
“Systemic Deficiency”: Legal Standard Setting, Human Rights, and Its Effect on the Individual in the Common European Asylum System

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Abstract: By looking at two judgments adjudicating Dublin-II-removals to Italy and Greece, this paper finds that setting the standard of “systemic deficiency” as a test in order to stop removals to countries within the Common European Asylum System is demonstrative of a clash between the sovereign interest and the human rights of asylum seekers and refugees. Drawing from Judith Butler’s concepts of ‘vulnerability’ and grievability’, law and rulings will be placed on a broader socio-political context. Through the standard of “systemic deficiency” a hierarchy of suffering based on “grievability” is created. “Systemic deficiencies” thereby impact local suffering and thus the lives of individual asylum seekers and refugees.

Legal debate tends to often be reserved for lawyers and law scholars. Through our paper, we aim to broaden the scope of legal analysis by recognizing the value of analyzing legal frameworks from the perspective of the humanities and social sciences that underlie its reasoning. We thus aim to present a theoretical insight into the debate around law and asylum and so provide an integrated legal analysis, researching the material conditions of refugees and asylum seekers in Italy and Greece. By doing so, we hope to reach a broad audience, opening legal analysis up to scholars of neighbouring disciplines.ⁱ

1. Introduction

Since 1999, the European Union (EU) has been working towards establishing what it termed the Common European Asylum System (CEAS). Working under the assumption that all EU member states have a shared responsibility to “welcome asylum seekers in a dignified manner,”ⁱⁱ the aim of the CEAS is to ensure that asylum seekers are treated fairly and that cases

are examined according to uniform standards; thereby ensuring that the outcomes of applications for asylum are independent from the state in which they are lodged.ⁱⁱⁱ Within the system, all member states are regarded as constituting safe countries in respect to each other. This has been stated in the Treaty of Amsterdam, which laid the foundation for the Dublin Regulation.^{iv}

The Dublin Regulation establishes the criteria and mechanisms for determining which member state of the EU is responsible for examining an application for asylum lodged in one of the member states of the EU by a third-country national.^v According to this regulation, third-country nationals within one member state can be removed back to the first EU member state they entered. Once an asylum seeker has lodged an application in one of the member states, his or her fingerprints are saved in the EURODAC database, which makes it possible to trace the movement of refugees and asylum seekers, allowing other countries to know whether an applicant has lodged a previous claim for asylum elsewhere and if so remove him or her to the respective member state. A further Council Directive defines the minimum standards on procedures for granting and withdrawing refugee status in member states.^{vi}

As Greece and Italy share borders with non-EU countries, they are a point of entry into the EU for many incoming asylum seekers. Being member states of the European Union, both countries have to abide by the aforementioned regulations: they are regarded as constituting safe countries, providing the same access to asylum as other member states and upholding the minimum procedural standards. Yet recent reports testify that there are insufficient conditions for asylum seekers and refugees in both countries. Against this background, asylum seekers who reside in other EU countries, but have passed Italy and Greece as first safe country, objected and appealed against their removal to these countries.

This paper looks at law from a broader perspective that sees its development as set within a political and theoretical framework. It examines the role of law and courts as administrators of levels of suffering, drawing from Judith Butler's concepts of "vulnerability" and "grievability", with specific regards to the standard of "Systemic deficiency" within the Common European Asylum System.

Two cases will then be examined: *EM (Eritrea) and others v. The Secretary of State for the Home Department [2012]* (E.M. herein after), regarding returns to Italy, and the European Court of Justice's (herein after ECJ) ruling of *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform [2011]* (N.S. herein after) regarding returns to Greece.

The paper will then focus on the setting of the overall standard of "systemic deficiency" regarding the conditions of an asylum system of a country of first entry into the European Union as a way to determine whether removals from other member states to this country of first entry are justifiable or not. Whilst the standard of "systemic deficiency" was considered met and lead to the withholding of returns to Greece, the standard was not considered met in the case of Italy. Evidence attesting conditions in Italy will be presented.

Through an analysis of the standard of "systemic deficiency", this paper will enquire into why and how the classification of such standard impacts asylum seekers, shedding light onto the relationship between law, rulings, sovereignty and human rights, concluding with a call for special attention to upholding standards of humanity, and human rights.

2. Vulnerability, Grievability and Human Rights

In her book *Frames of War. When is Life Grievable*, Judith Butler discusses the process of the devaluation and grievability of life.^{vii} She defines life by its inherent precariousness and argues that life is only grievable if it is recognized as life. Hence, one has to look at the conditions under which it becomes possible to apprehend a life or a set of lives as precarious, as well as those conditions that make it less possible, or even impossible.^{viii}

Butler argues that one is not born and later becomes precarious, but that precariousness is inherent in life itself. Survival is dependent on what Butler refers to as the “social network of hands.”^{ix} Since life is precarious from the start and since a living being may die, it is necessary to care for that being, so that it may live.^x Hence, precariousness implies living socially, which means that one’s life is always in the hands of others. At the same time the life of others, known or unknown, is always in our hands.^{xi}

The recognisability of the precariousness of life and thus of life itself is dependent on frames.^{xii} Butler argues that such frames are operative in imprisonment and torture as well as in the politics of immigration.^{xiii} It is according to these frames that certain lives are perceived as such while others, though apparently living, are not perceived as lives and hence as less valuable.^{xiv} Through racism, which changes our perception and way of perceiving, iconic versions of populations are produced.^{xv} The loss of these iconic versions of populations is “grievable”. According to Butler, the differential distribution of “grievability” across populations has implications for why and when we feel politically consequential affective disposition such as horror, guilt, righteous sadism, loss and indifference.^{xvi}

Precariousness is closely connected to precarity.^{xvii} While precariousness is inherent in life itself, precarity is a condition that is produced by political decisions impacting the access

certain populations have to social and economic networks of support. The relationship between precariousness and precarity is mutually enforcing. It is also at the same time a material and perceptual issue, because those whose lives are considered non-grievable are exposed to exclusion, injury, violence and death to different degrees of suffering.^{xviii}

The exclusion of the non-citizen as one of the paradoxes of Human Rights was first addressed by Hannah Arendt who identified that the Universal Declaration of Human Rights, by declaring the protection of the rights of man as those of the citizen, implied that the non-citizen did not constitute the subject of Human Rights.^{xix} For Rancière, the link between human life and the political sphere opens the door to the very conception of the non-citizen as non-human. So, Rancière's critique to Arendt is that "The Declaration of Rights states that all men are born free and equal. Now the question arises: What is the sphere of implementation of these predicates? If you answer, as Arendt does, that it is the sphere of citizenship, the sphere of political life, separated from the sphere of private life, you sort out the problem in advance. The point is, precisely, where do you draw the line separating one life from the other? Politics is about that border. It is the activity that brings it back into question."^{xx}

Though not the focus of this paper, one could argue that it is the precariousness that human beings share that constitutes one of the things that makes all humans equal. If all humans are equal, human rights should be the minimum criteria on which legal standard setting should be built. The line that delimits who is "other" is very thin and fragile, as those that could become a risk to the majority of the population can vary according to political contingency, which is now focused on the limiting of migration.^{xxi} This means that protecting those who are the most vulnerable implies the protection of society as a whole.

As was earlier exposed, Butler argues that life is only grievable if it is recognized as life. It is the recognisability of such life, the imposition, use and potential change of these “frames” that is political. In the case of law, its role would be to uphold such work carried out by politics, for better or worse, depending on the politics it institutionalizes. It is to this upholding of the political by law in the case of asylum that we turn to now, looking at removals to Italy and Greece within the European asylum system.

3. Removals to Italy and Greece: A question of Legal Standards and Evidence

3.1 E.M. (Eritrea) & Others v the Secretary of State for the Home Department.

On 17th October 2012, the civil division of the UK Court of Appeal adjudicated on the case between *E.M. (Eritrea) & Others and the Secretary of State for the Home Department [2012]* which had previously been adjudicated by the Administrative Court of the High Court of Justice. All appellants had fled to Europe, arrived in Italy and later travelled to the UK. The cases of each of the appellants differed in that some appellants had either applied for asylum and received refugee status in Italy and subsequently made their way to the UK, whereas others had gone through Italy without claiming asylum and did so after having arrived to the UK. All appellants were appealing against removal to Italy from the UK.

The appellants argued that the Italian asylum system was in such condition that their removal to Italy would result in them being subject to inhuman or degrading treatment. The Secretary of State for the Home Department on the other hand, decided for each case that the appellant's claim was unfounded and thereby enabled the issuance of removal directions.^{xxii} Hence, the Court of Appeal decided over the question of whether removals to Italy, the EU member state of first entry in this case, would amount to putting the appellants at risk of being

subject to inhuman or degrading treatment as stipulated in Article 3 of the European Convention of Human Rights.^{xxiii}

Although a large amount of evidence was presented by the appellants showing that “a very real risk of destitution”^{xxiv} awaited upon return due to the Italian asylum system being dysfunctional in large parts, the judgement was adamant in that the presented evidence was not enough to prove a likelihood of suffering inhuman or degrading treatment. The Court ruled that they were bound by the standard established by the Grand Chamber of the ECJ’s judgment in *N.S.*^{xxv}

N.S. adjudicated removals to Greece and sets the standard of “systemic deficiency” as a way to determine under which conditions the presumption of compliance to the minimum standards on procedures in member states for granting and withdrawing refugee status was rebuttable.^{xxvi} If “systemic deficiencies” amount to substantial grounds to believe that an asylum seeker would face a real risk of being subject to inhuman or degrading treatment, removals would not be allowed.^{xxvii}

In *E.M.* this was interpreted in such a way that removals could not be stopped if an appellant is facing an individual risk of being affected by flaws of the reception conditions and asylum procedure and is subject to inhuman or degrading treatment. Removals would only be objected if deficiencies are systemic, or a manifestation that an asylum system is internally flawed and thus an unsustainable system.

In *N.S.*, which referred to removals to Greece, the ECJ referred to the judgement of *M.S.S. v Belgium and Greece [2011]* (herein after *M.S.S.*) by the European Court of Human Rights (herein after ECtHR).^{xxviii} In *M.S.S.*, the ECtHR took into account the regular and anonymous reports of international non-governmental organisations attesting to the practical

difficulties in the implementation of the CEAS in Greece. It also took into account a correspondence sent by the UNHCR to the responsible Belgian minister and reports by the European Commission on the evaluation of the Dublin System and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency of the system and the effective protection of fundamental rights.^{xxix} The ECtHR came to the conclusion that the extent of the infringement of fundamental rights in Greece showed a “systemic deficiency” in the asylum procedure and in the reception conditions of asylum seekers.^{xxx}

While the judgement of *N.S.* found “systemic deficiencies” in Greece, *E.M.* did not find “systemic deficiencies” within Italy’s asylum system. Furthermore, the latter judgement relies on evidence to argue that the standard is not met and makes explicit comparison to the case of Greece. Referring to the UNHCR’s “Recommendations on Important Aspects of Refugee Protection in Italy” (UNHCR 2012),^{xxxi} *E.M.* states in its paragraphs 50-51 that while UNHCR’s report points out a number of concerns about Italy’s inability to cope with sudden influxes, uneven quality provision and care offered for vulnerable groups, these do not suggest that the asylum system is systemically deficient in contrast to the reports on Greece.^{xxxii}

Destitute and inhuman living conditions were for example attested by the appellant *A.E.* of *E.M.* After having received refugee status in Italy, *A.E.* was sent to a city in Tuscany, where she and others, men and women, were given accommodation in crowded and unsanitary premises, which they had to vacate during the day. *A.E.* was given food vouchers that ran out, leaving her dependent on charitable handouts. The accommodation was withdrawn after three months. Subsequently, *A.E.* lived in cramped accommodation shared with men for some time, before she left Italy and made her way to the UK from where she was returned back to Italy.

Upon return, A.E. lived found herself destitute in Milan. She lived in a squat, was repeatedly raped, had no money and relied on charity for food.^{xxxiii}

The judgement takes the reports presented as evidence by the appellants into consideration, yet it asserts that although the totality of the evidence about Italy is “extremely troubling and far from uncritical”^{xxxiv} it does not amount to a “systemic deficiency”, considering the evidence submitted by the Home Secretary, which attests the processing of asylum applications, the reception, accommodation and support system for asylum seekers and refugees. It is thus relevant to examine the conditions of the asylum system in Italy.

3.2 Living conditions of asylum seekers and refugees in Italy

The reception conditions, asylum procedures as well as the living conditions of asylum seekers and refugees in Italy are indeed highly troubling. In a report following a visit to Italy from 3rd to 6th July 2012, the Commissioner for Human Rights of the Council of Europe, Nils Muižnieks, commented on the reception conditions for newly arriving asylum seekers and highlighted a number of shortcomings. These included the existence of different types of centres, variability in standards and the effects of a sudden increase in capacity under the North African emergency framework.^{xxxv}

According to Muižnieks, especially the conditions of administrative detention in identification and expulsion centres (CIEs) give reason for concern. These concerns are corroborated by the findings of Iyengar et al,^{xxxvi} by the European Council for Refugees and Exiles,^{xxxvii} as well as by the UN Special Rapporteur on the Human Rights of Migrants, who pointed out that arbitrariness of decision making, insufficient medical care, lack of access to lawyers and NGOs and poor facilities and a lack of proper activities added to detainees’ frustrations.^{xxxviii} The Commissioner for Human Rights of the Council of Europe encouraged Italy

to replace the existing framework with an integrated, unified reception system, capable of responding to fluctuating needs and affording the same quality of protection everywhere in Italy.^{xxxix} Insufficient reception conditions in Italy were also attested by the appellants in paragraphs 16-17 of *E.M.*

In addition to the reception conditions, asylum procedures in Italy also give reason for concern. While the Commissioner for Human Rights of the Council of Europe expressed serious concern about the excessive length of court proceedings in Italy, the UN Special Rapporteur on the Human Rights of Migrants especially pointed to Italy's bilateral cooperation and readmission agreements with Libya, Egypt and Tunisia.^{xl} According to the Special Rapporteur and Amnesty International, these agreements often did not appear to respect human rights.^{xli}

The bilateral re-admission agreements between Italy and both Egypt and Tunisia exemplify this statement. Although these agreements enabled a speedy processing of applications, the Special Rapporteur pointed out that Egyptians and Tunisians were often held in ad hoc temporary facilities or in airport detention facilities that were not systematically accessible.^{xlii} Furthermore, the short time frame disabled proper identification of all potential protection needs, such as age assessment, claims for asylum and other vulnerabilities.^{xliii} In order for all migrants to have full access to the asylum procedure, Muižnieks urges the Italian authorities to provide systematic training for relevant officials, e.g. border control agents.^{xliv}

Besides poor reception conditions, insufficient access to the asylum system and questionable asylum procedures, the living conditions of refugees in Italy are concerning. Elisabetta Povoledo describes life in 'Salaam Palace', an abandoned university building at the outskirts of Rome, now inhabited by 800 refugees, and gives an example of the destitute conditions that refugees in Rome are living in.^{xlv} According to Povoledo, Italy has approximately

3,150 places in its state-financed asylum protection system in which refugees receive government assistance. As waiting lists to access these places are long, many refugees are left to fend for themselves. “If you’re not lucky to get one of those, you’re on your own. You have to find a way to support yourself, learn the language, get a house and a job,” says Ms. Boldrini, spokeswoman for the United Nations High Commissioner for Refugees in Italy.^{xlvi} The European Council of Refugees and Exiles, UNHCR the Commissioner for Human Rights of the Council of Europe, Nils Muižnieks, raise equal concerns with Muižnieks mentioning that the near absence of an integration framework for refugees and other beneficiaries of international protection created a serious human rights problem in Italy.^{xlvii}

The judgement by the Court of Appeal in *E.M.* took on a strict reading when interpreting how a state could be aware of “systemic deficiencies”, asking for specific reports on conditions in Italy. Yet authors such as Costello have argued for a less strict reading upholding that evidence to prove “systemic deficiencies” must be within the public domain.^{xlviii} If such a reading was followed, the abovementioned evidence would provide a strong case to sustain that asylum seekers and refugees are in serious risk in Italy.

The evidence which has been described above raises serious questions not only about the type of evidence that is considered valuable in court and about conditions in Italy. It also raises serious questions as to the interpretation of “systemic deficiency” which led to think that such evidence did not amount to the required standard that was voiced in *E.M.* (2012). While both judgments attest insufficient conditions for both the Greek and the Italian asylum system, only future removals to Greece are prevented. Addressing these questions, “systemic deficiency” will be explored in greater detail.

4. “Systemic Deficiency” – Its Clash with Human Rights

So far, it has been established that “systemic deficiency” entails a shift from looking at the risk of human rights violations of an individual towards a stricter standard. Theoretically, “systemic deficiency” as a standard implies that various flaws that cause an individual risk to a human being within the asylum process have to reach a point of becoming conceptually one flaw that makes the whole system deficient. It could be argued that this means that firstly, one serious detrimental event or flaw in the asylum system of a member state would not be enough for the standard to be met; it would have to happen to a mass of people rather than some people. Secondly, the systemic flaws would have to be sustained for a substantial amount of time, within various locations and such risk must arise from an institutional flaw rather than from abuse by some individuals in positions of power, such as guards, or asylum officers.

Because *N.S.* followed *M.S.S.*, the irrefutable presumption that a member state of the EU will follow minimum standards because of being a member state is disregarded.^{xlix} Yet the starting point of the interpretation of *E.M.* is the assumption of the existence of trust in the overall CEAS and practices of the individual member states based on the Amsterdam Treaty.^l Although we have seen that this premise is not backed up by evidence of reception and living conditions of asylum seekers and refugees, it is an assumption that is part of the public and political discourse and must hence be taken into account when understanding the strict interpretation of “systemic deficiency.”

Interpreting “systemic deficiency” as a strict standard, which entails going beyond evidence of individual risk to inhuman and degrading treatment, contradicts the rationale of human rights. The standard emerges out of the need to safeguard those who are removed. It would thus not be logical to interpret the standard in way that would ignore the very right which it

is designed to protect. Indeed, Costello argues for the need of making this standard part of the assessment to see whether a person that will be removed is at risk.^{li} As Costello puts it “Article 3 ECHR risk is no greater or lesser for emerging from systemic or non-systemic deficiencies.”^{lii}

This interpretation is backed up by the rest of the wording of the requirement to prohibit removals. The requirement is for “systemic deficiencies” to amount to substantial grounds for believing that there is a real risk of inhuman or degrading treatment. The requirement of a “real risk” which could affect a person in a non-systemic way, together with such risk being of inhuman or degrading treatment, points towards a greater value of the protection of the human rights of those affected by systemic deficiencies.

Yet *N.S.* restricts asylum seekers’ and refugees’ access to protection by, for example, establishing that preventing a removal did not mean that there was a responsibility on the state to deal with the asylum claim.^{liii} This indeed limits access to protection in order to prevent the interests of individual states. It seems that these judgements are demonstrative of a clash between human rights and the interest of sovereignty.^{liv} As Pirjola states “[t]he objective of the EUs asylum policy is then reconciling the universal interest of asylum seekers as stated in the EU policy documents with the particular interest of the EU or its member states.”^{lv} This balance is not reflected in the two judgments under consideration.

The Lisbon Treaty makes the EU Charter of Fundamental Rights binding. Article 52.3 of the Charter stipulates that the ECHR serves as the minimum standard to be applied in those rights that are stipulated in the Charter and also on the ECHR.^{lvi} This is the case of Article 4 (not to be subject to inhuman or degrading treatment) of the Charter, which corresponds to Article 3 of the ECHR. All this would point to the incorporation of individual inhuman or degrading treatment as the standard by which to stop a removal.

Thus, through the strict interpretation of the standard of “systemic deficiency”, rights protection as a concept is being redefined and cut in the interests of state sovereignty, making Dublin II mainly an “administrative tool.”^{lvii} This movement away from universal human rights is part of a larger context that is shaped, among other things, by law and rulings. Recent reforms of the Dublin Regulation include incorporating the standard of “systemic deficiency” as a way to measure deficiencies in conditions that risk inhuman or degrading treatment.^{lviii}

A process of classification takes place through the setting of this standard. Classification delimits what qualifies as a “systemic deficiency”. Although this might seem as a move towards mere classification analysis, these assertions are very much linked to reality. Indeed, when we talk about an incident or single event we are talking about individual incidents of detrimental treatment of human beings.

By requiring the standard of a “systemic deficiency” to be met, individual suffering, or local, non-institutionalized abuse of power loses its relevance. A process of homogenization takes place and individual suffering is only counted when it is part of a larger incident; a “systemic deficiency”. In order for there to be a “systemic deficiency”, the suffering of a group or population must take place. Thus, the setting of a standard involves defining refugees as a mass of people to which negative incidents have to happen, in order for the standard to be applied.^{lix}

The standard of “systemic deficiency” divides suffering into different categories and thereby creates a hierarchy of suffering, according to the number of incidents, the seriousness of incidents and the territorial distribution of such incidents. By doing so, suffering of some asylum seekers and refugees is recognised as grievable. This is the kind of suffering which is supposed to be avoided and eventually prohibited by the judgements in *N.S.* and *M.S.S.* In

contrast, the suffering of other refugees and asylum seekers is not deemed grievable as it is not considered as being caused by “systemic deficiencies”. Thereby, these individuals, such as the appellants in *E.M.* are vulnerable to being again exposed to their previous suffering. The standard of ‘systemic deficiency’ is therefore an insufficient standard from a Human Rights perspective.

Legal standards are useful as they allow legislating and ruling for the general population, rather than to particularities. It would be very hard to provide legal standards that answer every single case. It is legal standards that are used in order to apply to individual cases. Yet as we have before mentioned, it is the basis on which this categorization is made that produces the vulnerability of human rights. “Systemic deficiency” acts as part of the immigration “frame” through which the individual lives of asylum seekers and refugees are considered less grievable, increasingly as the refugee discourse shifts from protection to “a language of threats to the security of states.”^{lx}

Refugee law and rulings have played a big part in shaping and forming the concept of the refugee and towards the reproduction of truth on refugee matters which is authoritative.^{lxi} This means that rulings have a prolonged effect, beyond precedent in historical and political terms. This interaction is not recognized by a non-contextual approach to law.

Practices such as the detention of refugees and asylum seekers and their destitution, which are not considered systemic, contribute to the idea of devalued human life, incapable of deserving state support. As we have mentioned before, the setting of a standard of “systemic deficiency” provides an authoritative conceptualization over the administration of suffering, delimiting what is part of such concept and what is not.^{lxii}

If we go back to the clash between universal human rights and the interest of sovereignty, then we can observe a clash between the sovereign population of the member state and the asylum seeking/refugee population. This clash is resolved through techniques that keep the member state population “safe”. Detention centres and the lack of the right to work are particular examples of such techniques.^{lxiii} Thus, techniques, such as local mistreatment of refugees and asylum seekers, together with the homogenization of suffering through a classification which is not based on human rights standards, make individual suffering less visible as well as seemingly protecting the member state population. Local practices of dealing with asylum seekers and refugees allow for the normalization of suffering. Once such normalization exists, legal enforcement interacts with it, producing a co-dependent relationship of legitimization.

5. Conclusion

This paper set out to explore the standard of “systemic deficiency” to understand how it impacts individual asylum seekers, through the relationship between policy, law and rulings and the individual, in the judgements *E.M.*, *N.S.*, and *M.S.S.* The standard of “systemic deficiency” manifests a shift towards viewing of the asylum seeking population as less “grievable”. Consequently it was shown, how setting the standard of “systemic deficiency” divides suffering into different categories and thereby creates a hierarchy of suffering. By doing so suffering of some asylum seekers and refugees is recognised as grievable. An analysis of the rulings illuminated how the law influences the life of individual asylum seekers and refugees, highlighting the role of rulings within the wider social context of the reproduction of social realities.

It was also observed that evidence of conditions in Italy point to abuses which question the evidentiary evaluation of *E.M.* Furthermore, the standard of “systemic deficiency” entails a shift from looking at the risk of human rights violations of an individual towards a stricter standard which is not based on human rights.

The role law and rulings play in resolving the clash between human rights and sovereign responsibilities and interests becomes clear. The standard of “systemic deficiency” divides suffering into different categories and thereby creates a hierarchy of suffering. By doing so, suffering of some asylum seekers and refugees is recognised as grievable. This is the kind of suffering which is supposed to be avoided and eventually prohibited by the judgements in *N.S.* and *M.S.S.*

In contrast, the suffering of other refugees and asylum seekers is not deemed grievable as it is not considered as being caused by “systemic deficiencies”. Thereby individuals such as the appellants in *E.M.* are vulnerable to being again exposed to their previous suffering. It is for the development of new rulings and the interaction of different courts to contest such vulnerability.

ⁱ This paper is an adapted version of the presentation “Systemic Deficiency: Legal Standard-Setting and Its Effect on the Local” discussed at the 2013 ASPECT Graduate Conference: “Border Crossings: Transnationality, Citizenship, and Identity in Theory and Practice”, Virginia Polytechnic Institute and State University. We would like to thank Professor Jason Weidner for his comments as our panel’s discussant, and Sascha Engel, our reviewer. Eliana Barrera would like to thank Orlando Lopez for his comments.

ⁱⁱ European Commission, “Common European Asylum System,” 2013.
http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm

ⁱⁱⁱ Ibid.

^{iv} European Communities. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related Acts OJ C 340, Amsterdam.

^v Council of the European Union. Council Regulation (EC) No 343/2003 of 18 February 2003 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. Brussels, 2003.

^{vi} Council of the European Union. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in member states for granting and withdrawing refugee status. Brussels, 2005.

^{vii} Judith Butler, *Frames of War: When Is Life Grievable?* (New York: Verso, 2009).

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- viii Butler, *Frames of War* (New York: Verso, 2009), 2.
- ix Butler, *Frames of War* (New York: Verso, 2009), 14.
- x Ibid.
- xi Ibid.
- xii Butler, *Frames of War* (New York: Verso, 2009), 4.
- xiii Butler, *Frames of War* (New York: Verso, 2009), 24.
- xiv Ibid.
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- xvii Butler, *Frames of War* (New York: Verso, 2009), 25.
- xviii Ibid.
- xix Hannah Arendt. *The Origins of Totalitarianism* (New York: Schocken Books), 372.
- xx Jaques Rancière, "Who is the Subject of the Rights of Man?," *The South Atlantic Quarterly* 103:2/3 (2004): 303.
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- xxv N.S. (C-411/10) v Secretary of State for the Home Department and M.E. (C-493/10) v Refugee Applications Commissioner. 2011. C-411/10 and C-493/10.
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- xxx N.S. (C-411/10) v Secretary of State for the Home Department and M.E. (C-493/10) v Refugee Applications Commissioner. 2011. C-411/10 and C-493/10, paragraphs 87-890.
- xxxi UNHCR (2013), "Recommendations of Important Aspects of Refugee Protection in Italy," Accessed October 2013: <http://www.refworld.org/docid/522f0efe4.html>.
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