



CAUGHT IN BETWEEN BORDERS

citizens, migrants
and humans

LIBER AMICORUM in honour of prof. dr. Elspeth Guild
Editors: Paul Minderhoud, Sandra Mantu and Karin Zwaan

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The top half of the page features a background of the European Union flag, with its blue field and twelve yellow stars. The stars are arranged in a circle, and the flag's texture is visible. The text is overlaid on this background.

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Introduction

Kees Groenendijk & Paul Minderhoud

Fascination for the Concept of Borders

Professor Guild, who started working in Nijmegen in 1997, has been fascinated by borders throughout her academic career. She gave her inaugural lecture entitled *Moving the borders of Europe* in Nijmegen in 2001, a few years before the nine Central and Eastern European countries acceded to the European Union, the largest extension in its history. From September 2009 she holds a Jean Monnet Chair Ad Personam on the subject *Reflecting on Europe's Borders: Movement of persons and the rule of law*. Her valedictory lecture of 6 September 2019 was titled *Interrogating Europe's Borders: Reflections from an Academic Career*. In her list of publications, enclosed at the end of this book, numerous publications with a central focus on borders stand out. When organizing her farewell seminar the topic was obvious as was the title chosen: *Moving the borders of Europe Revisited*. At the seminar four of Professor Guild's former PhD students (Evelien Brouwer, Madeline Garlick, Claude Cahn and Sandra Mantu) gave presentations related to borders. The written version of these presentations can be found in this book. The concluding remarks of the seminar were given by her promotores Roel Fernhout and Kees Groenendijk. And so her two decades in Nijmegen have come full circle. The other former PhD students supervised by her in Nijmegen (Daniel Wilsher, Dana Baldinger, Simon Tans, Bjarney Friðriksdóttir and Anoeska Gehring) also contributed to this book.

The title of this *Liber Amicorum* for Elspeth therefore was rather obvious. *Caught in between borders: citizens, migrants and humans* reflects that the same person can be a citizen, a migrant or a human being within the same borders and that this categorization can change just like that. This title captures not only the academic fascination of professor Guild for borders but also, her life. Born and educated in Canada, she graduated in Greek language in Thessaloniki and then settled as a lawyer in London.

Once her academic career got shape in Nijmegen, her love developed in Paris. Years before the word Brexit was coined, she reduced its potential negative consequences by marrying a Frenchman. Living strategically at both ends of the Eurostar in London and Paris and commuting to Nijmegen on a regular basis, she was permanently crossing and caught in between borders.

Professor Guild and the Development of EU Migration Law

Elspeth started contributing to the development of EU migration law from the moment she started to practice law in London. She sent her first fax to Nijmegen in 1992: ten pages provoking us to think about how the ECJ's 1990 *Servino* judgment on the standstill clause for Turkish workers could be the basis for the protection of self-employed Turkish migrants in Europe as well. It would take eight years before the Court of Justice in its 2000 judgment in *Savas* interpreted the standstill clause in the Protocol

to the Association Agreement EEC-Turkey in the way she proposed. Her next fax was about how the Court's case law on the association with Turkey could also be useful in interpreting the 1975 EEC-Morocco Cooperation Agreement. The first reference on the clauses on migrant workers in that agreement would arrive in Luxembourg three years later.

Professor Guild contributed to the development of EU migration law in at least four different ways: first of all with her academic and other publications, secondly through her support to practising lawyers, judges and colleagues in academia, thirdly by preparing the ground for the EU legislator and, finally, by laying down the foundation for EU migration law as a separate academic discipline. We can only mention a few examples of each of those four pathways.

Rights of Individuals versus Powers of States

Over the last three decades professor Guild wrote almost three hundred articles, books, case notes, policy briefs and blogs. Her productivity and, more important, her combination of creativity, energy and wit are unique. Her 1996 compilation of and commentary on the first generation of EU instruments on immigration and asylum made the often inaccessible texts and the development of this new branch of EU law available to researchers and practitioners. In her innovative PhD, entitled *Immigration Law in the European Community*, defended in Nijmegen in 2000 professor Guild stressed the basic elements common to both the law on free movement of Union citizens and the first EU rules on migrants from outside the EU. Her study also demonstrated the unique capacity of EU law to grant enforceable rights to non-citizens even in immigration issues. The subjects of her publications changed over time from the Association Agreements and the accession of the Central European countries, to the status of long-term resident immigrants, the unhappy link between migrants and terrorism, borders and visa, Schengen (before and after 2015), citizenship and Brexit. Throughout this rich contribution professor Guild remained intrigued by and focused on two central themes. Her first focus is on how Human Rights and EU law both grant rights to non-nationals and how these rights can be enforced and developed. Her second focus is on how human beings in a marginal position (in a consulate far away, at the border, in immigration detention, or in a secret prison or a CIA rendition programme) are treated and how this treatment can be improved in order to meet minimum standards agreed in national and international law. Generally, she starts from the migrant's perspective rather than from state powers and she critically looks at efforts of states to acquire new powers or reinforce old ones with regard to non-nationals or nationals of immigrant origin on security, public order or economic grounds.

Her analysis is not limited to black letter law but relies on empirical data and on theoretical insights from sociology of migration and political sciences. Her work is a living model of how taking work done across the borders of your own discipline seriously enriches the outcome and relevance of your analysis. In recent publications on Brexit professor Guild vividly illustrated the role of law and politics in unsettling, degrading and excluding large numbers of people long settled in the UK and elsewhere in the EU. Brexit will not undo Elspeth's intensive efforts over decades linking lawyers in the UK and continental Europe. Her work in linking networks of immigration and

asylum lawyers in Europe, ILPA in the UK, GISTI in France, Hohenheimer Tage zum Migrationsrecht in Germany, ASGI in Italy and the European Immigration Lawyers Conference, will continue to bear fruit.

Stimulating, Supporting and Teaching Colleagues

Professor Guild continuously stimulated practising lawyers, judges, academic colleagues, civil servants and politicians to take EU migration law seriously, by setting a good example in her own work and by supporting others. She shared her broad knowledge and expertise generously with those who asked for advice or offered it as she saw opportunities which otherwise would have remained unused. Over the years at her initiative we discussed at the Centre for Migration Law (CMR) in Nijmegen with lawyers from different EU countries having their first case on free movement or EU migration law before the Court in Luxembourg and were looking for arguments or strategies. For almost fifteen years she taught a course on EU migration law for Dutch immigration judges at the Dutch Judges Academy (SSR) several times a year. This course undeniable contributed to the fact that almost one fifth of the first 150 references to the EU Court of Justice concerning immigration and asylum were brought by Dutch courts, the Dutch references outnumbering those by German courts.

For more than a decade, Elspeth was a leading member of the Network on Free Movement of Workers (FMOW) coordinated by the Centre for Migration Law until 2014 and left a strong mark on the activities of the Network. Early on she recognized the need for cooperation with colleagues in the Central and Eastern European countries. After the 2004 accession she used her own network to find the right experts from those countries for the FMOW.

Elspeth has successfully participated in various (collaborative) research projects. She involved the Centre for Migration Law successively in a Framework 5 project on European Liberty and Security (ELISE), a Framework 6 project on the Changing Landscape of European Liberty and Security (CHALLENGE) and a Framework 7 project on Enacting European Citizenship (ENACT). Together with Cristina Gortázar Rotaeche and Dora Kostakopoulou (both contributing to this book), ‘the girls’ as they called themselves, she organized several Jean Monnet seminars in Madrid, Manchester and Nijmegen resulting in a book: *The Reconceptualization of European Union Citizenship*. Twice she acted as a ‘founding mother’ of the recognition of the CMR as a Jean Monnet Centre of Excellence.

Professor Guild also initiated at the Centre for Migration Law a very active programme hosting visiting scholars interested in European migration and asylum law and practice. The programme is still in operation and has hosted over 30 researchers from across the world (including China). One of the first visiting scholars was her PhD student Diego Acosta, who contributed to this *Liber Amicorum* and, recently, was appointed professor of European and Migration law at the University of Bristol.

Preparing the Ground for the EU Legislator and Supporting Implementation

With written and oral advice to MEPs, Commission officials, the House of Lord Subcommittee on the EU or CEPS policy briefs professor Guild contributed, often invisibly, to proposals and amendments for EU legislative instruments or policy decisions in this field. One of those activities deserves more attention. Shortly after Elspeth arrived in Nijmegen, the Council of Europe asked the CMR how the Council could best support the integration of settled immigrants. Our advice was to develop a set of common rules granting immigrants security of residence and equal treatment. The Council of Europe (CoE) committed the CMR to do a comparative research on the relevant law and its actual application in CoE Member States. Only because of Elspeth's contacts with practitioners and academics across Europe we were able to produce our report in 1998. As a follow-up Elspeth took the lead in drafting a text that later became Recommendation (2000)15 of the CoE Committee of Ministers concerning the security of residence of long-term migrants. In the meantime EU Member States decided in Tampere that the EU should take over the lead from Strasbourg and use its new competence to make binding EU law on this issue. The European Commission asked us to do a similar study on the situation in all (then) 15 Member States, which was reported in April 2000 and followed by a proposal of the Commission which resulted in Directive 2003/109 concerning the status of third-country nationals who are long-term residents. This directive reduces the risk that immigrants from outside the EU are treated as temporary guests forever. The directive grants equal treatment, strong protection against expulsion and conditional mobility within the EU. After the extension of its scope to beneficiaries of international protection, the directive covers all non-EU nationals admitted for other than strictly temporary purposes. In 2017 this new EU-residence status had been issued to 3.5 million nationals of non-EU countries. Only a few Member States (e.g. Germany, France and Belgium) still prefer to issue settled immigrants with their own, less favourable national permanent residence status.

Professor Guild was well aware that adopting an EU instrument is only the first step. She stimulated the organisation of a series of seminars at the CMR, where one year after the end of the implementation period of a new directive, academics, Commission and national officials and practising lawyers from different Member States would discuss their experiences with this directive. Each seminar was followed by a book (eight volumes appeared in this format), often with a contribution by professor Guild, which made those experiences accessible to a wider audience and contributed to the directive being taken seriously.

Laying the Foundations for EU Migration Law as a Separate Discipline

Elspeth was the first person to be appointed as tenured professor in EU migration law inside and outside Europe. Before the Amsterdam Treaty entered into force she took the initiative to found the *European Journal of Migration and Law*. She suggested trusted friends as members of the Editorial Board and edited the journal ever since with Paul Minderhoud, during its first years with Thomas Spijkerboer, Ryszard Cholewinski, later with Sandra Mantu (all contributing to this book). The journal's title reflected the intention to be a forum for lawyers and academics from other disciplines.

She convinced Kluwer (later Brill-Nijhoff) to publish the series Immigration and Asylum Law and Policy in Europe, which offered a wider audience for the best PhD's in the field, not only the studies she supervised in Nijmegen and London or elsewhere in Europe. It became also a platform for the studies of other young and senior colleagues. In this series, now edited together with Valsamis Mitsilegas (contributing to this book as well), since the first volume ('Security of Residence and Expulsion') between 2001 and 2019 a total of 44 volumes were published.

Professor Guild Connecting Law and Politics

Elspeth always is acutely aware of the essential role academic lawyers can play in the drafting of national and international legal standards, if they are prepared to adapt to the political agenda and to act swiftly and independently. An early example of this awareness was the Draft Resolution on national policy on admission for employment presented to the EC Ministers responsible for Immigration, the predecessor of the EU's Justice and Home Affairs Council, at their meeting on 30th November and 1st December 1992 in London. The draft purported to set out harmonised 'principles', permitting Member States to choose which principles they would find most convenient and implement them in their national law, leaving the other principles untouched. The draft explicitly excluded individual workers or employers to rely on any matter in the resolution in pursuance of their rights against a Member State. At an ILPA conference held in London later the same week, Elspeth suggested to Kees Groenendijk to do something against this 'unacceptable' plan, which would create only opportunities for states not for individuals. Thus, on Saturday morning in the empty office of Elspeth's law firm the two were writing critical comments on the draft, arguing that the resolution would open the door to 'a new guest worker system' and conflict with existing Community law and international obligations of Member States. Moreover in their eyes: 'The process is an insult to democracy.' The comments were published as a note by the Meijers Committee and ILPA. The resolution was finally adopted in a thoroughly amended form in June 1994 under the Greek Presidency. Apparently, the note had been taken seriously by the drafters.

A quarter of a century later in 2017, professor Guild was one of the first academic authors writing on the drafting of the UN Global Migration Compact. The Compact also is a set of legally non-binding norms, which potentially could disregard rights migrants acquired under binding international instruments. With the aim of damage control she mobilised a group of colleagues and asked each of them to summarize the case law of the UN monitoring bodies on one of the central human rights of migrants. Within five months she succeeded in collecting and editing the contributions and arranged for the publication of a book (*Human Rights of Migrants in the 21st Century*) which made the legal boundaries for the drafters of the Compact visible.. After the adoption of Compact, without the consent of the USA and some EU Member States, Elspeth again mobilised colleagues to write a series of blog posts on how the implementation of the Compact at the national level could best be monitored (<https://rli.blogs.sas.ac.uk/themed-content/global-compact-for-migration/>). It is too early to judge the effects

of these academic efforts. Different aspects of the Compact are discussed in the contributions by Ryszard Cholewinski, Bjarney Friðriksdóttir and Jens Vedsted-Hansen in the final section of this book.

Importance of Her Academic Scholarship

After her dissertation professor Guild wrote three influential monographs. In *The Legal Elements of European Identity: EU Citizenship and Migration Law*, she enriched our understanding of European identity with the work of European political theorists. The role of supra-national human rights obligations in Europe and how they apply to extraterritorial action by states is the central topic in *Security and European Human Rights: Protecting Individual Rights in Times of Exception and Military Action*. It was also published in French and Hungarian. In 2009, she brought together many strands of her research in the launch of a new interdisciplinary approach to the field – *Critical Migration Studies* – in *Security and Migration in the 21st Century*. The importance of her scholarship to the academic community was honoured when Lund University bestowed on her a doctorate honoris causa in 2008. In the letter of motivation the University stated it was awarding her the honour:

‘In the course of a rich career combining research and practice, Elspeth Guild has successfully repositioned migration law at the intersection of discourses within and beyond the legal discipline. She has offered her scholarly expertise to political institutions as well as civil society across Europe, and thereby stimulated democratic processes around the formulation of the law. Engaging with the law in its formal rigour as well as its ideational implications has been a hallmark of Elspeth Guild's scholarship, which combines empirical and theoretical strands in an exemplary and inspiring fashion.’

This book contains 33 scientific contributions by (former) colleagues, PhD students and friends of Elspeth, all of whom have a special connection with the Centre for Migration Law. The contributions are divided into five categories: borders, citizens, migrants, asylum and the global compact on migration. They reflect the versatility of the work and interest of professor Guild, who was professor of European Migration Law from 2001 till 2019 at the Faculty of Law of the Radboud University Nijmegen, the Netherlands.



Caught in between borders: citizens, migrants and humans reflects the fact that the same individual can be a citizen, a migrant or a human being within the same borders and that this categorization can change just like that. This title captures not only the academic fascination of professor Elspeth Guild for borders but also, to a certain extent, the life of Elspeth herself.

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