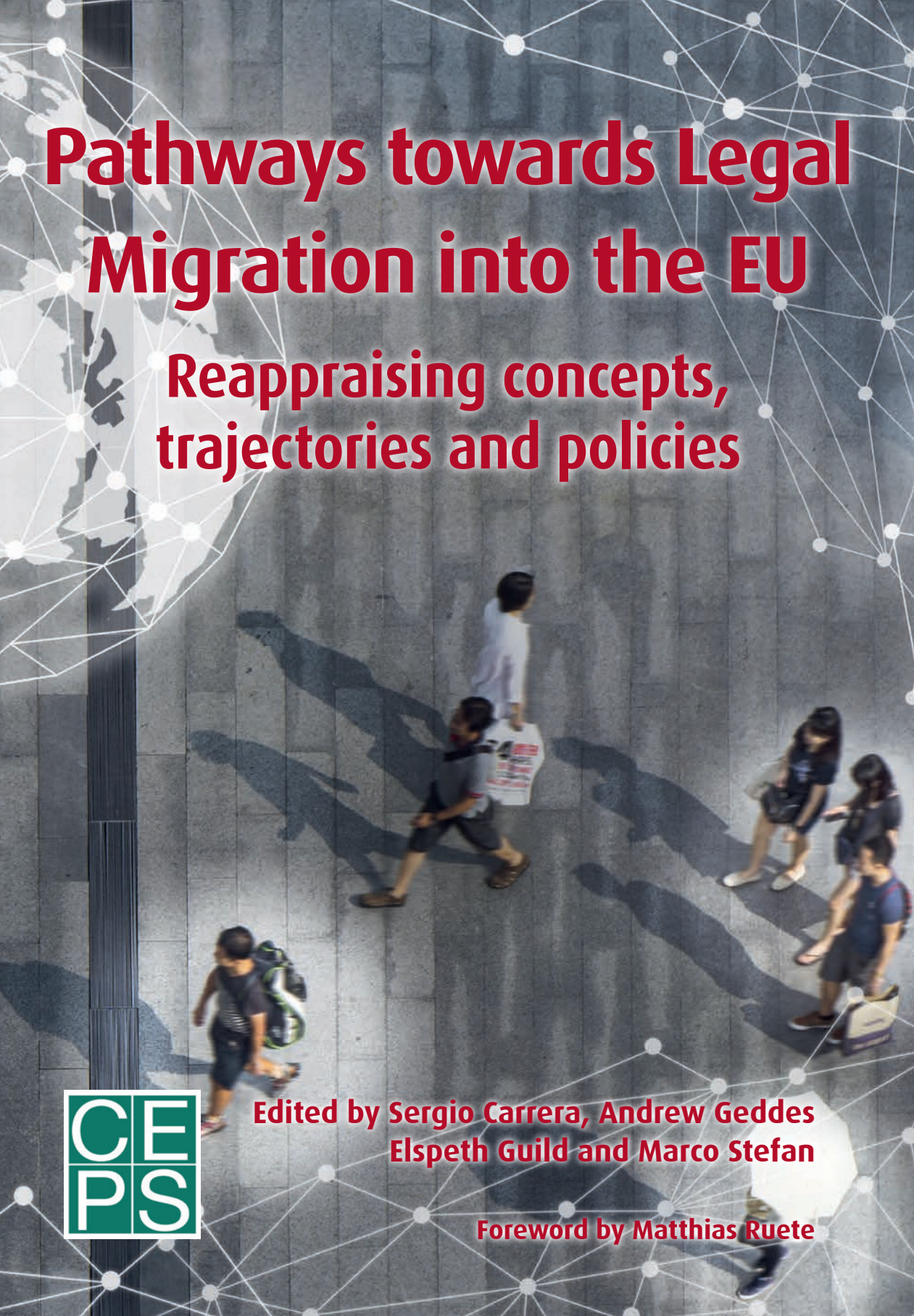
Pathways towards Legal Migration into the EU

Reappraising concepts, trajectories and policies



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19. EU LEGAL MIGRATION TEMPLATES AND COGNITIVE RUPTURES: WAYS FORWARD IN RESEARCH AND POLICY-MAKING

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The evolution of the Area of Freedom, Security and Justice (AFSJ) exemplifies the visionary template for European integration enshrined in the Schuman Declaration (9 May 1950): "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity."[1] Through consistent action in variable, and often unpredictable, environments as well as through processes of trial and error, European institutional actors have designed legal templates for migration governance that can better address the needs of European societies and polities, along with citizens, residents and admission seekers. There is a lot to commend 'Europe' for in this area. Hardly anyone would have predicted the adoption of so many legal migration directives in the early 1990s when the intergovernmentalist pillar of justice and home affairs (JHA) was established by the Treaty of European Union (in force on 1 November 1993).[2]

Transcending theirs fears about possible sovereignty losses and learning to trust each other and the common European Community institutions they had designed, national executives agreed on the partial communitarisation of the JHA pillar at Amsterdam (the Amsterdam Treaty entered into force on 1 May 1999) and finally on its full communitarisation by the Treaty of Lisbon ten years later (in force on 1 December 2009).[3] The first decade of the new millennium saw the adoption of the first five legal

[1] See the Schuman Declaration (https://europa.eu/european-union/about-eu/symbols/europe.../schuman-declaration_en).

[2] See the Treaty on European Union, 7 February 1992, OJ C 191/1, 29.7.1992.

[3] See the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, OJ C 306/1, 17.12.2007.

migration directives: the Long-Term Residence Directive; the Family Reunification Directive; the Directive on the Conditions of Admission of Students, Pupils, Unremunerated Trainees and Volunteers; the Directive on a Specific Procedure for Admitting Third-Country National Researchers; and the Blue Card Directive.[4] Shortly afterwards, the Single Permit Directive, the Seasonal Workers Directive and the Intra-Corporate Transfer Directive were adopted.[5] True, the processes of negotiating and agreeing on the legal content of the directives have not been smooth. But it is equally true that discontent, rival national interests and the prevailing ideological lenses did not stall the institutional journey of the AFSJ. After all, short-term opposition and temporary obstacles can delay and frustrate regulatory choices but these eventually become absorbed in long-term processes of continuous feedback loops of learning, trust-building and searching for better and more efficient policy designs.

What has also been remarkable in this institutional journey is the depth of the institutional change that has taken place. More openness and accountability was infused into the AFSJ, effective parliamentary supervision and judicial scrutiny provided improvements in the governance of legal migration, and the one-sided prevailing belief in restricting, controlling and securitising migration was supplemented by a more liberal

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[4] See Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.1.2004; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003; Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375/12, 23.12.2004; Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289/15, 3.11.2005; Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17, 18.6.2009. For an analysis, see Wiesbrock (2010).

[5] See Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and common set of rights for workers, OJ L 343/1, 23.12.2011; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on conditions of entry and stay of third-country nationals for the purposes of employment as seasonal workers, OJ L 94/375, 28.3.2014 and Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157/1, 27.5.2014, respectively.

approach and a stronger focus on the rights of the individual. The EU citizen has also been placed at "the heart of the project".[6] Such a liberal approach characterised the Tampere and Stockholm programmes.[7] In this respect, although ideology and security challenges led to a restrictive and security-based discourse and policy on external migration,[8] political pragmatism, a more positive frame for labour migration and the situation of European migration policies, which the global dynamics of human mobility and a rights-based focus fuelled by the binding EU Charter of Fundamental Rights, also played an important role in shaping the EU's legal migration *acquis* (Fletcher et al., 2016). In fact, it would not be an exaggeration to say that the latter has effected a cognitive change in how human mobility is perceived and should be regulated, thereby enriching the policy menu of the EU and of national governments.

To this end, the European Commission has played a remarkable role by providing forward-thinking, creative approaches and often an audacious reappraisal of some of the underlying assumptions that underpin policy selection in the migration field. Its numerous Communications have enriched the cognitive menu of national institutional actors and have prompted them to view migration as a resource and an opportunity for economic regeneration and societal enrichment. They have also emphasised the need for a flexible and proactive migration policy and consistently promoted the vision of a "Europe of rights"[9] and a 'Europe of citizens'. In reality, this vision of Europe was no other than the Schuman Declaration's vision of a Europe of solidarity. Promoting a more integrated social space and a Europe of solidarity was a political priority of the Stockholm programme. To this end, the Commission at that time called for a dynamic

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[6] See European Commission, Communication on an Area of Freedom, Security and Justice serving the citizen: Wider freedom in a safer environment, COM(2009) 262/4, Brussels, 10.6.2009, p. 2.

[7] See European Council, Presidency Conclusions of the Tampere European Council, SN 200/99, Brussels, 15-16 October 1999 and Council of the European Union, The Stockholm Programme – An Open and Secure Europe serving and protecting the citizens, 17024/09, Brussels, 2.12.2009; see also Guild and Carrera (2009) and Kostakopoulou (2007), pp. 153–191.

[8] This was evident in The Hague programme, which was agreed by the European Council in November 2004; see European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53/1, 3.3.2005.

[9] See European Commission, COM(2009) 262/4, op. cit., p. 7.

and comprehensive migration policy, which consolidates the Global Approach to Migration and is anchored on responsibility and solidarity.[10]

But a 'Europe of solidarity' needs to be a Europe of comprehensive solidarity and not of EU national solidarity. In other words, solidarity cannot be confined to nationals of the Member States. It has to embrace all residents in the EU and all those seeking sanctuary or admission to it. This, in turn, requires a positive commitment to the ideal of partnership and cooperation among the Member States and the EU's neighbours and third-country partners and to fundamental rights. Such a positive commitment to fundamental rights was exemplified very recently in Advocate General (AG) Paolo Mengozzi's opinion in *X and X v Belgium*.[11] He argued that the Member States have a positive obligation to issue humanitarian visas to Syrian applicants under Art. 25(1)(a) of the Visa Code and Art. 4 of the Charter of Fundamental Rights, which protects individuals against inhuman and degrading treatment. Such an obligation exists where there are serious grounds to believe that the refusal to issue a visa would lead to the applicants being subjected to treatment prohibited by Art. 4 of the Charter of Fundamental Rights and would prevent them from the only legal recourse to enjoy their right to apply for international protection.[12] A positive commitment to partnership, on the other hand, rules out both attitudes of insularity and national centrifugalism.

Social scientific research could aid policy-making in this area by studying the rise of neo-nationalism and populism in Europe and the serviceability of such discourses. At first sight, one might be tempted to view these discourses as regressive steps and a return to ethno-nationalism. However, as the political environment is undergoing change, ideology cannot but adapt to it. In this respect, one might find new elements in them or new articulations that draw and redraw boundaries among human beings and create 'othering'. Social scientists could add valuable knowledge to how conservative forces exploit economic uncertainty in order to arouse fears and prejudice among Europe's citizens and residents. Research on racism, xenophobia, the rights of hate crime victims and processes of othering is thus needed. For othering is essentially about distancing, that is, about creating barriers that keep human beings apart. These might be physical – that is,

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[10] Ibid., Priority 5, p. 23.

[11] See Case C-638/16 PPU *X and X v Belgium*, Opinion of AG Mengozzi of 7 February 2017.

[12] Ibid.

manifested in practices of 'walling' which separate 'ins' from 'outs' – or social or psychological. The latter happens when individuals share the same public space but are made to feel that they do not belong to it. It also happens when the other's empirical presence is denied in law and she or he is kept apart by policies that posit obstacles to full inclusion. Access to citizenship, for example, has become more difficult in Europe and civic integration policies have exclusionary effects. It would be interesting to map the scope and organisational structure of the integration policies of the Member States and to juxtapose these with the scope and structure of their anti-discrimination and anti-marginalisation policies. How much input do migrants have in the design and implementation of integration policies and what scope is there for achieving societal integration via a non-discrimination and citizenship-driven agenda?

Notwithstanding the work of social researchers, these are difficult times and the EU needs to avoid the capture of its values and policies by centrifugal nationalism and populism. It has to stand firm, affirm its values and defend its achievements. If it fails to do so, it will compromise its operation, the ethos of internationalism and connectivity among peoples, societies and states, as well as its principles of fundamental rights protection and non-discrimination. It also has to defend internal mobility and to extol its benefits for economies, societies, politics and individuals. And of course, the defence of mobility has to take place within a paradigm characterised by a positive appraisal of migration. For both internal mobility and external migration are transformative. Even during these challenging times, progressive forces need to challenge vigorously the negative and security-based narrative about migration and to defend both the experience of relating to one another and the openness of societies.

As the architectural foundations of the legal migration governance have been established, the reappraisal of the legal migration *acquis* could assess the implementation of the directives mentioned above. This is a perfect time for reflection and for improvements in the implementation of the existing instruments with a view to ensuring a fundamental rights-compliant implementation. Given the existing configuration of political forces, the robust defence of what has been adopted and the correction of gaps in implementation in 'old' and 'new' Member States are advisable. And as the Charter becomes more prominent in the EU legal order, social scientific research could aid policy-making by examining the extent to which the implementing measures adopted by the Member States affirm migrants' rights, including the right to health, education, family reunification and political participation.

An important aspect of the EU's institutional framework on legal migration would also be the drafting of an immigration code, which would incorporate the existing sectorial directives and provide a uniform level of rights. The Commission proposed this in 2009, but the Council sought to close the conversation about the immigration code by excluding it from the Stockholm programme. The Commission's "Action Plan Implementing the Stockholm Programme" resurrected this mandate, which national executives had left out of the Stockholm programme.[13] The code would provide "a uniform level of rights and obligations for legal immigrants" and further contribute to the aim of designing a common migration and asylum policy "within a long-term vision of respect for fundamental rights and human dignity".[14] But the Council was not open to this idea. A few months later, it reacted by noting that "some of the actions proposed by the Commission were not in line with the Stockholm Programme" and it urged the Commission to "take only those initiatives that are in full conformity with the Programme".[15]

The vision of the Commission and the Stockholm programme of a 'dynamic and fair migration policy' in the 21st century was interrupted by the economic crisis in the eurozone, the rise of Eurosceptic and neo-nationalist political parties in Europe and a sudden increase in the number of migrants and refugees seeking admission. Although the political environment continues to be restrictive, the long-term goal of an EU immigration code should remain on the agenda. For such a code would integrate all the existing instruments, eliminate inconsistencies and unjustified variations among them, and provide an opportunity for clarity, simplification and raised standards in rights protection. Such an institutional template would lead to a changed cognitive menu, since migrants would` be viewed as rightful participants in practices of economic cooperation. In this respect, a future immigration code would not be a subtraction from, but an important addition to the EU's legal migration architecture.

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[13] See European Commission, Delivering an area of Freedom, Security and Justice for Europe's citizens – Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, Brussels, 20.4.2010, 7.

[14] Ibid., 7.

[15] See Council of the European Union, Council Conclusions on the Commission's Communication "Delivering an area of freedom, security and justice for Europe's citizens – Action Plan implementing the Stockholm Programme", COM(2010) 171 final, Luxembourg, 3.6.2010, p. 2.

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