



Freedom, Security & Justice:
European Legal Studies

*Rivista quadrimestrale on line
sullo Spazio europeo di libertà, sicurezza e giustizia*

2019, n. 1

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SCIENTIFICA



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"Judicial Protection of Fundamental Rights in the European Area of Freedom, Security and Justice"

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Rivista giuridica on line "Freedom, Security & Justice: European Legal Studies"
www.fsjeurostudies.eu

Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017



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GOVERNING ASYLUM WITH (OR WITHOUT) SOLIDARITY? THE DIFFICULT PATH OF RELOCATION SCHEMES, BETWEEN ENFORCEMENT AND CONTESTATION

Luisa Marin*

SUMMARY: 1. Introduction and conceptual framework: how to frame solidarity at EU level? – 2. Solidarity in the process of European integration. – 3. The challenges of solidarity in the context of migration. – 4. The many geometries and the operationalization of European solidarity at EU level. – 5. European solidarity as a battlefield for contesting sovereignties. – 6. Administrative bilateral arrangements between MSs as a ‘bricolage’ solution to the stalemate of the Dublin reform or as a challenge to the EU’s sovereignty? – 7. *Quo vadis Europa?* Some directions to avoid EU’s implosion on the ‘refugee crisis’.

1. Introduction and conceptual framework: how to frame solidarity at EU level?

Since 2015 Europe has been experiencing a ‘migration crisis’, which is mainly a ‘reception crisis’ or, more exactly, a governance crisis on (the reception of) migrants.¹ This means that the alleged mass migration flow Europe has experienced, if put in a global perspective, is not as exceptional as it is constructed in the public discourse²; what is, however, exceptional is the crisis which has resulted, which is nevertheless a governance crisis of reception of an unprecedented number of migrants.

Within this crisis, European leaders have stressed the necessity to show solidarity in this complex moment.³ Solidarity in the governance of migration and in particular of one of its most sensitive aspects, i.e., the humanitarian dimension, is not an easy concept to frame and define at EU level. At the same time, its tentative translations into

Double blind peer reviewed article.

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¹ G. CAMPESI, *Seeking Asylum in Times of Crisis: Reception, Confinement, and Detention at Europe’s Southern Border*, in *Refugee Survey Quarterly*, 2018, pp. 44-70.

² UNHCR data can be consulted at http://popstats.unhcr.org/en/overview#_ga=2.53986731.200623967.1548772236-1627604111.1439478400 [last access: 28.1.2019]

³ Cf. Macron’s and Juncker’s speeches, referred infra, section 2.

policies and instruments has proven to be source of tensions between the different levels of the EU as a multi-level or multi-centered polity. Given the issues it already triggers in national contexts, it is easy to understand that the humanitarian dimension of governing migration in a supranational context, and in particular in a *sui generis* entity such as the EU, raises a number of issues, ranging from conceptual to practical, which don't have an easy fix.⁴

Among the conceptual questions underlying solidarity, one touches upon the nature of the EU as a polity. How can solidarity be framed in an incomplete polity such as the EU? Can it merely be conceived as a form of inter-state solidarity, or should it be more than this? For example, to what extent can the role of individuals as subjects of the polity be stretched? If one of the constituent elements of the EU as a legal order of its own is the community of persons entitled to have rights from it,⁵ can we consider persons as addressees of solidarity also a necessary part of this relation? Once we enter into this perspective, we also have the issue of which individuals can be considered as constituents of this polity: the citizens of the MSs or more broadly 'human beings', thus embracing also third-country nationals (TCNs)?

The aim of this article is to analyse the solidarity answers that have been put in place at EU level, and approach them especially from the angle of the interaction between the EU and the MSs. The article will dig into this area, a political 'battlefield', examining also the EU's reactions to MSs' challenges to solidarity, in the perspective of reciprocal challenges to sovereignty.

The article is organized as follows: after an introduction, also discussing the conceptual framework for solidarity in a polity such as the EU (1), the article will elaborate on the place of solidarity in the process of European integration (2), before focusing on the policy-specific challenges of solidarity in the context of migration (3). In the next section (4), the actual decisions translating solidarity into practice will be examined and also the many challenges they have triggered (5). Next to it, the practice shows that when states cannot find solutions to the protection of their national interests within the EU, they devise ad hoc, bilateral solutions, which also represent another challenge to EU legal integration (6). In the conclusions, the article will suggest directions to be taken in order to avoid the EU's implosion and give it a better direction to get out of this frustrating and unstable situation of deadlock on the reforms of the C.E.A.S. (7).

So far, the practical implementation of measures providing for forms of solidarity within the EU is undergoing many challenges that create a situation of instability and uncertainty on the whole integration process. However, in order to get there, the next section will explore precisely the role of solidarity in the European integration process.

⁴ Cf. F. DE WITTE, *Justice in the EU: the Emergence of Transnational Solidarity*, Oxford, 2015; A. SANGIOVANNI, *Solidarity in the European Union*, in *Oxford Journal of Legal Studies*, 2013, pp. 1-29.

⁵ Cf. the seminal *Van Gend en Loos* doctrine.

2. Solidarity in the process of European integration

EU integration was first an economic integration process. Was solidarity present in the Founding Treaties? Loyal cooperation and other principles were always there from the beginning, but can we argue that solidarity is one of the foundational principles of the EU?⁶

This section will answer this question in theoretical, legal and policy terms. Solidarity is a complex concept, value and principle, that is explained and has a meaning and function in different contexts, such as law, sociology, political philosophy, and economics. It permeates the EU integration project, such as fairness, (mutual) trust and loyal cooperation, which can be brought back to the social value of loyalty.⁷

Solidarity is a tie that binds every community, since it has a tradition as an ordering principle of legal relations.⁸ If solidarity is what is needed to make a community in classical sociologists' studies, how can we frame solidarity in a context such as the EU, which is a post-national context, and where, therefore, have recognition and identity to be worked out in new terms? Which is the place of solidarity in the European integration process?

Looking at the past, solidarity lays at the roots of the EU integration process. For example, in the Schuman Declaration, also known as "*le discours de l'horloge*", Robert Schuman used several key-words, such as world peace and de facto solidarity. He stated:

"L'Europe ne se fera pas d'un coup, ni dans une construction d'ensemble: elle se fera par des réalisations concrètes, créant d'abord une solidarité de fait. Le rassemblement des nations européennes exige que l'opposition séculaire de la France et de l'Allemagne soit éliminée: l'action entreprise doit toucher au premier chef la France et l'Allemagne".

Schuman's 'de facto solidarity' has meant a common vision for political process, to be built upon the ruins of the Second World War. Schuman's solidarity created a

⁶ A. BIONDI, E. DAGILYTĖ, E. KÜÇÜK (eds.), *Solidarity in EU Law: Legal Principle in the Making*, Cheltenham, 2018. See also E. KARAGEORGIU, *Rethinking solidarity in European asylum law: A critical reading of the key concept in contemporary refugee policy*, Lund, 2018.

⁷ S. MORANO-FOADI, *Solidarity and Responsibility: Advancing Humanitarian Responses to EU Migratory Pressures*, in *European Journal of Migration and Law*, 2017, pp. 223-254, at 227.

⁸ V. MORENO LAX, *Solidarity's Reach: Meaning, dimensions and implications for EU (external) asylum policy*, *Maastricht Journal of European and Comparative Law*, 2017, p 744; S. MORANO-FOADI, *Solidarity and Responsibility*, cit.; E. TSOURDI, *Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System*, in *Maastricht Journal of European and Comparative Law*, 2017, pp. 667-686; G. MORGESE, *Principio di solidarietà e la proposta di rifusione del regolamento Dublino*, in E. TRIGGIANI et al. (eds.), *Dialoghi con Ugo Villani*, Bari, 2017, pp. 471-476.

context of economic interdependence, first for coal and steel, and later on for the whole economic sector. This ‘spillover effect’ contributed to shaping the first decades of European integration, explained in political theory under ‘neofunctionalism’. The focus was, first, economic, and it aimed at creating a situation of interdependence between states.⁹

In a second, more strictly legal, perspective, solidarity is one of the overarching constitutional principles of European construction, though defining its meaning in legal terms is not an easy task. However, as early as 1973, the CJ stated that the “[f]ailure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order.”¹⁰ The European legal integration process is therefore a story of solidarity, first, between Member States and, perhaps, also beyond them.

Provisions on solidarity, indeed, are found in different parts of the treaties and of the Charter: solidarity is therefore worked out in different ways in relation to the actors concerned (states or persons), the relations it aims to cover, and the situations to regulate.

Solidarity is in the Preamble and also in Art. 2 TEU, which is the provision on the founding values of the EU. Solidarity is here indicated as a value of (European) society, and as an expression of the values common to the MSs. Furthermore, Art. 3 TEU, on the aims of European integration, considers solidarity as one of the founding values of

⁹ “World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it. The contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations. In taking upon herself for more than 20 years the role of champion of a united Europe, France has always had as her essential aim the service of peace. A united Europe was not achieved and we had war. Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries. With this aim in view, the French Government proposes that action be taken immediately on one limited but decisive point. It proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims. The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification. This production will be offered to the world as a whole without distinction or exception, with the aim of contributing to raising living standards and to promoting peaceful achievements. With increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent. In this way, there will be realised simply and speedily that fusion of interest which is indispensable to the establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions.” Schuman’s declaration, to be found at https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en [last access: 16.1.2019]

¹⁰ Court of Justice of European Union, *Commission v. Italy*, Case 39/72 (re: premiums for slaughtering cows), ECR, 1973, 101, para. 24.

the internal market, a social market economy, and it is a value that the EU should promote, as solidarity ‘between generations’ but also among MSs. Solidarity also guides the EU’s relations with the wider world, as provided for in Art. 3(5) TEU. Among the general principles of the EU’s external action and of the CFSP, solidarity is framed in a multi-dimensional meaning, as solidarity of the EU toward the international community (Art. 21 TEU), among MSs (Art. 24(2) TEU), but also from the states toward the EU (Art. 24(3) TEU).

Next to these general provisions of the TEU, and leaving aside other sector-specific provisions,¹¹ solidarity finds a specific application in other sections of the TFEU, corresponding to the EU’s policies. For example, in the AFSJ, solidarity acquires a clear role in a couple of provisions, but permeates the whole title since other provisions do enable the institutions to adopt measures enhancing solidarity: it is the case of Art. 78(3) TFEU.

In Art. 67 TFEU, the general provision of Title V on the AFSJ, solidarity between MSs is declined as the foundation of the common policy on asylum, immigration and external border control, but the same policies should be “fair towards third-country nationals” and stateless persons.¹² Art. 80 TFEU is the sector-specific provision of borders, asylum and immigration, and sets “the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States” as the overarching norm guiding the development and implementation of policies on borders, asylum and immigration.¹³ Here solidarity is declined together with responsibility, to form a single principle with at least two clearly indicated facets.¹⁴

Next to its legal dimension, solidarity has a ‘political life’ as well. In recent times, solidarity has indeed been invoked in many political speeches as the ‘binding element’ the EU needs in order to show its capacity to ‘throw the heart beyond the obstacle’, motivating the exceptional pooling of resources in difficult times.¹⁵ Solidarity is needed to create momentum for reforms and actions to counterbalance the distortive effects of

¹¹ It is the case of Art. 122 TFEU and of Art. 222 TFEU. The former deals with economic policy, whereas the latter, the so-called ‘solidarity clause’, which also expresses an idea of systemic solidarity, governs situations where an MS is hit by a terrorist attack or is the victim of a natural or man-made disaster. See also U. VILLANI, *Editoriale: immigrazione e principio di solidarietà*, in this *Journal*, 2017, n. 3, pp. 1-4.

¹² Cf. Art. 67 (2) TFEU.

¹³ Art. 80 TFEU states 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, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.”

¹⁴ G. MORGESE, *Solidarietà e ripartizione degli oneri in materia di asilo nell’Unione europea*, in G. CAGGIANO (ed.), *I percorsi giuridici dell’integrazione*, Torino, 2014, p. 364. See also S. MORANO-FOADI, *Solidarity and Responsibility*, cit., p. 231.

¹⁵ E. MACRON, speech in Athens, September 2017. Full text available at: <https://www.elysee.fr/emmanuel-macron/2017/09/11/discours-du-president-de-la-republique-emmanuel-macron-a-la-pnyx-athenes-le-jeudi-7-septembre-2017> [last access: 16.1.2019]; solidarity also features centrally in the speeches of the President of the Commission J.-C. Juncker on the State of the Union (SoU), cf. the SoU 2017 but also SoU 2018 and is invoked both as solidarity from the EU to the states, thus as vertical solidarity, but also as horizontal solidarity, between states. Links https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech_it_0.pdf and http://europa.eu/rapid/press-release_SPEECH-17-3165_it.htm [last access: 16.1.2019].

integration projects created upon incomplete political visions.¹⁶ For example, the Eurozone and the euro were built upon an incomplete post-national sovereign idea: monetary union as an exclusive competence of the EU, while fiscal and economic policies are firmly left in the hands of the MSs. Because of this, the Eurozone has implied the codification of structural injustices, since some states could profit more than others from the euro; when these structural deficiencies have materialized in all their consequences, solidarity has been invoked in support of actions restoring justice.¹⁷

This happened in the context of the EMU, with the Treaty on the European Stability Mechanism (ESM) and the Fiscal Compact, which were adopted outside EU Treaties.¹⁸ Years later, the same solidarity is also invoked to address another crisis which undermines process of European integration, the migration crisis.¹⁹ And this is not the whole story: the perceived lack of capacity of the EU to deliver successful policies in this field also threatens the trust of citizens in the EU, as the emergence of populists, anti-Europe and xenophobic movements in different European countries indicate.²⁰

In the governance of migration too, solidarity is invoked to support correction measures, addressing the structural disparities created by an incomplete political project, since geography and geopolitics do not necessarily affect European states in the same way, as destination or transit countries. At the same time, talking about solidarity within the EU in the context of migration and asylum involves some challenges to solidarity that will be expounded in the next section.

3. The challenges of solidarity in the context of migration

In the past few years a debate has taken place on solidarity in the field of asylum and migration, especially in conjunction with the ‘migration crisis’, or rather ‘reception crisis’,²¹ which vitalized the debate on the legal dimension of Art. 80 TFEU. This debate is also showing the profound crisis in which the EU is finding itself at the moment. But what is so special about migration and asylum as to make it hard for the states to find solutions to problems, developing policies and adopting instruments?

¹⁶ S. FERNANDES, E. RUBIO, *Solidarity within the Eurozone: how much, what for, for how long?*, 14/02/2012, at <http://institutdelors.eu/wp-content/uploads/2018/01/solidarityemus.fernandes-e.rubionefeb2012.pdf> [last access: 23.1.2019].

¹⁷ E. O. ERIKSEN, *Solidarity and the Future of Europe*, in [http://www.euvisions.eu/solidarity-future-europe/](http://www.euvvisions.eu/solidarity-future-europe/) (8 May 2018, last access on 15.1.2019).

¹⁸ Cf. G.L. TOSATO, *UE: unità del diritto tra Trattato ESM e Fiscal Compact*, 22 Dec. 2017, in <https://www.affarinternazionali.it/2017/12/ue-unita-diritto-proposte/> [last access: 16.1.2019].

¹⁹ I. GOLDNER LANG, *The EU financial and migration crises: two crises – many facets of EU solidarity*, in A. BIONDI, E. DAGILYTĖ, E. KÜÇÜK (eds.), *Solidarity in EU Law: Legal Principle in the Making*, cit., p. 133 ff.

²⁰ S. THORNE, *Sovereignty, Supranationalism, and Solidarity*, date: 8.6.2018, in <https://www.diplomaticourier.com/2018/06/08/sovereignty-supranationalism-and-solidarity/> [last access: 15.1.2019].

²¹ Cf. G. CAMPESI, *Seeking Asylum in Times of Crisis*, cit.

If the strength of solidarity in EU law is its legal nature, there, to some extent, also lies the problem. Its general meaning is questioned, since its status as a general principle of EU law is unclear. Solidarity gets a clearer meaning as a legal principle in relation to the area where it is supposed to operate. Here the focus will be on asylum and (irregular) immigration.

After the establishment of the AFSJ, with the Treaty of Amsterdam, solidarity was supposed to play a guiding role in the establishment of the C.E.A.S., as one can read in the Conclusions of the European Council of Tampere.²² At the same time, if solidarity has found application in secondary law,²³ the whole construction has never been based on the principle of shared responsibility. The mass migration experienced in 2015 made it clear that the existing legal framework was not designed to deal with high numbers of refugees, nor as a burden-sharing mechanism of solidarity: the core instrument, i.e., the Dublin Regulation,²⁴ was conceived as a set of rules to determine the country responsible for examining an asylum application.²⁵ It is no mystery that the Commission itself has written that the Dublin system must be reformed, “both to simplify it and enhance its effectiveness in practice, and to be equal to the task of dealing with situations when Member States’ asylum systems are faced with disproportionate pressure.”²⁶ In short, according to the Commission itself, the current Dublin system is unfair.

Alongside Dublin, whose “first entrance” paradigm reinforces the structural disparities created by geography, there are other rules which make it more complex to reach solidarity and fair allocation of responsibility between MSs, and this is the rule according to which all MSs are considered safe countries for TCNs, in spite of the structural differences existing within the EU.²⁷ The early application of the principle of mutual trust exacerbated this problem.

The governance of the humanitarian dimension of the migration phenomenon constitutes a complex and critical policy area of European integration, where states have divergent interests, the EU shared but limited competence and integration does not

²² To be consulted at http://www.europarl.europa.eu/summits/tam_it.htm [last access: 1.2.2019].

²³ It is the case of the Temporary protection directive, of the Frontex Regulation and of the E.A.S.O. Regulation, European Union Solidarity Fund (EUSF). Cf. S. MORANO-FOADI, *Solidarity and Responsibility*, cit., p. 231.

²⁴ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180, 29.6.2013, p. 31-59.

²⁵ M. DI FILIPPO, *Considerazioni critiche in tema di sistema di asilo dell'UE e condivisione degli oneri, in I diritti dell'uomo*, 2015, n. 1, pp. 47-60; A. GERACI, “There is not enough union in this Union”. *Principio di solidarietà e “Sistema di Dublino” alla prova del più imponente esodo di profughi dal secondo dopoguerra*, in *Federlismi*, 2016.

²⁶ Commission Communication of 4.5.2016, COM (2016) 270 final, on the so-called “Dublin IV” proposal, p. 3.

²⁷ Cf. S. MORANO-FOADI, *Solidarity and Responsibility*, cit., p. 232.

progress.²⁸ Solidarity within the EU, between Member States and toward TCNs, entails complex redistributive questions on which states want to have full control, because of budgetary implications, and also because of the trust these progresses require. The EU does not have supranational enforcement bureaucracies but requires MSs to enforce EU law. As lawyers and political scientists alike explain,²⁹ the resulting framework, 20 years after Tampere, is that MSs have different interests and few incentives to cooperate in facing the arrival of unprecedented numbers of migrants and organizing a coordinated action. Some states (host and transit states) need the support of others, but others (non-host states) don't.³⁰ Instead, they can dwell upon the imbalances created by existing rules, since irregular migrants are not entitled to travel toward their territories and apply for asylum there.³¹ In another perspective, they can also invoke rules and situations which allow a setback of European integration, for example suspending Schengen, in law or simply *de facto*. In short, in this case too, they can invoke, in their own interest, the unbalance created by "incomplete" rules.

This stagnation is also reflected in the political debate. For example, the head of the EU Commission, Juncker, in his "State of the Union" speech of 2018, clearly formulated a negative assessment on intra-state solidarity within the EU.³² In Juncker's analysis, the lack of sufficient progresses in developing solidarity toward each other, implies that MSs often opt for stepping back from integration, as the numerous re-installments of border control suggest. At the same time, the Commission has few powers to change the status quo: if MSs do not want or don't agree on a proposal of the Commission's, the latter cannot do much about it. The failures of the C.E.A.S. in progressing reforms, the non-decisions in the matter of asylum, are a demonstration of the liberal intergovernmentalism theory by Moravscik, and, therefore, of the incompleteness of the original project.³³

²⁸ Though specifically focusing on Art. 79, 4 TFEU, cf. L. DANIELE, *Immigrazione e integrazione. Il contributo dell'Unione europea*, in G. CAGGIANO (ed.), *I percorsi giuridici per l'integrazione*, Torino, 2014, pp. 63-77 at 75.

²⁹ Cf. C. HRUSCHKA, F. MAIANI, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, in K. HAILBRONNER, D. THYM (eds.), *EU Immigration and Asylum Law – A Commentary*, 2nd edition, Hart/Beck, pp. 1478-1604; see also N. ZAUN, *States as Gatekeepers in EU Asylum Politics: Explaining the Non-adoption of a Refugee Quota System*, in *Journal of Common Market Studies*, 2018, pp. 44-62; S. LAVENEX, *Failing Forward Towards Which Europe? Organized Hypocrisy in the Common European Asylum System*, in *Journal of Common Market Studies*, 2018, pp. 1195-1212; A. NIEMANN, N. ZAUN, *EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives*, in *Journal of Common Market Studies*, 2018, pp. 3-22.

³⁰ N. ZAUN, *States as Gatekeepers*, cit., p. 45.

³¹ S. LAVENEX, *Failing Forward Towards Which Europe?*, cit., p. 1201.

³² State of the Union (SoU) 2018 and is invoked both as solidarity from the EU to the states, thus as vertical solidarity, but also as horizontal solidarity, between states. at https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech_it_0.pdf [last access: 16.1.2019].

³³ Cf. N. ZAUN, *States as Gatekeepers*, cit., p. 45 ff.

In particular, the Head of the Commission complains about the fact that MSs are not able to go beyond an emergency perspective in arranging forms of solidarity among each other, and do not agree on enforcing any form of long-lasting solidarity.

Instead, the proposals which are on the table for 2018 are in the direction of further strengthening the European Border and Coast Guard Agency, which is still called Frontex in daily practice, with an additional 10,000 border guards by 2020, and an additional legislative reform, in order to strengthen the executive powers of the agency.³⁴ In addition, the Commission has presented a plan for a reform of the European Asylum Support Office (E.A.S.O.), in order to give it more powers also in respect of assisting MSs in deciding upon asylum requests; another project aims at speeding up returns for irregular migrants, in a logic of securitization.

To conclude, in 2018 and in the first months of 2019 the EU did not manage to invert the trend of failing to adopt substantial reforms on asylum and solidarity; instead, the EU only succeeded in further consolidating the dominant securitarian logic. The logic of ‘fortress Europe’ is alive and kicking, and it is the only one on which MSs manage to agree, leaving Europe unprepared for the next migration crisis.³⁵

Having explained the difficulties in organizing structural forms of solidarity, let us turn our attention to the attempts to enforce solidarity in practice at EU level.

4. The many geometries and the operationalization of European solidarity at EU level

As it was explained above, the policies (migration, borders, asylum) are indeed areas of EU shared competences; but in the (post-national) states’ perspective, are still very sensitive areas where national entities struggle to accept limitations to their sovereignty. Against this background, this section will deal with the ways the EU has tried to achieve forms of European solidarity.

While the scope of this article is limited to relocation schemes, it could be argued that solidarity might also take other forms; for example, financial support (e.g.: European Refugee Fund or E.R.F.) from the EU toward a MS or even a TC, or, in another perspective, as resource solidarity, by putting resources in common, e.g., increasing MSs’ human resources deployed to Frontex, or as operational solidarity, via a Frontex-coordinated Joint Operation.

In this same perspective, the European borders agency’s activity can be interpreted as a form of (vertical) solidarity and subsidiarity, in the sense of the EU (via its agency) intervening in support of an MS ‘under pressure’ for the maintenance of control at its

³⁴ Cf. COM (2018) 613 final, of 12.9.2018, at https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-border-coast-guard-regulation-631_en.pdf [lat access: 23.1.2019].

³⁵ S. LEHNE, *The EU Remains Unprepared for the Next Migration Crisis*, 3 April 2018, in *Carnegie Europe*, at <https://carnegieeurope.eu/2018/04/03/eu-remains-unprepared-for-next-migration-crisis-pub-75965> [last access: 23.1.2019].

external borders. It could also be seen as an expression of (horizontal) solidarity between MSs.

If these examples show that solidarity is inherent in many forms of cooperation at EU level, because it is an expression of a constitutive principle of the EU,³⁶ the notion and founding principle of solidarity nevertheless casts doubt on whether externalization deals and policies, as attempts to prevent or pre-empt migration, such as the EU-Turkey agreement, can be considered as a correct expressions of solidarity as a founding principle of EU law, since they imply an interpretation of solidarity which is exclusionary³⁷ and also unfair, in the sense of limiting access of TCNs to the fundamental rights provided by the EU's Charter and by primary EU law provisions, such as the funding rules of Title V on the AFSJ.³⁸ Next to it, they also don't respect the EU's principle of solidarity in the EU's external relations, ex Art. 3(5) and Art. 21 TEU.³⁹

In a legal perspective, these forms of solidarity do not go beyond a state-centered idea of solidarity, which the CJEU has rejected in cases such as *N.S. and M.E.*, as a response to the European Court of Human Rights' *M.S.S.* case.⁴⁰ Similarly, in *Aranyosi* and *C.K.* the CJ further reinforced the person-centered interpretation of mutual recognition, in harmony with fundamental rights; mutual recognition is one of the governing principles of the C.E.A.S., among other policies of the AFSJ.⁴¹

Having clarified that the principle of solidarity, as a founding principle of the EU as a polity, can only be in harmony with international law and fundamental rights, and thus cannot be guided by exclusionary aims, this article will only cover relocation schemes for refugees.

Solidarity in asylum matters has been worked out as far as solidarity and fair burden sharing (cf. Art. 80 TFEU). In particular, solidarity has been framed as requiring MSs to accept to cooperate with relocation schemes for refugees, to the benefit of the states most burdened by migration for geographical reasons (Italy and Greece), or rather, to the benefit of states which have accepted the highest number of refugees (Germany, Sweden, Austria) on the basis of a different set of criteria, defined at EU level.

This already shows that current C.E.A.S. rules, in themselves, have introduced a 'system' which requires correction measures. The Dublin Regulation, the most relevant instrument, is, in short, creating a 'system' which cannot hold in itself, but requires measures to introduce fairness among MSs. And this is indeed the case: it is not a secret

³⁶ Cf. also V. MORENO LAX, *Solidarity's Reach*, cit., p. 746 ff.

³⁷ V. MITSILEGAS, *Harmonizing Solidarity in European refugee law: The promise of mutual recognition*, in *Maastricht Journal of European and Comparative Law*, 2017, pp. 721-739, esp. p. 722.

³⁸ V. MORENO LAX, *Solidarity's Reach*, cit., p. 752.

³⁹ V. MORENO LAX, *Solidarity's Reach*, cit., p. 756.

⁴⁰ V. MITSILEGAS, *Harmonizing Solidarity*, cit., p. 729 ff.

⁴¹ L. MARIN, "Only You": *the emergence of a temperate mutual trust in the AFSJ and its underpinning in the European composite constitutional order*, in *European Papers*, 2017, n. 2, pp. 141-157.

that the Dublin Regulation has been labeled as ‘good weather’ law, i.e., a law that is unfit to cope with the challenges of massive migration.⁴²

Dublin is the expression of the paradoxes underlying Schengen integration. The paradox is indeed in building a system of shared borders, i.e., a common external border without internal border control, and building it on a logic of ‘chacun pour soi’. The paradox is in having the external border in common but not putting in common the resources for its governance. Frontex does not respond to a supranational logic, and the European rules of incomplete integration require that Finland patrols its external borders the same way Greece does.

Schengen has entailed a first form of externalization or of delegation of responsibilities from Northern European states toward Southern ones. This has not been built upon a system of joint management of external border control, nor of responsibility sharing in the context of asylum. Geography, more than rules, governs asylum, but geography, like any de facto situation, is not per se fair: hence rules are needed in order to bring justice into a given context.

This illustrates the fact that there is a necessity for fair burden-sharing measures and solidarity because of the unbalance on which Schengen was built. Incomplete rules of integration, as in the context of monetary union, require correction and compensatory features, in the form of fair burden-sharing and solidarity measures. This means that there are at least two issues: one set of issues – here called structural issues and boiling down to the reform of the Dublin system – and the more contingent solidarity measures. Organizing forms of solidarity does not diminish the urgency of a reform of the Dublin system, introducing a person-centered solidarity that stresses the agency of migrants as first actors of their integration process.⁴³ These are two distinct issues which should be tackled independently.

After this premise, on the correlation between the need for solidarity and the European rules on jurisdiction over asylum-seekers, I will now examine the instruments deployed by the EU in its attempt to create solidarity and fair burden-sharing, and, at the same, time, the challenges they have undergone by the MSs.

In 2015, during the so-called ‘migration crisis’, the EU tried to put solidarity between MSs into practice when it adopted two Council Decisions (EU) 2015/1523 of 14 Sept. 2015 and 2015/1601 of 22 Sept 2015, establishing provisional measures in the area of international protection for the benefit of Italy and Greece.⁴⁴

In April 2015, EU institutions started a political process acknowledging the mass migration fluxes and the need to show solidarity to some states. Solidarity has taken the

⁴² K. HAILBRONNER, *Asyl in Europa - wenn, wie, wann, wo?*, in *Frankfurter Allgemeine*, 10 December 2015.

⁴³ Cf. V. MITSILEGAS, *Harmonizing Solidarity*, cit., p. 739. F. MAIANI, *The Report of the European Parliament on the reform of the Dublin system: certainly bold, but pragmatic?*, blogpost of 20 Dec. 2017, at www.eumigrationlawblog.eu [last access: 29.1.2019].

⁴⁴ OJ 2015, L 248, p 80. For an assessment, see E. GUILD ET AL., *Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*, *EP Studies*, 2017.

form of emergency relocations between MSs. The plan of the Commission would have been to continue emergency relocations under permanent relocation schemes. Furthermore, E.A.S.O. teams were arranged to support frontline MSs and ‘hotspots’ were created.⁴⁵

With the twin decisions 1523 and 1601, the Council created temporary and exceptional relocation mechanisms from Italy and Greece to other MSs of persons in clear need of international protection. The total amount of persons to fall under these schemes was 160,000.

Interestingly, during the negotiations Hungary was indicated as included among beneficiary states, together with Italy and Greece, but it refused to be classified as a ‘frontline MS’, benefiting from allocations, and consequently it was indicated among the MSs to which allocations were attributed.⁴⁶ Orbán motivated his position as a sign of distrust toward Greece, and also with other arguments, but it seems to me that the logic is to deny the EU’s competence in this area. It is a politically blatant challenge to the EU’s sovereignty.

The solidarity measures had the duration of 24 months and they represented derogation from the Dublin criteria. The quotas of asylum-seekers to be received by states were settled in the Decisions and the process was supported with the allocation of a lump sum of 6,000 euros for each person relocated.

In practice, the relocation schemes were scarcely implemented: as of November 2017, only 32,000 persons had been relocated, out of the 160,000 indicated. As of the end of May 2018, the amount increased to 35,000.⁴⁷ The relocation ‘effort’ has been uneven between MSs. For example, Hungary and Poland did not relocate a single person. The Czech Republic relocated less than 1%. It is indeed this open disobedience and contestation of the ‘Visegrad group’ that moved the Commission to start an infringement action before the Court. Next to a poor track record of implementation, these measures became a political battlefield of open contestation of and challenges to the EU’s sovereignty by some Member States.

5. European solidarity as a battlefield for contesting sovereignties

⁴⁵ It is also important to acknowledge that hotspots are also a sign of distrust between MSs and the EU. Hotspots have been deemed necessary because some states were not enforcing EU law correctly, not taking fingerprints of migrants, or were not active (enough) in preventing secondary movements. This negligence in enforcing EU law is another sign of what has been indicated by political scientists as structural imbalances created by incomplete rules, as discussed above. The EU has tried to enforce solidarity also putting in place measures to cope with the ongoing trust crisis between MSs. In this case, the measures are also motivated by states’ self-interests in preventing secondary movements and reacting to distrust between states, by creating support for national administrations, which is also a form of control of their actions.

⁴⁶ For an explanation on Hungary’s choice, see <https://www.ft.com/content/080fb765-5e93-35f7-9a3c-2e83b26c4b8c> [last access: 23.1.2019].

⁴⁷ Data from the European Commission, found at <http://www.europeanmigrationlaw.eu/en/articles/datas/relocation-from-italy-and-greece.html> [last access: 23.1.2019].

Overall, the relocation schemes of the EU were unsuccessful, since in a time framework of 2 years, less than 25% of the target number of persons was relocated. They represent a policy failure,⁴⁸ also because the MSs did not manage to convert this temporary scheme into a permanent one.⁴⁹

This section is devoted to legal challenges against the schemes. In my view, poor implementation and ‘legal contestation’ are distinct issues. For example, poor or scarce implementation can be explained with many reasons, which can be related with the causes of a policy failure. Overall, the lack of implementation cannot be interpreted, in my view, as a direct contestation of European sovereignty. It should rather be seen as a critical attitude, as a policy shortcoming, or a sign of a policy failure, with multiple explanations.⁵⁰

In contrast to this, legal challenges are, in my view, acts of contestation of European sovereignty. As long ago as 2015, in December, Slovak Republic and Hungary, supported by Poland, had brought an action for annulment (2-3 Dec 2015) before the CJEU:⁵¹ the judgment was delivered in September 2017, and it confirmed the validity of the Council’s decisions.⁵² Scholars had received the judgment, in particular, with some criticism because of the limited clarification of the principle of solidarity in the constitutional system of the EU, in contrast with the Advocate General Bot’s Opinion.⁵³ Indeed, Advocate General Bot, after having stated that the decision is an expression of solidarity among MSs, recalls that solidarity is “among the cardinal values of the EU and is even among the foundations of the Union.” Bot examines the role of solidarity within the architectural system set up by the treaties, within the Charter, and specifically for Title V TFEU, arguing that solidarity “forms part of a set of values and principles that constitutes ‘the bedrock of the European construction’”, both a “pillar” and a “guiding principle”, which makes it more pressing to adopt measures to compensate for the “de facto inequality between Member States because of their geographical position.”⁵⁴

⁴⁸ S. LAVANEX, *Failing Forward*, cit.

⁴⁹ Cf. State of Union speech, 2018, quoted above.

⁵⁰ In similar terms, see B. DE WITTE, E. TSOURDI, *Court of Justice Confrontation on relocation – The Court of Justice endorses the emergency scheme for compulsory relocation of asylum seekers within the European Union: Slovak Republic and Hungary v. Council*, in *Common Market Law Review*, 2018, n. 5, pp. 1457–1494, at pp. 1492-1493.

⁵¹ The Council, on its side, was supported by Belgium, Germany, Greece, France, Italy, Luxembourg, Sweden and the Commission.

⁵² Court of Justice, Grand Chamber, Judgment of 6 September 2017, *Slovak Republic, Hungary v. Council of the European Union*, cases C-643/15 and C-647/15, at www.curia.europa.eu; Opinion of the AG BOT, delivered on 26 July 2017, same references. At <http://curia.europa.eu/juris/document/document.jsf?text=&docid=193374&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=10818601> [last access: 29.1.2019].

⁵³ See H. LABAYLE, *Solidarity is not a value: Provisional relocation of asylum-seekers confirmed by the Court of Justice (6 September 2017, Joined cases C-643/15 and C-647/15 Slovakia and Hungary v Council*, in www.eumigrationlawblog.eu [last access: 29.1.2019].

⁵⁴ AG BOT, Opinion, paras. 16-21.

After this important recognition of solidarity among the ‘Olympus’ of the ‘guiding principles’ of European integration, the Advocate General also uses it in deciding on the case, making it an obligation incumbent upon MSs and a principle of interpretation for other treaty provisions, and also for secondary law.⁵⁵ The Court, in contrast, is silent on the function of the principle of solidarity as an overarching constitutional principle of EU law, but it confirms the validity of the decisions, using solidarity only in the reasoning on the necessity of the contested decisions.⁵⁶ While this sparked the criticism of commentators,⁵⁷ others suggest that the status of solidarity among the general principles of EU law is uncertain.⁵⁸ While thorough examination of this case is outside the scope of this article, it has interestingly been observed that the Court of Justice has a tendency to underexpose the constitutional dimension of several cases in asylum and migration.⁵⁹ In my understanding, though questionable, this is done in order not to enter a political debate.

Among other sovereignty challenges, after having co-initiated action for annulment, Hungary held a referendum on 2 October 2016 against the EU’s plan for relocation quotas. The question was drafted as follows: “Do you want the European Union to be able to mandate the obligatory resettlement of non-Hungarian citizens into Hungary even without the approval of the National Assembly?” The turnout remained at 44% against the 50% required. However, the pro-Orbán response rate was very high: 99%. This means that Orbán did not succeed with the referendum, but still managed to mobilize a good share of the electorate. This referendum is here interpreted as another brick in the picture of direct challenges to or attacks on EU’s sovereignty: it was the first time that a Member State had arranged a referendum to mobilize support for an act of disobedience to EU law.

The Hungarian offensive did not stop here: in 2016, the Hungarian Constitutional Court, injected with judges close to the Government, came to the latter’s rescue with a judgment that gave an interpretation of the Hungarian Constitution in connection with Decision 2015/1601 on relocation. While it is interesting to note that domestic law (Constitution and Act of the Constitutional Court) does not provide the legal basis for the Court to perform this type of the review,⁶⁰ the Court based its decision to say the last word on the provision stating that: “If human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution can be presumed to be violated (...), the

⁵⁵ AG BOT, Opinion, paras. 241-242 and 254 ff., respectively. See also par. 295.

⁵⁶ Court of Justice of European Union, cases C-643/15 and C-647/15, parr. 251-253.

⁵⁷ See H. LABAYLE, *Solidarity is not a value*, cit.

⁵⁸ B. DE WITTE, E. TSOURDI, *Court of Justice Confrontation on relocation*, cit., p. 1478.

⁵⁹ D. THYM, *Court of Justice Judicial maintenance of the sputtering Dublin system on asylum jurisdiction: Jafari, A.S., Mengesteab and Shiri*, in *Common Market Law Review*, 2018, n. 2, pp. 549-568, at p. 561.

⁶⁰ G. HALMAI, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law*, in *Review of Central and East European Law*, 2018, pp. 23-42.

Constitutional Court may examine, on the basis of a relevant petition, in the course of exercising its competences, the existence of the alleged violation.”

In short, the Hungarian Constitutional Court offered its support to the Government with a judgment using the toolkit of constitutional pluralism, and referring especially to the *Lisbon Urteil* of the German Constitutional Court, ensuring that Hungarian constitutional identity would support a breach of EU law.⁶¹

This ‘offensive’, together with other issues, prompted the European Parliament to activate the rule of law procedure against Hungary, as provided for in Art. 7 TEU.⁶²

On the other side, the Commission did not watch at the window, though it took some time to react. In June 2017, it decided indeed to refer the Czech Republic, Hungary and Poland to the CJEU with an infringement procedure,⁶³ and the action was initiated in December 2017, a couple of months after the CJEU’s judgment confirming the validity of the Decisions.⁶⁴

The Czech Republic only recently relocated a little more than 10 persons, whereas Hungary and Poland did not relocate or pledge to relocate any single person.

Against this collection of reciprocal legal challenges, one has to conclude that the governance of the reception of asylum seekers has become a battlefield, an area of political and legal conflicts between the EU and several MSs, and between the Visegrad group and Brussels. In the same period, the Commission is acting against Poland and Hungary with rule of law proceedings, ex Art. 7 TEU.

Leaving aside the Visegrad group countries, one should nevertheless reflect upon the fact that the EU’s efforts to achieve solidarity across the EU have a very poor record of implementation of these initiatives. The other part of the picture is still one of MSs that poorly implemented the EU relocations plans. The upgrade from a temporary relocation scheme to compulsory relocation schemes did not occur.

Looking at this scenario, the EU lawyer observes that legal certainty has ceased to be part of solidarity measures between MSs. Implementation depends on the good will of the states; the commitment in enforcement is limited and controls by the ‘guardian of the treaties’ on its implementation have limited effects too.

As to intra-EU solidarity measures, the law that has resulted from it looks like a weak international law, rather than EU law as we used to know it. Attempts to move forward, with relocation mechanisms made structural as well as the reform of Dublin

⁶¹ G. HALMAI, *Abuse of Constitutional Identity*.

⁶² <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0340+0+DOC+PDF+V0//EN> [last access: 23.1.2019]

⁶³ Cases C-715/17 (Poland), case C-718/17 (Hungary) and case C-719/17 (Czech Republic), now pending.

⁶⁴ After the reasoned opinion of July 2017 and the answers it received, judged as not satisfactory by the Commission, the ‘guardian of the treaties’ decided to proceed to the Court. Source: [www.curia.europa.eu](http://curia.europa.eu) at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=200632&pageIndex=0&doclang=en&m ode=lst&dir=&occ=first&part=1&cid=8582548> [last access: 23.1.2019].

(IV), have been unsuccessful as well.⁶⁵ On this point, it is very dangerous for the EU to stay in this unstable situation, since the level of integration achieved so far can collapse, or disintegrate, as in an unstable star.

6. Administrative bilateral arrangements between MSs as a ‘bricolage’ solution to the stalemate of the Dublin reform or as a challenge to the EU’s sovereignty?

While structural reforms delay, the problems remain unsolved, and sometimes also become complicated. For example, it should also be mentioned that, while relocation schemes have not been made permanent, there is an even more urgent need for intra-EU settlements on disembarkations, because of the deadlock of the Dublin reform, but also after the Italian populist government’s policy of ‘closing’ its ports since 2018 and not allowing disembarkation to migrants rescued, be it by NGOs or even by its own Coast Guard boats.⁶⁶ In this context, Italy claims it does not allow disembarkation on its territory of migrants and asylum-seekers, before other EU MSs agree on a relocation plan for the persons on the boat. And because in 2018 and 2019 MSs have looked for ad hoc solutions for every boat, the EU is now pledging in favor of a more ‘coordinated and systemic approach’ toward disembarkation and ‘relocation’ of rescued migrants, in the words of commissioner Avramopoulos.⁶⁷

However, in this context of political deadlock, combined with contestation and poor implementation of relocation schemes, we have to consider the case of what one could call para-Dublin administrative arrangements.⁶⁸ It is here argued that the *status quo*, where reforms of the C.E.A.S. instruments are in a deadlock, creates frustration within MSs and also drives some states to take measures in order to prevent secondary movements. These measures seem to work as do-it-yourself measures or bricolage solutions to compensate the lack of structural reforms.

In particular, in 2018, after internal political tensions between minister Seehofer and chancellor Merkel, Germany tried to find by itself, at a bilateral level, some solutions to its daily challenges, in the stalemate of solidarity and Dublin reforms. In particular,

⁶⁵ See Commission Communication of 4.12.2018, COM(2018) 798 final, *Managing Migration in All its Aspects: Progress under the European Agenda on Migration*, at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20181204_com-2018-798-communication_en.pdf [last access: 11.3.2019]. At the time of publication of this article, an agreement on the reform of the Dublin system is still out of sight, cf. European Commission, *Remarks by Commissioner Avramopoulos following the Home Affairs Council*, of 7.3.2019, at https://ec.europa.eu/commission/commissioners/2014-2019/avramopoulos/announcements/remarks-commissioner-avramopoulos-following-home-affairs-0_en [last access: 11.3.2019].

⁶⁶ It is the case of the ‘*Diciotti*’ Coast Guard ship.

⁶⁷ Ansamed, *EU insists on moving forward with system for disembarkation*, 6.3.2019, http://www.ansamed.info/ansamed/en/news/sections/politics/2019/03/06/eu-insists-on-moving-forward-with-system-for-disembarkation_e6c780a0-349c-4eed-afac-bbb455edceec.html [last access 11.3.2019].

⁶⁸ As argued by S. Poularakis, *The Case of the Administrative Arrangement on Asylum-Seekers between Greece and Germany: A tale of “paraDublin activity”?*, at <http://eulawanalysis.blogspot.com/2018/11/the-case-of-administrative-arrangement.html> [last access: 23.1.2019].

Germany has reached administrative arrangements with Southern EU states, like Spain and Greece.⁶⁹ These arrangements have the purpose to avoid secondary movements, and minimize their consequences with rapid returns at the borders, bypassing the Dublin framework or creating a para-Dublin solution to secondary movements.⁷⁰

Let us consider the case with Greece. Germany and Greece, via exchange of letters, have created a scheme for administrative practices in order to avoid unilateral measures with respect to asylum-seekers and irregular migrants. This short administrative arrangement, of 15 articles, specifies measures to be followed between Germany and Greece. It was adopted on the basis of Art. 36 of the Dublin Regulation, which provides that MSs may, on a bilateral basis, establish administrative arrangements between themselves concerning the practical details of the implementation of the Regulation, e.g., exchange of liaison officers, simplification of procedures, shortening of time limits concerning transmission and examination of requests to take charge of or take back applicants.

With this arrangement, however, Germany and Greece set up new rules, well beyond the scope of Art. 36. In the first part of the agreement, the parties employ clauses and languages typical of readmission agreements, which are agreements with TCs on readmitting TC nationals. This arrangement lays down conditions for admission, competent authorities of each state, the procedure to be followed, and the state responsible for costs. These are not Dublin transfers, but something different, along with and in violation of the Dublin rules. In our understanding this arrangement establishes a fast-track return (readmission) procedure, because it applies to persons refused entry at the German-Austrian borders, like for other irregular migrants. Here we are not in the context of an asylum procedure, but of border control policies.

Commentators⁷¹ argue that this is not a Dublin arrangement also because of other obligations included in it: family reunification cases pending for a long time, and the obligation to re-examine all rejected requests. In short, the issues dealt with in the arrangement are not indicated in Art. 36 of the Dublin Regulation.

For these reasons, this arrangement can be seen as being in contravention of EU law, which prohibits bi- or multilateral agreements or national legislations on matters where

⁶⁹ Germany also has a similar agreement with Portugal. Cf. <https://www.bmi.bund.de/SharedDocs/pressemitteilungen/EN/2018/portuguese-counterpart.html> [last access: 11.3.2019]. See also C. KRUSCHKA, *The border spell: Dublin arrangements or bilateral agreements? Reflections on the cooperation between Germany and Greece / Spain in the context of control at the German-Austrian border*, at <http://eumigrationlawblog.eu/the-border-spell-dublin-arrangements-or-bilateral-agreements-reflections-on-the-cooperation-between-germany-and-greece-spain-in-the-context-of-control-at-the-german-austrian-border/> [last access: 11.3.2019].

⁷⁰ Cf. text of the agreement, to be consulted at https://www.fnrw.de/fileadmin/fnrw/media/EU_Asylopolitik/Germany_Greece_Deal_eng.pdf [last access: 23.1.2019].

⁷¹ S. POULARAKIS, *The Case of the Administrative Arrangement*. See also ECRE, *Bilateral Agreements: Implementing or Bypassing the Dublin Regulation*, Policy Paper 5/2018, at <https://www.ecre.org/wp-content/uploads/2018/12/Policy-Papers-05.pdf> [last access: 23.1.2019] and C. KRUSCHKA, *The border spell*, cit.

the EU has exercised its competence. More precisely, these arrangements are in sharp contrast with several provisions of the Schengen Borders Code and the Dublin Regulation, including provisions requiring assessment of the individual's conditions.⁷²

Germany has tried to reach other agreements, alongside this one, with Spain and also with Italy. As to Italy, sources appear to confirm that getting to an agreement did not work out, because Italian Interior Minister Salvini did not want to give a reason for success to his counterpart Seehofer, a political rival.⁷³

This example suggests that, in the stalemate of the reform of the Dublin Regulation, which is not progressing, and after the expiry period of relocation schemes, states find bricolage or do-it-yourself solutions to current challenges of their national interests, as the case of bilateral arrangements of Germany show.

The striking element of these administrative arrangements is that they provide for a fast-track return, applying a readmission logic within the EU, between MSs. It suggests as well that states have distrust in what the EU can achieve, on the basis of these rules that created incomplete integration on asylum. It is questionable, however, whether these administrative arrangements comply with EU law, and as such the Commission should call Germany, and its partnering states, to their responsibilities under EU law, and the administrative authorities of the MSs involved should set aside these instruments and apply EU law provisions.

7. *Quo vadis Europa?* Some directions to avoid EU's implosion on the 'refugee crisis'

This particular historic moment, a context where several European States have experienced economic struggles because of the sovereign debt crisis, but also because of processes of economic and political transitions (for Eastern European Countries), is a moment where the EU and the MSs find themselves in a very unstable situation, as we have seen above. The EU is not able to advance on its path of integration in matters of asylum, which touch upon the humanitarian dimension of migration, because MSs jeopardize any process of further supranationalization which would have consequences on the domestic sphere. This can be explained as well with the circumstance that MSs' societies have different experiences about integration of refugees and migrant workers, and some states have little or no experience in integrating communities of migrants with different ethnic backgrounds.

Current conflicts on competences and sovereignties, arising from the fragmented C.E.A.S., reflect the transformation of the EU from a regulatory state to an entity

⁷² C. KRUSCHKA, *The border spell*, cit.

⁷³ A. LA MATTINA, *E Matteo scarica il tedesco Seehofer: "Se la vedrà con i miei amici dell'Afd"*, in *La Stampa*, 15.9.2018, <https://www.lastampa.it/2018/09/15/italia/e-matteo-scarica-il-tedesco-seehofer-se-la-vedr-con-i-miei-amici-dellafd-Snu7W7nKX1yTut06G3sDbP/pagina.html> [last access: 23.1.2019].

exercising competences on core state powers.⁷⁴ This progressive and evolving shift in the EU's nature creates vertical tensions and challenges on competences and state sovereignty, additional to ordinary issues of enforcement of EU law in a context where the EU has to rely on MS bureaucracies, as this article has shown.

I will now try to sketch some ways in which solutions to this risky and frustrating state of affairs could be found.

Firstly, we observe that EU law is struggling to let a hospitality or humanitarian logic emerge. One of the problems of the current framework(s) of solidarity within the EU is that persons are the 'missing' component of a multi-polar relation, comprising the EU, MSs, and prospective refugees. Little is done to consider the refugees as first actors of their integration process.⁷⁵ First of all, they cannot benefit from the liberal free movement logic typical of EU integration; in contrast, they are framed as 'burdens' to be taken care of, as the expression fair burden sharing suggests. So, the emphasis on the persons, the prospective refugees, and their skills for being active in their integration into new societies must provide the tool to reconcile solidarity with the ethos of the community it aims to support.

In another perspective, the hospitality logic is not simply a feature of states community, but is also part of international law doctrinal scholarship which should also be reconsidered in these days.⁷⁶ For too long, a state's sovereignty has been equated with migration control, but the concepts are indeed distinct and independent, and excessive emphasis on migration control has overshadowed other policy objectives. I argue that it is desirable to rethink how these doctrines, used in other historical contexts, e.g., colonialism, can also be meaningful in this post-holocaust globalized world, where fundamental rights should be the common legal alphabet applying to the whole of mankind.

A third direction suggests that the EU should create more incentives for cooperation than it does now. In the context of asylum, the EU has not been able to create any '*solidarité de fait*'. The reality involves asymmetrical interests and bargaining positions between MSs (south-north; host-non host) which create few incentives for cooperation.⁷⁷ An effort has to be made to create interdependence, in the sense of establishing incentives for cooperation and sanctioning mechanisms for the opposite.

The EU's constitution and institutional set-up privileges protectionist (access-reducing) norms, whereas the protective dimension is largely left to MSs. It is here argued that this dissociation is dangerous, since it makes the EU dependent on MSs for

⁷⁴ P. GENSCHEL, M. JACHTENFUCHS, *Beyond the Regulatory Polity? The European Integration of Core State Powers*, Oxford, 2014.

⁷⁵ Cf. V. MITSILEGAS, *Harmonizing Solidarity*, and F. MAIANI, *The reform of the Dublin system and the dystopia of "sharing people"*, in *Maastricht Journal of European and Comparative Law*, 2017, pp. 622-645.

⁷⁶ The reference here is to Vitoria, Grotius and Vattel. Cf. V. CHETAIL, *Sovereignty and Migration in the Doctrine of the Law of the Nations: An Intellectual History of Hospitality from Vitoria to Vattel*, in *European Journal of International Law*, 2016, pp. 901-922.

⁷⁷ N. ZAUN, *States as Gatekeepers*. See also E. ROSSI, *Superseding Dublin: the European asylum system as a non-cooperative game*, in *International Review of Law and Economics*, 2017, pp. 50-59.

achieving a significant part of its objective. In this perspective, Lavanex has argued that the refugee crisis is a manifestation of dissociation between the EU's growing political aspiration as a normative power and the practical limits imposed by its constitutional compromise.⁷⁸

This is however a trap which the EU has to get out of. It affects its nature as a community based on the rule of law. Para-Dublin administrative arrangements should also be scrutinized, not only for their compliance with EU law, and for issues of transparency and accountability, but also because they can represent an existential threat to European integration. In my view this case is emblematic. One could also consider the case of de facto reinstatement of border controls, which often happens de facto.

In this context, it is to be hoped that the Court intervenes to inject this dimension of values and rights-based reasoning to defend the humanitarian logic of the European integration process; the political actors too should invest more efforts in pursuing a reform of the current legal framework, the Dublin Regulation in particular, in order to bring more justice into the system, which is a pre-condition to bringing everybody back to the table of responsibilities.

The status quo of rising sovereign populist movements and the threat to integration represented by Brexit force everybody to reflect upon the benefits of the European integration process, as a community based on the rule of law, and to make efforts, at the national and European levels, to support reforms, in a spirit of loyal cooperation and solidarity.

ABSTRACT: The progressive emergence of EU policies on migration, asylum and visa is based upon the Schengen integration process, which has conceptualized the EU's common external border as a juxtaposition of the MS ones. Upon this premise, the EU has developed the Common European Asylum System (C.E.A.S.) with several instruments, without putting solidarity at the core of the system, but rather holding onto the '*chacun pour soi*' logic, which implies that states geographically bordering with the Global South are also the ones that deal with the irregular migration phenomenon first. The aim of this article is to take stock of the attempts to operationalize solidarity in the last few years, after the so-called migration crisis of 2015-2016, which soon turned into a political battlefield. The article discusses this difficult path of solidarity, together with the stalemate of the reform of the Dublin system, and the challenges it represents for the EU integration process, since states increasingly look for ad hoc or bricolage solutions besides EU law.

KEYWORDS: solidarity – relocation – contestation – bilateral administrative arrangements – Dublin system.

⁷⁸ S. LAVANEX, *Failing Forward*, cit.