The Ethics of Migration Policy Dilemmas

Beyond Binary Descriptions of Openness vs. Closure: A Response to Kapelner (2024)

Daniel Thym

Daniel Thym is professor of European law at the University of Konstanz. He has published widely on various aspects of migration law and regularly engages in policy advice at the national and European levels. Thym is the author of the 700 page reference work on European Migration Law, published by Oxford University Press in 2023.

Kapelner's (2024) essay on the 'anti-immigration backlash' has gained in urgency at a time when a second Trump term is impending and extreme right parties have reaped electoral successes across Europe. On both sides of the Atlantic, the critical sentiment presents itself as an 'anti-asylum' backlash rather than a generic 'anti-immigration' movement—mirroring the distinction, by the former conservative French president Nicolas Sarkozy, between immigration 'choisie et non subi' (chosen and not endured; Ridet, Smolar and Van Eeckhout 2006). That is why this response will focus on asylum in order to identify means how states may respond to the backlash in practice.

In the second part of his essay, Kapelner identifies several such preventive and reactive measures over several pages which, on the whole, omit the hard choices he promises to tackle. Many of the instruments discussed in the essay might work in the long run at best, such as fighting the socio-economic root causes of migration and discontent in countries of origin and destination. They are not, in other words, a short-term 'fix' for the democratic dilemma. If we accept that public scepticism revolves around irregular entries, not labour migration, restricting the latter is not likely to increase acceptance of the former, and yet another response to backlash is taken off the table. With regard to asylum, Kapelner remains vague. While considering 'preventive claim pre-emption' at a highly abstract level, he refutes the crude Hungarian policies and the Trump-style 'Muslim ban' or family separation.

This contribution will discuss the potential of alternative and intermediate solutions. It takes a contemporary state practice which has received much attention as a starting point: 'pushbacks' of potential asylum applicants at the border without access to an asylum procedure. Several European states have engaged in such practices; to the surprise of many, they received political backing by the newly appointed second von der Leyen Commission in a non-binding communication published in December 2024 (European Commission 2024). Similar effects, albeit with some caveats, define the suspension of the right to asylum by President Biden by means of an executive order in June 2024 (White House 2024). In discussing these practices, we shall concentrate on the European Union. Could such

drastic moves be implemented legally in light of far-reaching legislative guarantees and human rights law? Could such a move be politically and morally justified? Our comments will be explorative in the sense that they engage in a hypothetical thought experiment which aims at transcending the binary contrast of openness or closure.

Setting the scene: advanced protection in Europe

The law marks a critical difference between Europe on the one side and the US or Australia on the other side. Within Europe, the European Court of Human Rights (ECtHR) in Strasbourg has steadily advanced the rights of asylum applicants over the past three decades. It turned the abstract prohibition of inhumane and degrading treatment into a wide principle of *non-refoulement* which is more generous than the one under the Refugee Convention in several respects. Supranational EU legislation supplements these human rights guarantees which are enforced on a daily basis by national courts in collaboration with the Court of Justice of the European Union (CJEU). This assertiveness of human rights law and corresponding EU legislation distinguishes Europe from the US and Australia (FitzGerald and Hirsch 2022).

For our purposes, the procedural element of the case law takes centre stage. Anyone applying for asylum at the external borders of the EU must be admitted to the territory, 'irrespective of the prospects of success of such a claim' (CJEU 2020, para 136). That is done in accordance with complex procedural safeguards, including mandatory legal remedies before forced return. That is why pushbacks are generally illegal under EU legislation (CJEU 2024, para 51), notwithstanding the recent claim by the European Commission that emergency powers under Article 72 Treaty on the Functioning of the European Union (TFEU) might possibly justify a derogation from the supranational legislation (Thym 2025). As long as the legislation is respected, selective non-admission is not an option under EU law, unlike in the US.

One may describe these legal safeguards as a measure that strengthens the rule of law to prevent populist and extreme right governments at the national level from unilaterally exiting European asylum legislation (Kapelner 2024, 11). Such exit may only be available *de facto* in countries with a weak domestic judiciary that is unwilling or unable to confront national governments over pushback policies. Experience in recent years indicates that governments in Greece and Poland can get away with such a strategy of non-compliance, while rigorous scrutiny by domestic courts forecloses this option for countries such as Italy and Lithuania whose domestic courts are more active and self-confident (Thym 2023a, 79-89). Hungary has been censured by European courts several times and must pay a daily penalty of 1 million Euros for dismantling its asylum system.

The latest reform of EU asylum legislation, adopted in the spring of 2024, does not alter the overall picture. It continues the European tradition of an assessment of each individual case in a path-dependent manner, as epitomised by the sheer complexity of the statutory provisions on asylum procedures. Various restrictions are meant to streamline procedures and render them more effective, notably border procedures for applicants with a low statistical recognition rate (Tsourdi et al. 2024). Nevertheless, these reforms are unlikely to reverse the dynamics on the ground fundamentally. Most people admitted to the territory will stay there even if they receive a negative asylum decision. Forced return is bound to function badly for several reasons (Hollifield, Martin and Orrenius 2022).

‘Externalisation’ as the real-life alternative

Legal and practical difficulties in effectively managing asylum flows on the territory are one reason why European states have increasingly embarked upon the ‘externalisation’ of control in recent years. Cooperation with third states takes centre stage in many contemporary policy documents, including the original proposal for the reform of the asylum legislation (European Commission 2020: 21-30). Cooperation with Turkey, Tunisia, Lebanon, Egypt, the Libyan coast guard, Morocco, and Mauritania has witnessed an upsurge in political attention as well as financial and operational resources (Thym 2023a, ch. 18). Such externalisation is not a new phenomenon. Western governments have employed it for decades in an attempt to pre-empt anti-asylum sentiment (FitzGerald 2019; Thym 2023b). International cooperation tends to be more effective than national measures for the simple reason that migration is a transnational phenomenon by definition. Its management will work better when several countries cooperate. However, it becomes normatively problematic when European states cooperate with dubious authoritarian regimes or embark upon externalisation to circumvent their legal obligations.

Indeed, such outsourcing can be described as a ‘legal black hole’ from a human rights perspective (Mann 2018). States exploit settled case law according to which the European Convention of Human Rights applies whenever states exercise ‘effective control’ over a person or territory. To be sure, this jurisdictional threshold is famously interpreted generously by the human rights court in Strasbourg to include border controls on the high seas – in contrast to the view of the US Supreme Court. However, this does not include scenarios where states support or sponsor neighbouring countries to thwart onward journeys. Judges in Strasbourg have indicated in several judgments that they will not start applying human rights to support for third states (Thym 2020), thus effectively leaving European governments leeway to control migration more effectively abroad than at home.

The human costs of externalisation are massive. More than 20,000 people have died in the Mediterranean and the eastern Atlantic during attempts to reach the European Union on boats and vessels which are often unfit for travel on the high seas. Less visible are migrants and refugees who die in the Sahara Desert or suffer violence and exploitation in transit countries. Moreover, many people will not embark on the dangerous journey in the first place. Asylum statistics demonstrate that the overwhelming majority of migrants and refugees embarking on the dangerous journey are men, notably in the age group of 16 to 30 years (Koopmans 2023). Externalisation means that women and other groups who do not have the money or courage to embark upon the dangerous journey are effectively excluded from the European asylum system. Legal pathways, such as refugee resettlement or sponsorship schemes, exist but are much less established than in Australia or Canada. Most asylum seekers enter irregularly.

Legal Pathways as an Intermediate Solution

An obvious answer to the detrimental effects of externalisation policies would be to enhance legal pathways for refugees and workers. Such calls for legal pathways are widespread, notably among actors of the centre-left. They are a humanitarian ‘control signal’ (Wright 2014) with which governments can respond to popular frustration about irregular movements by

other means than simple restrictions. In the context of asylum, legal pathways for workers would have to concentrate on the lesser skilled who, as German statistics show, are by far the biggest group entering via the asylum system (Brücker, Kosyakova and Schuß 2020) – in contrast to the focus on the higher skilled in contemporary labour migration policies which governments across Europe are desperately trying to attract in a 'race for talent' in response to demographic change.

For our purposes, it is critical to acknowledge that legal pathways for refugees and workers do not offer an easy response to the democratic dilemma. Even if states opened up sizeable pathways for the lesser skilled, they would often not be used by people entering irregularly nowadays. Nigeria has more than 200 million inhabitants, of which roughly ten thousand applied for asylum in an EU country last year. It is unlikely that legal pathways would be used predominantly by the same people who are considering entering irregularly via the asylum system. The absence of an immediate 'substitution effect' is even more apparent for refugees. Resettlement, in particular, habitually concentrates on the most vulnerable groups who do not embark upon the dangerous journey. Legal pathways will not, in other words, magically reduce irregular arrivals.

That does not mean that governments should abandon them. Legal pathways can be an important political message that stricter asylum policies do not result in closure. That is exactly what both the Biden administration and the European Union have tried to communicate for years. In 2016, the EU-Turkey Statement involved the promise of refugee resettlement (European Council 2016). In 2023, the Biden administration initiated meaningful labour pathways for up to 30,000 persons per month and established 'safe mobility offices' in Central America as an integral part of more restrictive asylum policies (U.S. Department of the State 2023). Neither initiative will 'fix' the problem single-handedly. In Europe, in particular, legal pathways have covered few people so far; moreover, we cannot expect a simple 'substitution effect' for the reasons mentioned above. In addition, legal pathways are often criticised as a 'humanitarian fig leaf' which governments highlight to justify closure (Kneebone and Macklin 2021, 1090-1095). In order to overcome that criticism legal pathways would have to be made available at a sizeable scale.

Two Trajectories for Strategic Implementation

Legal pathways would have to be employed strategically to help national governments and EU institutions to overcome the binary juxtaposition of openness and closure when responding to the democratic dilemma. This could be done in two ways. On the one hand, legal pathways may help convince third states to subscribe to an agenda of international cooperation based on 'burden-sharing' rather than 'burden-shifting'. Such an approach would involve capacity-building to improve reception capacities along the main migratory routes, including for people who do not reach the EU (Aleinikoff and Owen 2022). This would help overcome the predominant focus of 'externalisation' on closure. The Los Angeles Declaration and the EU institutions have repeatedly championed this idea in the abstract, even though the output remains meagre. By way of example, Italy offers legal pathways for seasonal and other workers from countries with a migration management agreement (Ministero dell' Interno 2023).

On the other hand, legal pathways might possibly serve as a justification to refuse entry at the border to people who enter irregularly. That is what the Biden administration had initially put forward for selected nationalities (U.S. Department of the State, 2023), before it suspended the right to asylum altogether one year later. One of the most controversial judgments of the European Court of Human Rights relied upon a similar logic when it declared a Spanish policy of 'hot returns', or 'pushbacks', to be compatible with human rights given that legal pathways were available in the abstract (ECtHR 2020). The implications of this judgment are highly controversial, not least because the judges refrained from giving clear guidance on several critical aspects (Thym 2020). Arguably, the very idea of overcoming the binary juxtaposition of openness or closure rendered the idea attractive for judges.

For our purposes, these controversies reiterate a basic tension behind the policies of the Biden administration and the ECtHR judgment. They essentially replace the need for an individualised assessment of each case, which has been the hallmark of Western asylum legislation for decades, with the abstract call for meaningful legal pathways irrespective of whether the person who is refused entry at the border has had a realistic opportunity to benefit from legal pathways. For states, it is precisely this generic character which renders legal pathways attractive as a justification for pushbacks, under the condition that harsh border practices will significantly reduce the number of arrivals. Such a solution helps overcome deep-rooted hurdles to immigration enforcement after entry which will never work well for structural reasons. At the same time, the absence of an individual right to admission entails that states retain full control over entry selection, including the option of deciding on the size of legal pathways. It also entails the weakening of the basic premise of European human rights law: the focus on each individual applicant.

A specific feature of the EU concerns institutional difficulties in implementing such a new approach. Even if courts were willing to interpret human rights along the lines outlined above, EU legislation would have to be amended so as to discontinue the statutory guarantee to be admitted to the territory whenever a foreigner applies for asylum at the external borders. That cannot be achieved easily. The path-dependent continuation of sophisticated asylum procedures in each individual case in the latest reform package indicates that Member States, the European Parliament, and the Commission are badly placed to embark upon deep structural reform in the short or medium run. This 'joint decision-making trap' (Scharpf 1986) complicates the design and implementation of new policies, thus effectively bolstering the position of those calling for disrespecting EU legislation or for outsourcing control to neighbouring states.

That is not a desirable trajectory. Western states should have the courage to redesign their asylum policies. Appeasing the anti-asylum backlash will often be the primary political motivation, but the ethical argument for fundamental reform rests on additional pillars: the *status quo* has a dark side which is often ignored. European states, in particular, have engaged in a *de facto* rationing of access to their asylum systems for decades, mainly by means of externalisation. In an exercise of organised hypocrisy, they have upheld the right to asylum at home, while enlisting neighbours as 'doormen' to reduce the number of arrivals. Many die *en route*, the most vulnerable groups are prevented from coming, cooperation with neighbours concentrates on restrictions, and asylum seekers will often stay in Europe permanently even if their application is rejected.

A greater emphasis on legal pathways, for both workers and refugees, could be the hallmark of a new approach which ideally kills the proverbial three birds with one stone. It presupposes that legal pathways are more than a humanitarian fig-leaf—something they have mostly been so far. Such an approach would appease anti-asylum sentiment if governments were seen to regain control. Additionally, a substantial number of workers and refugees would be authorised to enter legally, and finally governments could and should redirect cooperation with neighbours away from closure. Improving living conditions and asylum systems in countries of origin and transit should be an integral part of future asylum policy, as propagated by UNHCR's 'whole of route' approach (UNHCR 2024; Fratzke et. al. 2024).

Nevertheless, it is inherent in a dilemma that there is no perfect solution. Either choice has negative repercussions. In our case, the individual right to asylum with its inherent focus on the individual case would be the primary victim, as epitomised by political debates and human rights judgments about the legalisation of 'pushbacks.' Asylum policies would be fundamentally recentred away from the individual-centred legislation and case law which had developed in the period after the Cold War towards the generic availability of legal pathways, as well as better living conditions and asylum systems along the route.

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About the "Dilemmas" project

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Contacts

Website: https://www.migrationpolicycentre.eu/

Twitter: @MPC_EUI

Facebook: Migration Policy Centre

E-mail: migration@eui.eu

Address: Convento di San Domenico
Via delle Fontanelle 19

I-50014 San Domenico di Fiesole (FI)