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WHEN PROCEDURAL CONCERNS ECLIPSE HUMAN RIGHTS CONSIDERATIONS IN JUDICIAL PROCEEDINGS

EMPIRICAL EVIDENCE FROM THE EUROPEAN COURT'S ASYLUM JURISPRUDENCE

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SUMMARY

With an ever-growing number of issues on the political agenda of the European Union, it is easy to forget that the European Court of Justice is not isolated from them. Quite the contrary, empirical evidence from the Court's practice throughout the height of the so-called 'refugee crisis' reveals that its jurisprudence echoes the political struggles of the time. The cases covered by the Dublin package are one important example. Their dry and technical language is an unequivocal signal to the EU legislature: the Dublin system's shortcomings need to be addressed at the legislative level. Until then, the Court has no choice but to keep the system running in its current form. Yet, doing so is a costly exercise. It comes at the price of human rights considerations, which are largely absent from the Court's jurisprudence whenever the system appears to be in jeopardy. Instead, they are replaced by repeated calls to heed to the intention of the legislature and preserve the *effectiveness* of the asylum system.



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seat in a number of EU Member States; internationally, the principle of solidarity suffered an unprecedented blow. Disagreements brought about policies fueled by short-term fear, which in turn eclipsed the importance of protecting the rights of vulnerable asylum seekers. Not being able to agree on a solution for responsibility-sharing or the associated issues of intra-EU secondary movements, the overburdening of frontline states or the difference in Member States' structural capacities, EU Members shifted their attention (and funds) to the reinforcement of the Union's external borders – the one issue on which they could agree. This, however, happened out of tact with the reality on the ground; namely, a significant decrease in the number of irregular arrivals of asylum seekers to European shores since 2017.

As confirmed by the 2021-2027 Multiannual Financial Framework, the future of EU migration policy will continue to be dominated by the issue of controlling the borders at a time when other considerations, such as investing in the creation of a truly common European asylum system would

INTRODUCTION

The *Common European Asylum System* came under great strain during the unprecedented rise in the number of asylum applications to the European Union in the summer of 2015. The events, which have since been collectively referred to as the 'refugee crisis', had wide-ranging effects on different aspects of political life in the Union. Whilst domestically, nationalistic tendencies took the driving

have been a much more sustainable use of resources. The numbers of asylum seekers might have dropped, but the consequences of the 'crisis' still reverberate through every level of EU governance and the Union's court system is no exception.

The *sui generis* role of the European Union has meant that not only its political organs, but also its judiciary have had to fight for the preservation of its asylum system, albeit out of the spotlight. The Court's non-political nature often leaves its struggles under the radar. For every other institution in the EU, the increasingly obvious untenability of the asylum system in its current form, and especially the Dublin package, has translated into debating abstract rules and their meaning. For the European Court of Justice, the inconclusive and prolonged nature of the debates has led to the continued application of rules that are no longer fit for purpose on a daily basis. Not only that, but the Court has had to do so under the watchful eye of discontent media reports, critiquing its approach in asylum cases as 'too liberal' and forcing the Court to tone down its human rights-informed practice. This has materialized into a two-fold struggle for the Court.

On the one hand, it has had to forego certain considerations in its judgments because of the existential nature of the battle for preserving the *effectiveness* of the asylum system until its failures are addressed at the legislative level. On the other hand, it has had to exercise its independent role under the attack of the same hateful, anti-migration rhetoric that has also plagued the political debate. The result has been the establishment of a dry, largely

technical body of case law whose language prioritises procedural concerns over human rights. The message to the legislature is loud and clear: any change that needs to happen, must do so at the legislative level. The longer that takes to happen, however, the more difficult it would be for the Court to sustain it.

KEY FINDINGS

- An empirical study of the European Court of Justice asylum jurisprudence reveals that the majority of the Dublin cases which reach the Court lack any references to human rights, be they substantive or formal.
- Despite its 'activist' depiction in the media, the ECJ is very careful not to overstep its mandate within the asylum sphere. This is often signaled by its frequent recourse to the 'intention of the legislature' as a means of interpreting legislative provisions.
- The average asylum case before the Court is more likely to refer to the remarks made during the drafting of a legal instrument in the form of the *travaux préparatoires* than it is to the Charter of Fundamental Rights of the European Union, which is codified law.
- Despite a long history of serving as the Court's go-to measure for an expansive interpretation of the human rights afforded to EU citizens, the principle of *effectiveness* serves to eclipse the rights of third country nationals in the area of asylum.

POLICY RECOMMENDATIONS

The steps necessary for reforming the Dublin system in a sustainable fashion need to be taken as soon as possible. With the number of asylum seekers nowhere near what was witnessed during the peak of arrivals in the summer of 2015, now is an ideal moment to re-start such a reform initiative. Any new legislation needs to be aware of the Court's tendency to take the legislature's wording at face value and its reluctance to interpret substantive human rights protections into the largely procedural content of the directives and regulations governing the issue area.

Therefore, any forthcoming reforms need to include explicit references to human rights that go beyond the preambles and into the content of the instrument. Furthermore, legislators need to be wary of the increased securitisation of the language surrounding migration. Defining EU migration policy by control at a time when we have witnessed a significant drop in the number of arrivals to the EU is inappropriate and unsustainable. Although the reduction in arrivals does not imply that emergency preparedness is no longer

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relevant, it does imply that the orientation of narratives, policies and financial resources needs to take that into account. In fact, if there is currently a 'crisis', it is one that derives from the politics of migration rather than the size of migration flows. Dissociating from crisis-mode would allow the legislator to recapture the true spirit of the Union in its work. The European Union is

founded on the values of dignity, solidarity, and human rights. Therefore, any language to that end would be a welcome reaffirmation of the Union's continued aspirations to be at the forefront their protection.

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