

A CRITICAL ANALYSIS OF THE DUBLIN-IV PROPOSAL WITH REGARDS TO FUNDAMENTAL- AND HUMAN RIGHTS VIOLATIONS AND THE EU INSTITUTIONAL BATTLE: HOW CAN WE OVERCOME THIS OUTDATED DUBLIN MODEL?

DAVID KLAIBER*

The Dublin regime – in short – determines which EU Member State is responsible to examine an application for asylum. The former Dublin Convention was signed in 1990 and first came into force in 1997. Today, 22 years and several legislative generations later, the Dublin regime is determined by the Dublin-III Regulation. After the 2015 so called ‘migration crisis’ and the collapse of legal principles in the Regulation, European legislators called for a reform of the Dublin system. Beside the will to reform the whole Common European Asylum System (CEAS), special focus lies on the reform of the Dublin-III Regulation. Therefore, the Commission issued its proposal for a new Dublin-IV Regulation. The proposal led to enormous controversies not only in the academic world but also in the European Institutions themselves. The aim of this article is first to analyse the Dublin-IV proposal against the background of fundamental and human rights with the incorporation of relevant case law of the ECJ and the ECtHR. The analysis will show several such violations and contradictions to the relevant jurisdiction. Furthermore, it will be demonstrated that the European Institutions are far from consent with regards to the Commission’s proposal. By showing the different approaches of the Institutions and of the academic world, finally, this article will provide guidelines on how to reform the Dublin regime adequately and in accordance with fundamental and human rights.

1 INTRODUCTION

Today we have had a frank discussion on fundamental aspects of the asylum reform. We are no longer in the crisis situation we faced in 2015, but we must still make sure we are ready to face any future crisis. Discussions will now be continued by EU leaders on the basis of the work done so far.¹

The foregoing quote reveals two valuable aspects: First of all, the Member States of the European Union do not face a ‘migration crisis’ anymore. Secondly, the EU is nevertheless eager to reform the asylum and migration system in case of future migration influx. While a question mark can already be put behind the wording ‘migration crisis’ – meaning was it really a crisis caused by migrants or not rather than by the EU itself? – an exclamation mark

* Policy Legal Adviser to the Bündnis 90/Die Grünen Parliamentary Group in the German Bundestag. This article reflects exclusively his personal opinion. The author would like to thank Professor Xavier Groussot at Lund University, Faculty of Law, who supervised the original thesis, from which this article derives. I also want to thank Jonah Mendelsohn for his very valuable feedback.

¹ Valentin Radev, Bulgarian minister of interior during the Justice and Home Affairs Council on the 04 and 05th of June 2018, see ‘Tsetska Tsacheva, ‘Justice and Home Affairs Council, 04-05/06/2018’ (Justice and Home Affairs Council, 2018) <<https://www.consilium.europa.eu/en/meetings/jha/2018/06/04-05/>> accessed 22 September 2019.

follows the ‘from the scratch’ reform approach of the European Union institutions regarding the current secondary law instruments. Presently, 21 legislative procedures on a new policy on migration are pending.²

In this paper I will first of all explain the fundamentals of the Common European Asylum System (CEAS) (2.). Secondly, I will elaborate, in what seems to play only a secondary role in the reform plans, even though it is primary law: The fundamental and human rights enshrined in the Charter of Fundamental Rights of the European Union (‘the Charter’). The European Convention on Human Rights (‘ECHR’) – even though not primary law – also plays a major role, as every European Union Member State is a contracting party. In light of the foregoing, I will undergo a critical legal assessment of the so called ‘Dublin-IV’ reform plans with regards to fundamental and human rights (3.). Many voices of other European institutions have been raised against the Commission’s proposal of Dublin-IV since 2016. Under point 4. I will therefore present these views and critically evaluate their reasonableness. What lessons learned can we take from the different approaches of the institutions and what can be a way out of the Dublin system? This questions will be examined in point 5. Finally, a conclusion will form point 6.

2 THE MOMENTARY LEGAL FRAMEWORK OF THE CEAS

Based on Articles 67(2), 78 and 80 of the TFEU and Article 18 of the Charter, the European Union, institutions have the competence to legislate and develop a common policy on asylum, subsidiary protection and temporary protection. The goal is to offer appropriate status to all third-country nationals who need international protection and to ensure the principle of *non-refoulement*. This principle is enshrined in Article 33(1) of the Geneva Convention of 28 July 1951.³ As neither the term ‘refugee’ nor the term ‘asylum’ are defined in the TFEU or the Charter, they both refer to the Geneva Convention of 28 July 1951⁴ and the Protocol thereto of 31 January 1967. Thus, all policy of the EU must be in consistency with the latter.⁵

Under this premise, the EU has provided several legal instruments in the area of asylum and migration. The most important – but surely not exclusive – ones are the following: The Dublin-III Regulation, the EURODAC Regulation (recast), the Qualification Directive (recast), the Asylum Procedures Directive (recast) and the Reception Conditions Directive (recast). All of the mentioned are currently under revision procedure by different proposals of the European Commission. To make them directly applicable, the Asylum Procedure Directive and the Qualification Directive are going to be transformed into Regulations.⁶ Without doubt, the reform of the Dublin-III Regulation (‘Dublin-IV’) is not only the one

² ‘Legislative Train Schedule - Towards a New Policy on Migration’ (*European Parliament*, 2019) <<http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-single-permit-directive—possible-review>>.

³ ‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

⁴ Hereinafter ‘The Geneva Convention’.

⁵ European Parliament, ‘Migration and Asylum: A Challenge for Europe’, 2018, 3.

[http://www.europarl.europa.eu/RegData/etudes/PERI/2017/600414/IPOL_PERI\(2017\)600414_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/PERI/2017/600414/IPOL_PERI(2017)600414_EN.pdf).

⁶ See for the aforementioned legislation and their actual review process: ‘Legislative Train Schedule - Towards a New Policy on Migration’ (n 2).

with the most impact but also the most controversial. The *de-facto* collapse of Dublin-III in the year 2015 and following is the cause of increasing calls for reformation⁷ or even abandoning it.⁸

The so called Dublin-III Regulation of 2013 is the third generation instrument of its kind and established the criteria and mechanisms for determining the Member State responsible for examining an application for international protection. One of its main goals is that an application for international protection shall be examined by a single Member State. It imposes obligations on Member States responsible under the Regulation to ‘take charge’ of an applicant who has lodged an application in a different Member State or to ‘take back’, *inter alia*, applicants whose application is under examination and who made an application in another Member State or who are on the territory of another Member State without a residence document. The regulation applies not only to Member States of the European Union but currently also to Norway, Liechtenstein, Iceland and Switzerland.⁹ Denmark is not bound by Dublin-III (recital 42) but by an agreement.¹⁰ Article 13 of the Dublin-III Regulation forms the infamous ‘irregular first entry’ principle, where the Member State of the irregular border crossing is the responsible one to hear the asylum case, which among other factors led to drastic overcapacity problems in the EU external border countries.

3 THE REFORM PLANS OF THE DUBLIN SYSTEM

The focus will now turn to the reform plans of the Dublin system. The European Commission has issued reform proposals on all mentioned legal instruments except the Family Reunification Directive. This already shows the importance and priority approach of the European Commission towards a new CEAS. The following analysis will be limited to the proposal of a Dublin-IV regulation, as it created and still creates the most controversies between the European Union and the Member States. Furthermore, the Dublin system has the biggest impact on arriving asylum seekers in the territory of the European Union, as it allocates them to the responsible Member State, thus determining their lives until the asylum procedure is completed.

⁷ European Parliament, ‘Migration and Asylum: A Challenge for Europe’ (n 5) 8.

⁸ ‘[...] put an end to the practices shifting the responsibility to the Member States of first entry, or outside the Union.’, Berfin Nur Osso, ‘Towards the CEAS Reform: What Can Arendt Teach Us About the Dublin IV Regulation’, *Jus Gentium* (Tampere, 2018), <https://doi.org/10.13140/RG.2.2.16777.13923>, 14.

⁹ Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway [2001] OJ L 93/40; Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2008] OJ L 53/5; Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community, and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2009] OJ L 161/8.

¹⁰ Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention [2006] OJ L 66/38.

3.1 THE COMMISSION'S DUBLIN-IV PROPOSAL (D-IV) – A CRITICAL ANALYSIS

The proposed Dublin–IV Regulation¹¹ builds up, overthrows and modifies the Dublin-III regulation. In the following, I will first list the relevant proposed provisions. Hereinafter, I will give a legal assessment of how fundamental and human rights are touched upon or possibly violated.¹²

The first important major change of the proposal lies within the forward displacement of an inadmissibility procedure by changing Art. 3(3) D-IV. The new provision cites Article 33(2)(b)-(c) and Article 31(8) of the 2013 Asylum Procedures Directive. According to the Commission, this procedure is meant ‘to prevent that applicants with inadmissible claims or who are likely not to be in need of international protection, or who represent a security risk are transferred among the Member States’.¹³ Basically, this provision states that ‘before the start of the process of determining the Member State responsible, the Regulation introduces an obligation for the Member State of application to check whether the application is inadmissible, on the grounds that the applicant comes from a first country of asylum or a safe third country. If this is the case, the applicant *will be returned* to that first country or safe third country, and the Member State who made the inadmissibility check will be considered responsible for that application.’¹⁴ *Young* sees the *non-refoulement* principle of Art. 33(1) of the 1951 Refugee Convention endangered¹⁵ – one of the cornerstones of international asylum rights: If a Member States does not fully examine a substantive claim of an asylum seeker, the individual cannot become beneficiary of international protection. Consequently, the applicant’s repatriation to the country of origin cannot be challenged as *refoulement*, nor will he or she have the opportunity to establish that it is *refoulement*.¹⁶ This new concept of obliging Member States to send applicants back to third countries does not exist at the moment. It is left to the Member State to decide, if and if so, when they will apply their national laws regarding third countries.

In a next step, Art 3(4) D-IV declares the Member State responsible for the application, which considers the latter inadmissible or examines an application in accelerated procedure pursuant to Art. 3(3) D-IV. Finally, Art. 3(5) D-IV provides an ‘eternity-clause’ and makes the Member State which has examined an application for international protection responsible for examining any further representations or subsequent application of that applicant. This happens irrespective of whether the applicant has left or was removed from the territories of the Member State.

The next crucial change concerns Art. 9(1) D-IV which provides that the criteria for determining the Member State responsible shall be applied *only once* in the order in which they

¹¹ 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/2016/0270 final - 2016/0133 (COD).

¹² The following analysis is inspired by ECRE, ‘ECRE Comments on the Commission Proposal for a Dublin IV Regulation’ (2016) <<https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf>>.

¹³ D-IV (n 11), recital 17.

¹⁴ D-IV (n 11), 15.

¹⁵ Sophie Capicchiano Young, ‘Dublin Regulation IV and the Demise of Due Process’, *Immigration, Asylum and Nationality Law (J.I.A.N.L.)* 31, no. 1 (2017) 34, 37.

¹⁶ *ibid.*

are set out in Chapter III. Consequently, this carves the procedure of responsibility in stone as the wording of the proposed Art. 9(1) D-IV leaves no room for interpretation.

There is a serious threat of violations of Charter provisions regarding this ‘one shot’ procedure. First of all, despite the fact that the CJEU ruled in favour of an appeal possibility for an asylum seeker to contest the responsibility decision under Chapter III of Dublin III, the new Dublin IV proposal does not enlist such a remedy.¹⁷ While the wording of Art. 28(1) D-IV is nearly equal to the former provision of D-III, the new Art. 28(4) D-IV openly contradicts the *Ghezzebash* decision as it limits the scope of the effective remedy to an assessment of whether Articles 3(2) in relation to the existence of a risk of inhuman or degrading treatment or Articles 10 to 13 and 18 are infringed upon. There is no indication that the case law of the CJEU allows such a limitation of effective remedy. Also, Article 47(1) of the Charter grants an ‘effective remedy [to] everyone whose rights and freedoms guaranteed by the law of the Union are violated’. The limitation of contesting the responsibility application of a Member State endangers this fundamental right. Furthermore, Art. 9(1) D-IV will force Member States – especially these located at the external border of the EU – to raise their administrative resources significantly, as their responsibility decision becomes binding EU-wide irreversibly. It is highly unlikely, as could be witnessed in the years 2015 and following, that Member States at the external border invest into their administration by means of their national budgets. Thus, the ‘only once’ provision could lead to contradictions to the right of good administration. According to this provision, every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. Article 41 (1) of the Charter is however, according to the CJEU case-law, not addressed to the Member States. Such a right [to be heard in all proceedings] is however inherent in respect for the rights of the defence, which is a general principle of EU law. That right also requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision.¹⁸ Tendencies might be high, that the Member State with a high pressure of migration influx might declare itself not responsible for the application. In conjunction with slow procedures, these factors are highly likely to violate the right to good administration. Finally, the recast provision does not respect the circumstance that a personal situation of an applicant may have changed. With regards to family unity and the best interest of the child, Articles 7, 24 and 33 of the Charter are at stake. This derives from the ‘only once’ approach in Art. 9(1) D-IV. *Pro Asyl* mentions the following example: Under Dublin-III, if an asylum applicant travels from Italy to Sweden, where he has family relations, these circumstances are considered relevant for determining the responsible Member State (Italy or Sweden). If the asylum applicant then reaches Germany, again under Dublin-III, this could lead to Germany being the responsible Member State if family ties are established in its territory. The ‘only once’ approach in Art. 9(1) D-IV however would take the applicant’s chance away to be reunited with his family in Germany under the Dublin procedure.¹⁹ This

¹⁷ Case C-63/15 *Ghezzebash* EU:C:2016:409 paras 46 and 61 with regards to Article 12 Dublin III.

¹⁸ Case C-166/13 *Mukarubega. v Préfet de Police, Préfet de la Seine-Saint-Denis* EU:C:2014:2336, paras 43-48.

¹⁹ *Pro Asyl*, ‘Stellungnahme von PRO ASYL Zur Geplanten Reform Der Dublin-Verordnung (Dublin-IV, COM (2016) 270)’ (2016) <https://www.proasyl.de/wp-content/uploads/2015/12/Stellungnahme_Dublin-IV-PRO-ASYL.pdf>.

clear trend of hindering family bonds can also be witnessed with the removal of Art. 9(2) D-III, where authorities are obliged to respect evidence of family ties before a decision to take charge or take back the person concerned.

Even the rather sensitive matter of unaccompanied children is part of the Commission's will to reform the CEAS. In the new Art. 8(2) D-IV, the obligation of the Member States to ensure representation and assistance to unaccompanied children on their territory is limited to 'where an unaccompanied minor is obliged to be present.' In other words: Minors who participated in secondary movement and who are 'not obliged to be present' could be no longer entitled to the protection of assistance and representation. Another detail with a lot of impact brings the change of Art. 10(5) D-IV: This provision determines that the responsible Member State in the absence of a family member or a relative is where the unaccompanied minor first has lodged his or her application for international protection. While the mirror provision of Art. 8(4) Dublin III presumes in favour of the unaccompanied minor that this responsibility of the Member State must be in the minor's best interest, Art. 10(5) D-IV inverts this presumption, assuming that the decision of the Member State is in the minor's best interest.²⁰

A conflict of these described provisions with Art. 24(2) of the Charter is inevitable. This provision states that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. Charter provisions have to be applied as primary law, according to Art. 6(1) TEU. Both legal presumptions of Art. 8(2) and 10(5) D-IV shift the burden of proof to the minor. It cannot be in the child's best interest, where legal presumptions are not in his or her favour. The CJEU confirmed that '[...] unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State.'²¹ The only justification for this burden of proof shift can be read in Recital 20 D-IV, where the Commission is of the opinion that secondary movements of unaccompanied minors are not in the child's best interest. This explanatory attempt lacks of fundament though, as it does not explain, why the competent authorities are relieved from their *ex officio* responsibility enshrined in Art. 24(2) of the Charter.

Inaction can be witnessed in the area of unmarried partners in a stable relationship and same sex partners. Here, Art. 2(g) D-IV still leaves the discretion to the Member States and whether their law or practice treats the mentioned persons in a way comparable to married couples under its law relating to third country nationals. Furthermore, Art. 2(g) still excludes the reunification of adult children with their parents and leaves that matter to Art. 18 D-IV (dependant persons) and Art. 19 D-IV (discretionary clause).

In line with the case-law of the ECtHR, 'family' is regarded as a wide concept under Article 8 ECHR.²² Additionally, it becomes already apparent from the wording of Art. 7 of the Charter that 'family life' is a wide concept. Especially in countries with very conservative

²⁰ D-IV (n 11), art 10(5) '[...] unless that this is not in the best interest of the minor'.

²¹ Case C-648/11 *M.A. v Secretary of State for the Home Department* EU:C:2013:367 para. 55.

²² *Lebbink v. the Netherlands* App no 45582/99 (ECtHR, 1 June 2004), para 36; *Schalk and Kopf v. Austria*, App no 75/1995/581/667 (ECtHR, 22 April 1997).

views to same sex marriages or general mistrust of refugees and their religious marriages in their countries of origin (*ie* Hungary and Poland), a discretion clause can lead to different treatment of applicants, which are in tension or breach of the ECHR and/or the Charter. Consequently, where Member States have a margin of manoeuvre, the CJEU stated in the context of the Family Reunification Directive that this margin ‘must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof.’²³ The matter of family reunification and adult children is also left to exceptional circumstances (Article 18 D-IV) and discretion of the Member States (Article 19 D-IV). The scope of Art. 19 D-IV is now narrowed down, as it seems, to be a general clause for family matters, even though the provision in D-III does not limit the scope to family matters. Furthermore, now the discretionary clause can also be invoked *as long as no Member State has been determined responsible*. As recital 21 shows, the COM fears that the effectiveness and sustainability of the system could be undermined for examining an application lodged with it in cases when such examination is not its responsibility under the criteria laid down in D-IV. These restrictions may be justifiable under the law but may fuel severe integration problems and social exclusion. The Commission limits the positive effect for improving the chance of integration of applicants to the sibling(s) of the applicant.²⁴ A distinction between the reunification of siblings and the one of parents with their adult children seems arbitrary.²⁵ Both family ties are essential for the emotional and integrational status of the applicants and their family, especially where they shared the same destiny of war, famine, etc. The UNHCR therefore considers family unity crucial in providing “social, psychological, and economic support needed for effective integration” in the host country.²⁶

Another inaction, combined with the reformation of Dublin-III is the obligation to take back a beneficiary of international protection under certain circumstances, while the ‘systemic flaw’ exception is not applicable to these persons: Art. 3(2) D-IV is unchanged with regards to the systemic flaw principle, meaning that a transfer of an applicant is not permitted in risk of inhuman or degrading treatment within the meaning of Art. 4 of the Charter. As Art. 3(2) D-IV refers to the definition of ‘applicant’ in Art. 2(c) D-IV, only *applicants* for international protection but not *beneficiaries* of international protection are covered and protected by the ‘systemic flaw’ clause. In its detailed explanation of the specific provisions of the proposal, the Commission states that an obligation for the Member States responsible has been added to take back – under certain circumstances – a beneficiary of international protection. This is now codified in Art. 20(1)(e) D-IV in conjunction with Art. 26 and Art. 30 D-IV.

It becomes apparent, especially from German case law,²⁷ that Member States have the obligation under Art. 3 ECHR (and Article 4 of the Charter) to halt the transfers of people

²³ Case C-578/08 *Rhimou Chakroun v. Minister van Buitenlandse Zaken* EU:C:2010:117, para 43.

²⁴ D-IV (n 11), recital 19.

²⁵ Even though a distinction between siblings and adult children could be justified, there need to be substantive grounds for the distinction to be in compliance with the fundamental right of equality of Art. 20 of the Charter.

²⁶ UNHCR, ‘Integration – A Fundamental Component in Supporting Diverse Societies’ (2016) <<https://www.unhcr.org/56a9decf5.pdf>>.

²⁷ German Constitutional Court, Decision 2 BvR 273/16, 21 April 2016; Osnabrück Administrative Court, Decision of 4 January 2016, Az.5 A 83/15; Saarland Administrative Court, Decision of 4 January 2016, Az.

who enjoy international protection status where there is a risk of violation of being subject to torture or inhuman degrading treatment or punishment. In its *N.S.* judgement, the CJEU ruled that the Member States, including the national courts, may not transfer an *asylum seeker* where they cannot be unaware that systemic deficiencies would lead to a violation of Art. 4 of the Charter.²⁸ The ECtHR takes a different approach than the CJEU as the former is not bound by the ‘systemic flaw’ exception of Dublin-III.²⁹ In *Tarakhel v Switzerland*, the ECtHR made clear that the source of the risk of violation of Art. 3 ECHR is irrelevant to the level of protection guaranteed by human rights. Furthermore, a State is not exempted from ‘carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established.’³⁰ Even though in the cases of ‘Dublin-transfers’, Art. 4 of the Charter is used by the CJEU as the legal basis, the reasoning of the ECtHR can be found in Art. 19(2) of the Charter as well. The mentioned provisions are (partly) stemming from the *non-refoulement* principle. However, the *non-refoulement* has a wider application than being a mirror of Art. 4 of the Charter. For example, the right to a fair trial,³¹ the prohibition of slavery,³² the right to liberty,³³ the right to private life³⁴ and freedom of religion,³⁵ were upheld as being enshrined in the *non-refoulement* principle by both, the CJEU and the ECtHR. Finally, Recital 28 D-IV seems to acknowledge the need to respect fundamental rights where deficiencies or the collapse of asylum systems appear. As *ECRE* analyses correctly, beneficiaries of international protection are covered by Art. 26 and 30 D-IV – as both refer to Art. 20(1)(e) D-IV (“take back [...] a beneficiary of international protection”) – it is only consequent, to broaden the scope of Art. 3(2) D-IV in the sense that people with this status have to enjoy the same protection than “applicants” for international protection.³⁶ On the contrary, “an obligation for the Member State responsible has been added to take back a beneficiary of international protection, who made an application or is irregularly present in another Member State. This obligation will give Member States the necessary legal tool to enforce transfers back, which is important to limit secondary movements.”³⁷ This goes in line with the recent case law of the CJEU with regards to Art. 33(2)(a) of the directive on common procedures for granting and withdrawing international protection. The court ruled that a Member State is allowed “to reject an application for the

3K 86/ 15; Oldenburg Administrative Court, Decision of 4 November 2015, 12 A 498/15; Osnabrück Administrative Court, Decision of 17 December 2015, 5 B 432/15.

²⁸ Case 411/10, *N.S.* EU:C:2011:865, para 94.

²⁹ See Art. 3(2) Dublin III.

³⁰ *Tarakhel v Switzerland*, App no 29217/12 (ECtHR, 4 November 2014 Judgment), para 104.

³¹ Article 47 of the Charter and Article 6 ECHR, *Othman (Abu Qatada) v United Kingdom*, App no 8139/09 (ECtHR, 9 May 2012); *El Haski v Belgium*, App no 649/08 (ECtHR, 25 September 2012); *Al Nashri v Poland*, App no 28761/11 (ECtHR 24 July 2014).

³² Article 5 of the Charter and Article 4 ECHR, *Ould Barar v Sweden*, App no 42367/98 (ECtHR, 19 January 1999).

³³ Article 6 of the Charter and Article 5 ECHR, *Tomic v United Kingdom*, App no 17387/03 (ECtHR, 14 October 2003).

³⁴ Article 7 of the Charter and Article 8 ECHR, *F v United Kingdom*, App no 17341/03 (ECtHR, 22 June 2004).

³⁵ Article 10 of the Charter and Article 9 ECHR, *Z and T v United Kingdom*, App no 27034/05 (ECtHR, 28 February 2006). Notably, this case is cited by Advocate-General Bot in joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z*, para 71 on the concept of persecution for reasons of religion.

³⁶ *ECRE* (n 12), 18-20.

³⁷ D-IV (n 11), 17.

grant of refugee status as being inadmissible on the ground that the applicant has been previously granted subsidiary protection by another Member State, where the living conditions that that applicant could be expected to encounter as the beneficiary of subsidiary protection in that other Member State *would not expose him to a substantial risk of suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union.*³⁸ There is no reasonable explanation why beneficiaries of international protection should be exempted from this level of protection in D-IV, even though they are mentioned explicitly when it comes to transfer decisions.

The most striking changes in Dublin-IV are introduced by - what can be called – the ‘sanction approach’ in Art. 4, 5 and 20 as well as Recital 22 D-IV. While Art. 4 D-IV as a new provision sets out different obligations of asylum seekers in the Dublin procedure, Art. 5 D-IV follows with the sanction module, if the applicant is not acting in conformity with these obligations. The already mentioned Art. 20 D-IV then clarifies the procedures for persons ‘taken back’. These Art. 5 D-IV sanctions contain the mandatory use of the accelerated procedure upon return to the responsible Member State, the withdrawal of reception conditions except emergency health care if the applicant absconds and inadmissibility of information submitted after the Dublin interview. The new sanction approach in Dublin-IV clearly shows that the once ‘formalistic’ legal instrument of distributing applicants for international protection, becomes more and more a ‘substantive’ legislative piece. Article 4 can be understood against the background that the Commission fears an abuse of the Dublin system in case there are no consequences for not complying with the applicant’s obligation.³⁹

It is argued that the automatic sanction approach of D-IV can lead to a violation of Art. 31 of the Refugee Convention. This provision obliges States not to impose penalties, on account of their illegal entry or presence, on refugees under certain conditions.⁴⁰ In substance, Art. 20(5) D-IV withdraws all rights to an effective remedy under Chapter V of the Directive 2013/32/EU, where a third-country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document. As the rejection of an application could lead to a violation of the law, it remains unclear, how this provision can be interpreted in line with the right to a fair trial in Art. 47(1) of the Charter. This specific provision caused UNHCR’s significant concern and led to their suggestion, to delete Art. 20(5) D-IV.⁴¹ The biggest threat to a human rights violation forms Art. 5(3) D-IV. It deprives the applicant of any reception conditions, laid out in Art. 14 to 19 of the Reception Conditions Directive with the exception of emergency health care, or in other words: Schooling and education of minors, employment, vocational training, housing and health care. This ‘sanction reflex’ in a situation of non-compliance by the applicant, is in harsh

³⁸ Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim et al. v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov* EU:C:2019:219, para 103. (emphasis added).

³⁹ D-IV (n 11), 3.

⁴⁰ ECRE, ‘ECRE Comments on the Commission Proposal for a Dublin IV Regulation’, 2016, 23. <https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf>.

⁴¹ UNCHR, ‘UNHCR Comments on the European Commission 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’, 2016 1, 12. <https://www.refworld.org/pdfid/585cdb094.pdf>.

contradiction with Art. 1 of the Charter as it touches upon the dignity of an applicant: The applicant becomes pure object to the public authorities and is literally ‘left alone’ with the exception of emergency health care. On top, the term of emergency health care itself is neither defined in the D-IV proposal nor in Art. 19(1) of the Reception Conditions Directive. *Pro Asyl, Amnesty International et al.* therefore consider the exclusion of the named rights as not only unconstitutional but inhumane.⁴² Besides, the CJEU ruled in *Cimade and GISTI* that the Member States’ obligations to provide reception conditions to the applicant only cease ‘when the applicant has actually been transferred by the requesting Member State’.⁴³ This case-law has been confirmed in *Saciri*, where the Court referred to *Cimade and GISTI* and ruled that in ‘particular the requirements of Article 1 of the Charter of Fundamental Rights of the European Union, under which human dignity must be respected and protected, preclude the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive.’⁴⁴ Article 5(3) D-IV interferes with the Charter and settled case-law of the CJEU. It is obvious that beside Art. 1 of the Charter, the deprivation of Art. 14 to 19 of the Reception Conditions Directive also hinders the applicants to execute his rights under Art. 14 (Right to education) and Art. 34 (social security and social assistance) of the Charter. While the reform of other provisions may be object to political debates and different opinions, with Art. 5(3) D-IV, the Commission has overstepped the mark. There is no indication that this provision would hold in (national) Courts and it only provokes again the ever-lasting question of the principle of primacy of European Union law over national constitutional law: Where a national constitutional court rules that an applicant is granted more rights than envisaged in Art. 5(3) D-IV, this would infringe the Regulation and therefore create a conflict of both legal orders.

The reform plans are also directed against the appeal mechanisms of the Dublin procedure. In its new Art. 28(2) in conjunction with Recital 24, the Dublin-IV proposal now limits the right to an effective remedy against a transfer decision to seven days after the notification of a transfer decision. Article 27(2) Dublin-III gives the Member States a ‘reasonable time’ to contest the decision. Thus, Art. 28(2) D-IV is streamlined with the existing, least favourable national systems of Austria, Germany, the Netherlands, Bulgaria and Switzerland.⁴⁵ It comes with little surprise that the Commission chose a very narrow approach for the appeal deadlines, as this concept fits into the overall restrictive manner of the Dublin-IV proposal. Nearly half of the Member States have more favourable rules, with up to 60 days to lodge an appeal.⁴⁶ The CJEU did not render a judgement yet on what is considered to be a ‘reasonable time’ under Dublin-III. However, in *Dionf*, the Court found that a 15-day time-limit for appealing a decision in an *accelerated procedure* ‘appears reasonable

⁴² Pro Asyl and Amnesty International et al., ‘Flüchtlingspolitik in Europa - Nein Zu Dieser “Dublin IV Verordnung”!’, 2016 1, 3, <https://www.proasyl.de/wp-content/uploads/2015/12/Nein-zu-dieser-Dublin-IV-VO-Dezember-2016.pdf>.

⁴³ Case C-179/11 *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration* EU:C:2012:594, para 58.

⁴⁴ Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri and others* EU:C:2014:103, para 35.

⁴⁵ See exemplary for Germany, AIDA - Asylum Information Databasa, ‘Country Report : Germany’, 2017 , 16.

⁴⁶ See exemplary for Spain, AIDA - Asylum Information Databasa, ‘Country Report : Spain’, 2010, 29.

and proportionate in relation to the rights and interests involved.⁴⁷ There must be several concerns expressed with this 7 day approach. First of all, a transfer decision has a very strong impact on the applicant as he or she will be transferred to another country. Secondly, not all applicants are able to find legal assistance in seven days, who can contest the Dublin-decision, served by the public authorities. Thirdly, for the appointed lawyer(s), a seven days-period with often highly complex facts of the case and complicated legal questions, is hardly sufficient to work on professionally. These circumstance point to a violation of Art. 47 of the Charter and are clearly the consequence of the Commission's overall sanction approach of the Dublin-IV proposal.

As pointed out before, the remedy mechanism of Art. 28(4) D-IV limits the scope of appeal against transfer decisions to the assessment of risks of inhuman or degrading treatment under Article 3(2) or to infringements of the family provisions set out in Articles 10 until 13 and 18 D-IV. This is in direct contradiction to the *Ghezalbash* judgement of the CJEU, where it ruled that the Dublin III Regulation allows an applicant to challenge a transfer decision on the basis of misapplication of the responsibility criteria.⁴⁸ Such a scope of appeal, according to *AG Sharpston* stems from the respect of rights of defence and the right to be heard under Article 41 of the Charter in 'all proceedings likely to culminate in a measure adversely affecting a person.'⁴⁹ The wording of Art. 41 of the Charter is clear, thus there is no justification to limit the remedy possibilities to a certain catalogue. One inherent rule of law principle is the right to be heard and have an effective remedy against any measure adversely affecting a person (Art. 47 of the Charter). There is no reason why this principle should not be applied to applicants of international protection.

3.2 INTERIM RESULT: A DRACONIC, OBJECTIFYING, SANCTION MODEL

The legal analysis above has shown a clear shift in the new Dublin-IV proposal from a responsibility mechanism in Dublin-III, designed to allocate applicants of international protection to the responsible Member States, to a substantive sanction mechanism against people who search protection in the European Union. Nearly all examined provisions interfere with fundamental and human rights, which are protected by the Charter and the ECHR, respectively the case-law of the CJEU and the ECtHR. A lack of individual assessment makes room for a protective (border) approach. Despite the assertion in Recital 53 of D-IV that 'this Regulation respects the fundamental rights and observes the principles which are acknowledged, in particular, in the Charter of Fundamental Rights of the European Union', the close examination of the reform plans leads to the opposite assumption. The Commission's proposal aims at making an application for international protection as hard as possible. Every incentive to enter the European Union is choked off. The most blatant example is the deprivation of the reception conditions in case of secondary movement of an applicant, where only emergency health care shall be granted. Apart from clear legal indications of the Charter and the ECHR, the Commission's approach is morally deeply questionable. Modern legal systems are united in one standard: An individual shall never

⁴⁷ Case C-69/10 *Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2011:524, para 67.

⁴⁸ Case C-63/15 *Ghezalbash* EU:C:2016:409 paras 46 and 61.

⁴⁹ Case C-63-15, *Ghezalbash* EU:C:2016:186, Opinion of AG Sharpston, para 82.

become an object to the actions of a state.⁵⁰ Radović and Čučković observe correctly that ‘the [Commission’s] focus is thus on improving the position of MS and not the position of individuals [...]’.⁵¹ Therefore, it seems urgent to remind the European Union institutions of Art. 2 TEU:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

4 THE EUROPEAN INSTITUTIONS DISCREPANCIES: AN OVERVIEW

Instead of making applicants for international protection objects to the actions of the European Union and the Member States, a humanitarian and individualised concept should be adopted. As bearer of the Nobel Peace Prize, the EU certainly has a great responsibility towards the protection of human rights.

While the first part of this article consisted of a (rather technical) legal analysis, I will now analyse the proposed solutions of different EU institutions and how to overcome the flawed Dublin-III mechanism. The Dublin system had placed unprecedented pressure on southern border Member States, causing asylum seekers to be concentrated in those ones, while other Member States accepted varying levels of movement requests, creating a lack of solidarity and fairness in a system initially created to unite the EU. The problem of disproportionate pressure on some Member States’ asylum systems must be addressed, as it leads to the endangerment of fundamental rights of asylum seekers and creates political tensions between Member States. There have been several proposals on how to tackle the issue of the failure of the Dublin system. I will demonstrate their concepts and at the same time evaluate their reasonableness.

4.1 THE EUROPEAN PARLIAMENT I: ‘SUPRANATIONALIZATION’

A recently published European Parliament Briefing dealing with the Reform of the Dublin system, provides the essentials of the different views.⁵² First of all, the European Parliament in 2016 adopted a Resolution with clear indicators on how to reform the Dublin system.⁵³

⁵⁰ See Marx, who already concludes that applicants for international protection will be degraded to pure objects of the state: Reinhard Marx, ‘Reform Des Dubliner Systems – Kritische Auseinandersetzung Mit Den Plänen Der Europäischen Kommission’, *Zeitschrift Für Ausländerrecht Und Ausländerpolitik (ZAR)*, 2016 366, 375.

⁵¹ Maja Lukić Radović and Bojana Čučković, ‘Dublin IV Regulation, The Solidarity Principle and Protection of Human Rights - Step(S) Forward or Backward?’, *Eu and Comparative Law Issues and Challenges Series*, no. 2 (2018) 14.

⁵² Anja Radjenovic, ‘Reform of the Dublin System’ (2019) <[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)>.

⁵³ European Parliament, ‘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))’ (2016)

Diametrically opposed to the Commission's view⁵⁴, the European Parliament is open to the idea to revise the 'first-entry' principle in favour of a central collection of applications for international protection at a Union level. This approach 'supranationalizes' the CEAS, because the individual would seek asylum in the Union and not in a single Member State. In order to achieve this, a central system for the allocation of responsibility shall be established. The distribution would be based on certain thresholds per Member State relative to the number of arrivals. The latter would be involved fully into this centralised mechanism, while the distribution of the applicants itself is thought to function on a basis of 'Union hotspots'. To ensure family ties, the allocation mechanism must respect family unity and the best interest of the child.

The European Parliament's proposal can be considered as progressive in comparison with the Commission's approach. It has – at its core – the necessary idea to abandon the 'first-entry' principle. *Di Filippo* aims in the same direction with the centralized proposal, calling it 'ambitious pragmatism'.⁵⁵ Not only would this change of procedure take away the pressure from the countries of the external border of the EU but also the incentive of arriving applicants to engage into secondary movement. Inversely, the Member States, which underlie great pressure in the case of irregular high migration influx, are not tempted to a 'laissez faire' politics. In other words: To not register arriving applicants. Another positive fact is the extended recognition of family ties and the right of the child.

One of the down-side however is, that the proposal of the European Parliament lacks concreteness. It remains open, how the Member States are involved in this idea of centralization. Furthermore, this approach runs the risk of creating exactly the same weaknesses as the momentary Dublin system with regards to the proposed 'Union hot spot' mechanism: The European Union has no own sovereign territory. Such hot spots must be based on the voluntary participation of certain Member States. Considering a scenario like 2015, these hot spots would very likely collapse in the same manner as some countries like Italy or Greece did back in the time. Despite the cursoriness of the European Parliament's resolution, it must be acknowledged that it is, after all, a *European* concept.

4.2 THE EUROPEAN PARLIAMENT II (LIBE)⁵⁶: A GENUINE LINK

In a report from 2017⁵⁷, the LIBE committee made concrete proposals on how to reform the Dublin Regulation. First of all, asylum seekers who have 'a genuine link' with a particular Member State should be transferred to it. This is the first relocation criteria. If there is no such link, a distribution key decides automatically, to which Member State the applicant will be sent. Here, the asylum seeker has the option to choose between four countries, which, according to the distribution key, received the fewest applicants yet. However, the countries

<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0102+0+DOC+PDF+V0//EN>>.

⁵⁴ See the first part of this article.

⁵⁵ Marcello di Filippo, 'Dublin "Reloaded" or Time for Ambitious Pragmatism?' (*EU Immigration and Asylum Law and Policy*, 2016) <<http://eumigrationlawblog.eu/dublin-reloaded/>> accessed 22 September 2019.

⁵⁶ Civil Liberties, Justice and Home Affairs Committee of the European Parliament.

⁵⁷ Cecilia Wikström, 'LIBE Committee Report A8-0345/2017 on the 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' (2017).

of first arrival must register all asylum-seekers and check their fingerprints as well as the likelihood of an applicant being eligible for international protection. Additionally, applications with a very small chance of receiving international protection, are examined in the country of arrival. Family and children interests should be always a priority to the examining country. When it comes to incentives and disincentives, a clear system should be established to avoid absconding and secondary movement. Another new approach would be the sanctioning of frontline Member States that fail to register applicants with a stop of the relocation system. Inversely, Member States who refuse to accept relocation of applicants, would face limits on their access to EU funds.

Following up on its resolution, the LIBE committee's approach abandons the centralized idea of collecting all asylum applications and process them on a Union level with the constant participation of the Member States. Now, a 'genuine link' shall decide, where applicants should and could file their request for asylum. In the light of feasibility, the LIBE's proposal is more realistic than the original European Parliament's one. This does not mean that it is necessarily more favourable. With respect to the resources – especially the European Union's budget – however, a complete shift to a responsibility mechanism solely conducted by the European Union, seems rather far away. Therefore, the theory of a genuine link offers a positive first approach to respect and 'de-objectivise' asylum seekers. What remains open, is the effect of the 'four country mechanism', where applicants can choose in the lack of a genuine link. It is not too far-fetched to say that the countries with the least allocated applicants – from which they can choose – are very probable also the countries with the least favourable conditions.⁵⁸ Where the LIBE report falls back into old habits is the duty-catalogue for Member States of first entry as well as the sanction in the case of non-compliance. Especially the criterion of 'likelihood of an applicant being eligible for international protection' would bring back dark memories of the Dublin-III Regulation. When is an applicant 'likely' eligible for international protection? This approach drifts again away from an individualized scheme to presumptions against applicants that they might have no right to enjoy protection. Finally, while the budget cutting sanction of countries, which refuse to take in allocated applicants, is positive, the reverse sanction mechanism is not. There is no apparent reason, why asylum seekers should be sanctioned by being obliged to stay in a frontline Member State, which fails to register them. When a frontline Member State actually fails to register the applicants, it is highly likely that there is already a disproportionate migration influx taking place. If the proposed sanction kicks in, it will only and again lead to scenarios like in 2015, where certain Member States were factually unable to handle the situation.

4.3 THE COMMITTEE OF REGIONS: 'INDIVIDUALISATION'

A 2016 opinion of the Committee of Regions (CoR) under Rapporteur *Bianco* concluded that the Commission's approach on reform of the Dublin Regulation is inadequate.⁵⁹ The CoR demands a highly individualised concept, where professional experience and subjective wishes of asylum seekers shall build the focus. This incentive approach would discourage

⁵⁸ As can be witnessed today in Italy, Hungary, Greece for example.

⁵⁹ Vincenzo Bianco, 'Opinion - Reform of the Common European Asylum System CIVEX-VI/013', 2016, 1.

secondary movement and at the same time avoid a hard sanctions approach. Additionally, in order to establish a Member State's real and current reception capacity, the number of arrivals in that country should also be taken into account, by incorporating this parameter into the reference key. Individualisation is also on the agenda of *di Filippo*, who suggests to consider language skills, previous study or work experience as well professional qualifications as factors to be respected and recognised for the allocation of a Member State to a certain country.⁶⁰

In contrast to the Commission, an individual mechanism seems the most promising option to solve irregular high migration influx. First of all, it comes closest to safeguard human rights by abandoning the objectifying sanction approach of the Commission's proposal.⁶¹ Secondly, the integration process sets in significantly earlier as, for example, language barriers are either not existent or easier to overcome. Another advantage of respecting professional skills is that even where communication might be an issue, a least common denominator can already be established by sharing a workplace: A Syrian cook in a Hungarian restaurant is unlikely to know the language but there is no reason to assume that he can't use the cooking tools as good as his Hungarian colleagues. Implicitly, incentives for secondary movements are reduced. Where asylum seekers can settle together with their family, share the language and/or professional experiences and even start to work, no plausible reasons seem apparent, to give up such a situation. Finally, it is naïve to assume that applicants of international protection will always and only aim for the 'generous' welfare states. In Germany alone, since 2015, nearly 400.000 refugees found work or an apprenticeship.⁶² The latter indicates that most refugees are eager to start working upon arrival, which means no less than the fact that they pay taxes and social security contributions. To individualize the allocation system must enjoy the benefit of the doubt as *a contrario* the 'classic' Dublin approach was proved to failure.

4.4 THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE (EESC): ANALYTICAL APPROACH

With its opinion on the CEAS reform⁶³, the EESC partly approves the Commission's proposal with slight modifications with regards to procedural and human rights. While the EESC is in favour of a more efficient and effective reform of the CEAS, meaning the support of improved and speed up determination processes for asylum seekers, the opinion also expresses the need to protect people's human rights. Concretely, 'provisions should be clarified and included on procedural issues, individual treatment of applications, maintenance of discretionary clauses, maintenance of the deadline for the cessation of obligation for a Member State to assume responsibility, the rights of applicants, and the limitation of the

⁶⁰ di Filippo (n 55).

⁶¹ di Filippo calls the Commission's proposal 'the strange idea of treating persons as objects', *ibid.*

⁶² Patrick Gensing, 'Keine "Märchenstunde" Über Flüchtlinge' (*Faktenfinder tagesschau*, 2018) <<https://faktenfinder.tagesschau.de/inland/kramer-fluechtlinge-arbeitsplaetze-101.html>> accessed 22 September 2019; Bundesagentur für Arbeit, 'Fluchtmigration Statistik' (2018) <<https://statistik.arbeitsagentur.de/Statischer-Content/Statistische-Analysen/Statistische-Sonderberichte/Generische-Publikationen/Fluchtmigration.pdf>>.

⁶³ José Antonio Moreno Díaz, 'European Economic and Social Committee Opinion CEAS Reform I SOC/543' (2016) <<https://webapi2016.eesc.europa.eu/v1/documents/eesc-2016-02981-00-00-ac-tra-en.docx/content>>.

corrective relocation mechanism.⁶⁴ The EESC further considers Article 5 D-IV (sanctions) as having disproportionate procedural and reception consequences which are not in line with the standards in the current Asylum Procedures –and the Reception Conditions Directive as well as with the Charter.⁶⁵ It also considers the admissibility procedure without prior analysis of family members in other Member States as being at odds with Art. 7 of the Charter and Art. 8 ECHR and criticises the safe third country concept, which could be discriminatory on the basis of nationality.⁶⁶ Finally, the EESC is in favour of keeping discretionary clauses for the Member States to determine themselves, whether they want to be responsible for the asylum seekers application.⁶⁷

I consider the EESC's critique of the Commission's proposal as a positive sign but not as too profound or constructive. While the EESC opinion can be read more as a legal analysis, there are no concrete proposals on how to achieve a functioning new system of allocation of responsibilities in the European Union. Considering the EESC's role, which consists of employer's and employee's representatives, especially a more integration motivated opinion would have been preferable. To find work, is often considered to be the first step of an integration process. However, the opinion demonstrates the consensus of many European Union institutions that the protection of human rights disappeared from the Commission's view entirely.

5 THE LESSONS LEARNED AND THE WAY OUT

'At the European Council of June 2018, and at each subsequent meeting, in October 2018 and December 2018, however, EU leaders failed to achieve a breakthrough on internal aspects of migration and the EU's asylum policy, showing remaining differences among Member States as regards, in particular, the reform of the Dublin Regulation.⁶⁸ This discord must be seen as a clear thread running through the EU institutions⁶⁹ and the Member States. We have seen that the Commission follows a fundamentally diametric approach than the other European Union institutions and stakeholders. Additionally, certain Member States take every chance to slow down or block the process of reforming the Dublin system.⁷⁰ Thus, a threefold problem structure is established since 2015: A minority of Member States is not willing to accept responsibilities of treating applications of international protection. The European Commission, giving in to these Member states, follows a hardliner approach which deprives individuals of fundamental and human rights. In contradiction hereto, this approach is heavily opposed, especially by the European Parliament, which also seeks to reform Dublin from the scratch, but with another vision. Polls have predicted that the far right (extremist)

⁶⁴ *ibid.*

⁶⁵ *ibid.*, 6.

⁶⁶ *ibid.* 9.

⁶⁷ *ibid.*, 8.

⁶⁸ Radjenovic, 'Reform of the Dublin System' (n 52), 11.

⁶⁹ See analysis above.

⁷⁰ See for example Hungary, Péter Szijjártó and Ministry of Foreign Affairs and Trade, 'There Are 15 Million Internal Refugees and People in Need of Humanitarian Aid Living in the Immediate Vicinity of Europe' (2018) <<http://www.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/there-are-15-million-internal-refugees-and-people-in-need-of-humanitarian-aid-living-in-the-immediate-vicinity-of-europe>> accessed 22 September 2019.

parties will gain significantly for the 2019 European Parliamentary elections.⁷¹ Now, after these elections, the group ‘Identity and Democracy’ was created, succeeding the European of Nations and Freedom group (ENF). It builds the fifth largest group in Parliament with 73 members and Italy’s Lega party as well as the National Rally in France and Germany’s AfD form the biggest part of it.⁷² There is clear evidence that these ‘Eurosceptics’ are united in opposing any liberal refugee policy in their Member States. More ironically, the more the European Parliament shifts to the right, the higher the probability that the Commission’s proposal will actually find consent. However, two key players have been left out: The European Court of Justice and the European Court of Human Rights. It is rather surprising, how the Commission seems to fade out both Courts. The Dublin-IV proposal likely violates Charter and ECHR provisions, as analysed above. Therefore, I suggest that the future negotiations of the European Union and the Member States should focus on an efficient reform of the Dublin system, instead of wasting more time and resources on provisions, which obviously are in contradiction to primary EU-Law as well as the ECHR.

In the light of the foregoing, a way out of Dublin can only be achieved by a drastic shift to a highly individualistic approach. Some proposals above have taken this into account already. This concept is not unknown either: In 1979, the UNHCR Executive Committee recommended already that the intentions of the asylum seekers as regards the country in which he wishes to request asylum should be taken into account. ‘Meaningful links’ between the asylum seeker and particular States could help to narrow down the responsible Member State.⁷³ One ‘extreme’ version of this meaningful link approach would be a ‘free choice’ model, where the applicant can actually decide freely, where to reside during his or her procedure. A free choice model has been described as the ideal type of light system.⁷⁴ Free choice in this context would save resources as a pre-transfer litigation as well as complex fact finding procedure simply disappear. Moreover, a full cooperation from the applicant can be expected and intra-EU smugglers are less likely to find ‘clients’.⁷⁵ In accordance with the ‘genuine link theory’, applicants of international protection should no longer be allocated to Member States because of the irregular entry principle. It was proven to be not only inefficient but also lead to the collapse in some states, where a proper care of asylum seekers was not possible anymore. The respect for refugee rights – at the same time – are incentives for the latter, not to engage into secondary movement. If a stable, common CEAS is established and the conditions in every European Union Member State are the same, unjustified absconding is likely to be reduced. Additionally, any kind of separation of families

⁷¹ ‘Poll: EPP Still the Biggest Group after EU Elections, Far-Right to Make Gains’ (*EURACTIV*, 2019) <<https://www.euractiv.com/section/eu-elections-2019/news/poll-epp-still-the-biggest-group-after-eu-elections-far-right-to-make-gains/>> accessed 22 September 2019.

⁷² European Parliament, ‘Parliament Group Priorities: Identity and Democracy’ (2019) <<https://www.europarl.europa.eu/news/en/headlines/eu-affairs/20190712STO56963/parliament-group-priorities-identity-and-democracy>> accessed 22 September 2019.

⁷³ UNHCR Executive Committee, ‘Refugees Without an Asylum Country No. 15 (XXX)’ (1979) <<https://www.refworld.org/docid/3ae68c960.html>> accessed 22 September 2019.

⁷⁴ Francesco Maiani, ‘The Reform of Dublin III Regulation’ (2016) <<http://www.europarl.europa.eu/committees/en/supporting-analyses-search.html>>.

⁷⁵ See the benefits of the ‘free choice’ approach explained and supported in: German Bar Association and others, ‘Memorandum: Allocation of Refugees in the European Union: For an Equitable, Solidaritybased System of Sharing Responsibility’ (2013) <<https://www.proasyl.de/material/memorandum-allocation-of-refugees-in-the-european-union-for-an-equitable-solidaritybased-system-of-sharing-responsibility/>>.

and/or children as well as involuntary transfers should be avoided. Not only is the separation of families connected with psychological consequences but also the cause of irregular movement, mainly to reunite with family members. Furthermore, an early warning system should be established, where states can issue emergency help requests to the European Union and/or EASO, stating that basic care of asylum seekers cannot be guaranteed anymore. This notification should under no circumstances be connected with sanctions. On the contrary, such a procedure can trigger means of an EU fund, where the Member States in need can receive means on the basis of solidarity.

6 CONCLUSION

With its Dublin-IV reform, the European Union and especially the European Commission demonstrate, how unforeseen challenges in migration movements can at the same time lead to challenges of fundamental- and human rights. Contrary to its assigned role as the ‘Guardian of the Treaties’, the European Commission became the ‘Attacker of the Treaties’.⁷⁶ With its severe change proposals, the Commission drafted a disproportionate reform which is unworthy in the light of the values, enshrined not only in the Treaties but also in the Charter, the ECHR and the case-law of Europe’s highest courts. It is therefore a welcoming fact that there is a European counterbalance in the form of the European parliament and other institutions, which do not jump on the bandwagon of single European far right governments and parties, who essentially challenge the CEAS as a whole.

A functioning system of future migration movements to Europe can only work, when human beings are treated as individuals and not as objects. It is thus the most favourable approach, to abandon sanctions and to link the desire for protection with individual characteristics of asylum seekers. In 2017 and 2018, an estimated number of 313.540 migrants and asylum seekers arrived in Europe.⁷⁷ In comparison: The EU has a population of a total of 508 million people.⁷⁸ Its smallest country – Malta, with roughly 467 thousand residents would be responsible for around 1600 asylum seekers, equalizing 0.34% of the population, if all arriving asylum seekers would be distributed equally to the Member States. On the other hand, countries like Hungary or Poland strictly refuse to take in *any* responsibility under the CEAS. It becomes apparent, that this is not a problem of the number of refugees but an inherent problem of the behaviour of these Member States, which disrespect the core values and responsibilities deriving from the Treaties and international obligations. Referring to the mentioned numbers, a quick integration process of applicants of international protection is undebatable more promising than a sanction approach, where secondary movement is the consequence and thus, an imbalance of the equal share of

⁷⁶ To that extent, the role of the Commission as the ‘Guardian of the Treaties is also compromised by Constantin Hruschka, ‘Dublin Is Dead! Long Live Dublin! The 4 May 2016 Proposal of the European Commission’ (*EU Immigration and Asylum Law and Policy*, 2016) <<http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/>> accessed 22 September 2019.

⁷⁷ Mark Leon Goldberg, ‘European Union Releases Facts and Figures for Migrant and Refugees Arrivals in 2018’ (*UN Dispatch*, 2018) <<https://www.undispatch.com/european-union-releases-facts-and-figures-for-migrant-and-refugees-arrivals-in-2018/>> accessed 22 September 2019.

⁷⁸ ‘Living in the EU’ (*European Union*, 2018) <https://europa.eu/european-union/about-eu/figures/living_en#tab-0-0> accessed 22 September 2019.

responsibilities between the Member States inevitable. It is a dangerous development of the European Commission to leave the sphere of fundamental and human rights for policy reasons. The Commission is well-advised to take the interventions of other institutions, NGOs and stakeholders seriously and to find a compromise which is worthy to be considered in the light of the Charter and the ECHR. Unfortunately, at the moment, this does not seem to be the case. In a December 2018 press release, the Commissioner for Migration, Home Affairs and Citizenship Dimitris *Avramopoulos* said: ‘Four years on, we are better equipped than ever to protect our external borders and address migratory challenges inside and outside the EU. The time has come to consolidate the remaining building blocks of a comprehensive migration, borders and asylum system for the long run. A constantly evolving geopolitical context shows us that we cannot wait to react, but that we have to be ready for the future already now.’⁷⁹

This sounds like a war to come – not like a humanitarian Union to protect individuals.

⁷⁹ European Commission, ‘Managing Migration: Commission Calls Time on Asylum Reform Stalling’ (2018) <http://europa.eu/rapid/press-release_IP-18-6627_en.htm> accessed 22 September 2019.

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