Editorial

Fraternité

The EU treaties do insist on solidarity, be it solidarity between the peoples of Europe, between the member states or between generations.[1] According to Article 2 TEU, solidarity is a defining feature of European society. The EU Charter of Fundamental Rights goes even further by elevating solidarity to the status of a founding *value* of the Union alongside human dignity, freedom, and equality.[2] An entire chapter is even devoted to solidarity, with explicit rights attached to it, such as workers' right to information, the right of collective bargaining, the right to fair and just working conditions, the right to social and housing assistance and the right to healthcare. Thus, it would appear that, in the EU context, solidarity is not only a buzzword that would mainly create obligations for member states towards one another; it is also the vector of concrete social rights that qualify the intrinsically liberal nature of the Union, grounded as it is on subjective rights primarily aimed at the *emancipation* of individuals, through the recognition of rights aimed at the *protection* of individuals as such or in their economic capacity.

However, multifaceted solidarity is not a performative utterance. It seems hardly enforceable by its very nature, *a fortiori* in a supranational setting characterised by a great deal of diversity. In consequence, grand statements on solidarity in a legal text, without denying their normative potential,[3] are sufficient to ensure neither mutual assistance between member states nor the effective and large-scale

[1] *See*, regarding solidarity between the peoples of Europe, the Preamble to the TEU and Art. 3(3) TEU; regarding solidarity between member states, Arts. 24(2) and 31(1) TEU, Arts. 67(2), 80, 122, 194, 222 TFEU and the Protocol no. 28 attached thereto; regarding solidarity between generations, Art. 3(3) TEU.

[2] Art. 2 TEU, which is the main normative provision setting out the Union's founding values, does not name solidarity as such a value.

[3] *See*, for instance, to that effect, the recent recognition by the Court of the horizontal direct effect of the right to paid annual leave under Art. 31 of the Charter, ECJ 6 November 2018, Cases C-569/16 and C-570/16, *Bauer and Willmeroth*, EU:C:2018:871, paras. 84-85. *See*, in this issue, the case note on *Bauer* et al., E. Frantziou, '(Most of) The Charter of Fundamental Rights is Horizontally Applicable', 15 *EuConst* (2019) p. 306.

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protection of individuals, especially vulnerable ones. Currently, the wish of member states to intensify their solidarity seems to be lacking in certain respects.[4] They do not appear inclined to share 'burdens', whether the burden of public debt that certain member states have accumulated over the years or the burden of migrants landing on the shores of Europe in pursuit of a better life. Regarding the latter issue, one could legitimately doubt the effectiveness of the requirements laid out in Article 67(2) TFEU, i.e. that the Union shall frame a common policy on asylum, immigration and external border control, which is based on *solidarity between member states* (interstate solidarity) and is *fair towards third-country nationals* (interpersonal solidarity). In an increasing number of member states, waves of migration have given rise to stronger resistance on the part of political leaders and public opinion.[5] The other dimension of solidarity, in the form of Immanuel Kant's moral and cosmopolitan duty to be hospitable vis-à-vis foreigners,[6] is equally affected by that collective reluctance to give shelter to all 'your tired, your poor, your huddled masses yearning to breathe free' (E. Lazarus).

In such a political and legal context, a recent judgment of the French constitutional court (the *Conseil constitutionnel*)[7] could not help but draw the attention of European constitutional scholarship due to its highly symbolic value and (relative) boldness. The grand French Republican motto '*Liberté, égalité, fraternité*' is known to all, and in a judgment imbued with the ideals of justice and fairness, the *Conseil* has not only recognised, for the first time, the constitutional status of the third precept, i.e. fraternity; it has also fleshed out its meaning, making it akin to solidarity[8] by narrowing down, in essence, the scope of the offence that consists of facilitating the illegal entry, circulation and residence of immigrants on the national territory – an offence better known by the somewhat disturbing label

[4]In the recent past, however, certain forms of solidarity between member states have come to light, especially in the context of the Eurozone. *See*, for example, WTE/DN, Editorial 'Rethinking Solidarity in the EU, from Fact to Social Contract', 7(2) *EuConst* (2011) p. 169; V. Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area', 9(1) *EuConst* (2013) p. 7.

[5]*See*, for example, the opposition of certain member states vis-à-vis the relocation of third-country nationals across the EU (the so-called relocation quotas) in the context of their sudden inflow in Greece and in Italy. That situation gave rise to ECJ 6 September 2017, Cases C-643/15 and C-647/15, *Slovakia and Hungary* v *Council*, EU:C:2017:631. *See also* the pending actions for infringement introduced by the Commission against Poland, Hungary and Czechia, respectively Cases C-715/17, C-718/17 and C-719/17.

[6]I. Kant, *Perpetual Peace and Other Essays on Politics, History and Morals*, trans. T. Humphrey (Hackett 1983) p. 118-120.

[7]Decision no. 2018-717/718 QPC of 6 July 2018, *Mr Cédric H. and another*.

[8]From a French perspective, fraternity and solidarity largely overlap in terms of substance, although it should formally be possible to distinguish between the two. Historically, the narrative of fraternity, with its affective dimension drawing on the legacies of both Christianism and the Enlightenment, has gradually been superseded by the more scientific and neutral term 'solidarity'.

used by human rights activists, namely the 'offence of solidarity' (*délit de solidarité*).[9] In so doing, and despite the limited practical reach of its judgment, the *Conseil constitutionnel* has fostered interpersonal solidarity in a context of strained interstate solidarity.

The offence of solidarity at the border between France and Italy

According to the provisions of the *Code de l'entrée et du séjour des étrangers et du droit d'asile* (the French Code of Entry and Residence of Foreigners, 'CESEDA'), defining the offence of solidarity, any person who, directly or indirectly, facilitates the illegal entry, circulation or residence of a foreign national in France or on the territory of another contracting party of the Schengen Agreement shall be sentenced to five years' imprisonment and a fine of €30,000.[10] The Code does, however, provide two grounds for exemption. The first exempts the closest relatives of the foreign national from criminal prosecution[11] and the other, at the time of the judgment, concerned the facilitation of the illegal *residence* of a foreigner when the alleged act does not give rise to any direct or indirect compensation and only entails providing legal advice, food, accommodation or health care in order to ensure decent living conditions for foreigners, or any other assistance aimed at preserving their dignity or physical integrity ('the exemption').[12] It should be noted that illegal *entry* and illegal *circulation* – at issue in the present case – were *not* covered by that exemption.

In two separate sets of proceedings, a small farmer and an academic from the region of Nice were criminally prosecuted for assisting several illegal immigrants en route from Sudan and Eritrea via Italy. While it would appear, subject to further verification, that the former had facilitated the entry into French territory of circa 250 immigrants, thus on a rather large scale and in a systematic manner, the latter had only provided assistance by giving a ride to a handful of migrants in need of medical care. The accused were sentenced to suspended prison sentences of, respectively, four and two months for facilitating the entry and/or circulation of illegal immigrants in France.

[9]On this offence, in connection with the present cases, *see* S. Slama, 'Délit de solidarité: actualité d'un délit d'une autre époque', *Lexbase L'information juridique*, 20 April 2017, ⟨www.gisti.org/IMG/pdf/art_slama_2017-04-20.pdf⟩, visited 14 May 2019; S. Hennette-Vauchez, 'Vent mauvais sur la solidarité', *Libération*, 9 February 2017, ⟨doyoulaw.blogs.liberation.fr/2017/02/09/vent-mauvais-sur-la-solidarite⟩, visited 14 May 2019.

[10]Art. L. 622-1 of the Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA).

[11]Art. L. 622-4, 1° and 2° CESEDA.

[12]Art. L. 622-4, 3° CESEDA.

The Conseil constitutionnel and the freedom to help others for humanitarian purposes

After the judgments on appeal, both persons submitted an appeal on a point of law to the *Cour de cassation*, the supreme civil and criminal court in France. On that occasion, their counsels raised a 'QPC' (*question prioritaire de constitutionnalité*)[13] disputing the compatibility of the abovementioned legislation with the principle of fraternity. The *Cour de cassation* decided to refer that question to the *Conseil constitutionnel*.

In its decision issued on 6 July 2018, the *Conseil* held, first, that fraternity is a principle endowed with constitutional value. This follows from Article 2 of the Constitution, which notably contains the triadic Republican maxim, and from its preamble and Article 72-3, which both refer to 'the common ideal of liberty, equality and fraternity' between the French Republic and its overseas territories and populations.[14] Second, according to the *Conseil*, the freedom to help others for humanitarian purposes, regardless of the lawfulness of their stay on the national territory, derives from the principle of fraternity.[15] However, that freedom does not guarantee a general and absolute right of entry to and residence on the national territory; it is up to the legislature to strike a balance with the goal of combatting illegal immigration, which itself pertains to the constitutional objective aimed at safeguarding public order.[16]

Applying those principles to the legislation at issue, the *Conseil constitutionnel* gave a narrow reading in two respects to the offence of solidarity (thus broadening the scope of the exemption). First, it held that the legislature had failed to strike an appropriate balance between fraternity and public order by limiting the scope of the exemption to providing assistance for illegal residence without, however, including the facilitation of illegal circulation when the latter is merely 'ancillary to the assistance to the residence of the foreign national and pursues humanitarian purposes'.[17] It then went on to state that the legislature needed to exempt the latter from criminalisation in order to bring the legislation in line with the Constitution. Second, the *Conseil* interpreted the provisions at issue in a way that

[13]The QPC is a mechanism, added in 2008 to the French Constitution (Art. 61-1), that allows plaintiffs, in the course of a lawsuit before an ordinary court, to raise an issue relating to the compatibility of the applicable legislation with the rights and freedoms guaranteed by the Constitution. If that issue is deemed sufficiently new and serious, the ordinary court hearing the case on the merits refers the question to the *Cour de cassation* or the *Conseil d'État*, which can in turn decide to refer the matter to the *Conseil constitutionnel*. In the meantime, the proceedings on the merits are stayed until the latter makes its pronouncement.

[14]Para. 7 of decision no. 2018-717/718 QPC.

[15]Ibid., para. 8.

[16]Ibid., paras. 9 and 10.

[17]Ibid., para. 13.

effectively broadened the exemption to encompass 'any other act of assistance provided for humanitarian purposes' beyond the acts explicitly enumerated in the legislation.

The *Conseil* postponed the abrogation of the contested provisions until 1 December 2018 since their immediate abolition might have had manifestly excessive consequences, i.e. essentially extending the exemption to acts that could facilitate illegal entry into French territory. However, in order for the persons prosecuted in the main proceedings to derive potential benefit from the judgment, the *Conseil* ruled that, as of the day of the publication of its decision, the criminal exemption at issue would also apply to humanitarian acts that aimed to facilitate the *circulation* of illegal immigrants when the latter is ancillary to their residence. As regards illegal *entry*, the *Conseil constitutionnel* remained adamant, though: 'the assistance provided to the foreign national for his or her circulation does not necessarily give rise, as a consequence thereof, to an unlawful situation, in contrast with the assistance provided for his or her entry'.[18]

Subsequent to the judgment of the *Conseil*, the French legislature rephrased the exemption at issue almost entirely, not in the least to bring it into conformity with the interpretation of the *Conseil*, even though, strictly speaking, this was not required. The provision now exempts all acts facilitating illegal circulation or residence that do not give rise to any direct or indirect compensation and which consist of providing legal advice, linguistic or social assistance or any other assistance with an exclusively humanitarian objective.[19,20] The *Cour de cassation* subsequently annulled both second instance judgments in December 2018 on the basis of the decision of the *Conseil constitutionnel*, remitting the cases to a court of appeal for new judgment on the merits. In that respect, it can be expected that, in the light of the facts, the academic will eventually be cleared of the charges; this might, however, not be the case for the farmer since the facilitation of entry remains an offence regardless of any – humanitarian – purpose that may have motivated that action.

Looking beyond those two cases, the *Conseil* decision is bound to have rather limited reach in practice precisely because illegal entry, as a criminal offence, has not been affected by it. Thus, Kant's duty of hospitality towards foreign nationals has been only partially vindicated. The decision did, however, cause a buzz, making the headlines of French newspapers. It was undoubtedly a milestone judgment in at least three respects. First, from a French perspective, the *Conseil constitutionnel*

[18]Ibid., para. 12 in fine. *See also* para. 24.

[19]*See* Art. 38 of Law No. 2018-778 of 10 September 2018 for contained immigration, an effective right to asylum and successful integration.

[20]That wording suggests that the legislature has opted for a slightly more restrictive approach than the one taken by the *Conseil*, the *exclusive* character of the humanitarian aim being absent from the latter's decision.

relied on a certain notion of a sacrosanct Republican principle that most foreign observers of French law would probably think had had its constitutional value acknowledged decades ago. Second, in connection with the separation of powers and judicial legitimacy, a – constitutional – court has dared derive concrete normative consequences in the field of immigration and asylum law from an admittedly very blurred and potentially subversive principle.[21] Third, in an EU context, the *Conseil* has issued a decision that could potentially have an impact on how the principle of solidarity operates at the European level.

Fraternité at last, but which fraternité?

Why such late recognition of the constitutional and normative value of the principle of fraternity? At least five explanations can be adduced. First, it was perhaps thought unnecessary to sound the trumpet of fraternity, considering that the legislature or ordinary courts had already reclaimed a number of fraternity-related rights for the most vulnerable.[22] Second, the *Conseil* may have been reluctant in the past to dive into the bottomless, yet promising well that is fraternity for fear of its subversive potential to upend matters in several areas, e.g. health care, social services or perhaps even the environment. Once opened, the Pandora's box of fraternity might unleash a flood of unstoppable claims that could eventually lead to the recognition of even more new rights. Third, the *Conseil constitutionnel* may simply not have had the opportunity to sanctify that principle any earlier. In the present case, the breach of the principle of fraternity was actually not raised *ex officio* by the *Conseil* but was astutely put forward by the counsels of the parties, thereby incidentally showing the highly valuable contribution of the parties themselves to the development of constitutional law. In addition, it is not uncommon for courts to wait for the most suitable case in order to make a grand pronouncement. In this respect, the constellation of facts underpinning the decision of 6 July 2018 was certainly quite amenable to 'discovering' fraternity, allowing it to bare its teeth, especially in the current European context of tension on the issue of migrants.

[21]On the subversive function of the fraternity principle, *see* notably G. Canivet, 'La fraternité dans le droit constitutionnel français' (Conference in honour of Charles Doherty Gonthier, 20-21 May 2011), available at ⟨www.conseil-constitutionnel.fr/la-fraternite-dans-le-droit-constitutionnel-francais⟩, visited 14 May 2019.

[22]For example, the minimum income allowance (the so-called 'RMI', later the 'RSA') or the right to decent housing. *See*, more broadly, M. Borgetto, *La notion de fraternité en droit public français. Le passé, le présent et l'avenir de la solidarité* (LGDJ 1993); M. Borgetto, 'Sur le principe constitutionnel de fraternité', *RDLF* (2018) chron. n° 14.

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The fifth explanation, which deserves a bit more exposition, has to do with the philosophical ambivalence with regard to the multifaceted principle of fraternity in France. The meaning attached to the narrative of fraternity has indeed always been somewhat ambiguous, oscillating between: (i) a distinctively French, strictly *national* understanding based on the dichotomy between 'We' and 'the Others'; (ii) its *Republican* – thus universal by aspiration – dimension (in a nutshell, all friends of liberty and reason are unofficial French citizens); and (iii) its *social* connotation, in connection with the welfare state. During the French Revolution, fraternity was relied upon as a form of wishful thinking meant to get the entire French people marching under the same banner (the national understanding of fraternity) but also as a way to make room for all 'freedom fighters' (the Republican understanding). In passing, the latter aspect might account for the rather peculiar wording of the principle in the preamble of the Constitution of 1946 regarding constitutional asylum: 'Any man persecuted in virtue of his actions in favour of liberty may claim the right of asylum on the territories of the Republic'.[23] During the industrial revolution, the much earlier Constitution of 1848 entrenched the welfare aspect of fraternity by requiring, in its preamble, mutual assistance, especially vis-à-vis the most vulnerable citizens (the social understanding of fraternity).

Thus, by virtue of the constitutional principle of fraternity, the *Conseil constitutionnel* has not only endorsed the social understanding of fraternity; it has embraced a new notion of fraternity, namely a humanistic, universal, and liberal ideal that directly recalls Kant's duty of hospitality. That notion is distinct from the Republican understanding since, rather than focus on citizens in the abstract, it centres on concrete individuals irrespective of their commitment to liberty and reason. It is, above all, the opposite of a strictly national notion of fraternity that only benefits French citizens. The concept of fraternity that underpins the decision of 6 July 2018 would seem to be closer to the principle of human dignity than to an idea of national kinship.[24]

[23]Preamble of the Constitution of 1946, which is still currently in force via the preamble of the Constitution of 4 October 1958. See also the latter's Art. 53-1, adopted on the occasion of the ratification of the Schengen Agreement and which provides that: '... the authorities of the Republic shall remain empowered to grant asylum to any Foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France on other grounds'.

[24]That notably explains why some French scholars have vehemently criticised the *Conseil*'s decision, in spite of its rather limited reach. *See*, for example, A.-M. Le Pourhiet, 'La condamnation de Cédric Herrou a été annulée par un coup d'État du Conseil constitutionnel', *Figarovox*, 10 July 2018, ⟨www.lefigaro.fr/vox/societe/2018/07/10/31003-20180710ARTFIG00273-fraternite-avec-les-migrants-illegaux-lecoup-d-etat-du-conseil-constitutionnel.php⟩, visited 14 May 2019; Club-Jean-Bodin, 'Migrants: le Conseil constitutionnel en guerre contre la souveraineté populaire', *Figarovox*, 7 July 2018, ⟨www.lefigaro.fr/vox/societe/2018/07/07/31003-20180707ARTFIG00103-migrants-le-conseil-constitutionnel-en-guerre-contre-la-souverainete-populaire.php⟩, visited 14 May 2019.

The subversive function of fraternity

By acknowledging the constitutional value of fraternity and by allowing it to bare its normative teeth in immigration matters, the *Conseil constitutionnel* has undoubtedly been blunt, hence the concerns – or, alternatively, the enthusiasm – with regard to the enormous legal potential of that somewhat moralistic or political principle.[25] Admittedly, myriad rights can be derived from the principle of fraternity, ranging from extensive rights to social services and assistance for all, regardless of whether contributory payments have been made, to the right to a universal basic income or further rights for minorities.[26]

Courts, however, are usually perceived as lacking the legitimacy to produce normative consequences, especially in the form of social rights, by relying solely on fuzzy, open-ended principles. That especially holds true for a principle like fraternity, inasmuch as it could be seen as the 'mother' of all social rights. For a number of reasons, it is indeed more difficult for courts to vindicate fraternity-related rights as opposed to strictly individual liberties, the main hurdle being the separation of powers: any court action in that direction tends to encroach upon the Parliament's political discretion to define public policy. It is primarily up to the elected legislature to set the social standards it wants to impose on society as a means of qualifying liberalism. Another difficulty lies in the fact that fraternity-related rights usually come at an economic and social cost: social rights are hardly ever 'gratis'; they usually imply benefit entitlements and, thus, public spending borne by the state or another public authority, and ultimately by the taxpayer. Even in the absence of significant economic costs, fraternity-related rights can themselves incur social or political costs, in particular when it comes to migrants, and especially in times plagued by terrorism (just think of the heated debate on jihadists returning from Iraq and Syria). Society could, under those circumstances, come to perceive migrants as a potential threat to public policy and security, a menace to social cohesion; in other words, national fraternity.

All these reasons make it rather difficult nowadays for courts to be daring and push for further recognition of rights derived from the principle of fraternity. That said, *liberté* and *égalité* are admittedly equally blurry and they, too, can entail costs. However, today those principles are routinely regarded as less destabilising. In any

[25]On that potential, *see*, for example, C.D. Gonthier, 'La fraternité comme valeur constitutionnelle', *La fraternité*, Congress of ACCPUF, ⟨www.accpuf.org/images/pdf/publications/actes_des_congres/c3/IV-RAPGEN/fratvalconst.pdf⟩, visited 14 May 2019.

[26]Regarding the alleged potential use of dormant fraternity in favour of minorities where the principle of equality has failed, *see* J. Gilbert and D. Keane, 'Equality versus fraternity? Rethinking France and its minorities', 14(4) *I.CON* (2016) p. 883.

event, it can be assumed that the *Conseil* will wield the tool of fraternity with parsimony, as it did in its decision of 6 July 2018 by rather gently narrowing the scope of the offence of solidarity. A real breakthrough would have been achieved if it had exempted from prosecution the facilitation of illegal entry for humanitarian purposes. Yet the *Conseil constitutionnel* was cautious enough to decide against going down such a (subversive) road that, incidentally, might not have been all that well regarded at the EU level, in spite of its formal compatibility with EU law.

Fraternité and solidarity between member states

From a European perspective, the *Conseil* decision of 6 July 2018 is undoubtedly, to paraphrase Article 67(2) TFEU, *fair vis-à-vis third country nationals*, albeit through the persons aiding them. It would, therefore, seem to be quite amenable to the concept of interpersonal solidarity. However, it could perhaps also be seen as a slightly less positive development for the idea of interstate solidarity.

In formal terms, the French legislation at issue clearly complies with Directive 2002/90[27] defining the facilitation of unauthorised entry, transit and residence, which, somewhat ironically, was adopted upon a French initiative.[28] Article 1(2) of the Directive allows member states to refrain from imposing sanctions for the facilitation of both entry and transit when the aim of the individual providing assistance was humanitarian in nature.[29] Although the French legislature had not initially made full use of that possibility, it has just been prodded by the *Conseil constitutionnel*, on the basis of the French Constitution, to find a way to exercise that option with regard to circulation/transit. The *Conseil* could actually have gone much further without breaching Directive 2002/90 by exempting from prosecution the assistance of illegal *entry* for humanitarian purposes. The fact remains, however, that, in contrast to illegal immigrants themselves, who cannot, in principle, be prosecuted for staying illegally on the territory of a member state,[30] EU law allows member states to impose criminal penalties on persons who have committed the offence of facilitation of illegal immigration, as the Court has recalled in recent Italian and German cases.[31] By the same token, the European Court of Human Rights has also upheld the French legislation

[27]Council Directive 2002/90/EC of 28 November 2002 (OJ 2002 L 328, p. 17).

[28]OJ 2000 C 253, p. 1.

[29]For the record, the French initiative only foresaw the exemption applying to relatives.

[30]*See* ECJ 28 April 2011, Case C-61/11 PPU, *El Dridi*, EU:C:2011:268, paras. 58-59; and ECJ 6 December 2011, Case C-329/11, *Achughbabian*, EU:C:2011:807, paras. 45-46.

[31]*See* ECJ 6 October 2016, Case C-218/15, *Paoletti and Others*, EU:C:2016:748, issued in the specific context prior to Romania's accession to the EU; and ECJ 10 April 2012, C-83/12 PPU, *Vo*, EU:C:2012:202, with regard to the compatibility of the offence with the Visa Code.

at issue, albeit in very specific circumstances in which no penalty was imposed.[32] Thus, the French legislation would appear to be compatible, generally speaking, with both EU and European Court of Human Rights law.

The *Conseil constitutionnel* decision might, however, raise two issues that have European implications. No matter how mild the quantitative effects might be, such a decision *de facto* 'facilitates' the stay and circulation of illegal immigrants on French territory since it could be seen as an enticement to human rights activists to keep pursuing their actions and to illegal immigrants to keep trying to enter the territory of France or move to another member state. First, although Italian authorities and perhaps citizens may think of the decision as nothing more than a positive externality, almost a gesture of solidarity or willingness to share the burden, the *Conseil* decision could also be perceived as undermining the terms of the Dublin III Regulation, and with it the mutual trust between member states, regarding the determination of which member state is responsible for examining a given asylum request.[33] In principle, it is indeed up to the member state of arrival (in this case, Italy) to evaluate a request unless there are substantial grounds to believe that there are systemic flaws in the asylum procedure and conditions for the reception of asylum applicants in that member state that could result in inhumane or degrading treatment.[34] Second, the *Conseil*'s decision also raises suspicions regarding the ability of illegal immigrants to exit French territory, most notably to the United Kingdom via Calais, a route now quite (in)famous precisely with regard to migrants. If illegal immigrants are provided assistance that helps them circulate freely on French territory, this could potentially make it easier for them to reach the United Kingdom or another member state, thus creating another negative externality that impinges upon interstate solidarity by further complicating the processing of asylum requests.

Against this background – and bearing in mind that concerns should not be overstated in light of the limited practical reach of the *Conseil*'s decision – it becomes obvious that national courts, including constitutional courts, cannot afford to overlook the European dimension of asylum and migration. They must

[32]ECtHR 10 November 2011, Case No 29681/08, *Mallah* v *France*, with a dissenting opinion of Judge Power-Forde.

[33]Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person (recast) (OJ 2013 L 180, p. 31).

[34]*See* ECJ 21 December 2011, Cases C-411/10 and C-493/10, *N.S. and Others*, EU:C:2011:865, para. 86. The Court recently cleared Italy in this respect, leaving open the possibility, however, for an applicant for international protection to demonstrate *in concreto* that he would find himself in a situation of extreme material poverty; ECJ 19 March 2019, Case C-163/17, *Jawo*, EU:C:2019:218, paras. 95-97.

remain aware of and tackle any externalities they create for other member states and their own courts. For better or worse, asylum and migration issues can no longer be addressed in splendid isolation, regardless of the EU dimension. Interpersonal solidarity must be made to go hand in hand with interstate solidarity. At the same time, though, the latter ideal should not be allowed to prevail at the expense of certain forms of fairness and justice.

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