The Dublin Regulation vs the European Convention of Human Rights – A Non-Issue or a Precarious Legal Balancing Act?

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Abstract

The interpretation of the Geneva Convention and related legal provisions as well as the extent of practical support for asylum-seekers still differ within the European Union. Therefore, the implementation of the „Dublin II Regulation“, which undertakes to assign the one Member State responsible to examine an asylum-application, leads to multiple legal challenges mostly based upon the European Convention of Human Rights, when an asylum-seeker is to be transferred to the „responsible Member State“. While the European Court of Human Rights in T.I. once had confirmed the possibility of such challenges, they have often become increasingly restricted. National legal bodies also seemed unsure how to strike a balance between the perceived need to effectively implement the regulation as supreme European law (and as a corner-stone of the nascent „European Asylum System“) and the ECHR.

Taking into account for example the Bosphorus ruling of the Strasbourg Court, this paper concludes, that while there is indeed an assumption for conformity of national asylum practise in the EU with the standards of European Human Rights Law – which shall have significant consequences in procedure – there has to be room for the suspension of „Dublin transfers“ in certain cases. This – rather ironically – might increase the legitimacy of the regulation itself.

1. Introduction to the Dublin II Regulation

The European Union intends to create a common policy on asylum including a Common European Asylum System, the first corner-stone of this system being the so called “Dublin II Regulation” (Council Regulation (EC) 343/2003, 18.02.2003) that
principally consists of rules which one Member State has responsibility to deal with the asylum-claim of a third-country national on the substance.

The main aim is that there should be only one claim within the Member States’ territory processed in a single Member-State thereby avoiding “asylum shopping” or the “refugees in orbit” phenomenon. Responsibility is allocated according to hierarchically structured binding criteria ranging from the protection of unaccompanied minors (Article 6), the consideration of the family reunification principle (Articles 7-8, Article 14), possession of a visa or residence permit (Article 9), illegal entry or stay (Article 10), to, finally, first asylum-application as a subsidiary provision (Article 13).

Apart from these binding criteria, the so called “humanitarian clause” (Article 15) allows for accepting responsibility voluntarily taking into account exceptional humanitarian considerations not foreseen by the binding rules mentioned so far. Conversely, each Member State in which the applicant resides can take upon responsibility out of free choice (Article 3 para. 2 - instead of initiating a Dublin-procedure with the otherwise responsible Member State), although in both these cases the - from a literal reading of the regulation - seemingly free choice may turn into an obligation because of human rights law which I will expand upon later.

The process of allocating responsibility ought to take place at the moment of the first asylum-application in the Member States (Article 4 para. 1). When the Member State where this application is made holds another Member State responsible a reasoned request to take charge is to be made to this Member State (Articles 17-18). When responsibility is established, which according to the regulation should happen within five months of the application at the latest, the responsible Member State (possibly, after the asylum-seeker has been transferred to its territory, Article 19) must, generally speaking, examine the claim on its substance and retains its responsibility until the claim is accepted or the refused asylum-seeker is deported from the Member States’ territory or voluntarily leaves it for more than three months (Article 16). Whenever the asylum-seeker leaves the territory of the responsible Member State and enters another Member State the responsible Member State must at the latter’s request take him/her back (request to take back, Article 20).
The Dublin II Regulation and the Implementing Regulation (Commission Regulation (EC) 1560/2003, 02.09.2003) foresee more or less detailed rules for both the take charge and take back procedure between the Member States and the subsequent transfer of the third country national to the responsible Member State, including binding time-limits with the possibility of acceptance by default. When a transfer is to take place, the requesting Member State (that is the one that intends to do the transfer) is to issue a reasoned decision to the third-country national. This decision furthermore must be subject to a procedure of appeal and/or judicial review (Article 19, paras. 1-2). As a general rule, such appeal has no suspensive effect according to the regulation, but Member States are free to provide for exceptions to this rule in singular cases and nearly all have done so, mostly for considerations of national administrative or constitutional law.

2. Evaluation

A. Current stay of play

After more than three years of operating the Dublin Regulation (covering 14 Member States plus Norway and Iceland as from 01.09.2003, plus the 10 Member States then acceding to the EU from 01.05.2004, plus Denmark from 01.04.2006 and in future Bulgaria and Romania from 01.01.2007 onwards, so 29 states in all at this point - with a further extension to Switzerland anticipated), there now are several national court-decisions in Member States dealing with questions of implementation, some quite divergent and most difficult to access for scholars and practitioners while guidance by the courts in Strasbourg and Luxembourg is still missing. The Commission, notoriously under-staffed in the JHA field of operation, has given legal opinions to two issues so far (on the distinction between take charge and take back and the question of the regulation’s retroactive effect in relation to acceding Member States) and a group of Member States’ experts does meet in Brussels twice a year, with the Commission presiding, primarily to discuss conflicts of interpretation among implementing authorities (the so-called “Dublin II Contact Committee”).
This year, 2006, has also seen the publishing of evaluation reports analysing the “Dublin system” (which includes the Eurodac regulation, Council Regulation (EC) 2725/2000, 11.12.2000, with its European finger-print data base that may conclusively prove that someone already has applied for asylum in another Member State and has been in operation since 15.01.2003, mostly up to expectations) with the reports by ECRE\(^1\) and UNHCR\(^2\) to note in particular, both suggesting various changes to address short-comings, especially relating to family-unification and denial of re-access to the asylum-procedure “after a Dublin transfer” (with Greece as a troubling case-study\(^3\)) but refraining from demanding the immediate abolition of the system. The Commission too, is to publish its 3 years evaluation report (Article 28) soon and is expected at this moment not to suggest changes of the regulation itself but may instead propose amendments to the Implementing Regulation to clarify issues of interpretation.

**B. Statistics**

A word on statistics seems appropriate here, although all numbers given are to be treated with care given the methodological problems that have come to light in the process of collecting data in the Member States. In the first half of 2006, there have been approximately 13,700 requests (a slight decrease from the preceding semester) to take charge or take back received by Member States, with Germany, Sweden, France, Austria and the Slovak Republic receiving the most, whereas on the other hand, Germany, France, Austria, Belgium and the Netherlands being most active in sending requests themselves. The actual number of transfers effectively carried out is relatively lower (approximately 4800 overall), since not all requests are accepted (approximately 70%), some applicants “disappear” before being transferred and depending on judicial activity in the respective Member States, some transfers can not take place because the decision to transfer is quashed in the appeals/judicial review procedure (with rates ranging from 5-50% in that respect).

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\(^2\) UNHCR, The Dublin II Regulation, A UNHCR Discussion Paper (Kok), April 2006, www.unhcr.ch

\(^3\) Greek law as it stands makes it impossible to continue an asylum-application when the applicant leaves the country during the open procedure and then is taken back under the Dublin II Regulation; see UNHCR Updated memorandum on the law and practice of Greece, 30.11.2005
C. The current dilemma of the “Dublin System”

So albeit, most “Dublin procedures” now indeed are faster than such procedures had been under the application of the so-called Dublin Convention, an international treaty and the regulation’s predecessor, the question whether the whole process is too burdensome and complicated and a waste of resources that ought to be used to a better end in other parts of the asylum-process in the European Union, still is not answered conclusively.

However, the Dublin Regulation, as the political compromise that emerged after the drawn out negotiation process, was not meant to be a political tool to solve the question of inequality in numbers of asylum-applications in the Member States. But one of its clear intentions, often over-looked, arguably was and is to legalise the process of allocating responsibility to examine asylum applications in Europe, a process that before had been blurred by various bilateral and multilateral re-admission agreements and national “safe third country clauses” more or less outside effective and adequate legal scrutiny. So, while taking away the right of choice from the asylum-seeker to an extent (since the responsibility criteria themselves also partially are based upon the activities of the asylum-seeker), the Regulation, on the positive side, explicitly states the right that the asylum-claim is dealt with in (at least) one Member State (Article 3 para. 1) and, as already mentioned, obliges Member States to issue written decisions on inadmissibility subject to judicial review (Article 19 paras 1, 2), not to mention the rules on family reunification (Article 4 para. 3, Articles 6-8, 14, 15).

What remains critical however, is the fundamental dilemma that in a majority of cases asylum-seekers are vehemently opposed to a transfer-decision pursuant to the Dublin Regulation since they do not want to go back to the EU-country they first had entered or had claimed asylum in, mostly a country on the southern or eastern periphery of the Union; the reason why they are so opposed to it frankly and simply being that they already had invested a lot of money and effort to come to the country they are now in, because the respective other Member State’s asylum-system is (or is perceived to be) much more strict (eg low recognition rate, widely differing court

4 Though the responsible MS still may send the applicant to another country; however such a procedure also has to be a procedure subject to judicial review and in accordance with the Geneva Convention; see Art 3 para 3 Dublin II Regulation.
rulings on the situation in a given country of origin) or because the social care and general conditions of living for asylum-seekers there are (perceived to be) much worse. This opposition may lead to long drawn-out appeal-procedures or even efforts to actively subvert the “Dublin rules” by the applicants (e.g. by destroying visa, not telling the truth about their way into the Union or falsely claiming to have left the Union for more than three months among others). The more such cases arise, the less transfers there will be, the more resources will having been spent furtively, the more the “Dublin system” will appear inefficient from an “economical” view-point.

Somewhat ironically, the moment in the future (if it ever were to materialise, of course), when the asylum-systems and the standards of care and living for asylum-seekers will actually be completely harmonised within the Union (which of course is the aim of the Common European Asylum System of which the Dublin regulation is to be an indispensable part), the Dublin system should work perfectly, since there normally would be no longer any serious reason to oppose a transfer to another Member State with a totally equal system in theory and practise; however, then, asylum-seekers would also - with the exception of family reunification cases - no longer have an impetus to go further then to the first Member State they pass, so in the end the system would only have to deal with very few cases and therefore in the end might become “perfect” and uncontroversial, but of little practical value, anyhow.

Today, the situation, however is just the other way round. Although asylum-applications overall are sinking in Europe, the number of “Dublin cases” tends to remain relatively high as is the intensity of the legal debates and controversies in this area.\(^5\) One may speculate from the view-point of political science whether the harmonised administration of common rules on responsibility by Member States will have a neo-functional spill-over effect on material rules on asylum and therefore will eventually facilitate substantive harmonisation and the emergence of the Common European Asylum System or whether the problems inherent in this approach will damage further the anyhow still rather weak forces of supranationality in the Union’s JHA area, which rightly has been described by Kostakopolou as an area of “contained intergovernmentalism” troubled with confused procedure and unclear

\(^5\) Filzwieser, Ausgewählte Rechtsfragen im Zusammenhang mit der erweiterten Anwendung des Dublinverfahrens auf die neuen Mitgliedstaaten in AWR-Bulletin, Vierteljahreszeitschrift für Flüchtlingsfragen, 1/2005, 58
strategy. Be that as it may, it is rather safe to assume that the “Dublin system” will keep alive for the next years. So from a legal point of view and given the still big discrepancies in the Member States’ asylum policies and treatment of asylum seekers as already alluded to, one useful task in this context may be defining in greater detail the relationship between the Dublin Regulation and European Human Rights Law and to trying to give guidance for procedure in that respect, while concentrating on the rights of the third country nationals/asylum-seekers affected by all of this.

3. Dublin II Regulation & ECHR, the Article 3 para. 2 Connection

A. Full discretion, the traditional view

Traditionally, the Dublin system (from the Convention to the Regulation) has often been regarded as a set of intergovernmental arrangements, rules exclusively directed towards Member States how to deal with multiple asylum-applications in the European Union. Legal lacunae were to be filled by means of “gentlemen’s agreements” with asylum-seekers restricted to the role of passive recipients of their outcome. The obligatory nature of the criteria of responsibility to deal with an asylum-claim on its substance was in this view greatly reduced by the fact that every state had under the Dublin Convention (Art 3 para. 4) and has under the text of the Dublin II Regulation (Art 3 para. 2) the right to assume responsibility even if not responsible according to the relevant legal criteria, otherwise binding. The apparent freedom to accept or deny requests of Member States to take charge on humanitarian considerations (Art 15) is then also cited as another example of discretion granted to Member States authorities’ by the Dublin II Regulation.

B. TI and its consequences

If this discretion in the context of Article 3 para. 2 is to be interpreted as unlimited by Community law, its only potential legal limits then are the European Convention of

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7 The first sentence of Art 3 para. 2 reads: “By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation.”
Human Rights and its interpretation by the Strasbourg Court and, if any, rules of national constitutional and administrative law: With its well known (and in the Dublin context still singular) decision in *T.I. v UK*\(^8\) referring to the Dublin Convention the ECHR has made it clear that membership to a treaty or international organisation does not absolve states from their Convention responsibilities towards individuals when applying the provisions of such treaties or organisations. *T.I.* therefore opened the road for judicial review proceedings in relation to executive decisions made in applying the Dublin rules when a breach of the Convention by such application was substantively argued.

As for Community law however, following the argument just outlined, Member States would be regarded as enjoying complete freedom whether to apply the Dublin Regulation’s responsibility criteria or not (by means of exercising their right under Article 3 para. 2). Since there is this discretion, the equivalent protection test of the recent *Bosphorus*\(^9\) judgement would not apply either, as has been argued by Costello.\(^10\)

The application of the Dublin Regulation would nevertheless stay wide open for challenges of breaches of Article 3 European Convention of Human Rights (ECHR), without any considerations of Community law relevant and necessary: If a transfer to a Member State responsible for dealing with the asylum-claim on its substance pursuant to the Regulation’s criteria were to be seen as an infringement of Article 3 ECHR, then the Member State, in which the individual is residing, must abstain from such a transfer and take upon responsibility according to Article 3 para. 2 Dublin II Regulation. In such a case the discretion whether to apply Article 3 para. 2 is reduced to nothing in so far as the application of the provision becomes obligatory because of the ECHR. This connection between the ECHR and Art 3 para. 2 Dublin II Regulation first had been outlined explicitly by the Austrian Constitutional Court in a 2001 landmark-ruling\(^11\) and recently was confirmed by the Belgian Conseil

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\(^8\) 2000-III 435.  
\(^9\) *Bosphorus Hava Yollari Turizm v Ireland* (2006) 42 EHRR 1. The Court therein stated that he would refrain from exercising jurisdiction over Member States’ actions implementing Community law without discretion when the relevant parts of Community law provided equal protection for the individual than the ECHR, which the Court general agreed to be the case; rebuttal of this assumption is possible, albeit on the basis of the high „manifest deficiency of protection”- standard.  
\(^11\) Verfassungsgerichtshof (VfGH) 08.03.2001, G 117/00, G 146/00, G 147/00.
d’Etat/Raad van State.\textsuperscript{12} It has in practise led to a series of legal challenges, especially in relation to the Member States that had acceded to the European Union on 01.05.2004, and in relation to Greece. Looking at the somewhat exceptional Austrian example, these challenges have as a whole to undermined the application of the regulation’s responsibility criteria with, at a time, up to 90% of the transfers already agreed to by the other (responsible) Member States having to be cancelled because of the out-come of lengthy appeal-procedures and other connected factors.\textsuperscript{13}

However, similar developments could also be seen, albeit in varying degrees, in other EU-states with executive bodies and national courts more than often unsure whether the full adoption of national and supranational judicature concerning Article 3 EHRC, which mostly concerned deportations to the asylum seekers’ countries of origin and not transfers to other EU Member States, was indeed appropriate, with concrete legal guidance so far mostly missing.

\section*{4. Dublin II Regulation & ECHR, Interdependence}

\subsection*{A. Requirement to interpret Article 3 para. 2 in line with Community law}

What I am arguing here is that the relationship between the European Convention of Human Rights and the Dublin II Regulation (and to be more precisely between Article 3 EHRC and Article 3 para. 2 Dublin II Regulation) is much more interconnected than the more simplistic view outlined so far would have it. Looking at the preamble of the Regulation as a whole, one immediately appreciates that in the minds of the drafters of that legal instrument, the Dublin II Regulation and its application were by its very nature to be in conformity with human rights as provided by the EU-Charta and the EHRC. The preamble also makes reference to the Common European Asylum System with the Dublin II Regulation an indispensable part of it and postulates a quick and efficient procedure for the decision upon responsibility in order for the material examination of the asylum-claim to start as soon as possible.\textsuperscript{14}

\textsuperscript{12} Conseil d’Etat, Section d’ Administration, Zl. 162.039, 28.08.2006

\textsuperscript{13} See Frank/Anerinhof/Fitzwieser, Asylgesetz 2005, 2\textsuperscript{nd} edition, Vienna 2006, 143, 144.

\textsuperscript{14} See especially (1), (2), (12) and (15) of the preamble.
From that, it must reasonably be implied that these considerations should also be taken into account (by virtue of the general obligation to co-operate according to Article 10 Treaty of the European Union) by Member States’ authorities\(^{15}\) when exercising their “discretion” under Article 3 para. 2 Dublin II Regulation. This discretion therefore is not only restricted by requirements of the European Convention of Human Rights and, potentially, by national law as already stated, but also by Community law which as a result makes a careful and proportionate weighing of all the different factors necessary.

What I am intending to show subsequently, the more restricted the discretion of the Member States in this context is circumscribed, the less the risks of human rights violations as well as ineffective application of the regulation get and the higher the chance the Dublin system and the constant challenge of upholding human rights in the asylum context are not considered as mutually exclusive as is the prevailing view-point of many Non Governmental Organisations:

**B. Article 3 para. 2 as the exception, the effet utile-principle**

On the one hand, Member States are bound by virtue of the Community Law’s *effet utile* principle to generally respect the assignment of responsibilities according to the Regulation’s binding criteria. In other words, the exercise of Article 3 para. 2 Dublin II Regulation, ought not be the rule, but the exception. If Member States chose to ignore the responsibility criteria and were to deal with the majority of applications of asylum-seekers on their territory themselves, the effectiveness of the system would be severely endangered. This also might, maybe surprisingly, have negative consequences for asylum-seekers when their rights of family-reunification under Dublin II (as foreseen by art. 6-8 and 14 of the Regulation) were to be ignored or when they were to be sent back to a “safe third country” with which the Member State they are in has concluded a bilateral readmission agreement despite the fact that their asylum-procedure is still open in another Member State. So, general legal principles of the Community legal order supported by the Dublin Regulation’s preamble do limit the scope of the application of Article 3 para. 2 by *virtue of Community law*, therefore significantly reducing its apparent discretionary nature.

C. Community law obligation to use Article 3 para 2 to avoid breaches of ECHR

On the other hand, when the asylum applicant’s transfer to the responsible Member State would lead to a breach of Article 3 ECHR by the Member State enforcing the transfer, such an assignment of responsibility cannot be legal under Community law, again taking into account the relevant statements of intent in the Regulation’s preamble as well. Therefore, Member States in such a situation are bound by Community law to take responsibility upon themselves pursuant to Article 3 para. 2 Dublin II Regulation (just like they are bound to accept a “humanitarian request” according to Article 15 Dublin II regulation when a non-acceptance would lead to a violation of art. 8 EHRC\(^\text{16}\)). If this is not done immediately by the competent authorities at first instance, Article 19 para. 2 Dublin II Regulation provides for an appeals/judicial review procedure in which the affected asylum-seeker must be able to effectively enforce his/her subjective rights in this context.

5. Effects on Procedure

A. Article 3 ECHR, Presumption of Compliance and Exceptions

Having said that, one must look to the procedural consequences in order to break down the theoretical principle to its impact “on the ground”. When the preamble of the Dublin II Regulation states that the Member States all accept the principle of *non refoulement*\(^\text{17}\) this, at the level of Community law requirements that are discussed here, legal fiction must be integrated into the procedure to check whether an assignment of responsibility under the Regulation can stand because of a possible breach of art. 3 ECHR. This must also be done in relation to the broader assumptions emanating from the European Union legal order that all Member States generally accept *bona fide* their legal obligations as far as human rights protection, asylum-procedure and care for asylum-seekers are concerned, while still leaving the door

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\(^{16}\text{Art 15 para. 1 first and second sentence read: „Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerarations. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned.‟}\\n
\(^{17}\text{See (2) of the preamble.}\\
open for successful Article 3 ECHR- legal challenges in the case of serious non-compliance.

Such an integrated approach will have as starting-point the legal presumption that when the Council passed the Dublin II Regulation, Member States will have made sure that they all adhered to these requirements at that time, otherwise they would not have been in a position to pass the Regulation, which is the principle of “normative Vergewisserung” according to the Austrian Constitutional Court in a June 17th, 2005 ruling, a similar terminology, albeit with some variations in its precise meaning, is used by German courts. It goes without saying that this must be subject to rebuttal in individual cases, however with the presumption just mentioned as the starting-point and therefore the burden of proof falling more on the side of the applicant than vice versa. Normative Vergewisserung in this context also means that a legal challenge will only be successful when the individual concerned can bring forward evidence that in case of his/her transfer to the responsible Member State his/her individual rights will be breached in a way relevant to the transferring Member State’s legal obligations emanating from Article 3 ECHR. General criticism of a Member State’s asylum system will therefore usually not suffice and it will normally not be necessary for the respective appeals body/judicial review authority to entertain wide-ranging and time-consuming examinations of such a nature even when requested. The potential question whether Article 13 of the European Convention of Human Rights is respected in all aspects of the responsible Member State’s legal order therefore is not an obligatory part of the examination since neither from the rulings of the European Court of Human Rights nor from systematic considerations a necessity for such an inclusion can be inferred as long as Article 13 is respected in the Dublin-appeals/judicial review procedure of the requesting Member State which should be the case when Article 19 of the Dublin II Regulation is properly applied.

So arguably, by means of a certain shift in the balance of proof and a limitation to breaches of Article 3 ECHR strictu sensu, Community law in general and the provision of Article 3 para. 2 of the Dublin II Regulation in particular, on their own,

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18 VfGH 17.06.2005, B 336/05.
provide for a procedure that is both able to single out cases in which a transfer must not take place in order not to create incompatibility of the Regulation with the ECHR (with the other Member State then having to assume responsibility with no discretion whatsoever) and to avoid lengthy delays in the final assignment of responsibility therefore avoiding an application of the Dublin II Regulation contrary to the *effet utile* principle. Would this – given the lack of discretion - withstand the *Bosphorus* equal protection test?\(^{21}\)

**B. Article 8 ECHR**

It has to be added that according to the Regulation’s interpretation presented here Article 3 para. 2 also must be applied when a transfer to the otherwise responsible Member State would fall contrary to Article 8 ECHR, albeit this should only happen in rare cases given the fact that the Dublin II Regulation by virtue of several provisions among the criteria of responsibility (art. 6, 7, 8, 14 and 15) addresses the issue of family-reunification at the assignment of responsibility stage, but it nevertheless remains a possibility.

**C. Unreasonable Implementation of other rules of procedure**

Thirdly, whenever Member States in the process of assigning responsibility which is primarily, but not exclusively directed at them (the so called “consultation procedure”), in a manifestly *unreasonable* way (e.g. by conveying – on purpose – incomplete information to the other Member State or ignoring time-limits) violate the rules governing this process (Article 17-20 Dublin II Regulation, Dublin II Implementing Regulation) and therefore endanger its integrity, an assignment of responsibility based upon such a flawed procedure cannot stand as a base of a transfer even if the transfer otherwise would not be in breach of the transferring Member State’s obligation under the European Convention of Human Rights.\(^{22}\)

\(^{21}\) Costello, see footnote 10 above, has argued that the Bosphorus principle is still not applicable - even when there is no discretion - under Title IV, EC as in this area several restrictions on preliminary references to the European Court of Justice exist that may deny „equal protection status“. However, this question which is not explored here further has no decisive impact on the way national legal authorities should lawfully interpret the Dublin Regulation.

\(^{22}\) Based upon the principle that everybody should be able to trust executive authorities to act in good faith and not in a way that manifestly contradicts the law („Willkür“ in German). On the other hands, wrong interpretation of the law or other mistakes when implementing the Dublin II Regulation that fall below that threshold and do not lead to a breach of Fundamental Rights (Art 3 & 8 of the ECHR) do not make a declaration of responsibility void.
Procedure-wise this may, in some cases, also lead to an obligatory exercise of Article 3 para. 2 by the Member State in which the asylum-seeker is staying.

**D. Appeal/Judicial Review**

Staying with procedure, the Regulation in Article 19 para. 2 requires Member States, without exception - after the completion of a transparent consultation procedure - to provide the asylum-seeker with a reasoned decision upon his/her transfer to the responsible Member State against which an effective means of appeal/judicial review must be available. Whether the effectiveness of such an appeal is unduly curtailed by the possibility of excluding its suspensive effect – foreseen as the rule rather than the exception in Article 19 para. 2 Dublin II regulation and in line with the Procedural Directive – has already been the subject of some legal debate, but as individual cases vary, it is difficult to draw general conclusions apart from the one that an individual assessment of the need for suspensive effect by the appeals authority must be guaranteed in all Dublin cases.

**E. Summary**

Summing up, if the interpretation of Article 3 para. 2 Dublin II Regulation and the other requirements all flowing directly from Community law outlined above are adhered to in the daily practice of Member States’ authorities and as long as Member States do not systematically breach their obligations under Human Rights Law in the context of asylum (which however, as daily practice sadly shows, still cannot be taken for granted), equal protection in the sense of *Bosphorus* may be achieved, with the consequences outlined in that ruling.\(^{23}\) This, ideally, should not be disadvantageous to the asylum-seeker as the *Community law* right to an obligatory application of Article 3 para. 2 Dublin II Regulation overrides all potentially contradicting provisions of national law and forces Member States to create effective administrative procedures for this purpose, if not already existing, all of which is a step forward from the times of the Dublin Convention with its notion of “gentlemen’s agreements” outside the scope of judicial interference and “subjective rights”.

\(^{23}\) see above footnote 21.
If the conditions are not met (any longer), all acts under the Regulation (also) (again) fall under the full scrutiny of the ECtHR (in that case without any qualifications) and Member States’ authorities are not entitled to any assumptions of Community law legality as outlined. This is also, of course always the case for any remaining decisions Member States’ authorities take in the Dublin context with “real” discretion.

6. Conclusions

The Dublin II Regulation in itself does not grant Member States discretion to come to decisions in its implementation that would lead to breaches of the European Convention of Human Rights. In such situations Community law obliges Member States to take upon responsibility pursuant to Article 3 para. 2 of the Regulation, even when otherwise another Member State would be responsible. Community law on the other hand also requires Member States to an effective implementation of the binding responsibility criteria that should as a consequence be enforced in the majority of cases unless a need for an exception is proven in individual cases and as long as Member States do not systematically violate their legal obligations.

Given the manifold human rights concerns in various Member States in the field of asylum and the remaining existence of some problems in the implementation of the Dublin II Regulation – having been outlined for example in some detail in the recent evaluations by UNHCR and ECRE and also to be addressed by the European Commission in the upcoming evaluation in which changes in the Implementing Regulation will be proposed to alleviate some of these concerns – it is not yet clear that the equal protection standard will be achieved in the Dublin context in the practice of Member States in future. However, this is not the fault of the Dublin II Regulation, which as I have argued here, even in its existing form, is a sufficient mechanism for an assignment of responsibility in conformity with Human Rights Law. In this instance, it is not Brussels to be blamed.

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