

National Identity and Loyalty in EU Law in the Era of Migration?

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Abstract: National identity is overwhelmingly represented in the field of migration. European division deepened further with the migration crises. The migration issue accelerated the EU into a new level of political crises with clashes between EU law and national identity. The different approaches of the Member States, the EU, and the missing consensus in this vital area reached a new level with different approaches among the EU institutions. The paper analyses the emerging conflicts of compliance of member state's obligations in the light of decisions and stances of the main EU institutions and the Member States.

Keywords: solidarity, CJEU, Hungary, migration, relocation system

1 INTRODUCTION

The principle of 'solidarity', derived originally from the French system, brought into Community law by the Court of Justice, modified through adaptation to other Member State systems, and diffused through the European Community, may become one of those principles which characterise the European law on social protection.¹

For a categorisation of solidarity based on the parties to the relationship, there are using the term 'national solidarity' to refer to obligations among citizens and residents of Member States, 'Member State solidarity' to refer to the obligations between the Member States, and 'transnational solidarity' to refer to obligations among EU citizens.² For a classification based on goals, there can be classifying Union solidarity as market solidarity, communitarian solidarity, and aspirational solidarity.³ The notion of solidarity can be found in the preamble of the Charter of Fundamental Rights, where it is listed among the 'indivisible and universal values' on which the Union is founded.⁴ The preamble of the TEU expresses the desire of the Member States to 'deepen solidarity between their peoples'.⁵ Solidarity is expressed in Article 2 TEU as an attribute of European society, it is listed among the general Union objectives in Article 3 TEU, which requires the promotion of not only solidarity between generations, but also economic, social and territorial cohesion and solidarity between the Member States. These objectives are given concrete substance under sector-specific treaty provisions, such as Article 80 TFEU on solidarity in the area of asylum, border checks and immigration.⁶

With the abolition of internal border controls, interdependencies between EU Member States have increased and with it concerns about inequities in the distribution of asylum and refugee burdens

¹ <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/solidarity-principle>

² A. Sangiovanni, 'Solidarity in the European Union', (2013) 33 Oxford Journal of Legal Studies, 1–29, 5.

³ F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press, 2015).

⁴ Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice. Preamble, Charter of Fundamental Rights of the European Union (2000/C 364/01)

⁵ "Intend to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations...".

⁶ Küçük, E. (2016) The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?. *European Law Journal*, 22: 448–469. doi: [10.1111/eulj.12185](https://doi.org/10.1111/eulj.12185).

across the EU. While Europe's relative burdens in global terms have been limited, they did increase very significantly as the result of the Syrian crisis and almost doubled from 2014 to 2015. Moreover, within the EU, the distribution of asylum seekers has been highly unequal.⁷ The migration events in 2015 called for concrete measures of solidarity towards those Member States at the EU borders, to the so-called frontline states. In April 2015, the European Commission presented plan of immediate action to be taken in response to the crisis: among others the relocation mechanism. Thus, in 2015, Council Decision 2015/1523 of 14 September 2015 and Council Decision 2015/1601 of 22 September 2015 on establishing provisional measures in the area of international protection for the benefit of Italy and of Greece were adopted. They were based on Articles 78 TFEU, which empowers the EU to pass laws benefiting states overwhelmed by a sudden inflow of migrants,⁸ and Article 80 TFEU, which stipulates that such decisions must be governed by the principle of solidarity and fair sharing of responsibility between Member States.⁹ These decisions were intended to reinforce internal solidarity in the EU and show the commitment of all EU Member States to share the migration burden with the two Mediterranean countries. The binding new relocation initiatives adopted as a response to the Syrian crisis constitute a significant departure from earlier voluntary relocation initiatives in that they are all quota-based rather than reliant on ad hoc pledging mechanisms which have proven so ineffective in the past.¹⁰

2 THE QUESTION OF SOLIDARITY

Poland, Hungary, the Czech Republic and Slovakia have refused to comply with these relocation decisions, and Hungary and Slovakia challenged the legality of the relocation decision. Moreover, under the Slovakian Council presidency, the Slovak government tabled an alternative proposal based on the concept of 'effective solidarity'.¹¹ The Court rejected this challenge and upheld enforceability of the duty of solidarity among EU Member States. In the case, Hungary's grounds were following:

1. The pleas alleging that Article 78(3) TFEU is not a proper legal basis for the contested decision:

- relating to the legislative nature of the contested decision,
- the contested decision is not provisional and that its period of application is excessive.

It was maintained that even though the contested decision was adopted in accordance with a non-legislative procedure, it must be classified as a legislative act because of its content and its effects, since it amends a number of legislative acts of EU law, more fundamentally the Dublin III Regulation. Also, it was argued that the decision applies for a period of two years that can be extended by one year, so it cannot be classified as a "provisional measure" within the meaning of Article 78(3) TFEU. Moreover, this is also the case since the temporal effects of the decision will far exceed that period since lasting ties and obligations will be created between the applicants for international protection and the Member States of relocation.

2. The pleas relating to the lawfulness of the procedure leading to the adoption of the contested decision:

- alleging breach of essential procedural requirements,
- alleging infringement of Article 68 TFEU,
- alleging breach of essential procedural requirements in that the Council did not comply with the obligation to consult the Parliament laid down in Article 78(3) TFEU,
- breach of essential procedural requirements in that the Council did not act unanimously, contrary to Article 293(1) TFEU,

⁷ Thielemann, E. (2018) Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU. *JCMS: Journal of Common Market Studies*, 56: 63–82. doi: [10.1111/jcms.12662](https://doi.org/10.1111/jcms.12662).

⁸ In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

⁹ 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.

¹⁰ Ibid.

¹¹ Barigazzi, J. (2016) 'Slovakia Outlines Alternative Migration Plan', *Politico*, 16 June.

- reach of essential procedural requirements, in that the right of the national parliaments to issue an opinion in accordance with Protocol (No 1) and Protocol (No 2) was not respected and that the Council failed to fulfil the requirement that the deliberations and the vote within the Council be held in public,

- breach of essential procedural requirements in that, when adopting the contested decision, the Council did not comply with the rules of EU law on the use of languages.

It was maintained that the decision had to be adopted unanimously or in the form of voluntary allocations, taking into account the politically sensitive question for several Member States. Moreover, Hungary submitted that the conclusions of the European Council of 25 and 26 June 2015 referred only to the relocation of 40 000 applicants, instead of the 120 000 number agreed in the decision. It was claimed that the Council made substantial amendments to the Commission's initial proposal and adopted the contested decision without consulting the Parliament afresh, resulting in a breach of Article 78(3) TFEU. Hungary also sustained that this failure led to a breach of the principles of representative democracy, institutional balance and sound administration under Articles 10(1) and (2) and 13(2) TEU. It was argued that the Council breached the essential procedural requirement under Article 293(1) TFEU by amending a Commission proposal without complying with the requirement for unanimity. In turn, the Council argued that the Commission's agreement (even if implicit) amounted to an alteration of the proposal on the part of the Commission. Also there was the claim that the right of national parliaments to issue an opinion on any draft proposal for a legislative act, as provided for in Protocols no. 1 and 2 to the EU Treaties. The Slovak Republic also sustained that should the CJEU find that the decision had to be adopted by means of a legislative procedure, the Council had breached the procedural requirement by adopting the decision *in camera*, instead of in public. The country with Slovakia put forward that the Council infringed its Rules of Procedure since the text setting forth the successive amendments to the initial proposal and the final text were provided to the Member States only in English.

3. The substantive pleas in law were:

- breach of the principle of proportionality,

- the contested decision is not necessary in the light of the objective which it seeks to attain,

- breach of the principle of proportionality because of the particular effects of the contested decision on Hungary,

- breach of the principles of legal certainty and of normative clarity, and also of the Geneva Convention.

The state claimed that the relocation decision is not capable of redressing the structural defects in the Greek and Italian asylum systems. It also relied upon the small number of people relocated under the scheme by the time of the CJEU's ruling to show that the decision is inappropriate for attaining the intended objective. It was argued that the objectives pursued by means of the decision could be achieved just as effectively by other measures which could have been taken in the context of existing instruments, namely the so-called Temporary Protection Directive, the recourse to the "EU civil protection" mechanism provided for in Council Regulation (EC) no. 2007/2004 establishing Frontex, and the assistance from Frontex in the form of a "rapid intervention". Also, the country argued that it was subjected to particularly strong migratory pressure both before the adoption of the decision and at the time of decision. Therefore, it argued, the decision placed a disproportionate burden on Hungary by setting mandatory relocation quotas for it as it does for the other Member States. argued that it was subjected to particularly strong migratory pressure both before the adoption of the decision and at the time of decision. Therefore, it argued, the decision placed a disproportionate burden on Hungary by setting mandatory relocation quotas for it as it does for the other Member States. argued that the Relocation Decision is not sufficiently clear as to how it relates to the provisions of the Dublin III Regulation, that it raises an issue regarding the right to an effective remedy of those applicants who are not designated for relocation, and that there is a lack of clarity to determine to which country an eligible applicant is to be relocated. Hungary also claimed that the Relocation Decision was incompatible with the 1951 Refugee Convention since, in accordance with the UNHCR Handbook and guidelines on procedures and criteria for determining refugee status under that Convention, an applicant should be permitted to remain in the Member State in which he has lodged his request pending a decision on that request by the authorities of that country.^{12;13}

¹² Joined cases C-643 and C-647 Slovak Republic and Hungary v Council of the European Union, 6 September 2017.

3 INSTITUTIONAL RELATIONS

The foundations of a united Europe were laid on fundamental ideas and values to which the Member States also subscribe and which are translated into practical reality by the Community's operational institutions. These acknowledged fundamental values include the securing of a lasting peace, unity, equality, freedom, security and solidarity. The principle of solidarity of the European Union is a fundamental principle based on sharing both the advantages, i.e. prosperity, and the burdens equally and justly among members.

The Court of Justice of the European Union ruled before that failure 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,¹⁴ but it has not been clear whether the principle of solidarity among Member States can be enforced in European courts. The Court ruled that the contested decision gives effect to the principle of solidarity between EU Member States. It argues that the Council, when adopting the decision in question, was in fact required to give effect to the principle of solidarity between Member States, which applies under Article 80 TFEU when EU migration policy is implemented (paras. 252 and 329 of the Judgment). Because the relocation decision represents a concrete expression of the principle of solidarity, it is capable of imposing the legal obligation of solidarity. Consequently, the duty of solidarity in this domain of EU law is enforceable when it is transformed into a valid, legally binding obligation through the process of the adoption of concrete measures in accordance with a Treaty-based legislative procedure. Advocate General Bot, also submitted that the principle of solidarity between Member States in the area of EU immigration policy has a specific content and a binding nature (para. 23 of the Opinion). In his view, the principle laid down in Article 80 TFEU is transformed into a valid, legally enforceable obligation through the process of the enactment by the Council of concrete measures such as the relocation decisions (para. 22 of the Opinion).

Although the Court does not provide a fully-fledged definition of the principle of solidarity between EU Member States, it identifies some elements thereof. The Court added, this principle imposes a legal obligation upon EU Member States to act for the benefit of other Member States even when such actions are not in their own interest.

The Court made a similar finding, namely, a state cannot breach EU rules for the sake of the protection of its own conception of national interest.¹⁵ The Court expressly recognised that the application of this principle leads to the establishment of a clear distinction between beneficiaries of policies and the rest of the Member States, which should accept the responsibility of sharing the burden carried by the beneficiaries even if that sharing is not compatible with their national interests (para. 293 of the Judgment). Furthermore, in its ruling the CJEU rejected the view that the application of the principle of solidarity between EU Member States is based upon voluntarism.

The Court's ruling regards solidarity as a category which can impose legally binding effects, provided that it is concretized through specific measures taken in accordance with a legislative procedure. It implicitly rejects the opinion that the principle of solidarity among Member States should be a basis for voluntary commitments. The CJEU did not discuss the very nature of the duty of solidarity in EU migration policy, and the Advocate General in his Opinion on the case saw this concept as an EU value irrespective of the fact that it is omitted from the list of the EU values presented in Article 2 TEU (paras. 18-19 of the Opinion). According to Article 3(3) TEU, the EU aims at promoting 'economic, social and territorial cohesion, and solidarity among Member States'. The Charter of Fundamental Rights of the EU in its Preamble also identifies solidarity as a value upon which the Union is founded. Value-laden provisions of EU law could be enforceable in courts through legally binding instruments which represent the expression or emanation thereof. It seems, based on the Court's findings presented above, that this approach to enforcement of the principle of solidarity between EU Member States is accepted in EU immigration policy. The Court's inconsistency in the interpretation of the legal effect of various solidarity clauses incorporated in the EU Treaties originated in its preposition that this principle can be a source of legally enforceable

¹³ <http://www.asylumlawdatabase.eu/en/content/cjeu-joined-cases-c-64315-and-c-64715-slovak-republic-and-hungary-v-council-european-union-6>

¹⁴ Case 39-72 Commission of the European Communities v Italian Republic. Judgment of the Court of 7 February 1973.

¹⁵ Ibid.

obligations only when concrete legislative measures operationalise its application. The general and abstract character of this principle necessarily entails that the margin of discretion that the European legislator enjoys when putting the principle into effect, through the enactment of secondary law, is wide. What solidarity effectively means depends, to a large extent, on the specific circumstances of the sector in which it shall apply. A EU immigration policy based on solidarity and fairness is not only a normative requirement enshrined in the Treaties, but also a functional necessity arising from the general objective of a single market without internal frontiers, one in which the free movement of person is realised. This is so because once internal borders between EU Member States are removed, the decision of migrants to enter the EU becomes a common concern to all Member States.

Conclusion

The Court failed to determine the distinction between the principle of solidarity and the principle of loyalty. In previous case law, the Court often refers to the duty of solidarity in the context of the application of the loyalty clause stipulated in Article 4(3) TEU. Article 80 TFEU stipulates 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, and whenever necessary, the acts of the Union adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle: but it has limited enforceability, can be used for interpretation regarding the legality of solidarity instruments.

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