

Guest Note

The New Pact on Migration and Asylum: why Pragmatism Cannot Engender Solidarity

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The Pact's grand ambitions

The significance of solidarity as a 'founding and existential value' of the Union and as 'the bedrock of the European construction' has been reiterated time and again.¹ The 2015 increased refugee movements to Europe and the failure of the EU and the Member States to respond in a coherent, fair and humane manner have exposed the CEAS inherent limitations² and have led to what has been termed as the European refugee crisis, and what has proved to be the Union's solidarity crisis.

In the aftermath of 2015, faced with a number of humanitarian challenges including the appalling reception conditions for asylum-seekers and refugees arriving on the Greek islands,³ the European Commission appeared to acknowledge the myopic operationalization of solidarity over the past years. In September 2020, the Commission adopted the new Pact on Migration and Asylum which claims to pursue a 'humane' approach to migration and asylum with a focus on building trust amongst the Member States by closing the existing implementation gap.⁴ EC President, von der Leyen, has stated that the proposed reforms reflect a 'pragmatic and realistic approach' taking 'many legitimate interests' into consideration and thus, striking 'a new balance between responsibility and solidarity.'⁵ Solidarity features prominently in the Pact, as the main pillar for a fair, workable and sustainable EU migration system. Nonetheless, going beyond the rhetoric of solidarity requires an investigation of the considerations that have informed the Commission's proposals; an exposé of what is given priority to and what is let slide. In the following, I deconstruct the aforementioned ambitions of the Pact and ask to what extent the suggested reforms are likely to foster solidarity amongst the Member States.

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¹ See eg. Opinion of AG Bot in Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v. Council of the European Union* EU:C:2017:618 paras 17–19.

² See eg. M den Heijer, J Rijpma and T Spijkerboer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System', (2016) 53(3) *Common Market Law Review* 607.

³ See CoE Commissioner's for Human Rights Letter to Margaritis Schinas and Ylva Johansson Ref: CommHR/DM/sf 008-2020, 9 March 2020.

⁴ 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 p. 2-3.

⁵ Press statement by President von der Leyen on the New Pact on Migration and Asylum, 23 September 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1727

The underlying rationale of the suggested reforms

The Commission begins by pointing out the complexity of the phenomenon of migrant and refugee movements.⁶ It is on this basis that the Pact prioritizes the coordination or else integrated policy-making⁷ between the various aspects of migration, namely border management and screening, asylum and integration, return and relations with third countries. This is, essentially, a reiteration of the interconnection between the internal and external dimensions of EU migration and asylum policy and the fact that the latter is an essential component of the former.⁸

Second, the Commission underlines the limitations of the current Dublin system⁹ focusing on the lack of a ‘structured solidarity mechanism’¹⁰. Varying migration and asylum demands, according to the President of the Commission, call for collective yet varying contributions by Member States depending on geographies, capacities, and policy choices¹¹ (whatever that may mean). In light of this, the Pact aspires to build a system whereby responsibility in contributing to solidarity measures takes all these factors into account. Contrary to what the CJEU suggested in the Hungarian case, namely the indivisibility of the solidarity obligation,¹² the Commission seeks to reach a compromise that would remedy the existing ‘one-size-fits-all’ approach to solidarity.

In particular, the Commission introduces a ‘predictable and reliable migration management system’ of flexible solidarity contributions ranging from relocation of asylum seekers from countries of first asylum to returns of irregular migrants.¹³ The system distinguishes between three different levels for contributions to be triggered: a) disembarkation following SAR operations,¹⁴ b) pressure or risk of pressure¹⁵ and c) crisis situations.¹⁶ As regards disembarkation, solidarity contributions may take the form of relocation. In cases of pressure, Member States are free to choose amongst different options including return sponsorship and capacity building, and, finally, in times of crisis States shall choose strictly between relocation and return sponsorship. The Commission is granted the authority to decide, whenever necessary, what kind of re-adjustments (corrections) will have to be made so that the solidarity contributions pledged by Member States would be fit for purpose. In such cases, solidarity becomes compulsory by virtue of the exceptionality of the circumstances.

⁶ Communication on a New Pact (4) p 4.

⁷ 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, p. 11.

⁸ See e.g. European Council, The Stockholm Programme – an open and secure Europe serving and protecting citizens, OJ C 115/1, 4 May 2010, par. 6.2, 6.2.3 and European Council, Conclusions, 27 June 2014, para. 2, 5, 8.

⁹ Communication on a New Pact (4) p 5.

¹⁰ Proposal for a Regulation on asylum and migration management (n 7) p. 11.

¹¹ Press statement (n 5).

¹² Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v. Council of the European Union* EU:C:2017:631, para 291.

¹³ Proposal for a Regulation on asylum and migration management (n 7) Part IV Solidarity, Articles 45-60.

¹⁴ *ibid*, Articles 47-49.

¹⁵ *ibid*, Articles 50-53.

¹⁶ European Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613 final.

Why the Pact is failing conceptually

The complexity of the phenomenon of human mobility is a welcome contention in the Pact. The distinction between ‘economic’ migrants and refugees has been questioned both descriptively and normatively for not capturing the reality of migration experience (mixed movements, overlap of displacement root causes) and for demonizing the movement for reasons linked to socio-economic deprivation. Extensive research has shown that mixed movements prove policies based on rigid distinctions between regularity and irregularity, untenable.¹⁷ One would thus expect that the institution of asylum and border management/removal from the territory are kept distinct as permeated by diametrically opposite objectives. Instead, it is rather clear from the new proposals that the mixed character of migrant movements to Europe post-2015 is used by the Commission to precisely justify and reinforce the very distinctions that create the problem in the first place. In fact, the term ‘mixed’ bears a negative connotation pointing to persons unworthy of protection.¹⁸

By integrating mechanisms concerned with protection with border screening and return, the Pact normalizes a conflation between refugeehood and irregularity. Pre-screening procedures make further distinctions e.g. between groups of asylum-seekers based on nationality possible and even desirable in order to achieve speediness and efficiency.¹⁹ In this context, the movement of refugees to and within Europe continues to be deemed as a ‘threat’ to the EU project on market integration and migration to Europe is framed as a collective action problem addressed through intensification of border management and cooperation with third countries.

Although containment and deterrence have given rise to a number of human rights violations on European soil over the last years,²⁰ the Commission’s proposals have not moved away from migration control preoccupations. This is highly reflected in the way in which the system for allocating responsibility for refugees between EU states is organized. The rather symbolic move by the Commission to rename the reformed Dublin Regulation, ‘the Asylum and Migration Regulation’, does nothing to remedy the very point that nurtures the fundamental inequality at the heart of the CEAS, namely the first entry criterion, which remains intact. The new Regulation maintains the default position that the more geographically vulnerable a country is, the more responsibility it will bear. It is striking that the Commission does not consider the reverse consequences of such blame-based interpretation of responsibility allocation which has for years triggered a race to the bottom (divergence in recognition, status and rights attached to it). Instead, the new proposals continue to favour the default connection between external borders and responsibility alongside a cumbersome administrative bureaucracy, adopting compensatory solidarity

¹⁷ See Michele Foster, ‘Economic Migrant or Person in need of Protection?’ in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Martinus Nijhoff Publishers 2016). See also Tendayi Achiume, ‘Migration as Decolonization’ (2019) 71 *Stanford Law Review*, 1509, 1512-1513.

¹⁸ See Proposal for a Regulation on asylum and migration management (n 7) p. 10-11.

¹⁹ Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 COM/2020/612 final.

²⁰ See, among others, Cathryn Costello ‘Overcoming Refugee Containment and Crisis’ (2020) 21 (1) *German Law Journal*, 17-22.

measures to tackle unevenness. Trust –on the basis of which solidarity is shown- is, therefore, reduced to a question of how well a country guards Europe’s external borders and makes returns possible.

Why the Pact if failing principally

The Pact puts forward a proposal about an in-built flexible solidarity system, which will offer Member States a wide range of options for sharing responsibility. First, let us say that there is nothing wrong with flexibility as such. What is indeed controversial is the fact that the proposed system is heavily reliant on the Commission deciding which contributions will be considered proportional and appropriate, in case voluntary pledges are not sufficient. It becomes clear that the system does not advance determinate criteria on the basis of which solidarity will be ‘measured’. This can hardly be conceived as a system whose effects will be predictable and in line with legal certainty. A number of questions are raised: What counts as a meaningful participation in sharing of responsibilities in financial and other terms? What kind of trade-offs will be legally acceptable in determining obligations? How is it guaranteed that no country is left alone in times of crisis if an agreement is not made as to what is fair and just? How does implicating the European Commission or any other EU institution in defining particular deliverables is different from the role the Council was tasked in the context of the never activated Temporary Protection Directive?²¹ Arguably, we are moving from a majoritarian interpretation of solidarity to an authoritarian one.

In addition, flexibility in interstate relations and a ‘new balance between responsibility and solidarity’ seems to come at a cost: more coercion and commodification of asylum-seekers to be traded and transferred between the EU. Although solidarity as the guiding principle in the AFSJ is meaning to provide guidance for building a system which is fair towards third country nationals (Article 67 TFEU), the Pact seems to go to the opposite direction; it treats asylum-seekers as passive objects, directing those in need of protection towards countries they have not earlier considered as their final country of asylum and allowing for the possibility of those whose asylum application has been rejected to be transferred from one Member State to another in order for the latter to return them back to their country of origin (in the name of solidarity between the Member States). For such a system to work, it is first and foremost a matter of increasing the protection of rights and non-discrimination in the receiving states. Naturally, this is a costly enterprise which many European countries are not able to afford on their own nor are they incentivized to do so. In light of this, the language and function of solidarity (as relocation or return sponsorship) appears to be more of an *apology* for the Dublin rationale and less of an ‘honest’ assessment²² and revision of an unfair system. It is also doubtful if it could contribute in a meaningful way to closing the existing implementation gap in so far as refugee preferences are not taken into account and the practicalities and politics of returns are taken for granted.

²¹ The Directive was criticized for the absence of predefined commitments for solidarity. Reliance on the Council to agree on whether there exists a situation that qualifies as ‘mass influx’ was feared as a prolonged process to be avoided.

²² European Commission, Press Release, A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity, Brussels 23 September 2020.

A pragmatic and principled approach: can we have it both?

The Pact has been the subject of extensive analysis²³ by commentators who, among others, agree that it is not really a fresh start but rather a repackaging of old ‘tricks’. In the same vein, the challenges the new proposal raise from a human rights perspective have been flagged by leading experts and NGO’s.²⁴ In terms of narrative, the Commission seems to be pursuing an impossible goal; the achievement of a pragmatic approach to migration and asylum i.e. one that is in line with the Union’s internal market objectives which is, simultaneously, fair towards migrants and fair for all Member States. Supposing that fairness for Member States can be reconciled with fairness towards refugees, let us not forget that the Commission builds its proposals on a non-existing spirit of Union solidarity. As a matter of fact, the Pact is based on EU Member States’ disagreement on solidarity. Although considerations of varying interests and asylum demands is a step to the right direction, solidarity in the Pact is not conceived in terms of advancing some determinate decisions but rather leaves the decision of particular means, targets, and optimal outcomes to be taken by the Commission or other centralized administrative bodies at a future time; a solidarity dependent on bureaucratic discretion.

It is worth noting, here, that there is a delicate line between ‘pragmatism’²⁵ and compromise. In some matters, there may reasonably be one best, most pragmatic solution. For example, it really may be a fact that a compulsory solidarity scheme based on fixed criteria will increase certainty and reliability on the system. Yet, there may be a lack of consensus over the means used to achieve this solution. In this case, seeking a compromise becomes itself the goal as ‘the most pragmatic solution’. As suggested earlier, there is no clear answer to the question of how much should a Member State spend on capacity building in third countries in order for this contribution to be considered proportionate compared to relocation. In a case like this, being pragmatic means seeking compromise without considering that a principled approach is sacrificed. It will be interesting to see where the Commission will draw the line. In the new proposals, though, it is safe to argue that solidarity is framed primarily as a matter which Member States need to reach a compromise as best as possible and less as a question that implicates particular EU law obligations and fundamental rights where compromise is only a last resort.

The above indicate that hiding behind a ‘pragmatic approach’ the Commission evades objections at a meta-level. How is the future of the CEAS envisioned and what do we want solidarity to achieve? The Pact puts forward a series of normative arguments, affirming some form of consequentialism on the one hand and value grounded insights on the other. Unfortunately, ‘pragmatism’ does not magically resolves contradictions nor does it reconcile competing interests. These questions require reimagining the EU as a legal construct, solidarity and unity of its peoples, and its form of governance in a different way. As I have argued elsewhere, restoring mutual trust between EU states requires restoring faith to institutions. European asylum law and policy is bound to fail engendering solidarity if they

²³ See the special series of posts on the New Migration Pact at the Odysseus Network blog <http://eumigrationlawblog.eu/series-on-the-migration-pact-published-under-the-supervision-of-daniel-thym/>

²⁴ See relevant contributions at the ASILE FORUM https://www.asileproject.eu/df_the-new-eu-pact-on-migration-and-asylum/

²⁵ On pragmatism see eg. the work of Richard Rorty, Richard A. Posner, Hilary Putnam, Russel B. Goodman.

do not create the conditions where all those who are involved (or subjected to EU law) participate in EU legal processes of integration.²⁶ In the words of Banakar ‘its [solidarity’s] viability at the transnational level remains ultimately a function of its efficacy at the micro level of EU citizens’,²⁷ and non-citizens as the case of asylum policy indicates.

²⁶ For a more detailed analysis, see Eleni Karageorgiou, *Rethinking solidarity in European asylum law: A critical reading of the key concept in contemporary refugee policy*, PhD thesis, Lund University, 2018.

²⁷ Reza Banakar, ‘Law, Love and Responsibility: A Note on Solidarity in EU Law’ in R. Banakar, K. Dahlstrand and L. Ryberg Welanders (eds), *Festschrift till Håkan Hydén*. Lund, 2018, p. 2.