

The Price of Solidarity: Sharing the Responsibility for Persons in Need of International Protection within the EU and between the EU and Third Countries

1. Research topic and structure

The purpose of this project was to empirically and theoretically analyze the distribution of responsibilities in refugee protection within the EU and between EU Member States and third countries. In the empirical part the goal was to examine the distributive effects of the legal and policy mechanisms adopted to implement solidarity within the Common European Asylum System (CEAS) under Article 80 TFEU, with focus on Dublin Regulation. Questions on resettlement, as part of the sharing practices between the European Union and its Member States and third countries were also to be addressed in this empirical analysis. The theoretical part, was aimed to develop a theory and method to understand the concepts of "solidarity" and "fairness" in Article 80 TFEU and inform existing and future.

2. Project results

The project's point of departure has been that there is an uneven distribution of asylum-related responsibilities within the EU and between the EU and third countries, mainly because the meaning of the principle of solidarity and fair sharing of responsibility as well as the obligations lying at its core, remain elusive and greatly discretionary. In an effort to shed light to this principle, the project combined an empirical and a theoretical analysis of the issues at stake. In the following lines the main findings of this analysis are going to be presented.

Empirical Analysis

A. Syrian Crisis and EU solidarity: A case study

What forms the core of the project's empirical part, is a *case study* which tests solidarity and sharing as enshrined in Article 80 TFEU and envisaged in the Stockholm Program and beyond, via a reality check: in view of the current situation in Syria, it assesses the distributive effects of sharing mechanisms within the EU and addresses the corresponding challenges. A summary of the conclusions drawn can be schematically illustrated as follows:



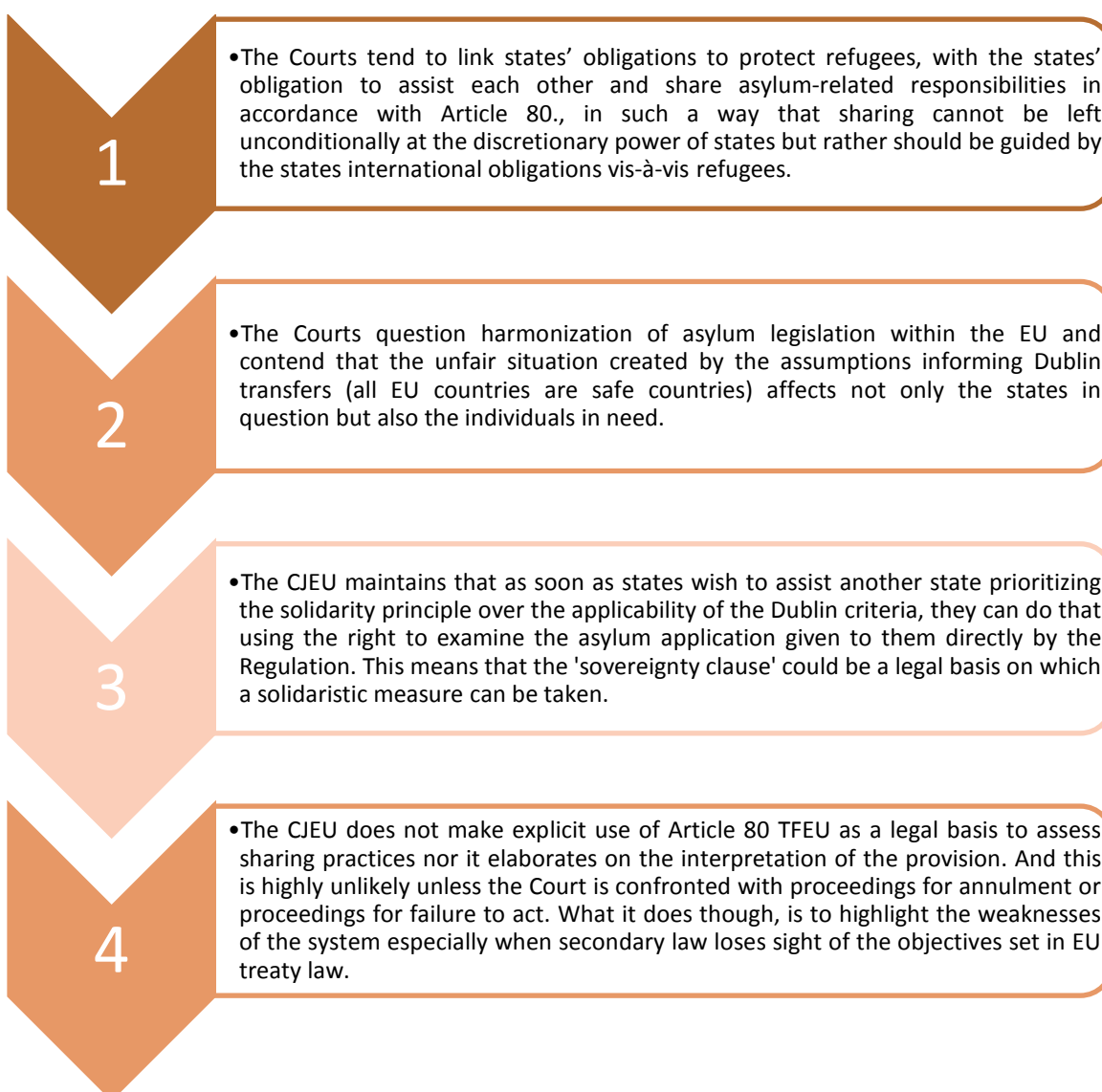
Lessons learned:

Despite the existence of a body of law (CEAS) designed to be applied with uniformity and based on solidarity amongst EU states, reality reveals that before a humanitarian crisis and the duties it entails for the international community, Europe's response is echoed in 28 individual policies, raising a lot of issues with regard to intra-EU solidarity and at the same time making its external contribution towards that crisis problematic. In addition to this

horizontal deficit of solidarity a vertical one, between states and individuals in need of protection, is equally evident. The demand for a legally clear and operationally realistic sharing system both at an *interstate* and *state-refugee* level should thus be seriously considered. The empirical analysis reveals that European states resort, by necessity, to a voluntary compliance according to perceived self-interest mainly due to the lack of a common understanding and comprehensive regulation of solidarity and sharing.

B. Refugee Protection, Solidarity and Dublin: The European Courts' Stand

States' obligations with regard to asylum are highly institutionalized, whereas states' obligations *vis-à-vis* sharing are not, revealing their discretionary nature. In that context, the project employed a case law analysis in order to explore whether and to what extent the European Courts have tried to interpret Article 80 TFEU as to the obligations it entails for states.



Lessons learned:

Both the Luxembourg and the Strasbourg Courts seem to address and try to promote solidarity in refugee protection, in two ways: by monitoring the harmonization of asylum legislation across Europe and by emphasizing the importance of supporting countries with less developed structures to guarantee the rights and benefits of third country nationals. The allocation of asylum related responsibilities between states shouldn't be conceived as a concept empty of human rights concerns. The Courts and specifically CJEU does not legislate and is clearly unable and perhaps unwilling to fill the gaps left by the loosely framed language of the Treaties and by the political compromises of secondary legislation, yet it does hint to an understanding of the Dublin system with an emphasis on protection standards.

C. Beyond Dublin?

Part of the project was a discussion about alternatives to the current allocation of asylum responsibilities system in the EU. The following suggestions are worth-noting:



Theoretical Analysis

The main contribution of this project to the question of how the principle of solidarity in the EU should be conceptualized, could be summarized as follows: In its capacity of being a party of the social contract of the international community, the EU has undertaken an obligation to assist refugees in need of protection. The obligation and corresponding right to protection is based on principles of solidarity in communitarian ethics, and an embodiment of relational justice, humanity and compassion (*state-individual solidarity*). Considering the international nature of the refugee problem and the need for cooperation, states must also show each other solidarity (*interstate solidarity*). On this interstate level, solidarity is not expressed as humanity and compassion, but as distributive justice. Solidarity as distributive justice between the Member States aims to ensure that the EU fulfills its obligation towards refugees. In this context, distributive justice is just a means for the protection of refugees.

The EU, as a legal order, has an obligation to ensure that its institutions develop and maintain sharing mechanisms designed to achieve a fair distribution between the Member States. 28 nation states, members of a Union, are committed to create an area of freedom, security and justice, in which measures enhancing asylum and refugee protection under a common asylum system will be governed by the principle of solidarity and fair distribution of responsibilities pursuant to Article 80 TFEU. CEAS policies are dictated by the need of building an asylum system based on common standards of protection (Tampere Conclusions, 1999), where similar cases should be treated alike and result in the same outcome, regardless of the Member State in which an asylum application is lodged. In other words, practices of *sharing norms*, which lead to the harmonization of asylum legislation across Europe, is the baseline. If furthermore, combined with the duty of sincere cooperation under Article 4(3) Treaty on the European Union, Article 80 TFEU amplifies the duty of Member States and EU institutions to engage in solidarity and fair responsibility sharing practices, not limited to emergency situations and not only as a matter of mere 'burden' sharing, namely *sharing financial resources* (reallocating funds) but also as a matter of ensuring that the right to seek asylum (Charter Art. 18) is fully respected through *sharing procedural and protection responsibilities*, or else sharing expertise and reallocating people.

Lessons learned:

Solidarity in the European asylum context should be seen as a concept with evolutive character, reflecting social reality and designed to address rapidly changing necessities. It

has, indeed progressed in the EU asylum law and policies from a rather moderate institutional reference to a radical idea that mandates action aiming specifically at fair patterns of distribution of asylum-related responsibilities amongst states. What follows is that the implementation of Article 80 TFEU should be seen as a series of ad hoc measures suited to each particular situation, the management of which is a law-governed process that the EU and its institutions have to guarantee.

Some might voice the view that the nature and content of solidarity and fair sharing of responsibility have been left deliberately vague, suggesting that European states had no intention of taking on new obligations to provide assistance to individuals in need or other states. Following this line of reasoning a discussion on solidarity merely amounts to “political rhetoric”. However, according to the above analysis, solidarity could still be seen to have normative significance as a form of law which confers competences (socially guaranteed powers) and provides legal authorization for certain kinds of executive-legislative action. Following a Scellian approach, solidarity should be seen as the benchmark by which certain measures (i.e. instruments adopted to materialize the Common European Asylum System) must be assessed and approved or rejected. Thus, Article 80 TFEU, even if not imposing duties on states, it has normative significance as it reflects key features of EU law geared to mutual dependence of the members of a community and delegates power to officials i.e. governments, EU organs, to make rules through which a fair sharing of asylum-related responsibilities is to be materialized. Following this line of reasoning, EU Member States should implement solidarity and fair sharing by taking measures or revising those already taken, to that direction.

3. Impact

The added value of the present research project can be summarized as highlighting the challenges and problematic areas in solidarity discussions in EU asylum law and policies and thus, offering a better understanding of solidarity to academics, students, legal practitioners, policymakers and other stakeholders. Such an understanding ensures legal certainty and consistency within the Common European Asylum System, as well as compliance with international human rights standards.