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Reforming the Common European Asylum System - Legislative Developments and Judicial Activism of the European Courts

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Samantha Velluti
College of Social Science
University of Lincoln
Lincoln
UK

ISSN 2192-855X ISSN 2192-8568 (electronic)
ISBN 978-3-642-40266-1 ISBN 978-3-642-40267-8 (eBook)
DOI 10.1007/978-3-642-40267-8
Springer Heidelberg New York Dordrecht London

Library of Congress Control Number: 2013946311

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

To Khaled

Preface

In June 2013, the amended European Union (EU) legislation on asylum was adopted after lengthy and complex negotiations. The recast "asylum package" represents a significant step forward in the further development of a Common European Asylum System (CEAS). Since the 1999 Tampere Conclusions, there has also been a series of landmark rulings of the European Court of Human Rights (ECtHR) and the European Court of Justice of the European Union (ECJ) which, combined with important constitutional and institutional changes introduced by the 2009 Treaty of Lisbon (ToL), has visibly changed the juridical and legal landscape in the area of asylum. Despite the progress made so far, the EU protection regime for refugees remains characterized by an underlying tension between a security paradigm and a human rights-based approach.

This timely volume provides fresh insights into legislative and judicial developments from a fundamental human rights perspective and responds to some of the contemporary challenges faced by the EU protection regime, with a particular focus on the rights of asylum-seekers.

Many of the ideas in this book are the end-result of collaborative research undertaken during my Visiting Professorship at the School of Law of the University of Cagliari in Italy in 2012. I am grateful to a number of colleagues, particularly Francesca Ippolito, with whom I had the opportunity to discuss at length a number of issues in relation to European asylum law, which I elaborate further in this book. I would also like to thank Sandra Wickenhauser at Springer for inviting me to contribute to the *Springer Briefs Series in Law* and for her enduring patience as completion was delayed by recent judicial and legislative developments at European level.

As an increasing number of people around the world are forced to flee their own country for fear of persecution, it is to them and to their heroic courage that this volume is dedicated.

July 2013 Samantha Velluti

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Abstract

By drawing on a human rights-based and de-constructivist approach, this volume critically examines selected EU instruments aimed at protecting asylum-seekers. It starts by unpacking underlying tensions in the field of asylum which are rooted in classical understandings of national sovereignty best described as a "trinity of unity," namely, a unitary territory, a unitary force, and a unitary people. It then proceeds to the analysis of the recasting of selected EU asylum legislative instruments. The reform aims at introducing a significant shift in the nature of legislation by way of introducing mandatory obligations for the Member States together with the abolition of opt-out clauses and a full harmonization of both procedures and standards, which are also in line with the changes made by the ToL. On the basis of a comparative analysis of a series of key asylum cases, the volume also intends to critically examine the jurisprudence of the ECJ and the ECtHR *vis-à-vis* the European Convention of Human Rights (ECHR) and the EU Charter of Fundamental Rights and Freedoms (EU Charter).

The volume assesses whether the EU provides an adequate framework for protecting those seeking international protection from the (opposing) perspectives of *effectiveness* and *fairness*. It shows that, despite the newly adopted "second-generation" legislative acts which include changes aimed at ensuring a stronger level of protection for asylum-seekers, the reform process at European level does not adequately ensure an equal standard of protection across all Member States. It is posited that a way to adequately address the gaps and inconsistencies in extant EU asylum law, as well as its numerous problematic applications, is through principled implementation by the Member States, that is, in compliance with their international refugee and human rights obligations. Increasingly, both national and European Courts will be called to play a key monitoring function to ensure that standards and guarantees are met. In this context, the book suggests that further mutual engagement is required between the two European Courts and also outlines a proposal for the creation of an *ad hoc* EU asylum court.

Chapter 1
Introduction

The harmonization of national asylum laws and policies has primarily been conceived as a way of limiting the "secondary movement" of asylum-seekers, namely, the migration to that Member State where they could enjoy the most generous conditions and higher probability of recognition and legal status of refugee or other form of international protection. Hence, EU asylum law has mainly aimed at reducing the incentive to move and encourage asylum-seekers to remain in the first Member State in which they could seek protection. In recent years, as an increasing number of protection-seekers are coming to the EU to be granted some form of international protection, asylum can no longer be considered only in terms of management but also requires Member States to balance the achievement of efficiency in regulation with granting a set of basic rights for protection-seekers.

After more than 10 years of existence of CEAS, it is apposite to examine its key characteristics and, in this context, look at how it has influenced the nature of refugee protection. This volume, therefore, intends to critically examine key EU legislative instruments adopted in the field of asylum in order to evaluate the standard of protection afforded to asylum-seekers. The core of the book comprises an examination of the reform of existing legislative instruments as well as the case-law of the European Courts. In particular, this volume is set out to assess whether the EU provides an adequate framework for protecting those seeking international protection from the (opposing) perspectives of effectiveness and fairness and shows that, in spite of some changes ensuring a stronger level of protection of asylum-seekers, the reform fails to provide the basis for ensuring an equal standard of protection across all EU Member States. The volume does not aim to present a comprehensive analysis of all amendments made to existing legislation but seeks to examine the most significant changes addressing issues which are of a particularly problematic nature from a human rights perspective.

As the book will go on to show, the first phase of CEAS did not fully achieve the expected results of coherence, uniform interpretation and application of EU asylum law. To date, measures adopted in this field display so-called "common denominator" solutions and have given Member States ample discretion. The strong focus on securitization has eroded the distinction between refugee

S. Velluti, *Reforming the Common European Asylum System - Legislative Developments and Judicial Activism of the European Courts*, SpringerBriefs in Law,
DOI: 10.1007/978-3-642-40267-8_1, © The Author(s) 2014

protection and migration control in asylum law and policy and has legitimized the pursuit of restrictive asylum policies, even though it fundamentally contradicts the international obligations of the EU and its Member States with international refugee and human rights law. To remedy to this state of affairs, the European Commission had originally proposed an ambitious recasting programme of the main legislative measures with the aim of changing the nature of the legislation. In particular, the original aim was to introduce mandatory obligations for the Member States together with the abolition of opt-out clauses and a full harmonization of both procedures and standards, which were also in line with the changes made by the ToL. However, in the course of the various negotiation stages most of the original drafts were significantly watered down especially by the amendments introduced by the Council of Ministers. For this reason as we shall see, the reform process has not resulted in a major overhaul of the EU asylum system.

The research is grounded in a human rights framework of inquiry, combined with a so-called "de-constructivist approach,"[1] which is used to unravel and critically examine the normative inconsistencies inherent in the EU's "securitized" approach to asylum. In particular, by drawing on the above methodology the book intends to unpack and evaluate the incongruence's engendered by the persistence in relying on a dichotomic approach to asylum, namely, one based on migration control/management and the officialised overarching objective of developing a CEAS truly founded on a rights-based approach to protection.

The rights-based approach embraced in this volume presupposes the existence of high quality EU asylum standards concerning in particular the conditions and criteria for determining asylum in the EU. The latter are reflected in the totality of procedural and substantive aspects of the standards governing the examination of asylum application, including the definition of beneficiaries of international protection.[2] The quality of these asylum standards can be meaningfully assessed by reference to three parameters,[3] which is here posited, a truly rights-based and refugee protection approach should aspire to:

- the likelihood that asylum applicants with comparable case background will receive *identical decisions* on their application in different Member States and consequently reduced secondary movements;

[1] I loosely rely on Derrida's approach to "deconstructivism." See Ref. [1]. As intended here, deconstruction involves a process made up of various stages. First, it is necessary to overturn a hierarchy of oppositions, both logical and axiological, which are at work in all the measures adopted in the context of CEAS. This will help to expose the way oppositions work and how meaning and values in the law are produced. Overturning is not intended as surpassing oppositions because they are structurally necessary in any given policy area. What it means is that they need to be subjected to thorough analysis and critique. In this way, the deconstructivist approach exposes the differences and eternal interplay between oppositions and helps to formulate new concepts and ideas in relation to the proper functioning of CEAS.

[2] See Ref. [2].

[3] Idem.

- the effective fulfilment across Member States of the *minimum standards* for the identification and protection of refugee and beneficiaries of subsidiary protection as well as reception standards for asylum-seekers and the procedural guarantees for asylum applications, laid down in EU asylum law;
- the *conformity* of the standards developed at EU level as well as implementing measures of the Member States with international refugee and human rights law.

The book draws extensively on official EU documentation as well as policy analysis, policy briefs and studies commissioned by the European Parliament and the European Commission. It also relies on position papers, reports and studies of the United Nations High Commissioner for Refugees (UNHCR), the European Council on Refugees and Exiles (ECRE) and selected non-governmental organizations (NGOs) such as Amnesty International (AI) and Statewatch, all of which closely monitor the developments in EU asylum law.

At the time of writing, CEAS has just entered into its second phase. The recast instruments represent a notable improvement but they still fall significantly short of full compliance with human rights obligations at international and European levels. The research findings of this volume point to a gap between the Union's commitment to the equal treatment and protection of the rights of asylum-seekers and the ability and willingness of the legislative institutions to make that commitment a reality. The legislative deadlock of the second phase of CEAS and the lack of intra-state trust and solidarity stifled progress in truly reforming the CEAS legal system. Against this backcloth, the analysis also intends to look at whether the European Courts with their respective rights-based policy agenda may overcome the limitations of existing EU asylum measures. In this context, the broader aim is to unravel the complex and evolving constitutional relationship between the EU and the overall system of the ECHR from the perspective of effective legal and judicial protection of fundamental rights for protection-seekers. In so doing, it concentrates largely on the ECHR and the EU Charter, which provide the basis for the jurisprudential analysis of asylum cases.

The book's main argument is that, in spite of the existence of certain limitations in both of the European Courts' jurisprudence, the role of the ECtHR and the ECJ as "regional refugee courts" is central to the effective guarantee of protection-seeker's fundamental rights, particularly in consideration of the piecemeal progress achieved through the reform of EU asylum legislation. By way of conclusion, it puts forward a tentative proposal for the creation of an *ad hoc* EU asylum court.

The book starts by examining key elements and characteristics of CEAS, both of a legal and non-legal nature, including a critique of the various conceptions of sovereignty which, is here posited, is an "essentially contested concept." This analysis is necessary to unfold some of the underlying tensions at the basis of CEAS, which explain the internal contradictions and inconsistencies and the gap between the EU's purported aim of promoting human rights and its security-based (or state-centred) approach to EU asylum law. The book then proceeds to a detailed critical analysis of the recast legislative instruments and illustrates the extent of substantive continuity with the first phase of CEAS and some positive