THE ROAD LESS TRAVELLED IN EU ASYLUM LAW: THE CJEU'S RESTRICTIVE WAY OF REASONING AND HOW A DIFFERENT APPROACH COULD STRENGTHEN HUMAN RIGHTS

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Many asylum cases present an opportunity for the European Court of Justice to promote and protect EU values such as human rights and the rule of law. Yet, in central issues on the EU asylum system, the Court has opted for careful and formal readings of law rather than exploring such perspectives. The Court's legal reasoning in asylum is examined by case analyses in NF v Council on the EU-Turkey Statement, X and X on humanitarian visas, and A.S. and Jafari on the EU asylum system. In free movement, the Court is considered a key driver of integration, whereas, in asylum law, it is seen as more restrictive. Rather than promoting EU integration and ensuring human rights protections, the Court grants discretion to the legislator or the executive. There are legitimate reasons why a different path has been taken in asylum. However, as a more extensive and dynamic method of interpretation could increase human rights protections, it is relevant to reassess the position of the Court in asylum law.

1 INTRODUCTION

This article reflects on the line of reasoning of the European Court of Justice (CJEU or the Court) in EU asylum law. Enshrined in international treaties and primary law, human rights in principle constitute powerful tools for judicial scrutiny. The open-endedness of many rules further means that the Court could help the harmonisation of asylum law. Nevertheless, in several cases involving possible human rights violations or putting the EU asylum system to the test, the Court has treated asylum law as a technical matter.[1] A different approach that interprets asylum law in light of human rights and constitutional principles is needed.

The Court's restrictive approach means that human rights protection is at risk when it avoids ruling on the substance, or when it does so but approaches the issues in a too formal way. Due to the EU's increasing powers, it is no longer just an economic organisation. It is an important political organisation that adopts policies in a wide range of areas that have implications for human rights. It is therefore important to reflect on how the Court shapes responses to migration and observes fundamental constitutional principles and guarantees.

Previous scholarship has argued that the expansive approach of the Court in free movement law may not be suitable in other areas, such as asylum. Scholars point to the legal and institutional differences and the political salience of asylum issues.[2] In the history of

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1 Iris Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law' in Tamara Capeta, Iris Goldner Lang, and Tamara Perišin, *The Changing European Union: A Critical View on the Role of Law and Courts* (Hart Publishing 2022).

2 See e.g. Daniel Thym, 'Between "Administrative Mindset" and "Constitutional Imagination": The Role of the Court of Justice in Immigration, Asylum and Border Control Policy' (2019) 44(2) European Law Review

European integration, migration of third-country nationals is a policy area permeated by distinct considerations. The third-country national has been conceptualized as a 'threat' to free movement and amplified the external borders.[3] On this basis, a more restrictive approach may be appropriate, as the legal foundations do not empower the Court to correct legislative choices similarly to fundamental freedoms.

While various scholars have provided valuable insights for the understanding of the Court's position, a remaining question, which this paper aims to answer, is how a more expansive method of interpretation could be used in asylum cases. This article aims to reveal the stakes and alternatives present in the argumentative paths not taken in asylum cases. I argue that the Court's formal and deferential method of interpretation could be replaced by a more teleological reasoning which would lead to more rights-protective outcomes. While considering the legitimate justifications for judicial restraint, this analysis highlights the need and possibility for a different reasoning in asylum that considers the human rights concerns at stake.

This article consists of five sections. The *second section* presents a set of central cases in EU asylum law that display judicial restraint. These are contrasted with the expansive interpretations met in free movement where the legal system was also put to the test. The *third section* explores the application of a more expansive and teleological reasoning in the asylum cases. The *fourth section* discusses different explanations for judicial restraint and human rights-based arguments. While more legal issues could be interpreted in light of EU values and principles, the EU needs to put human rights on top of its agenda to trigger this mode of reasoning. The *fifth section* is a conclusion of the findings and arguments of the article.

2 JUDICIAL APPROACHES TO FREE MOVEMENT AND ASYLUM

How the Court approaches legal issues and considers values or principles is important for the outcome of the case. In both asylum and free movement, as in EU law more generally, the legislation is written in such vague terms that the CJEU is often required to go beyond a mere textual interpretation of the law to reach a decision. Yet, the Court's rulings in these areas of EU law are generally based on different approaches and considerations. Certainly, there are nuances to both of these legal fields. However, this section shows that the teleological and value-based reasoning that is visible in free movement is sometimes missing in central asylum cases. While there may be legitimate reasons for varying approaches, they lead to different levels of rights protection and ultimately shape the legal systems in different ways.

2.1 EXPANSIVENESS IN FREE MOVEMENT

Expansive reasoning is found in many contexts in the EU, but it is most notable in the free movement case law. The internal market with the free movement rights for EU citizens is,

138; Thomas Spijkerboer, 'Bifurcation of people, bifurcation of law: Externalization of migration policy before the EU Court of Justice' (2018) 31(2) Journal of refugee studies 216.

[3] See e.g. Elspeth Guild, 'Promoting the European way of life: Migration and asylum in the EU' (2020) 26(5-6) European Law Journal 355, 357.

at least partly, a creation by the Court of Justice.[4] Through its expansive interpretation of the free movement of people, the CJEU has contributed significantly to shaping the EU as a zone where people can move freely.[5] The Court is considered to take an expansive approach when it interprets legal terms in a wider sense than the wording suggests or when the Court fills regulatory gaps by deciding the meaning of important words or concepts. This expansive approach appears in a wide range of cases, in all of which the Court was breaking new ground.

A few examples illustrate this. In *Antonissen*, the Court extended the meaning of 'worker' to also include work seekers.[6] Later, in *Grzelczyk*, the Court ruled that EU nationals, including non-economically active people, have a right to social security in other Member States.[7] The *Zambrano* case strengthened EU citizenship as the Court held that Article 20 TFEU precludes a Member State from denying residence to parents of minor EU citizens who have yet to exercise their right of free movement.[8] Furthermore, in *Carpenter*, the Court embarked on a line of jurisdiction that developed a concept of 'social citizenship' that moves away from the distinction between economically active and non-economically active citizens.[9] These cases, among others, have elevated the status of a Union citizen the 'fundamental status of nationals of the Member States'.[10]

The expansive rulings were possible due to interpretations that emphasised the legal aims of making free movement easier. The case of *Laval* serves as a good example of this legal reasoning.[11] In this case, the Court argued that the Posted Workers Directive could not be interpreted as allowing for provisions that go beyond the mandatory rules for minimum protection (paras 79–80). A different 'interpretation would amount to depriving the directive of its effectiveness' (para 80). This is not clear from the wording of the legislation but follows from a purposive interpretation that aims to remove obstacles to free movement. As a consequence, the Court limited the constitutional right to take collective action when it infringes on the right to free movement of services.

Since these cases, the Court has delivered some less expansive rulings. For instance, the Grand Chamber of the CJEU ruled in the case of *Dano* that Member States may reject claims of social assistance by EU citizens who have no intention to work and cannot support themselves.[12] This ruling was confirmed in *Alimanovic* where the applicant for social benefits had worked for 11 months.[13] Without recourse to the principle of proportionality, the Court held that the applicants were not entitled to benefits after six months. These examples of restraint do not mean, however, a retreat from previous rulings. There is a difference between

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[4] Thym, 'Between "Administrative Mindset" and "Constitutional Imagination" (n 2) 139.
[5] Spijkerboer (n 2) 16.
[6] Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* EU:C:1991:80.
[7] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Lovaine-la-Nueve* EU:C:2001:458.
[8] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* EU:C:2011:124.
[9] Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* EU:C:2002:434.
[10] See (amongst others) the following cases: Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* EU:C:2002:493; Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles* EU:C:2004:488; Case C-406/04 *Gérald De Cuper v Office national de l'emploi* EU:C:2006:491; Case C-127/08 *Blaise Beheten Metock and Others v Minister for Justice, Equality and Law Reform* EU:C:2008:449. See also Anja Wiesbrock, 'Granting Citizenship-related Rights to Third-Country Nationals: An Alternative to the Full Extension of European Union Citizenship?' (2012) 14(1) European Journal of Migration and Law 63.
[11] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* EU:C:2007:809.
[12] Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358.
[13] Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* EU:C:2015:597.

not extrapolating a principle further and retreating from it. If any of the previous cases were to come before the Court again it would probably not decide them any differently. The circumstances in *Dano* were different from *Grzelczyk* and in the case of *Brey*, the Court emphasised that what it held in *Grzelczyk*, remained valid law.[14]

The case law in free movement may have shifted slightly in recent years towards a less expansive and rights-sensitive interpretation, yet it continues to play an important role in the development of free movement law. A fairly new case demonstrating a somewhat expansive reasoning is *Coman*, in which the Court affirmed residence rights in EU countries (that do not recognise same-sex unions) to the spouse of an EU citizen who is exercising their right to freedom of movement.[15] Independent interpretations like these are used to harmonise EU law, even where they go against the politics of the majority in the Member States. These rulings hold important lessons for other legal fields in which judicial help for harmonisation might be needed. Yet, this path is less often taken in asylum cases.

2.2 JUDICIAL RESTRAINT IN ASYLUM CASES

Asylum law contains a vast number of cases, displaying both expansive and restrictive rulings by the Court of Justice. The CJEU has delivered judgments that enhance individual rights in relation to national authorities. This is notable in cases on the concept of a safe third country,[16] the Return Directive and the concept of detention.[17] Notwithstanding these cases, the overall picture is that the CJEU has not replicated the dynamism of the internal market in asylum cases. Observers argue that there is a noticeable trend towards treading carefully, with the Court referring to the position of the EU legislature or granting discretion to the Member States.[18] In several prominent rulings on legal aspects of the EU asylum system, the impression of judicial restraint on behalf of the Court has been reinforced. Examples of this that will be further explored below are *A.S.* and *Jafari* on the Dublin System,[19] *X and X* on humanitarian visas,[20] and *NF v European Council* on the EU-Turkey Statement.[21]

One difference between judicial approaches in free movement and asylum is how the Court contributes to EU integration. In the cases of *A.S. and Jafari*, the Court refrained from expressing itself on the principle of solidarity that could have improved the situation at the EU's external borders.[22] The Court argued that 'in light of the usual meaning of the concept of an 'irregular crossing' of a border, the crossing of a border without fulfilling the conditions imposed by the legislation applicable in the Member State in question, must be generally considered 'irregular' (para 61). When deciding upon its meaning, the Court remained close

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[14] Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* EU:C:2013:565.
[15] Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrari and Ministerul Afacerilor Interne* EU:C:2018:385.
[16] See Joined Cases C-411/10 and C-493/10 *N.S v United Kingdom and M.E. v Ireland* EU:C:2011:865.
[17] See Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others v Országos Idegenrendesszeti Föigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendeszeti Föigazgatóság* EU:C:2020:367; Case C-808/18 *Commission v Hungary* EU:C:2020:1029.
[18] Thym, 'Between "Administrative Mindset" and "Constitutional Imagination" (n 2) 3.
[19] Case C-490/16 *A. S. vs. Republic of Slovenia* EU:C:2017:585 and Case C-646/16 *Khadija Jafari and Zainab Jafari vs Bundesamt für Fremdenwesen und Asyl* EU:C:2017:586.
[20] Case C-638/16 PPU *X and X v État belge* EU:C:2017:173.
[21] Case T-192/16 *NF v European Council* EU:T:2017:128.
[22] Cases C-490/16 *A.S.* and C-646/16 *Jafari* (n 19).

to what it saw as the general objective of the Dublin system and emphasised the aim of establishing a predictable structure of responsibility, with the first state of entry being responsible for examining refugee applications.

The ruling is formal as the Court decided that the third-country nationals must be regarded as having crossed irregularly 'irrespective of whether the crossing was tolerated or authorised in breach of the applicable rules or whether it was authorised on humanitarian grounds by way of derogation from the entry conditions generally imposed on third-country nationals' (para 92). In contrast to the Advocate General's proposal, the Court interpreted irregular crossing in its legal context. The Court referred to the Schengen Borders Code which allows for a derogation of the entry conditions on humanitarian grounds, but only in the territory of the Member State concerned, not the territory 'of Member States' as a whole (para 80). The effect of this ruling is that Member States have to comply with a strict reading of the Dublin Regulation, regardless of the need for exceptions in times of mass influx.[23]

Furthermore, while the Court has in some asylum cases interpreted issues in light of human rights, there are cases where such considerations are absent. In *X & X*, the Court was asked to rule on the exceptional issuance of a visa with limited territorial validity for humanitarian reasons.[24] The case concerned a Syrian family who applied for a short-stay visa at the Belgian Embassy in Beirut. As the applicants intended to stay in Belgium when their short-term visa expired and apply for asylum, the Court viewed their application as an application for a long-term visa (para 43). Specifically, the Court held that such applications fell outside the scope of the Visa Code and were solely within the scope of national law (para 44). As a consequence, the Court was not competent to rule on the substantive issue.

Exceptions can be made for humanitarian visas, which the Court rejected. The Court argued that classifying the applications in question as applications for humanitarian visas, under Article 25(1)(a) of the Visa Code, would be contrary to EU law on several levels. It would be against the objective of the Visa Code, Article 79(2)(a) TFEU and the general structure of EU asylum law, notably Articles 1 and 3 of the Dublin Regulation and Articles 3(1) and (2) of the Asylum Procedures Directive (para 49). The reasoning is compelling but formal as it lacks concerns for the human rights issues at stake. The Court interprets the scope of secondary law and the possibility of humanitarian visas without considering the implications of the principle of non-refoulement.

The lack of human rights considerations was also visible in *NF v Council*, which concerned the EU-Turkey Statement.[25] The Court undertook a textual interpretation of the press releases made after the meetings with Turkey. Based on expressions such as 'leaders of the European Union' and 'Statement of the European Union Heads of State or Government', the Court argued that the Member States had not acted as the European Council in the meetings with Turkey (paras 49–51). The Court also found the terms 'Members of the European Council' and 'EU' in the Statement ambivalent. It implied that the Statement was concluded outside the procedures prescribed in Article 218 TFEU (para 56). These references could however also imply that the Statement did involve the EU.

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[23] See also Case C-670/16 *Mengesteab* EU:C:2017:587, decided on the same day as *A.S. and Jafari*. The three-month time frame established by *Mengesteab* limits the practical effects of *A.S. and Jafari* as the time period had expired for most of the migrants who crossed the Western Balkans route in 2015 and 2016.

[24] Case C-638/16 PPU *X and X* (n 20).

[25] Case T-192/16 *NF* (n 21).

Yet, the Court gave weight to the views of the EU institutions by referring to the Council's argument that the terms 'European Council' and 'EU' in the Statement amounted to simplified wording intended for the general public in the context of a press release and could not be taken literally (paras 57–61). As the Statement was not viewed as an act of the EU, the Court lacked jurisdiction and dismissed the case.

The reasoning is formal for several reasons. In contrast to the many free movement cases, the Court applied a strict method of interpretation focusing on the wording of the Statements rather than its effects on asylum law. The text of the Statement and its content attest to an intention of the parties to create binding commitments, which implicates the EU. The Statement carries legal effect on the EU asylum system as there is an agreement on repatriations of asylum seekers to Turkey. These were not considered by the Court, which almost exclusively relied on internal EU documentation to answer the question of authorship of the Statement.

In essence, whereas the CJEU has adopted an expansive approach to free movement, a different outlook defines the reasoning for asylum. It has taken a path of more formalistic and restrictive interpretations rather than exploring human rights instruments or values in its judgments. This cautious method of interpretation ensures greater executive discretion, even when human rights are at stake. It is explained by the structure of primary law which differs from the internal market and endows the legislature with a principled discretion.[26] Contradicting aims of stronger border controls and compliance with human rights law and the general political sensitivity of asylum law prevent an expansive case law. Yet, there is room for more deliberation on human rights issues in the case law, which I demonstrate in the following section.

3 THE LEGAL OPTIONS IN THE ASYLUM CASES: ALTERNATIVE WAYS OF REASONING

Judicial restraint limits the scope of conceptualisation and scrutiny of EU values such as human rights and the rule of law. There is a possibility for a more rights-sensitive approach in asylum law, which poses the question of how this could be practised in the cases studied. This section explores that possibility. The cases open for reflection on the functioning of the asylum system, the protection of rights and EU constitutional principles. By reflecting on these issues rather than making strict readings of law or by deferring to the Member States, more rights-protective outcomes can be reached. The following analysis shows how the Court could interpret the cases in light of EU principles and values and what difference that would make.

3.1 REFORM OR MAINTENANCE OF THE EU ASYLUM SYSTEM: THE *A.S* AND *JAFARI* CASES

The issue of how the EU should organise its asylum system had been up for debate for years when the CJEU ruled on the Dublin rules in the *A.S.* and *Jafari* cases. Observers argued that

[26] Thym, 'Between "Administrative Mindset" and "Constitutional Imagination" (n 2) 157.

the Dublin system did not work in practice and was unfair towards border states.[27] Even though the Court discussed the substance of the cases and the overall context, the method of interpretation was restrictive as the Court did not consider conflicting legal aims or the effects of the ruling on the functioning of the asylum system. By its inability to develop an adequate responsibility allocation mechanism since 1990, the legislator has proven that it is not capable of solving the issue. The Court could fill this gap to sever the 'Solomonic knot of Dublin'. A closer look at *A.S.* and *Jafari* discloses alternative ways of ruling that could be considered.

First, Advocate General Sharpston argued that the first state-of-entry rule did not apply in times of crisis. Her argument rested on the dual consideration that, firstly, the 'wave-through approach' of countries such as Croatia could not be classified as irregular and that, secondly, the Dublin system was set up for 'normal circumstances' while situations of 'mass inflow' were not covered.[28] The Court argued, by contrast, that the Dublin III Regulation was formed to cover crises as well. The early warning mechanisms cited by the Court as a mechanism to cope with crises was a watered-down outcome of the original Commission proposal to temporarily suspend the Dublin system in an 'urgent situation which places an exceptionally heavy burden' on a Member State.[29] In a sense, another interpretation by the Court would mean that the judicial branch would empower itself by replacing what people view as unfortunate political decisions.[30] Yet, such interpretations have been used in free movement when the interpretations otherwise would lead to unreasonable outcomes.

Second, the Advocate General also suggested that the Dublin III Regulation should be viewed independently from the Schengen Borders Code Regulation, which helped the judges in their interpretation of what 'irregular crossing' means.[31] Although the border crossings were not formally 'regular', AG Sharpston argued that the case was different in a situation of mass influx in which authorities 'actively facilitated both entry into and transit across their territories'.[32] The Court argued, by contrast, for an overarching coherence within the supranational legal order, by emphasising that other legal acts form part of the legislative context that influences interpretation, even though differences between the instruments could lead to different outcomes.

A third argument concerns the lack of constitutional imagination of the Court. The Court emphasised the aim of preventing secondary movements without exploring other perspectives. It was only in subsequent cases the Court recognised the conflicting aim of rapid processing of asylum claims.[33] What was at stake was not only the question of legal

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[27] See Daniel Thym and Evangelia Tsourdi, 'Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions' (2017) 24(5) Maastricht journal of European and comparative law 605; Violeta Moreno-Lax, 'Solidarity's reach: Meaning, dimensions and implications for EU (external) asylum policy' (2017) 24(5) Maastricht journal of European and comparative law 740.

[28] Opinion of AG Sharpston in Case C-490/16 *A.S.* and Case C-646/16 *Jafari* EU:C:2017:443, paras 155–190.

[29] 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 lodged in one of the Member States by a third-country national or a stateless person (Recast)' COM (2008)820 final, Art. 31.

[30] Daniel Thym, 'Court of Justice Judicial maintenance of the sputtering Dublin system on asylum jurisdiction: *Jafari*, *A.S.*, *Mengesteab* and *Shiri*' (2018) 55(2) Common Market Law Review 549, 558.

[31] Opinion of AG Sharpston in *A.S.* and *Jafari* (n 28) paras 121–141.

[32] ibid para 176.

[33] See Case C-670/16 *Mengesteab* (n 23) and Case C-201/16 *Majid auch Madzhdi Shiri v Bundesamt für Fredenwesen und Asyl* EU:C:2017:805.

responsibility but also of solidarity. The Court could have examined whether the first entry rule in the Dublin III Regulation was compatible with the principle of solidarity enshrined in Article 80 TFEU. This provision holds that the policies of the EU shall be governed by the principle of solidarity and fair sharing of responsibility. Based on Article 80 TFEU and Recital 25 of the Dublin III Regulation, the Advocate General referred to the principle of solidarity which enabled her to reach a different outcome than the Court.[34] Thus, the Court could have entered into a discussion on solidarity and responsibility sharing, which is the main point of disagreement among the Member States.

The Court underexposed the constitutional dimension of the case at hand. A different interpretation along the lines of the proposal of the Advocate General could have considered what serves integration best, adhering to Dublin III even where Member States no longer do so, or leading Member States out of the doomed Dublin system by identifying an integration interest through a solidarity argument. A functional interpretation could have built on this, and established exceptions based on Member States' willingness to side-step the state-of-first-entry rule and the situation for the Border States. The reluctance to do so is explained by the Court's 'administrative mindset'.[35] Typically, the Court focuses in asylum cases on what secondary law contains and leaves the reform of the system to the legislator. The wording of the provision and the manifold options of how to implement it do not guide the Court in a certain direction.[36] Rather than using this as an opportunity to explore values and principles, the initiative to revive the 'spirit of solidarity' is seen to rest with the political process. This is a reasonable position to take but departs from the Court's usual role in the EU.

3.2 THE SCOPE OF HUMAN RIGHTS-BASED REASONING: *X AND X*

While *A.S.* and *Jafari* raised questions about the Court's engagement with constitutional principles, *X and X* was concerned with the scope of EU law and the rights of asylum seekers.[37] The CJEU had the opportunity to establish a new and safe route for asylum-seekers to the EU. The Syrian family who applied for Belgian visas had been forced to return to Syria by the fact that they were not allowed to register as refugees in Lebanon and were not sufficiently prosperous to be able to maintain themselves in Lebanon without such registration. The CJEU abstained from any broader reflections on these issues but thanks to the Advocate General there is an opposing interpretation of EU law put forward to consider.

The Advocate General presented a ruling with the opposite outcome compared to the CJEU by, first, arguing that short-stay visas can be granted despite doubts of the applicant's intentions in humanitarian cases, and second, that after the visa expires the Syrian family will remain in Belgium based on their status as asylum seekers.[38] Therefore, he argued that the procedure concerns a short-stay visa.[39] AG Mengozzi also contended that 'by adopting a decision under Article 25 of the Visa Code, the authorities of a Member State implement EU

[34] Opinion of AG Sharpston in *A.S.* and *Jafari* (n 28) para 139.
[35] Thym, 'Between "Administrative Mindset" and "Constitutional Imagination" (n 2)
[36] Thym, 'Court of Justice Judicial maintenance of the sputtering Dublin system on asylum jurisdiction' (n 30) 561.
[37] Case C-638/16 PPU *X and X* (n 20).
[38] Opinion of AG Mengozzi in Case C-638/16 PPU *X and X* EU:C:2017:93.
[39] ibid para 88.

law for the purposes of Article 51(1) of the Charter and are, therefore, required to respect the rights guaranteed by the Charter'.[40] By viewing their application as an application for a short-stay visa, the EU Visa Code and the Charter of Fundamental Rights (CFR) would be applicable and thereby would render CJEU competent to rule on the substantive issues. This is important since the prohibition of refoulement would be deprived of any effectiveness if measures were not taken to ensure entry into a State for applicants who could otherwise be subjected to ill treatment.[41]

AG Mengozzi recalled the case *Hirsi Jamaa,* where the European Court of Human Rights (ECtHR) held that asylum seekers intercepted at sea cannot be sent back to Libya.[42] As they had been taken onboard an Italian military vessel and had been under continuous and exclusive Italian control, their applications fell under Italian jurisdiction, making the European Convention on Human Rights (ECHR) applicable.[43] The Member States could be under a similar obligation to issue a visa if there were substantial grounds to believe that the refusal thereof would violate the principle of non-refoulement. Still, on the issue of humanitarian visas, the ECtHR has reached a similar conclusion as the CJEU in *X and X*. In *M.N. v Belgium*, the ECtHR argued that it was not competent to rule on the matter since mere administrative control of Belgium over its embassies was found not to entail the exercise of jurisdiction.[44] The opportunity to take a more expansive approach was thus passed up also by the ECtHR.

A key issue in this case is that the possibility of applying for a humanitarian visa to apply for asylum has not been created in European law. Proposals to do so have been discussed but have only remained at the stage of discussion.[45] The CJEU could construct this possibility by interpreting EU law along the lines proposed by the Advocate General. Human rights-based arguments could shift the legal reasoning and lead to other outcomes. Both the CJEU and the ECtHR seem to have felt that they would have overplayed their hand if they had created the option of a humanitarian visa to apply for asylum. This is different from free movement cases where the CJEU has been keen on removing all obstacles to free movement in the EU. Applying this approach to asylum law would have allowed the CJEU to examine the consequences of *non-refoulement* in individual cases, which is needed when there are few legal channels for asylum seekers to travel and enter countries of protection. It might, however, be too politically explosive which explains the more cautious judicial approach. A different outcome needs legislative amendments to the current EU asylum law.

3.3 LEVEL OF DEFERENCE TO EXECUTIVE ACTORS: *NF V EUROPEAN COUNCIL*

In the case of the EU-Turkey Statement, the Court had the opportunity to rule on the legality of informal arrangements on readmission. The Court only has jurisdiction to review international agreements concluded by the EU according to Article 218 TFEU. This does not include informal readmission agreements. For some, the Statement simply reflects a

[40] Opinion of AG Mengozzi in *X and X* (n 38) para 84.
[41] ibid para 154.
[42] See *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012).
[43] ibid para 112-114.
[44] *M.N and Others v Belgium* App no 3599/18 (ECtHR, 5 March 2020) para 119.
[45] See Spijkerboer (n 2) 12.

political arrangement with no binding force.[46] This view is reflected in the judgment. Yet, others have considered it as an international agreement.[47] The Court overlooked important aspects of the Statement. A different reading of the Statement is possible and it would have enhanced the level of judicial scrutiny.

One alternative interpretation of the Statement can be made by focusing on the legal effects of the Statement. An act is reviewable by the Court if it is 'intended to produce legal effects vis-á-vis third parties'.[48] This is the case even though an act might be worded as non-binding.[49] As the Statement provided that all migrants would be returned to Turkey it seems clear that this was the intention. Moreover, the Statement has a legal effect on the EU asylum system as there is an agreement on repatriations of asylum seekers to Turkey. This is important to consider in relation to the *ERTA* doctrine, which is codified in Article 3(2) TFEU. It holds that whether a decision is a decision of the Council, or the Member States is governed by European law.[50] What is decisive is not the label of the Statement, but whether the decision implements a common policy or deals with a matter falling within EU competence. The rule is that once the EU implements a common policy in a certain field, the EU Member States no longer have the right 'to undertake obligations with third countries which affect those rules or alter their scope'.[51] Seen this way, it was not sufficient for the Court to consider merely who the signatories were.

Furthermore, a different interpretation could be made if the Statement was analysed in light of international rules on treaty-making.[52] Article 31 of the Vienna Convention on the Law of Treaties (VCLT) states that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. These rules are also relevant in the EU context. Eva Kassoti and Alina Carrozzini have argued that the text of the Statement, the subsequent practice of the parties in the application of the Statement and the principle of good faith, suggest that the Statement is attributable to the EU itself.[53] By reading the Statement it seems like the EU agreed to a number of agreements. EU institutions were involved in the negotiation with Turkey.[54] The EU also covered a significant part of the costs for implementing the Statement from the EU budget and the Commission was involved in the process of implementation. All these attest to the intention of the parties to create binding commitments. Even though

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[46] See Steve Peers, 'The draft EU/Turkey deal on migration and refugees: is it legal?' (*EU Law Analysis*, 16 March 2016) <http://eulawanalysis.blogspot.com/2016/03/the-draft-euturkey-deal-on-migration.html> accessed 1 October 2023; Gloria Fernández Arribas, 'The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem' (2016) 1(3) European Papers 1097.

[47] See e.g. Maarten Den Heijer and Thomas Spijkerboer, 'Is the EU-Turkey refugee and migration deal a treaty?' (*EU Law Analysis*, 7 April 2016) <http://eulawanalysis.blogspot.com/2016/04/is-eu-turkey-refugee-and-migration-deal.html> accessed 1 October 2023.

[48] Article 263(1) TFEU.

[49] Case C-355/10 *European Parliament v Council of the European Union* EU:C:2012:516 paras 80-82.

[50] Narin Idriz, 'The EU-Turkey Statement or the "Refugee Deal": The Extra-Legal Deal of Extraordinary Times?' in Dina Siegel and Veronika Nagy (eds), *The Migration Crisis?: Criminalization, Security and Survival* (Eleven Publishing, T.M.C. Asser Institute for International & European Law 2017) 9.

[51] Joined cases C-181/91 and C-248/91 *European Parliament v Council and Commission* EU:C:1993:271 para. 17.

[52] Eva Kassoti and Alina Carrozzini, 'One Instrument in Search of an Author: Revisiting the Authorship and Legal Nature of the EU-Turkey Statement' in Eva Kassoti and Narin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (T.M.C. Asser Press / Springer 2022) 245.

[53] ibid 254.

[54] Sandrino Smeets and Derek Beach, 'When success is an orphan: informal institutional governance and the EU-Turkey deal' (2020) 43(1) West European Politics 129.

they did not live up to the internal rules on treaty-making, according to Article 280 TFEU, the authorship is not affected as a matter of international law.[55] The Statement could therefore, contrary to the Court's judgment, constitute an international agreement.

In essence, a different reading of the Statement could be made by considering the legal effects, content, and involvement of EU institutions in the negotiation and implementation of the arrangement with Turkey. This is important since it would have made the annulment actions admissible, which in turn, would have allowed for a substantive review of the nature of the Statement, including its compliance with EU constitutional and procedural law and EU asylum and human rights law. The reason why the Court came to a different conclusion is because of its deferential approach to executive actors in politically sensitive matters. Rather than making its own assessment of the negotiation process and the implications of the Statement, the Court gave weight to the views of the actors who did not want to take authorship of the Statement. The formal approach and lack of consideration of values and rights limited the judicial scrutiny and empowered the Member States involved.

4 REASSESSING THE ROAD TAKEN BY THE CJEU IN ASYLUM CASES

While the previous section established how a different judicial approach would lead to more rights-positive outcomes in the asylum cases, a remaining issue is what argument could justify such an approach. Just because an interpretation is possible does not mean that it is preferable. The different legal aims of free movement and asylum are central to explaining the different judicial approaches. Based on the contradictory aims of asylum law, the Court cannot say that the EU has a mission to encourage immigration or to expand the fundamental freedoms of third-country nationals. It is, however, one of the fundamental purposes of the EU to create a space in which rights and common values are protected.[56] Yet even though the case studies show how broader teleological reasonings could have been used, there are several reasons why the Court may have avoided them. In this section, I will reflect on those reasons and discuss the legitimate justifications for different judicial approaches.

The issue of the proper role of courts connects to debates about the separation of powers and democracy. In the traditional position of the judiciary, courts are tasked with applying laws that have been passed by a democratically elected legislator on individual cases.[57] Due to the principle of legal certainty, a textual approach that remains close to the position of the legislator is preferred.[58] Yet the ambiguity of the legal provisions in asylum law means that the Court cannot avoid being normative and should explain why it pursues one objective over the other. Teleological reasoning is useful, or even necessary, in the EU because the legislation is often ambiguous, vague, and imbued with teleology. In the cases studied, the Court could consider the rights of asylum seekers based on the principle of

[55] Kassoti and Carrozzini (n 52) 254.
[56] See Articles 2 and 6 TEU.
[57] Panu Minkkinen, "'Enemies of the People'? The Judiciary and Claude Lefort's "Savage Democracy"" in Matilda Arvidsson, Leila Brännström, and Panu Minkkinen (eds), *Constituent Power: Law, Popular Rule and Politics* (Edinburgh University Press 2020) 38.
[58] Koen Lenaerts and José A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) 20(2) The Columbia Journal of European Law 59.

non-refoulement in *X and X*,[59] the effect different interpretations have on the principle of solidarity in *A.S* and *Jafari*,[60] and the legal effects of the EU-Turkey Statement on EU asylum policies in *NF*.[61]

Judicial reasoning can be seen as a continuation of the legislative process, as it allows courts to adjust legal principles according to how they play out. While the legislator is tasked with making legally unprecedented laws, the judiciary may develop the law gradually using existing legal sources.[62] The scope of the judiciary's decision-making powers includes deliberation on international human rights law. In this reading, there is a potential for judicial intervention based on rights and values.[63]

This democratic role is not merely theoretical.[64] The expansiveness of the Court in other contexts, most notably in free movement, is well-documented. The free movement cases show that the Court has often taken on a role of not merely applying or interpreting the law, but of expanding it. It has in such cases relied on the Treaty aims of making free movement easier. There is a distinct reason for value-based reasoning in asylum law. The EU institutions and the Member States are required to comply with human rights in all spheres governed by EU law, according to Articles 2 and 6 TEU and Article 51 CFR. The Court can apply a reasoning that examines the compatibility of legal measures with EU fundamental rights and freedoms, as well as key values and principles. Such reasoning is already applied in these cases by the Advocate Generals.

Teleological interpretation may be suitable to develop the law, but its use may also be subject to criticism, particularly when it is seen as expanding the role of the Court in making policy decisions. There are asylum cases where the Court has interpreted secondary law in light of human rights.[65] Nonetheless, there are important reasons why the Court may be reluctant to *generally* make expansive interpretations of asylum law.

The possibility of international law to counter EU legislative choices is limited. There is no inevitable primacy of individual rights over public interests. For instance, the European Court of Human Rights often recognises that 'as a matter of well-established international law and subject to its treaty obligations, a state has the right to control the entry of non-nationals into its territory'.[66] The Charter of Fundamental Rights is only applicable when Member States are implementing EU law and while the EU must respect human rights and contribute to their protection, the policy output may pursue other objectives as well.[67]

In this context, one must consider that the competing aims of EU asylum law have ensured a margin of discretion for Member States.[68] There is a distinct treaty regime for asylum law and policy, which prevents, in general, an approach similar to the one we have

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[59] Case C-638/16 PPU *X and X* (n 20).
[60] Cases C-490/16 *A.S.* and C-646/16 *Jafari* (n 19).
[61] Case T-192/16 *NF* (n 21).
[62] John Gardner*, Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012) 41.
[63] Minkkinen (n 57) 38.
[64] Minkkinen (n 57) 38.
[65] See e.g. Case C-36/20 PPU *Ministerio Fiscal* EU:C:2020:495 para 82, and Case C-72/22 PPU *Valstybės sienos apsaugos tarnyba* EU:C:2022:505 paras 58–64.
[66] See e.g. *Abdulaziz and others v United Kingdom* App nos 9214/80, 9473/81 and 9474/81 (ECtHR, 28 May 1985) para 67.
[67] Daniel Thym, *European Migration Law* (Oxford University Press 2023) 134.
[68] Sandra Lavenex, '"Failing Forward" Towards Which Europe? Organized Hypocrisy in the Common European Asylum System' (2018) 56(5) Journal of Common Market Studies 1195, 1196.

seen in free movement case law.[69] The constitutional principles of EU asylum law do not prescribe how open borders should be and thus the legislature benefits from the discretion to decide between different competing interests. The Treaties are not directing policy choices in a pre-determined direction of enhancing the rights of third-country nationals. If there is a distinctive rationale behind EU asylum law, it is protectionist. The aims of mobility and free movement within the Schengen area have led to an amplification of borders against countries outside Schengen. There is a foundational norm of protectionism in EU asylum law which builds on this distinction, and this in turn, limits the possibilities for judicial expansionism.[70] The initiative to make different policy choices may rest with the political process rather than the Court.

This is different from the free movement case law that has evolved in the context of a political project of strengthening EU citizenship rights. Considering the objectives of the law in this field as articulated in the preambles and articles of successive treaties and secondary legislation, the approach of the Court did not deviate from the aims of the legislators. The relevant provisions of secondary legislation have given precedence to the fundamental rights of workers over satisfying the requirements of the economies of Member States.[71] Therefore, when the Court decided to prioritize free movement rights over social rights in *Laval*, it did so in line with the Treaty aims of integration and open borders.

While the legal issues could have been resolved differently by the Court, one must also consider the political sensitivity of the field and the political pressure on the Court. The Court was previously concerned with promoting EU integration, but today there are more calls on the Court to assume a similar responsibility for the EU's democratic deficit.[72] With increasing demands for democratic legitimacy, the Court might alienate the Member States by deciding politically sensitive issues. At a time when some governments openly reject compliance with EU legislation, such as the relocation decisions, it is understandable that the Court will try to remain close to the legislator.[73] Attempts to develop constitutional values are only successful if they are embedded in political processes.[74] This is a further argument why the Court should not undo the discretion of the legislature to decide on the road to be taken.

There was strong resistance among Member States to further integration in all three asylum cases studied. In the case of *X & X* on humanitarian visas, thirteen Member States and the EU Commission intervened and all of them opposed the idea that there could be an obligation to grant humanitarian visas.[75] Thomas Spijkerboer noted this in his analysis of the case and argued that 'it would have needed a lot of courage to take another position than the Court did' in response to such high resistance.[76] Similar concerns were likely made in *NF v Council*. EU institutions were reluctant to take ownership of the Statement. Daniel Thym has

[69] Thym, 'Between "Administrative Mindset" and "Constitutional Imagination" (n 2) 142.
[70] Gregor Noll, 'Viciously Circular' in Vladislava Stoyanova and Stijn Smet (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press 2022) 3.
[71] Wiesbrock (n 10) 65.
[72] Joseph Corkin, 'Refining Relative Authority: The Judicial Branch in the New Separation of Powers' in Joana Mendes and Ingo Venzke (eds), *Allocating Authority: Who Should Do What in European and International Law?* (Hart Publishing 2020) 176.
[73] Thym, 'Between "Administrative Mindset" and "Constitutional Imagination" (n 2) 156.
[74] Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn, University of Chicago Press 2008) 31.
[75] Case C-638/16 PPU *X and X* (n 20).
[76] Spijkerboer (n 2) 12.

also argued that the Court was possibly aware of the political controversies surrounding the *A.S.* and *Jafari* judgments and that this may have contributed to the technical style of argumentation.[77] At the time, Member States fought back against EU measures to increase cooperation among them.[78] Even though the border states had an unprecedented burden of examining the refugees' applications, it may not have been plausible for the Court to argue that Member States should act 'in a spirit of solidarity' to manage the great inflows of migrants.

Essentially, the Court is acting in a constraining context in asylum law which explains the road taken. While the EU Charter for Fundamental Rights lends further credence to deepen human rights work, interest in keeping it within the parameters of EU law remains. Protectionist EU policies limit the potential for dynamic rulings. Nevertheless, while these factors explain the Court's behaviour, they are not completely convincing *de sentencia ferenda*. Human rights could carry more weight in EU asylum law. When human rights are at stake, the Court could do more to ensure compatibility with EU fundamental rights and principles. To generally embark on this line of reasoning, the Court would need to say that one of the fundamental purposes of the EU is to create a space for human rights, which could counter the strong political interests in the area. Such a purposive mode is, however, only likely to be triggered by a new political project that emphasises rights more.

5 CONCLUSION

In cases where the EU asylum system is tested, the CJEU does not explore broader teleological perspectives. In *A.S.* and *Jafari* the Court refrained from expressing itself on the legal implications of the principle of solidarity for asylum policy, in *X and X* the Court did not rule on the implications of the principle of *non-refoulement*, and in *NF v Council* the Court did not elaborate on the legality of the EU-Turkey Statement. These cases presented an opportunity for the Court to apply the kind of contextual and teleological analyses that it has undertaken in free movement but has not used to the same extent regarding asylum law. In the cases studied, other methods of interpretation were available, and by considering the context of the cases in conjunction with more expansive legal approaches, the Court could have reached other outcomes that were more rights-sensitive.

Certainly, one must keep in mind that asylum and free movement are two different legal fields. As academics have argued, the EU is different now compared to when the free movement cases were decided and the salience of political debates on asylum limits the possibilities for expansive court rulings. The Treaties provide the legislator with the discretion to balance rights and control objectives in secondary law. Human rights may not therefore vindicate a different outcome, but the in-depth analysis shows that values and rights could have been considered more than they currently are by the Court. As the Court

[77] Thym, 'Court of Justice Judicial maintenance of the sputtering Dublin system on asylum jurisdiction' (n 30) 556.

[78] See e.g. Council Decision (EU) 2015/1523 of 14 Sept. 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L239/146; and Council Decision (EU) 2015/1601 of 22 Sept. 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80. See also CJEU rulings in Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* EU:C:2017:631, and Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary, and the Czech Republic* EU:C:2020:257.

discovers how the legal rules play out in real life, it should assess the effects on human rights as part of its constitutional function. In a democratic system, it cannot only be the legislator that decides on the road to be taken within the confines of human rights.

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