in 2000, it only received its legal force with the Lisbon Treaty that came into force in 2009. Currently, free movement as defined in the Article 3(2), amended by the Lisbon Treaty, of the Treaty on European Union (TEU) states that:

> The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime (Article 3(2), Consolidated version of the Treaty on European Union 2009)

Here, we also observe that free movement is closely connected to border control. Overall, we can trace a historical lineage, complementing the economic interests with a political citizenship based on free movement. Therefore, the workers' right to free movement primarily had an economic purpose in the ECSC Treaty (1951) and the Treaty of Rome (1957). Subsequently, when free movement became a right, it was automatically included in the EU citizenship introduced by the Maastricht Treaty (1992). Security issues started to play a larger role after the Treaty of Amsterdam (1997) introducing the Area of Freedom Security and Justice, and free movement became a codified fundamental right in the Charter of Fundamental Rights that entered into force with the Lisbon Treaty (2007).

Although free movement is a fundamental right, it can be restricted on an economic basis. In addition to being mentioned in the basic treaties of the Union, free movement is more specifically defined in directives that the Member States have to transpose in their national legislation in a chosen form. There is a legal condition in the valid Free Movement Directive 2004/38/EC stating that people exercising their right to free movement must be able to provide for themselves, although the states shall not restrict free movement based on economic reasons (at least beyond transitional restrictions for new EU Member States). In practice, free movement is thus not an absolute right:

> Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends (Art. 27, Directive 2004/38/EC).

This directive has been implemented in different forms in the Member States, and two contrary examples are provided by Spain and Italy. Whereas Spain chose not to determine any economic conditions for residence (Parker & Catalán 2014: 385–386), Italy set stricter conditions of minimum wage, adequate housing and registering at the authorities at the threat of expulsion (Domnar 2009: 36). As was already visible in the formulation of the ESCS Treaty, restrictions have been possible only based on health or public order since the beginning, demonstrating the unique character of this supranational principle. However, it is not very clear how people may be repatriated for being a burden for the host Member State, which makes the situation relatively ambiguous (Minderhoud 2013: 209-226). A further challenge with the Free Movement Directive is that it only concerns EU citizens, while third country nationals (TCN) do not enjoy similar rights to free movement, social security and residence. Although the status of third country nationals was already specified in Council Directive 2003/109/EC and enlarged in Directive 859/2003/EC concerning social security, they only have the right to short-term visits before five years of legal residence, and only when they have acquired EU citizenship do they enjoy similar rights (Strumia 2013: 96-99). As the naturalization of immigrants is a matter of national discretion, TCNs in different Member States enjoy very different rights.

Another economic ground for restricting freedom of movement is the possibility to establish transitional restrictions for the citizens of countries that join the Union. It has been argued that the enlargements provide an 'oil-stain' type of extension of the Union citizenship, where suddenly some foreign residents in a Member State become 'co-nationals', although worker restrictions are often applied (Strumia 2013: 159-165). Such large-scale restrictions are thus made on economic grounds, in the form of transitional restrictions concerning new Member States, which has been in use since Greece, Spain and Portugal joined the Union in 1980s, and they may last a maximum of seven years. In 2004, ten new Member States joined the Union. For the new Member States, only Sweden, the UK and Ireland did not impose transitional restrictions, while for Bulgaria and Romania, all 'old' Member States (except for Sweden and Finland) established restrictions. However, for Croatia that joined the Union in 2013, most of the countries (14 out of 27) provided free access, and in 2016 only five Member States maintain restrictions, including the UK.

As visible in the discussion above, free movement was established for workers and later citizens of Member States, but still effectively targets people contributing to the economy. Indeed, the most important principle in people exercising their right to free movement is that they do not constitute a burden for the host state.

This is similar to the transitional restrictions, which Spain even re-established for Romanian workers in 2011, based on economic concerns.

Interplay of security and immigration in the Schengen area

Perhaps the most detrimental decision with regard to the exclusive character of free movement has been the Schengen agreement that has spurred the creation of the 'Fortress Europe' (Sassen 1999) based on strong exclusion of outsiders. As illustrated above, the legislation concerning free movement is related to the Schengen agreement, which has removed border controls inside the Schengen area, currently including 26 states, four of which are not EU Member States (Iceland, Liechtenstein, Norway and Switzerland). Since the Schengen agreement abolished internal borders in almost the entire EU (UK and Ireland opted out), it is no wonder that security issues received more attention and the external borders of the Union strengthened. Since December 2007, the Schengen area covers 9 out of 10 countries that joined the Union in 2004 (Cyprus being the exception), while Bulgaria and Romania have not yet been accepted in the area due to insufficient control of their non-EU borders. Croatia, which joined the Union in 2013, started its evaluation and monitoring mechanism to join the Schengen acquis in July 2015.

It is also possible for the Schengen states to impose temporary border controls based on security grounds. Therefore, although the EU Member States cannot restrict the right to free movement of EU citizens, they are able to re-establish border controls, as defined in the Article 2(2) of the Convention Implementing the Schengen Agreement (1985):

> However, where public policy or national security so require a Contracting Party may, after consulting the other Contracting Parties, decide that for a limited period, national border checks appropriate to the situation shall be carried out at internal borders. If public policy or national security require immediate action, the Contracting Party concerned shall take the necessary measures and at the earliest opportunity shall inform the other Contracting Parties thereof (Article 2(2), Convention Implementing the Schengen Agreement 1985).

Border controls have also been re-established in some countries in autumn 2015 due to the so-called migration crisis, with the main emphasis on the borders where the migrants enter the particular state. In October 2016, the Schengen states applying such restrictions include Denmark, Norway, Sweden, Austria, Germany and France.

In addition to the actual legal principles on free movement, mobility is also related to common European immigration and asylum policies, especially after the abolishment of internal border controls. Originally, common immigration and asylum policy was already envisaged in the Council conclusions in Tampere in October 1999, where the Council stated that:

> This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others worldwide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes (Tampere European Council 15–16 October 1999, Presidency Conclusions).

Although the Member States thus committed to granting free movement rights also to TCNs, the process is still unfinished. The Tampere programme was followed by Hague programme in 2004 and Stockholm programme in 2010, which ended in 2014. In contrast, the outlining of common principles has resulted in further restrictions for third country nationals moving in the Union area, thus contributing to the development of the 'Fortress Europe' (Talani 2012: 61-72). The process was launched in 1990 with the Dublin Convention connected to the Schengen Agreement,[5] setting the obligation for an asylum application to be handled in the first country the applicant arrives. Despite certain possibilities for opt-outs, all EU Member States have decided to be a part of the Dublin arrangements. Although Denmark is a part of the Schengen Agreement and the Dublin system, it received an opt-out from Justice and Home Affairs in the Maastricht Treaty, and thus, the country does not participate in the common asylum and immigration decisions. Moreover, Ireland and the UK negotiated an opt-in option in the Amsterdam Treaty. Thus, they may participate in the decisions related to the Area of Freedom Security and Justice on a case-by-case basis, and have decided to be part of the Dublin arrangement.

The Dublin Convention was replaced in 2003 with the 'Dublin II Regulation', the Council Regulation (EC) No 343/2003. In connection to this, the EURODAC system was also established to compare the fingerprints of asylum-seekers and irregular migrants. Dublin III was adopted in 2013 with the Regulation (EU) No 604/2013, also establishing the Common European Asylum System (CEAS). The CEAS was under preparation since 1999 and several harmonization measures were already concluded before the adoption. However, the Member States still have diverging practices in granting asylum, despite the legal provisions on receiving and processing asylum applications. The Dublin system means that the asylum-seekers may be sent back to the European Union country where they originally landed or were registered, which was stipulated already in the first Dublin Convention. However, it is not obligatory, and some countries (e.g., Germany in autumn 2015) have declared that they will not send people back to the Mediterranean countries facing the largest share of immigrants. In 2011, the Court of Justice of the European Union declared that no asylum seeker should be sent back to a Member State in which they would face a risk of inhuman or degrading treatment (case N.S. & M.E. 21 December 2011). This may of course be difficult to determine.

Despite the mentioned measures, no common immigration policy has been drafted till date in the EU. 15 years after the adoption of the Dublin Convention, the EU also adopted a Global Approach to Migration and Mobility in 2005, which is now in its second phase of launch with the Commission Communication COM(2011) 743. It provides a framework of the EU external migration policy, but does not constitute any legal provisions. In addition, the Council adopted the European Immigration and Asylum Pact in 2008, in which the Member States committed to conduct regularizations of irregular migrants only on an individual basis. This helped to put an end to the Spanish and Italian regularization campaigns, which were lamented by the other states, given the area of free movement. The Council agrees in the Pact 'to use only case-by-case regularisation, rather than generalised regularisation, under national law, for humanitarian

or economic reasons' (European Pact on Immigration and Asylum 2008).[6] The Pact was made at the proposal of Nicolas Sarkozy, and it can be considered a further sign of the Fortress Europe development (see also Vogt 2009).

Overall, in order to safeguard the free movement policy, the Member States have introduced the above-described measures to harmonize their immigration policies, but these harmonization efforts have simultaneously led to more exclusive policies at the EU level. The plans to pursue common policies reached their turning point in autumn 2015, when the number of migrants coming to Europe made the question of burden sharing inevitable. This illustration of the origins of the right to free movement demonstrates how free movement is intertwined with several aspects of European integration and questions related to insiders and outsiders. The fact that many countries have started to question the rationale of the Schengen policy and free movement for all can also be regarded as a sign of the lack of solidarity in the case of refugees. Now, in order to leave aside the legal formulations and focus on the limits of justice, the moral foundations of the right of refugees are outlined below.

Open borders and refugees

As was observed above, open borders are also related to who is granted the right to stay in a country. The problems related to responsibility towards 'outsiders' are also tackled by moral philosophers with regard to open borders: who is entitled to membership and who should make that decision based on which criteria? As demonstrated earlier, free movement in the European Union was originally devised as a right of the citizens of the six founding states (France, Germany, Italy, Belgium, Netherlands and Luxembourg) of the ECSC to work in other countries. None of these countries was a major immigration country in the 1950s, and the migration issues have gained major attention only in recent years, when the question of refugees has become more acute. Instead of discussing asylum seekers, I use the term 'refugee' employed by the authors presented below. More specifically, I do not discuss who should be considered a refugee, but focus on state duties towards people who are considered refugees.

We can find several arguments for restricting membership, since there is no global citizenship in sight. There have been extreme propositions where the sphere of justice only works inside a state, except in refugee cases (Walzer 1983), and where borders should be open in order to remedy global inequalities, except in massive refugee cases (Carens 2013; see also Bauböck 2009: 2). In addition, there are other arguments that balance between the duties towards the refugees and the duties towards citizens of a particular state, often privileging the latter (Bauböck 2015a, 394-401; Miller 2007). My aim is not to dwell into the larger discussion on the justification of inclusion or exclusion of people from a certain territory, but I present some views on the refugee policies. In the table below, I have classified some of the prominent accounts on moral duty towards refugees, as I have interpreted them.

Table 1. Morality of refugee policies in the works of different political philosophers

	More extensive policy	Less extensive policy
Freedom in focus	Joseph Carens	David Miller
State in focus	Rainer Bauböck	Michael Walzer

All of these authors argue that there is some duty to accept refugees, but while Miller and Walzer consider that the policies must be restricted in accordance with communal self-determination, Carens and Bauböck argue that the moral duty should be more extensive than it currently is. At the other dimension, whereas Carens considers that free movement is based on human freedom, Miller argues for the prevalence of freedom inside a state. Similarly, although both Walzer and Bauböck claim that state system is the core factor, Walzer regards the duty to refugees as not surpassing the duty to the community, while Bauböck considers the duty to refugees more pressing. It is noteworthy that Walzer's main work, where he discusses the question of refugees was written in 1983 (although he has referred to refugees also in his later writings). Rainer Bauböck regards that there are strong claims to grant asylum, and the duties stem from being responsible for the situation or being in the best position to help (Bauböck 2009: 26-28). Moreover, he also proposes that the liberal democracies assist the 'burdened societies' and promise free movement once they have become stable democracies (Bauböck 2015a: 400-401).

As we can observe, there are several options on where to draw the line. David Miller lists three arguments employed as the basis of a restricted sphere of justice: 'cooperative practice', 'political coercion' and 'common identity' views (Miller 2012: 277). Rainer Bauböck, in contrast, focuses on democratic self-determination as the basis of restrictions (Bauböck 2009: 2-3). In this, he separates three views on where to draw the line: 'all affected interests' (AAI), 'all subject to political coercion' (ASC) and stakeholder principle, which is the one he supports (Bauböck 2015b: 820-839). The views of Miller and Bauböck are somewhat complementary, since cooperative practice is based on mutual advantage for all affected interests (cf. Rawls 1973); political coercion is based on the view that only people subjected to political coercion are entitled to certain social goods (cf. Dworkin 2000), while the common identity (cf. Hume 1896) and stakeholder principle are rather different. While the common identity view is more exclusionary, stakeholder principle relies on the assumption that people are interested in the membership for instrumental and intrinsic reasons and that they have an interest in preserving the polity they seek to enter. While Miller argues that the modern state comprises of all these features, Bauböck considers that the AAI and ASC principles are both too over-inclusive and under-inclusive to provide any guidance (Bauböck 2015b: 820-839).

Miller tries to deal with the impossibility of global justice and argues that the sphere of distributive justice may enlarge while economic cooperation or regional identities take shape (Miller 2012: 163-164). An example of such pursuit is the European Union, with cooperation, coercive practices and some sense of common identity emerging at the regional level. In accordance with Miller's theory, the citizens of this community also share more extensive rights than outsiders, but he does not specify what justifies such exclusionary practices. Moreover, Miller argues that it is up to the state whether they accept refugees:

> the duty we are considering is a duty either to prevent rights violations being inflicted by third parties (if the refugees are fleeing violence or political persecution) or to secure the rights of people where others have failed in their responsibility (if the refugees are escaping food shortages caused by economic mismanagement, say). Such duties are weaker than the negative duty not to violate human rights oneself, and arguably weaker than the positive duty to secure the rights of those we are specifically responsible for protecting. At the limit, therefore, we may face tragic cases where

> the human rights of the refugees clash with a legitimate claim by the receiving state that its obligation to admit refugees has already been exhausted (Miller 2007: 227).

This would mean that states have a stronger duty towards their own citizens and the claims of refugees could be rejected. Miller considers that states may reject taking refugees since they have a stronger duty towards their own citizens, while Bauböck considers political refugees in need of asylum being the most urgent cases. Bauböck maintains that asylum seekers are not stakeholders in the new countries, in the sense that they have links to them or some other countries are responsible for their situation (Bauböck 2009: 26-27). In the current context, it can be asked whether the asylum seekers should be distributed evenly in the European Union – which was indeed agreed in autumn 2015 but has not been implemented – since the EU is collectively in the best position to help, even if some would have a preference to live in a particular country. In principle, the European Union appears to hold Bauböck's view, but it has failed to realize the sharing of the burden. Of course, not all transferred people are granted asylum, but a successful transfer process would smoothen the processing of applications.

Joseph Carens has also discussed the question of morality in terms of receiving refugees, in which he divides the main responsibilities into three groups. These include causal connection, humanitarian concern and the normative presuppositions of the state system, based on the claim that the other states have a duty to provide a place if the refugees' society has failed them (Carens 2013: 195-196). Carens criticizes the current refugee system based on non-refoulement, geographical proximity and occasional generosity (Carens 2013: 216). This means, firstly, that the policies are based on the norm that people cannot be returned to dangerous circumstances. Furthermore, the neighbouring countries bear the largest share and the richest countries only provide occasional asylums. Although he deems that it is easiest for people to return home from a nearby refugee camp, it is morally questionable that the poor neighbouring countries pay the highest price.

As Carens points out, the immigrants from the Middle Eastern region are considered a threat to the Western values, while simultaneously those countries are the ones that host the largest numbers of refugees, and the richer countries are trying to find ways to keep them out (Carens 2013: 220). In this regard, Paul Collier has also suggested that more emphasis should be put on the neighbouring refugee camps to which people could also be returned. The European refugee policy, where one may be able to obtain asylum only by risking their lives on a boat or in a truck, is perverse and only provides aid for the marginal number of people who manage to pay to the trafficker and then stay alive until they reach Europe (Collier 2015). Paul Collier has also proposed that refugee camps should be a place for people to stay in dignified conditions and work until they can return home (Collier 2015). However, the situation in the Middle East is not likely to be resolved very soon and not everyone would be willing to wait until they can return home, which may not even exist anymore. In addition, the UN has reported that 13 million children are not attending school because of conflicts in the Middle East (UNICEF 2015). This alone shows that the refugee camps are not a functional long-term solution, at least in their current form.

Carens also considers that refugees are not entitled to choose where they can settle, although their preference should also play a role (Carens 2013: 217-224). His proposal for making the refugee policy just is that refugees had a similar right to resettlement as they have the right to non-refoulement to their violent countries of origin, but that would pose significantly more stringent obligations for the states, which is unlikely to be accepted by those states (Carens 2013: 217-224). Therefore, instead of living for years in a refugee camp, they should have a right to resettle in another country. This right would be valid until the conflict is resolved or permanently, if the conflict continues and they wish to stay. This view is based on Carens's account of social membership being the basis for citizenship (Carens 2013: 160).

A completely opposite view is presented by Michael Walzer, who considers that states may decide not to accept immigrants in their area, although he argues that the 'claim of asylum is virtually undeniable' and simultaneously acknowledges that 'the right to restrain the flow remains a feature of communal self-determination' (Walzer 1983: 51). Therefore, although he maintains that all refugees have the right to asylum, no community has a duty to provide this right unless they are responsible for the situation or have an ideological or an ethnic affinity with the refugees (Walzer 1983: 49). For Walzer, the right of communities to self-determination then surpasses the rights of those people, for whom no one in particular may have a duty to help.

In the European Union, no state can be accused of being the culprit for the conflicts in the Middle East and there are no obvious ideological or ethnic affinities with the refugees. Walzer admits that he has no answers on where to draw the line, and neither do the politicians in Europe. Walzer also makes a topical point: 'Why mark off the lucky or the aggressive, who have somehow managed to make their ways across our borders, from all the others?' (Walzer 1983: 51). In his view, typical refugee policies thus benefit those who have the means and the strength to take a dangerous illegal route, whilst the people who not able to leave may be ignored.

In a similar vein, in an article published in 2001, Walzer emphasizes the view that refugees do not have a right to settlement, but have a right to get help (Walzer 2001: 30-31):

> Maybe the fundamental human right of refugees is not to be admitted here or there but simply to be helped. Help can take different forms: political or military intervention to change the conditions that forced the refugees to flee in the first place, so that they can go home; the movement of resources into their home country, so that they can make a decent life there; some degree of international supervision, by agencies more committed to global egalitarianism than any that now exist, to guarantee their rights at home or to organize economic assistance.

Again, this is of little help in the current refugee situation in Europe. Although other states are intervening in the conflict zones, such military interventions are unlikely to make the conditions habitable for people to stay there. In Walzer's thinking, it would thus be better to stay in the national context in the matters of distributive justice, as illustrated above. The sphere of distributive justice should have certain features, including shared economic, social, and cultural infrastructure; communal provision in terms of welfare; equality of opportunity; and strong democracy (Walzer 1986: 136-150). According to Walzer, distributive justice should thus be limited to the sphere of traditional nation-states, and not even the European Union should qualify as a provider of distributive justice. Walzer has also discussed the status of the Union, which does not fall into any category of institutions providing distributive justice. Although the Union is not able to provide distributive justice to immigrants, along with the internal free movement in the Union, it is likely to become an immigrant society as a whole (Walzer 1997: 50). Overall, Walzer

appears to support the national focus in refugee matters, which seems to be the preferred option also in some EU Member States.

As we can see here, there are strong moral claims for granting asylum, but the sovereign states also have a freedom to choose whom to let in. In the European Union, this is not entirely the case anymore with regard to EU citizens. Certainly, the process of establishing a common asylum policy should now be finalized; if it does not oblige states to more restrictive policies (see also Attinà 2015). As Paul Collier and Joseph Carens have outlined, we should pay attention to the refugee camps in the neighbouring countries, but in the absence of dignified conditions, people coming to Europe cannot be returned there.

The European Union appears to mostly follow Bauböck's model, where the duties towards refugees are pressing. The principle that the Union seems to advocate in this case is that people in need should be helped, as long as the Union is in the best position to help. This is also reiterated in the speeches of the European leaders. For example, the High Representative Federica Mogherini stated at a press conference after the terrorist attacks in Paris, '[w]e have a duty to protect those in need of protection that are escaping from the very same threats that we are facing in Europe today' (Mogherini 2015).

The best available option appears be that Member States establish a common approach in the European Union and distribute the asylum-seekers evenly in the Union, something also put forward by the European Commission in autumn 2015 (European Commission 2015). However, the realization has failed. Such proposals were already made in 1994 by Germany with regard to the refugees of that time, but the efforts have still not resulted in binding and permanent arrangements. Also in 2001, a Council Directive on Temporary Protection in the Case of Mass Influx 2001/55/EC (Article 26(1)) outlined non-binding measures, where moving people enjoying temporary protection from one place to another requires agreement both from the receiving state and the people concerned (Thieleman & Dewan 2007: 163-164). Still, it appears that the agreement of the asylum-seekers has been considered non-binding in the currently outlined transfers.

One of the incentives for the aspired quotas seems to be to lessen the incentive of people risking their lives to cross the border to the Union, as they no longer can decide where to seek asylum. The relocated people only have the right to reside in the specified country, and '[t]he Commission has also recommended to Member States that they consider imposing reporting obligations on relocated persons applying for asylum and only providing material reception conditions (providing food, housing and clothing only in kind)' (European Commission 2015). In other words, people are de facto obliged to stay in the particular country in order to receive social assistance.

In general, reducing the number of irregular migrants appears to be considered more important than providing a possibility for people to legally enter the Union, an approach that was strengthened in the recent legislative proposal by the Commission introducing passport control whenever Schengen external borders are crossed (COM(2015) 670 final). The Union thus argues for a more stringent control in order to stem the numbers of migrants, even at the price of free movement. Although most of the Union measures with regard to the migration numbers have been internal, they also involve external relations. For example, the Union also provided financial help to Turkey in hosting Syrian refugees, but the primary incentive appeared to have better control of the Turkish borders in exchange for progress in the Turkish enlargement process. In March 2016, Turkey and the EU also agreed on a deal where the Union would resettle one Syrian refugee for every Syrian returned to Turkey from Greece, which however was not immediately implemented due to resource difficulties in Greece (BBC 20 March 2016). This was arguably made in the hope of stemming the number of migrants taking the dangerous sea route, and despite harsh criticism, the agreement has "reached cruising speed" in autumn 2016 (European Commission 2016b).

Conclusion

Although free movement policies are intended to facilitate mobility inside the Union, they are closely connected to immigration and asylum policies. For example, certain states have lamented the other EU states' regularizations of irregular migrants (Finotelli & Arango 2011: 495-515). Such measures may make the 'Other' become more European, and this allegedly deteriorates the sense of unity. With the European Pact of Immigration and Asylum adopted in 2008, states, inter alia, committed to stop large-scale regularizations of irregular immigrants. This and other common EU-level restrictions in immigration policies further strengthen the exclusive nature of the Union. This is the major contradiction in the EU efforts observed in the legal overview in this article: harmonization simultaneously leads to exclusion. Moreover, the fact that people move freely in the European Union may also make citizens more negative towards immigration in general (Tonkiss 2013), although the purpose of internal free movement has been quite the opposite.

Europe is already a multicultural area and there is already much juxtaposition between the EU citizens with extensive rights and the rest. Alleviating this juxtaposition may sound impossible in the current European Union, where the restoration of the fully functioning Schengen system requires strengthening of the external borders. In the words of Commissioner Avramopolous: 'indeed an internal area without border controls is only possible if we have a strong protection of our external borders' (European Commission 2016a). The fact that the European Union has been able to agree on certain common principles shows that there is some solidarity with regard to burden sharing when the area of free movement is at stake. In contrast, agreeing on common principles has been all but easy and has put the solidarity of the Union under serious stress. In the end, the most important issue would be to try to provide equal opportunities for people, despite the morally arbitrary fact of where they have been born.

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Notes

1. Everyone holding a citizenship of any of the 28 Member States of the European Union is an EU citizen. This is problematic in the sense that the countries have very varying practices in granting citizenship (see e.g. Strumia 2013).

2. Restrictions for free movement also exist between German *Länder*, especially in the so-called *Duldung* cases of temporary suspension of deportation (Castañeda 2010).
3. Of course, whilst there might not be any border controls, the access to social services, healthcare etc., is strictly controlled.
4. Lisbon Treaty followed the failed constitutional treaty, removing the previous pillar structure of the Union and creating an obligation to even military assist other Member States, among other issues.
5. While the Schengen Agreement abolished border control between the signatories, the Dublin Convention related to asylum-seekers, who were obligated to lodge their asylum claim in the first signatory state. Currently, Dublin III Regulation applies to all EU Member States (and Iceland, Liechtenstein, Switzerland and Norway), except for Denmark, which has an opt-out from issues related to the Area of Freedom, Security and Justice.
6. In addition to EU legislation, the Member States are naturally bound by international law, such as the UN Refugee Convention (1951).

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