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# Law, Love and Responsibility: A Note on Solidarity in EU Law

Reza Banakar

'You can't fall in love with the single market'.
Jacque Delors[1]

## Introduction

When, in 1957, Belgium, France, Germany, Italy, Luxembourg and the Netherlands signed the Treaty establishing the European Economic Community (EEC), the precursor to the European Union (EU), the signatories knew that the success of their political project was, at least partly, dependent on creating shared values and a sense of community which could unite their countries.[2] Therefore, it is hardly surprising to find the idea of solidarity appearing as one of the cornerstones of the European project and evolving into a normative principle that maintains and justifies an integration policy with a redistributive component at the transnational level.[3] The Preamble to the Treaty establishing the European Coal and Steel Community (1951), emphasized that 'Europe can be built only through real practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development'. Later, reference to solidarity were made in both the Single European Act (1986) and the Maastricht Treaty (1992), where the 'desire to deepen the solidarity between their peoples', as well as promoting 'economic and social cohesion and solidarity among Member States' were listed among the Community's objectives. The Treaty of Lisbon (2007) went further by expanding the scope of solidarity from a principle used to unite the Member States to a socially cohesive idea. From the very outset, however, the principle of solidarity was meant to enhance the interstate relationships at the transnational level, rather than to create bonds of mutual responsibility between the citizens of the EU countries. As multiple EU crises have demonstrated, the assumption that the Member States can be united by solidarity at the transnational level, while their citizens remain divided at the national level and sceptical of the EU institutions' legitimacy, is a sociological misnomer. Similarly problematic, is the argument that in the absence of a 'European demos'[4] at the supra-state level, the EU has to be governed without input from, or direct interaction with, the micro level of legality, which includes citizens' everyday experiences of law and regulation.

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[1] J Delors, 'Address given by Jacques Delors to the European Parliament' (17 January 1989) *Bulletin of the European Communities*, Supplement 1/89. At: https://www.cvce.eu/obj/address_given_by_jacques_delors_to_the_european_parliament_17_january_1989-en-b9c06b95-db97-4774-a700-e8aea5172233.html. Retrieved on 12 October 2018.

[2] See the Schuman Declaration (1950) at https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en.

[3] For a discussion see S Börner, *Belonging, Solidarity and Expansion in Social Policy* (Basingstoke, Palgrave Macmillan, 2013), 47ff.

[4] Daniel Innerarity (2018) "Who Are We? A Democracy Without Demos?" In: *Democracy in Europe. The Theories, Concepts and Practices of Democracy* (London, Palgrave Macmillan), 97-121.

The idea of solidarity as a mechanism for integrating the EU was challenged by the 2010 Eurozone crisis and later by the 2015 migration crisis. However, it was turned on its head by Brexit. Notwithstanding the distinctively British character of Brexit, the result of the referendum on 23 June 2016 to leave the EU is the evidence of the EU's failed integration policy and its inability to generate a European identity that appealed to the majority of the people of the UK and a sense of solidarity between them and other Europeans. The data on EU citizens' self-identification, which was collected prior to the 2016 referendum, showed that UK citizens had the weakest sense of belonging or attachment to the EU.[5] In addition, among EU citizens, Britons and the Dutch were most negative to, and dismissive of, the notion of solidarity.[6] Brexit represents as much a dramatic change of direction in British history, as it represents a crisis of legitimacy, identity and ultimately solidarity for the European Union.[7]

This paper argues that although solidarity was developed as a principle in EU law to enhance the unity and cooperation between the Member States, its viability at the transnational level remains ultimately a function of its efficacy at the micro level of EU citizens. The question at the core of this inquiry concerns, therefore, how these two dimensions of solidarity are related to each other sociologically and what their relationship means for EU law and the EU's integration policy. The paper begins by taking a closer look at how the notion of solidarity has been conceptualised within sociology and the sociology of law, before examining the role of solidarity in EU law and policy. It concludes by arguing that the crisis of solidarity must be re-examined in the context of the contradictory policies pursued by the EU which, on the one hand, promote social conflicts while, on the other hand, seek to stabilise social conditions by appealing to a European sense of solidarity. This turns the EU into a source of anxiety that generates a negative form of solidarity, one which is tribal in nature and lends itself easily to the populist tide of nationalism and fear that is currently sweeping across Europe.

## A Tool for Enhancing Social Cohesion

Solidarity has a long history which can be traced back to antiquity, Roman civil law, early Christianity and the French Revolution. In its pre-modern usage, it appeared under the law of obligations and 'designated a specific form of liability'.[8] In its modern form, it can mean different things. Some understand it as the spirit of togetherness, group loyalty and moral obligation to assist one another in time of need, whereas others see it as an expression of collective interests which are 'represented by organised groups at a national and international

[5] European Commission, *European Citizenship* (Standard Eurobarometer 83 Spring 2015) 22.

[6] European Commission, *Special Eurobarometer 461***,** *Designing Europe's Future* (2017) 63. At http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/79157. Retrieved on 25 August 2018.

[7] For a discussion on the significance common identity in EU law and its effects on Brexit see R Banakar, 'Brexit: A Note on EU's Interlegality'. In B Lemann Kristiansen et al. (eds.) *Transnationalisation and Legal Actors: Legitimacy in Question* (London: Routledge, 2019).

[8] F Greiner, 'Introduction: Writing the Contemporary History of European Solidarity' (2017) 24 *European Review of History* 837, 840.

level'.[9] Solidarity regained currency in public political discourse at the end of the eighteenth century as both Britain and France underwent revolutionary transformations. In the case of Britain, the industrial revolution unleashed socio-economic forces which 'destroyed the traditional forms of social solidarity, such as family, local networks and guilds'.[10] Rapid industrialisation, the rise of capitalism as the primary mode of production and social organisation, conjoined with urbanisation, were seen as the engine behind the growing individualisation of collective relationships, which precipitated the atomisation of British society.[11] On the one hand, these developments undermined the traditional forms of social order while, on the other hand, the same forces instigated the formation of working classes as a social category, which generated its own form of solidarity as part of its confrontation with the growing capitalist classes. Thus, industrialisation and modernity were not causing the demise of social solidarity in Britain, but were reorganising the relationship between the individual and society by engendering new forms of dependencies.[12]

In France, where industrialisation happened later and at a slower pace than in Britain, it was the French Revolution (1789) which severely undermined social institutions, such as family and church, as well as community and civil society associations.[13] The disintegrative effects of modernity combined with the disruptive impact of the French Revolution tore apart the traditional fabric of French society and weakened its 'sources of morality and social solidarity'.[14] Thinkers such as Auguste Comte (1798–1857) described these rapid changes as unruly, anarchic and harmful to the welfare of society as a whole. In the turbulent decades following the French Revolution, Comte came to see solidarity as a means of social control which if harnessed correctly could prevent the spread of disorganisation and disorder which pervaded the French society (as we shall see below these ideas influenced Emile Durkheim).[15] As French sociology took shape at the turn of the previous century, the idea of solidarity became a standpoint from which one could describe and analyse the changing relationship between the individual and the community. Similar concerns with the transformation of society drove the German sociologist Ferdinand Tönnies (1855-1936) to distinguish between *Gemeinschaft* (or 'organic' community) and *Gesellschaft* (association or 'mechanical' society).[16] Modernity marked the passage from *Gemeinschaft*, i.e. a social order based on spontaneous and tacit common understandings, close emotional ties, sameness and a strong sense of belonging to a place, to one based on *Gesellschaft*, i.e. impersonal bonds intrinsic to modern industrialised urban life, where individuals related to, and associated with, each other through self-interest.

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[9] S Sciarra, *Solidarity and Conflict: European Social Law in Crisis* (Cambridge, Cambridge University Press, 2018), 2.
[10] Börner, *Belonging, Solidarity and Expansion in Social Policy*, (n 3), 56.
[11] See H Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (Cambridge, MA, MIT Press, 2005), 2.
[12] Börner, *Belonging, Solidarity and Expansion in Social Policy*, (n 3), 56.
[13] R A Nisbet, 'The French Revolution and the Rise of Sociology in France' (1943) 49 *American Journal of Sociology*, 156, 160.
[14] Nisbet, 'The French Revolution and the Rise of Sociology in France', (n 13), ibid.
[15] A Comte, *System of Positive Polity*. 4 vols. (New York: Burt Franklin, 1976 [orig. publ. 1851]).
[16] F Tönnies, *Community and Association (Gemeinschaft und Gesellschaft)* (London: Routledge and Kegan Paul, 1955).

In *The Division of Labour in Society*, Emile Durkheim distinguished between mechanical and organic solidarity.[17] The former was characteristic of societies where people were united around a set of shared values and beliefs, whereas the latter reflected the interdependence of people living in highly differentiated modern societies with complex division of labour. He also argued that changes which occur in law correlated with how solidarity, as a source of social cohesion, evolved over time. Hence the oft-quoted Durkheimian 'index thesis', according to which 'law can be studied as an index or measure of social solidarity.[18] Durkheim's social evolutionary assumptions led him to believe that all societies moved from organic solidarity towards modern forms of socioeconomic organization, resulting in diminished importance of, for example, religion as a functional basis for creating social cohesion. The empirical evidence does not, however, support this assumption. 'Whereas mechanical solidarity has persisted beyond Durkheim's expectation', writes Mike O'Donnell, 'organic solidarity has proved more fragile than he perhaps expected'.[19] Arguing along similar lines, Roger Cotterrell defines solidarity as 'an *ideal* of optimally (or perfectly) harmonious social cohesion and inclusion — an ideal that one might choose or not choose to pursue'.[20] In contrast to what Durkheim appeared to believe, adds Cotterrell:

> '[S]olidarity is not a natural or normal state of affairs in politically organised societies. If it is considered important, it has to be worked for, and the wise crafting of law is a very important means of doing so, although not the only or perhaps the most fundamental one. Also, there is a limit to the amount of progress in practical regulation that can be achieved by elaborating a concept of solidarity as a value in general terms'.[21]

Solidarity, as it is used above, refers to a desirable social quality which can enhance human rights as a universal value and create a more equitable and stable society, where people feel responsibility towards each other and care about one another's welfare. The question is if it is an exclusive process limited to supporting those in-group members who share a particular identity and/or a particular interest, or if it extends even to outsiders, to those regarded as strangers? Those advocating a *particularistic* form of solidarity argue that people have greater obligations towards their own in-group members; in other words, blood is thicker than water. Those who adhere to a *universalistic* conception of solidarity maintain, on the other hand, that solidarity's inherent moral core transcends all group boundaries. Richard Rorty, to give an example, believed that 'there is such a thing as moral progress and this progress is indeed in the direction of greater human solidarity'.[22] For him, solidarity was about 'the ability to think of people wildly different from ourselves as included in the range of "us"', which required the

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[17] E Durkheim, *The Division of Labor in Society* (New York, Free Press, 1964[1893]).

[18] Roger Cotterrell points out that this somewhat simplistic idea that the law mirrors moral conditions in a particular society is replaced in Durkheim's later work with 'a more subtle view of the intertwining of legal, moral and political aspects of society'. R Cotterrell, *Emile Durkheim: Law in Moral Domain* (Edinburgh, Edinburgh University Press, 1999), 13.

[19] Mike O'Donnell, 'Review Debate: We Need Human Rights not Nationalism "lite": Globalization and British Solidarity' (2007) 7 *Ethnicities* 250, 250-251.

[20] R Cotterrell, *Sociological Jurisprudence* (London, Routledge, 2018), 220.

[21] Cotterrell, *Sociological Jurisprudence*, (n 20), ibid.

[22] R Rorty, *Contingency, irony, and solidarity* (Cambridge, UK: Cambridge University Press,1989), 192.

ability to see 'traditional differences (of tribe, religion, race, customs, and the like) as unimportant when compared with similarities with respect to pain and humiliation'.[23] Solidarity can also be used negatively and turned into a force which demands conformity and tolerates no dissent or critical debate. This type of solidarity is, as a rule, particularistic and based on a strong sense of common identity and group membership. It emphasizes individual rights rather than collective responsibilities. At worst, it can be corrupted by hate and used to supress those who are defined as outsiders.

For Roberto Unger, by contrast, 'solidarity does not differ in kind from love'; it is in fact the social (or collective) manifestation of love, where love is 'neither an act nor an emotion, but a gift of self, an opening up to another person […]'.[24] Expressed differently, solidarity is a particular form of concern about, and understanding of, the other, where the other is not simply treated as the bearer of formal equal rights, or the object of respect, but as a person whose life, fate and ultimately welfare touches our own. Once solidarity is turned into legal rules and principles and implemented by legal authorities in a formal exercise of power, it becomes reified, thus losing its special love-like social quality, which transcends formal rights and entitlements. Taking Unger's argument to its final conclusion, we can deduce that once solidarity is exercised through the formal channels of modern law, its scope will be limited to the transitory material interests. Interestingly, Habermas who is also critical of the juridification of social relations, does not completely exclude the possibility of law being able to mediate solidarity as a humanitarian value when he describes communicative action as 'a switching station for the energies of social solidarity'.[25] Expanding on Habermas' point, we can argue that the law's ability to generate solidarity as a humanitarian value is limited to its ability to act as an 'institution',[26] mediating between lifeworld and system. This point corresponds with Cotterrell's idea, quoted above, that 'there is a limit to the amount of progress in practical regulation that can be achieved by elaborating a concept of solidarity as a value in general terms'.[27]

Common to all forms of solidarity is their critique of individualism and weariness in the face of what is perceived as disorder. In that sense, solidarity is a socially conservative idea. Irrespective of whether we adopt a particularistic or a universalistic understanding of solidarity, one problem remains. Being a fundamentally normative concept, solidarity does not provide a blueprint for how the sense of belonging and cohesion that it generates, which comes naturally to tightknit communities where members engage in face-to-face interaction and develop relationships based on trust and mutual dependence, can be transferred to, or reproduced at, transnational level among nations. What we find in practice, for example in the case of the EU, is that solidarity is turned into a principle which serves the mutual interests of the Member

[23] Rorty, *Contingency, irony, and solidarity*, (n 22), ibid.
[24] R Mangabeira Unger, *Law in Modern Society* (New York, Free Press, 1976), 207.
[25] J Habermas, *The Theory of Communicative Action, Volume 2: System and Lifeworld: A Critique of Functionalist Reason* (Boston, Beacon Press, 1987), 57.
[26] For a discussion on law as an institution see Habermas, *The Theory of Communicative Action*, (n 24), 365.
[27] Cotterrell, *Sociological Jurisprudence* (n 20), 220.

States, most of which are articulated in economic terms, rather than being used as an ideal for fostering common values, mutual understanding and a feeling of belonging among EU citizens.

The effects of this approach are demonstrated in a survey conducted by the European Parliament in the aftermath of the 2010 European crisis.[28] The survey showed that 49% of respondents supported the idea that their country financially assists other Member States which faced economic hardship. This meant that a majority of EU citizens (51%) could not see the rationale behind the ideal of solidarity and thus could neither commit themselves nor their countries to supporting other countries which had fallen into economic hard times. Taking a closer look at those who expressed solidarity, we discover two divergent approaches. According to the Eurobarometer, 51% of those who supported the idea of solidarity towards other Member States, justified their position 'in the name of European solidarity between Member States', whereas 44% believed that it was in 'the economic interests of their country to help another Member State'. Only 2% gave a different reason and 3% expressed no opinion.[29] This picture becomes more complicated once we realise that support for solidarity was 'particularly strong in Greece (which was well placed to appreciate the need for such help […]), Cyprus and Luxembourg (74% each), and Bulgaria (68%)'.[30] By contrast, 68% of the respondents in the United Kingdom, 53% in Germany, 52% in Ireland, and 50% in the Netherlands motivated their expression of solidarity in terms of economic self-interest.[31] Focusing on the 51% which did not express solidarity towards other Europeans, we may conclude that the EU integration policies have failed. Focusing, instead, on the 49% who expressed some form of solidarity, we could argue that there was still hope and reason to work towards a more inclusive form of solidarity among EU citizens belonging to different countries.

To sum up, we can identify three competing ideal typical forms of solidarity: particularistic, universalistic and interest-based. The first two categories involve social processes based on concrete relations, mutual expectations and experience of other people. They both construct and highlight *similarities*, or common identities, which might be achieved at the expense of recognizing *differences* and conflicts of interest. These two types of identity and experience-based solidarity have a strong affective dimension and can also involve a sense of moral responsibility, although they operate in two opposite directions. The first category works in an exclusive or *particularistic* fashion, i.e. by *not* extending itself to strangers, while the second category works in an inclusive fashion emphasising *universal* values which apply to human kind in general. The particularistic form of affective solidarity is closely tied up to group identity and comes naturally to most traditional forms of community, whereas the universalistic solidarity is an ideal which can be realised only through planning and political commitment. The third category, is a function of common *interests* which can unite a group of people with or without resorting to a common identity or common values. It can easily be turned into an

[28] European Parliament, Directorate-General for Communication, *Special Eurobarometer 7.41, Europeans and the crisis*, November 2010, 67-68. At http://ec.europa.eu/public_opinion/archives/eb_special_en.htm. Retrieved on 1 December 2018.
[29] European Parliament, *Special Eurobarometer 7.41*, (n 28), 67-68.
[30] European Parliament, *Special Eurobarometer 7.41*, (n 28), 68.
[31] European Parliament, *Special Eurobarometer 7.41*, (n 28), 68.

instrumental form of solidarity by divorcing the notion of interest from people's concrete experiences of one another and, instead, defining it in political, ideological or economic terms.

Despite its limitations, this third category can function in transnational environments, where value-based community cohesion is low or non-existent and cultural pluralism is high, and where group membership is transitory and open-ended. The original foundations of the EU being economic, it should perhaps be expected that its understanding of solidarity relies on the third category. However, as we explained, these three categories are ideal types, which means that in reality they overlap to some extent. Moreover, although the project of uniting the European countries, which began after the Second World War, used shared economic interests as its foundations, the EU has increasingly become aware of its democratic deficit and crisis of legitimacy, neither of which can be resolved through economic integration. Article A of the Maastricht Treaty anticipates the looming legitimacy crisis of the EU, but it also provides a solution to it. The legitimacy of the EU is to be enhanced by fostering solidarity, i.e. by 'creating an ever-closer union among the people of the EU, in which decisions are taken as closely as possible to the citizen'.

**Solidarity in EU Law**

Now let us turn to solidarity in EU law. The European Coal and Steel Community (ECSC), established through the Treaty of Paris in 1951, enshrined the idea of solidarity as a principle to strengthen the mutual economic interdependence, or 'solidarity in production', of the Member States. Since then, solidarity has remained an important feature of EU law, and gradually developed in successive EU treaties, requiring Member States to maintain mutual trust and respect, but also to collaborate and support each other in the face of challenges.

The Treaty of Rome (EURATOM and EEC Treaties, 1957) laid 'the foundations of an ever-closer union among the peoples of Europe', largely by establishing 'a common market,' which in turn required a partial harmonization of laws and policies of the Member States. In Article 3, Member States committed themselves to eliminating customs duties between themselves and establishing 'a common customs tariff' and a 'common commercial policy towards third countries'. The Community was, therefore, envisaged and developed as a 'customs union,' an arrangement which was completed by the end of the 1960s, although, the free movement of capital, individuals, and services continued to be restricted at this time. Thus, political ends were to be achieved through economic means. Moreover, the belief that an efficient capitalist economy was the best guarantor of democracy, moulded the union's conception of political and administrative matters from the very beginning. The six Member States did not, however, unconditionally surrender to a neoliberal market fundamentalism, which came to dominate the US and the UK's economies from the end of the 1970s onwards. Instead, they advocated a capitalist system which allowed a more prominent role for the public sector and maintained a concern with the welfare of the population. 'They saw,' writes Heiskala, 'much more room for public actors in promoting equality, not only indirectly by means of market structures, but also

directly'.[32] This also meant that from the inception, the notion of a united Europe was forged by merging two incompatible policies: one seeking social integration and upholding social rights and equality, the other pursuing a free market economy, which promoted individualism and competition. The former required a strong state apparatus committed to public policy regulation, while the latter presupposed a small state sector which worked to deregulate public companies, services and the labour market.[33]

In the first stage of the development of the European integration which stretches from the Treaty of Rome to the European Union of the 1980s and 1990s, we find three major cohesive forces holding the Member States together. These include: a longing and a desire for peace shared by all Europeans in the wake of the Second World War, a determination to defend themselves against a common threat posed at that time by communism and the Soviet Union, and a commitment to rebuilding Europe and generating prosperity for its nations. The combination of these factors, writes Kurt Biedenkopf, 'reinforced the spiritual, cultural, historical and religious bonds between the Member States of the Union'.[34] However Biedenkopf acknowledges that these factors belonged to a different time, when communism posed a real threat and, even to a different place, i.e. to the period prior to the enlargement of the EU. 'As goals they are still there, but the unifying force that contributed to the development of the European Union has faded'. Other forms of threat, the one from Islamic terrorism in particular, have been used to replace the threat of communism and, in countries such as Britain, to revive a sense of national identity.[35] Article 188 R of the Treaty of Lisbon underscores this point by declaring that 'the Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack […]'.

The consolidated text of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU),[36] which represents the second stage of the European integration, refers fifteen times to 'solidarity' in different contexts. Article 2 establishes that the Union 'shall promote economic, social and territorial cohesion, and solidarity among Member States' and Article 22 states that:

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[32] Risto Heiskala, 'The Emergence of the European Union as a Very Incoherent Empire' in Risto Heiskala and Jari Aro (eds.) *Policy Design in the European Union* (London, Palgrave, 2018) 13-48, 19.

[33] In his study of 'Neoliberalism in the European Union,' Christoph Hermann concludes that the EU gradually, albeit inevitably, came to adopt neoliberal ideas and policies. He maintains that, 'major policy issues, such as the Single Market Strategy, European competition policy, Economic and Monetary Integration, and even the European Employment Strategy, have enhanced "free" trade and "free" capital mobility, monetary restraint and budgetary austerity, the flexibilization of labour markets, and the erosion of employment security.' See Christoph Hermann, Neoliberalism in the European Union'. 79/1 (2007) Studies in the Political Economy, 61-89, 85.

[34] K Biedenkopf, '"United in Diversity": What Holds Europe Together?' Krzysztof Michalski (ed.) *What Holds Europe Together?* (Budapest, Central University Press, 2006) 14, 16.

[35] For a discussion see Banakar, 'Brexit: A Note on EU's Interlegality' (n 7).

[36] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2012/C 326/01. At: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT. Retrieved on 28 September 2018.

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

Being broad in scope, solidarity applies to many regulatory areas, ranging from asylum and security to environment and monetary policies and foreign policy, where the Member states are urged to 'show mutual solidarity'. This makes solidarity a multifaceted legal principle with social and political dimensions which are difficult to pin down. Eleni Karageorgiou, describes it as 'a constitutional principle', a meta-principle for community building, which despite its central role within the EU law, manifests itself differently within different domains of EU law.[37] Solidarity, she writes, 'seems to have no fixed meaning but rather constitute a "floating signifier" used to accommodate multiple and different meanings'.[38] Similarly, Irene Domurath argues that solidarity has developed 'to different extent in different fields of law. It is most advanced in socio economic law, but underdeveloped in areas of law that are new to the EU legal order'.[39] However, solidarity is not limited to macro-economic and foreign policy issues and is also used as a tool to generate micro integration across the Union. The Treaty of Lisbon refers to solidarity in relation to promoting 'economic, social and territorial cohesion' among the Member States, but it also stresses the need to 'combat social exclusion and discrimination, and […] promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'. Issues such as social justice and the protection of men and women's equal rights, arguably, require attention the rights of citizens at the micro level. However, the macro concern with 'mutual political solidarity among Member States' clearly overweighs any micro concern with solidarity among the EU citizens. Although the Treaty mentions solidarity as a value which binds together both Member States and their citizens, it does not recognize EU citizens' experiences of each other and their sense of community as an important element in the larger scheme of the European integration. Instead, as Andrea Sangiovanni observes, the Treaty uses solidarity instrumentally to mitigate the consequences of globalisation and the neoliberal policies which the EU has been pursuing in many areas, in an attempt to strike a balance between market principles and social protection.[40] Similarly, Jürgen Bast maintains that solidarity primarily concerns the relationships between the Member States, rather than citizens, and should be understood as part of the EU's efforts to 'make good on the promise of domestication global capitalism'.[41]

EU law also fosters competition and gives rise to conflicts between various groups, thus, undermining its own attempts at generating a social identity and solidarity across the Member

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[37] E Karageorgio, *Rethinking Solidarity in European Asylum Law: A Critical Reading of the Key Concepts in Contemporary Refugee Policy* (PhD monograph, Lund University 2018), 22-23.
[38] Karageorgio, *Rethinking Solidarity in European Asylum Law*, (n 37), 23-24.
[39] I Domurath, 'The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach'. In (2013) 35 *Journal of European Integration*, 459-475, 459.
[40] A Sangiovanni, 'Solidarity in the European Union'. In (2013) 33 *Oxford Journal of Legal Studies*, 213, 214.
[41] J Bast, 'Deepening Supranational Integration: Interstate Solidarity in EU Migration Law'. In (2016) 22/2 *European Public Law*, 289, 289.

States. In judgments such as *Viking Line* and *Laval*,[42] the Court of Justice of the European Union (CJEU) illustrated the EU's determination to uphold the principles of a free market economy at the transnational level, even when it amounted to eroding of the workers' rights at the national and local levels. Both cases were concerned with the right to strike in the Community law and with 'social dumping' i.e. attempts by employers to replace workers in one Member State with lower-paid workers from another Member State. In both cases, the CJEU held that it was a matter for national courts to decide if the right to strike was justified and proportionate.[43] Nevertheless, it provided that the right to take industrial action was established in the Community law and, thus, could only be exercised in a manner compatible with that law. This meant that the right to strike at national level was restricted by the right to freedom of movement and freedom of establishment, which are supranational rights.[44]

It was in the context of the migration crisis in 2015, when over one million migrants and refugees (half of whom were fleeing the War in Syria) arrived at the door of Europe, that EU solidarity was put to a crucial test at the national level of the Member States. Article 80 of TFEU describes the principle of solidarity and the fair sharing of responsibility among the Member States, which as Vanheule et al. explain, 'applies to both the Union institutions and the Member States concerning all matters falling within the policy area of borders, asylum and immigration, with solidarity'.[45] In the face of what has been described as the largest exodus of refugees since the Second World War, some Member States such as Germany and Sweden reacted by upholding the fundamental values of human rights, which lie at the core of the EU law, while others, such as the Czech Republic, Hungary, Poland, Slovakia, and Romania, refused to submit to 'burden-sharing' arrangement and insisted that the Dublin Treaty should apply. Hungary made headlines by erecting barbed wire fences at its border with Serbia to stop refugees crossing into its territory. The Hungarian prime minister accused the EU of 'trying to take away our country' and trying to dilute 'the population of Europe and to replace it, to cast aside our culture, our way of life'.[46] The public political debate on how to tackle the influx of migrants and refugees revealed how little weight the EU's humanitarian values carried once confronted with a crisis:

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[42] C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti [2007] ECR I-10779 and C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet [2007] ECR I-11767.

[43] For a discussion see Ann-Christine Hertzén *The European Social Dialogue in Perespetive: Its future potential as an autopoietic system and lessons from the global maritime system of industrial relations* (PhD monograph, Lund University, 2017), 242ff.

[44] See A C L Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ'. In (2008) 37 *Industrial Law Journal*, 126.

[45] D Vanheule, J van Selm, and C Boswell, *The Implementation of Article 80 TFEU. Brussels: European Parliament: Policy Department C: Citizens' Rights and Constitutional Affairs* (European Parliament Think Tank 2011), 8. At http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-LIBE_ET(2011)453167. Retrieved on 21 September 2018.

[46] *VOA News* (2018) 'Hungary's PM Fires Up Anti-Migrant Rhetoric Ahead of Election' https://www.voanews.com/a/hungary-orban-prime-minister-election/4337438.html. Retrieved on 15 August 2018.

> 'British Prime Minister David Cameron invoked insects when he warned of a "swarm" of "illegal migrants" invading Europe, while Hungarian Prime Minister Viktor Orbán declared that, "from a European perspective, the number of potential future immigrants seems limitless, [and most new arrivals] are not Christians, but Muslims". Orbán further added that the refugees entering Europe "look like an army". For his part, Polish Law and Justice Party official and former Prime Minister Jaroslaw Kaczynski warned that Muslim refugees would bring parasites and diseases to the local population, while the leader of the Sweden Democrats Jimmie Åkesson declared that "Islamism is the Nazism and Communism of our time"'.[47]

As the crisis dragged on and the Member States failed to agree on a new burden-sharing arrangement proposed by the European Commission, countries such as Italy and Greece, which bore the brunt of the migration flows, felt abandoned by the EU.

These events show that *particularistic* solidarity, based on in-group cultural ties or national identity, trumps both *universalistic* solidarity, which extends its scope of protection to include strangers, and the type of solidarity which is based on common *interests* of the EU countries. Expressed differently, the notion of interest-based solidarity, which operates independently of shared values among the citizenry, has very limited cohesive force compared to the sense of solidarity which is tribal, identity-based and builds on emotional bonds and the feeling of mutual responsibility towards in-group members. Similarly, universalistic solidarity, which includes lofty ideals and recognition of the common vulnerability of all humans, finds it difficult to persuade a group of people whose identity and sense of community is, at least partly, constructed in terms of fear and anxiety, where the outsiders are seen as a threat to their security and wellbeing. In this context, the EU itself becomes a stranger, an alien force and a source of anxiety and insecurity for local people in many Member States. As we saw in the case of Brexit, EU laws and policies which are introduced top-down are seen as external interference and denial of people's national sovereignty. Under these circumstances, the tribal sense of community can be boosted and transformed into political resistance against EU's governance. This is what we labelled above the 'negative' form of solidarity, which takes shape in reaction against external threats rather than as an expression of mutual support and moral responsibility towards fellow citizens.

**Concluding Remarks**

Solidarity is an elusive and multidimensional concept which indicates different things to different people in different times and places. It has been used to describe forms of social organisation at the national and local community levels, where factors such as group identity, mutual dependencies, interpersonal trust, loyalty, affective bonds but also common interests, join to create relatively stable relationships over time. Once we move the focus of our attention to the transnational level, where interpersonal relationships become fluid, community ties

[47] K M Greenhill, 'Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis'. In (2016) 22 *European Law Journal*, 317, 318.

become disembedded and relationships become increasingly transitory, solidarity loses much of its cohesive force. Looking back at our discussions, this leads us to two sets of issues regarding the governance of the EU. First, although the EU seeks social integration at the levels of the Member States and EU citizens, it does so on its own contradictory terms. As we saw above, on the one hand, it actively promotes neoliberal policies which foster competition and hyper-individualisation, while producing social conflicts with destabilising results for the Members States and, on the other hand, it appeals to the sense of solidarity among the Member States to neutralise conflicts and stabilise social relations. Second, the EU policymakers knew from the start that they had to actively promote solidarity as a method of social organisation if it were to have any perceptible effect on social integration. Nevertheless, in the context of EU law, the social dimensions of solidarity, which includes EU citizens' experiences, remain underdeveloped. This neglect, the causes of which are related to the gap between the transnational and local levels of governance, comes at a high price for the EU. It creates a political vacuum at the national and local levels, which is exploited by populist and nationalist groups whose aim is to bolster a negative form of solidarity. As Brexit has shown, besides spreading a tribal mentality and xenophobia, these populist groups work proactively against the very idea of a European Union.

Against the backdrop of the discussions above, we can now interpret Jacque Delors statement that we 'can't fall in love with the single market'[48] in the following way: for the European project to succeed, one needs much more than 'fair sharing of responsibility, including its financial implications, between the Member States'.[49] Admittedly, common economic interests can be employed effectively to bring people together and establish a basis for cooperation between them, but by themselves shared common interests do not generate a sense of community and belonging which can hold group members together over a longer period of time. To achieve an enduring form of solidarity, one needs to create a sense of community that can accommodate the 'love-like' quality which Unger highlights. This is not the type of solidarity which is instrumentally devised to serve the short-term and ad hoc needs of the Member States at the transnational level, but one which enshrines Unger's concern with the welfare of 'the other', where 'the other' is not reduced to the bearer of legal rights, but is recognised as a person whose well-being is deeply connected with our own. For solidarity to work effectively and in a positive humanitarian spirit, it needs to be realised as part of the 'moral progress' Rorty was referring to. However, although it is difficult to generate this type of solidarity, which is embedded in human experience, at the transnational level and across the EU Member States, one should not dismiss the law as a medium for boosting and upholding existing forms of solidarity. It is in such instances where law operates as an 'institution', to borrow from Habermas,[50] and succeeds in enhancing communicative rationality, which involves mutual understanding, that law becomes a medium for strengthening solidarity. Continuing this line of argument, EU law and policies fail to engender solidarity if they do not produce the conditions where all those who are involved (or subjected to EU regulation) are given an equal voice in

[48] Delors 'Address given by Jacques Delors to the European Parliament' (n 1).
[49] Article 63b, 'The Treaty of Lisbon'. (2007) *Official Journal of the European Union.*
[50] Habermas, *The Theory of Communicative Action*, (n 25), 365.

EU law's processes of integration. In the EU context, the Member States have a voice and citizens have their representatives in the EU parliament. However, EU citizens do not have a direct channel of communication with the EU and the EU elections are regarded as 'second order elections' characterised by low turnouts that testify to the EU's democratic deficit. To take this argument further (something which we cannot do for lack of space here), we need to critically explore the power hierarchy of the EU and its method of top-down governance, which create a distance between the EU institutions and EU citizens and provoke localised tribal resistance in the form of negative solidarity.

Solutions to these problems require reimagining EU law and its form of governance differently, not as a form of top-down exercise of power, but as a reflexive form of legality which develops through the interface between different levels of governance, i.e. at the intersection of the transnational, national and local levels. Moreover, the experiences of EU citizens, their sense of community, mutual expectations and legality, should be treated as a source of EU law. This is hardly the final word on this matter, especially once we consider the inherent diversity of EU citizens' experiences. Nevertheless, the EU being a legal construct, its future depends on the ability of its policymakers to envisage the law in a different way. Instead of the current understanding of the law as a force of normativity, which uses its sources of authority at the national and transnational levels to act top-down, they should envisage a reflexive form of legality which is equally entrenched at the local, national and transnational spaces. Impossible as it might sound, only a fundamentally different understanding of EU law and its sources of authority, which gives equal weight to the EU citizens' experiences, Member States' national interests and the macro economic and political reality of the EU, can overcome the democratic deficit of the EU.