Farahat | Hildebrand | Violante [Eds.]

Transnational Solidarity in Crisis

How Law Shapes Critical Transformations of Our Time

Nomos

Beiträge zum
ausländischen öffentlichen Recht und Völkerrecht

Edited by

the Max Planck Society
for the Advancement of Science
represented by Prof. Dr. Armin von Bogdandy
and Prof. Dr. Anne Peters

Volume 333

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Open Access funding provided by Max Planck Society.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de

1st Edition 2024

Published by
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-7560-1449-1 (Print)
ISBN 978-3-7489-1986-5 (ePDF)
DOI https://doi.org/10.5771/9783748919865

Online Version
Nomos eLibrary

Preface

This book compiles the findings from an international workshop that took place in the fall of 2022 at Friedrich-Alexander-University Erlangen-Nürnberg. The workshop and the resulting publication conclude a 7-year research project titled "Transnational Solidarity Conflicts," which was funded by the German Research Foundation (DFG). The project originally began as an investigation into solidarity conflicts in Europe during the Eurozone crisis, specifically examining the role of constitutional courts in addressing such conflicts. Throughout the project, we have observed an increase in solidarity conflicts within the EU and globally. These conflicts revolve around issues such as the distribution of resources in the context of migration, the pandemic, and climate change. In this final volume, we aim to assess how our conceptual approach to transnational solidarity conflicts can help understand and address the various solidarity conflicts that are prevalent in today's world.

We are grateful to the German Research Foundation for their ongoing support throughout the project and for generously extending the project duration due to the pandemic. Additionally, we would like to thank all workshop participants and the authors of this book for their contributions. Last, but not least, we would like to express our gratitude to our research assistants, Lisa Koller and Viola Berisha, for their tremendous support in finalizing the book.

Vienna, Cascais, Berlin, October 2024

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Marius Hildebrand (University of Erfurt), Anuscheh Farahat (University of Vienna), and Teresa Violante (FAU Erlangen-Nürnberg)

1 Introduction

Crises are "both a threat to and an opportunity for solidarity".[1] The two concepts are in a mutual relationship of tension. On the one hand, solidarity is an important means for overcoming a crisis and thus repeatedly invoked in crisis contexts. In this respect, solidarity should serve to cushion or compensate for the disintegrative moments of crisis-ridden developments. On the other hand, solidarity-based mechanisms and institutions are at issue in times of crisis. This happens when they come under pressure to adapt to crisis imperatives of necessity, exceptionality, and urgency or when their socio-moral foundations erode as a result of critical developments. In crises, solidarisation and desolidarisation processes intertwine in an often-paradoxical manner. A particularly impressive case in point is the so-called migration crisis of 2015 which gave birth to both: immediate, spontaneous popular support for refugees on one side and the upswing of a communitarian, anti-solidaristic closure cultivated by right-wing populist movements. In a similar vein, European solidarity and the struggle over its meaning took centre stage during the Eurozone crisis,[2] while the consensual and permissive logics underlying the integration project was severely challenged in an unprecedented way.[3]

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1 Sebastian Koos, 'Crises and the Reconfiguration of Solidarities in Europe – Origins, Scope, Variations' (2019) 21 European Societies 629, 629.

2 Stefan Wallaschek, 'Mapping Solidarity in Europe: Discourse Networks in the Euro Crisis and Europe's Migration Crisis' (Dr. phil thesis, University of Bremen 2019).

3 For the much-cited idea of a permissive consensus, its politicisation, and successive replacement by a constraining dissensus see Liesbet Hooghe and Gary Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2009) 39 British Journal of Political Science 1; for the politcisation of European governance see Swen Hutter, Edgar Grande, and Hanspeter Kriesi (eds), *Politicising Europe: Integration and Mass Politics* (Cambridge University Press, 2017); Pieter de Wilde and Michael Zürn, 'Can the Politicization of European Integration Be Reversed?'(2012) 50 Journal of Common Market Studies, 137.

After more than a decade of consecutive crises, it is not surprising that solidarity features prominently in social scientific, legal, philosophical, and transdisciplinary research.[4] Despite their different methodological perspectives, research objects and knowledge interests, the manifold contributions to the topic of solidarity allude to the fact that crises act as critical junctures for solidaristic regimes. Crises are privileged moments for the "reconfiguration of solidarity"[5] on a national and a transnational level. Such processes put political and legal institutions in which the scope and the conditionality of solidarity are explicitly or implicitly negotiated under pressure. Crisis-induced polarisation processes put them at risk of losing their legitimacy as impartial, reflexive, responsive or compromise-centred institutions.[6] The frequently stated multiplicity, seriality, and permanence of the crisis lends this relationship a particular virulence.[7] In addition to economic and migration policy issues, climate change and the age of the pandemic, in particular, represent pressing challenges whose consequences impact law and politics for the upcoming decades with acute crisis moments recurring again and again.

In view of the cascade of crisis events of global proportions since 2007, this volume aims to examine the tensional relationship between crisis and solidarity with a particular focus on the role of law therein. Empirically, it focuses on three crises with a global or at least supranational range: the

4 Recent publications in the field include: Andrea Biondi, Eglė Dagilytė, and Esin Küçük (eds), *Solidarity in EU Law: Legal Principle in the Making* (Edward Elgar 2018); Jürgen Gerhards and others, *European Solidarity in Times of Crisis* (Routledge, 2020) Christian Lahusen, Ulrike Zschache, and Maria Kousis (eds), *Solidarity in Times of Crises: Citizen Organisations and Collective Learning in Europe* (Palgrave MacMillan 2021); Helle Krunke, Hanne Petersen, and Ian Manners (eds) *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020); Katsanidou, Alexia, Ann-Kathrin Reinl, and Christina Eder. 'Together we stand? Transnational solidarity in the EU in times of crises' (2022) 23 European Union Politics 66. The interest in the relationship of solidarity and crisis also manifests itself in ongoing or recently completed research projects such as SOLID (https://solid-erc.eu), TRANSSOL (https://transsol.eu) or EUSOL (https://eusol.eui.eu/2019/05/28/solidarity-nature-value/).

5 Koos (n 1) 629.

6 Vivien A. Schmidt, *Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford University Press 2020); Poul F. Kjaer and Niklas Olsen, *Critical Theories of Crisis in Europe. From Weimar to the Euro* (Rowman & Littlefield 2016).

7 Myriam Revault d'Alonnes, *La Crise sans Fin. Essai sur l'expérience moderne du Temops* (Seuil, 2012); Andrew Gamble, *Crisis Without End? The Unravelling of Western Prosperity* (Palgrave MacMillan 2014).

European economic and financial crisis, the so-called migration crisis, and the COVID-19 crisis. Our primary observation is that, despite their different nature, we are witnessing an intensification of transnational solidarity conflicts in all three crises. Political and legal controversies revolve around the mode and the scope of solidarity relations. They refer to the conditions of solidarity, the distribution of costs and benefits and the allocation of scarce resources across and beyond the nation state, but also relate to questions of inclusion in and exclusion from solidarity. Thus, transnational solidarity conflicts also comprise processes of desolidarisation which challenge established institutional arrangements of solidarity, block their further development and adjustment to crisis-induced demands, and jeopardise the authority of conflict management enshrined in political and legal orders. The three crises analysed in this volume provide a diverse spectrum of solidarity conflicts characterised by diverging scopes, different key actors and distinct legal frameworks. However, the three crises also share critical features. Most notably, all of them are transnational by nature, ie they concern not only solidarity between states, but also across states, thereby also involving solidarity with individuals outside a given state or between the citizens of multiple states. However, they differ in terms of the concrete mode of transnationalism: The pandemic provoked conflicts about solidarity not only in the EU but also on a global scale involving issues of solidarity both between states and between states and individuals abroad. By contrast, solidarity conflicts in the financial crisis are conflicts about solidarity between and within EU Member States and between EU citizens in the context of the (often) constringent legal framework of the treaties. The migration crisis is also marked by a strong though often dysfunctional EU legal framework but it combines issues of solidarity between EU Member States with questions about solidarity between the EU and third countries and their nationals. In addition to their transnational dimension, all three crises were perceived as contagious crises in the sense that it is difficult, if not impossible, to contain their effects in one country or region. For the pandemic and the financial crisis, this is intuitively plausible, but also, in the case of migration, the fear of secondary movement within the Schengen area increased the perception of a contagious crisis. Contagiousness fuelled the perception that there was a need to react immediately to the crisis and paved the way for emergency rhetoric. Finally, all three crises were characterised by a strong external shock. Despite numerous internal problems also contributing to the concrete crisis constellation, all three crises were – to varying degrees – perceived as triggered by external and unexpected events

beyond the control of a single nation-state (the breakdown of Lehman Brothers, the war in Syria, the outbreak of COVID-19).

As an introduction, the following considerations are not meant to propose a narrow analytical framework the single contributions are bound to apply. It rather aims at a shared problem awareness that not only insists on the functional significance of a transnational understanding of solidarity but also sensitises to the problems of creating and maintaining solidaristic relationships in situations of crisis and the role of law therein. The idea is to identify through the various chapters' different modes of solidarity in crises and to understand what drives the different dynamics of these crises. This includes a strong interest in the differences and commonalities of the three crises regarding the relation between law and solidarity, the role of law in crisis and conflict management, and the impact of the crisis on the law itself. Moreover, this volume seeks to better understand what distinguishes or unites the three crises in terms of modes of solidarity and transnationalism that are under discussion and contestation. With this objective, we first approach the concepts of solidarity and transnational solidarity. In doing so, we underline, in a first step, that solidarity in general and transnational solidarity, in particular, should be conceived not only as a functional complement for the disintegrative effects of modernity, capitalism, interdependence, or globalisation but also and even primarily, as a controversial issue that is shaped and often also constrained by law (1). In the second step, we combine these considerations with a conceptual-historical approach to 'crisis' to show how our key concept of *transnational solidarity conflicts* allows us to analytically account for the crisis-induced politicisation of transnational solidarity issues (2). On this basis, we examine how the crisis-related proliferation and intensification of transnational solidarity conflicts challenge political and legal institutions (3). Finally, we derive from this a number of research interests that are pursued by the contributions to this volume (4).

2 Solidarity: Approaching an ultimately contested concept

The attempt to provide a definition of solidarity that is both comprehensive and precise is akin to "nailing a pudding to the wall".[8] The difficulty stems

8 Gerhards and others (4) 18.

not only from the fact that the last decade has seen a variety of publications on the topic of solidarity offering different approaches and conceptions of the term. Finding a valid definition is also complicated by the fact that solidarity – like many other key concepts in Humanities and Social Sciences – is familiar in an everyday sense and thus used in a fluctuating, imprecise and often suggestive way. Furthermore, in the political sphere, solidarity appears as a deeply contested concept.[9] It is frequently addressed in competing discourses and thus constructed in a different and often antagonistic manner. To disentangle the complex notion of solidarity and understand its transnational dimension, we will first clarify that solidarity is not a given resource but is rather a social relationship created through joint action that also allows for a transnational scope (a.). On this basis we can further clarify the relationship between law and solidarity and illustrate the law's role in transnational solidarity conflicts (b.).

2.1 Solidarity as joint action and the possibility of transnational solidarity

Solidarity was a crucial concept in utopian socialism where it was conceived as a means not only for compensating for the disintegrative effects of modernity but also for the struggle for a more egalitarian, 'justly' organised society.[10] In the international labour movement, the term was meant to leave behind religious, ethnic, and national ideas of belonging and cohesion and to create a class-based conception of identity and mutual support to overcome a joint experience of poverty and exploitation.[11] During the economic boom years in Western Europe that followed World War II, the expanding welfare state compensating for the inequalities produced by

9 We deliberately avoid the concept of „essentially contested concepts" developed by Walter Bryce Gallie since 'essentially', for Gallie, is not a mere intensifier, but alludes to an irreducible contingency, undecidability, and contestedness that is essential and specific to certain concepts – but not to others (see Walter Bryce Gallie, 'Essentially Contested Concepts' in *Philosophy and the Historical Understanding* (Chatto & Windus 1964). We reject this kind of conceptual essentialism. Instead, our formulation is meant to point to the mere fact, that solidarity has become a concept that is both central and contested in modern societies.

10 See Steinar Stjernø, *Solidarity in Europe: The History of an Idea* (Cambridge University Press 2004) 26ff.

11 Seminal for a pragmatic commitment see of course: Karl Marx and Friedrich Engels, 'Manifesto of the Communist Party', in Lewis S. Feuer (ed), *Basic Writings on Politics and Philosophy. Karl Marx and Friedrich Engels* (Doubleday and Company 1959).

capitalism and rebalancing the disintegrative effects of individual rights of liberal provenience was perceived as the institutional realisation of solidarity.[12] At the same time, the term became a fundamental value animating European integration as a political project aiming to transgress a nation-state-based design of solidarity.[13]

In all these domains, 'solidarity' functions not only as a given resource for redistributive and integrative policies within and beyond political communities but also as an *appel* to mobilize for certain positions and to reject alternative positions for lacking solidarity or for presupposing an overly narrow understanding of solidarity, and thus for being egocentric, unjust, immoral, parochial, nationalistic, or short-sighted. The picture becomes even more complicated since many academic approaches to solidarity implicitly link to this politico-normative dimension of solidarity and the appellative function it enshrines.

Broadly defined, the term 'solidarity' designates an idea of order that manifests itself in mutual obligations and aims at tackling common challenges or realizing common goods.[14] Irrespective of whether solidarity is primarily understood as a matter of joint action, a socio-moral resource, or a principle of order institutionalised in redistributive mechanisms, it is mostly framed as an "inner cement"[15] holding together a political entity by compensating for the inequalities and power asymmetries.[16] Solidarity relates to ideas of interaction, relatedness, belongingness, togetherness, sympathy, sameness, similarity, interdependence, a common idea of order, or a shared experience of vulnerability between members of a group. The varying enumeration alludes to the fact that solidarity refers to some sort of *common ground* as its condition. Since this common ground is constructed distinctively in different approaches to solidarity, the issue of claiming a

12 For a concise overview, which also deals with the different party-political and national-specific understandings of solidarity in Western Europe, see again Stjernø (n 10) 91ff.

13 Andrea Sangiovanni, 'Solidarity in the European Union: Problems and Prospects' in Julie Dickson and Pavlos Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (Oxford University Press 2012), 384ff.

14 Karel Wellens, 'Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations' in Ronald St. Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community* (Brill 2005).

15 Kurt Bayertz, 'Four Uses of "Solidarity"', in Kurt Bayertz (ed.), *Solidarity* (Kluwer 1999) 9.

16 See Geoffrey M. Hodgson, *Liberal Solidarity* (Edward Elgar 2021).

basis or foundation of solidarity is also where the conceptual difficulty of theorising the term stems from. Furthermore, the issue of finding or constructing a common ground for solidarity directly links to the (potential) scope of solidarity since the debate over the origins of solidarity comes along with competing ideas of inclusiveness and exclusiveness of solidarity as well as divergent conceptions of conditions for solidarity.[17]

As a first step, it makes sense to approach the term etymologically. The concept originates from the Roman Law of obligations. The *obligatio in solidum* designated a legal principle according to which each individual member of a group was liable for common debts.[18] In the aftermath of the French Revolution, the term began to supersede the concept of fraternity and featured prominently alongside freedom and equality as the two central concepts of the revolutionary imaginary. In the same development, the once concrete and precise legal term experienced a generalisation and became a core concept in discourses on politics and society.[19] The term, meant to compensate for the erosion of the traditional bonds related to the society of estates, took centre stage in the early classics of sociology. Framed as an indispensable prerequisite for restoring, continuing, and improving a societal order, in Auguste Comte's and Emile Durkheim's classic sociologies, solidarity appears as a *bottom-up* phenomenon, ie the result of shared norms and values between different parts of a society.[20]

Unlike in classical sociology – and very much in contrast to freedom and equality as the animating ideas of the emerging liberal democratic order – solidarity remained a peripherical concept in politico-theoretical and legal thought for a long time.[21] In these primarily *top-down* oriented disciplines, the relative peripherality of the term can be attributed to the idea of imposing positive obligations to commit an individual for a particular group is difficult to integrate into mainstream liberal political and legal philosophies. Dominated by the paradigm of warding off illegitimate encroachments on individual freedoms and the grounding of universalisable norms, it seemed difficult to attribute a collectively binding character to solidaristic institutions based on particular characteristics or mere polit-

17 See Stjernø (n 10) 85.
18 See Bayertz (n 15) 3.
19 Stjernø (n 10) 26ff.
20 ibid 30ff.
21 Bayertz (n 15) 4.

ical will.[22] From radical libertarian and liberal-conservative perspectives, solidarity is at odds with liberal culture and the core idea of individuality, insofar as any politicisation aiming at top-down obligations to act in solidarity beyond allegedly natural micro-communities seems to undermine the universal principles of individual freedom, personal responsibility, and the right to property.[23]

However, in recent years, the "freedom-solidarity issue"[24] has received new attention in political and legal philosophy. Against the backdrop of the global rise of solipsistic individualism disdainful of solidarity and right-wing nativism reserving solidarity for an ethnically defined in-group, authors like Richard Rorty, Craig Calhoun, or Fred Dallmayr have felt the need to bridge the gap between social obligations and individual freedom. New origins for solidarity include a "radically plural" notion of the public sphere, in which people realize that they are "bound to one another by promises that are explicit or implicit in their lives together",[25] an "ability to see more and more traditional differences (of tribe, religion, race, customs, and the like) as unimportant when compared to pain and humiliation",[26] and "a bond of mutual ethical responsibility" that is inextricably linked to our existence as "human-being[s] in the world".[27] In his attempt to develop a conception of solidarity that is adequate for understanding and supporting international integration processes, Andrea Sangiovanni has underlined, in a similar vein, that solidarity should not be grounded in "identity or fellow feeling", but in the recognition and endorsement of "reciprocity" and "joint action".[28] In a similar way, Juri Viehoff and Kalypso Nicolaïdis stress that solidarity creates a social bond that allows one to overcome a purely self-interested rationale without presupposing a consensually integrated community in which anyone would identify with the in-

22 ibid 4ff.

23 For such a radical politicisation of liberal pradigms of order see Nicholas Capaldi, 'Whats's Wrong with Solidarity?', in Kurt Bayertz (ed.), *Solidarity* (Kluwer 1999).

24 Fred Dallmayr, *Freedom and Solidarity: Toward New Beginnings* (University Press of Kentucky 2016) 190.

25 Craig Calhoun, 'Imagining Solidiarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere' 14 (2002) 14 Public Culture 147, 159.

26 Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge University Press 1989), 192.

27 Dallmayr (n 24) 195.

28 Andrea Sangiovanni, 'Solidarity as Joint Action' (2015) 32 Journal of Applied Philosophy 340.

terests of another.[29] Beyond important differences, these approaches share the idea of renewing the common ground on which solidaristic obligations could be built. They aim to transgress traditional ideas of belonging and to catch up with economic, financial, and political transnationalisation processes and their repercussion on social justice issues.

This paradigm of transgression is inherent in solidarity on which the concept of transnational solidarity, as elaborated by Carol Gould in particular, is based.[30] Gould points out that, in contrast to traditional conceptions of solidarity, the notion of transnational solidarity is not reduced to "members of a given community" (whether it is a parochial community, a class, or a nation state) but meant to denote "overlapping networks of relations of individuals or groups and distant others (again, individuals or groups), in which the former aim to support the latter through actions to eliminate repression or reduce suffering".[31] Hence, transnational solidarity does not refer to the challenge of creating and sustaining solidarity within pluralistic polities but to a cross-border endeavour that conflicts with other understandings of solidarity.

At a theoretically more fundamental level, the phenomena of transnational solidarity demonstrate that solidarity is not a superficial expression of an unavailable basis of togetherness or sameness rooted in class-, race-, religion-, ethnicity- or nationality-based identities. The issue of transnational solidarity rather brings to the forefront that solidarity, in general, relates to and depends on a common will to create and maintain bonds of mutuality which react to growing interdependences and mutual vulnerabilities.[32] This means, that solidarity should not be framed as a matter of a pre-discursive essence grounding a common identity, but as a matter of social practices that construct, perpetuate, and defend – or challenge and reduce more or less solidaristic identities.

29 Juri Viehoff and Kalypso Nicolaïdis, 'Social Justice in the European Union: The Puzzles of Solidarity, Rationality, and Choice', in Dimitry Kochenov, Gráinne de Búrca, and Andrew Williams (eds) *Europe's Justice Deficit?* (Hart Publishing 2015) 284.

30 Carol C. Gould, 'Solidarity between the National and the Transnational: What Do We Owe to "Outsiders"?' in Helle Krunke, Hanne Petersen, and Ian Manners (ed), *Transnational Solidarity: Concept, Challenges, and Opportunities* (Cambridge University Press 2020).

31 ibid 23.

32 See Sangiovanni (n 28).

2.2 The complex relationship between law and solidarity

This perspective on solidarity allows us to see that besides religion, economics, and politics, law is an important practice in which social relations in general and solidaristic relations, in particular, are negotiated. To begin with, the law often expresses (more or less) solidaristic attitudes. In a sense, economic and social rights or rights of refugees can be understood as crystallized solidarity on domestic, supranational[33] or international levels. Likewise, solidarity is today juridified in many legal orders. Art. 2 TEU, Art. 78 III and Art. 80 TFEU are paradigmatic for juridification through which solidarity becomes a legal concept that can be invoked in legal discourses, including court proceedings. However, when engaging with the law, we are not only dealing with a mere representation of social relations in the formal language of law. The law rather also plays a constitutive role for solidarity: on the one hand, law produces structures and institutions that pose obstacles to solidarity between certain groups or beyond borders. Law, for example, shapes the institutional role and the frequent claim for a strong protection of property rights, which is often invoked as an obstacle to solidarity and redistribution in public and legal discourse.[34] Law sometimes also explicitly prohibits solidaristic burden sharing as with the no-bailout clause in Art. 125 TFEU. On the other hand, law creates bonds, institutions and legal tools needed to operationalise solidarity be it in the form of sharing of resources or responsibility. Moreover, by referring to legal norms, solidaristic relations can be constructed, expanded, and defended – or contested and limited. In this respect, legal procedures, rules, and reasonings contribute to the further development of solidaristic relationships. This last aspect reminds us that law can also become the common cause for acting in solidarity with one another and supporting each other. It is in this vein that we may understand the relationship between law and solidarity in political and legal struggles for the realization of human rights or a projected constitutional goal. The relationship between law and solidarity is, thus, a complex one. This illustrates that not only are conflicts over solidarity fought out through the law, its case-by-case application and interpretation, but the law itself can become the point of reference and inspiration for solidaristic action.

33 See the Chapter on Solidarity in the EU Charter of Fundamental Rights.

34 Katharina Pistor, *The Code of Capital. How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

An illustrative case in point for how the law both shapes (the possibility) of solidaristic action and is itself shaped through conflicts about solidarity is the tense relationship between the no-bailout-clause in Article 125 TFEU and the different rescue mechanisms designed to support and adjust the budget of the economically weaker euro area Member States during the height of the financial crisis in the early 2010s. Whereas Article 125 TFEU was meant to limit or even cut off the further development of solidarity within the European Monetary Union, against the backdrop of the eurozone crisis, the eurozone Member States found a way to stabilise the common currency project by a specific form of transnational solidarity. The crucial idea of conditional financial support can be interpreted as a fundamental transformation of European solidarity. It linked financial support and default guarantees to the restriction of the Member States' budgetary and fiscal sovereignty.[35] At the same time, this mode of conditional support led to a fundamental shift of power in favour of supranational institutions and at the expense of national legislatives, especially in the economically weaker Member States.[36] Meant to stabilise the common monetary project and to compensate for the mutual interdependence of the eurozone Member States, the European Financial Stabilisation Mechanism (EFMS), the European Financial Stabilisation Facility (EFSF) and the European Stability Mechanism (ESM) instituted a form of solidarity that put emphasis on rule compliance and strict reciprocity.[37] These refinements of transnational solidarity in the eurozone were not easy to reconcile with the no-bailout-clause and required quite an interpretative stretch. Moreover, the institutional shifts involved with the crisis measures together with the increasing distributional effects of measures by technocratic institutions such as the European Central Bank (ECB) raised doubts regarding both the principle of separation of powers and the democratic accountability and responsivity of distributive decisions in the eurozone. The institutions addressed to solve these politically and constitutionally sensitive issues, as the European Court of Justice or the constitutional courts of the Member

35 See Farahat (n 36) 45ff.

36 Damian Chalmers, 'Crisis Reconfiguration in the European Constitutional State', in Damian Chalmers, Markus Jachtenfuchs, and Christian Joerges (eds), *The End of the Eurocrat's Dream: Adjusting to European Diversity* (Cambridge University Press 2016); Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press 2016).

37 See Sabine Frerichs, 'Unravelling the European Community of Debt', (2016) 22 European Law Journal 720.

States, contributed in a predominantly implicit but momentous way to the further (legal) shaping of transnational solidarity in the eurozone.[38] From this perspective, it becomes clear that they participated, whether intentionally or unintentionally, in concretising and defining the contested concept of solidarity and subsequently became the object of contestation themselves.

More recently, the handling of the economic consequences of the COVID 19-pandemic evoked new transnational solidarity conflicts in the EU. The Member States finally agreed upon a large programme entitled "Next Generation EU" (NGEU), the aim of which is "to promote the Union's economic, social and territorial cohesion"[39] to ensure long-term economic and social resilience in the view of potential future pandemics and other major crises. Most notably, NGEU also seeks to make the Union fit for green transition and digital transformation and to enhance crisis preparedness more generally. Thus, it pursues the achievement of common goods of the Union. The core of NGEU are loans and non-repayable subsidies to be disbursed through a newly established Recovery and Resilience Facility (RRF) to allow the Member States to fulfil the respective goals. The financial support is linked to a sort of "soft" conditionality mechanism, that is, the Member States are supposed to develop recovery and resilience plans together with the Commission and will receive the financial support only after the Council has endorsed the respective plans. The EU will generate the necessary resources for RRF through borrowing from the financial markets. In practice, this means that the EU will incur a massive debt of over 700 billion euros. As the Member States have not increased their budgetary contributions accordingly, it is still an open question how the EU will generate the necessary resources to repay this debt in the future, even if the political institutions expressed their will to equip the Union with more own resources (e.g., through new taxes on EU level). Therefore, one may also question how far NGEU, in the end, will actually enable solidarity in the sense of sharing of resources.[40] The conflicts surrounding NGEU are paradigmatic transnational solidarity conflicts. At their core, they revolve around the question of how the costs of realising the common good of resilience in the light of durable crises and societal transformations (climate

38 See for example: Farahat (n 36) 104ff and 181ff; Michelle Everson, 'An Exercise in Legal Honesty. Rewriting the Court of Justice and the Bundesverfassungsgericht' (2015) 21 European Law Journal 474.

39 NGEU Art. 4 (1).

40 On this see the contributions of Hilpold and Menéndez in this volume.

change, digital transformation, age of pandemics, etc.) are to be shouldered and distributed in the Union. The solution that has been found is remarkable as it envisages for the first time that these costs are to be shouldered by all Member States and EU citizens together. It thereby significantly reshapes transnational solidarity in the EU. At the same time, on the legal-technical side, NGEU again raised several constitutional doubts. It increased the risk of using exceptional competencies (Art. 122 TFEU) permanently. It challenged established interpretations of constitutional budgetary rules of the Union, namely the principles of budgetary unity and budgetary balance. Finally, NGEU also bears democratic shortcomings in that it effectively reduced the say of the European Parliament on budgetary issues. In this sense, NGEU also epitomises the challenge of how to allow for constitutional adaptation through interpretation in the light of rigid amendment rules and complex crises.

Transnational solidarity conflicts, however, do not only involve direct financial and budgetary relevance issues. Rather, they also involve how we distribute responsibility for others, ie non-EU-citizens, in the Union. The EU refugee protection crisis illustrates this dimension of solidarity neatly. Member States disagree both on whether and how far the EU should show solidarity to those seeking international protection at its borders, but also on how to distribute the responsibility for the protection of those already inside the Union.[41] Conflicts arise both as to the scope of solidarity and also as to the mode of solidarity. The latter involves questions such as: What would be fair criteria for distribution? What role do the needs and preferences of those seeking protection play in this regard? What does solidarity imply, ie only financial support of other Member States or also admission of refugees and asylum seekers? The asymmetries and dysfunctions of the Dublin system, as well as the continuing number of drowning migrants on the EU's external borders, demonstrate that migration is an issue where solidarity mechanisms are particularly hard to negotiate.[42]

41 See the underlying conflicts in CJEU, C-646/16, Jafari, ECLI:EU:C:2017:58 and C-490/16, A.S., ECLI:EU:C:2017:585; CJEU, C-643/15 and C-647/15, Slovak Republic and Hungary against Council, ECLI:EU:C:2017:631; CJEU, C-715/17, 718/17 and 719/17, European Commission against Poland, Hungary and Czech Republic, ECLI:EU:C:2020:257.

42 On the difficulties of the latest reform proposal (Proposal for a Regulation of the European Parliament and the Council on Asylum and Migration Management, COM (2020) 610 final): Francesco Maiani, A „Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact (EU Migration Law Blog, 10 Octo-

Moreover, solidaristic solutions in EU migration governance are often emergency-driven rather than addressing structural imbalances.[43] In this respect, they resemble solidaristic solutions in other fields, although NGEU might in the long run prove to provide an entry into more structural and long-term mechanisms of solidarity.[44] Although the principle of solidarity features prominently in EU migration law (Art. 80 TFEU)[45] as well as in the EU's constitutional core (Art. 2 TEU), the Court of Justice has so far missed the many opportunities to further concretise the constitutional standard that may be derived from these provisions.[46] At the same time, the surrounding political discourse illustrates how especially right-wing populist political actors seek to harness the momentum of crisis in order to push for more parochial and nationalistic scopes and modes of solidarity, thus defying the transnational ambition of solidarity enshrined in international refugee law and also reflected in the Treaties (Art. 78 (1) and 80 TFEU, Art. 2 TEU).

3 Crisis and the intensification of transnational solidarity conflicts

Similar to solidarity, crisis is an eminently political term. To substantiate this assertion, one may refer to the conceptual-history approach proposed

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ber 2020, <https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/> accessed 6 January 2023.

43 Lilian E. Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24 Maastricht Journal of European and Comparative Law, 667, 673.

44 See Peter Hilpold's and Hans Jürgen Bieling's contributions in this volume.

45 On the impact of this provision see Jürgen Bast, 'Solidarität im Europäischen Asyl- und Einwanderungsrecht' in Michèle Knodt and Anne Tews (eds) *Solidarität in Der EU* (Nomos 2014).

46 For a critique see Esin Küçük, 'The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?' (2016) 22 European Law Journal, 448, 454f; Violeta Moreno-Lax, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy' (2017) 24 Maastricht Journal of European and Comparative Law 740, 751ff. In the opinions of the Advocate Generals, the notion of solidarity has, however, been more prominently developed: AG Sharpston, Opinion of 6 July 2017, C-646/16 and 490/16, Jafari and A.S., ECLI:EU:C:2017:443, No. 158; AG Bot, C-643/15 and C-647/15, Slovak Republic and Hungary against Council, ECLI:EU:C:2017:618, No. 17; AG Sharpston, C-715/17, 718/17 and 719/17, European Commission against Poland, Hungary and Czech Republic, ECLI:EU:C:2019:917, No. 246–255.

by Reinhart Koselleck.[47] Etymologically, the term 'crisis' originates from medical discourse. In ancient Greece, it referred to the point at which the fate of a sick person turns either for the better or for the worse. It was not until the 18th century that the term, by "metaphorical extension", transgressed to the "socio-political sphere" to become a basic historical concept (*geschichtlicher Grundbegriff*).[48] Continuing the etymological meaning it had on the medical field, it came to denote a situation of social upheaval that meant a shock for public order. The semantic web surrounding the concept associates 'crisis' with urgency, exceptionality, bifurcation, alternativity, dissociation, dispute, but above all with the notion of decision. As Koselleck points out, 'crisis' is a "concept of progression that [...] leads towards a decision"; it refers to a "period of time when the decision is due but not yet made".[49]

However, the essential point about Koselleck's conceptual history perspective is that it puts us on a constructivist track. 'Crisis' is portrayed as an overdetermined socio-political concept allowing to condense diverse experiences, bundle disparate phenomena, and trigger opposed expectations.[50] Beyond the idea that a fundamental decision is needed, the definition of the meaning of the crisis situation and the concrete decision it needs to overcome this situation is subject to political struggles for interpretation. To put it differently: The politicisation processes coming along with crises are not a mere expression of given interests in crisis-induced conflicts over (solidaristic) redistribution; crises rather entail an interpretative struggle of crisis narratives and discourses that are striving to master the uncertainty related to the critical situation in order to legitimise the decisions made or to frame the future choices of feasible and suitable strategies.[51]

Even if the concept of crisis cannot be reduced to an ensemble of certain conditions or challenges but should be conceived as a discursively

47 Reinhart Koselleck, 'Krise' in Otto Brunner, Werner Conze, and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland. Band 3 H – Me*; for a thorough introduction, see Melvin Richter and Michaela W. Richter, 'Introduction: Translation of Reinhart Koselleck's "Krise" in Geschichtliche Grundbegriffe' (2006) 67 Journal of the History of Ideas 343.

48 Koselleck (n 49) 619.

49 ibid.

50 For a similar „pragmatist perspective", see Brian Milstein, 'Thinking Politically about Crisis: A Pragmatist Perspective' (2015) 14 European Journal of Political Theory 141.

51 Colin Hay, 'Narrating the Crisis: The Discursive Construction of the "Winter of Discontent"' (1996) 30 Sociology 253.

constructed phenomenon, what remains is the difference between expected 'normalcy' and 'normativity'[52] and the necessity of urgent, fundamental decisions as the defining logics of crisis. These features make them privileged occasions for exceptionalist and securitising strategies of Neo-Schmittian emergency politics.[53] Based on the conviction that the established procedures of normal law cannot cope with any critical situation, Carl Schmitt required a quasi-theological moment in which an emergent authority *sovereignly* creates new law to restore a vanishing order.[54] However, in a constructivist reading, as recently offered by Christian Kreuder-Sonnen or Jonathan White, Schmitt's objectivist conception of a critical situation, in which applicable law is overridden by the decision of a sovereign authority, is reinterpreted as a contingent result of a "rhetorical power game"[55] in which competing political projects try to win support for their crisis-narratives and build confidence in their countermeasures.[56] This critical perspective highlights the fact that exceptionalism is not a matter of an objective reality but a contingent construction offering a contestable interpretation of reality. It reminds us that crises are not automatically prone to executive-driven emergency logic.

For analytical as well as normative reasons, it is helpful to step back and return to the concept of crisis and its impact on identities and solidarities enshrined therein. First and foremost, a crisis is a point of intersection.[57] In critical moments, mutual trust, predictability, and certainties dwindle; institutionally consolidated tensions break up; the legitimacy of decision-making becomes precarious; dominant self-descriptions of political communities become dislocated; and the belief in a powerful public order is shaken. Under such circumstances, path dependencies and structural conditional factors of social action recede, and the concealed contingency

52 See Milstein (n 52) 150.

53 Jonathan White, *Politics of Last Resort: Governing by Emergency in the European Union* (Oxford University Press 2019); Christian Kreuder-Sonnen, *Emergency Powers of International Organizations: Between Normalization and Containment* (Oxford University Press, 2019).

54 Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (Chicago University Press 2005).

55 Kreuder-Sonnen (n 55) 56.

56 White (n 55) 88.

57 With a focus on the political consequences of financial crises, see Francisco Panizza, 'Introduction: Crisis as Moments of Truth' in Francisco Panizza und George Philip (eds), *Moments of Truth: The Politics of Financial Crises in Comparative Perspective* (Routledge 2014).

of social and political orders becomes visible.[58] In these phases, windows of opportunity open for political actors to condense manifold discontinuity experiences, to programmatically articulate disparate deprivation experiences and to organise majorities for veritable policy changes in order to overcome the (postulated) imbalances which led to the crisis situation. Thus, crises build an ideal breeding ground for populist politics.[59] Unlike single-issue movements or the traditional, thick-centred ideologies, these projects cultivate an unease that is relatively indeterminate in terms of content but radically challenges epistemic authorities and is thus frequently framed as a reaction to overly expertise-based, "post-democratic" reconfigurations of decision-making.[60]

However, similar to exceptionalism and emergency politics, the upsurge of populism points to a general thrust of crisis developments: It exemplifies that crises and crises' discourses induce politicisation processes, which express the need to reconfigure (transnational) solidarities in order to overcome the crisis and build a new crisis-proof order based on more appropriate and sustainable solidarity mechanisms. From this perspective, the multifaceted, and often overlapping cleavage lines between communitarians and cosmopolitans, supporters of populism and advocates of meritocracy, Global North and Global South, between Member States of a federation, but also between different social groups within these federations, that emerged and intensified against the backdrop of a series of crises since 2008, ultimately refer to the contingent construction of solidaristic relationships. We therefore propose to conceive these conflictual constellations as *transnational solidarity conflicts*.[61] Politically, transnational solidarity conflicts mainly manifest themselves in competing designs of the *scope* and the *mode* of solidarity, with *scope* referring to questions of membership and *mode* referring to the kind of reciprocity on which solidarity is based.[62]

58 See Giovanni Capoccia und Daniel R. Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59 World Politics 341, 343.

59 For the complex relationship of crisis and populism through a constructivist lens see Benjamin Moffitt, 'How to Perform Crisis: A Model for Understanding the Key Role of Crisis in Contemporary Populism' (2015) 50 Government and Opposition 189.

60 See Jacques Rancière, *Disagreement* (University of Minnesota Press 1998), 95-121; Colin Crouch, *Post-Democracy* (John Wiley & Sons 2004).

61 See also Anuscheh Farahat (n 36) 45ff.

62 With regard to the struggle over the adequate management of the eurozone crisis, Sabine Frerichs aptly differentiate between two modes of reciprocity: Whereas liberal-conservative actors and the euro Member States of the European North insisted

In turn, the different forms that these dimensions can take in solidaristic regimes illustrate that the conditions of solidarity may be shaped in different ways. Once more, these conflicts over the conditions of solidarity refer to the common ground issue, ie they are struggles over constructing foundations, origins, or motivations of solidarity adequate to overcome the crisis at stake. In the context of crisis, it becomes clear that transnational solidarity conflicts cannot be reduced to conflicts over redistribution that are based on purely material interests. Rather, they entail interpretative struggles over the definition of the crisis, adequate coping strategies, and their relation to other basic principles of order, such as democracy, equality, proportionality, or price stability.

This conflict-centred perspective highlights the contested nature of solidarity and allows us to connect the conceptual considerations to the research on political and legal institutions. It enables us to analyse the concepts of (transnational) solidarity that political and legal institutions perpetuate when they decide over crisis-induced conflicts and how these concepts and their argumentative foundations spill back on the interpretative power and the legitimacy these institutions try to build, maintain, and extend. Moreover, a conflict-centred perspective also allows us to identify strategies and ways in which different actors use the law in order to challenge dominant understandings of solidarity and distribution that are deeply entrenched in institutional thinking and political as well as legal structures. It opens the view to analyse such practices of contestation and to understand how they, in turn, impact legal and political structures, whether they push for adaptation and change or more inertia and resistance. In this context, it is also important to stress that not only the potentially disruptive dynamic of crises may produce societal costs. Rather, containing a crisis may also be costly and may often reinforce the unequal distribution of power and resources. A case in point is the financial crisis in the eurozone where the containment of the crisis brought about a new form of conditioned solidarity that reinforced existing power asymmetries between the European

on "rule compliance" as the necessary conditionality of solidarity; socialist parties and the most crisis-hit Euro countries in the European South pleaded for "burden sharing" based on membership as the manifestation of a crisis-proof solidaristic order (see Frerichs (n 39) 740.

North and South.[63] Given the imbalances in negotiation power, such a conditioned form of solidarity may even be labelled as anti-egalitarian.[64]

3 Crises and transnational solidarity conflicts as challenges for institutional conflict resolution

As we have pointed out, the concept of crisis always refers to an experienced or expected normality. Situations that exceed 'normal' problem situations and overwhelm established problem-solving mechanisms are observed as being crisis-like. Accordingly, social systems communicate 'crises' when their regular mechanism to continuously conceal the basic functions of *adaptation*, *goal attainment*, *integration,* and *latent pattern maintenance* reach their limits.[65] The concept of crisis appears when "the structure of a social system allows fewer possibilities for solving problems than would have to be used to maintain the system".[66] The crisis-related simultaneity of urgency, uncertainty, and politicisation creates a constellation in which the procurement of legitimacy is not keeping pace with the need for legitimacy. This discrepancy can be dangerous for individual political actors, specific institutions, but also entire political orders. In the latter case, we are witnessing a "crisis of public power", in which the "the existing normative grid of society" sedimented in a legally constituted framework of order and authority is fundamentally challenged by different crisis narratives and their conceptions of solidarity.[67]

The general disintegrative logic of crises stems from the fact that crisis contexts make it more difficult for decision-makers to find acceptance for their decision, regardless of the concrete content of the decisions made, since any decision (including the decision to leave everything as it is, or to postpone the decision with regard to the crisis-related uncertainty of their outcomes) will frustrate significant parts of the population affected by the decision. This is how an originally economic or pandemic challenge creates a negative momentum, in which the institutions in charge of deciding

63 On this see Baraggia, in this volume.
64 Menéndez, in this volume.
65 See Talcott Parsons, *The Social System* (Routledge & Keagan Paul 1967).
66 Jürgen Habermas, *Legitimationsprobleme im Spätkapitalismus* (Suhrkamp 1973) 11.
67 See Poul F. Kjaer and Niklas Olsen, 'Introduction: European Crisis of Public Power from Weimar until Today' in Poul F. Kjaer and Niklas Olsen (eds) *Critical Theories of Crisis in Europe. From Weimar to the Euro*, Rowman & Littlefield 2016).

critical issues run the risk of losing the support and the legitimacy needed to effectively cope with the crisis and to shape acceptable and sustainable solidarity relations.[68]

Against this background, it becomes clear why crises are test cases for the "interpretive power"[69] (*Deutungsmacht*) of the institutions addressed to solve crisis-induced solidarity conflicts. With regard to these constellations, parliaments, governments, and courts find themselves in dilemmatic decision-making situations. From a normative perspective oriented towards a "resilient constitutionalism"[70], they have to balance between maintaining the functional and normative integrity of public order and adjusting to a crisis-driven dynamic which is accompanied by 'urgencies' and 'necessities' but also by new conflict lines and new functional needs for (transnational) solidarity. How should they adapt to powerful crisis demands to sustain the normativity of public order in the medium term? When does the *adaptation* to crisis-driven transformations in extra-systemic environments turn into *submission* to partial interests? In which respect should an institution show *stamina*? And when does an overly rigid form of *stamina* lead to a *breakdown* of the entire public order?[71] To make matters worse, in a crisis context, it is unlikely that the addressees of these decisions will agree on the boundaries between an appropriate, crisis-sensitive *adaptation* and an unacceptable *subordination* of principles of order.[72]

However, crises not only go along with the risk of undermining public institutions, but also provide opportunities for (re-)building a public order and for (re-)gaining interpretative power. It may sound paradoxical, but to ward off the populist, radically oppositional and the exceptionalist, exec-

68 ibid esp. xii.

69 For the foundation of the term see Hans Vorländer, 'Deutungsmacht – Die Macht der Verfassungsgerichtsbarkeit' in Hans Vorländer (ed.), *Die Deutungsmacht der Verfassungsgerichtsbarkeit* (VS Verlag, 2006); André Brodocz, *Die Macht der Judikative* (VS Verlag 2009).

70 Xenophon Contiades and Alkmene Fotiadou, 'On Resilience of Constitutions. What Makes Constitutions Resistant to External Shocks?' (2017) 9 ICL Journal 3.

71 The italicised terms stem from the ideal-typical differentiation of four crisis reactions on the part of constitutional bodies proposed by Xenophon Contiades and Alkemene Fotiadou (see Xenophon Contiades and Alkmene Fotiadou, 'How Constitutions Reacted to the Financial Crisis' in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis. A Comparative Analysis* (Ashgate 2013).

72 The same applies to the boundary between subordination and breakdown. What some observe as a regrettable but merely temporary subordination, others already identify as a breakdown of constitutional normativity.

utive-dominated momentum of a crisis the institutions carrying a public order have to find ways to 'routinise' and 'normalise' crisis developments.[73] One way of doing so and accounting for the recurrence and the recidivism of crises, is to find ways to legally contain the emergency situation through the integration of emergency rules in constitutions.[74] Despite the fact that these are promising coping strategies to insist on the difference between crisis and the Neo-Schmittian idea of an unbound state of exception, the disintegrative momentum of solidarity conflicts, that comes along with fundamental crises, cannot be fully tamed by any institutional design, no matter how sophisticated it may be, but remains dependant on political and legal practices. Another practice builds on acknowledging the permanent need for interpretative adaptation of constitutions in times of rapid social, economic and ecologic transformation and in the light of high procedural hurdles for formal constitutional amendments. The requirement of continuous adaptation persists even when crisis rhetoric is not salient, but challenging circumstances remain. This highlights the need to identify methodologically sound justification and limitation of constitutional adaptation to ensure acceptance and to delineate interpretative adaptation from arbitrariness. At the end of the day, it is the agents within constitutional and political institutions that have to find a balance between crises imperatives and established normative principles of public order and to reconcile the *responsibility* towards crisis-needs, the *responsiveness* towards the expectations and demands of the people and the respect for the normativity of constitutional limits.[75]

When the handling of a crisis affects structural principles of public order, it is the constitutional jurisdiction that has a special role to play. Given that many crisis constellations are characterised by the executive-centricity of political decision-making structures and the relative weakening of the

73 Séville A. 'Why Emergency? Reflections on the Practice and Rhetoric of Exceptionalism' in M Heupel and others, 'Emergency Politics After Globalization' (2021) 23 International Studies Review 1963, 1966.

74 See Anna-Bettina Kaiser, *Ausnahmeverfassungsrecht* (Mohr Siebeck, 2020); John Ferejohn and Paquale Pasquino, 'The Law of Exception: A Typology of Emergency Powers' (2004) 2 International Journal of Constitutional Law 210.John Ferejohn and Paquale Pasquino, 'The Law of Exception: A Typology of Emergency Powers' (2004) 2 International Journal of Constitutional Law 210.

75 For the conceptual pair of *responsibility* and *responsiveness* and the increasing tension between the two see Peter Mair, 'Representative versus Responsible Government' (2009) MPIfG Working Paper 09/8 <https://www.econstor.eu/bitstream/10419/41673/1/615284884.pdf> accessed 15 January 2023.

legislative branch,[76] it does not make sense, to hold on to the idea that the conflict between majority-based legislation and counter-majoritarian constitutional review was the primary issue of constitutional democracy and to be overly rigid with regard to an allegedly 'activist' and tendentially anti-democratic constitutional court.[77] Instead, a normative model of constitutional review accounting for crisis-induced power imbalances and allowing to address transnational solidarity conflicts should aim at opening up interpretations by challenging structural power positions.[78] A notable example of this contestatory role of constitutional courts in times of crisis is the austerity jurisprudence of the Portuguese Constitutional Court. Although the court was vehemently criticised after it's austerity-critical rulings for privileging public employees at the expense of private-sector employees, for restricting the legislature's room for manoeuvre in an overly activist manner, and for putting the country's future viability at risk, it emerged strengthened from the confrontation with the executive and the legislature.[79] In its jurisprudence, the court has succeeded in a difficult balancing act. In the first phase, it highlighted the extraordinary circumstances of the crisis to which the budgetary legislation under review responded. The court shielded the crisis-induced adjustment pressures from constitutional imperatives. In a second phase, it insisted on the transient nature of the crisis and defended the normativity of the welfare state-oriented constitution.[80] By doing so, it has made marginalised positions visible; it has recalled the (frustrated) promises of the constitution; and it has brought alternative interpretations of the crisis and the constitution into play. It is in this sense that constitutional jurisdiction can be portrayed not only as a liberal but also a genuinely democratic institution, allowing for

76 See Chalmers (n 38); Agustín J. Menéndez, 'The Crisis of Law and the European Crises: From the Social and Democratic Rechtsstaat to the Consolidating State of (Pseudo-)Technocratic Governance' (2017) 44 Journal of Law and Society 56.

77 Claire Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' in Thomas Beukers, Bruno de Witte, and Claire Kilpatrick (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017) esp. 305ff; Kári Hólmar Ragnarsson, 'The Counter-Majoritarian Difficulty in a Neoliberal World: Socio-Economic Rights and Deference in Post-2008 Austerity Cases' (2019) 8 Global Constitutionalism, 605.

78 See Farahat (n 36) 68.

79 See Teresa Violante, 'The Portuguese Constitutional Court and Its Austerity Case Law', in António Costa Pinto and Conceição Pequito (eds), *Political Institutions and Democracy in Portugal* (Palgrave MacMillan, 2019).

80 See Farahat (n 36) 257ff.

a pluralisation of competing representations of the public will without presupposing a rational consensus over constitutional interpretations.[81] Such constitutionalism is not limited to the protection of procedural issues and negative liberties but also allows to engage with the issue of positive mutual obligations inherent in solidaristic relations and to play an integrative role in crisis contexts.

4 Research questions, research interests and overall objectives

In light of these theoretical considerations, the contributions in this volume deal with the relationship between crisis and transnational solidarity conflicts and their impact on the institutions deciding on crisis-induced solidarity issues. After engaging conceptually with the notion of solidarity, authors from different disciplines investigate the relationship between crisis and solidarity and their interplay in different in different crisis constellations we witnessed over the last two decades. The following sets of research questions guide their investigations.

First, the contributions address the relationship between crisis and solidarity. How is transnational solidarity reconfigured in times of crisis? Does this reconfiguration change from one crisis to another, and if so, why? Which alternative configurations were dismissed? Which role does the law play in the context of these different forms of solidarity? The descriptive findings that address these research questions lead to normative issues. How could a more adequate reconfiguration of transnational solidarity look like with regard to crisis in general or a specific crisis in particular?

A second set of questions refers to the institutional context and the crisis at stake. How did the institution(s) under study react to crisis demands of necessity and urgency? How did they try to reconcile crisis needs and normative premises of public order? Did they counter an exceptionalist appropriation of the crisis, and if so, how? How did they cope with the crisis-related uncertainties regarding the outcome of the decision? How did they deal with the seeming permanence of crises, ie the recurring outbreak of acute crisis situations relating to a long-term structural crisis? Were the institutions politicised as a result of crisis-induced polarisation processes? How did such politicisation affect the interpretative power of the institution(s)?

81 Pierre Rosanvallon, *Democratic Legitimacy: Impartiality – Reflexivity – Proximity* (Princeton University Press 2011) 243.

Third, the investigations deal with the interplay between the institutional context, the role of law, and transnational solidarity. An important question refers to the extent to which the institution(s) under study did account for the transnational dimension of the underlying solidarity conflict. How did they relate transnational solidarity issues to other normative and, in particular, legal principles? Which understanding of (transnational) solidarity implicitly informs these articulations and the underlying law? How do legal institutions position themselves with regard to the conflicts between traditional, nation-state-based conceptions of solidarity and transnational solidarity?

A fourth set of research questions focuses on the relationship between law and crisis. How has the law, in particular, constitutional law (national and European) and human rights, been used to react to the various crises? What strategies can be observed to allow for adaptions, ie formal change of rules, defiance or exceptionalism, interpretative adaptation of rules and principles? What specific role was attributed to norms at the constitutional level (national and European)? In how far were constitutional resilience and constitutional change discussed?

Fifth – and finally, how did law entangle solidarity in the crisis under study? Did the law provide guidance or infrastructure to develop and imagine new forms of transnational solidarity? In how far did established legal concepts and interpretations pose an obstacle to the renovation of scopes and modes of transnational solidarity? Was it possible for political actors to use the law to convey new forms of solidarity or to establish new understandings of core norms that support such a development?

The overall aim of this book is to provide a multidimensional analysis of transnational solidarity crises and law through the lens of concrete critical settings provided by the European economic and financial crisis, the migration crisis, and the pandemic crisis. Recent studies on transnational solidarity in critical contexts either adopt a bottom-up perspective dealing with the solidarity attitudes of individual citizens[82] and the involvement of grassroot organisations in solidarity issues[83] or a top-down perspective analysing which understanding of transnational solidarity was implicitly or explicitly

82 See Alexia Katsanidou, Ann Kathrin Reinl, and Christina Eder (n 4); Jürgen Gerhards and others (4).

83 See Donatella della Porta (ed) *Solidarity Mobilizations in the 'Refugee Crisis': Contentious Moves* (Palgrave Macmillan 2018); Christian Lahusen, Ulrike Zschache, and Maria Kousis (n 4).

affirmed by the decisive institution under study.[84] Complementing these approaches, the present book is based on a conflict-centred perspective, which allows to explore a kind of meso-level. While the primary objects of study of the book are still legal and political institutions, conflict-theoretical grounding invites to engage with alternative understandings and competing conceptions of solidarity in order to problematise the choices made in each case. This perspective portrays solidarity regimes as continual, crisis-driven struggles with provisional compromises.

We thereby seek to address gaps that we have observed both on a theoretical and empirical level. On a theoretical level, the book systematically relates the concepts of solidarity and crisis, which have hitherto been loosely connected at best. Recent publications in the field implicitly often presuppose a certain understanding of the crisis at stake in order to ask how key actors, organisations, and institutions substantiated – or how they should have substantiated – the vague principle of solidarity to respond to a crisis defined as an objective set of economic, societal, cultural, and political challenges. Moreover, they rarely pay attention to the role of law in relation to both solidarity *and* crisis. In contrast, the perspective advanced in this volume builds on a social constructivist and pragmatist conception of crisis that highlights the experience of uncertainty and the discursive nature of a crisis as crucial features of the term.[85] It is thereby sensitive to the disputed issues of crisis origins and adequate coping strategies, as well as to the crucial impact of narratives in crisis contexts. Our theoretical basis thereby enables us to disentangle the complex relationship of crisis, solidarity and law. On the one hand, it allows us to reconstruct how economic, social or health problems became crises of order and the inherent solidarity regimes. On the other, it serves to explicate that normative conceptions or future designs of solidarity apply and convey different narratives of a crisis, its root causes, and potential ways out. Against the background of this understanding of crisis, the planned volume reconstructs how crises challenged the solidarity regimes that have been established to normatively stabilise social orders, how these regimes have adapted to the crisis at issue, and how this adaptation has created harmful side-effects with regard to transnational solidarity and other principles of order. It seeks to identify and analyse similarities and differences between the three crises (financial,

84 See Andrea Biondi, Eglė Dagiltytė, and Esin Küçük (n 4); Helle Krunke, Hanne Petersen, and Ian Manners (n 4).

85 See for seminal perspectives: Hay (n 53); Milstein (n 52).

migration, pandemic) regarding the dynamic of crisis and solidarity conflicts, their handling by the institutions and the role of law. Ultimately, we will also ask how the three regimes under consideration could be designed in a more solidaristic and sustainable way in the future.

These reflections are interwoven with the central concept of *transnational solidarity conflicts*.[86] With its focus on the contested nature of solidarity's scope and content, this concept develops a conflict-centred perspective on solidarity regimes. It catches up with the ambiguity of solidarity, which stems not only from its problematic relationship to individual liberties and strong property rights but also from the issue of conditions of inclusion in and exclusion from a solidaristic community. It allows to analyse how different actors, institutions and organisations contribute to and struggle over defining the scope, the mode, and the conditions of solidarity in various, often interlinked policy fields and how the virulence of the crisis spills back on the legitimacy of the institutions addressed to solve crisis induced conflicts over the reorganisation of (transnational) solidarity.

On an empirical level, the volume brings together three different transnational crises with different scales and institutional frames of conflict resolution (the European economic, financial and currency crisis, the so-called migration crisis in Europe, and the pandemic crisis). The individual contributions aim to carve out the implicit ideas of solidarity built into the relevant institutional arrangements. They trace the historical path dependencies, current crisis-related adaptations, future trajectories and normative designs of solidarity regimes and their relationship with conflicting principles of order. Furthermore, the volume highlights the crucial role of law in transnational solidarity issues but also points to the structural limits and biases of law when it comes to transnational solidarity conflicts and their resolution. The envisaged chapters on the three crises – economic, migration, pandemic – investigate how the applicable legal framework has framed the solidarity conflicts in each case and in how far it facilitated or impeded transnational forms of solidarity. In addition, the volume seeks to provide suggestions of how the law could enable and support more transnational modes of solidarity and thus allow for more inclusive approaches in addressing the underlying societal challenges. At the same time, we critically reflect the relation between law and political discourse and structural conditions of the law (e.g., nation-state structure,

86 Farahat (n 36) 45ff.

given power relations etc.) with the intention to identify limits of law's potential in supporting and realizing transnational forms of solidarity.

5 Overview of the book

The book is structured in four main parts. With a focus on the EU, in part I, Hans-Jürgen Bieling, Peter Hilpold and Ann-Kathrin Reinl look at how relationships of transnational solidarity are renegotiated and reconfigured in times of crisis. In chapter 1, Hans-Jürgen Bieling contrasts the eurozone crisis and the pandemic crisis. Informed by a hegemony theory perspective, his critical analysis shows how contentious but dominant narratives of the two crises gave birth to two diametrically opposed understandings and regimes of solidarity. Bieling argues that, during the eurozone crisis, it was primarily the over-indebted, 'decadent' southern European Member States who were blamed for the crisis and who deserved solidarity only under hard conditions, according to the dominant narrative. In contrast, during the Covid-19 pandemic, the predominant framing of the crisis as an external shock allowed the political community to reorganise its "moral economy" in a more solidaristic way.

Just like Bieling, Peter Hilpold also compares the eurozone crisis and the Covid-19 pandemic and its impact on the reconfiguration of solidarity in Europe. However, whereas Bieling identifies a sharp contrast between the two types of crisis management and the understandings of solidarity enshrined therein, Hilpold rather observes a conflict-prone but still continuing development of solidarity mechanisms at the EU level trying to keep up with and adapt to the unforeseen series of crises of the last 15 years.

Ann-Kathrin Reinl closes part I with a quantitative study on political parties' positioning towards solidarity during the European Parliamentary Elections of 2019. Whereas most quantitative approaches to solidarity in the EU addressed the demand side, ie citizens' attitudes towards solidarity within the EU, her contribution deals with the supply side, ie how European political parties frame solidarity in their electoral programs. Reinl's assessment exemplifies how solidarity and crisis are intertwined in a tense relationship. Whereas European solidarity was mostly understood as financial support for crisis-ridden countries during the eurozone crisis, in the aftermath of the financial crisis and before the pandemic crisis reached Europe, the issue of financial support for crisis countries no longer features

prominently in the party programs. Instead, solidarity is mostly related to welfare policies at the EU level.

Part II is centred on the eurozone crisis and the establishment of solidarity mechanisms during this critical period of European integration. However, most contributions do not exclusively deal with the eurozone crisis. With a mostly critical impetus, they rather try to contextualise the establishment of the during the so-called sovereign debt crisis of the early 2010s. Antonia Baraggia engages with the fact that conditionality has become one of the crucial 'regulatory' instruments deployed by multilevel systems. In the EU, it has seen a quantitative and qualitative increase since the eurozone crisis. Baraggia argues that conditionality is misunderstood and also misjudged if it is seen merely as a means of reducing the room for manoeuvre of crisis-ridden Member States. Instead, she pleads that, in a 'federal-like' system like the EU, it should instead be conceived as a means to balance the autonomy of the Member States and solidarity within a supranational community. To make this thesis plausible, she compares the concepts of conditionality in the United States and the EU as well as the understandings of solidarity they contain. With regard to the EU, her analysis shows how NextGenEU and the new rule of law conditionality regulation have advanced conditionality as a pivotal mechanism for securing constitutional values and building an increasingly federalized system of solidarity.

Informed by a fundamental examination of the relationship between solidarity and money, Fernando Losada portrays transnational solidarity as a means to compensate for the deeper structural features of European monetary integration and the disbalances it has created. Losada shows how the European monetary regime constructs and reproduces inequalities and power asymmetries at the expense of debtor states. By renouncing the possibility of conducting their own monetary policies, Member States not only made a fundamental decision in favour of the political-economic integration of the EU but also placed themselves, as 'regular debtors', in a subordinated position *vis-à-vis* their creditors. During the eurozone crisis, attempts to limit the effects of the global economic and financial shock on the monetary policy have advanced financial stability as an overriding political objective, mobilizing the whole legal apparatus of the Union.

In a historically and conceptually encompassing contribution, Agustín José Menéndez deals with the development of solidarity in the EU. Based on an understanding of solidarity which highlights the importance of a 'solidum', ie a common fund of resources allowing to operationalise mutual

aid, he argues that the economic crises of the 1970s which materialised in the Maastricht Treaty and especially the eurozone crisis brought about an 'inverted' form of solidarity disadvantaging the weak and favouring the powerful. Based on this assessment, and with regard to the recent developments related to NextGenEU Menéndez, it is critical to an alleged breakthrough for the realisation of a more solidaristic Union. Whereas progressive observers often identify a 'turn towards solidarity' in European integration as a reaction to the pandemic, Menéndez highlights that transnational solidarity requires not only common debt but the development of supranational 'solida' to fund those in need of support. And what is more, for Menéndez, transnational solidarity worth the name requires, above all, that the paradigm of competition between the Member States is replaced by a practice of common interests and mutual aid.

Part III focuses on EU migration governance and the multi-layered transnational solidarity conflicts enshrined therein. Elspeth Guild's critical contribution shows how the framing of a crisis affects the design of transnational solidarity. Guild addresses the shifting meaning of solidarity in the EU's Common European Asylum System by comparing two critical situations: the arrival of asylum seekers from the Afghan, Iraq, and Syrian crises via Belarus and the opening of a Temporary Protection scheme for those fleeing from Ukraine after the Russian invasion. Guild argues that the reactions to the crises were driven by geopolitical considerations rather than international refugee law, with severe consequences for the refugees themselves. With regard to the asylum seekers entering the EU via Belarus in 2021, in official EU documents, the situation was conceived as an illegitimate act of an authoritarian, hostile regime that does not shy away from using migrants to destabilize neighbouring Member States. Whereas Syrians, Afghans or Iraqis fleeing war and persecution were thus 'weaponized' and constructed as a threat to EU internal solidarity requiring inter-Member State solidarity against a criminal policy, the Ukrainian refugees were portrayed as the 'living faces' of solidarity with a neighbouring country. As a result, on the one hand, the problematic policies of the state of emergency that deprived Syrians, Afghans and Iraqis of the right to access the territory to seek asylum and a fair asylum procedure remain unanswered by the EU. On the other hand, Ukrainian refugees benefited from the opening of a temporary protection scheme accompanied by a right of residence to social benefits, healthcare, housing, labour market access and education.

Lieneke Slingenberg's contribution deals with the social rights of refugees in EU law. She maps how EU legislation and case law have created different levels of social rights for refugees and explores the different understandings of solidarity they entail. In a way similar to Elspeth Guild, Slingenberg shows how refugees' social rights are dependent on dominant crisis narratives, creating highly conditional and, at times, even instrumental forms of solidarity. With regard to social rights, she argues that the so-called refugee crisis of 2015 has not increased solidarity with refugees. Primarily framed as a crisis of migration control (and not as a humanitarian crisis), it has led to the opposite. For refugees, it has become harder to reach EU territory. If they nevertheless did, their freedom of movement was limited as much as possible, using access to social benefits as an instrument for that purpose.

Lilian Tsourdi addresses the EU funding of migration policies as a manifestation of intra-EU solidarity in migration issues. Drawing on the concept of transnational solidarity conflicts developed in this introductory chapter and elsewhere,[87] in a first step, Tsourdi critically assesses how the funding of migration policies, which have entered centre stage since the outbreak of the so-called migration crisis, embodies inter-state solidarity. With regard to the new policy instruments in this field, she argues that solidarity through financial sharing in migration is gaining prominence and that the current reforms in the EU migration package on the financing of migration policy could initiate more structural forms of financial solidarity in migration issues.

Part III is closed by Nora Markard's contribution. Her contribution is not interested in state-bound solidarity but in civil society practices of solidarity, which seek to counter a "de facto and de jure rightlessness" created by the Member States' deflection of migration and the outsourcing of border checks. Drawing on Hannah Arendt's reflections on stateless people and especially on Jacques Rancière's paradoxical idea of the demos as "the part of those who have no part"[88], Markard is interested in how civil societal practices of solidarity towards refugees (ie immediate solidarity at the land border, search and rescue at sea, cities of refuge) counter rightlessness by constructing rightless humans in need as legal subjects. By recognizing refugees as rights holders, even where they are *de jure* rightless,

87 Farahat (n 36) 45ff.

88 Jacques Rancière, 'Who is the Subject of the Rights of Man' (2004) 103 South Atlantic Quarterly 207, 306.

they create a *dissensus* with the order of the 'police', by which those who don't have a part become participants.

Part IV turns to the solidarity issues raised by the pandemic crisis. Daniel Wei Liang Wang engages with the Brazil Supreme Court and the attempt to protect the most marginalized and vulnerable groups of Brazilian society through structural litigation. His assessment is ambivalent. On the one hand, the Court affirmed the solidarity commitments in the Constitution. On the other hand, its progressive and convincing intervention was unable to promote urgently needed policy changes. Despite a court that lived up to the promises of transformative constitutionalism, there was no significant change of policy with regard to the daily lives of prisoners, the *favela* communities and indigenous peoples.

Pedro Villarreal deals with global vaccine distribution through the so-called Covax-Initiative launched by the World Health Organisation and other international institutions. Villarreal analyses why the Initiative, which was meant to counter the nationalistic trend of vaccine hoarding and bring about a fairer distribution of scarce, urgently needed goods, was unable to reach its ambitious goals and realise a strong form of transnational solidarity. In his search for a future alternative, Villarreal is clear about the fact, that a purely "moral appeal to global ideas of solidarity" will not procure robust international law obligations. However, Villarreal still discovers potential mechanisms for a more stringent standard of transnational solidarity in the distribution of critical resources.

Tatiana Andia, Silvia Otero, Juan Sebastián Gómez and Maria Gabriela Vargas provide a case study on vaccine procurement in Latin America. Traditionally, vaccine procurement in the region relied on a collective mechanism organized in solidaristic and non-competitive terms (PAHO Revolving Fund). During the Covid-19 crisis, procurement shifted to COVAX, a philanthropic mechanism, focused on helping the poorest with less emphasis on transparency. Such a shift altered the previous dynamics from collective to individual negotiations, bilateral agreements, and donations. This also resulted in an increase in opacity and difficulties in accessing vaccines. Andia et al. argue that the pandemic caused a shift from cooperative solidarity (PAHO) to self-interested actions and fragmented procurement efforts. Whereas the EU's reaction to the Covid-19 crisis led to the development of a mechanism similar to the PAHO Revolving Fund, Latin America experienced de-solidarisation as a move away from regional solidarity towards self-interested actions as well as fragmentation.

In closing this Introduction, let us circle back to the sentence with which we opened: Crises are "both a threat to and an opportunity for solidarity". The essays collected in this volume open new avenues to explore the intricate relationship between crises and solidarity, as well as the reconfiguration of transnational solidarity conflicts through contemporary processes of global crises. The research explores, through different and multifaceted dimensions, how institutions have navigated crisis demands against the background of principles of public order. Law and legal institutions can be leveraged to support more inclusive forms of transnational solidarity. Still, they can also be employed as tools to exclude communities from the obligation of solidarity. Understanding the dynamics of crisis and transnational solidarity conflicts can better equip legal and political communities to address the multifaceted challenges of a still interconnected world.

Part I
Renegotiating Transnational Solidarity in Crises

Chapter 2 The European Politics of De- and Resolidarisation. A Comparative Perspective on the Financial Crisis and the Covid-19 Pandemic

Hans-Jürgen Bieling (University of Tübingen)

> "As a Social Democrat, I attribute exceptional importance to solidarity. But you also have obligations. You cannot spend all the money on spirits and women and then ask for help."[1]
> "Above all, we need the courage today that we did not have in the 2010 crisis to finally achieve more integration in the Eurozone. We must not miss the opportunity again but must resolutely use the disruption to now expand the monetary union into an economic union via the European Recovery Fund."[2]

1 Introduction: When deep integration becomes toxic, and when it does not

Solidarity is central to political communities, including the European Union. Supported and promoted by the Single European Market (SEM) and the Economic and Monetary Union (EMU), the EU is largely based on close economic integration, but also on a governance system that includes various aspects of institutional and regulatory communitarisation. Accompanying the dynamics of economic and political integration, social relations have also become transnational,[3] stimulating the emergence of new forms

1 Werner Mussler, 'Nach Interview in der F.A.Z. Dijsselbloem: "Ich bedauere, dass es als 'Nord gegen Süd' aufgefasst wurde"' *Frankfurter Allgemeine Zeitung* (Frankfurt, 22 March 2017) https://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/nach-interview-in-der-f-a-z-dijsselbloem-ich-bedauere-dass-es-als-nord-gegen-sued-aufgefasst-wurde-14937857.html accessed 26 May 2023.

2 Wolfgang Schäuble, 'Die Zukunft Europas: Aus eigener Stärke' *Frankfurter Allgemeine Zeitung* (Frankfurt, 6 July 2020) https://www.faz.net/aktuell/politik/inland/gastbeitrag-wolfgang-schaeuble-aus-eigener-staerke-16846887.html accessed 26 May 2023.

3 Hans-Jürgen Bieling, 'Konturen und Perspektiven einer europäischen Zivilgesellschaft', in Johannes Wienand and Christiane Wienand (eds), *Die kulturelle Integration Europas* (VS Verlag für Sozialwissenschaften 2010).

of cross-border, transnational solidarity. The strength and resilience of these forms of transnational solidarity are difficult to assess and vary from context to context. In any case, it would be an oversimplification to assume that the dynamics of cross-border connectivity, such as advanced economic interdependence, territorially extended division of labour and intensified political cooperation, automatically lead to increased transnational solidarity. Sometimes the opposite is the case, as some of the established forms of transnational connectivity in the global economy are becoming increasingly toxic.[4]

Internal relations in the EU are still far from such dramatic escalations, i.e., the 'weaponisation' of cross-border networks and infrastructures.[5] However, the numerous crises and related political discussions and initiatives indicate that the EU is not always able to practice a solidarity-based joint crisis management. Only under certain conditions does it seem capable of doing so. The different discourses and strategies that prevailed during the financial and euro crisis and the Covid-19 pandemic illustrate this. In the euro crisis, the EU drifted apart and struggled hard, in a context of eroding solidarity, to stabilise EMU through a reform of the European arrangements. It should be emphasised that the erosion of solidarity must be distinguished from the disappearance of solidarity. The erosion implies processes of de-solidarisation, such as a weakening of active ideational support, even if the institutionalised practices remain operational. By comparison, in the Covid-19 pandemic – aside from some nationalist efforts at the beginning – agreement was reached relatively quickly on NextGenerationEU. This refers to the establishment of a recovery and resilience facility, particularly to the benefit of economically weaker peripheral countries. This paper explores the reasons that explain the divergent strategies and the related processes of de- and re-solidarisation within the EU, particularly in the Eurozone. It is argued that this is generally due to the similar, yet divergent crisis dynamics, which – in the case of the Covid-19 pandemic – made a non-solidaristic discourse more difficult. Moreover, the European balance of power and hegemonic strategies in the Covid-19 crisis are clearly different due to the negative experience of the euro crisis and Germany's changed preferences.

4 Mark Leonard, *The Age of Unpeace. How Connectivity Causes Conflict* (Bantam Press 2021).

5 Henry Farrell and Abraham L Newman, 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion' (2019) 44 International Security 42.

This paper thus focuses on the changed political-economic structuring and the contested nature of negotiated and institutionalised forms of transnational solidarity. As will be discussed in more detail in the next section, this is linked to a specific understanding of solidarity that includes not only values and discourses but also its material conditions. Then, the paper turns to two case studies of the discursive and political processing first of the financial and euro crisis and second of the Covid-19 pandemic. It looks at their similarities and differences in order to determine more precisely the relevance of the (non-)hegemonic character of transnational strategies for the respective manifestations of the 'moral economy', i.e., shared and contested views on economic norms and practices that underpin European integration. The paper concludes with some reflections on the practice and prospects of transnational solidarity in Europe.

2 Conceptualising transnational European solidarity

In historical retrospect, 'solidarity' has been conceptualised and thought of in very different ways, not only socio-politically but also analytically.[6] Some have focused on the integration of entire societies, especially on the social bonds that came about through the quasi-natural forms of cooperation and connectedness.[7] Others were much more interested in the new forms of solidaristic communication and organisation that emerged in functionally differentiated[8] and socially divided societies – along the lines of class, gender or ethnicity.[9] The latter implies that solidarity need not always, or at least not primarily, be based on commonly shared values. Equally important and structurally fundamental are the common interests that favour the emergence of solidarity-based social relations. They are often linked

6 For an overview Kurt Bayertz, 'Four Uses of Solidarity' in Kurt Bayertz (ed), Solidarity (Kluwer 1999); see also Ursula Dallinger, Die Solidarität der modernen Gesellschaft: Der Diskurs um rationale oder normative Ordnung in Sozialtheorie und Soziologie des Wohlfahrtsstaats (VS Verlag für Sozialwissenschaften 2009); Heinz Bude, Solidarität – Die Zukunft einer großen Idee (Carl Hanser Verlag 2019).

7 Emile Durkheim, *The Division of Labor in Society* (The Free Press of Glencoe 1960); see also Talcott Parsons and Edward A Shils (eds), *Toward a General Theory of Action* (Harvard University Press 1951).

8 Franz-Xaver Kaufmann, *Sozialpolitik und Sozialstaat: Soziologische Analysen* (VS Verlag für Sozialwissenschaften 2009).

9 Fernando Tormos, 'Intersectional Solidarity' (2017) 5 Politics, Groups, and Identities 707.

to specific objectives, the joint realisation of which gives rise to forms of solidarity that are practised in everyday life.

When this happens, the immediate self-interests are put aside insofar as the mutual recognition of the actors – including their specific problem perceptions and interests – and the obligation to jointly pursue their own interests come to the fore. The joint forms of coordination are materially stabilised and secured by mutual concessions and compromises and discursively by processes of communicative understanding. This has two significant implications for the politics of solidarity. First, it suggests that both the material concessions and compromises and the processes of discursive understanding are fundamentally important for reproducing the commitments of actors in solidarity relations. This is especially true when solidarity points beyond the sphere of in-person interaction such as neighbourhoods or circles of friends and refers to social relations in which people encounter each other anonymously and largely unemotionally, beyond personal sympathies, for example, in the context of European integration. Second, the complex forms of coordination indicate that solidarity relations are based on practices of extended reciprocity that go beyond immediate, short-term exchange deals. However, solidarity can not only be strongly asymmetric in the short term; asymmetric effects can also be reproduced in the medium and long term if this is seen as advantageous or normatively desirable by the involved actors.

Whether it is possible to politically organise solidarity relations – here, to be more precise, the forms of transnational solidarity in the European Union – is therefore determined to a large extent by the crisis and the problem perception of the actors involved. At the same time, however, they, or at least the political-economically leading forces, must also be able to develop a widely accepted strategy – in the sense of a transnational hegemonic practice – which aims to overcome the existing crisis by designing and implementing new political concepts and applying reasonable instruments. In contrast to traditional forms of domination, which are primarily based on control and coercion, transnational hegemonic strategies and practices are characterised by the fact that they meet with the active or at least passive consent of the dominated or subaltern social forces.[10] Such consent can be generated discursively or ideologically. However, it is substantial and sustainable above all when it is also supported by a material substrate: for

10 Antonio Gramsci, *Selections from the Prison Notebooks* (Quintin Hoare and Geoffrey Nowell Smith ed and tr, International Publishers 1971) 244.

example, by the provision of common public goods – a stable currency to promote economic prosperity and social development – and by material compromises and related forms of solidarity. These two elements are inextricably linked. Mutual commitment to common goals is therefore sustainable above all when it is accompanied by a burden-sharing that is perceived as fair.

This does not preclude political struggles over common goals and the distribution of burdens. It is precisely in times of crisis, when "the old is dying and the new cannot be born"[11], that competing views on the content and direction of the transformation or reinvention of political arrangements and related practices become very clear. This is also true of the process of European integration, whose crises have repeatedly triggered the initiation of a series of new political projects. These have ranged from the European Coal and Steel Community (ECSC), the European Economic Community (EEC) with the Customs Union and the Common Agricultural Policy (CAP), via the European Monetary System (EMS) to the SEM and the EMU, various rounds of enlargement and treaty reforms. All these projects were characterised on the one hand by the fact that they were presented as answers to pressing problems or crises. Accordingly, the crises in the integration process so far can only be classified as development crises, not existential crises.[12] On the other hand, however, the above-mentioned projects have always been the result of complex inter- and transnational negotiations. Supported by numerous package deals and side-payments, they accordingly conveyed elements of transnational European solidarity. These elements have also been inscribed in the institutional settings and forms of regulation of the European Union, i.e., in the mode of operation of the EU institutions, in the cooperation between the member states and in different kinds of regulation and redistribution defined by primary and secondary law.

11 ibid 276.

12 Frank Deppe, 'Von der "Europhorie" zur Erosion: Anmerkungen zur Post-Maastricht Krise der EG' in Frank Deppe and Michael Felder (eds), *Zur Post-Maastricht Krise der Europäischen Gemeinschaft (EG)* (FEG-Arbeitspapier No. 10, 1993) 7, 7–14.

3 European crisis dynamics and the erosion or revival of transnational solidarity – two case studies

The institutionalisation of transnational solidarity has, however, its limits and often remains precarious, especially in times of crisis. This applies not least to all those arrangements whose functioning rests on a rather shaky foundation, and which at the same time – due to far-reaching forms of political control and complex distributional effects – depend on a rather high degree of solidaristic commitment. In the case of the EMU, the shaky foundations result above all from the fact that the ordoliberal design of the EMU and the so-called 'Brussels-Frankfurt consensus' are being constantly undermined by the political-economic dynamics of European capitalism. The ordoliberal design assumes that EMU, its members and supranational institutions should abide by the rules originally agreed and refrain from political intervention in the economy.[13] The 'Brussels-Frankfurt consensus' holds that this can best be achieved if all adhere to a specific division of competences that is appropriate and sufficient for the EMU's mode of operation. While the economic union, narrowed to SEM, is to be shaped by the Brussels apparatuses – the European Commission, the European Parliament, and the Council of Ministers – the monetary union is to be the primary responsibility of the European Central Bank (ECB) based in Frankfurt.[14] According to this consensus, all will be well, if the EMU member states support the ECB by maintaining fiscal discipline, even in times of economic crisis.

In the course of economic and monetary integration, above all in the financial and euro crisis, however, it turned out, that this setting rather reinforced but not balanced the processes of uneven development.[15] As a result, the established arrangements came under pressure to adapt. Moreover, the pressure on the member states of the Eurozone to bear more of the costs of crisis management has also increased. In this context, however, the proposals – referring to rather conflicting understandings of transnational solidarity – pointed in different directions: while some insisted on stricter

13 Magnus Ryner, 'Europe's Ordoliberal Iron Cage: Critical Political Economy, the Euro Area Crisis and its Management' (2015) 22 Journal of European Public Policy 275.

14 Paul De Grauwe, 'What Have we Learnt about Monetary Integration since the Maastricht Treaty?' (2006) 44 Journal of Common Market Studies 711.

15 Johannes Jäger and Elisabeth Springler (eds), *Asymmetric Crisis in Europe and Possible Futures: Critical Political Economy and Post-Keynesian Perspectives* (Routledge 2015).

compliance with the established fiscal rules of EMU, others advocated a more comprehensive, politically managed EMU. The latter also implies a more active common economic policy through more European resources, investments, and compensatory transfers.

3.1 The financial and euro crisis

The first serious test case for the sustainability of EMU was the financial and euro crisis. Its origins and unfolding were the subject of controversial academic and public debate from the outset. However, some causes and connections are beyond question: first, that the crisis originated in the U.S., where the economy was in a state of turmoil following the bursting of the so-called sub-prime bubble; and second, that the crisis affected the European countries, as their financial institutions were heavily involved in the trade in subprime loans and related securities. The recession therefore – also a consequence of the slump in production for export-oriented capital in Europe – quickly spread to the European economy. At first it seemed that the threat to EMU had been averted. In 2008 and 2009, governments, the European Commission and the ECB intensified their efforts to cushion the collapse of European banks and counteract the economic recession. On the one hand, all EU states set up special funds to stabilise ailing banks through state recapitalisation in the form of share purchases, loans or guarantees; on the other hand most countries launched economic stimulus programmes to mitigate the recession.[16] The ECB supported these processes by counteracting the drying up of the interbank market with a significantly loosened, liquidity-providing monetary policy.

However, this discretionary state interventionist stabilisation policy soon reached its limits. The costs of crisis management were considerable, reflected in rising public debt across the board. At the same time, the problems faced by the EMU member states varied significantly. While in some countries the economy gradually recovered, others, whose economies were particularly hard hit by the financial crisis and which already had high levels of public debt before the crisis, were confronted with sharply rising interest rates. They found it increasingly difficult to refinance their debt through

16 Waltraud Schelkle, 'Good Governance in Crisis or a Good Crisis for Governance? A Comparison of the EU and the US' (2012) 19 Review of International Political Economy 34.

new borrowing, leading to significant liquidity and, in the eyes of some observers, even solvency problems. For them, in any case, the financial crisis turned into a 'sovereign debt crisis', which ultimately also affected the EMU's mode of operation, and even called its very existence into question.[17] It became clear that the given design of EMU, in line with the above-mentioned Brussels-Frankfurt consensus, lacked transnationally flexible labour and product markets and fiscal compensation and was therefore insufficient to bring about the socio-economic convergence needed as the basis for a stable monetary union.[18] Why this was not the case has been the subject of much controversy, not only academically but also among the European public. Some attributed the uneven development in the Eurozone to the divergent productive foundations of the national models of capitalism, which increasingly drifted apart under the conditions of cross-border financial market-mediated accumulation. In this way, the structural imbalances in the intra-European current account balances between the surplus and creditor countries on the one hand and the deficit and debtor countries on the other became entrenched.[19] Others saw the problem primarily in the unsound budgetary policies of the national governments and – due to the single interest rate – in a monetary policy that was at the same time too expansionary for these countries, undermining the goal of improved competitiveness in the medium and long term.[20]

The second position largely prevailed in the European management of the financial and euro crisis.[21] This reflected the strong position of the governments of the so-called Nordic countries in the Eurozone, i.e., Germany, the Netherlands, Austria, and Finland, whose economies were running structural current account surpluses and whose financial institu-

17 Henk Overbeek, 'Sovereign Debt Crisis in Euroland: Root Causes and Implications for European Integration' (2012) 47 The International Spectator 30, 38–40.

18 Fritz W Scharpf, 'Monetary Union, Fiscal Crisis and the Pre-Emption of Democracy' (2011) 9 Zeitschrift für Staats- und Europawissenschaften (ZSE)/Journal for Comparative Government and European Policy 163.

19 Joachim Becker and Johannes Jäger, 'Integration in Crisis: A Regulationist Perspective on the Interaction of European Varieties of Capitalism' (2012) 16 Competition & Change 169; see also Costas Lapavitsas and others, *Crisis in the Eurozone* (Verso 2012).

20 Roland Vaubel, 'Die Politische Ökonomie der Staatsschuldenkrise und die Zukunft des Euro' in Dirk Meyer (ed), *Die Zukunft der Währungsunion Chancen und Risiken des Euro* (Lit Verlag 2021).

21 Joscha Abels, *The Politics of the Eurogroup: Governing Crisis and Conflict in the European Union* (Routledge 2023).

tions were therefore in the position of international creditors. The Nordic countries pushed for the Eurozone problems to be seen as a consequence of the excessive debt burden and insufficient competitiveness of the deficit countries. They were supported in this by the European Commission, the ECB and the associations of transnational financial, service and industrial capital, as well as by market-liberal forces in the debtor countries, all of which were interested in limiting and reducing public debt.[22] The close discursive link between the sovereign debt crisis and the euro crisis led quite directly to austerity policies, since neither a dissolution of the EMU nor a strategy of growth-induced consolidation were seriously considered in view of the unknown risks and considerable, at least hardly calculable, costs.

The model of a 'European Stability Union', characterised by the goals of austerity and improved competitiveness, largely determined the initiatives that have reformed the governance of EMU since 2010. For example, it was decided that the Commission and the Council of Ministers would coordinate and control national budgetary policies at an earlier stage in a European Semester. The criteria of the Stability and Growth Pact (SGP) were made even more restrictive through the adoption of a so-called 'six-pack', consisting of five regulations and one directive, only partly linked to the problem of current account imbalances. But that was not all: the Fiscal Compact transferred the German debt brake to the Eurozone; and the 'Euro plus Pact' aimed to extend the competition-oriented reform agenda to further areas of labour and social policy, albeit only through a declaration of intent. More far-reaching and binding were the reform conditions and controls imposed by the so-called Troika of the Commission, the ECB and the IMF in some highly indebted countries dependent on external loans. Usually, they were not associated with solidarity-based support, but with considerable external disciplinary pressure from which the countries concerned could not escape.

Ultimately, however, it would be too short-sighted to reduce the reform debate to this model alone. There have been some initiatives aimed at the somewhat different model of a 'European Liability Community'. This model could not be implemented in important respects, as the creation

22 Hans-Jürgen Bieling, 'European Financial Capitalism and the Politics of (De-)Financialization' (2013) 17 Competition & Change 283; see also Mathis Heinrich, 'EU Governance in Crisis: A Cultural Political Economy Perspective on European Crisis Management 2007–2014' (2015) 13 Comparative European Politics 682.

of Eurobonds or a European economic government were rejected, and most governments adhered to the no-bail-out principle. In some respects, however, it did succeed: a European Stability Mechanism (ESM) was set up with a substantial intervention capacity of 750 billion euros. In addition, to counteract the euro crisis, the ECB not only stabilised the credit system through interest rate cuts and an active liquidity management, but also adopted an unconventional monetary policy of extensive government bonds purchases to ease the payment difficulties of troubled states. In doing so, it effectively assumed the role of a 'lender of last resort' for public institutions.

The above-mentioned elements of a European liability community were certainly fundamental to the survival of EMU. They also contained some elements of solidarity, but their potential was not developed. Obviously, the initiatives of the 'European Liability Community' were overshadowed by the 'European Stability Union' or were significantly conditionalised by it. This is shown, among other things, by the distributive effects of the euro crisis, which were the subject of a rather one-sided political debate. Thus, the critical focus has been primarily on political interventions, such as those of the ECB, and on the negotiated support payments and transfers, such as in the framework of the ESM, while the distributional effects mediated by the financial markets have been largely ignored. For example, there has been little public discussion of the fact that the German treasury was relieved of around 100 billion euros through the so-called 'Greek crisis', i.e., through the extremely favourable credit offers, including negative interest rates, from internationally operating financial institutions.[23]

This example shows that the generalisation of austerity concepts and their affirmation through the reform of European economic governance was certainly driven by interests, but at the same time also guided by '"economic imaginaries", that is semiotic systems that give meaning and shape to the "economic field".[24] Particularly influential were the interpretations brought into the discussion by the German side, which were strongly influ-

23 Geraldine Dany, Reint E Gropp, Helge Littke and Gregor von Schweinitz, 'Germany's Benefit from the Greek Crisis' [2015] IWH Online 7 https://www.iwh-halle.de/fileadmin/user_upload/publications/iwh_online/io_2015-07.pdf accessed 26 May 2023.

24 Bob Jessop, 'Cultural Political Economy and Critical Policy Studies' (2010) 3 Critical Policy Studies 336, 344.

enced by ordoliberal concepts.[25] For example, the then German Chancellor, Angela Merkel, argued in her government statement of 2 November 2011:

> "Because the current crisis in the euro area is first and foremost a crisis of confidence, in addition to tackling the causes of this crisis – too much public debt, lack of competitiveness of some euro states – we must address the fundamental flaws in the construction of the Economic and Monetary Union. If we do this, we will, moreover, show that we do not only see the troubles of the crisis, but that we understand this crisis above all as a turn for the better, as an opportunity to turn around, and that we actually learn from it. These are, after all, very simple lessons: rules must be observed; their observance must be monitored; their non-observance must have consequences. National self-responsibility and European solidarity are mutually dependent."[26]

Such references to the regulatory framework and the personal responsibility of the actors can also be found in statements by other German politicians, including Jens Weidmann, the then president of the Bundesbank, and especially Wolfgang Schäuble, the German finance minister during the euro crisis.[27] In Schäuble's statements and writings in particular, the idea of solidarity plays an important role. In the tradition of ordoliberal thinking, however, it is Protestant-based and conditional. Supporting others is in principle possible and sometimes necessary, but it must respect certain ethical principles and institutional rules. By distrusting people as potential 'sinners', institutional arrangements are supposed to encourage the personal responsibility of individuals, a willingness to work hard, and honesty and thrift. This implies a fundamental scepticism towards all those notions of solidarity, which, in both the national and the European context, are decisively based on unconditional distributive transfers which repeatedly create perverse incentives and enable moral hazard. According to ordolib-

25 Ryner (n 13); see also Matthias Matthijs and Kathleen McNamara, 'The Euro Crisis' Theory Effect: Northern Saints, Southern Sinners, and the Demise of the Eurobond' (2015) 37 Journal of European Integration 229.

26 Angela Merkel, 'Regierungserklärung von Bundeskanzlerin Merkel zum Europäischen Rat', Deutscher Bundestag, 2 December 2011 https://www.bundesregierung.de/breg-de/service/bulletin/regierungserklaerung-von-bundeskanzlerin-dr-angela-merkel-800684 accessed 12 December 2015.

27 Josef Hien, 'The Religious Foundations of the European Crisis' (2019) 57 Journal of Common Market Studies 185.

eralism, a strong state and, in the context of the EU, a disciplining system of governance are needed to prevent this.

Based on these basic assumptions, Germany, in cooperation with other – so-called 'Nordic' – creditor states, propagated an understanding of solidarity that met with little approval in the highly indebted countries for both economic and ethical-moral reasons; all the more so, as "Berlin, Frankfurt, and Brussels early on fashioned the crisis into a 'normative' morality tale of Southern profligacy vs. Northern thrift."[28] Influenced by conflicting ethical-moral considerations – including the assignment of blame – cross-border solidarity remained absolutely minimal, i.e., tied to the economic survival of EMU. Moreover, the pre-existing forms of solidarity that had devolved over the previous decades have been partially damaged. This draws attention to the tensions in the functioning of the 'moral economy' of European integration. The moral economy encompasses the overlapping solidarities that can be mutually reinforcing, but also contradictory and undermining. In this sense, it encompasses the – under capitalist conditions – modernised norms and obligations, i.e., not only the socio-economic relations, but also the socio-cultural processes of the production of meaning. The interpretation of a concrete crisis constellation, for example, predetermines certain reactions. It makes a difference, whether a crisis is perceived as a 'sovereign debt crisis' or a 'euro crisis', as a 'refugee crisis' or a 'crisis of the European migration regime', etc. This suggests that the European economy and EMU are also fundamentally characterised by "dynamic combinations of norms, meanings and practices"[29], including conflicts over organisational structures. However, these conflicts can be mitigated under the conditions of hegemonic leadership, i.e., an active and integrating promotion of transnational solidarity norms. Given the rather narrow and dogmatic focus of the German hegemonic strategy, such ambitions were rather disregarded and not successful in the euro crisis. However, the situation was different in the Covid-19 pandemic, where the German position – and thus the relations of transnational solidarity – changed significantly.

28 Matthijs and McNamara (n 25) 230.

29 Jaime Palomera and Vetta Theodora, 'Moral Economy: Rethinking a Radical Concept' (2016) 4 Anthropological Theory 413, 414; for a more comprehensive overview see also Tim Rogan, *The Moral Economist:. R.H. Tawney, Karl Polanyi, E.P. Thompson, and the Critique of Capitalism* (Princeton University Press 2017).

3.2 The Covid-19 pandemic

Looking at the political-economic implications of the Covid 19 pandemic, at first glance they are strongly reminiscent of the course of the financial and euro crisis. As in 2008 and 2009, in 2020 and 2021 numerous medical and – in connection with the lockdown measures – economic initiatives were first taken at the national level, before various steps of European coordination were initiated as well; and as in the case of the financial and euro crisis, the states and societies of southern Europe were again particularly affected by the pandemic: on the one hand, because of the intensity of the outbreak due to the family way of life and the lack of medical care, which was dramatic in northern Italy; and on the other hand, because of the central role played by the tourism and cultural sectors, which were severely affected by the numerous lockdowns and the lack of foreign tourists and travellers, and which had to be supported economically.

However, although the crisis problem was similar, the interpretation and the European management of the pandemic differed significantly from that of the financial and euro crises. As far as the interpretation of the crisis is concerned, from the very beginning, i.e., soon after the outbreak of the pandemic, the unimaginable suffering in the severely affected countries – thousands of deaths, bereaved families, overburdened health systems, long and comprehensive lockdowns and servere economic consequences – was reported with great empathy in the media throughout Europe. Unlike the financial and euro crises, the causes were also not sought in the southern European countries themselves. Rather, the pandemic was perceived as a 'general crisis' or an 'external shock' that could not be avoided and that hit southern European countries particularly hard because of their unfortunate international linkages and sectoral vulnerabilities. A certain asymmetry in the evolution and consequences could therefore not be overlooked, even if the societies of the economically stronger 'North' were also affected by the pandemic, the lockdowns, and the disruptions in transnational value chains. Hence, over time, a common strategy emerged in which European interests increasingly took precedence over national interests and concepts.

Certainly, in the first months after the outbreak of the pandemic, there were also numerous nationalist reactions: for example, in the form of border closures to curb mobility and regain control over the spread of infection; in the procurement of medical equipment (masks or respirators); or in the research, organisation and provision of vaccines to privilege national

pharmaceutical companies and national populations. But there were also everyday forms of transnational solidarity, such as the transfer of patients when hospitals and intensive care units were overburdened, and the cross-border provision of urgently needed medical equipment. The experience of the difficulties of effective pandemic management led the governments to agree relatively early with the European Commission on two key projects for further communitarisation: on the one hand, the European Health Union, which contains numerous new elements, such as an additional agency (HERA) and a strengthened health governance, a common crisis and prevention strategy, the establishment of a data system required for this purpose, and the joint procurement of medicines;[30] and on the other hand, the establishment of the joint recovery fund 'NextGenerationEU', which is intended above all to provide economic support to the countries that were hit particularly hard by the pandemic and to prevent the feared upheavals in the Eurozone from occurring once again.

As far as the political economy and relations of solidarity in the EU are concerned, the recovery fund 'NextGenerationEU' is of fundamental importance. In response to the deep recession, the European Commission and the Council had agreed early on to loosen state aid rules and to temporarily suspend the Stability and Growth Pact (SGP) by applying a 'general escape clause' in order to increase the economic policy capacity of member states; and the ECB has launched another unconventional monetary policy programme, the so-called Pandemic Emergency Purchase Programme (PEPP), to ensure a properly functioning monetary system. In this context, NextGenerationEU has been crucial in providing additional common resources for member states to organise the stabilisation and modernisation of their economies. Although these resources are sometimes considered insufficient,[31] they represent a novelty for the EU in terms of

30 Eleanor Brooks and Robert Geyer, 'The Development of EU Health Policy and the Covid-19 Pandemic: Trends and Implications' (2020) 42 Journal of European Integration 1057; see also Marie Nabbe and Helmut Brand, 'The European Health Union: European Union's Concern about Health for All: Concepts, Definition, and Scenarios' [2021] Healthcare, 1741; Remi Maier-Rigaud, 'Krisengetriebene Integrationsdynamiken – eine neofunktionalistische Erklärung des zunehmenden Schutzes öffentlicher Gesundheit durch die Europäische Union' [2022] integration 202.

31 Zsolt Darvas, J Scott Marcus, Alkiviadis Tzaras, 'Will European Union Recovery Spending Be Enough to Fill Digital Investment Gaps?' (*Bruegel*, 20 July 2021) https://www.bruegel.org/2021/07/will-european-union-recovery-spending-be-enough-to-fill-digital-investment-gaps/ accessed 26 May 2023.

joint deficit spending, which significantly extents the economic and financial policy-making of the supranational institutions. In fact, the reconstruction fund has a total investment volume of 750 billion euros, of which 390 billion will be made available in the form of grants and 360 billion in the form of loans to the member states according to their exposure to the crisis. Counter-financing will come from additional Community revenue, but only a few years later.[32] As in the multi-annual financial framework (2021–2027) negotiated together with the reconstruction fund, the national investment programmes focus on climate protection and digitalisation, with 37 % and 20 % of the funds provided respectively. This double modernisation impulse – climate protection and digitalisation – not only reinforces the industrial policy turnaround already initiated by the Juncker Commission to mitigate the precarious and unbalanced development in the EU. It also substantially underpins the Green Deal strategy of the von der Leyen Commission.

The establishment of the NextGenerationEU was by no means smooth and without resistance. For example, some Nordic countries, the so-called 'frugal four' – the Netherlands, Austria, Denmark, and Sweden – pushed for national rebates, as did the German government, and successfully lobbied to convert a significant part of the community funds from grants to loans. However, they failed to prevent debt mutualisation. This was mainly because the German government repositioned itself in terms of European crisis management.[33]

> "Earlier opposition to a 'transfer union' gave way to advocating EU-wide solidarity against the economic consequences of the pandemic, debt financing and support for grants to member states. It was Germany's change of policy that altered the dynamics of policy-making within the EU, enabling agreement."[34]

However, the first steps in this direction were taken even before the outbreak of the Covid-19 pandemic. For example, the Federal Ministry of

32 Caroline De La Porte and Mads Dagnis Jensen, 'The Next Generation EU: An Analysis of the Dimensions of Conflict Behind the Deal' (2021) 55 Social Policy & Administration 388.

33 Ulrich Krotz and Lucas Schramm, 'Embedded Bilateralism, Integration Theory, and European Crisis Politics: France, Germany, and the Birth of the EU Corona Recovery Fund' (2022) 60 Journal of Common Market Studies 526.

34 Simon Bulmer, 'Germany, the Eurozone Crisis and the Covid-19 Pandemic: Failing Forward or Moving on?' (2022) 20 Comparative European Politics 166, 167.

Economics, then still led by the CDU, in cooperation with France and with the support of the Federation of German Industries (BDI), had argued for a more active European industrial policy, both in view of internal EU imbalances and global competition with the U.S. and especially China.[35] This strategic shift continued in the context of the pandemic. The reasons for this were multi-layered. From a political-economic point of view, it was crucial that a renewed orientation towards the Asian region appeared to be highly risky in the context of fragile value chains and the intensified conflict between the U.S. and China, and that, in return, the importance of the European economic area had regained significance. This included averting another – costly – euro crisis as early and proactively as possible by mobilising and making available community resources. The associations of export-oriented capital in Germany and in the EU supported the German government in this. The German government, in particular the then SPD-led finance ministry, still rejected a comprehensive mutualisation of debt, but supported the establishment of a European reinsurance scheme for short-time work (SURE) with a budget of 100 billion euros and later the NextGenerationEU recovery fund.

This fundamentally changed position of the German government is certainly due to the significantly changed political-economic environment. But it is also an expression of a changed perception of the European crisis processes and the associated possibilities for dealing with them effectively and in a socially inclusive manner. Of course, the role of the finance ministry under Olaf Scholz should not be overestimated. The structural political-economic changes were too serious and the lines of continuity with the previous finance ministry until the pandemic too pronounced. At the same time, they should not be underestimated either. After all, the team of advisors had changed considerably under Scholz and was clearly more Keynesian in orientation. It is precisely this Keynesian orientation that, in a context of general uncertainty, brings with it a greater sensitivity to the fragility and vulnerability of the European economy and to the economic and social costs of refraining from political intervention.[36] The willingness to politically correct and regulate the mode of operation of the European economy increases the possibilities for strengthening norms of

35 Etienne Schneider, 'Germany's Industrial Strategy 2030, EU Competition Policy and the Crisis of New Constitutionalism. (Geo-)Political Economy of a Contested Paradigm Shift' (2023) 28 New Political Economy 241.

36 Elke Muchlinski 'Keynes's Economic Theory – Judgement under Uncertainty' in Tom Cate (ed), *Keynes's General Theory Fifty Years Later* (Edward Elgar 2012).

transnational solidarity. This is especially true if, beyond the Keynesian critique of unregulated market dynamics, the socio-moral foundations of functioning political communities are strengthened. As the former finance and foreign minister put it:

> "Europe's founders knew that European solidarity is not a one-way street, but a life insurance policy for our continent. We must act in this historic crisis with this in mind. We need a clear expression of European solidarity in the corona pandemic. Germany is willing. It is now Europe's common task to buttress the existing programmes, fill the gaps and to span a safety net for all EU states that need further support."[37]

At least implicitly, the Keynesian perspective points in the direction of a strengthened solidarity by addressing the specific conditions of operation of different types of markets. In this respect, the analytical perspective of Karl Polanyi complements that of Keynes. Polanyi is even somewhat clearer, because for him the mechanisms of solidarity-based forms of co-operation inherently rely on the principles of reciprocity and redistribution, even under the conditions of the evolving market system.[38]

4 About similarities and differences: Understanding the (non-)hegemonic reorganisation of the European "moral economy"

The developments during the financial and euro crises and the Covid-19 pandemic outlined in the previous section are characterised by some similarities, but also by significant differences. The similarities lie primarily in the fact that both are expressions of transnational crisis dynamics that potentially call into question the very existence of European integration, in particular the functioning of EMU. The differences lie in the fact that the crisis strategies, and with them the ideas of transnational European solidarity, are diverging. On the one hand, this is due to different crisis narratives. In the case of the financial and euro crisis, the countries most

37 Heiko Maas and Olaf Scholz, 'A Response to the Corona Crisis in Europe Based on Solidarity' (*Auswärtiges Amt,* 2020) https://www.auswaertiges-amt.de/en/newsroom/news/maas-scholz-corona/2330904?utm_source=POLITICO.EU&utm_campaign=a1f43744b0-EMAIL_CAMPAIGN_2020_04_06_05_10&utm_medium=email&utm_term=0_10959edeb5-a1f43744b0-190285345 accessed 14 November 2022.

38 Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 1957 [1944]).

affected were blamed for the crisis themselves; in the case of the Covid-19 pandemic, responsibility could not be easily assigned to specific countries and actors. On the other hand, however, the hegemonic actors in the EU – not least the German government and the social forces supporting it – reacted quite differently to the crises, reflecting the changing relevance and composition of interests as well as the changing perspectives on the organisation of the 'moral economy' of European integration prevailing in public discourse.

The observation that crisis management in the Covid-19 pandemic was more strongly oriented towards transnational solidarity norms than before, i.e., in the financial and euro crises,[39] can be deciphered in terms of hegemony theory. At the same time, however, this involves a specific understanding of solidarity that sees it not simply as structurally given, but as institutionally organised and socially constructed. In this sense, the concrete – transnational – norms of solidarity and their practical implementation are constantly subject to political negotiations and public struggles. This suggests that solidarity relations cannot be conceived outside the existing interests of social and governmental actors. However, they cannot simply be traced back to these either, since the discursive struggle for 'necessary', or even better, 'appropriate' collective responses to pressing problems or crises – and in this sense the 'moral economy' of capitalist development – is of central importance.

However, the development and change of hegemonic strategies and practices is not so easy to grasp. This is mainly due to the fact that hegemony, as a form of domination characterised by the consent of the ruled, involves inter- and transnational processes on the one hand and multi-layered social processes on the other. The leading hegemonic forces can accordingly promote or hinder the formation of transnational solidarities through multiple channels or arenas of discourse. In this paper, the supranational and intergovernmental interpretations and positions were primarily taken into consideration; especially as they are presented from the perspective of the German federal government. Correspondingly, however, the societal discourses and debates, in which the interpretations of intellectuals and

39 Alexia Katsanidou, Ann-Kathrin Reinl and Christina Eder, 'Together We Stand? Transnational Solidarity in the EU in Times of Crisis' (2022) 23 European Union Politics 66; see also Licia Bobzien and Fabian Kalleitner, 'Attitudes Towards European Financial Solidarity During the Covid-19 Pandemic: Evidence from a Net-Contributor Country' (2021) 23 European Societies, 791.

political decision-makers are either accepted and supported or rejected, must also be considered.

In contrast to the financial and euro crises, where the crisis management was often conflictual and disruptive, in the case of the Covid-19 pandemic it was, by and large, more hegemonic in character. In a sense, NextGenerationEU functioned as a hegemonic project, or at least as a hegemonic initiative, that seemed to be useful for a number of strategic concerns: averting an impending euro crisis, redressing uneven development, re-industrialising and ecologically modernising the European economy through digitalisation and climate protection, and supporting European companies in the face of intensified global competition. At the same time, the transnational discourses mobilised in this context strengthened the 'moral economy' of European integration insofar as they served specific demands for a just European economic order with elements of mutual support and redistribution. The strengthening of transnational norms of solidarity thus unfolded during the implementation of hegemonic strategies and practices. Both dimensions, that of hegemony and that of solidarity, were in this sense rather linked in the Covid-19 pandemic – in contrast to the financial and euro crisis, in which the national forms of solidarity were mostly in the foreground and opposed to each other.

5 Conclusion: Preconditions of transnational solidarity

The cases discussed in this paper illustrate that transnational solidarities do not simply emerge naturally, but have to be actively produced – in public discourse and in political negotiation processes. If the efforts are to be successful, this requires a hegemonic strategy and practice, i.e., moral and intellectual leadership, but also material resources – financial support – to adequately take into account the interests and needs of the subaltern social forces. If activities are limited to moral declarations, i.e., expressions of solidarity, without material underpinning, they will be seen as lip service that cannot be taken seriously in the medium and long term. If, on the other hand, only material transfers are in the foreground, without any transnational – even controversial – communication and agreement on the common goals to be achieved, they easily degenerate into charitable compensation payments. In most cases, viable transnational solidarity norms only emerge when moral orientations and material compromises complement and reinforce each other. This is especially the case when they are

inscribed in the institutional, regulatory, and redistributive arrangements through which the European economic and monetary area is politically organised.

As far as the EMU's mode of operation was concerned, however, this process of 'inscription' was blocked for a long time. Accordingly, the 'Frankfurt-Brussels consensus' reproduced itself, although the financial and euro crises revealed the shaky foundations on which it was based. With the Covid-19 pandemic and the establishment of NextGenerationEU, the scene has obviously changed. Forms of a lived political-economic practice of transnational solidarity have emerged, at least in a rudimentary form, which could be adapted to the further development of a more comprehensive governance of EMU. Steps in this direction seem to be not only normatively desirable but also politico-economically necessary if the so-called resilience of EMU is to be strengthened. However, the reforms introduced so far could easily prove insufficient to prevent another euro crisis. Such concerns are serious as the scope for unconventional central bank policy is clearly limited in a situation of high inflation and rising public debt.

Chapter 3 Solidarity and Next Generation EU: Rebalancing National and Common Interests

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1 Introduction

The principle of solidarity is permeating the whole system of EU law.[1] The solidarity principle comes to bear in this system in three different ways: explicitly in a series of provisions (in the Articles 2, 3 para. 3, 21, 24 para. 2 and 3 TEU, as well as in the Articles 67, 80, 122, 194 and 222 of the TFEU),[2] indirectly in a series of further norms providing, for example, for common action, burden-sharing or care for the disenfranchised[3] and in a systematic perspective through the overall structure and the finality of the EU treaties, having as their aim the promotion of the interests of the Members States (MS) and their people in an international order where the EU intends to contribute to peace, human rights, progress and prosperity. Many more – direct and indirect – references to solidarity can be found in secondary law. With the declaration of the Charter of Fundamental Rights in 2000 and even more after its integration in primary law in 2009 solidarity has achieved a more pronounced status in the law of the European Union which is in many ways still to be explored.

However, EU law does not provide for a common definition of "solidarity". Its exact meaning will vary, depending not only from the setting

1 See Peter Hilpold, 'Understanding Solidarity within EU Law: an Analysis of the "Islands of Solidarity" with Particular Regard to Monetary Union' (2015) 34 Yearbook of European Law 257. This article draws heavily on this contribution and develops the theses set out there further, applying them, in particular, to the Next Generation EU program.

2 See Roland Bieber and Francesco Maiani, 'Ohne Solidarität keine Europäische Union: Über Krisenerscheinungen in der Wirtschafts- und Währungsunion und im Europäischen Asylsystem' (2012) Schweizerisches Jahrbuch für Europarecht 2011/2012 297, 298.

3 To name only a few, reference could be made to Treaty on European Union art 42 (7), establishing solidarity in case of an armed attack on the territory of a Member States (MS), Treaty on the Functioning of the European Union art 196 on civil protection or TFEU art 208–211 on development cooperation.

where this principle shall apply but also from the specific circumstances of the time, as the meaning of solidarity, as will be shown, is in continuous evolution. It cannot be fixed once and for all but it will remain, for the foreseeable future, a matter of political and also legal controversies. Notwithstanding this broad spectrum of possible meanings attributable to the concept of solidarity and its dynamic evolution in time, it will be shown that some general considerations can be made attributing substantial content to this concept transforming it into a tool of dogmatic analysis of positive law and prospective analysis of future legal developments.

Summarizing a longer debate[4] it can be stated that solidarity may primarily be based on considerations of reciprocity but it may (also) be the expression of altruism. Reciprocity means *do ut des* and constitutes a principle that lies at the heart of the efficacy of large parts of international law.[5] In general, also the principle of reciprocity is, like the principle of solidarity, subject to some dynamic evolution, to some potential for continuous development, even though the potential might be considerably larger with solidarity. In ancient times, *do ut des* might have implied a rather strict commutative relationship that should be realized in a rather short period of time. In a modern perspective, in higher evolved legal orders, this might no longer be the case. Costs and benefits from a transaction can materialize also over a longer period of time; the overall balance can take into consideration also "insurance costs" and elements like interests. For example, even social benefits granted to subjects contributing to a social insurance system can be seen as an implementation of the principle of reciprocity if looked at from the viewpoint of an insurance contract. And even if there is, in the specific case, no economic relationship between the benefits and the contributions or contributions by one party are lacking at all, reciprocity in a larger understanding could nonetheless be given if we apply John Rawls´ "Theory of justice"[6] based on a situation where distributive decisions are taken under a "veil of ignorance".

Of course, such an extended understanding of reciprocity might more easily come to bear in higher evolved legal orders that can manage such sophisticated considerations and calculations. In the international legal order which has still preserved, under many aspects, the characteristics of

4 Hilpold (n 1) 261ff.

5 Bruno Simma, *Das Reziprozitätselement beim Zustandekommen völkerrechtlicher Verträge* (Duncker & Humblot 1972).

6 John Rawls, *A Theory of Justice* (Harvard University Press 1971).

a primitive system,[7] reciprocity may still have a narrower, more traditional meaning. Being EU law from its origin and at its core still international law, also the European legal order is necessarily premised on this concept and for the foreseeable future, notwithstanding its nature as a legal order "sui generis", it will most probably maintain this essential characteristic.[8] This "sui generis" character of EU law offers, however, also the opportunity to depart from a strict understanding of reciprocity and to bring it to bear in a meaning closer to that of national law. Eventually, it might display also elements of altruism which appear in larger number in national constitutional systems that consider themselves as "social states".

A highly-integrated community may consider selfless help, altruism in the stricter sense, as a natural device for self-preservation, as an act to be set without hesitancy and expected as a right.

Even if reciprocity, in its strict interpretation, no longer applies, in case beneficiaries of grants or concessions are part of a larger community, be it of a national, an international or a supranational character, elements of a *do ut des* still may be discernible at the backdrop. The beneficiary may be asked at least not to counteract the interests of the respective community or even perhaps to contribute in some ways to the further prosperity of this community. The tool, to achieve all this, is conditionality, a concept of world-wide relevance in the field of aid and concessions (in particular within the IMF system) but of special importance within the European Union.

These considerations, transposed to the European Union, might imply that the understanding we attribute to solidarity – and also to the aspects of reciprocity and altruism it builds on – will largely depend from the status of integration. The European Union is not yet a state and therefore solidarity, which can be expected within the MS, cannot be pretended from the Union towards the MS. The Union is, however, not only a mere

7 Yoram Dinstein, 'International Law as a Primitive Legal System' (1986–1987) 19 N.Y.U. J. Int'l L. & Pol. 1 1.

8 See Case 26/62 *van Gend and Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1 (ECJ, 5 February 1963) The Community constitutes a new legal order of international law ECR 1, 12; Case 6/64, *Costa v. E.N.E.L.* ECLI:EU:C:1964:66 (ECJ, 15 July 1964) By contrast with ordinary international treaties, the EEC Treaty has created its own legal system, ECR 585, 593.

international organization.[9] Famously qualified as an "association of states" ("*Staatenverbund*") by the German Constitutional Court[10] the role solidarity can play within this order, will largely depend from the measure of cohesion achieved. As will be seen, especially in the field of the European Monetary Union, clashing demands for more or less solidarity are regularly based, directly or indirectly, on different understandings of this status of integration.

2 *Solidarity in an environment of "constructive ambiguity" and "open texture" – some preliminary remarks on the development of the European Monetary Union (EMU)*

If solidarity is a constitutional principle within EU law with varying degrees of relevance in the single sectors of EU law, for the functioning of EMU, for its very survival, this principle is of fundamental importance. Again, solidarity has a specific meaning within EMU and specific requisites apply for it in this area but the main elements, as explained above, are clearly present.

Within EMU solidarity has the immediate finality to preserve a policy that constitutes a necessary strengthening and completion of the internal market. Due to the precariousness of the relevant primary law, reflecting an unresolved struggle during the negotiations for the Maastricht Treaty as to the extent, MS were prepared to yield sovereignty in this crucial area to the federal level, the exact extent, solidarity could be pretended from MS as a legal obligation, remained open. The relevant provisions are characterized by "constructive ambiguity"[11] or "open texture" in the words

9 See recently Koen Lenaerts, ' L'Autonomie de l'Ordre Juridique de l'Union ' in Gavin Barrett et al (eds), *The Future of Legal Europe: Will We Trust in It?* (Springer Cham 2021) 551–570.

10 So in the famous Treaty on European Union (Maastricht judgement) of 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92.

11 The notion of "constructive ambiguity" appears to be an extremely useful concept to explain why in international law and in EU law (perhaps more than in national law) norms, expressing an apparent but weak consent, are prone to transpose conflict into the future. It refers to the concept of *"dilatorischer Formelkompromiss"* coined by Carl Schmitt who was again influenced in this by Hans Morgenthau (many thanks to Karine Caunes for this hint). Constructive ambiguity is the expression of a compromise between a clear hard law provision not attainable due to unsurmountable clashes

of H. L. A. Hart[12], creating a grey area where the undecided conflicts of the Maastricht negotiation process had to be continued in the decades to come. At the very core of this ambiguity lies the question of the degree of integration the single MS are aspiring at. Do eventual specifications of this "grey area", this "fringe of vagueness"[13] lead to results that are still covered by the positive norm (in this, on EMU)? This dispute between MS and in academia continues up to this day. Anticipating somewhat the conclusions it can be stated that practice – and, on its track, academic discussion – in the last decade have been prepared to set the outer borders of the relevant norms continuously more generously.

3 EMU according to the Maastricht Treaty and beyond

3.1 EMU as an asymmetric construct

As is well known, by the Maastricht Treaty an asymmetric EMU was created with a loosely integrated economic union and a highly cohesive, fully integrated monetary union. For MS, to give up monetary sovereignty was the direct consequence of the introduction of the Euro; to transfer the competence for economic sovereignty would have meant to renounce on ulterior competences that are not only retained to be at the core of MS sovereignty but the extent of such a concession would furthermore hard to be delimited as there is no way for a clear-cut border between what will be part of its governmental economic function and what will not. Economic policy, with all its ramifications, is eventually, in respect to monetary policy, nothing else than the other side of the same coin. In this sense, monetary integration could have become the prelude to full European integration, a step for which no consent was given, neither at the beginning of the 1990s nor in the aftermath. In solidarity terms the great challenge the "Masters of the Treaties" had to face was the following:

– First, the monetary union is in itself a solidarity project. It meant for some MS, in particular Germany, to give up a hard currency that in the past had brought many advantages to them.

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of interests and no norm at all, an inferior default situation none of the negotiators aspires to in the relevant situation.

12 See H. L. A. Hart, *The Concept of Law* (Oxford Clarendon Press 1961) 124.

13 Ibid 120.

– Second, care should be taken, not to overstretch the concessions implied by such a project. Moral hazard, whereby reckless spending would undermine the stability of the Euro, was to be avoided. MS with sound budgetary policies should not be overburdened with solidarity obligations in their attempt to preserve the monetary union. In more despicable words (often used by politicians and academics with a more austere budgetary policy of central and Northern Europe) the European Union should not become a "liability unions" or a "debt union". In this sense, concessions had to be made also by MS with weaker currencies.
– Third, countries with weaker currencies would lose the possibility to depreciate their currencies, putting them thereby, however, under considerable "competitive stress".

In sum, the introduction of the Euro was associated with a series of advantages, but also costs for all MS to be included in the Euro zone. At the outset it was not realistically foreseeable up to which point this compromise was balanced and what "stress tests" it would have to endure.

In order to provide some stability to this setting, a complex system of budgetary coordination rules as well as conditionality obligations both for entering EMU and for the time after was conceived.[14] The overall attempt was to guarantee solidarity with the EMU project with corresponding reciprocity obligations that would restrict MS sovereignty in economic matters to a minimum while leaving them budgetary powers to a maximum extent. The result was a complex edifice of rules and procedures with no precedent in any other national or international setting. Without being associated with somewhat stricter obligations it seemed to guarantee stability to EMU notwithstanding being further watered-down in 2005, paradoxically by France and Germany, with the latter country having been the main proponent of the stability provisions in the first place.[15]

Conditionality operated, first of all, as a gatekeeper for entering the Euro zone: The "Maastricht criteria", as contained in the "Deficit protocol"[16] fix "convergence criteria" among which stand out those regarding public finance: the annual government deficit must not exceed 3 % of GDP, government debt must not exceed 60 % of GDP. In order to avoid that MS

14 See Peter Hilpold, *Die Europäische Wirtschafts- und Währungsunion* (Springer 2021) 32ff.
15 See Council Regulation 1466/97 modified art 2 para 3 permitting the consideration of "other relevant factors" in the interpretation of the stability criteria by the Council.
16 Now Prot. no. 12 on the excessive deficit procedure.

would abandon budgetary discipline after entering EMU Germany insisted that these criteria would apply also in the aftermath and managed to extend their applicability by the Stability and Growth Pact (SGP) 1997[17] which entered into force in parallel with EMU on January 1, 1999.

Effectivity and credibility of budgetary discipline should be further enhanced by a surveillance and sanctions mechanism set out in the Articles 121 and 126 TFEU an well as in the SGP. On a whole, the mechanisms created thereby were extremely complicated and far from being effective.

3.2 The financial crisis as a strong impulse for reform

This became apparent after the finance and economic crisis broke out, starting in 2007. Widespread violation of the Maastricht criteria had led to debt burdens that risked becoming unsustainable in face of the need of further borrowing to sustain the dwindling economy and the ailing banking system in particular. Now, the EMU architecture was widely revised with measures inside and outside EU law while maintaining primary law unaltered, with one exception (Article 136 TFEU). Reforms consisted mainly in the following:

Starting in 2010, as an urgency measure, financial assistance was provided to MS at the risk of insolvency by the creation of temporary instruments: the European Financial Stability Mechanism (EFSM)[18] and the European Financial Stability Facility (EFSF)[19]. The EFSM was financed by the EU budget and therefore by all the (then) 27 MS. This fund, with a lending capacity of € 60 billion, remained operative until 30 June 2013. The EFSF was created as a special purpose vehicle in Luxembourg with a maximum lending capacity of € 440 billion whose activities have been taken over by the European Stability Mechanism (ESM), established on 27 September 2012 with an extended maximum lending capacity of € 500 billion. The establishment of the (permanent) ESM, an international organization located in Luxembourg, was made possible by an amendment of Article 136 TFEU to which the following para. 3 was added:

17 Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies based on TFEU art 121, 126.

18 Council Regulation (EC) 407/2010 establishing a European financial stabilisation mechanism (2010) OJ L118/1.

19 Representatives of the Governments of the Euro Area Member States Member States Meeting within the Council of the EU Decision, ECOFIN, 9 May 2010, Doc. 9614/10.

> "The member states whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."[20]

3.3 Conditionality

Already the EFSM and the EFSF operated under conditionality rules. By Article 136 TFEU conditionality became the linchpin for a permanent financial crisis instrument to be compatible with primary law. The reasons why primary law remained largely untouched reflect very well what was the common consensus on the role of solidarity within EU law and how the reciprocity rule was interpreted. First of all, it has to be considered that the financial crisis starting from the United States in 2007 had reached the European Union at a moment when negotiations about a reform of EU law had just been concluded and the Treaty of Lisbon was about to enter into force on December 1, 2009. This treaty, notwithstanding all the constructive ambiguities it displayed, offered a good argumentative basis for those MS which consistently had fought for the preservation of an asymmetric EMU, for upholding MS sovereignty in the field of economic policy and against a "liability union" and the creation of a "fiscal capacity". As to the exclusion of a "liability (or debt) union", for some MS, both Article 122 para. 2 TFEU as Article 125 TFEU seemed to operate exactly in this direction, thereby excluding both temporary as well as (and a fortiori) permanent aid mechanism in case of financial distress.

With regard to Article 122 para. 2 TFEU, recourse to which was taken in occasion of the urgent financial assistance actions in 2010, is was retained that the economic breakdown of a country like Greece was not an "exceptional occurrence" beyond the country´s control but that these events were foreseeable in view of irresponsible economic policy in the past.[21] In reality,

20 European Council Decision of 25 March 2011 amending TFEU art 136 with regard to a stability mechanism for Member States whose currency is the euro (2011) OJ L91/1.; entered into effect on 1 May 2013.
See extensively on this whole reform process Anuscheh Farahat and Xabier Arzoz (eds), *Contesting Austerity – A Socio-Legal Inquiry* (Bloomsbury Publishing 2021).

21 See Kurt Faßbender, 'Der europäische 'Stabilisierungsmechanismus' im Lichte von Unionsrecht und deutschem Verwaltungsrecht' (2010) Neue Zeitschrift für Verwal-

however, this provision is not designed to limit financial aid to MS with an impeccable record as to their fiscal policy but aims rather at fending off extreme consequences for a MS and eventually also for the European Union in altogether exceptional situations. Help provided by the EFSM and the ESFS was understood in this sense: It focused on the prevention of further harm and it came at a price in the sense that it did not come for free (no grants were given but only repayable credits) and this help was provided on strict conditionality terms. If some had feared that the availability of help subsequent to extreme budgetary profligacy would disenable the educative pressure of market forces the actual practice of help on strict conditionality terms proved them wrong: Thereby a reasonable compromise had been found that avoided a financial cataclysm while evidencing the severe consequences of past irresponsible squandering, also in political terms, the respective governments had to bear.

Similar considerations applied when Article 125 TFEU had to be put into practice during the financial crisis. According to a strict reading, this provision would not only exclude "automatic" liability by the EU and its MS for debts incurred by a MS but also impede the "spontaneous", "free" provision of assistance by an instrument like the ESM. In the case C-370/12, Thomas Pringle[22], the ECJ had the opportunity to set out a series of clarifications that would allow solidarity to come to bear within EMU in a balanced manner, allowing on the one hand for emergency interventions when extreme circumstances, whatever their origin, put at peril the financial system of the MS, while on the other, upholding solidarity as a reciprocity-based concept.

Already GA Juliane Kokott had opted in her Opinion in the "Pringle" case for sound judgment when interpreting the "no bail out clause". In fact, to prohibit any aid at all for a MS in financial difficulties would have enormous consequences; it might even imply the need for a total ban on trade and commerce between MS.[23] The challenge was therefore to apply

tungsrecht 799, 800f.; and, in the same vein, as to the Irish financial crisis, Matthias Ruffert, 'The European Debt crisis and European Union law' (2011) 48(6) Common Market Law Review 1777, 1787.

22 Case C-370/12 *Thomas Pringle v Government of Ireland u. a.* ECLI:EU:C:2012:756 (ECJ, 27 November 2012).

23 Case C-370/12 *Thomas Pringle v Government of Ireland u.a.* ECLI:EU:C:2012:756 (ECJ, 27 November 2012), Opinion of AG Juliane Kokott, para 133.
Opinion delivered on 26 October 2012, para 133.

the restrictions to solidarity in a way that would not rule out effective help[24] while, at the same time, emphasizing the need for a responsible budgetary policy by the MS.

According to the ECJ such an approach, as reflected by the ESM whose legality stood at the centre of the Pringle case, is fully reconcilable with the treaties.[25] In fact, according to this Court, by providing assistance to another MS, neither the aiding MS nor the ESM would assume its debt.[26] The same is true for the purchase of bonds issued by the ESM: in addition, in this case, the issuing MS remain solely answerable to repay its debt.[27] In sum, the ECJ made clear that Article 125 TFEU left no space for a compulsory bail-out, but voluntary measures should be permissible under certain conditions. This "conditionality clause" was read into Article 125 by the Court, so that free-riding would become counterproductive for any MS.[28] To be rescued should not become an attractive prospect for any MS. Conversely, budgetary restraint could be interpreted as an act of solidarity.[29] As was shown also by the actual lending practice by the EU via EFSM, ESFS and ESM the price to be paid for the borrowing country was

24 What is often overlooked: This effective help is regularly in the interest of all MS. See the very acute remark in Case C-370/12 *Thomas Pringle v Government of Ireland u.a.* ECLI:EU:C:2012:756 (ECJ, 27 November 2012), Opinion of AG Juliane Kokott, para 140: "It must only be emphasised that a broad interpretation of Article 125 TFEU would […] deprive the Member States of the power to avert the bankruptcy of another Member State and of the ability thereby to attempt to avert damage to themselves."

25 Case C-370/12 *Thomas Pringle v Government of Ireland u. a.* ECLI:EU:C:2012:756 (ECJ, 27 November 2012), para 131:
"It must be stated at the outset that it is apparent from the wording used in Article 125 TFEU, to the effect that neither the Union nor a Member State are to 'be liable for ... the commitments' of another Member State or 'assume [those commitments]', that that article is not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State."

26 Case C-370/12 *Thomas Pringle v Government of Ireland u. a.* ECLI:EU:C:2012:756 (ECJ, 27 November 2012), para. 137.

27 Ibid para 141.

28 Ibid para 137: „ […] provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy".

29 Ulrich Hufeld brought this to the point by the following slogan: "Solidarity through solvency". See Ulrich Hufeld, 'Europäische Wirtschafts- und Währungsunion: Das System' (2022) 9 Enzyklopädie des Europarechts 71, 146f.

high. Reciprocity remained intact. The EU and its MS made considerable interest gains from the credits granted to MS in financial distress.[30]

Conditionality rules are gaining ever more importance and are extend to the "political" in an effort to preserve core European values.[31] This happens not only as a political bargain intended to promote political aims with economic tools but also in recognition of the fact that respect for the rule of law might have direct positive repercussions on the economic and financial stability of a MS.[32]

3.4 The struggle for a "fiscal capacity" and the ever more extensive interpretation of the "economic limb" of EMU

It has further to be pointed out that the EU succeeded in managing and overcoming the debt crisis of some of its MS without yielding to the pressure of some MS to create a so-called "fiscal capacity", a request which has been on the table for long time.

There is no legal definition of the term "fiscal capacity". In its most generic fashion, one can find the following definition: "A set of common budgetary instruments specific to the euro area which could include mechanisms to counter adverse economic shocks."[33] Most commonly, however, more far-reaching tools are envisaged when reference is made to this concept. In its most extensive notion, a "fiscal capacity" would be the equivalent of a specific budget, on a permanent basis, of a consistent dimension, to be used for an EU fiscal policy. As mentioned, the EU has no such

30 See Kimberley Amadeo, 'Greek Debt Crisis Explained' (The Balance, 17 May 2020) <https://www.thebalancemoney.com/what-is-the-greece-debt-crisis-3305525> [assessed 10 February 2024].; and Claire Stam, 'Germany earned €2.9 billion from Greece's debt crisis' (EURACTIV, 21 June 2018) <https://www.euractiv.com/section/economy-jobs/news/germany-earned-2-9-billion-euros-from-greeces-debt-crisis/> accessed 26 February 2024.

31 See Christophe Hillion, 'Compromising (On) the General Conditionality Mechanism and the Rule of Law' (2021) 58 Common Market Law Review 267, 284.

32 See Armin von Bogdandy and Michael Ioannidis, 'Das systemische Defizit – Merkmale, Instrumente und Probleme am Beispiel der Rechtsstaatlichkeit und des neuen Rechtsstaatlichkeitsaufsichtsverfahrens' (2014) 74 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 283, at 303.

33 Presidenza del Consiglio dei Ministri – Dipartimento per le Politiche Europee, 'Fiscal capacity' (Dipartimento per gli Affari Europei, 19 July 2018) <https://www.politicheeuropee.gov.it/it/comunicazione/europarole/fiscal-capacity/> accessed 26 February 2024.

competence, not even of a shared nature together with the MS. In the whole process of tackling the financial crisis within the EU, with its apex in the years between 2010 and 2012, no serious attempt was made to establish such a capacity. Emphasis was laid on the "Open Method of Coordination" whereby the EU should limit itself, in principle, to give a coordinating impulse, and apply sanctions only as an ultima ratio, if, after a long and cumbersome process, regulated primarily in Art. 126 TFEU and in the SGP, no adequate compliance had been achieved.[34]

The reforms during the period of the financial crisis did not aim at a radical departure from this system of an asymmetric EMU but tried rather to make economic policy coordination more effective through a new system of "Economic Governance". In the period between 2010 und 2013 two packages of secondary norms, the so-called "Six-Pack" of 2011 and the "Two-Pack" of 2013 were prepared and adopted. Thereby, a highly complicated system of preventive control procedures, of "corrective" measures in case prevention had failed, was introduced. Furthermore, a new institutionalized form of dialogue between MS and the EU associated with EU-wide transparency, the "European Semester", was created.[35]

For the adoption of all these measures it was retained that existing primary law, in particular Article 136 TFEU, would offer a sufficient legal basis. This provision came to be called a "competence giant"[36], with a clearly perceptible critical undertone that gave expression to ever louder opposition against secondary law-making on this legislative basis. This protest did not go unheard and "the giant was laid to rest".[37] Recourse was now taken to

34 See Peter Hilpold, 'Das Unionsrecht der repressiven Haushaltskontrolle' in Ulrich Hufeld and Christoph Ohler (eds), *Europäische Wirtschafts- und Währungsunion* (EnzEuR vol. 9, Nomos 2022) 569–592.

35 For a detailed analysis of this process see Rosa M. Lastra and Jean-Victor Louis, 'European Economic and Monetary union: History, Trends, and Prospects' (2013) 32(1) Yearbook of European Law 57–206; Bruno de Witte, 'EMU as Constitutional Law' in Fabian Amtenbrink and Christoph Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020) 278–292; Francesco Martucci, 'Non-EU Legal Instruments (EFSF, ES, and Fiscal Compact)' in Fabian Amtenbrink/Christoph Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020) 294–325 and Hilpold (n 14) 45ff.

36 See Jürgen Bast & Florian Rödl, 'Jenseits der Koordinierung? – Zu den Grenzen der EU-Verträge für eine Europäische Wirtschaftsregierung' (2012) 39 Europäische Grundrechte-Zeitschrift 269.

37 See Hilpold (n 14) 113.

an instrument outside the treaties: The Fiscal Compact[38] of 2012, in force since 2013, i.a. restated and strengthened previously introduced rules on budgetary discipline (in particular as to the obligation to reduce excessive debt burdens) and obliged parties to the Compact to bring into effect budgetary discipline "through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes".[39]

3.5 Extending solidarity within the existing treaty boundaries: a test case for the future

The handling of the financial crisis revealed that it was possible to handle an epochal financial and economic crisis on a legal basis, created by the Treaty of Lisbon, that could not have foreseen a challenge of such a dimension. Notwithstanding the fact that MS and European institutions (not the least the ECJ!) had avoided a dogmatic attitude and were prepared to show a considerable degree of flexibility, crisis management as a whole was based on a rather prudent, conservative understanding of the leeway the treaties offered for appropriate action. The financial crisis, ignited and boosted to a considerable extent by the lack of budgetary discipline, would have been the wrong situation for switching to a solidarity concept based on altruism. Nonetheless, this was also an occasion where limits were tested and where dogmatism, for example as to a strict interpretation of Article 125 TFEU, according to which the EU and the MS would have been prohibited from aiding a struggling MS even on a voluntary basis associated with conditions, was overcome.

Much was done outside the treaties, both by international law and by private law instruments, when the competence basis offered by primary law seemed to have been exhausted. At the same time, conditionality was even re-enforced, advocates of rigor could see themselves confirmed. In reality, conditionality was more a concession to a group of stakeholders who rejected any departure from the strict operation of market rules also for highly indebted countries which should feel the full brunt of market forces as a consequence of their misbehavior.

38 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

39 Ibid art 3, para 2.

As a consequence, it can be said that apparently the formal rules had been respected but at the same time the perception was created that dogmatism was ill-placed in this area, that EMU rules offered some flexibility in interpretation and that solidarity was associated with a considerable degree of pragmatism.[40] At the same time, austerity measures engendered strong opposition by those groups (in some countries, especially in Greece, larger parts of the population) most affected by these measures, so that also conditionality as a political tool came under pressure.[41]

4 Next Generation EU – The Fall?

4.1 Preconditions

In early 2020, the Covid-19 epidemic broke out[42] and the ensuing economic crisis seemed to precipitate with continuously deteriorating forecasts. In March 2020 the nearly breakdown of supply chains with China, shutdowns in the social and the economic life, spreading unemployment and a world-wide crash in oil prices and the stock markets fueled fears of an unprecedented downturn with irremediable social consequences. These fears were further enhanced by the sudden evidence of profound inadequacies of some national health systems. Even within the EU it appeared that there were enormous differences in the strength and the resilience of the various health systems, also (but of course not exclusively) as a consequence of budgetary restrictions imposed by the SGP. Generally, all over the EU, the economic and societal fabric of the single MS was hit to a strongly varying degree.[43]

40 For some, already the reforms undertaken as a consequence of the financial crisis mark the transformation of the EMU from a "community of benefits" to a "community of benefits and risk-sharing". See Edoardo Chiti and Pedro Gustavo Teixeira, ´The constitutional implications of the European responses to the financial and public debt crisis' (2013) 50(3) Common Market Law Review 683.

41 For further detail, see Anuscheh Farahat and Xabier Arzoz (eds), *Contesting Austerity: A Socio-Legal Inquiry* (Bloomsbury Publishing 2021).

42 For an account of these events see Thomas Plümper and Eric Neumayer, ´Lockdown policies and the dynamics of the first wave of the Sars-CoV-2 pandemic in Europe' (2022) 29(3) Journal of European Public Policy 321.

43 See Commission Staff Working Document SWD/2020/98 Final, *Identifying Europe´s Recovery Needs*, document annexed to the Communication from the Commission to the European Parliament, the European Council, the Council, the European Eco-

The response sought was Keynesianism in its purest form: deficit spending at any price. This U-turn in financial austerity had consequences, first of all, for the MS which had now regained full budgetary sovereignty. To make this possibe on the technical level, on 23 March 2020 the fiscal rules of the SGP were suspended by the activation of the so-called espace clause.[44] It was also clear, however, that permissive rules alone would not suffice for single MS to counter effectively this crisis. The national fiscal capacity was simply too small to fulfil this task effectively. The Union had to intervene as such and in view of their very limited leeway as to their own resources, a change of paradigm was needed that would affect also the Union´s stance towards fiscal policy.

4.2 The reaction by the European Union

In 2020, in an astonishingly short period, EU MS agreed on a series of aid measures that gave new meaning not only to solidarity within EU law but also re-interpreted the provisions on EMU in EU primary law in a way for which no consensus would have been possible only a few months before. What was most surprising was the fact that all this happened within the context of existing EU law while during the financial crisis measures of far less portend were considered to lie outside the existing competence rules.

At the beginning, in early spring 2020, the EU started with an aid package that was unconventionally large in amount if measured in relation to previous rescue measure but very conventional as to structure and nature of the various measures.

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nomic and Social Committee and the Committee of the Regions, ´Europe´s Moment: Repair and Prepare For the Next Generation'. As to the ensuing struggle between Northern and Southern EU MS, see Dani Marco and Agustin Josè Menendez, 'The European Stability Mechanism is a False Solution to a Real European Problem' (2020) Verfassungsblog <https://verfassungsblog.de/the-european-stability-mechanism-is-a-false-solution-to-a-real-european-problem/> accessed 26 February 2024.

44 European Council, 'Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis' (European Council, 23 March 2020) <https://www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministers-of-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/> accessed 26 February 2024. The applicability of the escape clause has has been prorogated already twice. For 2023 the adoption of a largely revised SGP is envisaged.

Thus, on 26 April 2020 agreement was found among MS for package of initiatives that should consist in the following:

- € 100 billion for temporary **S**upport to mitigate **U**nemployment **R**isks in an **E**mergency (SURE program);
- € 200 billion for a Pan-European guarantee fund for loans to companies to be granted by the European Investment Bank
- € 240 billion were allocated to the ESM to enable this institution to finance pandemic support for MS.[45]

Further measures of minor dimension consisted in a re-direction of existing EU funds to counter the pandemic within the MS:

- €37 billion should be taken from structural funds
- up to €800 from the Solidarity Fund
- €31 billion from the 2020 budget[46]

Alongside these measures in the area of the real economy monetary policy measures of extraordinary amount were adopted. In March 2020 the European Central Bank (ECB) started the pandemic emergency purchase programme (PEPP)[47], a temporary asset purchase program of private and public sector securities. This purchase program for which not only all asset categories eligible under the existing asset purchase program (APP) could be considered but also securities issued by the Greek Government, was continuously extended: by further €600 billion on 4 June 2020 and by

45 See KPMG Insights, 'European Union: Government and institution measures in response to COVID-19' (KPMG, 18 November 2020) <https://home.kpmg/xx/en/home/insights/2020/04/european-union-government-and-institution-measures-in-response-to-covid.html > accessed 26 February 2024.

46 Ibid.

47 See Decision (EU) 2020/400 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (2020) OJ L248/24. Much helpful to this end proved the circumstance that the attack by the German Bundesverfassungsgericht in the PSPP case – that would have threatened more the PEPP program than the PSPP initiative – could be repelled by the public outcry the BVerfG judgment of 5 May 2020 had provoked. See Gavin Barrett, 'Coronavirus and EU Law: Driving the Next Stage of Economic and Monetary Union' in Gavin Barrett et al (eds), *The Future of Legal Europe: Will We Trust in It?* (Springer Cham 2021), 55–79 and Peter Hilpold, 'So long Solange? The PSPP judgment by the German Constitutional Court and the conflict between the German and the European 'Popular Spirit'' (2021) 23 Cambridge Yearbook of European Legal Studies, 159.

additional €500 on 10 December 2020, so as to reach eventually a volume of €1,850.[48]

Shortly after these first measures had been agreed upon in March 2020, the conviction had matured that these initiatives would not suffice and that a new approach was necessary.

Therefore, in May 2020, the European Commission proposed a new package of measures that epitomized a change of paradigm in the interpretation of the Union´s competences within EMU and a real quantum leap the EU was prepared to engage actively (and not only in a coordinator function) with fiscal policies within the EU.

4.3 The legal structure of Next Generation EU (NGEU)

The basis of NGEU is to be found in a proposal by the European Commission of 27 May 2020: "Europe's moment: Repair and Prepare for the Next Generation"[49]. The approval by the European Council followed two months later on 17–21 July 2020.[50] Specific aspects of the framework plan remained open until the end of 2020; in particular it had to be hammered out how much of this huge amount of funds should be given as grants and how much as loans, what would be the role of conditionality, how and to what extents these funds should be earmarked for the digital economy and for greening the EU and how these funds should be linked to the "ordinary" EU budget via the Multiannual Financial Framework (MFF), setting the ceiling of the EU budget and the "headings" for which these expenditures should be dedicated. Implementation in detail, in particular the adoption of the "Recovery and Resilience Facility – RRF"[51] happened only in early 2021. Implementation on the national level via the National Recovery and Resilience Plans is an ongoing process.

48 See European Central Bank, 'Pandemic Emergency Purchase Programme (PEPP)' (European Central Bank) <https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html> accessed 22 November 2022.

49 COM (2020), 456.

50 European Council Conclusions, 17–18–19–20–21 July 2020, EUCO 10/20.

51 European Parliament and European Council Regulation (EU) 241/2021 of 12 February 2021 establishing the Recovery and Resilience Facility (2021) OJ L57/17.

As it was efficiently said[52], NGEU as it was fixed between 2020 and 2021, is "essentially a huge pot of money" consisting of three components:[53]

a) The European Recovery Instrument (EURI)[54] sets the basic structure of NGEU by regulating, rather generically, in which areas (again very broadly defined) the overall amount of €750 billion should be spent in order to achieve "recovery" and "resilience", the central aims of NGEU. EURI further regulates to what extent these funds shall be allocated as grants or as loans and the period in which this instrument should be applicable (2021–2026).
b) Implementation of EURI required the adoption of a series of spending programs which specify the activities envisaged in EURI. At the center of these programs stands a newly created program, the Recovery and Resilience Facility (RFF) for which 672,5 billion (and therefore about 90 % of the NGEU funds as allocated in EURI) are earmarked.
c) For comprehensive budgetary planning, NGEU had not only to take care for the "spending side" (with EURI as the fundament and RFF and other, mostly already existing programs, as its specification) but also for the "passive side", for the provision of the money. To this end, the NGEU consists further of an amendment of the Own Resources Decision (ORD).[55] The necessary resources shall be obtained at the capital market where the European Union acts as the borrower.
d) The ORD has, therefore, a double function: to provide (ordinary) funding for the MFF 2021–2027[56] as well as providing funding for the NGEU, via borrowing on the capital market.[57]

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52 See Bruno de Witte, 'The European Union´s COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58(3) Common Market Law Review 635, 636.
53 Ibid.
54 European Council Regulation (EC) 2094/2020 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (2020) OJ LI433/23.
55 European Council Decision (EU, Euratom) 2053/2020 of 14 December 2020, on the system of own resources of the European Union (2020) OJ L424/1 and repealing Decision 335/2014/EU, Euratom.
56 European Council Regulation (EU, Euratom) 2093/2020 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 (2020) OJ LI433/11.
57 European Council Decision (EU, Euratom) of 14 December 2020, on the system of own resources of the European Union (2020) and repealing Decision 2014/335/EU

4.4 Solidarity as the legal basis

At the centre of the ongoing controversy about the legality of NGEU lies the question whether the European Union has sufficient competence for such a far-reaching project and eventually this is, at its very core, a conflict about the role and the interpretation of solidarity within EU law.

The way, the EU and its MS construed a competence basis for NGEU was somewhat peculiar:

For EURI, as explained, the financial foundation and delimitation of the whole project, Article 122 TFEU, the pivotal provision on solidarity within the EU, was used. As also set out, this provision allows for emergency measures of a temporary nature. When it comes to implement this project, first of all by the RFF, for which most of the NGEU funds are used, Article 122 is, however, no longer mentioned. Reference is, instead, made to Article 175 para. 3 TFEU[58] relating to cohesion policy.

It is interesting to note that in the past, cohesion policy was one of the most important bases for implementing a policy of solidarity.[59] What began rather modestly in 1975 – and as a consequence of special urgency by Great Britain which joined the European Communities in 1973 – with the creation of the European Regional Development Fund (ERDF) over time became an important instrument to address fundamental resource conflicts within the EU. With the "Single European Act" of 1986 a specific section on "Economic and Social Cohesion" was inserted in the EEC treaty, thereby giving the structural policy an explicit basis in primary law. By the Treaty of Maastricht, a Cohesion Fund was created which became operative in 1994 and which aimed at sustaining projects in the fields of environment and transborder infrastructure. Therefore, cohesion and structural policy in the EU since long has anticipated – on a smaller scale and on the basis of long-lasting negotiations – what now, by NGEU, has been implemented on a far broader dimension and on the basis of an extremely short negotiation and decision process.

Euratom, Article 5 "Extraordinary and temporary additional means to address the consequences of the COVID-19 crisis".

58 TFEU art 175 para 3 reads as follows:
"If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions."

59 For more details see Hilpold (n 1) 268 ff.

But still the question remains whether all these developments really are the expression of a continuum, whether NGEU rests on a solid EU competence basis and whether this sort of solidarity is compatible with the treaties.

5 Conclusions

As already set out, opinions vary in literature and in practice as to the legal assessment of NGEU. There have been voices who see in NGEU a "paradigm change", a "template that the EU could use again, to address new financial urgencies such as the need to increase military expenditures and to cushion the economic consequences of transitioning away from Russian oil and gas"[60]. For other authors, also in principle seeing NGEU as compatible with the treaties, there is "some stretching of the EU´s competences in Article 122 and Article 175 TFEU, and the frank acceptance that the European Union can incur massive debt in the common interest of its Member States".[61] For others still, the discrepancy between what the treaties allow and what NGEU promises and implements is more worrying;[62] they pose the question whether we are facing a "quasi-Treaty change"[63] and they warn that NGEU is likely to pave the way for a fiscal capacity for the EU, with a permanently altered division of competences.[64]

60 See Federico Fabbrini, 'Next Generation EU: Legal Structure and Constitutional Consequences' (2022) REBUILD Centre Working Paper No. 3, 1, 22 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4121330> [assessed 26 February 2024].

61 De Witte (n 52) 681.

62 See Päivi Leino-Sandberg and Matthias Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' (2022) 59 Common Market Law Review 433.

63 ibid 459. See on this issue also Armin Steinbach, 'Next Generation EU – Rechtliche Aspekte der Aufbau- und Resilienzpläne' (2022) 37 Zeitschrift für Gesetzgebung 1.

64 See Päivi Leino-Sandberg and Matthias Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' (2022) 59 Common Market Law Review 459. For the German Constitutional Court (BVerfG) in its judgment of 6 December 2023 (2 BvR 547/21, 2 BvR 798/21) these fears are not justified, but the whole structure of the Court´s reasoning in this document cannot really satisfy. In this document, the BVerfG emphasizes the uniqueness of the NGEU project and at same time calls for close control of its implementation. There is no guarantee that other MS will interpret the NGEU project the same way as the BVerfG – visibly impressed by the sharp criticism it had to endure after its ill-fated attempt to reign in ECB lending in the PSPP case – did in its "Own Resources" decision.

There is no clear-cut answer as to which side is correct in this controversy. We have seen that the principle of solidarity is in continuous evolution. NGEU could really constitute a watershed and the future judgments of analysts looking back to the years 2020 – 2026 (when the implementation of NGEU shall have been completed) will heavily depend also on the willingness and the capacity of MS to implement this program in a way that recovery and resilience will have constituted a substantive aim and not only buzzwords and pretexts for syphoning off as much funds as possible from the common pot. The same holds true for the goals of a digital transition and fostering the "Green Deal".[65] As well-sounding these concepts may appear at first sight, everything will depend on how these goals are implemented. Pursuing earnestly these goals can make a difference. At the same time, they are generic enough to justify expenditures of the most variegated, the most traditional kind. As the implementation of the projects financed by the RFF lies wholly in the competence of the MS they bear enormous responsibility for the success of this endeavor – a responsibility that should be made effective also by the control responsibilities attributed by NGEU to the EU institution.

It is also open from where the resources for the repayment of €750 billion credit (in 2018 prices, over €800 in current prices) will stem from. €390 billion of this sum will consist in grants, €360 in repayable loans. It is to be hoped that the loans will be repaid by the recipients, while it is not yet fully clear how repayment of the sums conceded as grants shall take place until 2058 at the latest.[66] Proposals have been made to conceive levies that would, at the same time contribute to achieve environmental goals such as a Carbon Border Adjustment Mechanism (CBAM), related to the CO2 footprint in the production process, a share of residual profits from

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See Peter Hilpold, ʻNext Generation EU und die "Einnahmensourveränität": Das EU-Eigenmittelsystem vor dem BVerfGʼ (2023) EuZW 169 and Armin Steinbach and Sebastian Grund, ʻDer EU-Corona-Aufbaufonds – nächste Etappe in die Fiskal- und Transferunion?ʼ (2023) 7 NJW, 405.

65 At least 37 % of the expenditures shall regard measures of sustainability, at least 20 % digitalization. These are, however, categories of expenditures which can be defined very broadly.

66 As a guarantee the own resources ceiling of 1,4 % of EU gross national income (GNI) has been raised to 2 %. See Article 3c ORD. See Richard Crowe, ʻThe EU Recovery Plan: New Dynamics in the Financing of the EU Budgetʼ in Gavin Barrett et al (eds) *The Future of Legal Europe: Will We Trust in It?* (Springer Cham 2021) 117, 133. See also Maria Kendrick, ʻNextGenrationEU: will the Debt be Repaid by EU Own Resources or Member State Taxpayers?ʼ (2023) 48(1) E. L. Rev., 29.

multinationals re-allocated to EU MS or a plastic tax or be suited to adapt the tax system to new economic realities such as a digital tax or a financial transaction tax.[67]

For the time being these proposals are mainly on paper only (with the exception of the "plastic tax" which, however, meets with strong resistance in the MS) and it is not clear whether these proposals can be implemented as planned and whether they will generate significant revenue.[68]

In case revenues should fall behind expectations MS are liable for the difference: In this case NGEU would be tantamount to a giant financial re-distribution mechanism and solidarity, in a "postponed austerity conflict"[69], would gain a new meaning. Maybe the dimension of NGEU was the result of an unparalleled crisis where the expert forecasts were over-anxious, maybe this package had only been possible because, by mere accident, a group of European leaders had been in power who showed unusual preparedness to act, maybe it was pure gamble. Nonetheless, it offers an opportunity, a "laboratory"[70] to further clarify the concept of solidarity that should neither be missed nor abused. It offers the opportunity to fil the concept of solidarity with new purpose and meaning in a way that could reach far beyond the present crisis and far beyond the European Union. The way, MS implement NGEU will also be a test as to what extent they can handle highly evolved forms of solidarity, where reciprocity is still there but less and less visible, in a responsible way. It is a test as to whether MS are mature enough for opening up a chapter of higher integration where solidarity will decisively and unavoidably evidence pronounced traits of altruism.

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67 As to these proposals see European Commission, 'The Commission proposes the next generation of EU own resources' (22 December 2021) < https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7025> [assessed 26 February 2024]. Proposals for the introduction of a Financial Transaction Tax date back more than a decade. See European Commission, 'Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC', COM (2011) 594 final.

68 The European Commission calculates with additional €17 billion annually. See European Commission, 'The Commission proposes the next generation of EU own resources' (22 December 2021) < https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7025> [assessed 26 February 2024].

69 Delayed until 2028 and lasting potentially until 2058.

70 To use the same terminology as Martucci (n 35) 325, who qualified EMU Inter-see Agreements concluded as a reaction of the earlier financial crisis as a "laboratory for strengthening integration in the euro area".

At the same time, it should neither be lost from sight that EMU is much more than NGEU. With other words: Also, the complex EMU system, as amended during and in the aftermath of the financial crisis, needs further overhaul, development and stabilization.[71] What solidarity effectively means in this system can be judged only if a comprehensive perspective is taken. Due to the growing complicacy of this system to which layer after layer is added while unfinished tasks are left behind in great number[72], the task to define what solidarity effectively signifies in the EU order will not become easier. Maybe the time has come to wait until the dust has settled from the COVID-19 crisis, to see whether it is possible to implement NGEU in a way that gives effective substance to solidarity and to start afterwards a process of re-engineering EMU in a way that copes with new "transnational solidarity conflicts"[73] sustainably and provides stability, transparency and some guarantee of resilience in case of new challenges as we have seen them before and as they can neither be excluded for the future.[74]

71 See Sandra Eckert, Vincent Lindner and Andreas Nölke, 'EMU reform proposals and their (non) implementation: An overview' (2020) Leibniz Institute for Financial Research SAFE, SAFE White Paper Nr. 78. This also an attempt to further reduce "differentiated governance" of EMU which proves to be detrimental to EMU´s cohesiveness. See Stefania Baroncelli,'Differentiated Governance in European Economic and Monetary Union: From Maastricht to Next Generation EU' (2022) 7 European Papers, 867.

72 One has to think only on the SGP which, in all its compromise character, never really worked and is now again to be amended.
As to the complexity of this instruments as it stands at the moment see Peter Hilpold, 'Das Unionsrecht der repressiven Haushaltskontrolle' in Ulrich Hufeld and Christoph Ohler (eds), *Europäische Wirtschafts- und Währungsunion* (EnzEuR vol. 9, Nomos 2022).

73 As so excellently portrayed by Anuscheh Farahat, *Transnationale Solidaritätskonflikte* (Mohr Siebeck 2021) with regard to national and European measures in relations to the attempts to overcome the Euro crisis.

74 With catching irony, Ulrich Hufeld has paraphrased Carl Schmitt´s (in)famous saying "*Souverän ist, wer über den Ausnahmezustand entscheidet*" ("*Sovereign is who decides on the exception*") to *"Souverän ist, wer über den Einnahmezustand entscheidet" ("Sovereign is who decides about the budget")*. See Ulrich Hufeld, 'Das Recht der Europäischen Wirtschaftsverfassung' in Peter-Christian Müller-Graff (ed) *Europäisches Binnenmarkt- und Wirtschaftsordnungsrecht* (EnzEuR vol. 4, Nomos 2015) 1517, 1561. Do MS still decide about their budget and if yes, to what extent? If the SGP, the "European semester" and the means necessary to repay the debts taken to finance NGEU come to mind, doubts might arise.

Chapter 4 Political groups' positioning towards EU solidarity in the 2019 European Parliament Election

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1 Introduction

With every crisis the European Union (EU) has faced over the last decade, conflicts over what solidarity actually means and how it should be implemented has arisen within and between EU member countries.[1] These conflicts took place at several socio-political levels and between a variety of actors. Research so far has already covered an analysis of conflicts at the policy level.[2] Moreover, public opinion research has investigated such conflicts from the perspective of EU citizenry. We have learned that citizens are more supportive towards EU-level solidarity policies if they generally back their country's EU membership, are more politically left-leaning and are the so-called "winners of globalisation".[3] On top of that previous insights demonstrate that citizens differentiate between solidarity in different instances. Providing transnational solidarity in a financial crisis scenario is less popular compared to solidarity in times of natural or health disasters (like the COVID-19 pandemic).[4] The latter findings, however, again vary

1 Alexia Katsanidou and Ann-Kathrin Reinl, 'Public Support for the European Solidarity Deal in EU debtor states: the Case of Greece' (2022) 44(3) Journal of European Integration 327.

2 Waltraud Schelkle, 'Fiscal Integration in an Experimental Union: How Path-Breaking Was the EU's Response to the COVID-19 Pandemic?' (2021) 59(1) Journal of Common Market Studies 44; Silvana Târlea and others, 'Explaining Governmental Preferences on Economic and Monetary Union Reform' (2019) 20(1) European Union Politics 24; Zbigniew Truchlewski, Waltraud Schelkle and Joseph Ganderson, 'Buying Time for Democracies? European Union Emergency Politics in the Time of COVID-19' (2021) 44(5–6) West European Politics 1353.

3 Christian Lahusen and Maria Grasso, *Solidarity in Europe: Citizens' Responses in Times of* Crisis (Palgrave Macmillan 2018); Jürgen Gerhards and others, *European Solidarity in Times of Crisis. Insights from a Thirteen-Country Survey* (Routledge 2019).

4 Philipp Genschel and others, 'Solidarity and Trust in times of COVID-19' (2021) 11 RSC Policy Paper; Alexia Katsanidou, Ann-Kathrin Reinl and Christina Eder, 'Together We Stand? Transnational Solidarity in the EU in Times of Crises' (2022) 23(1) European Union Politics 66.

between EU member countries depending on the perceived culpability in a situation and one's status as a (potential) giver or receiver of solidarity.[5] Hence, both the policy and the demand-side of the democratic process are already well covered in contemporary research.

What is, however, missing from scientific investigations to date is an EU-wide comparative analysis of the political *supply side*. Actors that are particularly relevant here – as they carry out a variety of functions – are *political parties*. Parties are elected by citizens in many democracies, they act as a link between the government and the electorate, and they also form governments. Consequently, a comprehensive analysis of the policy positions of this key political actor is not only necessary but also long overdue.

Probably the best opportunity for an EU-wide comparative analysis of party positions on EU solidarity are the elections to the European Parliament (EP). These take place simultaneously in all EU countries every five years, which is not the case of other national or local elections. Political parties communicate their policy positions in the run-up to EP elections, which makes it easy to compare them. In this chapter, I focus on the 2019 EP elections and analyse data from the Euromanifesto project.[6] Thus, the analysis covers a time period between major EU crises: the 2019 elections took place after the peak of the debt and migration crises, but before the outbreak of the COVID-19 pandemic.

The chapter evaluates and compares the positioning of the EP political groups on different types of EU solidarity, analysing too the connection with their positioning on the political left-right and the pro-anti EU axis. It turns out that even almost ten years after the outbreak of the European Sovereign Debt Crisis, the issue of EU solidarity still receives little attention from political parties in their election manifestos. Yet, the subject is talked more about and in a more positive manner when it comes to welfare state policies at the EU level. Moreover, the positioning on EU solidarity – and here in particular on an EU-wide welfare state – is related to the

5 Jürgen Gerhards, Holger Lengfeld and Julia Häuberer, 'Do European Citizens Support the Idea of a European welfare State? Evidence from a Comparative Survey Conducted in Three EU member states' (2016) 31 International Sociology 677; Sofia Vasilopoulou and Liisa Talving, 'Poor Versus Rich Countries: A Gap in Public Attitudes Towards Fiscal Solidarity in the EU' (2020) 43 West European Politics 919.

6 Ann-Kathrin Reinl and Daniela Braun, 'European Election Studies 2019: Manifesto Project' (*GESIS Köln*, 2023) https://search.gesis.org/research_data/ZA7891 accessed 26 February 2024.

positioning of the political group on the so-called left-right dimension. The more left-wing the political group is, the greater the willingness to transfer more welfare competences to the EU level. In contrast, no such clear trend can be identified for all the other aspects of solidarity here examined nor for the dimension of EU integration.

The chapter is structured as follows. First, I elaborate the current state of research on political parties' positioning towards EU solidarity. Then, I introduce the analysed data, present the results and interpret them in terms of content. In the final section of the article, I summarise the most important findings.

2 Political parties' positions towards EU solidarity

2.1 The role of political parties in the EU

In democratic regimes, political parties are part of the so-called "supply side".[7] They represent the public in the political arena, structure politics, are the connecting link between voters and governments as well as between governments and parliaments.[8]

Political parties are also important actors in the EU's multilevel system.[9] There are three types of party formations to name here. While ***national parties*** differ in numbers and ideology from country to country, they all compete for votes in European Parliament elections. At the moment each country still operates on separate electoral lists,[10] which means that national

7 Herbert Kitschelt, 'Growth and Persistence of the Radical Right in Postindustrial Democracies: Advances and Challenges in Comparative Research' (2007) 30 West European Politics 1176; Susan C Stokes, 'Political Parties and Democracy' (1999) 2 Annual Review of Political Science 243.

8 Russell J Dalton, 'Political Parties and Political Representation: Party Supporters and Party Elites in Nine Nations' (1985) 18 Comparative Political Studies 267.

9 Simon Hix and Christopher Lord, *Political Parties in the European Union* (St. Martin's Press 1997); Björn Lindberg, Anne Rasmussen and Andreas Warntjen, 'Party Politics as Usual? The Role of Political Parties in EU Legislative Decision-making' (2008) 15 Journal of European Public Policy 1107.

10 Currently, the introduction of transnational party lists is under discussion, which would for the first time enable people to vote for the same candidates and alliances in all EU countries. For more information see: European Parliament, 'EU election reform: MEPs push for common rules and transnational lists' (European Parliament, 3 May 2022) https://www.europarl.europa.eu/news/en/headlines/eu-affairs/2022042

parties run in the elections to the European Parliament, and later form ***EP political groups***. Only a few transnational/pan-EU parties stood for the 2019 EP elections (for instance VOLT). The election programmes of the parties are coordinated by transnational associations – the ***transnational party federations***[11] – which otherwise have no political power.

This chapter focuses on the analysis of campaign manifestos for the 2019 EP elections, which are prepared by both national parties and the transnational party federations. For a more straightforward interpretation of the manifestos' content, I will, however, not go into detail for every single party – this would go beyond the scope of this chapter – but instead perform analyses on the level of EP political groups.

2.2 Political parties and EU solidarity

If we take a closer look at parties within the EU and their substantive positions towards the Union, it is noticeable that they generally seem to be more favourable to it than the EU electorate.[12] This also applies to EU solidarity preferences. Politicians tend to be more positive about cooperation and burden-sharing across EU borders than the general public.[13] On top of this, we know that politicians and parties are more likely to advocate for EU solidarity when they are placed on the political left and generally hold pro EU integration stances.[14]

2STO27706/eu-election-reform-meps-push-for-common-rules-and-transnational-lists accessed 1 March 2024.

11 Simon Hix and Bjørn Høyland, *The Political System of the European Union* (Bloomsbury Publishing 2022).

12 Liesbet Hooghe and Gary Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2009) 39 British Journal of Political Science 1.

13 Lina Basile, Rossella Borri and Luca Verzichelli, 'Crisis and the Complex Path of Burden-Sharing in the EU' in Maurizio Cotta and Pierangelo Isernia (eds), *The EU through Multiple Crises: Representation and Cohesion Dilemmas for a 'Sui Generis' Polity* (Routledge 2021); Francesco Visconti and Alessandro Pellegata, 'Representation in Hard Times: Party-voter Distance on Support for Social Europe in Italy' (2019) 14 Italian Political Science 188.

14 Ann-Kathrin Reinl and Heiko Giebler, 'Transnational Solidarity among Political Elites: What Determines Support for Financial Redistribution within the EU in Times of Crisis?' (2021) 13 European Political Science Review 371; Ann-Kathrin Reinl and Stefan Wallaschek, 'All for One, and One for All? Analysing Party Positions

What is lacking in previous research, however, is the simultaneous study of party positions on EU solidarity in all EU countries over a variety of dimensions of solidarity. Thus far, research has mostly focused on individual countries[15][16] or politicians' preferences;[17] party positions on a variety of forms of EU solidarity were rarely analysed.[18]

Building upon this, the following questions arise, which have remained unanswered to date, and which will be addressed in this chapter: *Are political parties generally in favour of EU-level solidarity policies? Do we find clear divides across EP political groups, depending on their positioning vis-à-vis EU integration as well as the political left-right scale?*

3 The 2019 EP elections

The 2019 European Parliament election occurred in the aftermath of the height of the financial crisis and the increased numbers of asylum seekers in 2015/16, but before the outbreak of the Covid-19 pandemic. The election was held simultaneously in all 28 EU countries from 23 to 26 May 2019. In this election, voters elect national parties as their representatives to the European Parliament. Transnational lists, as elaborated by the Conference on the Future of Europe, did not (yet) exist. The 2019 election was characterised by a comparatively high turnout (50.66 %), with the largest political groups losing seats and Green and Eurosceptic parties gaining ground in the European Parliament. This empowerment of the political fringes may also have translated into a more nuanced positioning on EU solidarity issues.

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on EU solidarity in Germany in Challenging Times' (2024) 59 Government and Opposition 73.

15 Raphaela Hobbach, *European Solidarity: an Analysis of Debates on Redistributive Policies in France and Germany* (Springer 2021)*;* Reinl and Wallaschek (n 14)*.;* Peter Thijssen and Pieter Verheyen, 'It's All About Solidarity Stupid! How Solidarity Frames Structure the Party Political Sphere' (2022) 52 British Journal of Political Science 128.

16 An exception to this is: Carlos Closa and Aleksandra Maatsch, 'In a Spirit of Solidarity? Justifying the European Financial Stability Facility (EFSF) in National Parliamentary Debates' (2014) 52 Journal of Common Market Studies 826.

17 Basile and others (n.13); Reinl and Giebler (n 14).

18 Exceptions are Reinl and Wallaschek (n 14) and Basile and others (n 13).

4 Data and analysis strategy

4.1 Data base

If one wants to analyse the positions of political parties and compare them one with the other, several data sources come into play. First, one could consult so-called expert surveys, where national experts situate political parties on numerous policy issues. The disadvantage of this measurement regarding EU solidarity is that the topic is either insufficiently covered (as in the case of the Chapel Hill Expert Survey[19]) or only available for selected countries (such as the Open Expert Survey 2021[20], for the case of Germany). Second, one could analyse the press releases of political parties or their social media communication. Both approaches again carry drawbacks. This time, it might be problematic that information is not available for all parties at the same time, and as a result, it is very difficult to compare positions. Third, electoral manifestos can be used to analyse party positions. Before every election in the EU multi-level system, most parties publish an internally coordinated election programme that sets out the political direction of a party. Since national and regional elections in the EU countries do not take place at the same time, or only rarely, and this could again jeopardise the comparability of party positions, the EP elections provide a good basis for comparison.

The Euromanifesto project codes data for all European elections, drawing on the election manifestos published by the parties themselves. In exceptional cases and if no manifestos are available, reference is made to interviews with the party leadership or party websites. Based on the published party manifestos, their contents are then coded according to an established coding scheme. This scheme has existed for many years and is only minimally adjusted for every new election and extended by new categories (current issues that have remained overlooked so far). In the case of the 2019 election, data material from a total of 221 parties was analysed;

19 For more information see Chapel Hill Expert Survey, 'Mission' (Chapel Hill Expert Survey) https://www.chesdata.eu accessed 1 March 2024.

20 Michael Jankowski and others, 'Die Positionen der Parteien zur Bundestagswahl 2021: Ergebnisse des Open Expert Surveys' (2022) 63 Politische Vierteljahresschrift 53, see further: https://oes21.de accessed 11 March 2024.

this was done by dedicated country coders who have as their mother tongue the language of the country they code.[21]

The coders first divided the manifesto texts into individual statements (so-called quasi-sentences) using an online coding routine. Next, they assigned codes to the content of the respective individual statements. In addition, they had to decide whether a statement had a positive or negative connotation and to which political level the statement refers to (national/EU/unspecified). Table 1 provides an example of how a statement (quasi-sentence) is coded.

Text (quasi-sentences)	*Policy domain*	*Coding category*	*Evaluation*	*Level of governance*
In the European Union, we will fight for clean air	Welfare and quality of life	Environmental Protection	positive	EU
guarantee the rights of employees	Social groups	Labour Groups	positive	EU
fight against corruption	Political system (in general)	Political Corruption	positive	EU
retain our cultural diversity	Fabric of society	Multiculturalism	positive	EU

Table 1: Example Euromanifesto coding[22]

For the empirical analyses of this chapter those coding categories dealing with types of EU-level solidarity are of relevance. To that end, only statements on the EU level of governance – in contrast to the national level or unspecified statements – are considered. The following subsection discusses the selected coding categories in more detail.

4.2 Coding categories

As already discussed thoroughly in the introduction to this edited volume, solidarity can take different forms. To reflect this multidimensionality as accurately as possible in my empirical analyses, I consider five coding

21 For more information see Reinl and Braun (n 6).

22 The table is taken from Daniela Braun, 'Text Analysis of Party Manifestos' in Neil Carter and others (eds), *The Routledge Handbook of Political Parties* (Routledge 2023), 442.

categories, which vary particularly in their concreteness of their political implementation.

Number	(Sub-) category	Coding text
1	Social Harmony	*Appeal for a national (European) effort and solidarity; need for society to see itself as united; appeal for public spiritedness; decrying anti-social attitudes in times of crisis; support for the public interest.*
2	Financing the EC/EU	*National contributions to finance the EC/EU or its policies are supported or accepted.*
3	EC/EU Structural Fund	*Need to maintain or to extend EC/EU funds for structurally underdeveloped areas.*
4	European Monetary Union/ European Currency-transnational solidarity	*Favourable mentions or support for financial help with the European Union Member State/Eurozone.*
5	Welfare State (WS) (all subcategories added up[23])	

Table 2: Coding categories[24]

The first type of solidarity captured through the Euromanifesto coding scheme *Social Harmony* refers to broader values of solidarity and does not imply concrete political measures. We know from previous research that citizens are more inclined to support such rather vague solidarity statements which do not necessarily come with (financial) burden-sharing.[25] The second category talks about *Financing the EC/EU* and its policies. This category clearly implies financial redistribution and political parties might therefore be more reluctant to positively refer to the issue in their electoral manifestos. Category three adds even more information to the political purpose of redistribution, namely the *EC/EU Structural Fund*. Next, statements dealing with EU-wide risk-sharing rather than redistribution are considered, too. The coding category *European Monetary Union/ European Currency-transnational solidarity* relates to policies adopted during the

23 A distinction is made between the following subcategories when coding the data: general, pensions, health care and nursing service, social housing, childcare, job programs. For more information see the study's codebook: Reinl and Braun (n 6). For the analyses in this chapter, the percentages of the individual subcategories were summed up into one overarching category.

24 The table only contains the texts describing the statements that are to be classified positively. Negative statements usually describe the opposite. For more information on all formulations, see the study's codebook.

25 Ann-Kathrin Reinl, 'Euroscepticism in Times of European Crises: The Role of Solidarity' in Marco Baldassari and others (eds), *Anti-Europeanism: Critical Perspectives towards the European Union* (Springer 2020); Ann-Kathrin Reinl, 'Transnational Solidarity Within the EU: Public Support for Risk-Sharing and Redistribution' (2022) 163 Social Indicators Research 1373.

time of the European Sovereign Debt Crisis when some EU member states received a financial bailout from fellow countries. Even though the issue might no longer be as relevant in 2019, Eurosceptic parties in particular could refer to it negatively in their electoral manifestos. The last category analysed within the scope of this chapter talks about an EU-level *Welfare State* (including all subcategories). This type of solidarity, instead of referring to risk-sharing between member countries, focuses on welfare directed towards EU citizenry.

4.3 Analysis strategy

It is assumed that the more concrete a policy and the financial burden it places on one's own state, the greater the opposition towards it.[26] Political parties might therefore either discuss these negatively loaded issues less in their party manifestos than other issues or, if they do so, in a rather negative tone. Moreover, parties that are more on the political left should be more in favour of EU solidarity than right-wing groups; the same applies to pro EU parties.[27]

The results of the analyses are not broken down by individual party; with 221 parties in the data set this would go beyond the scope of this contribution. Further, I am not interested in country differences, but want to take a closer look at political groups. For this purpose, the Euromanifesto project distinguishes between seven party groups, which were the political groups represented in the EP in 2019. In addition, all parties having seats in the EP but not belonging to any specific group are considered:[28]

1. EPP: Group of the European People's Party *(N=40)*
2. S&D: Progressive Alliance of Socialists and Democrats *(N=31)*
3. Greens/EFA: Greens/European Free Alliance *(N=27)*
4. RENEW: Renew Europe *(N=32)*
5. GUE/NGL: Group of the European United Left/Nordic Green Left *(N=19)*
6. ECR: European Conservatives and Reformist Group *(N=16)*

26 Ibid.
27 Reinl and Giebler (n 14); Reinl and Wallaschek (n 14).
28 The chapter's analysis sample covers a total of 183 political parties (excluding all those parties which did not make it to the parliament in 2019).

7. ID: Identity and democracy *(N=9)*
8. Non-attached *(N=9)*[29]

5 Results

5.1 EU solidarity positions by EP political groups

Figures 1 to 5 give a descriptive overview of the relevance of the topic of EU solidarity in the European election campaign 2019. The respective Y-axes range from 0 to 100 percent. The lower the value indicated, the less the topic was addressed by the parties in their respective election programmes, i.e. the less relevant it was during the election campaign.

In mentioning ideas on EU-wide social harmony – which is appealing to joint efforts and solidarity – in their electoral manifestos (Figure 1), the S&D as well as the Greens/EFA show the highest positive values. Consequently, the issue is more popular among mainstream left parties; the right-wing ID group even speaks negatively about it. On top of that, this is the second highest overall endorsement for EU solidarity compared to all the other categories considered here. This is in line with previous research showing that the vaguer the wording on EU solidarity, the higher its approval.[30]

29 For more information on the party groupings see the Euromanifesto project's codebook in Reinl and Braun (n 6).
30 Reinl (n 23).

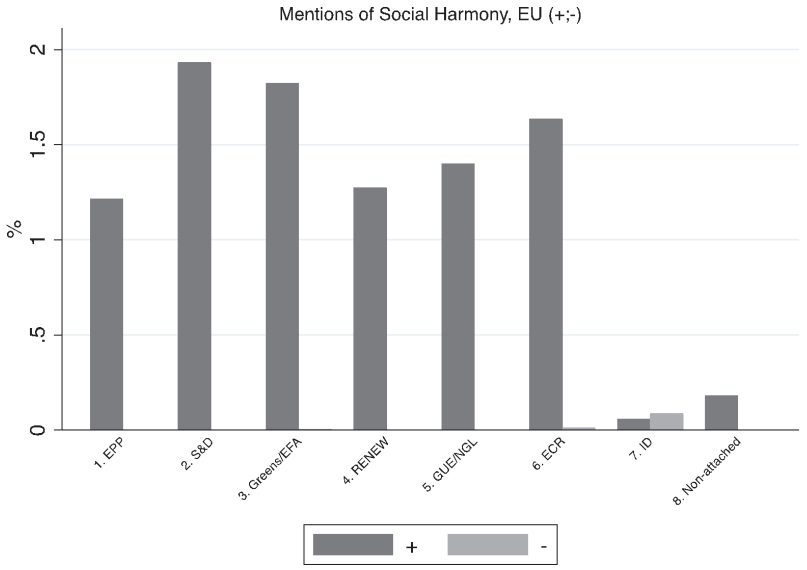

Figure 1: Mentions of social harmony

Figure 2 is devoted to statements about national contributions for financing the EU and its policies. It is not only evident that this topic was less of a theme in the programmes of the 2019 election but also that some political groups – more precisely ECR and ID – even talked negatively about it. Again, the most positive comments in this category were made by mainstream parties but the overall percentage shares are very low, and the mix of positive and negative statements is considerable. Consequently, we see a much stronger rejection of EU solidarity when financing the community is the issue compared to the solidarity category just discussed. More cohesion and cooperation are appreciated (Figure 1; *social harmony*) but not unconditionally supported by all political groups (Figure 2; *financing the EU*).

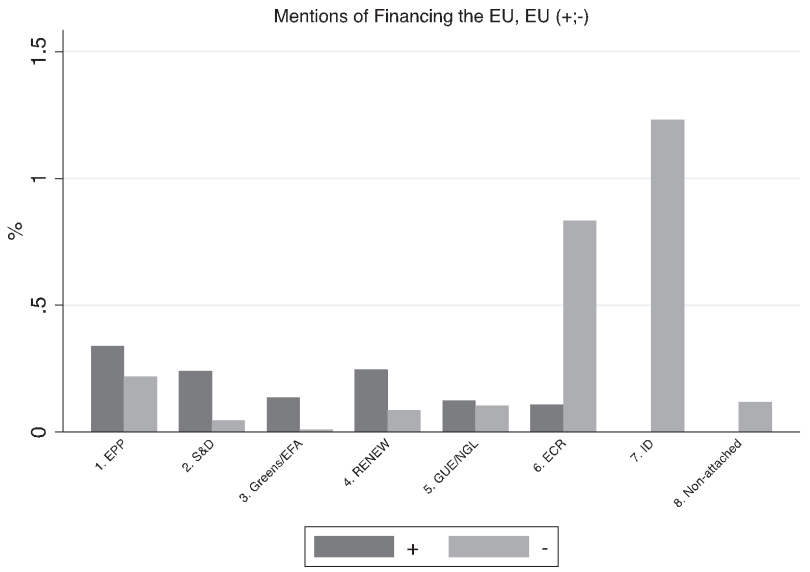

Figure 2: Mentions of financing the EU

Next, a much more concrete policy is considered, one that has been implemented in the EU since the 1970s: financial redistribution in favour of economically weaker EU regions. The issue of EU structural funds receives almost entirely positive mentions in the election programmes (Figure 3). Exceptions to this are brought forward by the Eurosceptic and right-wing camp consisting of the ECR and ID groups. The need to maintain or to extend EC/EU funds for structurally underdeveloped areas is most frequently mentioned by the EPP (slightly above 1 %) and the RENEW group (fewer than 1 % of their total manifestos). This policy also comes at a financial cost, but the good experience of the past, or the still ongoing need, nevertheless seems to evoke mostly positive feelings among the political groups. The fact that the topic was also discussed very little in the 2019 election campaign may be because it is a highly consolidated policy.

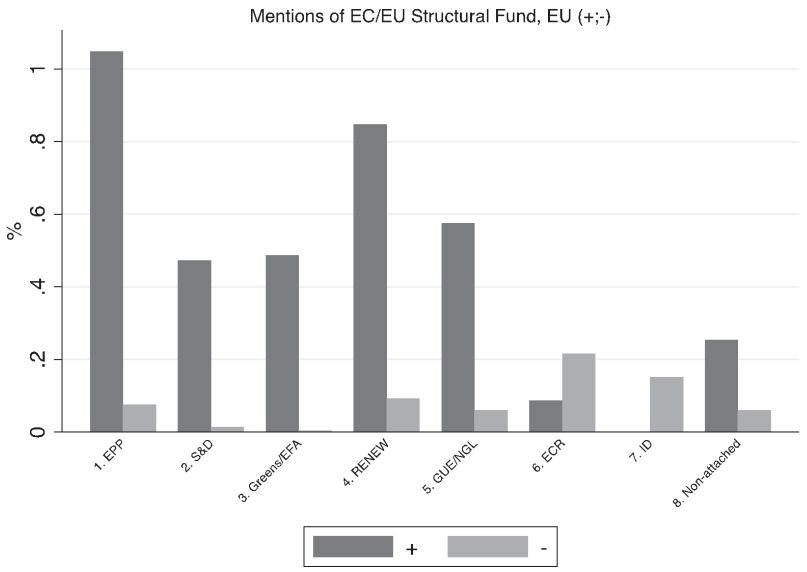

Figure 3: Mentions of EC/EU structural fund

Support for financial assistance among the European Union Member States/within the Eurozone seems to be a more polarising issue (Figure 4). Political groups on the extreme left (GUE/NGL) and the extreme right (ECR, ID) strongly oppose the issue, albeit for different reasons. At the top, it is also negatively referred to by "non-attached" parties. Once again, the RENEW group depicts a comparatively high share of positive only evaluations (about 0.8 %). The fact that this topic was not much of an issue in 2019, i.e. after the end of the financial crisis, can probably be attributed to the timing of the election.

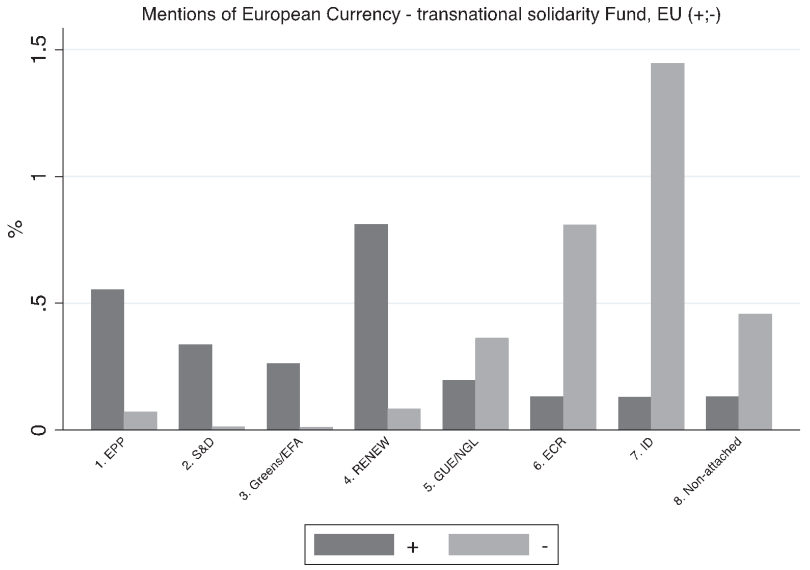

Figure 4: Mentions of European Currency – transnational solidarity fund

Finally, I consider the idea of extending or introducing social policies at the EU level. So far, the Union has hardly any competences in this field, but because of the upsurge of various EU-wide challenges over the last decade, an adaptation of competences in this direction is increasingly called for. Figure 5 provides information on the salience and positioning of EP political groups on the issue. We see that this topic, too, only played a minor role in the election manifestos. Probably this is also because until 2019 only few concrete social policies were discussed at the EU level. However, if we compare the percentages here with the other solidarity dimensions discussed earlier, emphasising EU welfare policies was definitely the most prominent solidarity issue during the 2019 EP election campaign. Moreover, in spite of the (presumably) additional costs coming along with the introduction of such policies, political groups tend to be rather positive towards such proposals (except for nationalist parties). The percentage share of positive statements on this category even exceeds 4 % for the S&D group. This raises hope for ideas currently under discussion of more intensive cooperation at the EU level in the future.

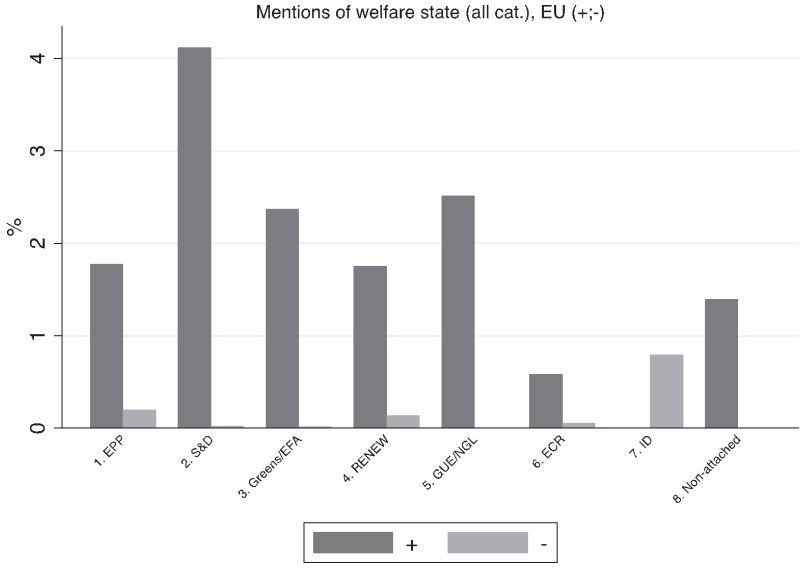

Figure 5: Mentions of welfare state

In summary, across all illustrations, interpretation suggests that solidarity did not have a high priority in the 2019 election campaign, at least not in the official election programmes. For all categories considered, the percentage share never exceeds 5 % and is often even below 1 %. In addition, depending on the type of EU solidarity under discussion, political groups are more or less in favour of it. This suggests that it is indeed important to look at the solidarity dimensions separately and to avoid drawing general conclusions across all of its forms and EP political groups.

Two possible interpretations suggest themselves to explain these patterns. *First*, the 2019 European elections took place in a period "between crises". In other words, the issue of solidarity was less relevant compared to the years of the financial crises and the long summer of migration, but also not as pronounced as during the pandemic. *Second,* the low relevance of EU solidarity in the 2019 election campaign could also be because most EP groups (apart from the Eurosceptics) have come to terms with the redistribution mechanisms already installed and the crisis aid programs. Some political consensus may have prevailed requiring no further discussion.

5.2 Preferences for EU solidarity and more general political dimensions

Next, the positioning of the EP groups towards EU solidarity dimensions is correlated with their stances on the so-called left-right and pro-anti-EU scales. After the coding of each election programme had been completed, the coders of the Euromanifesto project were asked via a survey about the general positioning of the parties on several scales. One such scale asked for the parties to be positioned between a left (1) and right (10) pole. A second presented an EU-scale ranging from (1) Anti-EU-integration to (10) Pro-EU-integration.[31] The EP political group classified as most left-wing is GUE/NGL (followed by the Greens), whereas the most right-wing group is ID (followed by ECR). On the EU-scale the group being on average the most Eurosceptic is ID (followed by ECR) and the most Europhile group is the Greens (followed by Renew). Consequently, ID – followed by ECR – represents one of the endpoints of both scales. As far as the other pole is concerned, the Greens are in each case very close to one of the extremes – or form it themselves – but differently accompanied by either the GUE/NGL group in terms of left-right positioning or RENEW concerning European integration.

The positioning of the political groups on some solidarity dimensions correlates strongly with their respective left-right positioning. Figure 6 shows a linear relationship between the two dimensions 1) EU welfare state; positive and 2) left-right position. The closer a party is positioned to the political left, the more likely it advocates EU-level welfare policies. Thus, we find by far the highest salience for the S&D group, followed by the GUE/NGL and the Greens. The liberal oriented RENEW group as well as the conservative EPP range in-between the left and the radical right (ECR & ID) pole.

31 The original scale ranges from (1) Pro-EU-Integration to (0) Anti-EU-Integration. I reversed the scale for matters of interpretation.

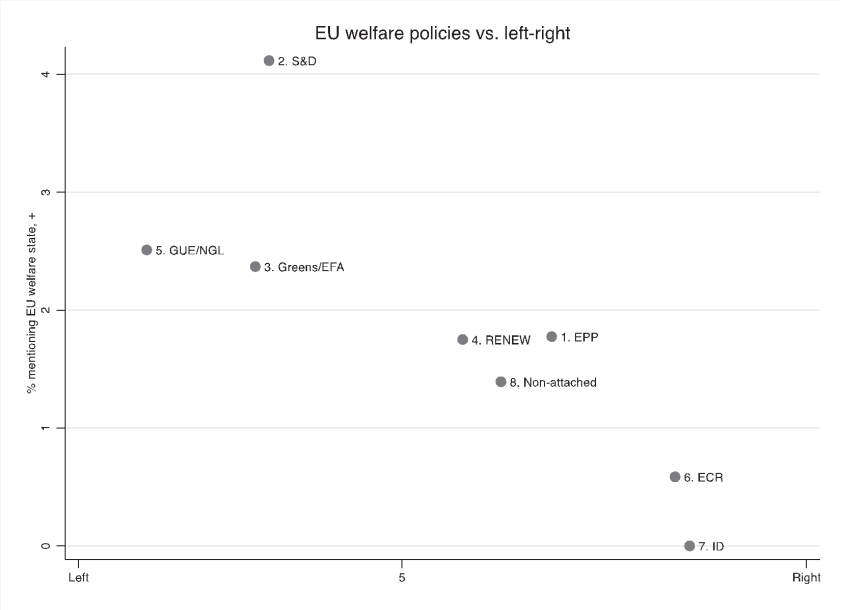

Figure 6: EU welfare policies vs. left-right position

For the remaining solidarity dimensions[32], however, no such clear connection with the political left-right orientation can be found. For the dimension "social harmony", the ECR group in particular speaks highly and positively about the issue, whereas EPP and RENEW articulate a more positive opinion on rather economically oriented questions (EU funds, financing the EU, EU monetary union). The latter finding may be explained by the fact that these two mainstream groups evaluate the EU and their country's membership from a more economic point of view. Although they favour stronger economic ties, they do not want to limit their national sovereignty (by transferring welfare policies to the EU level) and the concept of solidarity as such is not a guiding principle of their political agenda (social harmony).

Looking at the EU integration scale – i.e. the coder rating of whether a party is generally more in favour or against integration – the connection is not so clear cut. With regard to the dimension of "social harmony", the ECR group once again stands out, as it positions itself very positively and thus

32 The figures for the remaining dimensions are available upon request.

no explicit overall trend can be identified. Considering the more economic dimensions (EU funds, financing the EU, EU monetary union), EPP and Renew are again the groups that break a clear trend in these areas.

And even if the trend is more obvious for the welfare dimension (compared to all other forms), it still has its limitations (see Figure 7). In general, it turns out that the more pro-EU the EP political group, the more likely it favours increasing social policies at the EU level. However, the party groups breaking a clear pattern here are (1) the left-wing group GUE/NGL, which despite a not particularly strong pro-EU stance is in favour of more social policies at this level, (2) the very strongly pro-welfare group S&D, and (3) the less enthusiastic support by RENEW.

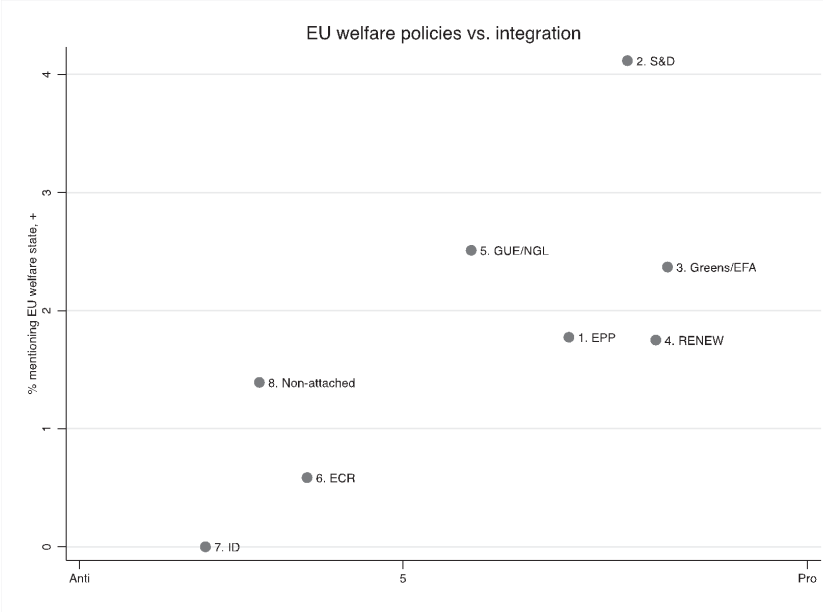

Figure 7: EU welfare policies vs. EU integration position

In conclusion, when looking at support for EU solidarity policies, neither of the two general political scales is universally appropriate to justify the patterns found. Rather, it depends on what kind of solidarity is being looked at. If it is more economic, neither of the two explanations work. This may be because such economic issues are just not perceived as solidarity by the parties themselves, but rather as a necessity of living together in a

globalised world. With regard to welfare-state policies, i.e. those policies that clearly go in the direction of permanent redistribution, the left-right positioning appears to be meaningful. As observed at the level of nation-states, those parties that are politically on the left tend to be more in favour of a joint welfare state agenda.[33]

6 Conclusion

For the first time, this chapter has looked at the positioning of political parties on different forms of EU solidarity from an EU-wide comparative perspective. For this purpose, I used and analysed data from the Euromanifesto project on the 2019 European elections. The results show that EU solidarity played only a minor role in the manifestos of the parties in this EP election. The percentage of the topic covered in the manifestos was very low on average. This does not mean, however, that parties are necessarily negative towards these forms of EU solidarity, but only that the topic was little discussed in the published election manifestos. It remains to be seen whether this was different for other communication platforms of the parties, such as social media or press releases; future studies should address this. What we also see is that the topic of EU solidarity is generally discussed positively by most parties (except for right-wing, Eurosceptic parties) and that the evaluation is even more affirmative depending on the policy field. We see consistently positive values for "appeals to (national) efforts and solidarity" and the "welfare state" category, whereas financing the EU and the joint currency face more antipathy. Moreover, the issue of financial support for EU crisis countries is no longer prominent for the parties following the end of the euro crisis. Instead, there is more talk about welfare policies at EU level. The latter is an interesting finding in light of the pandemic that broke out in 2020 and the political developments that followed. It will be interesting to study what changed in the 2024 election. As fringe parties gain more and more votes – in national and EP elections – this might also signal an even greater polarisation between the nationalist right-wing and the pro-EU left-wing parties on the issue of EU solidarity.

33 Jæger, Mads Meier, 'Does Left–Right Orientation Have a Causal Effect on Support for Redistribution? Causal Analysis with Cross-sectional Data Using Instrumental Variables' (2008) 20 International Journal of Public Opinion Research 363.

Chapter 5 Solidarity and the rise of conditionality in EU law

Antonia Baraggia (University of Milano)

1. Introduction

Liberal democracies seem increasingly fragile and precarious. The European Union, the most advanced system of supranational integration, is grappling with challenges that will define its very development as a multilevel constitutional system. In such a context, it has never been more urgent to develop governance tools to deal with the inherent and opposing tensions between different demands and identities in composite systems.[1]

Indeed, federal, and quasi-federal arrangements are characterized by the ongoing tension between conflicting but complementary principles: the autonomy of the States (and in the case of the EU, even their sovereignty), on the one hand, and a certain degree of shared rules, common values and solidarity, on the other.

Such a balance may not be clearly defined by constitutional norms, being the constitutional provisions often open to different interpretations in light of economic, societal, and power-related circumstances.

If we look at the federal arrangements through these lenses, we see that such tension has been recurrently addressed not only through the classical legal tools (such as the legislative division of competencies, supremacy clauses, etc) but also through the use of instruments derived from the state control of resources. This is what legal philosophers, starting from Spinoza, Michael Mann,[2] and Galbraith,[3] called *potentia* (or infrastructural power), which sits in opposition to *potestas*, the exercise of power through authority and the ability to produce regulatory acts.

Conditionality has become the most emblematic expression of this, where the 'central' level – in areas where it does not have legislative power

1 Ran Hirschl, 'Opting Out of Global Constitutionalism' (2018) 12 LEHR 1; Joseph Halevi Horowitz Weiler, 'Epilogue: Living in a Glass House. Europe, Democracy and the Rule of Law' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016).

2 Michael Mann, *The Sources of Social Power: Globalizations, 1945-2011* (CUP 2012).

3 John Kenneth Galbraith, *The anatomy of power* (Houghton Mifflin Harcour 1983)

– uses financial leverage to condition the rule-making choices of decentralized governance levels. Conditionality provides a new use of public power not involving the traditional issuing of laws or the exercise of pure coercion but obedience through the 'power of the purse'. In the same vein as other similar tools that have emerged in recent decades, such as nudging and soft law, conditionality takes a step away from the classic 'command and control' paradigm, and the growing recourse to such tools foregrounds the importance of finding governance alternatives for a world in which state sovereignty has metamorphosed and international and supranational actors have growing influence in the constitutional spheres of States.

The use of this mechanism is undoubtedly not new in the regulatory panorama, especially as a contractual mechanism for relationships between a central power and federated entities, but it does raise a series of constitutional issues – both about the very nature of the tool and the impact it has on the exercise of power - that have as yet not been thoroughly theorized.

This topic has been endlessly debated in American doctrine and case law because of the federal government's use of conditionality through spending clauses. Yet, experts remain divided as to the legitimacy and limits that should be placed on the executive's power to impose conditions on federal funding for States. Such problems are mirrored in Europe. Here, the European Union's attempts to achieve a broad array of goals have seen multiple manifestations of conditionality, from the political conditionality adopted during the process to join the European Union[4] to macroeconomic conditionality[5] and the forms adopted in multiple European funding programs,[6] to the use of conditionality in the especially delicate rule of law crisis.[7]

It is impossible here to delve into descriptions of all the conditionality regimes adopted in the European Union. The key point is that over time conditionality has seen both a quantitative and qualitative increase.

4 Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International 2008); Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (CUP 2005).

5 Ioannis A. Tassopoulos, 'EU strict conditionality from the perspective of the separation of powers' in Antonia Baraggia, Cristina Fasone and Luca P. Vanoni (eds), *New Challenges to the Separation of Powers* (Elgar Publishing 2020).

6 Viorica Viță, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' (2017) EUI Working Papers LAW 16/2017.

7 Justyna Lacny, 'Suspension of EU Funds Paid to Member States Breaching the Rule of Law: Is the Commission's Proposal Legal?' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021).

This pervasive spread and transformation of conditionality in the EU's legal framework has not been matched by equally robust and shared theoretical exploration as to the nature of this tool and its impact on relations between the Union and Member States.

Usually, conditionality has been negatively assessed as an instrument through which the central power impinges on the prerogative of the States. No one can deny that the use of conditionality impacts on the vertical dimension of the separation of power, and therefore on the principle of sovereignty, the distribution of competencies and, more generally, on the relations between the different levels of government.

However, at a deeper look, conditionality, far from being the pernicious tool that limits the State margin of maneuver, can be an instrument needed to strike a fair balance between the two competing strains of federalism: autonomy of the States and solidarity.

The goal of this chapter is to compare the use of conditionality in the United States and Europe to highlight the constitutional impact of conditionality and to show the relation between conditionality and solidarity, which is often overlooked and even not yet conceptualized by the legal literature. Of course, the EU cannot be considered a classical federal state, and we cannot enter into the long-standing debate about the nature of the EU here. However, the EU does face issues with a "federal-like" dimension for which traditional law enforcement mechanisms are not always adequate and sometimes not even available. In this sense, the use of conditionality in the EU can be compared to the experience of the prototypical federal state: the United States.

2. The federal solidarity

Reading the history of American federalism, one can identify different 'stages' of realization of the federal idea and the delicate balance between states and federation, between the principle of state autonomy and solidarity.

One of the most common classifications, which looks at intergovernmental relations and the mutual interactions between different levels of government, has distinguished two phases of American federalism: dual federalism and cooperative federalism. These are historical phases determined by contingent economic, social, political and institutional factors that are,

however, capable of affecting and changing the power relations between the center and the periphery.[8]

The determinants that signal the emergence of one model over another are many and range from the political context, polarized or consensual, to the economic context where, for example, crises or shocks occur, to the social context and the more general datum inherent in the nature of intergovernmental relations. However, the diachronic analysis of American federalism also allows us to identify 'invariants' in these transitional processes.

One of these invariant factors concerns the interpretation and implementation of the federal spending power clause. Indeed, as has been stated, "the pervasive influence of the federal government in modern American life is attributable in significant part to Congress's manipulation of federal funds"[9].

The transition from the dual to the cooperative model was marked, as is well known, by the profound transformations during the early twentieth century and sealed by the New Deal, which represented the beginning of a new constitutional cycle for the American legal system and state-federal relations. Cooperative federalism represented the dominant framework for intergovernmental relations, responding to the increasingly strong interrelationship between different levels of government in complex systems and balancing the competing principles of any federal arrangement: autonomy and solidarity. Despite solidarity is not commonly referred to in the US constitutional language, the US federalism "encompasses solidarity values",[10] and it plays a constitutive role in the federal structure. This also means that "when conflicts arise, autonomy values do not necessary trump solidarity values, and prioritizing solidarity values is not anathema" to the US constitutional system.

The study of federal conditionality offers a perfect perspective to assess the relationship between autonomy and solidarity over the evolution of the US federal system.

8 Daniel Elazar, 'Cooperative Federalism' in Daphne A. Kenyon and John Kincaid (eds), *Competition among States and Local Governments: Efficiency and Equity in American Federalism* (The Urban Institute Press 1992), 73.

9 David E. Engdahl, 'The Spending Power' (1994) 44 Duke LJ 1, 2.

10 Erin F: Delaney, Ruth Mason, 'Solidarity Federalism', (2022) Notre Dame Law Review, issue 2, 98, 623.

2.1. Cooperative federalism and federal conditionality

The constitutional revolution brought about by the New Deal marked the transition from the liberal state form to the social democratic one that would dominate the American order throughout the 20th century.[11]

This transformation takes place largely through a reinterpretation of both the Interstate Commerce Clause and federal spending power: a reinterpretation, endorsed by the Supreme Court, that will lead to the expansion of central state intervention into so many areas of economic and social significance and thus penetrate the sphere of regulation once left to the states. In the seminal article 'The Passing of Dual Federalism', Corwin identifies the matrix of this evolution, with the formal constitution unchanged, precisely in the interpretive activity of the Supreme Court, which "changed attitude [...] toward certain postulates or axioms of constitutional interpretation closely touching the federal system, and which in their totality comprised what (the Author means) by Dual Federalism".[12]

In this context, as has been observed, 'federal law and states' rights have composed, intertwining, a dynamic body, the parts of which have operated globally in 'cooperation': "a cooperation [...] that has been such mainly because the essential choices of the 'interventionist' model have been made at the center and the member states have then adopted their regulatory systems and administrative practices accordingly".[13]

This model of federalism is well described in a relevant May 24, 1937 ruling concerning the constitutionality of the *Social Security Act*: "The United States and the state of Alabama are not alien governments. They co-exist within the same territory. Un-employment is their common concern. Together the two statutes before us [the Act of Congress and the Alabama Act] embody a cooperative legislative effort by state and national governments, for carrying out a public purpose common to both, which neither could

11 Jane Perry Clark, *The Rise of a New Federalism: Federal-State Cooperation in the United States* (Columbia University Press 1938), 7.

12 Edward Corwin, 'The Passing of Dual Federalism' (1950) 36 Va LR 1, 4. The characteristics of *dual federalism* identified ibid by Corwin are: '1. The national government is one of enumerated powers only; 2. Also the purposes which it may constitutionally promote are few; 3. Within their respective spheres the two centers of government are 'sovereign' and hence 'equal'; 4. The relation of the two centers with each other is one of tension rather than collaboration'.

13 Giovanni Bognetti, *Lo spirito del costituzionalismo americano* (Giappichelli 1998), 206.

fully achieve without the cooperation of the other. The Constitution does not prohibit such cooperation".[14]

This phase of American federalism is marked by several defining constitutional aspects, including, for example, the use of *preemption*, i.e., the occupation by federal regulation of a certain matter previously left to the states and the subsequent recession of state regulation by the Supremacy Clause.[15]

Also institutionally significant is the creation of the U.S. Advisory Commission on Intergovernmental Relations [16] in 1959 and the passage of a series of legislative acts aimed at creating mechanisms and forms of cooperation such as the *Intergovernmental Cooperation Act* (1968), the *Intergovernmental Personnel Act* (1970), the *General Revenue Sharing* (1972).[17]

But the defining feature of the transformation can be identified in the expansion of precisely the Spending Power Clause and the increasing use of grants-in-aid. As Kincaid notes, 'among other things, that extraordinary period was marked by (1) dramatic expansions of federal government power legitimized by the U.S. Supreme Court, (2) major increases in federal aid to states and localities made possible by economic growth and federal receipts that delivered abundant resources to Democratic majorities in the Congress, and (3) a proliferation of federal grants-in-aid responsive to various alliances of elected officials, policy professionals, interest groups, and civic activists'.[18]

The use of grants-in-aid represents the tool that most characterizes the shift from the dual to the cooperative model: such a mechanism, in fact, almost naturally implies co-participation between the two levels of government in the implementation of certain policies. This co-partnership

14 *Carmichael v. Southern Coal & Coke Co.* 301 U.S. 495, 526 (1937). See, in particular, Eduard A. Lopez, 'Constitutional Background to the Social Security Act of 1935' (1987) 50 EPS 5.

15 On preemption 'as a unifying function', as a method 'by which prior federal intervention precludes state legislation instituting or increasing taxes, especially those most likely to affect the movement of persons or goods, through the so-called Commerce Clause', see Giuseppe Franco Ferrari, 'Il federalismo fiscale nella prospettiva comparatistica', in *Il federalismo fiscale alla prova dei decreti delegati* (Giuffrè 2012), 136.

16 See Timothy Conlan, 'From Cooperative to Opportunistic Federalism: Reflections on the Half-Century Anniversary of the Commission on Intergovernmental Relations' (2006) 66 PAR 663.

17 See John Kincaid, 'From Cooperative to Coercive Federalism' (1990) 509 Annals AAPSS 139, 140.

18 ibid

scheme is based on the central state providing the states with substantial funding to pursue certain purposes of general interest, and the states, in turn, agree to use these allocations to pursue the purposes underlying the federal 'gift'. Rather, it seems clear how the grants-in-aid mechanism urges, by creating an intertwining of federal influence and state policy choices, the establishment of cooperative intergovernmental relationships between the two levels of government.

The extent of cooperation is, however, variable depending on the presence of more or less stringent conditions for the use of funds and depending on the amount of funding itself.

Given that, in fact, the federal offer has proven difficult to refuse, theoretically, as the Supreme Court has also stated, it is constitutionally legitimate only to the extent that it leaves a margin of choice to the states regarding its acceptance. That is, the offer must not be of such magnitude that it is not practically refusable: this would result in an exercise of coercive power that would go beyond the framework of the constitutionally legitimate.

The nature of the conditions in the grant-in-aid offer also affects the cooperative nature of the instrument: the cooperative input of member states will be all the more intense the less stringent the conditions set for the admissibility of grants-in-aid.

Conversely, a highly conditional mechanism would reduce the margins of cooperation and co-participation between the Federation and the states in defining the measures to be implemented to the point of transforming the role of the states into that of mere executors of decisions, heterodirected through the use of leverage, taken by the center.

The contours of this faint distinction have been defined by Supreme Court jurisprudence, which has ruled on several occasions and consistently reaffirmed the legitimacy of such a practice with respect to the sovereignty of states. A look at this jurisprudence allows us to grasp sharply the issues at stake.

2.2. The Supreme Court jurisprudence on grants-in-aid

The transformation noted in the previous section was marked by the work of the Supreme Court, which intervened on several occasions regarding the

legality of grant-in-aid mechanisms, up to the landmark case represented by *South Dakota v. Dole*.[19]

Once the Federation's taxing power was recognized, which was further strengthened in 1913 with the introduction of the Sixteenth Amendment, and in the face of an increasing number of federal funding programs benefiting the states, Congress began to impose precise conditions, on the one hand, to ensure the efficient management of federal resources and, on the other, to ensure that the funds were used to pursue the primary purposes for which the Federation had intended them.

This expansion of the powers of the Federation into areas of policy under state jurisdiction – which was further accentuated during the New Deal [20] – did not, however, leave the states indifferent: in 1923, the Supreme Court was hearing the case *Massachusetts v. Mellon*[21], which concerned the constitutionality of federal funding for states that had agreed to establish programs designed to protect the health and welfare of infants and mothers, provided for in the *Sheppard-Towner Act* of 1921. Although the Supreme Court dismissed the case for lack of jurisdiction, it pointed to an important element in judging the legality of federal funding concerning the coercive or noncoercive nature of the federal program: "the powers of the State are not invaded, since the statute imposes no obligation, but simply extends an option which the State is free to accept or reject".[22]

Another interesting test for the Court is the case of *United States v. Butler* [23], in light of which the Supreme Court was seized by state appeals seeking to ascertain the constitutionality of the *Agricultural Adjustment Act* of 1933, which had introduced a tax on agricultural products, the proceeds of which would be redistributed to farmers who undertook to reduce their acreage under cultivation. The law applied only to certain crops, which the Secretary of Agriculture would identify. The Court, hearing an appeal by some cotton farmers who were particularly affected by the law, ruled by a majority that it was unconstitutional because it regulated a matter – agricultural production – reserved to the states, violating the Tenth Amendment.

This case, in addition to defining the boundaries of federal power over the states, provided an opportunity for the Court to rule on the extent

19 483 U.S. 203 (1987).
20 Douglas M. Spencer, 'Sanctuary Cities and the Power of the Purse: An Executive Dole Test' (2021) 106 Iowa LR 1209.
21 262 U.S. 447, 479 (1923).
22 ibid
23 297 U.S. 1 (1936).

of Congress's spending power under Article 1, §8: it can be legitimately exercised even outside the enumerated powers of Congress itself, as long as there is an objective to promote the 'general welfare of the United States'.

In the case at hand, the Court did not go into determining the link between the purpose of *general welfare* and the measures of the *Agricultural Adjustment Act*, leaving open the interpretive question of Article 1, §8; however, the act was declared unconstitutional because the taxation in question appeared to be a means to an unconstitutional end, in that Congress used the spending power as a mechanism for controlling and imposing activities that were within the jurisdiction of the states. Thus, stated Chief Justice Roberts: 'The act invades the reserved rights of the States. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government'.[24]

Butler casts the coordinates of U.S. jurisprudence on the subject of the Spending Clause and grants-in-aid programs: a jurisprudence that has been enriched and refined over time in search of a doctrine that can clarify the constitutional limits of the federal power to place conditionalities on the states in areas of their competence and determine when, from an attempt to direct states' policies according to a federal purpose in compliance with the federal arrangements, conditionality does not turn into an undue exercise of federal coercion.[25]

A year after *Butler*, the Supreme Court was again called upon to confront the constitutionality of the practice of grants-in-aid in *Steward Machine Company v. Davis*[26], which was decided in May 1937. It does not seem superfluous to point out that this case followed a few months after the *West Coast Hotel v. Parrish* ruling, which had affirmed the constitutionality of the minimum wage introduced by the State of Washington.

In *Steward*, the Court declares the constitutionality of the *Social Security Act,* which had provided for the authorization of administrative subsidies to help states meet the overhead costs of their unemployment benefit programs.

To qualify a state for such aid, its program had to meet federally prescribed criteria designed to ensure that the program would provide sufficient and effective financial relief. The program also provided for the impo-

24 ibid 68.

25 In *South Dakota v. Dole*, cited above, 211, the Court recognized that in some cases 'financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion'.

26 301 U.S. 548 (1937).

sition of a tax on employers with eight or more employees, but allowed employers to claim a 90 percent deduction of their contribution to a state unemployment compensation system if the state program met the eligibility criteria for federal grants.

In the *Steward* case, an Alabama company had paid the tax required under the law before filing a refund claim with the *Commissioner of Internal Revenue*, arguing that it could recover the payment because the law establishing it was unconstitutional. The plaintiff argued that the tax was not an excise tax, was not uniform throughout the United States, and its exceptions were numerous and arbitrary, in violation of the Fifth Amendment. In addition, the company claimed that the purpose of the law was to regulate a specific subject matter, so that it constituted an unlawful invasion of the powers reserved to the states, in part because it was ultimately a scheme of a coercive nature that left the states no choice as to whether or not to adhere to the scheme itself.

In a decision adopted by a five-to-four vote, the Court held that the tax instituted by the *Social Security Act* was a legitimate exercise of a constitutional power vested in Congress.

Writing for the majority, Justice Benjamin Cardozo first noted that the tax was not an exercise of coercive power against the states in violation of the Tenth Amendment. The Supreme Court rejected the argument that the *Social Security Act* provision involved, in effect, an unconstitutional attempt to compel states to adopt unemployment compensation legislation passed by the federal government. However, the Court did not simply declare the constitutionality of the provision in question; it elaborated a true *coercion test* that would be specified by case law to come.

Indeed, the Court holds that Congress is generally required to avoid using the *spending power* to "destroy[] or impair[] the autonomy of the states".[27] However, it recognizes that, in the present case, the state had the opportunity to refrain from joining the federal reimbursement program and, therefore, it was not a coercive program.

From the perspective of the limits of federal *spending power*, the Court then pointed out that, given the high unemployment rate and difficult economic times, the tax under appeal pursued the goal of '*general welfare*' at both the state and federal levels.[28]

27 *Steward Machine Co. v. Davis,* cited above, 586.

28 ibid 586–587: 'The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was

2.3. The Unconstitutional Conditions Doctrine: the Dole Test

South Dakota v. Dole is the leading case for conditional spending power and the limitations thereon; it has even been called 'the foundation of the modern conditional spending doctrine'.[29]

In 1984, Congress approved a law[30] that delegated the Secretary of Transportation to cut 5 per cent of federal Highway funds – to improve the safety of the interstate road system – for States that kept their drinking age under 21. South Dakota appealed this provision to the Supreme Court, arguing that cutting funds because of the condition imposed (legal drinking age) was an *ultra vires* exercise of federal spending power. Moreover, the provision violated the Twenty-First Amendment, which prevents Congress from directly regulating the legal drinking age.

The Court's assessment of the State's grievances resulted in the creation of what became known as the Dole test, setting out four fundamental elements to determine the unconstitutionality of conditions placed on federal funding. First, the Court drew on existing case law and confirmed the need for federal funding to be connected to the 'general welfare' goal. In its ruling, the Court also noted the 'courts should defer substantially to the judgment of Congress'.[31]

Secondly, the Court identified the nature of the conditions, stating they had to be clear and unambiguous so that States can make conscious choices, with full awareness of the consequences of their participation or non-participation in the federal aid program.

The third element is already evident in earlier case law, but it had never been fully fleshed out:[32] the correlation between the conditions imposed and the federal interest in specific national projects or programs. Should such a correlation not be discernible, the conditions imposed are deemed illegitimate.

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need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that, in a crisis so extreme, the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare'.

29 Daniel S. Cohen, 'A Gun to Whose Head? Federalism, Localism, and the Spending Clause' (2019) 123 Dick. LR 421, 436.

30 23 U.S.C. §158.

31 *South Dakota v. Dole*.

32 *Ivanhoe Irrigation Dist. v. McCracken* 357 U.S. 275, 295 (1958): 'The Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof'.

Finally, the conditions cannot breach the articles of the Constitutions, especially the federal principles of the Tenth Amendment. In such cases, the financial incentive offered by Congress could not be so demanding that it passes the point where pressure becomes coercion. Such programs go too far and become unconstitutional.

The Court assessed the constitutionality of the provision of law in the light of these four conditions and ultimately rejected South Dakota's grievances as the Highway funds were expressly to pursue a general interest: reduce the number of cases of driving under the influence, which was a goal that was hindered by the various drinking age limits in States. The conditions were clear and not ambiguous. The possibility of a breach of other constitutional provisions was also not proven in the Court's view as there was no violation of the Twenty-First Amendment or the Tenth Amendment because, in the pursuit of 'general welfare', Congress can use its financial leverage to regulate areas that go beyond those listed in Article 1 of the Constitution.

Finally, in this specific case, the imposition did not amount to coercion. "Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory, but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in § 158 is a valid use of the spending power".[33]

If South Dakota refused to change its legal drinking age, it would only lose 5 per cent of the allocated funds. This is a fairly modest percentage that, in the Court's view, cannot be said to be proper coercion. "[E]very rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now, the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems".[34]

The Court did provide a scheme for dealing with unconstitutional conditions and federal spending power, partly through its summary of earlier

33 *South Dakota v. Dole.*
34 *Steward Machine Co. v. Davis.*

case law, but some points do remain unclear such that scholars have even described the Dole rule as 'vacuous and illogical'.

2.4. Conditionality in the Affordable Care Act

The question of unconstitutional conditions has become entwined with one of the prickliest issues in American constitutional law from the last decade: the healthcare reform sought by President Obama (*Affordable Care Act* – ACA –, often called *Obamacare*). One of the provisions was that all State Medicaid programs should be extended to the entire population under 65 whose household income was below 133 per cent of the federal poverty level.

Created in 1965, Medicaid is a joint federal and State aid program designed to help cover healthcare costs for millions of poor Americans, especially minors from poor families, low-income pregnant women and people with disabilities. It is not a general program, but a program that focuses on specific categories of people meeting set requirements. Right from its earliest days, federal law set the minimum level of coverage and allowed the States a degree of flexibility in deciding whether to extend the healthcare aid to other categories of people on the poverty line. By 1982, all States had chosen to be part of Medicaid. Federal funding received from Medicaid thus became a significant part of State budgets, now accounting for over 10 per cent of income in most States.

The Affordable Care Act sought to disrupt this balance by asking all States to extend Medicaid to all citizens under a specific age limit and below a poverty threshold.

Owing to the ACA, the federal government agreed to cover 100 per cent of the costs of extending Medicaid in the initial years (up to 2016) and then 90 per cent thereafter.

Despite the benefits of the offer, once the ACA entered into effect, 26 States appealed to the Supreme Court, claiming the expansion of the Medicaid program was an illegitimate form of coercion and not an invitation or legitimate form of pressure as it did not allow the States to reject it. Indeed, should the States refuse to extend the Medicaid program, they would be punished by having all federal funding linked to the program withdrawn.

In the ACA ruling, the Supreme Court decided, for the first time in its history, that a federal program was illegitimately coercive and unconstitutional.[35] The majority opinion, supported by seven Court judges (in addition to Roberts and the conservative judges, also Breyer and Kagan supported the ruling), provides an interesting depiction of the status quo of the theoretical debate on the nature of federal conditionality and the still unresolved problems this poses.[36]

More specifically, the Court stressed the contractual nature of Congress exercising its spending power, the legitimacy of which 'thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'.[37] Compliance with this limitation is essential in ensuring the use of federal spending power does not undermine the status of the States as independent sovereigns in the federal system, based 'on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one'.[38]

As Justice Roberts continued, this is why "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions. [...] Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer".[39]

In the case in hand, the use of federal spending power is not merely a means to encourage States to extend Medicaid in accordance with federal preferences but a 'gun to the head'[40] of the States. Failure by a State to comply with the federal request to expand healthcare coverage would not result in only losing a relatively small portion of current funding but the entire amount. Indeed, Medicaid spending accounts for over 20 per cent of the total average budget of a State, with federal funds covering 50 to 83 per cent of those costs. This is a vastly different situation than when the Court dealt with Dole, where the threat was less than 1 per cent of the budget in the South Dakota case, and so ensured the State was actually in a position to reject the conditions imposed by Congress. This is not comparable with

35 *Nat'l Fed'n of Indep. Bus. v. Sebelius* 567 U.S. 519 (2012).
36 Laurence H. Tribe and Joshua Matz, *Uncertain Justice: The Roberts Court and the Constitution* (Henry Holt and Co. 2014), 256.
37 567 U.S. 519 (2012).
38 ibid
39 ibid
40 ibid

the loss of over 10 per cent of a State's total budget, an economic tool that leaves States with no real option other than to agree to such Medicaid.

While the ruling in question undoubtedly makes the boundaries and limits of spending clauses and federal conditionality clearer, it still leaves a few questions open,[41] such as determining in practice what constitutes *ultra vires* action by Congress. The Court failed to set a percentage of a State's budget as a threshold for determining whether a condition is coercive or not. It did not even deal with the possible asymmetries that might arise between a State that would be heavily hit by the federal 'threat' of withdrawing funding and another State that was impacted less by the program.

What appears quite clear in the Obamacare saga is that in the equilibrium between federal solidarity and states' autonomy, the pendulum has shifted in favor of the latter.

3. Conditionality in Europe: Pathways of a Disputed Tool

An examination of conditionality in the history of European integration shows it has been used in multiple ways, with the very nature of conditionality constantly and continually developing.

Europe is often analyzed through a comparative lens, using the United States as a reference point. This work certainly does not shy away from such an approach, but the goal is shifted away from specifically seeking the similarities and differences in how conditionality is adopted in both systems, especially as such information is relatively lacking in utility given the clear distinctions between the two cases. Instead, this investigation focuses on providing – on the basis of a comparative examination – the theoretical elements that can be used to determine the legitimacy and constitutionality of the use of conditionality in Europe.

Despite the inherent differences in usage and even in the reference constitutional frameworks, it is possible to identify certain elements found jointly in Europe and America.

Conditionality seems to sit somewhere between legislation and soft power, occupying a grey area in the exercise of power, in the shadow of that particular use of resources known as *potentia*. To borrow the words of

41 Mitchell N. Berman, 'Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions' (2013) 91 Tex LR 1283.

one of the world's leading scholars of conditionality as a governance tool, Frank Schimmelfennig, conditionality is a mechanism of 'reinforcement by reward'.[42] The debate about the coercive – or not – nature of conditionality is relevant to America and, perhaps to an even more problematic degree, Europe. Is conditionality always a coercive form of power, even when used with other means (i.e., using material incentives instead of mandatory rules)? And when does conditionality become coercive? For example, when a State depends on a specific benefit for its survival, does connecting such a benefit to conditionality become a form of coercion? If the conditioned goods are absolutely necessary, does such conditionality become a form of coercion? Plus, conditionality can be tricky to distinguish from a sanction when the benefit is the absence of that sanction.

Such questions gain significance in the light of the widespread use of conditionality in Europe, especially in times of crisis, as it happened during the economic crisis and as it is happening today in the rule of law crisis.

Yet, in Europe, the constitutional debate on conditionality as a governance tool remains fundamentally in its infancy. Despite the harsh criticism on how conditionality was employed during the Euro crisis – particularly the substance of the conditions imposed and the opaque manner in which they were managed[43] –, European institutions seem to have continued almost blindly to trust in conditionality, especially in times of crisis, because of the ineffectiveness of other traditional tools, and paid little attention to its constitutional impacts, limits and active effectiveness.

The following pages will concentrate on the relations between conditionality and solidarity in light of the cohesion policy and of the two most recent uses of conditionality, namely the rule of law conditionality and the new EU programs to combat the effects of the pandemic.

3.1. Solidarity and Conditionality in the EU

Solidarity is a fundamental value of Article 2 TEU, which is also reflected in the financial commitment of the Union and whose implementation is based on mutual trust between the Member States, which in turn is nourished by common respect for fundamental values, including the rule of law.

42 Frank Schimmelfennig and Ulrich Sedelmeier, *Introduction: Conceptualizing the Europeanization of Central and Eastern Europe* (Cornell University Press 2005).

43 Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 OJLS 325.

The debate over solidarity in the EU can be traced back to the first stages of the EU integration process[44], which was at the core of the development of EU cohesion policy. Solidarity was also at stake during the EU's response to the economic crisis and more recently, during the EU's response to the Covid-19 pandemic. Solidarity is at the core of the EU integration process, but it is still an ambiguous concept whose essence in the EU lacks a theoretical understanding. Solidarity in the EU is still trapped in the tensions mentioned above between the EU and the Member States. There is no doubt that the value of solidarity in the EU has not yet found full implementation, being constrained by the fact that social and fiscal policies are still rooted at the national level. This weak realization of the principle of solidarity has a broader implication for the resilience of the Union. As Maduro has already pointed out, without solidarity, "there can be no true social contract capable of legitimizing the emerging European polity, and the consequences would be either a return to a less advanced form of integration […] or, if the current model continues to be stretched, a crisis of social legitimacy which may manifest itself in increased national challenges to European policies (whose redistributive effects are not understood and accepted)".[45]

In the absence of a fiscal union and an equalization mechanism typical of federal states, one of the tools that permeates the redistribution of funds in the Union is precisely conditionality. The realization of the principle of solidarity is often linked to the use of conditional schemes to distribute funds. One of the most evident examples is the spending conditionality, which connects the disbursement of most EU funding programs to fulfilling a broad set of rules and standards. The first spending conditionality mechanisms were introduced as early as the 1990s, especially for the Common Agricultural Policy, where the EU linked funding to fulfilling specific environmental goals. Since then, the scope of application of spending conditionality mechanisms has grown significantly. They apply to more funding programs and substantive content as more and more conditionalities have been attached to funding disbursement[46].

44 See Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 OJLS 213; Sofia Fernandes and Eulalia Rubio, 'Solidarity within the Eurozone: how much, what for, for how long?' (2012) Notre Europe Policy Paper 51/2012.

45 Miguel Poiares Maduro, 'Europe's Social Self: 'The Sickness unto Death' in Jo Shaw (ed), *Social Law and Policy in an Evolving EU* (Bloomsbury Publishing 2000), 347.

46 For a critical assessment see John Bachtler and Carlos Mendez, 'Cohesion and the EU's budget: is conditionality undermining solidarity?' in Ramona Coman, Aman-

3.2 . Conditionality and solidarity: the case of cohesion policy

EU cohesion policy is, indeed, an interesting area in which to observe the use of spending power to achieve certain goals and the evolution of the relationship between the Union and member states from a cooperative federalism perspective: as noted, "it is the most redistributive EU policy area of the EU budget"[47] and, at the same time, "it is the paradigm case of EU multi-level governance".[48]

The first two solidarity-based instruments were introduced by the 1957 Treaty of Rome, which established two Funds: the European Social Fund (ESF) and the European Agricultural Guidance and Guarantee Fund (EAGGF, Guidance Section).

By contrast, the territorial dimension of cohesion policy has evolved only since the 1970s, with the introduction of the European Regional Development Fund (ERDF), with the aim of fostering economic, social and territorial cohesion and reducing regional inequalities, partly in light of Article 2 EEC Treaty, which assigned the EEC the task of promoting "harmonious development of economic activities throughout the Community".[49]

The ERDF was officially established in March 1975 by Regulation No. 274/75, which, in the absence of explicit provisions in the Treaties[50], had its legal basis in Article 235 of the EEC Treaty itself, i.e., the provision recognizing the so-called implicit powers of the Union. [51]

Although the creation of a cohesion policy was under discussion as early as the 1960s, two factors gave the decisive impetus for the creation of the Fund: the prospects of development towards EMU, which would inevitably accentuate regional disparities, and the first enlargement with the entry

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dine Crespy and Vivien A. Schmidt (eds), *Governance and politics in the post-crisis European Union* (CUP 2020), 121–139.

47 John Bachtler and Carlos Mendez, 'Cohesion Policy' in Helen Wallace, Mark A. Pollack, Christilla Roederer-Rynning and Alasdair Young (eds), *Policy-Making in the European Union* (2nd edn, OUP 2020) 233.

48 ibid

49 Art. 2, TCEE.

50 Bruno de Witte, 'The reform of the European Regional Fund' (1986) 23 CMLR 419.

51 Art. 235 TCEE: 'When action by the Community is necessary to achieve, in the operation of the common market, one of the purposes of the Community, without this Treaty having provided the powers of action for that purpose, the Council, acting unanimously on a proposal from the Commission and after consulting the Assembly, shall make appropriate arrangements'.

of Ireland and the United Kingdom into the Community, marked by the former's need, in particular, to support its economic development policies.

The ERDF was a relatively small fund, the size of which amounted to only 5 percent of the Community budget, and for this reason, too, it was not received entirely positively by the legal literature[52]; however, it decisively initiated the development of cohesion policy that would evolve from there to the present through a number of turning points[53]: from the reforms of 1979 [54] and 1984 [55] to the decisive reform of 1988 and on to the challenges of cohesion policy in the contemporary context.

Alongside the ERDF, other cohesion instruments were then introduced: the Integrated Mediterranean Programs[56] which, similarly to the former, were conditional grants-in-aid and responded, once again, to the needs arising from a new phase of enlargement: the entry of Greece, which had requested *ad hoc* support along with the other states of the Mediterranean area. Moreover, significantly, Article 23 of the Single European Act (SEA), in 1986, inserted five new provisions into the TEC: from Article 130(a) to Article 130(e).

This is a decisive step from a legal point of view because, for the first time, regional policy is formalized in the Treaties, thus healing the discord that had arisen between a policy that was, in budgetary terms, the second most important in the Union but which had no legal basis except in the aforementioned implicit powers under Article 235 TEC.[57]

Finally, in 1988, with Regulation 2052/88, a common framework for the management of the three cohesion funds (ERDF, ESF and the EAGGF) was introduced, thus determining the birth of cohesion policy.

52 Among others, Mario R. Martins and John Mawson, 'The Programming of Regional Development in the EC: Supranational or International Decision-making?' (1982) 20 JCMS 229; Yves Meny, 'Should the Community Regional Policy be scrapped?'(1982) 19 CMLR 373.

53 Gian Paolo Manzella and Carlos Mendez, 'The turning points of EU Cohesion policy' (2009) Report Working Paper.

54 Council Regulation (EEC) 214/79 of February 6, 1979, amending Regulation (EEC) No. 724/75 establishing a European Regional Development Fund [1979] OJ L 35/1.

55 Council Regulation (EEC) 1787/84 of 19 June 19 1984 on the European Regional Development Fund [1984] OJ L 169/1.

56 Council Regulation (EEC) 2088/85 of 23 July 23 1985 on Integrated Mediterranean Programs [1985] OJ L 197/1.

57 See Bruno de Witte, 'The Integrated Mediterranean Programmes in the Context of Community Regional Policy' (1990) EUI Working Paper LAW 90/8.

After this initial phase of creating and defining the instruments of cohesion policy analyzing its development with respect to the use of conditionality, the doctrine[58] identified three phases, respectively of experimentation (1994 to 2013), expansion (2014 to 2020) and consolidation (post-2020).

It is worth focusing on the third phase of cohesion policy development (2021-2027), which is intertwined with the vicissitudes of the programs adopted to cope with the pandemic shock (NextGenEU) and the new regime on rule of law conditionality.

The phase that opens with the 2021-2027 multi-year budget marks some continuity from the growth of the role of conditionality in the previous phase, although it introduces important novelties.

Chief among them is the Common Provision regulation that transforms the previous *ex-ante* conditionality regime into a system of 'enabling conditions', with four horizontal and sixteen thematic conditions to be monitored throughout the budget period and the possibility of suspending funding at any stage of the process.

In the new cohesion policy, the requirement to respect fundamental rights in the use of EU funds is also strengthened. The recent Communication on the 'EU Strategy for Strengthening the Application of the Charter of Fundamental Rights'[59] has, in fact, linked the implementation of EU-funded programs with compliance with key provisions of the Charter of Fundamental Rights. Although the scope of this conditionality is rather narrow, it is nonetheless an interesting application of conditionality, protecting and promoting the fundamental values of the Union[60], which is part of the Union's new strategy, as evidenced in this regard by the conditionality scheme to protect the rule of law.

58 Viorica Viță, *Research for REGI Committee - Conditionalities in Cohesion Policy* (European Parliament, Policy Department for Structural and Cohesion Policies 2018).

59 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions' COM (2020) 711 final.

60 Renata Uitz, 'Funding Illiberal Democracy: The Case for Credible Budgetary Conditionality in the EU' (2020) BRIDGE Network - Working Paper 7/2020.

3.3. Conditionality and solidarity in the most recent development of the EU

The link between conditionality and solidarity in the EU has been further elaborated in the so-called "rule of law saga". Indeed, the system of conditionality introduced by Regulation 2020/2092, dealing with the rule of law crisis, not only becomes an instrument capable of linking solidarity and responsibility but also an effective tool for resolving ruptures and managing conflicts in a composite constitutional system, like the European one, within the limits of the powers provided for by the Treaties.[61]

As the CJEU argued in the seminal decision C.156/21 and C-157/21, the regulation at stake aims to "protect the Union budget in the event of violations of the principles of the rule of law in the Member States" in a sufficiently direct manner, and not to sanction such violations as such, whatever their gravity[62] .

Analyzing the regulation, the Court states that "the types of measures that can be taken, the criteria for the choice and scope of such measures, and the conditions for the adoption and revocation of such measures, insofar as they all relate to injury or a serious risk of injury to the sound financial management of the Union budget or the protection of the Union's financial interests, support the finding that the contested regulation is intended to protect the Union budget during its implementation." [63]

Ultimately, the Court recognizes that respect for the rule of law is an essential prerequisite for sound financial management. However, only violations of the rule of law that *sufficiently directly harm* the interests of the Union can be sanctioned.

As mentioned above, however, this inseparable link between violations of the rule of law and damage to the EU budget, on the one hand, weakens and narrows the scope of the conditionality mechanism; on the other hand, it is believed that it is precisely this requirement that legitimizes the mechanism, allowing it to fall within the perimeter of the EU's competences.

Indeed, the EU can act to protect the values of Article 2 TEU, but it can do so only on the basis of those provisions of the Treaties that give it the competence to take such action.

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61 Case C-157/21 *Poland v Parliament and Council* [2022] ECLI:EU:C:2021:975, para 145 and Case C-156/21 *Hungary v Parliament and Council* [2022] ECLI:EU:C:2021:974, para 127.

62 *Poland v. Parliament and Council* (C-157/21), para. 124; *Hungary v. Parliament and Council* (C-156/21), para. 110.

63 *Poland v. Parliament and Council* (C-157/21), cited above, para. 128.

What remains to be considered, however, even in light of this assertion, is, as argued by Hungary and Poland in their claims, the legitimacy of a *horizontal conditionality* regime, i.e., conditionality linked to the value of the rule of law in general and not instead closely linked to the objectives of a specific program or the sound financial management of the EU budget.

The link between the nature of the conditions and the purpose of a given program is a requirement for the legality of conditionality schemes, a requirement already widely recognized in federal studies on conditionality, and elaborated in the abovementioned "unconstitutional conditions doctrine"[64] by the U.S. Supreme Court. In light of that doctrine, which appears to date to be the most accomplished formulation of the limits to conditionality schemes, one standard for assessing the legitimacy of a conditionality scheme is precisely the link between the nature of the condition and the specific federal financial program.

The Court of Justice seems to take a different path: in fact, it recognizes the legitimacy of such *horizontal conditionality* when it states that the conditions at stake can be linked to the value of the rule of law in Article 2 TEU, which must be respected in all areas of Union action. As the Court argues, based on the textual interpretation of the regulation, the notion of the rule of law "is to be understood in the light of the other values and principles of the Union enshrined in Article 2 TEU. It follows that respect for these values and principles - as participating in the very definition of the value of the 'rule of law' contained in Article 2 TEU or, as is evident from the second sentence of that article, intimately linked to a society respecting the rule of law - may be required under a horizontal conditionality mechanism such as the one established by the contested regulation"[65].

This broad statement, when viewed beyond the context of this regulation, is of utmost importance for the future development of the EU, as it could pave the way for the adoption of new forms of conditionality-having a legal basis in a primary law rule-to also protect the other Article 2 TEU values, which must be considered as a whole as they form the foundation of the EU legal order and "define the very identity of the Union as a common legal order" [66] .

Finally, it is precisely in the delicate passage aimed at justifying a horizontal conditionality regime that the Court opens a constitutional *paren-*

64 *South Dakota v. Dole*, 483 U.S. 203, cited.
65 *Hungary v. Parliament and Council* (C-156/21), para. 136.
66 *Ibid,* par. 127.

thesis on the nature of the Union, its identity, and its founding values and in particular the principle of solidarity, which deserves to be carefully explored. Solidarity is a fundamental principle that also finds concretization through the Union's financial commitment and whose implementation is based on mutual trust among member states, which in turn is nurtured by common respect for fundamental values, including the rule of law.

If we look at the rule of law conditionality, the rationale that links solidarity with conditionality stems from the need to guarantee that the financial assistance that flows from the EU to the Member States in need – and through this, implementing the value of solidarity – is used by the recipient Member State according to the aim of the funding scheme, of the EU policy goal and in compliance with EU values. Indeed, in the case of the rule of law, the aim is to protect, via the financial competences, the core and founding values of the EU against the challenges posed by Member States, which are themselves implementing divisive and controversial reforms. Therefore, conditionality is enshrined as an instrument of a constitutional nature, called to implement EU fundamental values, that is added – without circumventing them – to other tools available to the European institutions to protect aspects of fundamental importance, including Article 19 TEU, Article 47 of the Charter of Fundamental Rights and, of course, Article 7 TEU.

More recently, in the NextGenEU, conditionality is widely deployed[67] as a tool capable of fostering cohesion and solidarity among the Member states: the Resilience Recovery Facility (RRF) is based on a system of conditional transfers according to a set of objectives and long-term policy priorities in the RRF Regulation.[68] The regime of conditionalities envisaged by the new RRF Regulation aims to foster Member State action in critical sectors—identified by the EU as priorities for the future of the EU itself. This conditionality marks the discontinuity in both substance and procedure between the *NextGenEU* conditionality and that of the economic crisis, evaluating favourably the solidaristic framework of *NextGenEU*.

This is the position advocated by Costamagna, who points out the discontinuity profiles between conditionality under financial assistance programs and that of the *NextGenEU*, when he states that "from the institu-

67 See Takis Tridimas, 'Editorial Note: Recovery Plan and Rule of Law Conditionality: A New Era Beckons?' (2020) 16 Croatian Y.B. Eur. L. & Pol. VII.

68 Alberto De Gregorio Merino, 'The Recovery Plan: Solidarity and the Living Constitution' (2021) 50 EuLawLive Weekend Edition 2.

tional point of view, the mechanism was created and operates within the Union's legal system and, therefore, having to comply with fundamental rights standards, from the substantive point of view [...] the idea that conditionality must necessarily mean austerity has been abandoned.". [69]

However, although in diversity with respect to austerity conditionality, unresolved critical issues remain even in the case of the *NextGenEU.*

As Costamagna further notes, "the strengthening of the European institutions' ability to influence, when not determine, the economic policy choices made at the national level has not been accompanied by any changes in the institutional framework, nor has it been accompanied by a strengthening of the democratic nature of the decisions taken, leaving even more room for executive power" [70] .

Even with these critical issues, the most recent forms of conditionality differ from the mechanisms used during the Eurozone crisis, so that both the *NextGenEU* package and the new rule of law conditionality regulation seem, as noted by careful scholarship, to "*advance conditionality as a constitutional* virtue" [71] .

In particular, forms of 'executive conditionality' seem to be emerging and dominating the scene: that is, mechanisms whose purpose is to enforce other EU primary or secondary law obligations in areas where recourse to other ordinary means of institutional enforcement is not possible or does not produce adequate results, as in the cases of macroeconomic requirements, respect for the rule of law and the common values of Article 2 TEU.

These are often issues with a strong 'federal' dimension, concerning the relationship between different levels of government in the European context, which the Union struggles to address using its traditional *enforcement* mechanisms and not yet having *imperium* tools typical, instead, of state-type organizations.

The use of conditionality in the rule of law crisis and in the new programs to address the crisis caused by Covid-19, ultimately envisions a new, more 'positive' conditionality that is inherently different from that associated with *austerity* programs and that seems to be closer in form and substance to classical federal-style conditionality than to conditionality

69 F. Costamagna, *The Next Generation EU and the Construction of a European Economic Policy: what role for democracy and solidarity?*, in *I Post di AISDUE,* III (2021), Section Proceedings of AISDUE Conferences, 3, December 15, 2021, p. 52.

70 *Ibid*, p. 55.

71 Takis Tridimas, see note 66.

of an internationalist nature. As has been noted "these are developments that could lead to an epoch-making turning point and confirm not only the overcoming of the austerity paradigm that undoubtedly characterized the management of the (previous) economic crisis, but also the Union's commitment to respect for fundamental rights".[72]

We can, therefore, conclude, at least partially, that the most recent applications of conditionality on the one hand confirm the increasing use of the instrument in EU *governance* in sensitive issues; on the other hand, they seem to favor the emergence of conditionality regimes of a 'federal' nature. This application of conditionality is, indeed, closer to the practice of federal states in managing federal grants with strings attached to general policy goals and achieving national standards set by the central government.

4. Conclusions

In the light of the considerations expressed above and given the growing influence of conditionality in the US and Europe, it seems increasingly important to examine the role of conditionality as one of the current 'regulatory' instruments deployed by multilevel systems.

Looking at the EU, conditionality is undoubtedly an attractive option, particularly in those areas where the EU regulatory tools cannot ensure adequate compliance with EU law, objectives and values. Plus, it could help ensure the effective functioning of EU policies and foster solidarity among the Member States.

The use of conditionality in the rule of law crisis and in the new programs to address the COVID-19 crisis provide a new, more 'positive' conditionality that is inherently different, for example, from the 'austerity' conditionality adopted in the past. Such conditionality comes much closer to federal conditionality, which is also considered a 'significant and pervasive feature of modern governance'[73] and even an instrument that plays a 'pivotal role in preserving the integrity of [...] Constitutional rights and structure'[74] or in other words, counterbalancing solidarity and autonomy.

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72 Giuseppe Martinico, *The Tangled Complexity of the EU Constitutional Process*, Routledge, 2023, 139.

73 Tribe and Matz, *Uncertain Justice: The Roberts Court and the Constitution* (n 35).

74 Louis W. Fisher, 'Contracting around the Constitution: an Anticommodificationist Perspective on Unconstitutional Conditions' (2019) 21 JCL 1167.

Chapter 6 Transnational solidarity in European monetary integration: Unpacking the deep connection between money and solidarity

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Introduction

In a remarkable book, late David Graeber and David Wengrow claim that our understanding of evolution in the history of humanity is misleading: when considered from the point of view of equality among the members of society, ours is not the most refined of civilizations.[1] According to their view, our balancing between freedoms and authority, based on the idea of violence being inherent to human beings,[2] is inaccurate. After discussing different historical examples, they wonder what made societies get stuck into a specific form – the one most readers of this book may live in – in which private property coexists with liberties.[3] This chapter offers a tentative answer to their question that, formulated on the simplest of terms, relies on a single word: money. Or, to provide a more precise answer, a type of money that, as an infrastructure of certain power relations, locked us up into intrinsically unequal societies and, therefore, constitutes the ultimate foundation of (the need for) solidarity.

Not all human societies are subjected to these monetary arrangements. In the African plains exist nowadays forager communities that, in close connection with their environment, rely on instant satisfaction of their individual demands to subsist. In these societies, "the obligation to share [i]s open-ended and the amount of stuff that you g[i]ve away [i]s determined by how much stuff you have relative to others".[4] Interestingly enough, such well-established concepts in our socio-economic system as property and

1 David Graeber and David Wengrow, *The Dawn of Everything: A New History of Humanity* (Allen Lane 2021).

2 Thomas Hobbes, *Leviathan: Or the Matter, Form and Power of a Commonwealth, Ecclesiasticall and Civil* (Andre Crooke 1651).

3 Graeber and Wengrow (n 1) 115.

4 James Suzman, *Work: A History of How We Spend Our Time* (Bloomsbury 2020) 154.

hierarchy do not exist in these communities. Instead, these demand-sharing societies, based on what in mainstream anthropology was labelled as an 'immediate return economy',[5] create social structures combining material equality with individual freedom. Without authority, because no one is "subject to the coercive authority of anyone else",[6] and "granting individuals the right to spontaneously tax everybody else",[7] these forager communities guarantee:

> "firstly, that material wealth always ended up being spread pretty evenly; secondly, that everyone got something to eat regardless of how productive they were; thirdly, that scarce or valuable objects were circulated widely and were freely available for everyone to use; and finally that there was no reason for people to waste energy trying to accumulate more material wealth than anyone else, as doing so served no practical purpose".[8]

When observed from the viewpoint of current capitalist societies, solidarity seems deeply engrained in the socio-economic arrangements of these forager societies. Within them, all members of the community, regardless of their productivity, are entitled to eat and make use of tools as much as they need. Moreover, the membership of the community is not determined by blood, status, or years of settlement. Hence, newcomers will be subjected to the very same rules as any other member – meaning that the food and tools they bring with them will also be enjoyed and used by the rest of the community. Therefore, one could argue that in forager societies solidarity is unbounded. However, the core assumption of this contribution is precisely the opposite, namely that solidarity in those communities is not needed (and therefore does not exist) since there are no systemic inequalities resulting from the socio-economic structure of that society.

Capitalist societies, on the other hand, are based on very different premises. They result from key transformations in the relation between humans and nature that, in the context of new forms of human settlement designed to ease the domination of the population via the erection of

5 James Woodburn, 'Egalitarian Societies' (1982) 17 Man 431.
6 Suzman (n 4) 156.
7 ibid.
8 ibid 157.

walls,[9] forced subjects to put personal effort and resources into certain works, particularly in farming. While contributing to the consolidation of the established power, with time, a farmer could eventually provide food sustenance for a whole family and even produce additional returns. Importantly, the farmer's expectation for return became proportional to the effort made. Hence, this 'delayed return economy'[10] represents a different socio-economic model that is more prone to individualism and relying on legal institutions like private property. It is possible to find here the foundations for exclusion of the others and for the limitation of their participation in the use of goods, problems that lay precisely at the core of the concept of solidarity.

This chapter suggests that in 'delayed return economies' money, reflecting the shared constitutional project of the polity,[11] is the main responsible for the existence and shaping of such constraints and limitations. It therefore argues that money must be a central concept when studying solidarity, its manifestations and its structural limitations. Accordingly, to explore the features of Europe's transnational solidarity the study of the foundations of and constraints imposed by Europe's transnational money is crucial. The argumentation will thus depart from the explanation of the infrastructural power of money, elaborating the deep connection between money and solidarity from a historically informed theoretical perspective, and will subsequently expand the scope of the theoretical reflection to the specifics of European monetary integration and its impact on transnational solidarity.

2. Revealing the link between money and solidarity

Although apparently unrelated, money and solidarity are concepts inextricably connected, even if in a different way than one may initially consider. It is true that manifestations of solidarity may be quantified and therefore expressed as a monetary cost – especially once public policies of solidarity have been formally implemented. However, the link between the two concepts suggested in this chapter goes beyond such a merely quantitative dimension. The main argument is that solidarity is the outcome of the

9 James C. Scott, *Against the Grain: A Deep History of the Earliest States* (Yale University Press 2017).

10 Woodburn (n 5).

11 Christine Desan, *Making Money: Coin, Currency and the Coming of Capitalism* (Oxford University Press 2014).

monetary infrastructure that determines certain social, political and economic features of capitalist societies. To phrase the idea differently: money currently in operation determines the need for solidarity in order to address the inequalities that unavoidably emerge as a result of the socio-economic arrangements encapsulated in the currency. Or, in a nutshell: money, as consolidated form of structural power relations, is the ultimate foundation of solidarity. This statement nevertheless requires the unravelling of several ideas and assumptions contained in both concepts (money and solidarity) that, despite appearances, keep them deeply entangled.

2.1. Solidarity

Our argumentation starts with the unpacking of the idea of solidarity. Resulting from our daily experience, we *prima facie* consider it a concept attached to the very essence of what being human means for us, as expressed and represented by certain feelings towards others. Hence, with this term we usually refer to the relation between members of a community towards other human beings, either part of the same community or aliens to it. However, despite our general impression, solidarity is not by default attached to the nature of human beings, but just to the experience of collectively organized human beings *in a given socio-economic context*. In fact, solidarity was only formulated and elaborated as a concept after the consolidation of the nation-state and in the light of the social transformations imposed by the industrial revolution.[12]

The emergence of the concept of solidarity in this particular context responded to the sum of a number of developments and transformations resulting from the advance of capitalism. For instance, whereas throughout history all kind of physical tasks were usually assigned to slaves or to manpower captive and subject to some form of public authority (bosses, priests, chiefs, lords, or kings),[13] in the new industrial context workforce was instead subordinated to private owners of means of production. Moreover, if a century earlier revolutionaries in France were able to free themselves from the strong grip of the king in the name of freedom, equality and fraternity, by the dawn of the industrial revolution the privatization of the relations

12 Émile Durkheim, *De la division du travail social* (8th edn, Presses Universitaires de France 2013).

13 Scott (n 9).

of dominion questioned the actuality of such an achievement. And all this even though, inspired by the ideals of the revolution, the development of constitutionalism and its language of rights revolved around the idea of equality of all men before the law. Hence, solidarity was only conceivable when, contradicting certain collective and legally based aspirations, social inequalities became manifest and blatant within Western societies. Solidarity is, therefore, intrinsically connected to those inequalities – they actually are its *raison d'être*. Seen from this perspective, it is easy to understand why forager communities in Africa, egalitarian at their core, lack such a concept.

2.2. Money

If solidarity was conceived where and when society proved unequal despite legal mandates and social demands for equality, its full comprehension requires deciphering in first place the reasons why those manifestations of inequality emerged. It is at this point that we should return to the concept of 'delayed return economy' and, more specifically, to the origin of money (around 3000 BC) and its historical development.[14] Of course, far from being exhaustive, in this section we can only distil the outcome of millenary processes and trajectories. Our focus will be on certain specific features able to reveal monetary developments critical for our argument, which can be condensed in three aspects: debt as foundational content of money, money's hybrid nature at the intersection of social dichotomies, and its incorporation of a specific understanding of property. To understand in full the theoretical implications of each of these features a historical approach is followed.

2.2.1. Money comprises credit

The first of those features is the realization that money encapsulates a debt relation; in other words, that credit is an integral part of money.[15]

14 David Graeber, *Debt: The First 5000 Years* (Melville House 2012).; Michel Aglietta, *Money: 5000 Years of Debt and Power* (Verso 2018).

15 Henry Dunning Macleod, *The Theory of Credit* (Longmans, Green, and Company 1889).; Alfred Mitchel Innes, 'What is Money?' (1913) The Banking Law Journal 377.; Alfred Mitchel Innes, 'The Credit Theory of Money' (1914) The Banking Law Journal 151.

Continuing with the example of the farmer from the introduction, since the goods resulting from the farming effort will only become tangible in the future, their amount and quality are always dependent on undetermined factors and therefore remain uncertain at the present moment. However, reasonably expected returns can be used for obtaining goods and services in advance, giving rise to credit and thus fuelling the economy through finance.[16] On the other hand, perishable agricultural products must be used right after being harvested or collected; otherwise, they lose value or expire. Payment in kind to the owner for the use of the farming lands must therefore be done at that precise moment. In such a case, the boss or authority gave a token in return that could be used to redeem the actual debt when the tax collector arrived.[17]

These two operations of the farmer, one with providers and the other with the authority, have in common that they reallocate economic value through time, unfolding in the actual moment part of the effects of a payment to occur in the future, or postponing those effects for the future.[18] To the eyes of a private lawyer, each of these operations could be seen as two different legal transactions: an actual purchase of goods, acquisition of services or payment of taxes, and a debt/credit relation financing the operation (the farmer becoming debtor to the good or service provider, and creditor to the authority). The claim here is that money encapsulates these two legal transactions -an economic activity and its financing operation- into a single concept, objectified in the token given by the authority to redeem the payment of taxes. That token, including first a mark of the house and later engraving the face of the boss, and with time made of malleable precious metals to prevent counterfeit, became generally accepted as mean of payment due to its ability to redeem tax obligations.[19] By doing so, money encapsulates a singular contractual right (a right *in personam*) and transforms it into a right enforceable against everyone else (right *in rem*),[20] with the implications that will be explored below. In any case, whatever object is chosen to physically represent money, it circulates because

16 William N Goetzmann, *Money Changes Everything: How Finance Made Civilization Possible* (Princeton University Press 2016) 34.
17 Desan (n 11).
18 Goetzmann (n 16).
19 Desan (n 11).
20 Jongchul Kim, *Modern Money and the Rise and Fall of Capitalist Finance: The Institutionalization of Trusts, Personae, and Indebtedness* (Routledge 2023) 17.

of an underlying debt relation.[21] We can thus say that in 'delayed return economies' credit operates as currency.

2.2.2. The hybrid nature of money

A second feature of money that our argumentation needs to emphasize is its hybrid nature suspended between the state and the market.[22] Continuing with our example, the two legal transactions in which the farmer engages show how money, as an encapsulation of a credit relationship, enabled the market by fostering exchanges between economic actors *and* constituted and reinforced the structural power of public authorities – that, through identification with the king, will eventually become the state. Money therefore allows individuals to establish bonds, in the form of debt relationships, with other fellow individuals (as market actors) and with their political community (as taxpayers). Again, in a centuries-long evolution of intense experimentation with form and matter, at some point money finally coalesced this double nature into a single physical token able to encapsulate market and state debt relations together.

This hybrid nature of money has relevant implications because each soul of the currency may be emphasized depending on the context in which it is used. Hence, when operating within the polity, where the authority demands payment of taxes only in the currency it has previously issued and released, money can circulate smoothly, because all market actors will accept those tokens or, for that matter, coins as means of payment to redeem subsequently their tax obligations. The domestic dimension of money seems therefore unproblematic.[23] However, increased trade and commerce with actors coming from other polities required money to be detached from any specific political community if third parties were not to accept as a medium of payment a currency unable to redeem their taxes. For this reason, in commercial transactions of transnational character, the value of money became intrinsically connected to the value of the precious metal of the coin, rather than to the nominal value determined by the domestic authority.

21 Samuel A. Chambers, *Money Has No Value* (De Gruyter 2023).
22 Stefan Eich, *The Currency of Politics: The Political Theory of Money from Aristotle to Keynes* (Princeton University Press 2022) 5.
23 Johann Gottlieb Fichte, *The Closed Commercial State* (SUNY Press 2012).

As a result, it is possible to identify a tension between the territorial scope of the market and state dimensions of the currency: in market operations beyond the borders of the polity, the function of money differs from the one it plays within the state because the market bond prevails over the state bond – or, to phrase it according to private law terms, the geographical scope of the right *in rem* money gives rise to is, paradoxically, limited rather than universal. In addition to this, the conflict between the form and matter of coins gave rise to numerous socio-economic and political tensions during the Middle Ages. For instance, individuals could scrap and clip coins to reserve a portion of the precious metal for further transactions while still purchasing for its nominal value; and the state could debase the currency or mint new coins to adjust the amount of metal per unit to its own interests.

These situations exemplify how the two souls of the currency are in permanent tension and how they forced actors with different interests to engage in power games depending on the specific historical context: abundance or lack of precious metals, need to mint coins for paying war efforts, or drain of coins to other polities where the same amount of metal resulted in higher nominal value, are but some examples of situations provoking reaction from either private or institutional actors. Hence, the tension between the market and state souls of the currency, manifested in conflicts between the nominal and the metallic values of the coin, has been a constant in monetary developments, determining the arc of its history.[24]

Interestingly enough, money is not only suspended between the state and the market, but it also hangs in between many other well-established dichotomies. What we understand as separate entities, dimensions, or approaches, are indeed subject to the totalizing force of the bundle of social relations encapsulated in money – a bundle that works as a mechanism of social integration. Therefore, politics and economics, state and banks, or national autonomy and international cooperation are, because of money and despite appearances, as closely interrelated to each other as state and market.[25] Importantly, the accompanying mediator in these relationships is a complementary, but equally relevant mechanism of social integration, namely law. The different historical development of private law, focusing on market interactions, and of public law, organizing and limiting public

24 Desan (n 11).
25 Eich (n 22) 174.

power, paralleled the functions that money plays in the market and state dimensions. But if the currency is an integrative force joining these two dimensions together, law represents the rational force setting the borderlines between them. And it does so by simultaneously *limiting the action of the state* (constraining its powers through public law) and *regulating the markets* (establishing through private law the contours within which economic actors can operate freely). Law and money are thus complementary mechanisms of social integration.[26] The third feature of money that we need to highlight results precisely from the specific content that, due to this complementary character of their relationship, law has uploaded into money.

2.2.3. Money reflects property

A key element of the legal design of the marketplace is the content and features it assigns to the right to property. The property regime that has prevailed in modern economies and from which results the expansive force of markets has its roots in Rome. Whereas in previous civilizations debts were at a certain point cancelled, thus re-establishing the social balance between creditors and debtors and allowing a fresh start for all members of the community, in Roman law the supreme interest was to guarantee the observance of the right of creditors to be paid. Accordingly, rather than cancelling debts, Rome resorted to coinage to increase the resources available for making those payments. By increasing the money supply, it was thus possible to address debt crises while guaranteeing the integral protection of property.[27]

Regarding the substantive content of the right, the Roman concept of property differed from alternative models, widespread in other civilizations, that put the emphasis on the use of things in harmony with the environment or in line with common goods recognized by the society, thus embedding property in its social and cultural context. By contrast, Roman law recognized property as a right of absolute free disposition over the thing and, accordingly, as comprehending a right to legitimately limit, or even to plainly exclude, the participation of others in the use of the good

26 Fernando Losada, 'Towards a Constitutional Theory of Money: Opening Europe's Money Up to Public Discourse' (2022) 1(4) European Law Open 1025, 1029.

27 Graeber (n 14).

in question. The absolute disposition over the property has an additional feature that Graeber and Wengrow describe in raw terms:

> "What makes the Roman Law conception of property – the basis of almost all legal systems today – unique is that the responsibility to care and share is reduced to a minimum, or even eliminated entirely. In Roman Law, three are the basic rights relating to possession: *usus* (the right to use), *fructus* (the right to enjoy the products of a property, for instance, the fruit of a tree), and *abusus* (the right to damage or destroy). If one has only the first two rights, this is referred to as *usufruct*, and is not considered true possession under the law. The defining feature of true legal property is that one has the option of *not* taking care of it or even destroying it at will."[28]

A complementary understanding results from focussing on the relation between the good and its context rather than on the content of the right to property itself. From that point of view, in all property regimes the good possessed is always subjected to the supreme will of the legitimate owner. The difference between regimes would then lie on the identification of the owner either as a member of a community or part of a shared ecosystem (as is the case with alternative conceptualizations of property described by anthropologists),[29] or as a natural person (later even a juridical person) who, by virtue of the property regime, is able to rule over those collective interests. According to the Roman regime of property (whose development is intimately connected with slavery and the need to consider some human beings as things and thus completely detached from any social, family, or affective bond),[30] in all aspects related to the possession and use of the good, the owner is legitimately entitled to proceed to the legal fiction of detaching the possessed thing from any social tie. Hence, Roman ownership severs the bonds that anything has with nature, if such is its origin, or with society in case it has been manufactured. And it does so, importantly, without the consent of any other person.[31]

By freeing physical things (and human beings considered as such) from any ties, this legal understanding of property allowed the unfolding in full

28 Graeber and Wengrow (n 1) 161.
29 ibid.
30 Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Harvard University Press 1982).
31 Kim (n 20) 18.

of the innate potential intrinsic to each thing, although at the price of detaching both good and owner from their social and environmental context. Understood in that way, property becomes an emancipatory tool for owners, who get rid of any social responsibility resulting from possession and, therefore, turn into individual sovereigns over whatever is owned.[32] Money follows this same logic, providing its possessor with the ability to get anything from society while transcending social relations.[33] The outcome is the triggering of the exponential growth of capitalism based on economic materialism, and the promotion of individualism.

2.3. Money and solidarity

It is within this framework that we should conceptualize, to complete our reconstruction, the link between money and solidarity. The combination of the three features of money highlighted above results in a currency that seals up a socioeconomic system founded on an absolute understanding of private property, enabling its use in the marketplace to obtain future gains based on current wealth. This monetary arrangement is structurally prone to creating and consolidating inequalities, not only because the prospect of such gains is usually available to those already owning things, but mostly because the legal system and its absolute understanding of property consistently protect creditors. Moreover, guaranteeing debt repayment by increasing the money supply minimizes risks for creditors and assigns the payment effort to debtors, whose only choice in case of lacking assets is to sell their workforce to obtain the resources with which to pay back what they owe. Accordingly, labour becomes by design a critical way to guarantee in the long term the value of capital.

2.3.1. Attempts to stabilize society and finance…

The damaging outcomes of the unbalance between the legal position of debtors and creditors ingrained into this monetary design started to become noticeable with the developments associated to the Industrial Revolution. Growing social inequalities based on ownership and implicitly resulting from the burden imposed on labour were soon manifest, leading to class conflicts between capitalists and workers and, eventually, to episodes

32 Pierre Crétois, *La parte commune: Critique de la propriété privée* (Éditions Amsterdam 2020).

33 Kim (n 20) 20.

of social unrest. Against the risk of political instability, nation-states put emphasis on designing policies to counterbalance class inequalities and contribute to the appeasement of social relations. Importantly, against labour movements' attempts to internationalize the conflict with capital, policies implemented were mostly national. The immediate outcome of these tensions was the establishment and legal protection of workers' rights. Only at a later stage other social inequalities were addressed by active policies, gradually extending the protection to guarantee the living standards of all citizens to a minimum threshold. These policies were considered a manifestation of solidarity towards those members of the political community in need and represent the origin of what, in the end, would be the welfare state.

Despite this relief, class inequalities were simultaneously aggravated with the emergence and flourishing of finance, a legal development[34] allowing the full exploitation of the monetary framework by the banking sector and the incipient financial industry. Whereas coins, encapsulating the two legal transactions described above, were previously minted by, or at least in the name of the state, now a capitalist form of money was generated when law directly granted creditors, who usually enjoy rights *in personam*, with rights *in rem*. Such a configuration enabled the creation of money out of any concrete obligation or asset and without the intermediation of the state,[35] a development that banks and other financial institutions exploited *in extenso* motivated by the extremely lucrative output of such operations. Hence, what originally was the monopoly of the state in minting coins, as manifested by the institution of the seigniorage, gradually transformed into a prerogative of banks, who issued their own banknotes and, nowadays, merely create new money via keystrokes.[36]

In principle, this mechanism for money creation is infinite due to the lack of debt jubilees. However, the whole system relies on the trust of creditors in being eventually repaid, which can be put into question in case of liquidity crises or actual defaults. To prevent those situations from happening, the viability of the whole monetary design depends on an anchoring mechanism, which was established through the unlimited guarantee of liquidity provision by a bank operating at the top of the system, and usually

34 Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

35 Aaron Sahr, *Keystroke Capitalism: How Banks Create Money for the Few* (Verso 2022) 54.

36 ibid 94.

representing the sovereign power of the state to issue money. Working as a backstop for all the rights *in rem* distributed among the economy, this central bank guaranteed the value of capital assets and, consequently, contributed to the stability of the financial system.

2.3.2. …that are nevertheless prone to increasing instability

However, the increase in the pool of rights *in rem* that, facing an eventual risk of depreciation due to defaults, were considered legitimate and therefore worth of deserving liquidity recognition, resulted in an expansion of the amount of assets obtaining the status of money. Hence, by solving punctual crises through the provision of liquidity, the number of assets that could deserve such status raised, accordingly spreading among economic actors a false feeling of security. The price to pay for the expansion of stable money through a lender of last resort was the creation of the conditions for further instability,[37] because the expectation of an unlimited liquidity provision encourages innovation and risk-taking in the financial sector.[38] Such innovation ultimately results in the creation of new forms of money (ie. new social relations, freshly established bonds between debtors and creditors) that, since jubilees are excluded for systemic reasons, have to be either repaid or, eventually, guaranteed by the lender of last resort. Hence, the exacerbation of assets worth the status of money further promotes inequality due to the artificial increase of legitimate claims for creditors, its direct connection with the ownership of certain assets, the uneven access to the mechanisms of monetary creation and, last but not least, because it exposes the system to further crises able to overload, and thus jeopardise, the active policies of welfare – required to assuage the social unrest resulting from the burden imposed on labour within the monetary design.

It is thus possible to identify two areas that, since the Industrial Revolution, demanded from the nation-state the application of innovative but radically different stabilization policies resulting from the monetary design. On the one hand, the combination of creditor protection and the absence of jubilees eventually redeeming debtors from their burdens underpinned the structural need for welfare policies to stabilize labour. On the other hand, to guarantee the value of capital assets and the ultimate repayment of all debts,

37 Hyman P. Minsky, *Stabilizing and Unstable Economy* (McGraw-Hill 2008 [1986]).

38 L. Randall Wray, *Why Minsky Matters: An Introduction to the Work of a Maverick Economist* (Princeton University Press 2017) 83.

a central bank had to provide liquidity and act as a lender of last resort to stabilize the currency in punctual moments of crisis. Accordingly, solidarity operates by supporting debtors in two situations, although through different mechanisms, principles, and procedures. During normal times, it compensates all members of the polity through welfare state policies so they can focus on guaranteeing with their work the final payment of all debts, and when times of instability jeopardise the actual value of assets, it supports their owners through punctual liquidity assistance. These two mechanisms of solidarity towards debtors differ notably: welfare policies are constrained by limitations imposed by the factual availability of the resources to be redistributed (goods, services, monetary transfers), whereas in liquidity provisions, for which ownership of assets is the qualifying factor, solidarity does not depend on physical constrains and is therefore virtually infinite (see Table 1).

Aim of solidarity	Socio-political stability	Financial stability
Provision of	Public support – to guarantee ultimate repayment of debts through work	Liquidity – to guarantee the value of property
Institutionalized practice	Public policies (welfare state)	Lender of last resort
Debtors addressed	All members of the polity	Owners of certain assets
Resources available	Limited	Potentially infinite
Intervention	Permanent	Punctual
Articulated through	Right-based procedures	Discretionary decisions

TABLE 1 – Articulations of solidarity within the nation-state

We can thus conclude by highlighting that the need for welfare policies and financial stability are inextricably linked to the monetary design. Despite emerging in the same period, these two manifestations of solidarity nevertheless contribute to the stabilization of the polity through different mechanisms: the former by addressing daily social needs structurally resulting from the design of money, the latter guaranteeing as punctual backstop that such (unequal) monetary arrangement could continue operating in the future. Solidarity in the form of welfare policies works as the correcting mechanism that capitalist societies unavoidably need to prevent social unrest, whereas solidarity in the form of financial stability funnels society's potential of money issuance towards a common good from which debtors

who own certain (compromised) assets and, even most prominently, their creditors are direct beneficiaries.

In the aftermath of World War II, constitutional thinking acknowledged the relevance of the first dimension of solidarity (welfare state policies) by recognizing the transformation in the functions of the state it entails.[39] The liberal state therefore evolved into a social state in charge of ensuring production and, subsequently, of providing enough to cover citizenry's basic needs through redistribution.[40] Within this framework, solidarity was theoretically elaborated as both a principle of social organization and an entitlement for state intervention.[41] However, the second dimension of solidarity, the one resulting from the key connection between the state and the ability to issue money through a lender of last resort, remained overlooked by constitutional theory – or at least was not as explicitly recognised as was one of its key implications: the ultimate acceptance of capitalism as the economic system.

3. Transcending national borders: European money and transnational solidarity

Against the backdrop of the monetary framework designed for the national context, the remainder of this chapter moves the analysis to the transnational dimension, in particular to the specific case of the European common currency. If solidarity in the national context is fleshed out by the reaction to inequalities (welfare policies) and the systemic needs (a lender of last resort) resulting from the monetary design, establishing a transnational currency may eventually lead to specific forms of transnational solidarity. Paradoxically enough, the original design of the euro was precisely focused in preventing such a development: the foundational assumption of the Economic and Monetary Union (EMU) was national responsibility over all kind of redistributive policies, allegedly removing the shared currency from the sphere of politics. Following the evolution of the monetary design in European integration to our current days nevertheless reveals the peculiar workings of solidarity in the Eurozone and the specific arrangements it is subjected to in such a transnational framework.

39 Manuel García-Pelayo, *Las Transformaciones del Estado Moderno* (Alianza Editorial 2009 [1977]).

40 Ignacio Sotelo, *El Estado Social: Antecedentes, origen, desarrollo y declive* (Trotta 2010).

41 Carlos de Cabo Martín, *Teoría Constitucional de la Solidaridad* (Marcial Pons 2006).

3.1. The European market: Solidarity confined to national borders

Our starting point is the stage of development of the process of European integration before the actual agreement on the establishment of a common currency. Summing up the developments conducive to that moment, two were the key elements for the purposes of our argument. The first one is that European integration, while creating a common market for all Member States, contributed to the consolidation of the nation-state[42] and in particular to its acceptance as a framework of reference for redistributive policies. Although with variations among states, solidarity mechanisms proper of the post-war social state were arranged and managed at the national level, guaranteeing social rights through a mix combining the protection of fundamental rights, the implementation of social policies, and the provision of public services.[43] At this point, the relationship between the project of European integration and its Member states was still of a symbiotic nature: the European level contributed to economic prosperity, providing revenue for redistribution through welfare policies "at the expense of indulging in nationalistic economic policies".[44] Policies related to this first dimension of solidarity were, therefore, a national competence, but to a great extent they worked in close connection with and actually depended on achievements resulting from, European economic integration.

Another significant feature of European integration at that point was the key relevance of law in its development. The initiative of lawyers and judges was critical to characterize the European project not only as enshrining a community *of* law but, more importantly, a community established and developed *through* law.[45] Accordingly, law was the driving force of European integration and lawyers, with their rhetorical and argumentative abilities, were critical for steering the process. The rational authority of law and the audacious legal reasoning of the Court of Justice in key cases, relying on the autonomy of the new legal order, allowed for the shaping of the community

42 Alan S. Milward, *The European Rescue of the Nation State* (Routledge 1992).

43 Fernando Losada, 'European Integration and the Transformation of the Social State: From Symbiosis to Dominance', in Toomas Kotkas and Kenneth Veitch (eds), *Social Rights in the Welfare State: Origins and Transformations* (Routledge 2017).

44 Gunnar Myrdal, *Beyond the Welfare State: Economic Planning in the Welfare States and its International Implications* (Yale University Press 1960) 119.

45 Antoine Vauchez, *L'Union par le Droit: L'invention d'un programme institutionnel pour l'Europe* (Presses de Sciences Po 2013).

in strict accordance with legal procedures and requirements, but at the price of obscuring the actual political nature of the outcomes.[46]

3.2. The original design of the euro: A shared currency without solidarity mechanisms

When negotiating the EMU, Member states resorted to the expertise of lawyers and economists to seal an agreement about its constitutional features and institutional design. Both lawyers and economists shared their perception about the allegedly neutral nature of, respectively, law and money. Hence, due to the disparities in the level of economic convergence between the partners and their discrepancies regarding the concrete strategy to follow towards monetary integration,[47] negotiating efforts revolved around what at the time was a general consensus on the pertinence of sound money. Accordingly, the core foundation of the common currency was the detachment of monetary policy from the rest of economic policies and its uploading to the European level. The shared goal was to codify in the European treaties a currency severed from politics to guarantee price stability, actually fleshed out in an institutional design isolating monetary authorities from all political influence.[48] Prevention of transfers of financial burdens between Member states[49] was equally important for preserving the political neutrality of EMU – a decision contributing to the consolidation of the nation-state as the framework of reference for all redistributive issues.

Within this design, full national responsibility over fiscal policy was pivotal. Consequently, as part of the agreement about EMU, Member states on the one hand established the foundations for the coordination of their respective economic policies,[50] while on the other renounced to monetary financing through the new European Central Bank[51] and to any kind of privileged access to services offered by financial institutions.[52] By design, Member states were thus forced to collectively coordinate their economies

46 Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47(1) International Organization 41.
47 Kenneth Dyson and Kevin Featherstone, *The Road to Maastricht: Negotiating Economic and Monetary Union* (Oxford University Press 1999).
48 Consolidated version of the Treaty on the Function of the European Union (TFEU) art 130.
49 TFEU art 125.
50 TFEU art 121, 126.
51 TFEU art 123.
52 TFEU 124.

and to individually rely on market prices when financing themselves. In turn, through their individualized assessment of each Member state's economic situation, markets were supposed to work as enforcement mechanism of last resort in the event the coordination of national economic policies had been disregarded.

The legal and institutional decoupling of monetary and economic policies had meaningful implications for the structure and features of European transnational solidarity. Such a decoupling and, more specifically, the appeal to rules to constrain national economic and monetary sovereignty, and to markets to enforce them in the last instance, entails the formation of a new grey area, peculiar to the Eurozone, between the domestic and international dimensions of the currency that rearranges the roles to be played by state and market in the European polity. The euro creates a negative space where Member states, by ratifying the European treaties, have renounced their prerogatives to issue money autonomously, to determine the exchange rate vis-à-vis partner countries sharing the currency, and to resort to money issuance in order to pay their sovereign obligations. Whereas social policies, critical for Member states' socio-political stability, remain national competence, these constraints define a peculiar monetary arrangement that constitutes the foundation of new structures of transnational solidarity.

The critical feature in this regard was the lack of a lender of last resort for sovereigns in EMU's original design, an absence that, at the time, was not perceived as a major problem. First, because prudential supervision, the administrative monitoring of financial sector activities in search of potential systemic risks, was a matter of national competence. Hence, national authorities were in charge of assessing and eventually addressing the risks for financial stability coming from solvency problems in the financial sector. If needed, liquidity assistance was provided by the ECB, but Member states were expected to conduct prudential supervision according to sound standards since they would be responsible of eventual bailouts. Second, and more importantly, because risks to financial stability coming from Member states' eventual defaults were allegedly neutralized by the EMU's constitutional design. Although the competence over defaulting on debt obligations was not conferred to the European level and consequently remained national, the political assumption underlying the whole design was that all sovereign debts expressed in euros would be always repaid. In other words, despite the lack of any formal or legally binding agreement, the default of a member of the Eurozone on its sovereign debt obligations was

politically inconceivable. Finally, the combination of the structural principle of national responsibility over economic policies with constitutional theory's neglect of financial stability as an implicit dimension of solidarity were additional factors potentially contributing to obscuring the need for a lender of last resort.

Whatever the reasons may have been, by renouncing the privileges related to monetary issuance while excluding a backstop for the whole monetary system, Member states committed, although implicitly, to mobilize their own resources to guarantee full repayment of their sovereign debts. In the same way as in current monetary systems debtors must allocate resources or workforce to the payment of their obligations, in the framework of EMU Member states must gather money *before* spending it. Accordingly, by conferring the competence to issue euros to the extremely independent ECB, Member states became regular "money users" instead of privileged "money issuers".[53] This feature, presented in the positive as relying on, and even encouraging national responsibility, has a major impact on the budgetary and fiscal policies of Eurozone members, who are forced to depend exclusively on the revenue collected through taxes, complemented with borrowing from the markets, for the financing of national expenses.

The original design of EMU therefore ignored the close connection between money and solidarity in the two dimensions previously identified for the nation-state context. On the one hand, there was a mismatch between the scope of the new transnational currency and that of the solidarity mechanisms required to appease the social contestation of the inequality intrinsic to any monetary regime protective of creditors, that were only national. Moreover, those national welfare policies were subject to extreme pressure due to the budgetary constraints required to avoid excessive deficit and debt, and thus to stabilize the Eurozone economies. On the other hand, the absence of a lender of last resort deprived the new monetary system of the final anchor at the top of the system required to backstop the whole monetary regime in the event of Member states' insolvency, a risk for financial stability disregarded and allegedly neutralized through the combination of rules and, ultimately, the assignation of national responsibility. The upshot is that the establishment of the new transnational currency relied on national solidarity mechanisms, either in the form of social policies or

53 Pavlina R. Tcherneva, 'Money, Power and Distribution: Implications for Different Monetary Regimes' (2017) 5(3) Journal of Self-Governance and Management Economics 7.

through the assumption of costs in case of sovereign debt insolvency. This design was put to the test through a number of crises that triggered the integrative force of money.

3.3. Post-crises Eurozone: New form of solidarity through conditionality

The nature and features of transnational solidarity in the current Eurozone are a direct consequence of the deep transformations that the financial, sovereign debt and pandemic crises provoked on the EMU. A concatenation of factors led to such transformations. Without being exhaustive, they are summed up in few ideas before detailing the actual configuration of transnational solidarity in the Eurozone.

3.3.1. The transformation of the Eurozone

The establishment of the euro encouraged financial services to engage in cross-border activities. Sovereign bonds from Eurozone countries were perceived as a safe investment, especially for banks from the exporting economies, which needed to recycle massive trade surpluses resulting from a more integrated market with a single currency. Within the Eurozone, deeper debt relations started to flourish across the public-private divide and regardless of borders. Accordingly, the exposure of Member states to private sector risks coming from the whole Eurozone increased exponentially, with dramatic consequences.

Against the political assumption that each Member state would honour its sovereign debt obligations at all costs, Eurozone leaders faced a dilemma in 2010 when Greek financial situation worsened to the point of insolvency. The subsequent tensions revealed to what extent EMU's design was still half-baked. Market pressure was unbearable, and abiding by the idea of full national responsibility would only increase the damage for the Greek economy and its people without addressing the actual problem. On the other hand, Greek default on its debt, eventually providing some relief to its economy, would also spread unexpected losses across financial institutions from the rest of the Eurozone, which would eventually demand public intervention from their respective Member states. Although defaulting was a sovereign decision formally corresponding exclusively to Greek authorities, the risk of contagion and its repercussions concerned all Eurozone economies and therefore their political leaders actively engaged in the

discussions to prevent a Greek default or, at least, to minimize its consequences.

The outcome of those negotiations was a political compromise still placing national responsibility at the core of the system. However, to give relief to Greece and ease the pressure from the markets, national responsibility was complemented firstly with financial assistance provided either by Member states directly or by international institutions, secondly with unorthodox monetary policy measures, and only subsequently with partial defaults on Greek sovereign debt. This sequencing is relevant because it provoked changes in economic and political dynamics that transformed the relationship between Member states into confrontational debt relations and got locked up in the institutional system of the Eurozone, since then protective of creditors' interests *vis-à-vis* debtor Member states.[54]

Regarding financial assistance, prohibitions from the European treaties were circumvented by resorting to international agreements, that in the end established a permanent structure, the European Stability Mechanism (ESM), to support Eurozone members in distress without being fully integrated into the EU's institutional and legal system. On the monetary side, the inability to purchase sovereign bonds directly from Member States forced the ECB to buy those at market price in the secondary market. Purchasing bonds under those conditions diminished the impact of the help because in the end it mostly benefited investors on the brink of assuming losses in case of sovereign default. The upshot was that rather than alleviating the pressure from markets over Greek debt, those purchases only created concerns among the financial sector about how to qualify for them, without addressing uncertainties about the value of bonds still in the market. The costs of building the Eurozone without a lender of last resort started to become evident. Only when the possibility of unlimited bond purchases by the ECB was announced, on the grounds that the transmission mechanism of monetary policy was clogged in recipient countries, the pressure from markets eased. As soon as default was discarded value of bonds recovered. The possibility of purchasing bonds whenever similar circumstances occur has been since then institutionalized through the Transmission Protection Instrument (TPI) that is currently part of the ECB's toolkit.

54 Fernando Losada 'A Europe of Creditors and Debtors: Three Orders of Debt Relations in European Integration' (2020) 58(4) Journal of Common Market Studies 787, 795.

However, and this is crucial, all these relief measures were then and are still nowadays inextricably subjected to strict conditionality. Both financial and liquidity assistance were to be implemented only in exchange for the recipient Member state's commitment to implement austere economic policies, pursuing a fiscal consolidation that in the medium or long term would guarantee debt repayment. Without the signature of a memorandum of understanding, a private contract between the recipient and its creditors detailing those conditions, no assistance would be granted. This is a critical aspect of the political agreement that had its institutional manifestation in the amendment of the economic governance of the Eurozone to introduce, through the European Semester, tighter control and recurrent monitoring over national budgets.

The reaction to the pandemic introduced a number of relevant novelties into EMU's design. The major concern was to support national economies to overcome the effects of such a specific crisis. Hence, rather than focusing on fiscal consolidation the goal was, in the very short term, to provide ample resources to support health systems and medicine research, as well as to guarantee employment, whereas in the medium term the objective was to boost economic recovery, promoting the Commission's agenda towards green and digital transformations. Major innovations were thus related to the provision of funds from the Union, which reached unprecedented levels through the 'Next Generation EU' program. Crucially, the founding for that program was arranged through the issuing of bonds by the Commission in the name of the Union. This exceptional decision allowed the Commission to borrow from the market to then lend again half of that money to the Member states, thus shielding them from country-specific assessments in the markets, and to spend as non-refundable subsidies the other half.[55] The implementation of that program was articulated through the European Semester, now equipped with economic incentives to complement its fiscal monitoring and budgetary auditing tasks. The Commission and the Eurogroup, the main actors in this political process, have thus gained great influence over national economic policy-making.

55 Bruno de Witte, 'The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58(3) Common Market Law Review 635.

3.3.2. Transnational solidarity in European monetary integration

After mapping the transformation of European monetary integration, we are in a position to address the analysis of solidarity in this particular transnational context, where due to the specifics of the institutional design its workings are rather convoluted. The first manifestation of solidarity, key for remedying the inequalities intrinsic to monetary systems protective of creditors, guarantees socio-political stability through the provision of social policies. In the Union this is a matter of national competence, and therefore the impact of the euro on this first dimension of solidarity may seem negligible. However, rules on economic governance constrain to a great extent the ability of Member states to provide services and guarantee social rights, due to the subjection of national policies to clear fiscal limits. Moreover, in case of financial distress stricter rules towards fiscal consolidation and enhanced supervision of national budgets are applicable, reducing even more the fiscal space available to fund those policies properly. Although it could be argued that the Next Generation EU program could remedy this situation, its financial support focusses on productive investments conducive to the transformation of the economy and not on policies appeasing social needs. Consequently, within the EMU social policies became a dependent variable subordinated to the needs of the monetary system.[56]

The second dimension of solidarity guarantees the provision of liquidity through a lender of last resort, a critical function in any monetary regime oriented towards the structural protection of creditors. In the EMU, the detachment of monetary policy from the rest of economic policies, articulated through a strict division of competences between the European and national levels, resulted in the artificial split of the tasks related to the promotion of financial stability. According to this design, in the private sector liquidity issues would be addressed through the ECB as highest monetary authority, whereas problems of solvency are the competence of national authorities (including eventual bailouts) on the basis of Member states' responsibility over all financial matters. Meanwhile, no lender of last resort was foreseen for Member states, which had to address solvency issues exclusively through default on their sovereign debt obligations. Moreover, within EMU's original framework, Member states' exclusive dependence on markets may easily transform liquidity issues into solvency problems.

56 Francesco Costamagna, 'National Social Spaces as Adjustment Variables in the EMU: A Critical Legal Appraisal' (2018) 24(2–3) European Law Journal 163.

Hence, by design it was critical that, as mere currency users, Member states took especial care of their fiscal policies.

The division of tasks among European and national levels goes against the very idea of a lender of last resort, which unifies in a single figure the ultimate authority of the monetary system. The renunciation to such an authority for the euro was nevertheless a merely voluntaristic decision because this is an intrinsic feature to all monetary systems that will eventually emerge whenever pressing circumstances, no matter how unexpected, take place. In the case of the Union, the financial and sovereign debt crises worked as the trigger, forcing European institutions to take responsibilities corresponding to a lender of last resort and to address with their own limited means financial stability concerns. Financial stability thus became an overriding political objective mobilizing the whole apparatus of the Union.[57]

Aim of solidarity	*Socio-political stability*	Financial stability (for private sector actors)	Financial stability (for public, not sovereign actors)
Level of intervention	*National*	European	European
Provision of	*Public support – to guarantee ultimate repayment of debts through work*	Liquidity – to guarantee the value of property	Financial assistance – to guarantee sovereign debt repayment
Institutionalized practice	*Public policies (welfare state)*	ECB – liquidity provision	ESM and European Semester
Debtors addressed	*All members of the polity*	Owners of certain assets	Member states
Resources available	*Limited*	Potentially infinite	Borrowed from markets through intermediate institutions
Intervention	*Permanent*	Permanent	Continued until full repayment

TABLE 2 – Articulations of solidarity in the Eurozone

57 Klaus Tuori and Fernando Losada, 'The Emergence of the New Over-Riding Objective of Financial Stability', in Maribel González Pascual and Aida Torres Pérez (eds), *Social Rights and the European Monetary Union: Challenges Ahead* (Edward Elgar 2022).

Importantly for our purposes, the decoupling on the functions of a lender of last resort resulted in the addition of a third dimension to the workings of solidarity in the Eurozone (see Table 2). This new stream of solidarity results from the specific institutionalization in the Eurozone of the principle of creditor protection *vis-à-vis* Member states, which ceased to have the status of privileged creditors and instead simply operate in their capacity as regular debtors. In this spin-off of the protection of financial stability, solidarity is manifested through the provision of financial assistance to Member states, conditioned to making progress towards fiscal consolidation to guarantee in the end full debt repayment. New elements were added to the institutional framework with this goal in mind. Hence, the establishment of the ESM and the revamping of the process for the coordination of national economic policies, the European Semester. Moreover, the effects of the turn towards the protection of Member states' creditors had a noticeable impact on the legal domain. On the one hand, because the latest layering in the institutional setting, despite deriving from European monetary integration, remained beyond the scrutiny of EU law: the ESM is an international organization independent from the European treaties, and the European Semester monitors actual national competences and its main actor, the Eurogroup, only has an informal status.[58] But on the other hand, because without a lender of last resort financial stability had to be addressed by other means, and due to the existential character of the issues at stake the legal order had to be reinterpreted towards creditor protection. Just like social policies became a dependent variable of EMU, the whole legal order was also subordinated to EMU objectives and, in particular, to financial stability concerns.[59]

4. Conclusions

Money has an intimate but generally neglected connection with solidarity, to the point that monetary arrangements determining the balance between the interests of debtors and creditors in society are the actual foundation of social inequalities placed at the core of the concept of solidarity. In the con-

58 Case C-597/18 P *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C:2020:1028 (ECJ, 16 December 2020).

59 Fernando Losada and Klaus Tuori, 'Integrating Macroeconomics into the EU Legal Order: The Role of Financial Stability in Post-Crisis Europe' (2022) 6(3) European Papers: A Journal of Law and Integration 1367.

text of the nation-state, monetary arrangements result in the articulation of solidarity through a combination of welfare policies that appease social discontent for the lack of debt reliefs, and consequently for the need to work to pay debts, with a lender of last resort that protects creditors in case of debtor insolvency. In the context of European integration, the common currency added a new layer built on top of these foundations and, due to the content of the political agreement on the EMU, transnational solidarity works in a more convoluted way.

When establishing the euro, Member states wanted to emphasize the market side of the currency, a major step in the culmination of the single market, while limiting its state side to avoid transferring sovereign features of the currency to the European level. Financial stability tasks were therefore divided regarding private actors (ECB providing liquidity, Member states addressing solvency issues), and a lender of last resort for Member states was straightforwardly ruled out. Accordingly, the original design of the euro conceived national authorities as still placed at the apex of their respective national monetary systems, the ECB only providing liquidity assistance at lower levels in the monetary hierarchy. The different crises experienced by the Eurozone turned upside down this monetary design, placing the ECB at the apex of the system. It now plays the role of lender of last resort for Member states, but is constrained by structural limitations: financial or liquidity assistance provided, respectively, through the ESM or the ECB via its TPI program, must be subjected to strict conditionality. This requirement transfers responsibilities over financial stability and conditionality-related functions to other institutions and, importantly, through the reviewing of their actions, to the Court of Justice of the EU and, through the latter's interpretation of legal provisions, to the EU legal order. Financial stability concerns are thus the driving force in European integration.

Transnational solidarity in this context is thus fragmented: social policies are constrained by the specific needs of the monetary design, whereas responsibility over financial stability is scattered among the institutional setting, depending on the type of debtor in distress. Under these conditions, the need for effective solidarity may only increase. However, the structural features of European monetary integration point towards the opposite direction. By renouncing their money issuing abilities Member states placed themselves, as regular debtors, in a subordinated position *vis-à-vis* their creditors. Consequently, the balance between states and markets is currently tilting towards empowering the latter. Despite attempts to constrain

finance through new regulation, only a major crisis like the pandemic one may lead to major structural changes opening a window of opportunity for reconsidering systemic choices and rebalancing the scale, at least slightly, towards the debtor side.

Chapter 7 A solidaristic European Union? How the "economic constitution" of the EU pre-empts a solidaristic turn in European politics

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> "The near future had made up its mind to mince me into sausage-meat. What was I to do in the meanwhile? Read books? File the rough corners off my character? Earn money? I was sitting in a great waiting-room and its name was Europe. The train was due to leave in a week. I knew that. But no one could tell me where it was going or what would become of me. And now we are again seated in the waiting-room, and again its name is Europe! And again we do not know what will happen. We live provisionally, the crisis goes on without end!"
> Erich Kästner, *Fabian or Going to the Dogs, the story of a moralist*[1]

1. Introduction

In what sense can the EU be regarded as a polity founded on solidarity? Opinions seem to differ and vary over time. If we focus on the recent decades, the financial and fiscal crises of the 10s seem to have persuaded many that the EU is a "neoliberal" or "neoliberalising vehicle" whose laws and policies would undermine solidaristic institutions. In the opposite direction, however, we find many scholars sustaining that how the EU has reacted to the corona syndemic seems to justify its characterisation as a solidarity community, overcoming the "mistakes" that may have plagued previous "austerity" policies.

In this chapter, I will hopefully provide the reader with some of the elements needed to determine whether it makes sense to characterise the EU as a solidaristic polity and in which sense, and to what extent, if at all.

The argument proceeds in three steps.

1 Erich Kästner, Going to the Dogs: The Story of a Moralist (Cyrus Brooks tr, New York Review Books 2012) 44.

First, I undertake a conceptual clarification of solidarity. I distinguish between solidaristic practices and institutions and provide an account of the potentiality and the risks of the institutionalisation of solidarity. On the positive side of the account, I briefly describe why the regulatory ideal of the Democratic and Social state must be regarded as providing a blueprint of a "good" institutionalisation of solidarity. On the negative side, I call the attention of the reader to the legal and political techniques that turn the normative value of solidarity upside down, allowing an unjustified transfer of responsibilities to the profit of the powerful in society (that is what I would refer as 'inverted' or 'exploitative' solidarity).

Second, I briefly consider the historical and structural relationship between the process of European integration and solidaristic practices. The founding Treaties of the Communities were ambivalent, rendering possible not only that European institutions would become facilitators of the development of solidaristic bonds across and within national borders but also a constraint pre-empting solidarity across and within national borders (and eventually the vehicle through which forms of inverted solidarity could be imposed). While in the sixties and seventies, Europe was predominantly a facilitator of the Democratic and Social State, from the late seventies, it also became first one of its main constraints and then the enforcer of inverted solidarity. This has resulted in what we could characterise as a complex and rather schizophrenic relationship between the European Communities (later the EU) and solidarity. Such a lopsided relationship was epitomised by the fundamental norms introduced by the Treaty of Maastricht, which, once and at the same time, led to the creation of a common currency while pre-empting the emergence of mechanisms of insurance vis-à-vis the new economic risks that were being created.

In the third section, I zoom in on the government of the corona crisis. As already pointed out, this is usually claimed to have been an exercise in solidarity across borders, which would prove that the EU is indeed a solidaristic polity. I start with a summary but detailed reconstruction of the government of the crisis. Then, I show why this is, at best, a very modest exercise in solidarity because the fundamental decisions that will determine the distributional impact and consequences of what has been done have yet to be taken.

The last section holds the conclusions.

2. From social practices to legal institutions: what is there in a name

2.1. Solidaristic practices: Mutual aid in action

Solidarity is based on the capacity of human beings to "feel for others", to imagine being somebody else and to understand what the other is experiencing or is likely to experience. Leaving aside many possible nuances, Adam Smith characterised this as the moral sentiment of sympathy.[2] At the same time, solidarity also presupposes a capacity to act in concert with others to engage in reciprocal help. In brief, to establish strong bonds with others, or simply, to bond with others. This is what Piotr Kropotkin characterised as "mutual aid".[3]

Mutual aid propelled by sympathy leads to solidaristic practices.

Such practices have two key defining traits, which allow us to distinguish them from other morally relevant but different practices:

- First, solidaristic practices involve sharing the skills and/or resources of the participants so that they are partially fully divested in a common fund (the "solidum") and thus put in common. Through the referred "solidum", individuals "mutually support each other, strong and weak alike, for the welfare or well-being of the community".[4]
- Second, the common means (the "solidum") is disposed of according to common action norms, ensuring the mutuality and reciprocity of the aid to benefit those in need of assistance, *operationalising* mutual aid. Such common action norms tend to reflect the positive morality of the group to which the individuals belong.[5]

While the tendency to stand together through different forms of "solida" can be observed not only in human societies but also among animals (as indeed Kropotkin claimed in the context of a then famous polemics about the proper way of interpreting Darwin's *The Origin of the Species*),[6] the second trait of solidaristic practices is characteristically and exclusively human.

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2 Adam Smith, *The Theory of Moral Sentiments* (Oxford University Press 1976).
3 Petr Kropotkin, *Mutual Aid: A Factor of Evolution* (Freedom Press 1987).
4 ibid 22.
5 We will see in the next section that institutionalisation crucially involves the juridification of such common action norms.
6 Kropotkin (n 3). Cf Ruth Kinna, 'Kropotkin's Theory of Mutual Aid in Historical Context' (1995) 40(2) *International Review of Social History* 259–283.

For reasons of space, I cannot consider in detail how this definition allows us clearly to distinguish between solidaristic practices and other types of practices. I take leave to limit myself to two brief remarks.

The first is that while solidaristic practices result in exchanges (reciprocity is at the heart of mutual aid), not all exchanges are solidaristic because many of them, even if they may benefit the two parties, are undertaken considering only the self-interest of the parties. This is characteristic of standard market exchanges. To paraphrase Smith, if we owe our daily bread to the baker's self-interest,[7] it makes no sense to speak of solidarity. For an exchange to be solidaristic, the parties need to be moved by an idea of mutual support, not the realisation of self-interest. Hybrid motivations are, of course, possible. Concrete actors may have a complex set of motivations. They may enter specific transactions which society presupposes are undertaken for self-interested reasons for what is a complex set of reasons, which may include other-regarding reasons. Indeed, individuals may come to merge their motivations and develop what some characterise as forms of "enlightened self-interest".[8] However, it would be simply wrong to present what remain essentially self-interested transactions as expressions of solidarity. The key point is that capitalistic market transactions are not *in themselves* expressions of solidarity (independently of the intentions or wishes of specific actors) and indeed the very possibility of institutionalising markets depends on the previous existence and reproduction of non-market, solidaristic institutions. This brings me to a second and related consideration, namely, that the very possibility of creating and reproducing capitalistic markets relies on the existence of other non-capitalist institutions, which crucially include solidaristic communities of insurance against risk. In that regard, it is simply wrong to assume, as many tend to assume (not least on what concerns the process of European integration), that first we have capitalistic markets, and then we have, as a sort of luxury good, institutions ensuring redistributive justice. In that sense, ordoliberal theories are far more plausible: the capitalistic market is only possible within a given non-

7 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford University Press 1976) vol. I, 26–27 (corresponding to I.ii.2 in the standard reference system to quote from Smith's works).

8 The term is, quite obviously, ambivalent. And of course prone to be manipulated. Still, it is hard to find a better concept to reflect the idea that the social nature of human beings implies that, at least most of the time, it is in our self-interest to do well to others. That a proper understanding of what we should be interested in is that others do well.

market *ordo*, which comes logically and normatively *first*.[9] To that ordo, one is tempted to claim, belong the key solidaristic institutions that make societies possible and which come, in logical and normative terms, *before capitalistic markets*. Or, to put it differently and briefly, the *hidden hand* of the capitalist market (self-interest) presupposes the *hidden hand* of the social order (sympathy, to stick to Adam Smith's terminology).

The second remark is that while charitable practices and actions are not typically self-interested, they do not presuppose either a "solidum" or norms binding the way in which the one who gives and the one who receives should behave. If subject to moral norms, those norms do not focus on the bond between the two parties but on their respective positions (levels of wealth and deprivation).

One may tend to assume an abundance of solidaristic practices in pre-modern societies before the emergence of the modern conception of the individual and markets propelled by individual self-interest. However, and quite evidently, solidarity plays also a fundamental role in modern societies. The full recognition of the individual's dignity depends on the simultaneous affirmation of different kinds of solidaristic bonds. This renders it impossible to think of solidarity outside of an institutional context. To which we turn in the next subsection.

2.2. Institutionalisation: from solidaristic practices to the Democratic and Social State

When technological change gives rise to new risks and potential threats, which call for new common action norms regulating what should be put in common in the "solidum" and/or the terms of reciprocity, the need to fully institutionalise solidaristic practices becomes pressing. This is so because the normative knowledge needed to guide the action of those engaging in mutual solidaristic practices cannot be drawn from the pre-existing positive moral norms. This is so because such norms are produced through slow processes, through which they emerge, get tested and are consolidated. As a result, the "tempo" of the production of new positive moral norms is simply

9 Wilhelm Röpke, 'The Guiding Principles of the Liberal Programme', in Horst Friedrich Wünsche (ed), *Standard Texts on the Social Market Economy* (Gustav Fischer Verlag 1982).; as quoted in Werner Bonefeld, 'Freedom and the Strong State: On German Ordoliberalism' (2012) 17(5) New Political Economy 633–656, 637.

too slow. We should add a second shortcoming of positive morality when it comes to stabilising solidaristic practices, namely, the limited resources available to encourage compliance. When the solidaristic community becomes larger, and individuals come to stand in relation to each other as strangers, ie there are many people who are part of the group and still do not engage in face-to-face interactions with each other, group pressure becomes an insufficient means to foster compliance.[10]

The histories of the key solidaristic institutions of our societies, from public libraries to systems of public provision of water, from national health systems to social security arrangements, are indeed the histories of how different solidaristic practices got through different degrees of institutionalisation until they became organised around state institutions through state law (but, as we will see below, with state institutions not exhausting the institutional set-up of solidarity).[11]

The institutionalisation of solidaristic practices has some obvious advantages.

First and foremostly, the transcendence of face-to-face communities has the potentiality of increasing the size and scope of the solidaristic communities. Not only may this create better conditions for inclusion (in particular, for the realignment of inclusion criteria with normative requirements), but also potentially increases the size of the "solidum" and thus the very capacity to confront complex and serious challenges. The more people we are bonded with, the more diluted the risks that we are facing together, and the easier it is for the community of insurance to endure when confronting them. That is even truer in the case of social security and national health services, where the whole population of a political community participate.[12]

Second, it fosters the move from implicit and tacit to explicit and openly decided solidarity-organising common action norms. As already anticipated, this may result in such norms being more systematically shaped by

10 These forces account in general for the institutionalisation of common action norms and the emergence of the specific institution of modern law. See Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press 1999) 1–16. See also chapters 1 and 2 of Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007) 11–20, 21–37.

11 Abram De Swaan, *In Care of the State: Health Care, Education, and Welfare in Europe and the USA in the Modern Era* (Oxford University Press, 1988), 218ff.

12 Cf Colette Bec, *La Sécurité Sociale. Une institution de la démocratie* (Gallimard 2014). and Nicholas Timmins, *The Five Giants: A Biography of the Welfare State* (William Collins 2017).

normative criteria. When this is so, questions of distributive justice are no longer left to the mere evolution of positive moral norms but are actually *decided through procedures where a common will may be elaborated and settled upon*. That opens the possibility of making normative reasons endorsed after reflection and deliberation to bear on the design of such common action norms.

From this perspective, it should be said that the regulatory ideal of a Democratic and Social State, which emerged in the inter-war period and consolidated post-1945, can be regarded as one paradigmatic institutional concretisation of the value of solidarity. There are surely others, which would emerge in non-capitalistic constellations. I cannot elaborate on that point here. Suffice to add that a proper reconstruction of the history of the law of the EU should place the Democratic and Social State, via the common constitutional traditions, right at the centre of the European integration process, highlighting the ambivalent and shifting relationship between the two.[13]

2.3. The ambivalence of institutionalisation: in particular, of inverted solidarity

The institutionalisation of solidaristic practices is not bereft of risks, including its institutionalisation through social states.

The larger the community of solidarity, the more there is a need to encourage compliance. Or what is the same, as the pool of those insured grows, it is ever more important to ensure that all members, who in most cases are strangers to each other, do their part. This has tended to result in resorting to different forms of coercion, including the form of state coercion characteristic of modern law. The effectiveness of such a means comes, however, hand in hand with the potential of its subversion at the service not of guaranteeing the common good but at the service of the imposition of exploitative patterns of distribution of burdens.[14] To state the obvious, law

13 Marco Dani and Agustín José Menéndez, 'È ancora possibile riconciliare costituzionalismo democratico-sociale e integrazione europea?' (2020) *Diritto Pubblico Comparato ed Europeo* 289–326.

14 Among other things, this is why coherent liberals claim that the any justification of the obligation to obey the law (understood as a coercive system) has to have consent at its core, something which presupposes the democratic formation of the law. See Carlos Santiago Nino, *Ética y Derechos Humanos* (Ariel 1989) 400–411.

can be a form of democratic power, but also a means of exploitation. That is also true when it comes to solidarity.

As a result, the explicit positive character of common action norms (in the sense of positive, decided norms) does not by itself guarantee their legitimacy, which critically depends on the extent to which the will that poses the common norms can be regarded as a legitimately (ie democratically) formed common will. If that is not the case, the risk of an authoritarian declination of the legal norms organising the terms of contribution to the "solidum", and eventually the allocation from it, immediately materialises.

It can thus be said that state-mediated and legally organised solidarity is Janus-faced. If the state and the law are the institutions through which the common will is organised, new levels of solidarity can be achieved in terms of its breadth and depth. To put it differently, national health services or public libraries are in their better rendering paradigmatic examples of well-formed solidarity in action. But state power can be used to create legal institutions that turn upside down solidaristic relationships and create "solida" not as a way of standing together vis-à-vis risks or dangers, but for the profit of the few. Or what is the same, the state and the law can become the instruments through which the happy few exploit the restless many *in the name of solidarity*. This is what I refer to as 'inverted' or 'exploitative' solidarity.

Consider the old legal institution of solidaristic responsibility. Its origin is found in the social practices of commercial traders, which formed societies in which they placed in common, totally, or partially, their wealth; practices which in their turn reflected the capacity to engage in forms of mutual insurance against looming dangers. Given the high risks involved in maritime commerce, traders created different forms of "solida", which instituted forms of mutual insurance against losses.[15] To paraphrase the title of a famous book by Peter Bernstein, that was a way of standing "against the gods", in particular against the god of brute bad luck (in the form of storms or pirates).[16] These practices were then juridified, and gave birth to the legal institution of solidaristic responsibility (*obligatio in solidum*),

15 See for example Gianni Mignone, *Le Regole dei Mercanti: Introduzione al Diritto Mercantile* (Università degli Studi di Torino 2022) 37, 53.

16 Peter Bernstein, *Against the Gods: The Remarkable Story of Risk* (Wiley 1996). This practices constitutes an antecedent of modern insurance, which not only institutionalises such practices, but couples them with knowledge about probabilities.

which the lawmaker could then impose on different legal relationships.[17] How and with what effects this was done determined whether the law was acting as a facilitator of solidarity or turning solidarity into its head and manipulating its legal form at the service of exploitation. While in the case of commercial traders, the "solidum" was voluntarily created by the merchants, institutionalisation and legalisation meant that other debtors could see solidarity imposed upon them by the lawmaker as a way not of enabling them to do things they could not otherwise do (as was the case with the merchants), but as a way of protecting the interests of the creditors (who were the legislators themselves, or were in a position to shape the will of the legislators). Once "invented", the legal technology of solidarity could be placed at the service of different goals and objectives.

2.4. Other challenges of the institutionalisation of solidaristic practices, in particular, solidarity in federal polities

The "inversion" of solidarity is not the only challenge involved in the institutionalisation of solidaristic practices. Two other challenges are especially significant.

First, the need for institutionalisation does not do away with the need for institutions to be rooted and supported by solidaristic practices and moral sentiments. This insight is related to some moral philosophers' objection to institutionalising solidarity per se. This is on the basis that solidarity is only a genuine moral sentiment and spur to action when action is spontaneously motivated, fully unrelated to the perspective of coercive imposition in case of non-compliance. It seems to me that the history of European states shows the extent to which the institutionalisation of solidarity can strengthen, not weaken, solidaristic sentiments and practices. Public provision of health has contributed, for example, to eliminate the stigmas which were frequently placed on those who were ill (not least, if suffering from problems of mental health). Of course, the same political history abundantly illustrates the risks involved if we rely exclusively on state institutions as an expression of mutual aid propelled by sympathy. Statism may hollow out the moral and social basis of support for solidaristic practices and institutions. We may come to take for *granted* the institutions of solidarity, not realising how much they depend not only on our doing our part in

17 See for example Giorgio Amorth, *L'Obbligazione Solidale* (Giuffrè 1959) 7–10.

supporting them (eg paying our taxes) but also on discharging our political duties as citizens as a whole.

Second, it is to be decided the societal level at which institutionalisation of solidaristic practices should occur, or what is the same, what we may label the political geography of solidaristic institutions. This is where the process of economic integration, particularly European economic integration, enters our discussion. The consolidation of the European Democratic and Social State in the postwar period was largely premised on the assumption that the nation-state was the level at which democracy and solidarity could be realised.[18] However, Democratic and Social states also aspired to be open states (and indeed the whole recovery and reconstruction strategy was based on a growth of productivity which critically depended on an increase of intra-European trade). While it may be said that European integration did not lead, and has not led, to the creation of significant supranational communities of insurance since its launch, it has clearly affected the shape of national communities of insurance. Not least, it has resulted in such communities being based on residence, and not exclusively on nationality. The welfare state is the national home, but it is a home of which all residents are part. Moreover, national communities of insurance keep on interlocking with other regional and local communities of insurance. This multiplicity of the institutional sites of solidarity results from conflicting demands which must be reconciled into institutional design. On the other hand, and as I already pointed out, the bigger the community of insurance, the more diluted the risks, and the more resilient the community. By the same token, the wider the community of insurance, the less likely that compliance can be fostered by propensities and sentiments other than the shadow of institutionalised coercion. The wider the community of insurance, the more likely there will be not only different renderings of positive morality, even if in view of different normative values, but also different historical trajectories, resulting in different ways of institutionalising solidaristic practices.[19]

It is important to stress that, contrary to what is usually assumed, the co-existence of different levels at which communities of insurance need to be realised requires the maintenance of institutional and normative criteria

18 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (2nd edn, The MIT Press 1996) 491–515, esp 498–500.

19 This was indeed one of the major difficulties which leaders of workers movement faced when organising solidarity within the First International. See Nicolas Delalande, *La lutte et l'entraide: L'âge des solidarités ouvrières* (Seuil 2019).

to determine membership in the different communities, or what is the same, borders. The point of such borders should not be, and needs not be, to practice forms of exclusionary distributive justice. Such borders are necessary to pre-empt the powerful and the better off avoiding their political and economic duties. In brief, legitimate borders are not typically those erected against the wretched of the earth but rather those which pre-empt tax evasion and financial misdeeds.

3. The deep ambivalence of European integration from the standpoint of solidarity

3.1 The founding ambivalence of the European Communities

For reasons of space, I cannot engage in depth with the complex postwar constitutional history of Western Europe, of which the process of European integration is a central part.[20] Suffice it to say, as was already hinted in the previous subsection, that (most) Western European states aspired to be not only Democratic and Social but also open and cooperative. Such a commitment planted the constitutional basis of the process of European integration. The shape that the Western European economic and political order took was clearly determined by the international and military constraints at work in the period, not least US domination (usually referred as hegemony).[21] But also by the different views regarding what was to be the point and purpose of creating European institutions.

Some actors aimed to establish a structure to complement and supplement the national Democratic and Social States. From that perspective, the European Communities would reconcile economic integration at the continental level (necessary to increase productivity levels and thus improve the conditions in which Europeans found themselves) with the consolidation of

20 Dani and Menéndez (n 13), for the key texts to read in that regard.

21 For example, it seems not exaggerated to claim that without the pressure exerted at critical moments by the US governments, the process would have taken a very different course. If it is fair to say that such US governments acted as "federators" of sorts, European leaders managed to implement American wishes in ways congenial to their political preferences, in the process increasing their margins of autonomy vis-á-vis the US. See Alan Milward, *The Reconstruction of Western Europe, 1945–51* (Methuen & Co. 1984). A different interpretation, much more positive about US contributions, in Geir Lundestad, *The United States and Western Europe since 1945: From "Empire" by Invitation to Transatlantic Drift* (Oxford University Press 2003).

social states at home. This was, for example, the view which underpinned the action of the successive governments of the French Fourth Republic. To this was occasionally added the projection of solidarity to the continental level, either by means of redefining national communities of insurance in an inclusionary fashion or, eventually, by creating institutions organizing solidarity at the European scale.

Other actors, however, believed that supranational integration could and should allow the recreation of the liberal European economic order that had collapsed with the First World War (and had never been fully re-established in the interwar period). This objective was sometimes based on the assumption that it was possible, even necessary, to combine interventionism at home with liberalism at the European and international levels (a view largely shared by British governments from the mid-40s to the 60s).[22] Alternatively, it was said that the proper functioning of the national economies required a supranational liberal discipline, which could tame the choices made in postwar national democratic constitutions.[23] This was the view that ran through the bargaining position favoured by the German Chancellor of the Exchequer, which was shared by many of his ordoliberal collaborators (very fearful of French *dirigisme*). In both cases, the goal was to make the European Communities into a lever that would allow the European economy to be released from the "straitjackets" built in the interwar period (and quite obviously, during the Second World War) through a bold definition of transnational economic freedoms.

To summarise a long story in just a few lines, it should be said that the founding Treaties of the European Communities, and particularly the 1957 Treaty establishing the European Economic Community, can be said to be a compromise between these two competing visions. The result was an ambivalent legal text, the meaning and implications of which came to depend on the balance of forces at the national and at the supranational levels of government.

The balance changed with the passing of time. In the fifties, sixties and, to a considerable extent, the seventies, the "founding" ambivalence of

22 The kind of approach that would be basically followed by the United Kingdom, resulting in their non-participation in the Communities and the favouring of looser European free trade agreements.

23 Additionally, some saw in the process of European integration a unique chance to rectify in a liberal direction the constitutional commitments reflected in the constitutions drafted in the immediate postwar. See Guido Carli, *Cinquant'anni di vita italiana* (Lateza 1993).

the Communities was partially overcome in favour of building European institutions and norms in line with the requirements of the Democratic and Social state. Economic freedoms were not interpreted as harbingers of a socially unencumbered right to private property but rather as operationalisations of the principle of non-discrimination on the basis of nationality. In the spirit of postwar embedded liberalism, the common market fostered trade in goods while respecting national autonomy to choose a fiscal and monetary policy attuned to the specific needs of each Member State by means of tight control of capital movements. On what concerns the latter, economic freedom was not about the radically free disposal of one's capital, but rather meant the liberty to trade and to pay for goods and services across borders. In other terms, European individuals and companies were not left free to engage in transnational speculative operations. In this context, high and rapid economic growth favoured the recognition of the rights of foreign workers to be treated equally.

The radical shocks of the monetary crisis (from 1971) and the economic crises (1973 and 1979) rapidly altered the European social and economic context. Economies were simultaneously hit by stagnation and inflation (stagflation), leading to a fundamental transformation of the way in which monetary and fiscal policy were conducted. Neoliberal and ordoliberal visions started to merge into what may be called an ordo-liberal consensus, which left its imprint not only in European policies but also in the way in which Community law was interpreted and constructed. A process which may be referred to as of constitutional mutation started.[24] Next to the Community which was an enabler of solidarity emerged and started to be developed the profile of the Community as an external constraint of the national Democratic and Social States. In particular, economic freedoms and the principle of undistorted competition slowly but steadily became the alpha and omega of public policy and the ultimate criterion by reference to which political and constitutional soundness was to be determined.[25]

24 Agustín José Menéndez, 'A European Union in Constitutional Mutation?' (2014) 20(2) *European Law Journal* 127–141.

25 I refer to Agustín José Menéndez, 'The "Terrible" Functional Constitution of the European Union: "Sound" Money, Economic Freedom(s) and "Free' Competition' in Marco Goldoni and Mike Wilkinson (eds), *The Cambridge Handbook on the Material Constitution*, (Cambridge University Press 2023) 351–66.

3.2. The Maastricht decisive moment: the "constitutional" pre-emption of solidarity

The creation of the European Monetary system in 1978 and the new understanding of economic freedoms favoured by the European Commission and the ECJ since 1979 marked the beginning of a radical transformation of the European Communities. While it is important to keep that in mind, it is hard to contest that the process of constitutional mutation was accelerated by the completion of the economic and monetary union in the late 1990s. In that regard, the Treaty of Maastricht was a decisive moment. Not only was the free movement of capital put on steroids, but the principle of radical fiscal independence of each Member State was made part of the Treaties (now art.125 TFEU and indirectly 123 TFEU). This entailed in objective terms a constitutional choice *against* solidarity across borders (no matter which were the subjective intentions and expectations of the relevant actors).[26] Or what is the same, economic integration will deepen on the condition that no mechanisms of mutual insurance will be built to deal with the potential negative consequences of such deeper economic integration.

The least that can be said is that the centrality of the fundamental choices in terms of monetary and fiscal policy was indeed not realized at the time. Key in that regard was erecting a wall of separation between national exchequers. Such a wall could only be lifted in the most extraordinary circumstances, as stated in what is now Article 122 TFUE. In its second paragraph, financial assistance is foreseen in case of "natural disasters"[27] or "exceptional occurrences beyond" the control of a Member State. In its first paragraph, it is rendered possible to take measures "appropriate to the economic situation, in particular, if severe difficulties arise in the supply of certain products, notably in the area of energy", measures which are to be taken "in a spirit of solidarity between the Member States".[28] These very limited exceptions did not include the provision of financial assistance in the case of a fiscal crisis, as had been foreseen in the case of the balance of payments crisis before Maastricht (and remains part of

26 It could be argued that a neo-ordo-liberal turn resulted from decisions taken by many who clearly where not neoliberals or ordoliberales. Cf Jacques Delors, *Mémoires* (Plon 2003).

27 Cf Council Regulation (EC) 2012/2002 establishing the European Union Solidarity Fund (2002) OJ L311, 3–8.

28 This was later operationalised through Council Regulation (EU) 2016/369 on the provision of emergency support within the Union (2016) OJ L70, 1–6.

the Treaties on what concerns Member States which are not part of the Eurozone, ex Article 143 TFEU). All this implied opting for increasing the risks bore in common while renouncing at the same time to build institutions through which common insurance could be established to face them. Such a decision was closely related to the splendid isolation of the European Central Bank, formally prevented from discharging a standard function of all central banks, namely, acting as buyer of last resort of the debt issued by the public authorities (now Article 123 TFUE). The design of the European Union was based on pretending that the euro was the first currency without the backing of the public (read the state), but merely supported by the self-interest of the actors in financial markets. It was an article of faith that such design will, by itself, prevent any crisis whatsoever.

The design of EMU propelled a radical neoliberal turn of European institutions. Still, the complexity of the European constitutional field and of EU law itself implied the jury was still out on what concerned the direction in which the EU would be moving. Not only did national constitutions, institutions and policies remain obstacles to a neoliberal triumph, but the same could be said of the previous layers of European law and policy, grown on a very different normative soil. If Maastricht confirmed the neo-ordo-liberal direction of the European constitutional mutation, the full implications of such a turn would only be confirmed by the way in which European institutions governed the fiscal crisis of the '10s.

3.3. The fiscal crises: breaching the Treaties, doubling down on the radical separation of national exchequers, and pushing solidaristic institutions to the breaking point.

Many contemporary observers predicted in the mid-1990s that EMU was bound to fail and collapse.[29] Not only did the Eurozone not meet the

29 Critics of the euro came in from different social, economic and normative perspectives. Quite well know was the letter written by 62 German economists, and published in the *Frankfurter Allgemeine Zeitung* and in *Die Zeit* on 11 June 1992.
See Renate Ohr and Wolf Schäfer, 'The Monetary Resolutions of "Maastricht": A Danger for Europe' (1992) *Frankfurter Allgemeine Zeitung* https://www.feelingeurope.eu/Images/the%20monetary%20resolutions%20of%20maastricht.png accessed 25 March 2024. Their view leaned towards ordoliberalism.

criteria for being regarded as an "optimal currency area" (OCA),[30] but its design ruled out putting in common the resources needed to stabilize it. This was the argument underpinning calls for fiscal (and banking) union alongside monetary union.[31]

The critics were proven right, but not immediately so. The day of the reckoning was postponed for ten years by massive cross-border capital flows from the Northern "core" of the Eurozone to its "Southern" periphery. The latter seemed to converge with the former when, as a matter of fact, not only was the levelling up unreal (one is tempted to be fashionable and characterize it as "fake"), but an explosive mountain of economic risks was being built. Precisely because EMU had been designed on the premise that risks would not be shared, it was unclear how and who would have to deal with the consequences of the mass of risks eventually morphing into losses.

In 2007, signals started to emerge of a coming financial crisis. It exploded spectacularly in 2008 and mutated into a European fiscal crisis in 2009. Confronted with the need to both finance a double-digit deficit and roll over the considerable stock of Hellenic debt, the Greek state found itself close to fiscal asphyxia. Against the expectation built up by financial markets in the first decade of EMU, the Eurozone played by the book and stuck to the principle that it was the exclusive responsibility of the Greek government to deal with its fiscal problems. So-called "austerity measures" (draconian cuts in public spending affecting the core of the Greek welfare state) were implemented one after the other. However, the problem was compounded in the process, given their deflationary impact. Every dose of "austerity" only served to make Greek troubles bigger.[32] Moreover, the diagnosis leading to "austerity" policies neglected that what was at stake was not only the solvency of the Greek state, but also, and indeed foremostly, the solvency of Greek private debtors, something which necessarily concerned (and involved) the creditors of such debtors, who happened to be, in no small degree, the financial institutions of the Eurozone core. Finally, what

30 In extenso, Alberto Bagnai, *Il Tramonto dell'euro: Come e perché la fine della moneta univa salverebbe democrazia e benessere in Europa* (Imprimatur 2012).

31 See for example David McKay, *Federalism and European Union: A Political Economy Perspective* (Oxford University Press 1999) especially 173.

32 As acknowledged by the chief economist of the IMF, Olivier Blanchard in Olivier Blanchard and Daniel Leigh, 'Growth Forecast Errors and Fiscal Multipliers' (2013) Working Paper 13/1 IMF, https://www.imf.org/external/pubs/ft/wp/2013/wp1301.pdf accessed 17 March 2024.; and idem, 'Learning about Fiscal Multipliers from Growth Forecast Errors' (2014) 62 IMF Economic Review 179–212.

started as the fiscal crisis of one state soon became a general fiscal crisis of the Eurozone periphery, compounded by an acute economic crisis, in its turn aggravating the fiscal crisis and threatening to put an end to the monetary union.

As is well known, the solution that was finally taken to deal with the Greek fiscal crisis, later extended to other periphery states, was to require the Greek state to *Hellenise* the economic risks involved in cross-border flows, or what is the same, to *transfer* to the Hellenic Exchequer the losses stemming from cross-border debts, while at the very same time providing financial assistance to the Greek state, in the form of highly conditional loans. Austerity Europe, with its peculiar system of sources of law in economic agreements and memoranda of understanding, was slowly but steadily affirmed.

From the standpoint of solidarity among states, we can observe that the basic principles at the heart of EMU were both respected and breached. On what concerns the breach, the provision of financial assistance was hard to reconcile with article 125.1 TFUE. This gave way to all kinds of legal gimmicks, including pretending that the aid was being granted in a bilateral but coordinated way, the creation of ad hoc instruments to provide it, both within and outside EU law, and finally, the amendment of Article 136 TFUE to sanction the creation of what was formally a new international institution, the European Stability Mechanism, for the specific purpose of providing financial assistance to Member States when the "stability" of the Eurozone as a whole was at stake. It is hard not to conclude that the Treaties were complied in the breach. At the same time, however, the government of the crisis was characterized by the reinforcement of the principle of radical separation between the national exchequers. Quite decisively, the losses resulting from the mountain of cross-border loans were nationalized and imposed upon the "debtor" countries while liberating creditors from any form of responsibility. The distributive impact of such a course of action was not to realise "solidarity", as constantly claimed by European institutions, but rather "inverted solidarity", making the citizens of "assisted" states pay the full costs of financial recklessness (not least of creditor institution, which should have known better, and which was fair to expect would share the costs of their misjudgments) during a decade. Indeed, the Eurozone core financial institutions benefitted immensely as they were offered (again) a passport to escape their own mistakes. As a result, incumbent governments in the Eurozone "core" avoided having to

rescue their own banks, which was bound to be very costly in political terms.

4. A solidaristic infection? The Euro-corona syndemic or the existential crisis redux

4.1. The covid-19 syndemic: The policy response

As is well-known, lockdowns were judged by most (but not all) governments as unavoidable for the purpose of saving massive numbers of human lives as covid-19 started to spread. This posed many daunting tasks, particularly so in the case of the Eurozone. In the following, I focus exclusively on the fiscal and monetary challenges. "Freezing the economy" could only be socially accepted if states deployed massive economic resources to protect the socio-economic structure, which required massive public spending well over the limits set by EU fiscal rules and by the capacity of Member States to borrow in the financial markets. How the crisis was tackled had massive implications for the way in which the EU was conceived and the relationship it stood with solidaristic practices and institutions. The EU was ill-equipped, lacking a general framework reconciling democratic political action with expedited decision-making in situations of emergency. As was the case from 2010, the Union was confronted with a crisis not only lacking many of the legal tools required to govern it but also being constrained by Treaty provisions which rendered extremely difficult effective decision-making. As was pointed out in section 2, EMU was so built that the EU lacked a federal fiscal capacity. Moreover, the government of the fiscal crisis had led to the strengthening of the wall of separation between national exchequers, with financial assistance implementing a form of "inverted" solidarity.

The government of the crisis can be reconstructed in four steps. First, fiscal rules were suspended (section 4.1.1). Then, the limits on the use of public expenditure to intervene in private companies was set aside de facto, if not fully de jure (section 4.1.2). At the same time, the ECB acquired massive amounts of the debt issued by Eurozone states through the expansion of its "ordinary" QE programme and the launching of a specific pandemic QE (section 4.1.3). These three measures allowed each Member State to spend as much as it deemed necessary to sustain the economy through the covid-19 syndemic. But because the position of the Member States was very

different, reflecting historical trajectories and patterns, but also the effects of austerity policies, there was a serious risk not only that some states would only reluctantly spend but also that the different extent of state intervention would result in the consolidation of massive differences in the economic conditions faced by economic actors across the single market. This led to the design and implementation of the EU Next Generation programme (section 4.1.4). This was preceded by a series of false steps in which the EU tried to retool pre-existing institutions and programmes, some created during the fiscal crisis, with very limited success.

4.1.1. Suspending Fiscal Rules

The fiscal rules making up the Stability and Growth Pact, which constrain fiscal policy within certain boundaries, were officially "suspended" through the activation of the so-called "general escape clause" of the said Pact.[33] This entails that there were no limits, for the time being, to the accumulation of deficits and, consequently, to the size of public debt (the latter bound to grow automatically in relative terms due to the serious contraction of economic activity).

As we will consider later, it was left undecided for how long the rules were suspended, given that it was basically unforeseeable how long the corona emergency would last. The Commission's recommendations within the European semester were made in 2023 *as if the rules were already back in application*.[34]

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33 Cf European Commission Communication COM(2020) 123 final (2020) Activation of the General Escape Clause of the Stability and Growth Pact https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0123 accessed 25 March 2024. The Council then issued a "statement" following the Commission's recommendation Council of the EU, 'Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis' (Council of the EU, 23 March 2020) https://www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministers-of-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/ accessed 25 March 2024.

34 See for example the assessment of draft budgetary plans, at European Commission, 'Draft budgetary plans 2023' (European Commission, 22 November 2022) https://economy-finance.ec.europa.eu/economic-and-fiscal-governance/stability-and-growth-pact/annual-draft-budgetary-plans-dbps-euro-area-countries/draft-budgetary-plans-2023_en accessed 17 March 2024. At the time of writing, it seems likely such rules would be modified, in particular empowering the Commission to determine how they will apply in concrete terms to each Member State. How that can be reconciled

4.1.2. De facto suspending state aid rules

Simultaneously, the limits placed on the capacity of governments to shape the institutional structure of the economy through the injection of resources into economic undertakings were put on hold, de facto licencing all forms of state aid.

A framework decision was taken on March 13th,[35] followed by two amendments on April 3rd and May 8th.[36] The result was that states could ensure that corporations had ample liquidity, not only through the subsidisation of wages, cheap loans, financial guarantees, or tax cuts (direct or indirect through deferrals) but also through temporary nationalisations (ie of nationalisations not intended to transform the structure of the property of the means of production, but as a means of turning the state in the temporary caretaker of private property while the conditions for profitability were not met). In addition, states could use other exemptions ("damage caused by natural disaster or exceptional occurrences") to support the worst-hit sectors of the economy.[37]

The result was a steep increase in the levels of state aid granted in by the EU. The Commission estimates the aid granted in 2020 at 384,33 bn euro; in 2021, it remained rather high, at 335bn euro (in 2019, a year in which state aid was already on the increase, the estimated aid granted was estimated by the Commission at 134,6 bn euro).[38]

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with democratic legitimacy and equality of states before the Eurozone governance rules remains unclear.

35 European Commission Communication C 91 I/1 (2020) Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0320(03)&from=EN accessed 17 March 2024.

36 European Commission Communication C 112 I/1 (2020) Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0404(01)&from=EN accessed 17 March 2024.
European Commission Communication C 164/3 (2020) Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_2nd_amendment_temporary_framework_en.pdf accessed 17 March 2020.

37 Lena Hornkohl and Jens van't Klooster, 'With Exclusive Competence Comes Great Responsibility' (2020) Verfassungsblog https://verfassungsblog.de/with-exclusive-competence-comes-great-responsibility/ accessed 17 March 2024.

38 See European Commission, 'State aid: 2021 Scoreboard shows that COVID-19 State aid measures allowed for unprecedented levels of support while preserving the level-playing field' (European Commission, 8 September 2022) https://ec.europa.eu/com

In theory, the combined effect of the suspension of fiscal rules and the licencing of all kinds of state aid set the stage for a massive public intervention capable of "freezing", as it were, the economy, sheltering workers but also companies from the massive shock resulting from the lockdown of social activity needed to slow down the spread of the virus, without having to be worried about the limits that EU law normally imposed, via fiscal and competition rules, on such policies. States were left free (for the time being) to spend massively.

However, there was a serious risk that unleashing the "firepower" of public treasuries through the temporary suspension of state aid and fiscal rules would lead not to a homogeneous freezing of the economy and a coordinated reactivation but rather to the radicalisation of the divergence between states. As reiterated during the fiscal crisis in the *Pringle*, *Gauweiler*, and *Weiss* judgments by the European Court of Justice, it was a core element of the European fiscal "constitution" that public expenditure should only be covered through taxes or via the issuance of public debt on "markets" according to "market conditions". Given the different state of their public finances, different states had different capacities to borrow money on financial markets. And if the crisis was long enough, they all faced the risk of markets freezing and credit not being available. In the short run, there was a risk of an "asymmetric" reconstruction, which would give the lie to the (partially mythical, but tangibly relevant) characterisation of the single market as a level playing field.[39] In the long run, all states faced a fiscal meltdown. There was a limit to what could be collected through taxes without accelerating the economy's downward spiral.

These two factors rendered critical the intervention of the ECB through a massive expansion of its "non-conventional" policy par excellence, ie quantitative easing (QE).

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mission/presscorner/detail/en/ip_22_5369 accessed 17 March 2024.; and European Commission, 'State aid: 2022 Scoreboard shows that in 2021 State aid levels remained high to tackle economic effects of the pandemic' (European Commission, 24 April 2023) https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2407 accessed 17 March 2024.

39 Alexander Weber and Viktoria Dendrinou, 'Euro Area Under Threat From Uneven Virus Shock, EU Warns' (Bloomberg, 6 May 2020 https://www.bloomberg.com/news/articles/2020-05-06/euro-area-survival-put-at-risk-from-uneven-virus-shock-eu-warns accessed 17 March 2024.

4.1.3. Expanding the acquisition of public bonds and launching a specific pandemic QE: The ECB as the unconditional lender of last resort to Member States

The suspension of the fiscal and state aid rules was immediately followed by the stepping up and redefinition of the programme of quantitative easing of the ECB. In addition, the ECB launched a dedicated Pandemic Emergency Purchase Programme. The result was the massive monetisation of the public debt issued separately by all Member States of the Eurozone. Indeed, the ECB proceeded, for the first time explicitly and openly, to buy debt in proportions different from the capital key of the ECB itself, that is, in asymmetric proportions. Or what is the same, a higher proportion of Italian and Spanish debt was bought than German debt.[40]

While the ECB claimed that it was aiming at ensuring "monetary stability" and the effectiveness of its monetary policy decisions (in line with what it claimed was the point and purpose of QE), the fact of the matter is that by stepping in, the ECB provided states with an alternative source of funding to taxes and financial markets (even if the public debt was still issued *as if* there was no central bank intervention). The ECB emerged even more so than before as *the* lender of last resort to both states (and financial institutions), and it did so *despite* the extent to which a key actor, the German Federal Constitutional Court, threw doubts on its authority in the most dangerous days of the corona crisis.[41]

At the height of the crisis, the ECB was buying around 70 % of the debt issued by Eurozone states. As a result, by the end of 2021, the System of European Central Banks was holding public debt for a value close to 40 % of the Eurozone GDP.

Undoubtedly, the dire state of financial institutions (German and French ones, above all) may have come a long way to prompt this new set of "unconventional" monetary policies. But it remains the case that such policies allowed national governments a breathing space. It seems there are good reasons to conclude that the "neo-ordo-liberal" rhetoric, as codified

40 True, the ECB had started asymmetric buying under its QE-1 programme well before this spring. But it had done so timidly, and only because it was forced to do so by "technical" reasons (among others, the limited supply of German debt on financial markets).

41 Bundesverfassungsgericht (German Federal Constitutional Court 2nd Senate), Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, para. 1–237, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915
https://www.bverfg.de/e/rs20200505_2bvr085915en.html accessed 17 March 2024.

in the Treaties, was set aside (*for the time being*), prompted by powerful prudential considerations, not unrelated to the chronic weakness of the biggest European financial institutions. Another matter, which should be properly discussed, is whether this breathing space was not bought at the expense of a further increase of inequalities, reflected in increasing the dimensions of the financial bubble.

4.1.4. Common expenditure through jointly issued public debt?

Suspension of fiscal rules and of competition rules was bound to be not only temporary, but insufficient. Proceeding in such a way allowed overcoming the different capacities of states to become indebted, at the price of composing problems in the long-term. In concrete terms: By acting as an unconditional lender of last resort, the ECB created the conditions under which, in abstract terms, Spain and Italy could spend as much as Germany during the crisis. However, that would only result in even higher levels of indebtment of Spain and Italy relative to Germany in the middle and long runs. So when the Eurozone would come back to its "normal" governance, such highest debt levels would be there, resulting in major constraints to the fiscal policy of the most indebted states. This unleashed strong pressures to introduce elements of mutualisation of the debt issued during the syndemic.

As real as the political pressures were, the fact was that Article 125.1 TFEU remained part of the Treaty, and it forbade any form of mutualisation.

This is why the first decisions that were taken (and said to correspond to an envelope of more than 500 billion euros) were a reiteration of the means of financial assistance developed during the 2010s fiscal crisis (as is discussed in subsection a).

The situation was about to become even more complicated. As already pointed out, on May 5th 2020, the German Constitutional Court published a ruling in which it declared "ultra vires" the previous judgment of the European Court of Justice declaring quantitative easing compliant with European law while throwing very serious doubts on the conformity of the programme itself with German constitutional law.[42] Quite intriguingly, the German judges proceeded to require German institutions (and through them, the ECB) to produce a fresh set of reasons within a 3-month delay

42 ibid.

so as to prove that the design and implementation of the quantitative easing programme did not exceed what was required to avoiding deflation, without interfering excessively on the competence of Member States to shape fiscal policy. The conflict itself was overcome by means of a peculiar form of German "muddling through". In political terms, it could be concluded that the GFCC satisfied itself with raising the issue without drawing any immediate implications of the decision (implicitly, it accepted the arguments put forward by the ECB and the Bundestag as good enough to prove the proportionality of the ECB QE programme).

For our present matters, it is important that the same reasons that the Karlsruhe court used to challenge the soundness of quantitative easing could apply even more straightforwardly to the pandemic QE programme, the so-called PEPP. So, in a way, the German Federal Constitutional Court indicated the likelihood of a finding of unconstitutionality in the future. The judges touched a raw nerve. Massive buying by an institution lacking democratic accountability, which the ECJ came close to arguing was empowered to define the legal limits of its own powers (of what is and what is not monetary policy), thus creating a democratic and legal black hole at the center of EMU.

The combination of the centrifugal effects of unequal levels of expenditure among Member States and the perspective of a declaration of German unconstitutionality spurred European leaders to agree on an unprecedented yet modest given the order of the task, common public expenditure programme, the EU Next Generation programme, as we will see below in subsection b).

a) A false step: Repurposing the instruments created during the fiscal crises of the 10s

Before we deal at some length with the EU Next Generation programme, it is necessary to say that the Commission proposed using pre-existing tools and mechanisms to contain the covid-19 crisis. In particular, it was proposed that the European Investment Bank will extend new credit, the European Stability Mechanism will extend credit with "no conditionality" and, at the same time, a new credit mechanism, known by the acronym of SURE, and which replicated the format of the ESM without its conditionality, will extend loans to fund schemes aimed at protecting employment through the crisis. The Commission claimed that this would allow to mobilise 540

billion euros. Institutional optimism was misplaced. The EIB was bound to be slow and fail to meet the credit target, and the stigma associated with the ESM led to no country applying for its funding. It is only possible to speak of (relative) success when it comes to SURE. Even in that case, what was being proposed was the facilitation of national indebtment. But states piling even more national debt would not do anything to rebalance the fiscal capacity of the states. A different policy trajectory had to be followed.

b) EU Next Generation

As was pointed out in the introduction to this section, some form of partial mutualization or the costs of containing and overcoming covid-19 was much demanded by the countries which were, once and at the same time, more indebted at the beginning of the syndemic and more badly hit by the fallout from corona (both circumstances were met in the cases of Italy and Spain).[43] The Commission was supportive of that initiative and started working on a dedicated new European fund.[44] This led on May 18th, 2020, to France and Germany announcing a political agreement to create some form of European Recovery Fund (a *solidum* to pay for the costs of the

43 Jesús Sérvulo González, 'Spanish PM calls on European Union for a Marshall Plan and "coronabonds"' (El País, 23 March 2020) https://english.elpais.com/politics/2020-03-23/spanish-pm-calls-on-european-union-for-a-marshall-plan-and-coronabonds.html accessed 17 March 2024.; Reuters, 'Spain calls for Marshall plan, European debt mutualisation' (Reuters, 5 April 2020) https://www.reuters.com/article/health-coronavirus-spain-primeminister-idUSL8N2BT0NM/ accessed 17 March 2024.; Luca De Carolis, 'Conte, un piano Marshall per scacciare i fantasmi' (Il Fatto Quotidiano, 3 June 2020) https://www.ilfattoquotidiano.it/in-edicola/articoli/2020/06/03/conte-un-piano-marshall-per-scacciare-i-fantasmi/5822554/amp/ accessed 17 March 2024.

44 Jan Strupczewski, 'What we know of EU Commission's post-coronavirus economic recovery plan' (Reuters, 24 April 2020) https://www.reuters.com/article/us-health-coronavirus-eu-recovery-explai/explainer-what-we-know-of-eu-commissions-post-coronavirus-economic-recovery-plan-idUSKCN22627F/ accessed 17 March 2024.

crisis).[45] The Commission rendered explicit its proposals on May 27th[46] and the European Council held from July 17th to 21st approved the main lines of the plan,[47] which were then codified into European law, mainly through Regulation 2021/241, establishing the Resilience and Recovery Facility.[48]

The structure of the programme is marked by five of its features:

First, the fund will be part of the EU budget, which would be increased by 750bn, an amount which will be disbursed in the first three years (2021–2023) of the European fiscal cycle.

Second, the resources necessary to make the fund a reality will be raised in the financial markets. Or what is the same, the funding comes from the issuance of *supranational debt*. While this is not new, what is unprecedented is the level of common borrowing. This has prompted reference to the "Hamiltonian moment" of the EU.[49]

Third, contrary to what Italy and Spain required, the whole amount was split in two main forms: aids (390 bn) and loans (360 bn). The latter

45 Élysée, 'French-German Initiative for the European Recovery from the Coronavirus Crisis' (Élysee, 18 May 2020) https://www.elysee.fr/en/emmanuel-macron/2020/05/18/french-german-initiative-for-the-european-recovery-from-the-coronavirus-crisis accessed 17 March 2024.; see also Ana Carbajosa and Silvia Ayuso, 'Merkel y Macron anuncian un plan de ayudas de 500.000 millones para la reconstrucción de Europa' (El País, 18 May 2020) https://elpais.com/internacional/2020-05-18/merkel-y-macron-presentaran-una-iniciativa-conjunta-para-la-reconstruccion-de-la-ue.html?outputType=amp accessed 17 March 2024.

46 European Council Communication COM/2020/456 final (2020) Europe's Moment: Repair and Prepare for the Next Generation https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1590732521013&uri=COM%3A2020%3A456%3AFIN accessed 17 March 2024.

47 European Council Conclusions EUCO 10/20 (2020) Conclusions from Special meeting of the European Council 17–21 July 2020 https://www.consilium.europa.eu/en/press/press-releases/2020/07/21/european-council-conclusions-17-21-july-2020/ accessed 17 March 2024.

48 European Parliament and Council Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility (2021) OJ L 57/17, 17–75.

49 Scholz introduced the turn of phrase into the debate. See Peter Dausend and Mark Schieritz, 'Jemand muss vorangehen' (Zeit Online, 19 May 2020) https://www.zeit.de/2020/22/olaf-scholz-europaeische-union-reform-vereinigte-staaten accessed 17 March 2024.

Expressing opposition in line with his previous positions, Otmar Issing, 'The Covid-19 crisis: A Hamiltonian moment for the European Union?' (2020) 23(2) International Finance 340–347.

A critical comparative historical analysis in Christakis Georgiou, 'Europe's "Hamiltonian moment"? On the political uses and explanatory usefulness of a recurrent historical comparison' (2022) 51(1) Economy and Society 138–159.

amount will be spent if and only states make use of the possibility of receiving the loans.

Fourth, the granting of loans and the assignment of grants is subject not only to the forms of conditionality characteristic of economic governance (strengthened through Article 10 of Regulation 2021/241), but to four new forms of conditionality. Namely:

a) what may be labelled as "preconditionality", or the fact that national recovery plans were not only made in a template decided the European Commission (through the issuance of guidelines) but were drafted under the "non mandatory" supervision of the European Commission through a dedicated task force (named as RECOVER);
b) goal conditionality: the objectives of the public expenditure rendered possible by the European Recovery Fund are determined by European law; the overarching goals are defined in Article 4 of Regulation 2021/241, while six specific objectives (ecological transition, digitalization, intelligent, sustainable and integrative growth and social and territorial cohesion, health and economic resilience, Next-Generation policies) are enshrined in Article 3 of the same Regulation;
c) to this, we have to add c) what we could name as "macroconditionality": periodic payments are subject to the control not so much of the actual way in which the money is spent but to compliance with the recommendations issued by the European Commission to each state under the European Semester, ex the fundamental Article 17.3 of Regulation 2021/241;
d) the rule of law conditionality, as enshrined in Regulation 2020/2092.[50]

Fifth, the decision regarding how the amount spent in grants will be repaid and with what funds were not taken. The only actual decision was the introduction of a tax on non-recycled plastic residues, at a rate of 80 cents per kilo, which entered into force in 2021.[51]

50 European Parliament and Council Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget (2020) OJ L 433/1, 1–10.

51 European Council Regulation (EU, Euratom) 2021/770 on the calculation of the own resource based on plastic packaging waste that is not recycled, on the methods and procedure for making available that own resource, on the measures to meet cash requirements, and on certain aspects of the own resource based on gross national income (2021) OJ L 165, 15–24.

4.2. A more solidaristic EU? Between the inklings of a federal solidum and austerity business as usual

As was pointed out when reconstructing the government of the corona-crisis, EU Next-Generation has been trumped as leading not only to a "Hamiltonian moment", through which the EU would have become more of a federal state but also as a moment of "solidaristic infection". In this final subsection, I consider three reasons to pass a more sober and reserved judgment.

Firstly, the deeply asymmetric and dysfunctional design of the Eurozone, aggravated by the structural reforms undertaken in the wake of the fiscal crisis of the 10s, left Europeans with no real possibility of organising a genuine collective response to the covid-19 crisis for months. As was described in the previous subsection, the initial response consisted of unleashing the capacity of Member States to get indebted and spend. While supranational interventions on the side of the Council of Ministers, the Commission and the ECB were necessary, the real spending was undertaken by the Member States, facilitated by the acquisition of their debt (in secondary markets) by national central banks. It is important to keep in mind that it was Bankitalia, Banque du France or the Bundesbank, and not the ECB, that bought the massive majority of the respective national bonds. Far from being solidaristic in any sense, such measures assumed that each state would contain and overcome the crisis by acting *independently* and that each would bear entirely the costs of the policies it will implement, even if they would have massive cross-border effects.[52] It is important to keep in mind not only that it took months for a collective response in the form of the EU Next-Generation to be organised but also that the size of

52 By the same token, the loans from the European Investment Bank and from the SURE fund (no country made use of the credit lines from the ESM) had a very limited solidaristic character. Common debt was issued, but subject to full repayment on a separate basis by the Member States. Given the mechanics of credit granting, the extent to which interest rates were concessionary was very limited. What was put in common, and only to a limited extent, was the goodwill vis-á-vis the financial markets, resulting in lower interest rates that those demanded to some states when borrowing without the intermediation of these institutional arrangements. However, the *obligatio in solidum* would only emerge in the hypothetical case that these loans were not repaid, something which is unlikely not so much because of the specific terms enshrined in these loans, but because of the overall *disciplinary* character of European financial arrangements.

the collective intervention was dwarfed by the amounts spent by national Treasuries acting alone.

Second, it could be argued that a community of insurance has resulted from the "non-conventional" policies of the System of European Central Banks (SECB). Not only were some of the purchases undertaken directly by the ECB (from supranational institutions such as the EIB) but the strict correspondence between acquisitions and the capital key of the ECB was set aside for the time being. In that regard, it could be argued that the timing and the content of the ruling of German Federal Constitutional Court of May 5th reveal that something *innovative* was being done, which would have played a role in prompting a very clear-cut response on the side of the German constitutional judges, which between the lines would have, with their decisions, aimed at pre-empting the transcendence of the limits foreseen in Article 125.1 (even if the pandemic decisions were not the object of their ruling, at least not explicitly so).

However, it is important to add four caveats. The first is a reminder of what was said in the first item: most of the public debt which has been bought under QE and under PEPP has been acquired by *national* central banks. This constitutes a massive limit to the degree to which QE and PEPP have mutualised the costs of containing and overcoming the crises.

The second is that both QE and PEPP were de facto emergency decisions, undertaken in an undeclared state of emergency (as AG Cruz Villalón rightly pointed in his opinion in *Gauweiler*). It remains the intention of the ECB not only that the programmes would be discontinued (as has partially been the case already, although the proceedings of the debts coming to maturity are reinvested in newly issued public debt) but that the debt would be resold, replaced in the financial markets. Having said that, however, the fact of the matter is that, as was pointed, the SECB holds now debt for a value of approximately 40 % of the Eurozone GDP, which renders hard to imagine how the SECB could replace that debt in the markets without triggering the fiscal crises of most, if not all, Member States. This renders it possible to imagine more innovative solutions to deal with such stock of debt, including their transformation into perpetual debt, which could constitute a further occasion to create a European solidum. The third is that the distributive impact of both QE and PEPP has been hardly progressive. The PEPP and the acceleration of QE preempted the collapse of EZ economies. But in the process, capital holders benefitted much more intensively than workers. This was clearly reflected in the complete decoupling of the value of financial assets from macroeconomic

performance. Massive public debts prevented layoffs en masse, but at the price of feeding the financial bubble even further. Or what is the same, the enlargement of the (partial) European solidum benefitted first and foremost the better off.

Fourth, the EU Next Generation is a complex and, in many ways, yet-to-be-completed arrangement. The same conclusions put forward in the previous subsection regarding the EIB loans and the SURE loans apply to the extent that it is made of loans. There is little solidaristic in the provision of financial assistance when the creditor stands to benefit as much, if not more, than the debtor and when the power imbalance between creditor and debtor is preserved. It is only regarding the grants part of the European Recovery Fund that it makes sense to speak of solidarity. There is no doubt that the approval of EU Next-Generation entails that the EU, acting as a collective, issues common debt at unprecedented levels and then makes use of the funds thus collected to distribute grants and loans to each and every Member State in proportion to the degree to which their economies were affected by the syndemic. Thus, a common solidum is created, and we find legal norms allocating the resources raised on the basis of principles which claim to correspond to the requirements of mutuality and reciprocity.

And still, four further caveats are due:

First, it is important to keep in mind that the actual macroeconomic size of the programme is smaller than what its advocates suggest, not least when comparing the programme with the series of decisions which led to the forging of a common federal treasury in the US. Consider the following three sets of considerations:

a) The real size of EUNext-Generation is smaller than the one constantly advertised by European institutions. I will not consider the tendency of the European Commission to quote a constantly bigger figure without explaining that the new amount results from adjusting the original figure to inflation. More relevant is the fact that the 2020 figure of 750bn is only indicative of the maximum amount of the programme, which will only be reached if all Member States would borrow the maximum quota of loans allocated to them. Suffice it to say that in the case of the countries which financial markets perceive as representing a lesser risk, such as Germany or the Netherlands, it is cheaper to issue debt than to borrow money from the common fund. France does not have much of an incentive to borrow, if only because the meagre eventual financial benefits would not compensate for the loss of face (leading to eventual

higher interest rates in the future). So, in 2021 prices, we are talking about 325,9 bn of grants and 166 bn of loans, that is, slightly under 500 bn.

b) European institutions fail to emphasise that the amount of funds will be spent not in one single year but basically over a five-year period. This entails that the actual macroeconomic impact is much smaller than what may seem at first sight, or what is the same, a trifle more than 4 % of the EU GDP, spread over five years, or what is the same, and an average of 0,8 % GDP per year, if (a big if) all grants and requested loans would lead to actual expenditure and investment. This is much below the level of expenditure that the European Commission itself calculated was necessary to serve the most modest objective of the programme, namely, to compensate for the impact of the massive but unequal state aid granted by states from March 2020.

c) Additionally, it should be noted that the increase in real expenditure of 390bn comes hand in hand with reducing the "ordinary budget" of the EU, of the order of 100bn for the seven-year fiscal cycle. The result is that the new financial perspectives will have an expansionary effect in the first three years (2021–2023) but will have a deflationary impact from year four (in particular, the cuts to the EU budget will have a major impact on the expenditure associated to the common agricultural policy and research and development).

Second, raising funds through loans contributes, and not insignificantly, to the financialisation of the European economy. It could be argued that under the conditions prevailing in 2020 and 2021, there was not much of an alternative to funding most of the common expenditure but through the issuance of new public debt. Still, part of the costs could have been met through taxes collected on excessive profits, as famously John Maynard Keynes proposed when considering ways of paying for the Second World War.[53] As this was not done (despite Article 310.1, third paragraph), it is hard to avoid the conclusion that the programme contributes even further to the growth of financial assets, and, consequently, to the process of financialisation of the economy, even if at a smaller scale than the "standard" and the "pandemic" programmes of QE.

Third, the limits to the capacity of the EU to steer expenditure and of the Member States to channel the funds into public investment, both

53 John Maynard Keynes, *How to Pay for the War* (MacMillan & Co. 1940).

a consequence of the way in which European integration curtails public power, rendered from the very beginning very probable that most of the money would be applied to the subsidisation of private investment projects. As was pointed in the previous subsection, all money is transferred from the Union to national exchequers, with no money being spent from the centre. States are subject to a layer of conditionality requirements, as described in the previous subsection, which are more oriented to reinforce the capacity of the Commission to influence the overall design of national fiscal and social policies than to determine the way in which the funds are spent. Additionally, the radical downsizing of the public sector since the 1970s, compounded by the reduction of administrative capacities, accelerated by austerity policies, rendered it extremely difficult for Member States and their regions to actually make direct and effective use of the funds within the tight deadlines imposed upon them. As a result, a high percentage of the money is unlikely to end up being channeled to the creation and improvement of existing collective goods through public investment but rather would fund the public subsidization of private investment. Or what is the same, the programme will likely turn out to be a means to socialise risks while privatising benefits, an old practice now described as "derisking", and which has become dominant in the profile of contemporary states.[54] That can hardly be described as a way to realise solidarity. Rather, it seems to be another form of "inverted" solidarity.

Fourth, it remains unsettled how the cost of the programme will be funded, or what is the same, how the debt incurred to pay the grants will be repaid when it will become due. This is essential in order to determine the actual economic and normative effect of EU Next-Generation, and more particularly, the extent to which it can be described as a solidaristic programme. While it was generally agreed that the EU would see it recognised the power to collect new taxes or participate in the collection of existing ones at a level which would cover the costs of returning the principal of the debt issued to fund the EU Next-Generation programme, so far only a tax on the consumption of plastic has been implemented. In December 2021, the Commission proposed three additional new taxes,[55] namely, one based on revenues from emissions trading (expected to yield at least 7bn euros per

54 Gabor (n 30).

55 European Commission, 'The Commission proposes the next generation of EU own resources' (European Commission, 22 December 2021) https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7025 accessed 17 March 2024.

year, going up to19bn from 2028), one drawing on the resources generated by the (proposed) EU carbon adjustment mechanism (with a yield of 1,5bn per year from 2018), and finally one corporate income tax part of the proposed new framework of corporate taxation of the OCDE/G20 agreement. By June 2023 the Commission proposed a fourth tax, a specific form of tax on corporate profits (expected to generate 16bn per year from 2024).[56] As a result, we still do not know to what extent this leads to a shift from the logic of apportioning common expenses to Member States, as is now the rule. In other words, the decision to issue debt has been taken and acted upon while leaving open the question of what taxes would be levied to pay such debt. If no decision is taken, the EU Next Generation programme would be paid through the EU budget, or what is the same, most of the grants would be paid by the very Member States receiving them. In this case, a small redistributive impact between states will be coupled with an uncertain redistributive impact between Europeans as individuals. If new taxes are collected, whether the EU Next Generation reinforces solidarity would depend on the distribution of the tax burden, on the very characteristic of those taxes.

5. Conclusions: Back to a solidaristic EU?

In this chapter, I have done four main things.

First, I have provided a minimalistic definition of institutionalised solidarity, revolving around the putting in common of resources or capacities in a "solidum" and the governing of such solidum by common action norms (a key part of which are bound to be legal norms) organising mutuality and reciprocity in the use of the common resources.

Second, I have stressed the opportunities, but also the risks, associated with the institutionalisation of solidaristic practices. Institutionalisation facilitates the creation and preservation of bonds of solidarity in the face of rapid change while allowing the creation of communities of insurance among strangers. However, it may also create dangers, not least the placing of the legal technology of solidarity not at the service of mutuality and

56 European Commission, 'EU budget: Commission puts forward an adjusted package for the next generation of own resources' (European Commission, 20 June 2023) https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3328 accessed 17 March 2024.

reciprocity but of the exploitation of the many by the powerful few. This is what I propose to characterise as "inverted solidarity".

Third, I reconstructed the creation and transformation of the European Communities, later the EU, from the standpoint of solidarity. I departed from the ambivalence of the founding Treaties, reflecting two different visions of the point and purpose of European integration as a facilitator of the solidaristic society at the core of the regulatory ideal of the Democratic and Social State, or its constraint, with a view to expand the room for self-interested action. I also indicated that economic integration, as defined in the 50s, 60s and 70s, facilitated the consolidation of national social states while contributing to redefining the breadth and scope of national communities of insurance, by means of substituting nationality by residence as the main criterion of access. However, by the late 1970s, the direction in which the European integration process moved in socio-economic terms changed, and a hybrid of neoliberal and ordoliberal ideas started to inspire a slow but decisive process of constitutional mutation. This led to European Community law becoming, once and at the same time, a champion, and an enabler of solidarity and a battering ram with which to undermine national communities of insurance, unleashing property owners from their solidaristic obligations. A further and decisive turn was taken with the decision to create a monetary union divorced from any community of insurance but rather premised on the complete separation of national treasuries. The stability of the resulting asymmetric union was ensured for a while by massive cross-border loans, which created a de facto community of risks uncoupled from any community of insurance. This unavoidably led to a massive fiscal crisis in the 10s. There, the rhetoric of solidarity was put at the service of cloaking the imposition of the losses resulting from the mountain of cross-border loans to the "debtor" states, allowing to escape unscathed the reckless creditors. This is a paradigmatic instance of "inverted" solidarity in action.

Fourth, I reconstructed the government of the covid-19 crisis by the EU, showing its ambivalence. For one, the brunt of what the EU did was to unleash the power of individual Member States to spend by means of suspending fiscal rules, state aid rules, and allowing national central banks to implement massive programmes of acquisition of the national public debt. For two, the EU also created and implemented a programme of common expenditure funded by jointly issued debt in unprecedented amounts. This seems, at first sight, to correspond to a solidaristic response: a "solidum" was created and disposed of in the application of legal norms that aimed at

ensuring mutuality and reciprocity. Still, not only the amount spent is modest in relation to what would be required, but almost half of it consists of loans, not grants. Structural constraints on state capacity, largely resulting from the neo-ordo-liberal turn of European policy, render it improbable that most of the money will be employed for public investment. A good deal of the money would be used to "de-risk" private investment in such a way as socialising risks but privatising benefits. Moreover, no decision has yet been taken on how grants will be repaid, as the Commission has only put forward proposals which are not obvious would either be turned into actual regulations or, even if that would be the case, would raise enough revenue to pay for EU Next-Generation.

A solidaristic turn in European integration requires much more than the issue of some hundreds of millions of common debt. It requires a genuine and radical change in the socio-economic structure of the EU. Part of the answer lies in the development of supranational "solida" to fund, for example, common unemployment insurance, as was already proposed in 1975. But the core of the answer lies in ensuring that member states mutually support each other instead of competing with each other, not least for tax bases. As I have argued before, nothing would be more solidaristic than to jointly put an end to the existence of tax havens within the EU.[57]

57 Agustín José Menéndez, 'Neumark Vindicated: the Three Patterns of Europeanisation of National Tax Systems and the Future of the Social and Democratic Rechtsstaat' in Damian Chalmers, Markus Jachtenfuchs, and Christian Joerges (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge University Press 2016) 78–126.

Part III
Transnational Solidarity and EU Migration Governance

Chapter 8 What EU Solidarity in the European Neighbourhood and with whom?

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1 Introduction

In this chapter, I examine the shifting meaning of solidarity in the EU's Common European Asylum System as it relates to neighbouring states. From the perspective of two crises on the EU's external borders: the arrival of asylum seekers from the Syrian, Iraqi and Afghan crises via Belarus and the opening of a Temporary Protection scheme for those fleeing the Russian invasion of Ukraine, the EU has revealed very different approaches driven by geopolitical considerations rather than international refugee law. On the one hand, in categorising the Belarus situation as one of crisis, the EU's response was one seeking to punish the political authorities of Belarus through exceptions to the CEAS (and possibly also international law duties), resulting in severe action against the asylum seekers themselves. In the second case, the EU also found a crisis but opened a temporary protection scheme using, for the first time, a tool designed in 2001 allowing those fleeing the invasion to enter the EU freely and to move to the Member State where they wish to live. What lessons are learned from two crises on the EU's borders and the EU's solidarity response to each of them?

I will examine this question in the following sections: In the first part I examine the meaning of solidarity in the European Neighbourhood and its position in the legal framework regarding third-country nationals and refugees in the Treaty on the Functioning of the European Union (TFEU) (2). Next, are set out the case studies of Belarus-Poland and the Ukraine Temporary Protection scheme the meaning of EU solidarity in the neighbourhood from the perspective of two situations both treated as crises (3). In the next section, I look at the political conditions which have resulted in the very different treatment of the two legal responses to the situations (4). Following this, I regard how fundamental rights may be a form of solidarity (5). In the conclusions, I seek to answer the question posed in this chapter, looking again at the institutional tensions which have resulted in the very different configurations of solidarity in the case studies (6).

2 Solidarity in the legal framework of European Neighbourhood policy

Solidarity is a concept embedded in Article 80 TFEU applicable to all action in the area of borders, migration and asylum.[1] While generally applicable, it comes into its own when the EU is faced with a crisis. As set out in the introduction, crises are both a threat and an opportunity for solidarity. They permit the re-configuration of solidarity as will become apparent in this chapter regarding the use of the concept as regards arrivals of different groups of persons fleeing war towards the EU. The unsettled nature of the concept of solidarity becomes particularly evident when it comes to refugees. The EU's appreciation of the political frameworks which result in people fleeing their countries to seek protection in the EU appears to take precedence over the obligations of EU states, contained in binding international conventions, which constitute elements of solidarity within the international community and are acknowledged within EU law. Key to my analysis here is the flexibility of the content of solidarity as regards its purposes and participants. The scope of solidarity relations discussed in the introduction is central to this chapter. Article 80 TFEU makes clear that solidarity is an essential element of the Common European Asylum System (CEAS) among Member States. Solidarity is also set out in Article 67(2) TFEU, which requires the absence of internal border controls for persons and also frames a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. This provision can be read in different ways, firstly, that solidarity is exclusively among Member States and only fair treatment is required as regards third country nationals or that fair treatment of third country nationals is a form of solidarity among Member States. The later meaning is preferred as it reflects better the objective of abolition of border controls which is premised on third country nationals

1 Article 80 TFEU: "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"; Madeline Garlick, 'Solidarity under Strain: Solidarity and Fair Sharing of the Responsibility for the International Protection of Refugees in the European Union' (Dissertation, Radboud University Nijmegen 2016); Jürgen Bast 'Deepening supranational integration: Interstate solidarity in EU migration law' in Andrea Biondi, Eglė Dagilytė and Esin Küçük (eds), *Solidarity in EU Law* (Edward Elgar Publishing, 2018) 114–132; Violeta Moreno-Lax, 'Solidarity's reach: Meaning, dimensions and implications for EU (external) asylum policy' (2017) 24 Maastricht Journal of European and Comparative Law 740–762.

being treated fairly in every Member States and therefore do not move irregularly thereby disrupting the border control free area.

The solidarity of the Member States must also encompass the solidarity expressed in the common undertaking of the CEAS correctly to apply the Refugee Convention. Thus, it includes at least indirectly solidarity with the United Nation's High Commissioner for Refugees (UNHCR) which is the guardian of that convention. Similarly, as the Refugee convention sets out the rights of refugees, which is incorporated into the CEAS, solidarity of Member States to those claiming to be refugees (generally described as beneficiaries of international protection) which is incorporated into the CEAS, solidarity among the Member States to those claiming international protection is essential to the fulfilment of Article 80 TFEU solidarity requirement. For example, Member States must conform to the CEAS obligation contained in a directive to provide reception conditions to everyone seeking international protection. Those reception conditions must ensure a standard of living compatible for the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR) (see below on human rights standards). The correct delivery of reception conditions to those seeking international protection is an essential element to intra-Member State solidarity as regards the allocation of responsibility for determining asylum application (the Dublin system). If Member States fail to comply with their duties regarding reception conditions, intra-EU Member State solidarity as regards allocation of asylum seekers cannot be applied.[2] This constitutes a profound failure of Article 80 TFEU solidarity. This failure has been the basis of a number of legal challenges to the EU policy against persons seeking international protection moving from one host Member State to another in (legitimate) search for CEAS compliant reception conditions.[3] In the solidarity language of the CEAS, allocation of asylum seekers to one Member State for determination of their asylum applications is premised on the provision of a common minimum standard of reception conditions applicable across Member States. The failure of delivery of such a common standard is characterised as a 'push' factor whereby the failing Member State off-loads its responsibility onto other Member States by making reception on its territory incompatible with international human and

2 Case C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* EU:C:2011:865 (ECJ, 21 December 2011); *MSS v Belgium and Greece,* App No 30696/09 (ECtHR, 21 January 2011).

3 ibid.

fundamental right standards. Turning the language of solidarity around, the failure to provide reception conditions may in certain circumstances entitle the individual seeking international protection to move to another Member State in contradiction of the CEAS rules, because of the duty of the receiving state to provide him/her with solidarity in light of the other Member State's failure to do so.

3 Two Neighborhood Crises: two EU Solidarity responses

3.1 The Belarus Crisis

In June 2021, Lithuania, Poland and Latvia experienced a substantial rise in asylum seekers entering their states across their common borders with Belarus. People mainly coming from Middle Eastern countries[4] had arrived in Belarus notwithstanding visa requirements.[5] They appear or it is alleged that the Belarus authorities encouraged them to continue travelling onwards towards EU states, in particularly the three, Lithuania, Poland and Latvia. According to the Commission "this has been initiated and organized by the Lukashenko regime [the leader of Belarus] luring people to the border, with the cooperation of migrant smugglers and criminal networks."[6] By November 2021 according to the Commission, 7,698 people had entered the EU via Belarus. This was sufficient for the President of the Commission in her State of the Union address to identify the Belarus action as a hybrid

4 Amnesty International, 'Poland/Belarus: New evidence of abuses highlights 'hypocrisy' of unequal treatment of asylum seekers' (11 April 2022) https://www.amnesty.org/en/latest/news/2022/04/poland-belarus-new-evidence-of-abuses-highlights-hypocrisy-of-unequal-treatment-of-asylum-seekers/ accessed 11 November 2022; according to the Commission mainly Iraqi and Afghan nationals were present. According to Eurostat, Iraqi asylum seekers had a 35.6 % protection recognition rate in 2021 and Afghans 64.6 % Eurostat and European Migration Network, *Annual Report on Migration and Asylum 2021: Statistical Annex* (European Union, 2022) https://ec.europa.eu/eurostat/documents/7870049/14760013/KS-01-22-123-EN-N.pdf/283e6304-acb8-cde1-a09c-6f7a55e7241a?t=1655230090489 accessed 10 November 2022.

5 Ministry of Foreign Affairs Belarus, Visa-free travel, https://mfa.gov.by/en/visa/freemove/general/ accessed 05 May 2024.

6 European Commission, 'Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Responding to State-Sponsored Instrumentalisation of Migrants at the EU External Border' (Joint Communication, 23 November 2021) JOIN(2021)32, 1.

attack to destabilise Europe.[7] In the Council Conclusions of 21–22 October 2021, it is stated "The EU will continue countering the ongoing hybrid attack launched by the Belarusian regime, including by adopting further restrictive measures against persons and legal entities, in line with its gradual approach, as a matter of urgency."[8] This was certainly not the first time the EU has reacted to the arrival of asylum seekers with the claim that migrants are being weaponised by foreign states in the neighbourhood[9] but it is one which is having long term legislative consequences including the proposed reform of the Schengen Borders Code to include provisions on 'instrumentalization.'[10] The language of the EU institutions is to claim a crisis requiring inter-Member State solidarity against an illegitimate migration policy of a neighbouring country.

Only a couple of weeks later, on 10 November 2021, UNHCR and IOM issued a joint call for the immediate de-escalation at the Belarus/Poland border to ensure that the safety and human rights of migrants and refugees are upheld. These organisations noted that a number of people seeking to cross the border out of Belarus had died recently and they had received information regarding a group which was blocked at the border in terrible conditions. Their communique stated "UNHCR and IOM remind states of the imperative to prevent further loss of life and ensure the humane treatment of migrants and refugees as the highest priority."[11] This joint call

7 Ursula von der Leyen, 'State of the Union: Address 2021' (European Commission, 15 September 2021) https://state-of-the-union.ec.europa.eu/state-union-2021_en accessed 3 January 2023.

8 General Secretariat of the Council, 'European Council Meeting (21 and 22 October 2021) – Conclusions' EUCO 17/21 (European Council, 22 October 2021) 6 https://www.consilium.europa.eu/media/52622/20211022-euco-conclusions-en.pdf accessed 3 January 2023.

9 Felix Peerboom, 'Protecting Borders or Individual Rights? A Comparative Due Process Rights Analysis of EU and Member State Responses to 'Weaponised' Migration' (*European Forum*, 17 September 2022) https://www.europeanpapers.eu/en/europeanforum/protecting-borders-individual-rights-comparative-due-process-rights-analysis-weaponised-migration accessed 10 November 2022.

10 Vasiliki Apatzidou, 'Schengen Reform 'Alternatives' to Border Controls to Curb 'Secondary Movements'' (European Forum, 31 July 2022) https://www.europeanpapers.eu/en/europeanforum/schengen-reform-alternatives-to-border-controls-to-curb-secondary-movements accessed 10 November 2022.

11 UNHCR, 'UNHCR and IOM Call for immediate de-escalation at the Belarus-Poland border' (10 November 2021) https://www.unhcr.org/neu/70501-unhcr-and-iom-call-for-immediate-de-escalation-at-the-belarus-poland-border.html accessed 11 November 2022.

was an initiative of the organisations, not requested by the EU institutions. According to NGOs which are following this matter, the safety and well-being of people crossing the border in search of refuge was never properly addressed by any EU institution or agency, (notwithstanding the deployment to the EU-Belarus borders of 104 Frontex officers, 73 EU Asylum Agency staff and two Europol guest officers)[12] and even a year later many asylum seekers are still living in appalling conditions in camps at the border.[13]

From the perspective of the EU, there was no hesitation in finding that there was a crisis which engaged it with (in November 2021) 2,000 people close to the EU border and 15,000 in total stranded in Belarus.[14] The Commission was firm that there was a humanitarian crisis which had been created by Belarus. Thus, Belarus should bear the primary responsibility for addressing it. The Commission notes that Belarus is bound by the Refugee Convention and the principle of non-refoulement therefore it should provide protection to refugees there. UNHCR and other international organisations agreed that there was a crisis but considered that the crisis was not only of Belarus' making but also the result of legislative changes made in Poland to exclude people seeking international protection at the border from being able to make an asylum claim or have it considered.[15]

12 European Commission (n 6) 3.

13 Amnesty International (n 4).

14 European Commission (n 6) 3.

15 Among others see: Polish Ombudsman, 'Letter by the Polish Ombudsman to the Polish Minister of Interior' (25 August 2021), https://bit.ly/3K8KVa2 accessed 12 January 2024; Helsinki Foundation for Human Rights, 'The Draft Amendment of the Act on Foreigners and the Act on Granting Them Protection Violate EU Asylum Law Principles – Legal Opinion of the HFHR' (6 September 2021) https://hfhr.pl/en/news/the-draft-amendment-of-the-act-on-foreigners-and-the-act-on-granting-them-protection-violate-eu accessed 14 January 2024; OSCE, 'Urgent Opinion on Draft Amendments to the Aliens Act and the Act on Granting Protection to Aliens on the Territory of the Republic of Poland and Ministerial Regulation on Temporary Suspension of Border Traffic At Certain Border Crossings' (10 September 2021) https://www.osce.org/files/f/documents/3/3/498252_0.pdf accessed 12 January 2024; UNHCR, 'UNHCR Observations on the Draft Law Amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265)' (16 September 2021) https://www.refworld.org/docid/61434b484.html accessed 12 January 2024; Council of Europe Commissioner for Human Rights ('CoE CHR'), 'Commissioner Calls for Immediate Access of International and National Human Rights Actors and Media to Poland's Border with Belarus to End Human Suffering and Violations of Human Rights' (19 November 2021) https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-immediate-access-of-international-and-national-human-rights-actors-and-media-to-poland-s-border-w

In the Commission Communication, the same people are called refugees when referring to their presence in Belarus but as potential irregular migrants when referring to the same persons in the EU Member States.[16] In this context, the specter of secondary movement, that these refugees will move from the first Member State of arrival (Poland, Lithuania or Latvia) to another Member State is central. As designated in the document, this unauthorised secondary movement is an enormous problem. The Commission estimates that "over 10,000 detections at the German border with Poland …can be traced back" to these arrivals in Poland. In response to this problem, the reader is told that the German Federal police and the Polish police were cooperating by patrolling their border area (a Schengen control free border) to detect potential irregular migrants.[17] Thus the problem of secondary movement is implicitly the reason for the temporary reintroduction of border controls between Germany and Poland.[18] The reduction of this secondary movement through the blocking of people (if they might be asylum seekers) within the first Member State where they arrive is the purpose of one of the CEAS cornerstone measures, the Dublin III Regulation. Indeed, the CEAS itself is largely built around the principle that the EU determined according to its own rules where someone should seek asylum and asylum seekers' efforts to move elsewhere in the EU are to be prevented.[19]

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ith-belarus-in-order-to-end-hu accessed 12 January 2024; Council of Bars and Law Societies of Europe, 'CCBE Statement on the Situation at the EU Border with Belarus' (15 December 2021) https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/MIGRATION/MIG_Statement/EN_MIG_20211215_CCBE-Statement-on-Situation-at-the-EU-border-with-Belarus.pdf accessed 12 January 2024, 3.

16 European Commission (n 6) 2–3.

17 ibid.

18 Under the rules of the Schengen Borders Code, Germany has an existing temporary reintroduction of border controls on persons but limited to Secondary movements, situation at the external borders; land border with Austria and while in force since 13 September 2015, it was most recently renewed until 11 November 2022, European Commission, 'Temporary Reintroduction of Border Control' https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en accessed 12 January 2024.

19 Francesco Maiani, *The Reform of the Dublin III Regulation: Study for the LIBE Committee*, (European Union, 2016); Daniel Thym, 'Secondary Movements: Improving Compliance and Building Trust among the Member States?' in Daniel Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System* (Nomos 2022) 129–148.

The Commission's response to the crisis (notwithstanding the legal challenges – see below), crafted by DG HOME, has been to include in a proposed new Schengen reform package provisions intended to weaken access to asylum determination under the CEAS.[20] The particular measures include extending border procedures which permit rapid decision-making attached to expulsion as an exception to the regular asylum procedure and the disapplication of reception conditions requirements during border procedures.

3.2 The Ukraine-Russia Crisis

On 24 February 2022 Russia invaded Ukraine creating a crisis which most observers agree is indeed a crisis for Europe. Here the crisis is not about the dubious behaviour of the ruler of a neighboring country involving what would seem to be about 20,000 (maximum) third country nationals[21] most coming from countries with high recognition rates as refugees in the EU. In the case of the invasion of Ukraine, for many in the EU there was sense of incredulity, a lack of understanding how this could have come about. Since then there has been much re-writing of recent history of the EU's relationship Russia and Ukraine[22] and a terrific volte-face on a policy of integration of energy markets between the two which has left many EU states scrambling for new sources of fuel.[23] On 4 March 2022, the EU opened a temporary protection scheme for people fleeing Ukraine after 24 February (for Ukrainian nationals or long-term residents who are not able to return to their home country). In October 2022, it seems, according to the EU Asylum Agency, that 4.5 million Ukrainians (and others covered by the scheme) have registered as beneficiaries of temporary protection in a Member State. According to UNHCR, more than 7 million people have

20 Costica Dumbrava for European Parliamentary Research Service, 'Revision of the Schengen Border Code' (European Union, April 2022) https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729390/EPRS_BRI(2022)729390_EN.pdf accessed 10 November 2022.

21 Persons who are not nationals of EU Member States nor of the third state facilitating their movement.

22 Aziz Elmuradov, *Russia and EU in the New World Disorder: Revisiting Sovereignty and Balance of Power in the study of Russian Foreign Policy* (Routledge 2022).

23 Laurent A Lambert, 'The EU's natural gas Cold War and diversification challenges' (2022) 43 Energy Strategy Review 100934.

fled Ukraine since the beginning of the war, mainly headed to EU (and associated) states.

According to the Council Implementing Decision, which justified the opening of the temporary protection scheme,[24] the measures are based on solidarity with Ukraine. At preamble (3) it states that the invasion undermines European and global security and stability. The invasion constitutes unprovoked and unjustified military aggression against Ukraine and a gross violation of international law and the principles of the UN Charter. The European Council demanded the full respect for Ukraine's territorial integrity, sovereignty and independence within its internationally recognized borders: "In solidarity with Ukraine, the European Council agreed on further sanctions, called for work to be taken forward on preparedness at all levels and invited the Commission to put forward contingency measures."[25] Further, the Council states that it is resolute in supporting Ukraine and its citizens faced with an unprecedented act of aggression.

The Temporary Protection Directive[26] states that one of the requirements for opening a temporary protection scheme is evidence that there is likely to be a mass influx from the state subject of the scheme towards the EU. The Council Decision examines the evidence commencing with a note that Ukrainian nationals have not been subject to mandatory visa requirements on entry to the EU since 2017. Thus, if pushed, Ukrainian nationals are not faced with the obstacle of obtaining a visa before they can travel to the EU.[27] The Decision does not recommend the re-introduction of the visa requirement, which would make departure from Ukraine much

24 Council of the European Union, 'Council Implementing Decision (EU) 2022/382 of 4 March 2022' [2022] OJ L 71/1.

25 ibid.

26 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12.

27 Regulation (EU) 2017/850 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Ukraine) [2017] OJ L133/1; now replaced by: Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification) PE/50/2018/REV/1 [2018] OJ L303/39.

more difficult. It presents the visa-free travel situation as self-evident and immutable.[28]

The Decision examines arrivals from Ukraine following the 2014 annexation of Crimea concluding that about half of the arrivals will either seek family reunification or employment and the other half will seek asylum. It then estimates that the conflict will give rise to between 2.5 and 6.5 million arrivals of which 1.2 – 3.2 million would apply for asylum.[29] Accordingly, the Decision concludes that there is evidence of a likely mass influx. The numbers are so different from the Belarus case that it barely deserves comment (seemingly 0.003 %). As required by the Directive, the Decision concludes that a situation is likely to occur on account of the mass influx that Member States' asylum systems would be unable to process the arrivals without adverse effects on their efficient operation and the situation of those seeking asylum. This is somewhat ironic in light of the heavy criticism of the temporary protection scheme as privileging Ukrainians to the detriment of asylum seekers who hold other nationalities (very few Ukrainians have applied for asylum in Member States though they are entitled to do so under the directive). The argument is that asylum seekers go through a much more harrowing and lengthy procedure, having to struggle to get into the asylum system at all in many Member States, let alone to access benefits which are more limited under the Reception Conditions Directive than under the temporary protection scheme.[30] According to the Decision, the whole purpose of the scheme was to take those benefiting under the scheme out of national asylum systems so that they could continue to operate normally, though 'normally' seems to be specifically the problem.

According to the directive, UNHCR must be consulted regularly regarding the establishment, implementation and termination of any temporary

28 The UK did not participate in the 2017 measure lifting visa requirements for Ukrainians. When the invasion occurred while the UK opened its own protection scheme for Ukrainians this has been hugely hampered by the visa requirement, see: Alan Desmond, 'Visas Still Required: The UK Response to the Protection Needs Generated by Russian Aggression in Ukraine' (ASILE Project, 13 April 2022) https://www.asileproject.eu/visas-still-required-the-uk-response-to-the-protection-needs-generated-by-russian-aggression-in-ukraine/ accessed 14 November 2022.

29 In fact, the numbers have exceeded these estimates.

30 See the ASILE blog series which focuses mainly on this question: Sergio Carrera and Meltem Ineli Ciger (eds), 'EU Temporary Protection Responses to the Ukraine War and the Future of the EU Asylum System' (*ASILE Project*, April 2022) https://www.asileproject.eu/eu-temporary-protection-responses-to-the-ukraine-war-and-the-future-of-the-eu-asylum-system/ accessed 14 November 2022.

protection scheme (Article 3(4)). This is an indication of solidarity with the international organization responsible for the protection of refugees generally. While the directive does not require that the EU take UNHCR's advice, it is clear that temporary protection is not merely a matter of internal EU policy but fits into an international framework for the protection of refugees in respect of which UNHCR is the guardian.[31] The Decision states that UNHCR has welcomed the support of Member States for activating the temporary protection scheme and also for facilitating the sharing of responsibility for people fleeing in Ukraine among the Member States.

One of the more surprising aspects of the Decision is that the Council notes the agreement of the Member States not to apply Article 11 of the directive which is the provision which seeks to prevent secondary movement. When the directive was negotiated, the Dublin system of allocation of responsibility for asylum seekers among the Member States was also in the process of being transformed into a regulation.[32] Incorporated into the directive is the principle that beneficiaries of temporary protection will be subject to the 'no secondary movement' principle of the Dublin system. The decision to allow secondary movement of those enjoying protection under the Ukraine scheme is a major departure from EU policy. Since the development of the Dublin system, the EU has maintained that the limitation of consideration of any asylum application to one state only as determined by EU rules is an inherent part of solidarity among Member States.[33] Now under the temporary protection scheme, freedom of choice where to go and where to live in the EU is presented as solidarity among the Member States as well as solidarity with beneficiaries of the scheme.[34] Thus one of the logics of the treatment of Syrians and Afghans at the Belarus-Poland/

31 UNHCR, 'About UNHCR: The 1951 Refugee Convention' https://www.unhcr.org/1951-refugee-convention.html accessed 14 November 2022.

32 The Dublin II Regulation was adopted in February 2003 while the Temporary Protection Directive was adopted in July 2001.

33 Valsamis Mitsilegas, 'Humanizing Solidarity in European Refugee Law: The Promise of Mutual Recognition' (2017) 24 Maastricht Journal of European and Comparative Law 721; Eleni Karageorgiou, 'The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity' (2019) 88 Nordic Journal of International Law 315.

34 Daniel Thym, 'Temporary Protection for Ukrainians: the Unexpected Renaissance of 'Free Choice'' (*EU Migration Law Blog*, 7 March 2022) https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/; Lucas Rasche, 'Ukraine: A Paradigm Shift for the EU's Asylum Policy? Policy Brief' (*delorscentre.eu*, 23 March 2022) https://www.delorscentre.eu/en/publications

Lithuania/Latvia border is that secondary movement transforms refugees into irregular migrants who must be prevented from moving to another Member State and thus is the embodiment of solidarity, is turned on its head. Instead, allowing temporary protection beneficiaries free movement is the expression of solidarity.

4 The Politics of Solidarity in the European Neighborhood

Crises act as triggers for the activation of the language of solidarity and its deployment as a legal and operational tool.[35] Two questions arise immediately, first what qualifies as a crisis to activate solidarity tools and secondly what solidarity tools must be activated with neighboring states where refugee rights are at stake? Another chapter in this book will focus on solidarity exercised by civil society actors.[36] This chapter focuses on states and the EU as actors and examines the scope of EU solidarity through the question: what solidarity with whom? One of the questions that remains open is what internal divisions within EU institutions resulted in such different approaches set out in the case studies above.[37]

4.1 The Commission: DG HOME and Member State Interior Ministries concerns

DG HOME, the Commission directorate which deals with interior ministry border, asylum and migration concerns and has its ear close to the borders and immigration departments of the interior ministries of the Member

/detail/publication/ukraine-a-paradigm-shift-for-the-eus-asylum-policy accessed 16 February 2024.

35 Paul McDonough and Evangelia Tsourdi, 'The "Other" Greek Crisis: Asylum and EU Solidarity' (2012) 31 (4) Refugee Survey Quarterly 67; Luisa Marin, Simone Penasa and Graziella Romeo, 'Migration Crises and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity' (2020) 22 European Journal of Migration and Law 1.

36 See Nora Markard, in this volume.

37 An interesting examination, limited to one EU institution, the European Parliament can be found here: Ariadna Ripoll Servent, 'Failing under the 'Shadow of Hierarchy': Explaining the role of the European Parliament in the EU's 'Asylum Crisis" in Edoardo Bressanelli and Nicola Chelotti (eds) *The European Parliament in the Contested Union: Power and Influence Post-Lisbon* (Routledge 2020) 29.

States, clearly carved out the policy in respect of Belarus, following what has become path dependent behaviour of taking measures against asylum seekers in an effort to punish the leaders of neighbouring countries[38] for their actions in assisting the asylum seekers to move. However, the EU's Ukraine response is remarkably different. It appears to have been prepared at the level of the Presidency of the Council, Commission and Parliament sidelining DG HOME but engaging the European External Action Service. At Member State level it is axiomatic that interior and foreign ministries often find themselves at odds. The former is charged with protecting matters within the state while the latter is charged with diplomacy with other states. Borders and migration lie exactly on the fault line between the two, seen by interior ministries as area of security within the state and by foreign ministries as an increasing irritant in international relations. The complexity of the EU's management of the competing interests has been examined by Lavenex in her groundbreaking work.[39] I have also touched on this issue in some of my work.[40]

4.2 The Object of Solidarity

In so far as solidarity is concerned, in respect of the Belarus crisis, the EU has been inward looking. Solidarity has been only for EU Member States – the whole of the EU expressing solidarity with the three affected Member States through providing immediate financial and technical support and in the longer term changes to EU law to relax the functioning of various CEAS measures which might be unwelcome to Member States which consider that they are being subject to what the Commission has called a "cruel form of hybrid threat…state sponsored instrumentalization of people for political ends."[41] EU documents reveal no concern for solidarity with UNHCR, the

38 Cecilia Rizcallah, 'Facing the Refugee Challenge in Europe: a *Litmus Test* for the European Union: A Critical Appraisal of the Common European Asylum System through the Lens of Solidarity and Human Rights' (2019) 21 European Journal of Migration and Law 238.

39 Sandra Lavenex, 'Shifting Up and Out: The Foreign Policy of European Immigration Control' (2006) 29 West European Politics 329.

40 Elspeth Guild, 'The Pitfalls of Migration Diplomacy: The EU Pact and Relations with Third Countries' in Daniel Thym (ed) *Reforming the Common European Asylum System* (Nomos 2022) 209.

41 Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (n 6).

asylum seekers or Belarus though it does identify that a number of Belarus nationals have been seeking to escape from their country's regime. This seems to be an example of the DG HOME norm where solidarity is not only simply intra-state excluding international organisations and asylum seekers but also intra-EU.

In the EU's response to the Ukraine crisis, little attention (though a fair amount of lip service) appears to have been paid to interior ministry concerns about the numbers of people fleeing and arriving in the EU and the costs of their reception when the policy was developed. The adoption of the Decision establishing the scheme reveals a strong political willingness across the Member States to create a free movement regime for beneficiaries of the Ukrainian scheme in a language rarely heard from interior ministry officials. In the implementation of the temporary protection scheme that has been developed, resources have been deployed with generosity not often seen in the area of asylum seekers' reception.

Indeed, in the fairly closed political world of DG HOME, a 2020 new directions policy entitled the New Pact for Migration and Asylum[42] precluded the kind of move which the Presidencies of the three main EU institutions adopted in opening the temporary protection scheme. Instead, the Pact proposes the repeal of the temporary protection directive,[43] the measure which the Presidencies used to legalise the arrival and reception of those fleeing Ukraine. DG HOME was obliged to take ownership of the Temporary Protection Scheme, though its antagonism to the directive remains strong and, at the time of writing, before the end of the 2024 Commission, it remains committed to its repeal.

The temporary protection crisis remains one of Russian invasion, not the arrival of those needing international protection, as in the case of the Syrian, Iraqi, and Afghan refugee arrivals in 2021 via Belarus, where the crisis was the arrivals of individuals coupled with the behaviour of the leader of a neighbouring state (Belarus) allowing this to happen. The crisis was not the fall of Kabul to the Taliban (on the withdrawal of US and allied

42 European Commission, 'A Fresh Start on Migration: Building Confidence and Striking a New Balance between Responsibility and Solidarity' (23 September 2020) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706 accessed 12 November 2022.

43 European Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum [23 September 2020] COM/2020/613 final.

forces from the country), or the continuing human rights violations in Syria and Iraq carried out by their authorities.

4.3 The Institutional Setting of Solidarity

The shift of approach from Syria-Belarus to Ukraine is so enormous that it clearly did not come out of DG HOME itself. Instead of arrivals of people fleeing war (civil or otherwise, such as Syrians, Afghans or Iraqis) being seen as a threat to EU internal solidarity, those fleeing the Ukraine invasion are painted as the living face of solidarity with a neighbouring country to be received as an exercise of solidarity among Member States to stabilise that neighbour.

No temporary protection scheme was opened for the Syrians in 2015–2016. Instead, they had to walk across the Balkans to achieve human rights compliant reception conditions most notably in Germany, a main destination. The utter failure of reception in Greece, Italy and elsewhere in Southern Europe created the conditions of crisis for Member States, UNHCR and the people in need of protection. For those fleeing the Russian invasion of Ukraine the policy of open borders and immediate access to reception conditions everywhere stands in stark contrast. The crisis remains one of the Russian invasion not arrival of those needing international protection. Of course, numbers and geography matter. In 215–2016 about 2 million people arrived in the EU. In the twelve months following 24 February 2022, about 5–6 million people arrived in the EU from Ukraine. Between Syria and the EU, Turkey constitutes the largest single intermediary state through which most people seeking to enter the EU at that time passed. Between Ukraine and the EU there is no 'buffer' state along much of the border – access to the EU did not engage transit through a non-EU state (the exception in the Ukraine crisis has been Moldova).

4.4 The Institutional Response to Incoherence

Those within the EU institutions at the highest levels, may have been aware of the incoherence in the policy. When the President of the Commission made her State of Union address in September 2022 she stated: "*Our actions towards Ukrainian refugees must not be an exception. They can be our*

blueprint for going forward. We need fair and quick procedures, a system that is crisis proof and quick to deploy, and a *permanent and legally binding mechanism that ensures solidarity*. And at the same time, we need effective control of our external borders, in line with the respect of fundamental rights. I want a Europe that manages migration with dignity and respect. I want a Europe where all Member States take responsibility for challenges we all share. And I want a Europe that shows solidarity to all Member States. We have progress on the Pact, *we now have the Roadmap*. And we now need the political will to match." [emphasis added][44] The President's emphasis on solidarity as intra-EU is not however, promising for a wider understanding of the term and indeed, the negotiating positions of the EU legislators on the measures proposed in the Pact do not reflect an inclusive meaning of solidarity.

5 Fundamental Rights as Solidarity in the Neighborhood

In this section I examine the role of fundamental rights in the two crises and how they were incorporated or otherwise in the response and how they relate to solidarity. There are three main frameworks of human rights which apply to the EU and its neighbourhood. First, the EU has developed its own Charter of Fundamental Rights, which is formally connected to the ECHR (Article 6 TEU). There is a system for coherence of the Charter with the ECHR, requiring the interpretation of the Charter never to fall below the standard applicable to the equivalent human rights in the ECHR. However, the Charter only applies to EU Member States. For the 46 countries which are Council of Europe Member States, the ECHR is the regional human rights standard. All of the rights contained in the ECHR are also included in the Charter (though the reverse is not the case). Consistent with the rules of admissibility, individuals (or Member States) which are aggrieved regarding what they considered to be a violation of their human rights may petition the ECtHR to determine their complaint. The interpretation of an ECHR right by the ECtHR has legal consequences for the EU (Article 6 TEU) though the reverse is not the case.

The EU is bound by the Charter, solidarity in the Area of Freedom, Security and Justice must include, for the purposes of ensuring the correct

44 Ursula von der Leyen, 'State of the Union: Address 2023' (European Commission, 14 September 2023) https://state-of-the-union.ec.europa.eu/state-union-2022_en accessed 3 January 2024.

delivery of Chapter rights, solidarity among state institutions responsible for monitoring and oversight of human and fundamental rights compliance. These state bodies include ombudspersons, national human rights bodies and national preventive mechanisms (under the Convention against Torture).

As regards the Belarus crisis, the three EU Member States most affected had all declared states of emergency, reinforced their external border controls and called upon their armed forces to act. They also passed emergency legislation resiling from their obligations under the CEAS to accept and determine asylum applications. Specifically, as regards Lithuania, the decree introduced a state of emergency under which no asylum application was admissible by persons coming across the border without authorization. The crossing of the border in such circumstances was illegal, and such persons were subject to immediate detention. Three fundamental rights in particular were at issue: the right to access the territory to seek asylum, access to a fair asylum procedure and the right to liberty of the person except where an interference is lawful, necessary and proportionate. The Commission took no specific action as regards the correct application of the CEAS or its integrity as regards compliance with the Charter. However, an urgent reference was made from a Lithuanian court to the CJEU regarding the compatibility of the emergency legislation with its CEAS obligations which the Court determined in June 2022. It held that the Procedures Directive must be interpreted as precluding legislation of a Member State under which, in the event of a declaration of martial law or of a state of emergency or in the event of a declaration of an emergency due to a mass influx of aliens, illegally staying third-country nationals are effectively deprived of the opportunity of access, in the territory of that Member State, to the procedure in which applications for international protection are examined (para 75). It further held that the Reception Conditions Directive must be interpreted as precluding legislation of a Member State under which, in the event of a declaration of martial law or of a state of emergency or in the event of a declaration of an emergency due to a mass influx of aliens, an asylum seeker may be placed in detention for the sole reason that he or she is staying illegally on the territory of that Member State.[45]

Rather than deal directly with the rule of law crisis raised by the emergency legislation, the Commission offered support to the most affected states through a civil protection mechanism and mobilising additional

45 Case C-72/22 PPU *MA v Valstybės sienos apsaugos tarnyba* EU:C:2022:505, para 93.

funds. The Commission did provide Lithuania with Euros 36.7 million for the purpose of implementing asylum procedures, and reception conditions, including for vulnerable people. Poland and Latvia seem to have been reluctant to access EU aid for these purposes.

The CJEU is not the only supranational court to be engaged by the human rights crisis taking place on the Belarus-Poland/Lithuania/Latvia border. The European Court of Human Rights received in total, between 20 August 2021 and 18 February 2022, 69 requests for interim measures[46] brought by 270 applicants trapped there. Poland has yet to apply the interim measures. As Belarus is not a member of the Council of Europe, it is not bound by the European Convention on Human Rights (ECHR). But Poland, Lithuania and Latvia are, and thus, the complaints on grounds of violations of rights contained in the ECHR are against them. In the lead case, which has been communicated to Poland, 32 Afghan nationals complain about a breach of Article 3, the prohibition on torture, inhuman or degrading treatment or punishment, and Article 4 Protocol 4, the prohibition on collective expulsion (and Article 13, the lack of an effective remedy) regarding an incident in August 2021.[47] They claim that they crossed the Belarus-Polish border but were forcibly pushed back to Belarus by Polish border guards. Since that action, they claim to have been stranded between Belarus and Polish border guards in problematic sanitary and humanitarian conditions with no access to an asylum procedure, no remedy, and unable to go back to Afghanistan from which they fled when the Taliban took power.[48]

From the legal challenges and the decision of the CJEU and ECtHR, the question of solidarity with whom becomes somewhat clearer. Both courts found that the treatment of individuals whose asylum claims were not considered and their detention unjustified and constituting inhuman and degrading circumstances was incompatible with the Charter and ECHR. In this way the courts required the states to comply with fundamental and

46 Interim measures can be ordered by the Court in accordance with Rule 39 of its procedures where there is imminent risk of irreparable damage at stake, see: European Court of Human Rights, 'General Presentation of Interim Measures' (*echr.coe*) https://www.echr.coe.int/documents/pd_interim_measures_intro_eng.pdf accessed 14 November 2022.

47 *RA and others v Poland,* App No 42120/21 (ECtHR, introduced 20 August 2021).

48 See Registrar of the Court, 'Court gives notice of 'R.A. v. Poland' case and applies interim measures' (ECHR 283 (2021), 28 September 2021) https://hudoc.echr.coe.int/eng-press?i=003-7134761-9667819 accessed 16 February 2024.

human rights irrespective of the states' decisions to exclude some persons for the legal framework designed to provide consistency and coherence to these rights. In so far as fundamental rights provide a foundation for equal treatment (one could also have regarding to the relationship of fair treatment and solidarity in Article 67(2) TFEU discussed in the introduction) they also require the exercise of solidarity by states towards individuals. The failure of fundamental and human rights protection constitutes also a failure of solidarity.

6 Conclusions

In this chapter I have examined solidarity in Article 80 TFEU from the perspective of the actors entitled to it. I have identified found possible actors/recipients of solidarity: the EU Member States, (clearly specified in Article 80 TFEU) EU institutions, Member States and international organisations responsible for international conventions on refugee protection (as referred to in the TFEU); EU Member States and third countries dealing with refugee pressures; EU institutions and Member States with persons in need of international protection in accordance with international conventions commitments of all Member States (Commitments to the international community and one another under the CEAS). Examining two refugee situations categorised by the EU institutions as crises, the arrival of Syrians, Iraqis and Afghans at the Belarus/Poland-Lithuania-Latvian borders, and the flight of people out of Ukraine as a result of the Russian invasion, I have sought to parse the inconsistencies in the EU's arguments and choices about the nature of Article 80 TFEU solidarity. While in the former 'crisis' the EU closed its approach to any claims to solidarity wider than that among the Member States for the purpose of excluding people seeking international protection from access to fair asylum procedures, in the second, the invasion of Ukraine, the EU institutions and Member States characterised the crisis as one of Russian aggression and normalised the arrival of people fleeing it through the opening of a temporary protection scheme. The consequence here was equally exclusion from asylum procedures but for Ukrainian temporary protection beneficiaries accompanied by a right of residence, to social benefits, healthcare, housing, labour market access and education. Additionally, temporary protection beneficiaries were immediately entitled to free movement to any Member State and the right to access their temporary protection rights wherever they chose to live. Solidarity

under Article 80 TFEU was designed to include a third country, Ukraine, solidarity with Ukrainian temporary protection beneficiaries being a manifestation of that solidarity. Intra-EU solidarity was completely transformed from requiring the halting of secondary movement of asylum seekers to embracing secondary movement of temporary protection beneficiaries as a means to reduce reception pressure on the first EU Member State of arrival. The EU definitions of crisis and solidarity in the two situations are irreconcilable. Our understanding of these two responses must be examined through the EU institutional frameworks which informed them and by which they were moulded. Yet, by any standards, transnational solidarity has been much better served by the EU response to the invasion of Ukraine than the dubious behaviour of a Belarusian leader in respect of people who really do need international protection in the EU.

In the preceding section, I made reference to the struggles within EU institutions and, in particular, the EU Commission regarding the different definitions of solidarity on evidence in the two crises. I posited the tensions which are generally apparent in Member States between conceptions of security and benefit in interior ministries, which are focused on what happens at internal borders and within them, and foreign ministries, where international relations are at stake and the movement of persons across borders has traditionally been seen as a side issue which only complicates negotiations on more general matters. But within the EU, both are changing. With the rise of DG HOME, the voice of interior ministries and migration concerns have risen in the EU agenda. With the creation of the EU External Action Service, the Member State foreign ministries' monopoly over international relations has been challenged yet further with coordination provided by an EU agency. Efforts within the EU institutions to find equilibria and balances of interests has proven particular difficult not least because of the challenges in defining solidarity and crisis both of which have provided platforms for actors with different conceptualisations of security and EU/national interests to instrumentalise relations with third countries. Rare are examples such as the response to Russian invasion of Ukraine which, on account of their gravity, have led to a consensus in which the interior ministries have accepted a conceptualisation of solidarity and crisis which encompasses both a third country and those in need of protection.

Chapter 9 Graded Solidarity? The Social Rights of Refugees in EU law

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1 Introduction

Solidarity is an important value within the European Union, evidenced by its inclusion in Article 2 of the Treaty on the European Union and as title IV in the Charter of Fundamental Rights of the European Union. Solidarity has been described as the demand to 'respond to the needs of others'[1] or the 'readiness to share resources with others'.[2] Even though in the refugee context, the concept of solidarity is often used to refer to burden sharing between EU Member States as regards receiving refugees,[3] it can, therefore, also refer to demands for fairness in the distribution of benefits.[4] This chapter takes this latter approach and analyses the concept of solidarity within the European Union, as concretized as social rights to benefits.[5] Granting social rights (eg social assistance, health care, housing) can be seen as an expression of our solidarity with one another:

> 'Securing these rights will often require positive action by others, including the government. The need for such action is the reason social and economic rights are often called positive rights. Protecting them requires one to be actively committed to one's fellow citizens in a way that positively supports their economic and social wellbeing. (…) Such support

1 Sally J Scholz, 'Solidarity as a Human Right' (2014) 52 Archiv des Völkerrechts 49.
2 Marianna Fotaki, 'Solidarity in Crisis? Community Responses to Refugees and Forced Migrants in the Greek Islands' (2022) 29 Organization 295.
3 Martina Tazzioli and William Walters, 'Migration, Solidarity and the Limits of Europe' (2019) 9 Global Discourse 175; Micaela Del Monte and Anita Orav, 'Solidarity in EU Asylum Policy' (European Parliament, 2023).
4 Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 Oxford Journal of Legal Studies 213.
5 cf Markus Kotzur, 'Solidarity as a Legal Concept' in Andreas Grimmel and Susanne Giang (eds) *Solidarity in the European Union* (Springer 2017).

> will itself require positive and reciprocal relationships among citizens and depend on the presence of a kind of social solidarity'.[6]

As regards refugees, EU legislation and case law has, through the years, established a variety of levels of social rights for different categories of refugees. This chapter aims to map the different levels of social rights for refugees in EU law, in order to gain more insight into the scope of and basis for this kind of solidarity in EU law. It will show how solidarity with refugees as crystallized in their social rights is highly conditional, and, at times, instrumental. It will also show how this kind of conditional solidarity as regards refugees' social rights increases as a response to crisis narratives.[7]

In line with this book's focus on the influence of the so-called 'refugee crisis' as one of the potential crises influencing the concept of solidarity in EU law, this chapter focusses on the social rights of refugees, and does not include the social rights of other kind of migrants, such as labour or family migrants. The chapter uses the term 'refugees' in a broad, and not necessarily legal, sense. The term 'refugees' in this chapter refers to all migrants who have fled their country of origin and have applied for protection in the EU. It does include, therefore, migrants whose asylum application has been rejected; asylum seekers who are still waiting for a final decision on their asylum application; beneficiaries of temporary and international protection; and refugees who have a long-term residence status in the EU. The term 'refugees' is used to refer to all these kinds of migrants together; whereas more specific terminology is used when a particular sub-category of refugees is discussed.

After discussing the concept of solidarity in the context of social rights a bit further in section 2, section 3 maps refugees' rights to social assistance and health care in EU legislation and case law. It shows how these rights, as laid down in legislation, increase if the legal ties of refugees with their country of residence strengthen, and how the Court of Justice through its case law tempers this 'incremental system' a bit. Section 4 analyses these rights from the perspective of solidarity and argues that different notions of solidarity can be discovered in this system of rights. Often, however, the solidarity with refugees displayed by these rights is highly conditional. This conditionality is further expanded in the more recent legislative proposals

6 David Hollenbach, 'A Relational Understanding of Human Rights: Human Dignity in Social Solidarity' (2022) 71 Emory Law Journal 1487.

7 On conditionality as an increasing instrument also of solidarity among Member States see Baraggia, in this volume.

issued by the European Commission as a response to the so-called refugee crisis in 2015, as discussed in section 5. In addition, this section shows how these proposals also limit the scope of solidarity with refugees by making it harder to reach and enter EU territory, and, therefore, to be able to come within reach of solidarity crystalized in social rights.

2 Solidarity and refugees' social rights

Title IV of the Charter of Fundamental Rights of the European Union is entitled 'solidarity'. This title includes rights such as the right of collective bargaining and action, the right to fair and just working conditions, the right to social and housing assistance and the right to health care. According to the preamble, solidarity is one of the 'indivisible, universal values' on which the Union is founded. Article 2 of the Treaty on European Union (TEU) includes solidarity as one of the values that prevail in the societies of the Member States and Article 3 TEU stipulates that the EU shall promote solidarity among the Member States and 'contribute to solidarity among peoples'. With regard to asylum and immigration more specifically, Article 67 of the Treaty on the Functioning of the European Union (TFEU) holds that a common policy needs to be based on 'solidarity between Member States' and Article 80 TFEU states that such policies need to be 'governed by the principle of solidarity' between the Member States. Accordingly, solidarity is an important concept within the EU in general, and within the field of asylum and immigration in particular.

However, as these different references to solidarity within primary EU law show, solidarity is not a clearly defined concept. While the Charter stresses the foundational value of solidarity and further crystalizes it in individual social rights, the TEU and TFEU mainly stress the need for solidarity among Member States. As has been explained in the introduction to this volume, the multifaceted use and indeterminate meaning is a general characteristic of the concept of solidarity, whether used as a social, political or legal concept.

A useful distinction that has been made by philosophers is between solidarity *among* and solidarity *with*.[8] According to the former, solidarity is linked to social groups, it describes a special relationship of unity and

8 O'Neill 1996 and Miller 2017 referred to in Andrea Sangiovanni and Juri Viehoff,'Solidarity in Social and Political Philosophy' in Edward N Zalta and Uri Nodelman (eds)

mutual indebtedness within a group. This is also referred to as 'exclusionary ingroup solidarity'.[9] According to the latter, solidarity is a unilateral concept, where reciprocity is not required. You can act in solidarity with someone, for example a victim of a natural disaster or members of an underprivileged group, also if that (group of) person(s) does not act in solidarity with you.[10] This is also called 'inclusionary outgroup solidarity'.[11] Solidarity *among* is based on membership to a particular social group, whereas solidarity *with* is reaching out to the needs of others. In both cases, the concept of solidarity can be seen as a universalist concept, emphasizing responsibility for others as human beings, based on our common humanity, or as a closed, particularistic concept, based on the idea of a clearly defined community demarcated by social boundaries.[12]

Establishing whether someone falls within the relevant in- or outgroup is, however, not always enough for solidarity to materialize. Solidarity, especially as regards the welfare state, can be highly conditional. Van Oorschot has identified that criteria of deservingness are often used by the general public if they adopt a more conditional form of solidarity as regards access to the welfare state. Based on large-scale survey research, van Oorschot has identified the following five criteria that the general public, independent of gender, age or class, uses for assessing a person's deservingness of welfare; the so-called CARIN-criteria:

1. control: poor people's control over their neediness, or their responsibility for it: the less control, the more deserving;
2. need: the greater the level of need, the more deserving;
3. identity: the identity of the poor, ie their proximity to the rich or their 'pleasantness'; the closer to 'us', the more deserving;
4. attitude: poor people's attitude towards support, or their docility or gratefulness: the more compliant, the more deserving;

The Stanford Encyclopedia of Philosophy (Summer edn 2023) https://plato.stanford.edu/archives/sum2023/entries/solidarity/ accessed 6 March 2024.

9 Marit Hopman and Trudie Knijn, 'Understanding Solidarity in Society: Triggers and Barriers for In- and Outgroup Solidarity' in Mara A Yerkes and Michèlle Bal (eds) *Solidarity and Social Justice in Contemporary Societies* (Palgrave Macmillan 2022).

10 Sangiovanni and Viehoff (n 8).

11 Hopman and Knijn (n 9).

12 Fotaki (n 2); Markus Quandt and Vera Lomazzi, 'Solidarity: A European Value?' in Regina Polak and Patrick Rohs (eds) *Values – Politics – Religion: The European Values Study* (Springer 2023) in David M Rasmussen and Alessandro Ferrara (eds) *Philosophy and Politics – Critical Explorations*.

5. reciprocity: the degree of reciprocation by the poor, or having earned support: the more reciprocation, the more deserving[13]

Research has shown that these criteria are not only used by the general public but can also be identified in judicial reasoning about access to welfare.[14]

Accordingly, the scope and mode of solidarity expressed to refugees as regards their access to social benefits is influenced by many different notions of solidarity. Social rights of refugees can be seen, in line with the EU Charter on Fundamental Rights, as solidarity crystalized, and can be based on both solidarity among members and solidarity with an outgroup, depending on the definition of the ingroup. If the ingroup is 'fellow humans', 'members of society' or 'residents in a country', then granting social rights to (some) refugees could be seen as a form of (exclusionary) ingroup solidarity, a form of solidarity among members. However, if the ingroup is conceptualized as citizens or nationals of a country, then granting social right to refugees is a form of solidarity with outsiders. In both cases, the scope of solidarity can be universal (i.e. based on our common humanity) or particular (i.e. based on membership to a particular social (inside or outside) group, and in both cases, the mode of solidarity can be conditional (i.e. based on deservingness).

In addition, granting social rights to refugees can be seen, in line with the TEU and TFEU, as forming part of solidarity among Member States. This is a form of particular, ingroup solidarity among states, that could be conditional on rule compliance by states. Granting social rights to refugees

13 Wim JH van Oorschot, 'Who Should Get What, and Why? On Deservingness Criteria and the Conditionality of Solidarity among the Public' (2000) 28 Policy and Politics 33; Wim JH van Oorschot, 'Making the Difference in Social Europe: Deservingness Perceptions Among Citizens of European Welfare States' (2006) 16 Journal of European Social Policy 23. The relevance of these criteria for assessing person's deservingness of welfare, especially the criteria of control, reciprocity and need, is also confirmed by qualitative research (Tijs Laenen, Federica Rossetti, and Wim JH van Oorschot, 'Why Deservingness Theory Needs Qualitative Research. Comparing Focus Group Discussions on Social Welfare in Three Welfare Regimes' (2019) 60 International Journal of Comparative Sociology 190).

14 Gareth Davies, 'Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication' (2018) 25 Journal of European Public Policy 1442; Lieneke Slingenberg, 'Deservingness in Judicial Discourse. An Analysis of the Legal Reasoning Adopted in Dutch Case Law on Irregular Migrant Families' Access to Shelter' (2021) 20 Social Policy and Society 521.

is an important element of the common European asylum system, that can only properly function if the level of social rights for refugees among the different member states is harmonized. Accordingly, granting social rights by EU Member States can also be based on solidarity with other Member States, that are providing such rights to refugees, in addition to or instead of on solidarity with refugees. Seen in this way, it fits a conception of solidarity as 'joined action', that can be described, as explain in the introduction to this volume, as an *appel* to mobilize for certain positions. Member States jointly agree on providing social rights to refugees, in order to pursue the common good of a common European asylum policy.

This chapter will examine how all these different notions, scopes and modes of solidarity meet and compete in EU law on refugees' access to social rights, and to what extent crisis narratives change that. To that end, the next section will first map the social rights of refugees in EU law.

3 Mapping refugees' social rights in EU law: an incremental system

3.1 General overview

In order to better understand the solidarity expressed by refugees' social rights in EU law, this section maps and compares the rights of refugees as regards social assistance and housing laid down in EU legislation and resulting from CJEU case law. For the purposes of this chapter, the term 'social assistance' refers to benefits to meet basic needs (eg food, clothing, shelter), provided in kind or as financial allowances. This section first maps these rights as formulated in legislation. After that, the rights will be analysed and compared in their context, and case law about these rights will be discussed.

The social rights of refugees are laid down in different EU legislative instruments that have been developed over time, with the first instrument adopted in 2001 and the most recent (recast) one in 2013, and by different actors (i.e. by Council, with the European Parliament as consultee, or by Council and European Parliament in co-decision). There are currently five relevant applicable legislative instruments containing social rights for refugees, each applying to a specific category of refugees:

– Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Mem-

ber States in receiving such persons and bearing the consequences thereof;
- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals;
- Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection;
- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast);
- Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

The term 'solidarity' is mentioned in the preamble of three of them,[15] but it refers in all these cases to solidarity among Member States,[16] not to solidarity with refugees. However, although not explicitly labeled as an expression of solidarity, all instruments provide social rights to refugees. For refugees who are eligible for a long-term residence status (usually after five years of legal residence), for refugees who apply for or are granted with temporary or international protection and for rejected asylum seekers, EU legislation provides for the following access to and level of housing, social assistance and health care:

15 Recital 7, 9 and 20 of Council Directive 2001/55/EC; Recital 9 of Directive 2011/95/EU; and Recital 2 and 5 of Directive 2013/33/EU.

16 The recitals refer explicitly to solidarity between Member States or to the Stockholm Program 'which reiterated the commitment to the objective of establishing by 2012 a common area of protection and solidarity'. In this program, the concept of solidarity is used to refer to the objective of 'sharing of responsibilities and solidarity between the Member States' (see para. 6.2.2. of 'The Stockholm Programme. An Open and Secure Europe Serving and Protecting Citizens' [2010] OJ C115/01.

	Housing	Social assistance	Health care
Rejected asylum seekers – Directive 2008/115/EC			
General	X	X	X
During voluntary departure or postponement of removal	X	X	Emergency health care and essential treatment of illness[17]
Asylum applicants – Directive 2013/33/EU	Housing that provides an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health[18]	Food, clothing and a daily expenses allowance that provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health[19]	Necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders[20]
Beneficiaries of temporary protection – Directive 2001/55/EC	Access to suitable accommodation or, if necessary, receive the means to obtain housing[21]	Necessary assistance in terms of social welfare and means of subsistence[22]	Medical care that includes at least emergency care and essential treatment of illness[23]
Beneficiaries of international protection – Directive 2011/95/EU			
Subsidiary protection	Access to accommodation under equivalent conditions as other third-country nationals legally resident in their territories[24]	Core benefits at the same level and under the same eligibility conditions as nationals[25]	Access to healthcare under the same eligibility conditions as nationals[26]
Refugee status	Access to accommodation under equivalent conditions as other third-country na-	The necessary social assistance as provided to nationals[28]	Access to healthcare under the same eligibility

17 Article 14(1)(b).
18 Article 2(g) and 17(2).
19 Article 2(g) and 17(2).
20 Article 19(1).
21 Article 13(1).
22 Article 13(2).
23 Article 13(2).
24 Article 32(1).
25 Article 29(2).
26 Article 30(1).

	Housing	Social assistance	Health care
	tionals legally resident in their territories[27]		conditions as nationals[29]
Long-term residents – Directive 2003/109/EC, as amended by Directive 2011/51/EU	Equal treatment with nationals as regards procedures for obtaining housing[30]	Equal treatment with nationals as regards core benefits[31]	Equal treatment with nationals as regards access to goods and services and the supply of goods and services made available to the public[32]

NB. Most directives have additional specific provisions for vulnerable migrants or migrants with special needs.

This table shows, at first sight, a clear increase in rights if the legal ties of refugees to the country of residence strengthen. Rejected asylum seekers have no access to social rights. However, if their removal is officially postponed, on the basis of personal, practical or legal reasons, and, as such, their legal ties to the territory slightly increase, they are entitled to emergency health care. Asylum seekers are entitled to an adequate standard of treatment, which may, if provided as financial allowances, be at a lower level than the general social assistance level for nationals.[33] Beneficiaries of temporary protection are entitled to the 'necessary social assistance' and beneficiaries of international protection and long-term residents are entitled to equal treatment with nationals as regards (core benefits of) social assistance.

The table also shows that there is a distinction between absolute rights and relative rights. The rights for (rejected) asylum seekers and beneficiaries of temporary protection are laid down in an absolute manner; they are entitled to these provisions irrespective of the rights of nationals in the Member State concerned. The rights of beneficiaries of international protection and of long-term residents are, to the contrary, contingent on the

27 Article 32(1).
28 Article 29(1)).
29 Article 30(1).
30 Article 11(1)(f).
31 Article 11(4).
32 Article 11(1)(f).
33 Article 17(5) of Directive 2013/33/EU.

rights of other residents in the particular Member State, such as national or legally residing non-nationals.

3.2 Housing

Asylum seekers and beneficiaries of temporary protection are entitled to 'adequate' or 'suitable' housing respectively. This is an important absolute right, as even nationals do not usually have a right to actually obtain housing. Yet, the CJEU made clear that 'where a Member State has opted to provide the material reception conditions [for asylum seekers, LS] in the form of financial allowances, those allowances must be sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence *by enabling them to obtain housing, if necessary, on the private rental market*' (emphasis LS).[34] In addition, the reference to a dignified standard of treatment means, according to the CJEU, that housing cannot be withdrawn in case of violent behavior, not even for a few days. The Reception Conditions Directive authorizes Member States to withdraw reception benefits as a sanction for 'serious breaches of the rules of the accommodation centres as well as to seriously violent behaviour'.[35] In *Haqbin,* however, the Court held that respect for human dignity requires 'the person concerned not finding himself or herself in a situation of extreme material poverty that does not allow that person to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene, and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity.'[36] A sanction that consists in the withdrawal, even if only a temporary one, of the material reception conditions relating to housing, food or clothing would be irreconcilable with these requirements, according to the Court. This has recently been confirmed by the Court in *TO,* where the Court added that the fact 'that the conduct to be sanctioned may be particularly serious and reprehensible cannot lead to a different conclusion'.[37]

34 Case C-79/13 *Saciri* [2014] OJ C112/14, para 42.
35 Article 20(4) of Directive 2013/33/EU.
36 Case C-233/18 *Haqbin* [2019] OJ C211/16.
37 Case C-422/21 *Ministero dell'Interno v TO* [2022] OJ C368/12, para 41.

The quality of that housing leaves, however, more room for interpretation. Asylum seekers are entitled to housing 'that provides an adequate standard of living', which 'guarantees their subsistence and protects their physical and mental health' and beneficiaries of temporary protection are entitled to 'suitable accommodation'. If Member States choose to provide housing in kind, the Reception Conditions Directive specifies that asylum seekers should be housed in premises used for the purpose of housing applicants at the border or in transit zones, in accommodation centers or in other premises adapted for housing applicants.[38] Indeed, the CJEU held that asylum seekers cannot 'make their own choice of housing'.[39] If the housing capacities normally available are temporarily exhausted, the Directive authorizes Member States to house asylum seekers, for a period as short as possible, in premises that are not particularly used or adapted for housing applicants, such as tents or sport halls. Such facilities should, in any event, cover basic needs.[40] All this shows that asylum seekers are in any event entitled to a roof over their head. The same is true for beneficiaries of temporary protection.

If their request for international protection is rejected by a final decision, or if temporary protection ends, they are no longer entitled to housing under EU law, as they then fall under the scope of the Returns Directive. This Directive does not provide for housing or social assistance rights. This Directive does, however, provide for a right to emergency health care during the period of voluntary return or during the postponement of a return decision. In *Abdida,* the CJEU ruled that for seriously ill persons, this right is only effective if Member States also provide for, 'in so far as possible', their basic needs. 'The requirement to provide emergency health care and essential treatment of illness (…) may, in such a situation [a third country national suffering from a serious illness, LS], be rendered meaningless if there were not also a concomitant requirement to make provision for the basic needs of the third country national concerned'.[41] Accordingly, there is an 'implied right' for some kind of social assistance and housing for rejected asylum seekers, at least if they are seriously ill and their return

38 Article 18(1) Directive 2013/33/EU.
39 *Saciri* (n 34) para 43.
40 Article 18(9) Directive 2013/33/EU.
41 Case C-562/13 *Abida* [2014] OJ C65/13.

decision is postponed. This has, prudently, be confirmed by the Court in the more recent case of *B*.[42]

As soon as their request for international protection is granted, beneficiaries of international protection no longer fall under the personal scope of an absolute right to housing. Still, they are entitled to access accommodation 'under equivalent conditions as other third-country nationals legally resident in their territories'. The same is true for migrants who have a long-term residence status, albeit for them the standard is 'equal treatment with nationals'. While this right to equal treatment could seem a standard that provides stronger protection as compared to the minimum standard for asylum seekers, this is not necessarily the case. As availability of social housing is scarce in many Member States, and nationals or other third-country nationals do generally not have a right to be actually provided with housing, this standard does not prevent homelessness. Formal equal treatment could then merely mean ending up on the same waiting list as other third-country nationals or nationals. While in some Member States, like the Netherlands, beneficiaries of international protection are allowed to remain in their asylum seeker reception centre until another form of housing is available, in other Member States, like Greece, persons with international protection status are evicted from their asylum seekers reception centres and often end up homeless on the streets.[43] Indeed, ECRE has observed that beneficiaries of international protection 'face an array of legal and practical obstacles which prevent them from effectively exercising the right to accommodation within a reasonable time and from moving out of facilities for asylum seekers. Notwithstanding the severe consequences for the individuals concerned, including destitution'.[44]

42 Case C-233/*19 B v Centre public d'action sociale de Liège* EU:C:2020:757, para 34: 'it follows from the Court's case-law that certain guarantees pending return, which may include the provision of basic needs for the person concerned, must be provided, pursuant to Article 14(1) of Directive 2008/115, in situations where the Member State concerned is obliged to offer that person an appeal with automatic suspensive effect against a return decision taken against him or her, even if that person is staying illegally in the territory of the Member State in question'.

43 Refugee Support Aegean and Stiftung Pro Asyl, 'Beneficiaries of International Protection in Greece. Access to Documents and Socio-Economic Rights' (March 2022) https://rsaegean.org/wp-content/uploads/2022/03/2022-03_RSA_BIP_EN.pdf accessed 6 March 2024.

44 European Council on Refugees and Exiles, 'Housing out of reach? The Reception of Refugees and Asylum Seekers in Europe'(March 2019) https://reliefweb.int/report/w

In *Ibrahim,* however, the Court seems to provide for the possibility that the situation of beneficiaries of international protection who cannot meet their basic needs is unlawful, under Article 4 of the Charter, *irrespective* of what nationals in that Member State receive. This case was about the question whether Member States can declare an asylum application inadmissible on the ground that the applicant has already been granted subsidiary protection in another Member State, where the living conditions of those granted subsidiary protection in that other Member State are in breach of Article 4 of the Charter. In addition, the question was whether the answer is the same where those granted such protection receive subsistence allowance that is markedly inferior to that in other Member States, though they are not treated differently, in that regard, from the nationals of that Member State. The Court first repeats, with reference to other case law, that Article 4 of the Charter is violated if a beneficiary of international protection wholly dependent on State support, finds himself, 'irrespective of his wishes and his personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene *and a place to live*, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity' (italics LS).[45] The Court then adds, that this situation would also violate Article 4 of the Charter, if the person concerned is not treated differently from nationals of the Member State concerned.[46] Hence, even though under the legislation, beneficiaries of international protection are, merely, entitled to equal treatment with other legally resident third-country nationals as regards accommodation, the CJEU has established a minimum standard of treatment, including a place to live, that also applies to them.

3.3 Social assistance

As regards social assistance, only persons with refugee status are entitled to full equal treatment with nationals. The Court clarified that the reference

orld/housing-out-reach-reception-refugees-and-asylum-seekers-europe accessed 6 March 2024.

45 Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim* [2019] OJ 187/13 para 90.

46 ibid, para 93.

to 'necessary social assistance' does not mean that Member States are authorized to grant persons with refugee status benefits which they consider sufficient to cover needs, but which are less than the benefits paid to their nationals.[47] For beneficiaries of subsidiary protection and long-term residents, equal treatment as regards social assistance may be limited to 'core benefits'. In *Kamberaj,* the CJEU stressed that this exception needs to be interpreted strictly and held that core benefits include in any case social assistance or social protection benefits 'which enable individuals to meet their basic needs such as food, accommodation and health'. The Court referred in this respect to Article 34 of the Charter, which stipulates that the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources. According to the Court, it follows from this provision that if a certain benefit fulfils these purposes, it should be considered a 'core benefit'.[48] Accordingly, housing assistance that is meant to prevent housing costs from becoming an unreasonable burden and that is not designed to cover housing costs in full can also be considered a 'core benefit'.[49] However, it is ultimately for the national authorities to establish which benefits should be considered 'core benefits', taking into consideration the purpose of the benefit, the conditions subject to which it is awarded and the place of that benefit in the national system of social assistance.[50] Arguably, the same interpretation applies to the concept of 'core benefits' as regards beneficiaries of subsidiary protection.

Such core benefits should be provided on the basis of 'equal treatment with nationals' (long-term residents) or 'at the same level and under the same eligibility conditions as nationals' (beneficiaries of subsidiary protection). Contrary to housing, nationals usually have a subjective right to social assistance benefits in case of need, as a result of which this standard of equal treatment provides important protection to these migrants. A question that could arise it whether this equal treatment merely applies to the level of benefits, or also to the form of the benefits. Arguably, it means that such core benefits may only be provided in kind, or under a separate scheme, if the general social assistance scheme for nationals also allows for

47 Case C-713/17 *Ahmad Shah Ayubi* EU:C:2018:929.
48 C-571/10 *Kamberaj* [2012] OJ 174/12.
49 Case C-94/20 *KV* EU:C:2021:477.
50 ibid, para 43.

this.[51] This could, then, mean that beneficiaries of international protection and long-term residents cannot be provided with in kind social assistance benefits, provided in camps, which is a common policy for asylum seekers in Europe.

Similar to housing, the standard of social assistance for asylum seekers and beneficiaries of temporary protection is not defined in terms relative to the rights of others, but in absolute terms. For asylum seekers, the elements of social assistance that they are entitled to is explicitly stipulated in legislation: food, clothing and a daily expenses allowance. The standard is the same as for housing; such provisions must 'provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health'. The Directive makes clear that Member States may grant less favourable treatment to asylum seekers compared with nationals as regards social assistance, as long as this standard is met.[52] Beneficiaries of temporary protection are entitled to the much more general standard of 'necessary assistance in terms of social welfare and means of subsistence'. Even though formulated with less detail, this does not necessarily point at a substantial different standard as compared to the standard for asylum seekers.

The standard of health is the same for rejected asylum seekers whose removal is postponed, asylum seekers and beneficiaries of temporary protection. They are entitled to emergency care and essential treatment of illness. The only difference is that for asylum seekers essential treatment of 'serious mental disorders' is added. This can, however, also fall under the scope of the concept of essential treatment of illness. Also, beneficiaries of

51 Sometimes, general social assistance schemes do allow for provision in kind. For example, the Belgian Social Welfare Services Act, one of the two general social assistance schemes in Belgium, provides for assistance of 'material, social, medical or physiological nature' (Article 57 *Organieke wet betreffende de Openbare Centra voor Maatschappelijk Welzijn*). In the Netherlands, the general social assistance scheme contains a clause providing that a person is no longer eligible for general social assistance if that person is eligible for another kind of welfare scheme (known as a prior ranking benefit scheme or voorliggende voorziening) which can considered to be sufficient and suitable for the person concerned (Article 15 *Participatiewet*). This clause equally applies to nationals and non-nationals. Such a prior ranking benefit scheme does not have to provide persons with exactly the same kind of assistance as under the general scheme. The decisive criterion is whether the assistance provided under the special scheme is sufficient and suitable for the person concerned.

52 Article 17(5) Directive 2013/33/EU.

international protection and long-term residents are entitled to the same standard of health care: they are entitled to equal treatment with nationals.

3.4 An incremental system?

Hence, on the basis of the text of the Directives, EU law appears to provide for an 'incremental system',[53] where rights increase as soon as the legal ties with the country of residence strengthen. In this vein, rejected asylum seekers do, in general, not have a right to social assistance or housing benefits, but if their removal is officially postponed, as a result of which their legal ties to the territory strengthen a bit, they are entitled to emergency health care (including, as far as possible, basic needs, according to the CJEU); asylum seekers have a right to reception benefits that ensure an adequate standard of living, but that may be lower as compared to the social assistance benefits for nationals; and beneficiaries of international protection and long-term residents are entitled to equal treatment with nationals as regards social assistance.

The vagueness of some of the provisions, however, also leaves room for an interpretation that is not in line with this incremental system. This is particularly true for the Temporary Protection Directive, under which beneficiaries of temporary protection are entitled to 'the necessary social assistance' and 'suitable housing', which leaves a lot of room for interpretation. Arguably, this leaves room to provide them with the same provisions as asylum seekers, even though they are, contrary to asylum seekers, already found to be eligible for a protection status. Likewise, the concept of 'core benefits', used in the legislation to limit Member States' obligations towards beneficiaries of subsidiary protection and long-term residents, could leave room for providing them with the same provisions as asylum seekers.

In addition, especially the case law of the CJEU revealed another way in which this 'incremental system' has been nuanced. The CJEU has used the concept of 'basic needs' to establish a minimum standard of treatment that is the same for all different categories of refugees. From *Haqbin* it appears that the CJEU defines 'basic needs' as 'a place to live, food, clothing and personal hygiene'. Such basic needs should be provided 'as far as possible' to irregular migrants who are seriously ill and whose return is postponed;

53 cf James C Hathaway, *The Rights of Refugees under International Law* (2nd edn,Cambridge University Press 2021) 174.

it should be guaranteed for asylum seekers under all circumstances, even if regular housing capacities are temporarily exhausted or if there is a legitimate ground for reducing reception conditions (eg in case of sanctions); it should be guaranteed for beneficiaries of international protection, irrespective of whether they are treated the same as nationals; and it serves as a means to interpret the concept of 'core benefits' for the social assistance of beneficiaries of subsidiary protection and long-term residence status.

4 Refugees' social rights in EU law: an expression of solidarity?

If we use refugees' social rights as a proxy for measuring the degree of solidary with refugees expressed in EU law, what picture does emerge? As explained in section 2, solidarity is a multifaceted concept. I believe different notions of solidarity are visible in EU law on refugees' social rights and these can function as a relevant explanatory tool.

The EU legislator in particular has used membership criteria, mainly in the form of legal status, to provide social rights. Through the adoption of different instruments for different categories of refugees, based on their legal status, and stipulating a particular level of social rights in each of these instruments, the legislator clearly envisaged solidarity to increase on the basis of a stronger degree of belonging to the national community. This fits a conception of solidarity *among* members, where the ingroup is defined in legal residency terms. The full exclusion of rejected asylum seekers from the scope of social rights shows that the EU legislator did not adopt a universalist version of solidarity.

The difference between the different standards of treatment laid down in the various EU instruments could be explained using the distinction between solidarity *among* and solidarity *with*. It could be argued that the absolute rights provided to asylum seekers and beneficiaries of temporary protection display a conception of solidarity *with* a particular outgroup. This unilateral kind of solidarity does not require reciprocity or symmetry, which ties in with the rights provided to these groups of refugees, that can provide stronger protection than available for nationals. For beneficiaries of international protection and long-term residents, on the other hand, their rights are contingent on the rights of other legally resident migrants or nationals. This could indicate a notion of solidarity *amongst* members of a particular ingroup, which requires a much more symmetric relationship

between the members. Granting these refugees with the same rights as nationals fits this more reciprocal notion of solidarity.

In line with this, there are more instances of conditional solidarity as regards the outgroup. For asylum seekers and, to a lesser extent, beneficiaries of temporary protection, Member States are allowed to make access to social benefits conditional on their deservingness in terms of need, attitude and control. For both asylum seekers and beneficiaries of temporary protection, Member States may make provision of social assistance conditional on their need. They are only entitled to material reception benefits or social welfare and means of subsistence if they do not have sufficient resources themselves. Moreover, for asylum seekers, access to material reception benefits can be conditional on their residence in assigned reception centres, on their compliance with house rules and reporting obligations and on their non-violent behavior.[54] This is a clear example of how responsibility for neediness and absence of compliant behavior is used as a basis to deny welfare eligibility. As indicated in section 2, control and attitude are two factors that the general public uses to establish welfare deservingness. Withholding or reducing benefits from asylum seekers based on their absence from the assigned place of residence or on violating the house rules, fits these deservingness factors. It also shows how conditionality risks to transform into a punitive tool. It raises the question whether this kind of conditional solidarity is still about solidarity, aimed at collective responsibility for taking care of the more vulnerable members of the (in or out) group. Rather, it may be a form of social control, aimed at the maintenance of law and order and effective migration control.[55] Indeed, as I have argued elsewhere, EU law leaves a lot of room for Member States to use refugees' social rights as an instrument of migration control, by deterring future refugees and facilitating effective asylum procedures and return.[56]

When the Court of Justice had to interpret the possibility to withdraw benefits as a sanction for violent behavior, and concluded that complete withdrawal is not possible, the reasoning did not, however, clearly fit any of the deservingness criteria. Instead, the Court of Justice emphasized, with reference to the Charter of Fundamental Rights, the requirement to ensure

54 See for example articles 7 and 20 of Directive 2013/33/EU.

55 Tiina Likki and Christian Staerklé, 'A Typology of Ideological Attitudes Towards Social Solidarity and Social Control' (2014) 24 Journal of Community & Applied Social Psychology 406.

56 Lieneke Slingenberg, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality* (Hart Publishing 2014).

full respect for human dignity. It did not link this to the specific (temporary and insecure) membership status of asylum seekers. The Court, therefore, seems to rely more on universalistic notions of solidarity in this case, in order to limit the conditional solidarity expressed in Member States' policies.

For beneficiaries of international protection and long-term residents, conditional solidarity is only allowed in so far member states also apply this conditionality towards other legally resident migrants or their own nationals. Interestingly, however, here the CJEU seems to rely on deservingness criteria for widening the mode of solidarity for deserving refugees. As discussed above, the CJEU ruled that depriving beneficiaries of international protection of the possibility to meet their basic needs, even if they are treated the same as nationals, can be unlawful. Yet, the Court stressed that it would only be unlawful if the be beneficiary of international protection would end up in a situation of extreme material poverty 'because of his or her particular vulnerability, irrespective of his or her wishes and personal choices.' Hence, the reasoning of the Court seems to be based on need, and, therefore, fits a conception of conditional solidarity based on deservingness.

5 The influence of crisis

The foregoing sections mapped the social rights provided to refugees in EU law and analyzed the different notions of solidarity that are visible in this part of EU law. This section will examine to what extent these notions of solidarity are influenced by a crisis narrative. As has been discussed in the introductory chapter of this volume, a crisis can be both a threat to and an opportunity for solidarity. What role has it played as regards solidarity crystallized in refugees' social rights?

When the number of asylum applications in the European Union peaked in 2015, more and more people, especially the media,[57] started to refer to the situation as a 'refugee crisis'. This became, eventually, mainstream terminology, adopted by many governmental and non-governmental organizations. The European Commission referred to the 'migration crisis in

57 Myria Georgiou and Rafal Zaborowski, 'Media Coverage of the "Refugee Crisis": A Cross-European Perspective' (Council of Europe 2017) available: https://edoc.coe.int/en/refugees/7367-media-coverage-of-the-refugee-crisis-a-cross-european-perspective.html accessed 6 March 2024.

the Mediterranean', when it presented its 'European Agenda on Migration' in May 2015.[58]

But also before 2015, situations as regards asylum seekers were referred to as crisis, for example the 'reception crisis' in Belgium between 2008 and 2012.[59] In that period, all reception centers in Belgium were full, as a result of which newly arriving asylum seekers were not provided with accommodation, but with financial benefits instead. Reports indicate that in 2009 more than 2.700 asylum seekers were not provided with accommodation and were often obliged to live on the streets. In 2010 this number was 6.284.[60] Among those asylum seekers was the Saciri family. They applied for asylum in October 2010, and were only provided with a place in a reception centre in January 2011 after the reception agency was ordered to do so by court. In the meantime, they were eligible for financial benefits, and tried to find housing on the private rental market but were unable to pay the rent. Legal proceedings in the end reached the CJEU. In addition to ruling that the provision of housing needs to be guaranteed by Member States (see above), the CJEU ruled in this case that saturation of the reception networks is 'not a justification for any derogation' from meeting the minimum standards laid down in the Reception Conditions Directive. Accordingly, the Court does not leave room for Member States to use a crisis situation as a justification for not meeting their obligations under current EU law. The question is, however, whether crisis narratives are used as a reason to change these obligations.

In the European Agenda on Migration,[61] presented by the European Commission in 2015, the emphasis was clearly on solidarity among Member States, with proposals for a temporary distribution system and a resettlement scheme for persons in need of protection. The Commission did,

58 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' (Communication, 13 May 2015) COM(2015)240 final.

59 European Migration Network, 'The Organisation of Reception Facilities in Belgium. Focussed Study of the Belgian National Contact Point for the European Migration Network (EMN) in Cooperation with the Federal Agency for the Reception of Asylum Seekers (FEDASIL)' (August 2013) https://www.emnbelgium.be/sites/default/files/publications/be_ncp_emn_focussed_study_on_reception_version_30_august_2013.pdf accessed 6 March 2024.

60 Centrum Voor Gelijkheid van Kansen en Racismebestrijding, 'Jaarverslag Migratie 2010' (April 2011), 54.

61 European Commission (n 58).

however, also propose to make some changes as regards refugees' access to social rights. As part of this agenda, the Commission published a proposal for a recast of the Reception Conditions Directive in 2016.[62] When explaining the purpose of the recast, the Commission held:

> 'The migratory crisis has exposed the need to ensure greater consistency in reception conditions across the EU and the need for Member States to be better prepared to deal with disproportionate numbers of migrants. There are wide divergences in the level of reception conditions provided by the Member States. In some Member States, there have been persistent problems in ensuring adherence to the reception standards required for a dignified treatment of applicants, while in others the standards provided are more generous. This has contributed to secondary movements and has put pressure on certain Member States in particular.'

Accordingly, the Commission referred to the crisis in order to emphasize the need for more solidarity among Member States, not for more solidarity with refugees. In line with this, two of the main aims of the proposal are to 'further harmonize reception conditions in the EU' and 'reduce incentives for secondary movements'. This will reduce reception-related incentives for applicants to move irregularly to and within the EU, and it will contribute to a fairer distribution of applicants, according to the Commission. The proposal does, therefore, not necessarily aim to improve the reception standards for asylum seekers within the EU. The Commission did not propose to change the required level of material benefits and health care. It did propose, however, to allow Member States to make access to full reception benefits conditional on attending compulsory integration measures and on being present in the Member State that is responsible for examining the asylum application. In addition, it proposed to increase the possibilities for Member States to make the provision of full benefits conditional on actual residence in an assigned place. Accordingly, the Commission proposed to allow Member States to make solidarity with asylum seekers more conditional in order to meet purposes of migration control.

Another element of the 2015 European Agenda on Migration is a proposal for a Regulation on the qualification for international protection. In this proposal, the Commission did not propose any major changes as regards

62 European Commission, 'Proposal for a Directive of the European Parliament and of the Council. Laying Down Standards for the Reception of Applicants for International Protection (Recast)' (Proposal, 13 July 2016) COM(2016)465 final.

refugees' social rights. As regards social assistance, the relevant standard of treatment remains equal treatment with nationals and Member States remain allowed to limit the assistance of beneficiaries of subsidiary protection to core benefits. The Commission did propose, however, to allow Member States to make access to certain social assistance conditional 'on the effective participation of the beneficiary of international protection in integration measures'. As regards housing, the Commission proposed to add that refugees are entitled to equal treatment with other third-country nationals legally resident in the territories of the Member States 'who are in a comparable situation'. Accordingly, both the scope and the mode of solidarity with refugees as regards social benefits are slightly reduced in this Commission proposal.

Also, the proposal for a recast of the Return Directive is linked to the European Agenda on Migration.[63] This proposal was issued in 2018 but does not propose to change anything as regards migrants' (very limited) access to social rights.

As it turned out to be impossible to reach a compromise on all the legislative proposals of the European Agenda on Migration, the European Commission presented a new pact on Migration and Asylum in 2020. According to the Commission:

> Since the refugee crisis of 2015–2016, the challenges have changed. Mixed flows of refugees and migrants have meant increased complexity and an intensified need for coordination and solidarity mechanisms. The EU and the Member States have significantly stepped up cooperation on migration and asylum policy. Member States' responses to the recent situation in the Moria reception centre have shown responsibility-sharing and solidarity in action.

So, again, the Commission emphasized here, as in other parts of the communication, the need for solidarity among Member States, and not the need for solidarity with refugees. The Commission only mentions the need for solidarity with others when it refers to the need to demonstrate solidarity with third states hosting refugees. Accordingly, the display of solidarity in

63 European Commission, 'Proposal for a Directive of the European Parliament and of the Council. On Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast)' (Proposal, 12 September 2018) COM(2018)634 final.

this new pact is reserved for states; individuals should receive 'protection', according to the Commission.

Even though the Commission wanted to make a 'fresh start' with this new pact, the pact builds on the progress made and the commission urges to adopt the Recast Reception Conditions Directive, the Qualification Regulation and the Recast Returns Directive as soon as possible. As regards long-term residents, the Commission issued a proposal for recast of the Directive in 2022.[64] For this group of migrants, the commission proposed to extend their equal access to social assistance, by removing the possibility for Member States to limit such access to 'core benefits'. This fits the proposal's aim of strengthening the rights of long-term residents. Hence, other than with regard to asylum seekers and beneficiaries of international protection, the Commission proposed to somewhat increase the scope of solidarity with refugees who have become long-term residents in the EU. This fits the idea of an incremental system, as discussed in section 3.4, and it could be seen as an indication that the relevant 'in-group' is rather narrow, only including refugees who have established a rather settled status.

In December 2023, negotiations about the new pact seem to be close to an end.[65] Key elements of this pact are screening procedures, mandatory border procedures and increased detention, making it harder to physically and legally enter the territory of the EU. The EU response to the so-called refugee crisis in 2015 is, therefore, not to increase solidarity with refugees as regards their social rights, with the exception of a small increase in the social rights of long-term residents. To the contrary, the response is to make it harder for people to reach EU territory, and for those that manage to reach it, to limit their freedom of movement as much as possible and using access to social benefits as an instrument for that purpose.

64 European Commission, 'Proposal for a Directive of the European Parliament and of the Council. Concerning the Status of Third-Country Nationals who are Long-Term Residents (Recast)' (Proposal, 27 April 2022) COM(2022)650 final.

65 Statewatch, 'Tracking the Pact: Human Rights Disaster in the Works as Parliament Makes "Significant Concessions" to Council' (*statewatch.org*, 6 December 2023) https://www.statewatch.org/news/2023/december/tracking-the-pact-human-rights-disaster-in-the-works-as-parliament-makes-significant-concessions-to-council/ accessed 6 March 2024.

6 Conclusion

Social rights for refugees in EU law are not framed in terms of solidarity. The legal instruments that include such rights only refer to solidarity between Member States as regards burden sharing and, to that end, preventing so-called 'secondary movements' of refugees. Nevertheless, in line with the EU Charter on Fundamental Rights, social rights could be seen as solidarity crystalized, as concrete elements of solidarity with refugees and/or among fellow (legal) residents, members to the community or human beings.

This chapter showed that, analyzed in this way, the concept of solidarity can function as an explanatory tool to clarify the distinction between absolute rights, for applicants for international protection and beneficiaries of temporary protection on the one hand, and relative rights for beneficiaries of international protection and long-term residents on the other. This distinction sometimes results in a situation where refugees with stronger legal ties to the country of residence are less well off, especially as regards their right to housing, than refugees with weaker, or more temporary legal ties. If we analyze this from the perspective of solidarity we can, however, see how the scope of solidarity for these two groups is different. EU law displays solidarity *with* the former group and is based on solidarity *among* long(er) term legal residents.

This chapter also showed how solidarity with refugees as regards their social rights is highly conditional. Only deserving refugees receive the full package of social rights. The social rights of refugees who do not reside at their assigned place or who do not participate in integration courses can be curtailed. And only refugees who would otherwise face severe destitution are entitled to social rights irrespective of the rights provided to nationals. This conditionality of solidarity with refugees is increased in the more recent legislative proposals, which were drafted as a response to the so-called refugee crisis in 2015. On the basis of these proposals, Member States will have even more possibilities to use the social rights of refugees, especially those of asylum seekers, as an instrument of migration control, for example by making access to these rights conditional on meeting strict residence restrictions. These proposals, therefore, impact the *mode* of solidarity with refugees.

In addition, even though the different proposals of the New Pact on Migration and Asylum do not propose to limit the level of refugees' social rights, they also affect the *scope* of solidarity with refugees, by making it

more difficult to reach and enter the territory of the EU, and, therefore, by limiting membership to the relevant (in- or out)group for displaying solidarity with(in).

These proposals, therefore, clearly emphasize control over refugees, and limit the degree of solidarity with refugees in EU law, as expressed in their social rights. Crisis narratives have, therefore, mainly functioned as a threat to solidarity with refugees in EU law, not as an opportunity. The Court of Justice has, so far, done the opposite. As this chapter shows, its case law on refugees' social rights clearly prioritizes (conditional) solidarity, in line with the EU Charter on Fundamental Rights, over Member States' wish to use these rights as an instrument of social control. It remains to be seen whether the CJEU will stick to this approach if the new pact enters into force.

Chapter 10 Solidarity through EU Funding in the EU's Migration Policies

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1 Introduction

Legislative harmonisation has proven ineffective as the main means to realise implementation and inter-state solidarity in the EU's migration policies, used here as a shorthand for the EU's asylum, migration, and external border control policies. Crisis vocabulary has dominated the public discourse on migration in both the EU and its Member States since 2015. Nevertheless, the dysfunctions in the EU's migration policies are not primarily due to unforeseen and uncontrollable external events. Such events, for example the spike in arrivals of individuals seeking asylum in the EU as a result of armed conflict in Syria, merely heightened existing inherent challenges.

Scholars, including myself, have analysed the limitations inherent in the legal design and implementation modes of EU's policies, most notably the existence of a structural solidarity deficit, the EU's ambivalent approach to protection, and the decision to exclude migrants and asylum seekers from the EU's free movement area, as decisive factors behind what is a crisis of values and governance.[1] Therefore solidarity, or lack thereof, is in fact a key component of the perceived crisis in migration.

1 See Daniel Thym, 'The 'Refugee Crisis' as a Challenge of Legal Design and Institutional Legitimacy' (2016) 53(6) Common Market Law Review 1545–1574; Evangelia (Lilian) Tsourdi, 'The Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System', in Francesca Bignami (ed), *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press 2020) 191; Evangelia (Lilian) Tsourdi and Cathryn Costello, 'The Evolution of EU Law on Refugees and Asylum' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law: Third Edition* (Oxford University Press 2021) 793–823; Maarten Den Heijer, Jorrit J. Rijpma, and Thomas Spijkerboer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System' (2016) 53 Common Market Law Review 607.

Transnational solidarity conflicts as understood in this volume, that is political contestation around the scope and means of realising solidarity in migration,[2] have erupted between the Member States. At the intra-EU level, transnational solidarity conflicts relate to the lack of a reliable basis to distinguish between a Member State's 'inability' and its 'unwillingness' to comply with its implementation obligations in these policy fields. In addition, conflicts relate to the appropriate means to operationalise solidarity, such as through funding, operational support, or physical redistribution of migrants and asylum seekers. Beyond the EU, transnational solidarity conflicts extend to the EU's role in the international protection plane, and its efforts to both uphold and deflect protection obligations.

Funding has come to the forefront. In the intra-EU level, initially limited and labelled as 'symbolic politics', EU funding has steadily grown, and intricate management arrangements have developed for its disbursal and control. Still, several components of EU (migration) funding are essentially crisis and emergency-driven measures trying to cater for structural needs. Externally, the EU and its Member States are increasingly using funding instrumentally to pursue migration management objectives, such as containment and externalising migration control.[3] This is often coupled with conditionality arrangements. This means in practice that, where third states 'pursue satisfactorily' migration management objectives, for example, by immobilising protection seekers in their territory, they are 'rewarded' with funding.

Against this backdrop, this contribution critically assesses the role of the solidarity principle in the EU migration policies. Adopting the understanding in this volume of solidarity as social practice rather than a matter of a pre-discursive essence grounding a common identity,[4] it scrutinises EU funding as one such practice embodying solidarity. To do so, I first evaluate the nature, content, and scope of solidarity as a legal principle in migration and its implications for policy administration. Having recourse

2 See Hildebrad, Farahat and Violante in this volume.

3 See eg Evangelia (Lilian) Tsourdi, Federica Zardo, and Nasrat Sayed, 'Funding the EU's External Migration Policy: 'Same Old' or Potential for Sustainable Collaboration?', April 2023, Evangelia (Lilian) Tsourdi and Federica Zardo, 'Migration Governance through Funding: Theoretical, Normative, and Empirical Perspectives' (forthcoming, 2024 Journal of Immigrant and Refugee Studies), Natascha Zaun and Olivia Nantermoz, 'The Use of Pseudo-Causal Narratives in EU Policies: The Case of the European Union Emergency Trust Fund for Africa' (2022) 29(4) Journal of European Public Policy 510–529.

4 See Marius Hildebrand, Anuscheh Farahat, and Teresa Violante in this volume.

to legislation, case-law, and secondary sources, I identify whether binding legal obligations flow from the solidarity principle and analyse how these (should) impact the operationalisation of EU funding.

The next sections situate funding as one of the means to share responsibilities and ascertain the potential of EU funding to realise solidarity. This contribution limits itself to the intra-EU level. The research analyses issues such as the level of available financing; the type of actions EU funding supports; the modalities around co-financing; and, the funding distribution methods among Member States. I focus both on previous and on the current (2021–2027) multi-annual financial frameworks to provide a longitudinal view and comment on policy and legal evolution in this respect. Finally, I reflect on the role that EU funding will play in operationalising solidarity between the Member States in the New Pact on Migration and Asylum. Throughout the analysis, I also scrutinise the interplay between the design operationalisation of EU funding and transnational solidarity conflicts.

The research reveals a nuanced picture: funding has the capacity to boost inter-state solidarity and its design and operationalisation carries potential to alleviate transnational solidarity conflicts. Nonetheless, there are limitations to achieving inter-state solidarity through funding, while the current broader emphasis on externalising protection and its impact on migrants' fundamental rights might overshadow advances in realising inter-state solidarity.

2. What Solidarity in the EU's Migration Policies?

The first section scrutinises the relationship between EU law and solidarity in migration in order to conceptualise its scope and implications. Solidarity is often designated, in legal writing, as a principle of EU law, but it is controversial whether this should be viewed as a binding legal principle or as a political norm.[5] To complicate matters, there is no single notion of

5 Daniel Thym and Evangelia (Lilian) Tsourdi, 'Searching for Solidarity in the EU Asylum and Border Policies' (2017) 24(5) Maastricht Journal of European and Comparative Law 605, 607. See also Armin von Bogdandy, 'Founding principles', in Armin von Bogdandy and Jürgen Bast (eds.), *Principles of European Constitutional Law: 2nd ed.* (Hart Publishing 2011) 11–54, at 53–54, and Malcom Ross, 'Solidarity – A New Constitutional Paradigm for the EU?', in Malcom Ross and Yuri Borgmann-Prebil

the 'solidarity principle' applicable across various EU policies, but rather different expressions of solidarity in different provisions of the EU Treaties. Peter Hilled has eloquently spoken about 'islands of solidarity' within EU law.[6] The introductory contribution to this volume poignantly conceptualises the tension between 'solidarities' and crises in different areas of EU integration pointing to an even more complex policy and legal landscape.[7]

Solidarity exists as a founding principle of the entire EU legal order, as a structural element of the European integration project. Levade has described it as naturally flowing from the doctrine of international federalism that Bourgeois, and later Scelle, developed.[8] In this sense, solidarity is co-substantial to the EU construction, and has a constitutional value.[9] The presence of solidarity in the Treaties marks its growing importance. In an initial stage, the aims of the Community included 'closer relations between its Member States'.[10] However, starting with the Maastricht Treaty, 'solidarity' replaced the term 'relations'. Armin von Bogdandy understands this substitution as a conceptual transition from a Union based on international relations, to the Union as a federal polity.[11]

No precise definition of 'solidarity as founding principle' exists in the Treaties. Solidarity's foundational status nevertheless finds several expressions in the TEU and TFEU. The Union is founded on the value of solidarity.[12] It should promote solidarity between generations,[13] and economic, social, and territorial cohesion and solidarity among Member States.[14] Finally,

(eds.), *Promoting Solidarity in the European Union* (Oxford University Press 2010), 23–45, at 41–44.

6 Peter Hilpold, 'Understanding Solidarity within EU Law: An Analysis of the 'Islands of Solidarity' with
Particular Regard to Monetary Union' (2015) 34 Yearbook of European Law 257, 264.

7 See Marius Hildebrand, Anuscheh Farahat, and Teresa Violante, "Transnational Solidarity in Crisis" in this volume.

8 Anne Levade, 'La valeur constitutionnelle du principe de solidarité' in Chahira Boutayeb (ed), *La Solidarité dans l'Union Européenne : Eléments constitutionnels et matériels* (Dalloz 2011) 41, 44 referring to Léon Bourgeois, *Pour la Société des Nations* (Bibliothèque Charpentier 1910) and Georges Scelles, *Précis de droit des gens : principes et systématiques* (Sirey 1932).

9 Ibid., 45.

10 See Art 2, EEC Treaty.

11 See Armin von Bogdandy, 'Founding Principles' (n 1), 11–54, 53.

12 See TEU, Art 2.

13 See TEU, Art 3(3), 2nd indent.

14 See TEU, Art 3(3), 3rd indent.

it should promote solidarity and mutual respect among peoples.[15] From this we understand that even 'foundational' solidarity has different faces in the Treaties. It is a value that underpins the entire EU construction. Thereafter, this value is diffused in both a state-centred solidarity aim (*among the Member States*) and individual-centred solidarity aims (*between generations* and *among peoples*).

From the wording of these provisions, it becomes clear that they contain general orientations and aspirations and cannot form the basis of legally binding duties in and of themselves. These expressions of 'foundational solidarity' therefore can only assume a concrete role through the vehicle of a general principle of EU law.[16] They, therefore, need the CJEU as a 'bridge' by which to enter the EU legal order. What has been the stance of the Court to date? In what concerns state-centred solidarity, von Bogdandy observes that 'it has not been the basis for much judicial activism'.[17] The Court found no generalised duty for the Union institutions, or other Member States, to assist a Member State in financial difficulty based on the solidarity principle. It has been more proactive, though, in establishing entitlements for mobile EU citizens based on individual-centred transnational solidarity.[18]

However, the solidarity principle is not limited to this aspirational role in the Treaties. In fact, the EU Treaties contain many more *solidarities*, some of which are the source of binding legal obligations. The principle of solidarity and fair-sharing of responsibility in migration, asylum, and border control belongs to this category. The next sections first ascertain the different expressions of solidarity within the EU's migration policies (section 2.1), before scrutinising the legal nature, scope, and impact of the principle of solidarity and fair sharing and responsibility in Article 80 TFEU (section 2.2).

15 See TEU, Art 5(5).

16 Even this position is the object of debate. For support of solidarity's status as a general principle of EU law see: Case C-273/04 *Republic of Poland v Council* (2007) ECR 2007 I-08925, Opinion of Advocate General Poiares Maduro, para. 51. For the opposite opinion see: Abdelkhaleq Berramdane, 'Solidarité, loyauté dans le droit de l'Union européenne', in Chahira Boutayeb (ed), *La Solidarité dans l'Union Européenne: Eléments constitutionnels et matériels* (Dalloz 2011) 53, 67. Berramdane believes that to be the case: 'en raison de son contenu insaisissable et de son champ d'application imprécis'.

17 Von Bogdandy, 'Founding Principles', (n 1), 53.

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

2.1 Solidarities in the EU's migration policy

There are different expressions of solidarity within the EU's migration policies. First, state-centred solidarity and fairness towards third country nationals underpins the entire AFSJ area.[19] Article 67(2) TFEU plays a programmatic role, offering political directions creating binding legal obligations. Although it frames policies on asylum, immigration and external border control, it does not constitute the legal basis for their adoption.[20]

Next, through Article 78(3) the Treaty provides for the adoption of provisional measures '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'; this can be conceptualised as *emergency solidarity*.[21] Article 78(3) TFEU on the emergency solidarity measures, is legally binding and, in fact, has been put to use in order to adopt two emergency relocation Council decisions in September 2015.[22] Hungary and Slovakia contested this in actions for annulment before the CJEU, but the Court rejected their arguments.[23]

The Treaty also introduces in Article 80 TFEU a far-reaching article on the principle of solidarity and fair-sharing of responsibility that underpins (or should underpin) the EU asylum policy; this can be conceptualised

19 TFEU, Art 67(2).

20 See instead, Arts 77–79 TFEU.

21 TFEU, Art 78(3).

22 See Recital 1 of the Preamble to Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (2015) OJ L 239/146 (the 1st Emergency Relocation Decision); and Recital 1 of the Preamble to Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (2015) OJ L 248/80 (the 2nd Emergency Relocation Decision).

23 See Case C-643/15 *Slovak Republic v. Council of the European Union* and Case C-647/15 *Hungary v Council of the European Union*, ECLI:EU:C:2017:631 (European Court of Justice, 6 September 2017) and analysis in Bruno de Witte and Evangelia (Lilian) Tsourdi, '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*' (2018) 55(No.5) Common Market Law Review 1457.

as *structural solidarity*. All these are state-centred,[24] intra-EU, forms of solidarity.

As I have analysed in detail elsewhere,[25] there is also a place for the individual in these state-centred forms of solidarity, hence solidarity in migration is also transnational in the sense of solidarity between people. First, individual refugees and asylum seekers are the *indirect* beneficiaries of these actions. That is by enabling states to respond to their obligations, the situation of the individual improves. This is one facet of the issue; apart from the state-centred solidarity, directly affecting states and indirectly benefiting individuals, there are also individual-centred forms of solidarity at play.[26] For example recognised beneficiaries of international protection have full access to national solidaristic welfare,[27] while asylum seekers have access to reception conditions that must ensure a dignified standard of living but may fall short of national welfare standards.[28] Thus these forms of solidarity follow to an extent, the logic regarding transnational solidarity for EU citizens. This is because currently the EU largely relies on Member States' resources and national welfare systems to realize its common asylum policy.

24 See Valsamis Mitsilegas, 'Humanizing Solidarity in European Refugee Law: The Promise of Mutual Recognition' (2017) 24(5) Maastricht Journal of European and Comparative Law 721, 722–724.

25 Evangelia (Lilian) Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24(5) Maastricht Journal of European and Comparative Law 667.

26 For literature raising this perspective see Jürgen Bast, 'Deepening Supranational Integration: Interstate Solidarity in EU Migration Law' (2016) 22(2) European Public Law (2016) 289, at 290.

27 See Art 29(2) of European Parliament and European Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (2011) OJ L 337/9 (the recast Qualification Directive). Some differentiation is permissible for subsidiary protection beneficiaries, see Art 29(2) of the recast Qualification Directive.

28 See Art 17(5) of European Parliament and European Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (2013) OJ L180/96 (the recast Reception Conditions Directive).

2.2 The principle of solidarity and fair-sharing of responsibility: a critical anatomy

Article 80 TFEU generates legally binding duties. Scholars had argued earlier that at the very least, it is a standard of review under European constitutional law,[29] in a similar manner to fundamental rights. I had at that time argued that, in addition, its wording supports the creation of concrete duties.[30] In a string of cases, the CJEU interpretated the provision in this manner. The Court first proclaimed the legally binding character of the principle of solidarity in the EU asylum policy in a 2020 infringement action against Poland, Hungary and the Czech Republic.[31] It then reiterated this finding in a 2021 case relating to energy solidarity (ie to Article 194 TFEU),[32] highlighting that the principle of solidarity under Article 80 TFEU is not of an abstract nature but rather generates concrete obligations under EU asylum law.[33]

Article 80 TFEU states that the principle of solidarity and fair-sharing of responsibility *shall* govern the three 'policies', ie asylum, immigration, and external border control. Based on the linkages between the three policies and an analysis of Article 80 TFEU through the conceptual history of solidarity, in particular, the dominant Roman law tradition of obligation in solidum and the French tradition of solidarism, Karageorgiou and Noll concluded in a recent piece that Article 80 should be read as an alliance

29 See in this sense, Esin Küçük, 'The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?' (2016) 22(4) European Law Journal 448, at 454–456.

30 Evangelia (Lilian) Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24(5) Maastricht Journal of European and Comparative Law 667, 672–675.

31 See joined Cases C-715/17, C-718/17 and C-719/17, *Commission* v. *Poland, Hungary and the Czech Republic* ECLI:EU:C:2020:257, paras. 70, 80, and 90 (CJEU, 2 April 2020) as well as analysis in Evangelia (Lilian) Tsourdi, 'Relocation Blues – Refugee Protection Backsliding, Division of Competences, and the Purpose of Infringement Proceedings: Commission v. Poland, Hungary and the Czech Republic' (2021) 58(6) Common Market Law Review 1819, 1835–1839.

32 Case C-848/19 P, *Federal Republic of Germany v. European Commission* (Energy Solidarity), ECLI:EU:C:2021:598 (ECJ, 15 July 2021). See also, Kaisa Huhta and Leonie Reins, 'Solidarity in European Union Law and its Application in the Energy Sector' (2023) 72(3) International and Comparative Law Quarterly 771–791.

33 Energy Solidarity, para. 42.

clause, countering a threat of irregular immigration.[34] While intellectually rich, I find that this interpretation unduly limits the scope of Article 80 TFEU, while priming one of the policy areas – ie external border control – over the other two. This does not seem to find support in the treaties, neither in the text of Article 80 TFEU itself, nor in the rest of the TFEU chapter on the AFSJ.

Thereafter, Article 80 TFEU mentions that it is applicable to the policies' 'and their implementation'. Thus, it impacts both the legislation and the implementation phases. The language of the provision, ie 'including its financial implications', indicates that it is not limited to the financing of implementation. Article 80 TFEU states that 'whenever necessary', acts adopted by the Union as part of the policies in question 'shall contain appropriate measures to give effect to this principle'. This wording not only permits but, in fact, *requires* the adoption of concrete measures. The wording also clarifies that the solidarity and fair-sharing of responsibility principle is structural to these policies and should not be linked exclusively with emergency. Instead, that is the function of Article 78(3) TFEU which aims at the adoption of 'provisional measures', such as the emergency relocation decisions that remained in force between 2015 and 2017.[35]

Finally, Article 80 TFEU, as well as Article 78(3) TFEU establish solidarity that is limited *between* Member States and the *EU and its* Member States. More broadly, the solidarity principle, although present in international migration, for example in the international refugee regime, does not create binding duties, either through treaty norms or through customary norms. Solidarity-related initiatives, such as refugee resettlement, are voluntary. The Common European Asylum System has an external dimension with 'partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection' at its core.[36] It is clear that the goal of the co-operation is Eurocentric, that is the management of *inflows* of arriving asylum applicants.

34 See Eleni Karageorgiou and Gregor Noll, 'What Is Wrong with Solidarity in EU Asylum and Migration Law? (2022) 4 Jus Cogens 131, 138–147.

35 European Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (2015) OJ L 239/146 [Emergency Relocation Decision I], and European Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (2015) OJ L 248/80 [Emergency Relocation Decision II].

36 TFEU, Art 78(2)(g).

This wording does not demonstrate solidarity obligations with third states. If anything, the EU has connected the 'management' of inflows with deflection and externalisation, that is the polar opposite of solidarity with third states.[37]

As to the content of the term solidarity itself, it should be clearly distinguished from the EU concept of loyalty, ie the responsibility to implement. The two concepts are complementary, but not co-extensive.[38] Such conceptual unpacking has not taken place at the EU policy level, to the detriment of the development of inter-state solidarity in the EU migration policies. This has also fuelled political conflicts in relation to solidarity. The conflation of the different notions, ie solidarity and loyalty, had led in practice to the somewhat tragicomic expectation that Member States desirous of solidarity measures should fully implement their obligations under the *acquis* in order to be 'deserving' of solidarity measures. In addition, the mainstream perception of solidarity was that it constituted a predominantly emergency-based measure, given that it was not embedded in the policies' design. Calls for structural fair responsibility sharing were largely ignored. Taken together, all these elements would in practice cancel out any role for the solidarity principle! If the Member States at the external border were fulfilling the entirety of their obligations under the asylum and external border control *acquis* and dutifully financing most of the operations from their national budgets, then the policies would be found to be functioning effectively and, hence, there would be no need for the *exceptional* recourse to solidarity.

A final element is what value should be given to the reference to 'fair-sharing' in Article 80 TFEU. The Treaty does not solely mention the principle of solidarity. Rather, it refers to the principle of 'solidarity *and* fair sharing of responsibility'. A special importance is attached to those latter terms, which read together with the rest of the wording of the provision, I argue establish an obligation of result. The three policies under Article 80 TFEU and their implementation should be conducted in such a manner to ensure that responsibilities are shared fairly and equitably among the Member States.

37 See eg Evangelia (Lilian) Tsourdi, Andrea Ott and Zvezda Vankova (eds), 'The EU's Shifting Borders Reconsidered: Externalisation, Constitutionalisation, and Administrative Integration' (2022) 7(No.1) European Papers 87.

38 See for analysis Daniel Thym and Evangelia (Lilian) Tsourdi, 'Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions' (2017) 24(5) Maastricht Journal of European and Comparative Law 605.

Therefore, EU and inter-state arrangements and solidarity actions do not aim to merely offer *some measure of* support or to '*promote* a balance of effort'.[39] They aim to support up to the point where each Member State contributes their fair share. More ambitiously, the aim should be to structure the policies and their implementation in such a way that asymmetrical burdens do not occur in the first place. In this sense, the fair-sharing of responsibility makes solidarity in asylum policy a 'solidarity plus'. This goal is not present in other EU state-centred solidarities. Article 222 TFEU does not establish an obligation for the EU and the Member States to assist a disaster-stricken state to the extent that the consequences of the natural or man-made disaster have been equitably shared. The no bailout clause underpins the Economic and Monetary Union, making strict conditionality in the form of austerity measures a prerequisite for assistance.[40]

The reason behind this strong formulation could be the acknowledgment that Article 80 TFEU relates to policies that concern regional public goods. Notably, Suhrke conceptualized refugee protection as a global public good, a good whose benefits once provided: (i) cannot be excluded from other members of the international community (non-excludability) and (ii) do not diminish or become scarce when enjoyed (non-rivalry).[41] Later, Betts argued that in refugee protection it is unlikely these non-excludable benefits will accrue equally to all members of the international community. States with greater proximity to a given refugee outflow benefit more from a neighbouring state's contribution, thus making refugee protection a regional public good.[42] From this, it follows that asylum protection is a collective responsibility falling upon both the EU and the Member States.[43] The same can be argued about external border control at the EU context. In fact, the 2019 Frontex Regulation enounces European integrated border

39 Compare, former Art 63(2)(b) TEC.

40 See Art 125 TFEU.

41 See Astri Suhrke, 'Burden-Sharing during Refugee Emergencies: The Logic of Collective versus National Action' (1998) 11(4) Journal of Refugee Studies 396.

42 See Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Cornell University Press 2009) 29.

43 See Roland Bieber and Francesco Maiani, 'Sans solidarité point d'Union européenne: regards croisés sur les crises de l'Union économique et monétaire et du Système européen commun d'asile'(2012) 48(No. 2) Revue trimestrielle de droit europeén 295, 314, and the *travaux preparatoires* of the Draft Treaty Establishing a Constitution for Europe on understanding safeguarding external borders as a common responsibility; European Convention Working Group X 'Freedom, Security and Justice', Working Document 31, 2002, para. 2–3

management as 'a *shared* responsibility of the Agency and of the national authorities responsible for border management', while recognising in the same article that 'Member States shall retain primary responsibility for the management of their sections of the external borders'.[44] Seen in this light, the call for fair-sharing under Article 80 TFEU seems fully justified.

In search of what constitutes a 'fair-share', it is important to focus on relative capacities, rather than absolute numbers.[45] This presupposes a system of evaluation of the individual share of responsibility of each Member State on the basis of objective indicators.[46] This would not aim at establishing numerical caps, but rather at objectively assessing the protection or more broadly the implementation 'responsibility share' of each Member State, in the sense of a percentage of the total. Pending such a system, a Member State cannot objectively substantiate a claim that it is 'overburdened'. Instead, these arguments raise the suspicion of the rest, who are also called upon to shoulder part of the common responsibility. This has been the source of interstate transnational solidarity conflicts. Through an objective assessment of the implementation capacity of each Member State, 'inability to comply' with a state's obligations would be clearly distinguished from 'unwillingness to comply', thus preventing tensions between Member States over distributing part of the common responsibility.

Finally, it has been argued that the term 'necessary' in Article 80 TFEU is linked to two fundamental principles of EU law: subsidiarity and pro-

<https://dorie.ec.europa.eu/en/details/-/card/284341>, European Convention Working Group X 'Freedom, Security and Justice', Working Document 22, 2002, para. 4 < https://dorie.ec.europa.eu/en/details/-/card/284355>.

44 European Parliament and Council Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard and Repealing Regulations (EU) 1052/2013 and (EU) 2016/1624 (2019) OJ L 295/1 (hereinafter: 2019 EBCG Regulation), Art 7(1).

45 See Eiko Thielemann, Richard Williams and Christina Boswell., 'What System of Burden-Sharing between Member States for the Reception of Asylum Seekers?', *European Parliament* (2010) p. 18, http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/419620/IPOL-LIBE_ET(2010)419620_EN.pdf accessed 1 May 2024; Harriet Gray, 'Surveying the Foundations: Article 80 TFEU and the Common European Asylum System' (2013) 34 Liverpool Law Review 175, 181.

46 See Philippe De Bruycker and Evangelia (Lilian) Tsourdi, 'In Search of Fairness in Responsibility-Sharing' (2016) 51 Forced Migration Review 64. See also the indirect endorsement of this approach by the CJEU in the context of the distribution of asylum seekers in the framework of the emergency relocation schemes in Case C-643/15 *Slovak Republic v. Council of the European Union*, and Case C-647/15 *Hungary v Council of the European Union*, ECLI:EU:C:2017:631, para. 299–301 (European Court of Justice, 6 September 2017).

portionality.[47] In these policy areas where competence is shared, respect for the subsidiarity principle dictates that the Union may only act if the objectives will be better achieved at Union level. The same authors go on to argue that in the context of asylum, migration, and external border control, policymaking requires a double scrutiny, (i) establishing whether or not measures at Union level are required and (ii) determining whether or not Member States will be able to implement them unaided, or whether additional solidarity measures will be required.[48] Thus, if it is clear that individual Member States might not be able to implement a measure, then Union action may be required.

This research goes a step further. I argue that the structural character of the solidarity principle in Article 80 TFEU implies that the policies should be designed such that asymmetrical burdens do not occur in the first place. This is a logical consequence of achieving fair-sharing as a result. Where asymmetrical burdens result from the policy design, then there is an obligation not only to adopt palliative measures, but rather to redesign the policies so as to alleviate the structural imbalances. This reasoning could have far-reaching consequences for the administrative governance of these policies. The principle of solidarity and fair-sharing, for example, could form the basis of increased integration between the EU and the national levels, as one of the potential avenues to offset imbalances.[49]

3. Operationalising solidarity and fair-sharing of responsibility: what role for funding?

The chapter next explores the EU's efforts to concretely operationalise solidarity and fair-sharing of responsibility in the EU's migration policies, with a main focus on critiquing to what extent solidarity can be realised through financial sharing. A focus on the operationalisation of solidarity is crucial to ascertain whether the law in practice lives up to the constitutional standard of law on the books whose scope and normative content I analysed and argued in the previous section.

47 Dirk Vanheule et al., 'The Implementation of Article 80 TFEU on the Principle of Solidarity and Fair Sharing of Responsibility, including its Financial Implications, between the Member States in the field of Border Checks, Asylum and Immigration', *European Parliament* (2011) p. 100 http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453167/IPOL-LIBE_ET(2011)453167_EN.pdf accessed 1 May 2024.

48 Ibid.

49 See Bast, 'Deepening Supranational Integration', (n 22), 302–304.

Overall, Member States are largely expected to fund the implementation of EU's asylum and migration policies through their own national budgets. This is the case even under the latest multi-annual financial framework covering the period 2021–2027. EU funding is not premised on a so-called compensatory logic, where Member States can draw from the EU budget for the operationalisation of these policies. This is the case despite these policies delivering regional public goods, such as asylum provision and external border control. This chimes in with Sangiovanni's conceptualisation of 'reciprocity-based internationalism' that grounds imperatives for solidarity on all governance levels, and thus also the inter-state level, as a demand for a fair return in the mutual production of important collective goods.[50]

While EU policy-makers presented funding as one of the main means to realise intra-EU solidarity in these policy fields,[51] EU funding available has been modest. The New Pact on Migration and Asylum instruments further embed funding as a means to operationalise solidarity and pay greater attention to the administrative and governance aspects of the policies. Nonetheless, these instruments also operate under the allocations and consequently the limitations of the current multi-annual financial framework.

3.1 The Many Modes of Responsibility Sharing: A Critical Overview

In ascertaining the different modes of responsibility sharing, I draw from Gregor Noll's conceptual framework that identifies four ways of operationalising solidarity, namely through: normative, physical, operational, and financial arrangements.[52] The four operational facets of solidarity fit well with the conceptualisation of solidarity as a set of social practices that embody solidarity.

Normative sharing refers to legislative harmonisation, and this is considered an element of solidarity, as it prevents Member States to 'compete' with each other in lowering their standards to become less attractive desti-

50 Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33(No.2) Oxford Journal of Legal Studies 213, 218–232.

51 See eg European Commission Communication, 'Enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust' COM(2011) 0835 final, 2 December 2011.

52 For an in-depth analysis, see Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill 2000) 263.

nations. In terms of outcomes the harmonisation did not lead to a complete 'race to the bottom', rather states sought to share their restrictive practices, and maintain some of their own domestic standards.[53] As Zaun argues, strong regulators (a term she uses to describe States with an effective government and refugee protection, such as Germany and France) sought to reflect their pre-existing domestic policies in EU standards.[54] This led, for example, to the establishment of highly differentiated standards in the 2005 Asylum Procedures Directive prompting commentary that through this instrument exceptional procedures were normalized.[55] Several exceptional clauses were either retained or introduced in the recast legal instruments on asylum reception or procedures.[56] In other fields such as qualification, where in addition to strong regulatory national frameworks, a robust international legal framework underpinned the regulatory choices, the level of harmonisation was higher.[57] While the significance of establishing a level playing field is widely acknowledged, the relative contribution of legislative harmonisation to operationalising an overall concept of solidarity is contested.[58]

Physical sharing relates to the actual (re)distribution of individuals between Member States, whether it concerns those seeking asylum, those who are found in need of international protection, or those who are under a return obligation to their country of origin. The EU's responsibility allocation system at the time of writing, the so-called Dublin system, undermines fair-sharing of responsibility between the Member States, in allocating most

53 Philippe De Bruycker and Constança Urbano Dias De Sousa (eds), *The Emergence of a European Asylum Policy* (Bruylant 2004).

54 Natascha Zaun, *EU Asylum Policies: The Power of Strong Regulating States* (Palgrave Macmillan, 2017) 38.

55 Cathryn Costello, 'The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles' in Anneliese Baldaccini, Elspeth Guild, and Helen Toner (eds), *Whose Freedom, Security and Justice? EU immigration and asylum law after 1999* (Hart Publishing 2007) 151.

56 Reception Conditions Directive 2013, Art 11(6); Asylum Procedures Directive 2013, Art 43(3); Asylum Procedures Directive 2013, Art 31(8).

57 See for analysis, Christof Roos and Natascha Zaun, 'Norms Matter! The Role of International Norms in EU Policies on Asylum and Immigration' (2014) 16 European Journal of Migration and Law 45–68.

58 Eiko Thielemann, 'Why Asylum Policy Harmonisation Undermines Refugee Burden-Sharing' (2004) 6 European Journal of Migration and Law 47.

responsibility to states at the EU's external (maritime) borders in practice as ample scholarship has analysed.[59]

The emergency relocation decisions implemented during 2015–2017 constituted decisive – and controversial – attempts to realise a physical sharing model.[60] Notably, their effectiveness was undercut through several factors, including their own legislative and administrative set up.[61] Both emergency decisions numerically capped the beneficiaries concerned,[62] restrictively defined the eligible applicants for relocation,[63] and expired after two years.[64] In the same way as the general Dublin III Regulation, both decisions failed to take into account the preferences of asylum seekers.

Moreover, the emergency relocation schemes resulted in inter-state political conflicts as to the operationalisation of solidarity. The contestation arose from the EU's decision to make participation in the second emergency relocation schemes mandatory for the Member States. This marked a departure from the voluntary and small-scale solidarity measures that had taken place up to that point. Hungary and the Slovak Republic filed actions

59 See eg Francesco Maiani, 'The Dublin III Regulation: A New Legal Framework for a More Humane System?', in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill/Martinus Nijhoff 2016) 101 and Evangelia (Lilian) Tsourdi and Cathryn Costello, 'The Evolution of EU law on Refugees and Asylum' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law: Third Edition* (Oxford University Press 2021) 793.

60 See Emergency Relocation Decision I and II.

61 Bruno De Witte and Evangelia (Lilian) Tsourdi, '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' (2018) 55(No.5) Common Market Law Review 1457, 1459–67; Elspeth Guild, Cathryn Costello, and Violeta Moreno-Lax, 'Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece' (2017) Study for the LIBE Committee, 42–44 https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf accessed 1 May 2024; and Francesco Maiani, 'The Reform of the Dublin system and the Dystopia of "Sharing People"' (2017) 24(5) Maastricht Journal of European and Comparative Law 622.

62 1st Emergency Relocation Decision, Art 4 and 2nd Emergency Relocation Decision, Art 4(1).

63 1st Emergency Relocation Decision, Art 3(2) and 2nd Emergency Relocation Decision, Art 3(2) establishing the notion of applicants 'in clear need of international protection'.

64 The first relocation decision applied until 17 September 2017 and the second until 26 September 2017. See respectively 1st Emergency Relocation Decision, art 13(2) and 2nd Emergency Relocation Decision, art 4.

for annulment of that decision before the CJEU in December 2015,[65] constructing a series of imaginative arguments regarding procedural failings that had occurred during its adoption process. Invoking the proportionality principle to protect their national autonomy, they also attempted to strike down binding solidarity. In a lengthy judgment, the Court completely rejected the actions for annulment.[66]

Nonetheless, by September 2017, ie the expiration date of the time-bound relocation schemes, Hungary and Poland had not relocated a single person, while the Czech Republic had only relocated a dozen and had not pledged to do so for over a year.[67] Through infringement proceedings initiated by the Commission, the CJEU found this refusal to violate EU law.[68] The contestation around the use of people sharing as a solidarity operationalisation mode illustrates the political salience of the issue.

The more politically palatable *operational sharing* refers to institutionalised practical cooperation through EU agencies, and most notably through the European Asylum Support Office (EASO),[69] now European Union Agency on Asylum (EUAA)[70] and the European Border and Coast Guard (EBCG).[71] EU agencies are vessels of inter-state solidarity in the sense that through their modes of functioning they mobilise additional

65 Pleas in law and main arguments for Case C-643/15, *Slovak Republic* v. *Council of the European Union* ECLI:EU:C:2017:631 (ECJ, 6 September 2017), OJ C 38/41 of 01 February 2016; and for Case C-647/15, *Hungary* v. *Council of the European Union*, OJ C 38/43 of 01 February 2016.

66 See joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary* v. *Council of the European Union*, ECLI:EU:C:2017:631 (ECJ, 6 September 2017) and De Witte and Tsourdi (n 55).

67 European Commission, 'Fifteenth Report on Relocation and Resettlement' COM(2017) 465, 3, 6 September 2017.

68 Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland (Mécanisme temporaire de relocalisation de demandeurs de protection internationale)* ECL:EU:C:2020:257 (CJEU, 2 April 2020) and commentary in Evangelia (Lilian) Tsourdi, 'Relocation Blues: Refugee Protection Backsliding, Division of Competences, and the Purpose of Infringement Proceedings: Joined Cases C-715/17, C-718/17 and C-719/17 Commission v Poland, Hungary and the Czech Republic' (2021) 58(6) Common Market Law Review 1819–1844.

69 See European Parliament and Council Regulation (EU) 439/2010 of 19 May 2010 establishing a European Asylum Support Office (2010) OJ L 132/11.

70 European Parliament and Council Regulation (EU) 2021/2303 of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (2021) OJ 2021 L 468 (hereafter EUAA Regulation).

71 See European Parliament and Council Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard (2016) OJ L 251/1.

human, operational, and financial resources for policy implementation. For example, both Frontex and the EUAA are involved in jointly implementing policy, ie agency and/or deployed national experts work alongside national authorities implementing EU's external border control and asylum policy.[72]

Joint implementation and deployments were initially connected with the notion of emergency. Nevertheless, as the latest iterations of the agency founding regulations illustrate, the EU is moving away from such emergency-driven conceptions of agency involvement (and indirectly of intra-EU solidarity and fair sharing).[73] However, the limitations of their mandate, and that of the resources they have available, conditions the agencies' solidarity potential. In terms of the latter, agencies have own assets and statutory personnel but can also mobilise additional operational and human resources made available for specific time periods by other Member States.[74]

Finally, *financial sharing* could relate either to the full financing of the operationalisation of the policies in question through the EU budget (compensatory logic), or to a partial financing of activities through the EU budget. The next sections of this chapter explore to what extent EU funding can realise solidarity in the EU's migration policies.

72 See for analysis, Evangelia (Lilian) Tsourdi, 'Bottom-up Salvation? From Practical Cooperation towards Joint Implementation through the European Asylum Support Office' (2016) 1 European Papers (997 and Evangelia (Lilian) Tsourdi, 'Beyond the migration crisis: the evolving role of EU agencies in the administrative governance of the asylum and external border control policies' in Johannes Pollak and Peter Slominski (eds), *The Role of EU Agencies in the Eurozone and Migration Crisis: Impact and Future Challenges* (Palgrave Macmillan 2021) 175.

73 See for commentary, Evangelia (Lilian) Tsourdi, 'Policy Implementation and Enforcement Through EU Migration Agencies: A Brave New World?' in *EU Law Live Symposium on The Agencies of the European Union: Legal Issues and Challenges* 47–49, as well as Evangelia (Lilian) Tsourdi, 'European Union Agency on Asylum: An Agency 'Reborn'?' (2022) 98 *EU Law Live Weekend Editio*n 2–11.

74 See Evangelia (Lilian) Tsourdi, 'The New Pact and EU Agencies: A Tale of Two Tracks of Administrative Integration and Unsatisfactory Embedding', in Daniel Thym and Odysseus Academic Network (eds.), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New 'Pact' on Migration and Asylum* (Nomos 2022) 113.

3.2 Solidarity through EU Funding in Migration: A longitudinal view

EU funding specifically targeting migration policies was initially exclusively geared to asylum, with the adoption of a European Refugee Fund in 2000.[75] It was initially extremely limited, with an allocation of only €216 million over a four-year period,[76] leading academic commentators to label it 'symbolic politics'.[77] A specific financial envelope was foreseen for the case of emergency, but it was linked exclusively with the activation of the EU Temporary Protection Directive.[78] As that instrument was not activated at the time, Member States could not access that dedicated amount. The European Refugee Fund was renewed for the 2005 to 2010 period, containing a slightly enhanced financial envelope,[79] and largely following the initial design.

With the adoption of the 2007–2013 multi-annual financial framework, the EU undertook a substantial overhaul of Home Affairs funding, which led to the establishment- alongside a revamped European Refugee Fund –[80] of the following funding lines: the European Integration Fund,[81] the European Return Fund[82] and the External Borders Fund.[83] A major develop-

75 European Council Decision 2000/596/EC of 28 September 2000 establishing a European Refugee Fund (2000) OJ L 252/12 [hereinafter 2000 ERF Decision].

76 2000 ERF Decision, art 2(1).

77 See Eiko Thielemann, 'Symbolic Politics or Effective Burden-Sharing? Redistribution, Side Payments and the European Refugee Fund' (2005) 43(No.4) Journal of Common Market Studies 807.

78 2000 ERF Decision, art 6.

79 European Council Decision 2004/904/EC of 2 December 2004 establishing the European Refugee Fund for the Period 2005 to 2010 (2004) OJ L 381/52 [hereinafter 2004 ERF Decision].

80 European Parliament and Council Decision 573/2007/EC of 23 May 2007 establishing the European Refugee Fund for the Period 2008 to 2013 as Part of the General Programme Solidarity and Management of Migration Flows and Repealing Council Decision 2004/904/EC (2007) OJ L 141/1 [hereinafter 2007 ERF Decision].

81 European Council Decision 2007/435/EC of 25 June 2007 establishing the European Fund for the Integration of Third-Country Nationals for the Period 2007 to 2013 as Part of the General Programme 'Solidarity and Management of Migration Flows' (2007) OJ L 168/18 [hereinafter 2007 EIF Decision].

82 European Parliament and Council Decision 575/2007/EC of 23 May 2007 establishing the European Return Fund for the Period 2008 to 2013 as Part of the General Programme 'Solidarity and Management of Migration Flows' (2007) OJ L 144/45 [hereinafter 2007 RF].

83 European Parliament and Council Decision 574/2007/EC of 23 May 2007 establishing the External Borders Fund for the Period 2007 to 2013 as Part of the General

ment during that period was the expansion of the scope of the financial reserve for emergency measures in the new European Refugee Fund Decisions so that it covered, not only as before temporary protection but also 'situations of particular pressure'.[84] Emergency funding came with strict requirements though, such as a 6 month implementation limit.[85] This made emergency funding difficult for Member States to absorb, for example, in 2010 Greece only managed to use only 6 per cent of the emergency funding available to it.[86]

The set-up of the Home Affairs funding in the 2014–2020 multi-annual financial framework marked a departure from previous funding periods. Six funds were merged into two: the Asylum, Migration and Integration Fund (AMIF) and the Internal Security Fund (ISF).[87] A single set of administrative rules included in a 'horizontal regulation' (meaning applicable to all the different funding instruments), regulated the implementation of both the AMIF and the ISF funds. The overall amount available, while more extensive than previous funding periods, still remained modest. For example, the global resources (that is, the funding available for the entire period from 2014–2020) initially available for the Asylum, Migration and Integration Fund (AMIF) amounted to €3,137 billion.[88] This was more than the combined amount of the funds that were merged during the previous multi-annual financial framework (2007–2013), which was €2,200 billion.[89]

Programme 'Solidarity and Management of Migration Flows' (2007) OJ L 144/22 [hereinafter 2007 EBF].

84 2007 ERF Decision, Recs 21 and 22, and Art 5(1)–(2).

85 2007 ERF Decision, Art. 5(2)-(3).

86 See statistics and analysis for the case of Greece in Paul McDonough and Evangelia (Lilian) Tsourdi, 'The "Other" Greek Crisis: Asylum and EU Solidarity' (2012) 31(No.4) Refugee Survey Quarterly 67, 77.

87 Two separate instruments regulated the Internal Security Fund: European Parliament and Council Regulation (EU) 515/2014 of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision No 574/2007/EC (2014) OJ L 150/143 [hereafter: ISF Borders] and European Parliament and Council Regulation (EU) 513/2014 of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for police cooperation, preventing and combating crime, and crisis management and repealing Council Decision 2007/125/JHA (2014) OJ L 150/93 [hereafter: ISF Police cooperation].

88 AMIF Regulation, Art 14(1).

89 See European Council of Refugees and Exiles, "Information Note on the Regulation (EU) No 2014/516 of the European Parliament and the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund," 29 May 2015 (in copy with the author).

Still, at the time of its adoption the Fund accounted for a mere 0.29 per cent[90] of the EU's entire previous Multi-Annual Financial Framework.[91]

The funding instruments of the 2014–20 multi-annual period contained some improvements in terms of operationalising solidarity. For example, the process for the activation of emergency funding was simplified, for example doing away with the 6 month implementation limit, while emergency assistance could amount to 100 per cent of the eligible expenditure for Member States.[92] In addition, moderate design improvements led to a relative simplification of the management processes. One characteristic example was the elimination of the obligation for Member States to draw up annual programmes. Instead, funding operated on a multi-annual planning cycle, thus avoiding some of the repetitive paperwork for Member State authorities.[93]

Overall though, EU funding still covered only a limited portion of national spending in this area, and it did not compensate for the asymmetric pressures the EU's responsibility allocation rules in the area of external borders and asylum create. The pre-determined share available to Member States was largely based on absolute indicators, indirectly taken up from the previous period, that failed to account for relative pressures.[94] In addition, Member States are required to set up management and control systems at national level as part of the shared management model. These systems were intricate and demanded human and financial resources for their effective operation. It is for this reason that absorbing EU funding 'costs'.

During the period of increased arrivals in 2015–2016, the need for structural forms of funding became ever more apparent. Even a host of

90 Calculation included in Alessandro D'Alfonso, 'How the EU Budget is Spent: Asylum, Migration and Integration Fund (AMIF)' EU Parliamentary Research Service Briefing 2015, 1.

91 European Council Regulation (EU, Euratom) 1311/2013 of 2 December 2013 laying down the Multiannual Financial Framework for the Years 2014–2020 (2013) OJ L 347/884.

92 HA Funds Horizontal Regulation, Art 20(2), and Rec 15.

93 There were five main stages in the multi-annual programming cycle: a stage of policy dialogue; preparation of draft programmes by Member States to be approved by the Commission; thereafter, annual implementation reporting. Halfway through the implementation period is a mid-term review that includes enhanced reporting and evaluation, and could lead to the review of national programmes. The final stage consists of implementation reporting and ex-post evaluations that feed into the next multi-annual programming cycle. See HA Funds Horizontal Regulation, Arts 13–15.

94 See for example, AMIF Regulation, Rec 37 and Annex I.

Member States with stronger national economies, such as France, Germany, and the Netherlands, had recourse to emergency funding to implement their obligations.[95] Moreover, several Member States demanded for the first time the activation of the Civil Protection Mechanism for migration-related purposes.[96] This process allows for the pooling and transfer of non-financial resources and depends on the voluntary contribution of Member States. In the case of the 2015–2016 'refugee crisis', the non-financial resources consisted of items such as tents, blankets, etc. that were vital for emergency humanitarian assistance for those arriving. Items were undersupplied compared to demand.[97] A further development was the creation of an intra-EU humanitarian aid budget line.[98] This budget line, which draws from the general EU budget, is not specific to migration. However, its first activation related to the refugee crisis: several tranches of money were released for projects in Greece, mainly supporting reception capacity.

3.3 Solidarity through funding in the current multi-annual framework 2021–2027

There is no radical overhaul in the philosophy or scope of EU migration funding in the current funding period, ie the period 2021–2027. An enhanced financial envelope for these policies compared to the previous period, ie €25,7 billion, was initially foreseen for the budget heading relating to migration and border management.[99] Expenditure for these policy

95 See eg European Commission Communication, 'Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration' COM (2015) 510 final, 14 October 2015.

96 See European Council Decision 1313/2013/EU of 17 December 2013 on a Union Civil Protection Mechanism, (2013) OJ L 347/924 [hereinafter Union Civil Protection Mechanism Decision].

97 See European Commission Communication, 'On the State of Play of Implementation of the Priority Actions under the European Agenda on Migration' COM(2016) 85 final, 10 February 2016, annex 9 Accepted Member States' Support to Civil Protection Mechanism for Serbia, Slovenia, Croatia and Greece, 4.

98 See European Council Regulation (EU) 2016/369 of 15 March 2016 on the Provision of Emergency Support within the Union (2016) OJ L 70/1 [hereinafter Humanitarian Assistance Regulation].

99 European Commission, 'Heading 4: Migration and Border Management' (European Commission https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2021-2027/spending/headings_en accessed 1 May 2024.

areas is still a minor share of the EU budget (2.1 %, excluding the resources from the Next Generation EU recovery instrument), but these allocations represent a significant increase in relative terms, as compared with the 2014–2020 period.[100] Overall, despite the boost in existing resources, the amounts available bring EU funding only marginally closer to a compensatory logic. A significant part of the financing for the operationalisation of these policies is still to be drawn from national budgets following the logic of policy implementation by Member States.

In June 2023, in view of the mid-term review of the multi-annual framework, the Commission proposed to increase the overall amount relating to migration and border management by EUR 2 billion to provide for sufficient funding to support Member States in managing urgent challenges related to migration and borders as well as for the implementation of the New Pact on Migration and Asylum once adopted.[101] At the time of writing, ie February 2024, the European Parliament and the Council had reached a provisional agreement on the budget update that approved the Commission's proposal on this point.[102]

The following architecture in terms of funds has been adopted: an Asylum Migration and Integration Fund (AMIF 2021),[103] and an Integrated Border Management Fund made of two components: the Border Management and Visa Instrument (BMVI),[104] and the Customs Control

100 See Alessandro d'Alfonso, 'Migration and border management: Heading 4 of the 2021–2027 MFF', Doc. No. PE 690.544 (European Parliamentary Research Service, April 2021) https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690544/EPRS_BRI(2021)690544_EN.pdf accessed 1 May 2024.

101 European Commission, 'Amended proposal for a council regulation on the methods and procedure for making available the own resources based on the Emissions Trading System, the Carbon Border Adjustment Mechanism, reallocated profits and the statistical own resource based on company profits and on the measures to meet cash requirements' COM(2023) 333 final, 20 June 2023.

102 See European Parliament, 'Deal on mid-term revision of EU's long-term budget' (European Parliament, 06 February 2024) https://www.europarl.europa.eu/news/en/press-room/20240205IPR17408/deal-on-mid-term-revision-of-eu-s-long-term-budget accessed 1 May 2024.

103 European Parliament and Council Regulation (EU) 2021/1147 of 7 July 2021 establishing the Asylum, Migration and Integration Fund (AMIF) for the period between 2021 and 2027 (2021) OJ L 251/1 (hereinafter AMIF 2021).

104 European Parliament and Council Regulation (EU) 2021/1148 of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy (2021) OJ L 251/48.

Equipment Instrument (CCEI).[105] In addition, a Horizontal Regulation concerning both several funds under the cohesion policy and the migration policies funds regulates their implementation.[106]

In terms of objectives, the AMIF mentions as one of its explicit objectives 'enhancing solidarity and fair sharing of responsibility between the Member States, in particular as regards those most affected by migration and asylum challenges, including through practical cooperation'.[107] The main objectives of the BMVI do not include similar wording.

AMIF 2021 continues to disburse part of the funding in the form of national programs (roughly 60 % of the fund) that it calculates based on a fixed amount that it augments in the case of Cyprus, Greece, and Malta.[108] Thereafter, it boosts this fixed amount through a number of absolute indicators, such as the number of protected beneficiaries, the numbers of asylum seekers, the number of legally residing third-country nationals, or the number of third country nationals subject to a return order.[109] These absolute indicators cannot account for the relative pressures these numbers represent for different Member States.

The BMVI also broadly follows the same logic for disbursing the amounts under the different national programs.[110] It again foresees a fixed enhanced amount for the benefit of Cyprus, Greece, and Malta. It boosts this fixed amount, taking to account i) the length of external land borders and external sea borders of individual Member States weighted at 70 %; ii) the workload at external land and sea borders weighted at 30 %, that it ascertains through a number of absolute indicators, such as the number of crossings of the external borders at border crossing points.[111] The sharing methods of the BMVI better take to account the position and capacities

105 European Parliament and Council Regulation (EU) 2021/1077 of 24 June 2021 establishing, as part of the Integrated Border Management Fund, the instrument for financial support for customs control equipment (2021) OJ L 234/1.

106 European Parliament and Council Regulation 2120/1060 of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (2021) OJ L 213/159.

107 See AMIF 2021, Art 3(2)(d).

108 See eg AMIF 2021, Annex I.

109 See eg AMIF 2021, Annex I.

110 See BMVI, Annex I.

111 Ibid.

of individual Member States as they factor in the length of their external borders. Nonetheless, the absolute indicators the fund employs to ascertain the workload once again do not account for the relative pressures different Member States experience.

Both the AMIF 2021 and the BMVI, however, foresee an additional element of flexibility, which is the thematic facility. This is part of the funding which is not pre-allocated to national programs. Under AMIF 2021 it represents roughly 30 % of the overall available amount under the fund. Member States and the EU can direct the thematic facility under AMIF 2021 to actions such as emergency assistance, resettlement and humanitarian admission, and additional support to Member States contributing to solidarity efforts.[112] In fact, the regulation stipulates that the EU and Member States should direct 20 % of the initial allocation under the thematic facility to the aforementioned objective of enhancing solidarity and fair sharing of responsibility between the Member States.[113] The BMVI does not explicitly mention solidarity and fair sharing under the thematic facility.[114]

3.4 Solidarity through Funding in the New Pact on Migration and Asylum

While the current multi-annual financial framework runs until 2027, the instruments of the New Pact on Migration and Asylum will bring about developments in terms of operationalising solidarity and fair sharing through funding. I comment at the time of writing based on the available legislative agreement the LIBE committee endorsed on an Asylum and Migration Management Regulation (AMMR) in its February 2024 vote.[115] This regulation reforms the EU's system on allocating responsibility for processing asylum claims and establishes a solidarity mechanism.

112 See eg AMIF 2021, Art 11 and Rec 44.

113 See AMIF 2021, Art 3(2)(d) and Art 11(4).

114 See BMVI, Art 8.

115 LIBE made the text accessible here: Council of the European Union, 'Proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Regulation (EU) 2021/1147 and Regulation (EU) 2021/1060' (European Parliament, 8 February 2024) https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2024/02-14/06.RAMM_Asylumandmigrationmanagement_EN.pdf accessed 1 May 2024 [hereafter: AMMR February 2024 version].

The AMMR presents innovations in terms of operationalising solidarity and fair-sharing of responsibility. First, it foresees a structured process for identifying Member States under migratory pressure, at risk of migratory pressure or facing a significant migratory situation that can benefit from solidarity measures. Namely, the Commission will adopt a European Annual Asylum and Migration Report that, drawing from quantitative and qualitative indicators, will provide a comprehensive picture of trends and implementation in these policies and assess the need for solidarity and migration management measures.[116] Based on this report, the Commission will annually adopt i) an implementing decision on determining Member States 'under migratory pressure, at risk of migratory pressure or facing a a significant migratory situation'; ii) a proposal for a Council implementing act establishing a so-called Solidarity Pool.[117]

The results of this process might still be politically contested and generate solidarity-related conflicts. The fact that Member States have the possibility to argue that they find themselves in situations of pressure even if the Commission has not identified them as such illustrates the point.[118] Still, this structured process infuses elements of predictability, objectivity, and impartiality in the identification of pressure and need for inter-state solidarity. Where Member States 'self-identify' so to speak as experiencing pressures necessitating solidarity contributions, they still need to argue based on concrete and pre-defined qualitative and quantitative indicators and the Commission, and consequently the Council, can either endorse or decline access to solidarity measures.[119]

This framework also creates a more predictable operationalisation of inter-state solidarity through annual Member State pledges. Nonetheless, it is still exceptional situations of 'pressure' that trigger solidarity measures gathered under the framework of the Solidarity Pool. Under 'normal' circumstances Member States are expected to operationalise their national asylum and external border control systems and related obligations largely on their own financial and operational resources and personnel. What is available on a permanent basis is the so-called permanent EU migration support toolbox.[120] This toolbox in essence encompasses elements that

116 AMMR February 2024 version, Art 7a.
117 AMMR February 2024 version, Arts 7ba and c.
118 See eg AMMR February 2024 version, Arts 44c and 44d.
119 Ibid.
120 AMMR February 2024 version, Art 5(3).

this research previously identified as carrying a solidarity potential, such as operational support through EU agencies, EU funding, and the Civil Protection Mechanism.[121] Nonetheless, the toolbox also contains vaguely phrased elements, such as 'enhanced diplomatic and political outreach', or 'supporting effective and human rights based migration policies in third countries'.[122] These reflect the migration-development nexus policy thinking, whose impact is indirect at best, let alone empirically contested.

Coming back to the Solidarity Pool, to secure and operationalise solidarity-related pledges, the AMMR establishes new permanent governance mechanisms, such as annual High Level and Technical Level EU Solidarity fora, as well as the function of an EU solidarity coordinator that will play pivotal roles in animating inter-state solidarity through pledges and in operationalising these pledges.[123] Such permanent structures, mirroring UN level processes as in the Global Refugee Forum established in the framework of the UN Global Compact on Refugees, seem more apt to achieve effective and predictable inter-state cooperation compared to ad hoc bargaining. Therefore, this institutionalization drive has the potential to alleviate solidarity-related conflicts between the Member States.

The solidarity pool can consist of three types of contributions. First, relocations (ie organised intra-EU transfers) of asylum seekers or recently recognised beneficiaries of international protection.[124] Next, financial contributions, meaning financial transfers to the EU budget as external assigned revenues to benefit Member States that have access to the Solidarity Pool a given year.[125] Benefitting Member States can deploy these amounts either at boosting their own capacity, or third country capacities, in the areas of asylum, migration, or border management.[126] The fact that these amounts can target actions in third countries illustrates once again a policy mindset influenced by the migration-development nexus discourse. It also points to externalisation tendencies, to the extent that amounts will target boosting the border control capacities of third states. Finally, Member States can offer so-called 'alternative contributions' such as capacity building, staff support, equipment. Member States retain full discretion in

121 Ibid.
122 Ibid.
123 See eg AMMR February 2024 version, Arts 7d, 7e, 7f.
124 See AMMR February 2024 version, Arts 7c, 44a.
125 See AMMR February 2024 version, Arts 7c, 44i.
126 Ibid.

choosing between types of solidarity measures that are considered "of equal value". However, if they pledge alternative solidarity measures, they should indicate their financial value based on objective criteria.[127] If a specific benefitting Member State has not asked for alternative measures, these should be converted to financial contributions instead.[128]

The AMMR foresees a minimum of required relocations and financial contributions for the Solidarity Pool at Union level, which should at least be annually: (a) 30 000 for relocations; and (b) EUR 600 million for financial contributions.[129] In breaking with the past, solidarity has a mandatory character in the sense that Member States are to annually contribute their fair share calculated through a formula that takes into account their population size (50 % weighting) and their total GDP (50 % weighting).[130] Seeking to annually objectify each Member State's fair share marks improvement from the current situation of *ad hoc* bargaining. Nonetheless, to appease Member States that opposed relocation, and thus alleviate solidarity-related conflicts, the AMMR foresees that Member States retain full discretion in choosing between the types of solidarity measures they will contribute.

However, if Union-wide relocation pledges fall below the envisaged minimum of 30.000 per year, or below 60% of the reference number used to calculate each Member State's mandatory fair share for relocation, then so-called responsibility offsets become mandatory.[131] What this means practically is that the contributing Member State, eg Hungary, needs to examine applications for international protection for which the benefitting Member State, eg Greece, would have normally been responsible and cannot return these asylum seekers to Greece. Instead of mandating relocations then, the AMMR essentially envisages the suspension of the inter-state transfer component (ie the 'take back requests') for Member States that refuse to relocate. Whether this pragmatic solution will resolve solidarity-related conflicts remains to be seen. After all, for a responsibility offset to apply, asylum seekers arriving at the border Member States should have managed to irregularly continue their journey onwards to another Member State, which is not always practicable.

127 See AMMR February 2024 version, Arts 7c, 44j.
128 Ibid.
129 AMMR February 2024 version, Art 7c.
130 AMMR February 2024 version, Art 44k.
131 AMMR February 2024 version, Art 44h.

4 Conclusion

Intra-EU, state-centered solidarity, based on Article 80 TFEU creates binding legal obligations, impacting both the adoption of legislation, and the phase of implementation. Article 80 TFEU requires the adoption of concrete measures, whenever necessary. This reference in the Treaty to the principle of 'solidarity and fair sharing of responsibility', results into what I refer to as 'solidarity plus'. The aim is to provide support up to the point where each Member State contributes its fair share. More ambitiously, the aim should be to structure the migration policies and their implementation so that asymmetrical responsibilities do not occur in the first place. This has not been the case at EU level. If anything, the EU's current asylum responsibility allocation system fuels asymmetrical responsibilities, and consequently, intra-EU political conflicts.

The EU initially hinged heavily on normative sharing to achieve inter-state solidarity, an approach with contested results. Gradually the EU started experimenting with operational sharing that led to an institutionalisation push and to joint implementation patterns through EU agencies. Physical sharing has been less developed, with ad hoc initiatives spurring political contestation. Yet, physical sharing remained present in the policy and legal debate. Financial sharing had initially been modest. It has since grown in volume, playing a key role during the 2015–2016 increased migrant arrivals to the EU. These developments point to the need for structural forms of funding to support policy implementation. This chimes in well with the EU's migration policies ultimately generating regional public goods.

Consecutive EU multi-annual financial frameworks developed the EU's migration funding implementation design and sharing methods. Flexible components, such as emergency funding, emerged. Raising EU co-financing to 100 per cent in case of emergency funding led to greater absorption rates. The current multi-annual financial framework incorporates an additional element of flexibility, the thematic facility. The framework also boosts existing financial resources compared to previous periods. Nevertheless, the amounts available bring EU finding only marginally closer to a compensatory logic.

The New Pact on Migration and Asylum brings concrete innovations. It adopts a structured approach to define Member States' relative capacities and to apportion responsibilities on this basis. Quantitative and qualitative indicators underpin the triggering of solidarity measures. This comprehen-

sive set of indicators, overall, seems to be well suited to provide a holistic picture and assess relative pressure. The Pact foresees new permanent governance mechanisms, such as the annual solidarity fora and the Solidarity coordinator that have the potential to prevent, or at least, depoliticise inter-state solidarity conflicts.

However, the AMMR's approach is still likely to miss the mark on fair sharing. Even if it creates permanent governance structures, the regulation continues to link the activation of solidarity with pressure. Thus, instead of establishing structural fair sharing, solidarity remains a palliative solution. The regulation's baseline people sharing component, ie minimum 30.000 relocations annually at EU wide level, is rather unambitious. Next, it is unlikely that benefitting Member States will consider capacity building activities in third states, or sharing of personnel and equipment, as having equivalent impact on the ground as people sharing.

What is certain is that solidarity through financial sharing in migration is gaining prominence. The EU has found an inventive way to enhance the existing amounts under the EU budget for its migration policies through generating earmarked external assigned revenues that Member States will make available by means of the Solidarity Pool. The minimum amount the regulation currently foresees at EU wide level, ie EUR 600 million, is relatively modest and will not allow for a passage to a compensatory logic. However, it could be the precursor of deeper, structural, forms of financial sharing in the operationalisation of the EU's migration policies. This could constitute a decisive piece in the puzzle of enhancing policy implementation. Unfortunately, the externalisation push that underpins the Pact instruments,[132] are likely to overshadow these advancements in the intra-EU solidarity field.

132 See for analysis, Evangelia (Lilian) Tsourdi, 'The EU's New Pact on Migration and Asylum: three key arguments' (EU Law Analysis, 14 September 2023) https://eulawanalysis.blogspot.com/2023/09/the-eus-new-pact-on-migration-and.html accessed 1 May 2024.

Chapter 11 Transnational Solidarity Beyond the State: Claiming Subjectivity

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Over the past decades, the European Court of Human Rights (ECtHR) has become an increasingly important protector of the rights of people on the move at the border, enabling them to rely on human rights guarantees in order to oppose their immediate deportation, to have their claims for protection heard and to ultimately access asylum.[2] In an effort to limit the resulting human rights obligations under the European Convention on Human Rights (ECHR), European states have responded by deploying strategies aimed at avoiding scenarios that enable migrants to rely on human rights guarantees. While the states cite crisis narratives in support of their avoidance strategies, people on the move are experiencing a humanitarian crisis as a result of their rightlessness. In turn, therefore, people on the move and those supporting their struggles have been responding by fostering practices of solidarity from below across national borders with the aim of enabling said migrants to claim and rely on these rights.

In this article, I will take a closer look at these transnational practices of civil solidarity and their role in supporting the struggles of subjects on the move for legal subjectivity. In reading unauthorised border crossings as articulations of claims to legal subjectivity, I am using concepts developed by Jacques Rancière, assuming that people on the move 'have not the rights that they have and have the rights that they have not', and that they are 'putting two worlds in one and the same world':[3] in the face of *de-facto*

1 * The author wishes to thank Fabian Endemann, Pia Lotta Storf and Sebastian Benedikt for very helpful discussions and for their research assistance; additional thanks is due to Marlene Stiller for her research assistance.

2 See eg the account by Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017) 267–71 (on non-refoulement), 354–57 (on access to asylum).

3 Jacques Rancière, 'Who is the Subject of the Rights of Man' (2004) 103(2/3) South Atlantic Quarterly 207, 304.

and *de-jure* rightlessness,[4] they are casting themselves as rightsholders – as subjects of human rights. I will focus on three examples of practices of solidarity supporting these subjectivity claims, each addressing different forms of rightlessness: essential humanitarian support to people crossing land borders, civil search and rescue missions and cities of refuge. Costas Douzinas has pointed to the fundamental (legal) nature of this type of solidarity, which – relying on Ernst Bloch – he calls 'the ultimate norm of subjective right'.[5] I conclude with an assessment of the political nature of these practices of solidarity.

In Part 1, I will explain that, while solidarity in the EU law context is chiefly conceptualised as state solidarity, I am interested in transnational civil solidarity. I will also briefly sketch out how such practices of solidarity can be understood as strategies of legal subjectivation. In Part 2, I will present three examples of how such practices of solidarity seek to counter de-facto and de-jure rightlessness. Part 3 situates these practices in a political framework.

1 Civil Solidarity Against Rightlessness

1.1 Deflection instead of State Solidarity

European discussions over solidarity in the context of the so-called migration crisis tend to focus on solidarity between EU member states. Article 80 TFEU provides the relevant legal framework; it requires that the policies on border checks, asylum and immigration as well as their implementation 'shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'.

This understanding of solidarity – as responsibility sharing between states – has supported member states' reliance on the sovereignty clause in Dublin procedures, permitting states to unilaterally assume responsibility for cases under the Dublin Regulation.[6] It has also been cited in justifica-

4 Adel-Naim Reyhani, 'Anomaly upon Anomaly: The 1951 Convention and State Disintegration' (2021) 33(2) International Journal of Refugee Law 277.

5 Costas Douzinas, 'Philosophy and the Right to Resistance' in id and Conor Gearty (eds), *The Meaning of Rights – The Philosophy and Social Theory of Human Rights* (Cambridge University Press 2014) 105.

6 Case C-646/16 *Jafari* ECLI:EU:C:2017:586, paras 85 ff (European Court of Justice, 26 July 2017).

tion of the Council's 2015 and 2016 Relocation Decisions, obliging member states to relieve Greece and Italy from some of their responsibility for an unprecedented number of protection seekers.[7] And it is also underlying the Commission's proposals for a mandatory responsibility sharing mechanism in the New Pact for Migration and Asylum.[8]

From the beginning, it was rather unlikely that such a mandatory responsibility sharing mechanism would actually be adopted, both in light of the rocky implementation of the Relocation Decisions and given that the Commission's prior suggestions of such mechanisms – a mandatory crisis relocation mechanism for 'Dublin III'[9] and a corrective allocation mechanism as part of 'Dublin IV'[10] – have failed.[11]

On the contrary, despite repeated and urgent calls from the Southern EU member states disproportionately burdened under the Dublin system and by the strains of the 2009 financial crisis, the more affluent Northern member states as well as the 'Visegrád-4' states (the Czech Republic, Hungary, Poland and Slovakia) have been adamant in their resistance to any additional obligations to accept migrants. Indeed, as of 8 June 2023,

7 European Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (2015) OJ L 248/80; European Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (Relocation Decisions) (2016) OJ L 268/82.

8 European Parliament and Council Proposal for a Regulation COM(2020) 610 final of 23 September 2020 on asylum and migration management amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) 2021/1147 [Asylum, Migration and Integration Fund] amended by Regulation (EU) 2022/585.

9 European Parliament and Council Proposal for a Regulation COM(2015) 450 final of 9 September 2015 establishing a crisis relocation mechanism OJ L 16, which would have amended Regulation (EU) 604/2013 (Dublin III).

10 European Parliament and Council Proposal for a Regulation COM(2016) 270 final of 4 May 2016 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), (Dublin IV proposal), arts 34–43.

11 As to external solidarity, the Commission has not even proposed hard resettlement quotas in its New Pact on Migration and Asylum; Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No. 516/2014 of the European Parliament and the Council, COM(2016) 468 final, 13 July 2020.

member states will be able to opt to pay a 20,000 € sponsorship for each person they do not take.[12]

Instead, the EU member states have jointly directed their focus on deflecting migration and outsourcing border checks as well as protection to third countries, most prominently to Turkey,[13] but also to Libya[14] and other North African states.[15]

1.2 Jurisdiction Avoidance and Rightlessness

These efforts have been and continue to be part of a larger strategy of jurisdiction avoidance ever since the 2012 *Hirsi Jamaa* judgment.

In that case, the Grand Chamber of the European Court of Human Rights (ECtHR) confirmed that European countries cannot escape their human rights obligations even at high sea: they are bound by the non-refoulement guarantee and the prohibition of collective expulsion as soon as they exercise effective control over migrants at sea.[16] This means that, as soon as member state authorities physically engage with people on the move and thereby exercise jurisdiction, they must respect substantive and procedural guarantees which will usually require disembarkation on

12 Council of the EU, 'Migration policy: Council reaches agreement on key asylum and migration laws' (Council of the EU press release, 8 June 2023) https://www.consilium.europa.eu/en/press/press-releases/2023/06/08/migration-policy-council-reaches-agreement-on-key-asylum-and-migration-laws/ accessed 2 May 2024, stating: 'Member states have full discretion as to the type of solidarity they contribute. No member state will ever be obliged to carry out relocations.

13 Resettlement Regulation proposal (n 10).

14 See eg Odysseus Network, 'Memorandum of Understanding on Cooperation in the Fields of Development, the Fight Against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders Between the State of Libya and the Italian Republic' (*EU Migration Law Blog* 2017) https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf accessed 2 April 2024; Martino Reviglio, 'Externalizing Migration Management through Soft Law: The Case of the Memorandum of Understanding between Libya and Italy' (2020) 20 Global Jurist 1–12.

15 Thomas Gammeltoft-Hansen and Nikolas Feith-Tan, 'Extraterritorial Migration Control and Deterrence' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) 502.

16 *Hirsi Jamaa and ors v Italy* (2012) 55 EHRR 21, para 70.

the acting member state's territory.[17] Rather than preventing the arrival of people on the move in Europe, they would be obliged to facilitate it.

In the aftermath of *Hirsi*, EU member states have been working hard to avoid such scenarios, devising ways to control migration at a distance instead.[18] Such efforts include long established instruments like visa requirements and carrier sanctions, but also the involvement of third countries in the immobilisation of migrants through detention, pull-backs and rings of deflection reaching far into the African continent. They also include the failure to expand search and rescue (SAR) units – despite the fact that the Mediterranean is a hyper-surveilled water[19] – and the refusal to grant permission to enter port for boats bearing rescued migrants.[20] By thus avoiding direct, physical interactions, EU member states seek to sidestep the very human rights guarantees that the exercise of jurisdiction would

17 See Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27(3) European Journal of International Law 591, 592.

18 See Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"' (2020) 21(3) German Law Journal 385. This is not to say that pushbacks 'in person' are no longer happening; to the contrary, member states have been resorting to such practices more and more openly. The pushbacks at the Spanish enclaves of Ceuta and Melilla in Morocco, at the Aegean sea border between Greece and Turkey and at the land border between Belarus, Poland and Lithuania are the most prominent recent examples; member states appear emboldened by the ECtHR's refusal to find such practices illegal under the prohibition of collective expulsions, as well as the EU Commission's willingness to devise an exception clause. See Sergio Carrera, 'The Strasbourg Court Judgment "N.D. and N.T. v Spain": a Carte Blanche to Push Backs at EU External Borders?' (2020) European University Institute RSCAS Working Paper 2020/21, https://hdl.handle.net/1814/66629 accessed 2 April 2024.

19 See eg Petra Molnar, 'Technological Testing Grounds: Migration Management Experiments and Reflections from the Ground Up' (EDRi 2020) 17–19 https://edri.org/wp-content/uploads/2020/11/Technological-Testing-Grounds.pdf accessed 2 April 2024; Frontex, 'Eyes in the sky: Monitoring the Mediterranean' (*Frontex*, 20 October 2023) https://www.frontex.europa.eu/media-centre/news/news-release/eyes-in-the-sky-monitoring-the-mediterranean-17Gg1W accessed 2 April 2024; OHCHR, '"Lethal Disregard": Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea' (*OHCHR*, May 2021) 21–22 https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf accessed 2 April 2024.

20 Nora Markard et al, 'Support for Civil Search and Rescue Activities: Options for the German Government' (Heinrich Böll Stiftung European Union 2023) 13–14 https://eu.boell.org/en/support-civil-search-rescue accessed 2 April 2024.

trigger; their avoidance strategy is designed to render people on the move effectively rightless: without a duty bearer, human rights do not apply.

So far, the ECtHR has upheld its *Hirsi* jurisprudence.[21] But it has recently, beginning with *ND and NT*, started reinterpreting the substantive guarantees – non-refoulement and the prohibition of collective expulsion – in land border scenarios, namely by adding an exception to the prohibition of collective expulsion when that expulsion is the result of the migrants' own 'culpable conduct'.[22] This newly minted exception is supposed to apply when a group of persons uses irregular entry points instead of genuine and effective regular admission points to state territory.[23] So far, these cases were all set on land and not at sea, a distinction that the Court relied on in *ND and NT*.[24] They also did not concern the (absolute) non-refoulement guarantee in article 3 ECHR, but merely the prohibition of collective expulsion; nor, of course, can this jurisprudence affect the obligations under the 1951 Refugee Convention and under EU law, namely under the Asylum Procedures Directive.[25] Nonetheless, EU member states continue to invoke

21 See eg *N.D. and N.T. v. Spain* (2020) ECHR 142, paras 110, 185–87.

22 ibid, para 208.

23 ibid, para 210. On the Court's misleading use of its prior caselaw see eg Hanaa Hakiki, 'N.D and N.T. v. Spain: Defining Strasbourg's Position on Push Backs at Land Borders?' (*Strasbourg Observers*, 26 March 2020) https://strasbourgobservers.com/2020/03/26/n-d-and-n-t-v-spain-defining-strasbourgs-position-on-push-backs-at-land-borders/ accessed 2 April 2024; on the unclear scope of the exception, see Nora Markard, 'A Hole of Unclear Dimensions: Reading ND and NT v. Spain' (*EU Migration Law Blog*, 1 April 2020) https://eumigrationlawblog.eu/a-hole-of-unclear-dimensions-reading-nd-and-nt-v-spain/ accessed 2 April 2024. Subsequent case law includes *Asady and ors. v. Slovakia* (2020) ECHR 243; *Shahzad v. Hungary* (2021) ECHR 613; *A.A. v. North Macedonia* (2022) ECHR 300; *M.A. v. Lithuania* (2018) ECHR 1005.

24 See the partly dissenting opinion of Judge Pauliine Koskelo, *ND and NT* (n 20) para 38.

25 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33; European Parliament and Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (2013) OJ L180/60 (Asylum Procedures Directive). See Markard, 'A Hole of Unclear Dimensions' (n 22); Constantin Hruschka, 'Hot Returns Remain Contrary to the ECHR: ND & NT before the ECHR' (*EU Migration Law Blog*, 28 February 2020 https://eumigrationlawblog.eu/hot-returns-remain-contrary-to-the-echr-nd-nt-before-the-echr/ accessed 2 April 2024.

the 'culpable conduct' exception to avoid jurisdiction and to circumvent their non-refoulement obligation.[26]

In this, European states have purposely created or taken advantage of a situation in which, on the one hand, the movement of refugees is *de facto* prevented and, on the other hand, the rights that would allow such movement are *de jure* unavailable to people on the move.[27] In order to avoid a proclaimed crisis in Europe as a result of a 'mass influx' of 'illegal migrants', a humanitarian crisis of rightlessness and lawlessness is thus created for people on the move at Europe's external borders.

1.3 Transnational Solidarity in the Struggle for Legal Subjectivation[28]

In response to these efforts, people on the move have deployed strategies to both avoid migration control regimes and to bring themselves within the scope of regimes conveying rights. These efforts are usually not individual but collective. This is not just because migrants often travel together and share information in networks.[29] It is also because they receive support from family or religious groups, supporters and regular citizens along their way. As the examples below (in Part 2) will show, this support ranges from simple acts like providing food or shelter to professionally run private search and rescue operations and transnational political campaigns.

The mutual support that people on the move lend each other can be thought of as a form of solidarity. In this article, I will use the term 'practices of solidarity' more narrowly, to refer to the support provided

26 Vera Wriedt, 'Expanding Exceptions? AA and Others v North Macedonia, Systematic Pushbacks and the Fiction of Legal Pathways' (*Strasbourg Observers*, 30 May 2022) https://strasbourgobservers.com/2022/05/30/expanding-exceptions-aa-and-others-v-north-macedonia-systematic-pushbacks-and-the-fiction-of-legal-pathways/ accessed 2 April 2024; Dana Schmalz, 'Rights that are not Illusory: The ECtHR Rules on Pushbacks from Hungary' (*Verfassungsblog*, 9 July 2021) https://verfassungsblog.de/rights-that-are-not-illusory/ accessed 2 April 2024.

27 For this typology, see Reyhani (n 3) 285; Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29(2) European Journal of International Law 347, 364; Ayten Gündoğdu, *Rightlessness in an Age of Rights* (Oxford University Press 2014) 96.

28 This section draws on a research agenda developed with Fabian Endemann and Pia Lotta Storf in the context of the project 'People on the Move Navigating Human Rights Borders (NAVIG)'.

29 See eg Elisabeth Eide, 'Mobile Flight: Refugees and the Importance of Cell Phones' (2020) 10(2) Nordic Journal of Migration Research 67.

to people on the move by others in joint action, in the aim of overcoming the situation of rightlessness and the resulting humanitarian crisis created by state policies. These forms of transnational solidarity do not rely on any shared interests, experiences or kinship. Instead, they take humanity as their starting point to support people on the move in claiming the promise of the universality of human rights – both *de facto*, enabling them to use their rights, and by bringing them within the scope of rights regimes *de jure*, enabling them to claim legal subjectivity. As such, they create new, transnational political communities.[30]

With their migratory practices, people on the move have been acting, as Rancière would have it, 'as subjects that did not have the rights that they had and had the rights that they had not'.[31] This phrase originally refers to an argument put forward by the French women's rights activist Olympe de Gouges. She demonstrated both only that women were denied the political rights in the 1789 Déclaration des droits de l'homme et du citoyen, but also that, by being led to the guillotine for political reasons, their life was just as political as that of men, and that therefore they 'had the rights they had not', namely the very rights denied to them.[32] A similar case can be made for people on the move crossing the Mediterranean. In their case, the right both denied and performatively exercised can be conceived narrowly, as the freedom to seek protection from persecution and severe human rights abuses, or more broadly, as the right to freedom of movement on the face of the Earth.[33]

For his explanation of the political moment of this type of claim, Rancière refers back to the difference between man (or human) and citizen in Hannah Arendt's description of the situation of stateless people who had

30 On such an interactive and transnational understanding of solidarity see in more detail Marius Hildebrand, Anuscheh Farahat and Teresa Violante, 'Transnational Solidarity in Crisis', on this volume.

31 Jacques Rancière, 'Who is the Subject of the Rights of Man' (2004) 103(2/3) South Atlantic Quarterly 207.

32 ibid 303–4. De Gouges drafted a 'Déclaration des droits de la femme et de la citoyenne' in 1791 and was executed in 1793 as an enemy of the Jacobins.

33 Roger Nett, 'The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth' (1971) 81(3) Ethics 212. For examples of such claims, see eg Bino Byansi Byakuleka, 'We are born free Manifesto' (2015) https://mikrotext.de/wp-content/uploads/2015/01/manifesto-wearebornfree.pdf accessed 2 April 2024, or the initiative formed at Berlin's Oranienplatz, OPlatz, 'About' (*Oplatz.net*, 2024) https://oplatz.net/about/ accessed 2 April 2024.

to discover that, in the very situation where all they had left were human rights, those rights were quite worthless:

> The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships—except that they were still human. The world found nothing sacred in the abstract nakedness of being human.[34]

This was, she explains, because it turned out that in a world of states, rights actually only accrued to citizens; in this world, stateless people, finding themselves outside of all political communities, were effectively rightless:

> The calamity of the rightless is not that they are deprived of life, liberty and the pursuit of happiness, or of equality before the law and freedom of opinion—formulas which were designed to solve problems given *within* communities—but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them; not that they are oppressed but that nobody wants even to oppress them. Only in the last stage of a rather lengthy process is their right to live threatened; only if they remain perfectly 'superfluous,' if nobody can be found to 'claim' them, may their lives be in danger.[35]

In light of this finding, Rancière calls efforts to rely on rights 'they had not' the creation of a 'dissensus: putting two worlds in one and the same world'.[36] He explains that differentiating between the (effectively rightless) human and the (rightsholding) citizen does not mean that the rights of man (ie, human rights) are 'either void or tautological' (in the Burkean sense), rather: 'It is the opening of an interval for political subjectivization.'[37] The *political subject* that thus creates a dissensus is the demos; 'the part of those who have no part'.[38]

I will be relying on this idea in a slightly broader sense, reading the practices of migrants as an effort of turning themselves from mere humans into *legal subjects,* in particular, into subjects of human rights. It is by

34 Hannah Arendt, *The Origins of Totalitarianism* [1951] (Harvest 1968) 299.
35 ibid 295–6.
36 Rancière (n 2) 304.
37 ibid.
38 ibid 305.

casting themselves as rightsholders, and thus as legal subjects, that people on the move 'not only confront the inscriptions of rights to situations of denial; they put together the world where those rights are valid and the world where they are not'.[39] As Part 2 will show (and as I already indicated above), without such subjectivity, there are no rights, and therefore no obligations, and no accountability. I will come back to the political aspect of this subjectivation in Part 3.

2 Practices of Solidarity

The following three sections examine different practices of solidarity to support the legal subjectivation efforts of subjects on the move, as well as the response. The first practice, focusing on immediate solidarity at land borders, seeks to address *de-facto* rightlessness, ie the inability to exercise 'the rights that they have' in the host state's territory. The second, providing civil search and rescue services at sea, seeks to tackle *de-jure* rightlessness by bringing people on the move within the jurisdiction of European states, in an effort to claim 'the rights they have not'. The third, civil resettlement and relocation initiatives by 'cities of refuge', is aimed at overcoming the combination of *de-facto* and *de-jure* rightlessness that the European states' immobilisation strategies produce.

2.1 Immediate Solidarity at the Land Border

In the years following the large-scale arrivals of migrants by sea at the European shores in 2015, especially on the Italian islands of Lampedusa and Sicily, many of the migrants sought to leave Italy and travel onwards to other member states, including France. This movement was not only motivated by family networks and stronger economies offering better chances of integration, but also by seeking to escape the squalid and often inhumane reception conditions in Italy.[40] It increased when Italy abolished humanit-

39 Rancière (n 2) 304.

40 See eg Maryellen Fullerton, 'Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law' (2016) 29 Harvard Human Rights Journal 57, 82–95.

arian protection status and excluded asylum-seekers from the network of reception facilities operated by the local authorities.[41]

One of the routes led to the French town of Briançon, via the Alps – a dangerous path, especially in the winter. Amnesty International reports that '[v]olunteers on both sides of the Alpine border, with support from some representatives of local authorities, started to assist refugees and migrants determined to cross in 2017.' On the French side, activists opened shelters and offered food to those arriving from Italy; in so-called *maraudes* or outings, volunteers went into the French side of the border area on ski or on foot to offer assistance, equipment, food and hot drinks.[42] In this, they were supported by the mayor of Briançon, who provided space for the shelter and paid the electricity bills, commenting that the volunteer efforts show 'a willingness of the inhabitants to express their solidarity, humanity and fraternity. I am proud to see the way they took up these issues: by providing food, shelter and medical help.'[43]

While the Italian authorities showed little interest in holding back migrants, the French authorities were not only conducting pushbacks at the border,[44] but also subjecting supporters on the French side to criminal investigations. In doing so, they relied on a provision that dates back to 1938, criminalizing support for irregular migrants who are already in the country.[45] Specifically, this provision makes it a crime to 'directly or indirectly facilitate or attempt to facilitate the entry, movement, or irregular

41 Amnesty International, 'Punishing Compassion: Solidarity on Trial in Fortress Europe' (2020) 34 https://www.amnesty.be/IMG/pdf/2020_punishing_compassion_solidarity_on_trial_in_fortress_europe.pdf accessed 17 April 2024.

42 ibid 36. The term *maraude* is also used for outreach activities of streetworkers, eg looking for homeless people in need of support.

43 Interview of 4 April 2019, cited ibid.

44 Forum réfugiés and Cosi, 'Les obstacles à l'accès à la procédure d'asile dans le département des Alpes-Maritimes pour les étrangers en provenance d'Italie: Constats et recommandations' (April 2017) http://asylumineurope.org/wp-content/uploads/2017/04/resources_laccesalasileaupresdesautoritesfrancaisespourlespersonnesenprovenanceditalie_forumrefugies-cosi_avril2017.pdf accessed 17 April 2024. The practice continues: Médecins sans frontières, 'Denied Passage: The Continuous Struggle of people on the move pushed-back and stranded at the Italian-French Border' (*Médecins sans frontières*, 4 August 2023) https://www.msf.org/denied-passage-struggle-people-stranded-italian-french-border accessed 17 April 2024.

45 It is now contained in the 2005 Code of Entry and Residence of Aliens and the Law of Asylum (*Code de l'entrée et du séjour des étrangers et du droit d'asile*) (FR) (CESEDA), namely in art L. 823–1 para 1; until 2021, this provision was contained in art L. 622–1 para 1.

residence of an alien in France', punishable by five years in prison or a 30,000 € fine.[46] Exceptions applied to family members and spouses as well as to the uncompensated provision of legal advice, food, accommodation or medical care aimed at preserving the dignity or physical integrity of the alien; however, these exceptions were limited to assistance in providing illegal residence, excluding both entry and movement.[47]

The term *'crime de solidarité'* appears to have been coined by the French NGO GISTI (Groupe d'information et de soutien des immigrés) in the context of protests by undocumented immigrants or *sans-papiers*, in the mid-1990s. These protests drew a large solidarity movement after the police broke down the doors of the church of St Bernard in Paris to expel *sans-papiers* in 1996; notably, the protesting *sans-papiers* insisted that those offering solidarity would not speak *for* them, which would only reproduce their rightlessness.[48] Meanwhile, the government had consecutively increased the sanctions for supporting undocumented immigrants,[49] prompting the philosopher Étienne Balibar to call this effort 'attack on fundamental rights by trying to institute forms of individual denunciation that recall the darkest periods of collapse of public freedom'.[50]

46 CESEDA art L. 622–1 para 1 provided: 'Subject to the exemptions established in Article L. 622–4, any person who has, by direct or indirect action, facilitated or attempted to *facilitate the illegal entry, movement, or residence* of a foreign national in France is liable to five years' imprisonment and a 30,000 euro fine.' (Emphasis added.).

47 CESEDA art L. 622–4 provided: '[T]here cannot be criminal prosecution on the basis of Articles L. 622–1 to L. 622–3 for *assisting in providing the illegal residence* of a foreign national when it relates to: […] 3° Any natural or legal person, when the offending act did not give rise to any direct or indirect compensation and consisted of providing legal advice or providing food, shelter or medical care *intended to ensure humane and decent living conditions for the foreign national*, or any other assistance *aimed at preserving the dignity or physical integrity of this individual.*' (Emphases added.) A revised version of this provision is now contained in art 823–9 (see n 53 below).

48 Gündoğdu (n 26) 194, relying on Encarnación Gutiérrez Rodríguez, '"We Need Your Support, but the Struggle Is Primarily Ours": On Representation, Migration and the Sans Papiers Movement, ESF Paris, 12th-15th November 2003' (2004) 77 Feminist Review 152.

49 This legislative development and the first convictions are documented by GISTI, 'Les délits de la solidarité' (*Gisti.org*) section VII.A www.gisti.org/delits-de-solidarite accessed 17 April 2024.

50 Étienne Balibar, *We, the People of Europe? Reflections on Transnational Citizenship* (Princeton University Press 2004) 49.

In the mid-2010s, in the context of so-called secondary migration from Italy, among those prosecuted under this law were the activists Cédric Herrou and Pierre-Alain Mannoni. They had been convicted in 2017 for facilitating the irregular circulation, stay and entry of refugees and migrants in Roya valley, at the French-Italian border; many similar cases have been documented.[51] Seized with a constitutionality question during their appeal, the French Conseil constitutionnel found the 'crime of solidarity' partially unconstitutional in 2018.[52] The court relied on the constitutional principle of *fraternité*.[53] This principle, it explained, implied the 'freedom to help others, for a humanitarian purpose, without considering the legality of their residence on the national territory'; it was therefore unconstitutional to limit exceptions for humanitarian support to support aimed at protecting the dignity and physical integrity of the irregular migrant.[54] The exceptions clause was subsequently amended to include any form of 'support with a purely humanitarian aim', and it was extended to the support of irregular movement or stay (but not of irregular entry).[55]

More recently, similar support efforts have been made in the Polish and Lithuanian woods near the Belarussian border. In 2021, apparently facilitated by Belarus, about 8,000 mostly Iraqi, Afghan and Syrian migrants

51 See the list compiled by GISTI, 'B. Condamnations' (*Gisti.org*) http://www.gisti.org/spip.php?article1621 accessed 17 April 2024; see also Amnesty International (n 39) 38; Oriana Philippe, 'Legal Weapons in Action at the French-Italian border' (2020) 36(1) Revue européenne des migrations internationales http://journals.openedition.org/remi/14782 accessed 2 April 2024.

52 Conseil constitutionnel, decision n° 2018–717/718 QPC, 6 July 2018 – *M. Cédric H. et autre* [Délit d'aide à l'entrée, à la circulation ou au séjour irréguliers d'un étranger]. The Council was seized with a preliminary question (*Question Prioritaire de Constitutionnalité – QPC*) by the Cour de cassation.

53 The preamble and arts 2 and 72–3 of the 1958 French Constitution affirm this principle as a maxim and a common ideal (the latter in relation to the 'overseas populations').

54 Conseil constitutionnel, decision n° 2018–717/718 QPC (n 50), paras 8–10, 14–15.

55 CESEDA art L. 823–9, which replaced art L. 622–4 in 2021, now provides: 'L'aide *à la circulation ou* au séjour irréguliers d'un étranger ne peut donner lieu à des poursuites pénales sur le fondement des articles L. 823–1 ou L. 823–2 lorsqu'elle est le fait: […] 3° De toute personne physique ou morale lorsque l'acte reproché n'a donné lieu à aucune contrepartie directe ou indirecte et a consisté à fournir des conseils ou accompagnements juridiques, linguistiques ou sociaux, *ou toute autre aide apportée dans un but exclusivement humanitaire*. […]' The court explained that 'assistance given to a foreign national for his/her movement does not necessarily create an illegal situation, unlike the assistance given at entry.' Conseil constitutionnel, decision n° 2018–717/718 QPC (n 50), para 12.

crossed the border into the EU.[56] Seeking to avoid violent pushbacks (as well as violent abuse by Belarussian authorities pushing them over the border), many of them had to hide in the forests in sub-zero temperatures. Both Lithuania and Poland put in place a state of emergency. In Poland, this included a 'no-go area' along the border covering 183 villages and towns.[57] Humanitarian organizations, the media, activists and medical personnel were banned from entering the border area. Volunteers supporting migrants in this area were arrested and prosecuted.[58] Even outside the militarized border zone, volunteers fear reprisals.[59] As of December 2021, at least 17 persons have died in the forests a result of this situation of sanctioned neglect.[60] The entry ban lasted from September 2021 until the end of June 2022, while Poland erected a wall along the border with Belarus.[61]

56 See Frontex, 'Eastern Borders Route' (*Frontex*, 28 December 2023) https://www.frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-routes/eastern-borders-route/ accessed 17 April 2024.

57 This entry ban was originally in place from 2 September until 2 December 2021; since an extension beyond 60 days was not constitutionally possible, new legal provisions were adopted covering the same area. They were then renewed until 30 June 2022, despite the fact that the Polish Supreme Court had declared such no-go areas unconstitutional; Polish Supreme Court judgment of 18 January 2022, I KK 171/21. See Medico International, 'Situation on the Polish-Belarussian Border' (*Medico International*, 9 March 2022) https://www.medico.de/en/situation-on-the-polish-belarusian-border-18520 accessed 17 April 2024; see further Ewa Łętowska, 'Defending the Judiciary: Strategies of Resistance in Poland's Judiciary' (*Verfassungsblog*, 27 September 2022) https://verfassungsblog.de/defending-the-judiciary/ accessed 17 April 2024.

58 Lydia Gall, 'Polish Activists Arrested for Saving Lives: Authorities Should Stop Harassment at Belarus Border' (*Human Rights Watch*, 1 April 2022) https://www.hrw.org/news/2022/04/01/polish-activists-arrested-saving-lives accessed 17 April 2024.

59 Lorenzo Tondo, 'Poland-Belarus crisis volunteers: "Border police can be very aggressive"' (*The Guardian*, 10 November 2021) https://www.theguardian.com/world/2021/nov/10/poland-belarus-crisis-volunteers-border-police-aggressive accessed 17 April 2024.

60 Mohannad al-Najjar et al, 'A Chronicle of Refugee Deaths along the Border Between Poland and Belarus' (*Der Spiegel*, 22 December 2021) https://www.spiegel.de/international/world/a-chronicle-of-refugee-deaths-along-the-border-between-poland-and-belarus-a-de0d7ace-3322-4ac9-9826-9f2774a540ee accessed 17 April 2024.

61 See Agnieszka Bielecka, 'Poland Finally Lifts State of Emergency at Belarus Border: Polish Authorities Should Halt Summary Pushbacks of Migrants, Allow Access to Asylum Procedures' (*Human Rights Watch*, 6 July 2022) https://www.hrw.org/news/2022/07/06/poland-finally-lifts-state-emergency-belarus-border accessed 17 April 2024.

It was an almost cynical contrast when, following the February 2022 invasion of Ukraine by Russia, Poland was welcoming the Ukrainian war refugees with open arms. In August 2022, the Council of Europe reported:

> Since the start of the aggression against Ukraine on 24 February 2022, Polish state and non-state actors, governmental and local authorities, civil society, private companies and individual people have mobilised and joined forces in an unprecedented way to facilitate border crossings and directing refugees to their first accommodation places or to help them to continue their journey to other countries. Free trains and bus transfers from the borders within Polish territory and public transport in the numerous cities was made available. At the border, in order to facilitate contact with the arrivals and to make phone communication in Poland cheaper, refugees, if they requested, were given a Polish mobile phone operator sim card. […] Considering these unprecedented large-scale arrivals in this short period of time, the efforts of the Polish authorities at all levels, civil society, volunteers and individuals are highly commendable. The Polish local authorities and individuals had provided generous support within their limited resources and deployed continuous efforts in securing basic services to all those in need.[62]

In both scenarios, civil society actors have been seeking to provide basic humanitarian support, including clothes, food, accommodation and equipment. This support should have been provided by the states themselves, as the ECtHR emphasized in an interim ruling under Rule 39 in August 2021.[63] The underlying cases concern 32 Afghan nationals denied entry at the border between Poland and Belarus and 41 Kurdish-ethnic Iraqi nationals at the border between Latvia and Belarus. While noting that it was not making a finding on an obligation to let the applicants enter and emphasizing that states have the right 'to control the entry, residence and expulsion of aliens,' it required that Poland and Latvia 'provide all the applicants with food, water, clothing, adequate medical care and, if

62 Council of Europe, 'Report of the fact-finding mission to Poland by Ms Leyla Kayacik, Special Representative of the Secretary General on Migration and Refugees, 30 May – 3 June 2022', SG/Inf(2022)30 of 18 August 2022, paras 20, 23.

63 ECtHR, 'Court indicates interim measures in respect of Iraqi and Afghan nationals at Belarusian border with Latvia and Poland' (ECtHR press release, 25 August 2021) ECHR 244 (2021) on the cases of *R.A. and Ors. v. Poland* (App no 42120/21) and *H.M.M. and Others v. Latvia* (App no 42165/21).

possible, temporary shelter'.[64] The Court has since issued similar interim measures in over 60 other applications.[65]

As the interim orders affirm, the practices of solidarity enacted by citizens and civil society organizations thus aim at countering de-facto rightlessness. Migrants who come under the jurisdiction of states bound by human rights are technically rights holders, and therefore legal subjects. *De facto*, however, they cannot access the rights that they have.[66] Stepping in for the state, solidarity networks are both making up for this *de-facto* rightlessness and refuse to deny the migrants recognition as equals, treating them instead as the rights holders that they are, as persons whose actions and opinions matter.[67]

2.2 Search and Rescue at Sea

Alongside these efforts, volunteers have also taken up search and rescue (SAR) activities at sea. Many NGOs that offer SAR services were founded in the years following the Arab Spring and the mass drownings that were reported as a result of state failures to rescue. This includes the 'left-to-die boat' off the Libyan coast in 2011,[68] the October 2013 catastrophe off

64 ibid.

65 ECtHR, 'Update on interim decisions concerning member States' borders with Belarus' (ECtHR press release, 21 February 2022) ECHR 051 (2022).

66 See also Sonja Buckel, 'The Rights of the Irregularized: Constitutional Struggles at the Southern Border of the European Union' in Yolande Jansen, Robin Celikates and Joost de Bloois (eds), *The Irregularization of Migration in Contemporary Europe: Detention, Deportation, Drowning* (Rowman & Littlefield 2015) 144.

67 Cf Arendt (n 32) 296: 'The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective.'

68 See Council of Europe, 'Lives lost in the Mediterranean Sea: Who is responsible? Report by Ms Tineke Strik, Committee on Migration, Refugees and Displaced Persons', Doc. 12895 of 5 April 2012; see also the online documentation by Forensic Architecture, 'The Left-to-Die Boat' (*Forensic Architecture*) https://forensic-architecture.org/investigation/the-left-to-die-boat accessed 18 April 2024.

Lampedusa killing an estimated 360 migrants,[69] and the shipwrecks in April 2015 that left over 1,300 migrants dead or missing in a single month.[70]

These incidents and many others, which have made the Mediterranean the deadliest strait in the world,[71] are the result of the EU's non-arrival policies that force migrants onto deadly journeys in order to access asylum in the EU, and of a deliberate failure to rescue.[72] This is most glaringly obvious when looking at Italy's operation Mare Nostrum: Between October 2013 and October 2014, this operation was a singular effort to actively provide adequate SAR services following the deaths near Lampedusa in October 2013.[73] When it ended, Frontex launched Operation Triton and later Operation Sophia, neither of which had a SAR mandate; the number of deaths rose immediately,[74] as experts had warned they would.[75] In addition to the deliberate failure to rescue, these deaths are a result of jurisdiction avoidance in what Itamar Mann has aptly called a 'legal black hole'.[76]

In February 2012, the ECtHR passed its ground-breaking *Hirsi* decision, which I already mentioned.[77] It clarified that, wherever state authorities exercise effective control over a person, this brings that person under the jurisdiction of that state in the sense of article 1 ECHR – even at high sea,

69 BBC News, 'Lampedusa boat tragedy: Migrants "raped and tortured"' (*BBC News*, 8 November 2013) https://www.bbc.com/news/world-europe-24866338 accessed 18 April 2024.

70 UNHCR, 'Mediterranean Crisis 2015 at six months: refugee and migrant numbers highest on record' (*UNHCR*, 1 July 2015) https://www.unhcr.org/news/press/2015/7/5592b9b36/mediterranean-crisis-2015-six-months-refugee-migrant-numbers-highest-record.html accessed 18 April 2024.

71 Melissa Fleming, Crossings of Mediterranean Sea exceed 300,000, including 200,000 to Greece (*UNHCR*, 28 August 2015) https://www.unhcr.org/news/latest/2015/8/55e06a5b6/crossings-mediterranean-sea-exceed-300000-including-200000-greece.html accessed 18 April 2024.

72 See eg Thomas Gammeltoft-Hansen and James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53(2) Columbia Journal of Transnational Law 235, 241–57; OHCHR (n 18) 7–13.

73 The operation saved over 150,000 lives; see IOM UN Migration, 'IOM Applauds Italy's Life-Saving Mare Nostrum Operation: "Not a Migrant Pull Factor"' (*IOM*, 31 October 2014) https://www.iom.int/news/iom-applauds-italys-life-saving-mare-nostrum-operation-not-migrant-pull-factor accessed 18 April 2024.

74 See Charles Heller and Lorenzo Pezzani, 'Death by Rescue: The Lethal Effects of the EU's Policies of Non-assistance' (*Forensic Oceanography*, June 2016) https://content.forensic-architecture.org/wp-content/uploads/2023/04/2016_Report_Death-By-Rescue.pdf accessed 18 April 2024.

75 See the description in Mann (n 26) 354–5.

76 ibid.

77 *Hirsi Jamaa and Ors. v. Italy* (2012) ECHR 1845.

an area that no state has jurisdiction over. As suggested above, this meant that push-back operations at sea, designed to keep migrants away from European shores, triggered the non-refoulement guarantee and the prohibition of collective expulsion – meaning that border patrols were forbidden from disembarking the intercepted migrants elsewhere. The same applies in cases of state-led search and rescue operations, where rescuers also exercise effective control over rescued migrants.

On the other hand, no such obligations under the ECHR have been established yet in situations where state authorities remain at a distance, sharing information on movements, making phone calls or sending radio signals. Avoiding direct contact with migrants thus appears to allow states to skirt their human rights obligations: without a state bearing corresponding obligations, there are no human rights to rely on.[78] States have exploited this 'legal black hole' by relying on third-country authorities (with an often questionable degree of legitimacy[79]) to substitute pushbacks with pullback operations,[80] increasingly under the guise of search and rescue.[81] The pending case of *SS v Italy* is a case in point.[82] They are also relying on private actors for under-cover pushbacks[83] and have resorted to abandoning migrants on life rafts at sea.[84]

78 See Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25(4) Leiden Journal of International Law 857.

79 On the situation for migrants in Libya, see eg the short account in Anuscheh Farahat and Nora Markard, 'Places of Safety in the Mediterranean: The EU's Policy of Outsourcing Responsibility' (Heinrich Böll Foundation European Union 2020) 22–27.

80 Markard, 'The Right to Leave by Sea' (n 16).

81 Moreno-Lax (n 17) 388–90.

82 *S.S. and Others v. Italy* Appl. No. 21660/18 (ECtHR, pending), communicated on 26 June 2019. This case raises the question whether Italy is responsible for the actions of Libyan coast guards if those were called to the scene and instructed by the Italian authorities, against the background of an intense Italian-Libyan cooperation. See Moreno-Lax (n 17) 388–90 (on the facts), 404–13 (on functional jurisdiction).

83 Anuscheh Farahat and Nora Markard, 'Closed Ports Dubious Partners: The European Policy of Outsourcing Responsibility – Study Update' (Heinrich Böll Foundation European Union 2020) https://eu.boell.org/en/2020/05/25/closed-ports-dubious-partners accessed 2 April 2024. See also Giorgos Christides et al, '"We Were Slaves"' (*Lighthouse Reports*, June 28 2022) https://www.lighthousereports.nl/investigation/we-were-slaves/ accessed 18 April 2024.

84 Giorgos Christides and Steffen Lüdke, 'Greece Suspected of Abandoning Refugees at Sea' (*Der Spiegel*, 16 June 2020), https://www.spiegel.de/international/europe/videos-and-eyewitness-accounts-greece-apparently-abandoning-refugees-at-sea-a-84c06c61-7f11-4e83-ae70-3905017b49d5 accessed 18 April 2024. See also Niamh Keady-Tabbal

The law of the sea requires coastal states to establish and maintain adequate SAR services and to effectively respond to distress calls.[85] However, since Italy ended its Mare Nostrum operation in October 2014, no EU member state has moved in to systematically and actively provide search and rescue services to migrants crossing the Mediterranean – nor has Frontex.[86] As a result, migrants in distress at sea often fail to receive assistance. State authorities delay their response, play pass-the-buck or call third-country responders to the scene that will disembark the migrants in places not covered by the ECHR, under conditions that would trigger non-refoulement obligations for European actors. Since the law of the sea creates state obligations to rescue, but no individual right to be rescued, people on the move are unable to rely on this regime in such situations. So far, only the UN Human Rights Committee has affirmed that a delayed response to a distress call can constitute a human rights violation under the ICCPR;[87] no such findings have been made by the ECtHR yet.

Private actors have therefore started to address this situation by mounting their own rescue efforts. Among the organizations founded in response to the events mentioned are Watch the Med Alarm Phone (2014), Sea-Watch, SOS Méditerranée, Proactiva Open Arms, Jugend Rettet (all 2015) and Sea-Eye (2016), as well as many others. Operating off the Italian and Greek coasts up to the Northern African coasts, these organizations are based in Spain, France, Germany and other countries, and their ships are also registered in different countries.

These solidarity efforts have likewise been met with obstruction and criminalization. Thus, under Interior Minister Salvini, Italy sought to ham-

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and Itamar Mann, 'Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations' (*Just Security*, 22 May 2020) https://www.justsecurity.org/70309/tents-at-sea-how-greek-officials-use-rescue-equipment-for-illegal-deportations/ accessed 18 April 2024.

85 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS), art 98; International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS); International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97 (SAR Convention), modified by Resolution MSC.155(78), 20 May 2004.

86 See above, text accompanying n 72, for Operations Triton and Sophia.

87 *A.S. and ors. v. Malta* Comm No. 3043/2017 (2021), UN Doc CCPR/C/128/D/3043/2017, para 6.7 (affirming exercise of effective control); the communication was declared inadmissible for non-exhaustion of remedies. Several members of the Committee dissented.

string SAR NGOs by making them sign a 'Code of Conduct'[88] and by subjecting them to smuggling prosecution;[89] a revival of this type of policy was launched under Prime Minister Meloni in January 2023.[90] Greece is adopting similar tactics.[91] Following her visit to Greece in June 2022, the UN Special Rapporteur on Human Rights Defenders, Mary Lawlor, stated: 'At the tip of the spear are prosecutions, where acts of solidarity are reinterpreted as criminal activity, specifically the crime of people smuggling', adding: 'The negative impact of such cases is multiplied by smear campaigns perpetuating this false image of defenders.' She warned that this was having a 'suffocating effect' on civil society in Greece.[92]

These rescue efforts constitute a transnational effort of solidarity with migrants at sea. Unlike the efforts on land, these operations seek to address a situation of de-jure rightlessness. At sea, migrants are no longer part of a political community, instead they are reduced to their 'mere existence' as humans – as Hannah Arendt observes, while they should therefore, 'according to the implications of the inborn and inalienable rights of man, come under exactly the situation for which the declarations of such general rights provided', the opposite is the case: 'It seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man.'[93]

88 See eg Kristof Gombeer and Melanie Fink, 'Non-Governmental Organisations and Search and Rescue at Sea' (2018) 4 Maritime Safety and Security Law Journal 1; Eugenio Cusumano, 'Straightjacketing Migrant Rescuers? The Code of Conduct on Maritime NGOs' (2019) 24 Mediterranean Politics 106; Charles Heller and Lorenzo Pezzani, 'Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration Across the Mediterranean' (Forensic Oceanography 2018).

89 See the cases mentioned in Markard et al (n 19) 22–24.

90 Decreto-Legge 1/2023, Disposizioni urgenti per la gestione dei flussi migratori (2 January 2023) https://www.gazzettaufficiale.it/eli/id/2023/01/02/23G00001/sg accessed 18 April 2024. See Markard et al (n 19) 20–21.

91 UN Special Rapporteur on Human Rights Defenders, 'Greece: Migration Policy Having "Suffocating Effect" on Human Rights Defenders says UN Expert' (UN Special Rapporteur On Human Rights Defenders, 22 June 2022) https://srdefenders.org/greece-migration-policy-having-suffocating-effect-on-human-rights-defenders-says-un-expert-press-release/ accessed 18 April 2024. See also Border Violence Monitoring Network, 'Islets, Interim Measures and Illegal Pushbacks: The Erosion of the Rule of Law in Greece' (*Border Violence Monitoring Network*, 1 July 2022) 19–20 https://www.borderviolence.eu/20548-2/ accessed 18 April 2024.

92 UN Special Rapporteur on Human Rights Defenders (n 89).

93 Arendt (n 32) 300.

Migrants at sea do not even hold human rights, because they lack a state to oppose them to. The aim of providing search and rescue services as a form of solidarity is therefore not only to provide refugees and other migrants with *de-facto* access to rights they already have. Instead, their operations are supporting them in their efforts to come under the jurisdiction of states party to the ECHR by reaching the coastal waters and ports of those states, thereby activating rights that otherwise do not exist *de jure*.[94] The law of the sea, for all the SAR obligations it contains, does not confer any rights on those in distress; if states fail to respond to their distress call (in breach of SAR obligations), their rights are not violated, and they have no remedy.

2.3 Cities of Refuge

The third form of solidarity addresses a combination of *de-jure* and *de-facto* rightlessness, which results from the absence of rights and the inability to access territories where rights could be claimed.

International law on migration is dominated by the sovereignty paradigm, according to which, in the words of the ECtHR, 'as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory'.[95] As this formula highlights, this sovereign power is only subject to specific treaty obligations, namely including non-refoulement – that limitation upon the power to exclude, however, can only be relied on at the border or in the territory,[96] or (as in the *Hirsi* case) in situations where state authorities exercise effective control over persons extraterritorially.[97] The Court found, in *MN and others v Belgium,* that visa decisions do not constitute such an exercise of jurisdiction in the sense of article 1 ECHR, and therefore do not enable individuals to rely on Convention rights such as non-refoulement.[98] It affirmed that:

94 On triggering the ECHR at sea by political action, see Itamar Mann, 'The Right to Perform Rescue at Sea: Jurisprudence and Drowning' (2020) 21(3) German Law Journal 598.

95 *Abdulaziz, Cabales and Balkandali v. The United Kingdom* (1985) ECHR 7, para 67.

96 James C. Hathaway, *The Rights of Refugees under International Law* (2nd ed. Cambridge University Press 2021) 161.

97 Cf *Al-Skeini and ors. v. The United Kingdom* (2011) ECHR 1093, paras 130–37.

98 *M.N. and ors. v. Belgium* (2020) ECHR 930, paras 110–26.

> to find otherwise would amount to enshrining a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction. If the fact that a State Party rules on an immigration application is sufficient to bring the individual making the application under its jurisdiction, precisely such an obligation would be created. The individual in question could create a jurisdictional link by submitting an application and thus give rise, in certain scenarios, to an obligation under Article 3 which would not otherwise exist.[99]

That, the Court argued, would have the effect of negating the power to exclude.[100]

At the same time, the strategies mentioned at the outset – visa regimes, carrier sanctions, immobilization measures implemented by countries of origin and transit, failure to provide active SAR services – work to keep people on the move at exactly the distance that prevents them from relying on human rights in relation to European states *de-jure*, and that also makes it extremely difficult *de-facto* to access such rights by making the dangerous journey on land or by sea. Their situation is compounded by the fact that they are often also unable to claim rights where they are, especially in ungoverned territories in places like Libya.[101]

It is this anomalous[102] situation of rightlessness that resettlement movements seek to address.[103] Civil society groups, cities and smaller municipalities have formed a transnational movement that offers protection in their communities to refugees stuck abroad, in a bid to increase the spots their

99 ibid, para 123 (references omitted).
100 ibid, para 124.
101 Reyhani (n 3) 285–7 calls this 'absolute de-jure rightlessness'.
102 ibid 280–85.
103 The term resettlement is usually applied to refugees who are – as the 1951 Convention definition requires – already outside of their country of origin, but who are not receiving adequate protection in their current host country. It is considered one of the three 'durable solutions' for refugees, next to voluntary return and integration into the host society; see Executive Committee Conclusion No 56 (XL) 'Durable Solutions and Refugee Protection' (1989).

respective states are prepared to pledge for resettlement schemes.[104] As Helene Heuser has shown,[105] these 'cities of refuge' can rely on an ethics of hospitality, as laid out by Jacques Derrida in a speech to the International Parliament of Writers in Strasbourg in 1996.[106] Such initiatives can aim relocating protection seekers from Southern European member states – such as the German city of Osnabrück's initiative to take in 50 protection seekers stuck in Idomeni[107] – but also at extending protection to individuals not yet in Europe.

Balibar, writing in the context of the 1990s *sans-papiers* movement, has highlighted the role of cities in promoting the type of citizenship that generates solidarity – the kind of citizenship that cities of refuge rely on. An abstract, formal concept of citizenship, which separates the nation-state from society, he argued, had nothing to oppose to the criminalisation of solidarity. By contrast, a *cité* was inconceivable without a concept of active citizenship that also implies the possibility of solidarity; one that:

> attempts to form a concrete articulation of the rights of man and the rights of the citizen, of responsibility and militant commitment. It knows that the historical advances of citizenship, which have never stopped making its concept more precise, have always passed by way of struggles, that in the past it has not only been necessary to make 'a part of those who have no part,' but truly to force open the gates of the city, and thus to redefine it in a dialectic of conflicts and solidarities.[108]

104 The Global Compact for Refugees has created the Global Refugee Forum, where states regularly exchange pledges, including on resettlement. On the proposed EU framework, see above n 10.

105 Helene Heuser, *Städte der Zuflucht: Kommunen und Länder im Mehrebenensystem der Aufnahme von Schutzsuchenden* (Nomos 2023).

106 Later published as: Jacques Derrida, 'On Cosmopolitanism' [1977] in id, *On Cosmopolitanism and Forgiveness* (Routledge 2001). In French, the title – which draws on Marx and Engels' communist manifesto – is rather more compelling: 'Cosmopolites de tous les pays, encore un effort!'.

107 '50ausIdomeni'; see eg Helene Heuser, 'Sanctuary Cities sind in Deutschland nicht utopisch' (*Luxemburg*, April 2017) https://zeitschrift-luxemburg.de/artikel/sanctuary-cities-sind-in-deutschland-nicht-utopisch/ accessed 18 April 2024.

108 Balibar (n 48) 49–50, quoting Rancière (n 2) 305; he then continues: 'We must set the idea of a "community of citizens" back into motion, in such a way that it should be the result of the contribution of all those who are present and active in the social space. *Français, encore un effort si vous voulez être républicains!*' ibid 50 (emphasis in the original).

In this way, cities of refuge seek not only to overcome the situation of *de-jure* and *de-facto* rightlessness that the immobilisation of people on the move in countries of origin and of transit is designed to perpetuate. They also invite these people to become part of their community, offering them a way to belong. In this sense, they are extending the right to have rights – and that means, in Arendt's terms, being able to live 'in a framework where one is judged by one's actions and opinions'; it is a 'right to belong to some kind of organized community.'[109] Enabling them to not only come into the territory of the nation state, but also to become members of a political community offers them a way to turn themselves from utterly rightless individuals into legal subjects.

3 Transnational Negotiations of Subjectivity

These three different forms of solidarity thus address different forms of rightlessness, and they all aim at affirming or activating legal subjectivity. They are transnational in nature, in that they rely on civil society networks across borders, challenging the limitations of the nation state. Most importantly, however, they are not a form of humanitarian compassion or pity, 'marked by the capacity to feel the suffering of those who are not one's equals'.[110] Instead, they constitute a form of politicisation, a *dissensus,* in which those who don't have a part are participants: By recognizing people on the move as rights holders, even where they are *de jure* rightless, these solidarity practices – alongside the collective practices of the migrants themselves – are claiming and at the same time performing a subjectivity that doesn't technically exist yet. In claiming equal participation and rights and acting as though they exist, they performatively call into existence a state of equality among those involved – and thus the right to have rights.[111]

As Stefania Maffeis explains, this is not a unilateral act of recognition, but a collective undertaking among those who recognise each other as equals. Building on Rancière's concept of *dissensus* as a project of the *demos*, she writes:

109 Arendt (n 32) 177.
110 Gündoğdu (n 26) 72.
111 See Stefania Maffeis, 'Das Subjekt der Menschenrechte: Praktiken und Subjektivierung in Kämpfen der Migration' (2018) 12 Zeitschrift für Kulturphilosophie 245, 252.

> Subjectivation must be understood as a collective practice, in which different actors participate from different positions and perspectives, who keep one another in check and depend on one another, and who reflect, activate, or deactivate positions as well as categories that the actors are caught up in. Subjectivation therefore does not presuppose an awareness nor an activation of marginalized subjects. It rather constitutes a capability that only comes into existence in political situations, as a result of which experiences, affects, insights, and intentions can be articulated that had not been identifiable before.[112]

In the words of Ayten Gündoğdu, human rights can thus 'become political if and when they are invoked to create public spaces where those who are rendered rightless can appear and act in solidarity with others, translate their problems into common concerns, and participate in practices of founding and refounding equality and freedom.'[113] In this way, transnational practices of solidarity beyond and within the state open up political spaces to negotiate what human rights really mean.

112 ibid (my translation).
113 Gündoğdu (n 26) 67.

PART IV
Transnational Solidarity in the Covid-19 Crisis

Chapter 12 Covid-19, social marginalization, and the Supreme Federal Court of Brazil

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1 Introduction

This volume has put significant effort into conceptualizing solidarity and analyzing its many dimensions and manifestations. This chapter offers a different approach to understanding solidarity by focusing on its antithesis – social marginalization – and the possibilities of addressing marginalization and its direct consequences via courts.

Solidarity designates an idea commonly understood as manifesting itself in the identification with others, in recognising interdependency and mutual obligations between equals, in the joint responsibility and cooperation to realize common goals, and in the effort to approximate, protect and integrate others.[2] Marginalization is the negation of solidarity. It is the lack of identification of the community with those perceived as outsiders or belonging to the bottom of society; a diminished sense of empathy, obligation, and responsibility towards them; the refusal to cooperate with them as equals; and an effort to exclude them. Solidarity is a centripetal force that promotes integration, whereas marginalization is a centrifugal force that alienates parts of society.

The perception that the marginalized are not equal parties in the social contract reduces the weight society gives to their interests and needs. Moreover, the stigmatization that accompanies marginalization can make a community numb or even hostile to their demands when the marginalized are seen as guilty for their own condition, a burden, or even a threat. This results in the normalization of levels of deprivation and violence that a community would deem unacceptable if suffered by the non-marginalized.

1 The author is grateful to Jacqueline Leite for her invaluable research assistance.

2 For a comprehensive analysis of the concept of 'solidarity', see the Introduction in this volume. See also, Kristi Olson, *The Solidarity Solution: Principles for a Fair Income Distribution* (Oxford University Press 2020); Alain Supiot (ed), *La Solidarité. Enquête sur un Principe Juridique* (Odile Jacob 2015).

Latin America is a continent known for its high levels of socioeconomic and racial marginalization. Yet, marginalization there coexists with transformative constitutions that express a comprehensive view of social justice that has the idea of solidarity at its core. These constitutions establish progressive agendas committed to reducing social exclusion and inequalities, recognize a long list of human rights (including socio-economic rights), and empower independent courts to protect these rights. In many countries, this is accompanied by procedural rules that facilitate access to Justice and judicial practices that blur the distinction between law, policy, and politics to allow more incisive judicial control over governments.[3]

This context offers the conditions for fighting social marginalization through courts. This has taken the form of individual claims and structural cases aiming to improve the material conditions for entire groups. This chapter will focus on the latter. In structural cases, claimants seek to compel governments to change the rights breaching status quo of a given group through the enactment or improvement of policies and the reform of public institutions.

Structural litigation has been the topic of much debate in the literature. It is arguably the form of judicial intervention more likely to promote significant and enduring social change.[4] However, it forces courts to engage in issues of policy that test the limits of their capacity and legitimacy to interfere with the government´s discretionary decisions.[5] Covid-19 intensified this dilemma.

Despite the heated controversies around the responses to the pandemic, solidarity (at least at the national level) was strengthened during this

3 Armin von Bogdandy and others, *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune* (Oxford University Press 2017); Conrado Hübner Mendes, Roberto Gargarella and Sebastián Guidi, 'Introduction' in Conrado Hübner Mendes, Roberto Gargarella and Sebastián Guidi (eds) *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press 2022); Ezequiel Gonzalez-Ocantos, 'Courts in Latin American Politics', *Oxford Research Encyclopedia of Politics* (26 April 2019).

4 David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 Harvard International Law Journal 60; Charles Sabel and William Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 Harvard Law Review 1016; Katharine G Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) 8 International Journal of Constitutional Law 385.

5 Daniel Wei L Wang, 'Social Rights Adjudication and the Nirvana Fallacy' [2018] Public Law 29.

period as Covid-19 provoked an "unparalleled" social protection response globally.[6] However, governments have not always considered the pandemic's disproportionate health and social impact on the socially vulnerable.[7] Marginalized groups, in particular, are more likely to need special social protection during the pandemic, but their needs and interests are at greater risk of being neglected.

Legal action may be the only institutional option for these groups to challenge the neglect suffered in desperate circumstances. It is, therefore, important to understand (1) how courts have responded to structural claims aimed at protecting marginalized groups during the Covid-19 pandemic and (2) if (or to which extent) their response has been effective in promoting timely material change for marginalized groups.

To address these issues, this chapter will analyse structural litigation at the Brazilian Federal Supreme Court (STF) for the protection of three of the most marginalized groups in the country: indigenous peoples, the *favela* communities, and the prison population. There are three reasons for focusing on these groups. The human rights violations against them have been the object of litigation at the STF before Covid-19, but further claims were made during the pandemic, which allows a clearer understanding of the impact Covid-19 had on its decisions. Moreover, the violations of their rights have been documented by human rights organizations and resulted in rulings against Brazil in the Inter-American Court of Human Rights,[8] reducing the room for factual disagreement about the violence and neglect they suffer. Lastly, the President of Brazil during the pandemic, Jair Bolsonaro, expressed open disregard for the rights of these groups.

Bolsonaro praised the American cavalry for "decimating" the indigenous population there and regretted that the same did not happen in Brazil. He called indigenous groups unproductive, lazy, and an obstacle to economic development. He promised not to recognize indigenous land during

6 International Labour Organization, 'World Social Protection Report 2020–22' (International Labour Organization 2022) ch 3 Social Protection During the COVID-19 Crisis and Recovery, 63–80.

7 Jeffrey D Sachs and others, 'The Lancet Commission on Lessons for the Future from the COVID-19 Pandemic' (2022) 400 The Lancet 1224; International Labour Organization (n 6).

8 Inter-American Court of Human Rights *Favela Nova Brasília v. Brazil* (2017); Inter-American Court of Human Rights *Xukuru Indigenous People v. Brazil* (2018); Inter-American Court of Human Rights *Instituto Penal Plácido de Sá Carvalho v. Brazil* (2018); Inter-American Court of Human Rights *Presídio Urso Branco v. Brazil* (2011).

his government and to dismantle policies that protect indigenous populations. He also pledged to arm farmers disputing territory with indigenous groups.[9] To fight criminality, Bolsonaro proposed more incarceration and police violence. He celebrated the increase in the prison population as an achievement of his government.[10] He also affirmed that "a police officer who kills should not be investigated but decorated" and that "the Brazilian police should kill more".[11] Bolsonaro often sides with officers accused or convicted of unlawful killing and pardoned the officers convicted for executing 111 prisoners during a prison riot.[12]

Bolsonaro´s stances on the Covid-19 pandemic were also controversial. He minimized the threat to public health, opposed social distancing, spread misinformation, and promoted vaccine scepticism.[13] One institution that stood up to Bolsonaro was the STF, which openly criticized Bolsonaro´s management of the crisis and often showed independence, disposition, and strength to challenge the federal government on key issues related to the

9 For a list of Bolsonaro´s declarations on indigenous groups, see Survival International, 'What Brazil's President, Jair Bolsonaro, has said about Brazil's Indigenous Peoples' (*survivalinternational.org*, 2020) https://www.survivalinternational.org/articles/3540-Bolsonaro accessed 7 March 2024; see, also Congresso em Foco, 'Bolsonaro: "Quilombola não serve nem para procriar"' (*congressoemfoco.uol.com.br*, 5 April 2017) https://congressoemfoco.uol.com.br/projeto-bula/reportagem/bolsonaro-quilombola-nao-serve-nem-para-procriar/ accessed 7 March 2024; Salo de Carvalho, David R Goyes and Valeria Vegh Weis, 'Politics and Indigenous Victimization: The Case of Brazil' (2021) 61 The British Journal of Criminology 251.

10 Jair Bolsonaro, '- Significa 3,89 % a menos de bandidos levando terror à população' (*X*, 15 February 2020) https://twitter.com/jairbolsonaro/status/1228660825273049089 accessed 7 March 2024; Fernanda Trisotto, 'Qual é o Custo de Prender e Deixar Na Cadeia No Brasil?' *Gazeta do Povo* (25 November 2018) https://www.gazetadopovo.com.br/politica/republica/prender-mais-e-manter-preso-o-custo-da-proposta-de-bolsonaro-para-a-seguranca-e489eq94tc3iujetcxdd8z937/ accessed 7 March 2024.

11 Carta Capital, 'Bolsonaro em 25 Frases Polêmicas' *Carta Capital* (29 October 2018) http://www.cartacapital.com.br/politica/bolsonaro-em-25-frases-polemicas/ accessed 7 March 2024; Guilherme Mazui, 'Bolsonaro diz que é um 'absurdo' condenação de policiais por 'excesso'' (*g1.globo.com,* 3 October 2019) https://g1.globo.com/politica/noticia/2019/10/03/bolsonaro-diz-que-e-um-absurdo-condenacao-de-policiais-por-excesso.ghtml accessed 7 March 2024.

12 Conectas, 'Bolsonaro's Pardon Benefits Police Officers Involved in Carandiru Massacre' (*conectas.org*, 2019) https://www.conectas.org/en/noticias/bolsonaros-pardon-benefits-police-officers-involved-in-carandiru-massacre/ accessed 7 March 2024.

13 Elize Massard da Fonseca and others, 'Political Discourse, Denialism and Leadership Failure in Brazil's Response to COVID-19' (2021) 16 Global Public Health 1251.

pandemic.[14] This raised expectations that the STF could do the same to protect marginalized groups.

In sum, due to structural factors (social marginalization, transformative constitution, and accessible and strong courts) and circumstantial elements (Covid-19, a government hostile to marginalized groups, and the critical stance of the STF in relation to the government), Brazil reunites all the favourable conditions for the observation of strong court interventions to protect marginalized groups. In this sense, it is a *most-likely* case.

Building on the work of Rodríguez-Franco and Rodríguez-Garavito,[15] the analysis will focus on three dimensions of the STF decisions: the strength of the rights involved, the remedies ordered, and the court monitoring of compliance. Weak rights are declaratory, non-justiciable, or create target duties only; strong rights create immediately enforceable duties to provide services or to achieve outcomes. Weak remedies allow governments wider discretion to decide how and when to redress a rights violation; strong remedies represent a "command-and-control" approach with peremptory and detailed orders. Monitoring is weak when the court does not closely follow compliance with its orders or is unwilling to enforce them through sanctions; it is strong when the court requests continuous reports on the implementation of its decisions, elaborates on previous rulings, and threatens to sanction those unwilling to comply. "Weak" and "strong" are opposite poles in a continuum, and rights, remedies, and monitoring can have various levels of strength.

Apart from the doctrinal analysis of the decisions, this chapter will also assess how the government complied with the rulings and if there were concrete changes in policy and in the status quo that can be linked to the court interventions. This will be done using information from three sources: the briefs provided by litigants, public bodies, and stakeholders during the proceedings; policy papers and the scholarly literature; and the data on variables that can capture changes in the key issues that motivated the structural claims. For reasons of scope, this chapter will focus mainly on the period between 2020 and 2022, when the Covid-19 pandemic coexisted with the Bolsonaro government.

14 Daniel Wang and others, 'STF and the public measures for COVID-19 prevention and treatment' (2023) 19 Revista Direito GV 2336.

15 Diana Rodríguez-Franco and César Rodríguez-Garavito, 'Courts, Strategic Litigation, and Social Change' in Conrado Hübner Mendes, Roberto Gargarella and Sebastián Guidi (eds), *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press 2022).

2 Indigenous populations

The indigenous populations are under the constant threat of cultural and physical annihilation in Brazil.[16] A key milestone for the recognition of their rights is the 1988 Federal Constitution, which recognizes their rights to maintain their social organization, customs, languages, creeds, and traditions. It also recognizes their right to permanently remain in the "lands they traditionally occupy", which shall be demarcated by the Federal government.

Despite their right to remain in the "lands they traditionally occupy", this is still an unresolved legal and political issue. The demarcation of indigenous lands depends on the Federal government, and not all governments are committed to protecting this right. Bolsonaro, for instance, bragged about the fact that no indigenous land was demarcated during his government.[17] Moreover, there are legal disputes about the meaning of "traditionally occupy". In 2009, the STF applied a temporal threshold to determine traditional occupation, which required indigenous peoples to have been in possession of their lands when the Constitution was enacted (Pet 3388/09). This ruling was very controversial, and some saw the temporal threshold as an undue obstacle to the legal recognition and protection of indigenous lands.[18] In 2023, the STF overturned its own precedent to eliminate the temporal threshold as a requirement for demarcating indigenous lands (RE 1017365). Representatives of the indigenous population celebrated this as a victory. However, legal uncertainty persists as Congress soon reinstated the temporal threshold through legislation, and a STF ruling on the constitutionality of this new law is pending.

Connected to the legal uncertainty is the violence against indigenous populations due to territorial disputes. In recent years, there has been an increase in the number of invasions in indigenous lands for the exploitation

16 United Nations General Assembly, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Mission to Brazil' (8 August 2016) Human Rights Council 33rd Session UN Doc A/HRC/33/42/Add.1.

17 Sarah Teófilo, '"No meu governo, não foi demarcada terra indígena", comemora Bolsonaro' (*noticias.r7.com,* 29 June 2022) https://noticias.r7.com/brasilia/no-meu-governo-nao-foi-demarcada-terra-indigena-comemora-bolsonaro-29062022 accessed 7 March 2024.

18 Dailor Sartori Junior and Carolina A Vestena, 'Indigenous Rights and the "Marco Temporal"' (*Verfassungsblog. On Matters Constitutional*, 4 October 2021) https://verfassungsblog.de/indigenous-rights-and-the-marco-temporal/ accessed 7 March 2024.

of natural resources (eg, farming, mining, and logging) and of violence perpetrated by invaders against indigenous people.[19] Some claim that Bolsonaro´s views and declarations have encouraged physical violence against indigenous populations.[20]

In this context of high vulnerability, which was aggravated by Covid-19, APIB (an NGO that represents indigenous groups) and then opposition political parties filed ADPF 709 in July 2020 against the Federal government. ADPF is an action filed directly with the STF in response to the state´s failure to comply with a fundamental constitutional precept.

The claim was grounded on three main arguments. First, Covid-19 will be more lethal in indigenous communities due to their lower immunity, social vulnerability, and restricted access to public services. If not contained, it may cause the "extinction" or "genocide" of indigenous groups. Second, invasions and the presence of outsiders in indigenous land are one of the main causes of contagion. Yet, instead of repressing invasions, Bolsonaro´s rhetoric and his refusal to demarcate and protect indigenous lands encourage invasions. Third, the then-existing federal policy for the protection of indigenous populations against Covid-19 was vague, not fully implemented, and formulated without the involvement of indigenous groups.

In terms of remedies, the claimants sought, among other things: (i) the immediate imposition of sanitary barriers to protect isolated groups or those with occasional contact with outsiders, (ii) the immediate removal of invaders from indigenous lands, (iii) the creation (with the participation of indigenous groups) of a comprehensive plan to protect indigenous populations against covid-19, the implementation of which shall be monitored by the STF.

Acknowledging the gravity and urgency of the situation, the case rapporteur made a preliminary decision one week after the case was filed, which was confirmed by the full Court weeks later. The decision recognized the "risk of imminent mass extermination of indigenous people" due to the

19 Conselho Indigenista Missionário, 'Violência Contra os Povos Indígenas no Brasil. Dados de 2019' (Conselho Indigenista Missionário 2020) https://cimi.org.br/wp-content/uploads/2020/10/relatorio-violencia-contra-os-povos-indigenas-brasil-2019-cimi.pdf accessed 7 March 2024; Conselho Indigenista Missionário, 'Violência Contra os Povos Indígenas no Brasil. Dados de 2021' (Conselho Indigenista Missionário 2022) https://cimi.org.br/wp-content/uploads/2022/08/relatorio-violencia-povos-indigenas-2021-cimi.pdf accessed 7 March 2024.

20 Salo de Carvalho, David R Goyes and Valeria Vegh Weis, 'Politics and Indigenous Victimization. The Case of Brazil' (2021) 61 The British Journal of Criminology 251.

pandemic and mentioned Bolsonaro´s declarations as evidence of the government´s lack of commitment to protecting them. The STF ordered the government to create a "situation room" with representatives of indigenous groups and to formulate a comprehensive plan including health care, social care, and preventive health measures to protect them against Covid-19.

Yet, the STF judged that imposing the concrete measures requested – the immediate imposition of sanitary barriers and the expulsion of invaders – was beyond its institutional capacity. The STF considered that it did not have enough expertise and information to determine how these measures should be implemented or allocate the resources necessary to implement them. The STF also acknowledged the challenge of removing and relocating tens of thousands of people (many armed and willing to resist). Therefore, instead of ordering the government to implement these measures immediately, the STF required the government to include the expulsion of invaders as a goal in the comprehensive plan to protect indigenous people against Covid-19. Additionally, the court mandated the government to formulate a separate plan to implement sanitary barriers. Both plans had to be approved and their implementation monitored by the STF.

In sum, the STF opted for a weak remedy and a dialogical approach instead of ordering a detailed and concrete policy to be implemented. Even so, forcing the government to comply with the decision was very challenging. The government presented two versions of the plan for installing sanitary barriers, which the claimants and other NGOs considered insufficient, lacking concrete measures and details, and failing to consider the inputs offered by stakeholders. The STF conceded that the plan was not ideal but approved it in August 2020, given the urgent moment.[21]

The execution of this plan was also complicated. Indigenous groups have complained that there was insufficient information provided by the government about the installation of barriers, that not all barriers installed were in operation, and that those in operation were insufficient and inadequate. APIB also expressed frustration that the plan was limited to what the government itself considered feasible.[22] According to observers, after one

21 STF, 'Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental 709' (31 August 2020) https://portal.stf.jus.br/processos/detalhe.asp?incidente=5952986 accessed 7 March 2024.

22 APIB, 'Manifestação no "Relatório do Governo Federal: Atualização do Plano de Barreiras Sanitárias para os Povos Indígenas Isolados e de Recente Contato". Ação de Descumprimento de Preceito Fundamental 709' (2020) https://portal.stf.jus.br/processos/detalhe.asp?incidente=5952986 accessed 7 March 2024.

year of the STF decision, there was still no evidence that the government installed permanent and adequate sanitary barriers.[23] Two years into the pandemic, there was still no agreement on the criteria to evaluate the implementation of sanitary barriers.[24]

Regarding the comprehensive plan for protecting the indigenous population, several versions were presented and refused by the STF because they were vague, insufficient, and failed to consider the suggestions made by experts and stakeholders. A plan was eventually and half-heartedly approved in March 2021, with the case rapporteur lamenting the government´s "managerial collapse" and "precarity" that made it incapable of formulating a detailed plan. Indigenous groups were also unsatisfied with the approved plan. They expressed frustration with the fact that almost one year into the pandemic and eight months since the STF´s decision, the government had not yet presented a detailed plan and kept "dressing up" a deteriorating situation as more invasions were occurring and the conditions of the indigenous population were worsening.[25]

The execution of this plan was also challenging. Claimants constantly informed the Court about the inaccurate data provided by the government to prove compliance, the increase in violence and invasions in indigenous lands, and the social problems within the communities (including disease, malnutrition, and the lack of health and social care services).[26] The STF´s reaction to these complaints was to order the government to address the issues raised, to which the government acquiesced and responded by listing the existing and planned measures, only for a few months later, the litigants

23 Miguel Gualano de Godoy, Carolina Ribeiro Santana and Lucas Cravo de Oliveira, 'STF, Povos Indígenas e Sala de Situação. Diálogo Ilusório' (2021) 12 Revista Direito e Práxis 2174.

24 STF, 'Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental 709' (31 March 2022) https://portal.stf.jus.br/processos/detalhe.asp?incidente=5952986 accessed 7 March 2024.

25 APIB, 'Manifestação no "*Plano Geral de Enfrentamento e Monitoramento da Covid – 19 para os Povos Indígenas Brasileiros – 4º Versão*". Ação de Descumprimento de Preceito Fundamental 709'. (2020) https://portal.stf.jus.br/processos/detalhe.asp?incidente=5952986 accessed 7 March 2024.

26 See, for instance, APIB communications to the STF on 22 February 2022, 09 March 2022 and 24 May 2022 available at https://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=5952986 accessed 15 April 2024.

to inform the court that the problems persisted or worsened, continuing a cycle that frustrated experts and stakeholders observing this case.[27]

From the perspective of analysts involved in the case, this structural litigation became too big, bureaucratic, sluggish, and inefficient, producing more documents than results.[28] The general frustration is supported by the data as land invasions and killings of indigenous people increased during the pandemic (see Graph 1). In 2023, soon after Luiz Inácio Lula da Silva took office having defeated Bolsonaro in the presidential election, a task force was sent to the State of Roraima and found the indigenous population there suffering from malnutrition and disease to the extent that a genocide probe was opened.[29]

Graph 1 – Killings of Indigenous people and invasions of Indigenous land

Own creation. Source – **2017**: Conselho Indigenista Missionário, 'Violência contra os povos indígenas no Brasil. Dados de 2017.' (Conselho Indigenista Missionário 2018) https://cimi.org.br/wp-content/uploads/2018/09/Relatorio-violencia-contra-povos-indigenas_2017-Cimi.pdf 68, 82, 116; **2018**: Conselho Indigenista Missionário, 'Violência contra os povos indígenas no Brasil. Dados de 2018.' (Conselho Indigenista Missionário 2019) https://cimi.org.br/wp-content/uploads/2019/09/relatorio-violencia-contra-os-povos-indigenas-brasil-2018.pdf 56, 81, 127; **2019**: Conselho Indigenista Missionário, 'Violência contra os povos indígenas no Brasil. Dados de 2019.' (Conselho Indigenista Missionário 2020) https://cimi.org.br/wp-content/uploads/2020/10/relatorio-violencia-contra-os-povos-indigenas-brasil-2019-cimi.pdf 78, 124, 191; **2020**: Conselho Indigenista Missionário, 'Violência contra os povos indígenas no Brasil. Dados de 2020.' (Conselho Indigenista Missionário 2021) https://cimi.org.br/wp-content/uploads/2021/11/relatorio-violencia-povos-indigenas-2020-cimi.pdf 99, 156, 217; **2021**: Conselho Indigenista Missionário, 'Violência contra os povos indígenas no Brasil.

27 STF, 'Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental 709' (31 March 2022) https://portal.stf.jus.br/processos/detalhe.asp?incidente=5952986 accessed 7 March 2024.

28 Miguel Gualano de Godoy, Carolina Ribeiro Santana and Lucas Cravo de Oliveira, 'STF, Povos Indígenas e Sala de Situação: Diálogo Ilusório' (2021) 12 Revista Direito e Práxis 2174–2205.

29 Victoria Bisset, 'Lula Blames Bolsonaro for Yanomami Hunger, Opens "Genocide" Orobe' *Washington Post* (24 January 2023) https://www.washingtonpost.com/world/2023/01/24/brazil-yanomami-indigenous-malnutrition-emergency/ accessed 7 March 2024.

Dados de 2021.' (Conselho Indigenista Missionário 2022) https://cimi.org.br/wp-content/uploads/2022/08/relatorio-violencia-povos-indigenas-2021-cimi.pdf 93, 167, 248.

3 Prison population

Brazil has the third largest prison population in the world, behind China and the United States only.[30] Associated with mass incarceration is the problem of overcrowding. In 2020, over 668 thousand people were detained in a system with a capacity of 455 thousand. As a result, 72 % of the prison units held more prisoners than their maximum capacity, and 20 % had an occupation rate of 200 % above their capacity.[31]

Reports of torture, ill-treatment, and homicides are common.[32] Mass incarceration also contributes to unsanitary living conditions in prison facilities, where running water, adequate nutrition, sunlight, ventilation, and hygiene items are often in short supply. Moreover, health facilities in prisons are generally understaffed.[33] Unsurprisingly, there is a strong connection between overcrowding and poor health in the prison population, especially caused by infectious diseases such as tuberculosis, hepatitis, and STDs. In the State of Rio de Janeiro, mortality from infectious diseases was five times higher in the incarcerated population than in the general population (and 15 times higher from tuberculosis).[34] Prisons are reservoirs for diseases and a source of dissemination to the broader community.[35]

30 World Prison Brief, 'Highest to Lowest. Prison Population Total' (*PrisonStudies.org*, 2022) https://www.prisonstudies.org/highest-to-lowest/prisonpopulationtotal?field_region_taxonomy_tid=All accessed 7 March 2024.

31 Câmara dos Deputados, 'ONU Vê Tortura em Presídios como Problema Estrutural do Brasil' (*Câmara dos Deputados*, 22 September 2021) https://www.camara.leg.br/noticias/809067-onu-ve-tortura-em-presidios-como-problema-estrutural-do-brasil/ accessed 7 March 2024.

32 United Nations General Assembly, 'Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment on His Mission to Brazil' (29 January 2016) Human Rights Council 33rd Session UN Doc A/HRC/31/57/Add.4.

33 ibid.

34 Alexandra Sánchez and others, 'Mortality and Causes of Deaths in Prisons in Rio de Janeiro, Brazil' (2021) 37 Cadernos de Saúde Pública e00224920.

35 Francisco Job Neto and others, 'Health Morbidity in Brazilian Prisons. A Time Trends Study from National Databases' (2019) 9 BMJ Open e026853; Katharine S Walter and others, 'The Role of Prisons in Disseminating Tuberculosis in Brazil.

One attempt to address the conditions of the prison population through structural litigation at the STF was the case ADPF 347, filed by a political party in May 2015. The claimant argued that the state has completely neglected the prison population, which suffers from "hellish" forms of violence and deprivation, in complete contradiction with the civil and social rights in the Constitution. It also claimed that this situation is caused by mass incarceration, which results from, among other things, the excessive use of pretrial detentions, the courts´ resistance to disposing of the wide range of alternatives to imprisonment provided by the legislation, and the insufficient funding for the prison system.

Building on a doctrine created by the Colombian Constitutional Court, the claimant sought a declaration that there is an "unconstitutional state of affairs" in the Brazilian prison system. This implies the recognition that the prolonged omissions of the state have led to structural problems that cause massive and generalized violations of constitutional rights. It would also allow the Court broad powers to impose multiple measures on executive agencies to address a structural problem and to supervise their implementation.

The claimant also sought injunctions ordering (i) the Federal and State governments to elaborate plans to address this "unconstitutional state of affairs" to be approved and monitored by the STF in collaboration with civil society and (ii) the Federal government to disburse the funds reserved by law, but not always used, for the maintenance and improvement of the prison system. To reduce incarceration, it sought orders for the courts to, among other things, (iii) guarantee the right to a hearing before a judge for those in pre-trial detention within 24 hours of their detention; (iv) give reasons in their decisions for not choosing precautionary measures other than pre-trial detention; and (v) consider the inhumane conditions in prison when sentencing and deciding requests for conditional release and regime progression.

The STF made a preliminary decision in September 2015. The STF agreed that the "inhumane" and "degrading" situation of the prison population caused by mass incarceration constituted an "unconstitutional state of affairs" for which the Brazilian state is responsible (Judiciary, Legislative and Executive branches included). The STF also emphasized its counter-

A Genomic Epidemiology Study' (2022) 9 The Lancet Regional Health – Americas 100186.

majoritarian role of protecting the rights of such a marginalized and unpopular minority.

Nevertheless, concerning the concrete measures requested, the preliminary decision did not match its heightened rhetoric.[36] The STF guaranteed the right to a hearing within 24 hours of pre-trial detention (which was already starting to take place at the time) and ordered the disbursement of federal funds. Yet, it did not grant the injunctions that could interfere with the discretion of lower courts.

When Covid-19 emerged, there was still no final decision on the merits of the case. Yet, the emergence of the pandemic at the beginning of 2020 could have been a critical juncture for the STF on this issue. Many feared the impact of a highly contagious disease in overpopulated prisons and recommended the de-incarceration of low-risk offenders and vulnerable groups.[37] The pandemic made the problem of mass incarceration in Brazil more urgent and dramatic. If the STF does not act now, then when?

In March 2020, a petition was made within ADPF 347 seeking an order from the STF for criminal courts to consider conditional release, house arrest or alternative measures to imprisonment for inmates above the age of sixty with comorbidities that increase the risk of serious disease in case of Covid-19 infection, pregnant and nursing women, or whose offences do not involve violence or serious threat of violence. One day after the filing of the petition, a preliminary decision by the case rapporteur granted the request.

However, the preliminary decision was overturned by the full Court one day later based on procedural reasons and concerns about the breadth and over-intrusiveness of the preliminary injunction. Although the court recognized the threat to the prison population, it considered that Recommendation 62, issued by the National Council of Justice (the body responsible for making policies and recommendations to improve the functioning of the Judiciary), offered a better approach for courts to deal with the risk

36 Breno Baía Magalhães, 'O Estado de Coisas Inconstitucional Na ADPF 347 e a Sedução Do Direito. O Impacto Da Medida Cautelar e a Resposta Dos Poderes Políticos' (2019) 15 Revista Direito GV.

37 Sérgio Garófalo de Carvalho, Andreia Beatriz Silva dos Santos and Ivete Maria Santos, 'A Pandemia No Cárcere. Intervenções No Superisolamento' (2020) 25 Ciência & Saúde Coletiva 3493; National Academies of Sciences, Engineering, and Medicine, *Decarcerating Correctional Facilities during COVID-19. Advancing Health, Equity, and Safety* (Emily A Wang and others eds, National Academies Press 2020); Alexandra Sánchez and others, 'COVID-19 Nas Prisões: Um Desafio Impossível Para a Saúde Pública?' (2020) 36 Cadernos de Saúde Pública e00083520.

of Covid-19 in the prison system. The content in Recommendation 62 is similar to what was requested in the petition (ie., the de-incarceration of vulnerable groups), but unlike an STF decision, it was not binding on judges.[38] In sum, the STF admitted the risks for the prison population but did not order lower courts to consider these risks when deciding. Once again, the STF refused to make a decision that could be read as restricting the discretion of lower courts.

Ironically, the full Court decision overturning the rapporteur´s preliminary injunction has often been mentioned as an argument by lower courts to deny *habeas corpus* petitions filed by inmates grounded on the increased risk to their health and life due to Covid-19. Judges often argued that, according to the STF, they were recommended but not obliged to consider the risks of the pandemic for inmates when deciding.[39]

Apart from refusing to make a structural order to mitigate the impact of mass incarceration on vulnerable inmates during the pandemic, the STF did not give much weight to the risks of the pandemic when deciding *habeas corpus* petitions either. Despite the increase in the number of *habeas corpus* filed at the STF during the pandemic, the claimants´ rate of success remained the same as before the pandemic.[40] Moreover, the STF has rarely engaged with arguments related to the pandemic in the reasoning of its *habeas corpus* decisions.[41]

The prison population in Brazil actually increased significantly during the pandemic, although the proportion of those serving sentences in closed prisons has slightly reduced (Graph 2). This reduction may be associated with the recommendations to avoid sentencing to closed prisons during

38 Daniel Wei Liang Wang and others, ´Why Has a Progressive Court Failed to Protect the Prison Population? Mass Incarceration and Brazil´s Supreme Court´ (2023) 25 Health and Human Rights 67.

39 Natalia Pires de Vasconcelos, Maíra Rocha Machado and Daniel Wei Liang Wang, 'COVID-19 in Prisons. A Study of Habeas Corpus Decisions by the São Paulo Court of Justice' (2020) 54 Revista de Administração Pública 1472.

40 Ivar A Hartmann and others, 'Como STF e STJ Decidem Habeas Corpus Durante a Pandemia Do COVID-19? Uma Análise Censitária e Amostral (How Do the Brazilian Supreme Court and Superior Court of Justice Decide Habeas Corpus Writs during the COVID-19 Pandemic? A Census and Sample Based Analysis)' [2020] SSRN Electronic Journal https://www.ssrn.com/abstract=3659624 accessed 7 March 2024.

41 Daniel Wei Liang Wang and others (n 38).

the pandemic.[42]Still, it is unlikely that the very light approach by the STF directly contributed to this result.

In 2023, one year after the pandemic ended in Brazil and eight years after the case was filed, the STF finally ruled on the merits of the case. The Court confirmed the 2015 provisional ruling and ordered the Federal and state governments to devise plans to address the human rights violations within the prison system. Furthermore, it instructed lower courts to give justification for not opting for alternative measures when deciding to imprison someone. It remains to be seen whether and to what extent governments and courts will comply with this decision.

Graph 2. Prison population and prison regime

Source: Fórum Brasileiro de Segurança Pública, 'Anuário Brasileiro de Segurança Pública 2022', (Fórum Brasileiro de Segurança Pública 2022) available at: https://forumseguranca.org.br/wp-content/uploads/2022/06/anuario-2022.pdf?v=5.accessed 7 March 2024.

4 Police killings in the favelas

Brazil has the second-highest number of killings by law enforcement agents in the world.[43] Between 2018 and 2021, 25 thousand people were killed by the police in Brazil.[44] Police killings are not evenly distributed socially (young, black, and poor men are more likely to be killed by the police) nor geographically. During this period, nearly six thousand people were killed by the police in the State of Rio de Janeiro, the highest number in the country.[45]

42 Fórum Brasileiro de Segurança Pública, 'Anuário Brasileiro de Segurança Pública 2022' (Fórum Brasileiro de Segurança Pública 2022) https://forumseguranca.org.br/wp-content/uploads/2022/06/anuario-2022.pdf?v=5 accessed 7 March 2024.

43 World Population Review, 'Police Killings by Country' (*worldpopulationreview.com*, 2022) https://worldpopulationreview.com/country-rankings/police-killings-by-country accessed 7 March 2024.

44 Statista Research Department, 'Number of People Killed by Police Officers in Brazil in 2015 to 2021' (*statista.com*, 3 November 2022) https://www.statista.com/statistics/1181640/number-deaths-police-intervention-brazil/ accessed 7 March 2024.

45 Fórum Brasileiro de Segurança Pública, 'Anuário Brasileiro de Segurança Pública 2022' (n 42); Fórum Brasileiro de Segurança Pública, 'Anuário Brasileiro de Segurança Pública 2021' (Fórum Brasileiro de Segurança Pública 2021) https://forum-

Within Rio de Janeiro, a large proportion of these deaths occur in the *favelas*, the densely populated slums severely deprived of public services, and where the poorest and most marginalized urban populations live. *Favelas* are also territories where drug dealers, paramilitary groups (*milícias*) and the police fight for control. Police raids (*operações*) in the *favelas*, when heavily armed police officers (with the support of armoured vehicles and helicopters) enter these areas to confront the also heavily armed local gangs, are particularly deadly. Death tolls are high on both sides, and stray bullets often cost the lives of innocent people. Accusations of arbitrary use of force by the police during these raids are common, including executions of surrendered suspects.[46]

In 2019, the number of people killed by the Rio de Janeiro police peaked at 1.8 thousand. For comparison, in 2019, the police killed a thousand people in the United States,[47] which has a population twenty times bigger than Rio de Janeiro. Wilson Witzel, then governor of Rio de Janeiro who (like Bolsonaro) had started his mandate that year after winning the election with a "tough-on-crime" campaign, publicly defended a "shoot-to-kill" approach by the police.[48]

In this context, ADPF 635 was filed in November 2019 by a political party, with the support of civil society organizations, seeking an order for the State government to formulate a plan to reduce police lethality. This plan, to be devised with the participation of civil society and approved and

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seguranca.org.br/wp-content/uploads/2021/10/anuario-15-completo-v7-251021.pdf accessed 7 March 2024; Fórum Brasileiro de Segurança Pública, 'Anuário Brasileiro de Segurança Pública 2020' (Fórum Brasileiro de Segurança Pública 2020) https://forumseguranca.org.br/wp-content/uploads/2021/02/anuario-2020-final-100221.pdf accessed 7 March 2024; Fórum Brasileiro de Segurança Pública, 'Anuário Brasileiro de Segurança Pública 2019' (Fórum Brasileiro de Segurança Pública 2019) https://forumseguranca.org.br/wp-content/uploads/2019/10/Anuario-2019-FINAL_21.10.19.pdf accessed 7 March 2024.

46 Amnesty International, 'Brazil: Police Killings, Impunity and Attacks on Defenders: Amnesty International Submission for the UN Universal Periodic Review – 27th session of the UPR Working Group, May 2017' (*amnesty.org*, 1 September 2016) https://www.amnesty.org/en/documents/amr19/5467/2016/en/ accessed 7 March 2024.

47 Statista Research Department, 'Number of People Shot to Death by the Police in the United States from 2017 to 2022, by race' (statsita.com, 29 January 2022) https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/ accessed 7 March 2024.

48 Anna Jean Kaiser, 'Rio Governor Confirms Plans for Shoot-to-Kill Policing Policy' *The Guardian* (4 January 2019) www.theguardian.com/world/2019/jan/04/wilson-witzel-rio-police-security-shoot-to-kill accessed 7 March 2024.

monitored by the STF, should include measures such as the strict regulation of police raids, including the prohibition of the use of helicopters with snipers, limitations to police raids taking place near schools and healthcare facilities, the publicization of detailed reports following each raid to allow public accountability, and the thorough investigation of all killings.

Before the case was decided, and due to the emergence of Covid-19 in 2020, the claimant sought a preliminary injunction to forbid police raids in *favelas* during the pandemic except in "absolutely exceptional circumstances". It also requested an order for the police to notify the Public Prosecutor´s Office of any planned raid, informing the details of the raid, the "absolutely exceptional circumstances" that justified it, and the precautionary measures taken to minimize the risks for the population. The claimant argued that police raids had become deadlier during the pandemic, that there was a higher risk of fatal victims as more people stayed at home and thus the population density increased, and that the raids interrupted the provision of health care and the distribution of essential goods such as food and hygiene items for the population. A few days later, in June 2020, the case rapporteur granted the injunction requested, which the full court confirmed in August 2020.

In the first months following the preliminary decision, there was a significant decrease in the number of police raids and police killings compared to previous periods, which many saw as a concrete result of the court ruling.[49] However, the fact that the significant reduction in the number of raids coincided with the period when more stringent social distancing measures started to be imposed in Rio (March 2020),[50] which was before the preliminary decision (June 2020), makes a causal relationship between this decision and the number of raids difficult to establish (see Graph 3).

49 Daniel Hirata and others, 'Efeitos da Medida Cautelar na ADPF 635 sobre as Operações Policiais na Região Metropolitana do Rio de Janeiro' (Grupo de Estudos dos Novos Ilegalismo 2020) https://geni.uff.br/wp-content/uploads/sites/357/2021/02/2020_Relatorio-efeitos-da-Liminar.pdf accessed 7 March 2024; Carla Osmo and Fabiola Fanti, 'ADPF Das Favelas: Mobilização Do Direito No Encontro Da Pandemia Com a Violência Policial e o Racismo' (2021) 12 Revista Direito e Práxis 2102.

50 Rodrigo Fracalossi de Moraes, 'Nota Técnica. COVID-19 e Medidas Legais de Distanciamento Social: Isolamento Social, Gravidade da Epidemia e Análise do Período de 25 de Maio a 7 de Junho de 2020' (Instituto de Pesquisa Econômica Aplicada 2020) https://repositorio.ipea.gov.br/bitstream/11058/10073/1/NT_22_Dinte_Covid_19%20e%20medidas%20legais%20de%20distanciamento%20social_bolet%205.pdf accessed 7 March 2024.

In any case, soon after the preliminary decision and throughout the proceeding, the litigant and NGOs constantly complained to the STF about the lack of compliance with the decision. They argued that police raids were taking place in circumstances that were far from "absolutely exceptional" (eg, to interrupt the party of an alleged drug dealer) and that the police were testing the authority of the STF and trying to mock and demoralize the court.[51]

The responses of the Rio de Janeiro authorities to the decision show their defiance. The then police chief and the governor of the State argued that the whole situation in Rio de Janeiro is "absolutely exceptional" and, therefore, any action taken by the police to fight organized crime is compliant with the STF decision.[52] The Public Prosecutor´s Office, which was supposed to hold the police accountable, affirmed to the Court that it is in the discretionary power of the police to decide when a situation is "absolutely exceptional".[53] In summary, the authorities made it clear that the decision would not change institutional practices.

Indeed, from October 2020, the policy lethality and the number of raids started to increase and soon went back to the level before the STF preliminary decision was made and the social distancing measures started to be imposed in Rio de Janeiro (see Graph 3). In May 2021, the deadliest police raid in the history of Rio de Janeiro occurred when 28 people were killed

51 STF, Informações ASSEP-CRIM/PGR 173300/2021 in Arguição de Descumprimento de Preceito Fundamental 635/RJ (2020) https://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=5816502 accessed 15 April 2024; Luiz Eduardo Soares, 'Por que a Resposta ao Massacre do Jacarezinho é Essencial?', *Jornal GGN*, (9 May 2021) https://jornalggn.com.br/politica/por-que-a-resposta-ao-massacre-do-jacarezinho-e-essencial-por-luiz-eduardo-soares/ accessed 7 March 2024.

52 Vera Araújo, 'Novo Secretário de Polícia Civil Quer Tanques em Favelas', *O Globo* (27 September 2020) https://oglobo.globo.com/rio/novo-secretario-de-policia-civil-quer-tanques-em-favelasrolo-compressor-no-caso-marielle-24663149; Lucas Altino, 'Cláudio Castro diz que segurança no Rio é situação extraordinária, em referência a protocolo do STF sobre ações policiais', *O Globo* (7 October 2020) https://oglobo.globo.com/rio/claudio-castro-diz-que-seguranca-no-rio-situacao-extraordinaria-em-referencia-protocolo-do-stf-sobre-acoes-policiais-24681625 accessed 7 March 2024.

53 See also, STF, 'Ofício eletrônico nº 18248/2020/STF' in Arguição de Descumprimento de Preceito Fundamental 635/RJ (2020) https://portal.stf.jus.br/processos/detalhe.asp?incidente=5816502 accessed 16 April 2022.

by the police in *Jacarezinho*.[54] Many feared that the STF intervention would become ineffective if the Court did not react to the lack of compliance.[55]

Graph 3 – Police killing and police raids in the State of Rio de Janeiro

Source: Daniel Hirata and others, '11 Meses de restrição às operações policiais no Rio de Janeiro' (Grupo de Estudos dos Novos Ilegalismos 2022) available at: https://geni.uff.br/wp-content/uploads/sites/357/2022/05/2021_Um-ano-de-ADPF-das-favelas_GENI.pdf accessed 7 March 2024, pp. 6 and 8.

Given the challenges in guaranteeing compliance and the disagreements between the parties involved, in April 2021, the STF held a public hearing with the litigants, civil society and experts for a thorough discussion about the situation and the solutions for the increase in police raids and killings. In February 2022 (two years into the pandemic), the STF finally ordered the government to present a plan to reduce police lethality, devised with civil society's involvement and approved and monitored by the STF. The decision reaffirmed that only in exceptional circumstances can police raids take place but accepted that the police should be granted discretion to evaluate the exceptionality and the proportionality in the use of force, which can only be controlled *a posteriori* by the Judiciary.

The claimants and NGOs complained to the STF that the plan presented by the government was vague, insufficient and did not involve civil society. In May 2022, the STF ordered the government to hold a public hearing to collect suggestions from civil society and experts to improve the plan. However, the complaints to the STF about the deadly police raids continued and the number of raids increased from 2020 to 2022 in Rio de Janeiro, while decreasing in other states.[56] Moreover, two of the five deadliest raids in Rio de Janeiro took place after the February 2022 decision. Therefore, three out

54 Daniel Hirata and others, '11 Meses de Restrição às Operações Policiais no Rio de Janeiro' (Grupo de Estudos dos Novos Ilegalismos 2022) https://geni.uff.br/wp-content/uploads/sites/357/2022/05/2021_Um-ano-de-ADPF-das-favelas_GENI.pdf accessed 7 March 2024.

55 Osmo and Fanti (n 49).

56 Centro de Estudos de Segurança e Cidadania, 'Raio X das Ações de Policiamento' (2022) https://observatorioseguranca.com.br/wordpress/wp-content/uploads/2022/08/2022_raioxdasoperacoes4.pdf accessed 15 April 2024.

of the five deadliest police raids happened after ADPF 635 was filed (as mentioned, the deadliest one was in May 2021).[57]

The STF intervention was unable to change institutional practices and political incentives. According to the Rio de Janeiro governor, police raids have popular support and "was he concerned about opinion polls, he would order a raid every week"[58]. Unsurprisingly, there was a 240 % increase in police raids in the months before the 2022 election.[59] Moreover, in a show of defiance to the STF, the then commander of the Rio de Janeiro police blamed the court for the increase in police raids and violence. He publicly said that the STF decisions created a haven for criminals in Rio de Janeiro and encouraged them to come.[60]

5 Strong rights, weak remedies, strong monitoring, and the hollow hope

In the three case studies analysed in this chapter, the STF interpreted the constitutional rights involved as "strong" rights. This means they are justiciable and have wide substantive content: they protect not only individuals but entire groups and create positive and negative duties for authorities. Moreover, these rights can be breached by the mere existence of a particular state of affairs, without the need to discriminate and prove the illegality of specific acts/omissions, and create duties for the State to develop and implement agendas of wide social transformation. The recognition that the violence and deprivation suffered by these marginalized groups breach

57 Igor Mello 'Governo Castro Tem 3 das 5 Chacinas Policiais Mais Letais da História do RJ', (*UOL Noticias*, 22 July 2022) https://noticias.uol.com.br/cotidiano/ultimas-noticias/2022/07/22/com-castro-rj-tem-3-das-5-chacinas-policiais-mais-letais-da-historia.htm accessed 7 March 2024.

58 Octavio Guedes and Mariana Queiroz, '"Se eu me Baseasse por Pesquisa, Faria uma Operação Policial por Semana", Afirma Claudio Castro' (*g1.globo.com*, 8 June 2022) https://g1.globo.com/politica/blog/octavio-guedes/post/2022/06/08/se-eu-me-baseasse-por-pesquisa-faria-uma-operacao-policial-por-semana-afirma-claudio-castro.ghtml accessed 7 March 2024.

59 Bruna Fantti, 'Operações Policiais no Rio Aumentam 240 % às Vésperas da Eleição' *Folha de São Paulo* (29 September 2022) https://www1.folha.uol.com.br/cotidiano/2022/09/operacoes-policiais-no-rio-aumentam-240-as-vesperas-da-eleicao.shtml accessed 7 March 2024.

60 Luana Patriolino, '"Violência Policial Lamentável", diz Gilmar Mendes sobre Operação na Vila Cruzeiro' *Correio Braziliense* (26 May 2022) http://www.correiobraziliense.com.br/politica/2022/05/5010889-violencia-policial-lamentavel-diz-gilmar-mendes-sobre-operacao-na-vila-cruzeiro.html accessed 7 March 2024.

justiciable constitutional rights is very meaningful, given the decades of neglect and brutality that led to this situation. The STF also recognized that Covid-19 posed an unprecedented risk for these groups and that actions had to be taken to protect them.

Nevertheless, the STF did not make any order targeting the discretion of judges in the case of the prison population (ADPF 347) and opted for "weak" remedies to protect the rights of the indigenous populations (ADPF 709) and the *favela* dwellers (ADPF 635). Instead of making peremptory and detailed orders determining outcomes to be achieved or concrete measures to be taken within a fixed timeframe, the STF opted for approaches that allowed significant discretion for the government to determine how and when to redress the rights violations it found.

In ADPF 709, the STF opted for an experimentalist/dialogic approach[61], in which the court makes weak structural remedies setting the goals for governments to achieve, orders the formulation of plans, forces the government to engage with stakeholders, but gives authorities discretion to design the policy and decide how and when to implement it. In ADPF 635, the court prohibited police raids but in "absolutely exceptional" circumstances. Still, the strength of the order was diluted by the vaguely worded exception, which allowed authorities to interpret the ruling according to their convenience. Subsequently, when it became clear that authorities were unwilling to comply, the STF adopted an experimentalist/dialogic approach in this case and granted the police discretion to determine when circumstances are "absolutely exceptional".

In both ADPF 709 and ADPF 635, the STF exercised "strong" supervisory jurisdiction over the implementation of its decision. The STF welcomed submissions from claimants, NGOs, and grassroots organizations; ordered the creation of a situation room to oversee the policies related to indigenous groups, and held a public hearing to understand the situation in the *favelas* and the challenges for the implementation of the court decisions; requested continuous reports from the authorities and ordered them to elaborate on or implement the plans proposed.

Some argue that the combination of "strong rights, weak or moderate structural remedies, and strong supervision" is the most likely to achieve social change.[62] Accordingly, this approach allows courts to intervene in

61 Sabel and Simon (n 4).

62 ibid; Rodríguez-Franco and Rodríguez-Garavito (n 15); César Rodríguez-Garavito, 'Empowered Participatory Jurisprudence: Experimentation, Deliberation and Norms

complex policy issues without having to craft solutions or choose between policy alternatives in a context of uncertainty and disputes about each alternative's facts and consequences. Courts will neither have to participate in micromanaging policies that involve numerous decisions and actions by a plurality of authorities and bureaucrats. Moreover, it allows the participation of the affected marginalized groups, civil society, and experts in policy development and implementation. This will arguably lead to more democratic and epistemically superior decisions as the inputs offered by the broad participation are added to the expertise of public agencies. Lastly, it avoids the intrusiveness of strong remedies on legislation and administration, which can increase the risk of non-compliance and political backlash.

However, the findings in this chapter show the limitations of this approach. It is true that, without some form of counterfactual analysis, one cannot safely affirm that the court decisions had no impact. Despite the frustration expressed by those involved in the cases and the worsening in key variables following the decisions, it is theoretically possible that the situation could have been worse had the STF not intervened. Moreover, the legal precedents framing the condition of these marginalized groups as constitutional rights issues, the visibility the court cases gave to these issues, and the mobilization of grassroots organizations in collaboration with political parties and the legal profession should not be underestimated. They are valuable in themselves, especially for highly marginalized groups for whom solidarity is often lacking. The possibility that these indirect and symbolic effects of litigation will lead to material change in the future cannot be ruled out either. It is noteworthy that the STF continues to monitor compliance with its rulings in ADPF 347, ADPF 709 and ADPF 635, and maintains the power to make further decisions within these cases. Consequently, there is the possibility that the court intervention will be more consequential after Covid-19 and the Bolsonaro government.

Nonetheless, the timely material changes to protect these marginalized groups during the pandemic, which motivated the legal actions, have not occurred following the STF intervention. The claims and the STF decisions were grounded on the urgency of the situation and the expectation that structural litigation could impel governments to offer immediate or rapid protection against imminent threats to health and life. Yet, the situation seems to have worsened under the eyes of the STF. Improvements such

in Socioeconomic Rights Adjudication' in Katharine G Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press 2019).

as the reduction in the number of prisoners serving sentences in closed prisons can hardly be attributed to STF rulings during the pandemic. Furthermore, the STF decisions do not seem to have been able to address the root causes of marginalization and human rights violations. Analysts, claimants, and stakeholders have pointed to the continuation of the institutional practices that led to the vulnerability suffered by these marginalized groups, which was further accentuated by the emergence of Covid-19.

The findings in this chapter also challenge the idea that courts will convert weak remedies into strong ones as they become frustrated with the limits of the former to bring about concrete results.[63] They also contradict the theory that courts will resort to stronger forms of intervention if the government is deliberately obstructing or being hostile to the rights of a marginalized group.[64] In the cases analysed, the STF insisted on weak remedies despite the constant reports of non-compliance, the court´s frustration with the behaviour of authorities, and the hostility of high-level authorities towards the rights of marginalized groups.

One could argue that the STF made a mistake and that it should have opted for stronger remedies.[65] However, it is important to consider that this would have come at the cost of forsaking the advantages of weaker remedies and increasing the risk of defiance by an uncooperative government. This was evident in ADPF 635, when the STF made a weak but relatively stronger order and authorities not only openly ignored the decision but also blamed the court for the subsequent increase in police violence. Moreover, when courts expect their decisions to be resisted, highly specific orders can make the government´s defiance clearer for the public, threatening the institutional prestige on which courts´ political legitimacy relies. The trade-off between giving more teeth to their decisions and the negative consequences of open defiance limits the willingness of a court to make

63 Mark V Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009) 256; Mark V Tushnet, 'A Response to David Landau' (2012) Harvard International Law Journal 53, 161.

64 Katharine G Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) 8 International Journal of Constitutional Law 385, 385–420.

65 Daniel M Brinks, 'Solving the Problem of (Non)Compliance in Social and Economic Rights Litigation' in Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance* (Cambridge University Press 2017).

stronger orders. In this situation, a court may prefer to insist on weaker remedies to mask non-compliance while maintaining that the status quo is unacceptable.[66]

These case studies also frustrate the expectation that when supportive judges meet a support structure for rights advocacy, a "rights revolution" – judicial attention to, support for, and implementation of new rights – will likely happen.[67] The STF, to different degrees, was supportive of the claims and the support structure was present in all three cases. They were all filed by at least one political party with representation in Congress; the claimants were represented by an eminent public interest lawyer, Daniel Sarmento, who runs a human rights clinic based at a prestigious university; and there was significant involvement of civil society and grass-roots movements throughout out the proceedings and in the implementation stage (there were 28 *amici curiae* in ADPF 635, 15 in ADPF 347, and 10 in ADPF 709, almost all of them in favour of the claims). Over a hundred NGOs signed a letter to the STF urging it to take measures for the de-incarceration of vulnerable prisoners during the pandemic, given the "state of unconstitutional affairs" the Court itself declared in ADPF 347.[68]

In sum, and contrary to what the literature suggests, this chapter found no evidence of direct material outcomes from cases that combine independent judges sympathetic towards the claims, support structure for rights-advocacy litigation, and decisions that are textbook examples of "strong rights, weak or moderate structural remedies, and strong monitoring". These results seem to vindicate Rosenberg´s argument in his seminal work *The Hollow Hope* that, even when cases are won in the courtroom, litigation is unlikely to promote social change when the recipients of the orders and the political elites are unsupportive or hostile to the reforms directed by judges.[69]

66 Jeffrey K Staton and Georg Vanberg, 'The Value of Vagueness: Delegation, Defiance, and Judicial Opinions' (2008) 52 American Journal of Political Science 504.

67 Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998) 195.

68 Instituto Brasileiro de Ciências Criminais, 'Pandemia de COVID-19: Entidades e Juristas Cobram STF por Medidas em Favor de Pessoas Presas' (*ibccrim.org.br*, 27 March 2020) www.ibccrim.org.br/noticias/exibir/108 accessed 7 March 2024.

69 Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (2nd ed, University of Chicago Press 2008) 31–36.

6 Conclusion

Indigenous groups, the prison population, and *favela* dwellers were under unprecedented threat with the emergence of Covid-19. Yet, the "unparalleled" solidarity response for the broader population during the pandemic fell short of addressing the particular vulnerabilities of these marginalized groups.

Through the language of legal rights and structural litigation at the STF, these marginalized groups and their advocates tried to force an uneager government to materialize the solidaristic values engraved in the Constitution. The STF was assertive in affirming these groups' "strong" rights. The STF understood the urgency and the gravity of the situation and made preliminary decisions soon after claims were filed, granting at least some of the requests (although the one related to the prison population was quickly reversed).

In some cases, the STF also went beyond making bold judicial statements. Structural injunctions were made with different levels of strength, and there was constant monitoring by the court to compel governments to act and to engage with civil society and stakeholders. However, the STF insisted on weaker remedies even when it was clear that the implementation of the decision was problematic and that the situation was deteriorating rather than improving.

Although the STF articulated the language of rights to reaffirm the solidaristic commitments in the Constitution, the findings in this chapter highlight the limits of structural litigation to promote social change. In the same way that transformative constitutions can coexist with high levels of marginalization, eloquent and innovative court rulings can coexist with a largely undisturbed status quo for marginalized sectors of the population.[70]

The most serious cases of rights violation and marginalization have deep historical roots and, therefore, require intense reforms in institutions and wide-ranging policies. While more appropriate for judges handling complex policy issues, weak remedies can lead to mock compliance and inertia if authorities are unsupportive of the change courts aim to promote. Courts seem less able to promote timely material change when they are most needed, that is, when there is a widespread and acute violation of marginalized groups' rights under a government that is either hostile or indifferent to them.

70 Diego Werneck Arguelhes, 'Transformative Constitutionalism: A View from Brazil' in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press 2020).

Chapter 13 Transnational Solidarity, International Law and the Distribution of Medical Goods during Pandemics

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1 Introduction

The current volume's conception of solidarity[1] and its role in crises is especially topical as the world enters an "endemic" phase of the COVID-19 pandemic.[2] Aside from the loss of life and health, the disease exposed rifts in how countries actually uphold any given principle of solidarity during a global crisis, characterized by a distributive dilemma featuring conditions of scarcity of goods and time pressure.[3] Against such a backdrop, a robust conception of solidarity would require public authorities of every state to cater not only to the well-being of their own population, but also of those in other countries.[4] Thus, transnational solidarity means persons in a country accept the costs of sharing their own (scarce) resources with those of other countries, through the recognition of something similar between both of

1 The introductory chapter puts forward a concept of solidarity as "an idea of order that manifests itself in mutual obligations and aims at tackling common challenges or realizing common goods… [solidarity] is mostly framed as an 'inner cement' holding together a political entity by compensating for inequalities and power asymmetries" Anuscheh Farahat, Marius Hildebrand and Teresa Violante, in this volume.

2 "Endemic" refers to a novel disease ceasing to be extraordinary and remain circulating seasonally within the population, Aris Katzourakis, 'COVID-19: Endemic Doesn't Mean Harmless' (2022) 601 Nature 485; Jeffrey V Lazarus and others, 'A Multinational Delphi Consensus to End the COVID-19 Public Health Threat' (2022) 611 Nature 341.

3 Katharina Kieslich and Barbara Prainsack, 'Solidarity in Times of a Pandemic: Everyday Practices and Prioritization Decisions in Light of the Solidarity Concept' in Andreas Reis, Martina Schmidhuber and Andreas Frewer (eds), *Pandemics and Ethics: Development – Problems – Solutions* (Springer 2023) 33.

4 The argument that states sovereignty could be a "trusteeship for humanity" by catering to the interests of persons in other territories is posited by Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the
Accountability of States to Foreign Stakeholders' (2013) 107 American Journal of International Law 295–301.

them[5], which in this chapter means the need to protect against the global spread of a disease.

One of the most publicized displays of lack of solidarity during the COVID19 pandemic was so-called "vaccine nationalism".[6] Broadly speaking, this phenomenon occurred because effective vaccines against COVID-19 were initially scarce, and countries stockpiled doses at the expense of other countries. States competed against one another to procure as many doses as quickly as possible for their population. It represented an antagonistic setting in terms of a robust transnational solidarity between states.

During the COVID-19 pandemic, the World Health Organization (WHO), Gavi, the Vaccine Alliance – a public-private-partnership seated in Switzerland – the Coalition for Epidemic Preparedness Innovations – a Norwegian nongovernmental organization – the World Bank and the Bill & Melinda Gates Foundation, among others, launched the so-called Access to COVID-19 Tools Accelerator (ACT-Accelerator). The same partners launched the COVAX Initiative, the core operative component of the first pillar, whose goal was an equitable global distribution of vaccines against COVID-19. These were unprecedented mechanisms consisting of both procurement and donation of vaccine doses.

The innovative mechanisms of solidarity designed during the COVID-19 pandemic did not fulfil their purported goals. Only half of the promised doses were allocated in the expected timeframe, whereas most of these doses were through donations and not actual use of COVAX's procurement mechanism.[7] Such a scenario sheds light on the limits of transnational solidarity in the face of an acute global threat, like a pandemic. The debacle brought about by the global distribution of medical goods against COVID-19 generally, and vaccine nationalism in particular elicited calls for reforming the rules-based global health landscape. This has informed ongoing parallel negotiations for a new pandemic treaty and amendments to the International Health Regulations at the WHO in Geneva.

5 Taken *mutatis mutandis* from Barbara Prainsack and Alena Buyx, *Solidarity in Biomedicine and Beyond* (CUP 2017) 43.

6 Armin von Bogdandy and Pedro Villarreal, 'International Law's Role in Vaccinating Against COVID-19: Appraising the COVAX Initiative' (2021) 81 Heidelberg Journal of International Law 95–99.

7 Antoine de Bengy Puyvallée and Katerini Tagmatarchi Storeng, 'COVAX, Vaccine Donations and the Politics of Global Vaccine Inequity' (2022) 18 Globalization and Health 26.

In light of the above, the current chapter tackles the issue of solidarity in the distribution of medical goods – including vaccines – during pandemics. The structure is as follows: In the second section, the chapter examines existing conditions limiting solidarity during pandemics, with emphasis on the global distribution of medical goods. The ACT-Accelerator generally, and the COVAX Initiative particularly, have been core examples of attempts at countering nationalistic trends during the COVID-19 pandemic. While vaccines were the most notable display of limited solidarity, this certainly applies to other critical medical goods. The third section explains how multilateral mechanisms for fostering solidarity during pandemics are limited and, instead, the strongest structures of political representation and accountability are mostly national or, exceptionally in the case of the European Union,[8] regional. This landscape results in authorities prioritizing their own populations at the expense of those of other countries. Robert Putnam referred to these types of conundrums as a "two-level game", in which national authorities must navigate tensions between domestic prioritization and diplomatic, ie external considerations.[9] The current juncture of international negotiations on a pandemic treaty and amending the International Health Regulations at the WHO gives an example of Putnam's two-level game. The fourth section offers conclusions, arguing for a need to devise multilateral mechanisms that can pursue transnational solidarity as a realistic goal. Future initiatives to succeed the ACT-Accelerator and the COVAX Initiative should pay heed to the inherent limitations of transnational solidarity while remaining committed to changing the global distribution of scarce medical goods.

8 Alexia Katsanidou, Ann-Kathrin Reinl and Christina Eder, 'Together We Stand? Transnational Solidarity in the EU in Times of Crises' (2022) 23 European Union Politics 66–78.

9 Robert Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42 International Organization 434; for an application of the two-level game in the distribution of COVID-19 vaccines, see Matthew Kavanagh and Renu Singh, 'Vaccine Politics: Law and Inequality in the Pandemic Response to COVID-19' (2023) 14 Global Policy 239.

2 Legal Barriers and Catalysts for Transnational Solidarity in Pandemics

Law can play a role of both an inhibitor as well as a catalyst in entrenching transnational solidarity.[10] Whether the one or the other is the case will depend on how legal rights and obligations for different actors are framed. The following subsections address several dimensions of transnational solidarity in pandemics under international law, by referring to the past absence of mechanisms for the global distribution of medical goods, as well as some of the intricacies of the ACT-Accelerator.

2.1 Pre-COVID Distribution of Pandemic-Related Medical Goods

Pandemics caused by new and re-emerging diseases can trigger a global scramble to find medical goods offering protection and remedies against them. Which medical goods will be effective can vary from disease to disease. Key among these goods are safe and effective vaccines if and when they become available. In broad terms, these pharmaceutical goods allow persons to build an immune response to a disease before being directly exposed to it.[11] Vaccines are not the only medical goods required to treat communicable diseases. Other goods with prophylactic and therapeutic value, such as antiviral medicines, can contribute to protecting against communicable diseases.

Before COVID-19, the procurement of medical goods during pandemics was, with notable exceptions,[12] a mostly national affair. National authorities purchased medical goods both in "ordinary" and in emergency times

10 Alexandra Phelan, Mark Eccleston-Turner, Michelle Rourke, Allan Maleche and Chenguang Wang, 'Legal Agreements: Barriers and Enablers to Global Equitable COVID-19 Vaccine Access' (2020) 396 The Lancet 800–802.

11 Miquel Porta, 'Immunization' in *A Dictionary of Epidemiology* (6th ed, OUP 2016) available at: https://www.oxfordreference.com/display/10.1093/acref/9780199976720.001.0001/acref-9780199976720 all links accessed 12 January 2024.

12 The Revolving Fund from the Pan-American Health Organization (PAHO) was deployed during the H1N1 Influenza pandemic in 2009 to procured vaccines against influenza on behalf of Latin American and Caribbean countries. See Alba María Ropero-Álvarez, Álvaro Whittembury, Hanna Jane Kurtis, Thais dos Santos, M Carolina Danovaro-Holliday and Cuauhtémoc Ruiz-Matus, 'Pandemic influenza vaccination: Lessons learned from Latin America and the Caribbean' (2012) 30 Vaccine 916, 917.

through bilateral contracts with pharmaceutical companies.[13] The most immediate precedent to COVID-19 occurred during the H1N1 Influenza pandemic of 2009–2010.[14] During that event, there were no existing global mechanisms for the distribution of medical goods against the disease. Yet, when the H1N1 influenza pandemic officially concluded, the death toll was considerably low.[15] This fact likely explains why controversies regarding the H1N1 influenza pandemic were of a different, and therefore not comparable nature than those due to the COVID-19 pandemic: Whereas in the latter, vaccine nationalism has been decried due to the stockpiling of necessary medical goods;[16] in the former, the activation of dormant contracts for procuring those goods led to severe criticism and inquiries on potential conflicts of interest in the response to the pandemic.[17]

The post-pandemic reports concerning H1N1 influenza concluded by calling for more transparency in how public procurement procedures of medicines against pandemics are devised.[18] Studies pointed towards the absence of mechanisms fostering solidarity between countries in the distribution of medical goods during a pandemic.[19] Events occurring after the

13 Mark Turner, 'Vaccine procurement during an influenza pandemic and the role of Advance Purchase Agreements: Lessons from 2009-H1N1' (2015) 3 Global Public Health 322.

14 On 11 June 2009, the WHO Director-General declared the highest phase of pandemic alert, ie phase 6, due to the worldwide spread of H1N1 Influenza. The end of the pandemic phase was declared on 10 August, 2010. WHO, 'H1N1 in post-pandemic period. Director-General's opening statement at virtual press conference' (*WHO*, 10 August 2010) https://www.who.int/news/item/10-08-2010-h1n1-in-post-pandemic-period.

15 The higher-end estimates put the death toll worldwide due to H1N1 Influenza at around 200,000. Fatimah Dawood and others, 'Estimated global mortality associated with the first 12 months of 2009 pandemic influenza A H1N1 virus circulation: a modelling study' (2012) 12 The Lancet Infectious Diseases 687.

16 'WHO chief warns against 'catastrophic moral failure' in COVID-19 vaccine access', (*UN News*, 18 January 2021) https://news.un.org/en/story/2021/01/1082362.

17 Multiple institutional and journalistic reports pointed towards the use of millions of US dollars of taxpayer money in purchasing medical goods. For a critical perspective, see Sudeepa Abeysinghe, 'Pandemics, Science and Policy. H1N1 and the World Health Organization' (Palgrave MacMillan 2015).

18 See WHO, *Strengthening response to pandemics and other public health emergencies. Report of the Review Committee on the Functioning of the International Health Regulations (2005) and on Pandemic Influenza (H1N1) 2009* (2011) available at: https://www.who.int/publications/i/item/strengthening-response-to-pandemics-and-other-public-health-emergencies.

19 Turner (n 13).

H1N1 influenza pandemic, such as the West African Ebola crisis of 2014, did not acquire a global dimension and hence did not raise a pressing sense of need. Public authorities may conclude contracts with private actors located either in the same country or in a foreign setting,[20] in order to procure goods or services lying in the public interest. In most instances, authorities undertake public procurement procedures for purchasing these goods or services *for the benefit of their own populations,* clearly including the healthcare sector.[21]

In the case of medical goods against COVID-19, private law actors provide the vast majority thereof.[22] In the exercise of their mandate, public authorities may secure agreements or contracts with providers under the best possible conditions. Under a rational choice theory,[23] procurers will look for available alternatives for a particular good in a competitive setting and choose the best one.[24] Nevertheless, the list of available providers of medical goods necessary against a pandemic can be quite a short one. In the case of medical goods, particularly technically elaborate ones, who can produce them depends on, first, having the required technical expertise to manufacture them; and, second, the existence or absence of intellectual property rights, mainly patents, granting innovators exclusive rights.[25] The combina-

20 For more on transnational contract-making, see Mathias Audit and Stephan Schill, 'Transnational Law of Public Contracts: An Introduction', in Matthias Audit and Stephan Schill (eds), *Transnational Law of Public Contracts* (Bruylant 2016) 3–20.

21 Asserted in World Trade Organization/World Intellectual Property Organization/WHO, *Promoting Access to Medical Technologies and Innovation: Intersections Between Public Health, Intellectual Property and Trade* (2nd edition, 2020) 103.

22 Philip Hanspach, 'Improving Health Resilience Through Better Procurement of Medical Supplies: Lessons from the Covid-19 Pandemic' [2021] STG Resilience Papers – European University Institute 1–2.

23 A theoretical model not without criticisms. See Juliane Mendelsohn, 'Competition, Concentration, and Inequality through the Lens of the Theory of Reflexive Modernisation', in Jan Broulík and Katalin Ceres (eds), *Competition Law and Economic Inequality* (Hart/Bloomsbury 2022) 55–72.

24 Robert D Anderson, William Kovacic and Antonella Salgueiro, 'Competition Policy in Relation to Public Procurement: An Essential Element of the Policy Framework for Addressing COVID-19' in Sue Arrowsmith, Luke Butler, Annamaria La Chimia and Christopher Yukins (eds), *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic* (Hart/Bloomsbury 2021) 199–200.

25 Holger Hestermeyer, *Human Rights and the WTO. The Case of Patents and Access to Medicines* (OUP 2007).

tion of both these elements often leads to a "sellers' market",[26] wherein competition may be stunted by both the limited amount of providers, as well as the urgent nature of the need to procure a specific good needed to counter a crisis.[27] Given how the procurement of medical goods mostly, though not exclusively,[28] follows a market logic, public authorities from a particular country capable of paying more can gain faster access to scarce medical goods than the authorities of others. In doing so, these procurers manage to attain those goods before other potential purchasers.[29]

Medical goods that are still in the earlier phases of research and development can be purchased through legal contracts celebrated between developers and procurers, known as Advance Purchase Agreements (APAs).[30] Through them, developers of new medical goods commit themselves to provide them if and when they become available.[31] These contracts can, and have led to stockpiling, as they can overload the supply chain and leave other potential purchasers behind. Thus, APAs risk worsening pre-existing global inequities, as the core determinant factor for distribution is the ability to pay.

When negotiating contracts with pharmaceutical companies and other private actors, procuring actors strive to attain the most advantageous terms possible for them, be they price, volume, delivery conditions, or other features. But this can lead to distortions in access to those goods. Studies have shown how even before the COVID-19 pandemic, middle-income countries have had to pay more expensive prices for vaccine doses than higher-income ones.[32] There are certainly other factors that may explain

26 On the definition of a sellers' market, Thomas Zorn and William Sackley, 'Buyers´ and Sellers´ Markets: A Simple Rational Expectations Search Model of the Housing Market' (1991) 4 Journal of Real Estate Finance and Economics 315, 315–316.

27 United Nations Office on Drugs and Crime, *COVID-19 Vaccines and Corruption Risks: Preventing Corruption in the Manufacture, Allocation and Distribution of Vaccines* (2020) 4.

28 Exceptions include the category of drugs for neglected diseases.

29 United Nations Conference on Trade and Development, *Impact of the COVID-19 Pandemic on Trade and Development. Lessons Learned* (2022) 33.

30 Phelan, Eccleston-Turner, Rourke, Maleche and Wang (n 10) 800.

31 Ian Thornton, Paul Wilson and Gian Gandhi, '"No Regrets" Purchasing in a Pandemic: Making the Most of Advance Purchase Agreements' (2022) 18 Globalization and Health 2.

32 A phenomenon predating the COVID-19 pandemic. See N Herlihy, R Hutubessy and M Jit, 'Current Global Pricing for Human Papillomavirus Vaccines Brings the Greatest Economic Benefits to Rich Countries' (2016) 35 Health Affairs (Millwood) 227–234; Jan Wouters and others, 'Challenges in Ensuring Global Access to COV-

this variation, such as whether purchasers pre-invested in a medical product by financing its research and development.[33] Nevertheless, the closed-door nature of contract negotiations by different parties with transnational pharmaceutical companies is a reason for this divergence.[34]

2.2 COVID-19 as a Stress Test of Transnational Solidarity

No country in the world escaped the impact of the COVID-19 pandemic. Little wonder, then, that issues of transnational solidarity took the global stage. One of the distinctive features of this crisis in comparison to, for example, the financial ones of the 2010 has been the lower degree of moral hazard, that is, a common threat that lies beyond any individual state's responsibility.[35] It is a scenario where transnational solidarity is not subject to other qualifying factors.

And yet, the global distribution of medical goods during the COVID-19 pandemic by states was hardly a display of unqualified transnational solidarity. Although some political leaders, like the President of the European Council, argued that their decisions during the COVID-19 pandemic were based on solidarity with other countries,[36] the prevailing disparities in the distribution of medical goods cast doubt upon such framings. Other authors have referred to the difficulties in realizing solidarity during pan-

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ID-19 Vaccines: Production, Affordability, Allocation, and Deployment' (2021) 397 The Lancet 1027.

33 Niall McCarthy, 'Which Companies Received The Most Covid-19 Vaccine R&D Funding?' *Forbes* (6 May 2021) https://www.forbes.com/siteWs/niallmccarthy/2021/05/06/which-companies-received-the-most-covid-19-vaccine-rd-funding-infographic/.

34 Ann Danaiya Usher, 'CEPI Criticised For Lack of Transparency' (2021) 397 The Lancet 265–266.

35 Michael Ioannidis, 'Between Responsibility and Solidarity: COVID-19 and the Future of the European Economic Order' (2020) 80 Heidelberg Journal of International Law 775–776. Beyond far-fetched accusations against the Chinese government on whether the event was intentional, the strongest condemnations focus on its lack of transparency and not on fault lines. 'Covid-19 pandemic: China "refused to give data" to WHO team' *BBC News* (14 February 2021) https://www.bbc.com/news/world-asia-china-56054468.

36 European Council, 'Remarks by President Charles Michel Following the First Session of the Video Conference of the Members of the European Council' (25 February 2021) available at: https://www.consilium.europa.eu/en/press/press-releases/2021/02/25/remarks-by-president-charles-michel-following-the-first-session-of-the-video-conference-of-the-members-of-the-european-council/.

demics, both interpersonally and at a societal- or group-level, arguing for institutions offering material conditions for realizing solidarity, and for a recognition in public discourse of a similar situation faced alongside "others".[37] These "others" may be transnational in nature, including other countries and their inhabitants.[38]

A case in point is the pricing of vaccine doses across different countries, which was not proportionate to purchasing power. In South Africa, according to an investigation by the Health Justice Initiative, prices per dose in some contracts were double than those for the EU.[39] Moreover, a lack of transnational solidarity did not only operate along North-South lines. A well-known spat emerged between the United Kingdom and the European Commission, in light of the perceived preference the company AstraZeneca gave the former when delivering COVID-19 vaccines to each.[40] Resultantly, the European Commission launched litigation procedures in Belgian Courts, which concluded by establishing AstraZeneca's liability for not upholding the agreed-upon vaccine delivery schedules.[41] This saga shows how challenges to transnational solidarity play out in North-North constellations as well.

Due to the developments presented above, medical goods against pandemics stand at the core of debates on how to entrench more robust transnational solidarity against future threats. When the first vaccines against COVID-19 were successfully developed in 2020, public authorities all over the world faced the dilemma of devising criteria for their global distribution, considering that countries with more resources were better positioned to acquire them more promptly. The conundrum of how to ensure global equity is further aggravated by how time is of the essence: the longer

37 Barbara Prainsack, 'Solidarity in Times of Pandemics' (2020) 7 Democratic Theory 132–133.

38 Katsanidou, Reinl and Eder (n 8) 68.

39 Health Justice Initiative and others,"*One-Sided". Vaccines Save Lives – Transparency Matters* (5 September 2023) available at: https://healthjusticeinitiative.org.za/pandemic-transparency/.

40 Armin von Bogdandy and Pedro A Villarreal, 'The EU´s and UK´s Self-Defeating Vaccine Nationalism', (*Verfassungsblog,* 30 January 2021) https://verfassungsblog.de/the-eus-and-uks-self-defeating-vaccine-nationalism/.

41 Eventually, the European Commission and AstraZeneca reached a settlement out of court. Pushkala Aripaka and Ludwig Burger, 'AstraZeneca reaches settlement with EU on COVID-19 vaccine delivery', *Reuters* (3 September 2021) https://www.reuters.com/world/europe/astrazeneca-eu-reach-settlement-delivery-covid-19-vaccine-doses-2021-09-03/.

it takes for a country to secure medical goods for its population, the higher the loss of life and overall adverse health outcomes will be. The HIV/AIDS pandemic is a key example, in so far as despite the availability of effective antiretroviral medicines against the disease since the 1990s, lower-income countries in Sub-Saharan Africa had access to them decades after they were first developed and distributed in higher-income countries.[42] It shows the longstanding nature of inequity during pandemics. Consequently, breaking the cycle of these distributive failures is a key normative challenge for international law.

2.3 ACT-Accelerator and COVAX: Between charity and solidarity

Previous to the COVID-19 pandemic, no global mechanisms for the distribution of medical goods comparable to the ACT-Accelerator existed.[43] A number of aid-based distribution mechanisms have been devised for a number of routine vaccines, both at the international level (through UNICEF) and regionally, such as the Pan-American Health Organization's Revolving Fund.[44] None of these, however, directly addressed a scenario of global scarcity of one or several medical goods in an emergency where all states had an urgent need to access them at the same time. Therefore, before the COVID-19 debacle, most of the schemes devised for distributing medical goods followed an idea of charity and not of solidarity. Assistance was given to countries mostly under circumstances where those providing aid were not under time pressure and were, generally speaking, already well-off themselves. Conversely, the idea of solidarity developed in this volume means to mitigate the impact of (economic) inequalities and power asymmetries during crises.[45] Under this robust idea of solidarity, states should have access to medical goods during a pandemic even while all

42 Sharifah Sekalala and John Harrington, 'Communicable Diseases, Health Security, and Human Rights: From AIDS to Ebola' in Lawrence Gostin and Benjamin Mason Meier (eds), *Foundations of Global Health & Human Rights* (OUP 2020) 221–242.
43 Turner (n 8).
44 Wouters and others (n 32).
45 Hildebrand, Farahat, and Violante (n 1).

others are being affected, and not wait until those with higher purchasing power have had their needs fully covered.

There are legal foundations available for a different idea of global distribution of medical goods, one based on a more robust conception of solidarity. Such a model would draw upon a human rights perspective, which pleads for the allocation of life-saving goods based on need and not ability to pay.[46] Major gaps still exist when attempting to determine which criteria of "need" apply between countries and not just within. From a medical point of view, criteria of nationality or residence do not play any role whatsoever in establishing necessity.[47] Beyond this dimension, however, criteria on need tend to be uncertain. Even after the lessons of the COVID-19 pandemic, and beyond frameworks such as the Fair Priority Model, insights from both epidemiology and medical ethics have yet to produce a definitive account of a solidarity-based distribution of scarce medical goods during emergencies that translates into political consensus.[48] Such a gap between scientific and political concepts is essential in any proposals for a future, more equitable global mechanism for the distribution of pandemic-related medical goods, including vaccines.

The ACT-Accelerator and its vaccines pillar, the COVAX Initiative, were an alternative to a pure market-logic background for the global distribution of medical goods during a pandemic.[49] At the moment of their inception, these were unprecedented mechanisms, set up by Gavi, the Vaccine Alliance, the WHO, the United Nations Children´s Fund (UNICEF), the Coalition for Epidemic Preparedness Innovations and other partners. They purported to be a multilateral alternative for the procurement and distribution of vaccines and other medical goods, through both commercial purchasing as well as through development aid.

The COVAX Initiative, and particularly its legal arm, the Facility, split the world in two. On the one hand, countries deemed to have sufficient econo-

46 Colleen Flood and Aeyal Gross, *The Right to Health at the Public/Private Divide. A Global Comparative Study* (CUP 2014).

47 Kyle Ferguson and Arthur Caplan, 'Love Thy Neighbour? Allocating Vaccines in a World of Competing Obligations' (2020) 47 Journal of Medical Ethics 1.

48 Though focusing on "fair and equitable distribution" rather than "solidarity", see on this point Ezekiel Emanuel, Ross Upshur and Maxwell Smith, 'What Covid Has Taught the World about Ethics' (2022) 387 The New England Journal of Medicine 1542–1543.

49 WHO, 'What is the ACT-Accelerator' https://www.who.int/initiatives/act-accelerator/about.

mic resources financed their own doses, resorting to COVAX as a "broker" for signing APAs with pharmaceutical companies able and willing to manufacture vaccines; on the other hand, countries with a lower capacity were financed through development aid.[50] It is worth underscoring, however, that self-financing countries would not be cross-subsidizing financed ones, meaning that the Facility's financial resources are not redistributed to cover financed countries.[51] This shows how there is an inherent limitation to solidarity between participating countries.

The concept of "sustainable solidarity" was coined elsewhere to highlight this version of solidarity, capable of accounting for the unavoidable nature of nationalistic self-interest.[52] Basically, the driving factors of vaccine nationalism are recognized and meant to coexist with, yet not be replaced by unrestrained global solidarity.[53] While some may question this self-restrained conception,[54] there are arguments supporting this modality. As explained in the following lines, the premises for this understanding of solidarity have been affirmed in empirical inquiries.

The COVAX Initiative did not meet its initial goal of distributing 2 billion doses of COVID-19 vaccines by the end of 2021, reaching only around 50 % of that amount.[55] Notably, most of the distribution of vaccines was undertaken through bilateral agreements between pharmaceutical companies and public authorities.[56] An external inquiry commissioned by the WHO published in October 2022[57] pinpointed what it considered to be one of the main reasons for the COVAX Initiative's limited success: its "overambitious" scope. Basically, it expected high-income countries to use

50 Bogdandy and Villarreal (n 6).

51 Felix Stein, 'Risky business: COVAX and the financialization of global vaccine equity' (2021) 17 Globalization and Health 5.

52 Bogdandy and Villarreal (n 6).

53 A more radical proposal was made by Goving Persad, Alan Wertheimer and Ezekiel Emanuel, 'Principles for allocation of scarce medical interventions' (2009) 373 The Lancet 423–431.

54 Mark Eccleston-Turner and Harry Upton, 'International Collaboration to Ensure Equitable Access to Vaccines for COVID-19: The ACT-Accelerator and the COVAX Facility'(2021) 99 The Milbank Quarterly 444–445.

55 WHO, 'COVAX Delivers its 1 Billionth COVID-19 Vaccine Dose' (16 January 2022) https://www.who.int/news/item/16-01-2022-covax-delivers-its-1-billionth-covid-19-vaccine-dose.

56 Eccleston-Turner and Upton (n 45).

57 Most recently, see Open Consultants, *External Evaluation of the Access to COVID-19 Tools Accelerator (ACT-A)* (10 October 2022). The report includes the COVAX Initiative as one of the scrutinized mechanisms.

the procurement mechanism therein, instead of their doing it individually. According to some accounts collected within said inquiry, it was an unrealistic goal because "that is not how the world works".[58] This supports the view that what is needed is a version of transnational solidarity that coexists with self-interests. Public authorities cannot be expected to act against their own constituencies when distributing scarce life-saving resources. If public authorities have the economic means to receive medical goods faster than others, they will have a legal reason for doing so. Otherwise, they risk being subjected to challenges of accountability nationally. Therefore, any expectation for national or regional authorities to put the population of other countries or regions on equal footing with their own remains wishful thinking. And expecting authorities to prioritize the population of other countries over their own in settings of scarcity and time pressure is, to put it bluntly, out of the question.

In its conclusions, the WHO-commissioned external inquiry on the performance of the ACT-Accelerator advocates more nuanced mechanisms for the procurement and distribution of medical goods in the future.[59] This effectively means creating initiatives meant to focus on supplying medical goods to countries unable to do so by themselves. High-income countries would retain their possibilities to procure medical goods based on their own economic capacities. A major question, then, lies in whether the competition between countries directly financing their own purchase medical goods could lead to some holdbacks.

3 Can International Law Strengthen Transnational Solidarity in Pandemics?

At the moment of writing, representatives of WHO Member States have embedded international solidarity in the distribution of medical goods during pandemics in the draft for a Convention on pandemic prevention, preparedness, and response. The draft published so far enshrines the principle of solidarity in health emergencies as aimed at "all people and countries… to achieve the common interest of a more equitable and better prepared world to prevent, respond to and recover from pandemics, recognizing

58 ibid 28.
59 ibid 73.

different levels of capacities and capabilities".[60] It is, therefore, a conception of solidarity that recognizes economic inequality between countries. An even stronger linkage is found in another core concept introduced in the draft for a pandemic agreement and the amendments to the International Health Regulations: equity. It is a concept closely linked to solidarity, as it refers to key normative arguments based on how global access to medical goods should not be contingent on the ability to pay for them.[61]

While equity has a distributive component, it is not a synonym for equality. Very broadly speaking, equity in the field of health refers to avoiding unequal outcomes that are both avoidable and unfair.[62] These two qualifiers lead us to assume that guaranteeing equality of outcomes in health is not possible, least of all in fields with multivariate problems such as public health. Instead, debates focus on how to remove "avoidable" obstacles preventing a more equitable global distribution of medical goods, whilst considering that full-blown equality cannot, and perhaps should not be the key objective. This falls in line with the Fair Priority Model developed during the COVID-19 pandemic by several scholars based on bioethical principles.[63] For instance, under the Fair Priority Model, countries with a higher need in view of epidemiological circumstances can be granted priority access to medical goods over others.[64]

In line with Putnam's two-level game explained in the introduction,[65] one major challenge present in the negotiations of a new pandemic agreement is to balance the domestic pull, on the one hand, and transnational solidarity in the distribution of pandemic-related medical goods, on the other hand. The domestic pull prevents negotiators, prima facie, from agreeing to positions that may put their populations at a disadvantage in future pandemic scenarios. Eventually, the populations of their countries may hold them accountable should they negotiate international obligations

60 At the moment of writing, the text used for reference is World Health Organization, *Proposal for the WHO Pandemic Agreement*, A77/10 (27 May 2024), available at: *https://apps.who.int/gb/ebwha/pdf_files/WHA77/A77_10-en.pdf*, see particularly Article 3.

61 Flood and Gross (n 46) 453.

62 Sara Willen, Michael Knipper, Cesar Abadia-Barrero and Nadav Davidovitch, 'Syndemic Vulnerability and the Right to Health' (2017) 389 The Lancet 966.

63 Ezekiel Emanuel and others, 'An Ethical Framework for Global Vaccine Allocation' (2020) 369 Science 1309–1312.

64 ibid. Authors, however, recognize that epidemiological circumstances can rapidly change, and global allocation mechanisms might hardly be able to keep up.

65 Putnam (n 9).

that do not cater to their interests.[66] Little wonder, then, that the envisaged provisions within a future pandemic treaty reflect a strong domestic focus as a basis for pandemic response.[67] Despite calls for reform,[68] national authorities' leeway in questions of public procurement is likely to remain unfazed, since states will retain the final say on how they will negotiate the purchasing of medical goods in the future. At the same time, unless consensus is achieved on alternative global distributive schemes of medical goods for future pandemics, the conditions undermining transnational solidarity during the COVID-19 pandemic will re-emerge.

In terms of a potential compromise, it is possible to devise multilateral mechanisms funded in parallel, with a focus on countries with fewer financial resources to secure medical goods more rapidly in the future. Some of the criteria for mitigating the nationalist pull have been included so far. For instance, the current pandemic agreement has obligations of transparency to know to what extent authorities are stockpiling pandemic-related medical goods.[69] After all, countering vaccine nationalism begins by attesting exactly how it is occurring. But, during the COVID-19 pandemic, most information related to the volume and prices in the procurement of vaccines was attained through secondary sources, ie in media reports and academic studies.[70] Enhanced transparency in disclosing the terms and conditions of pharmaceutical contracts – albeit with redacted clauses deemed to be commercially sensitive – would help diagnose the extent to which countries are procuring more doses than they actually need[71] while accounting for the difficulties in legally assessing such necessity. Exposing the obstacles to deeper transnational solidarity in the global distribution of medical goods is a needed endeavour. What remains, then, is to find a legal foundation for its success.

66 Joseph Brown and Johannes Urpelainen, 'Picking Treaties, Picking Winners: International Treaty Negotiations and the Strategic Mobilization of Domestic Interests' (2015) 59 Journal of Conflict Resolution 1069–1070.

67 The current negotiating text of the pandemic agreement includes sovereignty as one of the guiding principles for pandemic response. (n 60).

68 Ole Kristian Aars and Nina Schwalbe, 'Bold moves for vaccine manufacturing equity' (2023) 402 The Lancet 771–772.

69 (n 60), Articles 3 and 9. In favor of enhanced transparency in the disclosure of Advanced Purchase Agreements, Bogdandy and Villarreal (n 6).

70 See Wouters and others (n 32), Supplementary appendix 2.

71 Also argued in Katrina Perehudoff and others, 'A Pandemic Treaty for Equitable Global Access to Medical Countermeasures: Seven Recommendations for Sharing Intellectual Property, Know-How and Technology' (2022) 7 BMJ Global Health 4.

3.1 Human Rights Law: Legal Dimensions of (Constrained) International Solidarity

The strongest legal arguments for more solidarity between countries are found in human rights law. Considering the nature of pandemics, the right to health lies front and centre, as enshrined in Art. 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is certainly not the only human right at stake, because other human rights obligations are also relevant for shaping states' preparedness and response to pandemics.[72] But it is, ultimately, the clearest legal framing providing concrete, practical normative yardsticks for global health challenges. Under the right to health and existing authoritative interpretations such as those from the Committee on Economic, Social and Cultural Rights (CESCR), states must take active steps to protect their population against "epidemic diseases", including through "immunization".[73] Concrete actions to be taken will vary from disease to disease.

Human rights discussions abound on whether and to what extent governments ie states are obliged towards individuals located beyond their jurisdiction. While the ICESCR obliges states to cooperate towards economic development, this has been interpreted by the CESCR as referring to relationships between states,[74] and not between states and individuals. Furthermore, obligations to respect, protect and fulfill the right to health shed light on the precise manner in which persons' access to healthcare services and products ought to be guaranteed. Broadly speaking, human rights obligations to respect mandate authorities of a state not to act or incur in omission in a manner that impairs the enjoyment of human rights,[75] even of persons located outside their territory. This falls squarely with the no-harm principle, which also includes avoiding transboundary harm.[76] In

72 Among the different health-related human rights, the right to life enshrined in Article 6 of the International Covenant on Civil and Political Rights stands out. The Human Rights Committee has interpreted this provision as including an obligation by states to 'take appropriate measures to address… the prevalence of life-threatening diseases'. Human Rights Committee, *General Comment No. 36. Article 6: right to life*, para 26.

73 Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (11 August 2000) UN Doc EC/C.12/2000/4 para 16.

74 CESCR 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)' para 14.

75 CESCR (n 73) para. 33.

76 Jelena Bäumler, *Das Schädigungsverbot im Völkerrecht* (Springer 2017).

their dimension to protect, human rights require states to take active steps so that persons are not impaired by other factors in the enjoyment their rights. Lastly, human rights obligations to fulfill are perhaps the most onerous, considering how they compel states to take actions towards ensuring persons may achieve the "highest attainable standard of health".[77]

Under human rights law, it is uncontested that national authorities must take all means to fulfill the needs of the population under their effective control. Such a view, however, evolved in the course of time addressing situations where decisions by public authorities may have an impact on persons located outside their jurisdiction. This led to the development of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.[78] These Principles, however, do not equate states' human rights between persons within their jurisdiction and persons outside of it.[79] In scholarship, some have posited such equivalence by stating that, practical implications notwithstanding, obligations to persons both within and beyond a state's jurisdiction stand at the same normative level.[80] Nevertheless, this point of view overlooks existing doctrine and institutional practice both at the multilateral and regional human rights systems. When States Parties fulfill their obligations under Arts. 16 and 17 ICESCR to report on the measures taken to observe their obligations,[81] both the CESCR and relevant non-state actors pose state representatives questions on how they upheld the human rights of persons within their jurisdiction.[82] At the most, as explained below, commitments

77 The obligation to fulfill is further structured in obligations to facilitate, provide and promote. CESCR (n 73), paras 3637.

78 Maastricht University/International Commission of Jurists, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (28 September 2011).

79 Olivier De Schutter, Asbjorn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon and Ian Seiderman, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 Human Rights Quarterly 1146.

80 Elena Pribytkova, 'Are there Global Obligations to Assist in the Realization of Socio-Economic Rights?' (2022) 54 N.Y.U. Journal of International Law and Politics 451.

81 Most recently, see CESCR 'Report on the seventy-first and seventy-second sessions (14 February–4 March and 26 September–14 October 2022' (22 February 2023) UN Doc E/2023/22, paras 83–85.

82 See for instance, the Universal Periodic Reviews of the United Nations Human Rights Council, emphasizing their mandate as "reporting actions [taken by states] to improve the human rights situations *in their countries*" (emphasis added), United

to international assistance owed to other states are part and parcel of these obligations.

Obligations to fulfil ESC rights in general and the right to health, in particular, have not evolved to the extent that providing health services and goods – like immunization/vaccination of persons in territories beyond the jurisdiction of authorities – are inherent to states' human rights obligations. The United Nations General Assembly has set the goal for each country in terms of Official Development Assistance (ODA) as that of reaching 0.7 % of its Gross National Income.[83] The Committee on ESC Rights has linked the 0.7 % benchmark to Article 2(1) of the ICESCR, which enshrines states' obligations to "…take steps, individually and through international assistance and co-operation… to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means".[84] Such a decision, however, does not constitute a veritable transnational solidarity, rather a development aid at most.

By means of expanding the fulfillment of the right to health at the policy level, in 2015 all UN Members pledged in the Sustainable Development Goals

(SDGs) to "Ensure healthy lives and promote well-being for all at all ages".[85] Moreover, the SDGs also envisage a commitment to "Reduce inequality within and among countries", with the second dimension being based on official development assistance and financial flows.[86] While the

Nations Human Rights Council, *Universal Periodic Review*, available at: https://www.ohchr.org/en/hr-bodies/upr/upr-home.

83 The goal was first set in *International Development Strategy for the Second United Nations Development Decade,* United Nations General Assembly Resolution 2626 (XXV) (24 October 1970) UN Doc A/RES/25/2626.

84 Article 2(1), International Covenant on Economic, Social and Cultural Rights. There are trends at the Committee on ESC Rights to push for developed states' ODA commitments on the basis of this 0.7 %. CESCR 'Consideration of Reports by States Parties Under Articles 16 and 17 of the Covenant. Concluding observations of the Committee on Economic, Social and Cultural Rights: Spain' (6 June 2012) UN Doc E/C.12/ESP/CO/5, para. 10. See also Pribytkova (n 69) at 429.

85 SDG Goal 3, https://sdgs.un.org/goals/goal3.

86 SDG Goal 10.B, in particular, affirms a commitment to 'Encourage official development assistance and financial flows, including foreign direct investment, to States where the need is greatest…' https://www.un.org/sustainabledevelopment/inequality/.

SDGs are legally nonbinding, they can nevertheless be cited as normative references for assessing states' actions in a number of fields.[87]

3.2 A Prospective Legal Approach towards Transnational Solidarity in Pandemics

Picking up after the lessons learned from the limited success of the ACT-Accelerator and COVAX during the COVID-19 pandemic, the nationalist/regionalist pull should be worked around rather than rejected. Any future mechanism offering alternatives to the "every-country-for-itself" formula should not try to proscribe authorities' sovereign considerations to prioritize their own inhabitants. Such endeavour would be destined to fail. Heeding to arguments posited elsewhere, expecting high-income countries to "repair a broken system that works in their favour"[88] is hardly a compelling political case. High-income countries have little to no political incentive to restrain themselves in the procurement of pandemic-related goods in the future, particularly if that will mean relinquishing existing competitive advantages to the detriment of their constituents.

It is unclear to what extent the push for states to pay equal heed to distributive questions concerning the human rights of persons beyond those within their jurisdiction can be articulated. Not even the extraterritorial dimension of human rights law formulate normative standards applicable equally to the constituencies of different countries.[89] Indeed, when scrutinizing the actions of national authorities, quasi-judicial human rights bodies question them exclusively on the basis of what exactly they did to fulfill their obligations vis-à-vis their own populations.[90] There are exceptional instances in cases where the authorities of one country exercise effective

87 Heike Kuhn, 'Reducing Inequality Within and Among Countries: Realizing SDG 10. A Developmental Perspective', in Markus Kaltenborn, Markus Krajewski and Heike Kuhn (eds), *Sustainable Development Goals and Human Rights* (Springer 2020) 144–145.

88 Mark Eccleston-Turner, 'Future-Proofing Global Health Governance Through the Proposed Pandemic Treaty. Options and Challenges' (*Verfassungsblog*, 18 August 2022) https://verfassungsblog.de/future-proofing-global-health-governance-through-the-proposed-pandemic-treaty/.

89 Again, notwithstanding arguments in Pribytkova (ne 63).

90 As seen in the different United Nations Special Procedures and in the work of both the Human Rights Committee and the Human Rights Committee on Economic, Social and Cultural Rights.

control in territories beyond their own.[91] But there is no known instance in which national authorities are challenged on the basis of to what extent they actively *fulfill* the human rights of populations located beyond their jurisdiction. Moreover, the distribution of scarce goods during time constraints because of emergencies is a zero-sum game. Claims that vaccines, as such, are a "global public good" are normative and do not refer to their physical properties.[92]

That does not mean improvements are not conceivable. Instead, legal limits can be erected to constrain the domestic pull as much as possible.[93] A more robust version of transnational solidarity would need, first, to scrutinize exactly how inequities between countries played out during pandemics so far. The core drivers of vaccine nationalism will not recede in the foreseeable future. There is no point in devising mechanisms of distribution dependent on universal buy-ins, which may run counter to the interests of those meant to do so. Once there is consensus on that point, future mechanisms could offer middle-ground solutions that go beyond charity, whilst remaining a politically feasible option for stakeholders who need to accept such mechanisms.

Ongoing developments in international law on pandemic prevention, preparedness and response are paving the way for deeper discussions of what solidarity means at a transnational level. The current version of a pandemic treaty has devised a so-called Pathogen Access and Benefit-Sharing System (PABS).[94] It offers an operative dimension of solidarity through the concept of equity. In summarized terms, under the PABS model, states would be obliged to share samples of pathogens having pandemic potential with the WHO coordinating surveillance and lab network.[95] These pathogens can be crucial for developing future effective medical goods. In return, recipients of pathogen samples who attained them through PABS

91 Major examples are the United States' operations in Guantanamo prison and its occupation of Afghanistan, as well as the Russian Federation´s ongoing occupation of parts of the territory of Ukraine. For a related study, see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011).

92 Jelena Bäumler and Julieta Sarno, 'The Immunisation against COVID-19 as a Global Public Good' (2022) 82 Heidelberg Journal of International Law 167–170.

93 Similar argument made by Benvenisti (n 3).

94 (n 60).

95 Namely, a global consortium of hundreds of laboratories that may handle pathogens with a pandemic potential, WHO, 'Coordinating Surveillance and Lab Network' https://www.who.int/europe/activities/coordinating-surveillance-and-lab-network.

must sign contracts – named Standard Material Transfer Agreements – that include a clause to provide the WHO with a 20 % of their "real-time production" if and when research using such samples leads to a pandemic-related product. This follows the logic of another existing non-binding mechanism, the Pandemic Influenza Preparedness Framework (PIP Framework).[96] The amount of 20 % doses is identical to the one found in the fair allocation mechanism in the COVAX Initiative, meant to ensure the protection of, first, critical personnel and, second, population groups at the highest risk in case of infection.[97]

The proposed PABS would represent a transnational form of solidarity, wherein states would commit to sharing pathogens with pandemic potential and the medical products resulting from the research and development using them. Such a model of solidarity, however, is not without criticism. The transactional approach of the PABS is, firstly, problematic in terms of the normative implications.[98] On the one hand, the proposed PABS does go beyond the PIP Framework's original bilateral framing, where only the state sharing the pathogen would have access to the benefit.[99] On the other hand, the PABS is based on the premise that sharing 20 % of real-time production is only justified after the sharing of a pathogen sample has occurred. This raises the question of why an unqualified international law obligation of sharing medical goods, which is not contingent upon a preceding pathogen-sharing, has not been considered.

96 WHO, *Pandemic influenza preparedness framework for the sharing of influenza viruses and access to vaccines and other benefits* (2nd edition, 2021) https://apps.who.int/iris/rest/bitstreams/1351857/retrieve. See also David Fidler and Lawrence Gostin, 'WHO's Pandemic Influenza Preparedness Framework: A Milestone in Global Governance for Health' (2011) 306 Journal of the American Medical Association 200.

97 Ezekiel Emanuel (n 63).

98 Mark Eccleston-Turner and Michelle Rourke, 'Arguments Against the Inequitable Distribution of Vaccines Using the Access and Benefit Sharing Transaction' (2021) 70 International and Comparative Law Quarterly 856, 858.

99 WHO, 'Standard Material Transfer Agreement 2' https://www.who.int/initiatives/pandemic-influenza-preparedness-framework/standard-material-transfer-agreement-2-(smta2).

4 Conclusions: Transnational Solidarity in Pandemics at a Crossroads

Like other crises, pandemics are in a relationship of tension with solidarity.[100] In a seminal article, Eyal Benvenisti argued that several of the normative principles of national-rooted sovereignty have evolved due to an increased interdependence between nations, where decisions taken by authorities in one state have an increased impact on stakeholders located beyond their jurisdiction.[101] The question, then, is what type of obligations derive from such interdependence. Considering the national anchors of political representation and accountability, a moral appeal to global ideas of solidarity does not suffice for shaping and construing international law obligations.[102]

Disagreements on how the global distribution of scarce medical goods should be undertaken during pandemics showcase the need to balance the interests of different stakeholders beyond those in a single country. Decisions on the procurement and, therefore, allocation of vaccines taken by public authorities have a direct impact on the populations of other countries. Vaccine nationalism is the direct offspring of pre-existing structures of political accountability, particularly in the public procurement of life-saving medicines. Studies have calculated around one million lives were unnecessarily lost to COVID-19 due to vaccine hoarding.[103] It can be said, then, that failures of transnational solidarity actually leads to a loss of life.

Despite the dramatic consequences of the unbridled self-interest of states, equality of consideration by authorities towards both their populations and those of other countries, while a subject of philosophical debate,[104] is not feasible in terms of international law arguments. Despite the expanding role of the WHO in the current pandemic treaty and amendments to the International Health Regulations, there is no intergovernmen-

100 Hildebrand, Farahat and Violante (n 1).

101 Benvenisti (n 3) 314–318.

102 Philipp Dann, 'Solidarity and the Law of Development Cooperation', in Rüdiger Wolfrum and Chie Kojima (eds), *Solidarity: A Structural Principle of International Law* (Springer 2010) 59–61.

103 Heidi Ledford, 'COVID vaccine hoarding might have cost more than a million lives', *Nature News* (2 November 2022) https://www.nature.com/articles/d41586-022-03529-3.

104 Notably, Thana de Campos-Rudinsky, 'Solidarity and Global Allocation of COVID-19 Vaccines. A Question of Equality?', in Tom Angier, Iain Benson and Mark Retter (eds), *The Cambridge Handbook of Natural Law and Human Rights* (CUP 2022) 465–482.

tal organization capable of representing the international community in the procurement of scarce medical goods. Instead, existing actors have either a private or a hybrid nature.[105] While these actors can exercise international public authority on the operative side of global health policies,[106] their lawmaking powers are still not equivalent to those of intergovernmental organizations. In view of this setting at the multilateral level, what is left is a set of competing normative priorities[107] towards national and foreign rights-holders, where existing legal structures allow the former to prevail over the latter.[108]

Ongoing developments regarding the lawmaking powers of the WHO have opened a path towards different visions of transnational solidarity. So far, treaty negotiations in Geneva have yet to entrench a stronger view of transnational solidarity in future pandemics. Nevertheless, proposals to mitigate the impact of nationalism on pandemic prevention, preparedness and response are still worth exploring. This chapter has posited that any transnational solidarity in pandemics can only be feasible by taking seriously the conceptual tenets of vaccine nationalism witnessed during the COVID-19 pandemic. Only then can solutions be devised to avoid a repeat of the distributive "moral catastrophe" experienced during the pandemic.[109] Future rules of international law will have higher chances of being effective if they work around, rather than aim to suppress the nationalist leanings involved in the public procurement of medical goods.

105 Whether and to what extent these actors exercise international public authority must be attested on a case by-case basis. This, in turn, differs from intergovernmental organization with a legal mandate provided at the outset by their Member States. For more on the theoretical framework of hybrid actors as ad hoc instances of international public authority, see Matthias Goldmann, 'Internationales Verwaltungsrecht', in Andreas Voßkuhle, Martin Eifert and Christoph Möllers (eds), *Grundlagen des Verwaltungsrechts* (3rd edn, CH Beck 2022) 351–352. More specifically on the role of public-private-partnerships in global health, see Markus Kaltenborn and Nina-Annette Reit-Born, 'Public-Private Partnerships als Akteure des Globalen Gesundheitrechts' (2019) 57 Archiv des Völkerrechts 53.

106 On how this was the case with the ACT-Accelerator, see Suerie Moon et al, 'Governing the Access to COVID-19 Tools Accelerator: Towards Greater Participation, Transparency, and Accountability' (2022) 399 The Lancet 492–493.

107 Ferguson and Caplan (n 47).

108 Ana Tanasoca and John Dryzek, 'Determining Vaccine Justice in the Time of COVID-19: A Democratic Perspective' (2022) 36 Ethics & International Affairs 336; (n 11).

109 (n 16).

Lastly, the reaffirmed principle of sovereignty in the current text of the pandemic treaty is not necessarily antagonistic to human rights considerations. Just like how decisions taken within ACT-Accelerator have "crucial implications" for numerous beneficiaries,[110] so does the procurement of medical goods by national and regional authorities. Consequently, even across national authorities, there is an emerging consensus on the need to devise better mechanisms for improving access to medical goods for stakeholders located outside of their jurisdiction. It is a recognition that they can, and should be held to a more stringent standard of transnational solidarity than they currently are. The legal framing of distributive issues during pandemics is a step in that direction, albeit not without hindrances. Whether more ambitious international law obligations for realizing transnational solidarity during pandemics politically stand any chance at prevailing remains an open question.

110 Moon and others (n 106) 491.

Chapter 14 Solidarity in crisis: diplomacy, production capacity and the challenges of vaccine procurement in Latin America

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1 Introduction

COVID-19 proved that infectious diseases with a pandemic potential are a serious threat to global health and well-being. Differential factors in health system capacities locate Latin American countries in a vulnerable spot in comparison to higher-income countries. This resulted in elevated infection and fatality rates in the region, seemingly parallel to pre-pandemic health burdens. The region was almost as affected by Covid-19 as Europe and North America, with more than 1,200 confirmed deaths per million inhabitants.[1]

Although the increased burden of disease in Latin America is not something new, the dynamic for international vaccine procurement introduced by COVID-19 surely is. Before the Corona crisis, most states in the region relied on the Pan American Health Organization (PAHO) Revolving Fund for Access to Vaccines to ensure transparent negotiations with suppliers as well as fair and affordable prices. This mechanism has proven successful in two ways: by increasing immunization across the region, and by maintaining its legitimacy as the main coordination mechanism over the past 30 years. Notwithstanding, this body which could have become a united front for the negotiation of COVID-19 vaccines in better conditions for the region, was relegated to less crucial activities during the pandemic while the procurement of vaccines was channeled through the COVAX mechanism.

Considering this, this paper analyzes the strategies used by eight Latin American countries to procure COVID-19 vaccines between August 2020

1 Thomas J Bollyky, Christopher J L Murray and Robert C Reiner, 'Epidemiology, Not Geopolitics, Should Guide COVID-19 Vaccine Donations' (2021) 398 The Lancet 97 https://doi.org/10.1016/S0140-6736(21)01323-4 accessed 20 May 2024.

and November 2021. We combined several sources of information, especially the Global Health Center and the UNICEF agreement databases. Additionally, we monitored official announcements and newspaper articles for over a year to identify other agreements signed, partners, terms of the agreements, and doses delivered over this period. Furthermore, we confirmed some of the information through informal interviews with key government informants.

We show that coherent with the theoretical framework provided in this book, vaccine procurement in Latin America is an example of desolidarization after a crisis. The findings underscore a paradigm shift in solidarity dynamics, illustrating a departure from cooperative endeavors towards self-serving actions. In navigating the complexities of vaccine procurement, states departed from cooperative mechanisms like PAHO's in favor of autonomous approaches such as direct negotiations, concessions and direct negotiations, and concessions and charitable contributions. Instead of a cooperative attitude, the course of the pandemic highlighted the self-interest behavior of states. To procure vaccines, Latin American countries abandoned PAHO's collective procurement mechanisms and engaged in independent strategies such as direct negotiations with medical producers, special contracts, concessions, and donations. Different procurement strategies, in turn, resulted in different timing and overall access to vaccines. Thus, the Corona crisis induced a transnational solidarity conflict, in which involved parties responded with self-interested behaviors.

The paper compares PAHO's revolving fund and COVAX as solidaristic mechanisms. The contrast between PAHO's revolving fund and the COVAX initiative highlights different facets of solidarity – respectively, cooperative, and philanthropic. While the former prioritizes equity and transparency, the latter has a narrower scope and shows tolerance for opacity. We suggest that, although both can be considered expressions of transnational solidarity, the PAHO revolving fund expresses *cooperative solidarity*, with equity and transparency as core values, whereas the COVAX mechanism expresses what we call *philanthropic solidarity*, where only the poorest are meant to benefit, and secrecy is tolerated in the name of increased coverage. Moreover, the fact that philanthropic solidarity was preferred over a cooperative one may threaten the future of Latin America's vaccine regional integration mechanisms in the future.

It is interesting, however, to note that while Latin America was experiencing a desolidarization moment, the European Union was developing an emerging mechanism close to the Revolving fund to procure COVID-19

vaccines. This may suggest that moments of crisis can destabilize established norms to produce both desolidarization and solidarization at the same time.

In the following sections, we develop the above arguments. First, we show the inequities in vaccine procurement in the region; second, we analyze the possible causes of such procurement inequities and attribute them to secrecy, minilateral negotiation strategies and legal and regulatory exceptions; third, we contrast PAHO Revolving Fund and COVAX as solidarity mechanisms; and fourth, we conclude with a discussion about the lessons learned from the COVID-19 vaccine procurement in Latin America.

2 Vaccine Procurement Inequity in Latin America

In 1977, PAHO's Board of Directors created a financial mechanism (a Revolving Fund) to jointly purchase vaccines, syringes, and cold chain equipment for member states. This mechanism would not only guarantee the affordability of vaccines and other associated health products but also their quality. Although only Bolivia incorporated the revolving fund purchasing mechanism in its legislation,[2] other member states have used it yearly for over 40 years, making it the legal and legitimate solidaristic mechanism for vaccine purchase in Latin America before the Corona crisis hit.

According to PAHO, the Revolving Fund for Access to Vaccines operates under four principles: transparency, quality, solidarity, and equity. It consolidates forecasted member states' demand requirements to leverage economies of scale and guarantee better prices. It also promotes transparent negotiations with suppliers, improving the purchasing power of countries in the Latin American region and contributing to the sustainability of National Immunization Programs. In addition to the negotiation and purchase activities, the Revolving Fund offers a line of credit for member states and guarantees the distribution of purchased vaccines.[3]

Comparing 1979 with 2021, Cornejo et. al show how participant countries in the Revolving Fund increased from 19 to 41 and the products purchased from 6 to 47. Similarly, the Fund's line of credit capital, which

2 Vaccines Law 12 December 2005 (*Ley de Vacunas Bolivia),* Gaceta Oficial de Bolivia, available at https://www.lexivox.org/norms/BO-L-3300.html accessed 20 May 2024.

3 Pan American Health Organization, 'PAHO Revolving Fund' (*paho.org*) https://www.paho.org/en/revolving-fund accessed 13 April 2024.

offers credits without interest for up to 60 days, increased from US$ 1 million to US$ 249 million and the purchased value from US$ 47 million to US$ 1000 million.[4]

Despite its long-lasting reputation, the Revolving Fund was not the place to go for Latin American countries to purchase COVID-19 vaccines. Instead, there were three ways in which countries could theoretically purchase COVID-19 vaccines: (1) through multilateral negotiations and agreements; (2) through bilateral negotiations and agreements; and (3) through donations. In Latin America, the Global Access Mechanism for COVID-19 Vaccines (COVAX) was the only multilateral negotiation platform available to procure vaccines. Under this procurement scheme, among the countries included in this chapter, Bolivia was the only country eligible to be financed. The other seven countries included in this analysis were self-financed, i.e., they paid for the vaccines they had reserved on their own.[5]

Considering that COVAX was not enough to reach the full vaccination of the population and that the first delays in delivering the doses proved that the mechanism was unreliable, most Latin American countries realized that a variety of procurement sources had to be used to balance the risk of supply shortages and delays in access to COVID 19 vaccines. In this sense, the Corona crisis, was a "point of intersection" in which predictability was shaken and the dominant mechanism for procurement became dislocated.[6] More importantly, the changes in procurement legal agreements produced important inequities in what used to be a pretty just procurement and access regional mechanism thanks to the Revolving Fund.

Production of major Coronavirus vaccines at the time was concentrated in 35 countries, most of them wealthy, according to data compiled by Duke University's Center for Global Health Innovation. All of them with facilities involved at some point in the production of the Oxford/AstraZeneca, Pfizer-BioNTech, Janssen (Johnson and Johnson), Moderna, Sinovac and

4 Santiago Cornejo and others, 'El Fondo Rotatorio para el Acceso a las Vacunas de la Organización Panamericana de la Salud: 43 Años Respondiendo al Programa Regional de Inmunizaciones' (2023) 47 Revista Panamericana de Salud Pública https://doi.org/10.26633/RPSP.2023.50 accessed 20 May 2024.

5 The other eligible countries for the COVAX mechanism were Dominica, El Salvador, Grenada, Guyana, Haiti, Honduras, Nicaragua, St. Lucia, St. Vincent & the Grenadines.

6 Brian Milstein 'Thinking Politically about Crisis: A Pragmatist Perspective' (2015) 14 European Journal of Political Theory 141.

Sinopharm Beijing formulations, the vaccines that have received World Health Organization (WHO) approval, as well as that of the Gamaleya Institute (Sputnik V), which was under review in the EU at the time and had received emergency authorization in dozens of countries, including some of the Latin American countries in focus.

To secure enough vaccines, Latin American countries used a combination of strategies to complement COVAX, which included signing different kinds of agreements with pharmaceutical companies and receiving donations. All the countries analyzed here advanced purchase agreements (APAs) while also participating in COVAX. However, the speed and the number of agreements varied considerably across countries.

By the end of 2021, Brazil and Mexico had signed the most bilateral agreements with companies (14 and 11, respectively), followed by Peru (8), Bolivia, Chile and Colombia (5), Argentina (4) and Ecuador (3). While the number of agreements does not necessarily coincide with the number of treatments secured, in this case, the order is maintained (see Figure 1). We use the term treatment to refer to the number of doses a vaccine requires for the immunization process to be completed without boost shots. For most vaccines, this means two doses; however, for vaccines produced by Johnson&Johnson or CanSino a treatment is equivalent to one dose.

Figure 1. Number of secured treatments (08/2020 – 11/2021)n

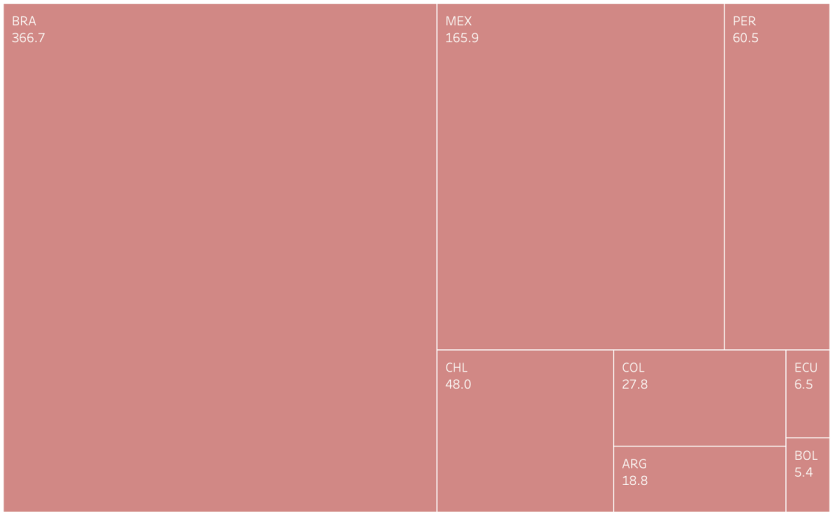

Figure 1. Number of secured treatments (08/2020 – 11/2021)n

When the secured treatments are analyzed as percentage of the country population, however, things change considerably. As shown in Figure 2, by this metric, Chile was able to secure more than 2.5 times the treatments needed to immunize its population, Peru two times, Brazil 1.9 times and Bolivia 1.8 times. Meanwhile, Argentina, Colombia and Ecuador struggled to secure the doses for half of their population. Moreover, as of April 2021, only Chile and Brazil had more than 25 % of the treatments agreed to be delivered.

Figure 2. Agreed and delivered treatments as a percentage of the population of the recipient country

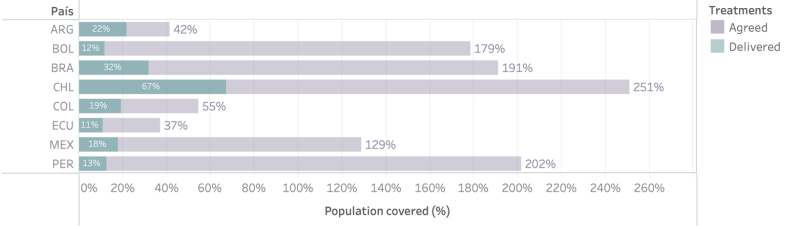

Figure 2. Agreed and delivered treatments as a percentage of the population of the recipient country

The delivery of vaccines was unequal across countries because it was strictly dependent on the time of agreement. As Figure 3 shows, bilateral agreements with companies account for most treatments delivered and explain Chile's and Brazil's relative success compared with other countries in the region. By contrast, COVAX was responsible for an important number of treatments delivered only in Bolivia.

Figure 3. Delivery of vaccine treatments by procurement strategy

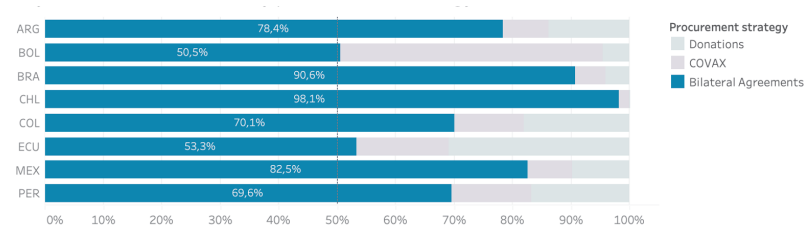

Figure 3. Delivery of vaccine treatments by procurement strategy

If we analyze the treatments delivered as a percentage of the population, however, we see further inequities. By July 2021, only Chile had enough treatments to cover more than 60 % of its population, followed by Brazil, with delivered treatments for 30 % of its population and Argentina, with treatments for a mere 20 % (Figure 4). The rest of the countries struggled to secure enough treatments for prioritized populations.

Figure 4. Treatments delivered as a percentage of the population of the recipient country

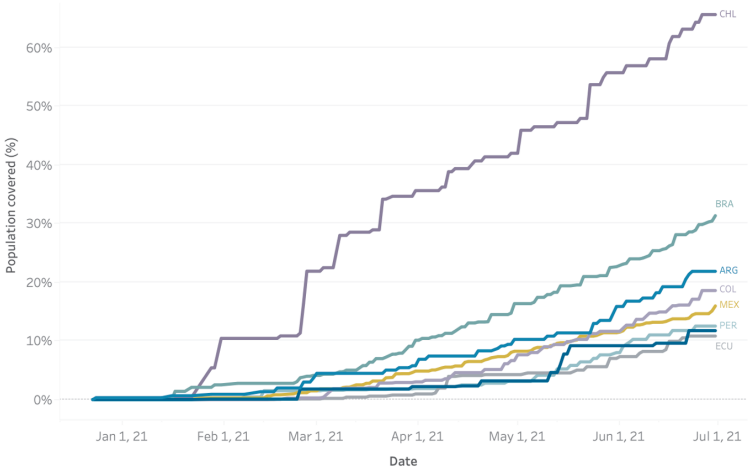

Figure 4. Treatments delivered as a percentage of the population of the recipient country

These inequities could be attributed to several differences in negotiating strategies. First, countries could not learn from the experiences of other countries nor have an international reference price because agreements were confidential. Second, countries had more leverage depending on their previous capacities. For instance, countries with manufacturing capacity were able to secure agreements that involved technology transfer and participation in the manufacturing processes. By contrast, the countries with limited capacities could either offer to conduct local clinical trials or simply purchase the necessary doses in the marketplace. Third, the sheer need for doses obliged countries to agree to clauses that would otherwise seem unthinkable. Some countries had to change their laws to guarantee the conditions posed by pharmaceutical companies.

In sum, although centralizing vaccine procurement in a unique global mechanism such as COVAX that promised to work with governments and manufacturers to ensure safe and effective COVID-19 vaccines were available to the highest risk populations worldwide, regardless of income level, for the Latin American region this meant undermining of the PAHO's Revolving Fund. This implied a crisis-induced process of desolidarization. A strong external shock (the Corona crisis) provoked solidarity conflicts, un-

dermined previously agreed upon norms, and replaced a legitimate regional solidaristic negotiation and procurement mechanism with a fragmented self-interested one.

3 Sources of Vaccine Procurement Inequities

In this section, we identify the multiple ways in which Latin American countries' independent negotiation and procurement strategies were inferior to the Revolving Fund solidaristic mechanism.

3.1 Secrecy of vaccine agreements

Following a trend that had already made its way into negotiations between pharmaceutical companies and governments to acquire drugs for high-cost diseases such as cancer, vaccine producers insisted on the confidentiality of all their supply agreements. This meant that countries could not publicize the contracts they signed to access vaccines despite the fact that these are clearly in the public interest. This confidentiality status also further prevented governments from negotiating on equal terms.

According to the information known at the time, the approval of new regulations in Latin America, including laws, decrees, and resolutions, strengthened the opacity of the purchase of vaccines and granted economic indemnity and confidentiality to pharmaceutical companies. Several of these changes, including the confidentiality of contracts, were made at the request of the laboratories.

The information blackout was also replicated in Mexico. Four of the documents that were marked as confidential by the Government for the contracts with Pfizer, AstraZeneca, and CanSinoBIO, are called: "Indemnification", "Insurance and Liability", "Exclusion of Liability" and "Release; Limitation of Liability for Claims Other than Third Party Indemnity, Disclaimer of Warranties".

Taking advantage of existing or recently created norms and laws to mark confidentiality, none of the Latin American countries made public the documents related to the purchase of vaccines (except Chile, where the chapter of Transparency International had access to a copy of the contract with the Covax Fund with erasures) or to the negotiations with the laboratories. However, Mexico set a deadline for the confidentiality of negotiations and

contracts for the purchase of vaccines. The Mexican government used its transparency law to define the end of confidentiality in five years.

Despite the advantages of pricing transparency for vaccine distribution, price per dose – the contractual information perhaps most highly valued by the global community – has also been systematically unpublished. Whilst there have been reports from parties involved in agreements, pricing information is incomplete in all formally published contracts other than those of the Dominican Republic and the United States.

Analysis of prices sourced from UNICEF's Market dashboard indicates concerning price variation both as a whole and when assessing specific vaccines. For example, for the AstraZeneca-developed vaccine, the dashboard showed that on average High-Income Economies are paying the least at US $6.26 per dose, second are the Lower-Middle Income Economies at US $6.72, and the most spent on vaccines is by UpperMiddle Economies at US $7.81.

Table 1 shows the prices per dose for some Latin American countries when available through public sources, including prices of COVAX or leaked documents. Unfortunately, there is only information about Argentina, Brazil, Mexico and Colombia.

Table 1. Available prices for certain vaccines and certain countries (several sources)

Country	*Vaccine developer*	*Price per dose (US)*
Argentina	Sinopharm	$40,00
Brazil	AstraZeneca	$3,16
Brazil	Bharat Biotech	$15,00
Brazil	Serum Institute of India	$5,00
Brazil	Sinovac	$10,30
Colombia	Pfizer	$12,00
Colombia	Sinovac	$6,00
Latin America	AstraZeneca	$4,00
Latin America	Gamaleya Research Institute	$3,00
Mexico	Serum Institute of India	$4,00
COVAX AMC	AstraZeneca	$3,00
COVAX AMC	Covavax	$3,00
Perú	Pfizer BioNTech	$12,00

3.2 Minilateral negotiation strategies

Another source of difference across countries is the type of agreements signed. Some involved manufacturing and technology transfer compromises, others included the development of clinical trials in the recipient country, and some were simple purchases.

3.2.1. Manufacturing agreements

In late 2020 and early 2021, procurement was the main indicator of who would receive vaccines and who would be left behind. However, manufacturing and supply quickly became crucial constraints for vaccine equity. Manufacturers could be categorized into two systems or approaches: one "global and decentralized" and one "centralized and internal" approach. Most were somewhere in between, but there were groups at both ends of the spectrum.

Global purchasing patterns tended to reflect the manufacturing approach. Those adopting a decentralized one had generally prioritized this in their sales and had a wider reach regarding the number of countries and regions purchasing their vaccine.

On the other hand, those who opted for a centralized approach tended to prioritize their manufacturing sites for 2021 sales and deliveries. A clear example in this regard may be that of US-based Moderna, whose mRNA vaccine is being manufactured in the US, South Korea and Europe (at plants in Spain, France, Switzerland, and the Netherlands). It had been purchased mainly in North America, Europe, South Korea, Japan, and Australia. At the time, Moderna had been one of the most expensive vaccines, and the cold chain conditions required for its conservation were less ideal for countries with fewer resources.

These power asymmetries reflected in vaccine access are influenced by other strategies such as manufacturing agreements. Survey results from the Coalition for Epidemic Preparedness Innovations (CEPI) highlighted that potential manufacturing capacity is concentrated in a few high-income and emerging economies, with the United States, China and India being the largest potential producers. These are followed by several economies in the European Union, Australia, Brazil, Canada, the Russian Federation, and the United Kingdom (CEPI, 2020). This underlines the strong degree of concentration of producers and distributors in emerging and high-income economies (ADB, 2020). Through manufacturing agreements, Latin

American countries found a way to compete in the vaccine market and gained procurement security. Below we compiled the information on public manufacturing agreements in the countries we reviewed using data from the UNICEF's Market dashboard. According to this, only Argentina, Brazil, and Mexico signed technology transfer agreements. Presumably, this has implications for the number of vaccines purchased by these countries and the speed of vaccine delivery.

Agreement type	Vaccine developer	Manufacturer	Vaccine name	Country
TechTransfer	Gamaleya Research Institute	Laboratorios Richmond	Sputnik V	Argentina
TechTransfer	AstraZeneca	mAbxience	Vaxzevria	Argentina
TechTransfer	Sinpharm (Beijing)	Unknown	BBIBP-CorV	Argentina
TechTransfer	AstraZeneca	Fiocruz	Vaxzevria	Brazil
TechTransfer	Sinovac	Instituto Butantan	Vaxzevria	Brazil
TechTransfer	Gamaleya Research Institute	União Química	Sputnik V	Brazil
TechTransfer	Gamaleya Research Institute	BIRMEX	Sputnik V	Mexico
TechTransfer	AstraZeneca	Laboratorios Liomont	Vaxzevria	Mexico

3.2.2. Clinical trials

Another strategy used by Latin American countries in this vaccine race concerns the approval of clinical trials in their territories. Below we mention the different clinical trials known and carried out in the countries we reviewed, according to information from Americas Society/ Council of the Americas (AS/COA):

Brazil	June 3, 2020 — Brazilian health regulator Anvisa announces it's approved human clinical trials to begin for an Oxford University vaccine in São Paulo. June 20, 2020 — Anvisa approves the third and final testing stage for the Oxford-AstraZeneca vaccine. July 3, 2020 — The Butantan Institute has reached Phase 3 for the Sinovac Biotech vaccine. July 21, 2020 — Brazil's government approves the country's third clinical trial for August, U.S. pharmaceutical firm Pfizer and German laboratory BioNTech's joint study.

	August 18, 2020 — Brazil's Anvisa approves human trials for over 6,000 volunteers for the Johnson & Johnson vaccine, the fourth candidate to enter Phase 3 trials in the country, joining the Oxford-AstraZeneca, Sinovac Biotech, and Pfizer-BioNTech vaccines. September 9, 2020 — Brazilian laboratory DASA announces it agreed to conduct Phase 2 and 3 trials of the U.S. COVAXX vaccine, pending regulatory approval, once the first phase of trials concludes in Asia. September 10, 2020 — The Brazilian state of Bahia agrees to conduct Phase 3 trials of the Russian Sputnik-V vaccine, pending regulatory approval. The state plans to purchase 50 million doses. September 15, 2020 — Brazil's Anvisa gives AstraZeneca approval to test the Oxford vaccine on an additional 5,000 Brazilians in Phase 3 trials. May 16, 2021 — Authorities in the city of Botucatu in the Brazilian state of São Paulo began inoculating citizens 18 to 60 years of age with the AstraZeneca-Oxford shot. July 6, 2021— Brazil's Anvisa announces it approved phase 1 and 2 clinical trials involving 150 volunteers for a Covid vaccine by French developer Sanofi Pasteur in collaboration with British firm GlaxoSmithKline. July 19, 2021 — Brazil's health ministry approves a trial of a third dose of AstraZeneca that will involve 10,000 volunteers.
Chile	August 2, 2020 — The Chilean Science and Health Ministries announce the start of Phase 3 clinical trials for the Chinese Sinovac vaccine trial, in collaboration with the country's Catholic University. The university's immunology center signed an agreement of cooperation with the Chinese pharmaceutical firm on July 16. November 4, 2020 — Chile announces that national regulator ISP approved Phase 3 trials for the AstraZeneca-Oxford vaccine. May 5, 2021 — Chile announces a new Sinovac clinical trial in a university study involving 5,000 children between 3 and 17 years of age.
Colombia	August 26, 2020 — Colombia's National Food and Drug Surveillance Institute approves clinical trials for Johnson & Johnson's vaccine at various study centers across the country.
Mexico	August 11, 2020 — The Mexican Foreign Ministry announces it will conduct Phase 3 clinical trials developed by U.S. firm Johnson & Johnson's pharmaceutical branch, Janssen, as well as two Chinese companies, CanSino Biologics and Walvax Biotechnology Co Ltd. August 25, 2020 — The Mexican government announces that 2,000 Mexicans have volunteered to participate in Phase 3 trials of the Russian vaccine Sputnik V. January 8, 2021— Mexico's Foreign Ministry announces that health regulator Cofepris has approved Phase 3 clinical trials for Germany's CureVac vaccine. February 2, 2021 — Mexico's Foreign Minister Ebrard announces that Phase 3 joint trials with the United States for the Novavax vaccine will begin involving 2,000 Mexican participants in seven medical centers nationwide.
Peru	August 28, 2020 — Per Reuters, Peru looks to begin separate testing of Chinese and U.S. vaccines. In the case of the Chinese tests, clinical tests will be led by Sinopharm, in collaboration with Lima's Cayetano

	Heredia University and National University of San Marcos, with 6,000 volunteers. Johnson & Johnson's will involve 4,000. September 9, 2020 — Peru begins clinical trials for the Sinopharm vaccine.

While many countries used clinical trials as a bargaining tool, it is unclear whether this strategy secured treatments faster than other strategies.

3.2.3. Diplomatic approaches

Success in vaccine negotiations was also mediated by timelines in international relations. In earlier stages of the pandemic, there were greater economic and scientific risks deriving from the uncertainty of whether vaccine candidates would be effective and successful in clearing sanitary regulations. Thus, the prospect of negotiating earlier was more costly. However, some countries were able to mobilize their diplomatic capital to advance strategies to mitigate some of these costs. Chile's strategy, for example, consisted not only of building a diverse negotiation portfolio with different pharmaceutical companies but also of including mechanisms that could compensate for scientific failure in the contracts they negotiated. This could be dependent on the early timeline of the negotiations but also due to Chile's reputation, relations, and experience in international trade. Therefore, state-level differences both in diplomatic capital and the timeline of negotiation strategies are factors we consider necessary to understand the variance in vaccine procurement we find in the region.

The ability to employ diplomacy to negotiate earlier helped some countries reduce the costs of uncertainty and put the region on the map of vaccine procurement. For example, Argentina's diplomacy with Russia managed to get the Latin American region onto Sputnik's radar. Also, early agreements between Chile and China, allowed for the latter to identify Latin American countries as potential buyers and to offer them credits for the purchase.

3.3 Legal and regulatory exceptions

3.3.1. Arbitration clauses

Arbitration clauses are especially important if we consider that among the conditions imposed by the pharmaceutical companies in these contracts

was being exempted from any responsibility for adverse effects that their vaccines may generate and the requirement that Latin American countries have sufficient funds reserved to address any lawsuit for such adverse effects.

Brazil, Argentina, Colombia, and Peru were also exposed to the economic indemnity requirements imposed by the laboratories. Colombia made explicit in the new regulations the possibility of contracting a "global coverage policy to cover possible convictions that may arise", one of the requirements imposed by Pfizer to sell its vaccine.

Pfizer was later questioned by various governments in the region, which have accused it of demanding unacceptable conditions for the sale of vaccines -e.g., Argentina. To cover itself against possible lawsuits, the pharmaceutical company asked countries to support the company by safeguarding their sovereign assets, which are federal reserves and military assets.

In Peru, government officials revealed that during the negotiation process, this laboratory requested clauses exempting it from liability for possible adverse effects of the antigen, delays in the delivery of batches, or other types of protection against future lawsuits. Amid the negotiations, the Government issued a supreme decree expressing its commitment to submit to international arbitration in case of disputes arising from the purchase of vaccines. Negotiations went on for several months. Finally, in February 2021, the contract for 20 million vaccines was signed, five months after the signing of binding terms and conditions between the Peruvian Ministry of Health and Pfizer. This first agreement contemplated the payment of US$118.8 million for an initial 9.9 million vaccines. That is US$12 per dose and US$ 24 for each complete vaccine.

3.3.2 Tax and law exemptions

In addition to the confidentiality agreement and arbitration clauses granted by different countries to laboratories, some tax exemptions were also imposed to purchase vaccines. In the case of Mexico, the Law of General Import and Export Taxes was modified, the first in July 2020, to create the table that established a 5 % import tax per kilogram of vaccine and exemption for exports. In February 2021, it was modified again to make the import and export of vaccines tax-free. Argentina also included the tax exemption for vaccines in its law created on October 29, 2020, specifically for vaccination in the country. Article 6° established that no import duties or any other taxes or levies have to be paid for COVID-19 vaccines.

Peru was one of the first countries to make changes to its regulations. In September 2020, as part of the negotiations with Pfizer, Sinopharm, and other laboratories, the Executive issued an Emergency Decree that excluded vaccine purchases from the State Contracting Law. These advantages also covered the distribution, application, and other complementary contracting processes to carry out the vaccination plan.

Another similar case is Mexico, which included in the amendments to its regulations the possibility of making payments more flexible for vaccine manufacturers. The regulation stated that "payments and necessary advances may be granted to enable them to obtain better conditions of opportunity and in the shortest possible time".

4 PAHO and COVAX as solidarity mechanisms

Solidarity is intrinsic to vaccine procurement and distribution in at least two ways. On the one hand, the underlying public health logic states that vaccines imply solidarity between the individual and the immediate group to which she belongs – be it a community, a family, a school, etc. In this type of concrete solidarity, one protects the group by immunizing oneself -i.e., herd immunity. On the other hand, vaccines imply a more extended type of solidarity that could transcend the immediate group to reach fellow city, nation, and world citizens. In this latter, more abstract type of solidarity, access to vaccines becomes an issue of human rights rather than an issue of herd immunity.

This could be mapped into the classic Durkheimian concepts of mechanical and organic solidarity. The term “herd” immunity suggests the existence of a “collective conscience”, the sense of belonging to a group and owing to it. Also, immunization to achieve herd immunity is the focus of a good amount of group pressure with its legal deployment in vaccine mandates and travel requirements. By contrast, when vaccination solidarity is expanded to the transnational level, the connections become loose, and the common conscience must rise above all diversities. Solidarity becomes more abstract and feebler, as in organic solidarity. In this case, legal mandates should be contractual and not discriminatory, as organic solidarity is more explicitly the result of the free will of autonomous individuals[7].

7 Émile Durkheim, *The Division of Labor in Society*, (Free Press, 1997); Peter Thijssen, 'From Mechanical to Organic Solidarity, and Back: With Honneth be-

With these lenses, we want to argue that, despite both being forms of purposeful transnational solidarity, the PAHO Revolving Fund falls closer to mechanical solidarity in the sense of responding to a Pan American binding collective conscience, while mechanisms such as GAVI and COVAX fall closer to organic solidarity, with a more abstract and loose sense of the collective with voluntary participation.

As stated above, the PAHO Revolving Fund helps countries accurately estimate their requirements for vaccines and related supplies and consolidates regional demand so that vaccines can be procured in bulk at the lowest price and shipped to each participating country. The Fund praises conducting competitive, transparent tenders for WHO-prequalified products and suppliers.

The activities of the PAHO Revolving Fund, coupled with the provision of high-quality technical assistance, were crucial to the successful control, elimination, or eradication of most of the region's great childhood killers, including polio, measles, and rubella. Between 1987 and 2010, measles elimination efforts led to the implementation of 157 national vaccination campaigns, vaccinating a total of 440 million people of all ages.

yond Durkheim' (2012) 15 European Journal of Social Theory 454 https://doi.org/10.1177/1368431011423589 accessed 20 May 2024.

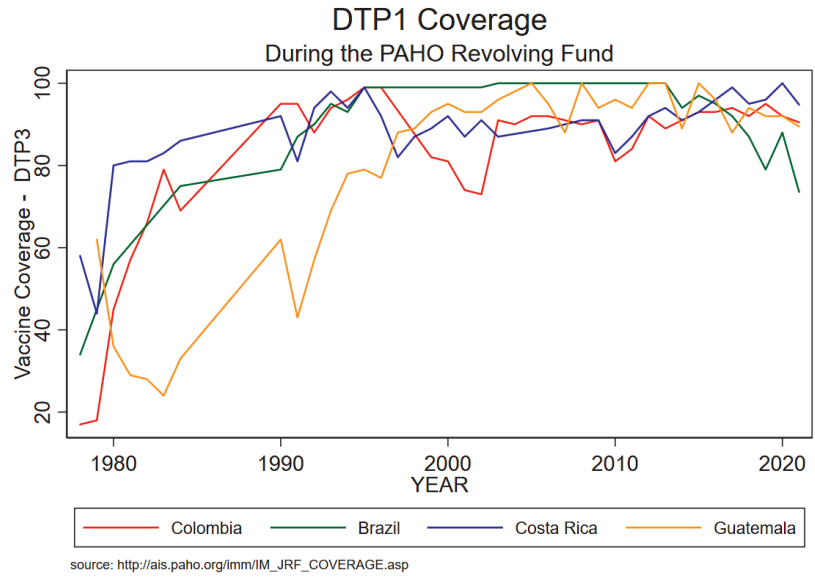

Figure 5. DPT1 Coverage (selected countries)

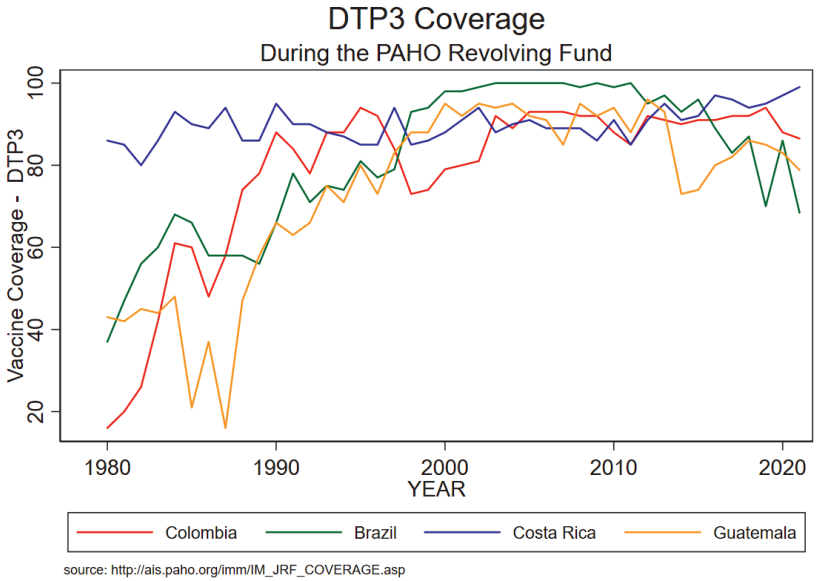

Figure 6. DPT3 Coverage (selected countries)

Immunization rates have grown steadily in the region, independent of the size, state capacity, and purchasing power of the country. As illustrated by Figures 5 and 6, for example, countries as diverse as Brazil, Colombia, Costa Rica, and Guatemala up took DPT1 and DPT3 vaccines in the 1980s and have been able to maintain vaccination coverage close to 80 % since the mid-1990s. Also, countries in Latin America and the Caribbean vaccinate over 100 million adults and children annually against seasonal flu.

Over the past 40 years, and on all sides of the political spectrum, PAHO Member States have maintained their commitment to the PAHO Revolving Fund, safeguarding its principles that are "solidarity, Pan-Americanism, and equitable access." Following these principles, the fund does not classify countries by gross national income. "Instead, the Revolving Fund establishes practices and procedures to offer quality vaccines to all participating countries and territories at the same lowest price per vaccine."[8]

Unlike PAHO Revolving Fund, GAVI was founded in the late 1990s to respond to the emergence and unaffordability of new vaccines. Rather than being an effort of nation-states, this was an initiative championed by the Bill & Melinda Gates Foundation and a group of founding partners who came up with "an elegant solution to encourage manufacturers to lower vaccine prices for the poorest countries in return for long-term, high-volume and predictable demand from those countries."[9]

Unlike PAHO's Revolving Fund, GAVI and later COVAX expand beyond nation-states to incorporate private actors, philanthropies, civil society organizations, banks, and other international organizations. Rather than using a language of collective conscience, they use the language of donors and beneficiaries.

But far from falling under a social evolutionist conception of solidarity whereby there is a unidirectional path from mechanical towards organic solidarity, we follow other authors that suggest that a historical cyclical model that links mechanical solidarity to organic solidarity, and vice versa, is possible.[10] Rather than thinking of mechanical solidarity as an archaic form of solidarity, we view it as the moral complement to healthy organic solidarity.

8 Pan American Health Organization (n 3).

9 Gavi, 'About Our Alliance'(*gavi.org*, 22 April 2024) https://www.gavi.org/our-alliance/about accessed 14 March 2023.

10 Craig J Calhoun, 'Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere' (2002) 14 Public Culture 147; Thijssen (n 6); Graham Crow, *Social Solidarities: Theories, Identities and Social Change* (Open University, 2002).

This is consistent with Andrea Sangiovanni's understanding that solidarity should not be grounded in "identity or fellow feeling", but in the recognition and endorsement of "reciprocity" and "joint action". Thus, we suggest that PAHO's Revolving Fund is a form of transnational solidarity that managed to last for a long time and foster cooperation, becoming a cooperative transnational solidarity. By contrast, GAVI and COVAX became voluntary and loose cooperation mechanisms with philanthropic elements.

5 Conclusion

What happened in the eight Latin American countries analyzed here reveals the need for a renewed framework for global collective action to promote effective prevention and response to pandemic infectious diseases and to ensure equitable access to medicines.

In the Latin American context, with the difficulties we have pointed out throughout this paper and the strategies that countries have adopted to deal with the lack of manufacturing capacity and uncertainty in the purchase of vaccines, we believe that emphasis should be placed on strengthening national capacities through multilateral institutions. Both binding agreements and effective resource sharing could help build a balanced governance framework that appropriately allocates subnational, national, and global responsibilities and does not constrain national initiative while providing a global safety net to support countries and geographic areas that have not yet developed such capacities. This treaty could achieve these objectives by building on the existing infrastructure of WHO and other agencies.[11]

Ensuring access to information on contracts, what is purchased, at what price, what is received, and how and with what criteria vaccines are distributed and applied is essential to control what the government does. Secrecy opens the opportunity for corruption and deepens the gaps in access to vaccines amid the transnational health crisis.

The philanthropic notion of solidarity, which may be consistent with that of Gould and Sangiovani, should be expanded because in moments of crisis

11 Fariza Nasreen Seraj Ahmad and others, 'Southeast Asia Needs a Revolving Fund for Vaccines' (2022) 10 *The Lancet Global Health* e1557 https://doi.org/10.1016/S2214-109X(22)00406-5 accessed 20 May 2024.

when we need to remember that we are all humans and interdependent, it may be insufficient.[12]

12 Jon Kim Andrus and others, 'New Vaccines for Developing Countries: Will It Be Feast or Famine?' (2009) 35 American Journal of Law & Medicine 311, https://doi.org/10.1177/009885880903500204 accessed 20 May 2024; Carol C Gould 'Solidarity between the National and the Transnational: What Do We Owe to "Outsiders"?' in Helle Krunke, Hanne Petersen, and Ian Manners (eds) *Transnational Solidarity: Concept, Challenges, and Opportunities* (Cambridge University Press, 2020).

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