

# The EU Constitution and asylum – beyond the myths

Given the wide range of political and institutional questions covered in the European Constitutional Treaty, it is difficult entirely to foresee the nature of the public debate during the British referendum on the Treaty. But one topic seems even now, two years before the probable date of the referendum, likely to be an issue on which the outcome of the referendum may turn. It is that of asylum policy, an area in which the European dimension has gained in salience over recent years. This paper attempts to dissipate widespread misconceptions by arguing that there is a strong case for a European co-ordinated approach with regard to asylum legislation and practices, and that the Constitution is positively contributing to this Europeanisation by introducing more ambitious objectives and a new decision making system in this area.

## Definition and background

Central to all informed discussion of European asylum policy is the fundamental distinction between asylum-seekers and economic migrants. The former category is made up exclusively of those who seek refuge in countries other than their own because they have a founded fear of political, racial or religious persecution. The second embraces all those who seek to live and work abroad for their own economic advantage. Not merely are these motivations psychologically distinct. They are also legally distinct. It is made specifically clear in the European

Constitution that determining the volumes of admission of third country nationals coming to European countries in order to seek work is a matter which remains in the competence of national governments (Article III-267.5). But the situation is radically different in regard to asylum policy. All European governments are already signatories of international treaties which establish for them a range of obligations in regard to asylum-seekers. The European Union's national governments have already agreed to circumscribe by international agreements their right to an independent policy towards asylum-seekers. These existing agreements are the essential background against which the European debate must be assessed.

## The rationale behind the Europeanisation of asylum policies

Granting asylum is a fundamental aspect of contemporary liberal societies. It is the logical conclusion of the development of the European Union as an area of peace and political stability. How to achieve a fair and more efficient procedure; which country of the European Union grants asylum to which applicant; which country is responsible for the welfare of the applicant while his or her application is being considered; and what rights accrue to successful asylum-seekers? All these are questions both sensitive in themselves and posing obvious challenges to administrative and political co-operation within the Union.

Over the past decade, European countries, France and the United Kingdom in particular, have seen a radical increase in the number of asylum-seekers seeking their protection. Like a number of other member states, Britain has now concluded that common European standards and practices in the field of asylum are useful for countries favoured by potential asylum-seekers. Common European standards would make it less likely that asylum-seekers would regard any individual EU Member State as a "soft touch" for the granting of applications. Equally, these common standards would ensure that no European government could seek to shift the burden of responding to asylum-seekers on to its neighbours by unreasonably harsh treatment of those seeking protection. Above all, the administrative and financial burden of receiving, processing and (where appropriate) settling asylum-seekers in the EU could, under common European policies, be more equitably shared among all the Member States of the Union.

## A historical review

Throughout the 1990s, the development of the European market and the removal of internal borders made it increasingly difficult for the EU Member States to pursue national asylum policies in isolation from each other. As part of the Schengen agreements, for instance, all 15 Member States, including the UK and Ireland, signed (outside the European treaty framework) the Dublin Convention, which defined the criteria and mechanisms

### EDITOR'S NOTE

This is the fifth in a series of regular *European Policy Briefs* produced by the Federal Trust. The aim of the series is to describe and analyse major controversies in the current British debate about the European Union. Forthcoming papers will consider the possibility of a 'two-speed Europe' and the changes made to the EU Constitution by the IGC.

We would welcome comments on and reactions to this policy brief. It and its successors will be available on the Federal Trust's website [www.fedtrust.co.uk](http://www.fedtrust.co.uk)

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for determining the member state responsible for examining an asylum application<sup>1</sup>. But it was not until the Treaty of Amsterdam in 1997 that the first steps were taken towards the adoption of common European laws and policies in this area.

The Amsterdam Treaty brought migration-related issues into the European framework and in particular gave EU institutions competence to elaborate and adopt measures on asylum policy. The Treaty did, however, retain certain intergovernmental features in its decision-making system, such as the unanimity requirement, ensuring that no national government could be outvoted. The established system was also characterised by the absence of effective judicial or democratic controls. The European Parliament had no role to play in the decision-making procedure unless the Council so decided (Article 67). The European Court of Justice, for its part, only had jurisdiction to give preliminary rulings (Article 68).

Following a long period of negotiation, recent years have seen some progress towards a common European approach in the field of asylum. For instance, the Council adopted in 2000 the European Refugee Fund (ERF) decision<sup>2</sup> which provides for a financial solidarity mechanism designed to support the efforts made by member states in receiving refugees. Resources are distributed in proportion to the cost borne by each member state given the trends of asylum flows. In the aftermath of the Kosovo crisis the Council also passed a directive on temporary protection<sup>3</sup> dealing with situations of a mass influx. It encouraged voluntary action by Member States to receive refugees on a temporary basis, such action being financially supported by the ERF. The UK was allocated about 9 million Euro in 2003, i.e. more than 22% of the overall funding, immediately after Germany, which received 10 million Euro the same year. Following the highly successful work of the ERF, the Commission has recently proposed to increase substantially the ERF budget over the period 2005–2010.

Other areas of the asylum debate have seen less progress. Since Amsterdam, the Commission used its newly acquired right of initiative to put forward a number of significant proposals. It incorporated into European law the essential features of the Dublin Convention<sup>4</sup> and proposed a set of measures designed to lay down minimum standards on the reception of asylum seekers, on procedures for granting or withdrawing refugee status, and on the rules for qualification of third country nationals as refugees. But national governments struggled to reach a consensus.<sup>5</sup> Critics have

argued that the directive to be adopted on asylum procedures lays down very low standards and as a result fails to achieve a substantive harmonisation of domestic policies. Similarly, the directive on the conditions of reception of asylum seekers lacks precise rules on the level of assistance Member States must provide. Member states will still be able to adopt fragmented regulations, thereby undermining the potential efficiency of a common approach.

## The Constitution: towards a common European asylum system

The Constitution does not substantially modify the competences attributed to the EU institutions with regards to asylum seekers, but it makes a significant alteration in the terms of the debate, calling explicitly for a "common European asylum system", going beyond the setting of minimum standards envisaged by the Treaty of Amsterdam. This system should comprise a uniform status of asylum and subsidiary protection, a common system of temporary protection, and common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status (Article III.266).

In order to meet recurrent criticism that a system of consensus in the Council simply leads to the adoption of decisions at the level of the 'lowest common denominator', the Constitution moves somewhat away from the cumbersome elements of intergovernmentalism established for asylum questions by the Amsterdam Treaty. Since 1999, the European Union has been struggling to fulfil the "Tampere" agenda on asylum agreed by the European Council of that year. This tardiness in implementing an agreed agenda has powerfully reinforced moves towards easier decision-making. The Constitution's new provisions in this sense are the obvious consequence. In future, qualified majority voting will be the rule for decision-making. The roles of the European Parliament and the European Court of Justice are also to be increased in this area.

## Conclusion

Asylum is a complex area, as it involves conflicting interests. National governments' desire to retain maximum control of their asylum policy must be balanced with the fact that nation states are no longer able to face the asylum phenomenon on their own, both for reasons both of fairness and efficiency. A European wide approach promotes a better sharing of the "burden" both directly and indirectly, by contributing to a more even distribution of costs, and by compensating for the distorting effects of independent and

uncoordinated actions. As a democratic and pluralistic society, the EU is under the obligation to guarantee that the right to asylum is equally and adequately protected throughout the European territory in accordance with international instruments.

The Treaty of Amsterdam sought to lay down the basis for a European co-ordinated approach on asylum. Progress, however, was limited, largely because of the cautious nature of the drafting of the Treaty provisions. The Constitution is looking to go beyond a mere definition of minimum standards and provides a sound basis for a common European asylum system. Under the Constitutional treaty, the UK government will still benefit from its opt out; it can choose to apply European legislation relating to asylum on an ad hoc basis, i.e. only when it is in its best interest to do so. But it is in Britain's general interest to contribute to the elaboration of a common European asylum policy. The new provisions will contribute to a more democratic, more efficient and more transparent European, and as direct consequence, British response to the asylum issue. Significantly, while the UK government had initially expressed some reservations, it has recently adopted a more welcoming response to a European co-ordinated approach on asylum issues.

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## Notes

1 Convention determining the Member State responsible for examining an asylum application lodged in one of the Member States on the European Communities [OJ C254 19-Aug-97](#)

2 European refugee Fund Decision [OJ L252 6-Oct-00](#)

3 Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [OJ L212 7-Aug-01](#)

4 Council Regulation 343/2003 establishing the criteria and mechanisms for examining an asylum application lodged in one of the Member States by a third country national [OJ L50 25-Feb-03](#)

5 Council Directive laying down minimum standards for the reception of asylum seekers [L031 06-Feb-03 018025](#). Council Directive on minimum standards for the qualification and status of third country nationals as refugees or as persons who otherwise need international protection [CNS/2001/0207](#). Council Directive on minimum standards on procedure for granting and withdrawing refugees status [CNS/2000/0238](#).