CHAPTER 37: UNRAVELLING THE SUBJECTS AND OBJECTS OF EU EXTERNAL MIGRATION LAW

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Abstract
EU AFSJ law is one of the EU's most controversial and expansive policy fields and currently the subject of a booming agenda. EU External migration law has been labelled to be the most unjust and inhuman in the contemporary global legal order. These issues operate at a curious nexus of analysis from a practical, conceptual and methodological perspective. This chapter explores how to understand the intersection thereof from the juncture of critical studies. How should we map the subjects and objects of EU external migration law going forward? How can we critically map analytical methods for EU external migration law?

Keywords: EU International Relations Law; External Migration; CJEU; AFSJ ; Critical EU Studies

Introduction
This chapter has as its objective the re-reading of EU migration law, by employing insights from EU critical studies. There is an emerging literature on critical EU studies, which has sought to target the place of practice and methodology to overturn key assumptions as to EU integration (E.g. Adler-Nissen, 2016). It is a very difficult genre of analytical and normative theorisation to apply to the study of the EU at a moment of significant disintegration and the rise of Euroscepticism spreading so broadly. Still, it is both a practical and empirical turn of emerging analysis. Such a genre, for example, seeks to bring EU studies scholars closer to the social phenomenon that they want to study and argues for the use of approaches which bring scholars closer to the people who construct, perform and resist the EU on a daily basis (Adler-Nissen, 2016, 1). In doing so, it looks to disorder and order EU studies and engage more conceptually and practically with its many subjects and objects and thus increasingly reflects critically upon the subjects and objects of the EU law-making and integration processes and challenge the orthodoxy of integration narratives. This is of much significance for legal scholars at this time, analysing EU law and its many sub-fields, which range from trade, to security, to migration, to international relations law. EU international relations law is one of EU law's most all-encompassing and successful subject areas yet lacking a distinctive critical studies genre (Bardutzky & Fahey, 2017) and, as will explored here, it is studied highly 'court-centrically'. It traverses awkwardly aspects of the EU's Area of Freedom, Security and Justice (AFSJ) and includes within its scope EU external migration law. It is thus a significant and useful larger 'canopy' under which to situate some of the most complex areas of contemporary EU law. EU AFSJ law is one of the EU's most controversial and expansive policy fields and currently the subject of a booming agenda, despite sitting closest to member states' sovereignty (Fahey, 2018). EU External migration law has been labelled to be the most unjust and

inhuman in the contemporary global legal order (Mann, 2016; Costello, 2016; Moreno-Lax, 2018). EU External Migration law has been mired by recent waves of de-legalisation and hyper-legalisation (Fahey, 2019), leaving the injustice gap to widen and allow a court-centric view to prevail, often with extreme consequences for individuals. This chapter turns a critical lens to this status quo and reflects upon analytical prisms.

Much EU political science literature has also become extraordinarily critical of EU migration law and policy in its manifold iterations in recent times. For example, leading political science scholars of EU foreign policy now characterise EU migration policy as a whole and abject failure, amounting to 'organised hypocrisy' and seek to critique EU external migration law and governance as 'failing forwards' in integration terms (Lavenex, 2018). Such criticism joins with a wave of contemporary scholarship which is critical of EU integration as a trajectory, flowing from its handling of the migration crisis. International migration law has also evolved into a discipline which takes an extremely sceptical approach of the EU on its *bona fides* as a human rights actor in migration. The EU has evolved from being the subject of critique of its cosmopolitanism (Benhabib, 2006), excluding foreign 'others' from its landmass to simply being an instrument of injustice production (Mann, 2016). Whilst it is difficult to label such specialist literature as critical studies *per se* or to look at it as exceptional in its critique, given the provenance of the human rights scholars there, such literature is entirely focussed upon examining the contradictory core of EU external migration law as a state of affairs. The latest EU scholarship on migration law seeks to target directly the constructivist dimensions thereof, critically examining assumptions embedded in the ambiguities at the heart of EU external migration law (e.g. Strik, Santos Vara & Carrera, 2019). It thus warrants a closer look at the parameters of the analytical idea of critical studies of EU External Migration law as a sub-set of EU International Relations law.

The above forms a curious nexus of analysis from a practical, conceptual and methodological perspective. The chapter thus considers: how should we understand the intersection thereof from the juncture of critical studies? How should we map the subjects and objects of EU external migration law going forward? How can we critically map analytical methods for EU external migration law as a sub-species of EU International Relations law? This overview argues for the value of critical EU international relations law as a broader umbrella for understanding EU external migration law. The discussion thus examines 1. Critical methodology of the umbrella of EU International relations law (Critical EU IR Law); 2. The contradictions of AFSJ law (The evolving contradictions of the AFSJ space); 3. The contradictions of EU migration law (3.1 competence contradictions, 3.2 conceptual contradictions and 3.3 institutional contradictions) and 4. the subjects and objects of EU external migration law. Accordingly, this chapter attempts a critical overview which maps out existing issues with EU migration law, with the starting point for a more thorough analysis by scholars of critical legal studies.

1. The Canopy: On Critical EU IR Law

This account begins with EU international relations law seen from the perspective of critical studies. One of the most significant features of contemporary EU law today is that it is not a subject that attracts much critical study. While the activism of the Court of Justice, the goals of European integration, the EU institutions and their policies and actions have been formally studied by most students of EU law, it is difficult to describe the sum total to be anything close to critical EU law studies (Cf Rasmussen, 1986). Critical legal theory and critical EU studies as an approach appears to generally exist independently, without focussing upon EU law. Most standard textbooks on European Union law written in the English language medium do not have -at the time of writing- a chapter on Critical EU law. Nor in specialist textbooks on EU International Relations law does such a topic exist. For example, the era of Brexit poses a considerable challenge to EU International relations law. The Treaty of Lisbon, intended to begin a landmark phase in international relations after the introduction of legal

personality, coherence and unity in EU international relations, has seen significant democratic enhancements in order to bolster the credentials of International relations and develop the EU as a good global governance actor. As the Introduction to this book notes, international relations is a compound political field- and so these developments matter greatly. It is thus, in short, a significant evolution, which has taken place. The chapter, however, asks what would a critical view of EU IR law look like? In a post-Lisbon era of institutional balance, how can we depersonalise the role of the CJEU or minimise the court-centric view of this era? Alternatively, how can we view the inter-disciplinarity or institutional balance that should be at the heart of the subject, currently so distant?

2. The Branches: The evolving contradictory space of the AFSJ

The AFSJ is arguably a highly significant focal point for study, broader than the specific area of migration. It is one of the vibrant areas of EU post-Lisbon law-making, bucking with the trends of the Better Regulation Agenda of the post-Lisbon. As a field of law, it has been remarkably active in the first post-Lisbon legislative cycle but also has been highly responsive ostensibly to political crises e.g. migration and has legislated with increasing propensity in areas of the highest political sensitivity e.g. migration. Migration thus falls within a broader set of developments of rising activity, responsiveness and action in the face of broad-ranging developments tending to suggest otherwise. AFSJ law has become embroiled in a series of critiques over time for the absence of justice therein or the imbalance of its core elements. However, its evolution as a regularised part of the structures of EU law-making arguably eclipses these traditional concerns or narratives. The relentless drive of its evolution despite its sensitivities is also of significance.

Justice and Home Affairs (JHA hereafter) resting heavily upon neo-functionalist logic evolved with the coming into force of the Treaty of Amsterdam and the creation of the Area of Freedom, Security and Justice (AFSJ) which communitarised parts of the third pillar and incorporated the Schengen acquis into the EU's legal order (Haas 1964). The latest evolution of JHA has seen its development as a space of integration and protection, giving effective access to justice, improved safeguards against crime and terrorism and a right to circulate freely within the Schengen area, enforced by a range of agencies and policies generally. However, the AFSJ as set out in Article 3(2) TEU as an 'area' perhaps is one of the most complex policy fields of EU law and governance (Ripoll-Servant & Trauner, 2018). It criss-crosses increasingly and invasively national, regional, international law. It has been criticised as a subject to be lacking any institutional unity, possessing and contributing to the EU's perceived democratic deficit and lacking any meaningful transparency (Colson, 2012). Despite the sensitivity of its content, it has continued to evolve rapidly through a diversity of legal instruments, significant Council programmes which often set the conceptual and thematic agenda (e.g. Tampere, Stockholm) and EU draft legislation. Its span of freedom and justice has earned it critique. The AFSJ has been increasingly 'regularised' from a legal, institutional and constitutional point of view, most recently in the Treaty of Lisbon during the period of the Stockholm Programme, for example, as to the powers of the Court, Parliament and Commission. Indeed, the AFSJ has become increasingly subject to a vast array of ordinary principles of EU institutional and constitutional law, including fundamental rights. The policy 'balance' accorded by law-makers between the 'A', 'F', 'S' and 'J' of the AFSJ, however, is notoriously a controversial debate (Douglas-Scott, 2014). Instead, increasingly, legal and non-legal scholars consider the AFSJ as a major site of injustice and inhumanity, sites of hyperlegalistion but also delegalisation in key law and policy texts (Mann, 2016). This critique displays in many respects the contradictions of the AFSJ at its core. These contradictions are borne out in several ways.

Its creation of an ostensibly borderless space for freedom, security and justice is contradictory because it has been partially 'institutionalised' through shared competences, minimum standards legislation and the institutionalisation of mutual recognition without any objective or finality. Controversial legal

outcomes such as the EU-Turkey Statement, discussed below, arguably constitute the antithesis of regularisation. Instead, the EU institutions have sought to evade and circumvent the rule of law parameters of the treaties (e.g. EU-Turkey Statement or use of soft law instruments). As Thym (2016) outlines, the construction of personhood, citizen and fundamental rights is especially contradictory in EU migration, which lacks any uniform category of rights bearer. This absence of uniformity of subject and object in more concrete terms (and rather nebulous) constructions of "others" through 'third country' nomenclatures has exacerbated the situation further. Accordingly, flux surrounds the idea of personhood here and exacerbates further the contradictory core of the AFSJ. As a result, there are competing visions, varying from the security driven to the exclusionary (Costello, 2016, 17).

3. The off-shoots: EU External Migration Law: On Contradictions

3.1. Competence Contradictions: Constitutional and legal provisions

There are many contradictions at the core of EU external migration law from a competence perspective, which reflect in various ways the broader conceptual challenges of regulating migration. The EU governance of migration has distinct internal and external facets, which may be viewed as legally and constitutionally contradictory. There is legal competence for enhanced measures to combat illegal immigration but also to manage efficiently migration flows, but with fairness towards third country nationals (Thym 2016, Weiler, 1992). The only external competence explicitly transferred to the EU under Title V TFEU is as to readmission, which contrasts with the silence of the Treaties on other areas of migration covered by Article 79 TFEU, depending instead upon implied external competences (Andrade, 2013). Moreover, EU external competences to promote legal migration and integration are concurrent competences with regard to Member State powers, which poses considerable issues also for coherence in practice. The AFSJ is also supposed to remain accessible to those whose circumstances lead them justifiably to seek access to EU territory (Morena-Lax 2017). Although there are difficult balancing acts embodied therein, the EU has sought to be a safe haven for those fleeing persecution. However, unrecognised refugees and asylum seekers have been assimilated into the generic category of Third Country Nationals, rendering their entry irregular or illegal unless they demonstrate compliance with general admission criteria. On the other hand, the EU border acquis contains general references to human rights and refugee law, giving the impression that special treatment must be accorded to those in search of international protection, in accordance with international and European standards. In particular, the transnational nature of migration and need for international responses highlight the need for an effective external dimension to EU migration policy, currently lacking. As a result, there is naturally an inherent contradiction, whereby, for example, pre-entry control is in patent disconformity with the fundamental rights acquis, structurally biased towards security and control (Fahey, 2019).

These constitutional contradictions and tensions underline the challenges that the EU faces in evolving law-making and developing its imperfect competences. Yet they are related to and aggravated by law-making techniques, discussed next.

3.2. Conceptual contradictions: Between delegalisation and hyperlegalisation

During the period of time now understood as the EU's migration crisis, there was an increasing number of soft law tools in EU external migration, used to enable flexibility, deploying management lexicon, principles and tools as a means to avoid or minimalize the need for 'hard' binding law (e.g. codes, frameworks, compacts, action plans, communications and press releases). While non-legal scholars have largely focussed upon the deficiencies of the overall regime during and after this period, these developments have mirrored identically trends in EU economic law on legal parameters in an era of crisis (Fahey and Bardutzky 2017; Kilpatrick 2015). In the context of migration, often they have arisen

from the contradictory constitutional parameters of the EU in migration, with multiple overlapping competence issues (Moreno-Lax 2017). Sometimes they reflected incomplete institutionalisation processes (Caporaso, 2018). Whatever the rationalisation, the EU has recently introduced waves of legislation and law-making packages in migration, replete with multiple competences. This diversity of instruments involved is significant because of what has resulted therefrom. This use of EU external migration instruments can be seen to display tendencies of 'hyper-legalisation' of external migration (Fahey 2019). i.e. a surge in the incidence of the creation of law-like instruments, soft law, hard law, legal instruments with legal effects and the general generation of rules and other norms in a field, with legal or law-related components. This 'hyper-legislation' has generated several highly significant decisions of the Grand Chamber or General Court in distinctive time-periods relating to the EU's migration crisis outlined below.

However, contrariwise, there is increasingly a '*de-legalisation*' of migration policy, where EU courts increasingly put key legal and policy questions in forms *beyond* review and outside of the treaties, as in the financial crisis (Bardutzky and Fahey 2017). 'De-legalisation' is understood here as the practice of putting issues, laws, practices and litigation beyond the scope of genuine and meaningful judicial review. It is at once both the relative, opposition and genus of hyper-legalisation. Three recent contemporary decisions of the Grand Chamber of the CJEU and General Court all in the area of EU external migration in 2016-2017 demonstrate the analytical challenges of de-legalisation in this new era: *X & X v. Belgium* (CJEU, 2017), *NM v. European Council* (General Court, 2017) and *Slovakia v. Council* (CJEU, 2017) (Fahey, 2019). The CJEU in a range of its highest profile cases has put the individual *beyond* redress though the denial of redress. They have held all such cases to be outside the scope of EU law for technical reasons, de facto and de jure. The litigants vary significantly, from Member States to individuals but the majority are individual applicants in the fields of visa, quota and solidarity. All are cases in the field of external migration and, although tightly circumscribed time-wise, are thus highly significant for the consistency of the outcome reached. It demonstrates a specific form of analytical framework, where key legal instruments are judged to have no legal effect or not to be justiciable. The decisions often demonstrate both de-legalisation and hyper-legislation to various degrees but it is the similarity of the outcomes or results which is the critical point of reflection at the highest judicial level in external migration and not the opposition thereof. These CJEU decisions have had other consequences. The EP remains excluded from some of the most significant legal acts in recent times and many soft law instruments continue to be used to circumvent legality and legal procedures (Andrade, 2013; Fahey, 2019). These developments are highly significant in an era where EU IR law has acquired much prominence.

The chapter next turns to examine the idea of EU unity in action and with specific reference to EU external migration law.

3.3. Unity Contradictions: EU and MS actions from the Dublin Regulation to the Syrian Crisis

One of the most complex features of EU external migration law is the extent to which it is 'external' and even of the 'EU'- that is to say that there are many complexities to its external dimension and its dimensions of being the outcome of a complex constellation of powers, competences and actions. For instance, considerable disquiet and political variance in domestic policies regarding external migration between the Member States (MS) has marred EU MS signature of the non-Binding UN Global Compact on Migration. The questionable external unity of the EU in the negotiations on the UN Global Compacts on Refugees and Migration in the wake of the New York Declaration for Refugees and Migrants is of note. The EU institutions have awkwardly competed with the Member States for speaking time in this domain of action internationally where the Union is only entitled to speak with one voice in areas of exclusive competence which are few and not including the entire area of migration. Several Member States in these specific negotiations have sought to make high-profile

interventions including non-papers e.g. Netherlands and Italy. Nonetheless, the unity of speaking and representation has been striking given that the EU delegation's statements were approved by the Member States in all instances. It is perhaps ironic that the EU's external competences can buffer its appearances in such a context. Also there is a contradiction here between political behaviour at different levels, nationally and supranationally, both equally witnessing rising politicisation. Some may argue that the degree of convergence between the EU and the MS in external migration is extremely high even if competence is not aligning to the same degree, think for example the EU-Turkey Statement. Still, a cloud of dubious legality surrounds the notion of EU action in the external migration context and the uncertainty that it generates hurts the EU legally and by means of reputation. In the context of the 2018 conference leading to the non-binding Marrakech Declaration, a human rights-based approach identified many areas of international cooperation, including migration, but was opposed vigorously by Hungary without any practical legal consequences. The Rabat process or UN Global Compacts, given their broad scope, are very likely to fall within MS competences and affect MS participation in international conferences and the making of opposition statements (Andrade 2018).

At every instance, the unity of the EU in external migration rests upon a sort of legal fiction. The exceptions here remain critical- that MS can thwart the operation of external exclusive competences and a MS cannot violate the duty of sincere cooperation for example by dissociating from a Union strategy. The question remains whether the EU will find it easy to land common positions before international migration convergences in areas not within the scope of external migration competences of the EU. While the Union can adopt statements in respect of migration and asylum, significant limits exist, e.g. Article 79(5) on the volumes of admission or Article 72 TFEU on MS' responsibilities to maintain law and order and national security. In such cases the notion of unity appears conflicted and fragile, and thus in danger in this increasingly volatile area of national politics. The recent domestic fall of the Belgian government on the signing of the Compact at International level, the opposition to and non-signature of the Compact by the Austrian far-right government or Visegrad countries opposition at EU level creates problems to EU unity. External migration here is mired by failures to adequately and comprehensively constitutionalise and also institutionalise a field. The ostensibly veneer of unity seems false and artificial and masks the underlying contradictions- they are multi-level contradictions.

4. A critique of the legal methods in EU IR and External Migration Law'

4.1. Judged: The 'court-centric' model of EU IR law

The most elementary part of EU law scholarship is that it constitutes a subject embedded within international law as an offshoot thereto although it is a complicated subject and object interaction (De Witte 2018). As most EU law scholarship indicates, EU External Migration law is innately caught up within complex norm-building at international level. Thus, as Guild states, fundamental planks of international migration law are fundamentally discriminatory or indeed unduly bound up with border control, including the UN's Global Migration Compact. Safe, fair and orderly migration requires complete disaggregation of migration regulation from border control, of all nations (Guild 2017; Costello 2016). This, however, remains far from the current status quo globally (Guild 2018). This renders the notion of the 'critical' as to the EU here sandwiched in between a variety of norms and thus a complex target to disaggregate (Moreno-Lax 2017). Isolating the 'EU' dimension of international migration to be critical of is also intricate, where the unity of the EU is riddled with overlapping layers and competences (Gatti 2018). The faults and flaws of the EU system and legal policies are thus deeply embedded with arguably even more flawed systems and legal ordering. However, much critique of the EU policies evolving in the legal domain begins and ends with analysis of CJEU decisions thereon. Yet the greatest handicap of the domain of EU law in its analytical study of migration appears to be the Court of Justice front and centre of the analytical prism. It is a handicap on a significant range of scholarship as its focal point.

The EU's external objectives arguably lack a telos or end point in which to move the Union. Although the Union had no single set of objectives for the Union's external policy prior to the Treaty of Lisbon, contemporary external policy objectives are 'non-teleological, non-prioritised, open-ended and concerned more with policy orientation than goal setting' (Cremona and Thies, 2014, 31). For example, Cremona (2014) has argued that the contribution of the Court in theory has been considerably constrained in contrast with its function in the internal market but still forms a valid focal point for the discussion of broad EU values. Its extraordinary Opinion 2/13 (CJEU 2014), in defiance of the wording of the treaties in Article 6 TEU thereof to accede, may further cause one to reflect what is meant by external objectives *post* Lisbon. The question of how powerful the Court is and should be seems like an eternal research question of EU law. One significant feature of EU international relations or foreign affairs law is that it is still a hugely court-centric one. This is not even for good reason. There are in reality a handful of truly 'constitutional' moments in external relations and mostly at a time predating broader constitutional moments in other fields of EU law (Thies and Cremona 2014). Court-centric analyses nevertheless still lead the research agenda and methodology in this field. Much ink has been spilled on the interpretation by the Court of Justice of the nature of the EU legal system in its foundational decision in *Van Gend en Loos*. There, the Court radically altered the understanding of the individual and subjects and objects of the EU treaties (Fahey and Bardutzky, 2015; 1). This decision has caused the Court to hold a celebration in 2013 of 50 years of its landmark decision, celebrating its activism and unique interpretation of the EU treaties that would result in an extraordinary supranational system evolving therefrom. This individualism and perhaps also activism would arguably result in a series of landmark ensuing decisions such as the Opinion 2/13 where the Court, *itself a party to ECHR accession* in negotiations with the Council of Europe, would strike down the Treaty-based agreement mandated for EU accession, contrary to the text of the treaties for the EU to explicitly accede itself to the ECHR (CJEU, 2013). The decision is a landmark ruling on the concept of the autonomy of EU law, which the Court held that it would be infringed by EU accession in the draft Accession Agreement (Thies and Cremona, 2014). It is a nice and neat example of the significant shift in the Court's actorness and its own evolving autonomy understood here with reference to other legal orders befittingly.

Increasingly the Court's landmark international relations judgements contain the most minimal levels of high abstraction, even landmark decisions on competence and EU investment powers (e.g. CJEU, Achmea (2015)). These developments matter for other domains of EU external relations or international relations, such as migration. The nature of jurisprudence which will likely develop on individuals rights in international relations looks certainly likely to diminish to a degree in trade, at least in terms of direct enforcement. It is of significance that EU external relations or international relations law is particularly difficult to litigate. Latest debates about the methods and methodology of EU and public international law advocate deeper law-in-context methods (Van Gestel & Micklitz, 2014), but are often heavily 'court-centric'. Arguably, the study of the EU as a global actor in law is predominantly institutionally-focussed and is arguably in need of a more diverse methodology to reflect organisational practice and law-making. Yet, a resolutely non-court-centric look at EU action in the global legal order may be considered to be understudied.

EU External Migration law suffers similarly from all of these 'childhood afflictions'. As a subject, it contends with significant policy and legal framework shifts taking place. The parameters of judicial review have been highly constrained and still the amount of caselaw and amount of analysis of court-centric issues of law and practice in EU External Migration law continues unendingly (Santos Vara and Carrera, 2019). This entails that we are particularly ill-equipped to deal analytically with the growing delegalisation and hyper legalisation of EU external migration law, only coming in part before the CJEU and only being capable of being subjected to limited checks and balances. Arguably, all law-making developments as to EU external migration continue to attract an additional health-warning.

4.2 Judging: The evolving subjects and objects of EU external migration law

One of the most complex conceptual elements of EU external migration law as a subject riddled with contradictions and sitting with difficulty within the realm of EU International Relations law is its evolving subjects and objects. The recognition by the Court of Justice of the European Union (CJEU) in its landmark judgment in *Van Gend en Loos* that the subjects of EU law are not only the MS but also the individuals (nationals of the Member States), carries an importance of what is usually called constitutional character (Fahey and Bardutzky, 2017; CJEU; 1963). The framing of subjects of EU law in *Van Gend en Loos* was a prelude to a drift of EU law from the logic of public international law. By authoritatively framing the subjects of EU law, the CJEU extracted it from the long-standing debate concerning the dichotomy between subjects (more so than objects) in Public International law. In Public International Law, the perceived redundancy of the subjects' formulation has brought about many alternative theorisations of the 'actors' of public international law. For example, it has churned out those seeing a reformulation from subjects and objects to 'participants' (Higgins, 1992), to escape the so-called 'prison' of the distinction (Bianchi, 2006). Rather, the entire discourse of public international law has operated as a fight for inclusion with regard to subjects and objects. It is a discourse perceived to be perpetuated by subjective positivists or old-fashioned positivists yet where EU law revolutionised the understanding of the individual to have an enforcement capacity (Bardutzky and Fahey, 2017).

EU AFSJ law has largely been a field about creating barriers and limitations upon rights or seeing restrictions impeded to a much more limited degree than the enabling and market opening and market integration tendencies as to individuals, consumers and companies with respect to the internal market. Instead, the trajectory of the internal market has been about the realisation of subjects and objects beyond the traditional scope of international law. As a sub-field, EU external migration law has only recently seen the normalisation of its institutional parameters and enforcement. Most significantly, the number of individuals affected by its policies, tools and practices continues to expand. Migration has reduced substantially from crisis times and individuals have had to encounter jurisdictional hurdles not met in other domains to date. In this regard, the subjects and objects of EU external migrations law have not aligned with caselaw in other more longstanding fields of administrative law. Instead, the CJEU has increasingly taken a variety of approaches to the 'others' of EU law, often exclusionary, denying rights or obligations. The 'dehumanisation' of the subjects and objects of EU external migration law is evident through the delegalisation approach of the CJEU outlined in this piece. It thus increasingly puts significant issues of EU external migration law beyond judicial review.

Moreover, extra-territoriality and de-legalisation have played a prominent role in the EU External migration caselaw of the Court in recent years, when the Court has held that EU law does not apply beyond its territory in migration (Fahey, 2019). The subjects and objects discourse of the internal market as the main thrust of the development of EU law has been cast aside. Instead, a less rights-centric approach to territory in EU external migration has been adopted which reduces litigants' rights and entitlements. These developments are argued here to warrant a fundamental rethink of the special references of legal methods in EU external migration as a genre of the species of the AFSJ and EU IR. Critical studies afford a vibrant analytical lens, which can deconstruct recent developments and enable future reflections that are more rights-centric and analytically sound. It would thus put people at the centre of crises related to external migration.

Conclusions

Critical legal studies arguably 'perform' their critical value-added by reducing the complexity of legal jargon, in an effort to reach the root-causes of problems. The 'critique' manifested in this piece deconstructively opens up the analytical space of migration. It thus has a broader objective and addresses a wider audience. The present account has sought to show how the internal and external dimensions of EU AFSJ law increasingly intersect with much legal complexity. These dimensions are perceived as one of the most complex areas of EU external unity, where intersecting competences thwart and impinge upon effective international action. Yet, they also promote some of the most unfair policies and legal practices that the EU has even been associated with internationally, despite its legal mandate to be a good global governance actor. AFSJ is thus an area ripe for critical reflection.

EU international relations law is a field where the EU's engagement with the world, international and regional organisations and current and future third countries has become a highly prominent symbol of the EU's capacity to survive and endure in the global legal order. International relations is arguably a highly insightful means of understanding European integration, second to no other subject. As a legal field, EU international relations law has long been a highly doctrinal and competence-oriented subject, dominated by court-centric views on European integration. Therefore, it is highly suitable for analytical engagement through the prism of critical studies. Arguably, many of the most challenging issues of EU external migration law align with concerns of EU IR law. The EU external migration law does not necessarily share all of the characteristics of EU international relations law perfectly or optimally, however, it offers a significant portfolio to assess EU international relations practices. Along these lines, this chapter has argued for a critical deconstruction of EU International relation law's link to external migration and of the specific practices it has fostered. That External Migration operates as one of the most 'unjust' or 'inhuman' dimensions of EU law and policy today and is thus sufficient reason to engage in such reflection and analysis in the future. A future research agenda will likely need to reflect further on the dimensions of a court-centric analysis, the place of EU IR law vis a vis External Migration and the critical dimensions of EU law studies. As the subjects and objects of EU IR law increase significantly, the dilemmas outlined in the present analysis are only likely to substantially increase.

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