BSc Thesis Seminar: Challenges to Democracy and the Rule of Law in European Politics

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Normative (in)coherence of the Common European Asylum System:

a gap between principle and practice

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Solidarity is a very demanding word because when pronounced it requires us to provide concrete actions -
Stefano Rodotà

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1. Introduction

In 2023 the European Union (EU) received more than 1.142.618 asylum requests (European Union Agency for Asylum, 2024). These numbers represent only the tip of the iceberg of a larger and broader phenomenon. Since 2014, every year, thousands of thousands of people have attempted to reach the European territory, traversing extremely dangerous paths, in the hope of a better future (Reddy & Thiollet, 2023, p. 2). This sudden large influx of arrivals has brought to light the inadequacy and deficit of the Common European Asylum System (CEAS). The CEAS, the overarching framework governing the asylum and migration policies inside the EU, not only has placed an excessive burden on frontline states, attributing them the full responsibility for managing asylum requests. It has also permitted national governments to conduct illiberal and illicit practices to prevent the entrance of individuals in their territory (Servent, 2020, p. 187). Scholars have largely discussed the nature of the CEAS and its ability to confront the European migration crisis but consensus is still yet to be found.

Attempting to further the normative discussion about the CEAS, this study will investigate the coherence of the system with its guiding principle. Solidarity mentioned both in the principal EU treaties and charter represents the founding value of the asylum system. Thereby, this paper will try to answer the research question: "Is the Common European Asylum System a normatively coherent tool in light of the value of solidarity to address the European migration crisis?". To investigate normative coherence, an immanent critique, a method which uncovers whether a practice violates its normative premise, will be conducted. This paper will reveal how the CEAS is structured around two normative contradictions. First, it appears incoherent to rely on directives as a legal instrument for implementing common standards of solidarity. Directives provide great flexibility in achieving objectives, permitting violations of the guiding principle of solidarity. Second, the Dublin regulation (DR) is shown to be incoherent, considering that, even if founded upon the principle of solidarity, the regulation lacks a compensatory mechanism for the inequalities it creates. To better illustrate the normative contradictions of the European system, the Italian asylum policies will serve as a practical example.

In the next section, the paper will present a literature review of the failure of the CEAS implementation and the shortcoming of the Italian asylum policy, establishing the frame of the research. Section three will provide a definition of the value of solidarity within the EU. Afterwards, it will follow a paragraph dedicated to understand the execution of solidarity inside the Union, and an explanation of the methodology of an immanent critique. These paragraphs will lay the theoretical foundation for the analysis. Section four will conduct an immanent critique at the European level to

showcase the normative contradictions of the CEAS by itself. And, lastly, section five will utilize the Italian case to illustrate the concrete manifestations of these normative contradictions.

2. Literature review

2.1 Failure of CEAS implementation

Scholars have carried out extensive studies on the reasons for the failure of the CEAS. Authors like Hoel (2015) or Mariniello et al. (2015) believe that to have a comprehensive and exhaustive understanding of CEAS current role, structure and shortcomings, it is necessary first to examine the history and the rationales behind its development. According to Mariniello et al. (2015), the main driver for the creation of the asylum system was the 1993 realization of the single market, which abolished internal borders and introduced the free movement of goods, capital, services and people among member states (MS) (pp. 2-3). The openness of the internal frontiers, led MS to strengthen the external border control and to increase collaboration in the asylum field (Hoel, 2015, p. 19). For this reason, in the same year, EU states signed the Maastricht treaty establishing migration as an area of EU cooperation. Even if, initially, decisions regarding asylum were made only via unanimity agreements among states, after a short period of time, with the Amsterdam treaty, a shift towards a more supranational form of decision-making was introduced, delegating greater authority to the Commission (Hoel, 2015, pp. 19-20). In parallel to the enhancement of the EU jurisdiction over migration policies, MS during the Tampere EU Council Summit established the CEAS, creating an area of common standard and cooperation for the fair treatment of asylum seekers. In 2004, The Hague Programme was initiated, imposing standards of minimum harmonization between national legislations in order to prevent an influx of people in specific countries. The results of the Programme were insufficient and subsequently with the Stockholm Programme (2011-2014), the Commission introduced a new set of reforms for the CEAS directives and regulations, still in force today (Lavanex, 2023, p. 336). Building upon the history of CEAS, Lavenex (2018) demonstrates how the asylum system shortcomings are the result of a governance crisis. He argued that the EU suffers from a mismatch between the desire to be a Union of values and the political/institutional limits imposed. He affirms that the asylum system suffers from an ‘organized hypocrisy’ between its protectionist instrument and the MS unwillingness to utilize them (p. 2). Other scholars such as Hatton (2023) shifted the focus of discussion, attributing the malfunctioning of the CEAS to the different asylum recognition rates within the EU. As the author proves, the system allows states to have their own asylum recognition policy, resulting in a mixed and diverse European asylum landscape. The consequence of the divergent recognition rates is the ‘asylum lottery’ (Hatton, 2023, p. 16).

According to Betkey (2017), 'asylum lottery', the uncertainty of your condition due to different treatment in each country, is one of the main deficits of the Union response to the migration crisis (p. 1). Expanding on this issue, Becker & Hagn (2017) proved how disparities are not only confined to asylum rights but also to the receiving conditions, including access to the job market, accommodation and levels of assistance provided to asylum seekers (pp. 22-24). These differences create a highly varied scenario inside the EU, in which states race to the bottom to implement the worst asylum condition, neglecting the needs of individuals, to discourage the entrance in their country (Toshkov & De Haan, 2013, p. 64). The natural consequence of the aforementioned issue is the increment of secondary movements between members, as explained by Lott (2022). Defined by the Radjenovic (2017) as "refugees or asylum seekers leaving the country they first arrived to go somewhere else" (p. 2) secondary movement represents the clandestine movement across Europe in search of better conditions or as an alternative to avoid the long waiting and/or failure of the Dublin transfer (p. 2). Examining the failure of CEAS, Vellutti (2014) offers an additional position, combining the arguments reported above. The author concludes that the system fails to achieve both its two main aims: protection and cooperation. Protection of asylum seekers as stated in the EU charter, and cooperation between states to ensure the overall control of the external borders of the Union (pp. 20-22).

2.2 Failure of Italian asylum policies

Italy is one of the countries most impacted by the European migration crisis. The country has found itself stuck in a terrible impasse. On the one hand it has received a number of asylum requests much superior to its capabilities, on the other, asylum seekers are being mistreated, confined in centers lacking basic necessities (Asylum Information Database, 2023, p. 127). For this reason, the current Italian migration crisis and its asylum policy have been subject of extensive examination (Bello, 2021; D'Angelo, 2017). Authors as D'Angelo (2017) focused on the inadequacy of the system as a whole. Describing systematically the various phases of the Italian migration scheme, he demonstrated how all the different reception centers are characterized by undignified and inadequate conditions, lacking the basic hygienic and sanitary standards and making it extremely difficult even for *Medecins Sans Frontières* to provide aid (pp. 2219-2221). Savino (2016) centered the attention on *Centri di Prima Accoglienza e Soccorso*, illustrating how asylum seekers are *de facto* detained in those structures until the accomplishment of the hotspot procedure. With no legal provision or judicial oversight, the system violates the most basic *habeas corpus* guarantee, depriving individuals of their freedom of movement (pp. 988-989). Prioritizing the analysis of the condition at the individual level, Esposito et al. (2002) shed light on the physical and mental damage experienced by women due to persistent

injustice and degrading circumstances (pp. 8-9). Other scholars as Bello (2021), instead, attributed the shortage of the Italian migration management to its unfair and discriminatory laws. Taking as instances the Bossi-Fini law, which extended the possibility of detention and the use of reception centers, and the Salvini decree, which portrayed migrants as a threat to the nation, the paper proved how the legal system is based on biased provisions that place asylum seekers in disadvantaged positions (pp. 457-461). Following the same line, Marceca et al., (2018) stressed how the poor possibility of integration into the nation is strongly linked to the deficit of the legal system (pp. 145-146). An alternative group of authors investigating the Italian migration crisis turned to the inefficiency of the transfers of the Dublin regulation, reporting that in 2022 only 8% of requests culminated with the actual relocations (European Council on Refugee and Exiles, 2023).

3. Theoretical framework

3.1 European Migration Crisis and Solidarity

To properly answer the research question, it is necessary to first define the key terms. The expression 'European migration crisis' has gained widespread usage among policy makers and observers to describe the emergency situation started in 2014/2015 and continuing till present day (Kriesi et al., 2024, pp. 3-4). It is characterized by the failure and breakdown of the European asylum system and EU institutions in managing the growing influx of migrants and asylum seekers on European soil (Lafleur & Stanek, 2016, p. 4; Hansen et al., 2021, p. 367). According to the OECD (2015) report, the current crisis, rather than being focused on the legal migration system, is putting at the center of the dispute the effectiveness of CEAS regarding the management of 'refugees' and 'asylum seekers' (p. 4).

Moving forward to the description of coherence, Schiavello (2001) defined it as the correspondence between principles and actions (p. 240). Hence, for the purpose of this paper, the normative coherence of the CEAS will be evaluated by analyzing its structure and implementation vis a vis the value of solidarity, supposed to be upheld and fostered.

Scholars are largely divided over the meaning of solidarity and consensus is still to be found. Authors as Nowicka (2017) defined it as a "social norm that motivates people to act in a desired way despite the fact that the action might conflict with their self-interest" (p. 385), highlighting its altruistic and emphatic instincts. Following the rationale of Nowicka (2017) and building upon the etiological cognitive studies of Tomasello (2010), Hogan (2020) affirmed that solidarity is the "human need to collaborate in efforts to reduce the suffering of the world and facilitate its flourishing"

(pp. 699-700). This definition not only points out the humanitarian spirit of solidarity, but also makes it universal in applicability ranging from the individual level, marked by intrapersonal relations, to the institutional level, characterized by relations between institutions and citizens. Since this paper will conduct an immanent critique, it is essential that the definition of solidarity is derived internally from the EU itself. Despite being one of the cardinal values of the Union, mentioned both in the Treaty of the Function of the Union (TFEU) and in the Charter of Fundamental Rights, solidarity lacks an exact legal characterization within the Union. The only document that provides an explicit delineation of the meaning of solidarity is the European Parliament (EP) working document of 2015, which defines it as "unity or agreement of action that produces or is based on community of interests, objectives, and standards" (p. 3), resulting to be in line with the caring and benevolent character of solidarity as reported by the two previous descriptions. For the EP solidarity encompasses two dimensions: external and internal solidarity (p. 3). External solidarity implies solidarity with a 3rd country or people not belonging to the EU who experience war or persecution. Internal solidarity, which is the one I will focus on for the purpose of this paper, means both solidarity between European citizens and third country nationals (TCNs) in the European territory, and/or between member states/EU towards other member states (p. 3). Many scholars like Karageorgiou (2016) emphasized this dualistic character of the EU internal solidarity, affirming that: "solidarity has to be understood has having two dimensions: the interstate one, related to the relocation of responsibility between MS and the state-individual dimension, concerning the assistance shown by state directly to individuals in need" (p. 197). The author states that solidarity is the cooperation between states at the financial and procedural level (interstate solidarity) in order to ensure the protection towards individuals in need (state-individual solidarity) (p. 198).

To best understand the implementation of solidarity between states in the context of asylum policies I will refer to the Stockholm Programme (2010-2014), adopted by the European council. Paragraph 6 of the Programme affirms that "the CEAS should be built around a spirit of solidarity that can adequately and proactively manage fluctuations in migration flows and address situations such as the present one at the Southern external borders" (p. 28)", uncovering the essence of solidarity between MS, so ensuring that support is given to those member states which carry a heavier burden of responsibility than others. In the context of migration and asylum, Straehle (2020) further elaborates on the definition of solidarity, expanding on the relationship between the state and the individual. He states that: "solidarity is the vehicle through which we express our respect and moral concern for the welfare of refugees" (p. 6), stressing the relevance of human condition. Building upon the latter depiction, The European Council on Refugees and Exiles (2013) declared that: "solidarity cannot be reduced to the obligation to adopt a series of measures that would solely serve Member

States' interests and needs, but it should also serve the purpose of a common policy that is fair towards third country-nationals" (pp. 13-14). Highlighting in this way, the second dimension of solidarity studied in this paper, solidarity towards individuals (p. 14).

3.2 Solidarity within the EU

Solidarity has always played a pivotal role in the development of the EU, fostering unity, fraternity and forging the identity of the Union (Ferrera, 2020, p. 107). Not only it is a prerequisite for integration, but it operates as a principle to achieve common goals, encompassing both responses to dangers and joint rights and obligations (Kotzur, 2017, p. 40). It represents the mechanism through which we share the burdens of each other's misfortune as it materializes (Sangiovanni, 2013, p. 231). A sort of moral obligation individuals might have towards other members in case of necessity (Kotzur, 2017, p. 40). Solidarity requires A to help B, regardless A's involvement in the cause of B's suffering. It is the relations that commit individual mutual help to each other in case of emergency (Grimmel & Giang, 2017, p. 3). Thus, solidarity should be implemented as mutual acceptance, cooperation and support in times of need (Banting & Kymlicka, 2015, p. 2). The value of solidarity proves itself to be imperative for the sustainment of a just institution. Due to the great diversity inside the EU societies, the practice of solidarity characterized by mutual tolerance and support for human rights is necessary for the maintenance of just institutions as the EU (Banting & Kymlicka, 2015, p. 2). In the context of social modernization, solidarity is required to adjust the overstretched capacities of an existing political framework, trying to respect and fulfil the promise inherent to the political system (Habermas, 2013, pp. 9-11).

For this reason, when applied to the sphere of migration, asylum and border, solidarity should be understood as a structural requirement rather than an emergency driven response (Tsourdi, 2017, pp. 662-663). It should be adequately and systematically embedded in the system administration mode, avoiding the solely emergency-driven execution. The latter is not sufficient to achieve the 'fair sharing' of responsibility and to respond to the CEAS needs, which are structural rather than exceptional in nature (Tsourdi, 2017, pp. 662-663). Solidarity provides not only a general framework, over which to structure political deliberation and decision, as a sort of programmatic guidelines. But it especially constitutes a structural central imperative, a real primary law duty that requires the Union to act to guarantee suitable outcomes (Lax, 2017, pp. 751-752). From this perspective, solidarity imposes a real continuous 'sharing' of responsibilities and protection duties rather than their mere 'allocation' (Lax, 2017, pp. 751-752). Following this reasoning, solidarity implies a greater level of commitment, going beyond the narrow institutional obligation, encompassing the perception of the

actual needs and an effective response (Thym & Tsourdi, 2017, pp. 618-619). Member states should manifest a sincere willingness to support each other for a fair burden sharing. Under the form of horizontal cooperation, solidarity is executed by relocating asylum seekers from an overburdened state to one with a minor pressure (Marini, 2019, p. 66).

Being a multifaceted concept, solidarity is not only implemented as reciprocal state aid, but it implies also considering and executing the interests and preferences of the asylum seekers, respecting their rights (Mitsilegas, 2014, p. 198). With the entry into force of the Lisbon Treaty, the EU renewed its commitment to the respect of fundamental values. In light of this constitutive promise, solidarity should not be intended as focused exclusively on the needs and interests of states, as in this case it would result as a state centered securitized principle. The risk of such a conception (as history has shown) is that the attention is only cast on the necessity and preference of member states without taking into account the position of the asylum seekers, breaching the commitment to fundamental values, neglecting the right of dignified life. Instead, solidarity should be understood as individual centered with the full acknowledgement and consideration of the recipient preference, respecting his right of life, and not only by addressing the security concern of states (Mitsilegas, 2014, p. 198). Falling into the trap of solidarity as a state centered securitized principle, it results in the implementation of an alliance against a common threat. If solidarity is exclusively understood through this lens, it fails to achieve its primary goal of human protection, neglecting the necessity of the recipients (Karageorgiou & Noll, 2022, pp. 152- 153). As support among individuals is the ultimate goal of solidarity, the latter increases the overall standard for TCNs protection, fulfilling the CEAS primary goal of reciprocal acceptance and assistance in times of crisis (Gray, 2017, pp. 24-25).

3.3 Immanent critique

This paper will try to answer the research question: “Is the Common European Asylum System a normatively coherent tool in light of the value of solidarity to address the European migration crisis?” through the lens of political theory. It will conduct an immanent critique analysis to demonstrate the normative incoherence of the structure and implementation of the CEAS with the value it is supposed to uphold. Deriving the definition from Stahl (2013) an immanent critique is a type of social critique that examines social practices in accordance to standards that are internal to those practices themselves (p. 7). It is a critique which draws its standards from the object it criticizes, rather than approaching society with independent external norms or predeterminate ideological commitments (Nicolaïdis, 2012, p. 357). Stahl (2013) differentiate between a hermeneutic and a practice-theoretic immanent critique. While both aim to discern internal contradictions, the former refers to the

examination of the self-understanding of the individual, and the latter turns to the analysis of behaviours and practices (pp. 11-20). To fulfill the objective of this paper the second one will be adopted. A practice-theoretic immanent critique discovers the tension and inconsistency internal to a political practice. It derives its standards internally from legal and political praxis to then juxtapose them to discern tensions, aspirations and conflicts within this observed world (Stahl, 2013, pp. 11-20; Nicolaïdis, 2012, p. 357). Following this method, the structure and implementation of CEAS appear to be normatively incoherent since it undermines the value of solidarity that is supposed to uphold and execute.

In line with the spirit of an immanent critique, the normative coherence of the CEAS has to be tested against its internal values, which draw their normativity from internal legal and political practices (Theuns, 2024, p. 64; Nicolaïdis, 2012, p. 357). For this reason, this study will assert the existence of solidarity as a social/legal practice inside the EU, through the examination of the treaties and regulations of the Union. To begin with, solidarity is immediately highlighted in the preamble of the Charter of the EU fundamental rights which clearly states that: "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity". Additionally, the value is founded as well in the art. 3 of the Treaty on European Union (TEU): "The EU shall promote economic, social and territorial cohesion, and solidarity among Member States", the latter underlines the unity and cooperation between member states. Another important legal source for the commitment to solidarity is art. 67.2 TFEU, which stipulates that: "The EU shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals" recalling the reciprocal support among EU members.

Regarding solidarity towards the individual art. 2 TEU affirms that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". Art. 78 TFEU demands that: "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", requesting an adequate level of assistance toward TCNs. Beside the articles, the preamble of CEAS directives and regulations appears highly significant declaring: "The European Council, at its meeting of 10-11 December 2009, adopted the Stockholm Programme which reiterated the commitment to the objective of establishing by 2012 a common area of protection and solidarity based on a common asylum procedure and a uniform status

for those granted international protection based on high protection standards and fair and effective procedures" and thus evoking the support and acceptance of asylum seekers.

4. *European level*

4.1 CEAS Description

A careful and accurate review of the European asylum system is imperative to discern its normative contradictions. The CEAS is the overarching scheme governing the asylum and migration policies inside the Union. Its final aim is to set out common standards of solidarity and state cooperation to ensure that asylum seekers are treated equally in an open and fair system (Mitsilegas, 2014, p. 199).

The system encompasses different legal instruments. It is composed by 3 directives, 2 regulations and 1 agency. Directives are a *sui generis* form of EU legislation. They set an objective and allow member states to stipulate their own laws to achieve the aim. In contrast, regulations are a binding legislative act that has to be applied uniformly across the EU (Zhelyazkova et al., 2023, p. 443). The first directive, the "Asylum Procedure Directive", establishes general rules for registering and lodging applications for international protection. It leaves, however, great discretion regarding procedures for asylum requests, appeals in court and criteria for the listing of safe third countries for refoulement. The second directive is the "the Reception Conditions Directive". The latter aims to ensure common standards of reception conditions throughout the EU. It sets out provisions for access to housing, food, clothing, education, etc., allowing flexibility when deciding the condition for the asylum seekers detention and the possible alternatives to detention. The last directive is the: "Qualification Directive" which determines the criteria for the qualification and status of third country nationals. One of the cardinal pillars of the CEAS is the "Dublin Regulation". It designates the member state responsible for the evaluation of the asylum application, based on the general provision of the first country of entrance as the immediate responsible one. Lastly, the "Eurodac Regulation" is the general regulation to support the identification of the member state responsible under the Dublin regulation. The "European Union Agency for Asylum" is the agency responsible for assisting the implementation of the asylum system as a whole (Mitsilegas, 2014, p. 199).

In 2016, the EU Commission issued a new set of proposals to reform the shortcomings of the CEAS, which still need to be voted on by the Council to eventually come into force. Even if the proposal represents a progress towards a proper asylum system focused on the burden sharing between countries, the amendments still continue to display the same structural incoherence and inconsistency as the previous one (Thym, 2016, p. 1545). In line with the critics outlined in this paper,

the qualification and asylum directives have been replaced by regulations maintaining, nevertheless, issues with the vagueness and generality of the text. The Reception Condition directive still keeps the status of a directive, allowing for divergencies and unequal treatment of refugees. Ultimately, a new mechanism of solidarity has been developed, but even so, the large inequalities between the system of EU members and the unfair first country scheme are still present (Thym, 2016, p. 1561).

4.2 CEAS normative contradictions

From the description of the CEAS it is already evident how the system is built upon two normative contradictions. This section will conduct an in-depth analysis of the structure of the CEAS and the execution of the Dublin regulation to demonstrate how they undermine the value of solidarity supposed to be upheld and executed.

Firstly, relying on directives to implement common standards of solidarity seems normatively incoherent with the aim of fostering solidarity towards TCNs. As described above, the nature and general formulation found in the directive permit violation of the fundamental principle of support and assistance towards TCNs, while adhering and implementing the directive's text (Dickson, 2011, p. 196). The structure of the directive, allowing for such contradictory execution, appears incoherent when compared to the standards of high assistance and support laid out in art. 78 TFEU and art. 2 TEU. Taking as an instance art. 8.4 of the Reception Condition Directive 2013/33/EU, it emerges that its formulation determines the possibility of a financial alternative to asylum seekers detention without, at the same time, providing specific details over the amount, instalments, guarantees, or timing of the transfer. This leaves substantial leeway to implement laws that may contravene the principle of support and assistance towards TCNs but remain in line with the directive itself (Dickson, 2011, p. 196). The Italian laws analyzed below will offer some concrete examples. The central issue of directives is that due to their structure and their vague and imprecise language, their enactment might be translated in violation of solidarity towards TCNs, undermining in this way the primary purpose of the CEAS (Leruth et al., 2022, pp. 5-6). A counter-argument brought by some scholars emphasized how the preference of the national legislator will influence the degree of transposition and the resources allocated (Zhelyazkova, 2013; Zhelyazkova & Torenvlied, 2011). Indeed, taking into account state intent is important when analyzing directive implementation. However, this approach risks to overlook the role of the agent and to neglect the origin of the problem, the structure of the directive itself. A critical reflection on the nature of directives sheds light on the discrepancy between the value guiding the directive and the national measure designed to achieve the result. There is a separation envisaged in and evidenced by the very character of directives, between the norm of

solidarity and support guiding it, and the structure and phrasing of the directive which allow for laws opposing the general principle (Dickson, 2011, p. 196).

Moving on, the second normative contradiction inside the CEAS concerns the implementation of the Dublin regulation. The regulation appears to be normatively incoherent with the aim of fostering solidarity and mutual cooperation between member states, as outlined in art. 3 TEU and art. 67.2 TFEU. It imposes a disproportionate burden and stress on frontline countries without incorporating a mechanism to offset the resulting imbalance, thus failing to realize the principle that is intended to uphold (Roots, 2016, pp. 9-10). Art. 3 DR declares that: "the first member state in which the application for international protection was lodged shall be responsible for examining it" creating inequalities between European countries. Following this rule, frontline states (such as Italy, Greece or Spain), being the first territory of arrival, are deemed to face greater pressure than the rest of Europe, resulting in a deeply unequal scenario and with no relocation scheme, violating the reciprocal support between members (Maani, 2018, p. 97). Art. 10 and 12 DR introduce the options of transfer of individuals to allow for family reunification and/or in case of possession of visa, which most of the time result in return to frontline countries since they are the first in which individuals are registered (Nascimbene, 2016, pp. 109- 112). Art. 29.2 DR, abuses by northern countries, allows for the rejection of the transfer of the responsibility of an asylum seeker from one state to another, rendering the host state responsible, even if it was not the originally designated one. In this way, the implementation of the whole system asserts greater pressure on border states. Without encompassing a correction mechanism, the regulation fails to execute the value of solidarity and mutual support between MS (Dreyer-Plum, 2020, p. 387).

5. Italian level

Italy serves as the perfect example to illustrate the failure and normative contradictions of the Common European Asylum System. Due to its geographical position in the middle of the Mediterranean Sea and in proximity to the African coast, between 2014-2022 the country has witnessed the arrival of more than 862,00 people on its territory, resulting in one of the country most impacted by the European migration crisis (Statista, 2024b). The national asylum system has been reported to be almost collapsing. On the one hand it has received a number of requests superior to its capabilities, on the other asylum seekers are being deprived of their basic human needs, confined in centers without sufficient assistance, and subjected to bureaucratic and administrative discrimination (Asylum Information Database, 2023, p. 127). As such, this paper refers to the current Italian crisis to expose the normative contradictions of the CEAS and how they are translated into the national

system. The first part will be centered on the analysis of 3 Italian laws to prove the incoherence of directives to execute solidarity and support towards TCNs. The second section will delve into the examination of the Dublin procedure to uncover the disproportionated burden faced by Italy and the lack of any compensatory mechanism included in the system, resulting in the violation of the principle of solidarity and cooperation between member states.

5.1 CEAS contradiction in the Italian asylum policy

The first law to be analyzed is the "Decreto legge 14 Settembre 2023",[1]which clearly specifies that the fee to be paid to avoid the detention in case of belonging to a safe third country corresponds to 4.938,00 euro. This law is the transposition of the art. 8.3 of the Reception Condition Directive 2013/33/EU, affirming that "Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law". It appears evident how *prima facie* the Italian law adheres to the EU directive, while *de facto* it violates its general principle of support towards TCNs. By imposing as an alternative to detention such a significant amount of money, the Italian law is breaching the spirit of solidarity and help towards TCNs, setting an unrealistic alternative. The aforementioned directive, due to its nature and to the vagueness of its phrasing, leaves a substantial leeway to the Italian law to contravene the overarching principle of support and assistance (Dickson, 2011, p. 196). Recalling the standard of solidarity and protection of TCNs, reported in art. 78 TEU and in the preamble of directives, the directive, by stating the option of financial guarantee without further specification, over the maximum threshold or the possibility of a third party making the payment, results in an implementation which violates its own standards. The inconsistency of the Italian law with the spirit of the directive was even noticed by the Italian Constitutional Court, referring the case for further clarification to the European court (Corte Suprema di Cassazione, 2024).

The second Italian law to be reviewed is the "Decreto legge 25 Marzo 2023".[2] The latter stipulates a list of safe third countries including Tunisia and Nigeria, lately flagged for violation of human rights and fundamental freedoms (Sandra, 2022; Amnesty International, 2023; Josua, 2023). This law is another instance of the incoherence of directives as a legal tool to implement common standards of solidarity towards TCNs. Art. 38 of the Asylum Directive 2013/33/EU declares that MS may apply

[1] Decreto legge 14 settembre 2023: "L'importo per la prestazione della garanzia finanziaria di cui all'art. 1 del presente decreto è individuato, per l'anno 2023, in euro 4.938,00".
[2] Decreto legge 25 Marzo 2023: "Ai sensi dell'art. 2-bis del decreto legislativo 28 gennaio 2008, n. 25, sono considerati Paesi di origine sicuri: Albania, Algeria, Bosnia-Erzegovina, Capo Verde, Costa D 'Avorio, Gambia, Georgia, Ghana, Kosovo, Macedonia del Nord, Marocco, Montenegro, Nigeria, Senegal, Serbia e Tunisia".

the safe third country concept when they are satisfied that a person in the concerned country will not be threatened on account of race or religion and no serious harm will be inflicted[3]. Even if the directive provides some sort of guidance regarding the rules for the nomination of a safe third country, its nature and vagueness still allow Italy to transpose it according to its own benefit, neglecting the standard of support towards asylum seekers. In light of the standard of solidarity reported above, the choice of directive to implement solidarity and support is contradictory. Italy is, on the surface, complying with the request of the directive. Yet, in practice, it is infringing the guiding principle of solidarity towards TCNs, mentioning countries home to the majority of asylum seekers, even if caught in violation of human rights, only to facilitate the repatriation procedure (Giuffré et al., 2022, pp. 571-572).

The Orlando-Minniti law is the last Italian law to be examined to prove the normative incoherence of the directive to implement solidarity towards TCNs. Art. 13 of the Orlando-Minniti[4] law abolishes the possibility of appealing to the Court of Appeal, in case of rejection of the asylum request. The Italian law specifies that decisions of the Civic Court regarding asylum cannot be appealed to the Court of Appeal, as any other legal case, but only to the Court of *Cassazione*. In this way, the decree limits the stage of jurisdiction for asylum seekers only to two levels while maintaining the three stages for any other legal matter, establishing a very disadvantaged environment for asylum seekers (European Council on Refugees and Exiles, 2017). Similar to the previous two laws, the last one is an empirical evidence of how the nature of directive allows for implementation against its own spirit. Art. 46 of the Asylum Condition Directive 2013/33/EU states the right of effective remedy before the court: "Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal". The directive does indeed elaborate a bit further on the provision ruling the appeal, the timing of the decisions, or the assistance given to the asylum seekers. Nevertheless, the structure and general character of the directive still leave freedom to Italy to execute according to its own purpose,

[3]Article 38 2013/33/EU Directive: 1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned: (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) there is no risk of serious harm as defined in Directive 2011/95/EU; (c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected; (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

[4] Legge Orlando-Minniti, Art. 13: "Entro quattro mesi dalla presentazione del ricorso, il Tribunale decide, sulla base degli elementi esistenti al momento della decisione, con decreto che rigetta il ricorso ovvero riconosce al ricorrente lo status di rifugiato o di persona cui è accordata la protezione sussidiari. La sospensione degli effetti del provvedimento impugnato, di cui al comma 3, viene meno se con decreto, anche non definitivo, il ricorso è rigettato. La disposizione di cui al periodo precedente si applica anche relativamente agli effetti del provvedimento cautelare pronunciato a norma del comma 4. Il termine per proporre ricorso per cassazione è di giorni trenta e decorre dalla comunicazione del decreto a cura della cancelleria, da effettuarsi anche nei confronti della parte non costituita".

neglecting the standard of solidarity towards TCNs. The Orlando-Minniti law is apparently implementing the directive, granting the right of an effective remedy before the court, but, in reality, it is imposing an extremely complicated and disadvantaged procedure to TCNs, violating the guiding principle of support.

Moving on to the evaluation of interstate solidarity, the case of Italy will illustrate the normative incoherence of the Dublin regulation. The latter establishes considerable disparities between countries, without foreseeing a compensation mechanism (Dreyer-Plum, 2020, p. 387). As reported above, the art. 7 of the regulation affirms that the first country of entrance of asylum seekers should be the responsible one for evaluating their applications. Later on, art. 10 stipulates that: "Where the applicant has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing" while article 12 affirms that: "Where the applicant is in possession of a valid residence document, the Member State which issued the document shall be responsible for examining the application for international protection". Following the system, relocation of individuals should be conducted to reunite family members and if the subject is in possession of a visa/residence permit from another state. Additionally, art. 29.2 DR states that, if the transfer fails within the six-month time limit, the member state responsible is relieved of its obligation, and the responsibilities are then transferred to the initial requesting state. Without including any type of compensatory measure, the whole procedure puts greater burden on Italy as a frontline country, violating the principle of mutual support and cooperation between states (Roots, 2016, pp. 9-10). Being Italy, in the majority of the cases, the first country of arrival, only between 2013–2022 the number of asylum requests submitted exceeded 800,000 (Statista, 2024a). Analyzing the outcome of the different provisions for the Italian country, it is evident the failure of the whole procedure in the implementation of solidarity between MS. In the first place, following art. 7 due to its geographical position, in 2016 it received 121.185 asylum requests compared to France for example, which only received 76.790 requests (Eurostat, 2024a). Examining the data from 2013 to 2017 Italy, together with Greece, experienced the highest number of asylum requests, around 500,000, facing an overwhelming strain on its capacity (Statista, 2024a). Proceeding to evaluate the result of arts. 10/12/29 DR, Italy has been reported accepting 38,574 transfer requests from other member states, due to family reunification or visa possession, between 2013 and 2021 (Ministero degli Interni, 2022). During the same years, it has only conducted 4,178 transfers to other countries, due to the rejection of the requests by partner states (Ministero degli Interni, 2022). The number of effective transfers conducted from Italy to other state partners is less

than 11% when compared to the number of incoming relocations over the Italian territory (Ministero degli Interni, 2022). The current scenario clearly is in opposition with the standard of solidarity and reciprocal support, outlined in the EU treaties. As Italy is one of the border states, it faces a significant pressure compared to the rest of Europe, without receiving any help from other member states. One of the main characteristics of the definition of the concept of solidarity according to the Stockholm Programme (2010-2014), is that it has to be understood as a "proactive management of migration flow to address the situation at the southern external borders". The above reported data demonstrate how the implementation of the Dublin regulation in the Italian case violates this principle, assigning to the country greater burden and lacking any relocation mechanism for the reciprocal support (Maani, 2018, p. 98). The Dublin regulation does not include any mechanism to compensate for its imbalance. On the contrary, it is based on geography as a principle to guide the allocation of responsibility (Küçük, 2016, p. 448). Using geography as a principle to execute solidarity between member states is self-contradictory. Naturally Italy, because of its position, will experience greater challenges compared to mainland non bordering countries (Dreyer-Plum, 2020, p. 387). Instead of using criteria like the GDP or population as allocation criteria, the regulation is based upon the geographical position of states. The result is a highly unfair system towards geographically disadvantaged countries like Italy, breaching the idea of solidarity between member states and burden sharing (Küçük, 2016, p. 448). As a result of art.7 and the first country of entrance provision, Italy faced a higher request of 'take back' when compared to other European countries, for example Denmark which in the same period of time, between 2013 and 2022, only received 1,915 take back requests (Eurostat, 2024b). This is a direct consequence of the Dublin scheme. As Italy is a frontline country, members of a family are being first registered there and then, when joined by the other components of the family even if arriving in another country, they are immediately sent back to Italy (Nascimbene, 2016, pp. 109- 112). The pressure of being a frontline country is, in this way, exacerbated by different provisions.

Another reason for which the implementation of the Dublin regulation violates solidarity between member states, is that it is only based on the negative recognition of the asylum right (Mitsilegas, 2017, p. 722). Negative recognition means that the legal status of rejected asylum seekers is acknowledged by all EU members. Conversely, positive recognition is confined to the state granting the asylum status. As a consequence, asylum rights, such as access to residence and work, are only recognized in the nation granting them, and not in the other EU countries (Aru, 2022, p. 1425). Being based only on negative recognition it violates the principle of mutual recognition and solidarity between member states (Mitsilegas, 2017, p. 722).

Grounded on fallacious criteria, as the geographical one and lacking an effective relocation procedure, the entire scheme of Dublin regulation appears highly incoherent with the idea of cooperation and support between member states, failing on its own standard of solidarity and cooperation when being implemented. Even if some emergency measures have been taken, such as the emergency relocation mechanism, they represent only temporary allocation resolutions, which eventually proved to be inefficient as well (Giacomo & Roos, 2017, p. 2). The relocation mechanism initiated by the Commission entailed the transfer of 40,000 individuals between 2015 and 2016 from Italy and Greece to other European countries based on the GDP and population of the host countries. The policy was a failure since at the end of 2017 the relocations from Italy were only 11,400, and they would only be executed if the EU recognition rate for international protection[5] for the nationality of the individual was above 75% (UNHCR, 2017). This means that only Syrians and Eritreans were eligible to be relocated, who, nevertheless, represented only 3.6 % of the arrivals in Italy in 2017 (Giacomo & Roos, 2017, pp. 2-3).

In conclusion, through the examination of the Italian case, the normative contradiction of the Dublin regulation appears evident. Built upon geographical criteria, the provision of the first country of entrance as the responsible one, the family reunification and the rejection of transfer, result in a scenario in which Italy, as a frontline state, faces a greater pressure compared to other European countries. Hence, in absence of any relocation mechanism, the Dublin regulation violates its own standard of reciprocal cooperation and support between MS.

6. Conclusion

The 2014 unprecedented arrival of refugees in Europe uncovered the deficit and inadequacy of the CEAS (Peters et al., 2023, p. 1). Instead of implementing a joint cooperative scheme, frontline countries like Italy were left alone, facing an excessive pressure on their national asylum systems (Menèndez, 2016, pp. 388-389). Additionally, the status and safeguard of asylum seekers, outlined in the CEAS, were violated by the establishment of restrictive and discriminatory rules. This emergency situation creates the opportunity to examine the normative coherence of the asylum system with the value of solidarity supposed to be upheld and fostered. Through an immanent critique

[5] The EU recognition rate for international protection represents the proportion of positive decisions on application for international protection over the total number of decisions issued (European Commission, n.d.).

analysis, this paper revealed how the asylum system is built around two normative contradictions. First, it appears incoherent to rely on directives as a legal tool to implement common standard of solidarity towards TCNs. The nature and vagueness of directives permit executions that violate the overarching principle for secondary ends. The Italian laws, on the surface resulting as implementing the directive but *de facto* subjecting asylum seekers to institutional and judicial discriminations, are concrete examples of the incoherence of directives. Second, the Dublin regulation is shown to be incoherent as it advocates for mutual support and solidarity between MS, but it lacks a relocation or compensatory mechanism for the imbalances it creates. Once again, the greater pressure faced by Italy, with no adjustment scheme with other EU countries perfectly exhibits this phenomenon.

However, some limitations should be acknowledged within this paper. The critical analysis conducted above highlights the normative contradictions of the asylum system, without advancing an alternative solution. Although, this thesis does not directly propose a resolution for the normative incoherence of the CEAS, it lays the ground for further reflections on a new structure for the European asylum system. Furthermore, this study lacks an extensive examination of the relation between fairness and solidarity. It would be interesting for future researches to investigate how fairness shapes the understanding and implementation of solidarity in asylum policies.

On the eve of the negotiations over the new CEAS reforms, this thesis carries significant implications for EU policy makers and legislators. By illustrating the normative contradictions of the asylum system it paves the way for the establishment of a new permanent relocation mechanism and more precise provisions to safeguard refugee rights.

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