

# THE PRINCIPLE OF SOLIDARITY AND THE CHALLENGES OF SYSTEM AND SOCIAL (DIS)INTEGRATION: IN ANTICIPATION OF THE NEW EU RULES ON MIGRATION AND ASYLUM

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## THE PRINCIPLE OF SOLIDARITY AND THE CHALLENGES OF SYSTEM AND SOCIAL (DIS) INTEGRATION: IN ANTICIPATION OF THE NEW EU RULES ON MIGRATION AND ASYLUM\*

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### **ABSTRACT**

*In the wake of the political agreement reached in December 2023 by the European Parliament and the Council on the New Pact on Migration and Asylum, it is necessary to reconsider the concept of solidarity as its breaking point. Although it is crucial for a fair sharing of burden and responsibility among Member States in the face of persistent migratory pressure, a workable solidarity mechanism seems elusive and difficult to achieve. The Pact's intended paradigm-changing approach towards a more flexible solidarity has initially been criticised by Member States, human rights organisations, and academia alike.*

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*This paper aims to examine the conceptual issues surrounding the proposed solidarity mechanism from an interdisciplinary perspective, relying on the analytical distinction of the concepts of system and social integration in the understanding and explication of the processes of constitution, transformation and (dis)integration of the social order. The aforementioned distinction is conceptually useful for analysing the process of functioning and (dis)integration of the social order because it allows scholars to simultaneously analyse how different institutional solutions affect the functioning and compatibility of the social (sub)systems of that order, and how they affect the character of the relationships between social actors with different interests and identities operating within that order.*

*Building on the existing extensive legal scholarship on solidarity in the EU migration and asylum policy, the paper will analyse the role of solidarity in the context of processes related to constitution, transformation and (dis)integration of EU. As an underlying value and a principle, solidarity permeates numerous areas of EU law and represents the “ideological” basis legitimising the European integration. However, it is often misunderstood or implemented in the manner which accommodates current political and social circumstances. Thus, it becomes a political tool, at the expense of its legal coherence. This has a far-reaching impact on the functionality and efficiency of the legal system, and potentially disintegrating effects both on the relations between the EU and the Member States institutional systems, and on the cooperativeness between political and social actors regarding the creation and adoption of future EU policies and laws. Lessons from other fields of law, notably from institutionalisation of solidarity within the social security law, will be explored to evaluate the position of solidarity in the context of the EU migration and asylum policy. The aim is to establish whether the patterns of flexible solidarity can represent a viable option which is in line with the legal conceptualisation of solidarity, and to investigate how strong is their (dis)integrative potential. This innovative approach will offer a wider and fresh perspective to the on-going debate surrounding the institutionalisation of the principle of solidarity in the EU migration and asylum law.*

**Keywords:** *EU migration and asylum law; principle of solidarity; system integration; social integration*

## 1. INTRODUCTION

The New Pact on Migration and Asylum (hereinafter: the Pact) was presented by the European Commission in September 2020.<sup>1</sup> It is comprised of a series of legislative proposals for the reform of the common asylum and migration management, building on the whole of government approach and integrated policy-making in the areas of asylum, migration, return, external border protection, fight against smuggling, and building of relations with third countries. “The fresh start” on migration highlights particularly that it is “based on the overarching principles of solidarity and a fair sharing of responsibility” and seeks to promote mutual trust

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<sup>1</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609 final, 23.9.2020 (COM(2020) 609 final).

between the Member States.<sup>2</sup> The solutions presented in the Pact were immediately criticised, especially in view of the proposed concept of return sponsorship.<sup>3</sup> Three years later, at the end of 2023, the European Parliament and the Council announced that they reached a political agreement on five main acts proposed within the Pact (regulations on screening, Eurodac, asylum procedures, asylum and migration management, and crisis and force majeure).<sup>4</sup> The debate and voting in the European Parliament on the ‘package deal’ including ten legal instruments took place in April 2024.<sup>5</sup> In anticipation of the new rules, it is important to reconsider a long standing debate on solidarity in the EU asylum and migration law from an interdisciplinary perspective.

This paper will therefore first explore the conceptual foundations of solidarity as a guiding principle of EU asylum and migration law (2.), concentrating on the most salient features of its operationalisation under the existing and the proposed rules

<sup>2</sup> See European Commission, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final, 23.9.2020, Explanatory memorandum, p. 1 (COM(2020) 610 final).

<sup>3</sup> Maiani vividly referred to the Pact as “a jungle of extremely detailed and sometimes obscure provisions”, see Maiani, F., *Into the Loop: The Doomed Reform of Dublin and Solidarity in the New Pact*, in: Thym, D., 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, pp. 43-60, p. 44. The Pact’s “vision on (flexible) solidarity” is criticised as inadequate (see Tsourdi, L., *EU Law Analysis: The EU’s New Pact on Migration and Asylum: three key arguments*, 2023 [<http://eulawanalysis.blogspot.com/2023/09/the-eus-new-pact-on-migration-and.html>], Accessed 3 April 2023, whereby the proposed flexibility comes at the expense of predictability and the Commission’s politically risky concept of return sponsorship appears “ill-suited to respond to the human rights risks”, incapable of alleviating the pressure on EU border states, and as perpetuating existing tensions (see Sundberg Diez, O.; Trauner, E.; De Somer, M., *Return Sponsorships in the EU’s New Pact on Migration and Asylum: High Stakes, Low Gains*, European Journal of Migration and Law 23 (2021), pp. 219-244, p. 243.; Milazzo, E., *Asymmetric Interstate Solidarity and Return Sponsorship*, Journal of Common Market Studies 61 (2023) 5, pp. 1179–1193), as well as leading to “commodification of asylum seekers” (Brouwer, E. et al., *The European Commission’s legislative proposals in the New Pact on Migration and Asylum*, Study, European Union, 2021, p. 115, [[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/697130/IPOL\\_STU\(2021\)697130\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/697130/IPOL_STU(2021)697130_EN.pdf)], Accessed 20 March 2024. The Pact is seen as “repackaging old tricks rather than a fresh start”, see Karageorgiou, E.; Noll, G., *What is wrong with solidarity in EU asylum and migration law?*, Jus Cogens, Vol. 4, 2022, pp. 131–154, 132.

<sup>4</sup> European Commission, Migration and Home Affairs: Historic agreement reached today by the European Parliament and Council on the Pact on Migration and Asylum, 20 December 2023 [[https://home-affairs.ec.europa.eu/policies/migration-and-asylum/new-pact-migration-and-asylum\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/new-pact-migration-and-asylum_en)]; [[https://home-affairs.ec.europa.eu/news/historic-agreement-reached-today-european-parliament-and-council-pact-migration-and-asylum-2023-12-20\\_en](https://home-affairs.ec.europa.eu/news/historic-agreement-reached-today-european-parliament-and-council-pact-migration-and-asylum-2023-12-20_en)], Accessed 2 April 2024.

<sup>5</sup> European Parliament, Draft Agenda 10 April 2024, [[https://www.europarl.europa.eu/doceo/document/OJQ-9-2024-04-10\\_EN.html#D-70](https://www.europarl.europa.eu/doceo/document/OJQ-9-2024-04-10_EN.html#D-70)], Accessed 2 April 2024. This paper was submitted on 12 April 2024, two days after the debate and voting.

on migration and asylum management, and analysing the legal effects of the legislative solutions and their capability to achieve their stated purpose. It will then proceed with the social and political contextualisation of the debate on solidarity mechanisms (3.), applying the analytical distinction of the concepts of system and social integration in the understanding and explication of the processes of constitution, transformation and (dis)integration of the social order. The purpose is to investigate the (dis)integrative potential of the solidarity mechanisms, as a way to explain the (in)efficiency of institutionalisation of the principle of solidarity in the field of EU asylum and migration, and to investigate whether the newly proposed patterns of flexible solidarity are in line with the conceptual foundations of solidarity (4.). Concluding remarks (5.) summarise the insights arising out of this interdisciplinary perspective with the aim of contributing to the ongoing debate on solidarity mechanisms in EU asylum and migration law.

## 2. CONCEPTUALISING SOLIDARITY IN EU ASYLUM AND MIGRATION LAW

### 2.1. General remarks on solidarity in EU law

As an underlying value and a principle, solidarity permeates numerous areas of EU law and represents the “ideological” basis legitimising European integration. However, it is often misunderstood or implemented in the manner which accommodates current political and social circumstances. Thus, it becomes a political tool, at the expense of its legal coherence.

Solidarity is a core value of the European Union (see Article 2 TEU),<sup>6</sup> which defines specific Union’s objectives (see Article 3(3) and (5) TEU), as well as a guiding principle for the Union’s actions (see, e.g. Article 21(1) TEU, Article 67(2) TFEU,<sup>7</sup> Article 80 TFEU). Along with human dignity, freedom, and equality, it is acknowledged as an ‘indivisible, universal value’ on which the Union is founded (CFREU,<sup>8</sup> see Preamble and Title IV). A ‘spirit of solidarity’ infuses especially sensitive Union policies and activities, such as external and security policy (Ar-

<sup>6</sup> Treaty on European Union (consolidated version 2016) OJ C 206, 7.6.2016 (TEU). For a wider narrative on European values and the mechanisms of their transmission into national contexts see Čepo, D., *European values in Croatia and the European Union: The state of affairs*, in: Čepo, D. (ed.), *European values and the challenges of EU membership. Croatia in comparative perspective*, Centar za demokraciju i pravo Miko Tripalo, 2020, pp. 15-34. See also McCormick, J., *Europeanism*, Oxford University Press, 2010, p. 2.

<sup>7</sup> Treaty on the Functioning of the European Union (consolidated version 2016) OJ C 206, 7 June 2016 (TFEU).

<sup>8</sup> Charter of Fundamental Rights of the European Union (2016) OJ C 206, 7 June 2016 (CFREU).

ticle 24(3) TEU), supply crisis (Article 122(1) TFEU), energy policy (Article 194(1) TFEU), or situations of natural disasters or terrorist attacks (Article 222(1) TFEU). The development of ‘mutual political solidarity’ between Member States is the basis for the Union’s international relations (Article 24(2) and (3) TEU). The abundance of references and contexts for solidarity in primary EU law reflects the elusive and versatile nature of solidarity as a social and legal construct and concept.<sup>9</sup> Solidarity in EU law plays different roles,<sup>10</sup> and has been recognised as carrying either constitutional-institutional functions (solidarity between institutions at the level of EU and Member States), or substantive functions (solidarity between individuals, facilitated through state or EU intervention).<sup>11</sup> Whereas the Preamble of the Treaty on European Union highlights the desire to deepen the solidarity between peoples, while respecting their history, their culture and their traditions, the operationalisation of solidarity takes place between Member States, as evident from the provisions mentioned above. The incoherence and complexity of references to solidarity in primary EU law, coupled with the lack of clear definition, makes solidarity very difficult to operationalise, especially in highly sensitive policy areas, such as common asylum and migration policy, despite a “common

<sup>9</sup> See more in Sangiovanni, A., *Solidarity in the European Union*, Oxford Journal of Legal Studies 33 (2013) 2, pp. 213-241; Stjernø, S., *Solidarity in Europe. The history of an idea*, Cambridge University Press, 2004; Martinović, A., *Solidarity as key determinant of social security systems in the EU*, Rev. soc. polit. 22 (2015) 3, pp. 335-352, p. 335 and further.

<sup>10</sup> Such as imposing of active obligations, providing value safeguards in relation to social rights, modifying market actions, building rights, and demarcating the field of application of EU rules, depending on the area. See Vanheule, D.; van Selm J.; Boswell, C. *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*, Study, European Parliament, Brussels, 2011 [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453167/IPOL-LIBE\_ET(2011)453167\_EN.pdf], Accessed 5 April 2024, p. 27-28.

<sup>11</sup> See Vanheule, D.; van Selm, J.; Boswell, C., *op. cit.*, note 10, p. 27-28. See also Ross, M., *Solidarity – A New Constitutional Paradigm for the EU*, in: Ross, M.; Borgmann-Prebil, Y. (eds.) *Promoting Solidarity in the European Union*, Oxford University Press, 2010, pp. 23-45; di Napoli, E.; Russo, D., *Solidarity in the European Union in Times of Crisis: Towards “European Solidarity”?*, in: Federico, V.; Lahusen, C. (eds.), *Solidarity as a Public Virtue?: Law and Public Policies in the European Union*, 2018, Nomos, pp. 195-248. In contrast, Van Cleynenbreugel identifies four prevailing solidarity concepts in EU law: liberalising (based on mutual recognition and sincere cooperation between Member States for the benefit of economic operators in the internal market), redistributive (regulatory redistribution as a means to enhance solidarity between individuals and across generations), constitutive (arising from constitutional pluralism and respect for fundamental rights as a means to enhance structural cohesion across different legal orders) and administrative (procedural solidarity as a means to ensure compliance and effective implementation of EU law). All of those concepts reflect a non-substantive understanding of solidarity as a de facto burden-sharing scheme and “as a background inspirational value for EU law and policy initiatives”, without being a legal principle capable of guiding or restraining Member States’ burden-sharing obligations. See Van Cleynenbreugel, P., *Typologies of Solidarity in EU law*, in: Biondi, A.; Dagilytė, E.; Küçük, E. (eds.), *Solidarity in EU Law. Legal Principle in the Making*, Edward Elgar Publishing, 2018, pp. 13-37, 36.

understanding that it is important for the functioning of these policy areas”.<sup>12</sup> Is it ‘just’ a value, or a value that has the status of a general principle of EU law at the same time; is it a ‘spirit’ that has the status of a legal principle, or a ‘spirit’ in terms of political commitments; is it an objective whose achievement is to be ‘promoted’ or pursued with legally binding norms? What is the connection between different functions and levels of solidarity: is the realisation of a constitutional function of solidarity at the level of Member States and/or EU institutions a prerequisite for the substantive function of solidarity, between peoples of Europe?

Solidarity applies as “a matter of principle within the whole EU legal order”,<sup>13</sup> but it is questionable whether it can be claimed that it has the status of a general principle of EU law, regardless of the strong assertions in the CJEU case law about its character and importance, including its specific expressions in particular policy fields.<sup>14</sup> Solidarity is instrumentalised in different EU policies primarily as a burden sharing mechanism between Member States, i.e. for allocation of responsibility (financial or other obligations), but also deployed as a trust building mechanism.<sup>15</sup> The issue of trust,<sup>16</sup> however, is arguably one of the weakest spots of effective operationalisation of solidarity in the field of asylum and migration.

<sup>12</sup> Goldner Lang, I., *Is there solidarity on EU asylum and migration law?*, CYELP 9, 2013, pp. 1-14, 13.

<sup>13</sup> Klamert, M., *Loyalty and Solidarity as General Principles*, in: Ziegler, K. S.; Neuvonen, P. J.; Moreno-Lax, V. (eds.), *Research Handbook on General Principles in EU Law. Constructing Legal Orders in Europe*, Edward Elgar Publishing, 2022, pp. 118-135, p. 132. On the procedural aspect of solidarity in the EU citizenship law see Shuibhne, N. N., *Applying Solidarity as a Procedural Obligation in EU Citizenship Law*, CYELP 19, 2023, pp. 1-38.

<sup>14</sup> In relation to Article 194(1) TFEU, the CJEU has held that “the spirit of solidarity between Member States, mentioned in that provision, constitutes a specific expression, in the field of energy, of the principle of solidarity, which is itself *one of the fundamental principles of EU law*”, and found that the principle of energy solidarity “...like general principles of EU law, constitutes a criterion for assessing the legality of measures adopted by the EU institutions”, which “...requires that the EU institutions, including the Commission, conduct an analysis of the interests involved in the light of that principle, taking into account the interests both of the Member States and of the European Union as a whole” (emphasis added). See Case C-848/19 P, *Federal Republic of Germany v European Commission*, EU:C:2021:598, paras. 38-53. See also: AG Sharpston in joined cases C-715/17, C-718/17 and C-719/17, *European Commission v Republic of Poland and Others*, EU:C:2019:917, para. 253 (solidarity is the “lifeblood of the European project”); AG Bot in joined cases C-643/15 and 617/15, *Slovak Republic and Hungary v Council of the European Union*, EU:C:2017:618, paras. 17-19 (solidarity is the “bedrock of the European construction”); and AG Mengozzi in case C-226/16, *Eni SpA and Others*, EU:C:2017:616, paras. 33-38 (solidarity has the character that could be defined as “constitutional principle”).

<sup>15</sup> Throughout the Commission’s proposal of the new Pact, different mechanisms and instruments designed to build and foster mutual trust among Members States, as well as citizens, are highlighted. See COM(2020)609 final, pp. 2, 4, 6, 14, 27.

<sup>16</sup> Goldner Lang identifies four crucial ‘facets’ of solidarity, based on the meaning and motivation for solidarity, to include loyalty, fairness, trust and necessity; with necessity as the predominant factor, and mutual trust (i.e. a lack thereof) among Member States as potentially the most destructive force

## 2.2. Operationalisation of solidarity in EU asylum and migration law

Legal scholars have been tracing the elusive solidarity in EU asylum and migration law for decades. Even a random glance at the titles of influential academic papers over the years, such as: “Is there solidarity on EU asylum and migration law?”,<sup>17</sup> “Searching for solidarity in EU asylum and border policies [...]”,<sup>18</sup> and “What is wrong with solidarity in EU asylum and migration law?”,<sup>19</sup> reveals an alarming perception that something is amiss between the proclamation of solidarity, and its operationalisation in the legal norms and practice.

Solidarity in asylum and migration policy is without a doubt a fully-fledged legal principle which is operationalised through legal norms, despite their questionable efficiency. Pursuant to Article 67(2) TFEU, the Union “shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third country nationals”. The scope of any solidarity measure in this field is clear from the wording and objective of this provision: it is limited to Member States. There is no duty of solidarity towards third country nationals: just a vague reference to the fact that policy should be ‘fair’ to them. It is a solidarity among Member States, not among their peoples, and certainly not solidarity with ‘others’ who do not belong to this community. In other words, if there is a compulsory solidarity mechanism, it is incurred upon Member States, but the positive or negative attitude of national actors within those Member States might have a significant impact on its practical realisation. An even stronger expression of solidarity is provided in the first sentence of Article 80 TFEU, which expressly invokes the principle of solidarity, with fair sharing of responsibility,<sup>20</sup> including its financial implications, between the Members States as the governing principle for policies on border checks, asylum and immigration,

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eroding solidarity efforts. See Goldner Lang, I., *The EU financial and migration crisis: two crisis – many facets of EU solidarity*, in Biondi; Dagilytė; Küçük (eds.), *op. cit.*, note 11, pp. 133-160, p. 150; Goldner Lang, I., *op. cit.*, note 12; Goldner Lang, I., *No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?*, *European journal of migration and law*, 22 (2020) 1, 39-59. See also Maiani, F., *op. cit.*, note 3, p. 59.

<sup>17</sup> Goldner Lang, I., *op. cit.*, note 12.

<sup>18</sup> Thym, D.; Tsourdi, E., *Searching for solidarity in EU asylum and border policies: Constitutional and operational dimensions*, *Maastricht Journal of European and Comparative Law* Vol. 24, No. 5., 2017, pp. 605–621.

<sup>19</sup> Karageorgiou, E.; Noll, G., *op. cit.*, note 3.

<sup>20</sup> Karageorgiou and Noll highlight that the separation of the principle of solidarity from fair sharing of responsibility is a remnant of the development of asylum and migration policies during the 1990s, where solidarity related to the ordinary operation of the asylum and migration policy, whereas burden and fair sharing was reserved for the times of crisis. According to them, this separation seems less plausible after Lisbon, when ‘crisis’ seem to be an ordinary state of functioning. See Karageorgiou, E.; Noll, G., *op. cit.*, note 3, p. 137.



and their implementation. It means that Member States, especially those that are most affected by migration flows, are entitled to solidarity, but the precise content of this duty remains unclear.<sup>21</sup> The second sentence of this paragraph confirms that the adoption of Union acts, containing appropriate measures, is necessary to give effect to this principle. Consequently, any number of mechanisms can be deployed to operationalise this principle, from cooperation and support, financial and other types of assistance, to relocation obligation. While Article 80 TFEU does not give a specific competence to adopt legislative measures, it defines how the competences conferred in other provisions (notably in Articles 77 – 79 TFEU) should be exercised, and creates an obligation for the Union legislator to include appropriate solidarity measures, if necessary.<sup>22</sup> According to the CJEU, the spirit of solidarity flows from Article 80 TFEU into the Dublin III Regulation<sup>23</sup> as well, and allows other Member States to, unilaterally or bilaterally, help a Member State faced with an unusually large number of third-country nationals seeking international assistance, by making use of the power under Article 17(1) of Dublin III Regulation to examine applications for international protection, even if such examination is not their responsibility, and regardless whether specific measures are adopted on the basis of Article 78(3) TFEU.<sup>24</sup>

So, what is so problematic about solidarity in the existing legal framework in the field of asylum and migration? There is an abundance of comprehensive legal literature on this topic,<sup>25</sup> and given the limitations arising from the scope, aims and

<sup>21</sup> Kortländer, P., *Artikel 80 AEUV* in: Schwarze EU-Kommentar, 4<sup>th</sup> ed., Nomos, 2019, p. 1219.

<sup>22</sup> See European Parliament, Committee on Legal Affairs (JURI), Opinion on the legal basis of the proposal for a Regulation of the European Parliament and the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], 18 April 2022, p. 6-7, [[https://www.europarl.europa.eu/doceo/document/JURI-AL-732595\\_EN.html](https://www.europarl.europa.eu/doceo/document/JURI-AL-732595_EN.html)], Accessed 26 March 2024. On the scope of Article 80 TFEU see more in di Napoli; Russo, *op. cit.*, note 11, p. 231.

<sup>23</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast), [2013] OJ L180/31 (Dublin III Regulation).

<sup>24</sup> Case C-646/16, *Jafari*, EU:C:2017:586, para. 100. The same discretionary clause is reflected in Article 25 of the proposal for a Regulation of the European Parliament and the Council on asylum and migration management, with additional possibility for the applicant to submit a substantiated request in writing for the application of this clause. See COM(2020) 610 final; and European Parliament, A9-0152/2023, Amendments 001-472 by the Committee on Civil Liberties, Justice and Home Affairs (LIBE), 26 March 2024 (European parliament, A9-0152/2023).

<sup>25</sup> In addition to the academic literature referenced throughout this paper, see in particular Mavropoulou, E.; Tsourdi, L., *Solidarity as Normative Rationale for Differential Treatment: Common but Differentiated Responsibilities from International Environmental to EU Asylum Law?*, Netherlands Yearbook of International Law 2022, 51, pp. 311-342,

methodology of this paper, we will refer only to a couple of selected issues commonly identified in scholarly writings.

As shown above, the principle of solidarity established in EU primary law provisions on asylum and migration should permeate all secondary legislation establishing entitlements and obligations of Member States, and, in principle, should govern Member States' actions even in the absence of common binding rules.<sup>26</sup> This can result in binding, as well as non-binding solidarity mechanisms. The problem with this is twofold. First, legally non-binding solidarity is 'just' altruism, which cannot be counted or relied on, especially in times of crisis. Second, legally binding solidarity, which appears too intrusive to (some) Member States, will remain inapplicable and ineffective.<sup>27</sup> These processes can be observed from a legal and sociological perspective and framed within the concepts of system and social integration. This can help explain how even some legally reasonable solutions might eventually be distorted or rejected in practice in the interrelations among the various actors which are affected by them. We will turn back to this issue in parts 3. and 4. of this paper.

### 2.2.1. The solidarity challenge: Asylum and migration management

The current EU secondary legislation in the field of migration and asylum falls short of the solidarity promise. The practical functioning of the Dublin system<sup>28</sup> on registration and processing of asylum applications perpetuates untenable systemic pressures on frontline Member States,<sup>29</sup> leading to covert or blatant breaches

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[[https://westminsterresearch.westminster.ac.uk/download/986938413392d0e51a456c5e254f447fdb-98290b055223fab8099ca1138f6a81/509667/NYIL\\_Chap-11\\_Mavropoulou%20and%20Tsourdi.pdf](https://westminsterresearch.westminster.ac.uk/download/986938413392d0e51a456c5e254f447fdb-98290b055223fab8099ca1138f6a81/509667/NYIL_Chap-11_Mavropoulou%20and%20Tsourdi.pdf)], Accessed 3 April 2024; and Maiani, F., Responsibility allocation and solidarity, in: De Brycker, P.; De Somer, M.; De Brouwer, J.-L. (eds.), *From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration*, European Policy Centre, 2019, pp. 103-118, [[https://www.epc.eu/content/PDF/2019/Tampere\\_WEB.pdf](https://www.epc.eu/content/PDF/2019/Tampere_WEB.pdf)], Accessed 28 March 2024.

<sup>26</sup> See case C-646/16, *Jafari*, EU:C:2017:586, para. 100.

<sup>27</sup> For a political science analysis of the effects of different types of responsibility-sharing mechanisms see Thielemann, E., *Refugee protection as a public good: How to make responsibility-sharing initiatives more effective*, in: Krunke, H.; Petersen, H.; Manners, I. (eds.) *Transnational Solidarity. Concepts, Challenges and Opportunities*, Cambridge University Press, 2020, pp. 165-186, 172 and further.

<sup>28</sup> For more on Dublin III Regulation, see e.g. Maiani, F., *The Reform of the Dublin III Regulation*, Study for the LIBE Committee, European Union, 2016, p. 12 and further [[https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL\\_STU\(2016\)571360\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf)], Accessed 27 March 2024.

<sup>29</sup> Santos Vara, J., *Flexible Solidarity in the New Pact on Migration and Asylum: A New Form of Differentiated Integration?*, *European Papers* Vol. 7, No. 3, 2020, pp. 1243-1263, p. 1250.

of EU law.<sup>30</sup> As evident during the refugee crisis of 2015 – 2016, the application of the responsibility of the state of irregular entry<sup>31</sup> for processing asylum applications was deliberately avoided by the states at the southern and eastern borders of the Union.<sup>32</sup> In addition, despite the existence of a hierarchy of criteria for determining the responsible state,<sup>33</sup> 99 % of applications are examined by the state where they are first lodged.<sup>34</sup> The evident failure of temporary relocation schemes which were implemented to alleviate migration pressures<sup>35</sup> should serve as a lesson on what works and what does not. In theory, relocation schemes were designed to reinforce solidarity among Member States. In practice, their binding nature was simply ignored by some Member States;<sup>36</sup> and their overall practical effect was frustrating.<sup>37</sup>

All of the above shows, that in the absence of effective solidarity schemes, Member States engage “in defensive rather than cooperative behaviour”.<sup>38</sup> It shows how incredibly lightly even binding solidarity mechanisms can be avoided, without real consequences.

The until then unprecedented refugee crisis of 2015 – 2016 has fully exposed the inadequacy of the existing legal framework to deal with such migration pressure. How does the New Pact attempt to remedy this situation? Its underlying idea is that “... no Member State should shoulder a disproportionate responsibility and that all Member States should contribute to solidarity on a constant basis”.<sup>39</sup> There

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<sup>30</sup> For a statistical overview of increase in the infringement proceedings in the area of asylum and migration in the period between 2014 – 2018 see Goldner Lang, *op. cit.*, note 16, p. 40. On systemic violations of EU asylum law see Tsourdi, L.; Costello, C., “Systemic Violations” in *EU Asylum Law: Cover or Catalyst?*, German Law Journal (2023) 24, pp. 982–994.

<sup>31</sup> Article 13(1) Dublin (III) Regulation.

<sup>32</sup> Maiani, F., *op. cit.*, note 28, p. 15.

<sup>33</sup> Article 7 Dublin (III) Regulation.

<sup>34</sup> Maiani, F., *op. cit.*, note 28, p. 14.

<sup>35</sup> 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, OJ L 239, 15.9.2015; 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, OJ L 248, 24 September 2015.

<sup>36</sup> See joined cases C-715/17, C-718/17 and C-719/17, *European Commission v. Republic of Poland and Others*, EU:C:2020:257. Despite the fact that Poland, Hungary and Czech Republic were found in infringement of EU law, the infringement itself concerned a failure to indicate an appropriate number of applicants for international protection that can be relocated to those countries, and not the failure to actually relocate the applicants, which is dependent on the existence of prior commitment to that effect.

<sup>37</sup> Maiani, F., *op. cit.*, note 28, p. 18-19.

<sup>38</sup> *Ibid.*, p. 6.

<sup>39</sup> COM (2020)609 final, p. 1. For a comprehensive analysis of the political and legal background which led to the preparation of the New Pact see Brouwer *et al.*, *op. cit.*, note 3, p. 26 and further.

is nothing new and revolutionary about this idea. The same goes for the proposed solutions and mechanisms. Out of five key proposals to overhaul the migration and asylum system regarding which the political agreement was reached between the European Parliament and the Council in December 2023,<sup>40</sup> this paper concentrates on the envisaged reformed solidarity mechanisms under the proposed Regulation on Asylum and Migration Management, according to the latest version of text with the proposed amendments by the European Parliament.<sup>41</sup> A brief legal analysis of the most important solidarity elements built into that proposal will help illustrate the conceptual issues surrounding solidarity from an interdisciplinary perspective, and explain its (dis)integrative potential.

### 2.2.2. The Proposal of the Regulation on Asylum and Migration Management

Under the proposal of the Regulation on Asylum and Migration Management (hereinafter: RAMM), the country of first entry remains responsible for asylum applications, meaning that the core elements of the Dublin system are actually preserved.<sup>42</sup> Solidarity is seen as a corrective mechanism, supplementing the ordinary rules on the attribution of responsibility.<sup>43</sup>

In its Explanatory Memorandum accompanying the RAMM Proposal, the Commission states that this instrument particularly aims at establishing a common framework for asylum and migration management based on comprehensive, integrated policy-making and the principles of solidarity and fair sharing of responsibility, as well as at ensuring sharing of responsibility through a new solidarity mechanism, which will be able to “deliver solidarity on a continued basis

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<sup>40</sup> See above note 5.

<sup>41</sup> The proposed regulation aims to establish clearer rules and a new solidarity mechanism among Member States on establishing and sharing responsibility for asylum applications. See COM(2020) 610 final and European Parliament, A9-0152/2023. This paper will rely and refer to the text and numeration of the provisions of the proposed regulation, taking into account the amendments from the latter document of the European Parliament, i.e. the text of the LIBE report tabled for plenary, which will be subject to the joint debate on the Migration and Asylum package and vote in the European Parliament on 10 April 2024. See European Parliament, Legislative observatory, Procedure File 2020/0279(COD) [[https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2020/0279\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2020/0279(COD)&l=en)], accessed 5 April 2024. This text can be subject to further amendments, the very least those of technical nature, but it was the latest version available at the time this paper was completed.

<sup>42</sup> See Articles 14 - 22 RAMM; Santos Vara, *op. cit.*, note 30, p. 1252; Cornelisse, G.; Campesi, G., *The European Commission's New Pact on Migration and Asylum. Horizontal substitute impact assessment*, Study, European Parliament Research Service, European Union, 2021, pp. 132-133.

<sup>43</sup> Part IV “Solidarity” RAMM; see also Cornelisse, G.; Campesi, G., *op. cit.*, note 43, p. 180.

in normal times” and to assist Member States faced with migratory pressure to effectively manage migration in practice.<sup>44</sup> The “normal times” solidarity seems nothing more than an orderly fulfilment of the obligation to establish and maintain national asylum and migration management systems, with sufficient funding and staff, and to reduce and prevent irregular migration from third states. This is reflected in Article 5 of the RAMM Proposal entitled “Principle of solidarity and fair sharing of responsibility.”<sup>45</sup> There is no definition of these principles, but the introductory parts of Article 5 require their observance from Member States “in implementing their obligations” (paragraph 1). The accent in paragraph 1a, inserted during negotiations,<sup>46</sup> is again placed on the fulfilment of the Member States duties, enumerated in the following subparagraphs. The hint to the origin and spirit of these obligations seals the ‘solidarity deal’: it is the “shared interest in the effective functioning of the Union’s asylum and migration management policies” that binds the Member States in this solidarity community, and is supposed to drive them to fulfil their ‘obligations and duties’. As rightly pointed out, this type of interstate solidarity in EU asylum and migration law is not the primary objective of the policies to be developed, it is the precondition for the system to function.<sup>47</sup>

Paragraph 1c inserts another obligation for Member States to have “national strategies in place that establish the strategic approach to ensure they have the capacity to effectively implement their asylum and migration management system, in full compliance with their obligations under Union and international law, taking into account their specific situation, especially their geographical location”.<sup>48</sup> These strategies should have a minimum content prescribed in this paragraph, to ensure their preparedness for situations of migratory pressure. This seems to be more an expression of principle of sincere cooperation among the EU and Member States, which ensures mutual assistance and respect in carrying out the tasks flowing from EU law, and not of the principle of solidarity.

On the other hand, the “migratory pressure” solidarity consists of providing “effective support to other Member States in the form of solidarity contributions on the basis of needs set out in Chapters I-III of Part IV” (paragraph 1, point (d)).

<sup>44</sup> COM(2020) 610 final, p. 4 – 5.

<sup>45</sup> In the amended version “Principle of solidarity and fair sharing *or* responsibility and duties of Member States” (emphases added). See European Parliament, A9-0152/2023.

<sup>46</sup> See European Parliament, A9-0152/2023.

<sup>47</sup> Bast, J., *Deepening supranational integration: interstate solidarity in EU migration law*, in: Biondi, A.; Dagilyté, A.; Küçük, E. (eds.), *op. cit.*, note 11, pp. 114-132, p. 130.

<sup>48</sup> See European Parliament, A9-0152/2023.

The “migratory pressure” solidarity is activated when the situation so requires,<sup>49</sup> but should be prepared well in advance. It is mostly based on “projected annual solidarity needs” set up for the upcoming year in the delegated act adopted by the Commission, which includes a projection of the total number of required relocations, and total need for capacity building measures, where it is anticipated that a Member State will face a situation of migratory pressure.<sup>50</sup> This type of solidarity mechanism is underpinned by financial incentives for contributing Member States, i.e. those Member States that demonstrate solidarity.<sup>51</sup> The initially proposed types of ‘solidarity contributions’ by the Commission included relocation, return sponsorship, and capacity-building measures.<sup>52</sup> However, the current version of the text completely abandons the controversial concept of return sponsorship, and substantially curtails the possibility to resort to capacity-building measures to avoid the relocation responsibility. This is a departure from the initial idea of a ‘pick-and-choose’, flexible solidarity, capable of adapting to “different realities and migratory flows”, which has been heavily criticised,<sup>53</sup> as there were ample opportunities to stretch it until it becomes completely distorted and devoid of purpose. Relocation becomes the primary and practically the only type of solidarity contribution under the compromise text of Article 45(1) RAMM.<sup>54</sup> The other type of solidarity contribution consists in triggering the discretionary clause from Article 25 concerning the voluntary examination of applications for international protection, but this time the agreement between a contributing and benefitting Member State is necessary,<sup>55</sup> which is quite unusual. There is also the possibility for the contributing Member State to commit to capacity-building measures pursuant to Article 55a(1) RAMM, which are restricted to addressing the specific

<sup>49</sup> The definition of ‘migratory pressure’ is provided in Article 2(1)(w) RAMM to mean, without prejudice to the definition of crisis from the Crisis Regulation, a situation whereby arrivals of third-country nationals or stateless persons, including by sea and disembarkations, place “a disproportionate responsibility even on well-prepared asylum, reception and migration systems, which requires solidarity contributions” pursuant to Article 45 RAMM.

<sup>50</sup> See Article 4c(2) RAMM; European Parliament, A9-0152/2023.

<sup>51</sup> COM(2020) 609 final, p. 96; see Article 61 RAMM and Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund, OJ L 251, 15 July 2021.

<sup>52</sup> COM(2020) 610 final.

<sup>53</sup> For an excellent and comprehensive critical evaluation of the various elements of the Pact see contributions in Thym, D.; 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. See also Mavropoulou, E.; Tsourdi, L., *op. cit.*, note 26, p. 28.

<sup>54</sup> See also Article 45b(1) RAMM, the last sentence: “The Commission and the Member States shall at all times prioritise relocation pursuant to Article 45(1), as the primary measure of solidarity.”, European Parliament, A9-0152/2023.

<sup>55</sup> See Article 45(1a) RAMM, European Parliament, A9-0152/2023.

needs of the benefiting Member State and identified in the delegated act adopted in situation of migratory pressure.

There are various structures designed to ensure smooth transition from “normal times” to “migratory pressure” solidarity, such as Annual Solidarity Pool (Article 45b)<sup>56</sup>, Solidarity Forum (Article 46),<sup>57</sup> Solidarity Response Plan (Article 52),<sup>58</sup> and EU Relocation Coordinator (Article 58a).<sup>59</sup> The Commission is responsible for preparing and adopting several important types of acts: the Annual Situational Report (Article 4b),<sup>60</sup> the projected solidarity needs delegated act which serves as the basis for solidarity pledges (Article 4c),<sup>61</sup> and the long term European Asylum and Migration Management Strategy (Article 4a).<sup>62</sup> Notification of a migratory pressure by the Member State under Article 49a RAMM triggers an immediate solidarity response; whereas Member States that have previously not been identified by the Commission as at risk of migratory pressure, may request such assessment (Article 50(1) RAMM), leading to solidarity response, if necessary. The European Parliament and the Council can also request the Commission to carry out such assessment (Article 50(1)(ba) RAMM). Where the Commission considers that the situation might be a crisis situation, and not a situation of migratory pressure, it will examine the applicability of the Crisis Regulation, with the agree-

<sup>56</sup> The Commission, led by the EU Relocation Coordinator, establishes each year the Annual Solidarity Pool, based on projected solidarity needs, consisting of the total number of required relocations and total need for capacity building measures, whereby relocations are at all times prioritised as the primary measure of solidarity.

<sup>57</sup> Solidarity Forum shall consist of representatives of all Member States capable of pledging solidarity contributions for the creation of the solidarity pool or solidarity response in situations of migratory pressure pursuant to Article 52.

<sup>58</sup> Following a notification of migratory pressure or the adoption of the Commission’s delegated act to determine migratory pressure, solidarity response (i.e. the type of solidarity contribution and timeline for performance) is indicated in the Solidarity Response Plan (Annex II RAMM).

<sup>59</sup> EU Relocation Coordinator shall be appointed by the Commission to support the implementation of the relocation mechanism and to coordinate the relocation activities from the benefiting Member State to the contributing Member State.

<sup>60</sup> The Commission shall monitor and provide information on the asylum, reception and migratory situation over the previous 12 month period as a whole through annual situational reports based on qualitative data and information provided by the Member States, Union agencies, and other relevant bodies, offices, agencies or organisations.

<sup>61</sup> The Commission shall, together with the transmission of the annual situational report, adopt a delegated act setting out the anticipated evolution of the migratory situation in the Member States and anticipated number of arrivals in the following 12 months, with the projected solidarity needs in the form of relocations and capacity-building measures.

<sup>62</sup> The Commission shall adopt a five-year European Asylum and Migration Management Strategy setting out the strategic approach to ensure access to asylum procedures and the functioning and implementation of asylum and migration policies at Union level, and transmit it to the European Parliament and the Council.

ment of that Member State (Article 50(4a) RAMM). Following the assessment, the Commission adopts a delegated act determining whether the Member State concerned is under migratory pressure (Article 51(2a) RAMM).

At least 80 % of pledges in the solidarity pool shall be made up of relocation measures or the application of the discretionary clause pursuant to Article 25. The remaining pledges may, where applicable, consist of capacity-building measures.<sup>63</sup> Where the Commission considers that the Member States' pledges do not correspond to the identified need, it shall distribute the remaining needs on the basis of the reference key from Article 54, which weights the population number and GDP per capita in the relevant parts, with a possibility of a limited deduction in accordance with the amount of processed applications for international protection in the previous ten years. This is again a move towards a considerably stricter solidarity regime than initially proposed by the Commission.

Apart from compulsory solidarity explained above, Member States are able to offer voluntary solidarity contributions in the form of relocations and/or capacity-building measures at any time (Article 45a RAMM), at their own initiative or at the request of the benefitting Member State, to assist that Member State in addressing the migratory situation or to prevent migratory pressure. Member States will keep the Commission, the EU Relocation Coordinator and the European Union for Agency Asylum informed of bilateral solidarity measures, including cooperation with third countries (Article 59(1) RAMM).

### **2.2.3. The 'hardship' solidarity of asylum and migration law: Creating the community of tension?**

The inherent tension between institutional solutions and operationalisation of solidarity, on the one hand, and the plurality of different interests of social actors involved in their implementation takes us back to wider theoretical considerations. As elaborated above, the idea of solidarity in EU asylum and migration law mostly arises out of pressure, a sense of urgency and anxiety, a hardship, a sheer necessity; and it is formally framed as such.

Bast sees the principle of solidarity in EU migration law as "a reaction to the tensions between a high degree of supranational integration and a simultaneous heterogeneity between Member States",<sup>64</sup> which is used to compensate for unequal distribution of costs and benefits caused by measures taken to support supranational integration. In his view, the same conclusion is applicable in all spheres of

<sup>63</sup> Article 45b(3) RAMM, European Parliament, A9-0152/2023.

<sup>64</sup> Bast, J., *op. cit.*, note 47, p. 131.



EU law and appears to be a corollary of the process of transitioning to federation. In other words, solidarity is a ‘price’ for supranationality. If so, this type of solidarity can only create a community of tension. A ‘price’ can be seen as a ‘punishment’ when supranationality is not a desired outcome, or if it is simply tolerated as a trade-off in view of economic and other gains in different areas.

To avoid such situation with potentially disintegrative effects, the compliance of the ‘community’ with the legal norms has to be rooted in the shared belief that each member gains a redistributive advantage within such group and because of such group. This is where, although at first glance it might appear somewhat unusual, a useful comparison can be made with the principle of solidarity in the field of social security. Social security is a predominantly national domain, but over time, we see transnational aspects of social solidarity in EU law.<sup>65</sup> Social solidarity is about creating inclusive risk communities, allowing for a redistribution of income, made possible through compulsory affiliation. Inclusion creates entitlement to community aid if and when a predefined risk materialises and causes a need for such aid. On the other hand, the community has a duty to satisfy that legally circumscribed need.<sup>66</sup> For the system to work, it requires binding rules, but the compliance is backed by a fundamental belief in social cohesion.<sup>67</sup> Social solidarity is primarily solidarity between individuals, but we can infer valuable lessons even when we transfer these considerations to solidarity between Member States.

The concept of solidarity in the proposed RAMM is about creating an inclusive ‘risk’ community, where the risk consists of an influx of migrants, asylum and international protection applicants which even a well-managed asylum and migration system of a particular Member State cannot accommodate (i.e. a migratory pressure). However, unlike social solidarity where the materialisation of the future risk (e.g. sickness) is quite certain and is bound to happen sooner or later to each and every member of the solidarity community (although not in equal manner and scope), there is nothing certain about the migratory pressure, except that it will probably not equally affect each and every Member State. This assumption may be driving certain Member States to try to avoid their obligations within the solidarity community.

The materialised risk gives rise to a ‘solidarity need’, which has (hopefully) been accurately predicted beforehand.<sup>68</sup> The ‘solidarity need’ triggers ‘solidarity contri-

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<sup>65</sup> Martinović, A., *op. cit.*, note 9, p. 344.

<sup>66</sup> Baldwin, P., *The politics of social solidarity. Class bases of the European welfare state 1875-1975*, Cambridge University Press, 1992, p. 31.

<sup>67</sup> Thuy, P., *Sozialstaatsprinzip und Marktwirtschaft*, Haupt, 1999, p. 36.

<sup>68</sup> This implies projected solidarity needs, in accordance with the delegated act adopted by the Commission. The element of prediction is problematic by itself. Research shows that spatial dispersion of the

butions': it is time for the solidarity pledges to materialise in the form of actual help. This entire 'solidarity deal' occurs at the level of Member States, at various points in time: from preparation, negotiation, and adoption of the rules, to making pledges and providing actual assistance national circumstances change, governments change, prevailing political options change, attitudes change. Asylum and migration policy and law are sensitive and politically divisive areas, but EU citizens are not directly bound by the solidarity which is directed at interstate level. No solidarity mechanism actively takes into account social cohesion and solidarity between nationals of contributing and benefitting Member States. The proposed RAMM encourages Member States "to take into consideration the capacities and willingness of regional and local authorities to take part in relocation efforts",<sup>69</sup> and recognises that cities and regions are "key players in the achievement of meaningful solidarity and successful relocation and integration trajectories".<sup>70</sup> However, it remains up to the Member States to ensure their cooperation. This leaves room for populism. Reluctance, hesitation, uncertainty, outright rejection of the common rules and their effective application: any variance of negative attitudes will shape the solidarity response within this complex community of risk and tension, and possibly distort the initial idea behind the creation of those rules.

How can we evaluate the (dis)integrative potential and effect of the legislative solutions described in the previous parts? We will use the distinction between the social and system integration to conceptualise the mechanisms of constitution, transformation and (dis)integration of social order, and apply them in the context of our considerations about solidarity as the crucial element of the EU asylum and migration law.

### **3. SOCIAL AND POLITICAL CONTEXTUALISATION OF THE SOLIDARITY DEBATE**

#### **3.1. Social and system (dis)integration: conceptual issues**

Lockwood builds the conceptual starting points<sup>71</sup> for understanding the problems of integration and disintegration of society on the basis of a broader so-

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asylum applicants seems more the result of circumstances, and not of planned actions. See Rogelj, B. (2017) *The Changing Spatiality of the "European Refugee/Migrant Crisis"*, Migracijske i etničke teme 33(2), pp. 191-219, p. 213.

<sup>69</sup> See Article 58a(2)(e) RAMM on the authorities of the EU Relocation Coordinator, European Parliament, A9-0152/2023.

<sup>70</sup> See Recital 63a RAMM, European Parliament, A9-0152/2023.

<sup>71</sup> When analysing and explaining social phenomena it is useful to point out the distinction between two types of theories. According to Mouzelis, the first type of theory can be seen as a set of interrelated

biological discussion of the 'nature' of social change and the transformation of a society's institutional order.<sup>72</sup> He points out that normative functionalists and conflict theorists, in line with their underlying theoretical assumptions, focus on different 'parts' of the social system when trying to answer the question of how social change arises from within a society. Since they assume that the institutional patterns are the fundamental 'parts' of the social system, normative functionalists believe that change in social order is due to the incompatibility between the institutional patterns that regulate the functioning of the social subsystems. According to them, social disorder and social conflict arise from a system disorder, which in turn is due to incompatibility, tensions and contradictions between the institutional norms/patterns of the subsystems.<sup>73</sup> Conflict theorists, on the other hand, believe that changes in the social system are due to tensions and contradictions (or lack of fit) between the core institutional order of the social system and its material substructure. They believe that such structural contradictions promote the development of latent or manifest conflictual social relations between social strata and groups, which can threaten the existing institutional order of the social system.<sup>74</sup>

The aforementioned approaches not only see the 'nature' of the emergence of structural contradictions, tensions and crises in a significantly different way, but also focus on fundamentally different aspects of social life when analysing and explaining social phenomena. As they focus primarily on social stability, value consensus and the interdependence of the institutionalized 'parts' of the social system, the normative functionalists' analysis overemphasizes the aspect of systemic (dis)integration of social change. On the other hand, since conflict theorists focus primarily on social conflicts and inequalities, in terms of competing interests and power imbalances between social groups, when analysing social phenomena, they overemphasize the social (dis)integration aspect of social change. Lockwood believes that the reductionism of these approaches can be avoided by analytically distinguishing between the system and social dimensions of the process of (dis)integration of the social order. From the perspective of social integration, it is

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substantive statements that attempt to tell us something about the social world, that can be tentatively proven or disproved by empirical research (substantive theory). Another type of theory can be seen as a set of interrelated terms, concepts and statements that serve as a set of tools that simply facilitate or prepare the ground for the construction of a substantive theory (theory as a conceptual framework). See Mouzelis, N., *Sociological Theory: What Went Wrong? Diagnosis and Remedies*, Routledge, 1995, p. 1. In this part (3.1.), we discuss the aspects of (dis)integration phenomena from the perspective of conceptual framework theory.

<sup>72</sup> Lockwood, D., *Social and System Integration*, in: Zollschann, G. K.; Hirsch, W. (eds.), *Explorations in Social Change*, Routledge, 1964, pp. 244-257.

<sup>73</sup> *Ibid.*, p. 245.

<sup>74</sup> *Ibid.*, p. 252.

necessary to analyse how social tensions and contradictions affect the ‘character’ of relationships between social groups, i.e., whether they promote the emergence of cooperative or conflictual relationships between actors. On the other hand, from the perspective of system integration, it must be analysed whether structural contradictions promote the creation of orderly or conflictual relationships between the institutional parts of a social system.<sup>75</sup>

Lockwood’s distinction is important because “it provides useful guidelines, it tells one what sort of things to look at and what sort of questions to ask in studying the development or change of specific social systems – whether groups, organizations or whole societies”.<sup>76</sup> It allows us to analyse whether an institutional ‘solution’ intended to regulate an aspect of social life promotes the emergence of tensions and contradictions in relation to existing norms or practices within different social (sub)systems. Furthermore, it allows us to analyse how social actors with different interests and identities position themselves in relation to an institutional solution and how this positioning influences the ‘character’ of their relationships with other social actors on the one hand and processes of transformation and (dis)integration of the existing social order on the other.

Although he believes that Lockwood’s distinction is crucial for the analysis of the processes of constitution, transformation and (dis)integration of social order, Mouzelis makes several suggestions that he thinks could further improve the conceptualization of these processes. First, he believes that ‘parts’ of a social system should not be distinguished on the basis of normative/non-normative characteristics, as Lockwood does. Accordingly, he proposes that the ‘parts’ of a system should always be considered/analysed as wholes/structures consisting of institutionalized complexes of norms/roles that regulate social processes and moderate the agency of individual or collective actors in these processes. Consequently, he believes that systemic contradictions and tensions arise as a result of inconsistencies between different types of ‘logics’ that lie behind the institutionalized norms/patterns that regulate processes within or between different social structures or subsystems.<sup>77</sup>

Furthermore, he believes that all sets of institutionalized norms/roles should be analysed in terms of their technological, appropriative and ideological dimensions. That is, Mouzelis believes that within each social structure or subsystem one can identify norms that have a predominantly technological, appropriative or ideolog-

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<sup>75</sup> *Ibid.*, p. 245.

<sup>76</sup> Mouzelis, N., *Social and System Integration: Some Reflection on a Fundamental Distinction*, *The British Journal of Sociology*, 25 (1974) 4: pp. 395–409, p. 395.

<sup>77</sup> Mouzelis, N., *Social Integration and System Integration: Lockwood, Habermas, Giddens*, *Sociology*, vol. 31, 1/1997, pp. 111-119, pp. 112-113.

ical character. The technological dimension refers to institutional means (norms and patterns) with which social actors can more or less intentionally construct, reproduce and reshape social existence and order. The appropriation dimension refers to norms that determine who and under what conditions has the right to control and manage these technological means. Finally, the ideological dimension refers to norms that justify and legitimize which social actors and groups (and under what circumstances) can use certain social technologies and institutional 'solutions' to (re)shape social life and social order.<sup>78</sup>

Mouzélis believes that society can be analysed in this way in constructivist categories and that one can see that institutionalized norms/roles are not only means of societal regulation of actors, but also means through which social actors constitute, reproduce and transform social order.<sup>79</sup> Thus, one can see that the institutional 'solutions' and patterns created by the agency of (macro-) actors who have appropriated the technologies for the construction of social reality are at the same time structural constraints that (mezzo, micro-) actors who are lower in the hierarchy of social order have to reckon with in their lives and actions.<sup>80</sup>

By conceptualising the processes of constitution and transformation of the social order in the way described above, one can analyse whether some institutional solutions and patterns are incompatible with other institutional patterns and whether such a situation fosters the emergence of systemic tensions and crises. At the same time, it is possible to analyse how actors with different interests, identities and values perceive certain institutional solutions and how they position themselves vis-à-vis the actors who created or supported them. That is, it can be analysed whether social actors who believe that certain institutional solutions threaten their interests, identities and values in such a situation choose strategies and agencies that create conflictual relationships with the actors who support such solutions. In this way, it can be analysed whether the strategies and agency of some actors promote the creation of conflictual relationships with other actors and whether they trigger social processes that can lead to a transformation or even disintegration of the existing social order.

### **3.2. The refugee crisis and challenges of social and system (dis)integration**

The crises of recent years (the eurozone crisis that began in 2009, the refugee crisis that began in 2015, and Brexit referendum in 2016) exposed the problems

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<sup>78</sup> Mouzélis, *op. cit.*, note 71, pp. 87-89.

<sup>79</sup> *Ibid.*, p. 90.

<sup>80</sup> *Ibid.*, pp. 141-143.

of the EU's institutional set-up and the divergent views of European integration among European leaders. The crises also opened up the possibility of deeper integration. In less than a decade, the Greece's exit from the eurozone was on the table, several Member States temporarily suspended the Schengen regime and the majority of the citizens of the United Kingdom decided to leave the EU. For this reason, some authors have written about a multidimensional crisis or polycrisis.<sup>81</sup> The polycrisis deepened the transnational-national cleavage, with political actors positioning themselves on a Europeanist or Eurosceptic side of the cleavage.<sup>82</sup> The COVID-19 pandemic crisis, which began in 2020, led to new accusations that the EU was unable to cope with extraordinary situations. Particularly, crises caused by exogenous shocks (eurozone, refugee and pandemic crisis) exposed the inadequacy of the institutional order and national and supranational leaders proposed new solutions, which have had mixed results. For example, the European Stability Mechanism created during the eurozone crisis became part of the EU legal system. With the NextGenerationEU, the instrument for recovery from the pandemic crisis, debt mutualization took place in the EU for the first time. However, the temporary relocation schemes were rejected during the refugee crisis and the search for a solution to the refugee crisis is still ongoing. The refugee crisis seems to be the most disruptive part of the EU polycrisis. It still serves as one of the main causes for the rise of radical right Eurosceptic forces and was also one of the main motives of the Leave side in the Brexit campaign.

Both the use of the principle of solidarity and concepts of social and system (dis) integration can help in explaining the strong impact of the refugee crisis. As mentioned above, solidarity in asylum and migration policy is limited to Member States and the treatment of third-country nationals, i.e. immigrants, should be fair. However, radical right Eurosceptic actors saw the immigrants coming from predominantly Muslim countries not only as third-country nationals but also as agents of change bringing about dilution of their national identities.<sup>83</sup> In contrast to the eurozone crisis, which was about budgets and debts, entities that are usually negotiable, the refugee crisis was presented as being about national identity,

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<sup>81</sup> Dinan, D.; Nugent, N.; Paterson, W. E., *A multi-dimensional crisis*, in Dinan, D.; Nugent, N.; Paterson, W. E., (eds.) *The European Union in Crisis*, Basingstoke: Palgrave, 2017, pp. 1-15. Juncker, J. C. *Speech by President Jean-Claude Juncker at the annual general meeting of the Hellenic federation of enterprises (SEV)*, 2016, [[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_16\\_2293](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_16_2293)], Accessed 10 April 2024.

<sup>82</sup> Hooghe, L.; Marks, G., *Cleavage theory meets Europe's crises: Lipset, Rokkan, and the transnational cleavage*, *Journal of European public policy*, Vol. 25, No. 1, 2018, pp. 109-135.

<sup>83</sup> Buonanno, L., *The European migration crisis*, in Dinan, D.; Nugent, N.; Paterson, W. E., (eds.), *The European Union in Crisis*, Basingstoke: Palgrave, 2017, pp. 100-130.

which radical right actors treat as non-negotiable and fixed. Faced with what they saw as an imminent threat to their national identity, Eurosceptic leaders and parties rejected applying the principle of solidarity to other Member States in solving the refugee crisis. Even when this meant helping a fellow Eurosceptic leader, the principle of solidarity was jettisoned. This was the case with the Hungarian Prime Minister Viktor Orbán, who refused to accept relocation of migrants although it would help his Eurosceptic ally Matteo Salvini after he became the Italian Minister of Interior in 2018.

Lockwood's distinction between social and system integration is highly useful in analyzing the causes and consequences of the refugee crisis. Tendencies of social disintegration of social relations and social order can be manifested as latent or manifest conflicts between actors with different interests or identities, in a situation where some of these actors begin to perceive certain institutional solutions as threatening to their own interests, worldviews and identities. These actors may then perceive such solutions, but also the whole existing order, as illegitimate. This is what happened with Central and Eastern European leaders, their rejection of temporary relocation schemes and the subsequent strengthening of their opposition to the whole EU project, which was in contrast to the more pro-European public opinion in their countries.<sup>84</sup> This created a major rift between the Central and Eastern European leaders and the EU.

Social dimension of the analysis is important because it shows that institutional solutions that are ineffective in practically solving the social problems they are supposed to regulate, do not in themselves have to generate disintegrative tendencies of the social order and social conflicts. It is only when the actors operating within the social order perceive institutional solutions as threatening and possess the power to fight them, can the existing institutional order descend towards disintegration.

Regarding the system disintegration, it is important to monitor the impact of crises, such as the refugee crisis, as they can best reveal structural contradictions and whether they promote the creation of orderly or conflictual relationships between the institutional parts of a social system. As shown here, the Dublin system and the reversibility of the Schengen system of free movement form the basis of a conflictual relationship between the institutional parts of the EU asylum and migration policy. This is a conflictual relationship which threatens the whole institutional order.

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<sup>84</sup> Petrović, N.; Mrakovčić, M.; Fila, F., *Anti-EU Backlash from Below or Above? Public Opinion in Central and Eastern Europe Prior to the 2015 Migration Crisis*, *Revija za sociologiju*, Vol. 51, No. 3, 2021, pp. 317-345.

#### 4. THE (DIS)INTEGRATIVE POTENTIAL OF THE SOLIDARITY MECHANISMS

We can trace these transformative processes in the microcosm of EU asylum and migration law. We have shown how the conceptual focus on solidarity between Member States, and solidarity as a hardship measure disregards other levels and functions of solidarity, as well as the reality of the existing social order in which the envisaged legal solutions will be applicable. As argued above, solidarity as a legal principle has to be enforced through binding norms, but there also has to exist a shared belief in mutual redistributive advantages arising from adherence to those norms. If those norms are rejected or circumvented by the actors that are subject to them, instead of intended integrative and mobilising function, as a manifestation of “alliance”,<sup>85</sup> they will have a disintegrative effect on the social order. Goldner Lang thus observes the process of “selective exit” and “spillback”, which implies the political withdrawal of Member States from common rules, which is evident in the increasing number of infringements of the existing EU legal framework in the field of migration and asylum.<sup>86</sup> However, the Member States’ readiness to abide, or on the contrary, to risk violation of common rules are shaped by the forces and actors within them, such as individuals, local authorities, administrative authorities, judiciary, civil society organisations, etc., as well as national legal traditions, culture and values. The above elaborated systemic-social distinction shows that the process of social (dis)integration presupposes the existence and interplay between a certain number of structural institutional solutions, and individual and collective actors. Nevertheless, the inherent tensions in their mutual relations do not necessarily have to lead to social disintegration.<sup>87</sup>

During the negotiation process, the initial Commission’s proposal of RAMM has been substantially amended. Even though the document is still not adopted, the current compromise text eliminates one of the most disputed concepts proposed by the Commission, the concept of return sponsorship. In the initial Commission’s proposal, it was the cornerstone of the “fresh” solidarity approach. The negotiations have shown that, apart from numerous other objections (notably from the human rights perspective), this solution could not be accepted even if its questionable normative construction could be improved. Return sponsorship was supposed to be an alternative to relocations, which are *per se* difficult to accept by some Member States. In the current text of the proposal, relocations are again the primary type of solidarity contribution, with potentially more limited room

<sup>85</sup> See Karageorgiou; Noll, *op. cit.*, note 3, p. 147.

<sup>86</sup> Goldner Lang, I., No solidarity..., *op. cit.*, note 16, p. 58.

<sup>87</sup> See more in Mrakovčić, M., *Doprinosi sociološke teorije konceptualizaciji (dez)integracije društva*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci 34 (2013) 2, pp. 1043-1072, 1070.



to avoid this obligation than under the currently applicable, and especially under the initially proposed rules. The normative conceptualisation of solidarity, even in the current text of the proposal of RAMM weakens its integrative potential: the “normal times” solidarity is not more than a duty to fulfil various obligations arising out of EU law; whereas the “migratory pressure” solidarity still appears as a hasty solution to impose the ‘feeling’ of solidarity on other Member States when times are rough for one or some of them. This is bound to perpetuate the existing conflicts and potentially reduce the effectiveness of the new solutions.

## 5. CONCLUDING REMARKS

This paper aims to contribute to ongoing discussions on how to frame solidarity within EU asylum and migration law, which is a particularly politically divisive issue. The above analysis suggests that legislative solutions created in the context of crisis and focused only on hardship or crisis solidarity might not be able to appropriately achieve political consensus necessary for their effective implementation. If perceived as imposed from “above”, the same mechanisms can be seen either as threatening to national identities and reinforcing social movements and political parties that oppose the EU project, or as not ambitious and efficient enough to strengthen the alliance which is necessary to foster EU integration. As the discussion and the voting in the European Parliament clearly showed, the adoption of the Pact itself was simultaneously perceived by different MPs as a victory *of* the far-right and a victory *over* the far-right.<sup>88</sup> This is bound to dictate the practical impact of the various instruments included in the Pact.

In more general terms we can rely on Weiler’s remark that “social mobilisation in Europe is at its strongest when the direct interest of the individual is at stake and at its weakest when it requires tending to the needs of the other”.<sup>89</sup> The “needs of the other” in EU asylum and migration law need to be reframed and aligned with shared interests to include not just ‘other’ Member States, but other individuals, local and regional communities, to ensure the effectiveness of eventually adopted legal solutions.

A stronger emphasis on operationalisation of solidarity as a multi-level, multi-function binding legal principle could help prevent and alleviate the systemic pressures in the course of its implementation. This type of thinking effectively

<sup>88</sup> See EUactiv, *EU’s historic migration pact passes amidst divisions and far-right fears*, [<https://www.euactiv.com/section/migration/news/eus-historic-migration-pact-passes-amidst-divisions-and-far-right-fears/>], Accessed 10 April 2024.

<sup>89</sup> Weiler, J. H. H., *The political and legal culture of European integration: An exploratory essay*, International Journal of Constitutional Law 9, No. 3-4, 2011, p. 693.

includes voluntary and non-binding mechanisms surrounding and accompanying the binding rules. It could reinforce the shared belief in common good and wider understanding that solidarity is an obligation that brings redistributive advantages, and “not a political favour”.<sup>90</sup>

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<sup>90</sup> De Bruycker, P., *The New Pact on Migration and Asylum: What it is Not and What it Could Have Been*, in: Thym, D., 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, pp. 33-41, 35.

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