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Variable geometry risky for refugees: Example Denmark

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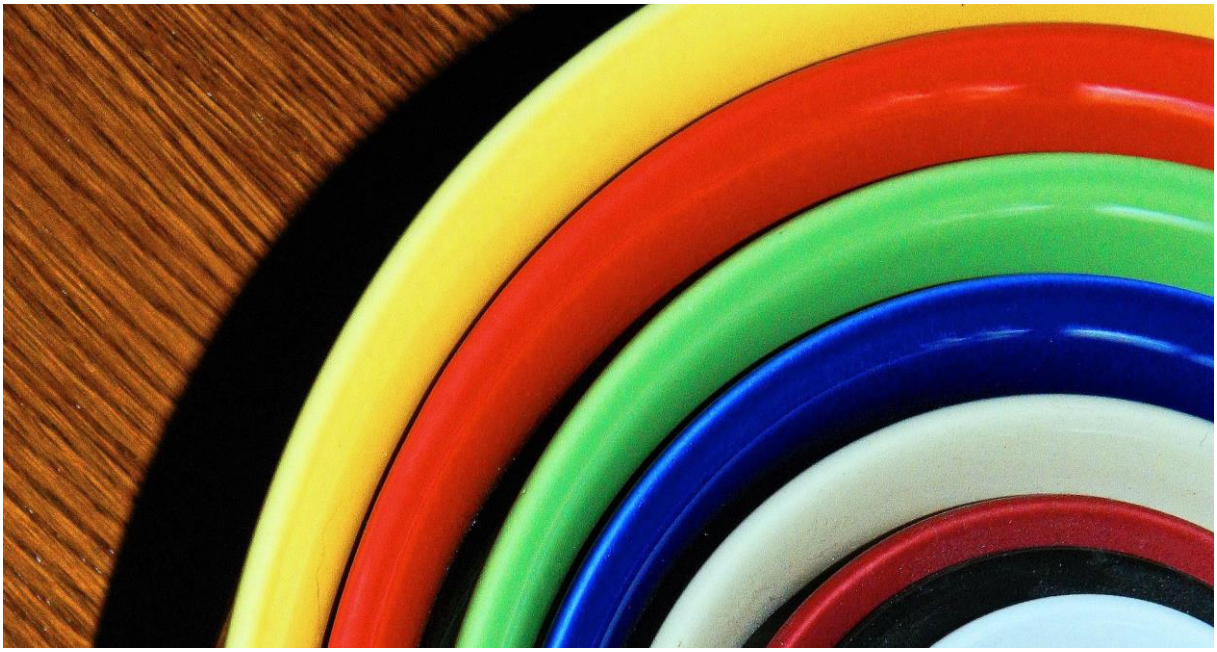
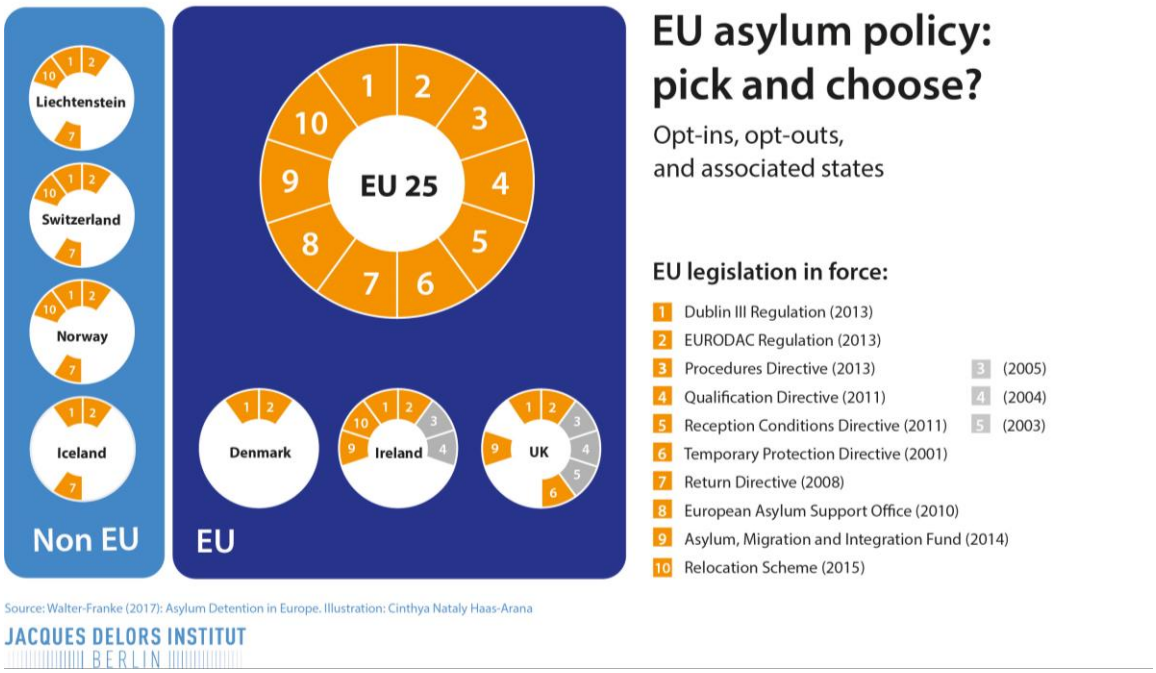


Should the Common European Asylum System accommodate various degrees of integration? With member states unable to agree on asylum reforms, flexible integration has become a temping alternative. Drawing lessons from the ongoing downgrading of refugee protection in the opt-out country of Denmark, this blog post warns that differentiated integration is not a good solution for the EU asylum policy.

It is no secret: Europe is struggling to move forward with the third asylum package. On responsibility-sharing, the fronts are so deeply entrenched that many policy-makers and commentators have turned to view variable geometry as the only way to reach a compromise. Instead of a single European asylum system, smaller groups of member states could develop deeper forms of solidarity, while others would opt in on certain measures or stay out.

Variable geometry is not a new idea. It is already a reality de facto, since the level of compliance with the Common European Asylum System (CEAS) varies significantly among member states. It is also a reality de jure, as three member states have opted out, and non-EU members have opted in on parts of the CEAS (c.f. graph below). Before the EU moves forward with multiple speeds in the field of asylum, we should have a look at the consequences of the existing flexibility. In my opinion, Denmark's recent asylum policy, most recently the new law L140, are a testimony to the fact that variable geometry can create dangerous blind spots.



Source: Walter-Franke (2017): Asylum Detention in Europe. Illustration: Cinthya Nataly Haas-Arana

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Denmark's protection standards are spiraling downwards

Denmark's immigration laws are now among the strictest in Europe. Under the influence of the right-wing Danish People's Party (DPP), anti-migration rhetoric has been prominent. Since 2015, over 50 reforms were adopted. Besides refugee status, new, more precarious forms of protection were introduced. Benefits for refugees were cut, valuables above $1520 became liable to be seized, and the waiting period for family reunifications was extended for up to 3 years. In addition, the immigration enforcement budget was increased sizeably last year.

By lowering its asylum standards, Denmark hopes to reduce arrivals. To quote immigration minister Inger Støjberg, "We're doing everything in our power to make sure that it is not attractive to come to Denmark". The country is not a major destination in the EU. The number of asylum applications peaked at 20.825 in 2015 and then dropped significantly after border controls were set up to halt movement on the Northern transit route to Sweden. Arrivals continued to decrease since, like in most of Europe after the closing of the Balkan route. In 2018, the country received 3.220 applications for asylum, or 557 asylum applicants per million inhabitants (see Table 1). This is significantly less than neighbouring Germany (2.233 per million), Sweden (2.130 per million) or Finland (816 per million), but more than Eastern neighbours (under 150 per million in the Baltic countries and Poland).

With two recent bills, Denmark is back in the headlines. In December 2018, the government and the DPP voted for a plan to create a retention camp on the uninhabited island of Lindholm. A former veterinary institute for contagious diseases is to be converted into a detention facility for refugees having lost their residency rights due to their criminal record and denied applicants with a criminal record, who cannot be returned. NGOs have warned that the conditions would be likely to breach the prohibition of inhuman and degrading treatment (Article 3 of the European Convention on Human Rights, ECHR).

In February 2019, with the support of the DPP and the Social Democrats, the government passed law L140, hailed as a 'paradigm shift' from integration to repatriation. Among other measures, this reform amends the residency rules applicable to refugees and beneficiaries of subsidiary protection. International protection of any kind becomes synonymous with temporary stay. Upon each permit renewal, the need for protection is to be reviewed. While in the past, the level of integration into Danish society played a significant role in deciding on residency rights, this shall no longer be the case.

Table 1: Asylum applications per million inhabitants in 2018 (Eurostat data)

	Asylum applications	Applicant per million (rounded)*
EU-28	637.895	1.244
Belgium	22.530	1.974
Bulgaria	2.535	359
Czechia	1.690	159
Denmark	3.220	557
Germany	184.180	2.223
Estonia	95	72
Ireland	3.675	759
Greece	66.965	6.236
Spain	54.050	1.158
France	119.190	1.773
Croatia	800	195
Italy	53.700	888
Cyprus	7.765	8.985
Latvia	185	96
Lithuania	405	144
Luxembourg	2.335	3.879
Hungary	670	68
Malta	2.130	4.478
Netherlands	24.025	1.398
Austria	13.375	1.516
Poland	4.110	108
Portugal	1.285	125
Romania	2.135	109
Slovenia	2.875	1.391
Slovakia	175	32
Finland	4.500	816
Sweden	21.560	2.130
UK	37.730	567
Iceland**	775	2.224
Liechtenstein**	165	4.329
Norway**	2.660	502
Switzerland**	15.160	1.787
Total EU & Schengen	656.650	632

* Calculated from Eurostat data on population and asylum applications, accessed on 07.03.2019

** Non-EU members of the Schengen free movement area

Temporary protection is a harmful slippery slope

The declared aim of the Danish government is to revoke the protection status and repatriate people as soon as the situation in their country of origin stabilizes. Abolishing long-term residency and integration assessments are supposed to ensure that international protection cannot serve as a backdoor to permanently settle in Denmark. This is in tune with the widespread idea that the institution of asylum is being abused, and that stricter standards would eliminate incentives for migrants to come.

The cocktail of temporary residence and status checks upon renewal is rightly criticised as potentially harmful to refugees. The UNHCR requires signatory states to provide durable solutions for refugees, since, on average, they will remain for 26 years abroad. Accordingly, the current practice in Europe is to start with temporary residence and grant unlimited permits after a few years. Under the long-term residence directive 2003/109/EC, beneficiaries of international protection having legally resided in the EU for over 5 years can apply for permanent residence. When they get it, they are no longer liable to be returned.

Effectively preventing access to permanent residence and undermining the value of links to Denmark bear serious consequences: this undermines integration into the host society and may seriously endanger mental health, as argued by the Danish Refugee Council in its response to L140. Concretely, as emphasised by the UNHCR Regional Representative, refugees will "live in an eternal fear of being sent home every time their residence permit is up for renewal. Such uncertainty can be detrimental to refugees' ability to lead a normal life and adapt to Danish society".

Variable geometry fosters downward regulatory competition

In a political context of 'moral panic' over migration, most EU member states are attempting to make themselves comparatively unattractive destinations. Due to an opt out on Justice and Home Affairs, negotiated as a condition to ratifying the Maastricht Treaty, EU asylum and migration norms do not apply to Denmark, except where specific arrangements are made, such as for Schengen rules or the Dublin system. In the last few years, this has enabled the country to lower its refugee protection standards below the EU's. The 'paradigm shift' from integration to repatriation in law L140 is the latest example of this downward regulatory competition.

The possibility of withdrawing international protection has always existed, but the Danish government is putting money and manpower into status checks, in order to make withdrawal a more significant part of the asylum practice. This is not unlawful: Article 1(C) of the Geneva Convention includes a clause for the cessation of the refugee status, among others on the grounds of changed circumstances in the country of origin. However, according to case law, this clause must be interpreted very restrictively. Withdrawing refugee status requires proving that the situation changed so fundamentally that it removes the basis of any fear of persecution.

EU law reaffirms this restrictive interpretation of changed circumstances. Under the Qualification Directive 2011/95/EU, a change of circumstance in the country of origin must be "of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded." (Art 11.2).[1] The EU Directive extends the same level of protection against withdrawal to beneficiaries of subsidiary protection (Article 16.2).

Unlike EU law, Danish law does not treat refugee and subsidiary protections equally regarding withdrawal. The Geneva Convention does not apply to subsidiary protection, nor the recently created temporary subsidiary protection (Art. 7.2 and 7.3 of the Alien's Act). According to Dorte Smed from the Danish Refugee Council, this new status has been granted to persons at risk not individually, but due to the general security situation. For instance, it was given to Syrian women, children and older men who are not subject to conscription, on the ground of generalized violence at home. Subsidiary protection is granted to persons at individual risk but for reasons outside the scope of the Refugee Convention, including some resettled refugees referred to Denmark by the UNHCR.

For beneficiaries of subsidiary and temporary subsidiary protection, L140 may have a big impact in light of current practice. While Danish immigration authorities must apply stricter criteria for persons qualifying for refugee status, they currently tend to consider a temporary or limited change of circumstances as sufficient to withdraw subsidiary protection. For instance, assessing circumstances as improved enough to establish that there would be no violation of Article 3 ECHR, Denmark is currently withdrawing temporary subsidiary protection to Somali refugees.

With law L140, Denmark intends to considerably increase the number of returns to safe countries and safe zones within refugee-producing countries. Alongside rejected applicants, the government now wants to start repatriating people having lost their protection status. When conducting regular status reviews, immigration authorities will have to withdraw protection and enforce repatriation "unless this surely breaches Denmark's obligations" (§1.12 of L140). Where a region becomes earmarked as safe, temporary subsidiary protection will only be renewed if return would violate the ECHR or the CRC. The level of integration into Danish society is no longer to be considered by the authorities, unless there is a breach of fundamental rights. L140 displaces the burden of proof on the need to remain against the interests of beneficiaries of international protection. These changes will impact refugees, but more deeply beneficiaries of subsidiary and temporary subsidiary protection coming from conflict zones, since Article 1(C) of the Refugee Convention does not cover them.

In line with the new policy, the government is already taking steps towards returns to war-torn Syria. Since it considers Damascus as safe, temporary subsidiary protection likely will no longer be granted to applicants from that area in future. Immigration Minister Støjberg also confirmed on Facebook on 27 February that the administration had started reassessing the status of Syrian refugees from the Damascus area. According to Dorte Smed, these are test cases to explore the limits of the law and they will be subject to appeal to the Refugee Appeals Board.

Reforms such as L140 are often symbolic messages to discourage potential migrants or appeal to the electorate, and rarely backed up with significant enforcement resources. However, the new immigration budget indicates that Denmark is serious with this 'paradigm shift'.

[1] In addition, refugees may put forward "compelling reasons arising out of previous persecution" for which they cannot be protected by their country of origin (Art 11(3)). The refugee status can also be revoked if they constitute a danger to national security (Art 14(4)(a)) or are convicted of a crime (Art 14(4)(b)). The same provisions apply to subsidiary protection under Art 16, 17 and 19.

Is the EU following the Danish approach?

Denmark is not alone in wanting to make international protection, including refugee status, more precarious. The third EU asylum package, under negotiation since 2016, entails a similar approach. In its 2016 reform proposal for the qualification directive, the Commission suggested to downgrade the rights attached to subsidiary protection in relation to refugee rights, to introduce compulsory checks of the need for protection at each renewal of residency permit, and a comprehensive review of the protection status before granting a long-term residence permit. In addition, any unauthorised movement within the EU would restart the 5-year waiting period to apply for long-term residency and would justify benefits cuts. The goal of these measures is to prevent secondary movement within the EU and diminish so-called 'pull factors' attracting migrants to Europe.

Along the same lines as the Danish Refugee Council, EP rapporteur Tanja Fajon argued that such measures would harm integration and cause too much red tape for member states. Her efforts were successful. In the inter-institutional compromise from June 2018, compulsory status checks were abandoned. Nevertheless, the member states have agreed on a general tightening of asylum procedures and protection standards, following Denmark and most member states in their race to the bottom.

Beware of flexibilizing solidarity

We currently see three paths towards a race to the bottom regarding protection standards in Europe. First, in the reform package currently under negotiation, the EU-28 and Commission are tightening the common rules to prevent secondary movement. Second, there are de facto multiple speeds when it comes to the concrete implementation of common standards. The asylum policy of several EU member states is violating their obligations under EU law. In these cases, the CEAS still provides a safety net for migrants, enforceable in courts where EU rules have direct effect. This does not apply to the third option: opt-outs such as the Danish (but also British and Irish) one allow selected EU member states to downgrade their laws below the minimum standards set by the CEAS.

The recent developments in Denmark are important examples illustrating what happens if we apply variable geometry to European migration policy: Any solidarity model that relies on layered integration or multiple speeds makes the system more vulnerable to regulatory competition. In addition, variable geometry does little to protect the EU's integrity. As evidenced by Brexit, granting opt outs to reluctant member states does not help to keep the Union together. In his open letter to EU citizens of 4 March 2019, President Macron was thus right to make Schengen membership dependent on a common commitment to solidarity (a single asylum policy with common acceptance and refusal rules) and to call for a European asylum office acting as a watchdog against the detrimental effects of a multi-speed, or rather multi-quality implementation of these common rules.