

## ■ ARTICLES

Juliane Ottmann

### **The Concept of Solidarity in National and European Law: The Welfare State and the European Social Model**

"Our unity is based on deep ties: common roots and common values. It is those values that make us a Community and a Union, not just a market. The triumph of the last 50 years has been the triumph of those values in Europe, of freedom and solidarity, delivered through a Community of law."<sup>1</sup>

#### **I. INTRODUCTION**

In recent years, the notion of solidarity has come to the fore of political and legal debates again – both at the level of the nation state and at the level of the European Union.<sup>2</sup> The discussion in the member states focuses on the reform of existing national welfare states whereas the European Union is engaged in a debate about the development of a 'European Social Model'. Central to the social welfare discourse is the notion of solidarity. While there are well established theories at the level of the national welfare state<sup>3</sup>, the discussion about 'Social Europe' and the development of legal concepts of social welfare in Europe has only begun. At the level of the European Union, the concept of solidarity and its relations to other concepts like *community*, *citizenship* and *social rights* are not yet clearly defined.

- 
- 1 "A Stronger Europe for a Successful Globalization" speech by José Manuel Durão Barroso, President of the European Commission at the official ceremony to celebrate the 50<sup>th</sup> anniversary of the signing of the Treaties of Rome on 25 March 2007 ([http://www.eu2007.de/en/News/Speeches\\_Interviews/March/0325Barroso.html](http://www.eu2007.de/en/News/Speeches_Interviews/March/0325Barroso.html)).
  - 2 Obviously, solidarity is also an important topic in international legal debates. But at the level of international law, it is difficult to determine the line between a moral concept of solidarity and a legal concept of solidarity. If solidarity was a universal concept, then *universal legal solidarity* would have to be based on the assumption that every human being has the (legal) obligation to express solidarity with all other human beings.
  - 3 Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press, Cambridge and Princeton University Press, Princeton 1990); Gøsta Esping-Andersen, *Welfare States in Transition. Social Security in the New Global Economy* (Sage, London 1996); Gøsta Esping-Andersen, Duncan Gallie, Anton Hemerijck and John Myles, *Why We Need a New Welfare State* (Oxford University Press, Oxford, 2003); Peter Baldwin, *The Politics of Social Solidarity: Class Bases of the European Welfare State, 1875-1975* (Cambridge University Press, Cambridge 1990); Steinar Stjernø, *Solidarity in Europe: The History of an Idea* (Cambridge University Press, Cambridge 2005).

Theories about solidarity have traditionally been developed in view of the nation state. The nation is considered a *Gemeinschaft* (community).<sup>4</sup> The members of the community are united by a *lien social* (social bond).<sup>5</sup> This social bond, grounded in a common language and a common cultural heritage of a people, is seen as the basis for social solidarity. From a legal point, the community or *Solidargemeinschaft* is often regarded as something prior to law. Conceptually, a nation is considered to be an entity that exists independently of the state and its legal regulations. It is thus the idea of the *nation* that provides the conceptual framework for the development of legal concepts of solidarity embodied in particular welfare regulations, social rights and institutions at the level of a member state.

In the context of European law, the discussion about solidarity seems to draw on the very same conceptual foundations. Accordingly, solidarity is considered a common value which unites member states and the people of the member states. But can the concept of solidarity be simply transferred from the nation state to the European Union?

The legal character of the European Union is different from that of a nation state or a federal state. Accordingly, the concept of community in the European Union is distinct from the concept of community in the nation state or in a federal state. Even though member states share a common history and agree on common basic values, the people(s) of the EU are not united in a way the people in a nation state are. The European Union is, above all, a community of law, a *Rechtsgemeinschaft*.<sup>6</sup> It is not a community united by solidarity in the traditional sense but, primarily, a community united by law. The discussion of solidarity in the European Union may therefore not simply revert to the theoretical foundations of national solidarity but has to reinvestigate the question about the philosophical foundations of social solidarity. Does social welfare rely on a community in the traditional sense or are there other possible explanations for solidarity and mutual assistance? Is solidarity a legal concept or is it a moral concept? Does it emanate from self-interest or from altruism? Is it based on reason or on emotion? The aim of this article is to examine the theoretical framework of the concept of solidarity in national and European law. It will first give an overview of the intellectual history of solidarity as a concept of moral and social philosophy, of law and in sociology. It will then explore the idea of solidarity as a basis for the national welfare state and relate solidarity to the idea of the 'European Social Model'. Finally, the article will discuss four different approaches to a theoretical foundation of solidarity in a community.

---

4 Ferdinand Tönnies, *Gemeinschaft und Gesellschaft* (8<sup>th</sup> edn Buske, Leipzig 1935, reprint Wissenschaftliche Buchgesellschaft, Darmstadt 2005).

5 Émile Durkheim, *De la Division du Travail Social* (1897) (8<sup>th</sup> edn Les Presses universitaires de France, Paris 1967) (*The Division of Labor in Society*, The Free Press, New York 1997) (quotes refer to the English text).

6 Hans C. Mayer, 'Europa als Rechtsgemeinschaft', in Gunnar Folke Schuppert, Ingolf Pernice and Ulrich Haltern (eds), *Europawissenschaft* (Nomos, Baden-Baden 2005).

## II. THE HISTORY OF THE CONCEPT OF SOLIDARITY

### 1. Solidarity in Civil Law

Originally, solidarity was a purely legal concept. In Roman Civil law *obligatio in solidum* referred to the joint liability of multiple creditors or debtors.<sup>7</sup> The Institutes of Justinian stipulated that in case of "two or more parties on either side in a stipulation [...] each joint promisee is owed the whole sum, and the whole sum can be claimed from each joint promisor".<sup>8</sup> This concept of joint liability can still be found in most civil law systems today as *obligations solidaires* in the French Code Civil<sup>9</sup> or as *Solidarhaftung*, *Solidarschuld*, *Haftung zur gesamten Hand*, *Solidarobligation* or *Gesamtschuldnerschaft* in German, Austrian and Swiss civil law.<sup>10</sup>

### 2. Solidarity in Moral Philosophy

Another concept of solidarity is found in moral philosophy where it is related to the virtues of charity and benevolence. Charity refers to unlimited loving and kindness to others. According to the Christian doctrine, charity comprises two parts: love of God and love of man. Love of man includes both love of one's neighbour and the love of one's self. In secular terms the love of the neighbour is translated into brotherhood (*fraternité*). Benevolence relates to an attitude of goodness expressed by sympathy and compassion and the desire to promote the happiness of others.

The moral philosophical dimension of solidarity was taken up by the *materiale Wertethik* of Max Scheler and Nicolai Hartmann.<sup>11</sup> For Scheler, there exists one moral entity (*Gesamtperson*) with a common responsibility (*Gesamtschuld*). Every individual is responsible for the acts, the will, the responsibility and the merits of oneself.<sup>12</sup> Hartmann defines solidarity as "a commitment, an obligation where each person is jointly responsible for him or herself".<sup>13</sup> He distinguishes between different forms or stages of solidarity, namely legal solidarity, solidarity as charity, solidarity based on a common religion, and historical generations. In the *Wertethik* of Scheler and Hartmann solidarity remained a moral concept.

---

7 *solidus* = whole.

8 Institutes of Iustinian, Book III, Title 16. See *The Institutes of Justinian* (translation J. B. Moyle, 5<sup>th</sup> edn OUP, Oxford 1913).

9 Civil Code Book 3 Title 3 Chapter 4 under the heading "Des obligations solidaires (Art. 1197 – 1216)". Paragraph I is dedicated to »la solidarité entre les créanciers « and paragraphe II to « la solidarité de la part des débiteurs ».

10 For German civil law: § 421 of the Civil Code (*Bürgerliches Gesetzbuch*).

11 Max Scheler, *Der Formalismus in der Ethik und die materiale Wertethik, Neuer Versuch einer Grundlegung eines ethischen Personalismus* (1916), in: M. Scheler, *Gesammelte Werke*, vol. 2, Bern & München: Francke, 1966); Nicolai Hartmann, *Ethik* (1916), 4th ed., Berlin: Walter de Gruyter, 1962.

12 Max Scheler, *Der Formalismus in der Ethik und die materiale Wertethik*, p. 210.

13 Hartmann, *supra* note 11, p. 489.

### 3. Solidarity in Sociology and Law

Pierre Leroux introduced a legal concept of solidarity replacing the idea of charity with the principle of a *solidarité humaine*.<sup>14</sup> Following the doctrine of *Saint Simonisme*, he considered solidarity a constitutive and essential element of society. He introduced a *natural law of solidarity* which stipulated a right of existential protection by the community for every individual based not on emotional relations between individuals, but on the idea of equality. In the following decades, the concept of solidarity gained a prominent position in French social philosophy and sociology.<sup>15</sup> Emile Durkheim introduced the distinction between mechanical solidarity and organic solidarity arguing that it is not similarity but the division of labour – or differentiation as we name it today – that creates the social bond in a modern society. This social bond is created by solidarity.<sup>16</sup>

### 4. Solidarity in Economics and Catholic Social Teaching

At the turn of the century the notion of solidarity was taken up by German philosophers and economists. The so called *Kathedersozialisten* ("socialists of the chair") surrounding the economist Gustav Schmoller wanted to introduce a 'third' way, a middle ground between socialism and capitalism.<sup>17</sup> Only a few years later the economists Heinrich Pesch<sup>18</sup> and Oswald von Nell-Breuning<sup>19</sup> developed an economic and political model named *Solidarismus*. Many of their ideas were taken up by the Catholic Church which based its social doctrine on the concept of solidarity and the concept of subsidiarity.<sup>20</sup>

## III. SOLIDARITY IN THE NATIONAL WELFARE STATE

Legal concepts of solidarity have been developed mainly in relation to national welfare states. The most significant difference between *moral* and *legal* solidarity

- 
- 14 Pierre Leroux, *De l'Humanité, de Son Principe et Son Avenir* (2<sup>nd</sup> edn Perrotin, Paris, 1840-45).  
 15 Léon Bourgeois, *Solidarité* (1896, reprint Colin, Paris 1998); Léon Duguit, *L'État, le Droit Objectif et la Loi Positive* (1901, reprint Dalloz, Paris 2003); Alfred Fouillée, *La Science Sociale et Contemporaine*, 3<sup>rd</sup> edn Hachette, Paris 1885).  
 16 Durkheim, supra note 5, p. 21  
 17 See Gustav von Schmoller, *Ueber einige Grundfragen des Rechts und der Volkswirtschaft: ein offenes Sendschreiben an Herrn Professor Dr. Heinrich von Treitschke* (Mauke, Jena 1875, reprint: VDM Müller, Saarbrücken 2006).  
 18 See Heinrich Pesch, *Christlicher Solidarismus und soziales Arbeitssystem* (Generalsekretariat der Studentischen Ortsgruppen der Deutschen Zentrumspartei, Berlin 1920), Heinrich Pesch, *Lehrbuch der Nationalökonomie, Erster Band, Grundlegung* (Herdersche Verlagsbuchhandlung Freiburg i.Br. 1905).  
 19 See Oswald von Nell-Breuning, *Baugesetze der Gesellschaft: Solidarität und Subsidiarität* (revised edition, Verlag Herder, Freiburg i.Br. 1990), Oswald von Nell-Breuning, *Unsere Verantwortung, Für eine solidarische Gesellschaft* (Verlag Herder, Freiburg i.Br. 1987).  
 20 See *Rerum Novarum* by Pope Leo XII (1891), *Quadragesimo Anno* by Pope Pius XI (1931), *Mater et Magistra* by Pope John XXIII (1961), *Centesimus annus* by Pope Ioannes Paulus II (1991).

is that, in the welfare state, solidarity is no longer seen as a voluntary act of charity but as an obligatory act based on legal rights and duties.

National welfare systems are founded on the principle of territoriality (community) and the principle of membership (citizenship). Citizenship is a status bestowed on those who are full members of a community.<sup>21</sup> The membership requirement is based on the idea that only those who contribute are entitled to social benefits. The overarching principle of the welfare state is solidarity – solidarity between the stronger and the weaker members of the group, solidarity between the younger and the older members of the group, and even solidarity between the present and the future members of the group. Legally speaking, the welfare state implements the social rights of its citizens. Social rights are considered second-generation human rights. T.H. Marshall refers to them as "the rights of each citizen to share in the social and cultural heritage" or "the right of each person to the fair share of the fruits of the collective labour".<sup>22</sup> Social rights refer to different sorts of legal norms. Social rights may also refer to a subjective right in the form of a specific claim right or to general legal principles that do not grant a specific right to a person but that are used for the interpretation of other legal norms and are in this way constitutive for the welfare state (*Sozialstaatsprinzip*).<sup>23</sup> While legal systems at national level have developed a more or less established doctrine on social rights, a final interpretation of this concept has not yet been produced at the level of the European Union.

#### IV. SOLIDARITY IN THE EUROPEAN UNION

The competences of the EU in the area of social policy are limited. The 'European Social Union' is therefore based on the multitude of the national welfare systems. Social rights have to be implemented by member states. In turn, the social policy of the member states is influenced by Community law. This principle is laid down in article 137 of the EU Treaty (now article 153 of the Treaty on the Functioning of the European Union), stating that the Community (Union) shall support and complement the activities of the Member States in the area of social policy. As a general tendency, the European Union has been attributing more and more importance to social issues. Since the Lisbon and Nice Summits in 2000, the term 'European Social Model' is in frequent use.

##### 1. The "European Social Model"

While a comprehensive definition of the 'European Social Model' does not yet exist, the notion emerges in EU documents and statements by EU representatives.

---

21 T.H. Marshall and Tom Bottomore, *Citizenship and Social Class*, (Pluto Press, London 1992) p. 18.

22 T.H. Marshall, *The Right to Welfare* (Free Press, New York 1981) p. 93.

23 According to the German constitutional doctrine a claim right can be deduced from Art. 1 para. 1 and Art. 20 para. 1 German Basic Law (*Grundgesetz*). See Hans D. Jarass and Bodo Pieroth, *Grundgesetz für die Bundesrepublik Deutschland, Kommentar* (9<sup>th</sup> edn C.H. Beck, München 2007).

The European Trade Union Confederation (ETUC) refers to the European Social Model as "a vision of society that combines sustainable economic growth with ever-improving living and working conditions". The 'Presidency Conclusions' of the meeting of the European Council in Barcelona in March 2002, state that "[t]he European social model is based on good economic performance, a high level of social protection and education and social dialogue. An active welfare state should encourage people to work, as employment is the best guarantee against social exclusion."<sup>24</sup>

A first conclusion which can be drawn from these statements is that European social policy takes an economic approach to welfare policy and that its focus lies on labour law issues. The emphasis of the European Social Model lies in the creation of common labour law standards which are ultimately designed to enhance the European common market.

## ***2. The Development of "Social Europe"***

A look at the history of Social Europe reveals that the emphasis on labour law has been dominant from the very beginning of the development of a 'Social European Union'.

In the early days of the Community, social policy was not a core issue of European politics and legislation. Still, the Treaty Establishing the European Community (EEC Treaty) of 1957 contained twelve articles on social matters, all related to labour law.<sup>25</sup> The European Social Fund (ESF), also created in 1957, was established as a structural fund to reduce differences in prosperity and living standards across member states and across the EU. Ever since, the promotion of economic and social cohesion has been an important instrument of European social policy.<sup>26</sup> In 1974, the First Programme of Social Action came into effect. In the following years, the Council adopted a number of labour law directives, most notably on equal opportunities and on health and safety at work. In 1989, the Community Charter of the Fundamental Social Rights of Workers was adopted. It was a political declaration on minimum social standards for workers in Europe which was legally not binding. It was followed by the Agreement on Social Policy, a protocol on social policy which was appended to the Maastricht Treaty in 1992 and empowered the Member States to take legally binding decisions in certain fields of social policy. Some areas of social policy, however, remained exclusively a matter for the Member States.

---

24 Presidency Conclusions, Barcelona European Council, 15-16 March 2002 (SN 100/1/02 REV 1), p. 8 ([http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/71025.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/71025.pdf)).

25 Employment, labour law and working conditions, vocational training, recognition of social security laws, prevention of accidents at work and occupational diseases, protection of health at work and collective bargaining between employers and employees (EEC Treaty arts.117-128).

26 [http://ec.europa.eu/employment\\_social/esf/discover/esf\\_en.htm](http://ec.europa.eu/employment_social/esf/discover/esf_en.htm).

The Maastricht Treaty refers several times to the notion solidarity.<sup>27</sup> The preamble expresses the desire "to deepen the solidarity between their peoples while respecting their history, their culture and their traditions". Article 1 stipulates that the task of the Union "shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples". Article 11 (2) stipulates that the Member States "shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity" and that they "shall work together to enhance and develop their mutual political solidarity". Article 23 stipulates that Member States shall act in "a spirit of mutual solidarity" in relation to Union action even when they abstain in a vote.

The preamble of the Charter of Fundamental Rights of the European Union (2000) expresses that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity". Under the heading 'Solidarity', a number of social rights are listed (Articles 27 – 38) relating to:

- Labour law
- Social Security and health care
- Environmental protection
- Consumer protection

The draft of the Treaty establishing a Constitution for Europe in its wording of 2004 mentions the term solidarity all together 18 times.<sup>28</sup> The following areas can be distinguished:

- Solidarity as a common value and an objective of the Union
- Social rights
- Solidarity as mutual loyalty
- Solidarity as mutual support in case of terrorist attack or other disasters (Solidarity clause)

The provisions referring to solidarity are taken up by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Reform Treaty)<sup>29</sup> which was signed on the 13<sup>th</sup> of December 2007.

The preamble of the Consolidated Version of the Treaty on European Union expresses the desire of the heads of states 'to deepen the solidarity between their peoples' and article 2 refers to 'solidarity' as one of the common values of the Union. Among the objectives of the Union listed in article 3 is the promotion of 'solidarity between generations' and 'solidarity among Member States'.<sup>30</sup>

---

27 Consolidated Version of the Treaty on the European Union (OJ 2002/C 325) ([http://europa.eu/eur-lex/en/treaties/dat/C\\_2002325EN.000501.html](http://europa.eu/eur-lex/en/treaties/dat/C_2002325EN.000501.html)).

28 Treaty establishing a Constitution for Europe (OJ 2004/C 310 (<http://eur-lex.europa.eu/JOhtml.do?uri=OJ:C:2004:310:SOM:en:HTML>).

29 <http://eur-lex.europa.eu/JOhtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>.

30 An official consolidated version of the Reform Treaty does not exist until now. All references are in this article are from the 'Consolidated texts of the EU Treaties as amended by the Treaty of Lisbon' issued by the government of the United Kingdom which is available at: <http://www.official-documents.gov.uk/document/cm73/7310/7310.pdf>).

The provisions on social rights originate from the EU Charter of Fundamental Rights which was supposed to be included as Part II of the constitutional treaty. In the Reform Treaty, the Charter is now inserted through a reference in article 6.<sup>31</sup>

Solidarity as mutual loyalty is to be found in articles 24, 31 and 32 of the Consolidated Version of the Treaty on European Union. According to these provisions, the Union 'shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States'. The Member States 'shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity', and they 'shall work together to enhance and develop their mutual political solidarity'.<sup>32</sup>

The Consolidated version of the Functioning of the European Union refers to solidarity in its preamble and in relation to the constitution of an area of freedom, security and justice (article 67 and article 80). Article 222 lays down a solidarity clause according to which the Member States 'shall act jointly in a spirit of solidarity' if a Member State is object of a terrorist attack or the victim of a natural or man-made disaster.<sup>33</sup>

Finally, the Reform Treaty introduces new concept of solidarity, namely solidarity in matters of energy supply and changes to the energy policy within the European Union. Article 122 and article 194 of the Consolidated version of the Treaty on the Functioning of the European Union refer to 'a spirit of solidarity between member states' in matters related to the functioning of the energy market and the security of energy supply in the Union.<sup>34</sup>

The notion of solidarity appears also in a number of other Community documents, such as the Social Policy Agenda 2000-2005, the Social Agenda 2005-2010, the Green Paper "Confronting demographic change: a new solidarity between the generations" in 2005<sup>35</sup> and the according Communication of the Commission of 2007 "Promoting Solidarity between the generations."<sup>36</sup> One of the most recent measure of the Community is the Green Paper "Modernising labour law to meet the Challenges of the 21<sup>st</sup> century"<sup>37</sup> issued in 2006.

The reference to solidarity in these European legal texts underlines a continuous process of addressing social policy issues in the European Union throughout the past decades: Whereas the emphasis of the European Social Model lies, above all, in the creation of common labour law standards which are ultimately designed to enhance the European common market, solidarity is also considered one of

---

31 Art. 6: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the treaties.' (*ibid.*).

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

35 Green Paper "Confronting demographic change: a new solidarity between the generations", Brussels, 16.3.2005, COM(2005) 94 final.

36 "Promoting Solidarity between the Generations", Brussels, 10.5.2007, COM(2007) 244 final.

37 Green Paper "Confronting demographic change: a new solidarity between the generations", Brussels, 16.3.2005, COM(2005) 94 final.

the common values and objectives of the Union. In this respect, solidarity relates to the cohesion between member states and their people(s) in a way that transcends the notion of a mere common market. This concept of solidarity is intended to create and enhance cohesion in a community – a European community. However, it has to be born in mind that the concept of community at the level of the European Union has to be distinguished from the concept of community at national level. The European Union is, above all, a community of law. Therefore, the discussion of solidarity in the European Union can not simply revert to theoretical foundations in national solidarity; the discussion has to revisit periodically the universal philosophical foundations of social solidarity.

## V. THEORETICAL FOUNDATIONS OF SOCIAL SOLIDARITY

A social community can be conceptualized in two ways. It can be conceived as a nation in the sense of Tönnies' *Gemeinschaft* or it can be understood as a risk pool. The *Gemeinschaft* is thought of as a homogenous group of people who are willing to help one another in times of need. This willingness to mutual support results from a sense of solidarity in that community.<sup>38</sup> The community is conceived as an ethical entity which exists prior to and independently of the state, and whose members are linked to one another by an inner social bond.<sup>39</sup> The risk pool, on the other hand, is created out of the awareness of mutual dependence.<sup>40</sup> The costs of risk and misfortune in a society are redistributed by the state applying the instruments of social insurance. In this way, the effects of fate, luck and social circumstances are translated into terms of social insurance and reallocated to all members of the risk pool. Once risks are pooled, the individual faces uncertainty not longer alone but as part of a larger group. Concerns that have formerly been individual become political.<sup>41</sup> The common underlying anthropological assumption of both a community and a risk pool is that individuals are interdependent social beings. Interdependence is expressed in terms of need. However, if solidarity is to be a legal principle, it must be conceptualized in terms of rights. But how can the transition from need to right be explained? Generally, one can distinguish between self-interest and altruism as motors, and between reason and emotion as sources for social solidarity. There are four different approaches.

---

38 See Ferdinand Tönnies, *Gemeinschaft und Gesellschaft* (8<sup>th</sup> edn Buske, Leipzig 1935, reprint Wissenschaftliche Buchgesellschaft, Darmstadt 2005).

39 Josef Isensee, 'Grundrechtsvoraussetzungen und Verfassungserwartungen an die Grundrechtsausübung', in Josef Isensee and Paul Kirchhof (Eds.), *Handbuch des Staatsrechts*, vol. V (C.F. Müller, Heidelberg 1992) § 115.

40 See François Ewald, *L'État-Providence* (Bernard Grasset, Paris 1986).

41 Peter Baldwin, *The Politics of Social Solidarity* (Cambridge University Press, Cambridge 1990) p. 32.

### **1. Solidarity Based on Empathy**

A first approach is based on the idea of altruistic sentiment, a feeling of mutual aid not reducible to other emotion or calculation. In the face of common vulnerability and universally shared risk, the individual has an empathic perception of suffering which allows him to put himself in the other's place. In this way, empathy is the sentiment that bridges the difference between self and other by forcing individuals to see others as themselves.<sup>42</sup>

The weakness of this approach is its failure to explain why altruism sometimes triumphs but at other times does not. Empathy can be useful to explain *ad hoc* demonstrations of solidarity (e.g. solidarity in time of disaster such as the Tsunami relief efforts in 2004/5) but it does not provide the basis for institutionalized solidarity. Institutionalized solidarity could better be explained with an economic approach to redistribution. It is based on the anthropological assumption of a *homo economicus* who acts out of rationally motivated self-interest and makes a cost-benefit analysis. In this way, there are economic efficiencies to be won from altruistic behaviour. One example would be preventive medicine which is more cost-effective than the hospital emergency room.

### **2. A Procedural Argument for Solidarity: John Rawls's Veil of Ignorance**

A liberal attempt to justify theoretically a society organized in a solidaristic manner is that of John Rawls.<sup>43</sup> He constructs a procedural argument for solidarity and social justice. The *veil of ignorance* spells out the conditions under which solidaristic interdependence could be expected. Rational actors are working behind the veil of ignorance having no knowledge of their position in life. It is assumed that parties do not know certain particular facts. No one knows his place in society, his class position or social status, his fortune in the distribution of natural assets and abilities, his intelligence and strength. The actors are impelled by fear of misfortune and therefore they create a society which institutionalizes aid for the neediest. It is the veil of ignorance which creates the circumstances by which egoism and altruism merge and the distinction between self and others is lifted.<sup>44</sup>

### **3. The "Contrat de Solidarité": François Ewald**

Another contractual approach is that of François Ewald. According to him, solidarity can be obtained by a social contract – *un contrat de solidarité*.<sup>45</sup> The *contrat de solidarité* is a contract concluded by the members of a society in consideration of their interdependence. Early forms of contractual solidarity can be found in medieval guilds which constituted a risk pool. Entering the guild

---

42 *Id.*, p. 35

43 John Rawls, *A Theory of Justice* (Harvard University Press 1971, revised edition 1999).

44 Baldwin, *supra* note 40, p. 37.

45 See Ewald, *supra* note 39, p. 20.

entailed the contractual promise of mutual solidarity with all other members of this association. The community based on the idea of a risk pooling realises a scheme of institutionalized assistance. In forming a community, individuals create an entity *sui generis*. This entity transforms their interdependence into an obligation of mutual assistance, which is mediated by this very community. Solidarity becomes a reciprocal promise of individuals to assist one another in time of need ("one for all, all for one"). When organised at the level of the state, solidarity takes the form of state-controlled reallocation of risk. The *contrat de solidarité* rests on three postulates:

- It assumes that human beings are interdependent. They know that they benefit from cooperation, and they want to maintain the cooperation for self-benefit.
- Human beings recognize one another as fellow men in the sense that they accept each other as individuals of equal social value.
- Certain collective goods are introduced to maintain the functioning of the collective.

#### **4. Solidarity and Diversity: Emile Durkheim**

The approaches explained so far are based on the assumption of a homogenous community, or in legal terms, of a nation state. They all refer to some sense of collective identity, of community and similarity. While they can serve as a philosophical explanation of the *national* welfare state, they cannot explain the concept of solidarity at the level of the European Union. The European Union does not consist of a homogenous group of people but of a community of member states and peoples. It is not a *Gemeinschaft* in the sense of a community in the nation state where the readiness to help one another might be based on an inner link between the members of the group. The European Union is too big and too heterogeneous to consist of *one* European people united in a way a people might be united in a nation state. Solidarity in the EU is primarily a concept which relates to the cooperation of the member states. The different member states are rather characterized by their diversity. A concept of solidarity at the level of the EU must respond to a communal diversity.

A concept of solidarity which may explain how diversity creates a social bond is found in the work of Emile Durkheim who set out to answer a question that is still as relevant now as it was then: how does (social) integration function?<sup>46</sup> Durkheim argues that it is not similarity but the division of labour – or *differentiation* in modern terms – that creates the social bond in a modern society. Durkheim distinguishes between two forms of solidarity: mechanical solidarity and organic solidarity.

*Mechanical solidarity* is the sort of solidarity which holds together rural, simple societies. It is solidarity *by similarities*. These societies consist of a homogenous group of people who all have the same interests. There is no difference between the interests of the individual members of the group and the group itself: the

---

46 Durkheim, *supra* note 5.

individual consciousness coincides with the collective consciousness (*conscience collective*).

Modern societies on the other hand are held together by *organic solidarity*. The main source of organic solidarity is the division of labour. The members of modern societies fulfil different functions. This differentiation leads to the development of individual interests which do not coincide with the interest of the collective. But how can the division of labour – a phenomenon which promotes separation, individualization and differentiation – support the cohesion of a group or a collective? Ascribing a moral function to the division of labour, Durkheim claims that it possesses a character which goes beyond its mere economic usefulness and which "constitutes the establishment of a social and moral order *sui generis*"<sup>47</sup>. As a result, individuals, who would otherwise be independent, are now linked to one another. That is the way in which functional interdependence fosters *organic solidarity*.

Durkheim does not distinguish between morality and law. For him, solidarity is both a moral and a legal phenomenon. He assumes that law is the visible symbol of a moral phenomenon – the social fact which can be observed. The law reflects all the essential varieties of social solidarity. According to Durkheim's typology, mechanic solidarity corresponds to repressive law, namely criminal law. Organic solidarity complies with law that aims at restitution, such as civil law, constitutional and administrative law.

## VI. Conclusion

While Tönnies' concept of *Gemeinschaft* can be applied at the national level, it does not reflect the concept of community at the level of the EU. Solidarity in the European Union could better be conceptualized in terms of Durkheim's concept of *organic solidarity* – solidarity based on *interdependence* rather than on similarity. In particular, the different concepts of solidarity, namely *solidarity based on similarities* and *solidarity based on interdependence* should not be confused.

The antagonism between similarity and diversity is also reflected in the concept of citizenship in the EU. The legal concept of European citizenship was introduced by the Maastricht in 1992. With the rise of European citizenship, European citizens have developed two citizenships, namely the national citizenship and the citizenship of the Union, which compliments national citizenship and does not replace it. In regard to welfare and social rights, the concept of two citizenships creates a contradiction. Welfare and social rights are an entitlement based on citizenship. This leads to the situation that in the EU social rights can be based on national citizenship as well as on Union citizenship. Gradually, the Union citizenship becomes a catalyst for the provisions of social rights. In particular, the European Court of Justice has begun to increasingly grant social rights to EU citizens who make use of their right to free movement.<sup>48</sup>

---

47 *Id.*, p. 21.

48 Koen Lenaerts and Tinne Heremans, 'Contours of a European Social Union in the Case-Law of the European Court of Justice', (2006) 2 *European Constitutional Law Review*, 101-115.

This has the effect that Union citizenship, creating a *Solidargemeinschaft*, becomes a catalyst for the provisions of social rights at the level of the European Union. This concept of *Solidargemeinschaft* seems to rest on an understanding of community as a homogenous group while, in fact, the EU consists of a community characterized by diversity. In this way, the law actually transfers the national concept of solidarity to the level of the EU without the EU relying on the same concept of community. Consequently, two different concepts of solidarity – i.e. *solidarity based on similarities* and *solidarity based on interdependence* – are confused here. But then this confusion might actually foster the creation of a welfare state at the level of the European in a way which was not foreseen when the Union citizenship was introduced by the Maastricht treaty.

- *Juliane Ottmann is doctoral researcher at the University of Brussels (KUB), Faculty of Law.*