European Studies – Master of Arts

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The Value of European Solidarity Within the Dublin Regulation

An Investigation on the Evolution of the Concept

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ABSTRACT

The refugee crisis that occurred in 2015 proved to be a historical failure for the Dublin Regulation, and it demonstrated both to policymakers and public opinion that the account of solidarity upheld was strongly outdated. If the European Union truly is a community based on shared values, then axiological changes should also result in institutional changes.

Acknowledging that no radical transformation of the account of solidarity has occurred since then, the aim of the following thesis is to investigate the extent to which the concept of European solidarity has evolved within the Dublin Regulation, adopted in 1997 and later amended in 2003 and 2013. Addressing this research question means investigating the phenomena of institutional variation and stagnation, for what concerns the concept of solidarity. Moreover, it is argued here that the results attained by the research may also orientate future strategies of revision.

With this in mind, the research adopted the institutional theory of Evolutionary Institutionalism (EI). Compared to the traditional theories of Rational Choice Institutionalism (RCI) and Historical Institutionalism (HI), EI is regarded as better suited for addressing the research question.

Following the introduction of the concept of solidarity (Chapter I), the theory (Chapter II) and the methodology (Chapter III), Chapter IV investigates the findings of the research: the evolution of the Dublin Regulation's content, together with an analysis of its factors of development. Chapter V, instead, studies the evolution of solidarity, and applies the EI's theoretical lenses to the institutional setting of the Dublin Regulation.

In terms of results, the following research will demonstrate that, despite having achieved material progress in ensuring solidarity, the Dublin system is still deficient. Nevertheless, this does not confute the fact that an evolution of the concept occurred, as displayed by the fracture emerged between the 'official' account of solidarity, upheld by the Regulation, and a 'substratum' of background papers and documents, behind it. Furthermore, the research will provide an explanation for institutional stagnation, by detecting an unbalance of power and a lack of interaction between the European Council and the European Commission.

KEY-WORDS: Solidarity, Values, Institutional Theories, Dublin Regulation, Migration & Asylum policy, Institutional Evolution.

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Chapter I – Introduction

1.1 – Overview of the Topic

During public speeches, diplomatic events, or plenary sessions of the European Parliament, it is quite common to hear that the European Union (EU) is a community based on shared values, such as justice, inclusion, and democracy. Likewise, another crucial one is that of solidarity, as representative of an alleged togetherness that does exceed mere cooperation between the Member States.

Solidarity has been extensively employed in the area of Migration and Asylum: a Union that shares its internal frontiers needs concerted actions and mutual help in the handling of migrations. The institutional setting within which the value has been mainly advocated is that of the Dublin Regulation: the document outlines a set of criteria to determine which Member State within the EU should be considered as responsible for the examination of an asylum application, submitted by either a third-country national or a stateless person.

The Dublin Regulation, which is regarded as the cornerstone of the Common European Asylum System (CEAS), has attracted a lot of criticism throughout the years. The major inconsistency displayed by the system is a lack of measures apt to achieve fairness in the process of burden-sharing (that is, a more balanced distribution of responsibilities between the Member States). This deficit of solidarity has been exacerbated by the refugee crisis occurred in 2015. Since then, the account of solidarity upheld by the Regulation has been regarded as outdated and in need of a radical revision.

If we assume that the EU is based on shared values, then potential alterations in our perception of values should also result in institutional changes. Nevertheless, it is far from being clear whether this occurred. Thus, the following study aims at understanding to what extent the account of solidarity has evolved within this institutional setting.

The following research does not aim at being a descriptive review of all the occurrences of solidarity within the Regulation: instead, it aims at understanding the reasons behind either its evolution, or stagnation. Furthermore, the study is nor an investigation of European solidarity as a mere philosophical concept, since the research does not address the value *per se*, but the manner in which it has been materially upheld by the institution. This strategic overlap also illustrates the relevance that this work has for the MAPES programme and its interdisciplinary

nature: while drawing stimuli and insights from the humanistic subject of philosophy – as any investigation on values and ideational forces would do – we argue here that the research always maintains a focus on its concrete and material implementation, by targeting institutions. Thus, the study relies upon political science and political theories of integration.

The first chapter of the research will aim at framing the value of solidarity within a specific historical and philosophical context, since confusion and ambiguity loom around its definition. Therefore, the study will start by introducing the value from a historical perspective (section 1.2), intending to highlight how interwoven the concept is with Europe.[1] Section (1.3) will display its philosophical and normative meanings. Thereafter, section 1.4 will dig into the EU context, providing a justification for the use of solidarity in this instance. Section 1.5 will get to the heart of the research, by outlining how the issue of Migration and Asylum is relevant for the value. Lastly, section 1.6 will better delineate the research question.

1.2 – Solidarity in Europe: a Historical Overview

The roots of solidarity are deeply embedded within Modern Europe.[2] Despite the Roman origins of the concept[3], the principle of solidarity only acquired relevance with the French Revolution, by the end of the eighteenth century. The notion developed in contrast to the religious account of 'charity', which provided one-sided support to the needy, in exchange for an implicit submission to a vertical, hierarchical power.[4] Contrary to this, French *solidarité* approached the revolutionary principle of *fraternité*[5], becoming both a claim of horizontal equality and a right of material support for society's worst-off. In the following years, studies over solidarity firstly appeared in France and then in Germany and England[6], highlighting its different facets.

In France, the interest in solidarity remained purely academic: intellectuals such as Pierre Leroux (*De l'humanité*, 1840), Auguste Comte (*Système de politique positive*, 1852), Émile Durkheim (*De la division du travail social*, 1893) and Léon Bourgeois (*Solidarité*, 1896) all

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[1] It goes without saying that solidarity has been also linked to other histories, regions and struggles (e.g. African Societies). Nevertheless, this exploration therein goes beyond the scope of this research.

[2] Sangiovanni, Andrea. "Solidarity as Joint Action: Solidarity as Joint Action". Journal of Applied Philosophy 32 (4), 2015: 340–59.

[3] Bayertz, Kurt. "Four Uses of "Solidarity"" in *Solidarity*, edited by Bayertz, Kurt, 1999.

[4] Metz, Karl H. "Solidarity and History. Institutions and Social Concepts of Solidarity in 19th Century Western Europe" in *Solidarity*, edited by Bayertz, Kurt, 1999.

[5] Laitinen, Arto, and Anne Birgitta Pessi, eds. Solidarity: Theory and Practice. Lanham: Lexington Books, 2014.

[6] Stjernø, Steinar. Solidarity in Europe: The History of an Idea. Cambridge, UK; New York: Cambridge University Press, 2005.

analyzed the sociological, legal, and political-philosophical implications of solidarity. The reason why the concept did not translate into politics forthwith was that "both the liberals and the socialists were deeply divided in their attitudes towards it".[7]

Conversely, England and Germany immediately witnessed solidarity acquiring political relevance. In Great Britain, the concept of solidarity started to call into question the sacred space of individual freedom and the long-established tradition of British liberalism.[8] This led to the inception of the so-called 'New Liberalism', steered by Leonard Hobhouse: the current shifted the focus from individual liberties to collective responsibilities.

While in Great Britain the quest for solidarity led to a fracture within the mainstream political order, the German encounter with solidarity followed yet another path, since the concept was absorbed by the polity, in the name of continuity. The *sociale Frage* (i.e. social question) here dealt with the recognition of workers' rights by the State, and the rise of a so-called *Sozialpolitik* became a way to ensure the class struggle would be managed 'internally'.

Simultaneously, the concept of solidarity was also embraced by the Catholic Church likewise, as a way to provide a Christian alternative – the Christian Social Teaching - to the binomial Socialism-Liberalism. Initiated by the encyclical *Rerum Novarum* (1891) by Pope Leo XIII, the thought was then developed by Heinrich Pesch (*Solidarismus*, 1905), who introduced the concept of solidarity in lieu of the Aquinian 'charity' or the Aristotelian 'friendship'.[9] Furthermore, Max Scheler contributed to the subject in its *Formalism in Ethics and a Non-Formal Ethics of Value* (1913-1916).

The proximity between Catholic thought and solidarity will stand firm through the twentieth Century, as illustrated by the Polish *Solidarność* movement created in Gdańsk in 1980 – in which the catholic concept was converted into a rallying cry for workers' strikes – and by the encyclical *Sollicitudo rei socialis* (1987) by Pope John Paul II.

An important observation can be drawn from this historical overview: the analysis showed how the concept was capable of evolving through time and adapting to the different demands posed by the historical and social evolutions. Solidarity has been a sociological matter of study (France), a principle of rupture in the liberal tradition (Britain), a symbol of class

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[7] Metz, Karl H. "Solidarity and History. Institutions and Social Concepts of Solidarity in 19th Century Western Europe" in *Solidarity*, edited by Bayertz, Kurt, 1999, p. 197.
[8] Ibid.
[9] Beyer, Gerald J. "The Meaning of Solidarity in Catholic Social Teaching". *Political Theology* 15 (1), 2014.

struggle (Germany), a code of Catholic rejuvenation (Catholic Social Teaching) and a motto for peaceful revolutions (Poland). Given this high level of heterogeneity, the concept of solidarity might face the critique of being contingent, volatile, and ambiguous.[10] Nonetheless, doubts surface as to whether the question 'what solidarity is' has been adequately investigated to date.

1.3 – What is Solidarity?

Any attempt of defining solidarity and grasping its essence is threatened by an alleged ambiguity looming around the concept. When digging into the *mare magnum* of literature about solidarity, a certain vagueness emerges as a defining, yet misleading, feature.

Firstly, doubts emerge when one wonders about the nature of solidarity, since the concept is both descriptive and normative[11], which means it is both a fact and a norm. Secondly, part of the ambiguity of solidarity is related to its justification and source of normativity: the concept seems to require some sort of shared bond at its basis – a shared identity, experience, or action[12] – but it may also extend to total strangers without contradicting itself, by appealing to a cosmopolitan ideal of a global community. Thus, the concept has a wide spectrum, ranging from exclusivity to pure inclusivity, in which to perform. Lastly, despite being characterized by a component of altruism, solidarity does not deny a logic of rational self-interest: "there can be no solidarity without moral reasons for acting solidarily. But neither could there be a form of solidarity […] without a strong fear for one's own interest".[13]

In conclusion, solidarity seems to be extremely difficult to fully depict, due to its vagueness. Nonetheless, it is argued here that the ambiguity is only *prima facie*, since the actual implementation of the concept into reality eventually erases it. Let us delve deeper into this exposition.

The preceding overview has displayed how deep solidarity is interwoven with European history. Nonetheless, it would be more accurate to refer to different European 'histories', to

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[10] Gerrits, André. "Solidarity and the European Union: From the Welfare State to the Euro Crisis", 2015 & Alston, Philip. "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?". Netherlands International Law Review, 29(3), 1982: 307-322.
[11] Preuss, Ulrich K. "National, Supranational, and international Solidarity" in *Solidarity*, edited by Bayertz, Kurt, 1999 & Sommermann, Karl-Peter. "Some Reflections on the Concept of Solidarity and its Transformation into a Legal Principle". *Archiv des Völkerrechts* No. 1, 2014.
[12] Sangiovanni, Andrea. "Solidarity as Joint Action: Solidarity as Joint Action". Journal of Applied Philosophy 32 (4), 2015: 340–59.
[13] Steinvorth, Ulrich. "The concept and Possibilities of Solidarity" in S*olidarity*, edited by Bayertz, Kurt, 1999, p. 35.

which the concept is tied: as evidenced, solidarity adapted to manifold political, social, and historical circumstances, resulting in the different outcomes previously depicted. This sheds light on a crucial trait of solidarity, that is its 'hyper-contextuality': the fact that the nature, the justification, and the normative extent of solidarity depend upon the contextual and material circumstances in which it occurs.[14] Thus, the alleged ambiguity that is often employed to portray the concept is nothing but an indication of the failure to appreciate solidarity as context-dependent.

In the light of this hyper-contextuality, it is not advantageous to provide an *a priori* justification of solidarity. Consequently, an exhaustive categorization of the phenomenon will be intentionally avoided here: the only purpose of the following section is to illustrate its essential traits, regardless of the reasons or context at its basis. In order to answer this question, it is thus necessary to look at the requirements of solidarity, i.e. the characteristics that we can detect in each of its occurrences. According to Scholz, there are three essential components common to every form of solidarity:

➤ The coexistence of both individual and collective motives. Solidarity is not only the outcome of a rational process in which the individual joins the group to attain goods that would otherwise be unachievable[15], but it is also an inverse process in which the collective experience permeates the individual life, providing it with further substance.[16] On the other hand, the community-feeling cannot override that of the individual.

➤ The need of some kind of unity. Whatever this may be – a shared identity, experience, agency or, more generally, "a shared interest in the consumption of some joint good"[17]– there must exist a collective intention to act jointly. Despite self-interested speculations can be prominent[18], they cannot fully account for solidary behavior.

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[14] Scholz, Sally J. Political Solidarity. University Park: Pennsylvania State University Press, 2008 & Alston, Philip. "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?". Netherlands International Law Review, 29(3), 1982: 307-322.

[15] Hechter, Michael. Principles of Group Solidarity. California Series on Social Choice and Political Economy. Berkeley: Univ. of California Press, 1988.

[16] Scholz, Sally J. Political Solidarity. University Park: Pennsylvania State University Press, 2008.

[17] Hechter, Michael. Principles of Group Solidarity. California Series on Social Choice and Political Economy. Berkeley: Univ. of California Press, 1988, p. 33.

[18] Laitinen, Arto, and Anne Birgitta Pessi, eds. *Solidarity: Theory and Practice*. Lanham: Lexington Books, 2014.

> Solidarity demands "positive moral obligations"[19], without compensation.[20] Cultivating a relation of solidarity means being able to share the burden in the absence of an immediate compensation, yet with the awareness that the same guarantee would be provided, should the circumstances be reversed.

This section has highlighted the essential traits of solidarity, detectable in each of its occurrences. Nevertheless, in the light of what has been said, we have to delve deeper into our context of interest.

1.4 – Solidarity in the European Union

Solidarity does not only permeate the history of Europe, but also that of the European Union. Since the 1950 Schuman Declaration and its monumental appeal for "a de facto solidarity"[21], followed by a plea for 'real solidarity' in the Preamble of the Treaty Establishing the European Coal and Steel Community (1951), the value has become a cornerstone of European political culture.[22]

The concept appears in the 4th Chapter of the Charter of Fundamental Rights of the EU, in art. 2, 3(3), 21, 24 of the Treaty on the European Union (TEU) and in art. 67, 80, 122, 194, 222 of the Treaty on the Functioning of the European Union (TFEU). The value of solidarity has also inspired cultural initiatives, such as the European Network Remembrance and Solidarity (ENRS) in 2005, the creation of the European Solidarity Centre in 2014, and the European Solidarity Corps (ESC) in 2016.[23]

The existence of all these occurrences, as well as its presence in the TFEU and TEU's preambles, suggest that solidarity is a 'principle', i.e. a norm that must "be realized to the highest degree that is actually and legally possible".[24] In essence, it is crucial to understand that solidarity is an institutional value and not just a legal compass or a cultural motto: the principle

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[19] Scholz, Sally J. Political Solidarity. University Park: Pennsylvania State University Press, 2008, p. 19.
[20] Hechter, Michael. Principles of Group Solidarity. California Series on Social Choice and Political Economy. Berkeley: Univ. of California Press, 1988.
[21] Schuman Declaration, 9 May 1950.
[22] Schmale, Wolfgang. "European Solidarity: A Semantic History". *European Review of History: Revue Européenne d'histoire* 24 (6), 2017.
[23] The ENRS fosters historical studies regarding wars, totalitarianisms, and population displacement. The European Solidarity Centre is a museum created in Gdańsk, in remembrance of the *Solidarność* movement. The ESC is an international volunteer project, aimed at involving young European people in non-profit experiences abroad.
[24] Karageorgiou, Eleni. "The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity". *Nordic Journal of International Law* 88 (3), 2019, p. 329.

is part of the axiology upon which the Union necessarily relies. It is with this meaning in mind that the following research will portray solidarity as a 'value'. Values, for their part, are normative stimuli and must be considered "as objects to be regulated or sources of inspiration to be objectified".[25]

Nevertheless, these appeals to European solidarity have not shed any light on how this contextualization should limit, and thereby clarify, the concept. Thus, how do we eventually denote solidarity, when implemented in the EU context?

Firstly, European solidarity mainly relies upon a group of States and their underpinning dynamics. Despite the importance of Civil Society Organizations (CSOs), Faith-Based Organizations (FBOs), and, more generally, Non-Governmental Organizations (NGOs), European solidarity cannot do without States: it is no accident that the commitment to the value displayed in the Treaties' preambles is signed by heads of States, rather than citizens. Thus, within the European context, solidarity is confronted with power relations and rational egoisms.

Against this background, doubts arise regarding the *raison d'être* itself of European solidarity. Nonetheless, the motive exists and is consistent with rational egoism: "competitive behavior may pay off if the social exchange relationship is limited to a single occasion […]. If several trials are expected, cooperation does pay off".[26] In other words, it is the expectation of reciprocity – and its potential loss due to noncompliance – that motivates European solidarity. As hinted before, solidarity is a two-horse chariot: if morality does not generate enough motivation, then prudence will.

In conclusion, the account of European solidarity will be here expressed as based on reciprocity, summarized in the idea that collective actions are transactions, in which "*each* party has both rights and duties".[27] In accordance with it, solidary demands will be justified by appealing to a joint production of 'collective goods'[28], which legitimizes reciprocal thinking. This will then account for a fair redistribution of costs and benefits, as well as rights and duties,

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[25] Foret, François, and Annabelle Littoz-Monnet. "Legitimisation and regulation of and through values". *Politique Européenne* 45 (3), 2014, p. 10.

[26] Bierhoff, Hans W. and Küpper, Beate. "Social Psychology of Solidarity" in S*olidarity*, edited by Bayertz, Kurt, 1999, p. 141.

[27] Gouldner, Alvin W. "The Norm of Reciprocity: A Preliminary Statement". *American Sociological Review* 25 (2), 1960, p. 169.

[28] Examples of such collective goods may be the European Internal Market or the Euro Area, the Common Security and Defence Policy (CSDP), as well as the Schengen Area.

between the members.[29] With this account of reciprocity-based solidarity in mind, it is now necessary to look at the specific topic of interest, the field of Migration and Asylum.

1.5 – European Solidarity in the Field of Migration & Asylum

The CEAS represents a major display of European solidarity since States coordinate efforts in a joint approach aimed at ensuring both safety for asylum seekers and security within the Schengen Area. Nonetheless, the issue of migration is, still today, a strong challenge for the CEAS and its underpinning principle of solidarity, as illustrated by the 2015 refugee crisis. Leaving aside its material costs, the migrant crisis has also represented a crisis of values for the Union.[30] Indeed, when confronted with 1.3 million of asylum seekers fleeing towards Europe[31] – a marginal percentage, compared to the population of Europe – the CEAS offered no guarantees of internal cohesion.

In July 2015, the relocation of 40,000 refugees from Italy and Greece was only adopted on a voluntary basis. In September 2015, the momentum for the adoption of a mandatory Emergency Relocation Scheme, aimed at relocating other 120.000 refugees, did not stop Hungary, Czech Republic, and Poland from free-riding (the reason why the European Commission launched infringement procedures against these countries[32]). During the refugee crisis, the principle of solidarity was almost inexistent[33], and unequally held by Member States.

One of the major reasons why, within the CEAS, Member States do not live up to solidarity is because they easily detect the costs, yet not the benefits, that stem from the collective production (the joint management of European external borders). Indeed, the costs, which are mainly related to a concerted redistribution of asylum seekers between the members and a joint management of external borders, are high, easily detectable, and troublesome, since they create cultural and political cleavages.[34] Benefits are, instead, harder to acknowledge: this

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[29] Sangiovanni, Andrea. "Solidarity in the European Union". *Oxford Journal of Legal Studies* 33 (2), 2013: 213–41.

[30] Goździak, Elżbieta M., Izabella Main, and Brigitte Suter, eds. Europe and the Refugee Response: A Crisis of Values? Routledge Studies in Development, Displacement and Resettlement. London; New York: Routledge/Taylor & Francis Group, 2020.

[31] Kershaw, Ian. Roller-Coaster: Europe, 1950-2017. London: Allen Lane, 2018.

[32] (IP/17/1607). European Commission Press Release, Relocation: Commission launches infringement procedures against the Czech Republic, Hungary and Poland

[33] Wollard, Catherine. "Has the Mediterranean Refugee Crisis Undermined European Values?". *IEMed. Mediterranean Yearbook 2018*, 2018.

[34] Gerhards, Jürgen and Holger Lengfeld, Zsófia Ignácz, Florian Kley and Maximilian Priem. European Solidarity in Times of Crisis: Insights from a Thirteen-Country Survey. Milton Park, Abingdon, Oxon: New York, 2020.

is because they are already in place and, thus, taken for granted: the CEAS enabled the liberalization of its internal space, the Schengen Area. Evidence of this can be found in the causal nexus between migration pressure – which often leads to mismanagements – and the resurgence of internal frontiers. This has been shown by the Franco-Italian borders' dispute in 2011[35], as well as by the erection of fences in Hungary, Bulgaria, Slovenia, and Croatia in 2015-2016[36]: "countries that disrupt the CEAS do not only endanger the notion of solidarity in respect of migration, but also jeopardize the EU's internal stability, from which they themselves benefit".[37]

The lack of solidarity encountered within the CEAS is mirrored in its *acquis*, and especially in the so-called Dublin Regulation, which governs the criteria for the allocation of international protections. The primary objective of the Dublin Regulation is to establish the criteria of allocation of responsibilities between the Member States, and designate the one in charge of the asylum applications' assessment. Besides several exceptions, the 'golden rule' consists in appointing the first state of arrival as the one responsible for the applications' evaluation. Exactly as it may sound, this system is far from being fair and solidary. In 2015, it showed all its deficiencies and limits[38], leaving the 1st arrival countries (i.e. Italy, Greece, Malta, Spain, and Cyprus) abandoned and unable to cope with unaffordable numbers.

In conclusion, even though the Regulation pays lip service to solidarity by directly mentioning it in its legal text – arguing that it "goes hand in hand with mutual trust"[39] –, the first-entry criterion serves an opposite purpose, namely a mechanism of 'punishment': "responsibility should lie with the Member State which through its own action (i.e. issuing visas

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[35] Balleix, Corinne. "From Lampedusa to the Post-Stockholm Programme: Difficult European Solidarity in the Field of Migration". *European Policy Brief* No. 24, 2014.

[36] Kershaw, Ian. Roller-Coaster: Europe, 1950-2017. London: Allen Lane, 2018 & Larivé, Maxime H. A. "A Crisis for the Ages. The European Union and the Migration Crisis", The Jean Monnet/Robert Schuman Paper Series Vol. 15 Special, 2015.

[37] Lombardi, Lorenzo. "Tackling the Migration Challenge by Diversifying European Solidarity". TEPSA Student Contest, 2021, p. 1.

[38] Larivé, Maxime H. A. "A Crisis for the Ages. The European Union and the Migration Crisis", The Jean Monnet/Robert Schuman Paper Series Vol. 15 Special, 2015.

[39] Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

and residence permits) or omission (not guarding the EU's external borders properly) had permitted the individual to arrive in the EU".[40]

1.6 – Definition of the Research Question

In light of the historical experience of the refugee crisis, it has been clear both to policymakers and public opinion that the Dublin Regulation needs to be revised, and that its underpinning account of solidarity is outdated. One question arises from this assertion: what happens when, due to history, values do not fit anymore into the institution that was supposed to uphold them? By considering the concept of solidarity as a principle and an institutional value upon which the EU relies, we would expect that, in response to changing values, the institution would adapt and evolve too. Since institutions rely on values and values are subject to history[41], then historical changes shall result in axiological adjustments and, subsequently, in institutional modifications.

Historically speaking, the Dublin Regulation was adopted in 1997 (Reg. No 97/C 254/01), first amended in 2003 (Reg. No 343/2003) and then in 2013 (Reg. No 604/2013). Nonetheless, the major deficiency detected – an unfair mechanism of responsibility allocation – does not seem to have ever changed. This leads us to the research puzzle: is it possible that the Regulation has gone through various revisions, which nonetheless did not result in any sort of evolution?

In the light of this, it is thus necessary to investigate to what extent has the account of solidarity – considered to be the axiological cornerstone upon which the CEAS relies – evolved (or not) within the Dublin Regulation. Addressing this research question necessarily entails an investigation of both the phenomena of institutional variation and stagnation, for what concerns the concept of solidarity: the explanatory power of the current research lies in the elucidation of the reasons behind the existence of such patterns. Therefore, the study does not limit itself to detecting the dynamics of evolution or stagnation, but first and foremost intends to provide an explanation for them.

It may be argued that the upcoming analysis lacks in authority, since the amendments made to the Dublin Regulation were all antecedents to the refugee crisis: since 2015, many

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[40] Karageorgiou, Eleni. "The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity". *Nordic Journal of International Law* 88 (3), 2019, p. 335.
[41] Karlsson, Klas-Göran, and Ulf Zander eds. *Echoes of the Holocaust: Historical Cultures in Contemporary Europe*. Lund: Nordic Academic Press, 2003.

attempts at revising the system have been made, but they have all been unsuccessful due to the Visegrád veto players. Nonetheless, understanding the reasons why the biggest flaw of the Regulation has remained intact may shed some light on why the subsequent efforts of re-examination failed. Moreover, potential results achieved by the research may orientate further strategies of revision. This is why we consider this work to be relevant and concrete for future policy-making.

With this in mind, Chapter II and III will introduce the theoretical and methodological framework in which to operate: respectively, Evolutionary Institutionalism (EI) and Historical and Comparative Institutionalist Analysis (HCIA). Following that, Chapter IV will give reasons of a concrete – yet limited in the results – evolution of the Dublin Regulation, while Chapter V will investigate the evolution of solidarity, partitioned in its different meanings. Moreover, it will apply the theory to the case study. Subsequently, some conclusive remarks on the future of the Dublin Regulation and its potential scenarios will be suggested.

Chapter II – Theoretical Framework

2.1 – New Institutionalism (NI)

The focus of this study will be bifocal, since it seeks to target both values (the value of European solidarity) and institutions (the way values are implemented and upheld in reality). This relation could be clarified by considering solidarity as the ultimate subject of the research, and the institutions as the means to achieve this goal: indeed, these allow for a concrete and tangible investigation over the extent the value of solidarity has been upheld. Since the research deals with Migration and Asylum, it will be necessary to look at ways in which the value is advocated by the CEAS in general and the Dublin Regulation in the specific. Within the inquiry, this latter will be considered as the institution (or 'institutional outcome') representing the vision and performance of the EU in the field of Migration and Asylum.

The upcoming theoretical framework will be required to dedicate a crucial focus to the role and function of institutions, while also being able to account for the relevance of values and other ideational forces. Moreover, the theory at play must be able to explain institutional stagnation, as well as change, in a consistent manner. It is then necessary to introduce the macro-theory of New Institutionalism first.

Since the 2nd half of the 1980s, the development of the EU has been marked by an increasingly higher rate of institutionalization.[42] This phenomenon attracted scholars and academics and led to the acknowledgment that institutions do matter since they impact on political behavior and act as constraints on political leeway. This resulted in the creation of the so-called 'New Institutionalism' (NI). Instead of being a classic and homogeneous theory, NI could be better described as "a reintroduction of institutions into a large body of theories […] in which institutions had been either absent or epiphenomenal".[43] NI is usually further partitioned into Rational Choice Institutionalism (RCI), Historical Institutionalism (HI), and Sociological Institutionalism (SI). We will here focus on the first two.

2.2 – Rational Choice Institutionalism (RCI) & Historical Institutionalism (HI)

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[42] Pollack, Mark A. "The New Institutionalism and European Integration" in Wiener, Antje, and Thomas Diez, eds. European Integration Theory. Oxford: Oxford University Press, 2009.
[43] Ibid., p. 109.

Since the late 80s, NI started to gain an increasing relevance under the guise of RCI: one of the major strengths of this theory was its capacity to move the theoretical discussion over EU integration beyond the stalemate created by the grand-theories of Neo-Functionalism and Liberal Intergovernmentalism. Roughly speaking, the essence of RCI can be grasped by two, seminal axioms:

➢ Institutions are the result of collective problems which, by their very nature, require a joint management between the actors. The value of an institution relies on its functionality: one is worthwhile insofar as it allows the solution of those problems. Pragmatically speaking, institutions act as constraints to an actor's room for maneuver.

➢ Every actor has its own preferences, which are exogenous and already 'given'. As Orion and Steinmo argue, RCI makes a crucial assumption concerning "clear and stable agent preferences".[44] Thus, institutions do not shape preferences, yet the opposite. Institutions, for their part, determine the strategies employed by actors to pursue their goals. Every actor's goal is to maximize its preferences, by following a logic of consequence according to which an action's worth is based on its effects.

The vast majority of assumptions made by RCI are also accepted by the second theory here analyzed, HI. One exception sets it apart: the emphasis put on time, rather than functionality, as the determining factor. While RCI argues that institutions are mainly shaped by functional demands which directly follow from actors' preferences, HI claims that they develop in accordance with a pre-existing path, paved by resolutions already made in the past. Put in another way, institutions are always the result of earlier decisions, and their future design rests on this, due to a mechanism of 'path-dependence'. This concept can be defined as the tendency "to perpetuate institutional and policy choices inherited from the past […] rather than starting from scratch with new institutions".[45] Path-dependence leads to lock-in situations, in which the possibility of reversing the process, despite being possible, is cost-intensive and, therefore, often considered as undesirable.

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[44] Lewis, Orion, and Sven Steinmo. "Taking Evolution Seriously in Political Science". *Theory in Biosciences* 129 (2–3), 2010, p. 237.
[45] Ibid., p. 111.

Instead of looking at HI as an account competing with RCI, it is more profitable to regard the former as a valuable variation, or an expansion, of the latter.[46] The affinity between RCI and HI can be illustrated by observing how both share the same shortcomings, which directly follow from their foundational axioms. For the purpose of the upcoming section and the relevance of the discussion, it is here possible to isolate three of them:

➤ Both theories provide a good account of institutional continuity and the incremental, seamless development occurring in 'normal times' (i.e. non-critical situations). Nonetheless, a theory should also account for the possibility of institutional changes. For what concerns RCI, the only possibility of change is that external preferences will change. As to HI, since actual institutions are in continuity with their earlier counterparts, then change only comes from the outside: the so-called 'critical juncture', i.e. exogenous shocks (e.g. a crisis, a revolution or a staunch resistance) which put pressure on the system, demanding a drastic change.

➤ Both RCI and HI hold the belief that institutions do not shape preferences, since these are exogenous, fixed, and therefore given. By regarding them as such, the theory simply assumes an internal homogeneity within the process of preference-formation; thereby, both theories are deficient in realism. Indeed, preferences are neither crystallized nor necessarily enduring through time. This is even truer when considering that, in the EU context, the actors at stake are Member States, each of which is characterized by internal disagreement and heterogeneity.

➤ The two accounts lack normativity, since both are based on *ex-post* analyses which facilitate the acknowledgement of how either functional demands (RCI) or history (HI) influenced the development of an institution. More difficult is to foresee which element will drive future progression, something that every theory should be able to account for.[47]

Against this background, should RCI and HI stand alone, both would not meet all the requirements outlined in the introduction. Firstly, the rationalistic nature at their roots precludes the role of ideational forces to have a shaping role in the institutional development (this being especially true for RCI). Secondly, if the two theories offer a good explanation of political

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[46] Pollack, Mark A. "The New Institutionalism and European Integration" in Wiener, Antje, and Thomas Diez, eds. European Integration Theory. Oxford: Oxford University Press, 2009.

[47] Porumbescu, Alexandra. "Sociological Institutionalism Arguments in Explaining EU Integration". Sociology and Social Work Review Vol. 2 (2), 2018.

continuity, they are deficient in accounting for any evolution or change that is not 'exogenous'. This is something both theories lack since they share the belief that institutions are 'sticky' and enduring political entities.

We argue here that, when taken to the extreme, it is misleading to consider them as such, since in reality institutions are deeply affected by the procedural development process: by way of illustration, institutions are always represented by actors; however, actors do change, and new personalities can also come into the political picture (e.g. as occurred with the Eastern enlargement in 2004). Since institutions are always dependent upon the political agent who is entitled to represent them, it follows that they can then also be differently affected by its replacement: the two theories lack in explaining this complexity. Lastly, as it will be further shown in the upcoming discussion, the HI's notion of critical junctures has been historically disproven by the 2015 refugee crisis which, despite calling into question the foundations of the Dublin Regulation, has not resulted in any modification.

It has to be said that a second generation of HI originated out of the necessity to provide a suitable explanation of endogenous change.[48] The core idea is that the traditional HI's concept of path-dependency drives us to a misleading crossroads, which leaves out valuable alternatives: either change is so abrupt to the point it leads to critical junctures, or it is so seamless that it is absorbed without solution of continuity. What is not considered is that small and modest changes may accumulate through time, resulting in an "incremental, 'creeping' change"[49] that may lead to internal developments.

We argue here that this 'second generation' has set such a considerable distance from 'traditional' HI to the point at which it may not even go under the same label anymore. Indeed, accounting for institutional development by pointing at incremental, internal changes (as an alternative to external shocks) does require the explanation of ways in which the 'structure' is able to influence the 'agent'. First, it is necessary to understand what these concepts stand for. Broadly speaking, the agency can be defined as "the capacity of an individual for conscious decision making"[50]; nevertheless, in our specific context, it will target the policy-initiator, i.e.

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[48] Streeck, Wolfgang, and Kathleen Ann Thelen. Beyond Continuity: Institutional Change in Advanced Political Economies. Oxford: Oxford University Press, 2005.
[49] Ibid, p. 9.
[50] Fürstenberg, Kai. "Evolutionary Institutionalism: New Perspectives". *Politics and the Life Sciences* 35 (1), 2016, p. 52.

the 'actor' responsible for designing the Regulation. Conversely, the 'structure' can be defined as the structural or environmental constraints which limit and therefore affect agent's choices.

With that being said, it is evident that the main problem with RCI and HI is that "while other approaches, notably RCI, grant actors the ability to influence institutions, [...] they do not account for institutions having structured the very influence being applied to them.[51] The same applies to HI, which "limits such influence to critical junctures, when structures are weak and easily changeable".[52] Thus, the crucial reason why both RCI and HI are unfit to explain endogenous change is that they display an extreme rigidity and do not account for a mutual, reciprocal influence occurring between agency and structure. In conclusion, accounting for endogenous institutional change, as the second generation of HI does, necessarily requires eliminating one of the axioms upon which both theories rely: that is, the fixed nature of actors' preferences and the impossibility for the structure to influence them.

That is why, by altering the theory in order to account for inner change, the second generation of HI radically breaks off with the traditional paradigm and moves significantly closer to a different model, that of Evolutionary Institutionalism (EI).

2.3 – Evolutionary Institutionalism (EI)

RCI and HI capture crucial – yet only isolated and partial – dynamics of institutional development.[53] By "overemphasizing received structure and de-emphasizing actors' adaptability"[54], both theories exclude any sort of influence that the structure could exert on individuals. On the contrary, it is necessary to account for a theory in which "agents interact and co-evolve with their environment".[55] It is argued here that theory of Evolutionary Institutionalism is better suited for capturing this 'holistic' aspect of the phenomenon.

Nowadays, evolution is not only acknowledged in the field of biology and genetics. On the contrary, it is considered as a sort of universal force on a par with gravity[56], that may be

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[51] Ibid., p. 54.
[52] Ibid., p. 53.
[53] Lewis, Orion A., and Sven Steinmo. "How Institutions Evolve: Evolutionary Theory and Institutional Change". Polity 44 (3), 2012.
[54] Fürstenberg, Kai. "Evolutionary Institutionalism: New Perspectives". *Politics and the Life Sciences* 35 (1), 2016, p. 49.
[55] Lewis, Orion. "Taking Evolution Seriously in Political Science". Theory in Biosciences 129 (2–3), 2010, p. 238.
[56] Beinhocker, Eric D. The Origin of Wealth: Evolution, Complexity, and the Radical Remaking of Economics. London: rh Business Books, 2007.

applied to every entity subject to variation. Considerable examples may be computers and algorithms, bacteria, technologies, economic and urban circuits, as well as institutions. Bearing in mind that the analogy between institutional and genetical evolution shall remain metaphorical[57], EI originates from the realization that there is a pattern that can be drawn from biological evolution which might be successfully reproduced elsewhere. This pattern is based on a tripartite process: variation, selection, and replication/retention. The initial moment is that of *variation*, consisting of a random change which departs from the previous state. When it happens to be fit for a certain environment, the variation is firstly *selected* and then *replicated*, i.e. passed on to the offspring.

With due caution, this model can also be applied to institutions, since actors are capable of creating new rules or principles (variation), which are then implemented within an institutional environment (selection) and eventually bequeathed to future generations (retention). The main divergence between biological and institutional patterns of evolution lies in the fact that the latter do not originate randomly, yet intentionally: individuals strategically and rationally choose rules and features to be modified within the institutional outcome. Nonetheless, this does not result in a perfect process of replication, since "humans do not […] have the capacity to fully predict the consequences of any particular institutional change".[58] The performance of a certain institutional arrangement can only be judged in the light of its concrete implementation and, until then, it remains conjectural, thus liable for reevaluation.

Furthermore, by juxtaposing institutional change with evolutionary theory, EI sets a second parallel in place: the one between genes and institutions. Despite belonging to distinct contexts, genes and institutions pursue the very same goal: providing means of replication for desirable behaviors and modes of obliteration for the unwelcome ones. Simply put, they are, to the very same extent, mechanisms of survival of an order that is beneficial and convenient to be inherited by future generations.

Should we re-consider RCI and HI's major deficiencies outlined before in the light of the brand-new theory of EI, it would then be possible to find new answers to old problems, since the latter relies on different foundational axioms. Against this background, EI will then be adopted as a way to transcend the limits of the two sub-theories of NI, which, briefly

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[57] Fürstenberg, Kai. "Evolutionary Institutionalism: New Perspectives". *Politics and the Life Sciences* 35 (1), 2016.
[58] Lewis, Orion A., and Sven Steinmo. "How Institutions Evolve: Evolutionary Theory and Institutional Change". Polity 44 (3), 2012, p. 322.

summarized, consist of (1) an impossibility in accounting for endogenous change, (2) an oversimplification in the process of preference-formation, and (3) a lack of normativity in the analysis. This will be demonstrated here, point by point.

➢ One of the major strengths of EI consists in accounting for endogenous change, without putting forward external shocks as the only option. This directly follows from the opportunity to account for a mutual and reciprocal influence occurring between structure and agent. Indeed, EI develops an account in which both agent and structure-based factors of development – as well as their interaction – can eventually impact on the institution. Thus, by appealing to this mutuality of influence, EI better meets the demands of realism and concreteness: institutions are not considered anymore as "independent, self-reinforcing, and essentially stable constraints on behavior"[59] produced by strategic and rational agencies; instead, dialogue, friction, and even internal incoherence between the different elements at play become key-features. Heterogeneity and complexity are, indeed, measures of realism. On a side note, it should be underlined that the introduction of the 'second generation' of HI also settled the question.

➢ EI solves the issue of oversimplification (2) by appealing to an 'ecological' approach: actors' rationality is part of an environmental whole that exerts an influence on individuals' behaviors. This permits the acknowledgment both of "the interactive nature of evolutionary change and the fact that agent preferences are dialectically shaped by the broader selection pressures that an individual faces".[60] Rationality is neither a crystallized orientation nor a one-sided stream of preferences collected by the individual, but a never-ending interlocution with the environmental conditions and obstacles faced.

➢ The last issue that EI settles is the lack of normativity displayed by RCI and HI. Lewis and Steinmo argue that "Rather than predicting the future, the goal of evolutionary theorists is to understand the forces and dynamics that have shaped the world as we know it".[61] Thus, the authors do not attribute EI a higher ability to foretell the future path of institutions, compared to RCI and HI. EI analysis should therefore look at the past, rather than the future.

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[59]Lewis, Orion A., and Sven Steinmo. "How Institutions Evolve: Evolutionary Theory and Institutional Change". Polity 44 (3), 2012, p. 325.
[60] Ibid., p. 330.
[61] Blyth, Mark, Geoffrey M. Hodgson, Orion Lewis, and Sven Steinmo. "Introduction to the Special Issue on the Evolution of Institutions". Journal of Institutional Economics 7 (3), 2011, p. 7.

While agreeing, in principle, with this claim, we argue here that EI has at least better chances to predict institutional developments. Let us understand why: the evolutionary process is far from being flawless since individuals only have a limited capability of prediction. It follows from this that the evolution will only reach sub-optimal results. Therefore, it is equally reasonable to expect future institutional developments to revise the shortcomings, in the direction of a 'never-fully-attainable' perfection. This is the advantage of institutional evolution, compared to the biological one: despite being imperfect, EI's development is strategically and intentionally designed. This means that its path follows a teleological direction since it has an ultimate goal to reach (at least at an idealistic level). EI has better chances to predict institutional developments since it is possible to grasp its teleological projection and intercept the strategy behind it.

EI is able to compensate for the major shortcomings displayed by the two traditional accounts of NI here examined. What is left to demonstrate is whether EI can also substantiate an influential role of ideational forces. Indeed, the research question set before relies on a crucial supposition that must be here confirmed and validated: namely, the fact that values do matter for the configuration of institutions and their eventual outcomes.

Nonetheless, this is an aspect neither captured by RCI nor HI.[62] EI, on the opposite, clarifies how values exercise their clout on institutions, by building further the evolutionary analogy. As aforementioned, institutions resemble genes, since both aim at passing on welcomed behaviors, leaving the unwanted out. Nonetheless, during their processes of replication, genes sometimes undergo random mutations which are then handed down to the offspring, altering their traits in a positive or negative way in relation to the environment. Within the analogy, ideas perform the same function of mutations[63], providing elements of variation that may lead to a complete reassessment of the institution. Against the "tendency to juxtapose "ideational" analysis against "rational" choice"[64], ideas and values are here considered as real forces to be reckoned with.

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[62] Lewis, Orion A., and Sven Steinmo. "How Institutions Evolve: Evolutionary Theory and Institutional Change". Polity 44 (3), 2012.

[63] Lewis, Orion, and Sven Steinmo. "Taking Evolution Seriously". ARENA working papers, 2007.

[64] Lewis, Orion A., and Sven Steinmo. "How Institutions Evolve: Evolutionary Theory and Institutional Change". Polity 44 (3), 2012, p. 335 (footnotes).

Since its very beginning, this work has stressed the centrality of values for EU institutions. By having finally legitimized their role, we can now draw the ultimate remarks from this theoretical chapter, by highlighting the way EI will be adopted here, in combination with RCI and HI.

2.4 – What is the Relation Between RCI, HI & EI?

At first sight, it might seem obvious to consider EI as an account competing both with RCI and HI: on the one hand, the analysis has *de facto* underlined their major shortcomings; on the other hand, it has offered EI as a valuable theoretical alternative, capable of sorting out their deficiencies and move the analysis forward.

Nonetheless, it is here agreed along with Fürstenberg that, rather than opposing the two theories, EI subsumes them.[65] Indeed, EI's fundamental axioms do not deny rational and strategic planning, nor neglect the relevance of time as a crucial variable for institutional design. Within EI, both functionality and time are considered as seminal variables, yet incorporated within a wider theoretical frame. RCI is considered as part of EI since the process of variation relies upon the actors' strategic goals and preferences. HI is also subsumed since the historical constraints put by earlier institutional decisions contribute to the creation of those environmental conditions – the structure – which shape actors' rationality and either select or reject variations.

Nonetheless, as standalone theories, both RCI and HI do only give meaning to a limited array of institutional possibilities, out of those considered as relevant for our research question. EI, instead, has the advantage of widening the theoretical grip over institutional developments: "The value added by Evolutionary Institutionalism is not the formulation of a new theory; it is the opposite, the integration of a much tested and successful biological theory into political science".[66]

In conclusion, RCI and HI will be here considered and adopted as meaningful theories, yet within the broader sphere of EI. The first two play a crucial role in accounting for institutional stagnation. The latter will be adopted since it accounts for endogenous developments within the institution, and because it assigns sway power to values and other ideational forces.

[65] Fürstenberg, Kai. "Evolutionary Institutionalism: New Perspectives". *Politics and the Life Sciences* 35 (1), 2016.
[66] Ibid., p. 57.

Chapter III – Methodology

3.1 – Introduction

The following research aims at understanding to what extent has the account of solidarity evolved within the Dublin Regulation. By looking at its historical development, it seems that the major detectable deficiency, that is an unfair mechanism of responsibility allocation, has never been modified or revisited, despite the sharp criticism and the historical failure it resulted in. In the light of the research question, Chapter II led to the adoption of a theory capable of explaining both institutional stagnation and change, providing a framework for understanding whether institutions evolve or not in response to values' changes. EI subsumes both RCI and HI, integrating their explanatory power within a wider, theoretical picture. Moreover, EI better provides a crucial role for values and other ideational forces, when compared to RCI and HI.

It is now necessary to adopt a methodology that will allow us to address our research question. This must comply with EI's foundational axioms, based on a mutual and reciprocal influence occurring between structure and agent; the methodological objective is "to reconstruct the evolutionary history"[67], in order to comprehend the historical, environmental, and structural conditions which shaped the evolution of the concept.

Following this, Lewis and Steinmo argue that the method to be adopted is that of the 'Historical Narrative', since this allows the research to bring out "the influence of historical contingency and environmental factors"[68] leading to those institutional outcomes eventually witnessed. The crucial idea is that the past is related to the present by a line of continuity; thus, in order to grasp the latter, we first have to analyze it in connection with the former. Despite agreeing on the objective that the methodology should attain, it is argued here that the method of historical narrative is not fit for performing this role, since the concept of narrative often presumes an intentional construction at its roots, aimed at achieving "certain strategic outcomes"[69], such as the construction of an identity or the shaping of a common, cultural substratum. In contrast with this, we argue that the methodology must follow the very same

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[67] Lewis, Orion. "Taking Evolution Seriously in Political Science". *Theory in Biosciences* 129 (2–3), 2010, p. 239.
[68] Ibid., p. 239.
[69] Foster, William M., Diego M. Coraiola, Roy Suddaby, Jochem Kroezen, and David Chandler. "The Strategic Use of Historical Narratives: A Theoretical Framework". Business History 59 (8), 2017, p. 1177.

scientific standards that apply to the evolutionary theory: thus, it must be as objective and factually accurate as possible.

3.2 – Greif's Historical and Comparative Institutionalist Analysis (HCIA)

The methodology must allow the research (1) to investigate both agent and structure-based factors of development and (2) to find itself in convergence with the theoretical framework. As it will be shown here, both the requirements are met by the Historical and Comparative Institutionalist Analysis (HCIA), as developed by Avner Greif (1998). HCIA perfectly fits with the research question since it aims at highlighting the structural conditions and dynamics which led the institution to develop. As Greif asserts:

> "HCIA is *historical* in its attempt to explore the role of history in institutional emergence, perpetuation, and change; it is *comparative* in its attempt to gain insights through comparative studies over time and space; and it is *analytical* in its explicit reliance on context-specific micro models for empirical analysis".[70] (stress is mine)

Drawing from this, the comparative methodology here adopted will focus on the micro-evolution of the Dublin Regulation since its institutionalization in the *acquis communautaire* in 1997, to understand how the value of solidarity has been upheld through time. Moreover, Greif's stress on context-specificity allows us to carry out the comparison internally, and not externally; which means, the discussion will not focus on potential comparisons between the Dublin Regulation and other treaties on Migration and Asylum, but will specifically look at the internal evolution of the Regulation. This will be carried out by also comparing the ultimate institutional outcome with the blueprints that had served as intermediate steps between the different revisions. Moreover, Council meetings and programmes that have historically set the direction of the Dublin Regulation will also be taken into account.

Thus, HCIA permits us to investigate the structural influence which resulted in the eventual institutional outcome, other than the agent-based intentions (1). That said, the

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[70] Greif, Avner. "Historical and Comparative Institutional Analysis". The American Economic Review Vol. 88, No. 2, 1998, p. 80.

remainder of this section will be dedicated to detecting a convergence between methodology and theory (2).

Firstly, HCIA shares with EI the definition of 'institution', which is accounted by Greif in terms of a constraint on actor's leeway, performed with a view to "maintain regularities of behavior".[71] Moreover, institutions are considered as self-enforcing outcomes[72], in which endogenous development can occur. Lastly, institutions are not reduced to mere products of actors' rational preferences since this is limited: "HCIA […] explores the possibility that institutional changes also reflect the limits on rationality, cognition, and knowledge, and the incentive for institutional innovations, adoption, and change implied by the existing institutions and circumstances".[73] In conclusion, HCIA displays some strategic overlaps with the theory, which legitimizes its application in the forthcoming discussion.

3.3 – Exogenous and Endogenous Factors of Institutional Development

A short yet crucial specification concerns the criterion for determining the factors of development, as either endogenous or exogenous. Indeed, by endorsing EI, the following research is committed to tracing the evolution of European solidarity by relying upon endogenous, rather than only exogenous, determinants (e.g. history is a valuable example). Appealing to an endogenous development means accounting for a change that directly stems from within, "being so a product of inherent institutional properties and working from the inside out".[74] It is for this specific reason that the following research will provide particular attention to internal inconsistencies of the system as potential stimuli for further development. At the current stage, it is thus necessary to conceptually distinguish between endogenous and exogenous factors.

As Gerschewski argues, in a biochemistry lab it is possible to isolate a chemical reaction, separated from the rest of the environment by means of a glass wall: in this context, every action and reaction occurring within the sterile environment is considered as endogenous, since it is

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[71] Ibid., p. 80.
[72] Ibid.
[73] Ibid., p. 82.
[74] Gerschewski, Johannes. "Explanations of Institutional Change: Reflecting on a "Missing Diagonal"". American Political Science Review 115 (1), 2021, p. 220.

not a product of interactions with external agents (in this case, it will be deemed exogenous). Despite the limits of the analogy, the rationale behind still stands out as insightful.

In our specific case study, what will be regarded as 'exogenous' is not just history and the series of past events which have influenced the institutional development of the Regulation, yet also the programmes, meetings or treaties that have vertically shaped its direction, orientation, and objectives. Briefly speaking, we are here referring to milestones such as the Amsterdam Treaty (1997), the Tampere Programme (1999), the Hague Programme (2004), the Lisbon Treaty (2007), or the Stockholm Programme (2009). Some of them are "presidency conclusions"[75] from the European Council and specifically deal with Migration and Asylum, while others are the outcomes of broader, all-encompassing Intergovernmental Conferences (IGC). In any case, it is correct to consider both as 'vertical' guidelines, since they do not directly stem 'from the inside out', yet from the 'outside in'.

On the other hand, the working papers in between the Regulations, which were conceived as testing tools aimed at critically underlining shortcomings of the institutional outcomes, will be accordingly considered as endogenous. To give further credit to this distinction and the 'horizontality' of these blueprints, as opposed to the aforementioned 'verticality', it can be pointed out that these are Commission proposals, rather than Presidency conclusions. Thus, they are products of the European Commission, which is the institution duly tasked with policy implementation, monitoring, and assessment.[76]

3.4 – How to Measure the Evolution of Solidarity

Before moving on to the next chapter, one last methodological question needs to be addressed: how can we adequately measure the evolution of solidarity within the Regulation's path? Doubts arise concerning the way of conceiving and measuring solidarity. Furthermore, accounting for the value in mere terms of a fair redistribution of responsibilities, as we have done so far, might be reductive, since it would not fully grasp the many facets that the concept entails. Hence, insofar as the analysis will not be duly equipped with the tools required to capture Regulation's changes, the research question cannot be fully addressed.

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[75] European Council, Conclusions of the Presidency, Tampere, 1999, p. 1.
[76] Egeberg, Morten. "The European Commission" in Cini, Michelle, and Nieves Pérez-Solórzano Borragán, eds. *European Union Politics*. Fifth Edition. Oxford; New York, NY: Oxford University Press, 2016.

With this in mind, it becomes necessary to diversify and differentiate the account of solidarity, in order to illustrate its various facets and detect the different changes the value has been subject to. We argue along with Lang that, in the field of the CEAS, four meanings of solidarity can be outlined: namely, solidarity as loyalty, trust, fairness, and necessity.[77]

- ➢ Solidarity as Loyalty. As mentioned in section 1.3, the principle of solidarity entails some positive obligations that actors need to honour and be loyal to, even when these are counterproductive. Furthermore, in this specific case study, obligations are enshrined within both Primary and Secondary EU legislation[78]: thus, the latter must be in full compliance with the former.[79] In conclusion, two parameters can be isolated: namely, (1) how much the Regulation, as well as its evolution through time, has ensured actors' compliance to the duties outlined and (2) how much does the Regulation, being a piece of Secondary law, abide by Primary law.

- ➢ Solidarity as Trust. The liberalization of internal borders provided by Schengen (1995), together with the establishment of the CEAS, is based on a crucial display of trust between the Member States. The very same criteria for responsibility-allocation, as laid out in the Dublin Regulations, rely on the assumption that Member States are willing to cooperate for ensuring the swiftest procedure possible, both in the interest of the State and the asylum applicant. It is not by chance that, in Dublin III, solidarity is said to go "hand in hand with mutual trust".[80] Thus, the evolution of solidarity within the Regulation can also be measured by looking at the possible ways it has ensured, enhanced, or weakened mutual trust between actors.

- ➢ Solidarity as Fairness. The common management of external borders is intrinsically unequal, for the reason that not all the frontiers are the same: while some are easy to monitor, others are strained 'hot spots' due to their proximity with countries of transit for migrants. In the light of this, whether a country is overburdened or not may simply depend upon a certain

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[77] Lang, Iris Goldner. "Is There Solidarity on Asylum and Migration in the EU?". *Croatian Yearbook of European Law and Policy* 9, 2013.

[78] To provide a definition, Primary Legislation concerns the EU Treaties, while Secondary Legislation mainly consists of all the documents – e.g. Regulations, Directives, or Decisions – flanking Primary law.

[79] Karageorgiou, Eleni. "The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity". Nordic Journal of International Law 88 (3), 2019.

[80] Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

"geographic determinism".[81] Solidarity within the CEAS must compensate for this unjust natural lottery and pursue fairness. Burden-sharing should thus be considered as a crucial element of the Regulation, and it should be applied under all circumstances, not merely during crises. Following this, two other criteria of assessment are set: to what extent is solidarity able to perform fairness (1) in the allocation of responsibility and, more in general, (2) in sharing the burden by also resorting to other means?

➢ Solidarity as Necessity. The reasons for helping and relieving overburdened countries are multiple and can have a different nature. Indeed, helping others may also be a way of preventing the danger to dramatically spread at home, by ensuring an overall higher level of security within the Union. As Lang puts it, "one can claim that the role of solidarity is to act as a joint insurance policy mechanism which increases the stability of the EU as a whole".[82] As already mentioned in section 1.3, there is a crucial component of egoistic rationality within solidarity, that should not be forgotten. In conclusion, the last parameter to be spelled out consists of the alleged efficacy of the Regulation in ensuring mutual security in the handling of migration.

Briefly summarized, the questions of interest are:

➢ *Solidarity as Loyalty:*

    ➢ *Has the Regulation ensured compliance between actors?*

    ➢ *Does the Regulation abide by Primary law?*

➢ *Solidarity as Trust:*

    ➢ *Has the Regulation enhanced mutual trust?*

➢ *Solidarity as Fairness:*

    ➢ *Has the Regulation ensured fairness in the responsibility-allocation?*

    ➢ *Has the Regulation ensured fairness by resorting to other means?*

➢ *Solidarity as Necessity:*

    ➢ *Has the Regulation ensured mutual security?*

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[81] (SEC (2001) 756). Commission Staff, Evaluation of the Dublin Convention, p. 17.
[82] Lang, Iris Goldner. "Is There Solidarity on Asylum and Migration in the EU?". Croatian Yearbook of European Law and Policy 9, 2013, p. 2.

Chapter IV – Findings

4.1 – Unit I: the Reg. No 97/C 254/01

The birth of the 'Dublin Regulation I' (No. 97/C 254/01) must be first contextualized, since its historical and institutional backdrop actively influenced its elaboration. In accordance with the methodological assumptions made in section 3.3, the following research will consider history as an exogenous factor of institutional development, as well as the Maastricht Treaty. In this first Unit, no endogenous component will be considered, since no internal factor of development can originate out of something absent before.

4.1.1 – Exogenous factors

Europe has always been an attractive resort for migration flows. With the foundation of the European Community in 1957, this pattern did not change; instead, it intensified in the years following. Nevertheless, different migratory trends occurred in the second half of the twentieth century. Garson and Loizillon have suggested a categorization into three distinct periods[83]: the first coincided with the so-called *Trente Glorieuses* (1945-1970), and was characterized by the urgency of rebuilding an entire continent, torn by a fatal war. This led to major migratory movements, eagerly welcomed by the different States. Europe both witnessed intra-community and third-countries movements.[84] The second period concurred with the opening of the energetic crisis in 1973 and was marked by (unsuccessful) policy attempts, pursued by States with the aim of reducing migration and foster returns. Only when the third period of migration opened in the 1980s, the then European Community started considering the foundation of a European Immigration Policy. The urgency for this jointly-managed mechanism was linked to the whole new migration patterns that this period displayed.

Firstly, immigration started to interest all of the European States, rather than targeted ones: "traditional emigration countries in Europe, such as Spain, Italy, Ireland, Greece and Portugal, gradually became countries of immigration".[85] The rise of this indiscriminate interest towards Europe as a whole carried with it certain risks, specifically related to the phenomenon

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[83] Garson, Jean-Pierre and Anaïs Loizillon. "The Economic and Social Aspects of Migration". Conference Jointly Organized by the European Commissiona and the OECD. Brussels, 21-22 January 2003.
[84] Ibid.
[85] Ibid., p. 4.

of 'asylum seekers in orbit'[86]: since immigrants were *de facto* entitled to lodge an application in more than one country – bouncing back and forth from one frontier to another – European states were facing high risks of 'congestions' in the traffic of applications. Moreover, a second threat, tightly linked to the first, concerned the so-called 'asylum-shopping': due to a lack of common policies, asylum seekers were cherry-picking the Member State where to apply, with respect to the highest standards of reception and social protection one could offer.[87]

The third period was also characterized by a sharp increase in the number of applications for refugee status, due to the tragic conflicts burst out in Yugoslavia (1991-2001), Northern Iraq (1994-1997) and Kosovo (1998-1999). As a direct consequence, the European Community felt the urgency to address the manifold humanitarian emergencies in a concerted way, holding up to the Geneva Convention (signed in 1951 and later amended in 1967 by the New York Protocol), which set States' obligations concerning refugees.

Events such as the fall of the Berlin Wall (1989) and the collapse of the USSR (1991) also favored further movements from the East to the West of Europe. Germany alone, as the most popular resort for these historical migrations, received more than half of the overall numbers, shifting from a parameter of asylum applications of 455.3 (in thousands) during the timeslot 1985-1989 to 1374.7 during the window 1990-1994.[88]

It followed from these major historical episodes – occurred in such a limited time-period – that immigration towards Europe was turning into a much more global and generalized phenomenon. Instead of exclusively originating from former colonies or neighbouring territories, asylum seekers were coming from much wider territories. This phenomenon had a crucial impact in the prioritization of further cooperation in the field of Migration and Asylum[89], especially in the light of security issues related to the Schengen's external borders.

Another trailblazing event was the Treaty of Maastricht – also referred to as the Treaty of the European Union (TEU) – signed in 1992 and entered into force in 1993. Leaving aside its major historical outcome – i.e. the creation of a European Monetary Union (EMU) together with

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[86] Fratzke, Susan. "Not Adding Up. The Fading Promise of Europe's Dublin System". Migration Policy Institute Europe, 2015.
[87] Hailbronner, Kay, and Daniel Thym, eds. EU Immigration and Asylum Law: A Commentary. Second edition. München: Oxford: C.H. Beck; Hart, 2016.
[88] Hatton, Timothy J. "European Asylum Policy". National Institute Economic Review No. 194, 2005.
[89] Geddes, Andrew, and Christina Boswell. Migration and Mobility in the European Union. Houndmills, Basingstoke, Hampshire; New York: Palgrave Macmillan, 2011.

its own currency – the Maastricht Treaty crucially shaped the EU's setup by establishing the so-called 'three pillars structure', which resulted in a "mix of supranational integration and intergovernmental cooperation".[90] The first pillar, ruled by the Community Method, concerned the portfolios of the European Community (EC), the European Coal and Steel Community (ECSC), and the European Atomic Energy Community (EAEC); the second pillar, named CFSP (Common Foreign and Security Policy), was mainly dealt intergovernmentally, as well as the third one, the JHA (Justice and Home Affairs). It is in this third pillar that the European Immigration Policy was included[91] with the aim of achieving policy-convergence regarding the respective migration and asylum laws, via intergovernmental cooperation. With this in mind, the Maastricht Treaty set several JHA's objectives, such as a common asylum and immigration policy, judicial and police cooperation (under the guise of the EUROPOL, the European Police office), as well as stronger cooperation against international crimes and frauds. It is in the light of these goals, all demanding a high degree of cooperation and convergence together with a considerable level of mutual trust, that "the EU institutions started coordinating divergent national practices".[92]

4.1.2 – The Outcome: the Dublin Regulation I

With this historical and institutional context in mind, it is possible to better understand the European Commission's plea for the creation of a concerted Migration Policy already in 1985.[93] The whole process resulted in the signing of the Dublin Regulation in 1990, notwithstanding that the agreement only entered into force in 1997 due to a diplomatic quarrel between the UK and Spain over the sovereignty and status of Gibraltar.[94]

As this section will attempt to underline, the Dublin Regulation I exactly addressed the problems raised by the surrounding context. Its major objective consisted in determining and outlining the criteria for a swift responsibility-allocation between the Member States, preventing

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[90] Phinnemore, David. "The European Union: Establishment and Development" in Cini, Michelle, and Nieves Pérez-Solórzano Borragán, eds. European Union Politics. Fifth Edition. Oxford; New York, NY: Oxford University Press, 2016, p. 21.
[91] Balleix, Corinne. "From Lampedusa to the Post-Stockholm Programme: Difficult European Solidarity in the Field of Migration". European Policy Brief No. 24, 2014.
[92] Hailbronner, Kay, and Daniel Thym, eds. EU Immigration and Asylum Law: A Commentary. Second edition. München: Oxford: C.H. Beck; Hart, 2016, p. 1024.
[93] Seilonen, Josi. Fortress Europe – a brief history of the European migration and asylum policy. Master Thesis from University of Helsinki, 2016.
[94] SEMDOC, (1993). The draft External Frontiers Convention.

refugees being 'in orbit', along with the chances of 'asylum shopping'. In line with this, the very Preamble of the Regulation undertook "to provide all applicants for asylum with a guarantee that their applications will be examined *by one of the Member States* and to ensure that applicants for Asylum are not referred successively *from one Member State to another*" (stress is mine).[95] By expressly stating that one – and only one – State shall be considered as responsible, the Regulation *de facto* settled one of the major issues which originally led to its inception.

Another crucial objective of the Regulation was fostering harmonization of asylum and common visa policies between Member States, in accordance with the inputs set by the European Council meeting in Strasbourg (December 1989) and the Maastricht Treaty. This level of convergence was seen as a first and crucial step towards an eventual communitarization of national laws under the future CEAS.

It is with this in mind that the Regulation set different criteria, hierarchically ordered, for determining the state responsible:

➤ Art. 4: if the applicant has a 'family member' (i.e. his/her parent, spouse, or child) who is subject to international protection, then the State where the family member resides should be considered as responsible for the asylum application.

➤ Art. 5: if a Member State has issued a residence permit or a visa that is still valid, then that State should be considered as responsible.

➤ Art. 6: if the applicant has illegally entered within a Member State, then that State should be considered as responsible.

➤ Art. 7: this article clarifies which State should be considered responsible in accordance with different circumstances of transit.

➤ Art. 8: in the case in which no State can be found responsible in accordance with the articles indicated before, then the State where the applicant has first lodged his application should be considered as responsible.

➤ Art. 9: this article displays the so-called 'Humanitarian clause': every Member State can deliberately decide to bear the responsibility of an asylum request, especially when family reasons (e.g. extended relatives) or cultural justifications (e.g. a specific language or

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[95] (97/C 254/01). Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, p. 1.

religion) are at stake. This clause is often coupled with the 'Sovereignty clause' (art. 3(4)), which, likewise, grants the Member States the right to examine any asylum application.

4.2 – Unit II: the Reg. No 343/2003

While the evolution of solidarity will be directly addressed in the next chapter, it is already evident that the Dublin Regulation I was not conceived as a solidarity mechanism; on the contrary, it addressed very different demands. As it will be shown here, the introduction of the concept of solidarity can be traced back to the time window which led to the adoption of the 'Dublin Regulation II'.

4.2.1 – Exogenous Factors

The Regulation's path was firstly marked by the Amsterdam Treaty. Signed in 1997 and entered into force in 1999, the IGC was the first to introduce the concept of solidarity "as a guiding principle of the EU asylum policy"[96], by committing to ensure "a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons".[97] One of its greatest achievements was the shift of competence of the Immigration and Asylum Policy from the intergovernmental method (third pillar) to the community one (first pillar). This was considered as a first, crucial step towards the communitarization of this policy[98], despite others argued that EU competencies were remaining fairly limited and still constrained to Member States' willingness, power, and pace.[99] The Treaty also included the objective of minimum harmonization between national laws.[100] Lastly, the Commission attained the "exclusive right to propose legislation starting in 2002"[101], while also making regulations binding.

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[96] Lang, Iris Goldner. "Is There Solidarity on Asylum and Migration in the EU?". *Croatian Yearbook of European Law and Policy* 9, 2013, p. 1.
[97] (97/C 340/01). Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, p. 29.
[98] Phinnemore, David. "The European Union: Establishment and Development" in Cini, Michelle, and Nieves Pérez-Solórzano Borragán, eds. European Union Politics. Fifth Edition. Oxford; New York, NY: Oxford University Press, 2016
[99] Faure, Raphaëlle, Mikaela Gavas and Anna Knoll. "Challenges to a comprehensive
EU migration and asylum policy". Overseas Development Institute, 2015.
[100] Hailbronner, Kay, and Daniel Thym, eds. EU Immigration and Asylum Law: A Commentary. Second edition. München: Oxford: C.H. Beck; Hart, 2016.
[101] Hatton, Timothy J. "European Asylum Policy". National Institute Economic Review No. 194, 2005, p. 109.

Another institutional episode of paramount importance occurred in 1999, when the European Council, under the rotating Finnish Presidency, set out objectives and pace for the creation of the CEAS, through the so-called 'Tampere Conclusions'. The Council reiterated again the need to harmonize the heterogeneous laws on Immigration and Asylum, in order to attain the first stage of the CEAS.[102] 'Harmonizing' meant collecting coherent criteria for a swift allocation of responsibility, minimum standards of reception, and "the approximation of rules on the recognition and content of the refugee status".[103] Moreover, the text also introduced the concept of Interstate solidarity, with a view to justify further protection for displaced people and introduce some forms of financial burden-sharing.

One, last element to be considered *ipso facto* as an exogenous determinant was, of course, history. The future development of the Regulation was influenced by the 9/11 terroristic attack, which strongly resonated in the Old Continent. The episode brought to light the (migration-related) issue of security in Europe and led to its prioritization over human and migrants' rights. The topic was reignited in the following years due to the terroristic attacks in Madrid (2004) and London (2005) and directly influenced the outlook of the following multi-annual programme after Tampere, The Hague Programme (2004). Stating that the "security of the European Union and its Member States […] acquired a new urgency"[104], the Programme aimed at ensuring a correct equilibrium between migration and protection; nonetheless, it clearly prioritized the dimension of security.

Another historical episode which had a strong influence in the development of the Regulation was the Eastern Enlargement in 2004. When, on the 1 May 2004, 10 Member States and 75 million new-born European citizens officially joined the Union overnight, the morale was up for the territorial expansion and the demonstration of soft-power displayed by the EU. Nonetheless, what became clearer in the following years was that the integration of new members also implied the inclusion of equally different perceptions of solidarity. As it will be further explained in section 5.2.2, various Eastern members developed a competing account of solidarity, in the field of Migration and Asylum, providing evidence of the fact that transitions

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[102] The second step should have consisted of a fully-fledged EU asylum system, in which national policies were not merely harmonized yet converged into one.

[103] European Council, Conclusions of the Presidency, Tampere, 1999, p. 3.

[104] (2005/C 53/01). European Council, Conclusions of the presidency, The Hague. Strengthening Freedom, Security and Justice in the European Union, p. 1.

to or inclusions of new political actors affect institutions (as explained in section 2.2). The enlargement had major consequences for what concerns the institutional stagnation of solidarity, since these Member States kept raising concrete opposition in the European Council.

4.2.2 – Endogenous Factors

As mentioned in section 2.2, one of the most serious shortcomings of traditional NI (as representative of RCI and the 1st generation of HI) consists in leaving out any form of mutual and reciprocal influence that may occur between agent and structure. The overemphasis put on "received structure"[105], together with a subsequent understatement of actors' elasticity in adapting to the environment, resulted in a set of theories uncapable of explaining endogenous change occurring within the institution.

It is our goal here to explicate this pattern of institutional evolution, by analyzing the working paper prescribed in 2000 by the European Commission. As mentioned before, it is correct to consider this document as endogenous since its critical remarks arose *vis à vis* the Regulation and its deficiencies; thus, its normativity stemmed 'horizontally'. The original aim of the paper was to assess the Regulation implemented up to that point, and update it in the light of the insights offered by the Amsterdam Treaty. The overall assessment was undoubtedly negative since its beginning: "there seems to be widespread agreement that it [the Dublin Convention, ed.] is not functioning as well as had been hoped".[106]

A major objective of the paper was to investigate different ways in which the Regulation could have been potentially enlarged, since its purpose was judged as too narrow and limited. One of the most meaningful recommendations entailed "an equitable distribution of asylum applicants between the Member States, in proportion to each Member State's capacity to receive asylum applicants".[107] In other words, the paper acknowledged the lack of fairness within the process of responsibility-allocation and advised ways to reinforce it. The document backed an enhancement in the degree of fairness, since the asymmetry generated by the Regulation put an unjust burden on frontline States, leading them to operate outside of the Convention and

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[105] Fürstenberg, Kai. "Evolutionary Institutionalism: New Perspectives". *Politics and the Life Sciences* 35 (1), 2016, p. 49.

[106] (SEC (2000) 522). Commission Staff, Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States, p. 1.

[107] Ibid., p. 11.

freeride.[108] Nonetheless, the paper recognized that, at its current status, the Regulation was not structurally designed for this form of burden-sharing, and it "is incompatible with an approach under which each Member State would take responsibility for a fixed proportion of the total number of asylum applicants".[109] Thus, what the Commission implied is that the attainment of this objective required a deep reassessment and restructuring of the Regulation. The paper also underlined the convergence of the proposal with the Amsterdam Treaty's plea for promoting a stronger 'balance of efforts' and reiterated the need for financial solidarity and policy-approximation. Lastly, the paper judged the scope of the Regulation as too narrow, since the international protection was only extending within the limits of the Geneva Convention, cutting out those asylum seekers left out by the Convention and yet eligible for protection "under the European Convention on Human Rights or under other international or national provisions".[110] Since this weakness was leaving to the discretion of States, the paper stated that the creation of the CEAS should have ensured harmonization under this aspect too.

It is noteworthy to observe how EI's pattern and glossary emerged back in the paper, whose aim, in other terms, consisted in *selecting* promising purposes to be potentially *replicated* within the Regulation: "No system for allocating responsibility for asylum applicants can aspire to deliver all of the possible objectives analysed […]. It is therefore *necessary to make certain political choices*" (stress is mine).[111]

4.2.3 – The Outcome: the Dublin Regulation II

Despite the invoked 'replication', the Reg. No 343/2003 slavishly followed the path already paved, by expanding and clarifying the articles while remaining loyal to the line dictated back in 1997. Compared to it, the Dublin Regulation II drew more attention to the protection of unaccompanied minors and to family unity.

The Regulation roughly preserved the same structure and hierarchy of rules, concerning responsibility allocation. No substantive means were introduced with the aim of strengthening

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[108] This was also reiterated by another Paper from 2001, which indicated the presence of a line "running broadly from south-east to north-west" (SEC (2001) 756, p. 17), dividing 'net importers' of migrants from 'net exporters' in accordance with an arbitrary "geographic determinism".

[109] (SEC (2000) 522). Commission Staff, Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States, p. 11.

[110] Ibid., p. 15.

[111] Ibid., p. 18.

fairness, despite the fact that the Regulation rhetorically appealed to the urgency of striking a "balance between responsibility criteria in a spirit of solidarity".[112] A concrete innovation was the commitment to the creation of the EURODAC system, a digital database created for the recognition of asylum seekers' identity via fingerprints, aimed at reinforcing the European tracking system.

Other examples of material solidarity were the establishment of the European Refugee Fund (ERF) in 2001, which aimed at ensuring financial burden-sharing, the Reception Conditions Directive in 2003, aimed at laying down minimum standards of reception for the asylum seekers, and the Subsidiary Protection Directive in 2004, which provided a safeguard to those people in need of international protection, yet ineligible for the refugee status under the Geneva Convention. It is significant that this latter element of solidarity was created in response to the insights provided by the working paper from 2000: under this very specific aspect, it is possible to affirm that the endogenous factors influenced the institutional development regarding the scope of solidarity, providing evidence of a tangible evolution of the concept.

4.3 – Unit III: the Reg. No 604/2013
4.3.1 – Exogenous Factors

The opening of The Hague Programme assumed a symbolic importance for the CEAS, since it marked the official beginning of its 'phase two': despite the fact that the respective national policies were far from being harmonized[113], the CEAS' first stage was declared officially concluded on the 1st of May 2004. As a direct consequence of its emphasis on security, the following year the FRONTEX agency was established (2005) with the aim of streamlining coordination and cooperation of actions which, nevertheless, kept being in firm control of Member States.[114]

In the same year, the Commission also released the Global Approach to Migration (GAM), which gave continuity to The Hague's commitments by adopting an all-encompassing approach capable of ensuring security, upholding migrants' rights, cooperating with third-

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[112] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, p.1.

[113] Hatton, Timothy J. "European Asylum Policy". *National Institute Economic Review* No. 194, 2005.

[114] Seilonen, Josi. Fortress Europe – a brief history of the European migration and asylum policy. Master Thesis from University of Helsinki, 2016.

countries and fostering a form of circular migration, in order to attain mutually beneficial results.[115] The GAM was further developed in 2011 under the acronym GAMM (Global Approach to Migration and Mobility), which put even more importance on external cooperation. In a wider perspective, the GAM anticipated the future strategy of 'externalization' of the European Migration Policy, which consisted in engaging with third-countries with the aim of sharing the burden and easing internal pressure.[116]

One of the most significant breakthroughs in the entire history of European Integration was the Treaty of Lisbon, signed in 2007 and entered into force in 2009. For what concerns Immigration and Asylum Policy, the legacy of the Lisbon Treaty is large. The Treaty can be considered as a key step within the process of supranationalization of the CEAS, with the institutionalization, from that point onwards, of the Ordinary Legislative Procedure (OLP) as the standard method of policy-making[117], the establishment of qualified majority voting in the Council[118], and the definitive end of the 'three pillars structure'. However, it seems to be exaggerated to consider the Lisbon Treaty as the full realization of this supranational integration, also because the IGC maintained a highly intergovernmental nature in Member States' core interests, such as the Eurozone's political economy, or migration.[119] A crucial role played by the Lisbon Treaty included the incorporation of the goals of the CEAS within "the rank of primary law"[120] and the creation of a legal basis for the obligations arising from this joint management: art. 77-80 of the TFEU set out rules regarding border controls, common policies on Asylum and Immigration and the fair sharing of responsibility.

Lastly, another event occurred in 2009. In Stockholm, the European Council meeting released the third multi-annual programme, for the period 2010-2014. Its priority was "the development of a forward-looking and comprehensive Union migration policy, based on

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[115] Martin, Marie. "The Global Approach to Migration and Mobility: The State of Play". Statewatch, 2013.
[116] Talani, Leila Simona. "The 2014/2015 Refugee Crisis in the EU and the Mediterranean Route". Journal of Balkan and Near Eastern Studies 22 (3), 2020.
[117] Balleix, Corinne. "From Lampedusa to the Post-Stockholm Programme: Difficult European Solidarity in the Field of Migration". European Policy Brief No. 24, 2014.
[118] Geddes, Andrew, and Christina Boswell. Migration and Mobility in the European Union. Houndmills, Basingstoke, Hampshire; New York: Palgrave Macmillan, 2011.
[119] Fabbrini, Sergio. Sdoppiamento: Una Prospettiva Nuova per l'Europa. Prima edizione, Anticorpi. Bari: editori Laterza, 2017.
[120] Hailbronner, Kay, and Daniel Thym, eds. EU Immigration and Asylum Law: A Commentary. Second edition. München: Oxford: C.H. Beck; Hart, 2016, p. 1031.

solidarity and responsibility".[121] However, the conclusions were not particularly innovative and still in line of continuity with The Hague's direction. The Stockholm programme undertook to further organizing legal migration and border control, fighting against human smuggling and illegal migration, building up comprehensive partnerships with third-countries, and developing effective return policies, yet abiding by the principle of non-refoulement of migrants.

4.3.2 – Endogenous Factors

With the official finalization of the CEAS' first stage, new solutions were ready to be adopted. In 2007, a Green Paper on the Future of the CEAS was presented by the European Commission. If the first stage mainly addressed policy-approximation, the Green Paper committed to undertake an in-depth reassessment of the Regulation. Its goal was "to achieve both a higher common standard of protection and greater equality in protection across the EU and *to ensure a higher degree of solidarity* between EU Member States" (stress is mine).[122]

Among the various objectives, ways to step up fairness were also included. It is noteworthy that the Green Paper addressed burden-sharing demands by recommending the creation of corrective mechanisms to complement the Regulation, rather than radically revising it. Suggestions included forms of 'intra-EU resettlement', aimed at re-distributing people granted with international protection, as well as the concession of long-term resident statuses, with the aim of allowing "under certain conditions, to move to another Member State".[123] Ways for enabling financial solidarity to perform best were also included, as well as a mechanism for pooling together information. This will eventually result in the establishment of the Malta-based European Asylum Support Office (EASO) in 2011, intended to pool resources, expertise, and information-sharing mechanisms together[124], other than facilitating and supporting Member States in settling asylum claims and transferring seekers. The EUROSUR, established in 2013, also became a platform for cooperating and preventing cross-border illegal activities and irregular migration.

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[121] (2010/C 115/01). European Council, The Stockholm Programme. An Open and Secure Europe Serving and Protecting Citizens, p. 5.
[122] (COM (2007) 301 final). Commission of the European Communities, Green Paper on the future Common European Asylum System, p. 3.
[123] Ibid., p. 11.
[124] Balleix, Corinne. "From Lampedusa to the Post-Stockholm Programme: Difficult European Solidarity in the Field of Migration". *European Policy Brief* No. 24, 2014.

The policy-evaluation rendered by the Green Paper eventually resulted in the Policy Plan on Asylum, a document released by the European Commission the year after (2008). In view of the Green Paper's inputs – coupled with 89 feedbacks from several stakeholders – the Policy Plan outlined some 'overarching objective' for the CEAS, including the one to "determine responsibility and support solidarity […], both within the EU and with third countries".[125]

Considerable progress was achieved for what concerns the meaning of solidarity to endorse: while, in a document from the same year, the European Council was reiterating that "each Member State is responsible for the controls on its section of external borders" and that the "control […] is exercised in a spirit of joint responsibility on behalf of all Member State"[126], the Policy Plan displayed greater maturity, emphasizing how single States' problems *de facto* concern the entire Union, which therefore holds a responsibility. In order to step up internal solidarity, the Plan considered valuable options:

➢ Establishing forms of 'joint-processing' of applications.
➢ Supporting struggling States with temporary, expertise assistance for streamlining the early procedures of applications.
➢ Establishing an emergency-measure of temporary suspension for the Dublin Regulation and its rules, in case of overburdening influxes.
➢ Creating an emergency-measure of voluntary re-allocation for people under international protection.

Complementarily with this, the Policy Plan also accounted for external solidarity, to keep pace with the ongoing process of externalization: more financial support towards third-countries and assistance in the process of capacity-building were considered, as well as Regional Protection Programmes (RPPs) supporting repatriations, integration strategies, and resettlements.

In conclusion, the Policy Plan on Asylum and the Green Paper on the Future of the CEAS both provided stimuli for the revision of the Dublin Regulation. Moreover, it is noteworthy how these endogenous factors developed and fine-tuned their critical stances and normativity in accordance with the 'constraints' imposed by the structure: that is the case of conceiving measures of fairness only as corrective mechanisms.

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[125] (COM (2008) 360 final). Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. Policy Plan on Asylum: An Integrated Approach to Protection across the EU, p. 3.
[126] (13440/08 ASIM 72). Council of the European Union, European Pact on Immigration and Asylum, p. 9.

4.3.3 – The Outcome: the Dublin Regulation III

Despite the bold stimuli, the Regulation did not move far from the past. Indeed, the Reg. No 604/2013 explicitly stated that, in view of the results attained by the first stage of the CEAS, its underlying principles should have been confirmed. As already happened in 2003, the Revision corrected and broadened the general structure, without questioning its foundations. For what concerns the expansion, the Reg. No 604/2013 prioritized minor's rights, by extending the definition of 'family member' responsible for the child protection and by ensuring them sound guarantees and assistance. Moreover, deadlines were tightened and transferring Member States started to be considered as legally responsible for migrants' rights.[127]

One of the major innovations introduced by the Reg. No 604/2013 was the Early Warning Mechanism, an instrument of crisis-prevention: whenever a State would be jeopardized by migration pressure or deemed as deficient in its asylum capabilities, a joint action of the Commission and the EASO shall be triggered; recommendations should be provided and a preventive action plan demanded. Should not the preventive action plan settle the issues, then a crisis management action plan shall be requested to the State and, once accepted, implemented.

The Early Warning Mechanism aimed at establishing a relationship of mutual trust and solidarity between the pertinent institutions (Commission and EASO) and the distressed States in handling the crisis. Nevertheless, its basic logic did not seem to abide by solidarity, yet to the principle of national responsibility: indeed, the concerted action organized by Commission and EASO only aimed at providing the necessary support to the endangered State, "in order for it to itself repair the deficiencies in its asylum system and to defuse a possible crisis".[128] In conclusion, the Early Warning device does not seem to honour its expectations and exploit its full potential. It is not a case that its very birth was the result of an unsatisfactory compromise worked out by the European Council in response to the Commission's encouragement to create an exceptional measure of suspension for the Dublin Regulation (as demanded by the Policy Plan on Asylum). The European Council deemed the proposal as too dangerous "for fears it

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[127] Fratzke, Susan. "Not Adding Up. The Fading Promise of Europe's Dublin System". *Migration Policy Institute Europe*, 2015.
[128] Thildéus, Albin. Dublin in "crisis". Investigating the Dublin Regulation as a Crisis Management System. Master Thesis from Lund University, 2015, p. 21.

could result in a pull factor for irregular migration"[129] and rejected it. The position of the European Council was crystal-clear: solidarity matters as long as it does not interfere with the core interests and activities of the Regulation: preventing asylum shopping and refugees in orbit, and curbing migration fluxes.

4.4 – Unit IV: The Refugee Crisis

As argued by HI, critical situations may result in revolutionary moments of de-stabilization, reassessment, and therefore evolution, for the institution. It could be argued that, during the refugee crisis in 2014-2015, the EU and the CEAS missed an 'evolutionary opportunity', without *de facto* adapting to what the situation demanded. That is why Talani argued that the refugee crisis also developed into an institutional crisis[130], in which the system proved to be unable to cope, yet reluctant to change. That also explains why the refugee crisis put a strain on European solidarity as never happened before.[131]

Since the aftermaths of the Arab Spring and its military conflicts in the Middle East, migrations started to arise in 2011–12, reaching their eventual peak in 2015. People were fleeing from civil war and persecution, with the Syrian conflict and the rise of the Islamic State of Iraq and Syria (ISIS) at the forefront. Political concerns and indignation from the public opinion arose in response to humanitarian tragedies such as the Lampedusa shipwreck (03/10/2013), when over 360 migrants died, and the two-vessels sinking occurred near the Libyan coasts (18/04/2015), when more than 1,100 people drowned. Already after the first tragedy, the European Council committed itself to "the imperative of prevention and protection […] guided by the principle of solidarity and fair sharing of responsibility"[132], despite no effective measure followed.

The most critical moment of the refugee crisis was reached in the second half of 2015, when sharing the burden ceased being a common objective, partly due to a Dublin Regulation

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[129] (COM (2013) 416 final). Communication from the Commission to the European Parliament concerning the Position of the Council on the adoption of a proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, p. 3.

[130] Talani, Leila Simona. "The 2014/2015 Refugee Crisis in the EU and the Mediterranean Route". Journal of Balkan and Near Eastern Studies 22 (3), 2020.

[131] Larivé, Maxime H. A. "A Crisis for the Ages. The European Union and the Migration Crisis", The Jean Monnet/Robert Schuman Paper Series Vol. 15 Special, 2015.

[132] (EUCO 169/13). European Council, Conclusions on the Council Meeting from October 24-25, 2013, p. 17.

which allowed States' egoistical reasoning. In July, the Council of ministers agreed upon a relocation-mechanism of 40,000 people, to ease Italy and Greece's shoulders. Nevertheless, the Commission's indication to base the redistribution on mandatory quotas was opposed by several Member States.[133] The same happened in September, when the Council arranged a relocation scheme for a total of 120,000 people.[134] Permanent quotas of redistribution were unequivocally rejected by the Visegrád States in a joint communiqué.[135] Furthermore, between August and September 2015, fences were built by Hungary on its Serbian, Croatian and Slovenian borders, leading to a significant chain reaction, with Bulgaria, Slovenia, and Croatia responding likewise.[136] The Schengen zone was temporarily suspended, as well as the Dublin Convention, since migrants were not processed in first-arrival countries anymore.

The corrective – yet grossly inadequate – measure undertaken in response to the unfolding crisis consisted in an externalization of the European Immigration Policy, which aimed at transferring part of the burden to third-countries. A representative example was the EU-Turkey deal arranged in 2016, under which Turkey committed itself to readmit Syrian people present in Greece who were found ineligible for protection. In exchange, "for every Syrian being returned [...], a Syrian would be resettled from Turkey to the EU".[137] The EU also streamlined visa-liberalization for Turkish travelers and funded the country with 3 billion euros of humanitarian aid.

Whenever and wherever externalizing policies proved to be unfeasible, the EU answered by militarizing borders[138]: the Italian Search and Rescue (SAR) operation *Mare Nostrum* was substituted by the joint European campaign of *Triton* (2014) and *Sophia* (2015), which proved to be less effective. The last practice to be implemented was the 'hotspot approach'. In line with the direction undertaken by the Early Warning Mechanism, hotspots provided expertise to – yet also control on – States such as Greece and Italy, whose practice of 'non-registering' migrants in the EURODAC was well known. Hotspots pooled together the EASO, FRONTEX,

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[133] d'Oultremont, Clémentine, and Anna Martin. "The Migration Crisis: A Stress Test for European Values". *European Policy Brief* No. 38, 2015.

[134] Šelo Šabić, Senada. "The Relocation of Refugees in the European Union: Implementation of Solidarity and Fear". *Friedrich-Ebert-Stiftung*, 2017.

[135] Maurice, Eric. "Refugee quotas 'unacceptable' for Visegrad states". EUobserver, 2015.

[136] Kershaw, Ian. Roller-Coaster: Europe, 1950-2017. London: Allen Lane, 2018.

[137] Karageorgiou, Eleni. "The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity". *Nordic Journal of International Law* 88 (3), 2019, p. 350.

[138] Talani, Leila Simona. "The 2014/2015 Refugee Crisis in the EU and the Mediterranean Route". Journal of Balkan and Near Eastern Studies 22 (3), 2020.

EUROPOL, and the EUROJUST (the European judicial cooperation agency). Their assistance was limited to identification, registration, and returns.

4.4.1 – Attempts to Reform the Dublin Regulation

As wisely suggested by HI, the humanitarian crisis eventually led to a reassessment of the Reg. No 604/2013. On the 13 May 2015, the Commission released the European Agenda on Migration[139] and set out some general objectives, such as reducing the incentives for illegal crossings, reinforcing a common asylum policy, saving lives in the sea, and strengthening legal, humanitarian corridors.

Roughly one year later, on the 4 May 2016, the European Commission presented a reform of the Dublin Regulation, to be incorporated within a broader reevaluation of the CEAS as a whole. In line with the former revisions, the proposal did not aim at altering the general structure of the Regulation; the main objective was to introduce stronger corrective measures, such as an allocation mechanism to be triggered whenever a specific threshold would be reached, together with a stronger relocation system, shorter process times, more protection for minors and a broader definition of family members.[140] Despite some positive aspects, the proposal was both rejected by the Council and criticized by agencies such as the European Council on Refugees and Exiles (ECRE) for being too circumspect and, above all, far from being fairer (for example, the threshold was judged unrealistically high).

The 2016's failed attempt was then followed by an even bolder proposal, developed by the European Parliament in 2017.[141] For the first time since 1997, this motion directly addressed the foundational deficiencies of the Regulation. Indeed, the proposal intended to ease frontline States and make the system fairer by:

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

[140] (IP/16/1620). European Commission Press Release, Towards a Sustainable and Fair Common European Asylum System, 4 May 2016.

[141] (A8-0345/2017). European Parliament, Report on the Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person.

- Establishing a corrective allocation mechanism to prevent unbalanced and disproportionate numbers. The mechanism was not considered as an emergency measure, and no threshold was established.
- Redistributing people in accordance with GDP, population-size, and solidarity instances already shown. Following this, transfers should have then been directed towards four of the States with the lowest share. Coercive measures were intended to ensure compliance.
- Letting the Union's budget cover transfers costs, instead of burdening the transferring State, in order to incentivize compliance.
- Deleting forms of financial solidarity, with a view to preventing States from shirking responsibilities by 'paying': "Allowing other Member States to buy themselves out from the system would not be fair to frontline Member States".[142] Moreover, it was argued that this practice led States to turn their eye from their international obligations.

On the other hand, the proposal also aimed at valorizing asylum seekers' choice, in order to limit the possibilities of secondary movements. This was pursued by:

- Leaving the applicant free to choose between the four Member States, in the case the allocation mechanism was triggered.
- Conferring the right to be transferred to another Member State within a maximum group of 30 people, with the aim of preventing isolation.
- Providing particular attention to "family, cultural or social ties or language skills"[143], as well as education background or potential diplomas held.
- Eliminating the paternalistic legacy of the Regulation. As an example, the Reg. No 604/2013's appeal to 'beneficiaries of international protection' was substituted with people "who legally reside in a Member State".[144]

Despite the fact that this bold proposal was adopted by the European Parliament with a majority of 390 votes – against 175 no and 44 abstentions –, it then hit the wall of the European Council and was rejected. On the 4 December 2018, the then President of the European Commission Jean-Claude Juncker threw in the towel[145], declaring to have given up the completion of the CEAS and the reform of the Dublin Regulation.

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[142] Ibid., p. 96.
[143] Ibid, p. 132.
[144] Ibid, p. 63.
[145] Gotev, Georgi. "Juncker Commission gives up on Dublin asylum reform". EURACTIV, 2018.

Chapter V – Discussion

5.1 – The Evolution of Solidarity

It is now necessary to investigate the way and the extent to which the value of European solidarity has been upheld within the Dublin Regulation over the years. As already mentioned, the meanings of solidarity must be discerned and diversified. On the one hand, this methodological operation allows us to open a concrete and evidence-based discussion about the concept and its evolution. On the other hand, it also gives the chance to grasp all its different facets, that would otherwise be overlooked. As outlined in section 3.4, many criteria for examining solidarity exist. They will now be analyzed in order.

5.1.1 - Has the Regulation Ensured Compliance Between Actors?

The Dublin Regulation outlines multiple criteria necessary to determine the State responsible for an application. This requires a considerable degree of loyalty towards the norms, together with the actors' disposition to engage, collaborate, and comply with each other.

In its early days, the Regulation struggled in ensuring compliance: during the biennium 1998-1999, 95 percent of the overall number of applications were processed outside of it[146]; only in a percentage equal to 6 percent did the applications result in a Member State asking another one for taking the request back or taking charge of it. The acceptances of these requests only represented the 4.20 percent and the actual transfers the 1.7 percent.[147]

The revision of the Regulation in 2003 was promising further results, since the increasing level of policy-approximation, pursued with the aim of reaching the first stage of the CEAS, should have also had a beneficial impact in ensuring compliance between the Member States. Nevertheless, the experience showed how much harder it was to put into concrete effect the formal process of harmonization. By way of illustration, the practice of detention was systematically used in France, while being almost inexistent in Spain[148], and "recognition rates of candidates for refugee status vary for certain third-country nationals from approximately 0%

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[146] Hailbronner, Kay, and Daniel Thym, eds. EU Immigration and Asylum Law: A Commentary. Second edition. München: Oxford: C.H. Beck; Hart, 2016.
[147] (SEC (2001) 756). Commission Staff, Evaluation of the Dublin Convention.
[148] Fratzke, Susan. "Not Adding Up. The Fading Promise of Europe's Dublin System". Migration Policy Institute Europe, 2015.

to 90% within Member States".[149] A report delivered by the European Parliament (2008) also underlined how Member States tended to overlook the procedure for the determination of the refugee status, in order not to be regarded as responsible.[150] For the same reasons, States were often concealing people's entries from the EURODAC database[151] and the Regulation's criteria were not diligently applied.

Officially, the first stage of the CEAS, which mainly concerned with policy-approximation, ended in 2004. Nevertheless, the Reg. No 604/2013 still displayed the same deficiencies. An ex-post evaluation from the European Parliament (2020) did acknowledge a lack of "coordination mechanism at national level to implement the procedures induced by the Dublin Regulation"[152] and an absence of compliance regarding the safeguard of migrant's rights during the application. Furthermore, the study declared that transfers occurring under the Dublin Regulation badly performed "due to non-compliance with the deadlines for carrying out a transfer".[153]

5.1.2 –Does the Regulation Abide by Primary Law?

For what concerns the adherence between the Regulation (which is considered as belonging to Secondary law) and Primary law (i.e. EU treaties), the former originally displayed a remarkable continuity with the latter. The objectives addressed by the Regulation I answered to the list of challenges outlined by the Maastricht Treaty, such as the harmonization of national laws, the joint control over external borders, and a deeper degree of cooperation between the Member States. Moreover, the Regulation's scope, which only concerned people falling into the category of 'refugees', abided by Primary law and, more specifically, to the Art. K.2, which required adherence to the Geneva Convention from 1951. Nevertheless, despite this formal adherence to the Maastricht Treaty, the concrete achievement of these objectives proved to be harder than expected.

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[149] (A6-0287/2008). Report on the evaluation of the Dublin system. Committee on Civil Liberties, Justice and Home Affairs, 2008, p. 5.
[150] Ibid.
[151] Ibid.
[152] (PE 642.813). European Parliamentary Research Service, Dublin Regulation on international protection applications, February 2020, p. 1.
[153] Ibid., p. 70.

In the light of these results, it is difficult to affirm how far the Regulation managed to abide by the following Amsterdam Treaty and its objectives, such as the creation of minimum standards of reception or the achievement of the well-known "balance of effort between Member States".[154] On a positive note, the introduction of the Subsidiary Protection Status (2004), the form of international protection correcting the limits of the Geneva Convention, allowed further adherence with the principles enshrined in the European Charter of Fundamental Rights[155], as also did the stress on family unity.

The widening gap between the Dublin Regulation and Primary law was meant to grow with the Lisbon Treaty. By amending the TFEU, the IGC introduced new articles which incorporated the issue of Migration and Asylum within Primary law. Of particular importance for the following research was the art. 80, which explicitly mentioned solidarity as a guiding principle, by affirming that "The policies of the Union set out in this chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility".[156] Despite the fact that the article was vague and its actual translation into policies questionable, what remains evident is that it provided a legal justification for actions exceeding the "mere cooperation between states".[157]

5.1.3 – Has the Regulation Enhanced Mutual Trust?

Compared to the period antecedent to the Dublin Regulation I, characterized by a total disharmony in the handling of migrations, the partnering attained via intergovernmental cooperation might have enhanced mutual trust between the Member States. Nonetheless, it is also true that its possibilities of cooperation were egoistically curtailed since the start: in 1994, Germany proposed a revision aimed at better implementing the principle of burden-sharing within the original Regulation. Being the worst hit EU-country and accounting alone for more than half of the overall number of applications[158], it presented a plan of refugees-redistribution

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[154] (97/C 340/01). Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, p. 29.
[155] Signed at the Treaty of Nice in 2000, it must be specified that the Charter became a binding piece of Primary law only after the entry into force of the Treaty of Lisbon (2009).
[156] Consolidated Version of the Treaty on the Functioning of the European Union, Art. 80.
[157] Karageorgiou, Eleni. "The Law and Practice of Solidarity in the Common European Asylum System: Article 80 TFEU and Its Added Value". *European Policy Analysis. Swedish Institute for European Policy Studies* 14, 2016, p. 4.
[158] Hatton, Timothy J. "European Asylum Policy". *National Institute Economic Review* No. 194, 2005.

based on parameters such as country and population size, together with GDP per capita. The proposal was swiftly rejected by the European Council and especially by the UK, which had every reason to protect its privileged position as one of the least-hit States. It is likely to argue that this episode might had detrimental effects in the process of trust-building, undermining the level of mutual trust between the Member States since the very beginning.

Despite no fundamental change was introduced by the Dublin Regulation II, the Amsterdam Treaty's transition from a strictly intergovernmental approach towards an eventual communitarization may had a positive influence in the process of trust-building. Nonetheless, no logical connection exists between policy-communitarization and the eventual "emergence of a rights-respecting model of asylum law and policy formulation".[159] Realistically speaking, the unwieldy lack of homogeneity in national legislations and practices had detrimental effects in terms of actors' mutual trust. The direct consequence is that if "the Dublin system is rooted in such premises as mutual trust and reliability and […] if these prerequisites are not fulfilled […] the whole system suffers".[160]

In the last revision of the Dublin Regulation, the meaning of solidarity as mutual trust acquired a primary role. The term assumed importance in relation to the Early Warning Mechanism: by relying upon cooperation and recommendations, the device was intended to foster mutual trust, since "Solidarity, which is a pivotal element in the CEAS, goes hand in hand with mutual trust".[161] Furthermore, its importance was also reiterated in the Stockholm Programme, where it acted as a normative stimulus for exchanging best practices and developing a peculiar 'European judicial culture', based on the reciprocal understanding of national laws.

5.1.4 – Has the Regulation Ensured Fairness in the Responsibility-Allocation?

There are several elements indicating how the entire evolution of the Dublin Regulation has been particularly deficient in ensuring fairness within the process of responsibility-allocation.

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[159] Juss, S. S. "The Decline and Decay of European Refugee Policy". *Oxford Journal of Legal Studies* 25 (4), 2005, p. 751.

[160] (A6-0287/2008). Report on the evaluation of the Dublin system. Committee on Civil Liberties, Justice and Home Affairs, 2008, p. 4.

[161] Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

Therefore, the Regulation has failed in upholding the value of solidarity in one of its strongest meanings. The aforementioned German proposal was an example of this: aside from being a lost opportunity for ensuring mutual trust, the episode was also a blatant demonstration of the Regulation's lack of fairness: indeed, the German proposal intended to target the root cause of unfairness within the Regulation, namely the excessive burden put on first-entry States.

In 2003, the critical remarks uttered by the working paper from 2000 provided a strong chance of development; nevertheless, they were never concretely addressed by the Reg. No 343/2003. The Dublin Regulation kept being particularly deficient in the provision of burden-sharing mechanisms. The EP's evaluation from 2008 reiterated that "the high level of multiple requests and the low level of effected transfers are indicators of the deficiencies of the Dublin system and of the need to establish a common European asylum system".[162]

The third revision did not reinforce fairness in a consistent manner; in this respect, the Regulation's credentials kept on being inadequate.

5.1.5 – Has the Regulation Ensured Fairness by Resorting to Other Means?

Through the years, corrective and flanking measures were introduced with a view to strengthening fairness, without altering the core axioms of the Regulation.

One year after the German fiasco (1995), the European Council adopted the so-called 'Temporary Protection Directive', as a way of compensating for the previous turndown. The Directive was conceived as an exceptional measure, to be applied in the course of unmanageable upsurges of refugees' influxes. The instrument aimed at granting temporary protection to refugees fleeing from a geographically-specific troubled area, without having them to apply; it intended to prevent congestions of applications and ease pressure on frontline countries. Nevertheless, its ultimate significance must be called into question: despite originating in the escalating context of the Yugoslavian wars, the Directive was never triggered, neither in the event of the following war of Kosovo, nor in any other occasion. Thus, it is difficult to advocate how this mechanism has substantially succeeded in reinforcing fairness within the Regulation. This is even more evident if we consider that the Directive did not aim at fixing the root causes

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[162] (A6-0287/2008). Report on the evaluation of the Dublin system. Committee on Civil Liberties, Justice and Home Affairs, 2008, p. 4.

of fairness-deficiencies; the mechanism only had a corrective purpose to be triggered in the sole event of emergency situations.[163]

The Reg. No 343/2003 made some remarkable progress under this specific aspect. As already mentioned in section 4.2.3, the co-financed European Refugee Fund was institutionalized as a form of financial solidarity between the Member States. Set up for the time-window 2000-2004 with a budget of 216 million euros, the Fund was further developed in the years 2005-2010, reaching a sum of 604 million euros.[164] Furthermore, the pool acted as blueprint for future projects, such as the EU External Border Fund developed between 2007-2013 with the aim of sharing the costs of external borders' controls. Nevertheless, it should be specified that burden-sharing is not equal to burden-shifting[165] and solidarity should not be toned down to its mere economic aspect[166]; as outlined in section 1.3, the concept entails substantial positive obligations.

The Reg. No 604/2013 achieved very limited progress in enhancing burden-sharing mechanisms. The only worthy exception was the Early Warning Mechanism: nevertheless, the system only provided means of assistance for the endangered State, in order to let it 'sort the problem out'. The discussion in section 4.3.3 has already highlighted the major deficiencies of the Mechanisms and why it does not ensure fairness.

5.1.6 – Has the Regulation Ensured Mutual Security?

Internal security has always been one of the crucial objectives of the CEAS, to be ensured through a sound management of migrations. This fundamental task was undertaken by the Dublin Regulation. Nevertheless, due to the unequal distribution of responsibilities and the lack of fairness, the Regulation only managed to ensure one-sided security. The asymmetrical and unjust *status quo* has been exclusively beneficial for those European States which have found themselves geographically surrounded and 'protected' by frontline States. It is only in the light of this disproportion that the rationale in defense of the *status quo*, as the one represented by the

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[163] Thildéus, Albin. Dublin in "crisis". Investigating the Dublin Regulation as a Crisis Management System. Master Thesis from Lund University, 2015.

[164] Hatton, Timothy J. "European Asylum Policy". *National Institute Economic Review* No. 194, 2005.

[165] Newland, Kathleen. "Cooperative Arrangements to Share Burdens and Responsibilities in Refugee Situations short of Mass Influx". *Migration Policy Institute*, 2011.

[166] Lombardi, Lorenzo. "Tackling the Migration Challenge by Diversifying European Solidarity". *TEPSA Student Contest*, 2021.

UK in 1994, can be fully understood. Further evidence of this can be found in the concept of 'safe third-country' developed in the London ministerial meeting in 1992: by bestowing non-EU countries the status of 'safe', Member States could then refuse to accept and process an application, insofar as it was found that the migrant had transited through one of these safe areas, without applying. Strategically granted to all Eastern European States in the years following the USSR collapse, this resolution addressed the security demands put forward by European Member States.[167]

The Reg. No 343/2003 achieved the most on the security-side of the topic: by way of illustration, the establishment of the EURODAC provided the Member States with a new instrument for assigning responsibilities and determining accountability for an application. Indeed, it offered material evidence of the asylum seeker's path since its entry into the EU. As already suggested in section 4.2.1, the prioritization of security issues, together with the need to implement tools for the recognition of identities, was prompted by the Western world's trauma of 9/11. What, years after, remains unclear is "whether the securitization […] is the most appropriate to increase security or if, by adding to irregular migration, it is indeed obtaining the opposite result of increasing insecurity".[168]

In the course of the Reg. No 604/2013, no major evolution was detected. What is worth mentioning was the launch of the Asylum and Migration Fund (3,869 billion euros) and the Internal Security Fund (4,648 billion euros) within the Multiannual Financial Framework (MFF) 2014–2020. Despite being placed outside of the Dublin Regulation, the introduction of these funds acted as a new boost to security demands, with a budgetary increase of 40 percent compared to the period 2007–2013.[169]

5.1.7 – Conclusions on the Evolution of Solidarity

It is now the time to draw some conclusive remarks on the evolution of solidarity. By looking at the historical development of the Regulation, it is not an exaggeration to affirm that the concept of solidarity experienced an evolution. As one might have already guessed from section

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[167] European Council on Refugees and Exiles (ECRE). "Report on the Application of the Dublin II Regulation in Europe". *European Legal Network on Asylum*, 2006.
[168] Talani, Leila Simona. "The 2014/2015 Refugee Crisis in the EU and the Mediterranean Route". *Journal of Balkan and Near Eastern Studies* 22 (3), 2020.
[169] Lang, Iris Goldner. "Is There Solidarity on Asylum and Migration in the EU?". Croatian Yearbook of European Law and Policy 9, 2013.

4.1.2, solidarity was not an ideational force behind the original shaping of the Dublin Regulation I, nor it held any sort of sway power. It is emblematic that, compared to the revisions from 2003 and 2013, the concept of solidarity did not even appear within the Regulation's text. The explicit absence of a value that, later in the years, will increasingly assume a crucial role in the rhetoric, narrative, and justification of the CEAS does only provide further evidence of the evolution that is depicted here. Furthermore, the principle acquired an increasing relevance for the Regulation, and became one of the most influential normative and critical stimuli: as it will be further explained in section 5.2.1, endogenous incentives arising *vis à vis* the Regulation had a concrete influence on its revisions. Despite this, in terms of results *stricto sensu*, the Regulation is still far from being fully solidary:

➢ Solidarity as mutual compliance was never fully realized, despite the objective of harmonizing actors' practices was formally achieved in 2004 (The Hague Programme). Concerning the adherence of the Regulation to Primary law, this faded with the institutionalization of the Lisbon Treaty and its art. 80, which set the bar higher by identifying solidarity as a legal principle, to be fulfilled at the highest degree possible.[170]

➢ Despite a growing, rhetorical importance achieved through time, very little progress was made in order to materially ensure mutual trust.

➢ A strong definition of solidarity as fairness was never considered as an objective. The resort to other means did not prove to be effective either: both the Temporary Protection Directive and the Early Warning Mechanism did not attain the results expected.

➢ Despite security was the aspect under which the Regulation achieved the most – as has been shown – it must be remembered that the protection ensured was only one-sided and asymmetrical.

In the light of these results, it is now necessary to pose one, last question: can we provide a more accurate account of the only partial phenomenon of institutional change, as well as the most predominant pattern of stagnation?

5.2 – Applying EI to the Case Study

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[170] Karageorgiou, Eleni. "The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity". Nordic Journal of International Law 88 (3), 2019.

By drawing upon EI and its methodological partitioning between exogenous and endogenous factors, Chapter IV has summarized the findings of the research: namely, how the Dublin Regulation's content has evolved through time, and due to which determinants (both endogenous and exogenous). The conclusions reached in the first section of Chapter V promptly answered to the primary research question; nevertheless, as mentioned in section 1.6, investigating the evolution of solidarity also entails a study of both the phenomena of institutional stagnation and development of the concept. A thorough investigation through the lenses of EI could shed further light on this point.

In section 2.3, it has been argued that EI is better equipped than RCI and HI for providing a realistic account of what an institution is: what the two traditional theories miss is the possibility of accounting for an influence that the structure exerts on the agent, something settled by EI with the introduction of 'endogenous determinants'. It is now the time to specify what 'structure' and 'agent' are, in our specific case.

As mentioned in section 2.2, the agent is the policy-initiator and the figure responsible for designing the Regulation. Since 2002, this role has been exclusively played by the European Commission: the institution has *de facto* been the sole proponent of those papers which have provided normative stimuli and innovative proposals to the Regulation. On the other side, the 'structure' can be defined as the environmental conditions and constraints imposed by the European Council to the Commission's entrepreneurship. Thus, the structure consists of an intergovernmental and rationally-egoistic context, mainly based on a logic of national interests, which puts a brake on the leeway of the Commission (as described in section 1.4). The constraining nature of the 'structure' derives from the fact that the Dublin Regulation was not originally designed for upholding a fully-fledged system of burden-sharing.

5.2.1 – Variation, Selection, and Replication of Solidarity within the Regulation

The application of the evolutionary process – proper of biological life – to wider scenarios does perpetuate a specific pattern, based on variation, selection, and replication. Is it possible to detect the same model, in our case study?

Solidarity as an institutional value is present since the Maastricht Treaty (1993). Nevertheless, on that occurrence, the concept mainly performed a rhetorical role, by invoking

cohesion and unity between the Member States and their people, in a manner not different from the past (e.g. the Single European Act).

What is crucial about the concept of 'variation', the first element of the evolutionary pattern, is that it intrinsically requires a change from the ordinary behavior, direction, or meaning. An episode that fulfilled this requirement was the proposal put forward by Germany, which aimed at implementing a different, fairer, and pragmatically concrete form of solidarity, based on a just re-distribution of responsibilities in accordance with each Member's possibility. Following the theoretical framework, this can thus be considered as an intentional and strategic variation (yet immediately rejected by the European Council).

What is most important, the variation was not an exceptional *unicum* in the history of the Dublin Regulation; yet, it was further *selected* on each and every occasion of Regulation's reassessment: the Working Paper from 2000, the Green Paper from 2007, and the eventual Policy Plan from 2008 all reiterated the same ideational variation, representative of a fairer system of burden-sharing. A similar, yet even bolder, selection was the one offered by the European Parliament in 2017. Furthermore, the dreadful handling of the refugee crisis in 2015, which undermined the EU values as described in the TFEU[171], appears to have provided confirmation for this selection.

Nevertheless, the selected account of solidarity never reached its third stage: the replication. Despite the fact solidarity acquired an increasing relevance within the Regulation's revisions (compared to the original version), the account was never fully retained. To better understand this, it is crucial to remember that, within EI, every variation, selection, and replication process is the result of a deliberate and calculated decision. More specifically, to replicate an institutional feature means to knowingly retain welcome practices that have been previously selected, and opt-out from the unwelcomed ones. Thus, it is likely to conclude that, despite the strong legal basis provided by the art. 80 of the TFEU, the establishment of a fairer account of solidarity has never been considered as a crucial objective for the structure, i.e. the European Council.[172]

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[171] Wollard, Catherine. "Has the Mediterranean Refugee Crisis Undermined European Values?". IEMed. Mediterranean Yearbook 2018, 2018.

[172] Until the Lisbon Treaty, the European Council was the most crucial legislator. With the establishment of the OLP, the Council became the co-legislator, on a level equal to the European Parliament.

Nonetheless, as a matter of fact, it is not entirely correct to affirm that the selection has been rejected wholeheartedly, yet only in its strongest meanings and implications. Let us understand why. The so-called 'endogenous' factors are the results of the influence that the structure exercises on the agency: as already mentioned in section 4.3.2, endogenous factors adjusted their normativity in accordance with the constraints and limits put by the structure. In short, the decision to consider the implementation of solidarity only in terms of additional and flanking measures to be coupled with the criteria of responsibility is an example of how the selected patterns silently reached the Regulation, by toning down their normative attitude. By way of illustration, the Working Paper from 2000 stated that:

> "The *most pragmatic approach* to the question of burden sharing would appear to be to address it further in the contexts mentioned above, and *not to seek to replace* the Dublin Convention with a mechanism for distributing asylum applicants between the Member States in proportion to each Member State's capacity to receive them, particularly since discussions on physical burden sharing […] *have not produced any concrete results*" (stress is mine). [173]

Examples of these measures were the stimuli for the establishment of the ERF, the EURODAC and the subsidiary protection[174], the creation of the EASO[175], the institutionalization of voluntary re-allocation processes, the establishment of hotspot approaches, as well as the introduction of further amendments in order to boost efficiency.[176]

A first conclusion can be drawn: the decision not to replicate a feature yet so often selected became indicative of a growing discrepancy: the one between the vision on solidarity upheld by the Dublin Regulation and represented by the European Council, against the entrepreneurial agency represented by the European Commission (and, to a lesser extent, the European Parliament). The evolution of the concept of solidarity within the Dublin Regulation

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[173] (SEC (2000) 522). Commission Staff, Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States, p. 12. Furthermore, a similar instance was also taken by the Policy Plan on Asylum in 2008.
[174] Ibid.
[175] (COM (2007) 301 final). Commission of the European Communities, Green Paper on the future Common European Asylum System.
[176] (COM (2008) 360 final). Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. Policy Plan on Asylum: An Integrated Approach to Protection across the EU.

took, and still takes, the form of a dialogue between different visions regarding the role of the CEAS and the extent to which cooperation should lie in it.

5.2.2 – Stagnation of Solidarity within the Regulation

As mentioned in section 2.3, one of the merits of EI is that of providing an explanation for those incongruities and mismatches that are intrinsic to the institution. The historical analysis has displayed one of its major inconsistencies: that is, the predominance of stagnation over evolution, and inertia over variation. Despite two revisions, the Regulation is, still today, much more similar to the original version than to the attempted innovations introduced by the following factors of development. This is representative of an unbalance in the power of influence between agency and structure, in favor of the latter: despite occupying a legislative role on an equal footing with the European Parliament, the European Council holds tight to the issue of Migration and Asylum, regarded as a core, national interest. It is not a coincidence that, in the event of sudden inflows in migrations, the Council will act as a standalone institution in the adoption of measures.[177]

It might follow from this short description that the traditional HI's concept of path-dependency would be more than enough for explaining this institutional continuity: revising a Regulation from its foundation is cost-intensive, and therefore something to avoid. Nevertheless, compared to HI, the theory of EI provides a deeper level of analysis, by framing the issue within a wider picture, and allowing us to grasp its evolutionary complexity. What the HI's theoretical lenses do not detect is that, despite the predominant pattern of stagnation, what has also been witnessing is a fracture growing underneath the institutional surface, between the account of solidarity upheld by the Regulation and the one advocated by the 'substratum' of background papers and documents (as mentioned in the previous section). Thus, the apparent and superficial continuity that is detectable in the official revisions of the Regulation does not devaluate the progress that has been undeniably attained for what concerns the value of solidarity that *should* be implemented; nor it does make the path of the Regulation more linear in the eyes of EI.

There is also another question that, being a vigorous counterargument against HI, legitimizes the endorsement of EI: why has the refugee crisis not been a critical juncture, despite

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[177] Fact Sheet on the European Union, Immigration Policy, 2021.

being an exogenous and de-stabilizing shock for the institutional order? The remainder of this section will address this issue.

Along with Soifer, we argue here that a better understanding of critical junctures requires a conceptual partition between 'permissive' and 'productive' conditions[178]: while the former represent the institutional *pars destruens*, consisting of the conditions leading to a rupture and an opening for new institutional opportunities, the latter correspond to the *pars costruens*, namely the concrete inputs eventually triggering a deviation from the *status quo*. To occur, critical junctures need both conditions.

What is noteworthy is that the partition relies on the dichotomy agency-structure, since permissive conditions can also be defined as "those factors or conditions that *change the underlying context to increase the causal power of agency* […] *and thus the prospects for divergence*".[179] On the same line, critical junctures are described as institutional episodes in which structural constraints loosen up, while the agency's sway power increases.[180]

Against this background, the permissive conditions risen by the refugee crisis should have provided the space for the 'agency' – consisting of a ten-year long discussion concerning ways to reinforce fairer mechanisms of burden-sharing – to arise. Nevertheless, this did not occur in reality. The reason is that, within our specific case, the dichotomy agency-structure is representative of two different institutions (the Commission and the Council), whose decisional power is different. As mentioned before, in the case of emergency situations, the sole institution to be responsible for adopting measures is the European Council, while the Commission is tasked with policy-proposals and the European Parliament with a consultative role. Thus, in the circumstances leading to a critical juncture, the Council has more relevance, while the possibilities for the agent to influence the structure shrink.

Nevertheless, the primacy of the Council over the Commission should not have necessarily resulted in failures in reinforcing fairness, since several Member States manifesting interest towards relocation and redistribution exist, such as frontline states (Greece, Italy, Spain, Malta, Cyprus) or countries which unjustly bore the highest numbers of refugees (Germany,

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[178] Soifer, Hillel David. "The Causal Logic of Critical Junctures". *Comparative Political Studies* 45 (12), 2012.
[179] Ibid., p. 1574.
[180] Capoccia, Giovanni and R. Daniel Kelemen. "The Study of Critical Junctures. Theory, Narrative, and Counterfactuals in Historical Institutionalism". *World Politics* 59(3), 2007.

Sweden). Thus, why does such a staunch opposition against distribution-quotas exist? It is for answering this question that RCI comes back in handy.

As already explained in section 2.2, RCI relies on a logic of consequence, according to which the value of an institution depends upon its effects. In line with this, the decision to oppose solidarity measures stems from their consideration as consequentially disadvantageous: it is then possible to understand why States such as Hungary, Slovakia, Czech Republic, and Romania expressed staunch opposition and voted against the relocation of 160.000 refugees, between July and September 2015. By way of illustration, the Prime Minister of Hungary, Victor Orbán, built a whole national ideology in contrast with immigration, as representative of the dichotomy Christianity-Islam.[181] In the light of the national political interests, the logic of consequence led these States to vote against the decision.[182] Despite the proposal for a relocation was adopted anyway (since the decision-making procedure for this portfolio is majority voting) and the outcome was reputed as binding, Hungary did not relocate any of its refugees and, together with Slovakia, challenged the Council decision by taking the case before the European Court of Justice (EUCJ). On the 6th of September 2017, the Court dismissed the demands from the two countries.

In conclusion, episodes of institutional shock and de-stabilization are not enough for delivering a critical juncture, since these only allow permissive conditions to occur. What is also needed is the contribution of productive conditions, whose achievement requires a deep interaction and influence between actor and structure. Nevertheless, in our specific case study, this interplay has been lacking, since the relation is not intrinsic to one, single institution, but is representative of two different bodies, whose sway power and influence are highly unbalanced and which also follow different logics.

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[181] Mendelski, Bruno. "The Rhetoric of Hungarian Premier Victor Orban: Inside X Outside in the Context of Immigration Crisis" in The Palgrave Handbook of Ethnicity, edited by Ratuva S. Palgrave Macmillan, Singapore, 2019.
[182] Šelo Šabić, Senada. "The Relocation of Refugees in the European Union: Implementation of Solidarity and Fear". *Friedrich-Ebert-Stiftung*, 2017.

Chapter VI – Conclusions

6.1 – Summary of the Research

It is now the time to draw some conclusive remarks from the research question posed at the beginning. These will first be preceded by a short summary, aimed at providing an extensive portrait of the study undertaken. The current research has addressed a crucial question that concerns the axiological foundations of the EU: to what extent has solidarity changed within the institutional setting of the Dublin Regulation? The question was spurred by an alleged change in our perception of the value, occurred in the aftermath of 2015: since the EU is based upon a legacy of common and institutional values, it is likely to infer that values' change will result in institutional changes. By opening to this question, the research also committed to study both the phenomena of institutional stagnation and development of solidarity, advancing an explanation for the existence of both patterns.

The peculiarity of this work resides in the fact that the research neither does abstractly contemplate the meanings and extension of European solidarity, nor does uncritically enumerate occurrences of solidarity within the Regulation. Instead, the work focuses on the interdisciplinary relation between values, considered as normative stimuli, and institutions, that are the ways in which values are concretely upheld (in an imperfect way).

A constant objective throughout the entire thesis has been to demonstrate that EI, compared to RCI and HI, is better suited for addressing the research question, since it provides a more realistic account of institutional progress, in which both actor and structure have a mutual power of influence. Furthermore, compared to traditional NI theories, EI better explains both the phenomena of institutional stagnation and development, in a consistent manner. From a critical perspective, EI achieves this by perhaps displaying a higher level of complexity compared to the other two theories. Nevertheless, we argue here that complexity is a measure of realism.

For what concerns the methodological parenthesis, HCIA provides the general framework in which to operate, together with specific indications regarding the distinction between exogenous and endogenous factors of development (necessary for truly adopting an evolutionary approach) and the declination of solidarity in its different meanings.

Following this, what has the research demonstrated? Has the value evolved through time? The current research argues that an evolution of the concept has been clearly occurring, and that the concept has acquired an increasing relevance over the years. In support of this vision, the research has *de facto* shown how endogenous factors of development, which arose *vis à vis* the Regulation's major deficiencies, have had a direct influence on the following revisions. Nevertheless, in terms of results, the Regulation is still far from being a fully solidary mechanism. It is emblematic that the only normative stimuli to be eventually replicated through the revisions were all corrective and flanking measures: no radical reassessment has ever been carried out, and bolder proposals were never endorsed.

The current research has also displayed different meanings of solidarity: we argue that this makes our analysis sharper and more precise. While, under certain aspects, the Regulation achieved very little results and progress (e.g. solidarity as fairness or trust), in regard to other meanings such as mutual security, the Regulation attained considerable advancements (it is not a coincidence that the topic was crucial for the European Council's interests and objectives).

Chapter IV aimed at outlining the content of the Dublin Regulation(s) and their development. Moreover, it also isolated the exogenous and endogenous factors of influence, with a view to understand the driving forces which have inspired the institutional evolution. Chapter V, instead, ventured into an application of EI within the case study: after having detected the evolvement of solidarity in its different meanings, it employed the variation-selection-reproduction pattern for a better understanding of its evolution. It also investigated the disequilibrium of power between agent and structure, in order to comprehend the phenomenon of institutional stagnation, as well as the reasons why the refugee crisis did not turn into a critical juncture. In conclusion, this analysis provided an explanation for both the phenomena of institutional stagnation and variation, by elucidating the reasons behind.

6.2 – Towards a Fairer Dublin IV?

The current research may find its logical conclusion by ultimately pondering on possible paths to achieve a fourth revision of the Regulation more in line with the demands of solidarity.[183] As mentioned in section 2.3, the research can legitimately open itself to this conjecture since the

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[183] This conclusion follows from the assumption that there is still room for improvement for the Dublin Regulation. We will not argue on this point and accept it.

theory adopted is teleological. This opens a dialog on the future of the Dublin Regulation. Since the dynamics of institutional development mainly rely upon the axis actor-structure, two crucial alternatives located across this spectrum will be pondered.

The first alternative entails an adjustment of the agency towards the structure, eventually resulting in an alignment of the Commission and its proposals with the intergovernmental and rationally-egoistic constraints put forward by the European Council. The concrete result would be a more pragmatic and realistic approach, in which small yet concrete steps towards solidarity would be made, instead of bolder and all-encompassing proposals. Nevertheless, a significant, related risk would be that of a 'normative flattening': the need to accommodate different and sometimes asymmetrical instances might result in solidarity and fairness being probably traded with cooperation and compliance. The Commission's proposal from 2016 seemed to have already followed this path, by aiming at striking a compromise between solidarity demands and the Council's prudence and reluctance. Furthermore, the European Pact on Migration presented in September 2020[184] adhered to the same direction. The Pact explored the possibilities of 'return sponsorships', according to which dissident States could decide not to accept relocations, yet to bear the costs of returns. By investigating this and other forms of "flexible solidarity"[185], the Commission committed to "a last-gasp, realpolitik effort […] that keeps all 27 countries at the table".[186]

The second and opposite alternative concerns an approximation of the structure towards the agency. In this case, the Council would be the one adjusting to the Commission's inputs, with the aim of reinforcing fairness and solidarity. Nevertheless, as it has been demonstrated, external shocks do not necessarily result in critical junctures: how can we then conceive this second scenario?

It might be of profit to look for incremental change as an alternative way to conceive institutional development[187], since there is no evidence nor norm declaring that evolution should necessarily occur abruptly. As argued in section 5.2.1, a growing rift between the official

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[184] (IP/20/1706). European Commission Press Release, A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity.

[185] Beirens, Hanne. "The EU Pact on Migration and Asylum—A Bold Move to Avoid the Abyss?". *Migration Policy Institute Europe*, 2020.

[186] Ibid.

[187] The account of incremental change has been outlined within the current research when talking about the 'second generation' of HI.

Regulation and the underneath 'substratum' has been opening. Thus, what will be summarily suggested here is that the unsatisfaction towards the manner in which solidarity is upheld might become the real driving force of development in the future, by accumulating frustration, discontent and mounting pressure on the structure. This could be considered especially true if a further communitarization of the European Immigration and Asylum Policy occurred, in favor of a stronger role for the European Parliament in the process of decision-making. This mutation in the institutional setting would change the balance in the agency-structure relation and lead to incremental changes.

The Dublin Regulation is often presented as an institutional failure. Especially since 2015, a rising criticism has underlined how short-sighted its norms are. Furthermore, the Regulation has become a symbol of both the shortcomings and the inconsistencies displayed by European cooperation. Without denying this, we conclude this research convinced of the fact that one of the main assets of EI is that of placing the current state of the Regulation within a wider picture: through evolutionary lenses, we tend not to consider the value of solidarity upheld by the institution in ultimate terms, yet only as part of a never-ending process of development.

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politics/article/study-of-critical-junctures-theory-narrative-and-counterfactuals-in-historical-institutionalism/BAAE0860F1F641357C29C9AC72A54758. Accessed July 23, 2021.

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