



Dealing with migration

**Externalisation of asylum and
migration policy.
Some rule of Law concerns**

**Tineke Strik
Centre for Migration Law
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Constitutionalisation of rule of law

- Lisbon Treaty, Article 2 TEU: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.
- (COM(2014)158): principle of legality, legal certainty, prohibition of arbitrariness of executive powers, independent courts, effective judicial review including respect for fundamental rights
- Charter of FR became binding and made part of general principles of the Union's law.



Rule of law as objective

- Article 3(1) TEU: one of EU objectives is to promote its values.
- Article 21 (2)(a) TEU: Safeguarding these values is an important aim of external cooperation
- Article 4(3) TEU: Member States must cooperate sincerely and loyally in achieving the EU's objectives.

This underpins the obligation for Member States and EU institutions to act and cooperate according to the rule of law, democracy and fundamental rights obligations.



Multilevel implications of EU values

- The principles of rule of law, democracy and fundamental rights constitute a vital reference at all levels of the EU:
- the legal order of the Member States,
- the interinstitutional relations and functioning of the EU as a whole
- the external dimension of EU policies and actions



Member State level

- Article 7 procedure for Council to address violations of Art 2 TEU
- Enforcing compliance by Commission, through infringement procedures.
- Annual monitoring report on rule of law, specifically on independent judiciary, corruption, checks and balances and media freedom.
- Conditionality Regulation, linking EU funding to rule of law compliance



EU level

- Institutional balance of legislature:
 - Co-decision has become the norm (ordinary)
 - Budgetary power shared by Council and Parliament
 - Parliament appoints EU Ombudsman
 - Scrutiny of Commission's enforcement difficult
 - Court of Justice full competence
 - EU institutions (incl. agencies) are bound by Charter of Fundamental Rights



External cooperation

- Art 21 TEU and 205 TFEU: external cooperation **guided by its own principles**, and seeks **to advance in the wider world**: the rule of law, universality and indivisibility of human rights and fundamental freedoms, respect for human dignity and international law, principles of equality and solidarity.
- 3) consistency between different areas.
- Art 208 and 214: objectives development cooperation and humanitarian aid.



External dimension on migration

- Art 78 and 79 TFEU: co-decision on asylum and migration instruments:
- -Art 78(2)(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection
- -Art 79 (2)(c) illegal migration and unauthorized residence, including removal and repatriation of persons residing without authorization.
- Article 79(3) TFEU legal basis for readmission-agreements
- and -clauses, but procedures according to art 218 TFEU



Article 218 TFEU

Council:

- (2-4) decides on mandate and is consulted during the negotiations, can (re)direct Commission
- (6) concludes agreement by qualified majority

Parliament:

- (6)(v) has the right to consent
- (10) is informed at all stages of procedure

Both: opinion CJEU on compatibility of the agreement with the Treaties (article 218 (11) TFEU. If incompatible, the agreement cannot enter into force without amendment or revision of the Treaties.



Informal cooperation

- Formal Agreements do not exclude informal cooperation.
- Regional dialogues, joint declarations, statements, partnerships, MOUs etc.
- Mandate from (European) Council to negotiate
- No role Parliament, despite own competence on readmission, no use 78(2)(g)
- No competence Court of Justice. Consequences:
 - individuals no access to justice,
 - Court not able to protect general principles of EU law, including institutional balance and sincere cooperation.



Budgetary power

- Parliament only involved in case of budgetary consequences, for instance the EU-Turkey statement.
- EU Trustfund for Africa: because of emergency (2015-2020) no role Parliament.
- Regulation 2021/947 NDICI 2021-2027 (co-decision)
- Fight between Council and Parliament: limitation to 10 percent for migration and only that part can be made conditional. Marginal role implementation



Human Rights Protection

- Protection level is no selection criteria for partner country, no human rights impact assessment
- Legal framework:
- EU law/ Charter not applicable outside EU, except if EU Agencies (Frontex, Europol) work in third countries, but tasks outsourced to IOM or UNHCR and funding activities not bound by EU law.
- No guarantees of respect for ECHR or international law.
- Risk of lack of access to asylum procedure or basic social needs, preventing departure, torture or refoulement. No access to justice. Research: more repressive migration policies to avoid responsibility.



Implementation and monitoring

- No monitoring external cooperation, except on complying with readmission obligations. Parliament has restricted access to information.
- Other monitoring bodies:
- EU Ombudsman and FRA no competence to monitor outside EU
- Lack of transparency also limits work of (EU) NGOs
- NGOs, lawyers and IGOs in third countries often under strain and limited access migrations/refugees and monitor their situation



Risks of conditionality

- Conditionality may affect development goals, economic growth, freedom of citizens **and human rights goals**
- **Community Common Visa Code** revision in 2019 Regulation 2019/115, amending Reg 810/2009
- Article 25a: suspension visa facilitation/liberalisation if third country cooperates insufficiently on readmission
- **Post-Cotonou Agreement**, signed April 2021
- Proposal for revision **Regulation for generalised schemes of tariff preferences** for developing countries
- COM(2021)579, September 2021



Equality and solidarity, 21 TEU?

- Responses third countries
 - Stutz/Trauner: less cooperation, reduction return rates
 - Norman: strategic indifference
 - Cassarino: reversed conditionality
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- COM(2021)890, 14 December 2021, measures in case of instrumentalisation;
 - Definition in SBC proposal, COM(2021)891



Definition of instrumentalisation

- Art 2(27): instrumentalisation refers to a situation where third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security.



Time for reflection

- Formalise cooperation, and/or use article 78(2)(g)TFEU
- Take interests and needs third countries into account
- Human rights criteria and impact assessments
- Annual reports on impact human rights, based on independent institutes, NGOs, IGOs (fund their capacity, ensure their mandate), discussed in Council and Parliament and to be used for judicial scrutiny
- More transparency and scrutiny funding
- Conditionality to rule of law and fundamental rights compliance, to Member States, third countries and EU Agencies.
- Start infringement procedures to stop pushbacks at external borders
- Comply with Global Compact Refugees: solidarity