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**THE DUBLIN SYSTEM:**

**HISTORICAL EVOLUTION, CHALLENGES AND  
FUTURE OUTCOMES**

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***Appendix: TABLE OF ABBREVIATIONS***

**CEAS:** Common European Asylum System

**CJEU:** Court of Justice of the European Union

**EU:** European Union

**ECHR and ECtHR:** European Convention on Human Rights and European Court of Human Rights

**ECJ:** European court of Justice, it is one of the three courts of the CJEU which are the ECJ indeed, the General Court and the European Civil Service Tribunal

**EP:** European Parliament

**GDP:** Gross Domestic Product, the total value of goods and services produced by a country in one year.

**JHA:** Justice and Home Affairs Council

**MS:** Member State(s)

**NGO** Non-Governmental Organization

**TEU:** Treaty on the European Union

**TFEU:** Treaty on the Functioning of the European Union

**UNCHR:** United Nations High Commissioner for Refugees

***ABSTRACT:***

The aim of this thesis is that of analyzing the issue of asylum within the European Union.

The content of this dissertation will be reached through a historical approach typifying the historical background of the issue of asylum, the current state of affairs and the potential evolution of the related legislation. I intend to construct this dissertation by deepening on the Dublin system per se. Ultimately, the afore said matters will be investigated upon by relying on the interpretation offered by notable EU Law academic scholars.

## ***INTRODUCTION:***

In recent years, the European Union has faced one of the most threatening challenges since its foundation. Indeed, the financial and economic crisis of 2008 has drastically impacted on all spheres of society, causing an increasing level of unemployment and a decrease in the standards of living.

In many European countries, the aforesaid phenomenon has led to a rise in xenophobia and violence against the migrants who started to be considered as the cause, or at least the scape goat, for several problems occurring in these countries.

As Florian Trauner reports, the Secretary General of the Council of Europe, Thorbjørn Jagland, considered that human rights, democracy and the rule of law in Europe now face an unprecedented crisis since the end of the Cold War.<sup>1</sup> Migrants could face the risk of ‘unjustified, excessive or inadequate detention’ and, if not detained, a ‘lack of basic protection’ (such as minimum health care)<sup>2</sup>

However, the crisis of 2008 has solely worsened the situation. Indeed, migrants and asylum seekers had already been perceived as “burdens” and as people “profiting” of European countries’ resources for a long time prior to this event. The budgetary restrictions stemming from the austerity measures imposed after the crisis have, however, increased the sense of distrust towards the migrants, the latter being subjected to multiple accusations of not being in real need, but rather objectified as individuals coming to Europe just to be richer while profiting of the assistance and financial support provided by the EU’s governments, reducing the resources to support national citizens who were, according to the latter, actually in need.

On 2014 the UNCHR published a report according to which the asylum system had been seriously damaged and undermined in some parts of Europe, therefore the refugees had to fight in order to receive the protection they were entitled to obtain.

As Trauner reports quoting the UNCHR:

*“Difficulties in accessing territories and asylum procedures, violations of the principle of non-refoulement, low recognition rates and the destitution of those who have been recognized as refugees continue to encourage onward movements”<sup>3</sup>*

<sup>1</sup> Council of Europe 2014, 5.

<sup>2</sup> F. Trauner, 2016 quoting Council of Europe 2014, 18.

<sup>3</sup> F. Trauner, 2016 quoting UNHCR, 2014.

In this scenario of political tension the massive migratory flows of the last few years have exacerbated the aversion towards the migrants, but also between the Member States on the borders and the European Union, the latter has indeed been accused by many citizens and politicians of having abandoned these countries, such as Italy and Greece. In light of the aforesaid considerations, the acceptance of the EU rules started to be perceived as placing an excessive burden on southern Member States and the ignorance of these same EU rules as overburdening the Northern Member States. 4

These accusations and the so-called migratory crisis have ultimately led to the Dublin system being called into question.

The aim of this thesis is therefore to analyze the evolution of the Dublin system throughout time. Additionally, I will attempt to identify the underlying reasons of the crisis plaguing the aforementioned system as well as envisaging which changes may be introduced if a possible Dublin IV Regulation were to be promulgated, trying to determine whether this proposal could actually resolve the inefficiencies arising from the Dublin III Regulation.

More specifically, in the first chapter I will try to assess the various treaties and agreements that have regulated asylum in Europe since the Geneva Convention until before the Lisbon Treaty. In other words, I will try to provide an historical framework concerning the first phase of the CEAS, including the first two Dublin Regulations, analyzing the purpose of these Regulations and their characteristics. For instance, I will delve into the matter relative to the establishment of the aforementioned Regulations, the latter attempting to assess which Member State should be held responsible for an asylum application.

The primary intent of this first chapter is to understand which are the legal basis upon which the current regulation has been constructed.

Successively, in chapter 2, I wish to analyze the Treaty of Lisbon which established the legal basis for a “common policy” and for a “uniform status” on asylum and subsidiary protection in the EU. In particular, I will focus on Article 78 and Article 80 of the aforesaid Treaty, precisely because of the relevance of these articles in the field of asylum.

Indeed, the concepts of mutual respect and duty of cooperation presented by Article 80 are paramount for the purpose of creating an asylum system that emerges as fair and efficient.

<sup>4</sup> F. Trauner, 2016.

Furthermore, in the same chapter, I will attempt to define the main characteristics relative to the current Dublin III Regulation, including its failures as well as the anti-European feelings generated by these same deficiencies. In the third chapter I will ultimately present the totality of features relative to the Dublin IV proposal, the latter being submitted in tandem with the innovations regarding the Dublin III Regulation.

Moreover, a critical appraisal offered by various academics will be offered.

Lastly, my discussion will shift towards potential future scenarios which have been foreseen on this matter. Indeed, the future of the Dublin system is still uncertain, although several alternative proposals have been made.

Ultimately, both in Chapter II and III, I will briefly present the position of some far-right European parties and in particular that of Italy with regard to the asylum system.

## ***CHAPTER I: HISTORICAL FRAMEWORK OF THE EUROPEAN ASYLUM SYSTEM***

In this chapter I will try to provide an historical framework of the European Asylum System by following a chronological analysis of the various legislations which have been adopted over time. The aim is to frame the issue of asylum in a more comprehensive way, not only related to the inflows of immigrants that the EU has experienced in the last few years.

### **1.1 The Geneva Convention 1951**

The Geneva Convention is particularly notable because it has given a definition of the term “refugee”, this has been of utmost significance for the development of asylum policies throughout Europe placing on the States the responsibility and legal obligation to protect the above mentioned “refugees”.

The main principle brought about by this Convention is the principle of “non-refoulement”, that is to say that a refugee should not be sent back to the country of origin if, in that country, he or she may be subject to life threats or limitations of personal freedom. This rule has become a customary international law and the UNCHR has been founded in order to safeguard the Convention and the 1967 Protocol. <sup>5</sup>

The Geneva Convention along with the 1967 Protocol is crucial with regard to international refugee law and for the EU asylum acquis. The EU has not acceded to the Geneva Convention as a whole (because the Geneva Convention does not permit this accession), however the Member States did. Hence, the EU is only bound, according to the ECJ case law, by the provisions of the Geneva Convention corresponding to obligations provided for under customary international law.

Moreover, with the aim of avoiding mismatches between the obligations to which the Member States are bound by supranational Union law, and those to which they are bound by public international law, the EU has committed itself (according to Article 78(1) of the TFEU) to respect the provisions which, in this sense, have to be considered as a matter of Union law when establishing the CEAS.

The Geneva Convention does not contain rules on procedures, but grace to its application, some “general principles on a fair asylum procedure” have been developed. Indeed, state parties should

<sup>5</sup> U. R. UNCHR, Refugees s.d.



institute “fair and effective” procedures in order to establish who is entitled to the guarantees of the Geneva Convention. They should do so in compliance with the principle of good faith.

The UNCHR Handbook on procedures and Criteria for Determining Refugee Status of 1979 and several Executive Committee Recommendations on the determination of refugee status are particularly relevant in this sense. <sup>6</sup>

## **2.1 The situation until the 80’s, the Schengen agreement 1985 and the SEA 1986**

Within the context of the European Union the “asylum” issue was not so relevant until the 1980’s. Indeed, from the mid 1980’s the applications for asylum intensified and eventually exploded in the 1990’s.

This increase was probably a result of the broader political situation. The war in Yugoslavia led thousands of people to seek asylum elsewhere in Europe, also given the fact that the collapse of the USSR and the consequent removal of the iron curtain as a barrier to their mobility, facilitated the flows.

At the beginning of this migratory phenomenon the policies adopted by Europe were principally intergovernmental, in other words the European States as sovereign states agreed to those policies without passing through the supranational institutions of the EU namely, the European Parliament, the Commission, the Council and the Court of Justice.<sup>7</sup>

The Schengen agreement was originally an intergovernmental agreement of particular significance because it provided for the abolition of border controls within the territory of the EU. It was originally signed by 5 members which subsequently increased.

This abolition was accompanied by several other measures among which the enforcement of controls within the borders and the raise of policy standards within the Schengen Member States. The Schengen Information System (SIS), which then became the European Information System (EIS), was established in order to create a database in which the authorities of the various countries could add information concerning individuals who had to be investigated.<sup>7</sup>

The Convention also included measures for short term visas (less than 90 days) which had to be uniform throughout the EU in order to allow the free movement of people. With regard to long-term visas, thus superior to 90 days, they remained within the competence of MS.

<sup>6</sup> Hailbronner and Thym, 2016

<sup>7</sup> Hansen, 2000

The increased freedom of movement achieved within the EU territories after the 1980's for EU and non-EU citizens had also some negative consequences such as the possibility for free movement of unauthorized migrants, criminals and potential terrorists. This of course deeply affected the European immigration policy and the necessity for some policy changes in other EU areas emerged, therefore the need for a higher level of harmonization became of utmost importance.<sup>8</sup>

The Single European Act was aimed at abolishing the frontiers within the European territory. This Act along with the above-mentioned Schengen agreement 1985, led to an intensification of the relations between the Member States and eventually to a necessity for harmonization of asylum and migration policies.

Indeed, it was generally agreed that protection had to be given even to people who did not necessarily met the status of refuge as defined by the Geneva Convention in 1951.

However, several differences among the Member States existed with regard to who could qualify for temporary protection. For instance, some Member States admitted people coming from former Yugoslavia whereas others accepted people only from certain areas or only specific types of refugees. Moreover, even the rights which were granted were not the same everywhere in the EC

These forms of imbalance led the Member States to recognize the necessity for some sort of cooperation and that harmonization was the mean through which this was possible to achieve.<sup>9</sup>

Therefore, the issue of asylum was addressed for the first time by an ad hoc group which was created on the same year (1986) with the aim of developing policies on immigration and asylum.

The group stemmed from an earlier intergovernmental organization, the so called Trevi Group, which was set up in the 1970's in order to combat terrorism.<sup>10</sup>

### **3.1 The Dublin Convention**

The rules regulating responsibility for asylum seekers were firstly agreed in 1990 in the form of an intergovernmental treaty signed by the 12 Member States of the European Economic Community. This international treaty was known as the Dublin Convention and it entered into force on 1 September 1997. Subsequently, it was replaced in 2003 by Regulation 343/2003, known as Dublin II regulation. The latter is also linked with the posterior EU legislation establishing the EURODAC,

<sup>8</sup> Gelatt, 2005

<sup>9</sup> Kerber, 1999

<sup>10</sup> Hansen, 2000

which is a system introduced by a regulation in 2000, with the aim of comparing the fingerprints of the asylum seekers. <sup>11</sup>

Indeed, the EURODAC introduces a database of fingerprints of asylum seekers who have entered a country of the Schengen Area. This archive of fingerprints is particularly relevant with regard to the Dublin Regulation area as, grace to it, it has become possible for the authorities to determine whether an individual has already made an application or travelled through another European country. <sup>12</sup>

The Dublin rules have a wider geographical scope than other EU asylum law measures. Indeed, this system concerns not only all the Member states, comprising UK, Ireland and Denmark (on the basis of a treaty of the latter with the EU), but it also includes non-EU countries which are however part of the Schengen system, that is to say Norway, Iceland, Switzerland and Liechtenstein.<sup>13</sup>

The Dublin Convention was aimed at preventing “forum shopping”, i.e. to avoid the phenomenon in which asylum seekers leave for countries where the reception conditions and recognition quota are good.

Moreover, the Convention was also aimed at counterbalancing the phenomenon of “refugees in orbit” where applicants referred successively from one Member State to another and any of these States acknowledges itself to be the competent State for the examination of the application. However, the Dublin Convention did not function as expected. In fact, 95% of all asylum applications were processed outside the Dublin system (1998-1999 period). <sup>14</sup>

The main purpose of the Dublin system was to facilitate the processing of applications and determining which state should be held responsible for the analysis of the applications in question. In order to do so, the Dublin Convention drew a list of conflict rules:

- “(a) the Member State where the applicant has a specified family member (spouse, parent or child) who already has been recognized as a Geneva Convention refugee;*
- (b) the Member State which has issued the applicant a residence permit;*
- (c) the Member State which has issued the applicant a visa, with certain specified exceptions;*

<sup>11</sup> S. Peers 2014, S. Peers, 2012

<sup>12</sup> Jan-Paul Brekke, 2015

<sup>13</sup> Peers S. , 2014 and Peers S., 2012

<sup>14</sup> Hailbronner and Thym, 2016

*(d) the Member State which the applicant first entered without authorization, unless the applicant has been living in the Member State where he/she has applied for over six months;*

*(e) the Member State responsible for controlling entry of the applicant, unless the applicant is a non-visa national who does not require a visa to enter either the Member State of first entry or the Member State in which he or she subsequently applies;*

*(f) the Member State in which an application is made in an airport transit zone; or*

*(g) as a default, the Member State in which the application is made.”<sup>15</sup>*

Many critics have been expressed about this Convention. Indeed, it was claimed that the Convention was separating family members and that it was not recognizing the differences in interpretation at the national level.<sup>16</sup>

#### **4.1 The Treaty of Maastricht**

The Treaty of Maastricht which entered into force on November 1, 1993, created the legal basis to booster cooperation between MS in the area of temporary protection.

The Maastricht Treaty is particularly significant with regard to asylum policies as, according to Article K (1) and (3), these policies are considered as a matter of common interest.

Indeed, in this Article it is provided for the responsibility of Member States to inform and consult within the Council of the EU in order to create some sort of coordination among themselves. Moreover, the Council is entitled to act on behalf of a Member State or the Commission by adopting positions and pursuing coordination with the aim of achieving the objectives of the Union. It can also adopt joint action if an action taken by the Council is deemed more effective for achieving the above-mentioned objectives of the Union rather than an action taken by Member states acting individually.

Finally, the Council can also draw up conventions which will be recommended to the Member States. However, it should be noticed that these measures can only be taken if there is unanimous agreement within the Council, this of course can slow down the process of agreement on matters of

<sup>15</sup> Official Journal

<sup>16</sup> S. Peers, 2016

<sup>17</sup> Kerber, 1999

asylum policies, but at the same time this condition of unanimous vote is what allowed the inclusion of these policies into the TEU although being a matter of intergovernmental cooperation (so, governed by public international law rather than by the sui generis rules of the EC law).

Nevertheless, under the same article, the right of co-decision has not been granted to the European Parliament, but it would simply be informed and consulted. Article K also stated that the ECJ had no jurisdiction to interpret these matters unless provided otherwise under Article K (3).<sup>17</sup>

Furthermore, this Treaty introduced the tripartite pillar structure which became fundamental for the governing of the EU. The first pillar concerned matters which were to be dealt with by the supranational institutions (Commission, Council, Court of Justice and Parliament) of the EU. The second pillar instead, involves matters of foreign affairs which represent a common interest of the Union. Finally, the third Pillar, which was purely intergovernmental, dealt with Justice and Home Affairs (JHA). The Member States used to address asylum and migration through the Third Pillar. <sup>18</sup>

With regard to the achievements under the TEU, as explained by Kerber quoting the Council Decision of 4 March 1996 on an Alert and Emergency Procedure for Burden-Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis: *“On September 25, 1995, the Council adopted a resolution on burden-sharing concerning the admission and residence of displaced persons on a temporary basis, this was supplemented by a Council decision taken March 4, 1995 on an emergency procedure for burden sharing in situations of max influx.”* <sup>19</sup>

Two years later, on March 5, 1997 the Commission submitted to the Council a proposal for a joint action which had to be taken in accordance to Article K 3(2)(b) regarding temporary protection. This proposal suggested the procedural rules for the actions to be taken in cases of migrations from territories where war or any other kind of life threatening perils were present. This proposal was aimed at harmonizing the benefits granted under temporary protection policies to the migrants and at improving the system as a whole. These joint actions are not however binding on the Member States which, differently from what happens with regards to EC regulations or directives, could simply fail to implement them. <sup>19</sup>

Due to some other critiques emerged within the European Parliament and the Member States, the Commission submitted an amended proposal on June 24 of 1998. In this amended version, it was provided that the temporary protection should not last more than 5 years. Moreover, family reunification was envisaged, in particular with regard to women and unaccompanied minors.

<sup>18</sup> Hansen, 2000

Finally, the relation between temporary protection and asylum procedures was drastically changed as well. Under this version of the proposal, the asylum determination procedure could be suspended during the time in which temporary protection is given, but this postponement may only last 3 years from the grant of temporary protection by the Council to the individual in question or at most the delay may be increased up to 2 years. In a supplementary proposal, financial actions were also envisaged. However, despite these measures were deemed to be concrete and realistic the Council did not adopt the proposal of the Commission. <sup>19</sup>

## 5.1 The Treaty of Amsterdam

The Treaty of Amsterdam transferred the “Schengen Acquis” from the Third Pillar mentioned above which, as we may recall was purely intergovernmental, to the First Pillar which was instead supranational. It did so by transferring the Acquis without imposing particularly relevant changes to the First Pillar under Title IV of the Treaty of Amsterdam. In this way, the supranational institutions of the EC have acquired many powers which they would not have under the third Pillar. For instance, the Commission will have the right to submit proposals with regard to the immigration from third countries, the European Parliament will have the right to be consulted and the ECJ will be entitled to give preliminary rulings. However, as noted by Kay Hailbronner, the deadline for this form of communitarization was for five years after the Amsterdam Treaty, but until that moment the power of initiative would not be exclusive of the Commission but rather shared with the Member States and even the ECJ would have limited jurisdiction, for instance it could not emanate where a domestic judicial remedy already existed.<sup>20</sup>

The Title IV of the Treaty of Amsterdam “Visas, Asylum, immigration and other policies related to free movement of persons” brought matters that had always been related to intergovernmental cooperation into the competences for the EC. <sup>21</sup>

The Community was given the power to adopt measures with regard to asylum and international protection by Article 63(1) and 63(2) of the Treaty of Amsterdam <sup>22</sup>

<sup>19</sup> Kerber, 1999

<sup>20</sup> Hansen, 2000

<sup>21</sup> Kerber, 1999

<sup>22</sup> Article 63 The Council, acting in accordance with the procedure referred to in Article 67, 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,

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: <sup>23</sup>

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;* <sup>23</sup>

Due to the fact that the legal framework for temporary protection under TEU was deemed to be obsolete, on December 3, 1998 the Council and the Commission adopted an Action Plan concerning possible implementation of the provisions envisaged under the Treaty of Amsterdam in the areas of freedom security and justice. The measures were divided into three subcategories according to their

- (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 person

<sup>23</sup> S. Peers, 2016

deadline, namely those measures which had to be taken within 2 years (for instance, a EU policy on readmission and return) and those to be taken as quickly as possible (such as minimum standards to establish temporary protection as well as an equal burden-sharing among the Member States in the handling of the arrival of migrants) and those to be taken within a period of 5 years (that is to say, minimum standards for subsidiary protection).<sup>24</sup>

## **6.1 Dublin II regulation and other subsequent international treaties**

The Dublin Convention was replaced by a subsequent regulation, the Regulation 343/2003, that is commonly known as the Dublin II Regulation. This regulation was implemented by a Commission Regulation and essentially amended the hierarchy of criteria for responsibility and accelerated the process of transfer of asylum seekers between MS.

The Dublin II Regulation formed part of the first phase of the Common European Asylum System (CEAS) and was subject to several judgements of the CJEU. It was enforced by a Regulation which was adopted by the Commission.

Between 1999 and 2005, the EU adopted a series of laws aimed at defining minimum standards in areas such as the reception and qualification of asylum seekers in order to reduce differences between Member States' asylum systems.<sup>25</sup>

Moreover, the crisis of 2008 coincided with the recast of the EU asylum legislation, indeed the great majority of legislative texts developed before 2005 have been subject to a recast exercise in order to develop fully harmonized asylum standards and procedures, surpassing the common minimum standards of the first generation.<sup>25</sup>

As we are told by Flaurian Trauner:

*“Prior to 2005, the Council and the European Parliament (EP) developed a different approach to asylum. The EP tended to propose liberal, refugee-friendly measures and acted as an advocate for more harmonization.<sup>26</sup> The Council insisted on not expanding the rights and benefits for asylum seekers and to maintain flexibility for member states. Since the EP had no more than the right to be consulted, the Council*

<sup>24</sup> Kerber, 1999

<sup>25</sup> F. Trauner 2019

<sup>26</sup> Hix and Noury 2007, 202. quoted by F. Trauner 2019



*translated most of its positions into EU law<sup>27</sup>. The second generation of asylum laws were negotiated under co-decision, implying an empowerment of the EP, compared to the previous negotiations. The Parliament, in alliance with the Commission, was keen to develop more harmonized and liberal rules, yet the Council refrained from being put under pressure. The member states had just implemented the first generation of asylum laws and perceived less urgency to agree on second-generation asylum laws. The Council insisted on compromises that were close to its position – even at the risk of failed negotiations”.* <sup>28</sup>

The CJEU has given several rulings over time with regard to the Regulation. In its ruling, the CJEU stated that:

*“Mutual trust between Member States as regards the compliance of their asylum systems with human rights standards was justifiable in principle” ... “[however, it is] not inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights’* <sup>29</sup>

As it is clarified, not any infringement of a fundamental right could lead to the suspension of the Dublin rules. With the purpose of determining if there is a breach of a fundamental right which can cause the suspension of the Dublin System, The CJEU referred to the MSS judgement of the ECtHR which stated that:

*“The regular and unanimous reports of international non-governmental organizations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the UNHCR to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting the Dublin II Regulation.”*<sup>29</sup>

The first criterion for responsibility of MS comprised within the Dublin II Regulation is a criterion which concerns unaccompanied minors and assess that the MS that should be held responsible for the unaccompanied minor is the one in which resides a family member of the latter who can take care of him or her. The criterion concerning family reunification remained in the same form as in

<sup>27</sup> Ripoll Servent and Trauner 2014, 1146–1148

<sup>28</sup>Lopatin 2013; Ripoll Servent and Trauner 2014

<sup>29</sup> S. Peers, 2016

the Dublin Convention, whereas the third Criterion stated that a MS was responsible for the family members of an asylum-seeker if the latter was waiting for a decision on its application in that MS. The EURODAC Regulation was enforced in order to enforce the fifth criterion (third in the Convention).<sup>29</sup>

## 7.1 The ECHR and the ECtHR

The European Convention on Human Rights comprises 3 provisions which are particularly relevant for immigration and asylum policy. The European Court of Human Rights (ECtHR) transformed the ECHR into a tool of refugee protection, although the states which were part of the Convention originally decided otherwise by not inserting a right to asylum within the ECHR.

Nevertheless, at the beginning of the 1990's the ECtHR used Article 3 of the convention in order to increase the level of protection for the refugees by extending it beyond the reach of the aforementioned Geneva Convention. Differently from the Geneva Convention the ECHR established a mandatory judicial system providing for authoritative interpretation.

The EU has not acceded to the European Convention, however human rights are protected in Europe due to a parallel interpretation of the Charter even if there is conflict between the ECJ and ECtHR and the former prevails over the latter with regard to EU law.<sup>30</sup>

The ECtHR has developed extensive criteria for limiting the discretion of the states with regard to the extradition or expulsion whenever there is a risk of torture or life threats abroad, thus it wants to preserve the principle of non-refoulement. Furthermore, Article 3 “*construes the provision as an absolute guarantee from which no derogation is possible and which can therefore cover also those who are excluded from refugee status under the exclusion provisions in the Geneva Convention*”.

It should be noticed that even situations of living conditions in extreme poverty or the lack of medical care abroad (if the applicant effectively faces death upon return because of this lack of health care) are considered to be violating Article 3 by the ECtHR. Moreover, the violation of Human Rights in countries of origin can also prevent deportation or extradition. Indeed, in this case the national courts can interpret the Geneva Convention on their own without the necessity of a preliminary reference to the ECJ. Furthermore, the national courts and the ECJ should interpret the Geneva Convention with the established principles of public international law.<sup>30</sup>

<sup>30</sup> Hailbronner and Thym, 2016

## ***CHAPTER II: THE TREATY OF LISBON, THE DUBLIN III REGULATION AND ITS FAILURES***

In this chapter I will analyze the Lisbon Treaty with regard to asylum, focusing on Article 78 and Article 80. These two articles provide fundamental guidance with regard to asylum matters and the current doctrine on asylum is based on them and on the principle of solidarity that they promote. Afterwards, I will discuss about the Charter of fundamental rights and the CEAS.

The Dublin Regulation, and the Dublin II Regulation are indeed part of the first phase of the CEAS, whereas the Dublin III Regulation is in the second phase of the CEAS. Consequently, I will address the Dublin III Regulation, the main differences with the first two regulations and, even more importantly, the critics and failures both from a legal and political point of view. This point, is particularly relevant because it explains why a recast of the Regulation may be necessary.

### **1.1 The Treaty of Lisbon**

The Treaty of Lisbon established the legal basis for a “common policy” on asylum and for a “uniform status” on asylum and subsidiary protection in the EU. This treaty is also relevant with regard to the protection of fundamental rights because, grace to it, the Charter of Fundamental Rights of the European Union has become a legally binding document.<sup>31</sup>

With the advent of the Treaty of Lisbon the issue of asylum is addressed in Article 78 of the TFEU, as follows: (Article 78 TFEU ex Article 63 (1)(2) and 64(2) TEC)<sup>32</sup>.

Treaty Guidance under Article 78 TFEU:

*(1) The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be 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.*

<sup>31</sup> Smyth, 2014

<sup>32</sup> S. Peers, 2016

*(2) For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:*

- a. a uniform status of asylum for nationals of third countries, valid throughout the Union;*
- b. a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;*
- c. a common system of temporary protection for displaced persons in the event of a massive inflow;*
- d. common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;*
- e. criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;*
- f. standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;*
- g. partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection;*

*(3) In the event of one or more Member States being confronted by an emergency situation characterized 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 States) concerned. It shall act after consulting the European Parliament. <sup>33</sup>*

### **1.1.1 ARTICLE 78(1)**

Although the EU is not a party to the Geneva Convention (despite of the Member States) and thus, the EU is not bound by the Convention, the EU asylum acquis has the duty to comply with the Geneva Convention and the 1967 Protocol according to Article 78(1), non-compliance with the Geneva Convention would constitute an infringement of the Article.

This subordination of the Common European Asylum System to the Geneva Convention that is set out under Article 78(1) TFEU does not change the legal basis of the Geneva Convention itself which, being part of EU law, is subject to the interpretative principles of public international law.

This same article clarifies that the respect for the Geneva Convention applies to “*all instruments building the EU asylum acquis, including rules on subsidiary and temporary protection*”.<sup>34</sup>

Furthermore, Article 78(1) states that the CEAS is embedded into international refugee law. The above-mentioned CEAS must be in compliance with other relevant treaties as well.

This obligation concerns the conventions which have been ratified by all Member States.

According to Article 78 the Court of Justice has been given “normal” jurisdiction; therefore, it has been registered an increment of cases concerning asylum which have reached the Court.

Moreover, according to the same Article paragraph 1 the EU should act in this area ‘with a view to offering appropriate status to any third-country national requiring international protection’ and requires ‘compliance with the principle of non-refoulement’. In other words, the policy has to comply with the Geneva Convention, the New York Protocol, and ‘other relevant treaties’. While ensuring the compliance with the above-mentioned treaty the EU has to ensure that also the principle of non-refoulement is respected.<sup>35</sup>

### **1.1.2 ARTICLE 78(2)**

In the Treaty of Lisbon, it is provided for a common policy on asylum that goes beyond the minimum measures envisaged by the Treaty of Amsterdam. Article 78(2)(a) TFEU refers to a uniform “status of asylum” instead of the “qualification of nationals of third countries as refugees.” which was the term previously used.

However, this term does not mean that there is the possibility for a distinct status which does not coincide with the definition of “refugee” given by the Geneva Convention.

<sup>34</sup> Hailbronner and Thym, 2016

<sup>35</sup> S. Peers, 2016

The personal scope of Article 78(2) concerns third country nationals comprising stateless persons.<sup>36</sup> Indeed, in **point c**, which concerns temporary protection, it is stated that in this regard the EU has “wide discretion”. The term “displaced persons” shows that that the provision concerns people seeking protection due to civil wars or natural disasters in their country of origin. <sup>36</sup> Furthermore, **point e**, provides information on how to determine which MS is Responsible. The rules for determining which member state is responsible are settled down today in the Dublin III regulation. However, the “criteria” and “mechanisms” according to which this is defined are not limited to the former or present Dublin Regulations. Indeed, relocation mechanisms or additional distribution can be introduced through the ordinary legislative procedure or through an agreement among the Member States. <sup>36</sup>

The Reception Conditions are addressed in **point f**, as explained by Hailbronner and Thym:

*“Article 78(2)(f) TFEU allows for the adoption of standards concerning the conditions for the reception of applicants for asylum or subsidiary protection. The reference to ‘applicants’ makes clear that the provision concerns the status during the asylum procedure, while the bundle of rights of those having been granted international protection is covered by Article 78(2)(a), (b) TFEU. Once an application has been rejected, the former applicant for asylum must regularly be characterized as an illegally staying third country national within the meaning of the Return Directive 2008/115/EC, whose return to the country of origin or transit is covered by Article 79(2)(c) TFEU” <sup>36</sup>*

Moreover,

*“The reference in Article 78(2)(f) TFEU to should not be interpreted strictly as covering rules on legislative harmonization only. Rather, the provision should be interpreted in the light of Article 80 TFEU on solidarity, which does not in itself provide a legal basis for support instruments but can influence the interpretation of other Treaty provisions.*

*This implies that Article 78(2)(f) TFEU covers financial or operative support, including through the Asylum, Migration and Integration Fund that supports projects concerning the accommodation of asylum seekers.” <sup>36</sup>*

<sup>36</sup> Hailbronner and Thym, 2016

Lastly, **point g**, regulates cooperation with Third States. In this provision, it is established a legal basis for cooperation with third countries for the ultimate purpose of handling the flows of asylum seekers or people seeking subsidiary and temporary protection. <sup>37</sup>

### 1.1.3 ARTICLE 78(3)

This Article concerns some measures for the Member States in case of emergency situations. Decisions regarding this form of support should be made by the Council when qualified majority is met and after having consulted the European Parliament. With regard to the period of time for which these provisional measures should be applied, the EU institutions have a certain degree of discretion. They have the same discretion with regard to the definition of an “emergency situation” and to which support measures should be taken in those situations. However, as it is explained by Thym and Hailbronner:

*“Any permanent amendment of secondary legislation outside the confines of the ordinary legislative procedure cannot be decided on the basis of Article 78(3) TFEU; neither can visa requirements be imposed on that basis.”* <sup>37</sup>

The Treaty of Lisbon created an agenda for asylum measures whose entry into force was settled out in the Stockholm Programme which stated that the Common European Asylum System “*should be based on high protection standards, with due regard also for fair and effective procedures capable of preventing abuse*”.

Therefore, it is of utmost importance to grant to the applicants an equivalent form of protection and treatment for what concerns the reception conditions and the same status throughout the Union. What the Union aimed to achieve was indeed a strong level of harmonization without particular differences between the policies of the various Member States. Indeed, the creation of a Common Asylum System remained a key objective for the EU. <sup>38</sup>

Furthermore, some immigration law measures concerning the issue of asylum were adopted by the EU, namely a Regulation on social security for third-country nationals as well as a Directive aimed at extending long-term residence status to refugees and persons with subsidiary protection.

Afterwards, the Commission proposed to amend the Dublin rules regarding the problem of unaccompanied minors and the EU, in order to deal with the so-called immigration crisis which

<sup>37</sup> Hailbronner and Thym, 2016

<sup>38</sup> S. Peers, 2016

occurred in 2015, adopted two Decisions on the ‘relocation’ of asylum seekers within the EU territory and the resettlement of refugees from third countries. Moreover, in September of the same year a permanent system for relocating asylum seekers was proposed by the Commission as well as a list of which third countries could be considered as safe and so the immigrants could be sent back without violating the principle of non-refoulement. In the following year, December 2016, the Commission proposed a legislation aimed at revising the Dublin rules once again.<sup>39</sup>

#### **1.1.4 ARTICLE 80 TFEU**

As it will be addressed in the next sections, the Dublin Regulations have been criticized for placing an unfair burden on some Member States, especially Greece and Italy which, also for geographical reasons, have been more exposed to migratory flows. Indeed, the Dublin Regulations state that the country where the asylum seekers firstly enters is the one which has to process the asylum application and thus countries on the coasts of the EU such as Italy and Greece have found themselves dealing with the majority of applications of all these migrants coming from North Africa.

Due to this situation, Article 80 TFEU should be constructed as a “*horizontal provision that may influence the interpretation of other Treaty competences on border controls, asylum and immigration*”.<sup>40</sup>

This article is particularly relevant for the endorsement of forms of solidarity and burden sharing. The EU institution have some discretion with regard to the appropriate measures that need to be taken with the aim of promoting solidarity and responsibility. Indeed, various forms of support have been envisaged namely, financial, logistical, operative or legislative support.

Legislative support may perhaps include a relocation scheme for asylum seekers whereas the financial support may insist in distributing money to the Member States, as decided by the Commission, in order to control the external borders more effectively as well as to enhance the asylum, migration and integration purposes.<sup>40</sup>

Furthermore, this article introduces two main concepts the one of “mutual respect” that concerns the duty of institution to not violate the prerogatives of the others, and the “duty of cooperation”.

States may indeed be willing to cooperate due to these two concepts and not merely for altruistic reasons, but also because they can have beneficial effects in terms of security and prosperity by

<sup>39</sup> S. Peers, 2016

<sup>40</sup> Hailbronner and Thym, 2016



cooperating. In this sense, refugee protection has to be intended as a public good, the same idea applies to irregular immigration as well, more cooperation creates more national security.

However, it has to be more clearly assessed whether a system of shared responsibility should address the causes or the effects of the disparities in the distribution of the burden.

If it has to assess the causes then it is necessary to adjust the primary factors that influence how the burden is shared, whereas if it has to affect the effects this may include the resettlement of refugees or compensative financial transfers between Member State.<sup>41</sup>

## **2.1 Charter of Fundamental Rights**

The EU is bound to respect to Charter of Fundamental Rights, at the same time the Member States are bound to respect it when they are implementing EU law. In this regard, the ECJ generally follows the ECtHR on the ECHR, however the ECJ is not actually obliged to follow the Strasbourg Court.

Differently from the Universal Declaration of Human Rights, the Charter does not state that “everyone has the right to seek asylum”. Indeed, there was a concern among the members of the Convention which were drafting the Charter about the possible implication of an individual right to asylum beyond the limits of the Geneva Convention, this is also confirmed by the drafting history and the choices made for the wording. <sup>42</sup>

## **3.1 Common European Asylum System: first and second phase of the CEAS**

The common European Asylum System (CEAS) was based on the application of the Geneva Convention which established that nobody should be sent back to the country of origin if over there he or she may be subject to persecution (principle of non-refoulement).

The purpose of the System in the short run is to determine which states should be held responsible for the examination of an application for asylum. Moreover, a common ground for the rules on the reception of asylum seekers should be found among the MS.

Meanwhile, in the long run the Union should provide a uniform status for those who have been granted asylum, this status should be valid all over the Union.

<sup>41</sup> Dirk Vanheule, 2011

<sup>42</sup> Hailbronner and Thym, 2016

The Commission proposed in 2000 and 2001 a legislation establishing the first phase of the CEAS, all these measures were adopted by December 2005. The Council implemented Article 63(1) b adopting the Directive 2003/9 which fixed the minimum standards on reception conditions for asylum seekers. Afterwards the Council adopted a Directive with the aim of defining the meaning of “refugee” and subsidiary protection. This directive implemented Article 63(1) and the Article 63 (2) (a) and used the legal base for legal migration law (Article 63(3)(a) EC). The latter is commonly known as the Qualification Directive (Directive 2011/95/EU (recast), clarifying the grounds for granting international protection.<sup>43</sup>

Furthermore, the Council adopted a first-phase Directive on asylum procedures, implementing article 63(1)(d) EC. A section of this Directive was annulled by the Court of Justice because it had been challenged by the European Parliament. In July 2001, THE Council emanated a directive which was aimed at setting out a model temporary protection system which the EU was supposed to use in the event of a future perceived crisis (although it has never been used).<sup>43</sup> In conclusion, the EC used adopted a Decision establishing a “European Refugee Fund” in September 2000. <sup>44</sup>

The Hague Programme on the development of the JHA policy was the base of the second phase. It was adopted in November 2004 and it should have been achieved by the end of 2010 following the adoption of legislative proposals made by the Commission following a review of the existing asylum measures in 2007. To this purpose, the Commission provided a Green Paper on the review of the CEAS in 2007 and a policy plan on asylum in 2008. This plan concerned the review and update of existing legislation with the aim of increasing the level of harmonization. <sup>43</sup>

Indeed, there were national divergences in the grant of refugee status and the grant of subsidiary protection status. To this end, in 2008 the Commission proposed some amendments to the EURODAC Regulation, the Dublin II Regulation and the Reception Conditions Directive.<sup>48</sup>

The European Union has had for a long time the ambition to create harmonized reception conditions for asylum seekers throughout all the Member States of the Union. However, this ambition has often differed from reality. As a matter of fact, National differences in reception conditions exist and the efforts to coordinate policies across the EU have proved to be vane in several cases, challenging the Dublin system. Indeed, the Dublin Regulation is crucial for the creation of a common regional asylum legislation. <sup>45</sup>

The CEAS (Common European Asylum System) which was created to ensure the reception of asylum seekers has 4 EU directives: the Dublin Regulation, (2003/343/CE), the Asylum Procedures

<sup>43</sup> S. Peers, 2016

<sup>44</sup> Jan-Paul Brekke 2015

Directive (revised version: Directive 2013/32/EU, processing asylum cases), the Qualification Directive (Directive 2011/95/EU (recast), clarifying the grounds for granting international protection), and the Reception Directive (reception conditions and rights for asylum seekers).<sup>45</sup>

The Asylum Procedures Directive covers application for international protection and thus it does not cover the asylum claims which are based on the ECHR when this extends beyond the Geneva Convention<sup>46</sup>

#### **4.1 Dublin III Regulation**

The Dublin II Regulation was thereafter supplanted by the Dublin III Regulation, proposed by the commission in 2008 and which was adopted in 2013 and became effective from 1 January 2014. This Regulation constitutes the second phase of the CEAS, but became legally applicable 18 months before the revised legislation on asylum procedures, reception conditions and EURODAC.<sup>47</sup> The Dublin III Regulation extended the scope of the Regulation to applications for subsidiary protection. Moreover, the scope of “family members” included married minor children and their parents. It was also specified that a third-state, in order to be held responsible for an application, must be “a safe third country” as it is defined by the laws on asylum procedures.

Furthermore, procedural rights such as right to information and to a personal interview for protection seekers have been added.<sup>48</sup>

For the Dublin III Regulation in particular the Commission and the EP agreed on the suspension of the transfers of asylum seekers whenever a Member State was considered to be put under an excessive burden. However, this clause was introduced only in the form of an additional ‘early warning mechanism’ and ad hoc support for countries under ‘particular pressures’ (Regulation No. 604/2013, Articles. 22 and 23).<sup>49</sup>

According to S. Peers, in his analysis of the Dublin System Evolution, it is surprising that the Dublin III Regulation was not intended to drastically change the basic principles of the Dublin system, even though the latter was held responsible for the violation of some Human rights. Indeed, the Commission proposal to suspend the system in such cases of violations was insufficient and anyway even that proposal was rejected by the Council. As we have seen, the rules on information for asylum seekers and legal safeguards had been improved granting a better protection

<sup>45</sup>Jan-Paul Brekke, 2015

<sup>46</sup> Hailbronner and Thym, 2016

<sup>47</sup> S. Peers 2014

<sup>48</sup> S. Peers, 2016

<sup>49</sup> F. Trauner, 2019

and likely a better position for asylum seekers. However, this is not a sufficient measure, the Dublin System according to Peers should be utterly rethought or at the very least disapplied in a great number of cases where it may cause violations of Human rights and so on and so forth.<sup>50</sup>

From the Dublin III Regulation, the rule according to which an application of an asylum seeker should be analyzed only in one state, generally in the first country of entry, has been applied to all applications for international protection, not only asylum as set out in the UN refugee Convention.

If there are some issues applying these criteria, Article 3(2) of the Dublin III Regulation says that in cases of uncertainty with regard to the Member State that has to be considered responsible, it is the First Member State where an application for protection was deposited that must analyze that application.

In the second sub-paragraph of the same article there is a new addition to the rules which is indeed the result of the case law of the CJEU on the Dublin II Regulation: if the transfer of an asylum-seeker is deemed impossible *“because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union”*, then the Member State determining responsibility must continue to examine the criteria in the Regulation to see if another Member State is responsible.<sup>50</sup>

Moreover, Article 33 of the Dublin III Regulation introduced a new early warning mechanism. This mechanism is put into place whenever there is a “risk of particular pressure” on a national asylum system or “problems in the functioning of the asylum system of a Member state” which might jeopardize the functioning of the Dublin System (Article 33(1)). In the latter case, it is the Commission that, along with the European Asylum Support Authority (EASO) has to make some recommendations to the Member State in question in order to encourage it to “draw up a preventive action plan”. Afterward, the Member State has the duty to inform the Commission and Council of its intention to draw up the plan to deal with that pressure or problems but at the same time always “ensuring the protection of fundamental rights of applicants for international protection”, the Member State can also decide to draw a plan of this kind on its own initiative.<sup>51</sup>

Furthermore, according to Article 33(2), the Member State that has drawn the plan has the duty to submit it to the Council and the Commission as well as giving reports on its implementation. The Commission has firstly to inform the European Parliament on the core aspects of the plan and then it has to provide information concerning the implementation of the plan both to the European Parliament and to the Council. On the other hand, the Member State in question has to take “all the

<sup>50</sup> S. Peers, 2014

appropriate measures”, as suggested by the article, to be able to manage the pressure on its asylum system.

A crisis management action plan can be demanded by the Commission in situations where a crisis is likely to arise and a preventive plan is deemed insufficient or unable to deal with the inadequacies of the system. The Member State, following the request of the Commission, has to redact this plan within 3 months and continue to report every 3 months on the length of asylum procedure, detention conditions, reception capacities et cetera (Article 33(3)). The role of the Council in this procedure is to provide political guidance, the European Parliament along with the Council may also hold discussion or provide guidance on any solidarity measures. <sup>51</sup>

#### **4.1.1 The EU relocation scheme and the protection of the family unit**

In September 2015, the European Union adopted 2 Decision grace to its “emergency powers” which are set out in Article 78(3) TFEU (mentioned in the previous chapter). These powers allow the EU to derogate from the Dublin Rules with regard to Italy and Greece and redistribute some of the asylum seekers to other Member States. One of this decision was challenged in the CJEU by two MS whereas the Commission proposed to amend the Dublin III Regulation to establish permanent rules on relocation. <sup>52</sup>

This scheme envisaged the necessity of transferring several thousand of migrants out of the latter to countries and to reassigning these protection seekers to other Member States. Moreover, this relocation scheme had to be integrated with “increased operational support”.

However, this relocation scheme has failed because the Member States make available only a very limited number of places and impose very hard conditions in order to discourage the transfers to their country. In addition, as it is explained above, the system is not particularly attractive for the applicants themselves who have no say on their country of destination. <sup>53</sup>

More in details, as it is explained by Peers, the system of Relocation works in the following way:

*“The Member State of relocation is to be responsible for considering the application, and asylum seekers and refugees are not able to move between Member States, in accordance with the normal Dublin rules (except for short visits by refugees on the basis of a residence permit, within the Schengen area). The selection of asylum seekers is made by Italy and Greece, who must give ‘priority’ to those who*

<sup>51</sup> S. Peers, 2014

<sup>52</sup> S. Peers, 2016

<sup>53</sup> Maiani, 2016

*are considered ‘vulnerable’ as defined by the EU reception conditions Directive. Furthermore, the preamble to the Decision states that specific account should be given to the specific qualifications and characteristics of the applicants concerned, such as their language skills and other individual indications based on demonstrated family, cultural or social ties which could facilitate their integration into the Member State of relocation’; the relocation States can express a preference to this end. But this preference is not binding: the main text of the Decision states that the relocation States must accept the asylum seekers nominated by Italy and Greece, except that they can refuse relocation ‘only where there are reasonable grounds for regarding’ an asylum seeker as a danger to their national security or public order or where there are serious reasons for applying the exclusion provisions in the qualification Directive... asylum seekers do have the right to insist that their core family members (spouse or partner, unmarried minor children, or parents of minors) who are already on EU territory come with them to the relocated Member State.”*<sup>54</sup>

With regard to the protection of the family unit, the Dublin III Regulation conceptualizes in a new fashion the definition ‘family member’ by expanding it in a way which is consistent with the texts adopted during the second phase of the CEAS, Directive 2011/95/EU.

The requirement of dependency for minor children is removed. Moreover, the reunification of unaccompanied minors is improved, not only with a ‘family member’ who is present in one of the member states, but also with siblings or other relatives.

In brief, the Dublin III Regulation confirms the judgment of the CJEU in the case of *K*<sup>55</sup>. Indeed, it is provided that in cases where there is a situation of dependency, member states are usually asked to keep or bring family members together.<sup>56</sup>

<sup>54</sup> S. Peers, 2016

<sup>55</sup> “In its judgment on *K v Bundesasylamt*, the CJEU examined the humanitarian clause of the Regulation and reached the conclusion that, in cases of dependency, the principle of protection of the family unit ‘normally’ requires states to keep or gather together the members of a family.” (Morgades-Gil, 2015)

<sup>56</sup> Morgades-Gil, 2015

## **5.1 The main failures of the system and the possible causes of these failures**

The Dublin system whose purpose has always been to guarantee access to protection for those seeking it, the respect for international and the EU protection standards, to promote a form of cooperation in a spirit of solidarity and a fair distribution of the burden among the Member States has proved to be highly inefficient in several occasions. The increasing number of migrants has put the system under pressure, damaging the functioning of the CEAS.

The three main failures of the system are the following:

- . EU allocation-schemes: These schemes are not attractive because they do not take into account the different situations and circumstances of the applicants and therefore, they do not promote cooperation with the protection seekers. Moreover, there is a problem with the standards of reception in some Member States. The decision on where the applicants should go is taken as a “no-choice” decision for the asylum seekers who, as a consequence, tend to resist the system.
- . Insufficient cooperation among the Member States: Each Member State until now has tried to make its own good by aiming at transferring out as many protection seekers as possible. Furthermore, the excessive burden placed on some Member States disadvantaging them is aggravating the situation. A big amount of the financial and administrative resources is often wasted because of a lack of cooperation between the Member States, which continue to transfer the migrants offsetting one another and resulting in the applicants being back to their point of departure having been transferred.
- . The bureaucratic approach of EU allocation schemes: Indeed, the Dublin procedures, such as facts-finding and the examination of applications, tend to take a long time as although the purpose of the system is exactly that of preventing the examination of multiple applications, they continue to be frequent. <sup>57</sup>

In order to investigate the possible causes of these failures we have to bear in mind that, as we have previously mentioned, the no-choice policy for which the asylum-seekers are not free to choose their destination has a negative effect on the willingness to cooperate of the protection seekers.

<sup>57</sup> Maiani, 2016

Indeed, they wish to go in a place where either family members and friends live or where there are strong communities of their same country of origin, this would make them feel less abandoned and hopeless. However, according to the rules of the Dublin system this parameter cannot be respected most of the time.

Furthermore, although all the Member States are subject to the EU law there are still wide divergences between the asylum systems that each Member State provides.

In addition to these structural causes, some other issues emerge mostly related to the conflict between the different national interests. There is not indeed enough cooperation between the Member States and each of them seem inclined to pursue its own good. The Member States have repeatedly tried to minimize the incoming transfers and maximizing the outgoing ones. For instance, they do deny evidence of family ties in order to refuse an application.

Another essential problem is linked with the difficulties in the handling of intergovernmental procedures. this phenomenon, can produce delays in the examination of the applications.

The same problem arises with regard to the relocation procedures which are often slowed by the requests of in-depth security checks made by the relocation states and so on and so forth.



## 6.1 The anti-European feelings generated by the migratory crisis:

As we have discussed above, the Dublin system has always generated some concerns, therefore the logical question is why it has been maintained for so long. In order to address this question, we have to conceptualize the Dublin system as a “competitive game” where each Member State tries to minimize its share of the “burden” caused by the incoming migrants. As it is pointed out by Tamara Tubakovic, an evidence of the negative outcomes of this behavior carried on by the Member States is the “*well documented practice of piling requests on patently failed national asylum systems, disregarding the rights of applicants and the functioning of the CEAS as a whole*”.<sup>58</sup>

The status quo has therefore been maintained during periods of normal rate of migration flows. However, with the sadly well known “migratory crisis” of the last few years, which caused a lot of deaths in the Mediterranean Sea, it became clear that the Dublin System needed to be revised. <sup>58</sup>

The problem was not only a legal issue, but also a political issue. Indeed, the Member States on the borders started to claim that they were under an excessive pressure and that the European Union was not doing everything that it could to help them.

This high rate influx of asylum seekers in countries such as Greece and Italy, which are indeed the countries on the borders of the EU, led to disastrous consequences, including the violation of the protection seekers’ human rights. <sup>59</sup>

This accuse of jeopardizing the refugees’ rights has been confirmed by the report of the ECRE, 2014 which explained that a fair and efficient analysis of the applications was not guaranteed in all the Member States. Moreover, it was found that the allocation of responsibility was applied in a “*very disparate way for example by not taking into account the presence of the family*” and therefore using the country of first arrival as the main criterion. <sup>60</sup>

The political scientist Betz, pointed out that we should not be surprised that the consensus for new populist right-wing parties has increased almost simultaneously with the increasing numbers of immigrants. This phenomenon has indeed caused an “explosion” of xenophobic feelings in Europe. As a consequence, it has been relatively easy for the far-right parties to reinforce nationalistic feelings in order to gain more votes. <sup>61</sup>

This migratory crisis, also caused by the Syrian War and the Arab Springs, has had some serious consequences on the EU. Indeed, several far-right parties have acquired consent all over the Union,

<sup>58</sup> Tubakovic, 2017

<sup>59</sup> Schmidt s.d.

<sup>60</sup> Blanca Garcés-Mascareñas, 2015

<sup>61</sup> Inglehart, 2016

namely the UKIP, the Front National of Marine Le pen, the AfD in Germany, the League of Matteo Salvini in Italy, the Fidesz of Orban in Hungary and many others.

The rather harsh comments on immigration made by these parties and their leaders, especially on certain online platforms such as twitter, Facebook and so on, are more and more « normalized ». This kind of populism aims, for instance, at fighting the Islamic extremists in order to save « our women ». Indeed, it is often perceived that almost all the sexual assaults or harassments today are done by « non-white » and « non-Christians », regardless of the statistical evidence on the matter, which actually states that most of the episodes of violence towards women take place at home. <sup>62</sup>

For instance, in the case of Italy, it is common knowledge that the position of Matteo Salvini is rather hostile with regard to the incoming immigrants. During its political campaign its slogan was « Prima gli italiani » putting the accent on the fact that the Italians should matter more than the migrants coming to the borders. He also repeatedly said that the European Union was depriving Italy of its sovereign power and while he was the Home Secretary, he carried out a politics of « closing the ports » and accused the NGO's of carrying on illegal actions. Furthermore, his party has an history of anti-European feelings, it has indeed accused the EU of being incapable to deal with the migratory crisis and of having left Italy alone.

<sup>62</sup> Ulrike M. Vieten, 2016

### ***Chapter III: The Dublin IV proposal***

Due to all the above-mentioned issues emerging from the Dublin III Regulation the European Commission, on May 4, 2016, has promoted three proposals to reform the CEAS in order to face in a more efficient way the “refuge crisis” experienced by the EU in the last few years.

One of these proposals is indeed the so-called “Dublin IV proposal” which was aimed at reforming and fixing the current problems of the Dublin III Regulation.

In this chapter, I will try to explain which are the main innovations of the proposal, but I will also present some critics which have been made and some possible alternatives.

#### **1.1 Innovations of the Dublin IV proposal: allocation mechanism, a special pre-procedure, transfers and Family relations**

Among the amendments and innovations envisaged by this proposal there is a corrective allocation mechanism. This mechanism would be aimed at rendering the burden sharing fairer among the member states. Indeed, this mechanism will take place every time that a member state receives more than the 150% of the reference number for applications. This reference number is calculated on the population (50%) and on the GDP (50%) of each Member State (Article 35 of the Dublin IV Proposal).

An application can only be rejected on the basis of proven reasons of national and public security, in that case indeed responsibility would remain with the State of first application which would examine the case following an accelerated procedure.

A Member State can also decide to not participate to the relocation mechanism, but if they decide to do so temporarily (12 months) or permanently (by constantly renewing this decision) they have to pay 250'000 euro per application as a solidarity contribution to the Member State that will accept the applicants on their behalf. <sup>63</sup>

This procedure entails a claim for international protection in the Member State where the protection-seeker entered at first. Afterwards, the Member State has the duty to evaluate whether an application is admissible or not.

<sup>63</sup> Maiani, 2016

Indeed, if the applicant comes from a first country of asylum or a safe third country he will be returned to that country.

This declaration of inadmissibility has to be done within 10 days. With the term, the first country of asylum we refer to a state outside the EU that has given a refugee status to the asylum seeker in question.<sup>64</sup>

The applicants should remain in the Member State responsible for their claim which is held responsible for their claim. <sup>65</sup>

The State of application has also the duty to verify if the applicant constitutes a security threat to the country, in the latter scenario accelerated procedures should be applied.

These accelerated procedures will take place when an applicant is transferred back to the first country where he entered or when he comes from a safe country of origin. These procedures are aimed at excluding “manifestly unfounded claims”. <sup>64</sup>

In short, an asylum application will be pre-examined by considering if the applicant is coming from a first country of asylum, a safe third country, a safe country of origin and if he constitutes a security risk. This pre-procedure is particularly relevant because, by extending what was provided for in the Dublin III Regulation, an applicant would be sent back if a safe third country indeed exist regardless of the fact that he/she has already obtained the refugee status in that country. <sup>66</sup>

A transfer proceeding should be carried out within a period of 4 weeks, it has indeed been shortened in order to incentivize the receiving Member State to respond to the request quickly and in a more efficient way. Responsibility shifts are eliminated as well if the receiving Member State does not provide a response within the time limit. A person can exercise its right to an effective remedy against a transfer decision within 7 days.<sup>65</sup> The scope of these appeals concerns cases where family unity is at stake or there is a risk of inhuman treatment Article 28 (4) of the Dublin IV proposal.<sup>66</sup>

The Member State of “allocation” will be held responsible for verifying whether family ties exist, unless the asylum seeker has family ties in the Member State benefitting the relocation mechanism, in the latter case it is the benefitting member state which is indeed deemed responsible for this investigation. If it is found that there are not relevant family ties then the Member State of allocation can perform another check, so that the decision would provide more legal certainty for the applicant.<sup>66</sup>

<sup>64</sup> Gogia, 2017

<sup>65</sup> Progin-Theuerkauf, 2017

The definition of “family members” would be extended to siblings and family relations which have been created “before the applicant arrived on the territory of the Member States” instead of in the country of origin as it is set out in Article 2 of the Dublin IV proposal.<sup>66</sup>

## **2.1 The political Response to the Dublin IV Proposal**

The response to the Dublin IV proposal is highly controversial. Indeed, many states have repeatedly demanded a recast of the Dublin III Regulation and a reform of the status quo. However, those same countries, especially those at the borders such as Italy, Greece, Spain, Malta and Cyprus have voted against the proposal and also against the compromise solution presented by the Bulgarian presidency in office. Anyway, it should be noticed that Greece, Malta and Cyprus although agreeing with the Italian position about the necessity of introducing a system of quotas, have remained open to further negotiations. There were several reasons beyond this rejection and one of them certainly was that they feared that the situation would not change in the long run, most of all in cases of very high inflows.

However, also some very political reasons should be considered.

Several countries have voted against because they were not willing to give asylum to Middle-eastern and African Asylum seekers, due to their internal socio-economic and political situations. This was the case of the Visegrad Group (Poland, Hungary, Czech Republic and Slovakia) and the Baltic Countries (Latvia, Lithuania, Estonia). On the other hand, also France, Germany, the Netherlands, Belgium, Romania and Slovenia opposed to the proposal. Belgium for instance has said that there was no room for discussion, while Germany underlined that the Italian position which was negative along with even stronger positions held by other countries, such as Hungary and Poland which have always been against the reform of the European asylum system, constituted a problem.

With regard to Italy, the Ambassador Maurizio Massari has voted against on behalf of the at the time Minister of Home affairs Matteo Salvini, who then declared “*Today it is a victory for us, we have breached the front*” underlying once again its nationalistic positions according to which Italy has been left alone.

However, despite its position against the current state of play of the Dublin III Regulation the group EfN, which is composed by the Front National of Marine Le Pen and the League North of Matteo Salvini and others far –right parties, has remained outside of the negotiations for the reforms.

Indeed, in 2017 the proposal of the Commission has passed to the Parliament, because according to the procedure the text needs to be examined both by the European Parliament and the Council. The

<sup>66</sup> Maiani, 2016

Assembly has then appointed Cecilia Wikström along with some shadow rapporteur (which have to defend the positions of each parliamentary group and are indeed appointed by them) in order to prepare a report amending the text proposed by the Commissioners. However, the group EFN has not indicated any shadow rapporteur and therefore has not taken part to the 22 negotiations which have taken place.

The position of the League North in this situation was controversial also for another reason, the leader of the party had expressed the intention to get closer to Viktor Orban, leader of the Visegrad block, who also promotes a policy of “closing the borders”. The problem is that, while Matteo Salvini asked for more collaboration from the EU and wanted the burden of the asylum seekers reception to be shared among all the Member States, Viktor Orban was absolutely unwilling to open its frontiers to the migrants who firstly arrived in Italy, Greece or other states. Therefore, although they both built their political campaign and program on the hostility towards immigration, their positions still seemed to be rather incompatible.<sup>67</sup>

### **3.1 Critics to the Dublin IV proposal: Would the system become fairer?**

The Dublin IV proposal was designed to solve the problems of the Dublin III Regulation which we have analyzed above. However, many critics have been made about this proposal.

In particular, the proposal is said to be ineffective as it does not eradicate all the issues emerged from the Dublin III Regulation.

The Commission formulated this proposal probably assuming that, if threatened by some sort of sanctions, the applicants would avoid or at least diminish the secondary movements from the first country of irregular entrance to other Member States. However, the sanctions which have been foreseen within the proposal have raised some concern about the respect of the human rights of the applicants. Furthermore, a similar system has already been applied in the past and it has proved to be inefficient, therefore it is not utterly clear why in this case these sanctions would produce a different outcome. <sup>68</sup>

Additionally, the prevention of secondary movements seems to be put at the core of the CEAS objective ignoring the fact that these secondary movements are very often caused by the inability of the MS to respect certain EU standards and therefore that they are in some cases a sort of strategy to grant the rights at the basis of the CEAS contained in Article 78 TFEU.

<sup>67</sup> My formulation stems from the comprehensive analysis of three different articles one by Camilli, 2018, one by Magnani, 2019 and one by Borsa, 2018

<sup>68</sup> Maiani, 2017

Evidence suggests that the Dublin system would cause the burden sharing to be even more unbalanced among the Member States. Indeed, the first applications would still be competence of the Member States of the first country of irregular entry which are usually the countries on the coasts or borders. But, in this case, also the countries which constitute a desirable destination, due to the possibilities that they offer to the applicants depending on the compliance with the duty to lodge the application in the first State of irregular entrance. This would make the countries of first application the “gatekeepers” of the CEAS placing even more responsibilities on them.

Moreover, the shortened deadlines for the examination of the applications would also put the stress on the first application States once again. <sup>69</sup>

According to Sarah Progin-Theuerkauf, the new fairness mechanism will be almost inapplicable as the reference number is unlikely to be overcome. Indeed, most of the applicants pass through “safe” third country such as Turkey and thus, according to this proposal, they would probably be sent back after the pre-procedure. The said pre-procedure brings other risks as well. For instance, the family unity principle could easily be violated as persons would be sent back even though there is an evidence of family members within the EU.<sup>69</sup>

Lastly, the amount of 250'000 euro which would be paid to the Member State who will take the asylum seekers on behalf of another member state does not seem to be particularly reasonable. This solidarity contribution does not seem to enhance solidarity among member state but on the opposite, it allows the member states to “buy themselves out”. Also, the amount of 250'000 euro is rather arbitrary. Indeed, it would be excessive if the applicants integrate in the society in a short period of is not able to integrate quickly 250'000 would not be sufficient to pay for his or her necessities over many years <sup>70</sup>

Tamara Tubakovic claims that the proposal would indeed be effective in terms of preventing Member States from circumventing the responsibility and the asylum seekers from escaping. However, this would be true only in an environment of mutual trust and solidarity <sup>71</sup>

#### **4.1 Possible future scenarios**

Due to the critical aspects explained above it is not utterly clear what will happen in the future. According to an analysis carried out by Amelia Martha Mathera, there are many scenarios that can potentially take place.

<sup>69</sup> Maiani, 2016

<sup>70</sup> Progin-Theuerkauf, 2017

<sup>71</sup> Tubakovic, 2017

1) Maintaining the status quo:

As a matter of fact, several countries in particular in the eastern part of the EU refuse to apply the current regulation whereas other countries such as Germany decided to allow asylum seekers to enter the German territory without taking into account their country of first arrival. However, these constitute an exception. It seems rather realistic to maintain the status quo if an agreement is not found among the institutional bodies of the European Union <sup>72</sup>

2) Accept the Commission Proposal:

This scenario foresees the European Parliament and the Council to accept the proposal of the Commission. So far, only the European Parliament proclaimed its position in the Wilkström Report. In this report, the European Parliament has made some amendments aimed at changing the criteria according to which the responsible Member State is determined. More specifically the European Parliament has proposed the following amendments:

*“Abandonment of the criterion of first entry and the adoption of a quota system. The main difference with the original Proposal is that this criterion will be adopted without any need of phases. The application must be presented in the country of first entry. This State verifies the existence of a wide range of “effective links” between the applicant and a MS... Therefore, MS will receive applicants who have links with their community, and all this, within the limits of their quotas. If an applicant lacks connections, then he can choose between the four countries most distant from the fulfillment of his quota.”.*

*Legal access to EU from third countries should be facilitated. The Dublin transfers, which are against human rights, have to be stopped.*

*The EP proposes to strengthen the rules in the best interest of the child: the major guarantees for the appointment of a legal guardian, no forced transfers, the country where it is located must take charge of the child’s vulnerable condition, and lastly for each transfer, there is the need for an evaluation by a multidisciplinary team and prior appointment of a guardian in the destination country.*

*The costs of reception in the identification phase of the competent State and the transfer will be covered by the EU budget Transfers and will be carried out by the European Asylum Agency.” <sup>73</sup>*

<sup>72</sup> Matera, 2020



However, this scenario seems to be unlikely because the main challenges already experienced in the Dublin III Regulation will not be completely overcome. Indeed, all the MS composing the CEAS have diverging national interests which are hard to conciliate. <sup>73</sup>

3) A new proposal:

The possibility of a new proposal, and not simply an amendment to the existing one, should also be taken into consideration. In this case the core principle which should be achieved is that a fairer burden sharing among the MS should be pursued and attained. This scenario will necessarily imply a longer period of time as the negotiations will be restarted from the beginning. <sup>74</sup>

4) Free choice:

In a study on the capacity of immigrants to integrate within the country where they lived, Brekke and Brochmann found some evidence that the majority of the immigrants have better work prospects and integrate faster in countries such as Norway than, for instance, in Italy. In this sense, where someone seeks asylum is not only relevant from the point of view of the EU and of the Member States, but also for the asylum seeker him or herself.<sup>75</sup>

In 2013 a group of German organizations, including ProAsyl, proposed the option of “free-choice” model. This proposal aimed at replacing the criterion of “country of first arrival” with the one of the “applicant’s first choice”. The applicant would be allowed to travel across Europe. In cases of unequal distribution, a compensatory funding, so a financial aid, would be given to the countries which have a highest number of asylum applications. <sup>76</sup>

Rapoport and Moraga proposed a sort of mixed free-choice system providing for negotiable quotas that would take into account both the preferences of the protection-seekers and those of the Member States<sup>77</sup>. Furthermore, Guild suggested that the free movement of refugees within the European Union should be enhanced in order to minimize the importance of the country where the application is formally deposited. <sup>78</sup>

5) Enlargement of the Dublin System outside the EU:

The UNCHR and the International organization of Migration also proposed the enlargement of the Dublin System to non- Member States on the Mediterranean coasts. However, the plausibility of

<sup>73</sup> Maiani, 2016

<sup>74</sup> Matera, 2020

<sup>75</sup> Brekke, 2014

<sup>76</sup> Blanca Garcés-Mascareñas, 2015

<sup>77</sup> Rapoport, 2014

<sup>78</sup> Guild, 2015

this measure is very low as some of the neighboring countries to the EU are politically instable and they cannot always guarantee an adequate treatment nor an efficient system of asylum. <sup>79</sup>

Many bilateral agreements with third countries have taken place over time, in particular with Turkey, but some scholars, such as Gliatta, are concerned about this evolution because there is the risk of undermining the solidity of the system, to prevent the asylum or protection seekers from their right to ask for international protection and to violate the principle of non-refoulement. <sup>80</sup>

<sup>79</sup> Matera, 2020

<sup>80</sup> Gliatta, 2018

## ***CONCLUSION***

In the recent years the migratory crisis has been the focus of the political and media debate in Europe. The despairing news reporting the death of hundreds of migrants escaping from sorrowful conditions has shaken the soul of many.

On the other hand, these massive migratory flows have heightened some feelings of racism and xenophobia. The fear of losing their job because of the migrants has pervaded many and consequently the political arena.

Some countries which have suffered the migratory crisis excessively, due to their geographical position, have claimed that the EU was not doing enough and have started to question the Dublin System. Indeed, the inadequacy of the Dublin System seemed to be the only point of agreement between those who wanted to close the ports and the “doors of the EU” to the migrants and those who claimed that the Dublin system was dangerous for the asylum-seekers themselves.

The aim of this thesis has been to show that the problem of how to deal with immigration is not new.

The Dublin System and more in general the Asylum law has undergone various recasts and amendments, starting from the Geneva Convention up until the Lisbon Treaty.

As a matter of fact, the world changes and the law, which cannot be conceived as static, should do the same. This is precisely why the EU has adopted several measures over time to adequate the legislation to the situation in which the asylum issue was versing.

Compared to when the first Dublin Regulation was written in the 1990’s, not only other States have joined the European Union shifting the balance of power, but also the number of asylum and protection seekers has increased impressively.

The Arab Springs in North Africa and the decennial war in Syria have had devastating consequences on those countries. Hence, a lot of people who were desperate sought asylum in Europe, aspiring to a better life for themselves and their children.

However, these increased migratory flows and the consequent migratory crisis has brought to light some underlying inadequacies and problems of the Dublin III Regulation, urging the Commission to formulate a Dublin IV proposal.

Nevertheless, this proposal has not reached an agreement neither in the European Union, indeed it has not been accepted in the European institutions, nor in the Academic field. As it was previously mentioned, many scholars have argued that this proposal does not actually solve the problems of the Dublin III Regulation, because the states at the border of the EU are still put under an excessive pressure and the rights and preferences of the Asylum seekers are still at risk of violations. Therefore, the future of the Dublin System is still unclear also due to the fact that the recent European Elections have changed the political scenario and this could potentially cause some unexpected outcomes.

Some alternatives to the Dublin System are also plausible, but it is not utterly clear if they would be feasible in terms of efficiency and costs. Nevertheless, whatever form of recast will take place either the same (amended) proposal, a completely new proposal, a free choice proposal, or the maintenance of the status quo, some relevant points should be taken into consideration.

As it is suggested by Schmidt, the policies of “closing the borders” which have been proposed by several politicians, constitute a violation of the refugees’ protection laws and leaves people in unhuman situations. Moreover, closing the western Balkan borders would not stop the migratory flows but it would merely add even more pressure to countries such as Italy and Greece and in that sense, it is not sufficient to provide a monetary compensation in order to resolve the situation in which they verse.

Indeed, it is rather necessary to establish a distribution system in which the Member State do not take part to a competitive game but accept individual responsibility instead with the aim of ensuring the fundamental rights of asylum seekers and the basic humanitarian standards. <sup>81</sup>

With this purpose, it is deemed essential to create legal ways to access the EU because human life is at risk in the dramatic transit in the Mediterranean Sea and this has caused hundreds of deaths which could have been avoided.

It may appear that the issue of asylum and migration calls into question the very strength of the European construction or that, in the words of Jean-Claude Juncker, «*Europe is really not up to the task*»,<sup>82</sup> meaning that Member States are not willing to fully cooperate yet.

For instance, Francesca Campomori reckons in her work that the Member States are now facing a serious crisis of “governance” where the various prerogatives, both at a national and international

<sup>81</sup> Schmidt

<sup>82</sup> Tissier-Raffin, 2015

level, are disputed. According to her, the Member States have indeed proved to be incapable of foreseeing a common strategy for handling immigration.<sup>83</sup>

However, a stronger Europe, even completely reformed, is possible, but for it to be so, the MS of the Union must really start to collaborate rather than compete.

In this sense, as suggested in the work of Guild and others (although before the Dublin IV proposal), the Dublin System should be replaced with “*a non-coercive, solidarity-based, fundamental rights compliant system of responsibility allocation for asylum claims*”.

Furthermore, for the system to be efficient, a form of mutual recognition of asylum decisions should be introduced. Indeed, this would allow free movement rights, the possibility to join family and the achievement of a better integration into the society, as the asylum-seekers were European citizens.<sup>84</sup>

Likewise, Gliatta has the same opinion with regard to the concept of “free staying” in the EU, emphasizing the notion of “free” because a system of protection can only work if the willingness of the asylum or protection seekers is taken into consideration and if, and only if, the Union works in a synergetic fashion. <sup>85</sup>

<sup>83</sup> Campomori, 2019

<sup>84</sup> Guild, 2015

<sup>85</sup> Gliatta, 2018

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## **RIASSUNTO:**

Il proposito di questa tesi è di illustrare l'evoluzione del Sistema di Dublino, partendo dal contesto storico nel quale esso venne fondato ed analizzando le varie leggi e normative che lo hanno preceduto ed accompagnato. In un secondo momento, andrò ad analizzare la situazione attuale dando particolare rilevanza agli Articoli 78 e 80 del TFEU ed al Regolamento di Dublino II, spiegandone le principali caratteristiche e punti critici i quali hanno condotto alla Proposta del Regolamento di Dublino IV da parte della Commissione, spiegando anche di quest'ultimo quali siano i punti più innovativi e facendone una valutazione critica.

In ultimo verranno presentati alcuni possibili scenari futuri.

### **1. CONTESTO STORICO DEL SISTEMA DI ASILO EUROPEO:**

#### **La Convenzione di Ginevra, l'accordo di Schengen e l'Atto Unico Europeo**

La Convenzione di Ginevra del 1951 rappresenta il punto di partenza di quest'analisi e contestualizzazione del Sistema di Asilo Europeo. Infatti questa Convenzione ci fornisce la definizione di rifugiato e promuove il principio di "*non-respingimento*" per il quale i rifugiati non devono essere rimandati indietro al loro paese di origine se lì non sussistono delle condizioni di vita dignitose.

Nonostante questa prima testimonianza risalente al 1951, il problema dell'asilo non è stato particolarmente rilevante fino agli anni ottanta quando, in seguito alla guerra in Jugoslavia, moltissimi hanno tentato di raggiungere l'Europa da quei paesi. In seguito a questo fenomeno le politiche adottate dall'Europa erano perlopiù intergovernative.

Infatti, l'accordo di Schengen del 1985 era originariamente un accordo intergovernativo che prevedeva l'abolizione dei controlli di frontiera all'interno dei territori dell'Unione e fu firmato da 5 paesi che andarono poi ad aumentare. Venne anche istituito un Sistema d'Informazione di Schengen per creare una sorta di archivio riguardo a tutti gli individui che venivano investigati dai vari paesi.

L'Atto Unico Europeo (AUE) del 1986, anch'esso mirato ad abolire le frontiere all'interno del Territorio Europeo, ed il sopracitato accordo di Schengen, fecero comprendere la necessità di una maggior cooperazione e armonizzazione tra i vari Stati Membri nella ricezione dei rifugiati.

Nello stesso anno venne anche creato un gruppo Ad Hoc per sviluppare politiche sull'immigrazione e l'Asilo.

#### **La Convenzione di Dublino**

Nel 1990, sotto forma di trattato intergovernativo, venne per la prima volta firmato da 12 Stati la Convenzione di Dublino (2003/343/CE).

Quest'ultimo è entrato in vigore nel 1997 ed era finalizzato a prevenire il fenomeno del forum shopping ovvero il fenomeno per il quale, i richiedenti asilo cercano di raggiungere i paesi dove le condizioni di accoglienza e il livello di riconoscimento sono migliori. Inoltre, si voleva anche evitare che i richiedenti facessero riferimento a vari Stati Membri senza che nessuno di questi ultimi

riconoscesse di avere il dovere di esaminare la loro richiesta. In breve, il proposito principale della Convenzione di Dublino era di facilitare l'analisi delle richieste e determinare quale stato dovesse essere ritenuto responsabile per esse. Per farlo la Convenzione di Dublino stabilisce che: lo Stato Membro dove un richiedente ha un familiare, un permesso di residenza, dove è entrato inizialmente senza autorizzazione (a meno che il richiedente risieda nello Stato membro in cui egli/lei ha presentato la domanda da oltre sei mesi), dove la richiesta è stata fatta o dove una domanda è presentata in una zona di transito aeroportuale, è da considerarsi lo Stato Membro responsabile per l'analisi della richiesta.

## **Il trattato di Maastricht**

Questo trattato, entrato in vigore nel 1993, ha creato la base giuridica per promuovere la cooperazione tra gli Stati membri per quanto concerne la protezione temporanea.

Esso è particolarmente pertinente riguardo alle politiche in materia di asilo in quanto, ai sensi dell'Articolo K (1) e (3), tali politiche sono ritenute una questione di interesse comune.

Infatti, in questo articolo è prevista la responsabilità degli Stati membri di consultarsi in sede di Consiglio dell'UE al fine di creare una sorta di coordinamento tra di loro.

Inoltre, il Trattato ha introdotto una struttura tripartita dei pilastri. Il primo pilastro riguardava questioni nelle competenze delle istituzioni sovranazionali (Commissione, Consiglio, Corte di giustizia e Parlamento) dell'UE. Il secondo pilastro riguardava invece la politica estera in quanto interesse comune dell'Unione. Infine, il terzo pilastro, puramente intergovernativo, riguardava la giustizia e gli affari interni (GAI). Gli Stati membri si occupavano di asilo e immigrazione attraverso il terzo pilastro.

## **Il Trattato di Amsterdam**

Questo trattato ha trasferito l'*acquis* di Schengen dal terzo pilastro puramente intergovernativo, al primo pilastro che era invece sovranazionale. Il Titolo IV del Trattato di Amsterdam che riguardava i visti, l'asilo e l'immigrazione, ha fatto entrare nelle competenze della Comunità Europea questioni che erano sempre state legate alla cooperazione intergovernativa.

## **Il Regolamento di Dublino II**

La convenzione di Dublino sopracitata è stata sostituita da un successivo regolamento, il regolamento 343/2003, comunemente noto come regolamento di Dublino II.

Per quanto riguarda i contenuti e le innovazioni apportate dal Regolamento in questione, il primo criterio di responsabilità degli Stati membri è un criterio che riguarda i minori non accompagnati e valuta che lo Stato membro che dovrebbe essere responsabile del minore non accompagnato è quello in cui risiede un familiare di quest'ultimo che possa prendersene cura.

Il criterio relativo al ricongiungimento familiare è rimasto invece invariato rispetto alla Convenzione di Dublino, mentre il terzo criterio stabilisce che uno Stato membro è responsabile per

i familiari di un richiedente asilo se quest'ultimo è in attesa di una decisione sulla sua domanda in tale Stato membro.

## ***2. IL TRATTATO DI LISBONA, IL REGOLAMENTO DI DUBLINO III E I SUOI FALLIMENTI***

### **Il trattato di Lisbona**

Questo trattato è rilevante poiché ha fornito la base giuridica per una politica comune in materia di asilo e per uno status uniforme “in materia di asilo e di protezione sussidiaria nell'UE” ed anche perché, grazie ad esso, la Carta dei diritti fondamentali dell'Unione europea è diventata un documento giuridicamente vincolante.

Alla luce dell'Articolo 78, in particolare Articolo 78(1), l'UE dovrebbe infatti offrire uno status adeguato a qualsiasi cittadino di un paese terzo che necessita di protezione internazionale sulla base del principio di non respingimento.

In altre parole, la politica deve essere conforme alla Convenzione di Ginevra, al Protocollo di New York e ad altri trattati pertinenti. Pur garantendo il rispetto dei suddetti, l'UE deve garantire il rispetto anche del principio di non respingimento.

Per quanto riguarda ciò che è scritto nell'Articolo 78(3) alcune misure devono essere prese in favore di Stati membri in caso essi versino in situazioni di emergenza. Rispetto alla durata di queste misure provvisorie e la definizione di cosa costituisca una situazione di emergenza le istituzioni dell'Unione Europea godono di una certa discrezionalità.

Inoltre, nell'Articolo 80 dello stesso trattato vengono promosse forme di solidarietà e ripartizione degli oneri. In questo senso, sono state previste varie forme di sostegno, in particolare finanziario, logistico, operativo e legislativo.

Per esempio, può essere creato un programma di ricollocazione per i richiedenti asilo, o si possono distribuire fondi agli Stati membri al fine di controllare in maniera più efficace le frontiere esterne e di migliorare l'asilo. Inoltre, questo articolo introduce due concetti principali: quello del rispetto reciproco che riguarda il dovere delle varie istituzioni di non violare le prerogative degli altri, e quello del dovere di cooperazione.

### **Il Regolamento di Dublino III**

Il regolamento Dublino II è stato successivamente sostituito dal regolamento Dublino III, entrato in vigore il 1 gennaio 2014.

Il regolamento Dublino III ha esteso il campo di applicazione del regolamento alle domande di protezione sussidiaria. Inoltre, in questo Regolamento vengono inclusi come membri della famiglia i figli minori sposati e i loro genitori. È stato poi specificato che uno Stato terzo, per essere ritenuto responsabile di una domanda, deve essere un paese sicuro.

Oltretutto, sono stati aggiunti diritti procedurali quali il diritto all'informazione e a un colloquio personale per i richiedenti protezione.

Per quanto concerne il regolamento Dublino III, la Commissione e il Parlamento Europeo hanno convenuto sulla sospensione dei trasferimenti di richiedenti asilo ogni qualvolta uno Stato membro sia considerato sotto un onere eccessivo. Tuttavia, questa clausola è stata introdotta solo sotto forma di “meccanismo di allarme rapido” che viene messo in atto ogni volta che vi è un rischio di pressione eccessiva su un sistema nazionale di asilo ed in quest'ultimo caso è la Commissione che, insieme all'Autorità europea di sostegno per l'asilo (EASO), deve formulare alcune raccomandazioni allo Stato Membro in questione, al fine di incoraggiarlo a elaborare un piano d'azione preventivo.

A tutte le domande di protezione internazionale è stata applicata la regola secondo la quale la domanda di un richiedente asilo dovrebbe essere analizzata in un solo Stato, generalmente nel primo paese di ingresso.

Inoltre, vi è un sistema di ricollocazione il quale come spiegato da S. Peers, funziona nel modo seguente:

*“Lo Stato membro di ricollocazione è responsabile dell'esame della domanda e i richiedenti asilo e i rifugiati non sono in grado di circolare tra gli Stati membri, La selezione dei richiedenti asilo è fatta dall'Italia e dalla Grecia... Inoltre, si dovrebbe tener conto in modo specifico delle qualifiche e delle caratteristiche specifiche dei richiedenti interessati, quali le loro competenze linguistiche e altre indicazioni individuali basate su legami familiari, culturali o sociali dimostrati che potrebbero facilitarne l'integrazione nello Stato membro di ricollocazione. Tuttavia, questa preferenza non è vincolante: il testo principale della decisione stabilisce che gli Stati di ricollocazione devono accettare i richiedenti asilo designati dall'Italia e dalla Grecia, e possono rifiutare il trasferimento solo se vi sono ragionevoli motivi per considerare il richiedente asilo un pericolo per la sicurezza nazionale...I richiedenti hanno il diritto di insistere sul fatto che i loro membri della famiglia di base (coniuge o partner, figli minori non coniugati o genitori di minori) che si trovano già sul territorio dell'Unione si rechino con loro nello Stato membro dove sono stati ricollocati.”*

Il Regolamento di Dublino III ridefinisce il concetto di membro della famiglia ampliandolo, infatti il requisito della dipendenza per i minori viene rimosso. In ultimo, la riunificazione dei minori non accompagnati è ampliata anche a fratelli o altri parenti.

### **I tre principali fallimenti del sistema e le possibili cause.**

Il sistema di Dublino è stato duramente criticato in quanto sono emersi i seguenti problemi che rischiano di minarne l'efficienza e la stabilità

Per esempio, la politica di “non-scelta” per la quale i richiedenti asilo non sono liberi di scegliere la loro destinazione, ha un effetto negativo sulla volontà di cooperare di questi ultimi. Inoltre, sebbene tutti gli Stati membri siano sottoposti al diritto dell'UE, vi sono ancora ampie differenze tra i sistemi di asilo e gli standard di accoglienza di ciascuno Stato membro.



Infine, la cooperazione tra gli Stati membri non è sufficiente e ciascuno di essi sembra incline a perseguire il proprio bene. Gli Stati membri hanno ripetutamente cercato di minimizzare i trasferimenti in entrata e di massimizzare quelli in uscita. Ad esempio, negando la prova di legami familiari al fine di rifiutare una domanda.

### **I sentimenti anti-europeisti generati dalla crisi migratoria**

Il sistema di Dublino ha sempre suscitato qualche preoccupazione, la domanda che dovremmo perciò porci è perché sia stato mantenuto in vigore per così tanto tempo. Per rispondere a questa domanda, dobbiamo concettualizzare il sistema di Dublino come un gioco competitivo in cui ogni Stato Membro cerca di minimizzare la sua parte dell'onere causato dai migranti in arrivo in Europa. Lo status quo è stato pertanto mantenuto durante i periodi di basso o normale afflusso di migranti.

Tuttavia, con la tristemente nota crisi migratoria degli ultimi anni, che ha causato molte morti nel Mar Mediterraneo, è diventato chiaro che il sistema di Dublino doveva essere rivisto. Il problema non era solo giuridico, ma anche politico. In effetti, gli Stati membri, in particolare quelli sulle coste, hanno iniziato a sostenere di essere sottoposti a pressioni eccessive e che l'Unione Europea non stava facendo tutto il possibile per aiutarli.

L'alto tasso di afflusso di richiedenti asilo in paesi come la Grecia e l'Italia, che sono paesi appunto sui confini dell'UE, ha portato a conseguenze disastrose, tra cui la violazione dei diritti umani dei richiedenti protezione, come testimoniato da un report del ECRE del 2014.

Il politologo Betz, ha sottolineato che non deve sorprenderci il fatto che il consenso per i nuovi partiti di destra populistici sia aumentato quasi contemporaneamente con il crescente numero di immigrati. Questo fenomeno ha effettivamente causato un'esplosione di sentimenti xenofobi in Europa. Di conseguenza, è stato relativamente facile per i partiti di estrema destra rafforzare sentimenti nazionalistici acquisendo così voti.

Nuovi partiti di estrema destra o populistici sono emersi ovunque in Europa per esempio troviamo il Front National di Marine Le Pen, l'AfD in Germania, il Fidesz di Orbán in Ungheria.

Anche il caso italiano è particolarmente rilevante in quanto è risaputo che la posizione di Matteo Salvini e di altri politici di destra sia piuttosto ostile nei confronti dei migranti in arrivo. Durante la sua campagna politica il suo slogan è stato «Prima gli Italiani» mettendo l'accento sul fatto che gli italiani debbano importare più dei migranti che arrivano sulle coste dell'Unione. Ha anche più volte detto che l'Unione Europea stava privando l'Italia del suo potere sovrano e mentre era Ministro degli Interni ha condotto una politica di «chiusura dei porti» e ha accusato le ONG di compiere azioni illegali. Inoltre, il suo partito ha una storia di sentimenti antieuropeisti, infatti l'UE è stata accusata di essere incapace di affrontare la crisi migratoria e di aver lasciato da sola l'Italia.

### ***CAPITOLO III: LA PROPOSTA DI DUBLINO IV***

A causa di tutte le questioni sopra menzionate emerse dal Regolamento di Dublino III la Commissione Europea, il 4 maggio 2016, ha promosso la cosiddetta proposta di Dublino IV che era atta a risolvere gli attuali problemi del regolamento di Dublino III.

Nella proposta è prevista l'introduzione di un meccanismo di allocazione correttiva, volto a rendere più equa la ripartizione degli oneri tra gli Stati membri. In effetti, questo meccanismo avrà luogo ogni volta che uno Stato membro riceve più del 150% del numero di riferimento per le domande. Questo numero di riferimento è calcolato sulla popolazione, per il 50%, e sul PIL, per il 50%, di ciascuno Stato membro (Articolo 35 della Proposta di Dublino IV).

Uno Stato membro può anche decidere di non partecipare al meccanismo di ricollocazione, ma per farlo deve versare 250.000 euro per domanda come contributo di solidarietà allo Stato membro che accoglierà i richiedenti al suo posto.

Una domanda d'asilo deve essere preliminarmente esaminata valutando se il richiedente proviene da un paese primo di asilo, da un paese terzo sicuro, da un paese di origine sicuro e se costituisce un rischio per la sicurezza. Questo pre-procedura è particolarmente importante poiché estende quanto previsto dal regolamento Dublino III e prevede che qualora un paese terzo sicuro esistesse effettivamente, il richiedente sarebbe mandato indietro.

Inoltre, lo Stato membro di assegnazione dovrà verificare l'esistenza di legami familiari, a meno che il richiedente asilo non abbia legami familiari nello Stato membro beneficiario del meccanismo di ricollocazione, in tal caso è lo Stato membro beneficiario ad essere responsabile della verifica.

#### **La risposta politica alla proposta di Dublino IV**

La risposta alla proposta di Dublino IV è molto controversa. In effetti, molti Stati hanno ripetutamente richiesto una riforma del regolamento di Dublino III e dello status quo.

Tuttavia, gli stessi paesi, in particolare quelli situati alle frontiere, come l'Italia, la Grecia, la Spagna, Malta e Cipro, hanno votato contro la proposta e anche contro la soluzione di compromesso presentata dalla Presidenza bulgara in carica.

Diversi paesi hanno votato contro perché non erano disposti a concedere asilo ai richiedenti asilo a causa della loro situazione socioeconomica e politica interna. È il caso del gruppo di Visegrad (Polonia, Ungheria, Repubblica ceca e Slovacchia) e dei paesi baltici (Lettonia, Lituania, Estonia). D'altro canto, anche Francia, Germania, Paesi Bassi, Belgio, Romania e Slovenia si sono opposti alla proposta. Il Belgio, ad esempio, ha affermato che non c'era spazio per ulteriori discussioni, mentre la Germania ha sottolineato che la posizione italiana, che era negativa, e le posizioni ancora più forti di altri paesi come l'Ungheria e la Polonia, che sono sempre stati contrari alla riforma del sistema di Asilo Europeo, costituivano un problema.

Anche la Lega Nord di Matteo Salvini ha votato contro la proposta e nonostante avesse sempre criticato il sistema di Dublino è rimasta fuori dai negoziati per le riforme. Infatti, nel 2017 la proposta della Commissione è passata al Parlamento, perché secondo la procedura il testo deve essere esaminato sia dal Parlamento europeo che dal Consiglio. L'Assemblea ha quindi nominato

Cecilia Wikström insieme ad alcuni relatori ombra (che devono difendere le posizioni di ogni gruppo parlamentare e sono nominati da loro) al fine di preparare una relazione sulle possibili modifiche al testo proposto dai Commissari. Tuttavia, il gruppo Efn, cui appartiene la Lega, non ha indicato alcun relatore ombra e pertanto non ha preso parte ai 22 negoziati che si sono svolti.

### **Critiche alla proposta di Dublino IV**

La proposta di Dublino IV è stata concepita per risolvere i problemi del regolamento Dublino III che abbiamo analizzato in precedenza. Tuttavia, sono state mosse molte critiche a tale proposta. In particolare, la proposta è ritenuta inefficace in quanto non elimina tutte le questioni emerse dal regolamento Dublino III, ma anzi potrebbe causare un ulteriore squilibrio nella ripartizione degli oneri tra gli Stati membri. Infatti, le prime domande rimarrebbero di competenza degli Stati membri del primo paese di ingresso irregolare che sono di solito i paesi sulle coste o alle frontiere. Ma, in questo caso, anche i paesi che costituiscono una destinazione desiderabile, come ad esempio la Germania, sarebbero gravemente toccati.

Inoltre, secondo Sarah Progin-Theuerkauf, il nuovo meccanismo di allocazione correttiva sarà quasi inapplicabile in quanto è improbabile che il numero di riferimento venga superato.

Infine, l'importo di 250.000 euro che verrebbe versato allo Stato membro che accoglierà i richiedenti asilo per conto di un altro Stato membro non sembra particolarmente utile al fine di incrementare la solidarietà tra gli Stati membri, ma al contrario permette agli Stati membri di pagare pur di non essere coinvolti.

### **Possibili scenari**

In base ad un'analisi effettuata da Amelia Martha Mathera, ci sono molti scenari che possono potenzialmente verificarsi.

- 1) Mantenimento dello status quo
- 2) Accettare la proposta della Commissione
- 3) Una nuova proposta: In questo caso, il principio fondamentale da raggiungere è quello di perseguire e raggiungere una ripartizione più equa degli oneri tra gli Stati membri. Questo scenario comporterà necessariamente un periodo di tempo più lungo in quanto i negoziati dovrebbero ricominciare dall'inizio.
- 4) Libera scelta: Nel 2013 un gruppo di organizzazioni tedesche, tra cui Proasyl, ha proposto l'opzione del modello della "libera scelta". Questa proposta mirava a sostituire il criterio del paese di primo arrivo con quello della prima scelta del richiedente. Il richiedente sarebbe permesso di viaggiare attraverso l'Europa. In caso di distribuzione disuguale, un finanziamento compensativo, quindi un aiuto finanziario, sarebbe concesso ai paesi che presentano il maggior numero di domande di asilo.
- 5) Ampliamento del sistema di Dublino al di fuori dell'UE: L'UNCHR e l'Organizzazione internazionale per le migrazioni hanno inoltre proposto l'ampliamento del sistema di Dublino agli Stati non membri sulle coste mediterranee. Tuttavia, questa possibilità desta molte preoccupazioni

in quanto alcuni dei paesi confinanti con l'UE non sono basati sugli stessi valori dell'Unione e potrebbero non rispettare gli standard minimi di protezione e di accoglienza.

## CONCLUSIONE

Negli ultimi anni le notizie che ci hanno raggiunti riguardo a migliaia di migranti che hanno tentato di raggiungere le coste Europee hanno generato sentimenti contrastanti. Le centinaia e centinaia di persone che sono morte nel Mediterraneo mentre cercavano una vita migliore hanno scosso l'anima di molti, rendendo ai loro occhi l'attuale sistema pericoloso per i migranti stessi. D'altra parte, questi massicci flussi migratori hanno accresciuto alcuni sentimenti di razzismo e xenofobia. La paura di perdere il lavoro a causa dei migranti, pur essendo una paura che si è dimostrata infondata, ha pervaso molte persone e di conseguenza anche l'arena politica.

L'inadeguatezza del sistema di Dublino sembrava essere l'unico punto di accordo tra queste due visioni. Infatti, l'aumento dei flussi migratori e la conseguente crisi migratoria hanno messo in luce alcune carenze e problemi di fondo del regolamento di Dublino III, sollecitando la Commissione a formulare una proposta di Dublino IV. Tuttavia, questa proposta non ha ancora raggiunto un assoluto consenso né da parte delle istituzioni Europee né nell'ambito accademico dove molti studiosi ed esperti sostengono che quest'ultima non risolve fino in fondo i problemi presenti nel Regolamento di Dublino III.

Oggi, il futuro del sistema di Dublino non è ancora chiaro. Ad ogni modo, che la stessa proposta venga mantenuta seppur emendata, che si decida per una proposta completamente nuova, per una proposta che includa una sorta di libera scelta da parte del richiedente o per il mantenimento dello status quo, alcune considerazioni dovrebbero essere fatte.

È necessario istituire un sistema di redistribuzione in cui gli Stati membri non partecipino a un gioco competitivo, ma accettino la responsabilità individuale di garantire i diritti fondamentali dei richiedenti asilo e le norme umanitarie di base. A tal fine, è essenziale creare vie di accesso legali all'UE. Infatti, la vita umana è a rischio nel drammatico transito nel Mediterraneo e ciò ha causato centinaia di morti che si sarebbero potute evitare.

Potrebbe effettivamente sembrare che la questione dell'asilo e dell'immigrazione metta in discussione la forza stessa della costruzione Europea, chiarendo che gli Stati membri non sono ancora disposti a cooperare pienamente. Tuttavia, un'Europa più forte, anche completamente riformata, è possibile, ma affinché sia così, i paesi dell'Unione devono davvero iniziare a lavorare insieme anziché competere.

In questo senso, come suggerito nel lavoro di Guild e altri (anche se scritto prima della proposta di Dublino IV) il sistema di Dublino dovrebbe effettivamente essere sostituito con un sistema non coercitivo, solidale e conforme ai diritti fondamentali di attribuzione delle responsabilità per le richieste di asilo. Inoltre, affinché il sistema sia efficiente, occorre introdurre una forma di riconoscimento reciproco delle decisioni in materia di asilo. In effetti, ciò consentirebbe il diritto di libera circolazione, la possibilità di unirsi alla famiglia e il raggiungimento di una migliore integrazione nella società per i migranti, come fossero a tutti gli effetti cittadini Europei. Inoltre, nel suo lavoro Gliatta è d'accordo sul punto di risiedere liberamente nell'UE, sottolineando il concetto

di "liberamente", perché un sistema di protezione può funzionare solo se si tiene conto della volontà del richiedente asilo e se, e solo se, l'Unione lavora in maniera sinergica.