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**“Le charme discret de la solidarité”.  
Inquiries in the History and Theory of  
Solidarity in EU Treaties**

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## 1. Solidarity Obligations within the European Treaties. The focus of this paper and some methodological caveats

The idea that the solidarity is a value, and perhaps even a legal principle playing a role in the building of human societies is a widely accepted one, though it remains difficult to be more accurate on the real meaning of the word “solidarity”<sup>1</sup>.

To give an idea of how various and frequent the referrals to solidarity may be in different contexts, we shall recall some examples, among the many actually possible. We shall start from the seminal work of Durkheim who has spoken for the first time of the role of solidarity in the construction of a social identity also in primitive human communities<sup>2</sup>.

But it is noteworthy that the word solidarity appears in several other contexts in which also it plays an important role.

It is, for instance, used in referral to the legitimacy of the role played by trade unions and, generally speaking, of all the organizations which seek a bottom up reformation of modern society through grassroot activities<sup>3</sup>.

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<sup>1</sup> The distinction between values and principles is in some ways a blurred one and it is maybe useless. It is to be found in legal discourse whenever one wants to distinguish what is legally binding (a legal principle) from what is not (a value) implying solely a sense of moral obligation. But see in our text *infra* at paras. 2 and 6

<sup>2</sup> Durkheim speaks of two types of solidarity in his famous work *De la Division du Travail Social*, Paris 1893 (I was able to consult the second French edition, Paris 1990), where he describes the different types of solidarity through the examination of their different law systems. The first one, which he calls mechanic solidarity, is typical of primitive communities based on the sharing of common values, on a system of sanctions for the violation of these common values, and has a genuine altruistic foundation (*ibidem* pp. 35 ff.). Whereas the second type, organic solidarity, is a feature of more complex societies, with a specialization and division of labor, which are governed by a sort of cooperative system of laws. Durkheim describes a bigger society which is characterized by diversity of values and division of labor. Here the solidarity plays an important role, but it is not based on altruistic feelings towards the other members of the community, but rather on the awareness of the interdependence of all the individuals as members of that society and therefore, at least according to Durkheim, it is based on a self-interest perception and it can be seen as a product of the division of labor (op. cit. pp.79 ff.).

<sup>3</sup> The idea at the basis of the use of the word solidarity in these contexts is to affirm the legitimacy and opportunity of creating human gatherings in a society, as a tool for inducing social change by

Again, the word solidarity appears in several theoretical discourses concerning the reasons laying the foundation of societies, such as, e.g., in the social teaching elaborated by the Roman Catholic Christian Church<sup>4</sup>.

And, coming to legal language, the idea of solidarity pops up in the civil law theory of legal obligations, where obligations to pay what is due may be defined as solidary when they can be required from no matter each among the obligated subjects<sup>5</sup>.

But solidarity is frequently referred to in the Constitutions of several States in Europe and in other parts of the world, not only to convey the idea of a community of destinies among all the individuals linked together by the constitutional compact, but also to point at specific obligations of solidarity due by the citizens to the collectivity as such<sup>6</sup>.

The word solidarity is also frequently used in the language of interstate relations, as a referral to the idea that social links may be traced among the States living and cooperating in a social milieu frequently described as an international community<sup>7</sup>.

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significant grassroots movements, linking together all those interested in that social change. This is well documented in the history of trade-unionism and also by Marxist advocacy of class solidarity. As a matter of fact, it is contended that through action, out of a unity of interest, of all the peoples oppressed and exploited by capitalism, social change can eventually be reached. Any quote in this respect would seem superfluous but anyway it is possible to refer to the fact that the famous Polish trade union chose Solidarity as its name. The same seems to apply to any other grassroots movement. See in this connection P. Ekins, *A New World Order: Grassroots Movements for Global Change*, London 1992

<sup>4</sup> See the *Catechism of the Catholic Church*, at 1939-1942 [https://www.vatican.va/archive/ENG0015/\\_P6Q.HTM](https://www.vatican.va/archive/ENG0015/_P6Q.HTM). And also G.J. Beyer, *The Meaning of Solidarity in Catholic Social Teaching*, in *Political Theology*, 2015, pp. 7 ff. And from the several possible quotes from the Popes' teachings, we shall choose the followings

“The solidarity which binds all men together as members of a common family makes it impossible for wealthy nations to look with indifference upon the hunger, misery and poverty of other nations whose citizens are unable to enjoy even elementary human rights. The nations of the world are becoming more and more dependent on one another and it will not be possible to preserve a lasting peace so long as glaring economic and social imbalances persist”.

(St. John XXIII, *Mater et Magistra*, 1961, no. 157)

“Interdependence must be transformed into *solidarity*, based upon the principle that the goods of creation are meant for all. That which human industry produces through the processing of raw materials, with the contribution of work, must serve equally for the good of all”.

(St. John Paul II, *Sollicitudo Rei Socialis*, 1987 no. 39)

<sup>5</sup> A solidary obligation, or an obligation *in solidum*, is a type of obligation in which the obligors are bound together, each liable for the whole performance (passive solidarity) or each of the obligees and claim the whole of the performance (active solidarity).

<sup>6</sup> Article 2 of the Italian Constitution e.g. recognizes the “inalienable obligations of political, economic and social solidarity”. See F. Giuffrè, *La solidarietà nell'ordinamento costituzionale*, Milano 2002; F. Polacchini, *Doveri costituzionali e principio di solidarietà*, Bologna 2016

<sup>7</sup> The idea of the existence of a society of States, sometimes described as an international community is to be found very frequently in international lawyers' writings such as H. Mosler, *The International Society as a Legal Community*, Alphen aan den Rijn 1980 or B. Simma, *From Bilateralism to Community Interest*

And in the end, the word solidarity appears often in the European Union Treaties after Lisbon and therefore, though the idea of solidarity is already a much diffused one in international law developments and has played an important role in doctrinal theorizing of that discipline, it is nevertheless a commonplace to say that the European Integration Process should be more closely related with the idea of solidarity even since the origins of that process<sup>8</sup>.

Now, this paper aims at verifying if the approach to solidarity issues, already present in the first documents of European integration, has undergone a process of streamlining till the current Treaties, a process conveying a specific European understanding of solidarity, or if the frequent recitals of this word, moreover in different contexts, haven't changed the general, if not generic, meaning of the word, i.e. that of an appeal to a sense of moral obligation to seek the common good, normal, and even maybe obvious, in a gathering of States and peoples designed to be permanent and lasting<sup>9</sup>.

This being the limited focus of this paper, we shall not indulge in more structural analyses, such as the one of the legal qualifications of solidarity in the European Union Treaties, whether it should be deemed to be a legal fundamental principle, or a simple recast of a political tenet, or a restatement with ethical implication of a value underlying the whole project of a European integration<sup>10</sup>, nor shall we try a classification of the various types of solidarity, as several scholars have done with reference to different

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*in International Law, Recueil des Cours de l'Académie de Droit International de La Haye (250) 1994, pp. 217 ff.*

As for the solidarity issues, see, among many, R. St. John MacDonald, *Solidarity in the Practice and Discourse of Public International Law*, in *Pace International Law Review* 1996, pp. 259 ff.; R. Wolfrum, *Solidarity amongst States: An Emerging Structural Principle of International Law* in P.- M. Dupuy and others, *Common Values in International Law: Essays in Honour of Christian Tomuschat* Kehl 2006, pp. 1087 ff.

<sup>8</sup> A. Pellet, *Les fondements juridiques internationaux du droit communautaire*, in *Collected Course of the Academy of European Law*, V-2 (1997), pp. 193 ff., at p. 268 says that

“La solidarité plus forte entre les Etats membres que celle qui unit (?) les éléments de la “communauté internationale”.

See also R. Bieber, F. Maiani, *Sans solidarité point d'Union européenne. Regards croisés sur les crises de l'Union économique et monétaire et du Système européen commun d'asile*, in *Revue trimestrielle de droit européen* 2012, p. 295 ff., where the authors state that

“the Treaties confer on that concept a scope that varies according to the context — sometimes an objective or parameter for EU action, sometimes a basic value, sometimes a criterion of the obligations to which the Member States have subscribed by acceding to the European Union. The common denominator that links those various emanations of solidarity in the context of the European Union is the recognition of the existence of a “common interest”, separate from and separable from the sum of the individual interests”.

<sup>9</sup> It is commonplace when tackling the issue of solidarity to refer to the Schuman Declaration issued May 9, 1951 where the word “solidarity” appears twice.

<sup>10</sup> Anyway, some considerations on these questions will be found in the Concluding Remarks (see paragraph 7).

*loci* of the Treaties, distinguishing a solidarity among States from a solidarity among the European citizens, or other types of solidarity<sup>11</sup>.

We simply would get involved with the problem of the meaning of the word “solidarity” as used in different places of the two European Treaties<sup>12</sup>.

We shall go into these issues, seeking for useful hints not only through the interpretation of the norms in the Treaties, but also drawing on the practice by States and Institutions, and looking also in the European Court of Justice case law in order to end our trip with a modest proposal on the interpretation of the referrals to solidarity in the European Treaties.

At this juncture, a further, important consideration is useful. That the recitals of the idea of solidarity in the European Treaties can be essentially traced back to the 2004 text of the Draft Treaty adopting a Constitution for Europe<sup>13</sup>.

As a matter of fact, even if the word solidarity has been in use in the European lexicon since the early developments of the history of European integration, nevertheless it is undeniable that the Treaties after Lisbon are highly indebted, as for the use of the word “solidarity”, to the Draft Treaty of 2004.

## 2. Solidarity Obligations within the European Treaties. Article 2 of the Treaty on European Union

Coming to the texts of the European Treaties, we find in the seventh recital of the Treaty on the European Union a first referral to solidarity and precisely to the fact that the Union was created by Member States out of the desire

“to deepen the solidarity between their peoples while respecting their history, their culture and their traditions”

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<sup>11</sup> Irina Domurath speaks, in this connection of the three dimensions of solidarity, a solidarity between Member States, one between the EU citizens, and another between generations. See I. Domurath, *The three dimensions of solidarity in the EU legal order: limits of the judicial and legal approach*, in *Journal of European Integration*, 2, 2013, p. 459 ff.

<sup>12</sup> To this end, according to Articles 1 TEU and TFEU, stating that the two treaties “have the same legal value”, we shall assume, at least for a start, that as for the problem of interpretation above sketched, the two Treaties should be considered as one.

<sup>13</sup> Again, this is a subject on which it is impossible to quote exhaustive materials. Anyway, see the proceedings of the CIDEL (Citizenship and Democratic Legitimacy) 2004 Meeting in London. R. Bellamy, *Which Constitution for What Kind of Europe? Three Models of European Constitutionalism*, Paper presented at CIDEL Workshop London, *Constitution Making and Democratic Legitimacy in the European Union*, 12 - 13 November 2004 retrievable at <https://web.archive.org/web/20051031013243/http://www.arena.uio.no/cidel/WorkshopLondon/Bellamy.pdf>  
J. Pollak, *The Convention Hype: Visions of Representation*, *ibidem* <https://web.archive.org/web/20051031013220/http://www.arena.uio.no/cidel/WorkshopLondon/Pollak.pdf>

This looks as a referral to an interstate dimension of solidarity (though the much more appealing term “peoples” is used), whereas in Article 2 of the same Treaty, as modified by the Lisbon Treaty, we shall find a referral to solidarity as a value typical of European societies, sharing it along with other common values upon which the Union is founded.

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

It should be simply obvious that speaking of solidarity referring to the European society (e.g. Article 2 TEU), the Treaty refers to solidarity between the EU citizens, to a society based on the recognition of solidarity among individuals as a value<sup>14</sup>.

This is, at least, the generally accepted interpretation of Article 2, which considers the fact that solidarity is only mentioned in the second sentence, and not in the first one.

But this is not the problem. In this Article, solidarity is not defined, but simply mentioned. The point is to understand which is the reason of this mention.

According to the generally accepted interpretation the values mentioned in the first sentence should be considered European values, directly inspiring the European Union as such, whereas the values mentioned in the second sentence should be deemed to be values proper to national societies<sup>15</sup>.

This analysis is clearly inspired by a vision of the European Union as a gathering of sovereign States within each one of them some values prevail (those referred to in the second sentence of Article 2), whereas those values referred to in the first sentence should be considered as common to the Union as well as to Member States.

But it is also possible to interpret this Article in another direction, using as a pivotal asset the fact that the second sentence of the Article speaks of a “society” and not of “societies”, even when referring to Member States. This would imply, so the argument runs, that even if still divided in different States, a European society is no doubt emerging beyond national borders, i.e. at a European level.

Be that as it may, Article 2 is clearly referred to solidarity between persons living in a society which can be described as incorporating some values, among which solidarity has a paramount role to play.

One should also consider that Article 2 was elaborated in the framework of the Conference for the Future of Europe which was called to write the Draft Treaty adopting a Constitution for Europe and reflects the transitional situation of a European Union on the way to a constitutional asset.

Anyway, though it is true that the two sentences are sketched to show that there are values pertaining to the Union as such, and others to the Member States, nevertheless,

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<sup>14</sup> E.g. the European Charter has a part entirely devoted to solidarity

<sup>15</sup> And this notwithstanding the fact that Article 2 uses the word society and not societies.

the second sentence tells us that these values (those mentioned in the first sentence) are common to Member States, who also share other values, those mentioned in the second sentence.

Some further considerations on these issues may perhaps come useful at this juncture. In fact, if we move to the preparatory works of the Draft Treaty adopting a Constitution for Europe, we shall find that the text prepared by the Praesidium of the Convention ran as it follows and was very different from the text eventually approved

“The Union is founded on the values of respect for human dignity, liberty, democracy, the rule of law and respect for human rights, values which are common to the Member States. Its aim is a society at peace, through the practice of tolerance, justice and solidarity”.

And it is easy to note that, whereas the first sentence included the reference to the fact that the values mentioned were “common to the Member States” (now in the second sentence), the second sentence was formulated as stating a program for future action aimed at the establishment of “a society at peace”, identifying solidarity (along with tolerance and justice) as one of the practices suitable to reach the end of a society at peace.

This formulation was the object of a host of critical interventions as well as of uncountable proposals of amendments, ranging from highlighting that the word value was not what was needed in a legal text (and therefore the much more advisable word “principles” was proposed) to explicit referrals to religious, i.e. Christian values<sup>16</sup>.

All these amendment proposals, though valuable documents of a widespread debate on the subject, nevertheless show that the discussion was not inspired by the needs and requirements of a positive legal approach, but rather by the logic of political confrontation, perfectly understandable in a constitutional debate, but not intended for the technicalities of legal interpretation<sup>17</sup>.

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<sup>16</sup> See e.g. the proposed amendment by Mr. Lopes and Lobo Antunes, stating in the explanation that

“Only principles may be legally binding and its violation invoked before a Court”

retrievable at [https://web.archive.org/web/20050223170343/http://european-convention.eu.int/Docs/Treaty/pdf/2/2\\_Art%20I%20%20Lopes%20EN.pdf](https://web.archive.org/web/20050223170343/http://european-convention.eu.int/Docs/Treaty/pdf/2/2_Art%20I%20%20Lopes%20EN.pdf)

or the amendment proposed by a Polish member, Mr. Wittbrodt, according to which a second paragraph should have been added, stating that

“The Union’s values include the values of those who believe in God as the source of truth, justice, good and beauty as well as of those who do not share such a belief but respect these universal values arising from the other sources”.

<https://web.archive.org/web/20050223170354/http://european-convention.eu.int/Docs/Treaty/pdf/2/Art%20%20Wittbrodt.pdf>

<sup>17</sup> As for the issues of solidarity, it should also be remembered that, at the time when the Draft Treaty was being negotiated, the European Charter on Fundamental Rights had already been adopted, and this is another issue to add to our argument. The Charter states in its Preamble that



### 3. Solidarity Obligations within the European Treaties. Article 3 of the Treaty on European Union.

Solidarity between Member States (this time explicitly referred to, instead of peoples) pops up again in Article 3, stating in the third paragraph, that

"The Union promotes economic, social and territorial cohesion, and solidarity between the Member States"

This undoubtedly is the case in which the word "solidarity" has a meaning of its own, referring to a specific European policy, though it may reserve more than a surprise<sup>18</sup>.

To start with, and though it may look strange, the word solidarity doesn't appear in Articles 174 to 178 TFEU relating to the cohesion policy, so that one may think that the recital of solidarity in connection with cohesion policies in Article 3 TEU should be interpreted as a mere juxtaposition of two different items. In the sense that the Union would promote "economic, social and territorial cohesion" **and** "solidarity between the Member States", as two different strategies.

Nevertheless, this seems not to be the case, because cohesion and solidarity are referred as a single objective in Protocol no. 28 and, what is more, were consistently linked in policy planning documents and reports relating to cohesion strategies.

In the first report on Cohesion, solidarity between States appears as a fundamental principle in the establishment of sound cohesion policies, though the idea of a European inter-state solidarity may sometimes shift to the one of a European solidarity policy, in the sense of a structural action by the compact Institutions-Member States<sup>19</sup>.

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"Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice".

Furthermore, Title IV of the Charter has the word "Solidarity" as title, including Articles from 27 to 38, devoted to the protection of Labor and Welfare Rights, again conveying the idea of a society inspired by the value of solidarity among the individuals.

<sup>18</sup> The European economic, social and territorial cohesion policy has been one of the major concerns for the European Union through the years. See, among others, R. Leonardi, *Cohesion Policy in the European Union. The Building of Europe*, Palgrave MacMillan, 2005; J. Bachtler, *EU Cohesion Policy and European Integration: The Dynamics of EU Budget and Regional Policy Reform*, Routledge 2013; L. Polverari, S. Piattoni, *Handbook on cohesion policy in the EU*, Elgar 2016

<sup>19</sup> See European Commission, *First Report on Economic and Social Cohesion 1996*, Luxembourg: Office for Official Publications of the European Communities, 1996, where at p. 118 the text clarifies that

"At the political level, cohesion policies are an expression of mutual support between Member States.

Strangely enough, though the second cohesion report from 2001 was entitled ‘Unity, solidarity, diversity for Europe, its people and its territory’, the word solidarity did not appear in the report itself<sup>20</sup>.

And since then the word solidarity will practically disappear from the lexicon of cohesion. Maybe, because the two terms may look synonyms, in the sense that cohesion policy will be understood as a practical expression of the European solidarity. Or perhaps because it may seem useless to speak of solidarity considered the fact that the Cohesion Strategies and apparatuses were already well established. And what is more, the Juncker Commission will definitely leave aside the theme of solidarity to focus on competitiveness.

But, generally speaking, solidarity can be deemed in this context simply to mean action for cohesion, or rather the reasons for which a cohesion policy was established. Meanings, all of them, which should be considered peculiar to this context.

In the same Article, anyway, other referrals to solidarity in different contexts, are to be found e.g. to the intergenerational solidarity and to international solidarity at a global level.

[The Union] ... “shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child”.

Intergenerational solidarity refers to an issue which is of particular concern in Europe, the one relating to the conditions of ageing population, whose numbers are increasingly important in most of the European Countries<sup>21</sup>.

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They underpin the notion of European solidarity, creating a new framework of opportunity which is both additional and complementary to the national one.

This is not simply a matter of resource transfer, but a Community approach, or method, which seeks to make the fullest use of the potential of the Union economy as a whole by implementing best-practice techniques and taking decisions as close to the grassroots as possible. By involving a wide range of people and organisations at regional and local level, Community cohesion policies give the most concrete expression to the principle of subsidiarity” and at page 130 “The starting point for the Union's structural policies must be to guarantee long-term support for the poorest regions, in view of the profound disparities which persist between the lagging regions (Objective 1) and the rest.

Solidarity with these regions is an important basis for progress not just for social reasons, but in order to increase the economic potential of the Union as a whole.

Catching-up tends to be a slow process, necessitating a long-term commitment”

<sup>20</sup> European Commission, *Unity, solidarity, diversity for Europe, its people and its territory. Second report on Economic and Social Cohesion*, Luxembourg Office for Official Publications of the European Communities, 2001

<sup>21</sup> It is true that the concept of solidarity between generations, is a theme highly settled in a global context, particularly in the UN discourse relating to the idea of a sustainable development.

In the context of sustainable development, intergenerational solidarity goes beyond the relations among currently living persons of different generations and includes those who are not born yet.

The 1995 World Social Summit decided to establish plans to “fulfil our responsibility for present and future generations by ensuring equity among generations and protecting the integrity and sustainable use of our environment.” In this view, humanity, as a whole, forms an intergenerational community, in which

The Union claims to be an “age-friendly community”, and is involved in constant cooperation with the Member States and other International Organizations on this subject.

So, even if this recital of solidarity needs due mention and consideration, it is obvious that it relates to developments and processes which cannot be assimilated to those discussed above in relation to Article 2.

Same considerations apply in the context “solidarity and mutual respect among peoples” (Article 3, para. 5) which is clearly a referral to the idea of solidarity as a basis of multilateralism at a global level.

“In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”.

The Union has been a strong partner in multilateralism and has constantly strived for the reform of multilateral institutions and the spreading of an attitude to partnership cooperation. Moreover, the idea of solidarity at the international level is further developed in relation to the Common Foreign and Security Policy in Article 21 of the same Treaty, where solidarity is mentioned as a principle along with equality<sup>22</sup>, whereas Article 24 introduces an apparently different concept, that of mutual political solidarity

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all members (generations) respect and care for each other, fulfilling a common goal of the survival of humankind.

This is one of the major issues at stake, when speaking of sustainable development. But, given the fact that the idea of sustainable development is recited in another sentence of the same Article 3, it seems preferable to accept the idea of “solidarity between generations” as relating to an age friendly Union.

<sup>22</sup> “The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”.

among Member States<sup>23</sup> which is elevated at the position of a guideline in matters of Common Foreign and Security Policy in Articles 31<sup>24</sup> and 32<sup>25</sup>.

To be sure, it is difficult to understand the value of all these referrals to solidarity; rather they seem a description, in some way optimistic, of what European societies or the European Union look like, or should. It is wise, anyway, to accept, at least for the moment being, the idea that even if the word solidarity may have different meanings depending on the context in which it appears, the various referrals to solidarity do not imply a definite normative value.

4. Solidarity Obligations within the European Treaties. The Treaty on the functioning of the European Union. The spirit of solidarity in Articles 122, 194, 222.

But if we move to the Treaty on the functioning of the European Union, we shall find that explicit reference to solidarity between States is much more frequent than in other different contexts. And what is more, it appears in relation to situations in which one or more of the Member States are faced with situations of particular gravity or real emergencies.

A “spirit of solidarity” is referred to in Articles 122, 194 and 222 TFEU, always speaking of situations which may require joint action in help of a Member State confronted with dangers or other difficulties. Moreover, Article 222 TFEU is explicitly called the Solidarity Clause.

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<sup>23</sup> “2. Within the framework of the principles and objectives of its external action, the Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions.

3. The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations”.

<sup>24</sup> “1. Decisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise. The adoption of legislative acts shall be excluded.

When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted”.

<sup>25</sup> Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach. Before undertaking any action on the international scene or entering into any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity.

Referral is also made to solidarity in Articles 67 TFEU, stating that the common policy on asylum, immigration and external borders control shall be “based on solidarity between Member States” and 80 TFEU in which the solidarity again is elevated to the dignity of principle and coupled with the principle of fair sharing of responsibility, in a context in which Article 78.3 refers to situations of emergency due to “a sudden inflow of nationals of third countries”<sup>26</sup>.

So, it seems possible to say that whereas in the Treaty establishing the European Union, a multifaceted referral to different aspects of solidarity is to be found, in the Treaty on the functioning of the European Union referral is always made to emergency situations in which a Member State is forced to seek help by the fellow Members or by European institutions.

We shall begin from the so-called Solidarity Clause.

The Solidarity Clause, inserted by the Lisbon Treaty as Article 222 of the TFEU, requires the EU and Member States to act jointly and "in a spirit of solidarity" if a member state that is the subject of a terrorist attack on its territory or the victim of a natural or man-made disaster requests assistance<sup>27</sup>.

The introduction of this clause was recommended in the final report of the VIII "Defense" Group of the European Convention in charge of drafting the text of the Treaty that adopts a Constitution for Europe, to face the growing threat of international terrorism.

The clause was conceived, at the beginning, as mainly referring to terrorist attacks, and the idea of including disasters, whether natural or manmade, was not seen as fundamental.

Nevertheless, Michel Barnier, EU Commissioner for Regional Policy, then also serving as the Chairman of the Committee, was in favor of the inclusion of the disaster clause<sup>28</sup>.

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<sup>26</sup> “The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle”.

<sup>26</sup> See R. Sapienza, *Commentary on Article 222 TFEU*, in P. Herzog, C. Campbell, G. Zagel (eds.), *Smit and Herzog on the Law of the European Union*, Newark, 2019, *ad vocem*, *cui adde* T. Russo, *Natural and Man-made Disasters: Solidarity among Member States*, in C. Jimenez Piernas, L. Pasquali, F. Pascual Vives (eds.), *Solidarity and Protection of Individuals in E.U. Law. Addressing New Challenges of the Union* Pisa 2018, 3 ff.; M. Del Chicca, *Solidarity among Member States in case of a Terrorist Attack*, *ibidem* pp. 27 ff.; M. Gestri, *EU Disaster Response Law: Principles and Instruments*, in A. De Guttry, M. Gestri, G. Venturini (eds.), *International Disaster Response Law*, The Hague 2012, pp. 105 ff.; S. Myrdal, M. Rhinard, *The European Union’s Solidarity Clause: Empty Letter or Effective Tool? An Analysis of Article 222 of the Treaty on the Functioning of the European Union*, UI Occasional Papers 2010/2 Swedish Institute of International Affairs; S. Olsson (ed.), *Crisis Management in the European Union. Cooperation in the Face of Emergencies* Berlin-Heidelberg 2009.

<sup>28</sup> R. Sapienza, *Commentary*

Besides, European Solidarity was already on the move. A European Union Solidarity Fund had been created in 2002 following the flooding in Germany, the Czech Republic and Austria in the summer of that year<sup>29</sup>.

Natural or man-made disasters were thus included in the Solidarity clauses in the Draft Treaty establishing a Constitution for Europe of 2004, Articles I-43 and III-329. The Solidarity Clause in Article I-43, had the following text

“1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilize all the instruments at its disposal, including the military resources made available by the Member States, to:

(a) — prevent the terrorist threat in the territory of the Member States;  
— protect democratic institutions and the civilian population from any terrorist attack;

— assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;

(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

2. The detailed arrangements for implementing this Article are set out in Article III-329”.

Whereas Article III-329, whose title was “Implementation of the solidarity Clause”, had the following text

“Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

2. The arrangements for the implementation by the Union of the solidarity clause referred to in Article I-43 shall be defined by a European decision adopted by the Council acting on a joint proposal by the Commission and the Union Minister for Foreign Affairs. The Council shall act in accordance with Article III-300(1) where this decision has defense implications. The European Parliament shall be informed.

For the purposes of this paragraph and without prejudice to Article III-344, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defense policy and by the Committee referred to in Article III-261; the two committees shall, if necessary, submit joint opinions.

3. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action”.

The two Articles matched perfectly in an impressive way, whereas the Treaty of Lisbon has created some confusion, melting the two Constitution Articles into one. Article 222 TFEU, whose title is now “Solidarity Clause”, reads as follows

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<sup>29</sup> *Ibidem*

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilize all the instruments at its disposal, including the military resources made available by the Member States, to:

(a) — prevent the terrorist threat in the territory of the Member States;

— protect democratic institutions and the civilian population from any terrorist attack;

— assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;

(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

2. Should a Member State be the object of a terrorist attack or the victim of a natural or manmade disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

3. The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council shall act in accordance with Article 31(1) of the Treaty on European Union where this decision has defense implications. The European Parliament shall be informed. For the purposes of this paragraph and without prejudice to Article 240, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defense policy and by the Committee referred to in Article 71; the two committees shall, if necessary, submit joint opinions.

4. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action”.

The solidarity clause has therefore no match in the TEU and stands autonomously in the TFEU, hinting at a “spirit of solidarity” and one is forced to wonder whether this hint really has a normative value, or merely describes the ratio of the prescriptions <sup>30</sup>.

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<sup>30</sup> Some authors, such as Sapienza, *op.cit.*, and others referred to there, have argued that Article 222 could be seen as a complement to the mutual defense clause currently referred to in Article 42, para. 7, TEU, which has sometimes been indicated as what remains of Article I.43 of the Draft Treaty adopting a Constitution for Europe and reads as follows

The spirit of solidarity is mentioned also in Article 122 TFEU, first paragraph, according to which the Council, on a proposal from the Commission, in a “spirit of solidarity” between Member States, may decide on measures appropriate to the economic situation, in particular if serious difficulties arise in the supply of certain products, in particular in the energy sector.

The provision essentially reproduces the text of the previous Article 100 TEC, where no reference to the spirit of solidarity was made.

The scope of this rule would seem to coincide with any economic situation whose gravity is such as to require the intervention of the Council: the “serious difficulties in the procurement of certain products”, therefore, would seem to be mentioned only by way of example.

Of particular importance is the reference to the “energy sector”, added precisely with the Lisbon Treaty, which can be read in conjunction with the provisions of Article 194 TFEU, in the first paragraph, according to which the objectives of the Union’s energy policy must be pursued “in a spirit of solidarity between the Member States”.

##### 5. The practical implications of the “spirit of solidarity”

Now, it is appropriate to start with the consideration that the words “in a spirit of solidarity” in Article 222 come from the text of the Draft Treaty adopting a Constitution for Europe, and therefore it is also appropriate to conclude that the idea of a spirit of solidarity can be traced to the constitutional approach and flavor of the whole text of 2004.

It may perhaps imply that, given the fact that it is impossible to imagine all the situations which may occur in these fields, it looks wise to advocate for a spirit of solidarity by all those involved in a process which, due to its constitutional nature, has implications in the field of mutual responsibilities for the States involved in it.

But when we come to the practical definition of what this obligation of solidarity implies, we shall find a host of detailed procedural paths, different hypotheses of

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“7. If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defense policy of certain Member States”.

But this seems not to be the case.

In fact, Article 42.7 TEU simply introduces an obligation of aid and assistance between states in the event of armed aggression against one of them, whereas the solidarity clause ex Article 222 TFEU covers threats from non-state actors and natural or man-made disasters.

The clause governed by Article 42, par. 7, TEU does not contemplate the involvement of EU institutions and outlines an obligation of “horizontal” solidarity between the member states, whereas the solidarity clause ex Article 222 TFEU is addressed both to the Union and to the Member States, thus providing for an obligation of “vertical” solidarity.

Moreover, it is not clear whether, in order for the obligation of help and assistance prescribed by Article 42, par. 7, TEU, there is an explicit request from the State victim of the aggression. The silence of the rule on this point leads us to believe it is not necessary: in support of this thesis we can refer to Article 222 TFEU, which expressly places “the request ... by the political authorities” of the injured State as a prerequisite for the obligation of assistance.



competences sharing by the European institutions with the Member States, more or less precisely sketched, in which there seems to be no room for an all-pervasive obligation of solidarity, opening the collaboration among States to further hypotheses than those expressly provided for.

It is difficult to reach a clear interpretation of what this obligation of solidarity should imply.

As regards the position of the Member States, Article 222, par. 2, TFEU provides that

"if a Member State suffers a terrorist attack or is the victim of a natural or man-made disaster, the other member states, at the request of its political authorities, provide help. To this end, the Member States coordinate in the Council".

From the activation of the clause, at the request by the political authorities of the victim state, it would seem to derive a real legal obligation to provide help. Member States, in fulfilling this obligation, are free to adopt the measures they deem most appropriate, albeit in compliance with the principle of good faith and in a spirit of loyal cooperation.

Article 222 does not provide the definition of a terrorist attack, nor that of a natural disaster, which are necessary prerequisites for requesting assistance.

Pursuant e.g. to Article 222, par. 3, TFEU, the mechanisms for the implementation of the clause by the EU was to be defined in a decision adopted by the Council, on a joint proposal by the Commission and the EU High Representative for Foreign Affairs and Security Policy, by qualified majority. On June 24, 2014, the European Council adopted the Decision 2014/415/EU providing rules and procedures for the implementation of Article 222<sup>31</sup>.

Article 3 (b) of the Decision relating to the implementation of Article 222 TFEU qualifies as a terrorist attack "a terrorist offence as defined in Council Framework Decision 2002/475/JHA".

In essence, these are offensive actions that can cause serious damage to a country or an international organization, where committed to intimidate the population, force public authorities or an international organization to carry out or refrain from carrying out an act, or destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization. Pursuant to par. 1, the EU uses all the means at its disposal, including military means made available by member states, to provide help to the State that has requested it, in order to protect democratic institutions and the civilian population.

Article 3 (a), of the joint decision defines a natural disaster "any situation which has or may have a severe impact on people, the environment or property, including cultural heritage".

There has been a long discussion on the territorial scope of the clause. Article 222 would seem to refer to a mainly internal dimension of solidarity: the clause, in fact, is

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<sup>31</sup> See Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause OJ L 192, 1.7.2014, p 53-58, and Corrigenda OJ L 221, 25.7.2014, p. 26 and OJ L 275, 17.9.2014, p. 7.

applied when the victim of the terrorist attack or natural disaster is an EU member state. There are also, within the provision, references to the "territory" of that State. It is also true, however, that Article 222 is located in part V of the TFEU, which as we know is dedicated to the external action of the European Union.

The question arose, then, whether the latter can be applied when the terrorist attack or natural disaster occurring outside the territory of one of the Member States requires a response from the latter and from the Union itself. If situations of this type arise, its application does not seem to be excluded a priori.

All in all, it is important to note that the "spirit of solidarity" serves here as a reason for acting together in solidarity, whereas the questions of when and where act are in some way fixed, though not always in clear terms, with no possibility for the "spirit of solidarity" to overstretch the field of application of the rules.

Member States shall not choose lines of behavior different from those explicitly provided for- in the Treaty or the decision rules, then claiming to have acted "in a spirit of solidarity".

Same reasoning applies to Article 122 TFEU, where, pursuant to first paragraph,

"the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy",

whereas in the second paragraph,

"when a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned".

For the purposes of this Article, therefore, the State must find itself in a situation of serious difficulty, comparable to those under Article 222.

But again, one is forced to wonder if the "spirit of solidarity" may require, or at least allow, something more than the simple abidance to the letter of the norms.

No answer is to be found in the practice of the Member States or the European institutions, nor can the Court of Justice case law offer something more, rather suggesting that the "spirit of solidarity" does not encourage creative suggestions on the part of any of the subjects involved.

Useful hints can be drawn from the most celebrated Pringle judgment, an appeal against a judgment of the High Court (Ireland) in proceedings brought by Mr. Pringle, a member of the Irish Parliament, against the Government of Ireland, Ireland and the Attorney General seeking a declaration, first, that the amendment of Article 136 TFEU by Article 1 of Decision 2011/199 constitutes an unlawful amendment of the FEU Treaty and, secondly, that by ratifying, approving or accepting the Treaty establishing the European stability mechanism, concluded in Brussels on 2 February 2012 ('the ESM

Treaty'), Ireland would undertake obligations incompatible with the Treaties on which the European Union is founded<sup>32</sup>.

In this judgment the Court refers explicitly to Article 122 TFEU as embodying the spirit of solidarity between the Member States, only to reject that provision as a basis for financial assistance of the Union to the Member States, without any further reference to the principle of solidarity<sup>33</sup>.

The same approach was followed in the Anagnostakis Case. Mr Alexios Anagnostakis, had proposed a European citizens' initiative named 'One million signatures for a Europe of solidarity', which he submitted to the European Commission on 13 July 2012. The objective of the Initiative was the establishment in EU legislation of 'the principle of the state of necessity, in accordance with which, when the financial and political existence of a Member State is threatened by the servicing of abhorrent debt, the refusal to repay that debt is necessary and justifiable'.

The proposed Initiative referred to 'economic and monetary policy (Articles 119 [TFEU] to 144 TFEU)' as the legal basis of its adoption. By decision of 6 September 2012, the Commission refused to register the Initiative on the ground that it manifestly

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<sup>32</sup> Case C-370/12 EU:C:2012:756, para. 115

<sup>33</sup> "115 It must first be recalled that, under Article 122(1) TFEU, the Council of the European Union may decide, in a spirit of solidarity between Member States, upon measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

116 Since Article 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States who are experiencing, or are threatened by, severe financing problems, the establishment of a stability mechanism such as the ESM does not encroach on the powers which that provision confers on the Council.

117 Next, in relation to Article 122(2) TFEU, the referring court, in order to assess whether the ESM encroaches on the competence attributed to the Union by that provision, asks whether that provision exhaustively defines the exceptional circumstances in which it is possible to grant financial assistance to Member States and whether that article empowers solely the Union's institutions to grant financial assistance.

118 In that regard, it must be stated that the subject-matter of Article 122 TFEU is solely financial assistance granted by the Union and not that granted by the Member States. Under Article 122(2) TFEU, the Council of the European Union may grant, under certain conditions, such assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.

119 The exercise by the Union of the competence conferred on it by that provision of the FEU Treaty is not affected by the establishment of a stability mechanism such as the ESM.

120 Further, nothing in Article 122 TFEU indicates that the Union has exclusive competence to grant financial assistance to a Member State.

121 It follows that the Member States remain free to establish a stability mechanism such as the ESM, provided however that, in its operation, that mechanism complies with European Union law and, in particular, with measures adopted by the Union in the area of coordination of the Member States' economic policies (see paragraphs 68 and 69 of this judgment). As is apparent from paragraphs 111 to 113 of this judgment, the second subparagraph of Article 13(3) and Article 13(4) of the ESM Treaty are intended to ensure that any financial assistance granted by the ESM will be consistent with such coordinating measures.

122 Consequently, Article 122 TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it".

fell outside the scope of its powers to submit a proposal for the adoption of a legal act of the Union for the purpose of implementing the Treaties.

Challenging the Commission decision before the General Court, Mr. Anagnostakis argued that the Commission should have rather based its decision on Article 122 TFEU and Article 136(1)(b) TFEU. But the Court dismissed his claim, using the same argument as in *Pringle*<sup>34</sup>.

6. The spirit of solidarity and the principle of solidarity and fair sharing of responsibility in Article 80 TFEU

It is now time to go to a conclusion on the problem if the clause “a spirit of solidarity” should be deemed to have the same value of a mere referral to solidarity. To that end we shall compare what we have seen till now to the principle of solidarity recited along with a referral to the fair sharing of responsibility in Article 80 TFEU.

The idea of a burden sharing, and therefore of a principle of solidarity, is also a common feature in issues of migration and asylum policies<sup>35</sup>.

With the Treaty of Amsterdam, in Article 73 (1), second paragraph, a solidarity mechanism was introduced for the first time in favor of those Member States which were faced with an emergency situation characterized by a sudden influx of citizens of third countries, through which the Council, deciding to qualified majority on a proposal from the Commission, could adopt temporary measures for the benefit of the State concerned for a duration not exceeding six months<sup>36</sup>.

The Treaty establishing a Constitution for Europe further elaborated on this idea in Article III 266. 3 which was to become Article 78.3 TFEU, also maintaining the possibility, introduced by the Treaty of Amsterdam, that the Council should adopt measures for the benefit of those Member States that are faced with emergency situations characterized by a sudden influx of third-country nationals, eliminating the reference to the maximum duration of six months in the original text.

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<sup>34</sup> See *Anagnostakis v. European Commission*, Judg. of the General Court, 30 September 2015 ECLI:EU:T:2015:739, paras 36-44. In 2017, the Grand Chamber of the Court, sitting as a judge of appeal, refused to attribute to the clause “in a spirit of solidarity between Member States” a particular significance, adding something else to the letter of Article 122. See *Anagnostakis v. European Commission*, Judg. of the Court (Grand Chamber), 12 September 2017, ECLI:EU:C:2017:663, paras. 67-81

<sup>35</sup> See, e.g., M. Gottwald, *Burden Sharing and Refugee Protection*, in E. Fiddian-Qasmiyeh et al. (eds.), *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford 2014, pp. 525 ff.; A. Hurwitz, *The Collective Responsibility of States to Protect Refugees* Oxford 2009; V. Moreno-Lax, *Solidarity's Reach: Meaning, Dimensions, and Implications for EU (External) Asylum Policy in Maastricht Journal of European and Comparative Law* 2017, pp. 740 ff.

<sup>36</sup> Article 73 (1)

1. This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.  
2. In the event of one or more Member States being confronted with an emergency situation characterized by a sudden inflow of nationals of third countries and without prejudice to paragraph 1, the Council may, acting by qualified majority on a proposal from the Commission, adopt provisional measures of a duration not exceeding six months for the benefit of the Member States concerned.

The Lisbon Treaty also added Article 80 TFEU, which originally was Article III-268 TCE, according to which the policies relating to border controls, asylum and immigration must be governed by the principles of solidarity and fair sharing of responsibilities among the Member States, including on a financial level.

The same principle is also referred to in Article 67.2 TFEU which provides that the Union shall develop a common policy on asylum, immigration and border control "based on solidarity between Member States and fair towards third-country nationals".

First of all, it is important to spend a few words on the qualification of solidarity as a principle in this article.

The word principle is used, again, in different contexts in the European Treaties and more generally in European Legal Order, with different meanings<sup>37</sup>.

Article 5 TEU speaks of the fundamental role of the principles of conferral, subsidiarity and proportionality, whereas Article 21.1 TEU states that

“The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”.

Now it is easy to understand that though the three principles mentioned in Article 5 TEU are at the basis of the sharing of competences in the Union, and therefore they shall be regarded as major, fundamental, structural principles, the principles mentioned in Article 21 can be described as values the protection of which is of paramount importance for the Union, but they do not share the nature of those in Article 5.

This consideration applies to Article 80, where the principle of solidarity and fair sharing of responsibilities is applicable to the relations among Member States, whereas “Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle” only “whenever necessary”.

Secondly, given the formulation used in Article 80 “the principle of solidarity and fair sharing of responsibility”, one may wonder if in these matters the solidarity spoken about should be regarded as different from that applicable in other contexts in which the referral to the “fair sharing of responsibility” is missing.

I would be in favor of a broad interpretation of the term solidarity (and thus not differing from other contexts), accepting the idea that the “fair sharing of responsibility” should be regarded as a useful qualification of the rather vague term “solidarity”<sup>38</sup>.

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<sup>37</sup> I'm speaking of course of those cases in which the word “principle” is used in the Treaties, and not of those principles which, according, to the European Court of Justice could be asserted as a form of non-written European Rules.

<sup>38</sup> On the vagueness in legal language see G. Christie, *Vagueness and Legal Language*, in *Minnesota Law Review* 1964, pp. 885 ff. still important and basic.

As a matter of fact, solidarity is a vague term, as is proved by the fact that the provisions referred to do not clarify what actions should be taken in order to ensure the application of the principle of solidarity, nor what measures could be adopted by the Council pursuant to the aforementioned Article 78.3.

And it is precisely due to this vagueness that important problems in the management of these measures have arisen<sup>39</sup>.

Anyway, also for the European Common Asylum Policy, one can reach the conclusion that the spirit of solidarity, or rather the principle of solidarity and fair sharing of responsibility, hardly implies something more than what is required by the norms.

And a complex burden sharing strategy has been devised by the Union, assisting the States both through operational assistance and financial support.

Some major issues were at stake, when the Council adopted two decisions in September 2015 pursuant to Article 78, par. 3, TFEU, introduced a temporary derogation from the system, regulating an emergency relocation mechanism to attribute to states other than those of arrival the examination of applications from asylum seekers in clear need of protection. The so-called relocation was organized according to a complex algorithm that combines different criteria of an objective nature to determine the shares of asylum seekers to be directed to other Member States: total population, GDP, unemployment rate, average of spontaneously submitted asylum applications and number of resettled refugees per million inhabitants in the period 2010-2014.

This system was challenged, as anybody knows, by Slovakia and Hungary before the Court of Justice. In her decision the Court stressed that given the fact that the risk to be the first country of arrival for those migrants was unevenly distributed among Member States due to geographic realities, it was mandatory that the resulting burdens

“must (...) be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility”.<sup>40</sup>

Further elaborating on this subject, the Court has recently ruled again in favour of the lawfulness of the relocation schemes provided for by the Council, rejecting the contention by Poland, Hungary and the Czech Republic that Article 72 TFEU could

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<sup>39</sup> See the claims by Hungary and Slovakia, *infra* in this same paragraph

<sup>40</sup> See the judgment on joined cases C-643/15 and 647/15 *Slovakia and Hungary v Council* EU:C:2017:631 paras. 280-292, at 291. But see also the critical remarks by H. Labayle, *Solidarity is not a value: Provisional relocation of asylum-seekers confirmed by the Court of Justice (6 September 2017, Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council)*, in *Eumigrationlawblog.eu*, stating that «Advocate General Bot’s remarkable interpretation of the issue suggested that a landmark decision was in sight. The matter in question, and the nature of the principles invoked, allowed the Court to take a new position. Given the clear and unambiguous nature of the case, the Court could rather easily have addressed the criticism regarding some of the newer Member States’ actions during the 2015 crisis. It even provided an opportunity to settle the uncertainty left by the Court’s earlier jurisprudence on humanitarian visas and the EU Turkey agreement. However, despite the doubts regarding the EU’s projects and values, the Court decided not to take this opportunity to address these issues», retrievable at <http://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council/>

legitimize action contrary to the European Union Law based on a reserve of “the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”.<sup>41</sup>

## 7. Concluding Remarks

Coming to a conclusion, we shall in the end note that even with the Asylum issues again we find an emergency situation, again a referral to solidarity borrowed from the Draft Treaty adopting a Constitution for Europe, and therefore we are led to conclude that the “burden sharing” formula, advocated with the words “fair sharing of responsibility”, can be ascribed to the category of solidarity emergency measures, and that, at least from a functional point of view, the words “solidarity and fair sharing of responsibility” should be seen as an equivalent for the “spirit of solidarity” referred to in other emergency situations<sup>42</sup>.

All these different contexts appear therefore dominated by the idea of solidarity, implying a general, if not generic, mutual obligation of responsibility sharing. An obligation based on the constitutional (or quasi-constitutional) nature of the links existing among the Member States of “an ever closer Union”.

At this juncture, some words on the normative nature of these referrals to solidarity may come useful.

As a matter of fact, it is difficult, from the considerations detailed above, to solve the question of the legal nature of the referral to solidarity in the European Treaties.

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<sup>41</sup> See the judgment of April 2, 2020 in joined cases C-715/17, C-718/17 and C-719/17, *Commission vs. Poland and Others* (*Temporary mechanism for the relocation of applicants for international protection*) ECLI:EU:C:2020:257. The Commission, acting under Article 258 TFEU, was seeking a declaration by the Court stating that by failing to indicate at regular intervals, and at least every three months, an appropriate number of applicants for international protection who could be relocated swiftly to its territory, Poland, Hungary and the Czech Republic had failed to fulfil their obligations under 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), and, consequently, the subsequent relocation obligations incumbent on them under Article 5(4) to (11) of each of those two decisions. The Court ruled that Article 72 TFEU, could not be read in such a way as to confer on Member States the power not to apply a provision of EU law (paras. 145 and 152).

<sup>42</sup> We have already spoken of EU Common Foreign and Security Policy relating to which, in Article 21 of the TEU, solidarity is mentioned as a principle along with equality, whereas Articles 24, 31 and 32 introduce an apparently different concept, that of mutual political solidarity among Member States. Again, these formulations were present in the Draft Treaty adopting a Constitution for Europe, further elaborating provisions of previous versions of the TEU. The idea of solidarity coupled with equality and qualified as “mutual” and “political” seems to be traceable to the diplomatic lexicon of international relations, but seems not to add more to the mere concept of interstate solidarity.

Some authors have favored the idea of the possibility of qualifying solidarity as a legal principle. Others simply refer to the fact that it is classed among the values shared by the Member States of the European Union<sup>43</sup>.

Nor has the European Court of Justice, as we have already seen, offered useful advice on the nature of this pretended principle.

Recent field research has highlighted a, so to say, short-sighted approach by the Court to the issues of solidarity.

“While the European judiciary machinery appears to have been deeply involved in solidarity issues, with more than one hundred judgments delivered in the course of its activity, the Court has shown moderate or lacking interest not only in theoretical issues concerning the solidarity themes, but also in highlighting the role, if any, of considerations pertaining to subsidiarity”.<sup>44</sup>

Be that as it may, therefore, one is forced to conclude that, even if the existence, within the Treaty, of a general principle of solidarity between the States could be affirmed, the formulation used in the Treaties are not useful to differentiate the effects, if any, in the different situations in which the inter-State solidarity is invoked.

One should assume therefore that the reference to inter-State solidarity, whether evoked as a principle (Article 80 TFEU) or as a spirit inspiring collaboration by Member States (Articles 122, 194, 222 TFEU), is simply made to an obligation which should be assumed and carried out in view of the attainment of a common goal, and not for the satisfaction of an individual, unilateral claim.

Moreover, all these recitals of solidarity, whether in the form of “in a spirit of solidarity” or in the formula “principle of solidarity and fair sharing of responsibility” are to be traced back to the golden age of European Union Constitutionalism, well represented by the 2004 Draft Treaty establishing a Constitution for Europe.

Nevertheless, one should not think that these recitals are only possible or sense-making in a Constitutional environment.

As stated above, in fact, the recital of solidarity simply seems to have a descriptive nature and function, the one of remembering the fact that in a Union, some obligations may rest on the *affectio societatis* binding together all the Members of that Union.

This is perhaps what the European Court of Justice was advocating in the famous and most celebrated judgment on the *Van Gen den Loos Case*, when stating that:

“The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies

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<sup>43</sup> See R. Bieber, F. Mariani, *op.cit. supra*, ft.8

<sup>44</sup> D. Schiek, *Solidarity in the case law of the European Court of Justice – opportunities missed?* In H. Krunke, H. Petersen, & I. Manners (eds.), *Transnational Solidarity. Concept, Challenges and Opportunities* retrieved at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3523787](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3523787)



that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states”<sup>45</sup>.

This was for sure what Robert Schuman was thinking about when describing the situation to come with the Coal and Steel Community as a de facto solidarity.

In the Schuman Declaration of 1950, which is generally deemed to be the starting point of the long history of European Integration, just after the often-quoted sentence “Europe will not be made all at once, or according to a single plan”, another less quoted sentence follows, stating that

“It will be built through concrete achievements which first create a de facto solidarity”.

And after the proposal of placing the Franco-German production of coal and steel as a whole “under a common High Authority within the framework of an organization open to the participation of the other countries of Europe”, another referral to solidarity follows, according to which

“The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible”<sup>46</sup>.

The Preamble to the Treaty establishing the European Coal and Steel Community in 1951 clearly mirrored those ideas emphasizing that

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<sup>45</sup> European Court of Justice, *N.V. Algemene Transport en Expeditie Onderneming Van Gend & Loos vs. Nederlandse Administratie der Belastingen*, case 26/62, decision of February 5, 1963. For a thorough insight on the judgment see M. Rasmussen, *Revolutionizing European Law: A history of the Van Gend en Loos Judgment in International Journal of Constitutional Law*, 2014, pp. 136 ff.

<sup>46</sup> The control of the Ruhr and the Rhineland (and therefore of coal and steel production) had been a subject of continual confrontation between France and Germany. In March 1921, due to delay in paying reparations settlement by Germany, French and Belgian troops had occupied Düsseldorf and other western German cities. The issue was settled with the Locarno Agreements (1925), due to English and U.S. mediation. After the Second World War, Schuman offered, with his Declaration, to rebuild the franco-german relations on a basis of mutuality and solidarity in the framework of a European Organization. The text of the Schuman Declaration can be found at [https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration\\_en](https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en). See, for a fresh contemporary approach to the subject R. Vernon, *The Schuman Plan: Sovereign Powers of the European Coal and Steel Community*, in *American Journal of International Law* 1953, pp. 183 ff. and more recently E. Grace SJ, *The Future of European Solidarity: A Reflection on the Schuman Declaration*, in *Studies: An Irish Quarterly Review*, vol. 105, no. 419, 2016, pp. 342 ff.

“Europe can be built only through real practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development”<sup>47</sup>.

Thus, it would be simply correct to state that the solidarity between States lies at the foundation of the European integration process, though not particularly elaborated at that time, and has evolved through the years, following and adapting to the different contexts.

The referral to solidarity then was not assisted by a thorough analysis of its legal implications and looks merely as a restatement of the idea that creating a community will unavoidably generate a condition of solidarity, an idea deeply rooted in Catholic Social Thought<sup>48</sup>.

A solidarity implying responsibility towards this Union by its Member States, as was stressed by the COMECE Bishops in their document *A European Community of Solidarity and Responsibility*

“With the signing of the Maastricht Treaty, these countries formed a community based on solidarity, the quality of which is only today coming to the fore. At the same time, it is evident that this solidarity also implies a community of responsibility. In the future of the European Union, solidarity and responsibility must become increasingly more closely linked. To the extent that further steps towards integration prove necessary, the community of solidarity must be supported by the willingness of people to live together. At the same time, it will only have a future if, as a responsible community, it also remains open to those Member States which are still outside it”<sup>49</sup>.

In conclusion, be it a principle or a value, solidarity among the Member States can be said to be the genuine “spirit” of the European Union.

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<sup>47</sup> The Treaty establishing the European Coal and Steel Community (ECSC) was signed in Paris on 18 April 1951 by Belgium, Germany, France, Italy, Luxembourg and the Netherlands. It was concluded for a period of fifty years and, having entered into force on 23 July 1952, it expired on 23 July 2002. See J. Gillingham, *Coal, Steel and the Rebirth of Europe, 1945-1955. The Germans and French from Ruhr Conflict to Economic Community*, Cambridge 1991

<sup>48</sup> The idea of solidarity is typically endorsed in Catholic Social Thought, where it is contrasted to social division and struggle advocated by other ideological visions (see *supra* note 4). A founding father of the European Union, Robert Schuman embodied the most genuine spirit of European reconciliation. A profoundly committed Roman Catholic, he was raised in the contested border area of Alsace-Lorraine and thus experienced from his youth the desire for a Europe free of artificial boundaries and joined in cooperation and solidarity. Educated in Thomism, and fiercely influenced, among others, by Pope Leo XIII, Jacques Maritain, and Maurice Blondel, Schuman tried to defend his political ideas as a Christian humanist, among which the idea of solidarity. See A.P. Fimister, *Robert Schuman, Integral Humanism and European Integration*, in *Notes et Documents* 9 (Septembre-Décembre 2007), pp. 73 ff.; W. Kaiser, *Christian Democracy and the Origins of European Union*, Cambridge 2007.

<sup>49</sup> COMECE (Commission of the Bishops’ Conferences of the European Community), *A European Community of Solidarity and Responsibility. A Statement by the COMECE Bishops on the EU Treaty Objective of a Competitive Social Market Economy*, 27 October 2011, p. 20.

A solidarity which was developed through the years, deeply intertwined with the fabric of the European integration, so as to lead the Member States at the eve of a constitutional evolution, which the Lisbon Treaty has tried to preserve as much as possible along with the awareness that it “is more than an agreement which merely creates mutual obligations between the contracting states”.