

Does Europe need a new legal framework to tackle mass migration?

Mass migration into the European Union is a crisis of politics, not capacity. Levels of migration have remained remarkably similar over the past half-century. Although the number of refugees has steeply increased, it is also not an unprecedented phenomenon. In fact, it has still not reached previous levels, such as during the Balkans conflict. The resurgence of nationalist policies, and the enhancement of state control that they precipitate, presents a more immediate threat to liberal democracy and European integration than does migration itself, even its unauthorised segment. The EU must construct a legal framework that appeals to the reality of its political crisis whilst recognising the overstatement of its migration crisis. In doing so, it must provide relief for those parties endangered by its current shortcomings, whilst steering a safe course for the future of Europe and its Union.

Providing short-term relief and long-term stability may be distilled into two interdependent objectives: first, to prevent unsafe journeys for those seeking international protection and, second, to effectively organise the distribution of related responsibilities and costs among its member states.

Preventing dangerous methods of migration is a stated, and laudable, goal of EU policies. Yet, the dangerous journeys undertaken by refugees are the result of EU visa policies and carrier sanctions. Whilst nationals from refugee-producing countries require a visa to reach the EU, visa-issuing criteria include proof of willingness to return to their country, and an ability to do so. However, refugees are legally defined under EU and international law as persons in need of protection, and thus unable to return to those very same countries. Concurrently, sanctions are imposed on commercial airlines and shipping companies transporting migrants into the EU without correct documentation. As a result, left with no means of legal access, refugees are pushed into illegality, obliged to turn to smugglers to reach the EU via unsafe routes. Thus, within this legal framework, criminal syndicates are the only actors to benefit. Instead of discussing military action against smugglers in the Mediterranean, the EU would do better to simply destroy their business model by removing

demand for their services, by creating a system for provision of humanitarian visas. This would allow greater regulation and tracking in place of current irregular and clandestine movements, as well as providing safe legal passage.

Once within EU territory, the responsibilities for asylum-seekers must be equitably distributed among EU-states. Despite claims to the contrary, the EU has a Common European Asylum System (CEAS) that comprises common refugee law contained in a number of interlocking legislative instruments. That said, this has not created an EU-wide asylum status. Rather, the CEAS is limited to allocating responsibility for the processing of asylum applications to individual member states, with further obligations in lieu of a positive decision. Accordingly, the entire operation relies heavily on member states effectively transposing EU legislation and the strength of their national asylum processes.

Unfortunately, there is a geographical bias built into the EU legal framework, which has left political will and national resources wanting. Claimed by some to be the “cornerstone” of the CEAS, the Dublin Regulation III (‘Dublin’) establishes that, by default, the first member state an asylum-seeker enters is allocated operational responsibility, *unless* it features systemic deficiencies. With political upheaval currently prevailing south and east of Europe, “frontline states”, such as Greece and Italy, are suffering from overloaded asylum systems. This has led to poor reception conditions and lower recognition rates, which, in some cases, fall below international and European standards.¹ Consequently, an absurdity arises whereby the Dublin system creates the systemic deficiencies that suspend its application. Not only is a legal paradox created, but also a legal vacuum.

The weak enforcement, or effective suspension, of Dublin has allowed many migrants to evade their first country of entry. With “frontline states” no longer acting as an effective border control, an enormous strain is now placed upon the EU’s borderless Schengen zone. Considered one of the signature achievements of EU integration, it has come under heightened scrutiny in light of the current migration influx and attendant security

¹ See, e.g., *MSS v Belgium and Greece* (2011) 53 EHRR 2

concerns. With the Schengen zone only as strong as its weakest link, bonds between member states are becoming strained whilst nationalist policies are strengthening.

Built on the illusion of common standards, the CEAS and its key legislative components have failed to equitably distribute national responsibilities and, in turn, a truly pan-European legal framework for those seeking asylum is thwarted. Taken together, any proposed reforms must centre on harmonising national asylum standards and alleviating pressure with meaningful relocation mechanisms. The recent Council Decision to introduce a temporary relocation system in the EU perhaps offers some relief to those countries currently overburdened. However, like Dublin, it is still based on a model of coercion that contradicts the traditional model of EU integration and comprises criteria that present a crude abstraction of human needs as a matter of numerical evaluation.

Burden-sharing policies are perhaps best formulated via political suasion, not legal imposition. Proposals for a centralised EU agency, resembling the European Central Bank, represent a viable alternative to the current legal framework. Charged with the processing of asylum applications and determining responsibilities across the EU, such an agency could prove to be a useful political forum, as well as a means of homogenising procedural and substantive asylum standards. For the sake of current urgency and future sustainability, this must be facilitated with adequate resources and intelligence sharing.

It is precisely at such critical moments as now that the EU can demonstrate its added value and strengthen its legitimacy. In the wake of global crises, it is all too easy to succumb to nationalist responses and erect a new iron curtain forged from emergency legislation. However, we must avoid being left with the oxymoron of pan-European nationalism. Instead, governments should embrace the human rights and protection imperatives at the core of this crisis and respond in accordance with the fundamental values at the heart of the Union's *acquis communautaire*.

Word count: 1000