

5

Migration as a Constitutional Crisis for the European Union

ALEZINI LOXA AND VLADISLAVA STOYANOVA

5.1 INTRODUCTION

This chapter aims to offer insights into the wider implications for the rule of law, including for the EU constitutional order, of the restrictions of migrants' and asylum-seekers' rights that follow from systematic non-compliance with the Common European Asylum System (CEAS) by certain Member States.¹ In other words, has the migration and asylum crisis developed into an EU constitutional crisis? There is a growing body of literature about the constitutional crisis of the EU.² A rich debate also exists as to the failures of the CEAS.³ Our aim is to bring these two into conversation to demonstrate that migration governance has a constitutive role for the EU. If the EU fails to treat the migration crisis as an EU constitutional crisis, the EU might risk disintegration and return to the national. This would take the evolution of the European project further away from its telos.

The framing of our research question and our arguments requires at least three initial clarifications that are offered in Section 5.2. The first refers to our

¹ Restrictive practices regarding migrants' rights might be in accordance with the CEAS, but still in violation of other standards (such as those enshrined in the ECHR). Such restrictive practices might be also in compliance with both the CEAS and ECHR, but still objectionable in light of, for example, the wider principles of solidarity or the rule of law that are constitutionally enshrined.

² See K L Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2021) *Yearbook of European Law* 1, for further references.

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

understanding of the EU constitutional order and when this order can be perceived as being in crisis. The second refers to our understanding of a migration and asylum crisis. The third refers to the specificities of the EU as a supranational legal order in relation to the migration crisis as an EU constitutional crisis. Section 5.3 presents how the EU constitutional order has been challenged by the migration crisis. Specifically, it presents how non-compliance, non-enforcement and informalization have become characteristics of the EU migration and asylum governance especially post 2015 and have prompted a constitutional crisis where both EU institutions and Member States furnish disintegration. Given the current vision of the EU on the development of its asylum and migration governance, as expressed in the New Asylum and Migration Pact, Section 5.4 shows that these characteristics are likely to persist and will continue to have constitutional implications. Finally, Section 5.5 examines what the future holds for EU migration and asylum governance in view of the rise of populism in EU Member States, to conclude that all the alternative scenarios indicate that it might be wiser for the EU to *not* come forward with new proposals (such as the New Pact) in ‘politically and symbolically charged areas’ (such as migration and asylum) during populist times.⁴

5.2 A UNION OF CRISES

To address the question whether the migration and asylum crisis has developed into an EU constitutional crisis, it is necessary to explain our understanding of constitutional crisis. For this purpose, it is useful to refer to Hailbronner who defines the crisis of EU constitutional democracy as ‘weakening of European democracy and of the normative force of important European constitutional principles’.⁵ These key constitutional principles of the EU are the rule of law, mutual trust, sincere cooperation, solidarity, and commitment to human rights and democracy.⁶ Hailbronner explains that crisis of constitutional democracy entails ‘a systemic weakening of the power of constitutional norms to provide direction for and constraints on the exercise

⁴ An expression taken from R McCrea ‘Forward or Back: The Future of European Integration and the Impossibility of the Status Quo’ (2017) 23 *European Law Journal* 66, 72 where he explains that a reason for the success of the European integration is the choice to integrate ‘less controversial “functional areas” and to avoid ‘politically and symbolically charged areas’.

⁵ M Hailbronner, ‘Beyond Legitimacy. Europe’s Crisis of Constitutional Democracy’ in M Graver, S Levinson and M Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 277, 278.

⁶ Article 2 TEU.

of political power and/or a considerable decrease in the quality of democracy.⁷ The weakening of EU constitutional norms has important implications for how the EU engages with Member States. In this sense then, our understanding of an EU constitutional crisis also includes the inability of the EU, due to the absence of tools or the non-utilization of existing tools, to effectively provide a political and legal response to the shared challenges faced by Member States from within its constitutional framework and in respect of its normative foundations.⁸

As to the migration and asylum crisis, we understand this as a twofold crisis. First, a crisis caused by the collapse of the Common European Asylum System, manifested through its systemic non-application and the inherent and well-known deficiencies as to its design. Second, a crisis resulting from the prevalent and protracted situation experienced post 2015 where the EU constitutional principles of human rights, solidarity and rule of law are not upheld in EU legislative or judicial practice (as shown in detail in Section 5.3). All of this suggests a failure of the European Union to lead a response to address the common challenge experienced at Member States level.

Certainly, individual Member States, as demonstrated in Part III of this volume, face constitutional challenges of weakened democracies and have systematically engaged in restrictions of migrants' rights. It can thus be argued that appeals for anti-immigration policies in constitutional democracies should 'not be mistaken for evidence of a "constitutional crisis"'; rather such appeals are 'compatible with existing constitutional understandings and arrangements'.⁹ Restrictions upon migrants' rights 'can take place within normal politics' since commitments to human rights can be reinterpreted in a way that is less favourable to migrants.¹⁰ The position of the EU is, however, specific in comparison with the Member States. Accordingly, while restrictions of migrants' rights might not necessarily lead to a constitutional crisis at the level of Member States,¹¹ the situation is different from the perspective of the EU. This is because the EU is an example of governance beyond the

⁷ Hailbronner (n 5) 277, 280.

⁸ 'One of the weakest elements in the legal-political edifice of today's European Union (EU) is [...] ensuring that the national governments are faithful to the basic principles of democracy, protection of fundamental rights, and the Rule of Law.' Scheppele, Kochenov and Grabowska-Moroz (n 2) 2.

⁹ A Aleinkoff, 'Inherent Instability. Immigration and Constitutional Democracies' in M Graver, S Levinson and M Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 477, 485.

¹⁰ *Ibid.*, 491.

¹¹ See Chapter 1 in this volume.

state.¹² If the EU cannot guarantee compliance with its rules (such as those in the CEAS) in a context where mutual trust among the Member States must be assumed, Member States will resort to self-help, that is, each Member State will try to individually solve the issues in accordance with its own interests as perceived at the particular point in time.¹³ Self-help ultimately defeats the purpose of having a Union, or at least having an EU with competence in the area of migration and asylum.

5.3 THE CHALLENGES TO EU MIGRATION AND ASYLUM GOVERNANCE

EU integration in the area of migration and asylum has been characterized by a ‘continued tension between nationalism and Europeanization’.¹⁴ The constant bargain between Member States and the EU, with respect to transfer of sovereign powers has shaped this legal area that has not evolved in light of the *telos* of an ever closer Union. Instead, as Walker notes, ‘the resilience of the tension between competing visions of the role of the states and the European centre in the development of FSJ [the area of Freedom, Security and Justice]’ can be seen ‘as a factor conditioning its constitutionalization’.¹⁵ This is persistent in the history of EU integration in asylum and migration throughout the treaties where the ‘sovereigntist legacy in immigration translates itself into a policy-making environment in which national jealousies and priorities are never far from the surface’.¹⁶ Overall, it was not until the Lisbon Treaty when certain constitutional guarantees first made their appearance in EU migration and asylum law.¹⁷

¹² For the EU’s mission of taming the nation-state, J H H Weiler, ‘To Be a European Citizen. Eros and Civilization’ in J H H Weiler (ed), *The Constitution of Europe* (Cambridge University Press 1999) 324.

¹³ As it actually happened during the 2015–2016 crisis.

¹⁴ H Toner, ‘The Lisbon Treaty and the Future of European Immigration and Asylum Law’ in L Azoulai and K de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014) 28.

¹⁵ N Walker, ‘In search of the Area of Freedom, Security and Justice: A constitutional Odyssey’ in N Walker (ed), *Europe’s Area of Freedom, Security, and Justice* (Oxford University Press 2004) 20.

¹⁶ *Ibid.*

¹⁷ By this we mean full judicial review by the Court of Justice of the EU. Under Amsterdam Treaty the jurisdiction of the CJEU was limited substantively and procedurally pursuant to Articles 62(1) 68(3) TEC for the transitional period prescribed in Article 67 TEC. Contrary to the other transitional arrangements of Amsterdam, the limitation to the Court’s jurisdiction was only abolished with the Treaty of Lisbon.

Against this background, it can be expected that a migration crisis would push the EU framework of cooperation to its limits. Still, with the legal mechanisms in place after Lisbon it was not certain to what extent such a crisis could affect the EU as a constitutional order. This uncertainty has been resolved given that, as this section will show, post 2015 the governance of migration and asylum has been pushed outside the EU constitutional frame with serious implications for the EU legal order. This section thus demonstrates how non-compliance, non-enforcement and informalization have become the prevalent characteristics of EU migration and asylum governance post 2015. All of this has led to a constitutional crisis where both the EU institutions and the Member States create ‘disintegration by evading existing law’.¹⁸

5.3.1 Non-compliance

To begin with, Member States’ compliance has been an issue characterizing asylum and migration law harmonization for many years. Even prior to the migration crisis, Member States in the south were turning a blind eye towards secondary movement by asylum seekers.¹⁹ Italy, Bulgaria, Hungary and Malta feature among the Member States with a history of non-compliance with the CEAS requirements.²⁰ Greece has, however, been the primary culprit for defying the rules. The structural deficiencies of the Greek asylum system resulted in the cases of *MSS v. Belgium and Greece* and *N. S. and others* that recognized that Member States should not always carry returns under Dublin if this could expose asylum seekers to treatment contrary to their human rights.²¹ At that point, the foundational principle of mutual trust as the basis of the European project and, relatedly, the CEAS, was undermined by the systemic flaws existing in one EU Member State. It is important to note, however, that the non-application of the Dublin mechanism took place from within the EU legal framework. Specifically, the non-application of the

¹⁸ R Wessel, ‘Normative Transformations in EU External Relations: The Phenomenon of “Soft” International Agreements’ (2021) 44 *West European Politics* 72, 86.

¹⁹ D Thym, ‘The “Refugee Crisis” as a Challenge of Legal Design and Institutional Legitimacy’ (2016) 53 *Common Market Law Review* 1545, 1548.

²⁰ See *Tarakhel v. Switzerland* App no 29217/12 (ECHR 2014); V Stoyanova, ‘“Recasting” Detention of Asylum Seekers: Human Rights Law, EU Law and Its Application in Bulgaria’ in V Mitsilegas, V Moreno-Lax and N Vavoula (eds), *Securitising Asylum Flows* (Brill 2020) 319; European Council on Refugees and Exiles, ‘Dublin II Regulation: Lives on hold – European Comparative Report’, February 2013, 113–114.

²¹ *M.S.S. v. Belgium and Greece* [GC] App no 30696/09, ECHR 2011; Judgment of 21 December 2011, *N. S. and others*, C-411/10 and C-493/10, EU:C:2011:865.

ordinary Dublin rules on responsibility was based on Article 3(2) of Dublin II, according to which Member States have a discretion to examine asylum claims even in cases where they were not responsible according to the Dublin rules.²² Despite the non-compliance with the rules, no hard enforcement measures were adopted by the European Commission. Instead, the measures actually taken at the EU level focused on providing financial and administrative support.²³

The financial and administrative support proved insufficient in the face of the 2015 arrivals. This is because the architecture of the EU legal order relies on the importance of patrolling the common external borders while allowing an internal area of free movement. The story as to how the rights of non-EU citizens have been sacrificed, so that the EU citizens benefit from free movement within the Union, is well known.²⁴ In relation to the interplay between border control and the rights of asylum-seekers, the message transmitted by the EU to the Member States of South and Central Europe has prioritized the control of the external borders, often at the expense of asylum-seekers.²⁵ This message has been part of the constitutional foundation of the EU, which has implied 'collectivization of the protectionist side of the nation state'.²⁶

During the 2015/2016 crisis the 'collectivization of the protectionist side of the nation state' created particular problems for the EU that protectionism would not normally create for the nation state. Faced with increased arrivals of migrants and refugees, the periphery EU Member States had two choices – (i) preventing entry at all costs or (ii) subverting the EU asylum system by not registering arrivals but rather letting people make their way to the North and the West. As to the first option, it implied a humanitarian crisis at the EU doorstep.²⁷ It turned out to also be practically impossible to achieve.²⁸ So, the

²² Dublin III then came with an amended Article 3(2) in order to reflect the specific circumstance of non-return due to systemic flaws in the Member State responsible which could lead to treatment contrary to Article 4 of the Charter.

²³ For an overview see European Commission, Recommendation of 8.12.2016 Addressed to the Member States on the Resumption of Transfers to Greece Under Regulation (EU) No. 604/2013, 8 December 2016, COM(2016) 8525 final, paras 4–8

²⁴ R Byrne, G Noll and J Vedsted-Hansen, 'Understanding the Crisis of Refugee Law: Legal Scholarship and the EU Asylum System' (2020) 33 *Leiden Journal of International Law* 871.

²⁵ *Ibid.*

²⁶ G Noll, 'Why the EU Gets in the Way of Refugee Solidarity?' *Open Democracy* 22 September 2015.

²⁷ This almost became a reality in February 2020 when the Turkish president deliberately ignored the EU-Turkey statement and let migrants and refugees reach the Greek border.

²⁸ People find ways to circumvent border controls.

second option prevailed; the periphery EU Member States bypassed their obligations and became corridors *en route* to the North and West. Subsequently, the failure of the Member States located at the external borders to offer substantive protection to asylum seekers and to guard the borders created a domino effect of non-compliance. Germany publicly declared that it would disregard Dublin and would accept all refugees that managed to enter its territory.²⁹ As a consequence, ‘the “Western Balkans route” became an epitome for the partial collapse of the Dublin system and the EU’s border control policies’.³⁰ The practical collapse of Schengen followed – in the autumn of 2015 border controls were reinstated far beyond the permissible time limits set by the Schengen Border Code.³¹ Austria, Germany, Denmark, Sweden, Norway and France in practice nullified the Schengen acquis. These countries have exhausted all procedures and continued to impose border controls until May 2020 under the justification of public policy or public security threats due to migratory movements.

5.3.2 Enforcement Deficit

EU asylum and migration law is not only disregarded, it is also not enforced. The problem is not that there are no enforcement mechanisms. Rather there is often ‘no interest in activating them’.³² Specifically, it does not seem like the Commission ever understood non-compliance as an issue capable of threatening the constitutional structure of EU Law. This cannot but have negative repercussions for the constitutional structure of EU Law.

In this context, it was not until 2015 that proceedings were first initiated against Member States located at the external EU borders (Greece, Croatia, Italy, Malta and Hungary) to ensure ‘full compliance’ with EU asylum law.³³ This late reaction is hard to understand given that most of these countries defied EU law in a systemic manner. The procedures initiated by the Commission, which primarily concerned reception and registration upon

²⁹ A Dernbach, ‘Germany Suspends Dublin Agreement for Syrian Refugees’, 26 August 2015, Euractiv (translated by Sam Morgan, Der Tagesspiegel); D Thym, ‘Beyond Dublin-Merkel’s Vision of EU Asylum Policy’, 26 October 2015, EU Migration Law Blog.

³⁰ D Thym, ‘The “Refugee Crisis” as a Challenge of Legal Design and Institutional Legitimacy’ (n 19) 1549.

³¹ P Thallmann, ‘Schengen, Migration – and the Resurrection of the Westphalian Nation-State?’ in C Rauegger and A Wallerman (eds), *The Eurosceptic Challenge, National Implementation and Interpretation of EU Law* (Hart 2019) 110–134.

³² Den Heijer, Rijpma, and Spijkerboer (n 3) 614.

³³ EU Commission Press Release, ‘Implementing the Common European Asylum System: Commission Escalates 8 Infringement Proceedings’, 10 December 2015.

entry, were closed with regard to nearly all the Member States as the Commission found improvements.³⁴ The protracted situation of vulnerability experienced by asylum seekers on the ground testifies the opposite. At the same time, the Commission has not opened any infringement action in relation to the failures of Austria, Denmark, Sweden, Norway, Germany and France to comply with the Schengen Border Code. On the contrary, the Commission legitimizes these countries' actions of non-compliance by proposing amendments to the Border Code that would render the period of exceptional reinstatement of border controls close to indefinite.³⁵

The failure of the periphery Member States to effectively protect EU borders and deter secondary movements prompted a reaction by the Member States of the North to protect their national borders. In essence, Member States with no experience in asylum, having troubled administration and unable to provide for the material needs of asylum seekers, failed to comply with the CEAS. This failure by the Member States at the external border, to keep migrants far from the Member States of Central and Northern Europe legitimized the violation of the Schengen *acquis* and the reestablishment of border controls. The EU institutions were simply bystanders for some time. Then, they proceeded with half-hearted attempts to ensure that the first deviants (the Member States at the external borders) comply with EU law and with endorsement of the second deviants (the Member States in the West and North) by recognizing the legitimacy of their defiance and proposing amendments to fit their behaviour.

The only cases related to infringements of the CEAS that have reached the CJEU concern Poland, Hungary and the Czech Republic.³⁶ These Member

³⁴ On the implementation of EURODAC Regulation (EU) 603/2013: Case INFR(2015)2197 against Croatia, Case INFR(2015)2202 against Greece and Case INFR(2015)2203 against Italy (closed 8/12/2016). On the Asylum Procedures Directive 2013/32/EU: Case INFR(2015)0402 against Greece (closed in 25/07/2019), Case INFR(2015)0459 against Italy (closed 25/07/2018). On Reception Conditions Directive 2013/33/EU: Case INFR(2015)0403 against Greece (closed 25/07/2019), Case INFR(2015)0460 against Italy (closed 10/10/2019). See, however, Cases INFR(2015)0432 and INFR(2015)0433 against Hungary on non-communication of transposition measures for the Asylum Procedures Directive 2013/32 and the Reception Conditions Directive, which are still open and Case INFR(2015)2201 against Hungary on the incorrect implementation of EU asylum and migration *acquis* which was referred to the CJEU and addressed in the Judgment of 17 December 2020, *Commission v. Hungary*, C-808/18, EU: C:2020:1029.

³⁵ EU Commission, Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders COM (2017) 0571 final.

³⁶ See European Commission Fact sheet, 'December infringements package: key decisions', 7 December 2017.

States were referred to the CJEU for non-compliance with the relocation decisions.³⁷ Hungary was also referred to the CJEU for non-compliance with the Asylum Procedures Directive, the Return Directive and the Reception Conditions Directive, read in conjunction with the Charter of Fundamental Rights of the EU.³⁸ These initiatives can be assessed as part of measures intended to address the broader rule of law problems in Hungary and Poland (such as independence of the judiciary, freedom of speech, etc.). This linkage of migration and asylum law with broader problems, has its positive sides – it might be an indication that the Commission perceives non-compliance with the CEAS as a problem that triggers more general concerns about the rule of law. At the same time, however, it might also indicate that the Commission is not that troubled by violations of EU migration and asylum law *per se*. If the latter is correct, the Commission does not seem to understand that such an approach threatens the EU internal rule of law. The EU is, after all, founded upon the centrality of law whose application and implementation guarantee not only rights for individuals (even if these happen to be migrants), but also the very viability of the integration project. When migration and asylum law function as legal areas characterized by compliance and enforcement deficit (by themselves even if not linked to broader rule of law problems), it can be doubted to what extent the EU can be considered as a constitutional order. Such doubts also arise since EU migration and asylum governance has been dominated by informalization, a feature that has become very prominent post 2015.

5.3.3 Informalization

By way of emergency framing, the EU response to the migration and asylum crisis was only in a very limited way characterized by measures adopted from within the Treaty framework. Instead, informal cooperation and the adoption of soft law was promoted for having the necessary expediency and flexibility to address the situation on the ground.³⁹ As a result, informal cooperation has

³⁷ Judgment of 2 April 2020, *Commission v. Poland, Commission v. Hungary and Commission v. Czech Republic* (Temporary mechanism for the relocation of applicants for international protection), C-715/17, C-718/17 and C-719/17, EU:C:2020:257.

³⁸ Judgment of 17 December 2020, *Commission v. Hungary*, C-808/18, EU:C:2020:1029. See also Judgment of 18 June 2020, *Commission v. Hungary* (Transparency of associations), C-78/18, EU:C:2020:476.

³⁹ J Santos Vara, 'Soft International Agreements on Migration Cooperation with Third Countries: A Challenge to Democratic and Judicial Controls in the EU' in S Carrera, J Santos Vara and T Strik (eds), *The External Dimensions of EU Migration and Asylum Policies in Times of Crisis* (Edward Elgar Publishing 2019) 21.

become the governance paradigm.⁴⁰ The EU-Turkey agreement has been the prime example of this paradigm leading the way for a series of other informal instruments and creating spaces of liminal legality.⁴¹ This agreement appeared in the form of a press release on the EU Council website and, according to the CJEU, it lies outside the scope of EU law.⁴² Regardless of its legal nature which has been explored in detail,⁴³ the agreement managed to contain new arrivals and it has been seen as a blueprint for the external dimension of EU asylum and migration law ever since.⁴⁴ The move towards more informal cooperation in asylum and migration governance is also evident from the Migration Partnership Framework and the Joint Way Forward on Migration Issues between Afghanistan and the EU.⁴⁵ In this context, Wessel has noted that '[t]he political reasons for expediency and pragmatism are understandable, but [...], they do come at a price'.⁴⁶ The price to pay, in this case, is the push of migration and asylum law out of the EU constitutional framework to a space of liminal legality with severe costs for the affected individuals and serious repercussions for the EU constitutional order as a whole.⁴⁷

These repercussions manifest themselves in the following. First, informal agreements bypass the European Parliament and cannot be an object of *ante* judicial control as they are not adopted following the procedure of Article 218 TFEU.⁴⁸ As a result, they lead to diminished protection for the affected

⁴⁰ T Strik, 'Migration Deals and Responsibility Sharing: Can the Two Go Together?' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019) 56–74.

⁴¹ EU-Turkey statement, 18 March 2016 <www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

⁴² Exemplified in the Order of 12 September 2018, *NF v. European Council*, C-208/17 P to C-210/17 P, EU:C:2018:705, Order of 11 December 2018, *QC v. European Council*, T-834/16, EU:T:2018:984.

⁴³ M Gatti and A Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019) 175–200.

⁴⁴ EU Commission, On establishing a New Partnership Framework with third countries under the European Agenda On Migration, COM (2016) 0385 final.

⁴⁵ EU Commission, On establishing a New Partnership Framework with third countries under the European Agenda On Migration, COM (2016) 0385 final; Joint Way Forward on Migration Issues between Afghanistan and the EU, WK 6248/20 INIT.

⁴⁶ Wessel (n 18) 72.

⁴⁷ Cf C Kilpatrick, 'The EU and Its Sovereign Debt Programmes: The Challenges of Liminal Legality' (2017) 70 (1) *Current Legal Problems* 337, 341–345 on the term 'liminal legality' and the constitutional challenges raised for the EU in the context of the economic crisis.

⁴⁸ The control of an informal agreement after its adoption also does not seem very likely as was seen in the case of the EU-Turkey statement. Vara (n 39) 29–36.

individuals.⁴⁹ As Vara has noted, '[t]he lack of jurisdiction of the Court of Justice might also mean that it is not allowed to protect the general principles of EU law and, in particular, institutional balance and sincere and loyal cooperation.'⁵⁰

Another repercussion from the informalization has been identified by Vitiello: 'by transposing EU principles, such as solidarity and shared responsibility, into international relations while de-contextualising them, the Union may trigger their transformation into "empty boxes" to be filled – on a case-by-case basis – with national voluntarism.'⁵¹ Principles that are central to the EU architecture like solidarity, sincere cooperation and mutual trust are no longer seen as tied solely with intra-EU cooperation. Instead, they are transplanted to external action as a means of legitimizing informal cooperation with third countries as a central element of EU asylum and migration governance. This transplantation runs the real risk of diluting the legal significance of these principles in the EU legal order.⁵² This has been the case with the binding principle of solidarity. Despite attempts to operationalize solidarity through the Relocation Decisions and the ensuing litigation,⁵³ the binding nature of this principle seems to have been indeed diluted – in light of the narratives of the Commission and the proposals in the New Pact – to something that 'must be given voluntarily' and that 'cannot be forced'.⁵⁴ (see Section 5.4.2) .

5.4 THE NEW ASYLUM AND MIGRATION PACT

The presentation of the New EU Pact on Migration and Asylum in September 2020 expresses a continuous effort to find a solution within the EU by more harmonization through law and the introduction of a common framework for responsibility sharing.⁵⁵ Acknowledging the shortcomings exposed by the 2015/

⁴⁹ Vara (n 39) 33.

⁵⁰ Ibid.

⁵¹ Michael W Doyle, 'Responsibility Sharing: From Principle to Policy' (2018) 30(4) *International Journal of Refugee Law* 618.

⁵² D Vitiello, 'Legal Narratives of the EU External Action in the Field of Migration and Asylum: From the EU-Turkey Statement to the Migration Partnership Framework and Beyond' in V Mitsilegas, V Moreno-Lax and N Vavoula (eds), *Securitisating Asylum Flows* (Brill 2020) 158.

⁵³ Judgment of 6 September 2017 in *Slovakia v. Council* and *Hungary v. Council*, C-643/15 and C-647/15, EU:C:2017:631.

⁵⁴ See 'State of the Union Address 2016: Towards a Better Europe, a Europe that Protects, Empowers and Defends' (Press Release IP/16/3042). See A Michailidou and HJ Trenz, 'European Solidarity in Times of Crisis: Towards Differentiated Integration' (Arena Working Paper 5/2018) 7.

⁵⁵ New Pact on Migration and Asylum COM(2020) 609 final.

2016 migration crisis, the New Pact tries to offer a ‘fresh start’ to EU migration and asylum governance under the presumption that the problems experienced by Member States can be overcome by changes in the legal landscape. The proposed changes strengthen the synergies between migration control and asylum under the assumption that protection needs can be easily and swiftly identified at the EU external borders. In addition to these synergies, a second prominent characteristic of the New Pact is the introduction of the idea of flexible solidarity. Finally, the New Pact reiterates the need to cooperate with third countries so that the pressure on the EU is relieved. A closer look will show that there are historical and constitutional origins behind these three solutions. The Pact can thus be viewed as a continuation of the persistent EU deficiencies in migration and asylum governance rather than the ‘fresh start’ that it claims to be.

5.4.1 *Solidification of the Nexus between Protection and Migration Control*

A noticeable aspect of the Pact is the solidification of the links between asylum, external border controls and return procedures. This will be chiefly achieved in the following ways. First, a ‘pre-entry screening’ is introduced,⁵⁶ which builds on the idea of transit zones, such as the ones used by Hungary,⁵⁷ and which aims at swift removals of the persons. Second, a ‘seamless link’ between asylum and return is forged by the extended use of border procedures.⁵⁸ Third, the position of asylum seekers in the context of Dublin transfers, is weakened.⁵⁹ We would like to focus on the latter since, as we will show, it has serious repercussions of a constitutional nature for the EU.

The New Pact retains the link between the responsibility for examining asylum needs and the protection of the external borders since the responsibility criteria based on first entry are preserved.⁶⁰ This link is actually further strengthened by ‘reinforcing the responsibility of a given Member State for

⁵⁶ Proposal for a regulation introducing a screening of third-country nationals at the external borders COM(2020) 612 final, 1.

⁵⁷ See Chapter 8 on Hungary in this volume.

⁵⁸ Amended proposal for a regulation establishing a common procedure for international protection in the Union, COM(2020) 611 final, 9.

⁵⁹ Although the Dublin regulation has been repealed, the New EU Pact does not substantially change the Dublin system for determining the responsible Member State. For this reason, we will continue to refer to Dublin.

⁶⁰ Articles 9(1) and 21, Proposal for regulation on asylum and migration management. Some new criteria are introduced: extending the definition of family member, clarifying a Member State’s responsibility following search and rescue operations, and introducing a new criteria relating to the possession of educational diplomas.

examining an application for international protection' and by deleting some rules on cessation or shift of responsibility between Member States.⁶¹ The objective is to 'further incentivize persons to comply with the rules and apply in the first Member State of entry and hence limit unauthorized movements and increase the overall efficiency of the CEAS'.⁶²

The Dublin mechanism has been based on coercion of asylum-seekers. The element is further strengthened since the 'incentives' to comply with the rules include punishing asylum seekers by limiting their right to material reception conditions to the Member State where the applicant is required to be present.⁶³ Therefore, instead of creating incentives for better convergence and improvements regarding the Member States' reception conditions, the burden is transferred in the form of an obligation upon the asylum seekers to prevent their unauthorized movements. Such an effect is also expected by the deletion of the rules allowing for cessation or shift of responsibility of the Member State based on the behaviour of the applicant – absconding or leaving the territory of the Member States.⁶⁴ In addition, by introducing a system of take back notifications instead of the existing take back request system for cases where responsibility has already been established, the proposed Regulation on Asylum and Migration Management aims to simplify the take back procedure and to achieve more procedural efficiency.⁶⁵ Such efficiency is also intended to be achieved by shortening the deadlines for making and replying to requests to take charge, for making take back notifications, as well for making and deciding on appeals.⁶⁶

The limitations of procedural rights of asylum seekers subject to transfer decisions, also aim at increased system efficiency. The scope of the right to challenge transfer decisions is limited to an assessment as to whether the transfer would result in a real risk of inhuman or degrading treatment and whether the family related criteria have been correctly applied.⁶⁷ A challenge to a transfer decision has to be submitted within two weeks and does not have an automatic suspensive effect. The individual can, however, request a court to suspend the transfer.

⁶¹ Proposal for a regulation on asylum and migration management COM(2020) 610 final, 17.

⁶² Recital 54, Proposal for regulation on asylum and migration management.

⁶³ Article 10 Proposal for a regulation on asylum and migration management.

⁶⁴ Recital 54, Proposal for regulation on asylum and migration management.

⁶⁵ Asylum and Migration Management Regulation SWD (2020) 207 final, 12. Article 31 of the Proposal.

⁶⁶ Recital 58, Proposal for regulation on asylum and migration management.

⁶⁷ Article 33, Asylum and Migration Management Regulation.

Member States have been pushing for limitations on judicial review in line with the floodgates argument, in order to limit the procedural safeguards for asylum seekers that have been established by the CJEU.⁶⁸ However, access to court as the central tenet of the EU rule of law does not only presuppose the existence of remedies, but it is also related to the intensity of judicial review. It is precisely this kind of judicial scrutiny that guarantees not only the rights of asylum seekers, but also respect for the rule of law within the EU, as former AG Sharpston has argued.⁶⁹ The proposed limitations as to the possibility of challenging Dublin transfers, reverse the case law of the CJEU regarding the right to an effective remedy,⁷⁰ and represent a return to the status quo at the time of Dublin II.⁷¹ As the Court has observed in *Ghezlbach*, Article 27(1) of Regulation No 604/2013, that which enshrines the right to an effective remedy, makes no reference to any limitation of the arguments that may be raised by the asylum seeker when availing himself/herself of that remedy.⁷² The CJEU justified this procedural protection by noting that the Dublin Regulation governs not only relations between Member States, but also the relation between a Member State and an individual. The Court has also suggested that these two levels of relations are actually linked and inform each other. In *Ghezlbach*, the Court thus explained that:

the requirements laid down in Article 5 of the regulation to give asylum seekers the opportunity to provide information to facilitate the correct application of the criteria for determining responsibility laid down by the

⁶⁸ Shadow Opinion of Advocate-General Eleanor Sharpston QC – Case C-194/19 *H.A.* – on appeal rights of asylum seekers in the Dublin system, 12 February 2021, EU Law Analysis Blog, point 16 and 161.

⁶⁹ Shadow Opinion of Advocate-General Eleanor Sharpston QC – Case C-194/19 *H.A.* – on appeal rights of asylum seekers in the Dublin system, 12 February 2021, EU Law Analysis Blog, point 128.

⁷⁰ Judgment of 7 June 2016, *Ghezlbash*, C-63/15, EU:C:2016:409; Judgment of 7 June 2016, *Karim*, C-155/15, EU:C:2016:410; Judgment of 25 October 2017, *Shiri*, C-201/16, EU:C:2017:805; Judgment of 26 July 2017, *Mengesteab*, C-670/16, EU:C:2017:587; Judgment of 16 February 2017, *C. K. and others*, C-578/16 PPU, EU:C:2017:127; Judgment of 25 January 2018, *Hasan*, C-360/16, EU:C:2018:35; Judgment of 23 January 2019, *M.A. and others*, C-661/17, EU:C:2019:53; Judgment of 2 April 2019, *H. and R.*, C-582/17 and C-583/17, ECLI:EU:C:2019:280; Judgment of 15 April 2021, *H.A.*, C-194/19, EU:C:2021:270.

⁷¹ In its judgment of 10 December 2013, *Abdullahi*, C-394/12, EU:C:2013:813, the Court held that Article 19(2) of Regulation No 343/2003 meant that the only way an asylum seeker could challenge the responsibility of a Member State, as the Member State where the asylum seeker first entered the EU, was by pleading systemic flaws in the asylum procedure and in the reception conditions, which provided substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.

⁷² *Ghezlbash* C-63/15.

regulation and to ensure that such persons are given access to written summaries of interviews prepared for that purpose would be in danger of being deprived of any practical effect if it were not possible for an incorrect application of those criteria – failing, for example, to take account of the information provided by the asylum seeker – to be subject to judicial scrutiny.⁷³

Therefore, as noted in *Ghezelbash*, the idea behind the individual procedural guarantees in the Dublin system that lead to judicial scrutiny, is to ‘verify whether the criteria for determining responsibility laid down by the EU legislature have been applied correctly’. The correct application of these criteria is arguably also intended to serve the relation of mutual trust between the Member States. After all, since Member States purport to mutually trust each other, they have adopted these criteria and the assumption seems to be that Member States are interested in their correct application. If not, the whole Dublin system seems to be a farce: if the genuine objective of correct application of the rules is under question, then the objective appears to be evading responsibility at all costs and under any circumstances in disregard of the rules themselves. But then why have these rules and why keep on amending the rules that are not or are reluctantly complied with anyway? Are these rules simply for the sake of sustaining the perception that there is a common EU asylum system, when ultimately national interests govern and the system is only relevant when it selectively operates in harmony with the national interests? If this is the case, this situation does raise serious concerns as to the constitutional structures of the EU that are based on the rule of law.⁷⁴ The reason is that law is adopted when it is questionable whether the relevant actors, the Member States and the affected individuals (i.e. the asylum seekers) genuinely intend to comply with the law that in any case might not be in their interests. The anomaly seems to be suggestive of the situation during the 2015/2016 crisis when the Dublin mechanism collapsed since both the Member States and the affected individuals had a joint interest not to

⁷³ *Ghezelbash* C-63/15, para 53.

⁷⁴ Serious concerns as to the protection of fundamental rights also arise. However, arguments on how rules from the CEAS might be in violation of these rights, have been widely explored. See for example, V Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017). See also H Hofmannova and K Řepa, “Othering” in Unconcerned Democracies and the Rise of Anti-liberal Political Divisions’ in M Jesse (ed), *European Societies, Migration and the Law* (Cambridge University Press 2020) 43, 44, for arguments on how since restrictions of migrants’ rights might be contrary to human rights law, such restrictions endanger ‘the core normative structures of modern post-war constitutionalism’.

apply the rules. If this anomaly is about to be normalized to some extent and in some form, there cannot be rule of law.

Procedural guarantees contribute to the objective of correct application of the Dublin criteria. If the latter is assumed to be the actual objective pursued by the Member State, then procedural guarantees actually strengthen mutual trust between them.⁷⁵ It then logically follows that if *in practice* there is no mutual trust (rather mistrust and making sure that responsibility is avoided as much as possible by quick and efficient transfers), conferral of individual procedural rights to asylum seekers should be indeed avoided. The limitation of these procedural rights then appears understandable. It follows that the objective of efficiency, heavily relied upon in the proposed Regulation on Asylum and Migration Management, not only undermines the rule of law, as already mentioned above; it is also suggestive of the instability and vulnerability of mutual trust among Member States in practice.

5.4.2 *Flexible Solidarity*

Similarly, the proposed system of 'flexible' solidarity in the Regulation on Asylum and Migration Management reveals the absence of trust. The proposed Regulation on Asylum and Migration Management intends to regulate solidarity in two situations: disembarkations following search and rescue operations and migratory pressures. In the first situation, the Member States are offered the possibility to *choose* between the following solidarity measures: relocation, or relocation of only vulnerable persons, or 'capacity-building measures in the field of asylum, reception and return, operational support and measures aimed at responding to migratory trends affecting the benefiting Member State through cooperation with third countries'.⁷⁶ In a situation when a Member State is assessed to be under migratory pressure (i.e. the second situation), the assisting Member States have the option to help *only* through the above mentioned capacity-building measures. They also have the option to contribute only through return sponsorship.⁷⁷ The latter means

⁷⁵ The CJEU in *Ghezelbash C-63/15*, para 55, did not directly say this. It did add, however, that 'if it were established in the course of such an examination that an error had been made, that could have no bearing on the principle of mutual trust between Member States on which the Common European Asylum System is based, as such a finding would simply mean that the Member State to which the applicant was to be transferred was not the Member State responsible within the meaning of the criteria laid down in Chapter III of Regulation No 604/2013 [references omitted].'

⁷⁶ Article 47(4) Proposal for a regulation on asylum and migration management.

⁷⁷ Article 52 Proposal for a regulation on asylum and migration management.

supporting the benefitting Member State to carry out the return of third-country nationals. Support in the form of return sponsorship is defined and regulated in the proposed regulation.⁷⁸ In contrast, support in the form of capacity building is not concretized; it is therefore difficult to understand the concrete measures that it demands.

Overall, 'flexible' solidarity means that Member States might be relieved from the responsibility of relocating asylum seekers. The available options between relocation, return sponsorship and the vaguely defined 'capacity building measures', imply that Member States can trade their responsibilities in the area of asylum by helping with returns. The relief offered to Member States that do not want to relocate asylum seekers, is not necessarily offset by requiring them to contribute to the *asylum policy* (by, for example, funding reception capacities in other Member States). It can be rather offset by helping with returns or cooperating with third countries for preventing arrivals. This not only further strengthens the abovementioned synergies between asylum and return, but it also reflects the absence of an asylum policy that can be characterized as *common* to the Member States.

In sum, instead of attempting to achieve implementation of law and harmonization of protection offered on the ground, the new Pact and the paradigm of 'flexible solidarity' embodies conflicting elements and objectives and reflects the absence of a commonality and common policy. It seems to be intended to serve the interest of the Visegrad countries. This paradigm seems like a further turn towards common goals, as a method of international governance, rather than common rules that have been central to the development of the EU project. The scheme is not meant to apply equally to all the Member States, but it allows each to pick and choose what they want to do, with the Commission determining both what each Member State needs and how sufficient each Member State's action is. This poses the risk of creating another area of differentiation in EU migration and asylum law, while at the same time negating predictability and legal certainty.⁷⁹

5.4.3 Cooperation with Third States

As already noted in Section 5.3.3, legal certainty cannot exist when informalization is a governing paradigm. The continued domination of this paradigm clearly emerges from the New Pact, where migration policy is placed 'at the

⁷⁸ Article 55 Proposal for a regulation on asylum and migration management.

⁷⁹ E. Karageorgiou, 'Guest Note on the New Pact on Migration and Asylum' (2020) 2(3) *Nordic Journal of European Law* III.

heart of relations with third-country partners'.⁸⁰ The component of 'mutually-beneficial partnership and close cooperation with relevant third countries' is set as a priority in the EU's approach for addressing 'the entirety of the migratory routes'.⁸¹ In light of this priority, the proposal for a Regulation on Asylum and Migration Management envisions that the Commission and the Council shall take 'appropriate actions' with regard to third countries that do not cooperate sufficiently in the readmission of illegally staying third-country nationals.⁸² In its communication on the New Pact on Migration and Asylum, the Commission identifies not only readmission, but also supporting developing countries that host refugees, helping third countries to manage irregular migration and human smuggling, and the development of legal pathways to Europe (e.g. resettlement),⁸³ as key points in the EU relationship with third countries. The Commission's document also indicates that this relationship is 'first and foremost based on bilateral engagement'.⁸⁴

Overall, the Pact maintains the historical link of migration and asylum policies with both the Area of Freedom, Security and Justice and the EU Common Foreign and Security Policy and Development Cooperation.⁸⁵ This link between the constitutional Area of Freedom, Security and Justice and the intergovernmental area of Common Foreign and Security Policy, bears important ramifications. The adoption of measures related to the Area of Freedom, Security and Justice under the Common Foreign and Security Policy legal basis raises concerns in relation to the horizontal division of competences that is inherent in the constitutional structure of the Union and the division of powers between the EU and the Member States.⁸⁶ The most pressing concern is the significant limitation of judicial guarantees.

⁸⁰ Proposal for a regulation on asylum and migration management COM(2020) 610 final 6; New Pact on Migration and Asylum COM(2020) 609 final 17.

⁸¹ Article 3(a), Proposal for a regulation on asylum and migration management.

⁸² Article 7, Proposal for a regulation on asylum and migration management.

⁸³ See Commission Recommendation 2020/1364 on legal pathways to protection in the EU, [2020] OJ L 317/13.

⁸⁴ New Pact on Migration and Asylum COM(2020) 609 final 17.

⁸⁵ G Papagianni, 'Forging an External EU Migration Policy: From Externalisation of Border Management to a Comprehensive Policy?' 2013 15(3) *European Journal of Migration and Law* 283; S Lavenex and R Kunz, 'The Migration-Development Nexus in the EU External Relations' (2008) 30 *European Integration* 439, 449; C Matera, 'An External Dimension of the AFSJ? Some Reflections on the Nature and Scope of the Externalisation of the AFSJ Domains' in M Fletcher, E Herlin-Karnell and C Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2019) 362, 376–380.

⁸⁶ P Garcia Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' (2018) 55 *Common Market Law Review* 157–200; Matera (n 85) 370–372.

Measures adopted under a Common Foreign and Security Policy legal basis are not subject to full judicial review by the CJEU.⁸⁷ In such a context, any procedural guarantee of individual protection is taken away. Individuals, whose rights might be violated in the context of Common Foreign Policy and Security Missions, may have recourse to other adjudicatory bodies, but they are not entitled to protection by the CJEU.⁸⁸ This is important since it frames a setting where the EU legal order – founded as a *sui generis*, yet complete order of law – functions, in certain instances, as a loosely integrated intergovernmental setting with no accountability for the actions it undertakes.

What is more, the Pact maintains and strengthens the emphasis on use of soft-law measures that escape the rule of law and promote bilateralism. In this way, the concerns about judicial review and accountability, mentioned in Section 5.3.3, persist. They are even intensified by the normalization of informal cooperation with third countries as the core of EU external migration governance. In light of the assumptions underpinning the EU asylum and migration governance, as solidified in the New Pact, namely that asylum is abused by migrants coming from third countries, cooperation with these countries appears crucial for convincing them to fight the irregular migration of their own nationals (i.e. the migrants or the prospective migrants). It is thus necessary for the EU to present this fight as a shared concern and thus make third countries willing to cooperate. This is not an easy task. An additional complexity arises from the cooperation with third countries (such as Turkey and Libya), where, according to the current EU policy, migrants are to be contained.⁸⁹ To sustain this cooperation, the EU needs to continue to project to third countries the normative value of the asylum-seekers' right to protection, given that these countries host a substantial number of migrants and with its policy the EU is keen to ensure that these migrants do not leave their

⁸⁷ Article 49 TEU and 275 TFEU. See also E De Capitani, 'Progress and Failure in the Area of Freedom, Security and Justice' in F Bignami (ed), *EU Law in Populist Times, Crises and Prospects* (Cambridge University Press 2020) 404–405.

⁸⁸ An example to this effect is the ECtHR. See V Stoyanova, 'The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law' (2020) 23(3) *International Journal of Refugee Law* 40. See also V Mitsilegas, 'Extraterritorial immigration control, preventive justice and the rule of law' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar Publishing 2019) 305–307; M Giuffrè and V Moreno-Lax 'The Rise of Consensual Containment: From Contactless Control to Contactless Responsibility for Migratory Flows' in S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019) 82–108.

⁸⁹ V Stoyanova, 'The Right to Life under the EU Charter and Cooperation with Third States to Combat Human Smuggling' (2020) 21(3) *German Law Journal* 436.

current hosts. If the projection by the EU of the normative value of asylum fails, the current EU strategy of engaging with third countries would collapse: the latter will have weak incentives to be hosts.

Finally, the emphasis on use of soft law as the primary method for outsourcing migration control to third countries, creates issues in relation to enforcement. The events that occurred at the Greece-Turkey border in March 2020 were revealing.⁹⁰ They showed that governance through partnerships of contested legal nature, is always dependent on the will of both parties. Hence, when such third countries find themselves in destabilized national and international settings and, consequently their will to serve the EU subsides, the respective EU migration policy is trapped in the informality it pursued.

5.5 CONCLUSION: EU MIGRATION AND ASYLUM LAW IN POPULIST TIMES AND THE PROSPECTS FOR THE FUTURE

It has always been a challenge for the EU to fully integrate the governance of migration and asylum within its constitutional structures. Even if common rules in the area of asylum and migration exist, there is a tendency not to comply with them, not to enforce them and to evade them. Even worse, in practice Member States are rewarded for not complying with the rules. Those Member States that deviate from the rules of the CEAS are rewarded since they could shift responsibility to other Member States. The shift, however, is prompted by the relevant law that unfairly places the burden on the deviant Member States. Instead of working towards reinstating legality, the EU institutions praise state practices which go against EU and international human rights obligations in so long as they manage to function as a European 'shield' and keep migrant populations outside EU borders.⁹¹

In this context, we can speak of migration as posing a constitutional crisis for the EU, in the sense that migration and asylum as EU legal areas have developed by threatening the core foundations of the EU as a project. The

⁹⁰ AD Ergin, 'What Happened at the Greece-Turkey Border in Early 2020? A Legal Analysis', 30 September 2020, *Verfassungsblog*.

⁹¹ Cf the events taking place in Greek-Turkey land borders in March 2020 when attempts for mass entry were met with push backs, detention and suspension of the right to submit asylum applications. This approach was endorsed by the EU institutions and Greece was thanked for being the European 'aspida'[shield] in EU Commission Press Release, in remarks by President von der Leyen at the joint press conference with Kyriakos Mitsotakis, Prime Minister of Greece, Andrej Plenković, Prime Minister of Croatia, President Sassoli and President Michel, 3 March 2020.

project's core tenets such as rule of law, respect for human rights, freedom of movement and mutual trust have been challenged.

In this chapter we brought forward the policy incoherence that characterizes the unsustainability of the current EU migration and asylum law, which has repercussions of a constitutional nature for the EU project and its progress. Ronan McCrea defines 'policy incoherence' as 'a situation where different EU rules or a combination of EU and national rules, operate at cross purposes, undermining the ability of each to achieve the goals intended or where the rules and structures brought about by the degree of integration achieved to date produce otherwise avoidable negative outcomes for the Union and its Member States'.⁹² McCrea explains that situations of policy incoherence are not sustainable for the EU.⁹³ He argues that the only solution for the EU is further integration and if this is blocked by some Member States, the EU constitutional project will struggle.

The policy incoherence that pervades the EU asylum and migration law can be summarized as follows. First, EU migration and asylum governance is characterized by rules that operate at cross purposes: protecting internal security, protecting asylum seekers, ensuring strict border controls, assisting in the development of third countries and so on. The security considerations behind the creation of an EU cosmopolitan migration regime undermine the creation of a full area of freedom security and justice, respect for the fundamental rights of migrants as full human beings and not as just objects of EU policies, and the division of competences at a procedural level.⁹⁴ At the same time, the current structures of EU migration and asylum law produce negative outcomes both for the EU and for the Member States, as is shown by the broader tendency of non-compliance and implementation deficit.

Overall, EU asylum and migration law is characterized by intense political tension and partial compliance, partial implementation and partial integration. Much like McCrea, we believe that standing still is not an option. At the same time, however, it seems that the EU does not have the necessary means and political support to push forward integrational processes through the classic community method. In this context, it seems like the New Pact functions as a simple adjustment of EU law which involves no additional integration. The future then is likely to be characterized by erosion of law's place 'as integration's dominant medium' and by turn towards closer

⁹² McCrea (n 4).

⁹³ Ibid.

⁹⁴ See 'The Insecure Security Constitution' in K Tuori, *European Constitutionalism* (Cambridge University Press 2015) 269–318.

administrative cooperation and co-evolution through the establishment of common approaches and goals.⁹⁵ The latter, however, would come with its distinct risks of bypassing the normative and conceptual foundations of the EU project and in terms of results, it does not look like it would be located far from disintegration.

In light of the tensions, we will now proceed to examine what seem like the different possible future developments of the EU migration and asylum law.

5.5.1 *Adoption of New Instruments and Repoliticization*

The attempts for more harmonization through the adoption of new instruments are not sufficient to re-introduce migration and asylum in the EU constitutional framework. As Section 5.4 shows, the most recent efforts to revamp the CEAS brought nothing revolutionary or novel; rather, the new additions in many ways express the interests of countries like Hungary and Poland. Even more disturbingly, the New Asylum and Migration Pact in some way normalizes or even endorses non-compliance by proposing rules which take the CEAS a step back in terms of human rights guarantees and hence in terms of European constitutional principles. In this regard, the New Pact may be considered as a technical fix attempting to cover rather than correct the inherent problems of EU migration and asylum law.

It has been proposed that instead of technical fixes, political debates are necessary to discuss the meaning of constitutional values, such as asylum. Thym has, for example, observed that ‘basic consensus on the normative foundations is what the EU’s asylum policy lacks at this juncture’.⁹⁶ Thym has thus proposed politicization that implies overcoming the cleavages among the Member States and introduction of a functioning system of cooperation among them of a lasting nature.⁹⁷ We are, however, skeptical about this proposal since the value of asylum does not seem to have much resonance given the populist political climate, as described in the country chapters included in this volume. Politicization of the matter is not likely to lead to solutions that might be empirically grounded and morally just. Rather, as Noll suggests in Chapter 3 in this volume, the current political and democratic structures lock us into policies that do not respond to the actual problems of

⁹⁵ M Dawson, ‘Integration Through Soft Law? New Governance and the Meaning of Legality in the European Union’ in D Augenstein (ed), *Integration through Law’ Revisited, The Making of the European Polity* (Ashgate 2012) 139.

⁹⁶ D Thym, ‘The “Refugee Crisis” as a Challenge of Legal Design and Institutional Legitimacy’ (n 19) 1568.

⁹⁷ *Ibid.*, 1569 and 1572.

the empirical reality.⁹⁸ Unless European societies emerge with different kinds of political and representative structures of governance, the current ones might not lead us to different solutions. Even the courts, both national and international, that are meant to be non-majoritarian and are viewed as sites where populist policies can be contested,⁹⁹ are susceptible to statist policies that have serious negative effects on migrants.¹⁰⁰ In short, democracy as a form of governance leads to moral and social injustice.

5.5.2 *The Unlikely Potential of Convergence*

Any solution to the challenges that the EU faces in the area of migration and asylum would have to address the socio-economic differences between the Member States and the different standards of protection offered in each one of them. Solidarity is about sharing norms, which implies better harmonization of standards so that asylum seekers are offered similar reception conditions in say Sweden and Bulgaria and the recognition rates are comparable for the different nationalities. However, this implies not simply adoption of norms, but also guaranteeing these norms in reality.

The idea of harmonization of asylum procedures and reception conditions is a myth, given the persisting socio-economic differences between the Member States. Asylum and migration laws cannot bridge these differences. The gaps between countries like, for example, Sweden and Bulgaria, will persist. This reality cannot be simply ignored anymore. Admittedly, since the 2004 enlargement – if not before – this reality has been existing also with respect to other areas of EU action, for example, social security or monetary union. The specificities of asylum and migration lies, however, in the lack of enforcement through infringement proceedings against the deviants (from the side of the EU) and the powerful political tensions characterizing these policy areas (from the side of the Member States) especially post 2015.¹⁰¹

⁹⁸ Noll's analysis focuses on the ageing population in Europe. However, his idea and arguments can be extrapolated and have more general relevance.

⁹⁹ See Chapters 10–12 in this volume that argue that courts are the site where populist policies can be contested (Italy, Austria and Belgium).

¹⁰⁰ See Chapter 4 in this volume.

¹⁰¹ In less politically salient areas, the Commission has been a lot more proactive. The data published by the Commission in the Annual reports on monitoring the application of EU law show that since 2015 the vast majority of infringement cases opened by the Commission are in the fields of Environment; Internal Market Industry, Entrepreneurship and SMEs; Mobility and Transport; and Financial Stability, Financial Services and Capital Markets Union, at <https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en>.

This data could also mean that there are more violations in these areas. However, if we think

The essential question that arises then is whether this reality can allow more central actions (at the level of the Union) to tame nationalistic tendencies. This looks unlikely. The Union is precluded from solving these fundamental disparities between Member States, unless we assume that integration in one area (i.e. migration and asylum) produces the need for integration in other areas (i.e. social policies, salaries, welfare rights). However, migration and asylum interact with social and economic realities that lie beyond the reach of the Union due to the absence of competence and with policy areas on which consensus is a lot harder to achieve in an enlarged Union with varied national interests.¹⁰² As a result, there is little prospect that Member States will agree upon common rules that can actually make a practical difference. The reason behind this seems to be the broader lack of political consensus in connection with the rise of populist parties.¹⁰³ Without Member States' agreement in this 'politically and symbolically charged area',¹⁰⁴ ultimately the EU might be without the means for change. Not having such means is more than indicative of a constitutional crisis.

5.5.3 *The Prospect of Europeanization Far from Constitutional Demands*

Another scenario needs to be considered as well. It is possible that the political tension in combination with intense Eurosceptic populism, can lead to the paradox of more Europeanization. The latter, however, will *not* follow EU constitutional demands. On this matter, Lindseth notes that there is increasing potential for EU mobilization and integration in border controls since this is

about how long it took for the Commission to open infringements concerning the CEAS and about the low number of migration-related infringements against the overwhelming evidence of systematic violation, then political sensitivities do seem to play a role.

¹⁰² This relates to Walker's explanation that '[s]ince Maastricht's innovative designs in monetary, social justice and foreign policy, Europe had undergone a period of rapid expansion of competences and regulatory infrastructure as well as of territory – an expansion that had taken the European project well beyond its initial comfort zone of an elite-driven "permissive consensus" on market-making and the consolidation of peace.' N Walker, 'Europe's Constitutional Overture' in NW Barber, M Cahill and R Ekins (eds), *The Rise and Fall of the European Constitution* (Hart 2019) 177, 189.

¹⁰³ McCrea (n 4) 90: '[...] the level of political agreement on economic matters that existed in early decades of the integration process no longer applies. Indeed, the recent rise of populist parties who challenge the centrist Christian and Social Democratic parties that have long dominated politics in most EU states shows that the degree of political consensus is falling not rising.'

¹⁰⁴ McCrea (n 4) 72.

an area where pan-European politics align.¹⁰⁵ On the issue of border controls, Eurosceptic populists set the agenda since their ‘Europhilic confrères to the north and west [...] have needed to respond to the increasingly anti-immigration mood’.¹⁰⁶ As a result, populists threatening the core of the EU project have become ‘the unexpected (and certainly inadvertent) agents of Europeanization’.¹⁰⁷

Such a type of Europeanization would be based on integrated administration with an emphasis on EU agencies, like the European Border and Coast Guard Agency and the European Asylum Support Office. This implies more Europe at the borders. Tsourdi has clarified how administrative integration with the involvement of these agencies would come with its own constitutional challenges and would require rethinking accountability processes in order to comply with procedural guarantees.¹⁰⁸ Tsourdi’s concerns are more than valid. We, however, think that the problem is of a much more general constitutional nature since more Europe at the borders and, accordingly, more Europeanization in the current political climate, would lead to more distancing from the EU constitutional demands as we now know them. Strengthening the means of exerting power and ensuring exclusion of migrants and refugees at the borders, risks exposing the most vulnerable to treatment in violation of fundamental rights (those in need of international protection and without means of legal entry to Europe). What is more, such Europeanization would necessarily reinforce the security dimension¹⁰⁹ of EU migration and asylum law and, as a result, it would take it further away from the cosmopolitan ethos which has been located at the core of the EU project.

Any call for more integration in the area of EU asylum and migration would thus have to address a series of issues. First, the empirical reality on the ground is such that persistent socio-economic differences between Member States exist and are likely to remain a continuing feature. Far from the past of homogenous European societies with similar politics and concerns, the EU now has to address potential harmonization in light of the antithetic conditions and politics existing across its twenty-seven Member States. What is more, the current political climate creates concerns regarding the future of

¹⁰⁵ P Lindseth, ‘Democratic Disconnect, Power-Legitimacy Nexus and the Future’ in F Bignami (ed), *EU Law in Populist Times, Crises and Prospects* (Cambridge University Press 2020) 526–527.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ E Tsourdi, ‘The Emerging Architecture of EU Asylum Policy’ in F Bignami (ed), *EU Law in Populist Times, Crises and Prospects* (Cambridge University Press 2020) 226.

¹⁰⁹ See also Tuori (n 94) 315–318.

law. To what extent can Member States reach an agreement which would take the EU project forward? The way forward should be shaped in light of the EU telos rather than in light of closer cooperation without accountability and human rights protection. Closer to the normative foundations of the EU constitutional order, EU migration and asylum law needs to evolve in light of the rights conferred to individuals and respect for the protection needs of the vulnerable. As a result, it might be more prudent for the EU to refrain from proposing changes in immigration and asylum law (such as those currently formulated in the New Pact), an area charged with political tensions at a time when populist parties seem to dominate the agenda setting.

ACKNOWLEDGMENT

We would like to express our gratitude to Xavier Groussot, Eleni Karageorgiou and Stijn Smet for their comments on earlier versions of this Chapter.