Rule of Law Abnegated

The Illusion of Asylum Seekers' Rights in Belgium

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Multicoloured lights are illuminating the central square of Brussels with its traditional Christmas tree. The streets are filled with the smell of mulled wine from the Christmas market, the so-called *plaisirs d'hiver*. A few hundred meters from the *plaisirs*, on Boulevard Pacheco, are a mass of cardboard boxes. Under them cower dozens of asylum seekers, crushed by anguish and ignored by passing revellers. They have been denied material support by the Belgian government for months. It is the second winter that hundreds of asylum seekers will spend on the cold streets of Brussels. More than 2700 of them are still without any material assistance and shelter. 869 of them have a domestic court order recognising their right to reception, yet the Belgian government has consistently refused to implement them. As we demonstrate in this blog, this deliberate refusal to secure the human rights of migrants, especially where these are single males, is not only creating a humanitarian disaster in Belgium's streets but also undermines the *raison d'être* of Belgian democracy. While the government's actions have been condemned by human rights experts and courts alike, it is arguably reflective of a worrying wider trend in the EU of the impotence of the law to secure human rights for migrants.

A Rule of Law Crisis

Asylum seekers' right to receive material assistance is considered fundamental in EU law and Belgian Law, in order for them to have effective access to international protection and to live in dignity. This right is recognised regardless of personal characteristics. Since 2021, Belgium has faced an increase of asylum applications: from 16,910 in 2020 (the low figure is explained by the pandemic) to 25,971 in 2021, 36,871 in 2022 and more or less the same number for 2023 (by the end of November, this figure was approximately 32,000). Nothing exceptional, especially if we look back to 2015 which saw 44,760 asylum seekers. What is exceptional however is that the Belgian government has willingly done nothing to solve what is a 'reception crisis' of their own making.

Indeed, since 2022, the Belgian government has been condemned more than 8500 times by the national courts for its failure to abide by reception law; more than 1700 interim measures were imposed by the ECtHR, which found in July that Belgium had violated the right to fair trial (Article 6§1 ECHR) in the *Camara* case. There remain 187 cases with active interim measures applied as ordered by the Strasbourg Court. The cumulative periodic penalties ordered by the courts so far amount to EUR 35,524,200. The government continues to refuse to pay to the point that some pieces of furniture from the office of the Secretary of State for Asylum and Migration were seized, for only EUR 119,623.94 so far.

The Belgian authorities' 'blatant refusal to comply with the injunctions of [their domestic courts] reveals 'a systemic failure [...] to enforce final court decisions concerning the reception of applicants for international protection', in the words of the Strasbourg Court (§§ 121 and 118), with detrimental consequences for the Rule of Law. By systematically ignoring thousands of court judgments, the Belgian government jeopardizes 'the fundamental foundations of the rule of law' (§59) and thus endangers the very *raison d'être* of Belgian democracy. This leads to a vertiginous situation of powerlessness as we know too well that '[w]here-ever law ends, tyranny begins, if the law be transgressed to another's harm' (Sect. 202). Such a Rule of Law defiance also hijacks the judicial systems as described by the French division of the Brussels

Labour Tribunal: Courts flooded by requests are unable to function properly. Worse still, there is a dramatic humanitarian situation behind this open Rule of Law defiance, cynically justified through the language of human rights which are turned upside down.

Using Human Rights Language to Deny Human Rights

Strikingly, since the ECtHR *Camara* judgment in July 2023, the situation on the ground has only deteriorated: the Belgian government has not shown any signs of compliance either with national judgments or with the ECtHR's. Quite to the contrary. On 29 August 2023, Ms Nicole De Moor, the Secretary of State for Asylum and Migration, supported by the Prime Minister, Alexander De Croo, announced that single men seeking asylum would be automatically excluded from accommodation and material assistance. Two weeks later, the Council of State ordered the suspension of the 'decision'. However, Ms De Moor maintained that she did not intend to change the policy.

The resulting automatic exclusion of single male asylum seekers from accommodation facilities since August has been justified because they are deemed 'non-vulnerable'. This language is borrowed from human rights which tend to give an enhanced protection to vulnerable groups, including in the case of migrants. The use of 'vulnerability' markers by the Belgian authorities to justify the refusal of accommodation to single men is worrying since it robs an entire group of their legal claims and rights to reception and asylum. It makes the enjoyment of rights conditional on additional prerequisites not enshrined in law and fails to recognise the potential vulnerabilities of male applicants, as well as the inherent vulnerabilities of all asylum seekers. The deeply dehumanising effect of this is illustrated by a forty-year-old asylum seeker: 'First women and children, then the dogs. Only then the men. If someone attacks us at night, what should we say or do? We don't know anything or anyone here'.

A Dire Humanitarian Situation

The government's (in)action is generating an increasingly dire humanitarian situation, which has been decried by UN Special Rapporteurs, the UNHCR (even very recently) and Dunja Mijatović, the Council of Europe Commissioner for Human Rights, among others. The severity of it is underscored by the Netherlands' cessation of expulsions or transfers of single male applicants to Belgium under the Dublin framework, as this would breach Article 3 of the ECHR and non-refoulement.

Asylum seekers denied accommodation are left to sleep in the streets, often in makeshift tents, which are frequently destroyed by the police, essentially eradicating all forms of shelter. In the absence of accommodation, asylum seekers are also more likely to be victims of harassment and violence (including robbery). Their personal belongings are taken or simply thrown away, threatening their asylum applications, as these belongings include essential documents. While some asylum seekers who are deprived of accommodation in reception centres found refuge in squats (belonging to the State or private companies), evictions are commonplace. The lack of reception facilities also means that health problems remain underdetected and under-treated: a large number of asylum seekers developed skin disorders such as scabies, digestive problems, musculoskeletal problems and mental health issues. Several have been affected by outbreaks of diphtheria, among others.

Those in the street are mainly Eritreans (28,5%), Afghans, Palestinians, Guineans and Syrians. By contrast, it seems that no Ukrainian refugees have been left in the street and generally no reception crisis was experienced by them. It is further evidence that race and passports are central to how refugees are differentiated.

Importantly, the reception crisis also directly obstructs access to the asylum procedure. Adequate reception facilities are an essential aspect of fair and efficient asylum proceedings, and thus a prerequisite to guarantee access to international protection. The lack of accommodation not only has a negative impact on the asylum procedure, it can also suspend access to the procedure altogether. Asylum authorities have stopped inviting asylum seekers (mainly single men) who are denied accommodation, given the detrimental impact their dire living conditions would have on their

interviews. Access to information on their procedure is also severely impacted.

The suffering of asylum seekers who are denied accommodation 'is only alleviated thanks to the invaluable work of Belgian NGOs'. Yet, Civil society is increasingly stretched to beyond its limits trying to make up for the government's non-compliance.

(Im)possible Solutions

Nonetheless, according to Ms De Moor, the only solution to the humanitarian crisis is to 'reduce incoming flows' (with the help of the EU). This ignores that more selective immigration policies through 'Fortress Europe' and militarisation of border controls are highly ineffective in stopping immigrationbackfire by increasing irregular migration and dependence of migrants and refugees on smuggling.

More importantly, it also ignores that there are, in fact, real solutions that could handle the ongoing humanitarian disaster in Belgium. Neither money nor infrastructure is lacking in this respect. Detailed solutions and plans have been on the table for more than a year. These include requisition of Civil Protection and Defence buildings and personnel, activation of a compulsory dispatch plan between municipalities, activation of a financial aid distribution plan with the Public Centers for Social Action, mobilisation of available rooms in hotels and the requisition of all campsites and holiday resorts which become available at the end of the summer, finding sites to install an additional 600 container units provided by the European Union Agency for Asylum (already two years ago) etc. The Belgian government has refused to implement these quite simple solutions and, failed, at one point, to execute the national courts' rulings ordering the lifting of the attribution of specific reception facilities for individual files (which can only be done by the federal authorities) in order to allow applicants to access social welfare centres that can allocate an equivalent living wage.

A Piece in the Anti-Rule of Law Puzzle

The reason the crisis persists is due to a lack of political will combined with a flagrant denial of the Rule of Law. The current government's attack on the law is a new turn, especially given its centrist nature, the so-called *Vivaldi* coalition composed of liberals, socialists, greens and Christian democrats. In fact, this situation would have been unimaginable even under the much more right-wing and conservative Secretary of State for Asylum and Migration in 2015, when the law was observed.

This new turn is part of a wider trend in the EU whereby Member States tend to increasingly engage in open non-compliance with EU law and fundamental rights, especially in migration and asylum. This trend is reinforced by the fact that there 'is increasing evidence of unconcerned disregard for the rule of law *at* EU level' as argued by Laurent Pech. Generally, abiding by the law appears to have become a matter of cherry-picking, at least when it comes to migrants. This renders its corrective force no longer effective. This happens not only through the open repudiation of the laws implementing the fundamental values which undergird our democracy, such as the blatant disrespect for the Rule of Law evident in Belgium today. This anti-Rule of Law tendency also appears when the law is twisted to do evil, which Ganty and Kochenov have termed Lawlessness law. We know only too well that whether through the repudiation of the law or evil law, only human suffering can follow, and much beyond migrants.

There is, of course, a strategic political bet made by the Belgian government: elections will be held in June and they most likely hope that their openly anti-migrant stance will win them more votes, stealing a march on the ascendent far right. This is a dangerous bet, as we have seen with Belgium's Dutch neighbour, for it ignores that those who are drawn to far right politics will not vote for what are seen as pale imitations thereof. We are still waiting for a political party in Europe which will gamble on an honest story about migration and offer a positive narrative, full of opportunity and solidarity, to counteract the anti-Rule-of-Law carousel. Ignoring thousands of Courts' judgments should never been an option.

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