

SEKCIA MEDZINÁRODNÉHO A EURÓPSKEHO PRÁVA

„Vplyv globalizácie na medzinárodné a európske legislatívne procesy“

ZBORNÍK

ZO

IV. ročníka medzinárodnej vedeckej konferencie

BANSKOBYSTRICKÉ ZÁMOCKÉ DNI PRÁVA

Univerzita Mateja Bela v Banskej Bystrici
Právnická fakulta



PROJEKTOVÁ SEKCIA

„Bezpečnosť a migračné toky v Európskej únii“

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na tému

„Strategické determinanty kreovania právnych noriem“

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NAJNOVŠÍ VÝVOJ V OBLASTI EURÓPSKEHO MIGRAČNÉHO PRÁVA

RECENT DEVELOPMENTS IN EUROPEAN MIGRATION LAW

Lubica Saktorová¹

Abstrakt

Cieľom príspevku je prezentovať prehľad najnovšieho vývoja v oblasti európskeho migračného práva, ktorý sa od vypuknutia migračnej krízy v roku 2015 stal jedným z ústredných bodov záujmu európskych zákonodarcov. Úvod bude predstavovať základný prehľad vývoja európskeho migračného práva. Pokiaľ ide o súčasné otázky migrácie, ktoré poukázali na potrebu reformy existujúcich pravidiel, determinujeme sedem legislatívnych návrhov, ktoré sú v súčasnosti predmetom rokovaní Rady Európskej únie.

Kľúčové slová

Migračná politika, azylové právo, európska legislatíva, reformy, legislatívne návrhy.

Abstract

The aim of the paper is to present an overview of the recent developments in the field of european migration law, which had become a point of interest of european legislators since the 2015, the presumed peak of the so -called european migration crisis. The introduction will provide the basic overview of the evolution of the european migration law. With reference to the current migration problems that highlighted the need to reform the existing rules, we will determine seven legislative proposals that are being discussed by the Council of the European union at the present.

Key words

Migration policy, asylum law, European legislation, reforms, legislative proposals.

Introduction

European migration law today includes legislation related to the asylum law, the immigration: legal migration or irregular migration law, free movement of people, all addressed within the Treaty on the European union (TEU) and the Treaty on the functioning of the EU (TFEU), the Charter of fundamental rights of the European union, the European convention on human rights, Geneva convention and protocol relating to the status of refugees. Referring to the secondary law of the EU related to migration issues, there exist several clusters of legal rules evolved through the time.

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At the beginning of the European integration process, migration policy was strictly a matter of national competence. After the creation of a Single European Market in 1986, these competences gradually shifted to the European level as well. Cooperation on asylum began as a so-called side measure which compensated states for their loss of control tools following the abolition of border controls within the Schengen area. The Schengen Implementing Convention of 1990 contained a first set of rules on the responsibility for processing applications for asylum.² Similarly, all Member States, including those who did not initially join the Schengen area, agreed upon the Dublin Convention of 1990 concerning asylum jurisdiction. The Dublin I. entered into force in September 1997.³ European migration policy was being increasingly formalised. While the original Schengen and Dublin Conventions moved towards the demarcation of asylum jurisdiction without a substantive harmonisation of rules on asylum procedure, reception conditions or recognition criteria, the Treaty of Maastricht declared the whole field of asylum policy an area of common interest that was to be realised through intergovernmental decision making (Justice and Home affairs third pillar).⁴ Thus, the EU institutions started coordinating divergent national practices.⁵ Although fully developed supranationalisation was achieved only by the Treaty of Lisbon, The Treaty of Amsterdam was a significant next step, since it first created a supranational competence within the framework of today's TFEU,⁶ In 1999, the European Council in Tampere brought forward the idea of a Common European Asylum System (CEAS), which later found its way into the EU Treaties as a legally binding objective.⁷ Many decisions made at the time have shaped the contours of Europe's asylum policy ever since. During the first phase of legislative rules we can talk about the former Asylum Reception Conditions Directive 2003/9/EC, the former Asylum Qualification Directive 2004/83/EC, the former Asylum Procedure Directive 2005/85/EC and the former Dublin II Regulation (EC) No 343/2003 together with the former Eurodac Regulation (EC) No 2725/2000 are the cause of many achievements and problems of EU asylum policy to this date. The common asylum policy had always been meant to be a

² Articles 28, 38 Convention Implementing the Schengen Agreement (OJ 2000 L 293/19) covering the Benelux countries, Germany and France at the beginning.

³ Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities (Dublin Convention) of 15 June 1990 (OJ 1997 C 254/1), at the time comprising the 12 EEC Member States.

⁴ HAILBRONNEN, K. THYM, D. EU Immigration and Asylum Law: A Commentary / München: C.H. Beck, 2016. - p. 1023-1053. - ISBN 978-3-406-66653-7.

⁵ HAILBRONNEN, K. EU Immigration and Asylum Law: A Commentary / München: C.H. Beck, 2010. - p. 355.

⁶ Article 63 EC Treaty as amended by the Treaty of Amsterdam (OJ 1997 C 340/173)

⁷ For the essential policy structure, see the Commission Communication, COM (2000) 755; the Commission Communication, COM (2003) 152.

gradual process.⁸ The Commission proposed to replace existing minimum standards by a common set of rules in a second phase of legislative harmonisation that should reduce disparities among Member States both in terms of legislative design and administrative practice on the basis of the more robust Treaty base established by the Treaty of Lisbon, which entered into force in December 2009.⁹ This included : Asylum Qualification Directive 2011/95/EU, the new Asylum Procedure Directive 2013/32/EU, the new Asylum Reception Conditions Directive 2013/33/EU, the Dublin III Regulation (EU) No 604/2013 and the Eurodac Regulation (EU) No 603/2013.

To resume: despite establishing various mechanisms to co-ordinate the migration in the European Union during the past decades, it was only in 1999 that the EU officially started to work towards a common migration policy for Europe.¹⁰

Migration to Europe from the northern and eastern Mediterranean, African and Middle Eastern countries is not a new phenomenon. What is different the past couple of years is the immense number of refugees trying to enter the European Union. Previously, the migration discourse has focused on the process of the asylum applications, this time the situation in Europe tend to be considered a migration crisis.¹¹ In the past, the asylum applications have peaked in 1992 (672.000 applications in the EU), mostly from the former Yugoslavia, as well as in 2001 (424.000 applications in the EU), after which the number of applications decreased to around 200.000. While between 2010 and 2012 cca 1.4 million non-EU nationals immigrated into the EU every year, and around 700.000 emigrated yearly. Since 2012 onwards the attention has been focused on asylum seekers who have been trying to get into the EU in unprecedented numbers: the number of asylum seeker in 2013 was 431.000, and rose to 627.000 in 2014, only to more than double to 1.3 million in 2015.¹² However, the problem is, the asylum claims do not represent the real situation, as many immigrants do not

⁸ For more information about the development of the common asylum system in the EU see DE ZWAAN, JAAP W., GOUDAPPEL, FLORA A. N. J. Freedom, Security and Justice in the European Union (T.M.C. Asser Press, 2006), p. 91; TEITGEN COLLY, C. The European union and asylum: the illusion of protection, Common market law review, 2006, vol. 43 (6), p. 1503-1566; SIDORENKO, O.F. The Common European Asylum System (T.M.C. Asser Press, 2007).

⁹ Cf. the Commission Green Paper, COM (2007) 301; and the policy plan on asylum in accordance with the Commission Communication, COM (2008) 360.

¹⁰ Commission Communication, COM (2008) 359 final. [online] 2008. [cit.2018-11-15] 2008. Available at [https://www.eumonitor.eu/9353000/1/j4nvke1fm2yd1u0_j9vvik7m1c3gyxp/vkcweek1amw9/v=s7z/f=/com\(2008\)359_en.pdf](https://www.eumonitor.eu/9353000/1/j4nvke1fm2yd1u0_j9vvik7m1c3gyxp/vkcweek1amw9/v=s7z/f=/com(2008)359_en.pdf).

¹¹ BERHIDSKY, L. The EU's Migration crisis is far from over. Bloomberg. [online] 2016. [cit.2018-11-15] Available at: <https://www.bloomberg.com/opinion/articles/2016-09-06/the-eu-s-migration-crisis-is-far-from-over>

¹² EUROSTAT Database. Demography and migration; Asylum and managed migration. [online] Datasets (pop) and (migr). [cit.2018-12-12] Available at: <http://ec.europa.eu/eurostat/data/database> . 2016.

register themselves.¹³ Germany, with the highest number of new asylum claims in 2015 - over 476.000 - announced that more than a million people had been counted in their “EASY” - system for counting and distributing people before they make asylum claims. On the other hand, during the peak of the crisis FRONTEX recorded 1.800.000 illegal entries through the EU borders.¹⁴

The current migration crisis highlighted the urgency to reform the existing EU asylum rules. Under the current system, asylum seekers are not treated equally, and the proportion of positive asylum decisions across the EU also varies greatly. As a result of this situation, the European Commission presented several legislative proposals in order to reform the Common European Asylum System (CEAS). The aim of these proposals is firstly to make the CEAS more efficient and resistant to pressure of migratory flows. Secondly, the focus of the reform is to eliminate pull factors, secondary movements as well as enhancement of the formal and material support to the most affected member states.¹⁵

The legislative proposals relate to:

(1) The reform of the current Dublin Regulation (Dublin III) to form a system capable of allocating asylum applications proportionally among member states and to guarantee the convenient processing of application respecting the principle of solidarity and the fair sharing. Moreover, the aim is to discourage misuse and prevent secondary movements of applicants across the EU¹⁶. Migrants arriving in EU today are not allowed to choose the State where they want to lodge their asylum requests and where they wish to go and live in a future. The founding principle of the Dublin III Regulation is that each asylum request must be examined by the Member State of the first arrival of the individual in the EU area, e.i. where the person was initially identified by local authorities. Such Member State is generally responsible for the examination of the asylum application, while the criteria for establishing responsibility vary from family considerations, to recent possession of visa or residence permit in a Member State, to whether the applicant has entered EU irregularly, or regularly. In practice, this evidently means that an only handful number of EU Member States is responsible for

¹³ SEILONEN, J. Fortress Europe – a brief history of the European migration and asylum policy: A historical institutionalist analysis of the migration and asylum policy, and the impacts of the current migration crisis [online] Lokakuu 2016 [cit.2018-11-15] Available at : <https://helda.helsinki.fi/bitstream/handle/10138/169924/Fortress%20Europe%20%20a%20brief%20history%20of%20the%20European%20migration%20and%20asylum%20policy.pdf?sequence=2>

¹⁴ FRONTEX. Risk Analysis for 2016. [online] 2016. [cit.2018-10-12] Available at: https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf

¹⁵ COUNCIL OF THE EUROPEAN UNION. Asylum reform file n. 9520/18. Brussels: 30th May 2018. Available at: <http://data.consilium.europa.eu/doc/document/ST-9520-2018-INIT/en/pdf>

¹⁶ The reform of the Dublin III. Regulation. PE 571.360. [online] 2016. [cit.2018-10-12] Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU\(2016\)571360_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf)

processing most asylum claims. Nevertheless, the individual preferences of the target country are not primarily considered. The migratory crisis has highlighted the limitations of the current system, which creates a disproportionate and extensive burden for the frontline states.¹⁷

(2) The reform of the Asylum Reception Conditions Directive: the proposal for a new Directive of the Council and the European Parliament is aiming to determine and to enhance the criteria for the reception of whose applicants, who need the international protection.¹⁸ The essential objective of this legislative proposal is to provide standard reception conditions to all asylum seekers that will ensure the benefits of decent and equal living across the EU. Proposal seeks to provide the applicants with e.g. the right to work no later than nine months after lodging the application, right to access to education for minors as well as the obligation to appoint a guardian for unattended minors. In the second round the legislative proposal is aimed to diminish the secondary movements of all asylum applicants by setting up certain geographical limitations. Respecting the safety and the security objectives, the directive will be restricting the access to reception conditions to the Member State that is responsible for their asylum procedure. Nevertheless, it will limit the provision of travel documents except on serious humanitarian grounds as well as allow states concerned to restrain the applicant's presence to a specific geographical location.¹⁹

(3) The qualification regulation: the legislative proposal for a Regulation of the Council and the European Parliament on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection.²⁰ The replacement of the qualification directive with a regulation intends to harmonise protection standards and

¹⁷ Ibid.

¹⁸ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down standards for the reception of applicants for international protection (recast). [online] Brussels COM (2016) 465 final. [cit.2018-12-12] Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_on_standards_for_the_reception_of_applicants_for_international_protection_en.pdf.

¹⁹ RECEPTION CONDITIONS FOR ASYLUM APPLICANTS: Council agrees mandate for negotiations. Press release 711/17. [online] 2017. [cit.2018-11-12] Available at: <https://www.consilium.europa.eu/en/press/press-releases/2017/11/29/reception-conditions-for-asylum-applicants-council-agrees-mandate-for-negotiations/pdf>

²⁰ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents. [online] Brussels COM (2016) 466 final. [cit.2018-12-12] Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_on_beneficiaries_of_international_protection_-_subsidiary_protection_eligibility_-_protection_granted_en.pdf

rights for asylum seekers. The objective is to unify the rules of asylum applications across the EU: the status of refugees (clearly set the criteria for the identification of persons genuinely in need of international protection), identification of the persons eligible for subsidiary protection or the content of the protection granted and amending Council Directive 2003/109/EC.²¹ The legislative proposal aims to ensure that all asylum applicants are granted common rights.

(4) The Asylum Procedure Regulation: the proposal for a Regulation of the Council and the European Parliament to establish a unified procedure for the international protection in the EU by replacing the asylum procedure directive with a regulation.²² Such act would harmonise different procedures of Member States and replace them with a unified and simple one. The essential purpose is to reduce disparities in recognition rates among them in order to protect vulnerable individuals, safeguard applicants' rights, prevent abuse or incentives to asylum shopping, make the procedure simply more effective and more economy. The asylum procedures directive²³ currently defines the procedures that EU Member States needs to follow to grant and to withdraw international protection. The new legislative proposal aims to replace this directive with a regulation to establish a common procedure for international protection.²⁴

(5) The Eurodac (European Dactyloscopy) Regulation: is the legislative proposal for a Regulation of the Council and the European Parliament to update the Eurodac regulation in order to improve the EU fingerprint database for asylum seekers.²⁵ The Eurodac database currently contains the fingerprints of all asylum seekers and irregular migrants who have been

²¹ COUNCIL DIRECTIVE 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents

²² Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. [online] Brussels COM(2016) 467 final [cit.2018-12-12] Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_for_a_common_procedure_for_international_protection_in_the_union_en.pdf

²³ DIRECTIVE 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection

²⁴ COMMON EUROPEAN ASYLUM SYSTEM REFORM: Council ready to start negotiations on qualification and protection standards. Press release 489/17. [online] 2017. [cit.2018-10-14] Available at: <https://www.consilium.europa.eu/en/press/press-releases/2017/07/19/qualification-protection-standards/pdf>

²⁵ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast) [online] Brussels COM(2016) 272 final. [cit.2018-11-15] Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/eurodac_proposal_en.pdf

registered in one of the EU Member States or in one of the associated countries. The database helps to deliver the implementation of the Dublin regulation and contribute to verification of the asylum claims across the EU Member States. Furthermore, it improves the control system of criminal records of asylum applicants and of the responsibility of Member State for examining an asylum application. The target of the proposed reform is to upgrade the system by collecting additional biometric data such as facial images, to simplify access for the authorities of law enforcement and to expand its scope by including data on third country nationals who stay in the EU irregularly.

(6) The European Union Asylum Agency (EUAA) Regulation: the legislative proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010/ to establish a fully-fledged EU asylum agency.²⁶ This proposal aims to turn the existing European Asylum Support Office (EASO) into a fully developed European Union asylum agency responsible for providing the operational and technical assistance to the EU Member States in managing the orderly migration flows. The agency will also ensure convergence in the evaluation of applications for international protection. In addition, the EUAA will be able to set up asylum support teams composed of a minimum 500 experts from Member States and the others ensured by the Agency.²⁷

(7) The Resettlement Framework Regulation: Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council/ to create a permanent EU resettlement framework. The Commission proposed to set up a permanent EU resettlement scheme that would replace currently existing ad-hoc resettlement frameworks. The new rules intend to diminish the risks of uncontrolled and irregular arrivals and pursue the safe and legal pathways to European Union. Moreover, it will aim to provide harmonised rules for the resettlement as well as humanitarian admission and to support third countries hosting those, who need the international protection. The Council plans to adopt a two-year EU resettlement and humanitarian admission plan that will include the limitation of

²⁶ Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010. [online] Brussels COM (2018) 633 final. 2018. [cit.2018-10-27] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0633&from=EN>

²⁷ Ibid.

the admitted persons, the contributions of Member States to this number and the overall geographical priorities.²⁸

In the end of the 2017, the Council agreed on a mandate to start negotiations with the European Parliament on the legislative draft proposals. In September 2018, the Commission updated the single proposal regarding the EU asylum agency. Since then, all of the legislative proposals are under persistent consideration of either Council or the Parliament. In both cases the primary sources and press releases of these institutions claims, the negotiations are at the advanced stage.

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Cf. the Commission Green Paper, COM (2007).

COMMISSION COMMUNICATION, COM (2008) 359 final. [online] 2008. [cit.2018-11-15] 2008. Available at

[https://www.eumonitor.eu/9353000/1/j4nvke1fm2yd1u0_j9vvik7m1c3gyxp/vkcweek1amw9/v=s7z/f=/com\(2008\)359_en.pdf](https://www.eumonitor.eu/9353000/1/j4nvke1fm2yd1u0_j9vvik7m1c3gyxp/vkcweek1amw9/v=s7z/f=/com(2008)359_en.pdf).

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COMMON EUROPEAN ASYLUM SYSTEM REFORM: Council ready to start negotiations on qualification and protection standards. Press release 489/17. [online] 2017. [cit.2018-10-14] Available at:

<https://www.consilium.europa.eu/en/press/press-releases/2017/07/19/qualification-protection-standards/pdf>

²⁸ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council. [online] Brussels COM (2016) 468 final. 2016. [cit.2018-12-17] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0468&from=EN>

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PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25th November 2003 concerning the status of third country nationals who are long-term residents. [online] Brussels COM (2016) 466 final. [cit.2018-12-12] Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_on_beneficiaries_of_international_protection_-_subsidiary_protection_eligibility_-_protection_granted_en.pdf

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