

Dublin III and Beyond: Between Burden-sharing and Human Rights Protection

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The main purpose of this paper is to point out briefly the deficiencies of the present-day Dublin system and to outline one of the proposals that seeks to offer a solution that would make burden-sharing between the Member States possible and desirable and also protect human rights.

Keywords: Dublin III Regulation, burden-sharing, EU Commission, reform.

Enacted as an instrument seeking to establish clear guidelines on determining the Member State responsible for examining an application for international protection, the Dublin Regulation,¹ presently in its third generation (after the previous Dublin Convention and Dublin II Regulation,² the latter being repealed by the present Regulation), is considered to be the cornerstone of the EU's Common European Asylum System, or CEAS. While many of its principles, such as its overall emphasis on family reunification,³ prevention of forum-shopping or of the so-called "orbit cases", in which there is no Member State which takes responsibility for refugees or asylum-seekers,⁴ are to be regarded as essential aspects of any asylum system, it is also true that the Dublin System, in its drive towards a speedy system of establishing the responsible Member State, also has very serious deficiencies. Consequently, this paper aims to present some of the defects of the Dublin System, as well as some ideas on which a reform of the system should be based.

The main issue with the Dublin System is the fact that, in practice, it does not offer an efficient framework for burden-sharing,⁵ mainly leaving the border states (such as Greece, Italy or Hungary)⁶ to deal with a disproportionate amount of refugees and asylum-seekers. This is in principle due to the philosophy that underpins the whole Dublin System. According to the Dublin III Regulation, the

¹ Regulation (EU) No. 604/2013 of the European Parliament and Council, OJ L 180, hereinafter "Dublin III Regulation".

² Regulation (EU) No. 343/2003 of the European Parliament and Council, OJ L 50/2, hereinafter "Dublin II Regulation".

³ Recital 14 of the Dublin III Regulation preamble emphasizes this point: "In accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the Charter of Fundamental Rights of the European Union, respect for family life should be a primary consideration of Member States when applying this Regulation."

⁴ For the purposes of this essay, I am using the term "refugee" to refer to those persons seeking international protection who have been officially recognized as such by the authorities of one Member State, while the term "asylum-seeker" will refer to those individuals which have not yet been recognized as refugees. It has to be borne in mind that, in the letter and spirit of the 1951 Geneva Convention on the status of refugees, upon which the Dublin System heavily relies, the status of refugee exists from the moment an individual meets the criteria set forth by the Convention and not from the moment of official recognition. In any case, refugee status is not granted, as it exists independently of state recognition.

⁵ Even though the CJEU recognized that Greece was faced in 2010 with a "disproportionate burden being borne by it compared to other Member States and the inability to cope with the situation in practice". See the joined cases of N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, [2010] ECLI:EU:C:2011:865, para. 87.

⁶ Jesus Fernandez-Huertas Moragay & Hillel Rapoport: Tradable Refugee-admission Quotas and EU Asylum Policy, in CESifo Economic Studies, Vol. 61, 3/2015, 638–672, p. 639.

principle of authorization,⁷ as established by article 3(1), entails that only one Member State shall be responsible for the application procedure. Afterwards, the Regulation sets up a hierarchy of criteria under which the responsible state is to be determined, including family unity,⁸ the best interest of the child,⁹ the place where the applicant first lodged his/her application¹⁰ etc. All in all, “responsibility for examining an application for international protection lies primarily with the Member State which played the greatest part in the applicant's entry into or residence on the territories of the Member States, subject to exceptions designed to protect family unity”.¹¹ Thus, the rationale for the present Recast Dublin Regulation is the same as the previous one.

However, in a 2015 report prepared by ICF International for the European Commission, it is pointed out that the Dublin System has limited distributive effect,¹² with many Member States (including Greece, Estonia, Croatia, Luxembourg, Latvia, Romania and Slovenia) having net transfers close to zero, meaning that the number of refugees or asylum-seekers they transfer is nearly identical to the number they receive.¹³ Ironically, the report also notes that the hierarchy of criteria for the allocation of responsibility does not take into consideration Member States’ capacity to provide protection and was not designed to distribute responsibility evenly.¹⁴ Neither does the primacy of the principle of family unity over other criteria reflect in reality, as the criteria most used are related to documentation and entry reasons.¹⁵

Moreover, the Dublin System is seen as being based on the assumption that all Member States are complying with EU law and providing for quick and efficient asylum application procedures which are respecting a common set of standards.¹⁶ In practice, on the other hand, reception conditions and recognition rates vary greatly from one Member State to another.¹⁷ For example, the Italian Refugee Council reported that by the end of 2014, only 64'625 asylum seekers filed their applications in Italy from a total number of around 170'000,¹⁸ which would suggest that many asylum seekers are moving on to other countries searching to file their applications there instead. It has been rightfully suggested that instead of seeing this movement as forum shopping, it should be viewed as a search for efficient and quick asylum procedures, as EU law *should* be guaranteeing, especially since the fact is that the Italian bureaucracy has been often criticised for being slow in registering asylum applications.¹⁹

⁷ Zelalem Mogessie Teferra: The Dublin System of Refugee Admission: A Law and Economics Analysis (9 November 2014). Available at SSRN: <https://ssrn.com/abstract=2521180> or <http://dx.doi.org/10.2139/ssrn.2521180> (3 October 2017).

⁸ Dublin III Regulation, articles 6-11 all make reference to family members of the asylum-seeker.

⁹ Ibid, Article 8 (1).

¹⁰ Ibid, Article 7 (2).

¹¹ See the Commission's proposal COM(2008) 825 final, OJ C 317, p. 6.

¹² ICF International, Evaluation of the Dublin III Regulation. Final report, 4 December 2015.

¹³ Ibid, p. 10.

¹⁴ Ibid, p. 11.

¹⁵ Ibid.

¹⁶ Vincent Chetail: The Common European Asylum System: Bric-à-brac or System?, in *Reforming the Common European Asylum System: The New European Refugee Law*, V. Chetail, P. De Bruycker & F. Maiani, eds, Martinus Nijhoff, 2016, pp. 3-38, Criminal Justice, Borders and Citizenship Research Paper No. 2564990, p. 34.

¹⁷ Enhancing the Common European Asylum System and alternatives to Dublin, a study by the Directorate General for Internal policies, Policy department C: Citizen's rights and constitutional affairs, Brussels, 2015, p. 55.

¹⁸ Ibid.

¹⁹ See <http://the-ipf.com/2016/11/09/asylum-seekers-reception-italy/> (3 October 2017) and the UNHCR's Recommendations on important aspects of refugee protection in Italy, 2013, p. 11: “The delays are the result of structural gaps and lack of capacity in the existing reception system, slow administrative procedures and problems in the registration of the asylum applications”.

With this in mind, it is essential to note that the EU asylum system is based on a principle which resides at the core of EU law itself, namely the principle of mutual trust, which presupposes that each Member State presume, save in exceptional situations, that all other Member States are complying with EU law, especially with fundamental rights.²⁰ The issue with mutual trust is that the CJEU's understanding of it could conflict with human rights' protection, particularly in the case in which, by implementing the Dublin III Regulation, a Member State which is not responsible for an individual application decides to transfer an asylum-seeker to the responsible Member State. This was the case in *N.S. and M.E.*,²¹ where the CJEU found an obligation for the Member State not responsible, but on whose territory the asylum-seeker was to be found, to nevertheless examine an asylum application if the asylum-seeker would face inhuman or degrading treatment in the Member State where he would be transferred (the responsible state).²² The CJEU's decision follows a previous ECtHR decision, *M.S.S. v Belgium and Greece*,²³ where the latter established that article 3 of the ECHR (prohibiting inhuman or degrading treatment and torture) would be violated if there is a "real risk" that a person might endure poor living conditions in the state where he/she might be transferred or if that person would face a "real risk" or *refoulement* to the country of origin.²⁴ However, even though the CJEU mentioned *M.S.S.* in its judgment of *N.S. and M.E.* and uses the ECtHR's "real risk" threshold, it nevertheless understands "real risk" as being the result of "systemic deficiencies" in a Member State's asylum procedures.²⁵ Thus, the EU standard is higher, requiring that there be "systemic deficiencies". It is easy to see that this reading of the Dublin II Regulation holds on to mutual trust as much as possible and only obliges non-responsible Member States to take charge of the application procedure if there are "systemic deficiencies" in the asylum procedures of the responsible Member State. This high threshold has been criticised for not taking into consideration less institutional and more individual situations in which a "real risk" of inhuman or degrading treatment might exist, but without "systemic deficiencies".²⁶ It was nevertheless expressly included in the text of the Dublin III Regulation, in article 3(2), which talks of "systemic flaws".

Mutual trust might seem a logical underlying principle in areas where EU law is harmonized and, thus, one should expect a universal standard to be applied in all Member States, but it can lead to perverse results. As in the case of the above mentioned Italian asylum system, while in theory conditions ought to be the same in all EU Member States, in practice they are not. It seems that, by requiring such a high threshold, mutual trust is locking the system into a collision course with the more human rights-friendly ECHR standard. Of course, in more cases such as *C.K., H.F., A.S. v. Slovenia* [2017],²⁷ the CJEU seems to have abandoned the "systemic deficiencies" requirement, relying just on "real risk", but it might also be the case that this later decision is a *lex specialis* to the general rule established by *N.S. and M.E.* After all, the CJEU still mentioned "systemic deficiencies", even though in the particular situation of *C.K., H.F., A.S.*, the threshold did not apply. However it might be interpreted, it is a sign that the Court has realized the unfair nature of the Dublin system and has moved closer to the ECHR standard. Seeing how

²⁰ Opinion 2/13 [2014], ECLI:EU:C:2014:2454, para. 191.

²¹ See *supra* note 5.

²² *Ibid.*, paras. 98 and 108.

²³ *M.S.S. v. Belgium and Greece* (App. No. 30696/09) ECtHR (2011).

²⁴ *Ibid.*, para. 358.

²⁵ *N.S. and M.E.*, [2010] ECLI:EU:C:2011:865, see *supra* note 5, para. 94.

²⁶ Hemme Battjes & Evelien Brouwer: *The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?*, in *Review of European Administrative Law*, vol. 8, no. 2, 183-214, Paris legal publishers, 2015, p. 190.

²⁷ C-578/16 PPU *C.K., H.F., A.S. v. Slovenia*, [2017] ECLI:EU:C:2017:127, para. 98. Here, the CJEU held that "even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum-seeker within the framework of Regulation No. 604/2013 can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that article".

a similar relaxing of the mutual trust principle has occurred also in the case of European Arrest Warrants,²⁸ it might not be a singular change of paradigm, but a general tilt of the CJEU towards a more human rights-friendly system.

However, from a human rights perspective, it is evident that the Dublin system still leaves much to be desired as it allows states a large margin of discretion of whether to resort to the inherently discretionary sovereignty and humanitarian clauses. While the CJEU has stepped in and tilted slightly towards the ECHR standard, it still needs to be pointed out that this “correction” occurred precisely because the Dublin Regulation was unclear. Moreover, I would like to point out to those cases in which an asylum-seeker or refugee pending transfer to another Member State would not suffer inhuman or degrading treatment, at least as it is understood by the ECtHR or the CJEU, but would nevertheless be subjected to distress. A more humane system, which takes more account of the asylum-seekers’ or refugees’ personal situation and needs is required, one which also entails burden-sharing, a principle which is presently not envisaged by the present legal framework.

But in finding an alternative to the present system, stakeholders’ views should be taken into consideration. Thus, human rights advocates tend to minimise the importance of States’ interest and economic capabilities of receiving refugees, while governments, on the other hand, for various and complex reasons, tend to overlook human rights violations when establishing their migration policies. Even though one side might have a better point to make than the other, it is still obvious that the two, sometimes opposing, interests exist and must be reconciled. Any reform of the Dublin system should start with this basic assumption. Sometimes, even if governments would desire to contribute more by offering more resources or accepting more refugees or asylum-seekers, they are still under the pressure of public opinion, which, in most cases, turns out to be more or less uninterested on the whole in receiving more refugees or asylum-seekers. The situation is indeed very complex and it has not only legal and humanitarian undertones, but also political and economic ones. And all must be taken into consideration when discussing state responsibility for refugees and asylum-seekers.

One interesting approach, for example, comes from a law and economics perspective and offers a market-based solution.²⁹ A market of refugees and asylum-seekers would be created and it would operate based on Tradable Refugee Quotas (TRQs),³⁰ where Member States of the EU would be incentivised to contribute more to the market by taking in more refugees and asylum-seekers than initially promised (assuming that, in the initial phase, Member States would agree to take in a certain number of refugees and asylum-seekers).³¹ The incentive would be under the form of funding for complying with the quota initially agreed upon, with the countries accepting more refugees and asylum-seekers receiving extra funding.³² On the other hand, countries not living up to the initial promised quotas would pay for accepting fewer refugees and asylum-seekers than initially agreed upon.³³ This market would then be supplemented by a matching system which would take into consideration refugees’ and asylum-seekers’ preferences for certain Member States.³⁴ It is noteworthy that, presently, the Dublin III Regulation does

²⁸ In the joined cases of *Aranyosi and Căldăraru*, the CJEU held that a real risk of inhuman or degrading treatment can require a Member State to refuse extradition under a European Arrest Warrant. Thus, even in the case of a harmonized area of EU law, mutual trust can give way to the respect of fundamental rights. See *Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru*, [2016] ECLI:EU:C:2016:198.

²⁹ Moragay and Rapoport 2015, see *supra* note 6.

³⁰ *Ibid.*, p. 640.

³¹ *Ibid.*, p. 651.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*, p. 653.

not require Member States to take into consideration asylum-seekers' consent, except in the case of the humanitarian discretionary clause under Article 17 (2).

According to this proposal, Member States would be penalised for not taking in the promised quotas and would, thus, be incentivised to improve their asylum conditions and attract more refugees and asylum-seekers in order to fill in the promised quotas.³⁵ On the other hand, Member States' preferences should also be taken into consideration and where there is a more or less good match between individual refugees' and asylum-seekers' preferences and those of a specific country, the transfer should operate.³⁶

This proposal is loosely based on the European Relocation from Malta (EUREMA) program in 2009, in which 12 EU Member States participated voluntarily in order to alleviate the burden Malta had incurred due to high numbers of refugees and asylum-seekers. According to the European Asylum Support Office (EASO), while some Member States did not conform to the initial quotas promised, out of the 253 individuals envisaged for relocation, 227 benefited from this pilot project and were transferred from Malta.³⁷ The project was extended and EUREMA II, which operated from 2012 until 2013, managed to transfer 217 of the envisaged 306 refugees and asylum-seekers.³⁸ Although the pilot project was limited in number, it does provide for a strong alternative to the Dublin System.

If the Dublin System is to receive an overhaul, burden-sharing should be the basis of the new reform. Indeed, the European Commission has recently proposed (yet another) recast Dublin Regulation in 2016.³⁹ According to the proposal, "the new Dublin scheme will be based on a European reference system from the start of its implementation with an automatically triggered corrective solidarity mechanism as soon as a Member State carries a disproportionate burden".⁴⁰ However, it keeps the old criteria and setting, while the main addition is a corrective allocation mechanism⁴¹ which would be triggered when a particular Member State is faced with disproportionate numbers of applications for international protection for which that Member State is responsible.⁴² Member States not participating in the allocation procedure would be obliged to make a solidarity contribution of 250,000 Euros per each applicant who would have otherwise been allocated to that Member State.⁴³

There is definitely a striking resemblance between the law and economics solution described earlier and the above proposal by the Commission. However, it has been criticised in a very recent European Parliament briefing⁴⁴ for not providing a complete overhaul of the system and not instead creating, as the Parliament had previously suggested⁴⁵, a centralised EU system for collecting applications and

³⁵ Ibid, p. 655.

³⁶ Ibid, pp. 655-656.

³⁷ European Asylum Support Office (2013), Annual Report on the Situation of Asylum in the European Union 2012, Publications Office of the European Union, Luxembourg.

³⁸ European Asylum Support Office (2012), EASO Fact Finding Report on Intra-EU Relocation Activities from Malta.

³⁹ Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final, Brussels, 4.5.2016.

⁴⁰ Ibid, p. 4.

⁴¹ Ibid, Article 34, p. 67.

⁴² Ibid.

⁴³ Ibid, Article 37 (3), p. 69.

⁴⁴ Reform of the Dublin System, 10 March 2017, available online at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI\(2016\)586639_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI(2016)586639_EN.pdf) (6 May 2017).

⁴⁵ European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)), para. 38.

allocating responsibility. The proposal has also been criticised by the Committee of Regions,⁴⁶ the European Economic and Social Committee,⁴⁷ national parliaments,⁴⁸ the European Council on Refugees and Exiles⁴⁹ and the EU Agency for Fundamental Rights,⁵⁰ amongst others, citing lack of emphasis on refugees' and asylum-seekers' individual situations and on the child's best interests. The corrective allocation mechanism, on the other hand, has been welcomed as a major improvement. It is now to be seen whether this new revised instrument will, if it comes into force in this form, overcome the faults of its predecessors and whether it will protect human rights accordingly.

The success of a potential Dublin IV Regulation would, of course, also depend on the Court's jurisprudential output on the matter and on its interpretation of this future instrument. However, in the light of the Court's recent judgment⁵¹ concerning Slovakia's and Hungary's challenge of the 2015 Council Decision⁵² to relocate migrants and refugees from Italy and Greece to other EU Member States, it seems that the Court is already laying the groundworks for the future recast Regulation in what concerns one decisive aspect – the principle of solidarity. The Court finally found that the principle of solidarity, found in article 80 TFEU, is a source of legally enforceable obligations for EU Member States.⁵³ Thus, at least in the case of solidarity, the issue has been clarified and a solidarity mechanism such as that described above can benefit from the Court's jurisprudential support.

⁴⁶ Opinion factsheet available online at: <http://cor.europa.eu/en/activities/opinions/pages/opinion-factsheet.aspx?OpinionNumber=CDR%203267/2016> (6 May 2017).

⁴⁷ The opinion is available online at: <http://www.eesc.europa.eu/?i=portal.en.soc-opinions.39248> (6 May 2017).

⁴⁸ Six Member States (Hungary, Slovakia, Czechia, Poland, Romania, and Italy) have submitted reasoned opinions that the proposal does not comply with the principle of subsidiarity. They are available online at: <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20160270.do#dossier-COD20160133> (6 May 2017).

⁴⁹ ECRE Comments on the Commission Proposal for a Dublin IV Regulation, October 2016, available online at: <https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf> (6 May 2017).

⁵⁰ Opinion of the European Union Agency for Fundamental Rights on the impact on children of the proposal for a revised Dublin Regulation (COM(2016)270 final; 2016/0133 COD), available online at: <http://fra.europa.eu/en/opinion/2016/fra-opinion-impact-children-proposal-revised-dublin-regulation> (6 May 2017).

⁵¹ Joined cases C-643/15 and C-647/15 Slovakia and Hungary v. the Council, [2017] ECLI:EU:C:2017:631.

⁵² Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248/80.

⁵³ For an analysis of the decision, see Daniela Obradovic, Cases C-643 and C-647/15: Enforcing solidarity in EU migration policy, European Law Blog, 2 October 2017, available online at: <http://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy/> (6 May 2017).