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THE MANY FACES OF SOLIDARITY AND ITS ROLE IN THE JURISPRUDENCE OF THE AFSJ

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1. Introduction

Solidarity is a concept that transmigrated, around the time of the French Revolution, from legal jargon into political speech,[2] and from there back again into the legal text of the EU fundamental Treaties.[3] In its political sense, solidarity describes a desirable attitude or behaviour, and as an idea it acquired political power in the 19th century, when it 'became the skeleton-key to all social problems'.[4] In many European languages, it refers to a common feeling or action in support of a common interest, or to mutual support within a group.[5] It is probably in this sense that it was used by Schuman in its famous declaration of 1950, where he said '*L'Europe ne se fera pas d'un coup, ni dans une construction d'ensemble : elle se fera par des réalisations concrètes créant d'abord une solidarité de fait'*. On that occasion, he also spoke of '*solidarité de production'* (between France and Germany), which is closer to state of

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[2] Stjernø, *Solidarity in Europe. The History of an Idea* (CUP 2009) 27 and work there cited.
[3] The part of the Schuman declaration of 9 May 1950 mentioning solidarity, on which more below, was almost verbatim transposed in the preamble of the 1951 Treaty instituting the European Coal and Steel Community. Solidarity between Member States was then inserted in the Treaty on the European Community (Article 2) as modified in 1992 by the (Maastricht) Treaty on the European Union (Article G.2).
[4] Hayward, 'Solidarity: The Social History of an Idea in Nineteenth Century France' International Review of Social History , Volume 4 , Issue 2 , August 1959 , pp. 261, 263.
[5] Oxford Dictionary, 'Solidarity'.

community than to a behaviour, but in any case expresses the (political) idea of interconnection and mutual relation. In the second, legal sense, the word solidarity appears no fewer than 13 times in the Treaty on the Functioning of the European Union (TFEU), and 11 in the Treaty on the European Union (TEU). To solidarity is also dedicated a title in the EU Charter of Fundamental Rights (concerning labour rights, family rights, and consumer rights).

In its various transmigrations, in its service to as different masters as Leninists and Catholics, in its centenary history, the concept has inevitably been diluted, as if being tossed around discoloured the meaning. The result is that solidarity is a vague notion, one of many in which a purely semantic, essentialist analysis yields as many results as there are observers.[6] This is also clear by having a cursory glance at the EU Treaties: solidarity appears in such different contexts (solidarity between employer and employees; between Member States if difficulties arise in the area of energy supply; between the Union and the Member States in case of a terrorist attack or of a natural or man-made disaster, etc) that a unitary meaning is possibly impossible to find. Rather than concentrating on the essence or meaning of solidarity, and thus deriving its 'correct' legal interpretation, we adopt a functionalist approach. The question moving the inquiry of this chapter is thus the following: how is solidarity used in the case law of the Court of Justice of the European Union (herein, 'the Court')? This chapter purports to ascertain the legal nature of solidarity in the case law in the Area of Freedom, Security and Justice (AFSJ). The analysis thus starts with a jurisprudential (i.e. philosophical, legal-theoretical) inquiry, as this field may prove helpful in suggesting a theoretical (legal) framework to structure the answer. It will need to be ascertained, in the first place, what exactly is meant by a 'face of solidarity', that is, what could the 'legal nature' of a concept be, in general terms. Thus, section one is of general and abstract nature, and it is independent, so to speak, from the concrete object of the chapter. It provides instead the necessary theoretical background which will inform and, it is hoped, sharpen and validate the rest of the chapter. This is done in section 2. Building upon these theoretical foundations, the chapter zooms in on an area of particular practical relevance, the AFSJ. Section 3, 4, and 5, consider solidarity as value, as principle, and as rule, detailing the applicable caselaw. The analysis is done with reference to 16 judgments and/or opinions decided by the Court since the entry into force of the Lisbon

[6] J Elster, 'Some notes on 'Populism'' (2020) 46(5) Philosophy and Social Criticism 591: 'Definitions can never be true or false [...]. Those who write about populism, capitalism, democracy and other complex social phenomena sometimes give the impression that one can send out a kind of conceptual probe to discover their 'true meaning', just as one can send out a space ship to show us the hidden face of the moon. One writer may, for instance, criticize another for having 'misunderstood' populism. Such essentialist practices are common but meaningless. Everyone is entitled to their own definition, provided they stick to it consistently and, for ease of communication, do not deviate too much from common usage.'

Treaty. This chapter therefore suggests that the case law on solidarity in the AFSJ evinces three faces of solidarity: solidarity as aspirational value, solidarity as principle, and solidarity as a rule. Speaking of solidarity as a 'value' means that it transcends specific doctrinal domains such as migration law, labour law, human rights etc, and it offers instead a standard of behaviour to strive for and on the basis of which to adopt or interpret other rules. Solidarity is also a principle in the sense that it guides the application or interpretation of other rules, and in this sense, it is akin to a value (the differentiation is defended in the next section). Finally, solidarity is a rule in so far as it provides the solution to a legal controversy in a specific instance, by creating an obligation for the EU legislator or for the Member States.

2. The Theory

We begin from the proposition that solidarity (as many other concepts) comes on a spectrum of bindingness. The volume of its normativity varies: louder in certain cases when it leads to the annulment of EU law; more silent in other instances, when it is merely invoked as an aspirational value. But it is not the aim of this chapter to *explain* the variance in normativity, so to speak. That is a law-in-context enquiry, which may build upon, but is rather distinct from, the one attempted by this chapter. To be sure, while our chapter is not primarily concerned with seeking 'to identify the ideational and zeitgeisty elements of case law'[7] (as others instead are), we do recognise that that element is essential to a correct understanding of our analysis, but its discussion shall be limited to the conclusion.[8] This chapter's approach - and in particular this section's - is more abstract and has an aspiration to generality. What this section says about solidarity, we believe, could be said about many other concepts in (EU) law.

What are, then, the 'faces' of solidarity - and what is exactly a 'face', in this context? What are the possible legal 'strengths' of a legal concept? What does it mean, in other words, to say that the normative value of a concept or of a provision varies? It is a well-established and non-controversial philosophical position that systems, including those based on words such as the law, can carry normative strength. Particular attention has been dedicated, in philosophical and

[7] D Schiek, 'Solidarity in the case law of the Euro- pean Court of Justice – opportunities missed?' in Krunke; Petersen, Manners (eds), *Transnational Solidarity. Concept, Challenges and Opportunities* (CUP 2020) 4.
[8] In technical jurisprudential terms, our analysis is not rigidly anchored to legal positivism, as we believe that some concepts, which some would call "non-legal concepts", are relevant to our understanding of "legal concepts". The distinction obscures more than it reveals.

jurisprudential work, to the normativity of *words*. Reference shall be had for example to Austin's theory of speech act, according to which certain words not only present information, but perform an act. Many legal texts share this characteristic (of commanding, of ordering something), even though the way they *do things* (their normative power) varies. Quite how much they can do - how much words influence behaviour - is an open question. Even within a legal system, the strength of normativity varies on a continuum. Within a given (legal) system, the cogency of a rule may differ from that of other rules. The difference may be one of hierarchy,[9] or of some other kind. Let us consider in more detail the difference 'of some other kind'. A legal system is not all equally binding. In a first sense, this is obvious and was also noted by Kelsen and Hart in their seminal contributions on the definition of law: certain rules are conditional, or permissive, rather than peremptory. In a less obvious sense, there are shades of normativity even for orders or commands - and this is what our article seeks to explore. Law, as expressed by Baxter in a famous article quoting a beautiful phrase by Shakespeare, comes in 'her infinite variety'.[10]

The 'classics' help by suggesting at least a distinction between values (or principles) and rules. Reference shall be had to the seminal work of Dworkin and MacCormick. Despite the fact that they are highly influential authors, to the best of our knowledge their distinction is not routinely adopted, at least in these explicit terms, by scholars of EU law.[11] Another source of inspiration could be the scholarship on the phenomenon of 'soft law' in the EU. However, the inquiry in that context is slightly different than ours, as that is oriented to understanding what and when produces legal effects, rather than classifying, in an abstract manner, what kind of legal effects exist.[12] For this reason, in our opinion studies on soft law have not yet provided a convincing theoretical standpoint from which to analyse this specific issue of strength of normativity.[13] Building on speech act theory, Wessel[14] proposed various examples, in European Union law, of the categories of legal 'speech' identified by Ruiter.[15] These are Declarative legal acts; self-obligating (or 'commissive') legal acts; purposive legal acts; Imperative legal acts; hortatory

[9] H Kelsen, *Pure Theory of Law* 267.
[10] Baxter, 'International law in "her infinite variety"' (1980) 29(4) International and Comparative Law Quarterly 549.
[11] But for the distinction between principles and rules in EU law see T. Tridimas, *General Principles of European Community Law* (OUP 2006), drawing from Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).
[12] Eliantonio, Korkea-aho, Stefan (eds), EU Soft Law in the Member States. Theoretical Findings and Empirical Evidence (Hart 2021).
[13] A similar opinion is expressed by A Turk and N Xanthoulis, 'Legal accountability of European Central Bank in bank supervision: A case study in conceptualizing the legal effects of Union acts' (2019) 26(1) Maastricht Journal of European and Comparative Law fn 14.
[14] R Wessel, 'Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?' (2016) European Foreign Affairs Review 16
[15] See D.W.P. Ruiter, Institutional Legal Facts: Legal Powers and Their Effects (Kluwer Academic Publishers, 1993).

legal acts; expressive legal acts and assertive legal acts. This categorisation by Ruiter (as applied by Wessel to EU law) is mentioned here as one example of possible taxonomies of legal acts, even though in that example the focus was not the normative 'weight' of each act.

Dworkin posits that rules (such as those found in a statute) providing rights and obligations can in fact be complemented, in a decision-making process, by other 'standards' governing their operation and application. What are these other standards? Dworkin distinguishes between policies and principles. A policy is the standard 'that sets out a goal to be reached, generally an improvement in some economic, political, or social features of the community'.[16] A principle is 'a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality'.[17] The distinction between specific rules and principles also appears very clearly in Hart's later works, such as *Punishment and Responsibility*,[18] in which the Oxford philosopher considers that rules of criminal law are subject to (more general) principles, and asks whether, in turn, these principles reflect a moral tradition (a conjecture he rejects, and here lies an important difference with Dworkin). MacCormick usefully describes the opposition between values and rules as a difference in specificity and extension ('unlike rules, whose operative facts delineate specific circumstances of application, values are pervasive [...] These are norms that bear on decision-making in almost any circumstance, so there is no point in singling out particular circumstances of application. They are what we commonly call 'princi- ples', or indeed 'general principles'[19]).

We suggest adopting a taxonomy partially overlapping with the above. The rest of the chapter therefore discusses three faces of solidarity: as an aspirational value; as a principle; and as a rule. When talking about solidarity as value, we will consider something akin to Dworkin's 'policies': solidarity is the aspiration toward a social situation considered desirable. Solidarity as 'principle' participates in the notion developed by both Dworkin and MacCormick, in that it bears over decision-making - and thus guides the application of rules - regardless of the specific context on which a rule applies. The distinction between a principle and a value is perhaps little more than arguing semantics,[20] but it is justified in light of the distinction (if

[16] R Dworkin, *Taking Rights Seriously* 22.
[17] R Dworkin, Ibid.
[18] H. Hart, 'Punishment and Responsibility: Essays in the Philosophy of Law' (OUP 2008).
[19] N MacCormick,*Institutions of Law* (OUP 2004) 26.
[20] J. Wouters, 'Revisiting Art. 2 TEU: a True Union of Values' (2020) *European Papers* 255, 260 'it seems a somewhat pointless undertaking to try to distinguish systematically between "values" and "principles"'.

blurred[21]) between EU values on one hand (Article 2 TEU), and on the other hand EU general principles (Article 6(3) TEU).[22] Finally, solidarity as a rule is one capable to confer rights or generate obligations in specific circumstances, when the Treaties say so. This taxonomy, which builds closely on those classic works, has the advantage of being sufficiently abstract to lay claims, if not to universality, at least to generality within EU law. They could be applied not only to solidarity, but also to notions such as '(mutual) trust', 'security', 'best interests of the child', and so on. The three categories therefore transcend the specifics of our case study, and are instead useful because they encompass, jointly or individually, characteristics of all the values that a normative text can have. The rest of the chapter is devoted to teasing out the three aspects, as applied to solidarity in the case law of the CJEU.

Other authors have provided very helpful taxonomies of the principle of solidarity: our taxonomy is different from the previous ones because it focuses precisely on the normative value (or juridical status) of solidarity and as such complements scholarly writing in this field. For example, Domurath identified three dimensions of the principle: solidarity between Member States, between Member States and individuals, and between generations.[23] Thym and Tsourdi distinguished four dimensions of solidarity in the EU context: 'transnational solidarity, inter-state solidarity, solidarity between a particular group of individuals and, finally, the institutional dimension'.[24] Schiek's comprehensive study suggests 'to identify the dimensions and types of solidarity'[25] along four dimensions ('solidarity between citizens, between Member States and the EU, between Member States and Citizens and international solidarity') and, within those, six categories ('solidarity as charity, solidarity as mutual obligation, solidarity as risk mitigation, embedding individual rights, embedding the Internal Market, rejecting limiting effects of national solidarity').[26]

[21] F Casolari, 'I principi del diritto dell'Unione europea negli accordi commerciali: una visione di insieme' in G. Adinolfi (ed), *Gli accordi di nuova generazione dell'Unione europea in materia di commercio ed investimenti* (Giappichelli 2021) 2.
[22] On the distinction see also the comment on Article 23 TEU by A. Rosas, 'EU Restrictive measures against third states' (2016) Il Diritto dell'Unione Europea 641: 'Whilst this provision thus uses the notion of "principles", they are referred to in art. 2 TEU as "values", and values they are.'
[23] I. Domurath, The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach, in: 35 European Integration 1013, pp. 459-475; see also P. Hilpold, 'Understanding Solidarity within EU Law', 34 Yearbook of European Law (2015), p. 257.
[24] Thym and Tsourdi, 'Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions' (2017) 24(5) Maastricht Journal of International Law 605.
[25] Schiek (n 7) 3.
[26] Ibid 3.

3. Solidarity as an Aspirational Value

Solidarity is presented as an aspirational value in the preamble of the TEU (since its entry into force in 1993)[27] where Member States express their desire 'to deepen the solidarity between their peoples while respecting their history, their culture and their traditions'. Further, it is expressly included among the values, common to Member States, on which the EU is founded (Article 2 TEU). It is also an objective of the EU to promote 'solidarity between generations' (Article 3(3) TEU). Similarly, it features as a 'universal value' in the preamble of the Charter, and 'solidarity' is also the rubric of Title IV of the Charter on worker rights, family life, and consumer protection. This aspirational role has been confirmed extensively in the jurisprudence of the Court in the AFSJ, by the Court and AGs alike. A first example is *Slovakia and Hungary v Council*.[28] These two States had contested the validity of Council Decision (EU) 2015/1601[29], which introduced relocation mechanisms for the purpose of easing the burden of heavy migratory fluxes on Italy and Greece.[30] The importance of solidarity in this context – and employment thereof as a value – was made clear by AG Bot in his Opinion in this case, who argued that:

> "solidarity is among the cardinal values of the Union and is even among the foundations of the Union. How would it be possible to deepen the solidarity between the peoples of Europe and to envisage ever-closer union between those peoples, as advocated in the Preamble to the EU Treaty, without solidarity between the Member States when one of them is faced with an emergency situation? I am referring here to the quintessence of what is both the *raison d'être* and the objective of the European project'."[31]

The AG's reference to Article 3(5) TEU – where this notion is mentioned as an objective - undoubtedly underscores the status of solidarity as an aspirational value. This is, we submit, a 'policy' in the Dworkinian sense, since solidarity works as a standard to be achieved. It does not, however, lead directly to any concrete applications in the Opinion. The AG instead was of the view that 'behind what is by common consent called the '2015 migration crisis', another

[27] In addition, in its Article A, the Maastricht TEU stated that the task of the EU 'shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples'.
[28] Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council*, Judgment of the Court of 6 September 2017, EU:C:2017:631.
[29] 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
[30] Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council*, paras 1-31.
[31] Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council*, Opinion of 26 July 2017, EU:C:2017:618, para 17.

crisis is concealed, namely the crisis of the European integration project, which is to a large extent based on a requirement for solidarity between the Member States which have decided to take part in that project'.[32] This suggested that solidarity was understood as background, as a desirable objective rather than an enforceable rule or even principle guiding the application of a rule.

A similar understanding of solidarity is evident across multiple other Opinions. A first example thereof is *Ryanair.*[33] The circumstances of this case were peculiar: doubts as to the interpretation of Article 5 of Directive 2004/38/EC arose in the context of proceedings brought by Ryanair against a fine it received for failing to ensure that a passenger possessed all necessary documents for entering Hungary.[34] The AG opined for a broad reading of this provision (arguing in favour of the individual's entry on Hungarian territory)[35], recalling that "Article 67(2) TFEU provides that the European Union is to ensure the absence of internal border controls for persons and must frame a common policy on, inter alia, immigration and the control of external borders that is based on *solidarity* between Member States and is fair towards third-country nationals."[36] Thus, solidarity was once again invoked as the overall objective of the system establishing the contested provisions. Similarly, in *K.S.*[37], the Court was asked to clarify the arrangements for the reception of an asylum-seeker where a national authority has adopted a decision to transfer them to the Member State it has identified as being responsible for examining that application pursuant to Regulation No 604/2013.[38] The AG also opted for an interpretation of the Regulation benefitting the asylum-seekers, recalling the aspirational value that solidarity holds vis á vis provisions of Chapter II of the TFEU.[39] This very legal form of solidarity was also stressed in *Vethanayagam v Minister van Buitenlandse Zaken*[40], which raised questions as to the distribution of competence in relation to the Visa Code. In developing her analysis, AG Sharpston recalled that the Schengen system was one of "real solidarity such that the effects of a decision taken by one Member State are not limited solely to the territory of that Member State but, on the contrary, concern the Schengen area as

[32] ibid, para 24.
[33] Case C-754/18 *Ryanair v Országos Rendőr-főkapitányság,* Opinion of 27 February 2020, EU:C:2020:131.
[34] ibid paras 1-2.
[35] ibid para 81.
[36] Ibid, para 32.
[37] Joined Cases C 322/19 and C 385/19 *K.S. M.H.K. v The International Protection Appeals Tribunal, The Minister for Justice and Equality*, Opinion of 3 September 2020.
[38] Ibid, paras 23-40.
[39] Ibid, para 40.
[40] Case C-680/17 *Vethanayagam v Minister van Buitenlandse Zaken*, Opinion of 28 march 2019, EU:C:2019:278.

a whole."[41] *X v Staatssecretaris van Veiligheid en Justitie*[42] featured different circumstances, but an equal commitment to this interpretation of solidarity: in this case the applicant had filed 4 subsequent applications for international protection in two different MS, while being investigated for allegedly committing a sexual offence on the territory of the MS where the first applications were filed.[43] The referring Court thus sought to understand which MS would be competent for assessing the last application. In this context, AG Bot underscored the cardinal value of solidarity, describing it as a "'pivotal element' in that system [which] must, moreover, be 'genuine and practical' and be shown towards the Member States most affected by flows of asylum applicants which place disproportionate pressure on their systems."[44] A similar situation arose in *Kastrati*[45], which concerned the interpretation of Regulation No 343/2003 of 18 February 2003. The referring court essentially wished to know in what way the withdrawal of an asylum application by an asylum seeker, who lodged an application for asylum in only one Member State, affected the applicability of this instrument. AG Trstenjak also reiterated the aspirational role of the *spirit* of solidarity, arguing that:

> "Regulation No 343/2003 has essentially adopted the concept of the Dublin Convention of 15 June 1990, whereby, in an area in which the free movement of persons is guaranteed in accordance with the provisions of the Treaties, each Member State is responsible vis-à-vis other Member States for its actions in relation to the entry and residence of third-country nationals and must bear the consequences of its actions in the spirit of solidarity and cooperation in good faith."[46]

This understanding of solidarity was also affirmed by the Court itself. Indeed, in *Jafari*[47], the Court was asked whether Articles 2, 12 and 13 of the Dublin III Regulation were to be interpreted in light of other EU acts or not: the applicants in the proceedings had entered the EU through the Slovenian and Croatian borders – where they were issued documents – but travelled to and ultimately applied for asylum in Austria and Germany. These two MS sought to know whether the applicants' documents issued by the competent authorities of the MS of entry could be seen as visas within the meaning of the Schengen Borders Code, thus enabling

[41] Ibid para 38
[42] C-213/17 *X v Staatssecretaris van Veiligheid en Justitie,* Judgment of 5 July 2018, EU:C:2018:538.
[43] C-213/17 *X v Staatssecretaris van Veiligheid en Justitie,* Opinion of 13 June 2018, ECLI:EU:C:2018:434, paras 1-10.
[44] ibid, para 71.
[45] C-620/10 *Kastrati,* Opinion of 12 January 2012, EU:C:2012:10.
[46] Ibid para 48.
[47] Case C-646/16 *Jafari,* Judgment of 26 July 2017, EU:C:2017:586.

them to recognise the applicants as having entered their territory irregularly.[48] The broader question posed was thus whether the Dublin III Regulation had to be read in conjunction with the Schengen Borders Code and the Return Directive.[49] The Court employed solidarity as a value to reiterate that the distribution of responsibility between MS in asylum and migration must be done with regard for other MS as well. Indeed, according to the Court:

> "Recital 25 of the Dublin III Regulation thus refers, inter alia, to the direct link between the responsibility criteria established in a spirit of *solidarity* and common efforts towards the management of external borders, which are undertaken, as stated in recital 6 of the Schengen Borders Code, in the interest not only of the Member State at whose external borders the border control is carried out but also of all Member States which have abolished internal border control."[50]

4. Solidarity as a principle

Solidarity is described as a legal principle in a number of provisions of the Treaties. At a broader level, it is featured in Article 21 TEU as one of the principles which ought to guide EU external action more broadly. In the context of the AFSJ, solidarity is spelled out in two provisions: Article 80 TFEU, which underscores it as a guiding notion for MS action; and Article 78(3) TFEU, a "specific legal basis for provisional measures which implement the principle of solidarity in emergency situations characterised by a sudden inflow of nationals of third countries".[51] The two provisions fail however to disclose the character and role that this principle holds vis á vis other provisions in the Treaties, suggesting merely that it exists to regulate the exercise of MS competence in this field.

Member States' difficulties relating to the management of migration flows have been a fertile ground for the employment of solidarity as a legal principle. Indeed, within the jurisprudence of the Court, solidarity is most often utilised to guide interpretation of sensitive rules affecting MS responsibility in the context of the CEAS. The degree of normativity to be attributed thereto is however debatable since its use in this juridical form has not extended beyond Opinion of

[48] Ibid, paras 1-2, 29-36.
[49] Ibid, para 36.
[50] Ibid, para 85.
[51] Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council*, Opinion of 26 July 2017, EU:C:2017:618, para 17 AG Opinion, para 84.

AGs, with one exception: *N.S. and others.*[52] In this case, the Court was asked – inter alia – to provide an interpretation of Article 3(2) of Regulation 343/2003, with a view to clarifying the extent to which fundamental rights could trump the transfer of an asylum seeker to the state responsible for his/her asylum application pursuant to Article 3(1) of the same Regulation.[53] The applicant in the case was an Afghan national having entered the EU through Greece, however ultimately seeking international protection in the United Kingdom. Pursuant to Article 17 of Regulation 343/2003, the competent British authorities sought to transfer him back to the State they viewed as responsible for assessing his application for international protection – Greece. The applicant however contested the transfer, alleging the possibility of being exposed to fundamental rights violations in Greece on account of the systemic deficiencies affecting this State's asylum reception system.[54] The Court employed solidarity as a principle in the context of analysing the weight to be attributed to fundamental rights protection in the context of the CEAS, and particularly whether they could offset the transfer of the asylum-seeker, ultimately finding in favour of the suspension of this mechanism when such risks occur.[55] The result was however not reached through a direct application of the principle to the case at hand: solidarity was in fact not a self-standing principle in the Court's analysis, opposable to Article 17 of Regulation No. 343/2003, but rather one of the driving principles contained within Article 80 TFEU.[56] The Court in fact acknowledged the need for solidarity in the execution of obligations in the context of the CEAS, however recognising that solidarity (and the fair sharing of responsibility) may not ultimately justify the execution of provisions which may result in curtailing the fundamental rights of asylum-seekers.[57]

Other examples of the principle of solidarity being employed as a tool for interpretation are *Jawo*[58]*, X v Staatssecretaris van Veiligheid en Justitie*[59]*, Jafari*[60]*, X and X*[61] *and Adil.*[62] The circumstances leading to its application are generally similar: the entry and subsequent travel through the EU of an asylum seekers generates tensions between MS authorities as to the entity responsible for the assessment of the individual's asylum application; the Advocate General then relies, inter alia, on the principle to reiterate that the CEAS is not a system comprising

[52] C-411/10 *N.S. and Others*, Judgment of 21 December 2011, ECLI:EU:C:2011:865.
[53] Ibid paras 34-44.
[54] Ibid.
[55] Ibid para 123.
[56] Ibid, paras 10 and 93.
[57] Ibid paras 93-94.
[58] Case C 163/17 *Jawo v Bundesrepublik Deutschland*, Opinion of 25 July 2018, ECLI:EU:C:2018:613, para 145.
[59] Case C-213/17 *X v Staatssecretaris van Veiligheid en Justitie*, Opinion of 13 June 2018, ECLI:EU:C:2018:434, para 99.
[60] Case C-646/16 *Jafari*, Opinion of 8 June 2017, ECLI:EU:C:2017:443, para 139.
[61] C-638/16 PPU *X and X*, Opinion of 7 February 2017, ECLI:EU:C:2017:93, para 174.
[62] Case C-278/12 PPU *Adil*, Opinion of 9 July 2012, ECLI:EU:C:2012:430, para 33.

many MS acting alone, but an area which ought to see MS collaborate towards the management of migration flows. For instance, in *X v Staatssecretaris van Veiligheid en Justitie*, AG Bot described the principle of solidarity as being irreconcilable with the automatic nature of the take-back mechanism envisaged by Article 23 Dublin III, which ought to be applied with consideration for the "disproportionate pressure" on the asylum systems of the MS most affected by the migration crisis.[63] Similarly, in *Jafari*, the AG juxtaposed the principle of solidarity to the responsibility criteria enshrined in Dublin III, reiterating the need to strike a balance between the two, ultimately proposing that the Regulation be read separately from the Return Directive. Similarly, in *Jawo*, the referring Court asked a series of questions relating to the dischargement of duties under the Dublin III Regulation when a migrant absconds on the day of his transfer back and subsequently objects the decision. The referring Court sough to know, in particular, which effect poor reception conditions could have on the execution of a take-back procedure. The principle of solidarity – as provided within Article 80 TFEU – was however not attributed normative force: the AG limited himself to noting that the adoption of a – currently not existing – "genuine policy on international protection within the European Union" would be compatible therewith.

In *X and X* the applicants (two Syrian citizens and their children) had applied for short-term visa at a diplomatic representation of Belgium in Lebanon, hoping to flee Syria where they alleged to be exposed to the risk of being persecuted. [64] The concerns for potential fundamental rights for a visa application filed outside of the territory of the EU raised the novel and contentious question whether the Charter of Fundamental Rights of the EU could apply extraterritorially – a question answered in the affirmative by the AG.[65] More particularly, AG Mengozzi proposed that compliance with the principle of solidarity would require reading Article 25(1) of Regulation No. 810/2009 (on short-term visas) in light of fundamental rights – a position unfortunately not seconded by the Court. The normative character of this principle was reiterated by AG Bot in *Slovakia and Hungary v Council*, who stressed that "[s]olidarity is both a pillar and at the same time a guiding principle of the European Union's policies on border checks, asylum and immigration'. An expression of this is Article 67(2) TFEU, which states that the Union is to 'frame a common policy on asylum, immigration and external border

[63] Case C-213/17 *X v Staatssecretaris van Veiligheid en Justitie*, Opinion of 13 June 2018, ECLI:EU:C:2018:434, para 71.
[64] C-638/16 PPU *X and X*, Opinion of 7 February 2017, ECLI:EU:C:2017:93, paras 31-32.
[65] Ibid para 176.

control, based on solidarity between Member States, which is fair towards nationals of third-countries."[66]

Adil[67] represents the only exception to this line of litigation as it introduced the principle of solidarity not at a horizontal level (i.e. in the context of migration-countering efforts by MS), but rather at a vertical one (regulating the relationship between the CJEU and national courts.) In this case, the referring Court had requested that its preliminary reference relating to the interpretation of Article 21 of the Schengen Borders Code (providing for the prohibition of border checks) be dealt with under the urgent procedure.[68] AG Sharpston, in assessing the need thereof, described compliance with the principle of solidarity as entailing that national courts are under an obligation to provide all necessary legal and factual information to the Court in order to enable it to ascertain the urgence of the case.[69] Solidarity as a legal principle is thus a hermeneutic tool, utilised to reiterate the background against which other provisions of EU law ought to be interpreted. Yet one could go so far as to state that these 'expectations of solidarity' expressed by AG Bot and AG Wathelet incorporate moral or ideological considerations of what solidarity should entail, thus providing support to a Dworkinian reading of the caselaw.

5. Solidarity as a Rule

The preponderance of cases utilising solidarity for interpretative purposes should not however suggest that solidarity holds limited normative value. Indeed, *solidarity* has been employed as a rule in a twofold manner: one the one hand, as a rule to challenge the validity of secondary EU legislation; on the other hand, as a duty binding upon MS. The former approach can be evidenced in *Slovakia and Hungary v Council.*[70] The contested decision, so Poland contended in support of the applicants, did not allow the Member States to ensure the effective exercise of their responsibilities with regard to the maintenance of law and order and the safeguarding of internal security.[71] The Court noted that Article 5(7) of the relocation Decision allowed for derogations on grounds of national security or public order[72] and that practical difficulties in

[66] Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council,* Opinion of 26 July 2017, EU:C:2017:618, para 20.
[67] *C-278/12 PPU Adil,* Judgment of 19 July 2012, EU:C:2012:508.
[68] The referring court can file such a request pursuant to Article 104b of the Rules of Procedure of the Court.
[69] Case C-278/12 PPU *Adil,* Opinion of 9 July 2012, ECLI:EU:C:2012:430, para 33.
[70] Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council,* Judgment of the Court of 6 September 2017, EU:C:2017:631.
[71] ibid para 306.
[72] Ibid paras 12, 41.

implementing those provisions were not a flaw inherent in the mechanism.[73] The Court thus confirmed the validity of the Decision. A similar approach is visible in *Commission v Poland, Hungary and Czech Republic*, which arose from the alleged failure of those Member States to comply with certain relocations decisions.[74] Of particular relevance for this section is the analysis provided in paragraphs 80 and 81, where the Court recalled that:

> "the burdens entailed by the provisional measures provided for in Decisions 2015/1523 and 2015/1601, since they were adopted under Article 78(3) TFEU for the purpose of helping the Hellenic Republic and the Italian Republic to better cope with an emergency situation characterised by a sudden influx of third-country nationals on their territory, must, in principle, be divided between all the other Member States, in accordance with the principle of *solidarity* and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs the Union's asylum policy. […] The Commission's action is therefore based, in the present case, on a neutral and objective criterion relating to the gravity and the persistence of the infringements which the Republic of Poland, Hungary and the Czech Republic are alleged to have committed, which, having regard to the objective of Decisions 2015/1523 and 2015/1601 such as that objective has just been recalled, serves to distinguish the situation of those three Member States from that of the other Member States, including those which did not fully comply with their obligations under those decisions."[75]

The second approach - solidarity as a duty – was proffered by AG Bot in two separate cases. Firstly, in *X v Staatsecretaris van Veiligheid en Justitie,* in the context of the same discussion described in Section 3 of this chapter; and in *Slovakia and Hungary v Council.* In the former the AG relied on this phrasing to argue that "In so far as [the] transfer [back of an applicant] takes place automatically, irrespective of its human and material toll, I consider that, in a situation such as that at issue, it deprives the procedure for determining the Member State responsible of the rationality, objectivity, fairness and expeditiousness pursued by the EU

[73] ibid paras 308-309.
[74] Specifically, with Article 5(2) of 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 2015 L 239, p. 146) and Article 5(2) of 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 2015 L 248, p. 80).
[75] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and Czech Republic*, Judgment of 2 April 2020, EU:C:2020:257, paras 80-81.

legislature within the framework of the Dublin III Regulation and is an impediment to the discharge of the *duties of cooperation and solidarity* that must underpin the Common European Asylum System."[76] Similarly, in *Slovakia and Hungary v Council*[77], he opined that "the non-application of the contested decision also constitute[d] a breach of the obligation concerning solidarity and the fair sharing of burdens expressed in Article 80 TFEU. [According to him] there [was] no doubt that, in an action for failure to fulfil obligations on this matter, the Court would be entitled to remind the offending Member States of their obligations, and to do so in no uncertain terms."[78]

6. Conclusion. Solidarity: Clé de Voûte de la Construction Européenne?

What can be evinced from the above is that solidarity has been expressed in a plurality of ways in AFSJ jurisprudence, both from a semantic and juridical point of view, giving rise to challenges in terms of legal certainty. Solidarity may regulate relationships between individuals in close groups such as the family - formations which we would generally regard as private - as well as, with an abstraction, relations between states. But if this 'private' value is elevated to the functioning of the EU as a whole ('There are no societies, only individuals who interact with each other'[79]) it is not only due to the personal (religious) convictions of certain founding members (Adenauer, De Gasperi, Schuman[80]). It is 'the cement of society' because it offers a corrective to material and perhaps moral shortcomings: solidarity is shown when someone is in want; and it is the opposite of opportunistic behaviour generated by negative emotions such as contempt, envy, and hatred. This means, we believe, that moral considerations are relevant to the decision-making process. A Dworkinian framework helps provide a taxonomy of cases where this happens. When solidarity is a standard - and not merely a rule - a mechanical application is not possible (if indeed it ever is possible at all). Our enquiry thus sought to define the boundaries of this notion with a view to assessing its degree of normativity, and showed that, within the AFSJ, this is a rather multifaceted tool. As section 3 demonstrated, when

[76] C-213/17 *X v Staatssecretaris van Veiligheid en Justitie*, Opinion of 13 June 2018, ECLI:EU:C:2018:434, para 10.
[77] Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council*, Opinion of 26 July 2017, EU:C:2017:618, para 242.
[78] ibid.
[79] J Elster, *The Cement of Society. A Study of Social Order* (Cambridge University Press 2010) 248.
[80] Consider the ironic title by the Guardian 'EU founding father Robert Schuman moves a step closer to sainthood' (19 June 2021) available at: < https://www.theguardian.com/world/2021/jun/19/eu-founding-father-robert-schuman-moves-a-step-closer-to-sainthood> Accessed 15 October 2021.

solidarity is employed as a value, it has the form of a standard to be attained (e.g. Case C-646/16 *Jafari* and Case C-754/18 Ryanair). Solidarity may also take the form of a legal principle (Section 4), in which case, it is an hermeneutic tool to reach a given conclusion or advance a teleological interpretation of EU secondary law (*X and X, Jawo, X v Staatssecretaris)*. Solidarity as a legal principle holds value also because it regulates not just horizontal relationships (i.e. fostering cooperation between member states), but also vertical ones (solidifying further cooperation between EU courts and national courts) (*Adil).* Finally, when utilised as a rule, solidarity can seemingly constitute a ground of review of the validity EU secondary legislation (*Commission v Poland, Hungary and Czech Republic* and *Slovakia and Hungary v Council).*