(DE)-CONSTRUCTING AND DESMITIFYING EUROPEAN UNION´S FOUNDED VALUE OF SOLIDARITY

(Des)construccion y desmitificacion del valor fundacional de la union europea de la solidaridad

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Abstract

Over these past few years, both the European Union ("EU") as a whole and some of its member states have faced unprecedented challenges that have seriously put at risk not only the EU project in its entirety but also the integrity of some of its limbs: the economic crisis started in 2008, the migration crisis with its bulk of humanitarian implications and political tensions, Brexit and the Catalan independence referendum, the surge of populism, or the current COVID-19 crisis, are just examples of this complex phenomenon. Against this problematic backdrop lurks the value of solidarity, a principle that is not only deeply embedded in the constitutional texts of some of its member states, but it has profoundly informed the EU model since its inception. Taking solidarity more seriously and rediscover its legal (not just its moral/aspirational) meaning could thus represent a concrete tool to tame the tensions that traverse the continent and a way out of the various crises that threaten its very essence.

Keywords

Solidarity, deconstruction, myth, Founded Value.

Resumen

En los últimos años, tanto la Unión Europea ("UE") en su conjunto, como algunos de sus estados miembros se han enfrentado a desafíos sin precedentes que han puesto en grave peligro no solo el proyecto de la UE en su totalidad, sino también la integridad de algunos de sus países miembros: la crisis económica que comenzó en 2008, la crisis migratoria con tremendas implicaciones humanitarias y tensiones políticas, el Brexit y el referéndum de independencia catalán, el aumento del populismo o la crisis actual de COVID-19, son solo ejemplos de este complejo fenómeno. En este contexto problemático, se esconde el valor de la solidaridad, un principio que no solo está profundamente arraigado en los textos constitucionales de algunos de sus estados miembros, sino que ha informado profundamente al modelo de la UE desde su inicio. Tomar la solidaridad más en serio y redescubrir su significado legal (no solo moral / aspiracional) podría representar una herramienta concreta para dominar las tensiones que afectan el continente y una salida a las diversas crisis que amenazan su esencia.

Palabras claves

Solidaridad, deconstrucción, mito, valor fundacional.

Summary: I. Introduction. II. Solidarity in General. III. Solidarity and "Spirituality". IV. Solidarity as a Pure Legal Concept: *Ubi Duo Rei Facti Sunt, Potest Vet Ab Uno Eorum Solidum Petit. V.* The Socio-Political Transformation of Solidarity. VI. Demystifying Solidarity. VII. Conclusion. Bibliography.

I. INTRODUCTION

Over these past few years, both the European Union ("EU") as a whole and some of its member states have faced unprecedented challenges that have seriously put at risk not only the EU project in its entirety but also the integrity of some of its limbs: the economic crisis started in 2008, the migration crisis with its bulk of humanitarian implications and political tensions, Brexit and the Catalan independence referendum, the surge of populism or the current COVID-19 crises, are just examples of this complex phenomenon. Against this problematic backdrop lurks the value of solidarity, a principle that is not only deeply embedded in the constitutional texts of some of its member states, but it has profoundly informed the EU model since its inception. Taking solidarity more seriously and rediscover its legal (not just its moral/aspirational) meaning could thus represent a concrete tool to tame the tensions that traverse the continent and a way out of the various crises that threaten its very essence: being a very rich but also elusive concept, shedding light on the legal understanding of solidarity might be very important. The goal of this paper is to offer an epistemological de-construction of the principle of solidarity as a foundational/historical principle and as an element forging the constitutional identity of the European Union ("EU"): as such, solidarity can become the legal answer to reinforce the political integration of the EU and to redress the humanitarian, political and democratic crises affecting it.

In terms of methodology, the paper is an exercise of postmodernist conceptualism approach that proposes the analysis of the plural meanings and domains that solidarity has had throughout history. The deconstruction of the principle proposed in this piece follows Derrida's conceptualisation of the phenomenon and its definition as a postmodernist theory although, similarly to Deleuze and Foucault, he does not use the term and would resist affiliation with "-isms" of any sort.[1] Once the principle is deconstructed, the paper does

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[1] Jacques Derrida, De la grammatologie, Minuit 1967. See also, Aylesworth, Gary, "Postmodernism", The Stanford Encyclopedia of Philosophy, 2015, Edward N. Zalta (ed.), URL= <https:plato.stanford.edu/archives/spr2015/entries/postmodernism/>.

not suggest an alternative proposal but values the legal dimension of the epistemological evolution of the term.

II. SOLIDARITY IN GENERAL

The process of deconstruction starts with an analysis and decomposition of the different connotations that the principle of solidarity has in the sense of *logos*. The first step is devoted to the analysis of solidarity in a spiritual sense and, more concretely, with the Hebrew, Christian and Islamic notions of charity, love, friendship, purification and compassion, all virtues that have been used as synonyms of (or closely associated to) solidarity. This is followed by an examination of solidarity as a purely legal concept, dispossessed of its spiritual, moral and idealistic nature to become a more mundane but legally enforceable concept. The second step examines the conceptualisation that solidarity and the theory of contractual obligations experienced in Roman law, its modern reception by the Napoleonic Civil Code and the present civil law systems. The legal construction corresponds to the etymological analysis of the word.

The term solidarity comes from the Latin word "*in solidum*" that connotes a shared responsibility for the whole common objective (*solidum*) and not just the care for an individual. Roman civil law institutionalised the "obligations in *solidum*" implying that each debtor owed an identical thing to that to which (his co-oblige) is held. Although there is scepticism on the epistemological analysis of solidarity, this paper proposes to value an interpretation of the principle concomitant with this etymological root and its original pure legal conceptualisation. The next phase of this deconstructive process of the logos is focused on the social-political transformation that the concept experienced with the French revolution and its new idealisation. With the utopic framing of the concept of fraternity, the French revolutionaries naturalised a new ideal connotation of solidarity despite the fact that solidarity and fraternity are not synonyms. The examination continues by analysing the relations between both concepts in French constitutionalism and the typology of solidarity. Once the deconstruction of the genealogical historical approach of the logos is concluded, the paper proposes a demystification and delusion of the principle, recovering its legal nature and obligational sense, to be able to assign responsibilities within the EU legal and political framework. The methodological process of demystification engaged in the fourth section of the chapter, after the deconstruction of the term, can be defined as a pragmatic conceptual proposal. The idea that the law itself governs can be understood as the idea that legal provisions authorise officials to act in a manner entailed by a gasp of the legal provisions.[2] Pragmatic conceptualism rejects the

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[2] Benjamin C. Zipursky, "Pragmatic Conceptualism", Legal Theory, vol.6 (2000), pp.457-485, p.475.

idea that the function of the law necessarily exhausts its content, it does not deny the significance of a functional analysis of the law in legal theorizing or in legal interpretation.[3]

Solidarity is a universal value, a virtue, a meta-principle that has had various meanings, synonyms and conceptualisations throughout history. Solidarity as a phenomenon is multi- and cross-disciplinary with moral, ethical, political and legal implications. The Oxford dictionary defines the concept as: "unity or agreement of feeling or action, especially among individuals with a common interest; mutual support within a group".[4] This great semantic richness, various forms and its epistemological link with other concepts along the history (friendship, charity, fraternity) and with legal principles (loyalty, cooperation, cohesion, subsidiarity) makes it difficult to define the concept and invites to distinguish solidarity from close but not synonymic notions.

Somehow, the modern understanding of solidarity is *a-historic*, in the sense that its development had breakups and its evolution was not lineal and not attached to previous historical meanings. In other words, following Saussure's well-known distinction, the signifier of solidarity (the codification of a word, its phonic component) is autonomous of its signified (the ideational component, the concept that appears in our mind when we hear or read the signifier).[5]

The historical account of solidarity links this concept with man nature as a political animal (*zoon politikon*), the egalitarian notions of civic friendship (*Philia*) in Ancient Greece and Rome and the brotherliness in some spiritual traditions.[6]

III. SOLIDARITY AND "SPIRITUALITY"

Spiritualism has used ambivalent concepts such as charity, love, fraternity, compassion to the concept of solidarity even if there are differences among them, as we are going to illustrate in this section.

a. Judaism

In Judaism, charity, *Tzedakah* (הקדצ) comes from the same root as the word justice, that is not only good but also right.[7] The same message is

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[3] Ibid p. 476.

[4] Oxford dictionary entry "solidarity", available at: https://en.oxforddictionaries.com/definition/solidarity last access on 27 September 2018.

[5] F.de Saussure, Écrits de linguistique générale, Gallimard, 2002.

[6] Hauke Brunkhorst, Solidarity, from Civic Friendship to a global legal community, The MIT Press, 2005.

[7] Michael Walzer, "On Humanitarism: Is Helping Others Charity, or Duty, or Both?", Foreign Affairs. Vol.90/4, pp.69-90, p.70.

conveyed by the Hebrew word *mitzvah*, which in the Bible means 'commandment' but has come colloquially to mean 'a good deed' or 'an act of human kindness' although it still implies that something has to be done.[8]

Through a host of institutions—most notably the *tithe*, Jewish law makes the giving of charity a *mitzvah* (a commandment), not an option.[9] Charity is righteousness as far as God, the Giver of all blessings, claims from His gifts a share for the poor. According, the ideal type of the righteous man is he who is "eyes to the blind", "feet to the lame", and "father of the poor".[10] Charity is equal in importance to all the other commandments in the Torah combined, reads an early rabbinic law code.[11]

Under Jewish law, an individual's duty to others includes giving charity to the poor and the needy. This charitable duty extends not only to identifiable persons who need financial and similar assistance but to the community at large as well. While one might have reached a similar conclusion by analogizing from the duty to rescue as derived from verse 16, the Pentateuch instead contains many concrete references to such obligations.[12]

According to the Maimonides, charity is the most important positive commandment; it applies to everyone, including poor people;[13] and it can be enforced in Rabbinic courts. The obligations of charity, like the duty to rescue, are ultimately grounded on a meta-narrative of Jewish law. These obligations indicate rather clearly that individuals are not to view themselves as strangers, but rather as close-knit members of a family-like community who are to watch over and take care of one another.[14]

Maimonides delineate eight levels of charity, in descending order of moral virtue, that can characterize the relationship between donor and recipient, where the highest degree is *"that of the person who assists a poor Jew by providing him with a gift or a loan or by accepting him into a business*

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[8] Ibid

[9] Jon D Levenson, Charitable in Judaism, available in https://hds.harvard.edu/news/2013/12/13/why-give-religious-roots-charity# The Hebrew word for charity is Tzedakah also translated as righteousness".

[10] The Book of Job, as quoted in Joseph Jacobs, Kaufmann Kohler, Cyrus Adler, A.M. Friendenberg and Lee K. Frankel, "Charity and Charitable institutions" in Jewish Encyclopedia.

[11] Ibid

[12] David Hartman and Tzvi Marx, "charity" in A Cohen and Paul Mendes Florhr (eds) Contemporary Jewish Religious Thought: original essays on critical concepts, movements, and beliefs, Collier Mcmillan, 1988.

[13] Sheldon Nahmod, "The Duty to Rescue and the Exodus Meta-Narrative of Jewish Law", Arizona J. Int´l & Comp. L. 751 (1999), p. 759.

[14] Dudley C. Rose, The Ministry of Healing in https://hds.harvard.edu/news/2013/12/13/why-give-religious-roots-charity#

partnership or by helping him find employment—in a word, by putting him where he can dispense with other people's aid."[15] Maimonides argued, following Talmudic precedents, that insofar as Jewish communities in the Diaspora had coercive power, they could legitimately force their members to give *Tzedaka.*

b. Christianity

For Christianity, the role of charity is first built on the injunctions of the Hebrew Bible. In the New Testament, Jesus' parables and actions also speak to the morality of charitable sentiments.[16] The concept of charity referred to love of God above all things is a core theological virtue for Christian morality. Kierkegaard described Christian love with three Greek concepts: (a) *agape*, or altruistic and unconditional love, mercy, and compassion; (b) *philia,* or love as friendship, love for relatives and neighbors, consisting in sharing friendship and mutual admiration; and (c) *eros*, sensual and passionate love, connected with the corporal and sensuality.[17]

Catholic theology and its criticism have been debating whether other concepts of love such as Eros have been included in the proto-theological conceptualisation of love to God and consequently *caritas*. [18] In *Summa Theologiae*, Thomas Aquinas relates charity with friendship and union of man with God.[19] Charity as friendship is considered as an Aristotelian virtue even if it did not seem so, distinct from other virtues, but yet the most important and the mover of the other virtues.

Thus, solidarity is not rooted in the Aristotelian understanding of friendship as utility or pleasure. Rather, solidarity is friendship in the fullest sense of the term because it is grounded in the goodness of virtue, a mutuality of wanting the good for the other person that you want for yourself.[20]

Solidarity as defined in Catholic social teaching is that which "helps us to see the 'other' whether a person, people or nation, not just as some kind of instrument, with a work capacity and physical strength to be exploited at low cost and then discarded when no longer useful, but as our "neighbour", a "helped", to be made a sharer, on a par with ourselves in the banquet of life

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[15] Maimonides, Mishne Torah.

[16] Dudley C. Rose, "The Ministry of Healing in Christianity" in https://hds.harvard.edu/news/2013/12/13/why-give-religious-roots-charity# See: the First Epistle of Paul to the Corinthians, the Gospels of John, Matthew or Luke.

[17] Soren Kierkegaard, Works of Love, some Christian reflections in the forms of discourse, Harper and Row Publishers, 1962.

[18] See Nietzsche critics

[19] Thomas Aquinas, Summa Theologica, Benzinger Bros, 1948, II–II, q. 23, a. 1

[20] Ibid

to which all are equally invited by God."[21] This love of the neighbour was transplanted ambiguously into the political realm as fraternity.

c. Islam

In Islamic tradition, the concept of solidarity can be related with two notions, *Zakat* (الكزة) "that which purifies" and *Ummah* (امق) "community of believers". *Zakat* is related to the forms of giving and among the different forms, the one that is best known is *zakat,* one of the Five Pillars of Islam and an immediate obligation of Men.[22] The *zakat* consists in the obligatory payment of a determinate portion of specified for the benefit of the poor. In the Koranic usage is referred to the portion of the property so paid.[23] The mandatory nature of the zakat makes it comparable to a tax system where citizens were expected to give a percentage of their income to satisfy the needs of the community. In the modern world, we see charity as a much more personal act, but in the ancient Islamic world, it was much more a community duty.

In Islamic law, the *Zakat* is a hybrid between the elements of ritual and revenue-raising, insofar as paying zakat is a ritual act of purification, the focus is on the payer; as a system of revenue-raising, the centre of concern is the recipients, particularly the poor.[24] Being charitable is a way of purifying material deeds, and thus never losing track of the most important goal, which is serving God—in this case, by serving one's fellow humans.[25]

The development of the legal framework for zakat in an Islamic state is dependent upon the school of law, which is adopted as an official school in that particular state. A good example of the application of the zakat institution in modern legislation is the Zakat Ordinance of 1980 of the Islamic Republic of Pakistan. Save for a few exceptions, *zakat* as an obligatory tax is not imposed in modern Islamic states.[26]

The concept of solidarity is also related with the Ummah, since a *Hadiz* (the words of the prophet and sources of law after Coran) state: "He is not a believer whose stomach is filled while the neighbor to his side goes

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[21] See John Paul II, Enc.Let. Sollicitudo Rei Socialis, No.40 (30 December 1987): AAS 80.5, 513-586, as quoted in Stalpelton, op. cit.

[22] Jocelyne Cesari, "Islam: the many reasons for charity", in https://hds.harvard.edu/news/2013/12/13/why-give-religious-roots-charity#

[23] A, Zysow, "Zakat" in Encyclopedia of Islam, available at https://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/zakat-COM_1377?s.num=0&s.f.s2_parent=s.f.book.encyclopaedia-of-islam-2&s.q=zakat

[24] Ibid

[25] Jocelyne Cesari, Ibid.

[26] Javaid Rehman and Aibek Ahmedov, Islamic Law of Obligatory Alms, UK centre for Legal Education, 2011, p.45-46.

hungry."[27] This addresses a moral obligation and sets a social norm about what a truly Islamic community should be and how the relationship among believers must be organized.

IV. SOLIDARITY AS A PURE LEGAL CONCEPT: *UBI DUO REI FACTI SUNT, POTEST VET AB UNO EORUM SOLIDUM PETI*[28]

The French Napoleonic codifiers (Jean Jacques Régis de Cambacérès and Louis Joseph Faure) transplanted into article 1211 of the Napoleonic *Code Civil* of 1804 the institutes of Justinian 531 (*ius in solidum*) as passive solidarity with some changes. The etymological and legal meaning of *solvere* identifies with releasing, unleashing, dissolving, especially in the archaic period. The origin of the obligation was related to the payment of a sum of money (*poena*) to redress the victim of a crime.[29] The Napoleonic codification was restricted to civil obligations and not those that arose from a crime.

This restriction of the primitive principle of *in solido* results primarily from a general development of modern law, in which civil and criminal law are differentiated. This process of modernisation led to a paradoxical reconstruction of the Roman law enabling the concept of solidarity for uses that derive from very different traditions and from a completely different social realm than in Roman law.[30]

From this first codification, continental civil codes regulate solidary obligation as a kind of multi-personal obligation and diverse to prorate (communal) or simple obligations, in which each obligee is the holder of a share-part of the total obligation, and each obligor responds only to the portion that corresponds to it.[31] Each type produces different legal consequences.

In some civil code systems (France, Spain, Italy) if a plurality of subjects concurs, there is a general *iuris tantum* presumption that the obligation does not subsist as an inseparable whole but is divided into equal or proportional parts between each of the obliges. In other words, solidarity cannot be presumed and the law recognizes its existence: (a) when the obligation itself expressly provides for solidarity, for the burden is now assumed voluntarily

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[27] Al-Sunan al-Kubrá 19049.

[28] If there are two obliged supporters, it can be asked to all one of them. Upianus Lib.47 ad Sabinum.

[29] S. Solazzi, L´estinzione delle obbligacioni nel diritto romano,ed. Jovene, 1935, p.9.

[30] Thomas Fiegle, Von der solidarité zur solidarität: ein französich-deutscher Begriff-transfer, LIT Verlag, 2002, p.37-39.

[31] See Principles of European Contract Law, Chapter 10, Section 1: Obligations with a plurality of debtors. See French Civil Code Book 3 Title 3 Chapter 4 (art. 1197-1216), Spanish Civil Code Book 4, Title 1, Chapter 3 (art. 1137-1148), Italian Civil Code Book 4, Title 1, Section VII (art. 1292).

by the debtor/s who are supposed to take care of their own concerns and affairs (conventional solidarity); (b) when the law expressly provides for solidarity for which the law has its own legal reason for the imposition of solidarity (legal solidarity); and (c) when the nature of the obligation requires solidarity (real solidarity). [32]

However, even in continental European jurisdictions there is a general trend to avoid prorate obligations, and in some of these legal systems all that is required is the willingness of the contracting parties to lend or demand the obligation integrally, without requiring the use of the term solidarity obligation.[33] Furthermore, the Principles of European Contract law required the contrary presumption and stipulates that under the same contract, they are solitarily liable, unless the contract or the law provides otherwise.[34]

It is also relevant to the proposal of deconstruction and transplantation of the private law conceptualisation into the public constitutional domain, the distinction between active and passive solidary obligations. The active solidarity or solidarity of the creditors focuses on the internal relation between the creditors, in which each creditor is entitled to demand the debtor's fulfilment of their entire obligations and when one of the creditors is settled, the obligation is extinguished to all other creditors.[35]

The passive solidarity has two dimensions: *external*, whereby the solidary obliged responds for the whole, and *internal*, related to the obligations among the obliged themselves. In our case-scenario, the internal sense is the relationship between member states of the EU, whereas the external dimension refers to the consequences that a breach of the principle of solidarity causes vis-à-vis third parties.

The Napoleonic codification enables a rationalisation and the legal civil enforcement of solidarity; in other words, with codification, the principle of solidarity is no longer presumed (as it happened with moral and ethical dimensions), but it is expressly stipulated. This means that the codification of solidarity placed the concept in a more realistic dimension and less in the ideal. After the revolution and the epistemological mutation, solidarity

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[32] See https://lspuoblicon2015.wordpress.com/category/i-obligations/chapter-3-different-kinds-of-obligations/section-4-joint-and-solidary-obligations/

[33] See: Principles of European Contract Law, in Spain "Obligaciones Solidarias" in Wolters Kluwer available in .. in France, Clément François, "Présentation des articles 1310 à 1319 du nouveau paragraphe 1 "l´obligation solidaire" available in https://iej.univ-paris1.fr/openaccess/reforme-contrats/titre4/chap1/sect3/ssect2/para1-obligation-solidaire/

[34] Principle of European Contract Law, article 10:102.

[35] ibid

moves from this private law constitutive essence and swifts to the realm of public law and politics.[36]

V. THE SOCIO-POLITICAL TRANSFORMATION OF SOLIDARITY

Following the first appearance of the word *solidarity* in article 1211 of the Napoleonic Civil Code, Charles Fourier incorporated the word into his vocabulary, thus initiating the political-social nuance that the concept has today, while Leroux transformed the legal concept into a social concept.[37] The main characteristic of solidarity according to Leroux is not the rightful claim but a direct and altruistic feeling, as opposed to an exterior duty. The author transformed solidarity from its purely legal undertone to a binding moral principle that would bind socioeconomic relationships in the society.[38]

Leroux conceived solidarity as the law of mutual interdependence and used it to replace the concept of charity in the laic public republican sphere. The French revolutionary also linked the modern political concept of solidarity to the French utopic Revolutionary principle of *fraternité*, in spite of the fact that solidarity was not much coined in legal terms as the principle of *fraternité*.[39]

However, fraternity is a political and anthropological principle to articulate the individual in the community.[40] The current conception of solidarity, politicised in the French revolution, share substantive elements and *telos* with the concept of fraternity, an epitome value of the French revolutionary political engineering used to idealise, and compact the French Nation and the *patrie*.

In the French revolution, fraternity appears as an abstract virtue that enables or re-establishes the connections between the individuals even if it was not included in the 1789 Declaration on the Rights of Man and of the Citizen.[41] Fraternity experienced a slow and gradual process and the Revolution elevated the concept to a position alongside the more prominent Republican

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[36] Ibid.

[37] Charles Fourier, Theorie de l´Unité Universelle, (1822), Les Presses du reel, 2001, p. 65, Vol.II. Pierre Leroux, De L´Humanité, Fayard, 1980, p.4.

[38] Andreas Wildt, "Solidarity: Its History and Contemporary Definition" in Solidarity: Philosophical Studies in Contemporary Culture, 2009.

[39] Pierre Cot, Les Procès de la République, La maison Française, 1944.

[40] H. Brunkhorst, Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft, 2002; K.H. Metz, "Solidarität und Geschichte", in: K. Bayertz (ed.), Solidarität. Begriff und Problem, 2002, 172 et seq.

[41] Marcel David, Fraternité et Révolution Française, Aubier, 1987, p.350

ideals of liberty and equality, but it never gained the same official, legal status in this period.[42]

The concept of fraternity was always problematic and was situated more in an aspirational realm, what Le Pourhiet terms "purely moral wishful thinking".[43] The principle of fraternity was, in essence, a utopic principle and a core element to build up the political organisation of an ideal society even if the treatment and nature of the principle evolved significantly after the revolutionary momentum.[44] As in the revolutionary period, the principle of fraternity has played as an indirect constitutional norm in the development of a body of jurisprudence on solidarity.[45]

It can be stated that in French constitutionalism solidarity is only a truncated approach to the value of fraternity as a constitutional principle, with fraternity being the justification lying behind measures to promote solidarity.[46] The principle of solidarity is enshrined in section 12 of the preamble of the 1946 Constitution – which was incorporated to the 1958 Constitution – in the following terms: "The Nation proclaims the solidarity and equality of all French people in bearing the burden resulting from national calamities." In general terms, the preamble to the 1946 Constitution has been described by some scholars as "one of the stellar moments of the welfare state"[47] because it combines the restatement of the rights of the man and of the citizen with the fundamental principles protected by the constitution, in addition to a list of political, economic and social principles among which is solidarity.[48] The solidarity principle has been invoked in several decision of the *Conseil Constitutionnel* as a constitutional value binding the legislator in its policy-making activity.[49] In the 1958 Constitution, the concept of solidarity is present as a link to all people belonging to the French-speaking world: "The Republic shall participate in the development of solidarity and cooperation between States and peoples having the French language in common." On the other hand, and due to the success and polyvalence of solidarity at international level, French constitutionalism faced a legal and political penumbra that was

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[42] Jeremie Gilbert and David Keane, "Equality versus fraternity? Rethinking France and its minorities", International Journal of Constitutional Law, Vol. 14, Issue 4, 2016, pp.883-905, p. 900.

[43] Anne Marie Le pourhiet, "Droit à la différence etrevendication égalitaire" in Norbert Rouland, Le droit à la difference, Presses universitaires d´Aix Marseille, 2002.

[44] Anne-Rozenn Morel, "Le Principe de Fraternité dans les fictions utopiques de la révolution Française", Dix-huitième siècle, 2009/01 (n. 41), pp. 120-136, p.125.

[45] Ibid.

[46] Michel Borgetto, op.cit. p.11-14.

[47] Fernandez Segado, p. 146

[48] Fernandez Segado, p. 146

[49] Fernandez Segado, p. 148

amended with an analogy of the constitutional accommodation and understanding of fraternity. It is in connection with the principle of fraternity that solidarity received a positive legal application.[50] In the French political discourse, and despite the differences between the two principles, solidarity has been progressively substituting fraternity as a basic principle of law.

French modern constitutionalism can be understood as a valid example of how the principles of fraternity and solidarity have been used indistinctively. However, this legal strategy confusing both terms limits the concept of solidarity to its vertical variant and confuses etymologically two different realities because fraternity is more nuanced than solidarity.

Durkheim also distinguishes the various types of solidarity; mechanical solidarity or solidarity by similarities, this kind of social solidarity comes from a number of states of consciousness common to all the members of the same society. It lies in the social cohesion, a psychic type of society.[51] Mechanical solidarity happens in traditional and more homogenous societies, where people had a similar living, social and cultural conditions. [52]

Social assistance, charity and other forms of vertical solidarity imply the cooperation of those who have more economic resources with those who have fewer opportunities. An emergent phenomenon, the social factor consists of commonalities, similitudes, and likenesses. It is what individual's share, what they have in common. Mechanical solidarity derives from and is proportional to the strength of the collective conscience.[53] In this kind of societies, solidarity is very strong, comparable to the solidarity between brothers, to fraternity, before the idealisation of the principle of fraternity to achieve political goals.

In contrast to mechanical solidarity, organic solidarity is the social integration that arises out of the need of individuals for one another's services. In a society characterized by organic solidarity, there is a relatively greater division of labour, with individuals functioning much like the interdependent but differentiated organs of a living body. Society relies less on imposing uniform rules on everyone and more on regulating the relations between different groups and persons, often through the greater use of contracts and laws.[54]

In the case of organic solidarity, the emphasis is on the diversity that exists between solidary parties. The recognition of the value of otherness is

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[50] Ibid.

[51] Emile Durkheim, La división du travail sociale, Quadrige/Presses Universitaires de France, (5 Edition), 1998, p. 35-78.

[52] Ibid

[53] Whitney Pope and Barclay D Johnson, "inside organic solidarity", American Sociological Review, Vol. 1983, p. 681.

[54] https://www.britannica.com/topic/mechanical-and-organic-solidarity

essential to successfully integrating individuals into an organic whole. Rec-ognition claims tend to promote group differentiation but also organic soli-darity because they also proclaim unity in diversity.[55]

What worried Durkheim was that the process of weakening mechanical solidarity might leave a moral vacuum that would not automatically be filled.

VI. DEMYSTIFYING SOLIDARITY

Following Derrida's theory,[56] the process of deconstruction of solidarity in this paper has ended and an alternative theory of re-constructive theory will denaturalise the methodology. However, the paper does not aim to reconstruct the logos but value a pure legal dimension, autonomous to the moral, ethical and spiritual domains that have transformed solidarity into a polysemic term. This legal purification of the term does not necessarily imply the avoidance of the other related significances but to remark the legal essence.

The principle of solidarity in the EU cannot be restricted to the utopic realm, as a forward-looking viewpoint.[57] Solidarity has to take advantage of its privileged legal conceptualisation and hierarchic position in the EU legal systems. The lack of a precise definition in the communitarian *acquis* cannot mean a lack of enforcement or weakness of this EU constitutional identity principle. In order to be effective and become a possible tool and a valid answer to reinforce the political integration of the EU, solidarity needs to transit from an aspirational and illusionary dimension to an aversive one.

The obligational nature and the assessment of responsibilities in a com-munal sense is a way to generate the necessary demystification of the princi-ple. A binding solidary multi-party obligation in both, an active (relation between the member states) and passive (external and internal) dimensions will enforce the concept of solidarity.

In order to illustrate this application, we propose an example of how the principle could be applied in factual and real cases concerning the principle of solidarity and the process of integration of the EU. In June 2018, Matteo Salvini, Italy's Interior Minister responsible for managing immigration poli-cies, denied the Dutch flag vessel *Aquarius* that saved 629 migrants stranded

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[55] Peter Thijssen, "From mechanical to organic solidarity, and back: With Honneth beyond Durkheim", European Journal of Social Theory, Vol.15 (4), pp.454-470, p.

[56] Jacques Derrida, Force de Loi, le fondement mystique de l´autorité, Galilée, 1994;

[57] Kim lane Schepple, "Aspirational and aversive constitutionalism: the case for study-ing cross-constitutional influence through negative models", International Journal of Constitutional Law, I.CON, vol.1, number 2, 2003, pp. 296-324, p.299.

in Libyan waters to dock in an Italian port.[58] One hundred twenty-three unaccompanied minors, 11 younger children and seven pregnant women were among the passengers of the *Aquarius*. The refusal of this vessel is not anecdotic, but it has been consolidating a general policy of some EU governments, but Italy and Malta have refused several vessels to dock in their ports (*Aquarius*, *Dattilo* and *Orione*). A measure that wanted to be imposed even to the Italian vessel *Diciotti* transporting 177 migrants.[59] The measures are in the same line as other migratory policies implemented by Hungary, Poland and the Czech Republic or the identity controls at Danish-Swedish borders to stop migration flux.

Matteo Salvini's argument is the need to stop undocumented migration and organisations rescuing migrants at sea that conduct human trafficking and business with illegal immigration.[60] Spain offered their ports to disembark these ships, a fact that opened a controversy between the Spanish and Italian governments. Among the arguments maintained by the Spanish minister against this refusal were the damages to the notion of Europe and he asked for a "unified EU policy based on solidarity that brings order to the refugee flows".[61] However, the same Spanish authorities, in a later case involving a Spanish fishing boat, *Nostra Maria del Loreto,* have denied the authorisation to dock in Spanish ports.[62] This denial evidences a gerrymandering abuse of the concept of solidarity by the Spanish institutions, that only six months after accusing Malta and Italy, are reproducing mimetically the same behaviour, by failing to abide by the principle of solidarity.

The shutting of ports to needed migrants can be considered as breaching European Human Rights Conventions and other Human Rights charters. However, if the notion of solidarity is understood as charity, utopic, ideal, aspirational the effects of these violations are the same to the consequences of not following the Kantian categorical imperative or breaching a moral contractualist obligation.

A legal notion of solidarity in its active dimension will allow each of the member states to demand Italy, Malta or Hungary to fulfil their entire legal obligation. In its passive dimensions, external (the legal concept of solidarity obliges to respond for the whole) all the member states are responsible for the Maltese

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[58] See https://www.bbc.com/news/world-europe-44432056

[59] https://www.corriere.it/politica/18_agosto_25/diciotti-migranti-attesa-funzionari-l-identificazione-bordo-f2ea641a-a84d-11e8-a941-3e0c2a4df45f.shtml?refresh_ce-cp

[60] Ibid.

[61] https://elpais.com/elpais/2018/08/07/inenglish/1533634921_878837.html

[62] https://www.europapress.es/epsocial/migracion/noticia-pesquero-senora-loreto-pone-rumbo-espana-permiso-gobierno-desembarcar-11-migrantes-20181201221429.html

and Italian breach, and they can be demanded the fulfilment of the obligation. In the internal dimension of the passive solidary, the obligation will establish the channels to demand responsibilities among the member states themselves.

As it has been mentioned previously, there is a current legal and jurisprudential trend to consider that a common obligation is solidary if there is evidence about the willingness of the contracting parties to lend or demand integrally the obligation unless the contract of the law provides otherwise.[63] In this sense, the communitarian acquis and the transcendence of the principle of solidarity invite to consider that the obligation is solidary in both active and passive terms.

The demystification of the solidarity principle remarking its nature and essence as contractual obligation allows the transplantation of the social contract theory to the object of research. The TEU is a normative agreement that grounds principles of justices, rights and political and legal obligations. Member states are subjected collectively to this pact and therefore the agreements must be kept (*pacta sunt servanda*), especially if the obligations derived from a constitutional-identity principle such as solidarity. In other words, and using Kierkegaard's expression, in the case of the principle of solidarity in the EU, love is the fulfilment of the Law.[64]

VII. CONCLUSION

Habermas claimed the need of a deeper and real constitutionalisation of the EU to tackle the greatest crisis that the Union has been facing for a decade.[65] A crisis that is multidimensional encompassing economic causes (since the big global banks, corporations and hedge funds attacked and ruled the EU sovereignty throughout Market signals)[66], humanitarian aspects (migratory, security, EU external borders), democratic (democratic deficit of the EU functioning) and political reasons (the effects of the Brexit, the rise of populist and xenophobic regimes in the EU). A political perfect storm that has been placing the Union into an existential crisis for a decade and that seems to be growing over the time.

Brunkhorst already wondered in 2011 if the crisis of solidarity was putting the EU into an end.[67] The answer that offers this paper, following the

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[63] Principle of European Contract Law, article 10:102.

[64] Kierkegaard, op. cit.

[65] Habermas Jurgen, Zur Verfassung Europas-Ein Essay, Suhrkamp, 2011.

[66] Hauke Brunkhorst, "Europa in der Krise. Die fatale Gleichzeitigkeit von Konstitutionaliserung und Dekonstitutionaliserung der Union", Zeitschrift für Evangelische Ethik", 57, pp: 249-257, 2013. p.255.

[67] Hauke Brunkhorst, "Solidarität in der Krise: Ist Europa am Ende?, Leviathan, 39: 459-477, 2011.

rationale of Brunkhorst question, consists in valuing a legal concept of solidarity to mediate in the crises. This valuing advocates for the application of the contractualist theory, stressing the privileged political consideration and legal conceptualisation that the principle of solidarity, as constitutional identity value, has in the EU political history and legal acquis.

The paper does not limit its proposal to a classical contractual analogy, but it suggests a legal transplantation of the theory and principles of contractual obligations law into the domain of public EU constitutional law. The goal is to provide effectiveness to an aspirational principle of the Union. Effectiveness is a key concept of the European constitutional legal order and a well-established doctrine in the EU supranational order created by the case law of the Court of Justice. The paper claims effectiveness of the principle of solidarity in relationship with the effects of the provisions of EU treaties and the possibility of judicial review and enforcement (ie direct or indirect effect, direct applicability, enforceability, self-executing nature of some legal rules).

The principle of solidarity will be effective if it is implemented, executed and obeyed by as many addresses as possible. As Karpen remarks, the effectiveness of a law is measured in terms of outcomes since nobody would approve and support ineffective legislation:

> Effectiveness is the extent to which the observable attitudes and behaviours of the target population (individuals, enterprises, public officials in charge of the implementation or enforcement of legislation) correspond, and are a consequence of, the normative model of the law that is the purposes of behaviour, which the legislator strives for … Effectiveness is impact in the real world, implementation of norms, realisation of law ... Effectiveness of legislation is clearly in the centre of law drafting. A law, which has no causal consequences − the targeted ones! − makes little sense.[68]

Therefore, a first conclusion is to claim for a political effective Europe all the way through the assumed legal obligations by the member states even that this effectiveness might threat, according to some, their sovereignty. The "threat" will be particularly inopportune because it comes in a moment that the Union is facing an existential dilemma and a political crossroad. The answer to this statement consists in affirming that the transfer of sovereignty happened before, when the State became a member of the Union, ratifying the EU "constitutional" Treaties, the communitarian *acquis* and the rights and duties that this political founding contract implied.

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[68] Karpen, U, "Efficacy, Effectiveness, Efficiency: From Judicial to Managerial Rationality" in Meßerschmidt; K and Oliver-Lalana, D, (eds.) Rational lawmaking under review. German constitutional law. Legisprudence according to the German Federal Constitutional Court (Springer 2016) 295.

It is also arguable from a conservative perspective that concept of sovereignty is open and changes across time and space,[69]and therefore, the government of Hungary, Poland or Spain are not obliged by their predecessors, especially, when these new governments are majoritarily supported in fair electoral contests. The answer to this claim consists denying the use as synonyms of majoritarian elected and democracy and the use of the principle of the rule of law and legal obligations.

Whether the legal enforcement of the principle of solidarity proposed in this paper is not politically realistic? We understand that idealistic is not to expect a response of the Union protecting its founding values versus a short-termism and openly Europhobic nationalism,[70]particularly, when the existence of the Union, the rule of law and human rights are endangered.

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[69] Bartelson, Jens, "The Concept of Sovereignty revisited", European Journal of International Law, Vol.17, num.2, 2016.

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(DE)-CONSTRUCTING AND DESMITIFYING EUROPEAN UNION´S FOUNDED VALUE OF SOLIDARITY

(Des)construccion y desmitificacion del valor fundacional de la union europea de la solidaridad

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