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Department
of Political Science

Chair of European Union Law

Asylum law in the European Union: a broken system?

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Academic Year 2018/2019

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Introduction

In 2015, an unprecedented influx of asylum seekers and migrants knocked at the doors of Europe asking for protection. The administrative and humanitarian challenge exposed the shortcomings of EU asylum law, worsening the crisis. Although the weaknesses of the system became unavoidable at that point in time only, EU asylum law was always characterised by complex dynamics. This thesis will trace back the milestones of European Asylum Law, to gain a critical perspective to be applied to the current situation and the future.

The topic of Asylum law is of extreme relevance nowadays. It has become a primary objective of the European Parliaments and the Councils to agree on a reform of the current system. In addition to that, the heated debate on asylum policy has made its way in national parliaments and has been exploited in party politics and electoral campaigns. Indeed, the debate on matters of asylum in Member States of the EU, such as Italy in particular, has become a central point in political communication, polarizing the public and creating a chance for the birth and rise of right-wing populist parties.

The communication utilized in the public discourse on matters of asylum is often misleading; it is indeed fundamental to examine what measures exists for the management of migration flows and more specifically asylum in the EU. In fact, this thesis focuses on EU policy instead of national asylum regimes to identify and address the root causes of the problems on these matters.

The history of asylum policy in the Union is as old as the Union itself; the free movement of workers, and then people, the abolition of internal borders and the need for flanking measures, all direct towards asylum law, although in a 'passive' way.

The thesis is structured in three chapters that divide the processes of EU asylum policy in likewise stages. The first chapter retraces the first steps of asylum law in Europe, its origin as a 'consequence' of free movement and the abolition of internal borders. This phase has strong intergovernmental characteristics to it, as the ever-recurring reluctance of Member States to give up competence to the EU on these matters was at its starkest.

The evolution of asylum law into itself is outlined, starting from the first competence skirmishes during the establishment of the internal market to the Treaty of Amsterdam, that although under restrictive conditions, integrates asylum law in the Treaty, completing the process of 'communitarisation'.

The main achievements of the first phase are undoubtedly the Schengen Agreement and the Dublin Convention and the integration in the Treaties of the former. Lack of consensus in the Community led Member States to sign an intergovernmental agreement abolishing internal frontier controls and establishing a single external border in 1984; it was the origin of the Schengen Agreement. The Dublin Convention, conversely, was signed in 1990 and aimed at creating a mechanism to establish which state was responsible for examining an asylum application lodged in a Member State of the European Communities. This is of particular relevance as the principles enshrined in the Dublin

Convention will regulate responsibility on application until the present. The thesis will indeed follow the evolution of the Dublin system throughout the years. Finally, the first chapter examines the evolution of asylum law in the Treaties: the introduction of this policy area under the Third Pillar with the Treaty of Maastricht and, later, the integration of the Schengen acquis in the Amsterdam Treaty and the conferment of powers to the EU to set policies on matters of asylum.

The second chapter focuses on the secondary legislation adopted indeed on the basis of the Amsterdam Treaty. This stage, on the contrary of the first one, is characterised by a strong willingness to cooperate, resulting in an intense 'season' of political programming, that was devoted to the building of the Common European Asylum System. Unfortunately, the premises of this phase were swiftly betrayed by the difficulties encountered in negotiating the minimum standards on asylum that would then become the building blocks of the CEAS. Nevertheless, this phase is fundamental: the first versions of the secondary legislation that, to this day, govern asylum were adopted. Minimum standards of reception conditions, qualification, asylum procedures, temporary protection and responsibility for asylum applications were set for all Member States. The latter in particular is the integration in the EU framework of the Dublin System, which is thoroughly discussed in the chapter. The complexity of negotiations, and the fear of MS' to be stripped away of their sovereignty if they had agreed on higher standards undermined the principles at the basis of the creation of a common asylum policy and blinded the actors from foreseeing the fundamental problems with this body of law that were consolidated in this very moment. The culmination of the second phase is the Lisbon Treaty: it marks the official integration of asylum law in the Treaties and represents a major development in the processes of asylum policy, by granting the EU competence on matters of asylum and the adoption of the ordinary legislative procedure.

The third and final chapter will focus on the downfall of asylum law instruments in the wake of the 2015 refugee crisis, trying to identify the main problems with the Common European Asylum System and how to move forward from them.

The starting point will be the second phase of the CEAS. Again, the focus will be on how the Dublin system kept on evolving, in this case through the recast of Dublin II into Dublin III, whilst maintaining its core problems. The pivotal moment of this chapter, and in a broader perspective of Asylum law in the EU altogether is the refugee crisis of 2015. The arrival of more than a million asylum seekers at the 'doors' of Europe unavoidably exposed the shortcomings of the asylum system in the EU. Burdened by the state of arrival principle, countries like Italy and Greece fell under the pressure of hundreds of thousands of asylum applications, resulting in the failure of the CEAS. The thesis will then move to analyse the EU's response to the crisis, through emergency measures and long-term solutions. The mechanisms set forth by the European Agenda on Migration of 2015, such as the Relocation mechanism, will reveal themselves to be insufficient to manage the crisis, and leave the Union with a profound need for reform on the matters relevant to this thesis. The final part of the chapter will indeed focus on the need of reform and possible alternative models to the Dublin system, and conclude with an overview of the current state of play.

This thesis wants to stress the ever-lasting reluctance of Member States to concede competence to the European Union, even in the wakes of migrant and refugee crises such as the aforementioned one. Moreover, through the analysis of the developments in asylum law until now, the underlying issues in the malfunctioning of the system will be exposed.

Chapter 1 - From intergovernmental cooperation to partial 'communitarisation'

1.1 The first stages of asylum law in the European Union

The very first "hint" of a future Asylum policy can be traced back to the European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms), signed in Rome the 4th of November 1950.

Although the Convention did not envisage for asylum related norms, it did provide some limits to the power of Member States on expulsion of foreigners. Indeed, some level of '*par ricochet' protection*[1] was carved out of the Convention by the then newly created European Court of Human Rights. The "par ricochet" measures mostly consisted of norms to provide a safeguard to those individuals that would risk severe violations of human rights if expelled.

The following evolution in this direction would have to wait for the Treaty establishing the European Economic Community, signed in Rome the 25th of March 1957. We have to understand these developments as almost 'passive', as they were not made with precisely asylum in mind, but nonetheless they provide what will become the basis of Asylum policy in Europe.

The Treaty of Rome establishes a common market, based on the free movement of goods, workers, services and capital. In that workers represent, if not all individuals, certainly a category of them, these provisions are an evolution in the direction of Immigration rights. Moreover, article 100EEC[2] enables the Council to issue directives to approximate national laws hindering the functioning and establishment of a common market and Articles 117 and 118 promote close cooperation between Member States and the Commission on matters of social policy, thus establishing competence for the Commission.[3] It is indeed in this context and as a consequence of articles 117 and 118 that the "intense competence debate" described by Papagianni[4], that will be defining of this intergovernmental phase, began to unfold.

On this basis, the Commission issued a Decision[5], setting up a prior communication and consultation procedure on migration policies in relation to non-member countries. The Decision obliged member states to inform the Commission and other MS on draft measures and agreements regarding workers from third-countries in the areas of entry, residence and employment, as to allow the Commission to arrange a consultation on the drafts

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1 Francesco Cherubini , *Asylum Law in the European Union*, (Abingdon:Routeledge,2015)

2 Article 100 EEC The Council, acting by means of a unanimous vote on a proposal of the Commission, shall issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market.

3 Georgia Papagianni, *Institutional and policy dynamics of EU migration law*, (Leiden;Boston: Martinus Nijhoff, 2006)

4 Commission Decision 85/381/EEC setting up a prior communication and consultation procedure on migration policies in relation to non-member countries, OJ L217/25, 14/8/1985

4 Papagianni, *Institutional and policy dynamics of EU migration law*

and if needed to facilitate the adoption of a common policy on international instruments relating to migration. Five Member states challenged the Decision before the European Court of Justice[6], pleading lack of competence. According to the plaintiffs, not only did the Commission extend the powers conferred to it by Art. 118, but, since migration policy fell under exclusive competence, the contested decision also fell outside the scope of Art. 118.

Eventually, the contested decision was declared partially void, but most importantly, the claim of lack of competence on migration was dismissed by the Court. Even though the Court recognized that the Commissions' ability to adopt binding measures was conferred to it by the said provisions, as to enable the Commission to carry out its tasks, it also concluded that the objective of ensuring conformity exceeded the scope of the Commission's powers under art 118EEC.[7]

It is interesting to note how precisely Advocate General Mancini commented the reasoning on these proceedings. He identified three factors for the opposition of Member states: firstly, "the irritation aroused by unexpected and displeasing events", since Member States "must have been greatly surprised when they were faced with a measure and a full bodied one....and great must have been their desire to bring the institution responsible for that measure back into line with a good judicial rap over the knuckles"; secondly, the fact that "Member States are genuinely – or better vitally – interested in preserving full control over the admission to their territory of workers from non-member countries, inter alia, because of the obvious political and public policy ramifications"; and, thirdly, the Commission's errors, since according to Mancini "it is permissible to conjecture that if the Commission had put its emphasis on the Community's labour market ... it would perhaps have avoided the actions...yet without renouncing the objectives that it had in view."[8]

As the European Community kept on evolving towards the Institution as which we now know it, the necessity to eliminate internal barriers as to favour the establishment of an internal, or common, market, became more and more obvious. Moreover, this need to eliminate internal frontiers "implied the existence of a single external frontier and therefore at least convergent policies on the entry and residence of third-country nationals."[9] Unsurprisingly enough, Member States and EU institutions were not all on the same page on this project. Indeed, some member states went on cooperating 'outside of European law'. The Commission and the Council themselves were showing an uncoordinated effort in directions one might define not very coherent; as of 1985 the Council had already expressed their wish for the abolition of internal borders control in the conclusions of the Fontainebleau meeting[10], whilst the Commission published a White Paper on the establishment of the common market in which the abolishment of controls on internal frontiers was for the first time linked to the harmonisation of policies including asylum policies[11]. Nonetheless these "good intentions" had no tangible following, as although the Parliament advocated to include a more solid legal basis to anchor immigration

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7 Ibid. p. 8

8 Opinion of Mr. Advocate General Mancini, ECR [1987] at p. 3228 and 3229. ECLI:EU:C:1987:473

9 Cherubini, *Asylum Law in the European Union, p. 131*

10 which took place on the 25 and 26 june 1984.

11 Unfortunately this Commission's proposal was never taken up, as a consequence of the strong opposition of Ireland, the UK, Greece and Denmark against the abolishment of border controls.

policy to the establishment of the internal market in the Single European Act, resistance of Member States discouraged the two institutions.

1.1.1 The Single European Act

The Single European Act aimed to restructure the objectives of the Rome Treaty, to include new ones, all to be achieved before the 31 December 1992 deadline established by it. As for the relevant matters of this thesis, this development is significant to maintain a timeline, but is relatively 'poor' in terms of legislative progress. The new 8a article asserted that the internal market "shall comprise an area without internal frontiers in which the free movement of […] persons [...] is ensured in accordance with the provisions of this Treaty", but it merely set an intention, as the renewed version of art. 100A[12] excluded free movement of persons from the areas in which national legislation could be approximated towards the functioning of the internal market.

Nevertheless, the SEA allowed the Member States to assert their position on migration in form of the Declaration[13] attached to articles 13 to 19[14] and the Political Declaration by the Governments of the Member States on the free movement of persons.[15] Whilst in the Political Declaration the governments express their will to "cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries"[16], they also assert, in the Declaration attached to Articles regarding the internal market, that "nothing in these provisions shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries" , offering a clear cut vision on the sentiment that was typical of the behaviour of Member States in terms of migration law. Moreover, Member States were diffident of the binding effect of the deadline.

Another fundamental development of that time is the institution of Ad Hoc Immigration groups, later "Free Movement Coordinators" group, initiated in 1986. The form was completely intergovernmental, although Commission and General Secretariat of the Council were granted seats and served not only to coordinate efforts in this direction, but to somehow institutionalize the very non-Communitarian nature of the topic.

The Ad-Hoc Immigration Group, together with the TREVI Group (coordinating measures to counteract terrorism and security) and the CELAD group, was a by-product of the intergovernmental cooperation on 'immigration-related issues'[17], often initiated by the UK, that took place in Europe in the 1980s. The Coordinators group came to be, as a consequence that the Rhodes Council reckoned there were too many

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12 100a(1) The Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. (2) Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons

13 Single European Act, General declaration on Articles 13 to 19 of the Single European Act, OJ L 169, 29/06/1987

14 Provisions relating to the foundations and the policy of the Community on the internal market

15 Papagianni, *Institutional and policy dynamics of EU migration law*

16 Singe European Act, Political declaration by the Governments of the Member States on the free movement of persons

17 David O'Keeffe, "The Emergence of a European Immigration Policy," *Immigration and Nationality Law Review* no.17 (1995-1996): 265-282

groups to stimulate concerted effort, so all of the aforementioned ones were united under the Free Movement Coordinators in 1988, which resulted in the issuing of the Palma document the year after, a coordinated work programme containing a list of measures considered necessary to realise the objective of the free movement of persons within the Community. The Ad-Hoc Immigration group will draft two conventions, one that would never pass[18] and the one known as the Dublin Convention.

1.2 The Intergovernmental Stage

Finally, migration and asylum start to be recognized as issues in need of communitarian or at least intergovernmental regulation. The two biggest achievements of this intergovernmental stage are the Schengen Agreement and its acquis and the Dublin Convention.

1.2.1 The Schengen Agreement and Implementing Convention

The increasing urgency for free movement, paired with the ongoing lack of consensus in the Community

framework led some of the Member States to take a parallel track. Driven by problems caused by long queues at the common borders of France and Germany, the respective heads of government decided to sign a bilateral agreement on abolishing frontier controls on the 13 July of 1984 in Saarbrücken. The Benelux countries, already familiar with the issue, immediately took part to the project.[19]

Just one year later, on the 14 of June 1985, Germany, France, Belgium, the Netherlands and Luxembourg reunited in Schengen to sign the Convention on the gradual abolition of checks at their common borders. The agreement was meant to "eliminate controls on common borders, transferring them on external borders" by the first day of 1990 (it would come into force in 1995).

Finally, the necessity to reconcile free movement of people and goods with the assurance of security for citizens became instantaneously clear. To this end, new solutions and mechanisms for a coordinated effort on police, customary, and judiciary matters are found. The main objectives of the Schengen agreement included the strengthening and harmonisation of external border controls for all contracting parties[20]; the unification of entry and visa requirements[21];the institution of the Schengen Information System, to allow exchange of information of the identities of citizens between national polices of the involved states[22];the creation of a method to determine the state responsible for the asylum application[23], the organisation of cooperation between

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18 On the crossing of external borders

19 Papagianni, *Institutional and policy dynamics of EU migration law*

20 Arts. 3–8 SIA

21 Arts. 9–27 SIA

22 Arts. 48–58 SIA, Arts. 59–66 SIA, Arts. 67–69 SIA

23 Arts. 28–38 SIA

judiciary and police systems of the states[24] and last but not least the harmonisation of policies and legislations relative to the fight of drug and arm trafficking[25].

The timing of this much needed effort crossed the one of modern European history; the falling of the Berlin Wall indeed relocated completely a part of the external border to constitute the at the time- future- Schengen area. As a consequence, the date initially set to be the one of the implementation of the Agreement was not fulfilled. Instead, the initial contracting parties signed the Convention implementing the Schengen Agreement to help fulfil the initial premises of the Agreement. The reasoning echoes the principle of mutual recognition of national standards in the European law context: that is, that free circulation of people, in this case, cannot be considered possible until the parties involved reach a sufficient level of mutual trust in the way other contracting parties carry out control of their (not anymore only own) external borders.[26][27]

By 1990, in addition, more countries became contracting parties, further expanding the Schengen area. Italy signed the agreements on 27 November 1990, followed by Spain and Portugal on 25 June 1991, Greece on 6 November 1992, then Austria on 28 April 1995 and Denmark, Finland and Sweden on 19 December 1996. In the following years, especially after the integration of Schengen and its acquis in the legal framework of the European Union, most European countries would become a part of Schengen, even if some, such as Ireland and Great Britain would only accept parts of the agreement.

Moreover, it is interesting to note how Schengen positions itself vis-à-vis Community law. Even if initiated as parallel action to the community one, the Schengen contracting parties expressed their attachment to the European Communities from the very beginning. This complementarity was also expressed in the 1990 Convention Implementing the Schengen Agreement, in which specific provisions ensuring the compatibility between Community law and Schengen were introduced. [28]

Nevertheless, Schengen was established as a 'public international law product', that not only was set under a different legal regime than the Community framework but was also characterised by a less constraining structure. Schengen's institutional structure was more general so as the scope of the cooperation of its contracting parties; there was an Executive Committee composed of one Minister from every contracting party as the highest body and with a competence to set up working parties "composed of representatives of the administrations of the Contracting Parties in order to prepare decisions or to carry out other tasks".[29] Unanimity was set as the ground decision making rule. As for the aforementioned Executive Committee, there were no specific provisions of any kind on the way their workings should be carried out. Although profoundly different from the Communitary framework, the 'absence' of constraints in Schengen favoured a pragmatic and

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[24] Schengen Information System, SIS, Arts. 92–119 SIA

[25] Arts. 70–76 SIA

[26] As enshrined in the Joint Declaration to art.139 of the Schengen Implementing Convention, "The Convention shall not be brought into force until the preconditions for its implementation have been fulfilled in the Signatory States and checks at external borders are effective."

[27] Lucilla Deleo, *La Politica Migratoria nell'Unione Europea*, (Bologna: d.u.press, 2007)

[28] Papagianni, *Institutional and policy dynamics of EU migration law*

[29] Art 130-133 of the Convention implementing the Schengen Agreement

innovative approach defined by a flexible set of institutional rules. In conclusion, we can also note that the two core principles of Schengen have been security and sovereignty. This flexible framework, however, also presented some flaws. As there was no supranational judicial control, the implementation of the requirements was not so strictly overseen. Also, the safeguards needed for the functioning of the agreement, for example data protection, depend too heavily on remedies being available on national law.[30]

The question to be asked, however, is how asylum or migration law find a place in this new Schengen framework. From this perspective, Schengen exclusively focuses on creating an external border, relegating migration to a security matter and thus stopping at the security measures needed to allow the internal border control abolition. As far as asylum seekers were concerned, in the Implementation Convention only one intention was made clear: that asylum shopping, that is the abuse of the right of asylum, should be avoided at all costs.[31]

The reason why Schengen is of such importance, in conclusion, other than obviously contributing to the concept of general European citizenship and European-ness of today, is that it served as a laboratory to see how regulation on third country nationals could be achieved. Indeed, the Schengen Convention is fundamental as it has become a model for the development of immigration policies at the European level.

At almost the same time as this '*laboratoire d'essai'*[32] was taking place, the aforementioned Ad Hoc Immigration working group was drafting the convention known as the Dublin Convention.

1.2.2 The Dublin Convention

The Ad Hoc Immigration group had the task to reconsider measures to achieve a common policy to eliminate asylum abuse, in consultation with the Council of Europe and the UNCHR, and , also on the basis of the Palma document, their workings resulted in the draft convention determining the state responsible for examining applications for asylum lodged in one of the Member States of the European Communities, i.e. the Dublin Convention.[33] The Convention entered into force on 1 September 1997, signed at first between Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the UK. Austria, Sweden and Finland would later join the Convention, with its entry into force respectively on 1 October 1997 for the first two, and on 1 January 1998 for Finland. The main objectives of the Dublin Convention are to set out rules for asylum applications, so as to prevent multiple and simultaneous asylum application in different member states on one hand, and to solve the phenomenon of 'refugee in orbit'[34] on the other.

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30 O'Keeffe, *The Emergence of a European Immigration Policy*

31 Cherubini, *Asylum Law in the European Union*

32 The expression "laboratoire d'essai " was first used by Edith Cresson, French Minister of European Affairs, in the course of the signature of the Schengen Implementing Convention, on 19 June 1990

33 Cherubini, *Asylum Law in the European Union, p.* 136

34 The phenomenon in which asylum seekers wander from one country to another searching for a country who will accept responsibility for their asylum applications

If it was indeed noted that the Schengen Agreement, however innovative and dynamic, lacked some of the structure typical of European law instruments, the Dublin Convention was drafted in a more 'european' fashion: it was of course a product of intergovernmental cooperation, but strongly influenced by the EEC. As we recall, the very Immigration working group was assisted by the European Institutions, and the establishment, under Art. 18 of the Convention, of a Committee comprising one representative of the Government of each Member State and chaired by the Member State holding the Presidency of the Council further confirms the more traditional outlook.

A fundamental assumption of the 'Dublin system' is that "State parties mutually recognise each other as 'safe third countries'"[35]. Moreover, the main principles ruling the mechanisms are the 'authorisation principle', strongly reliant on mutual trust in Member States' asylum procedures, and the 'exclusivity principle'. The first one implies that if, for example, a Member state rejects an asylum application, it will be automatically rejected by another Member State receiving the same claim.

The main resolution of Dublin is to determine the state responsible for asylum application under the principle of exclusivity. The procedure rules that the state most penetrated by the asylum seeker, be it explicitly or implicitly, will be responsible. In the same way, the state will also be responsible for the leaving of the third country national in case of rejection. These procedures will be carried out under the relevant provisions of the national law of the state in question.

Under this wording it is evident how the intention of the asylum seeker is completely irrelevant: even though migrants might be willing to reach an internal European country, the border to be crossed is obviously an external one; thus 'confining' the asylum seekers in countries that have for example maritime external borders.

The overlap with the Schengen Agreement is obvious, if only because the Dublin convention has a much narrower scope of only determining responsibility, which is already contained in Chapter 7 (art. 28 to 30) of the Convention implementing the Schengen Agreement. Nevertheless, the contracting parties of the two instruments are not equal. To prevent the possibility of a conflict, the Schengen Executing Committee issued a resolution after which a protocol was signed in Bonn on the 26 April of 1995, establishing that, as soon as it came into force, the Dublin Convention would substitute the relevant provisions of the Schengen Implementing Convention.[36]

In fact, Schengen and Dublin have to be understood as complementary, both having as ground the establishment of an area without internal frontiers. The SIA and the Dublin Convention share principles and objectives, first and foremost the 'one-chance-only' principle[37]: that only one Signatory State is responsible for the asylum application of a third country national.

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35 Agnes Hurwitz, "The 1990 Dublin Convention: A Comprehensive Assessment," *International Journal of Refugee Law* no. 11 (1999): 646-677

36 Cherubini, *Asylum Law in the European Union*

37 Kay Hailbronner, Claus Thiery, "Schengen II and Dublin: responsibility for asylum applications in Europe" *Common Market Law Review*, Volume 34 no. 4, (1997): 957–989

These two asylum law treaties represent a significant step forward in the path to common asylum law and procedures. They are the culmination of the intergovernmental efforts at cooperation on asylum, and as such, they keep the sovereignty of the Signatory States intact. Indeed, both treaties contain an exception clause, stating that in special circumstances, responsibility could be shifted from one state to another if the first state already had rejected the application[38]. Although this element preserves sovereignty, it potentially defies the objective of the Treaties.[39]

Furthermore, the two instruments neither truly lead to harmonisation of substantive asylum law nor they (yet, at least) change Community law; however, they do establish an international responsibility.

1.3 From Maastricht to Amsterdam

The achievement of intergovernmental measures attempting to regulate asylum and setting responsibility for European countries in a more cooperative fashion calls for a new stage in the development of asylum law: its 'communitarisation' and inclusion in the Treaties. In particular, the Treaties of Maastricht and then Amsterdam significantly contribute to this process, and generally to the process of European Integration.

1.3.1 The Treaty of Maastricht

On the 7th February 1992, the Treaty on the European Union (TEU) was signed in Maastricht. The objective was to establish the European Union as a single institutional framework, integrating all that had been done both at an intergovernmental and supranational level until then. Other than introducing some very important legal principles in the procedures of the newly renamed EU, such as the principle of subsidiarity, the status of 'citizen of the European Union' and the co-decision procedure, the Treaty introduces the Pillar Structure: the institutional framework intended as a three-Pillar structure. The First Pillar was constituted of the European Economic community, now European Community, with enlarged competences, the introduction of the European System of Central Banks and the European Central Bank. The second Pillar integrated foreign and security affairs under the European Union: a 'Common Foreign and Security Policy' (CFSP) that maintained a strong international character, instead of supranational. As for the third Pillar, the most relevant to our discourse, the competences of the EU were expanded into the field of 'Justice and Home Affairs'. The 'Justice and Home Affairs' Pillar was given the power to act in the areas of asylum, immigration, judicial cooperation in civil and criminal matter, and police cooperation.

During the Council of Maastricht that would bring to this treaty, the debate on competence on matters of immigration, asylum rights, police- and judiciary cooperation arose again; it is decided to keep these matters tied to the intergovernmental logic. This decision came about from the realization that time was not yet ripe for the integration of the whole Justice and Home Affairs chapter in the community context. [40]

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[38] Art. 3(4) DC; Art. 29(4) and Art. 30(2) SIA.

[39] Hailbronner, Thiery, "Schengen II and Dublin: responsibility for asylum applications in Europe"

[40] Deleo *La Politica Migratoria nell'Unione Europea*

The third Pillar is a result of the compromises reached between States who wished for an extension of EU competence (such as the Netherlands) and others who preferred to keep it under a 'classic' intergovernmental approach (such as the UK)[41]. As specified in Title VI of the Treaty on the European Union, the purpose of the Pillar is "achieving the objectives of the Union, in particular the free movement of persons" and, to that end, 9 areas of common interest in which Member States have to cooperate are defined:

1. asylum policy;
2. rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;
3. immigration policy and policy regarding nationals of third countries:
    (a) conditions of entry and movement by nationals of third countries on the territory of Member States;
    (b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment;
    (c) combatting unauthorized immigration, residence and work by nationals of third countries on the territory of Member States;
4. combatting drug addiction in so far as this is not covered by 7 to 9;
5. combatting fraud on an international scale in so far as this is not covered by 7 to 9;
6. judicial cooperation in civil matters;
7. judicial cooperation in criminal matters;
8. customs cooperation;
9. police cooperation for the purposes of preventing and combatting terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol). [42]

The institution of Europol is significant in this context as it structures the police cooperation that had been carried out, until the Europol Convention (1995), only between the Schengen Signatory States.

Although at an intergovernmental level, the setting of the common interest is a fundamental step in the direction of 'communitarisation', and a definite sign of at least institutionalisation of the topics. Indeed, although the competence is exclusively of the Member States, a possibility for integration is set forth in art K.9: under unanimous decision, the community competence in terms of visa matters ratified by art.100C can be extended to the other areas disciplined by the third Pillar [43]. Other than the introduction of this '*passerelle'* clause, many more elements confirm the intention of the Union to integrate JHA.

For instance , under Art. K.3 Member States shall inform and consult one another within the Council with a view to coordinating their action and the Council shall draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements; Art. K.4 sets up a coordinating committee and provides that the Commission shall be "fully-associated" with works in the areas

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[41] Ibid.

[42] Treaty on European Union OJ C 191 29/7/1992

[43] Except for judicial, customary and police cooperation

of the Pillar; Art.K.6. sets forth that the European Parliament shall be regularly informed by the Presidency and the Commission of discussions in the areas covered by the Title VI and, under the same article, the Presidency shall consult the European Parliament on the principal aspects of activities in the areas referred to in this Title and shall ensure that the views of the European Parliament are duly taken into consideration.

However, in the words of Cherubini, "there is no clearer evidence of the unwillingness of the Member States to abandon intergovernmentalism than the Council's failure to make use of article K.9 TEU"[44].

Finally, the Declaration on Asylum attached to the Final Act of the TEU states that "the Council will consider as a matter of priority questions concerning Member States' asylum policies, with the aim of adopting, by the beginning of 1993, common action to harmonize aspects of them" and "the possibility of applying Article K.9 to such matters". Nevertheless, the Commission will issue a report, admitting that the time limit for such action was too narrow.

In conclusion, the Treaty on the European Union brings about concrete progress in two ways: through the creation of proper legal bases that made possible the accomplishment of the internal market, and through the institutionalisation of the pre-existing informal forums[45] and ad-hoc intergovernmental cooperation. Moreover, the importance of having enshrined an *obligation* to cooperate on a permanent basis, although intergovernmentally, is to be noted.[46]

Also relevant are the achievements in asylum through the Third Pillar competences. Given art K.3 to K.6, the Council adopted a Resolution on minimum procedural standards for examining asylum application, which still left most of the decision-making to the Member States but reinforced the principle of *non-refoulement* ratified by Refugee Convention. Under the same newly-attained competences, a Joint Position was adopted on the definition of 'refugee'[47] The Decision attempted at harmonising the definition and give an interpretation to Art.1 of the Refugee Convention to be taken as basis by the MS. Both of these instruments were rejected by the Member States, who continued to apply different substantive and procedural laws at a national level.[48] However these attempts show the potential utility of granting more competence on asylum matters to the EU institutions.

These goals will partly be attained by the Amsterdam Treaty.

1.3.2 The Amsterdam Treaty

On 2 October 1997, the path to 'communitarisation' of asylum policy reaches a milestone, with the signing Treaty of Amsterdam amending Treaty on European Union. The Treaty will enter into force the 1st of May 1999, and completely restructure the Third Pillar established by the Maastricht Treaty. Intergovernmental cooperation in the JHA sector shifts in part into the First Pillar, thus entering under Union competence. The

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[44] Cherubini, *Asylum Law in the European Union*, p. 140

[45] Papagianni, *Institutional and policy dynamics of EU migration law*

[46] O'Keeffe, "The Emergence of a European Immigration Policy"

[47] 96/196/JHA: Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of, the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees. OJ L 63, 13/3/1996

[48] Cherubini, *Asylum law in the European Union* 142

areas to be communitarised, that is to be moved to the First Pillar, are transferred under title IV of the Treaty "Visa, asylum, immigration and other policies connected to free movement of people". Provisions related to police and judiciary cooperation remain in the Third Pillar, considerably narrower in scope. The areas that had been governed by the Member States through intergovernmental cooperation become supranational legislation, initiated by the European Union. Other than that, the main objective of the Treaty was to simplify and update the Treaty on the European Union, through the amendment or deletion of over 50 obsolete articles and to prepare the legal system for future EU enlargement.

The transfer of the First Pillar has been defined as a "fundamental change"[49] and a "Copernican Revolution"[50], because it signifies a complete switch from the previous scenario. Until this moment, Member States had always been reluctant to concede even the slightest power to an institution on matters of asylum; this tendency had manifested in many ways over the times covered: from the 'migration policy case' to the Maastricht Treaty. Even after some competence was granted to the EU institutions by the Maastricht treaty, namely issuing Joint Decisions and resolutions seen in the previous paragraph, Member States had refused to attribute binding force to these instruments.[51]

This behaviour will change with the Amsterdam Treaty. Under the new Title IV, provisions regarding free movement of people are binding and fully capable of having direct effect if directly applicable. [52]

Under Article 61[53] of the Treaty, the Union sets a goal for the Council to "progressively establish an area of freedom, security and justice". To that end, over the course of 5 years, the Council shall adopt measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, and measures to prevent and combat crime; other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries ;measures in the field of judicial cooperation in civil matters; appropriate measures to encourage and strengthen administrative cooperation and measures in the field of police and judicial cooperation in criminal matters aimed at a high level of security by preventing and combating crime within the Union.

The Amsterdam Treaty is expected to take the process on immigration and asylum matters "first into the realm of semi-community activity and then into full community activity"[54], with the transitional period of five years constituting the 'semi-community' activity. The five year period is indeed one of the devices through which the drafters have tackled the 'communitarisation' of this particular area of law; for the same time period, the

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[49] Kay Hailbronner, "European Immigration and Asylum Law Under the Amsterdam Treaty" *Common Market Law Review* Volume 35, no.5 (1998): 1047–1067, p. 1047

[50] Massimo Condinanzi, Alessandro Lang and Bruno Nascimbene, *Cittadinanza dell'Unione e libera circolazione delle persone* (Milano: Giuffrè, 2006) p. 23

[51] Hailbronner, "European Immigration and Asylum Law Under the Amsterdam Treaty"

[52] Hailbronner, "European Immigration and Asylum Law Under the Amsterdam Treaty"

[53] Ex Art. 73i in the TEU, will become 61 in the Consolidated version

[54] Joanne van Selm-Thorburn, "Asylum in the Amsterdam treaty: A harmonious future?", *Journal of Ethnic and Migration Studies* (1998): 627-638, p. 631

Commission will share its (then exclusive) right of initiative with the Member States[55], a practice typical of the Third Pillar.[56] The transitional period also applies to the requirement of unanimity in the Council.[57]

In regard to asylum and migration law in particular, Article 63 defines the competences of the Council on the matter. It is to be noted how the sectors of competence regarding asylum are defined in more detail, as a consequence of the dismemberment of provisions between the First and Third Pillar that occurred in this Treaty.

The Article recites:

"The Council, acting in accordance with the procedure referred to in Article 61, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

(1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:
   (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,
   (b) minimum standards on the reception of asylum seekers in Member States,
   (c) minimum standards with respect to the qualification of nationals of third countries as refugees,
   (d) minimum standards on procedures in Member States for granting or withdrawing refugee status;
(2) measures on refugees and displaced persons within the following areas:
   (a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,
   (b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons;
(3) measures on immigration policy within the following areas:
   (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion,
   (b) illegal immigration and illegal residence, including repatriation of illegal residents;
(4) measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States."

Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.

Measures to be adopted pursuant to points 2(b), 3(a) and 4 shall not be subject to the five-year period referred to above."

It is evident how neither measures relating to expulsion, deportation and their transnational enforcement nor measures on preventing migration movements are mentioned.[58] The article needs to be comprehensive of measures on asylum, but truthfully, some of these objectives set have already been achieved by either the Dublin Convention or the Schengen Implementation Convention. Most importantly, two clauses are contained

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[55] Article 66

[56] Hailbronner, "European Immigration and Asylum Law Under the Amsterdam Treaty"

[57] Ex Art. 73k

[58] Hailbronner, "European Immigration and Asylum Law Under the Amsterdam Treaty"

at the end of the article above, also representing a 'safeguard' to the reluctance of Member States to give up their exclusivity. Moreover, it is an expression of the principle of subsidiarity, now enshrined in the Treaty.

Another fundamental resolution of the Amsterdam treaty is to integrate Schengen and its acquis into the institutional framework of the European Union. To integrate the body of law, a Protocol integrating the Schengen acquis into the framework of the European Union was attached to the Amsterdam Treaty.

Indeed, the most important steps in terms of abolition of border controls had been achieved by Schengen, so it only made sense to integrate its provisions under the EU legal roof. However, being it was conceived in a legal 'territory' outside of Community law, not subject to the European parliament or its Court of Justice, its integration was not self-evident. The Protocol lays out the process: from the date of entry into force of the Treaty of Amsterdam, the Schengen acquis will apply to the initial Signatory States. From the same date, the Council will take up on the role of the Schengen Executing Committee.

The Council shall determine the legal basis for each of the provisions or decisions which constitute the Schengen acquis. Until these decisions have not been taken, the Schengen acquis shall be regarded as acts based on Title VI of the Treaty on European Union. The Court of Justice of the European Communities shall exercise the powers conferred upon it by the relevant applicable provisions of the Treaties. In any event, the Court of Justice shall have no jurisdiction on measures or decisions relating to the maintenance of law and order and the safeguarding of internal security.[59] In accord with the same reasoning that divided the ex-Justice and Home Affairs sector in supranational Community law under the First Pillar and intergovernmental cooperation under the Third, the Schengen agreement's legal basis will be found partly in Title IV, and partly in Title VI; provisions relating to police cooperation are put under the Third Pillar, whilst measures regulating free circulation of people and the abolition of border controls in the new IV title.

It goes without saying that substantial changes such as those brought by the Amsterdam Treaty had the power to unsettle the Member States, notoriously adverse to the perspective of a loss of exclusivity over matters of free circulation. Indeed, a mechanism was introduced in the Treaty that aimed at appeasing the 'euro-sceptic' sentiments of some participants: the opt-out protocols.

Through Protocols attached to the Treaty of Amsterdam, United Kingdom and Ireland assert that they will not take part in the adoption by the Council of proposed measures pursuant to the new title and such measures will neither be binding upon, nor applicable in these Member States. The UK and Ireland thus don't automatically participate in provisions stemming from the Schengen acquis and Title IV. The implication is that the controls at their borders will not be abolished. However, the two countries will participate to the remaining 'closer cooperation' matters. Denmark issued an opting-out protocol as well, in that it derogated from the adoption of measures by the Council under the new Title.

The Dublin Convention will not be integrated in Community law on this occasion, but it will be replaced by Regulation No. 343/2003 establishing the criteria and mechanisms for determining the Member State

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[59] Protocol integrating the Schengen acquis into the framework of the European Union, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts OJ C 340, 10/11/1997

responsible for examining an asylum application lodged in one of the Member States by a third-country national, a result of the new competences conferred to the new Title.[60]

[60] Cherubini, *Asylum law in the European Union*

Chapter 2 - Legislative developments in Asylum Law in the post - Amsterdam

The Amsterdam Treaty brought the development of asylum law in the European Union to a new level, as the legitimate coronation of decades of informal intergovernmental cooperation. Not only did the Treaty confer powers to the EU institutions to set new policies, but it also set off a new beginning for political cooperation and political programming on these matters. This chapter will examine the 'season' of political programming on asylum matters that characterized the EU in the post-Amsterdam period, the birth of the Common European Asylum System and the treaty of Lisbon.

2.1 Political Programming

It was soon to be noticed among institutions and governments, especially given the low binding qualities of instruments used up until then, such as resolutions and recommendations,[61] that there was a growing need to agree on a shared and common political line of matters of asylum and immigration. Although these political programmes will have a limited legal weight, they have an important role for their political significance and for their ability to support and spur national governments in the adoption of policies.[62]

The first expression of this need is the drawing of the "Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice", also known as the Vienna Action Plan, that was adopted during the Vienna European Council the 3rd December 1998. The Cardiff European Council called on the Council and the Commission to present the plan, emphasizing how "those provisions[63] offer new opportunities to tackle an area of major public concern and thus to bring the European Union closer to the people"[64].

The Action Plan set deadlines for the measures provided for in the Amsterdam Treaty. In particular for asylum, the plan calls for an overall migration strategy, characterised by a system of European solidarity. Moreover, it sets a two year deadline (after the entry into force of the Treaty) for the following measures to be taken: effectiveness of the Dublin Convention; implementation of Eurodac; adoption of minimum standards on procedures for granting or withdrawing refugee status, with a focus on reducing their duration and the situation of children; limit 'secondary movements' by asylum seekers between Member States; undertake a study with a view to establishing the merits of a single European asylum procedure.

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61 Livia Saporito, *Per un diritto Europeo dell'immigrazione*, (Torino: Giappichelli Editore, 2008)

62 Kay Hailbronner, Daniel Thym, "Constitutional Framework and Principles for Interpretation" in *EU Immigration and Asylum Law. A Commentary*, 2nd edition, ed. Kay Hailbronner and Daniel Thym (München: C.H. Beck/Hart/Nomos, 2016)

63 Introduced by the Amsterdam Treaty

64 Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice OJ C 19, 23/1/1999

2.1.1 The Tampere European Council

The goals expressed by the Action Plan find further development during the Tampere European Council on 15 and 16 October of 1999. At the summit, the establishment of the Union as an area of freedom, security and justice is made a priority, and the intention to fully exploit the potential of the Amsterdam Treaty on these matters is renewed. The Tampere Council is regarded as one of the most significant turning points for asylum policy, as it clearly defines the moment in which "the separate, but closely related, issues of asylum and immigration" were set as one of the primary objectives of the Union. It sets the famous Tampere milestones: a Common EU asylum and migration policy, a genuine European area of justice, an unionwide fight against crime and stronger external action.

The calling for the development of a Common Asylum policy is a major breakthrough, and it is articulated along four main issues.

The first issue tackled is partnership with countries of origin, through "a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit" that "requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children".[65]

The second main objective of the Council is the establishment of a Common European Asylum System, derived from the provisions in the Amsterdam treaty and based on the Geneva Convention of 1951, thus on the non-refoulment principle. Indeed, what makes the Tampere Council deeply relevant is its being the starting point for the legislation that would govern asylum law in the EU for years to come. The instruments of the system are the Dublin II Regulation, the Reception Conditions Directive, the Qualification Directive and the Asylum Procedures Directive. The third objective is fair treatment of third country nationals, through non-discrimination and integration policies and by granting rights and obligations "as similar as possible" as those of European citizens. The fourth and final point is the management of migration flows, to be achieved developing a common policy in terms of visas and fake identity documents.

It is evident how the process to establish a common EU policy on these matters is a multifaceted one, that includes the management of the migration phenomena from more sides.

As for developments in judicial cooperation, the Council called for the establishment of a "genuine" European Area of Justice. Among the objectives, the exchange of best practices and increased cooperation on cross border crime are stressed.

The Tampere Council sets 51 objectives with relative deadlines, guaranteed by a monitoring system that entails the obligation for the Commission to report to the Council and Parliament. To attain the

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[65] Point 11 of the Presidency Conclusions of the Tampere European Council of 15 and 16 October 1999

objectives, the document also includes the principles which would govern their adoption; the area of freedom, security and justice shall be based on the principles of transparency, democratic control and solidarity. Moreover Tampere introduces important instruments towards the establishments of an area of freedom security and justice, such as Eurojust, to an organisms composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from their Member States, with the task of facilitating coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases.

The Commission promptly reacted to the Tampere Council with the Communication on a Community immigration policy[66], efficiently synthesising the new strategy that would characterise the institutional action: on one hand 'common', in regards to the setting of minimum standards for all Member States, and on the other 'global and integrated' , that is capable of evaluating the effects of those policies on a broader social, economic and cultural context.[67]

The 'season' of political programming of a common asylum policy find its next development at the Leaken European Council of December 2001. The Council reaffirms its commitment to the policy guidelines and objectives defined at Tampere but calls for new impetus in the realization of the objectives. As the progress achieved until that point was insufficient, the Council sets new deadlines and redefines a 'true' common asylum and immigration policy as one that implies the establishment of the integration of the policy on migratory flows into the European Union's foreign policy; the development of a European system for exchanging information on asylum, migration and countries of origin, to be achieved through the implementation of Eurodac and measures to apply the Dublin more efficiently; the establishment of common standards on procedures for asylum, reception and family reunification, including accelerated procedures where justified; the establishment of specific programmes to combat discrimination and racism.[68]

The shortcomings of the initial Tampere projects further reveal themselves at the Seville European Council of June 2002. On that occasion, the Council identified four major areas of concern: the fight to illegal immigration[69], coordinated and integrated management of external borders, the acceleration of asylum and immigration policymaking and the integration of immigration policy in relations with third countries. In the conclusions, the Presidency urges the adoption of the measures set forth by the

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66 Communication from the Commission to the Council and the European Parliament on a Community immigration policy COM/2000/0757

67 Livia Saporito, *Per un diritto Europeo dell'immigrazione*

68 Point 40 of the Presidency Conclusion of the Leaken European Council of 14 and 15 December 2001

69 Point 30 of the Presidency Conclusions of the Seville European Council of 21 and 22 June 2002

69 Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union OJ C 142, 14/6/2002

Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union[70]

If the previous Councils underlined how not enough progress on the "separate, but closely related, issues of asylum and immigration", the Thessaloniki Council of June 2003 shows the true determination to change. Migration was made a "top political priority" and as such, it urged for:

> "a more structured EU policy, which will cover the whole spectrum of relations with third countries […] to be viewed as a two-way process in order to combat illegal migration and to explore legal migration channels under specific terms of reference. In this context, the issue of smooth integration of legal migrants into EU societies should also be further examined and enhanced. Furthermore, the existing financial means at our disposal for the coming years 2004-2006 should be carefully reviewed and taking into account the overall framework and the need for budgetary discipline"

It is interesting to note how the Presidency Conclusions also request the extension of finances for this sector, implying for the first time that Member States should share the costs deriving from the coordinated and integrated management of external borders. *Burden sharing* will become an extensively discussed theme in the contemporary discussion on asylum and will thus be further analysed in Chapter 3.

2.2 The first phase of the Common European Asylum System

As we recall, the Amsterdam Treaty called for the adoption of measures to be adopted within a period of five years after the entry into force of the Treaty, on determination of responsibility for asylum applications, minimum standards on the reception of asylum seekers in Member States, minimum standards on the qualification of nationals of third countries as refugees, minimum standards on asylum procedures and minimum standards for temporary protection of displaced persons. This provided a legal basis for the Common European Asylum System initiated by Tampere Council.

The CEAS was to be articulated in two phases, the first of which will be discussed in this chapter. The four building blocks of the system were: "a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection."[71]

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[71] Point 14. Of the Presidency Conclusions of the Tampere European Council of 15 and 16 October 1999

The first phase of the CEAS had the objective to introduce regulation at the EU level, mainly to prevent secondary movement of asylum seekers. That was to be achieved through the enactment of secondary legislation, between 2000 and 2005, that would set minimum standards for Member States for the aforementioned building blocks[72]. The general approach of the CEAS reflects the then restrictive EU competences of the time, by mostly focusing on vertical policy transfers and introducing practices at the national level.[73] The CEAS is to be intended as an 'organised body of law'[74], with its components sharing definitions and concepts, and even more so a common objective. Directions for the layout of the system are derived from Art. 63 of the Treaty of Amsterdam; the only topic added to the legislation programme by Tampere are secondary rights for refugees, under "content of refugee status".[75]

The four building blocks of the CEAS resulted in likewise pieces of secondary legislation.
The Qualification Directive[76] delimits the personal scope of the measures, by defining who qualifies as 'refugee' or 'person in need of international protection' and the rights accorded to those who are granter protection, and thus represents the heart of the CEAS. In that same reasoning, the Asylum Procedures Directive[77] is the "backbone of the system, as it links most of its limbs"[78]; it lays out procedures for granting and withdrawing refugee status and definitions of safe third countries and manifestly unfounded claims. In fact, the Procedures Directive regulates entitlement to the rights provided in the Reception Conditions Directive[79], that lays down minimum standards for the reception of asylum seekers. Lastly, the Dublin II Regulation[80] establishes the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member State. The Regulation is underpinned by the EURODAC Regulation, that established a fingerprinting system to monitor secondary movement, and complemented by a

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72 Steve Peers, Nicola Rogers, eds. *EU Immigration and Asylum Law*, (Leiden: Brill/Nijhoff, 2006)

73 Hailbronner, Thym, "Constitutional Framework and Principles for Interpretation"

74 Hemme Battjes. *European Asylum Law and International Law*, (Leiden: Brill/Nijhoff, 2006)

75 Ibid. p. 196

76 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L 304, 30/9/2004

77 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ L 326, 13/12/2005

78 Battjes. *European Asylum Law and International Law,* p. 197

79 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers OJ L 31, 6/2/2003,

80 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 OJ L 050 , 25/02/2003

Regulation on how to implement the Dublin System[81]. This piece of legislation will be further discussed later in the chapter.

After such a flourishing 'season' of political programming, that had set bright expectations on the instruments that would build the CEAS, the results of the legislation were sobering. To be measures stemming from cooperation and the institution of a common system, the provisions are fairly restrictive. Five years of negotiations, characterised by the unwillingness of Member States to take the responsibility of fulfilling the promises of high standards of protection of asylum seekers, resulted in a 'race to the bottom'. The race to the bottom effect is common when setting minimum standards, and it stood true in this case as well, with MS coordinating on the least favourable treatment of asylum seekers.[82]
The requirement of unanimity by the decision-making process of the first phase of the Common Asylum System is partly to blame, as well as the conviction of some Member States that higher standards on reception condition and qualification are pull factors for asylum seekers.[83]Moreover, the first stage did not include any provision for burden-sharing whatsoever, partly for the general low profile kept by the Union while legislating on these matters, but also for the belief that disproportionate distribution of asylum applicants depended mainly on different asylum regimes across the EU.[84] The results of the first stage of the CEAS are, however, were still an innovation for asylum regimes of the time. The Qualification Directive was able to increase protection standards and codify subsidiary protection amongst other things and had indeed a deep impact on legislation and practices all over the EU, as well as the Temporary Protection Directive, introducing the situationof a 'mass influx'.[85]

To be noted is how Regulation 343/2003 (The Dublin II Regulation) and the Eurodac Regulation were, and will remain, the only two Regulations of the Common Asylum System. The legal instruments setting minimum standards on Reception, Qualification, Temporary Protection and Asylum Procedures are indeed Directives, still leaving considerable space to Member States in the implementation of measures on those matters whilst those composing the Dublin system have binding

[81]Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 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 OJ L 222, 5/9/2003

[82]Timothy J. Hatton, "European Asylum Policy." *National Institute Economic Review* 194, no. 1 (October 2005): 106–19. doi:10.1177/0027950105061503.

[83] Refugee Council briefing on the common European asylum system, March 2004

[84] Hatton, "European Asylum Policy"

[85] Christian Kaunert & Sarah Léonard (2012) The development of the EU asylum policy: venue-shopping in perspective, Journal of European Public Policy, 19:9, 1396-1413, DOI: 10.1080/13501763.2012.677191

legal force. For this reason, and also because the Dublin System is the true cornerstone of the CEAS, they will be examined more in detail.

2.2.1 Responsibility for Applications for Asylum

Council Regulation No 343/2003 was adopted on 18th February 2003, establishing 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. It entered into force on 17th March of the same year and became applicable from September 2003. The Regulation is complemented by a Commission Regulation laying down detailed rules for its application.[86] The Regulation replaces the Dublin Convention; now as secondary legislation deriving from Art 63 of the Amsterdam Treaty, instead of an intergovernmental agreement – as called for by the Tampere Conclusions.

The process that brought to this Regulation started from a Commission's working paper entitled "Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an asylum application submitted in one of the Member States"[87]. The paper sought to underline the problems in the implementation of the original Dublin Convention, also by considering factors not strictly dependent on the Convention itself, such as the development of Eurodac and the enlargement of the European Union. Nonetheless, assessing the success of the Dublin Convention was not a straightforward procedure - as the Convention itself did not include any monitoring or evaluation criteria. Although the paper reviewed the possible new alternatives for determining responsibility, it concluded that "there did not appear to be many viable alternatives to the present system"[88].

The other relevant preparing document was an evaluation of the Dublin Convention[89] that had been proposed in the Vienna Action Plan. The two documents denounce the vagueness of the scope, definition and wording of the Convention, and its inefficiency.

With these precedents, a Proposal for a Council Regulation on Responsibility for Applications for Asylum was submitted.[90] The proposal aimed for the Regulation to provide a quicker determination

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[86] Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 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 OJ L 222, 5/9/2003

[87] "Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an asylum application submitted in one of the Member States" SEC(2000)522

[88] Ibid. p.19

[89] Evaluation of the Dublin Convention, Commission Staff Working Paper, SEC (2001) 756

[90] Proposal for a Council Regulation 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. COM/2001/0447, OJ C 304E , 30/10/2001

procedure by laying down a timetable, and to generally correct the inaccuracies and loopholes of the original Convention to increase and guarantee the efficiency of the system.

In the Proposal, the Commission attempted to better the conditions for family reunification, by suggesting four new criteria (such as, for example, unaccompanied minors), an expanded list of family members, and a new rule for family members applying for application in the same Member State.[91] Unsurprisingly, most of these changes did not 'make the cut' to the final Regulation. In the two years that passed between the presentation of the Proposal and the actual adoption of the Regulation, complex negotiations took place at Justice and Home Affairs Councils.

However, although the Dublin Regulation does not present fundamental changes in terms of content, apart from the introduction of family reunification as one of the first criteria and the inclusion of the 'humanitarian clause', it does signify a step forward for Asylum law as a part of a Common policy. As a Council Regulation, the System is now binding to all Member States of the Union. In addition to Member States, Non-EU States Iceland, Norway, Switzerland and Liechtenstein agreed to apply the Dublin Regulation, whilst Denmark availed itself of the opting-out mechanism once more. In that Dublin was now an integrated piece of legislation, and also probably as an answer to vagueness critiques made to its original version, Dublin II presented a more detailed and specific hierarchy of criteria to determine responsibility.

In conclusion, the Regulation was at the center of heated debate between Member States and it was critiqued after its adoption for possible incompatibility with the European Convention on Human Rights and the right to seek asylum. The shortcomings of the Dublin System were already evident at this stage; a great occasion to provide a fairer and more efficient system was lost.

2.2.2 Eurodac

The Eurodac Regulation[92] was the first of the system do be adopted, precisely the 15th of December 2000. With the legal base of Art. 63(1)(a), the Regulation set up a system for taking and comparing fingerprints of asylum seekers ,that was initially mentioned in the Dublin Convention of 1990, and had the task to facilitate the application of the Dublin system(at this point in time not yet updated to Dublin II). The Regulation, as mentioned before, is not part of the Common European Asylum System; it does indeed stem from the Dublin Convention.

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91 Peers, Rogers *EU Immigration and Asylum Law*

92 Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention OJ L 316 , 15/12/2000

Eurodac consists of a computerised central database that stores and compares fingerprints and data on asylum applicants, a Central Unit in charge of operating the central database and means of data transmission between Member States and the database[93].

The Regulation entered into force in December 2000, but would start to be applied only in January 2003, after the technical requirements were achieved and another Regulation[94] laying down rules to apply Eurodac entered in force.

The history of Eurodac is long and complex: the first feasibility study on the system dates back to 1992, and a first draft of the Convention was already made in 1997[95]. However, negotiations were complicated, riddled with doubts first on whether to include illegal immigrants in the system, then on the rights of illegal immigrants to data protection[96]. The Eurodac working party submitted a Protocol in 1998, only to be 'frozen' ; then, the Commission proposed a Regulation to take over the Protocol and the Convention, bringing substantive changes, especially on matters of data protection; after a back-and-forth with the European Parliaments, also suggesting amendments, the Council adopted the Regulation in December 2000.[97]

The Eurodac Regulation strikes for its language and organisation; for example, it refers to refugees as 'aliens' and generally it is strongly focused on the impediment of secondary movement, sometimes at a borderline with a violation of human rights. Indeed, the compatibility of the instrument with human rights law is one of its main issues. Whilst gathering and comparing fingerprint data on irregular 'crossers' can be justified, the compilation of data of illegal residents cannot. The breach would be of Article 8 of the European Convention of Human Rights, granting a right to the respect for his private and family life, his home and his correspondence. The exception to this right can be justified by matters of interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. However, it does not seem as these grounds would justify the Eurodac system.[98]

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93 Article 2 of the Eurodac Regulation

94 Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention Official Journal L 062 , 05/03/2002

95 Legislative resolution embodying Parliament's opinion on the draft Council Act drawing up the convention concerning the establishment of 'Eurodac' for the comparison of fingerprints of applicants for asylum, and on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, concerning the establishment of 'Eurodac' for the comparison of fingerprints of applicants for asylum, OJ C 34, 2/2/1998

96 Advanced by the Belgian Presidency

97 Peers, Rogers, *EU immigration and asylum law: Text and commentary*

98 Ibid.

Another question regards the use of Eurodac data for different purposes: Eurodac is not a simple database, but one with a specific purpose, thus for its data to be used in any other way or grant access to other parties it would need new legal bases[99].

The final issue with the Regulation has more of an efficiency character than a strictly legal one. Taking and comparing fingerprints of third-country nationals who cross the border irregularly will mostly result in keeping the refugee in the Member State they were crossing the border of to begin with. The concept that transit countries have to police their external borders on behalf the destination countries not only implies that transit countries would incur in more costs, but also that they will have a higher number of asylum seekers. [100] If asylum-seekers wish to apply for asylum in a specific country, apart from the case in which they have links, chances are it will be a wealthier country than the transit one. In this sense, the system is unfair to less wealthy transit countries.

Fundamental is the acknowledgement that at the time of the adoption of these regulations their underlining problems were already identifiable but not solved, and as a consequence they will be 'carried' in the next decade.

2.3 The Lisbon Treaty

The entry into force of the Lisbon Treaty[101] on the 1st of December 2009, marked the definitive 'communitarisation' of asylum law[102]. The Treaty amended and reorganized the existing treaties into two separate treaties, the Treaty on European Union and the Treaty on the Functioning of the European Union. It completely eliminated the Third Pillar, and united competences on police and judicial cooperation with those on visas, asylum and immigration under a new Title V of the TFEU.

The Treaty introduces Articles 78-80 on asylum, granting the EU competence on matters of asylum policy, that will now be adopted in accordance with the ordinary legislative procedure, also resulting in joint decision-making powers on asylum the European Parliament. This signifies a shift for asylum law in the EU, strengthening the role of EU institutions.[103] As we recall, the Amsterdam Treaty gave the EU competence to legislate on minimum standards and under the unanimity procedure for a transitional period of five years.

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[99] Ibid.

[100] Ibid.

[101] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community OJ C 306, 17/12/2007

[102] Cherubini, *Asylum Law in the European Union*

[103] Christian Kaunert, Sarah Léonard, "The European Union Asylum Policy after the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection?" *Refugee Survey Quarterly*, Volume 31, no. 4, (December 2012): 1–20, https://doi.org/10.1093/rsq/hds018

In the Lisbon Treaty, Art. 78(2) states that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure shall adopt 'uniform statuses', 'common system', 'common procedures' on matters of asylum. Moreover, the principles of solidarity and fair sharing of responsibility are enshrined in the Treaty[104], although the implications are not clear. Another turning point for asylum law is determined by the coming into direct effect of the Charter of Fundamental Rights, that would become a binding source of primary law. The shift in decision-making processes crucially influences the institutional dynamics of policymaking on asylum, [105] especially when we consider how the requirement of unanimity undermined a more positive outcome of negotiations for instance for the first phase CEAS instruments.

Moreover, the increased participation of the European Parliament, and with it its Civil Liberties and Fundamental Rights Committee imply an input from a knowingly more 'asylum-seeker friendly' approach. National powers clearly lose power in terms of promoting their interests.

If we look back at the first stages of asylum policy outlined in the first chapter, we soon realize the entity of this development. In the first years of intergovernmental cooperation, and generally before the Amsterdam Treaty, the idea of conceding competence, even if shared, to the Union and the eventual cession of veto powers from the MS was unconceivable. In that, the Lisbon Treaty in this context is more relevant from the point of view of the progress achieved until now than it is regarding to the future. It is the defeat of the reluctance toward 'communitarisation' that characterises MS's behaviours.

Of course, the developments introduced by the Lisbon Treaty are relevant for the future of asylum policy too. Indeed, at the time of adoption of the Treaty, the second phase of the CEAS was in full swing, as all instruments apart from the recast of the Qualification Directive had not been passed.[106]

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[104] Art 80 TFEU

[105] Toner, "The Lisbon Treaty and the Future of European Immigration and Asylum Law"

[106] Ibid.

Chapter 3 - Evaluation of the state of Asylum Law and perspectives on the future

After having carefully examined the history of asylum policy in European Law, this third chapter will analyse its main faults and some perspectives for the future.

In the first chapter of this thesis, the main events and developments of European Migration Law have been examined and traced back. Now, some perspective can be gained, as to look at this body of law as a whole, in the entirety of what it has come to be. Essentially, EU asylum law is a regime of secondary law. The subject of our interest is, even after its introduction in the TFEU, derived from national law and secondary legislation more than it is from the Treaties.[107] Moreover, we now introduce events in our commentary of EU asylum law. It is indeed safe to say that the migratory flows which reached their peak in 2015 have exposed the shortcomings of the Common Asylum Policy. It was clear that national Governments and the Union itself had to respond to these new challenges through a comprehensive reform of the existing measures and a refocusing on four pillars: to address the root causes of irregular migration; dismantling trafficking and smuggling networks and improving returns; securing external borders whilst maintaining the safety of border crossers; establishing a stronger EU asylum policy capable of providing more efficient procedures for asylum-seekers and regular migrants.[108]

3.1 The CEAS post first phase

The Common European Asylum System, whose first phase was outlined in the previous chapter, was structured in two phases: the first one from 1999 to 2004, with the objective of setting minimum standards on reception conditions, asylum procedures, qualification criteria and responsibility for asylum application. This resulted in the adoption of Directives and Regulations, and whilst the implementation of this type of secondary legislation was a considerable evolution, it merely set a lower common denominator, and still called for harmonisation. Indeed, harmonisation was the central focus of the second phase of the CEAS, to last from 2004 to 2010(then moved to 2013). To this end, all the aforementioned legislative instruments were recasted. The piece of legislation that underwent most changes is the Dublin Regulation. Having already replaced the Dublin Convention in 2003, the Dublin regulation was itself amended and recasted into Regulation III 2013. As set forth by the Hague Programme in 2005, "the aims of the Common European Asylum System in its second phase will be

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[107] Loïc Azoulai, Karin de Vries. "Introduction" in *EU Migration Law : Legal Complexities and Political Rationales*, ed. Loïc Azoulai, Karin de Vries. *(*Oxford: Oxford University Press, 2014)

[108] Joanna Apap, Alina Dobreva , Anja Radjenovic. "The Migration Issue" briefing of the ERPS (March 2019) PE 635.542

the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection."[109]

However, it is worth considering how the Dublin System is the only one including Regulations in the framework of the CEAS. This implied that the only imposed rules on matters of Asylum in Europe were indeed those of the Dublin System. All other measures are Directives; they successfully set minimum standards on procedures, reception conditions, qualification and temporary protection. However, Member States were left to implement the minimum standards to their own discretion. This resulted obviously in strong differences between Members State's 'offer' in terms of asylum, with the consequence of increasing secondary movement. This is exactly why the harmonisation stage of the CEAS was required. As most -if not all- negotiations between member states on matters of asylum, those for Dublin III were also long and complicated.

3.1.1 Dublin Regulation III

The shortcomings of the Dublin system became more and more clear during the evolution of the CEAS; so that, when all the instruments of the first phase of the CEAS were recasted, the Council took the occasion to amend the Dublin Regulation. In the Green Paper on the future of a Common European Asylum System[110], issued in 2007 to evaluate the options for shaping the second stage of the system, the concept of including "corrective" burden sharing mechanisms in the Dublin System was first introduced. Indeed, the Evaluation of Dublin II concluded that although the Regulation was successful in providing a quick, fair and objective mechanism to establish which Member State is responsible for an asylum application lodged on EU territory, and fairly effective in reducing secondary movements, it recognized that the System could place an excessive burden on Member States under higher migratory pressures given by their geographic location. In particular among burden–sharing measures, Intra-EU resettlement was mentioned. Moreover, a Commission Working Document accompanying the proposal for the recast of Dublin[111] also underlined the main faults of the System. On the asylum-seeker side, "unclear or inadequate" provisions and insufficient information can create hardship for the claimers and their protection, as well as the interests of the child and other vulnerable groups are not sufficiently safeguarded. Member States, on the other hand, are also penalized by the system: not only disputes between them on rules are not talked efficiently, but the transfer rules can overburden States under particular pressure.

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[109] The Hague Programme: strengthening freedom, security and justice in the European Union OJ C 53, 3/3/2005

[110] Green Paper on the future Common European Asylum System COM/2007/0301

[111] Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person COM(2008) 820 final

The proposal for the recast of Dublin II into Dublin III indeed reflected these issues, setting forth the two main objectives of increasing the system's efficiency and ensuring higher standards of protection for asylum-seekers and better addressing situations of particular pressure on Member States.[112] It is evident how the objectives of increasing efficiency and ensuring protection can be in contradiction with each other, and indeed it proved easier for Member States to agree to cooperate on the first rather than the latter.[113]

As a matter of fact, when Regulation 604/2013[114] was adopted, five years after the original proposal, it did provide for additional clarifications, especially in the hierarchy of criteria; a stronger family unity principle; a new system for crisis management attempting to ease the burden of highly pressured MS.

Notwithstanding the modifications of the Regulation that attempt to 'cure the symptoms' of the System, the core rules and methodology remained essentially unchanged. Again, a chance to rethink the system was missed. With all its weaknesses, the system was however functioning, or at least functioning enough with the migratory pressure of the years in which it was adopted. In the event of the refugee crisis of 2015 its shortcomings became finally obvious.

3.2 The refugee crisis of 2015 and the failure of the asylum system

The influx of refugees and migrants experienced by Europe between 2015 and 2016 was unprecedented. More than a million of refugees arrived at the doors of Europe, fleeing from humanitarian emergency areas, in particular as a result of the Syrian war and the Libyan civil war. The crisis, other than being a deeply worrying situation of emergency and larger scale crisis that saw millions displaced, was the ultimate test of all the efforts made during the years in establishing a Common European Asylum System. Under the pressure of the arrival of hundreds of thousands of migrants on the shores of Italy and Greece, the Union was unable to respond effectively, and the system collapsed. In the words of den Heijer, "in Europe, the refugee crisis is first and foremost a policy crisis". [115]

The faults of the Dublin system are manifold, so as the reasons for which it did not work. The first criticism of the system is that it does not operate fairly. Holding the country of first-arrival as a basis

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[112] Impact Assessment, Commission Staff Working Document accompanying the Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person SEC(2008) 2962

[113] Steve Peers,"The second phase of the Common European Asylum System: A brave new world – or lipstick on a pig?" www.statewatch.org, (April 8, 2013) https://www.statewatch.org/analyses/no-220-ceas-second-phase.pdf.

[114] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person OJ L 180 29/6/2013

[115] Maarteen den Heijer, Jorrit J. Rijpma, Thomas Spijkerboer. "Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System" *Common Market Law Review,* Volume 53, no.3 (2016): 607-642, p. 607

for assigning responsibility had already been proven to place an excessive burden on Member States, but the 2015 refugee crisis was the ultimate demonstration. One of the reasons of the failure of the system is that the responsibility for claims was allocated only in the southern European countries.

Moreover, the efforts to stop secondary movement of asylum-seekers, migrants and refugees, just did not stand the quantity of people trying to cross borders illegally to seek asylum in a different country than that of arrival. It is only ironic how the states at the 'doors' of Europe, thus those suffering the influx of migrants the most, were among the less wealthy and worse administrated of the European Union. From a conceptual perspective it is striking that asylum seekers have no say in the country they will file the asylum application in. There is indeed a difference between 'asylum shopping', the phenomena dreaded by legislators of the Dublin System at the base of measures restricting secondary movements and the self-determination ability to decide for one country instead of another. Especially so because preferences of asylum seekers are governed by personal concerns, such as presence of family, asylum communities, colonial or linguistic links of the country and by the actual reception conditions and social rights of different Member States, as well as the general economic and political climate. Decisions on destinations are made by asylum seekers before arrival, from information gathered from word of mouth , through social media and from advice of human smugglers.[116] This can in a sense be seen as a double sided failure: on one hand Dublin creates a system that is unable to match the asylum seeker's preferences, and on the other it shows the shortcomings of the harmonisation efforts of the second phase of the CEAS. Some of the factors that shape asylum seekers precepted preferences are not in control of Member States, for instance the asylum communities that have formed or the level of wealth of the country, but the EU is definitely guilty of not having created a "level playing field"[117] for asylum seekers.

The main reasons for these failures reside in the fact that even after the second phase of the CEAS was concluded, the Directives still all contained the principle that Member States may introduce more favourable procedures. This principle imparts a 'race to the bottom' effect, which is common with all 'minimum standards'. However, in this case it is reversed: Member States voluntarily race to the bottom, so as to limit asylum application in their country by offering worse recognition rates, reception conditions and protection. At the same time, asylum seekers will resort to avoidance behaviour to spin the system in their favour. The only way Asylum seekers can contrast the coercion to apply in a state decided by the Dublin regulation, they will lie about their route or try to avoid registration and in some cases, go as far as cutting off their fingertips to avoid being inserted in the EURODAC database.[118]

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[116] Ibid.

[117] Ibid. p 609

[118] Ibid.

Another issue with the regulation, or more specifically with the ways in which it was, or better so was not, applied, is the degree of fairness in examination of asylum applications and thus protection of asylum seekers' rights. That the degree of protection is heterogeneous among Member States,[119] constitutes a threat for asylum seekers safety.

The Dublin Regulation was undoubtedly the most problematic instrument of the Asylum package; however, the failure to deliver during a time of emergency is to attribute to the Common European Asylum System as a whole. The premises of the CEAS were bright, initiated during a time of political enthusiasm and willingness to cooperate, namely the European Council of Tampere.

It can be argued that the CEAS suffers from a "solidarity deficit"[120]. Indeed, the principle of solidarity is included in the premises all the documents composing the system and in the very articles that give base to it[121]. However, there are no actual judicial obligations deriving from it and no particular implications for the legislative process, apart from financial transfers[122]. Moreover, the ideals on which the CEAS is founded upon; that Europe is an Union, with external borders only, that operates as a single entity and not as individual Member States, somewhat contradicts the factual reality.[123] Is the area of protection and solidarity, indeed, "common"? The minimum standard approach resulted in numerous differences in implementation, creating many co-existing different asylum systems, that cannot work as one as implied by the CEAS.

It also has to be mentioned that an efficient asylum and migration policy is the result of a balance between external and internal measures: the absence of safe and legal means to claim asylum from outside the EU was crucial to the crisis, favouring illegal arrivals and smuggling and thus endangering asylum seekers.

3.3 The EU's response to the refugee crisis

The crisis of the Common European Asylum System was indeed relatively swiftly acknowledged by the European Union, who set forth a series of immediate emergency response measures and more generally set new objectives for the reform of the legislation and future policies to mitigate the causes

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[119] Blanca Garcés-Mascareñas, "Why Dublin 'Doesn't Work.'" https://www.cidob.org/en/publications/publication_series/notes_internacionals/. Barcelona Centre for International Affairs, November 2015.

[120] Daniel Thym, "The "refugee crisis" as a challenge of legal design and institutional legitimacy" *Common Market Law Review*, Volume 53, no.6, (2016): 1545–1573 p. 1550

[121] Art 80 TFEU

[122] Thym, 'The "refugee crisis" as a challenge of legal design and institutional legitimacy'

[123] Ibid.

of migration and better address it when unavoidable. The Communication to initiate this response was the European Agenda on Migration[124] . The document affirms:

"We need to restore confidence in our ability to bring together European and national efforts to address migration, to meet our international and ethical obligations and to work together in an effective way, in accordance with the principles of solidarity and shared responsibility. No Member State can effectively address migration alone. It is clear that we need a new, more European approach. All actors […] need to work together to make a common European migration policy a reality"[125]

The first part of the Agenda addressed the immediate action to be taken up against the loss of lives at sea, a tragic consequence of the 'journey of hope' endured by migrants crossing the Mediterranean in inadequate conditions. To that end, the Commission set a goal to triple the budget for the rescue operations "Triton" and "Poseidon" and to target the exploitative networks of smuggling that are at the source of creating dangerous pathways to Europe.

As for internal measures, a key solution to easing the pressure off more burdened Member States was the proposal for relocation and resettlement schemes. Relocation is the transfer of asylum seekers from a more pressured MS to one that can better administrate asylum claims, whilst resettlement provides legal and safe pathways to enter the European Union to avoid asylum seekers resorting to illegal pathways and to protect them from traffickers and smugglers.

The introduction of these mechanisms is extremely relevant in our discourse as it is the consequence of a serious commitment from the Union institutions to cooperate on a solidarity basis, as promised by its premise. Another tool to help Italy and Greece manage the volume of migrant arrivals was the "Hotspot" approach, that is to complement the work of national administrations with the work of European Agencies Frontex Europol and EASO[126]. The Agenda also calls for a series of external measures, tacking development cooperation, humanitarian assistance and a better implementation of the Returns Directive. These prompt changes and emergency measures proposals are based on Article 78(3) TFEU, that will be triggered.[127]

The Common European Asylum System is also tackled in the plan, setting as an objective the uniforming of reception conditions and asylum procedures; a monitoring and evaluation system; and guidelines to fight against abuses of the asylum system. Most importantly, it acknowledged that the

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[124] A European Agenda on Migration, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. COM(2015) 240

[125] Ibid p.2

[126] European Asylum Support Office, an agency formed in 2011 to strengthen the cooperation of EU Member States on asylum, enhance the implementation of the Common European Asylum System, and support Member States under particular pressure.

[127] In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament. Art 78(3) TFEU

Dublin system needed a substantive reform. The prompt reaction of the Union to the crisis was much needed, and it gave hope that a new and improved uniform common asylum system was on the way.

But were the objectives set in the European Agenda for Migration achieved in the past four years? We will in particular look at the Relocation project and the Dublin System.

In September 2015, for instance, the Council adopted the "Relocation Decisions"[128]. Although the Agenda mentioned introducing relocation as an automatic mechanism also for the long term, the Relocation Decisions regard exclusively the emergency situation of Italy and Greece . The objective of the mechanism is twofold: on one hand taking pressure off overburdened MS and ensure the fair sharing of responsibility among MS, and on the other to ensure the proper application of Dublin and the protection that should derive from it. In fact, apart from the criticisms of the Dublin System when applied, one major problem was whether it was applied at all. Monitoring abuse of the system and situations in which the influx on asylum seekers were too heavy to administrate under Dublin were indeed also among the objectives of the Agenda. In addition to working towards a fairer and better mechanism for responsibility, 40 infringement procedures were started in 2015 against Member States failing to implement EU asylum legislation, in particular on effective fingerprinting and transposing the Asylum Procedures and the Reception Conditions directives.[129]

The Relocation decisions set out the objective of relocating a total of 160,000 asylum seekers over the course of the following 24 months, on the basis of a distribution key, calculated with the size of the population ;GDP; average number of spontaneous asylum application and number of resettled refugees per million habitants between 2010 and 2014; unemployment rate.[130] The parameters were meant to ensure fairness and relocate asylum seekers in an organic manner.

According to the Decisions, only asylum seekers who had applied for asylum in Italy or Greece and had arrived in said countries after 24 March 2015 were eligible for relocation. Of those, given that the asylum seekers were able to a) actually make an asylum claim in situations as overworked as those of 'frontline' countries and b) prove their day of arrival, only the asylum seekers with the nationality of a country with 75% recognition rate were eligible. The nationality criteria had the function of only relocating people with high chances of being granted asylum, but again, verifying one's nationality has proved difficult, as most asylum seeker who make it to the EU have no

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[128] Cathryn Costello, Elspeth Guild, Violeta Moreno-Lax, "Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece" , EU Publication (March 2017) doi:10.2861/389341

[129] den Heijer, Rijpma, Spijkerboer, "Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System"

[130] Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person COM(2015) 450

documents. In this framework, once again, the asylum seeker will be relocated regardless of his country of preference[131] and most importantly not requiring the consent of the person to be relocated.

The results of the crisis relocation mechanisms are truly sobering. Although the Decisions are legally binding, few Member States have effectively complied. Indeed, some MS, as for instance Hungary, the Czech Republic and Slovakia (who had also voted against the Decisions in the Council) have rejected applications for relocation.

Indeed, the relocation scheme swiftly transformed in a political issue for many Member States. Although we do refer to the Asylum System as Common and to the refugee crisis to a phenomenon which affects the European Union as a whole, there's "no common political framing of the 'refugee crisis' as being a common European problem."[132]. This is in part to blame to the rise of right-wing, populist and often euro-sceptic parties and then governments that have emerged as a consequence of the perception of the refugee crisis as unstoppable and an 'invasion', whilst this perception actually being a consequence of the incapacity of the EU to manage it. The everlasting reluctance of Member States to concede their sovereignty on matters of asylum had shown itself again. In particular, the MS challenged the EU's authority of relocating asylum seekers, resulting in insufficient pledges of relocation and many relocation requests rejected on national security grounds.

In addition to this political challenge, practical shortcomings were also encountered in the design of the relocation process. The nationality criterion, for example, was deemed as discriminatory and ineffective, especially in Italy. In fact, asylum seekers arriving through the Central Mediterranean route have more heterogenous countries of origin. Furthermore, asylum seekers' lack of involvement is the decision-making process of their relocation was criticised[133]. For a future, fair and effective mechanisms, asylum seekers should receive reliable information that enables them to make informed choices; and then their preferences should be matched with relocation opportunities.

At the end of the 24 months, be it for unrealistic expectation of the EU, practical or political problems, only 21.000 asylum seekers of the planned 160.000 were successfully relocated.

While the immediate emergency response measures were implemented, discussions on the reform of the CEAS and the Dublin system started. The priorities and possible directions of the reforms were set out in Commission Communication at the start of April 2016[134]. Five priorities were identified: establishing a sustainable and fair system for determining the Member State responsible for asylum

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131 Costello, Guild, Moreno Lax, "Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece", Study, PE 583 132, (European Parliament, 2017)

132 Ibid p.29

133 Ibid.

134 "Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe", Communication from the Commission to the European Parliament and the Council , COM(2016) 197

seekers; reinforcing the Eurodac system; achieving greater convergence in the EU asylum system; preventing secondary movements within the EU; a new mandate for the EU's asylum Agency.

The Communication included two possible roads to take for the Dublin reform: 1) a corrective fairness mechanism supplementing the present system and 2) a new system for allocating asylum applicants in the EU based on a distribution key. Under the first option, the criteria allocating responsibility remain unchanged, but a corrective mechanism would be introduced and triggered in situations of emergency to effectively support a MS confronted with a significant influx of migrants. Basically, what had happened in 2015 but with automatic triggering of relocation and slightly fairer criteria for relocation itself[135]. The second option proposes to revise the system more deeply, with the first country of arrival still having to register all migrants and return those not eligible for international protection, then to be automatically and immediately (as a praxis and not an emergency measure) re-distributed according to the distribution[136]. As soon as one month after the publication of this communication, the proposal for the Dublin IV Regulation was issued, as the first instalment of legislative proposals to reform the CEAS.[137]

The Commission proceeded indeed with the first option, deciding against the suggestion of the Parliament to completely overhaul the Dublin regime. Indeed, the Parliament had issued a resolution in April 2016 calling for a revision of the State of first entry criteria and the possible establishment of a central collection of applications at Union level, viewing each asylum seeker as seeking asylum in the EU more than in the individual MS. [138] Regardless of the resolution, the Commission proposes to streamline and supplement the current rules with a corrective allocation mechanism. The recasted Regulation will include a new automated system monitoring the number of asylum applications received, a parameter to determine when a MS is under disproportionate pressure and a 'fairness mechanism' to alleviate said pressure. The mechanism will be triggered when the number of asylum applications is above 150% of the reference share. Moreover, MS not willing to accept the allocation of asylum seekers in its country will have to pay a 'solidarity contribution' of 250.000 euros.

The Dublin IV regulation as proposed would maintain the problems mentioned earlier in the chapter and potentially worsen them. In fact, the only lesson learned seems to be that corrective mechanism is fundamental to share responsibility (in case of an emergency). Other than that, it actually reinforces the very Dublin faults that were acknowledged earlier in the chapter. It further negates agency and freedom of choice to asylum seekers, strengthens the criteria and, in an attempt to 'streamline' the

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[135] Such as removing the nationality criteria

[136] Gertrud Malmersjo, Milan Remáč. "Regulation 604/2013 (Dublin Regulation) and asylum procedures in Europe", Implementation Appraisal, PE 573.304, (European Parliament 2016)

[137] Proposal for a Regulation of the European Parliament and of the Council 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(recast) COM(2016) 270

[138] European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI))

procedures, it strips away the higher standards of protection achieved in the passage from Dublin II to Dublin III. Instead of acknowledging the resistance of asylum applicants to the Dublin System, it represses it with new constraints. Moreover, it further burdens the 'frontline' states through "gatekeeper" obligations to identify applicants, registering claims, administer admissibility screenings and leaving them 'alone' to deal with inadmissibility cases.

In October 2017, the LIBE Committee (to which the proposal was assigned) adopted a report and voted to start interinstitutional negotiations, mandate then confirmed by the EP. The main suggested amendments are to set links to a particular country as the first relocation criteria, individual guarantees for minor asylum applicants, no transfers of asylum applicants representing a security risk between MS and no transfers between MSs of applicants manifestly unlikely to be granted international protection.

3.4 Alternatives to Dublin

Although the EU has mostly 'stuck' with Dublin principles from the first signing of the Convention in 1990, during these years discussions on alternatives to Dublin have been made. A workable responsibility allocation system must respect at least three conditions: it provides applicants with positive incentives to cooperate, it provides positive incentives to Member States to engage in a cooperating behaviour rather than a defensive one and finally it should drastically reduce heavy bureaucracy and the resort to coercion.[139] The three main alternative models are the free choice model, the "Dublin minus" System[140] and a limited choice model.

The free choice model is a 'light' system: they minimize the time, coercion and effort required for the asylum procedure. In this model the asylum applicant could choose the country in which to apply for asylum, or an hypothetical country of first arrival could examine their application though genuine link and family reunification criteria only. When proposed to the Commission, it objected that this system would not provide a fair sharing of responsibility. While this might be true, although it is likely that with correct and reliable information provided to asylum seekers and a simultaneous uniforming of reception conditions in the EU would make for a self-balancing fair sharing of responsibility, the major critique to the present system is its lack of fair sharing of responsibility. [141] Moreover, such a system would "match" asylum applicants with welcoming supportive countries, thus increasing their chances of a successful integration. The only danger would be that the reverse 'race to the bottom' that some MS used to avoid being filed asylum claims would penalize the 'free choosers'.

The Dublin "minus" model would be the easiest to achieve it would practically entail a radical simplification of the already existing Dublin system. The criteria would be simplified, take charge

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[139] Francesco Maiani, "The Reform of the Dublin III Regulation", Study, PE 571.360 (European Parliament, 2016)

[140] In the context in which the current proposal for Dublin IV, with the strengthening of criteria and coercion is a "Dublin plus".

[141] Maiani, "The Reform of the Dublin III Regulation"

and a series of other procedures would not be necessary anymore. The system, in return would be easier, faster and less costly and provide nearly identical redistributive results, whilst reducing its shortcomings to some extent. A better system could then be built on a more basic Dublin system and it is easily the most agreeable model of all.

The final model is a compromise of the two precedent ones. The "limited choice" would rely on examining the application where lodged; criteria of meaningful links and family unity would be strengthened; the same criteria could be combined with a quota system. A system would notify which MS are 'below quota', and applicants would have the chance, if not to lodge the application in their state of choice, to choose among a list of countries below quota. The quota system would be binding for MS but not coercive for asylum seekers, and it would provide the fair and effective system longed for by European citizens and asylum seekers alike.[142]

Anyhow, although it is unlikely that any of these models will restructure the Dublin System, or at least not in this recast, the proposal is still going through modifications to this day.

3.5 Current state of play

The current state of play for asylum policy in the European Union still brings on the challenges that it did in 2015. No consensus has been achieved on reform of the CEAS and in particular of the Dublin System. Moreover, the migration debate has polarised at national level, and the right-wing parties that were on the rise during the refugee crisis have made their way in European institutions, further complicating the debate at the EU level.[143] Irregular arrivals have majorly decreased from the times of the refugee crises, but the same issues are still looming. Union action is focusing on global partnerships and long-term cooperation to address the root causes of migration flows. The legislative reform of the Common European Asylum is still underway, with the EU still in need of an, indeed, "EU- wide approach"[144] based on, amongst other things, the automatization for a solidarity mechanism in order not to repeat past errors. All the proposals for recasting the main directives and regulations of the CEAS have been published and are awaiting approval.

Today, the Union has tools to manage migration better, through partnerships with countries of origin and transit and operations to consistently save lives at sea. The externalization of asylum policy into cooperation and development aid transmits an idea of higher security and control; but it is to some extent worthless without a strong, common, European asylum policy.

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142 Ibid.

143 Willemijn Tiekstra. "State of Play in the Debate on Migration Management in Europe." https://www.clingendael.org. Clingendael, Netherlands Institute of International Relations, October 16, 2018.

144 Progress report on the implementation of the European agenda on migration COM(2019) 126

Conclusion

This thesis attempted to trace back the most significant developments in European Asylum Law to this day. Its main objective was to stress the ever-lasting and ever-recurring reluctance of Member States to actively cooperate and concede competence to the Union in the building of a common asylum policy. Moreover, it focused on the 2015 refugee crisis, seizing the opportunity to use this pivotal event to underline the main faults of the Common European Asylum System and EU asylum law altogether. Importantly, it tackled possible alternatives to the current system, investigating the ways in which the common asylum policy could develop to provide fairer mechanisms that ensure protection of asylum-seekers in every stage of the process, but particularly upon arrival.

The first chapter delved into the first hints at asylum law, the first efforts at intergovernmental cooperation and the path to 'communitarisation'. Although this is really the 'embryonal' stage of asylum law in the EU, it is also the moment in which the problems that are dealt with throughout the thesis set their roots. Indeed, the shortcomings defined 'unavoidable' in the third chapter emerge in this very first phase. For instance, the first competence skirmishes stem from Articles 117 and 118 of the Treaty of Rome. The words of Advocate General Mancini, quoted on page 7, as well as, to a certain extent, the content of the Declarations attached to the Single European Act, on page 8, resonate with the dealings of Member States even in more recent times. Nevertheless, the true foundations of asylum law in the EU are set during this time: first and foremost, the Schengen Agreement, relevant in itself for abolishing checks at internal borders, but even more so for serving as a *laboratoire d'essai* for the Dublin Convention.

To consider the unawareness of the drafters of the Dublin Convention that to this day the principles set in the original Convention would still govern the allocation of responsibility for asylum applications, and with such difficulties, is truly striking. In fact, the thesis follows the evolution of the Convention into a Regulation, a recast of that Regulation and the proposal for a third recast that has demonstrated to be extremely difficult to get consensus on; carrying its most important flaws intact from one modification to another. We refer to the principle of first-country-of-arrival and the stark impediments on secondary movement, and the neglect of the asylum-seeker's agency.

At the same time asylum law was slowly but steadily making its way from purely intergovernmental cooperation to 'communitarisation'. The first attempts at the integration of these areas in the Treaties closely regarded the interest of the Member States of maintaining sovereignty. The Maastricht Treaty introduces the Pillar structure, and relegates asylum and migration matters to the Third Pillar, to remain tied to the intergovernmental logic, as not to further complicate the already heated debate on competence. The introduction in the Pillar structure is nevertheless an evolution, as well as the definition of the 9 areas of common interest defined in Title VI, namely because it enshrines an obligation to cooperate on a permanent basis in the Treaty.

The Treaty that truly revolutionized EU asylum law is the Treaty of Amsterdam; through the transferral of asylum matters under the First Pillar, granting competence to the Council to, within a

transitional period of 5 years still governed by unanimity, adopt a series of minimum standards on asylum related issues. These articles will give a legal basis to the building of the Common European Asylum System, cornerstone and 'pebble in the shoe' of asylum in the EU. Nevertheless, even the most promising developments of asylum law cited in this thesis will have some limitations, often introduced by the Union to satisfy the Member States, that have the result of hindering further evolution in the direction of a common asylum policy that is fairer for both MS and asylum seekers. In the particular case of the Amsterdam Treaty, the limitation is the opt-out mechanism.

This 'one step forward, two steps back' perspective is emblematic of the topics tackled in the second chapter. Indeed, the premises of this phase were extremely bright; both with the new competences granted by the Treaty of Amsterdam and the strong need for a shared political line on matters of asylum that made the topic a priority in European Councils of that time, famously the one in Tampere in 1999.

The Council of Tampere called for the building of a Common European Asylum System, to be articulated in two phases, one setting minimum standards on matters of asylum, namely reception conditions, asylum procedures, qualification as a refugee and determination of responsibility for asylum claims, and the second harmonising the legislation. As it is outlined in the thesis, the expectations on the establishment of the CEAS were not satisfied. A great opportunity to set ground rules and practices that could have shaped asylum law into being more efficient, fair, and respectful of asylum seekers today was missed. In fact, the setting of minimum standards resulted in a race to the bottom, mainly as a consequence of Member States unwilling to take up on the responsibility deriving from high standards.

The epitome of this approach is seen in the conversion of the Dublin Convention into Regulation 343/2003. A long series of preparing documents, evaluations and assessments preceded the adoption of the Dublin Regulation, already underlining the possible faults of the system. However, the adopted piece of legislation presented no substantive change from its precedent. The criteria and rules were revised and rendered more appropriate to an instrument of secondary legislation rather than an intergovernmental agreement, with a renewed attention to family criteria and the introduction of a 'humanitarian clause'. A great occasion was however lost.

The last development before the third and final chapter is the Treaty of Lisbon. In the framework of this thesis, the Treaty of Lisbon represents a fundamental achievement looking back to the early attempts at 'communitarisation', and in the perspective that the final conferment of competence, albeit shared, to the Union, and the introduction of the ordinary legislative procedure for asylum matters represents the coronation of that process.

The final chapter revolves around and event that has and will deeply mark the history of modern Europe: the refugee crisis of 2015.

The starting point of this period is the second phase of the CEAS, the one devoted to the harmonisation of national standards. Indeed, the first phase of the CEAS created as many different

asylum regimes as there are Member States, especially considering that all the CEAS instruments were Directives, apart from those composing the Dublin System. In fact, when the humanitarian emergencies and wars in Syria and Libya caused an unprecedented amount of asylum seekers to dangerously make their way to Europe, the shortcomings of the system were irremediably exposed.

In particular, the manifold faults of the Dublin System have been enumerated in the final chapter. What is truly important is to note how solutions to the issues of the Dublin system could have been resolved earlier in time. The Implementation Appraisals, Green Papers, Working Staff Communications and Evaluations that have preceded the adoption of the Dublin Regulation II and III clearly identified the underlying problems of the system. However, the crisis had to strike for them to be acknowledged. It is self-explanatory that asylum cannot be a trial and error area of law, or one that waits for an emergency to update itself. In cases in which protection of vulnerable people is at stake, the Union cannot afford to not provide a system that is truly efficient and fair. Moreover, such changes would have been easier to implement before such experience; before the Dublin System collapsed under more than a million asylum applications; before right-wing governments that won elections on asylum-themed electoral campaigns made their way into the European Parliament, rendering negotiations more complicated.

At the same time, Member States are 'guilty' of having questioned the authority of the Union, thus maintaining theirs, in the wake of such a crisis. The failure of the relocation mechanisms is the clearest example of the behaviour that we have highlighted. Although the discourse has had connotations of 'common', 'european', 'uniform', a high influx of asylum-seekers was mostly treated as an individual country issue. Albeit some Member States, such as Germany, had 'opened their doors', the burden placed on Italy, Greece and now Malta has not only put pressure on the countries in that moment, but also taken a toll on their politics and general state administration.

Today, negotiations are currently underway for the Dublin Regulation IV. The proposal had been submitted in 2016, without presenting major changes, apart from the introduction of an automatic emergency relocation mechanism that would serve as a corrective mechanism to ease the burden on over-pressured states. The events have made it clear that the Dublin regime should be, if not completely, at least partially overhauled.

The mechanism to determine which Member State is responsible for an asylum claim shall be fair both to the Member States and to the asylum seekers ; it should consider asylum seekers' preferences, family and genuine links, as well as the realistic reception capacity of different Member States; it should be built on positive incentives to Member States to cooperate.

In conclusion, if a new and more workable Common European Asylum System is to be created, Member States have to shift away from the defensive behaviour that has characterised them in this discourse, and the Union has to enforce its laws and binding instruments in favour of a cooperation that encompasses political, administrative, bureaucratic and humanitarian aspects of asylum.

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Riassunto

Introduzione

La crisi migratoria del 2015 è rimasta nell'immaginario comune di italiani ed europei, per le tremende immagini di centinaia di migliaia di migranti che arrivavano alle ' porte' d'Europa mettendo a rischio la loro vita. Questa tesi vuole ripercorrere la storia del diritto d'asilo europeo, concentrandosi sui momenti principali e sui problemi fondamentali che hanno portato al suo fallimento durante la crisi migratoria.

La tesi si divide quindi in tre capitoli, che suddividono gli sviluppi del diritto d'asilo europeo in altrettante fasi.

Il primo stadio analizzato è quello che vede protagonista la cooperazione intergovernativa, e che si conclude con il Trattato di Amsterdam; i principali sviluppi di questo periodo, che va dagli anni '50 al 1999, sono gli accordi di Schengen, la Convenzione di Dublino, ed i Trattati di Maastricht ed Amsterdam.

La seconda fase, invece, si concentra sulla legislazione secondaria adottata in seguito all'acquisizione, seppur con restrizioni, di competenza in materia d'asilo per l'Unione Europea, conferita nel Trattato di Amsterdam. Questa fase è caratterizzata da una forte spinta cooperativa tra Stati Membri ed Unione, coltivata durante i Consigli Europei, in particolare quello di Tampere, dove nasce il progetto di fondare un Sistema Europeo Comune di Asilo. All'interno del Sistema vengono adottate, durante una prima fase che va dal 2000 al 2004, le direttive ed i regolamenti che daranno forma al diritto d'asilo europeo. In particolare, queste sono le Direttive per l'accoglienza, le procedure d'asilo, la protezione temporanea e la qualificazione. Inoltre, il sistema integra il meccanismo di Dublino attraverso il Regolamento che stabilisce i criteri e i meccanismi di determinazione dello Stato membro competente per l'esame di una domanda di protezione internazionale presentata in uno degli Stati membri ed il regolamento di EURODAC; un database di impronte digitali per monitorare, ed impedire, il movimento secondario dei richiedenti asilo. La seconda fase si conclude con il Trattato di Lisbona, coronamento finale del processo di integrazione e 'comunitarizzazione' del diritto d'asilo nei trattati europei, che conferirà maggiori competenze all'Unione ed assegnerà la procedura legislativa ordinaria al diritto d'asilo.

La terza ed ultima fase si concentra invece sui più recenti sviluppi del diritto d'asilo europeo, ovvero la seconda fase del Sistema Europeo Comune di Asilo. L'evento centrale di quest'ultima fase è la crisi dei rifugiati del 2015. All'arrivo di più di un milione di migranti e richiedenti asilo in Europa, ed in particolare nei paesi alle sue 'porte', come Italia e Grecia, il sistema d'asilo ha mostrato le sue debolezze ed incapacità a gestire l'emergenza. Verranno quindi approfonditi i problemi principali del sistema Dublino e degli altri strumenti di legge e quali sono le possibili alternative per il futuro.

Dalla cooperazione intergovernativa alla 'comunitarizzazione' parziale

I primi sviluppi a livello di diritto d'asilo possono intendersi come 'passivi'. Infatti, non avvengono propriamente con il diritto d'asilo in mente, ma nonostante ciò porranno le basi per sviluppi futuri.

In particolare, ci riferiamo ad alcune limitazioni all'espulsione di stranieri nella Convenzione Europea sui Diritti Umani, ed alcune competenze conferite dal Trattato di Roma al Consiglio che permettevano l'approssimazione di leggi nazionali che potessero ostacolare il mercato comune.

Nonostante ciò, la necessità di abbattere le frontiere interne per favorire l'istituzione di un mercato interno, implicando quindi l'esistenza di un'unica frontiera esterna, si faceva sempre più chiara di pari passo con l'evoluzione della Comunità Europea.

Bisognerà però attendere i primi accordi intergovernativi per ottenere questi cambiamenti. Infatti, l'Atto Unico Europeo non apportò nessun cambiamento sostanziale su questi temi. Tuttavia, l'AUE concesse agli Stati Membri un'opportunità di esprimere la loro posizione rispetto al libero movimento delle persone attraverso la Dichiarazione generale relativa agli articoli da 13 a 19 e la Dichiarazione politica dei governi degli Stati Membri sulla libera circolazione delle persone. In questa occasione, gli Stati Membri esprimono la loro volontà di cooperare, senza pregiudizio delle competenze della Comunità, per l'ingresso, la circolazione ed il soggiorno di cittadini di paesi terzi. Allo stesso tempo, viene ribadito che le disposizioni dell'AUE non pregiudicano il diritto degli Stati membri di adottare le misure che essi ritenessero necessarie in materia, tra le altre cose, di controllo dell'immigrazione da paesi terzi. Si noti come in questa fase, seppur ancora 'embrionale', la conservazione della sovranità sulle questioni migratorie è già una priorità per gli stati membri.

I primi sviluppi tangibili in questo campo sono appunto gli Accordi di Schengen e la Convenzione di Dublino. Rispettivamente firmati nel 1985 e 1990, rappresentano i primi approcci intergovernativi alla regolamentazione della migrazione e dell'asilo.

Gli Accordi di Schengen vengono firmati inizialmente da Germania, Francia, Belgio, Paesi Bassi e Lussemburgo per ovviare alla mancanza di consenso all'interno della Comunità Europea e con l'obiettivo di abolire gradualmente i controlli alle frontiere interne comuni, trasferendoli ad un'unica frontiera esterna. Finalmente la necessità di unire la libera circolazione di persone e beni con la garanzia della sicurezza per i cittadini si fa priorità, portando alla creazione di nuovi meccanismi e soluzioni per sforzi coordinati in ambito doganale, giudiziario e di coordinamento delle forze dell'ordine.

Gli obiettivi principali di Schengen erano l'armonizzazione dei controlli alle frontiere esterne per tutte le parti contraenti, l'uniformazione dei requisiti per i visti, l'istituzione del Sistema d'Informazione Schengen per lo scambio di informazioni sull'identità dei cittadini tra polizie nazionali e la creazione di un metodo per determinare lo stato responsabile d'una richiesta d'asilo. Gli Accordi di Schengen verranno inoltre integrati dalla Convenzione di applicazione dell'Accordo di Schengen per facilitarne l'implementazione.

Gli Accordi di Schengen possono essere considerati come un prodotto di diritto pubblico internazionale, poiché non facevano inizialmente parte del *framework* Comunitario; inoltre, al contrario appunto degli strumenti della Comunità, avevano una struttura istituzionale più flessibile, favorendo un approccio più pragmatico ed innovativo.

La Convezione di Dublino, per la quale Schengen ha una funzione di *laboratorie d'essai,* sarà invece strutturata in maniera più solida, con una maggiore influenza della Comunità Europea che si rifletterà anche nei metodi. La Convenzione si pone come obiettivo di stabilire un meccanismo che determini lo Stato Membro competente per una domanda d'asilo presentata in uno degli Stati Membri. Questo meccanismo, oltre a voler provvedere un sistema efficiente per la determinazione della responsabilità, ha come priorità l'eliminazione dell'abuso di asilo e l'evitare dei fenomeni di '*refugee in orbit'* e '*asylum shopping'*. A fronte di questa necessità, la Convenzione include delle misure per evitare il movimento secondario, integrate dal sistema Eurodac, un database di registrazione delle impronte digitali dei richiedenti asilo. Il principio governante di Dublino è quello del paese di primo approdo, secondo il quale sarà il primo Stato Membro nel quale il richiedente asilo ha 'messo piede' ad occuparsi della sua domanda d'asilo.

Schengen e Dublino vanno intesi come dei meccanismi complementari che hanno entrambi come obiettivo l'istituzione di un'area senza frontiere interne. Rappresentano senza dubbio un passo avanti verso una politica d'asilo comune. Entrambi i documenti contengono però una clausola di eccezione che consente agli Stati Membri di rifiutare le loro imposizioni, preservando quindi la sovranità degli Stati.

La transizione dalla fase intergovernativa a quella comunitaria è rappresentata dai Trattati di Maastricht e poi di Amsterdam. Il Trattato di Maastricht, o Trattato sull'Unione Europea, introduce la struttura a pilastri nel diritto europeo, relegando le questioni relative all'asilo nel terzo pilastro, dedicato a 'Giustizia ed Affari Interni'.

Poiché il dibattito in merito alle competenze dell'Unione rispetto all'immigrazione, l'asilo e la cooperazione giudiziaria e tra polizie era ancora particolarmente acceso, si decide di includerle nel terzo pilastro che rimarrà di carattere intergovernativo.

Tuttavia, il Titolo IV del Trattato include nove aree di interesse comune che richiedono la cooperazione tra Stati Membri, tra cui le politiche d'asilo e di immigrazione di cittadini terzi, creando quindi, seppur a livello intergovernativo, un permanente obbligo a cooperare.

In conclusione, il Trattato sull'Unione Europea rappresenta un progresso, sia per la creazione delle basi legali che hanno reso possibile l'istituzione del mercato interno, sia per l'istituzionalizzazione dei forum informali e gruppi di cooperazione intergovernativa ad hoc preesistenti.

Il processo di 'comunitarizzazione' del diritto d'asilo europeo trova il suo coronamento nel Trattato di Amsterdam. Il Trattato, infatti, trasferisce l'area delle politiche d'asilo ed immigrazione dal terzo pilastro al primo, portando quindi queste materie sotto alla competenza dell'Unione. L'Articolo 63

definisce le competenze del Consiglio e prevede, entro i cinque anni dall'entrata in vigore del Trattato, che questi adotti misure relative all'asilo, in particolare un meccanismo per la determinazione dello Stato responsabile di una domanda d'asilo; norme minime per l'accoglienza dei richiedenti asilo; norme minime per la qualificazione di cittadini di stati terzi come rifugiati; norme minime sulle procedure d'asilo. Inoltre, il Trattato integra Schengen ed il suo *acquis* nel quadro istituzionale dell'Unione Europea. Il Trattato di Amsterdam è profondamente rivoluzionario per il percorso del diritto d'asilo nella UE, poiché pone le basi legali per gli sviluppi a venire, ovvero il Sistema Europeo Comune di Asilo. Tuttavia, viene introdotto un meccanismo che permette agli Stati Membri di non essere vincolati se non sono in disaccordo: il meccanismo di '*opt-out'*.

Sviluppi legislativi del diritto d'asilo nel Post-Amsterdam

Il periodo successivo al Trattato di Amsterdam è caratterizzato da una forte spinta alla cooperazione. Il crescente bisogno di una linea politica condivisa sulle questioni relative all'asilo si riflette nei Consigli Europei degli anni seguenti al Trattato. Il più importante è il Consiglio Europeo di Tampere del 1999, poiché da inizio alla creazione di un regime europeo comune in materia di asilo.

Il Sistema Europeo di Asilo Comune, avviato dal Consiglio di Tampere, era articolato in due fasi: una prima fase dal 2000 al 2005, dedicata all'adozione di norme minime su responsabilità delle domande d'asilo, qualifica di rifugiato, condizioni di accoglienza e procedure d'asilo, mentre la seconda aveva l'obiettivo di armonizzare gli standard della legislazione della prima fase.

La prima fase si concretizza nell'adozione di legislazione secondaria su questi temi. La Direttiva relativa alla qualifica di rifugiato stabilisce le condizioni per la concessione della protezione internazionale. La Direttiva Procedure, invece, disciplina l'intera procedura di una domanda di asilo. La Direttiva relativa alle condizioni d'accoglienza invece riguarda l'accesso alle condizioni di accoglienza dei richiedenti asilo. Infine, il Regolamento Dublino determina lo Stato Responsabile di occuparsi di una domanda d'asilo; viene così integrata la Convenzione di Dublino, alterandone leggermente la forma per renderla più appropriata ad essere uno strumento di diritto europeo, ma mantenendone i principi fondamentali. Inoltre, il Regolamento Dublino verrà integrato dal Regolamento Eurodac.

Nonostante questo rappresenti un progresso per il diritto d'asilo nell'UE, l'obbligo di unanimità nei primi cinque anni dopo il Trattato di Amsterdam, ed in generale la paura degli Stati Membri di incorrere in responsabilità troppo elevate hanno contribuito ad una forte 'corsa al ribasso', negli standard minimi. Inoltre, si noti come tutti gli strumenti tranne quelli componenti il Sistema Dublino siano direttive, strumenti che per natura lasciano considerevole spazio di manovra agli Stati Membri.

Questi sviluppi vengono integrati inoltre dal Trattato di Lisbona, entrato in vigore il primo dicembre del 2009, che elimina definitivamente la struttura a pilastri ed introduce gli Articoli da 78 a 80 sulle misure relative all'asilo. Il Trattato conferisce maggiori competenze all'Unione, tramite l'assegnazione della procedura legislativa ordinaria alle misure relative all'asilo, che non saranno più

norme minime ma si riferiranno alla 'creazione di un sistema comune che comporti status e procedure uniformi'.

Il Trattato di Lisbona conclude il faticoso percorso di integrazione nei trattati, inizialmente noto come 'communitarizzazione'.

Valutazione dello stato attuale del diritto d'asilo e prospettive per il futuro

Durante la seconda fase del Sistema Europeo di Asilo Comune, tutti gli strumenti della prima fase vengono rifusi; in particolare, il Regolamento Dublino subirà diverse modifiche, mantenendone comunque, nonostante le negoziazioni, i principi intatti. Nonostante la fase di armonizzazione, a causa della grande discrezione degli Stati Membri nell'implementazione delle direttive si erano creati tanti regimi d'asilo quanti gli Stati Membri dell'UE.

L'evento chiave del nostro discorso sul diritto d'asilo nell'Unione Europea è senza dubbio la crisi dei rifugiati del 2015. Più di un milione di migranti, rifugiati o meglio richiedenti asilo arrivarono alle 'porte' dell'Europa, in fuga da aree di forte emergenza umanitaria, in particolare causata dalle guerre in Siria e in Libia. Sotto la pressione dell'arrivo di centinaia di migliaia di migranti sulle coste italiane e greche, l'UE è stata incapace di rispondere efficacemente.

Le ragioni del fallimento del CEAS e del Regolamento Dublino in particolare sono molteplici ed elencate in dettaglio all'interno della tesi.

Le critiche principali al Sistema sono come detto in precedenza le conseguenze della 'corsa al ribasso' e il 'deficit di solidarietà' dato dalla totale assenza di obblighi giudiziari alla solidarietà.

Per quanto riguarda Dublino, i due temi fondamentali sono che il Regolamento non operi in maniera giusta, principalmente perché risulta in una pressione eccessiva per gli Stati in 'prima linea', rendendo il sistema inoperabile. Inoltre, il Sistema Dublino non considera in nessuna parte della procedura le preferenze, o i legami effettivi (come comunità di compatrioti, legami linguistici o coloniali) ad uno Stato Membro piuttosto che ad un altro del richiedente asilo.

La risposta dell'Unione Europea alla crisi dei rifugiati è stata pronta, ma non ha sortito l'effetto augurato. In particolare, il meccanismo di *relocation,* ovvero il trasferimento di richiedenti asilo da un paese sotto una pressione elevata ad uno che potrà meglio occuparsi della domanda d'asilo, aveva l'obiettivo di trasferire 160.000 richiedenti asilo nei 24 mesi successivi. Nel 2017, ovvero alla fine dei 24 mesi, solo 21.000 richiedenti asilo erano stati trasferiti con successo. Le ragioni del fallimento di questo meccanismo sono da ricercare nell'eterno rifiuto dell'autorità dell'UE da parte degli Stati Membri.

Mentre venivano messe in atto le misure d'emergenza in risposta alla crisi, si dava inizio anche alle discussioni sulla riforma del Sistema Europeo d'Asilo Comune. Vi erano due principali opzioni per la riforma del Regolamento Dublino: integrare il sistema corrente con un meccanismo correttivo o creare un nuovo sistema basato su dei criteri di distribuzione. Le proposte di superamento del

Regolamento Dublino avanzate dal Parlamento vennero ignorate, risultando nella presentazione di una proposta per Dublino IV nel 2016 che seguiva la prima opzione di riforma. Il meccanismo correttivo avrebbe la funzione di alleviare la pressione sugli Stati Membri più colpiti dagli arrivi, automatizzando il meccanismo di *relocation,* e obbligando gli Stati Membri contrari al trasferimento dei richiedenti asilo nella loro nazione a pagare un 'contributo di solidarietà' di 250.000 euro. È evidente che i principali problemi di Dublino non vengono risolti da questa proposta.

I modelli alternativi a Dublino che potrebbero essere implementati per rendere il sistema di determinazione della responsabilità più equo sono tre: il modello di 'libera scelta', il modello 'Dublino minus' ed il modello di 'scelta limitata'.

Il modello di 'libera scelta' lascia, appunto, libera scelta al richiedente asilo rispetto allo Stato Membro in cui fare domanda, integrato da una maggiore armonizzazione dei regimi d'asilo per 'livellare' l'offerta dei diversi paesi.

Il modello 'Dublino minus', invece, semplificherebbe essenzialmente il Regolamento Dublino, riducendo costi e tempi e parzialmente eliminando alcuni dei problemi.

Il modello finale della 'scelta limitata', invece, è una sintesi dei primi due, ovvero andrebbe a creare un equilibrio tra le preferenze dei richiedenti asilo e la disponibilità degli Stati Membri. Il richiedente potrebbe scegliere solo tra una serie di paesi che non raggiungono la loro quota di rifugiati.

Ad oggi, il diritto d'asilo si trova ad affrontare le stesse sfide del 2015, seppure la crisi sia passata ed il numero di sbarchi sia considerevolmente diminuito. La riforma del CEAS è ancora in corso, date le grandi difficoltà incontrate nelle negoziazioni.

Tuttavia, l'Unione ha dei nuovi strumenti per gestire i flussi migratori, come ad esempio le *partnership* con i paesi di origine e transito ed operazioni per salvare le vite in mare. L'esternalizzazione della politica d'asilo tramite la cooperazione e gli aiuti allo sviluppo trasmette un'idea di maggiore sicurezza e controllo; tuttavia, è potenzialmente inutile in mancanza di una politica d'asilo forte, comune, ed Europea.

Conclusione

Questa tesi vuole ripercorrere gli sviluppi più importanti del diritto d'asilo dell'Unione Europea, con l'obiettivo di sottolineare l'eterna riluttanza degli Stati Membri a cooperare e concedere delle competenze all'Unione Europea nella costruzione di una politica d'asilo comune. Concentrandosi sulla crisi dei rifugiati del 2015, vuole sottolineare i principali difetti del Sistema Europeo Comune di Asilo e del diritto d'asilo europeo in generale.

È importante notare come le problematiche relative alla politica d'asilo nella UE emergano già nello stato 'embrionale' della cooperazione su questi temi. In questo senso ci riferiamo non solo alla riluttanza degli Stati Membri a rinunciare alla loro sovranità, ma anche alla Convenzione di Dublino,

che, nonostante le varie occasioni di modifica mantiene lo sbilanciato criterio del paese di primo approdo.

Inoltre, si osservi come anche i maggiori sviluppi siano sempre limitati in qualche maniera dalla riluttanza degli Stati Membri. La Convenzione di Dublino e gli Accordi di Schengen avevano delle 'clausole di sovranità', mentre il Trattato di Amsterdam prevedeva il meccanismo '*opt out'*. Gli stessi strumenti di legge che compongono il Sistema Europeo Comune di Asilo sono profondamente influenzati dalla 'corsa al ribasso' degli Stati Membri per raggiungere un accordo sulle norme minime.

La crisi dei rifugiati getta finalmente una luce su queste problematiche, mostrando l'inefficienza dei meccanismi relativi all'asilo. Di fronte all'incapacità degli Stati Membri e dell'Unione a gestire correttamente l'emergenza rifugiati, è fondamentale guardare al passato. I difetti del Sistema Dublino erano evidenti ancor prima della crisi, come dimostrano i vari Green Paper e Implementation Appraisals delle istituzioni europee che componevano le preparazioni alla rifusione del Regolamento Dublino. Nonostante ciò, è servita la crisi perché si acquisisse una maggiore consapevolezza. Il diritto d'asilo, però, non può essere né un campo del diritto nel quale si apprende dagli errori, né uno nel quale si attende una situazione di emergenza per aggiornarsi. In casi in cui è in gioco la protezione di persone vulnerabili, l'Unione deve imperativamente fornire un sistema che sia efficiente e giusto. Inoltre, tali cambiamenti sarebbero stati più semplici da implementare in una fase precedente, in quanto i partiti populisti di estrema destra che hanno vinto elezioni grazie a campagne elettorali fondate su retoriche anti-immigrazione sono arrivati fino al Parlamento Europeo, apportando ulteriori difficoltà alle negoziazioni.

Allo stesso tempo gli Stati Membri sono colpevoli di aver messo in dubbio l'autorità dell'Unione Europea, rinforzando quindi la propria, durante una tale crisi. Il fallimento dei meccanismi di *relocation* è un chiaro esempio di questo comportamento. Nonostante il discorso sull'asilo si fondi su sistemi 'comuni', 'europei' ed 'uniformi', l'altro numero di arrivi di richiedenti asilo è stato percepito come un problema individuale dei paesi, in particolare quelli penalizzati dal Sistema Dublino come l'Italia e la Grecia.

Ad oggi, sono ancora in corso le negoziazioni per il Regolamento Dublino IV; la proposta è stata presentata nel 2016, e non presenta cambiamenti sostanziali, con l'eccezione dell'aggiunta di un meccanismo correttivo per alleviare la pressione sugli stati con maggiore influsso. Come dimostrato dagli eventi, il superamento di Dublino è fondamentale. Il meccanismo che determina lo Stato Membro responsabile di una domanda d'asilo deve essere giusto, sia nei confronti del richiedente che dello Stato Membro; deve considerare le preferenze del richiedente, come anche i legami effettivi (*genuine links*); deve riflettere le effettive capacità d'accoglienza di diversi Stati Membri e deve essere costruito in maniera da incentivare gli Stati Membri alla cooperazione.

In conclusione, la creazione di un Sistema Europeo Comune di Asilo che sia più praticabile e giusto è strettamente legata alla volontà degli Stati Membri ad abbandonare il comportamento 'difensivo'

che li ha caratterizzati nelle dinamiche del diritto d'asilo, e l'Unione deve applicare le leggi e gli strumenti vincolanti in favore di una cooperazione che comprenda gli aspetti politici, amministrativi ed umanitari dell'asilo.