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The implementation of the principle of solidarity as a persistent ‘make-it or break-it’ challenge for the EU

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Parole chiave

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Abstract

The blogpost discusses the persistent crisis of solidarity which is hammering governance of irregular migration and asylum policies within the EU. The Authors argue that the lack of solidarity is the main reason behind the failures of European migration policy and urge for a thorough debate and reform of the Dublin system.

¹ The current contribution is a reflection which started with the publication of a special issue on ‘Migration Crises and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity’, for the *European Journal of Migration and Law*, issue 1- 2020, with articles of Simone Penasa, Graziella Romeo, Iris Goldner Lang, Luisa Marin, Silvia Morgades Gil, and Davide Strazzari.

This blogpost discusses the persistent crisis of solidarity which is hammering governance of irregular migration and asylum policies within the EU.

Solidarity is among the fundamental values of the EU, and is also a core value of the common policies on asylum, immigration and external border controls, together with fairness toward third-country nationals (Article 67 TFEU). It is sufficient to look at Article 80 TFEU, which addresses the concern about solidarity by stating that migration policies shall be “governed by the principle of solidarity and fair sharing of responsibility.” The same concern is well known by European institutions. In the case *Slovakia and Hungary v. Council*, Advocate General Bot stressed that “solidarity is among the cardinal values of the Union and is even among the foundations of the Union.” According to Bot, “solidarity is both a pillar and at the same time a guiding principle of the European Union’s policies on border checks, asylum and immigration” (see Opinion of Advocate General Bot, 26 July 2017 in Cases C-643/15 and C-647/15, *Slovak Republic, Hungary v. Council of the European Union*). More recently, Advocate General Sharpston argued that the principle of solidarity necessarily implies accepting burden-sharing (see Opinion of Advocate General Sharpston, 31 October 2019 in Cases C-715/17 *Commission v. Poland*, C-718/17 *Commission v. Hungary* and C-719/17 *Commission v. Czech Republic*).

Irrespective of its legal relevance, the principle of solidarity in the policies of migration and asylum is struggling to materialize in a stable way in the context of asylum (see for example M. Takle, *Is the migration crisis a solidarity crisis?*, in *The Crisis of the European Union*, A. Grimm (Ed.), pp. 116-129, London: Routledge, 2018). Attempts at enacting instruments translating forms of solidarity in the EU have created tensions and conflicts at many levels, between Member States (horizontal level) and between (some) states and the EU (vertical level).

This has happened although in political speeches solidarity is usually invoked as the ‘binding element’ the EU needs in order to show its capacity to ‘throw the heart beyond the obstacle’, motivating the exceptional pooling of resources in difficult times. For example, solidarity is invoked to create momentum for reforms and actions to counterbalance the distortive effects of integration projects created upon incomplete political visions.

Against this backdrop, the governance of the humanitarian dimension of migration constitutes a complex and critical policy area of European integration, where states have divergent interests (S. Nicolosi, *La riforma del sistema europeo comune di asilo tra impasse negoziale e miopia normativa*, *Rivista trimestrale di diritto pubblico*, 2019, pp. 521 ff). Furthermore, the heart of the challenge lays in the fact that solidarity within the EU, between Member States and toward third-country nationals entails complex redistributive questions on which states want to have full control, for several reasons: first, due to budgetary implications; second, solidarity in asylum means some openness toward non-European citizens on matters touching upon access to domestic welfare systems; third, solidarity between Member States requires high levels of systemic trust between the states. Such a level of trust, is normally achieved within state entities through coordination among their own internal structures and organization. Now, the EU itself has limited supranational bureaucracies, and therefore requires the cooperation of the Member States to enforce EU law. Indeed, the EU is a polity that mirrors some of the operational strategies of federal

systems. When it comes to migration, asylum and border control though, state sovereignty is still a bulwark against genuine political integration. In other words, the problem of migration policy needs to be understood in light of the perspective of European integration and thus by linking the application of European measures to the broader political context of Member States. What the migration crisis reveals is thus the tension between a sovereignty-based rhetoric and the concrete impossibility to face contemporary mass migration at domestic level.

From such a viewpoint, the scenario is far from being comforting. Indeed, only one year ago Italy's 'closed ports policy', coupled with Malta's refusal to accept the *Aquarius* ship and the French President's reaction against Italian 'immigration cynicism', raised the issue of intra-European solidarity and responsibility sharing. The issue of migration policy became soon linked to the spread of sovereignist and *identitarian* arguments in public debate. On the very same days when Italy, Malta and Spain were discussing the destiny of the *Aquarius*, the Hungarian Parliament passed a constitutional amendment aiming at introducing the concept of constitutional self-identity. In doing so, the Hungarian Parliament was actually following up a previous judgment of the Hungarian Constitutional Court which recalled the concept of the "constitutional self-identity of Hungary", the preservation of which is a duty for all state bodies (art. 3, Bill T-332).

Radical sovereignist rhetoric has ceased to dominate the Italian and also the European debate on migration. At the same time, the only step forward in the direction of responsibility sharing in migration has been the Malta declaration on disembarkation of September 2019. Italy, France, Germany and Malta meet under the aegis of the Finnish Presidency and the Commission. The meeting resulted in a joint declaration setting out some elements of a scheme for future possible arrangements and calling for other Member States to participate in the new mechanism envisioned to deal with disembarkations. The Malta joint declaration is an example of intergovernmental informal cooperation and by reading it through it is evident that it lacks many core aspects which are necessary to transform it into a piece of EU legislation. Indeed, states agree that, on the one hand, the new scheme will be applicable for six months, with one possible renewal, and on the other the reform of the Common European Asylum System must still be pursued on different though complementary grounds. The declaration aims at introducing a new relocation mechanism based on five essential rules: 1) states have to ensure the 'dignified disembarkation' of migrants taken on board on the high seas on a vessel; 2) states can always offer an alternative place of safety on a voluntary basis, informing the Commission; 3) in case of disproportionate migratory flows in a participating state, an alternative place for a safe disembarkation shall be proposed; 4) persons rescued by state-owned vessels shall be disembarked in the territory of their flag state; 5) vessels engaged in rescue operation shall be required to comply with the instruction given by the Rescue Coordination Centre and abstain from interfering with Search and Rescue operations of the official coast guards of African states, including Libya.

To some extent the declaration rationalized *ex post* the management of mass migration of the last six months. Indeed, EU Member States engaged in arm wrestling over the identification of the safe place of disembarkation, with Malta refusing on a number of occasions the designation made by Italy.

If one looks at the declaration from the viewpoint of the sovereigntist arguments as explored so far, it does not seem that it paves the way for a radical different narrative of the proper way to manage mass migration or, even less, of the relevance of states' responsibility in taking care of migrants rescued in a situation of distress.

Therefore, even if the peak of the sovereigntist rhetoric on migration is over at the present moment, EU Member States have so far failed to move decisively forward a serious discussion of the flaws of the Dublin system and a reform. The weakness of the European asylum system then is becoming the mirror of the weakness of the European integration. Significantly enough, Advocate General Bot interpreted the opposition of the two recurring Member States – Slovakia and Hungary, together with the support of Poland – to the so-called relocation mechanism (Council Decision (EU) 2015/1601 of 22 September 2015) as the expression of “the crisis of the European integration project, which is to a large extent based on a requirement for solidarity between the Member States which have decided to take part in that project.”

This is, however, precisely the moment when the role of the principle of solidarity is brought into play. Such a principle, indeed, should be interpreted, at the same time, as part of Member States' constitutional identities as well as the operational instrument for coordinating actions within the EU.

In other words, the issue of migration policy should be addressed as a problem of how a transnational/quasi-federal polity enforces solidarity values when it comes to external migration flows. This is another way of saying that the problem of mass migration is linked to the broader issue of the building of an authentic transnational polity, which should be able to speak with a single voice in immigration matters. Indeed, detaching the management of mass migration from the issue of building a transnational polity is probably one of the reasons of the current shortcomings of the asylum and border control policies.

How to get out of the crisis? The solution is not simple, as witnessed by the difficult fate of the 2016 Proposal for a 'Dublin IV' Regulation, which did not make it to be adopted. At the same time, another effort experimented in the past to achieve solidarity during an emergency situation, and also to overcome partly the distorting effects of the Dublin system, relocation schemes, have not proved to be successful, for several reasons.

In this context, a reform of the asylum system should try to work at least on two aspects, in order to realize some forms of stable and affordable solidarity between Member States.

First of all, a Dublin reform should dare to put on the negotiation table a concrete effort to overcome the first entry criterion for the responsibility of processing asylum requests.

Secondly, concerning relocation schemes, the choice between compulsory or voluntary relocation schemes must be made. Though this might trigger radical questions as to the scope and nature of solidarity within the EU, one should recall that whichever way is preferred, solidarity must be expressed or via accepting the relocation of migrants, or by compensating it with a consistent financial support to other Member States that accept to relocate migrants. In both cases, with compulsory or voluntary relocation schemes, the state should be faced with the duty of contributing financially for the lack of cooperation to the scheme.

At the same time, a swift reform should be prepared rather urgently, because of the relatively low arrival of migrants of this last period, if compared with the outbreak of the so-called crisis of 2015-2016. This suggests a reform should be rather agreed now than during 'emergency times'.

The risk is that, lacking a reform which is needed, and with the persistent side-effects of policies in need for reforms, states find solutions at bilateral level, like Germany did in the past with the so-called 'Seehofer arrangements'. At the same time, disembarkation questions have to be discussed in instruments which should be binding and should avoid expressing an idea of solidarity 'a la carte', as if the EU would work as a restaurant where you can choose the dishes you like most and skip the others.

The work to do is much, and the targets to be achieved are many. However, as challenging they might be, they are necessary for the survival of the EU as a community based on principles and rules, but also as a polity which has contributed to deliver freedom, security and justice to its (non-)citizens and inhabitants.

This effort is all the more important now, when the EU has to show a reaction capacity to the 'existential crises': migration, eurozone and rule of law crises, not to mention Brexit. However, the EU like anyone else must learn from these crises: it is the case of Brexit, which has, so far, shown that the EU is able to talk with one voice.

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