

**THE LEGAL RATIONALITY OF EU LAW: THIRD COUNTRY NATIONALS'**  
**RIGHTS TO FREE MOVEMENT IN THE AREA OF FREEDOM, SECURITY AND**  
**JUSTICE (AFSJ)**

The concept of political legitimacy within the European Union has gained considerable attention<sup>1</sup> since Weiler discussed it in his seminal article<sup>2</sup>. Its meaning remains elusive<sup>3</sup> and although “there are many ways to cut the conceptual cake of legitimacy in the European Union”<sup>4</sup>, it has been defined as “the normatively conditioned and voluntary acceptance by the ruled of the government of their rulers”<sup>5</sup>. This definition is a good starting point but the legitimacy problematic is compounded by the lack of structure to enable an analysis to be conducted<sup>6</sup>. Conventional doctrinal analysis of legitimacy tends to be conducted either through political science that looks at political power relationships<sup>7</sup> or law that considers the law making process<sup>8</sup> and its institutional structure<sup>9</sup>, or a combination of both that perceives

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<sup>1</sup> See e.g. Beetham D., Lord C., *Legitimacy and the European Union*, Longman, 1998.

<sup>2</sup> Weiler J.H.H., “The Transformation of Europe”, (1991) 100 YLJ 2403.

<sup>3</sup> Arnall A., “Introduction: The European Union’s Accountability and Legitimacy Deficit”, in Arnall A., Wincott D., (Eds.), *Accountability and Legitimacy in the European Union*, 2002, OUP at 3. See also de Búrca G., “The Quest for Legitimacy in the European Union”, (1996) 59 MLR 349 at 349.

<sup>4</sup> Walker N., “The White Paper in Constitutional Context”, Jean Monnet Working Paper No.6/01, accessed at <http://www.jeanmonnetprogram.org/papers/01/011001.html> at 3.

<sup>5</sup> Bellamy R., Castiglione D., “Legitimizing the Euro-‘Polity’ and its ‘Regime’: The Normative Turn in EU Studies”, (2003) 2 EJPT 7 at 10.

<sup>6</sup> Beetham, D., *The Legitimation of Power*, Macmillan, 1991 and Beetham D., Lord C., “Legitimacy and the European Union” in Weale A., Nentwich M., (Eds.), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*, Routledge, 1998 at 15 use a structure of legality, normative justifiability and legitimation to analyse the political legitimacy of the European Union. It is submitted that although a useful structure, it can be incorporated within, and then analysed more effectively, through the legal rationality lens.

<sup>7</sup> Op. Cit. n.6 Beetham. See also Barker R., “Legitimacy, Legitimation, and the European Union: What Crisis?” in Craig P., Rawlings R., (Eds.), *Law and Administration in Europe: Essays in Honour of Carol Harlow*, OUP, 2003 at 157.

<sup>8</sup> Franck T.M., *Fairness in International Law and Institutions*, Clarendon Press, 1995 at 26 and “Legitimacy in the International System”, (1988) 82 AJIL 705 at 706.

<sup>9</sup> See Majone G., *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, OUP, 2005 at 28, criticised by Dougan M., “‘And Some Fell on Stony Ground...’ A Review of Giandomenico Majone’s *Dilemmas of European Integration*”, (2006) 31 ELR 865. See also Singer M., “Legitimacy Criteria for Legal Systems”, (2006) 17 KCLJ 229.

the existence of a “democratic deficit”<sup>10</sup>. However, the polity only creates an impact upon the community and the individuals within that community, or the ruled, when laws, be they hard or soft, are enacted. It is submitted that one way to analyse the legitimacy question from a legal position is to examine the law in action. The question remains though how to achieve this and to this end this paper seeks to provide a structure for such an analysis through the principles of legal rationality. We can all probably agree that law is built on judgment rather than chance<sup>11</sup> and is therefore grounded in practical reason and logic. As such the methodology itself, for analysis of the law, must also be logical and grounded in practical reason. The legal rationality analysis provides such a basis to enable a clear and structured approach to be followed, that could be utilised in a wide range of disciplines ranging from the macro level of examination of a political structure to the micro level of legal doctrines within a specific legal field of a doctrinal area and indirectly determines the legitimacy of the polity.

This paper is constructed in three parts. The first will establish the elements of legal rationality and the reasons for examining the free movement rights of third country nationals in EU law. The second will describe two pieces of legislation on third country nationals (henceforth TCNs) in the AFSJ before analysing them through the lens of legal rationality in the final section.

## **LEGAL RATIONALITY**

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<sup>10</sup> See Moravcsik A., “In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union” in Begg I., Peterson J., Weiler J.H.H., *Reassessing the Fundamentals*, Blackwell Publishing, 2003 at 77. The “democratic deficit” of the European Union has seen considerable academic debate. For a comprehensive summary of the debates see Weiler J.H.H., “European Democracy and its Critics: Polity and System” in *The Constitution of Europe: “Do the New Clothes have an Emperor?” and other Essays on European Integration*, CUP, 1999 at 264; Craig P., de Búrca G., *EU Law: Text, Cases and Materials*, 3<sup>rd</sup> Ed., OUP, 2003 at 167; Chalmers D., Hadjiemmanuil C., Monti G., Tomkins A., *European Union Law*, CUP, 2006 at 167.

<sup>11</sup> Brownsword R., *Contract Law: Themes for the Twenty-First Century*, Butterworths, 2000 (henceforth CL) at 209.

Law can be considered to be “the enterprise of subjecting human conduct to the governance of rules”<sup>12</sup> or “the human attempt to establish social order as a way of regulating and managing human conflict”<sup>13</sup>. As such it deals with human action and human social action. Nozick<sup>14</sup> states that “to term something rational is to make an evaluation; its reasons are good ones (of a certain sort), and it meets the standards (of a certain sort) that it should meet”. Thus the evaluation of the legal enterprise is grounded by practical reason<sup>15</sup> under the heads of formal, instrumental and substantive<sup>16</sup> rationality that represent “the standards that we judge that it should meet and the reasons that we count as good ones”<sup>17</sup>, where the “we” is society in general<sup>18</sup>. Formal rationality requires legal doctrine to be free from contradiction and for rules to be the same for everyone, instrumental rationality requires these rules and legal doctrine to be action guiding whilst substantive rationality necessitates the norms underlying legal doctrine to be justified. They are mutually exclusive as they are comprised of different factors and have different ends, namely the avoidance of conflict between laws, guidance for action and the justification for such action. They are essential as the failure of an element of legal rationality creates dislocation between those who rule and the individual who is ruled. In essence the failure of a desideratum of rationality leads to a conclusion that the law is defective. Legal rationality enables the results of political endeavour, the law, to be

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<sup>12</sup> Fuller L.L., *The Morality of Law*, Yale University Press, 1969 at 96.

<sup>13</sup> Beyleveld D., Brownsword R., *Law as a Moral Judgment*, Sweet & Maxwell, 1986 at 2.

<sup>14</sup> Nozick R., *The Nature of Rationality*, George Allen and Unwin, 1984 at 98.

<sup>15</sup> See Toddington S., *Rationality, Social Action and Moral Judgment*, Edinburgh University Press, 1993, chapter 6 in which he confirms the claim of John Finnis (Finnis J., *Natural Law and Natural Rights*, Clarendon Press, 1980, chapters 1 & 2) that the practically reasonable point of view is the required viewpoint for social science. He goes on to agree with Finnis that this practically reasonable point of view can be shown to be a moral point of view but dismisses, it is submitted correctly, Finnis’ attempts to do so.

<sup>16</sup> See Teubner G. “Substantive and Reflexive Elements in Modern Law” (1983) 17 *Law & Society Review* 239 at 252 where he proffers the alternative labels of internal, system and norm rationality.

<sup>17</sup> *Op. Cit.* n.11 at 209.

<sup>18</sup> See Gardner J., Macklem T., “Reasons”, in Coleman J., Shapiro S., (Eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, OUP, 2002 at 440 who have questioned the existence of legal rationality as a separate concept. Their position, however, originates firmly within the area of philosophical rationality, considering the broad view of providing reasons in a narrow context that is grounded within empiricism.

scrutinised for legitimacy that then reflects on politics. A more detailed examination of the three elements of legal rationality now follows.

## **Formal Rationality**

Formal rationality states the requirement that legal doctrine must be free from contradiction and that the rules should be the same for everyone. At first blush this would appear to repeat a traditional view of legal scholarship in which laws should be interpreted consistently and the irreconcilable avoided, provided laws apply to all. However, elevating boundaries between different legal disciplines (e.g. between rules in EU and international law or criminal and civil law) will not satisfy the requirements of formal rationality as the two legal positions may contradict one another. Furthermore, tension between two principles may not be contradictory where they complement decision making rather than contradict it. Thus a principle, for example, that stated that TCNs must not be discriminated against on the basis of their nationality would contradict a principle that TCNs, because of their nationality, were not included within the scope of the EC Treaty. However, if the second principle provided that discrimination provisions would only apply when the rights of free movement were invoked then this would simply create tension between the two principles rather than contradictions.

Formal irrationality then may arise in one of three ways<sup>19</sup>. First, doctrinal positions from outside Community law may contradict those within. Second, different doctrines within

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<sup>19</sup> Op. Cit. n.11 at 211.

European law may be contradictory. Third, situations within an area of EU law may be inconsistent.

## **Instrumental Rationality**

Instrumental rationality can be sub-divided into two types, generic and specific. Generic instrumental rationality requires legal doctrine to be capable of guiding action and so, as Fuller observes, certain minimum principles must be presupposed<sup>20</sup>. This so-called “inner morality of law” is made up of legal rules that should be general, promulgated, prospective, clear, non-contradictory, and relatively constant. They should not require the impossible and there should be congruence between the law as officially declared and the law as administered. The Fullerian principles can be categorised as procedural matters as they are not underpinned by a moral conception and can be equated with the concept of the rule of law<sup>21</sup>. Beyleveld and Brownsword<sup>22</sup>, Allan<sup>23</sup>, Simmonds<sup>24</sup>, Boyle<sup>25</sup> and Murphy<sup>26</sup> have all attempted to construct a substantive conception of the rule of law, with Fuller’s procedural requirements infused with moral values, a position Fuller himself advocated. It is submitted that moral values may be sufficient but not necessary requirements for instrumental rationality, for which instrumentality is the key<sup>27</sup>. As legal rationality requires all three

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<sup>20</sup> Fuller L.L., *The Morality of Law*, Yale University Press, 1969 at 39.

<sup>21</sup> See Hayek F.A., *The Road to Serfdom*, London, 1944 at 54.

<sup>22</sup> Op. Cit. n.13 at 314.

<sup>23</sup> Allan T.R.S., *Constitutional Justice: A Liberal Theory of the Rule of Law*, OUP, 2001.

<sup>24</sup> Simmonds N.E., *Central Issues in Jurisprudence*, 2<sup>nd</sup> Ed., London, 2002 and “Straightforwardly False: The Collapse of Kramer’s Positivism”, (2004) 63 CLJ 98.

<sup>25</sup> Boyle J., “Legal Realism and the Social Contract: Fuller’s Public Jurisprudence of Form, Private Jurisprudence of Substance”, (1993) 78 Cornell Law Review 371.

<sup>26</sup> Murphy C., “Lon Fuller and the Moral Value of the Rule of Law”, (2005) 24 Law & Philosophy 239.

<sup>27</sup> For an interesting academic discussion on whether the rule of law is infused with morality see the debate between Simmonds, Op. Cit. n.24, who argues for the infusion, and Kramer M.H., *In Defense of Legal Positivism*, OUP, 1999 and Kramer M.H., “On the Moral Status of the Rule of Law”, (2004) 63 CLJ 65 who

elements for justification of legislative action, the moral issues can be analysed under the substantive element of rationality.

It must be noted that the principle of non-contradiction plays an important role in instrumental rationality, as well as being the basis of formal rationality, when it is set alongside the principles of clarity, constancy and promulgation. Furthermore the distinction between contradiction and tension observed in formal rationality is of no importance in instrumental rationality as a legal matter will be clear or unclear without considering why the problem exists.

Generic instrumental rationality is a necessary, if not always sufficient, condition of action-guidance and is complemented by specific instrumental rationality. Legal intervention, either by legislation or by the judiciary, must display an informed and competent attempt at promoting given ends. Legislative officials must consider which legal technique, or combination of techniques, would be most effective to achieve the task. Furthermore if the legal act is intended to facilitate then it should do so, if it is intended to provide protection then it should protect. Finally, the judiciary will employ different ideologies, based on personal or normative beliefs, when interpreting legal instruments.

### **Substantive Rationality**

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argues against. For the purposes of this thesis the question of the moral underpinning of the rule of law is negated by the necessary requirement of substantive legal rationality.

Substantive rationality requires that all rules of law should be based on good reasons. It is here that we encounter again the ideas of practical reason. First, there is a requirement that the empirical facts sustaining particular legal doctrines should be plausible. Second, and moving beyond empirical plausibility, the principle underpinning the doctrine must itself be defensible as legitimate. However, this requirement that the substance of legal doctrine should be justified or legitimate can be interpreted in at least three ways<sup>28</sup>. First, law may be substantively rational if its norms are by and large accepted as justified and legitimate. Problems occur if legal norms are not considered legitimate and so either have to be amended or public perception adjusted. Law may certainly be used to mould public opinion over time but it is extremely difficult to change public perception swiftly, unless in an emergency situation, and thus the acceptance of the law. Second, law may be substantively rational if norms follow the first requirement but can also be shown to be a consistent set. This interpretation raises the same problems as the first but even if legal norms are considered to be legitimate they may fail the requirement of consistency. However, Brownsword<sup>29</sup> suggests that so long as this inconsistency is only noted by legal theorists then the law can still be effective. The third way of interpretation suggests that law to be substantively rational does not depend upon acceptance. If, and only if, its norms form a justified and legitimate set may law display substantive rationality. Thus problems occur on this view when the legal norms cannot be coherently defended and justified, regardless of their acceptance. The interpretations involving acceptance include a substantial subjective element. It is submitted that if one is attempting to base rules of law on good reasons, the dictates of practical reason require an entirely objective approach. Thus the only logical meaning of substantive

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<sup>28</sup> Brownsword R., "Towards a Rational Law of Contract" in Wilhelmson T. (Ed.), *Perspectives of Critical Contract Law*, Dartmouth, 1993 at 250; Adams J., Brownsword R., *Key Issues in Contract*, Butterworths, 1995 at 338 (henceforth TRLC and KIC respectively).

<sup>29</sup> Ibid.

rationality is that of the third interpretation. However, the justification of norms underlying legal doctrine is by definition value-laden and as such suffused with moral considerations.

Three options are available to establish how the determination of the moral criterion of substantive rationality is to be achieved<sup>30</sup>. First, it could be left to be determined by the judiciary to interpret the law, without outside direction on the positions to be taken. Judges with their training in fairness and impartiality combined with their separation from the legislative, political process could be considered to be an august and ideal body of moral deliberation<sup>31</sup>. However, as Griffith<sup>32</sup> has argued, the judiciary's social and educational background combined with their age and awareness of their position tend to make most judges susceptible to the adoption of conservative attitudes when faced with hard cases<sup>33</sup>. Dworkin<sup>34</sup> has answered Griffith by claiming that a rights culture would change the social base of the legal profession and that a professional judiciary steeped in such a culture would consider cases on the basis of social justice rather than social status quo. This is adequate as a general social observation and ideal but as Griffith points out the "principal function of the judiciary is to support the institutions of government as established by law"<sup>35</sup> or to uphold the rule of law<sup>36</sup>. As such the principal value of the judiciary specifically and the legal profession in general is to "preserve and protect the existing order"<sup>37</sup> thereby perpetuating the social status quo. Without some form of external moral guidance it is difficult to see how the

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<sup>30</sup> Op. Cit. n.11 at 223.

<sup>31</sup> See Browne-Wilkinson, Lord, "The Infiltration of a Bill of Rights", [1992] PL 397; Laws J., "Is the High Court the Guardian of Fundamental Constitutional Rights?" [1993] PL 59.

<sup>32</sup> Griffith J.A.G., *The Politics of the Judiciary*, 5<sup>th</sup> Ed., Fontana, 1997, ch.9.

<sup>33</sup> Cf. Dworkin R., *Taking Rights Seriously*, Duckworth, 1978, ch.4.

<sup>34</sup> Dworkin R., *A Matter of Principle*, Clarendon Press, 1985 at 28-31.

<sup>35</sup> Op. Cit. n.32 at 343.

<sup>36</sup> A constitution would provide the external moral guidelines to direct the moral guidelines for substantive rationality. See Mancini G.F., "Politics and the Judges – The European Perspective" (1980) 43 MLR 1 for a consideration of European judicial law making in the shadow of a constitution and without a practicing background, especially in the Italian legal system.

<sup>37</sup> Op. Cit. n.32 at 342.



judiciary could provide a socially just moral criterion for substantive rationality<sup>38</sup>. The equivalent position to that being advanced here is the situation in the UK before the Human Rights Act 1998 (henceforth HRA) came into force with the Court of Appeal's judgment in *ex parte Smith*<sup>39</sup> epitomising the limitations without an external moral guide. Dickson<sup>40</sup> highlights a similar situation in the House of Lords since the HRA in regard to international human rights standards that are unincorporated in UK law.

That external guidance could be provided by the second option<sup>41</sup>, the standards of fairness already recognised, either expressly or impliedly, in positive legal doctrine. Thus Sir John Laws suggests that by following common law precedent, UK judges are able to uphold fundamental constitutional rights without a written constitution<sup>42</sup>. A system of precedent may limit judicial idiosyncrasy, indeed conforming to the requirements of formal rationality by limiting contradictions within the law, but substantive rationality is designed to evaluate the defensibility of legal doctrine. Establishing that a rule or procedure through precedent is employed at a particular time cannot be the reason for justifying that legal doctrine - that is, doctrine cannot validate itself as legitimate. Furthermore the development of strict precedent, combined with the apparent conservative nature of the judiciary, leads to a diminution in the standards of fairness in recognised legal doctrine as the use of existing doctrine as the standard of legitimacy would curtail any proposal for reform or revision. If this were to be modified to allow some small improvements to existing doctrine then this suggests that there

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<sup>38</sup> Op. Cit. n.34 at 30 where Dworkin appears to be suggesting such a situation with a conservative judge having to apply a principle of political morality if it is included in a legislative act.

<sup>39</sup> *R v. Ministry of Defence ex parte Smith* [1996] 1 All ER 257. Cf. *A and others v. Secretary of State for the Home Department* [2005] 2 AC 68 at 129 per Lord Hoffman.

<sup>40</sup> Dickson B., "Safe in their Hands? Britain's Law Lords and Human Rights", (2006) 26 LS 329 at 335.

<sup>41</sup> Op. Cit. n.11 at 224.

<sup>42</sup> Op. Cit. n.31 Laws J. For a critical analysis of Laws position see Griffiths J.A.G., "The Brave New World of Sir John Laws", (2000) 63 MLR 159. See also Poole T., "Questioning Common Law Constitutionalism", (2005) 25 LS 142.

is a form of legitimacy outside the existing doctrine that can recognise such improvements and the need for them.

The third option is to invoke the standards of fairness recognised by the community<sup>43</sup>. This option raises two questions. What are the ‘standards of fairness’ and within which community are they to be recognised? Standards of fairness require some form of definitional elucidation. It is submitted that as the community is an arena for human social action then this is achieved through philosophical analysis using practical reason. As fairness is value-laden then the standards envisaged must be moral values<sup>44</sup> that are universal in nature, developed from a transcendental deduction, that can themselves be rationally justified and be grounded in practical reason. A modern neo-Kantian moral theory that answers these requirements is that advanced by Gewirth<sup>45</sup>. It is outside the scope of this paper to consider his theory in depth<sup>46</sup> but he argues from human action to a supreme principle of morality that he calls the Principle of Generic Consistency (PGC). In essence this states that on pain of contradiction of being a human being, every human being must act in accordance with the generic rights of other human beings as well as themselves, where the generic rights are freedom and well-being. As these generic rights are held equally by all human beings then they are human rights<sup>47</sup>. It is submitted that, even if Gewirth’s argument to the PGC is disputed, the moral concept that underpins the principle of fairness is one that is embodied by the concept of human rights.

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<sup>43</sup> Op. Cit. n.11 at 225.

<sup>44</sup> See Op. Cit. n.15 where Toddington establishes that practical reason must be viewed from the moral point of view when used to analyse human social action.

<sup>45</sup> Gewirth A., *Reason and Morality*, University of Chicago Press, 1978.

<sup>46</sup> See Regis Jr. E., (Ed.), *Gewirth’s Ethical Rationalism: Critical Essays with a Reply by Alan Gewirth*, University of Chicago Press, 1984; Beyleveld D., *The Dialectical Necessity of Morality: An Analysis and Defence of Alan Gewirth’s Argument to the Principle of Generic Consistency*, University of Chicago Press, 1991.

<sup>47</sup> Gewirth A., *The Community of Rights*, University of Chicago Press, 1986, ch.1.

Furthermore if Gewirth's argument<sup>48</sup> of a supreme principle of morality derived from human action by practical reason is employed then legal doctrine may be rationally justified using the PGC as the basis of human rights. The second question involving the determination of the community is as difficult as the first. Human rights are considered to be universal and so one could posit the notion that the community encompasses the whole of human kind. However, where legal doctrine is territorially delineated then it is logical to presume that the community will be likewise. Thus European Union law will be confined to the territory of the current twenty-seven Member States. External agreements may extend this community reach in certain defined areas such as trade and immigration.

### **Choice of Doctrinal Research Area**

Those ruled in Bellamy and Castiglione's definition<sup>49</sup>, when considered in the context of the EU, include all the peoples resident in the EU. These are made up of citizens of the EU<sup>50</sup> and third country nationals. The position of the individual has been enhanced with the creation of citizenship of the Union and the rights that are correspondingly granted especially for free movement. Citizens of the European Union are able to determine the extent of their rights to freedom of movement in a relatively logical and straightforward manner as the principle of free movement of persons is enshrined in the EC Treaty as one of the four fundamental freedoms. The Union, however, is not just populated by EU Citizens, with an estimated 12.5

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<sup>48</sup> Op. Cit. n.45.

<sup>49</sup> Op. Cit. n.5.

<sup>50</sup> Article 17EC provides that '[e]very person holding the nationality of a Member State shall be a citizen of the Union'.

million<sup>51</sup> TCNs legally resident in the Union in 1997 that had increased to 16.2 million<sup>52</sup> by 2003. These TCNs do not form a homogenous group as their population is made up of peoples with many different national identities spread throughout the European Union. As such, the citizens of this so-called twenty-eighth state<sup>53</sup> are a disparate group culturally, socially and economically with the majority emanating from developing countries. However, from the sheer weight of numbers, it can be considered that TCNs have an important effect on, and play an important part in, the economy of the Union. They work, provide services, purchase goods, pay taxes and in general participate fully in the Europe-wide economy<sup>54</sup>. Demographic trends indicate that the steady population growth in developing countries is paralleled by falling birth rates and an aging work force in Western Europe<sup>55</sup>. This demographic pattern suggests that to ensure economic growth is sustained by the necessary workforce in the medium to long term, an increasing level of migration from third countries into the European Union will be required<sup>56</sup>. Therefore the TCN population in the European Union is likely to increase in real and proportional terms as it increases in importance economically<sup>57</sup>. With this growing importance of TCNs to the Community it would be

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<sup>51</sup> High Level Panel Report on the Free Movement of Persons, delivered 18<sup>th</sup> March 1997, <http://europa.eu.int/comm/dg15/en/people/hlp/htm> at 2. Site accessed 25 November 2002.

<sup>52</sup> See [http://europa.eu.int/comm/justice\\_home/doc\\_centre/asylum/statistical/docs/population\\_by\\_citizenship\\_2003\\_en.pdf](http://europa.eu.int/comm/justice_home/doc_centre/asylum/statistical/docs/population_by_citizenship_2003_en.pdf) site accessed 10 June 2007. These are the most up to date figures before the new round of EU accessions on 1 May 2004 and 1 January 2007.

<sup>53</sup> Cholewinski R., "The Rights of Non-EC Immigrant Workers and their Families in EC Countries of Employment: A Case for Integration", in Dine J., Watt B. (Eds.), *Discrimination Law: Concepts, Limitations and Justifications*, Longman, 1996, 134 at 135.

<sup>54</sup> See Hoogenboom T., "Integration into Society and Free Movement of Non-EC Nationals", (1992) 3 EJIL 36-52.

<sup>55</sup> Dell'Olio F., "Immigration after Nice: From 'Zero Immigration' to Market Necessity" in Arnall A., Wincott D., (Eds.), *Accountability and Legitimacy in the European Union*, OUP, 2002 at 469 and Stalker P., "Migration Trends and Migration Policy in Europe", (2002) 40 International Migration 151.

<sup>56</sup> See United Nations, *Replacement Migration: Is it a Solution to Declining and Aging Populations?* ST/ESA/SER.A/206, United Nations Publications, 2000; Commission Communication on a Community immigration policy, COM(2000) 757 final, Annex 1; House of Lords EU Select Committee 13<sup>th</sup> Report of Session 2000-2001, *A Community Immigration Policy*, HMSO, 2001 at paras.21-27; Commission Communication on immigration, integration and employment, COM(2003) 336 final at 12; Commission Communication on a policy plan on legal migration, COM(2005) 669 final at 4.

<sup>57</sup> Gamberale C., *European Citizenship and Political Identity*, University of Sheffield unpublished thesis No.9481, 1998 at 284.

reasonable to assume that their free movement rights<sup>58</sup> would be clearly defined, readily accessible and simple. This is not the case<sup>59</sup>. Moreover, the extent of such rights has altered over time, as has their political perception by the Member States (henceforth MSs), with certain TCNs receiving more favoured status than others as the political moment swings.

## **FREE MOVEMENT RIGHTS BASED ON THE AFSJ**

The AFSJ was introduced into the EC Treaty at the Treaty of Amsterdam by moving the provisions concerning free movement of persons from pillar three (Title VI TEU) into pillar one (Title IV EC). It required measures to be introduced by 1 May 2004 to ensure the free movement of persons in accordance with Article 14EC in conjunction with directly related flanking measures (Article 61(a)EC). Article 62EC split the legislation to be adopted into measures concerning internal free movement and measures involving the crossing of external borders, whilst Article 63EC outlined three different types of TCNs, those claiming asylum, refugees and immigrants.

### **The Dublin Regulation**

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<sup>58</sup> See Oliver P., “Non-Community Nationals and the Treaty of Rome”, (1985) 5 YEL 57; Alexander W., “Free Movement of Non-EC Nationals: A Review of the Case-Law of the Court of Justice”, (1992) 3 EJIL 53; Cremona M., “Citizens of Third Countries: Movement and Employment of Migrant Workers within the European Union”, (1995) 2 LIEI 87; Hedemann-Robinson M., “Third-Country Nationals, European Union Citizenship, and Free Movement of Persons: a Time for Bridges rather than Divisions”, (1997) 12 YEL 321.

<sup>59</sup> See Peers S., “Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union”, (1996) 33 CMLRev 7.

An asylum-seeker will travel to the EU and make an application in a specific State on the basis of subjective reasons applicable to that particular applicant. It may be that the person applies at the first opportunity as soon as he or she has arrived in the EU, or the applicant may favour a particular EU MS because of family connections or a supportive community, cultural, linguistic or historical connections or individual preference that the applicant has for the receiving country<sup>60</sup>. The EU has, however, created a system of allocating the MS responsible for assessing the applicant's claim in a one-stop-shop objective system. This was originally laid down in Articles 28-38 of the Schengen Implementing Convention and then replaced by the Dublin Convention<sup>61</sup> of 1990. In 1992, at the London Council meeting of the ministers responsible for immigration, the London Resolutions determined the "safe third country" concept required for the Dublin Convention<sup>62</sup>.

The Dublin Convention and the use of the safe third country concept aroused considerable criticism. First the Dublin Convention did not achieve its objective as a MS would not substantively assess and process the application. A MS would first determine if the asylum applicant had passed through a non-MS before entering the EU. If so then that country would be assessed on the safe third country criteria in the London Resolutions and if it fulfilled the criteria then the person would be returned to that third country without considering the actual

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<sup>60</sup> Blake N., "The Dublin Convention and Rights of Asylum Seekers in the European Union" in Guild E., Harlow C. (Eds.), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law*, Hart Publishing, 2001, 95 at 99.

<sup>61</sup> Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, O.J. 1997 C254/1.

<sup>62</sup> Council Document 10579/92: the life and freedom of the asylum applicant could not be threatened within the meaning of Article 33 of the Geneva Convention; there must be no risk of torture or inhuman or degrading treatment; the applicant must either have been granted protection or had an opportunity to claim protection in the third country before entering the EU, or there is clear evidence of his admissibility to a third country; and, there must be effective protection available within the meaning of the Geneva Convention. The three non-legally binding instruments in this document became known as the London Resolutions. See van Selm J., "Access to Procedures: 'Safe Third Countries', 'Safe Countries of Origin' and 'Time Limits'", 2001, UNHCR, available at <http://www.unhcr.org/protect/PROTECTION/3b39a2403.pdf>, accessed 5 September, at 10.

application<sup>63</sup>. Second if the asylum applicant had passed through a number of third countries, particularly as third countries followed the EU example and incorporated the safe third country definition into their own domestic law, or passed through several MSs then the individual could remain in orbit without their application being assessed<sup>64</sup>. Third there was evidence that the end of the chain resulted in *refoulement* in breach of Article 33(1)<sup>65</sup> of the Geneva Convention<sup>66</sup> (“chain *refoulement*”). Fourth, the Geneva Convention obligates each signatory State<sup>67</sup> to make its own judgment about the recognition or refusal and eventual deportation of individual applicants for asylum. By failing to assess an application a MS was thereby in breach of the Geneva Convention<sup>68</sup>. Fifth applications for asylum on humanitarian grounds that are not based on the Geneva Convention were not considered and the family reunification provisions (Article 4) were too strict<sup>69</sup>. Furthermore the evidential rules that required proof of the travel route of asylum-seekers were often impossible to satisfy that, in Hurwitz’ opinion<sup>70</sup>, rendered the Dublin Convention virtually useless in many cases. Seventh the MSs applied different standards for the determination of “protection” within Article 33 Geneva Convention with the UK following the “internal protection” approach in which an individual can fear persecution from non-State actors as well as State actors, and Germany

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<sup>63</sup> Achermann A., Gattiker M., “Safe Third Countries: European Developments”, (1995) 7 IJRL 19 at 22 and Borchelt G., “The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards (2001-2002) 33 Colum. Hum. Rts. L. Rev. 473 at 497.

<sup>64</sup> Ibid. Borchelt at 501 and Coman G.I., “European Union Policy on Asylum and its Inherent Human Rights Violations”, (1998) 64 Brooklyn Law Review 1217 at 1235. See also Dunstan R., “Playing Human Pinball: The Amnesty International United Kingdom Section Report on UK Home Office ‘Safe Third Country’ Practice”, (1995) 7 IJRL 606.

<sup>65</sup> Article 33(1) Geneva Convention: “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.”

<sup>66</sup> Op. Cit. n.63 Borchelt at 502, Joly D., “The Porous Dam: European Harmonisation on Asylum in the Nineties”, (1994) 6 IJRL 159 at 170 and Weidlich S., “First Instance Asylum Proceedings in Europe: Do Bona Fide Refugees Find Protection?” (2000) 14 Georgetown Immigration Law Journal 643 at 657.

<sup>67</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1*, 2<sup>nd</sup> Ed., 1992, Forward.

<sup>68</sup> Foblets M.C., “Europe and Its Aliens after Maastricht. The Painful Move to Substantive Harmonisation of Member States’ Policies Towards Third Country Nationals, 42 (1994) Am. J. Com. L. 783 at 794.

<sup>69</sup> Hurwitz A., “The 1990 Dublin Convention: A Comprehensive Assessment”, (2000) 11 IJRL 464.

<sup>70</sup> Ibid.

and France following the “accountability theory” that only considered State actors<sup>71</sup>. The result of the failure to take into account the MSs’ different definitions of protection<sup>72</sup> meant that “the system is fundamentally flawed as the same individual who seeks asylum in different Member States is likely to have a different outcome as regards protection”<sup>73</sup>.

Probably the most damning flaw of the Dublin Convention was that it simply did not work<sup>74</sup>. This was confirmed in two working papers the Commission issued on the operation of the Dublin Convention<sup>75</sup>. The result was the replacement of the intergovernmental Dublin Convention with Regulation 343/2003/EC<sup>76</sup> that has become known either as the Dublin Regulation or Dublin II. Much of the Dublin Regulation mirrors the Dublin Convention. Article 3 requires MSs to examine an asylum application of a TCN, the examination being carried out by a single State determined by the criteria laid down in Chapter III of the Regulation. Article 3(2) enables a MS to examine an application even if it is not the responsible State as determined by the Chapter III criteria. This is coupled with Article 15 that sanctions any MS, on humanitarian grounds, to bring together family members, as well as other dependent relatives, based in particular on family or cultural considerations and with the consent of the persons concerned. Special cases where the person concerned is dependent

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<sup>71</sup> See Moore J., “Whither the Accountability Theory: Second-Class Status for Third-Party Refugees as a Threat to International Refugee Protection”, (2001) 13 IJRL 32 and Wilsher D., “Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?” (2003) 15 IJRL 68. See TI v. UK [2000] INLR 211 and R v. Secretary of State for the Home Dept., ex parte Adan, R v. Secretary of State for the Home Dept., ex parte Aitsegeur [2001] 2 AC 477.

<sup>72</sup> Noll G., “Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law”, (2001) 70 NJIL 161.

<sup>73</sup> Guild E., “Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures”, (2004) 29 ELR 198 at 207.

<sup>74</sup> Op. Cit. n.60 at 95.

<sup>75</sup> Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an asylum application submitted in one of the Member States, SEC(2000)522 final, and Evaluation of the Dublin Convention SEC(2001)756 final.

<sup>76</sup> Council Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, O.J. 2003 L50/1. A further Regulation has been adopted fleshing out the detail of Dublin II – Council Regulation 1560/2003/EC laying down detailed rules for the application of Reg. 343/2003, O.J. 2003 L222/3.



on assistance of another person because of pregnancy, a new-born child, serious illness, severe handicap or old age, should normally be kept or brought together with another relative in a MS, so long as there were family ties in the country of origin. If an unaccompanied minor has relatives in a MS who can care for him or her then there should be reunification if possible and if it is in the best interests of the child. Article 3(3) enables a MS under domestic law to return an asylum-seeker to a third country, so long as the Geneva Convention is complied with. The hierarchy of criteria for the allocation of the State responsible for examining the asylum claim are set out in Chapter III, are similar to the Dublin Convention criteria with a descending order of priority involving the best interests of the child and family reunification. The default position is that if the criteria cannot designate the MS responsible then the first MS in which the asylum application was lodged is responsible (Article 13). Chapter V outlines the procedures for taking charge and taking back if a MS establishes through the hierarchical criteria that another MS is responsible for determining the application. The request to take charge occurs where the asylum-seeker did not make an application in the MS that is considered to be responsible whilst a request to take back means that an application had previously been lodged, withdrawn or rejected in another MS.

The Dublin Regulation maintains “the same hereditary weaknesses which bedevilled the Dublin Convention”<sup>77</sup>. In particular the possibility of “chain *refoulement*”, asylum-seekers in orbit and the return of an asylum-seeker to a safe third country without assessing the safety of the third country or the asylum-seeker if returned there. However, although the weaknesses remain there are improvements. The first is that the legislative measure is a Regulation and so has direct applicability in the MSs. Domestic courts can rely directly on it and are able to refer questions of interpretation to the ECJ under Article 234EC. As a consequence the ECJ

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<sup>77</sup> Op. Cit. n.73 at 207.

can provide the harmonisation that Guild<sup>78</sup> calls for on definitional issues, in particular the determination of the meaning of protection in the Geneva Convention. Indeed the issue of the difference of protection may now have receded with the House of Lords' acceptance that Germany does indeed provide sufficient guarantees over the level of protection required for the Geneva Convention<sup>79</sup> and the ECHR<sup>80</sup>, and evidence by Phuong<sup>81</sup> that French legislation and case law has now come into line with the British position. Battjes<sup>82</sup> suggests that the position that a MS does not have to consider the merits of an asylum application before an applicant is returned to either another MS or a safe third country is in compliance with the MS's obligations under Article 33(1) of the Geneva Convention, so long as the applicant is given the opportunity upon application to present evidence specific to his or her case that could rebut that presumption. The introduction of a humanitarian clause alongside the "sovereignty clause" of Article 3(2) provides some greater protection for family members and more vulnerable persons over the examination of the asylum application and transfer to another MS. Also the family reunification criteria at the head of the hierarchy of criteria emphasises the importance of family reunification within the EU.

However, problems remain with the new Dublin Regulation. The first is that there is an automatic presumption that all EU MSs are safe for the return of asylum applicants (Recital 2). Thus it is possible that domestic courts and immigration authorities will ignore the

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<sup>78</sup> Ibid. at 208.

<sup>79</sup> R v. Secretary of State for the Home Dept., ex parte Zeqiri [2002] INLR 291 and R v. Secretary of State for the Home Dept., ex parte Yogathas, R v. Secretary of State for the Home Dept., ex parte Thangarasa [2003] 1 AC 920.

<sup>80</sup> Ibid. Yogathas & Thangarasa at 819 per Lord Hutton where his Lordship equated the protection under Article 3ECHR with the scope of protection required under Article 33(1) of the Geneva Convention. See R v. Secretary of State for the Home Dept., ex parte Razgar [2004] 2 AC 368 where a similar position was adopted for Article 8ECHR.

<sup>81</sup> Phuong C., "Persecution By Non-State Agents: Comparative Judicial Interpretation of the 1951 Refugee Convention", (2003) 4 EJML 521.

<sup>82</sup> Battjes H., "A Balance Between Fairness and Efficiency? The Directive on International Protection and the Dublin Regulation", (2002) 4 EJML 159 at 188.

specific circumstances of the individual. Second, the definition of family member in Article 2(i) is limited to an asylum applicant's spouse (or partner if the national law recognises this), their minor children as long as they are unmarried and dependent, and the father, mother or guardian when the applicant is a minor and unmarried. This is considerably truncated when compared to the definition for family members of an EU citizen in Article 2(2) of Dir. 2004/38. In a research paper for the UNHCR in 2006<sup>83</sup>, Kok investigated the operation of the Dublin Regulation and found three significant issues of concern. The first<sup>84</sup> was that some MSs do not conduct a full and fair assessment of a returnee's asylum application, treating certain claims as implicitly withdrawn and failing to comply with the *non-refoulement* principle. Second<sup>85</sup> some asylum-seekers are returned or deported to a safe third country before the full legal process is completed as the right to suspensive effect of appeals is not automatic. Third<sup>86</sup> there is an inconsistent approach to family reunification that does not give full effect to the right to family life in Article 8ECHR. Furthermore the limited definition of "family member" creates significant hardships for some families and difficulties for MSs when processing asylum applications. The first Commission Report<sup>87</sup> on the evaluation of the Dublin Regulation confirmed the first and third of Kok's findings<sup>88</sup> whilst also noting the increased use of custodial measures before the transfer of the asylum-seeker and procedural irregularities, particularly with time limits<sup>89</sup>.

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<sup>83</sup> Kok L., *The Dublin II Regulation*, UNHCR, 2006.

<sup>84</sup> Ibid. at 2.

<sup>85</sup> Ibid. at 3.

<sup>86</sup> Ibid. at 3.

<sup>87</sup> Commission Report on the evaluation of the Dublin system, COM(2007) 299 final.

<sup>88</sup> Ibid. at 6.

<sup>89</sup> Ibid. at 8.

The position of Greece in relation to the Dublin Regulation has caused considerable concern with low rates of granting refugee status to applicants<sup>90</sup> as well as allegations of persecution of asylum-seekers by non-State actors<sup>91</sup> and indeed State actors<sup>92</sup>. However, of more concern are the procedures for assessing applications for asylum<sup>93</sup> and the possibility of the refoulement of TCNs. In particular where an asylum-seeker applies for asylum in Greece but then leaves for another MS before the assessment procedure is concluded, then the application will be withdrawn and the applicant notified as a person whose whereabouts are unknown. That individual, if returned to Greece under the Dublin Regulation, will be unable to have the process reopened unless the TCN presents themselves to the authorities within three months of the notification and can adduce evidence that any absence was as the result of force majeure<sup>94</sup>. The Commission has now brought an Article 226EC action against Greece for these procedural problems<sup>95</sup>.

Probably the most serious criticism of the Dublin Regulation is the same as that identified by Blake over the Dublin Convention, in that it does not work effectively or efficiently. In a recent ECRE report<sup>96</sup>, low transfer rates<sup>97</sup>, the continuance of multiple asylum applications<sup>98</sup> and the lengthy and cumbersome nature of the Dublin procedure at the beginning of an

<sup>90</sup> Skordas A., Sitaropoulos N., "Why Greece is not a Safe Host Country for Refugees", (2004) 16 IJRL 25 at 27.

<sup>91</sup> Ibid. at 32.

<sup>92</sup> Pro Asyl, "The Truth May be Bitter, but it Must be Told: The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard", October 2007, <http://www.statewatch.org/news/2007/oct/greece-proasyl-refugees.pdf>, accessed 5 September 2008.

<sup>93</sup> Amnesty International, "Out of the Spotlight: The Rights of Foreigners and Minorities are Still a Grey Area", EUR 25/005/2006, <http://www.amnesty.org/en/library/asset/EUR25/016/2005/en/dom-EUR250162005en.html>, accessed 5 September 2008.

<sup>94</sup> See UNHCR, "UNHCR Position on the Return of Asylum-Seekers to Greece Under the "Dublin Regulation"", 15 April 2008, <http://www.unhcr.org/cgi-bin/txis/vtx/refworld/rwmain?docid=4805bde42>, accessed 5 September 2008.

<sup>95</sup> Case C-130/08 *Commission v. Greece*, O.J. 2008 C128/25.

<sup>96</sup> ECRE, "Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered", March 2008, <http://www.ecre.org/files/Sharing%20Responsibility%20Dublin%20Reconsidered.pdf>, accessed 10 September 2008.

<sup>97</sup> Ibid. at 10.

<sup>98</sup> Ibid. at 11.

asylum application<sup>99</sup>, were identified as establishing the inefficiency and ineffectiveness of the system leading to concerns over the best use of public money<sup>100</sup>. ECRE also examined the disproportionate effect of the Dublin Regulation on Southern and Eastern MSs compared to Northern and Western countries<sup>101</sup>, and the negative effect on applicants for refugee status themselves in the EU's 'asylum lottery'<sup>102</sup>.

## **The Reception Directive**

Once it has been clarified which MS has responsibility to determine the asylum application, there must be at least minimum reception conditions and rights provided for asylum-seekers. Directive 2003/9/EC<sup>103</sup>, applies to all TCNs and stateless persons who apply for asylum either at the border or in the MS's territory as long as they are allowed to remain on that territory as asylum-seekers and to family members, if they are covered by the same asylum application according to national law. When the asylum-seeker applies for asylum the MS according to Article 13(1) must grant the right to material reception conditions to ensure a standard of living that is adequate for the health of the applicant, ensure subsistence and secure the human dignity of the asylum-seeker. These material reception conditions include housing, food and clothing, provided in kind<sup>104</sup>, or as financial allowances or in vouchers, and a daily expenses allowance (Article 2(j)). Alongside these 'material reception conditions' MSs must ensure asylum-seekers receive adequate health care that includes at least

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<sup>99</sup> Ibid.

<sup>100</sup> Ibid. at 12.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid. at 14.

<sup>103</sup> Council Directive 2003/9/EC laying down the minimum standards for the reception of asylum seekers, O.J. 2003 L31/18 Article 3.

<sup>104</sup> Defined in Article 14.

emergency care, essential treatment of illness and the protection of special needs (Article 15) although asylum-seekers may be required to be medically screened on public health grounds (Article 9).

After providing for the ‘material reception conditions’ the Directive considers other rights for asylum-seekers, including the right to free movement. Article 7(1) states that asylum-seekers may move freely within the host MS’s territory, or within an area assigned to them by that MS. The scope of this assigned area is not defined in the Directive but it cannot affect the unalienable sphere of private life nor impinge upon access to all the benefits under the Directive. Applicants must inform the competent authorities of their current address and notify any change as soon as possible (Article 7(6)). Article 7(2) provides that MSs can decide on the residence for the asylum-seeker because of public interest, public order or for the swift processing and effective monitoring of the application. MSs may also, when it proves necessary (e.g. legal reasons or reasons of public order), confine an applicant to a particular place in accordance with domestic law (Article 7(3))<sup>105</sup>. However, Article 7(5) enables MSs to provide for the possibility of granting applicants temporary permission to leave their place of residence or assigned area, with decisions taken individually, objectively and impartially and reasons provided if the decision is negative. MSs must also specify a time period, from the date of application, during which time an applicant is not able to work (Article 11(1)) but after a year without an initial decision on the application the MS must provide conditions for granting access to the labour market, a right that cannot be lost during an appeal process. However, MSs can prioritise jobs to EU citizens and other legally resident TCNs if the labour market demands (Article 11(4)).

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<sup>105</sup> See Hailbronner K., “Detention of Asylum Seekers”, (2007) 9 EJML 159.

The material reception conditions appear, from Article 13(1) and (2), to be concrete rights essential for the human dignity of the asylum-seeker. However, MSs can make the provision of the material reception conditions subject to actual residence by the applicants in a specific place, as determined by the MS (Article 7(4)). Furthermore, they may be reduced or withdrawn where the asylum-seeker *inter alia* abandons the subscribed place of residence without informing the competent authorities, or without gaining permission if the move had been requested (Article 16(1)(a)). The only benefit that the MSs cannot withdraw is an asylum-seeker's access to emergency health care (Article 16(4)).

It should be noted from the outset that the standards outlined are the minimum<sup>106</sup> required and MSs can choose to retain higher standards (Article 4). However, these minimum norms are markedly “minimum”<sup>107</sup> and MSs have the option to lower them further if the asylum-seeker is found to be in breach of the Directive's requirements. As the material reception conditions are supposedly the minimum standards required to enable an asylum-seeker to retain his or her human dignity, their withdrawal must breach the requirement that “[h]uman dignity is inviolable” (Article 1 Charter) and could lead to the risk of the individual becoming destitute in breach of Article 3 ECHR<sup>108</sup>. This is particularly so where an asylum-seeker moves from their place of residence without informing or receiving permission from the authorities, especially, as Rogers<sup>109</sup> notes, only Germany restricted the freedom of asylum-seekers in such a way before the Directive was adopted and the German Basic Law protects

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<sup>106</sup> Kuijper P.J., “The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects”, (2004) 41 CMLRev 609 at 614 notes that a minimum standards Directive “does exactly what the title announces, namely laying down rather minimal standards”.

<sup>107</sup> O’Keefe D., “Can the Leopard Change its Spots? Visas, Immigration and Asylum Following Amsterdam” in O’Keefe D., Twomey P., *Legal Issues of the Amsterdam Treaty*, Hart Publishing, 1999, 271 at 272.

<sup>108</sup> Rogers N., “Minimum Standards for Reception” (2002) 4 EJML 215 at 228.

<sup>109</sup> Ibid. at 227.

the human dignity of individuals. The restriction of the free movement of asylum-seekers, at least within the territory of the host MS, appears to be unnecessary, affects significantly the quality of life of the individual concerned, and requesting permission to move residence is demeaning and likely to cause even more stigmatisation of asylum-seekers<sup>110</sup>. Furthermore an asylum-seeker's free movement can be totally curtailed by their confinement to a particular place. Even though this is an exception to the norm<sup>111</sup>, must be justified on the grounds in the Directive and would be interpreted by the ECJ narrowly, there are no minimum conditions or safeguards on the use of detention by MSs in the Directive<sup>112</sup>.

Asylum-seekers are granted little in the way of free movement rights. Under the Dublin Regulation they have limited choice as to which MS can assess their application as the default position is that the first country of entry is the responsible MS. The exceptions to this are narrow, and narrowed further by the use of a truncated definition of family member. Air carrier sanctions further limit the movement of asylum-seekers into the EU and therefore necessity drives opportunity with asylum-seekers either crossing the EU external borders clandestinely by road or by boat from nearby States. As the majority of neighbour countries are safe third countries then the asylum-seeker can be returned there. The alternative is to entrust entry into the EU into the hands of human traffickers or human smugglers, entering the EU illegally and without documentation or a travel evidence trail. The provision of minimum reception standards in Directive 2003/9, the restriction of free movement to the host MS or to part of the territory or an assigned place, the detention of asylum-seekers and the withdrawal of the material reception conditions for exercising free movement, demeans, stigmatises and breaches the human dignity of asylum-seekers. It is submitted that the effect

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<sup>110</sup> Ibid. at 229.

<sup>111</sup> Op. Cit. n.73 at 214.

<sup>112</sup> Op. Cit. n.108 at 229.



on people who have left their country of origin in desperation is likely to be severe and could lead to asylum-seekers choosing to remain covertly in the EU rather than claiming asylum.

## **LEGAL RATIONALITY**

### **Formal**

Formal legal irrationality can occur in three possible ways. The first is where a doctrinal position from outside Community law clashes and contradicts with Community law. Thus international law can provide doctrines at variance with Community law with the Geneva Convention and the ECHR providing the two most pertinent instruments. This international position appears to be in contradiction with the Dublin Regulation. This enables an asylum-seeker to be returned to another MS without assessing the merits of the asylum-seeker's case as there is an automatic presumption in Recital 2 that all MSs are safe for the return of asylum applicants, in contravention of Article 13 ECHR<sup>113</sup>. Furthermore it is assumed that MSs do not return asylum-seekers or refugee applicants to third countries in breach of their Geneva Convention commitments even though there is evidence to the contrary<sup>114</sup>. Elements of the Dublin Regulation that have been carried over from the Dublin Convention also cause contradictory concerns. Article 3(3) of the Dublin Regulation allows MSs to send an asylum-seeker, pursuant to the national legislation, to a third country, so long as it is in compliance with the Geneva Convention. However, when this is married together with bilateral readmission agreements between MSs and third countries and the readmission agreements

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<sup>113</sup> *Nasseri v. Secretary of State for the Home Department* [2008] 1 All ER 411 at para.19.

<sup>114</sup> *Ibid.* Also see Op. Cit. n.83 at 2.

negotiated by the Commission on behalf of the Community with third countries then problems are produced. Community readmission agreements<sup>115</sup> include a clause requiring the third country to take back a non-national TCN even if they only transited through that third country. This in turn has seen Community neighbour third countries either signing their own bilateral agreements with other third countries or having a policy to hand on any returnees. The combined effect of the Dublin Regulation and readmission agreements is chain *refoulement*, refugees in orbit and the contravention of a State's international obligations as set out in Article 33(1) of the Geneva Convention and Articles 3 and 13ECHR. Under the Reception Directive removal of the minimum reception conditions could lead to an asylum-seekers destitution which would itself be a breach of Article 3ECHR.

The second area of contradiction that may exist for formal rationality is where there are contradictions between different doctrinal positions in the Community legal pantheon. Both the Dublin Regulation and the Reception Directive have problems over the treatment of asylum-seekers and the protection of fundamental rights. Article 14(1) of the 1948 Universal Declaration of Human Rights states that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution' and Article 18 of the Charter of Fundamental rights provides that 'the right of asylum shall be guaranteed with due respect for the rules of the Geneva Convention and in accordance with the Treaty establishing the European Community'. The Charter is currently only a political document without legal enforcement but under the new Article 6(1)TEU of the Lisbon Treaty the Charter will have legal effect as it will have 'the same legal value as the Treaties'. Up to that point fundamental rights are

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<sup>115</sup> See for example Council Decision 2005/809/EC concerning the conclusion of the Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorization, O.J. 2005 L304/14, Article 3. See Kruse I., "EU Readmission Policy and its Effects on Transit Countries – The Case of Albania", (2006) 8 EJML 115.

protected by general principles of law as enunciated by the ECJ and codified in Article 6(2). The Dublin Regulation, as demonstrated above, enables MSs to return TCNs to third countries and contracts the principle of *non-refoulement* in Article 33 of the Geneva Convention thereby contradicting Article 18 of the Charter. Furthermore by enabling MSs to remove the minimum reception conditions the Reception Directive contradicts the right to human dignity in Article 1 of the Charter.

The third aspect of formal irrationality can occur between different cases or definitions of terms within the same doctrinal branch of Community law. The principle of the freedom of movement of persons, as a stand alone principle, provides a freedom to persons that is not limited by any notions of citizens of the EU, TCNs or specific groups of TCNs. However, this general principle applicable to all has been limited to citizens of the EU and their family members, with a significant curtailment of the principle for TCNs by a number of legal instruments. Of course this curtailment, and the adoption of the legislative measures for that purpose, is a legitimate process of law making. However, this does not stop the contradiction from being evident.

## **Instrumental**

Eight factors need to be fulfilled for law to satisfy generic instrumental rationality, or reflect the rule of law. The first factor of promulgation is satisfied as all of the legal instruments in the AFSJ have now been published in the Official Journal although before the Treaty of Amsterdam many were not, including Schengen and the Schengen Implementing Convention.

Also rights under the AFSJ appear to be prospective and not retroactive and do not prescribe the impossible.

Following its introduction at the Treaty of Amsterdam, the law in this area has evolved, and is still doing so, very rapidly, raising concerns over the constancy of the law and through its complexity, its clarity. The sixth factor, that of non-contradiction, incorporates those contradictions identified in the analysis of formal rationality, but also includes the contradictions that could be explained as tensions between legal principles. The result is that the law on the AFSJ is not yet constant, is highly complex and thus unclear, and is extremely contradictory.

The final two factors mark the essential requirements for the rule of law. The first is generality that consists of two elements: equality before the law, or formal equality, so that the authorities must apply the law consistently and treat individuals in similar positions equally; and, the general applicability of laws so that like cases are treated alike, or substantive equality. From the wide discretion provided to the MSs over the transposition of the Reception Directive a TCN in one MS will be treated very differently to other TCNs in other MSs<sup>116</sup>. This is also evident in the Dublin Regulation where MSs' laws on assessing asylum claims ensure that there is an 'asylum lottery'<sup>117</sup> for TCN asylum-seekers.

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<sup>116</sup> Report from the Commission to the Council and European Parliament on the Application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, COM(2007) 745 final.

<sup>117</sup> Op. Cit. n.96 at 14.

A further necessary element contained within instrumental rationality is that of specific instrumental rationality which creates sufficiency for action-guidance when complementing the generic version, and contains three elements. The first is that legitimate ends or goals must be promoted in a good faith manner or attempt by the legislative bodies or judiciary when acting within the legal enterprise. The evidence from Greece indicates that this is not the case over the Dublin Regulation and so the Commission has commenced legal proceedings. Furthermore, when adopting the Reception Directive the Council were quite clear that the material reception conditions were essential for the human dignity of the asylum-seeker. However, these material reception conditions can be withdrawn by a MS thereby undermining the protection of the right to human dignity. The second factor is the use of the most effective legal technique to achieve societal ends by legal officials, ensuring that the function of the legal act matches its effect. The Dublin Convention did not satisfy this requirement, and although the Dublin Regulation is an improvement, it is submitted that many of the inherent weaknesses of the Dublin Convention are carried over into the Dublin Regulation. The third element considers the judiciary's different ideologies and personal agendas when interpreting the law. It is reasonable to find that the judges of the ECJ comply with this element when utilising their teleological approach to interpretation.

### **Substantive**

Substantive rationality requires that all rules of law must be based on good reasons so that legal doctrine can be sustained on plausible empirical facts and that the underlying principle can be justifiable or legitimate. Such justification takes place through the application of standards of fairness recognised by the community. As fairness is value-laden then the

standards envisaged must be moral through the application of human rights norms within the Community. Such human rights norms are possessed by individuals on the basis of their innate humanity.

The position of TCNs in the AFSJ is disturbing when considered against human rights norms. The violation of both the Geneva Convention and the ECHR by the legislative instruments that have been adopted, and the accompanying practices of chain *refoulement*, refugees in orbit and possible breaches of individual human rights that the formulated instruments and policies, if not encourage, then at least condone, signify a marked lack of regard for TCNs as human beings with innate human rights. The material reception conditions in the Receptions Directive are designated as the minimum required to ensure the dignity of the asylum-seeker (Article 13). However the MSs are authorised to withdraw the material reception conditions, except for emergency medical care, in the event of digressions by a TCN, that can include the TCN exercising his freedom of movement. This means that the withdrawal of the minimum reception conditions must breach the statement that “[h]uman dignity is inviolable” (Article 1 Charter) and could lead to the risk of the individual becoming destitute in breach of Article 3 ECHR<sup>118</sup>. As Article 1 of the Charter goes on to hold that human dignity must be respected and protected then it is difficult to see how this provision satisfies human rights norms. Indeed the effect is to treat TCNs, or more particularly asylum-seekers, as less than human. This dehumanisation of TCNs can be characterised in the amalgamation of the term asylum/refugee and immigration, in particular when dealing with illegal immigration and the

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<sup>118</sup> See *R v. Secretary of State for the Home Department ex parte Limbuela, Tesema & Adam* [2006] 1 AC 396; noted Mackenzie A., “Case Comment”, [2006] EHRLR 67 and Hardiman-McCartney A., “Absolutely Right: Providing Asylum Seekers with Food and Shelter under Article 3”, (2006) 65 CLJ 4. See also Puttick K., “Strangers at the Welfare Gate: Asylum Seekers, “Welfare” and Convention Rights after Adam”, (2005) 19 IANL 214, Palmer S., “A Wrong Turning: Article 3 ECHR and Proportionality”, (2006) 65 CLJ 438 and York S., Fancott N., “Enforced Destitution: Impediments to Return and Access Section 4 “Hard Cases” Support”, (2008) 22 JIANL 5.

return of “illegal” immigrants to third countries, and the utilisation of the terms “flood”, “swamped” or “invasion” in common parlance to describe immigration. The result is the failure not only to protect the human rights of TCNs but to fail to respect their human rights or even their humanity. This violates the requirements of substantive rationality where human rights of individuals must be protected through the human rights norms of the Community. The current lack of legal effect of the Charter of Fundamental Rights and the inability of the Community or the Union to accede to the ECHR<sup>119</sup> exacerbates the situation. Although the Lisbon Treaty will go some way to alleviating this human rights lacuna, it may take some time before the effects are felt in a change in legislative attitude.

## **CONCLUSION**

The AFSJ is a major new area of legislative competence for the European Union that involves providing free movement rights for TCNs. As such TCNs are considered to fall within one of three categories of persons: asylum-seekers; refugees; or, immigrants. From the examination of the Dublin Regulation and Reception Directive under the category of asylum-seekers it can be observed that there are some major concerns over their treatment of TCNs. When they are analysed through the lens of legal rationality these concerns become more focused. The conclusion from this analysis is that EU law in this area fails to meet the requirements of all three elements of legal rationality and as a consequence the legitimacy of the polity raises significant concerns. It is submitted that this legitimacy can only be resolved by the polity interacting with all the people of the community and ensuring that the community sees that the legislation enacted is rational.

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<sup>119</sup> See Opinion 2/94 [1996] ECR I-1759.