

# SOLIDARITY AND THE CRISIS OF VALUES IN THE EUROPEAN UNION

XAVIER GROUSSOT\* & ELENI KARAGEORGIU†

*Looking at Article 2 TEU, this contribution considers that there is an external and an internal crisis of values: the former referring to challenges to EU values coming from individual Member States which prioritize their own agendas and the latter referring to the tension between a liberal and more solidarity-driven understanding of the EU's foundations as it stems from the very wording of Article 2 TEU. In an attempt to unpack solidarity and offer a better understanding of its nature, scope and legal implications for the EU and its Member States, this contribution proceeds as follows: first, it studies solidarity within a specific methodological and theoretical framework based on a 'structured network of EU principles' established by the CJEU in the post-Lisbon era. Second, it operates under the assumption that a holistic understanding of EU solidarity requires us to go beyond the dominant form of solidarity based on the relationship between Member States ('interstate solidarity') and to explore the relationships between individuals ('interpersonal solidarity'). Our key argument is that a larger institutional recognition of 'interpersonal solidarity' has the potential to put the social question more squarely on the table and, as such, to enable the EU to better address the polycrisis it is facing. A 'Scellian approach' to EU solidarity - which places the person at the heart of the theoretical framework and as the real subject of solidarity is useful to adopt as a source of inspiration in such an endeavour.*

## 1 INTRODUCTION

Following the delivery of the Cases C-156/21 and C-157/21 (*Budget Conditionality Cases*),<sup>1</sup> solidarity in European Union (EU) law and its relation with the rule of law context, that forms the basis of the litigations brought before the Court of Justice of the European Union (CJEU) by Hungary and Poland challenging the validity of the Budget Conditionality Regulation,<sup>2</sup> regained currency in debates on the constitutional structure of the EU.

The cases were adjudicated *in plenum* on 16 February 2022 and the CJEU confirmed the validity of the EU law legislation. These cases are paradigmatic of the understanding of the rule of law, as a value enshrined in Article 2 TEU, on the one hand, and the principle of solidarity, as more than a fundamental legal principle, on the other. As regards the former, the *Budget Conditionality Cases* have demonstrated a shift in the perception of the operational function of the values of the EU, establishing that the rule of law is a founding value of the

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\* Faculty of Law, Lund University.

† Faculty of Law, Lund University.

<sup>1</sup> Case C-156/21 *Hungary v European Parliament and Council of the European Union* EU:C:2022:97 and Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union* EU:C:2022:98.

<sup>2</sup> Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L433I/1 (Conditionality Regulation).

Union and a legal norm which imposes an obligation on the Member States to comply with its constituent elements.<sup>3</sup> In addition, the *Budget Conditionality Cases* are central to a discussion of the nature and role of solidarity in EU law, with the CJEU referring to it as a principle of constitutional and legal relevance that might also be understood as a ‘Foundational Principle’ (or ‘Founding Principle’) of EU law, in a similar vein to the ‘rule of law’ as defined by the text of Article 2 TEU.<sup>4</sup>

The contributions in this special issue seek to explore the theoretical and practical implications of these and previous CJEU rulings on the principle of solidarity understood as an organic, regulatory, and organizational principle in the EU. Comparative aspects of the function of solidarity at various levels (national, regional, international) as well as its oftentimes conflictual relationship with other EU principles (e.g., loyalty) is also discussed; The core doubled-edged question of the special issue is, ultimately, whether a re-imagination of the current constitutional structure of the EU is possible so as to enable a shift of priorities in EU integration towards a more social values-based approach.

We address this question by exploring solidarity in EU law from a sociological and institutionalist perspective, which can prove helpful towards an understanding of the concept with regard to its constitutional function.

Looking at Article 2 TEU, this contribution considers that there is an external and an internal crisis of values:<sup>5</sup> the former referring to challenges to EU values coming from individual Member States which prioritize their own agendas and the latter referring to the tension between a liberal and a solidarity-driven understanding of the EU’s foundations as it stems from the very wording of Article 2 TEU.

Our hypothesis is the following: key for EU institutions such as the European Commission and the CJEU in addressing this crisis of values, is to find ways to develop and concretize the constitutional functions of solidarity in the EU by emphasizing its

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<sup>3</sup> Conditionality Regulation (n 2); Case C-156/21 *Hungary v European Parliament and Council of the European Union* (n 1) para 231.

<sup>4</sup> For a detailed analysis, see Xavier Groussot, Anna Zemskova, and Katarina Bungefeldt, ‘Foundational Principles and the Rule of Law in the European Union: How to Adjudicate in a Rule-of-Law Crisis, and Why Solidarity is Essential’ (2022) 5(1) *Nordic Journal of European Law* 1.

<sup>5</sup> The term ‘crisis of values’ is inspired by scholarly discussion on the EU as a community of values, see, among others, Jan Wouters, ‘From an Economic Community to a Union of Values: The Emergence of the EU’s Commitment to Human Rights’ in Jan Wouters, Manfred Nowak, Anne-Luise Chané, and Nicolas Hachez (eds), *The European Union and Human Rights: Law and Policy* (Oxford University Press 2020). The literature abounds by contributions on Article 2 TEU and the Union values and principles, see e.g., Jan Wouters, ‘Revisiting Art. 2 TEU: A True Union of Values?’ (2020) 5(1) *European Papers - A Journal on Law and Integration* 255; Elżbieta M Goździak, Izabella Main, and Brigitte Suter (eds), *Europe and the Refugee Response: A Crisis of Values?* (Routledge 2020); Marcus Klamert and Dimitry Kochenov, ‘Article 2 TEU’ in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford University Press 2019); Andrew J Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge University Press 2010); Andrew T Williams, ‘Taking Values Seriously: Towards a Philosophy of EU Law’ (2009) 29(3) *Oxford Journal of Legal Studies* 549; Justine Lacroix, ‘Does Europe Need Common Values?’ (2009) 8(2) *European Journal of Political Theory* 141; Päivi Leino and Roman Petrov, ‘Between “Common Values” and Competing Universals’ (2009) 15(5) *European Law Journal* 654; Pavlos Eleftheriadis, ‘The Idea of a European Constitution’ (2007) 27(1) *Oxford Journal of Legal Studies* 1; Takis Tridimas, *The General Principles of EU Law* (2nd edn Oxford University Press 2006); Armin von Bogdandy, ‘Doctrine of Principles’ (2003) *European Integration: The New German Scholarship - Jean Monnet Working Paper* 9/03 <<https://jeanmonnetprogram.org/archive/papers/03/030901-01.pdf>> accessed 01 August 2023; Koen Lenaerts and Marlies Desomer, ‘Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means’ (2002) 27(4) *European Law Review* 377.

‘interpersonal’ dimension. A larger institutional recognition of ‘interpersonal solidarity’ has the potential to put the social question more squarely on the table and, as such, to enable the EU to better address the polycrisis<sup>6</sup> it is facing.

In an attempt to unpack solidarity and offer a better understanding of its nature, scope and legal implications for the EU and its Member States, this contribution proceeds as follows: first, it studies solidarity within a specific methodological and theoretical framework based on a ‘structured network of EU principles’ established by the CJEU in the post-Lisbon era. Second, it operates under the assumption that a holistic understanding of EU solidarity requires us to go beyond the dominant form of solidarity based on the relationship between Member States (‘interstate solidarity’) and to explore the relationships between individuals (‘interpersonal solidarity’).

Building on this, we argue that solidarity’s potential is that it is attuned to the changing social, political and legal necessities, and thereby capable of contributing to the fulfilment of the purposes of the European Union as a whole. The analysis is divided into three parts: in the first, we discuss the historical, political, and legal dimensions of the concept of solidarity. In the second, we analyse the place of solidarity under the light of the ‘structured network of principles’ created by the CJEU in the context of the EU crisis of values; and in the third we explore the potential of solidarity drawing on the sociological work of the French jurist Georges Scelle on institutional structures and measures required to support them.

## 2 THE DIMENSIONS OF SOLIDARITY IN EU LAW: HISTORICAL, LEGAL, POLITICAL

Notwithstanding the centrality of solidarity to the project of European integration, questions regarding its actual function, application and enforceability remain somewhat elusive. The same applies to its interplay with other EU constitutional concepts such as, ‘sincere cooperation’, ‘mutual trust’, ‘democracy’, ‘equality’, and ‘rule of law’.

This has been attributed partly to the nature of the concept which is both descriptive and normative,<sup>7</sup> and partly to its normative ground, namely whether it requires a shared bond, identity, common experience, group membership or shared action<sup>8</sup> (*particularistic* conception of solidarity), whether it appeals to a cosmopolitan ideal of a global community (*universalist* conception of solidarity) or whether it functions under a logic of rational self-interest (*interest-driven* conception of solidarity) rejecting any affective, altruistic or love-like

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<sup>6</sup> A term first coined by the French sociologist Edgar Morin and Anne Brigitte Kern in their book, *Homeland Earth: A Manifesto for the New Millennium Advances in Systems Theory, Complexity and the Human Sciences* (Hampton Press 1999). The term has been used extensively in recent years, including in the political discourse, see e.g., the Speech by the former President of the European Commission, Jean-Claude Juncker at the 2016 Annual General Meeting of the Hellenic Federation of Enterprises, referring to the multiple, mutually reinforcing challenges facing the EU, from ‘the worst economic, financial and social crisis since World War II’ through to ‘the security threats in our neighborhood and at home, to the refugee crisis, and to the UK referendum’ <[https://ec.europa.eu/commission/presscorner/detail/de/SPEECH\\_16\\_2293](https://ec.europa.eu/commission/presscorner/detail/de/SPEECH_16_2293)> accessed 15 June 2023. See also, World Economic Forum, ‘The Global Risks Report 2023’ (18th edn) <[https://www3.weforum.org/docs/WEF\\_Global\\_Risks\\_Report\\_2023.pdf](https://www3.weforum.org/docs/WEF_Global_Risks_Report_2023.pdf)> accessed 15 June 2023.

<sup>7</sup> See e.g., Karl-Peter Sommermann, ‘Some Reflections on the Concept of Solidarity and its Transformation into a Legal Principle’ (2014) 52(1) *Archiv des Völkerrechts* 10.

<sup>8</sup> See Andrea Sangiovanni, ‘Solidarity as Joint Action: Solidarity as Joint Action’ (2015) 32 (4) *Journal of Applied Philosophy* 340.

social qualities.<sup>9</sup> That is why, solidarity has been considered as a context- and circumstances-specific concept.

It is therefore crucial that the EU principle of solidarity in this present time is studied in light of a ‘theory of crisis’, notably a theory that allows for the understanding of the process of EU political and legal integration within a context of polycrisis, different from a ‘business as usual’ context. Similarly, solidarity in EU law cannot be studied in isolation but rather in relation to other EU constitutional concepts (such as ‘mutual trust’ and ‘sincere cooperation’) that form part of a ‘structured network of principles’ according to the CJEU since *Kadi I* and *Opinion 2/13*.<sup>10</sup>

The roots of the concept of solidarity are embedded within modern European history<sup>11</sup> and its development is to be traced in different historical trajectories, including the French revolution and the work of French sociologists such as Pierre Leroux (*De l’humanité*, 1840), Auguste Comte (*Système de politique positive*, 1852), Emile Durkheim (*De la division du travail social*, 1893) and Leon Bourgeois (*Solidarité*, 1896), the ‘New Realism’ in British liberal tradition, workers’ struggles and the *Sociale Frage* in Germany, Catholic Social teachings, and the Polish *Solidarność* movement; one could add more recent manifestations of solidarity such as the Greta Thunberg movement on climate activism akin to ‘environmental solidarity’<sup>12</sup> and the ‘Refugees Welcome’ movement, a grassroots response to the 2015 refugee crisis. These represent focal trajectories in solidarity’s evolution through time and testimonies to its nature as a ‘chameleon’<sup>13</sup> capable of adapting to different societal demands.

The common feature of solidarity’s various historical manifestations is that it denotes a particular community.<sup>14</sup> In the same vein, the signatories of the Treaty establishing the European Economic Community (EEC), were aware that the political project they were embarking on was dependent on establishment of shared values and a sense of community grounded, first and foremost on a ‘de facto solidarity’ which could further unite their countries.<sup>15</sup> 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’, and later on both the Single European Act (1986) and the Maastricht Treaty (1992) listed ‘economic and social cohesion and solidarity among Member States’ among the Community’s objectives. Solidarity has also been at the

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<sup>9</sup> For a similar account see Reza Banakar, ‘Law, Love and Responsibility: A Note on Solidarity in EU Law’ in Reza Banakar, Karl Dahlstrand, and Lotti Ryberg Welander (eds), *Festschrift till Håkan Hydén* (Juristförlaget i Lund 2018).

<sup>10</sup> Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* EU:C:2008:461; and *Opinion 2/13* EU:C:2014:2475.

<sup>11</sup> Karl H Metz, ‘Solidarity and History. Institutions and Social Concepts of Solidarity in 19<sup>th</sup> Century Western Europe’ in Kurt Bayertz (ed), *Solidarity* (Springer 1999).

<sup>12</sup> See Sven-Eric Liedman, ‘Solidarity: A Short History from the Concept’s Beginnings to the Present Situation’ in Helle Krunke, Hanne Petersen, and Ian Manners (eds), *Transnational Solidarity* (Cambridge University Press 2020) 19.

<sup>13</sup> JES Hayward, ‘Solidarity: The Social History of an Idea in Nineteenth century France’ (1959) 4(2) *International Review of Social History* 261.

<sup>14</sup> Eleni Karageorgiou, *Rethinking solidarity in European asylum law: A critical reading of the key concept in contemporary refugee policy* (PhD Thesis, Media-Tryck Lund University 2018).

<sup>15</sup> See the Schuman Declaration (1950) <[https://europa.eu/european-union/about-eu/symbols/europeday/schuman-declaration\\_en](https://europa.eu/european-union/about-eu/symbols/europeday/schuman-declaration_en)> accessed 14 June 2023.

centre of the working groups discussions leading up to the Draft Treaty establishing a Constitution for Europe, which eventually paved the way for the Lisbon Treaty (2009). Albeit doubts raised with regard to its legal enforceability, the general impression from the working groups is that the inclusion of the principle of solidarity was considered to be critical for the realization of Union policies.<sup>16</sup>

At present, solidarity is codified in EU primary law and in particular in the preamble of the EU Charter of Fundamental Rights as a ‘founding principle’ of EU law.<sup>17</sup> In addition, the term appears 22 times in the Treaty framework established post-Lisbon.<sup>18</sup> Finally, recent evolutions marked by the European Green Deal<sup>19</sup> and the European Pillar of Social Rights,<sup>20</sup> are testimonies to an increased visibility and weight placed to the language of solidarity in the EU context. Worth noting is the fact that solidarity is not exclusively referred to in the treaties as a response to threats<sup>21</sup> or crisis situations.<sup>22</sup> The mutual defense clause in Article 42(7) TEU and the sudden inflow of third-country nationals clause in Article 78(3) TFEU do reflect an emergency-driven solidarity approach (imposing ‘an obligation of aid and assistance’ and of ‘adopt[ing] provisional measures for the benefit of the Member State(s) concerned’, respectively).<sup>23</sup> The same applies in cases of terrorist attacks and natural or man-made disasters (Title VII, Article 222 TFEU, solidarity clause) where ‘joint action in a spirit of solidarity’ between the EU and the Member States is explicitly required.<sup>24</sup> Yet, there are references to solidarity as the ‘governing principle’ in the areas of immigration, asylum and border checks (Article 80 TFEU) and as key guarantee for achieving the Union’s aims in the energy sector,<sup>25</sup> including reinforcing the collective nature of energy

<sup>16</sup> For a detailed analysis of the discussions in the Convention Working Group X ‘Freedom, Security and Justice’ and the roots of Article 80 TFEU on solidarity in the field of asylum, immigration, and border checks, see Karageorgiou 2018 (n 14) 72-76.

<sup>17</sup> See Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (EUCFR), recital 2.

<sup>18</sup> Florian Kommer, ‘The Clash of Solidarities in the European Union: Rethinking Jürgen Habermas’ Conception of Solidarity in the Transnational Context’ (2018) 11(2) Fudan Journal of the Humanities and Social Sciences 175, 176. On the CJEU’s regular references to the principle of solidarity in its jurisprudence see Siofra O’Leary, ‘Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union’ in Gráinne de Búrca (ed), *EU law and the welfare state: In search of solidarity* (Oxford University Press 2005). On solidarity litigation before the CJEU, see the contributions by Hyltén-Cavallius and Küçük in this Issue.

<sup>19</sup> See Claire Dupont and Diarmuid Torney, ‘European Union Climate Governance and the European Green Deal in Turbulent Times’ (2021) 9(3) Politics and Governance 312.

<sup>20</sup> See the contribution by González Pascual to this Special Issue. See also Maribel González Pascual and Aida Torres Pérez (eds), *Social Rights and the European Monetary Union* (Edward Elgar 2022).

<sup>21</sup> See Theodore Konstantinides, ‘Civil Protection in Europe and the Lisbon “Solidarity Clause”. A Genuine Legal Concept or a Paper Exercise’ (2011) 7 Uppsala Faculty of Law - Working Paper no 3.

<sup>22</sup> See Yves Bertoincini, ‘European Solidarity in Times of Crisis: a legacy to develop in the face of COVID-19’ (2020) European issues n 555 - Policy Papers, Fondation Robert Schuman, 10, <<https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-555-en.pdf>> accessed 01 August 2023. Bertoincini argues that the incorporation of the ‘solidarity clauses’ in the Lisbon Treaty reflects another form of solidarity: Member State solidarity. For him, ‘this obligation of solidarity is typical of de facto solidarity arising from the concrete achievements referred to in the Schuman declaration’.

<sup>23</sup> Sara Myrdal and Mark Rhinard, ‘The European Union’s Solidarity Clause: Empty Letter or Effective Tool?’ (2010) UI Occasional Papers No 2, 1 <<https://www.ui.se/globalassets/ui.se-eng/publications/ui-publications/the-european-unions-solidarity-clause-empty-letter-or-effective-tool-min.pdf>> accessed 01 August 2023.

<sup>24</sup> Article 222 TFEU, the general solidarity clause, was introduced by the Lisbon Treaty as one of the new solidarity clauses. This clause is directly linked to a situation of crisis.

<sup>25</sup> See also Peter Oliver and Kaisa Huhta, ‘Free Movement of Goods in the Labyrinth of Energy Policy and Capacity Mechanism’ in Leigh Hancher, Adrien de Hauteclocque, Kaisa Huhta, and Malgorzata

policy in the functioning of the energy market, promoting energy efficiency and energy saving, the development of new and renewable energy, and the interconnection of energy networks (Article 194 TFEU).<sup>26</sup> These references demonstrate the function of solidarity as a ‘dynamic and contextual meta-principle of constitutional rank’ that informs the way EU institutions and Member States make use of their discretion in decision and lawmaking.<sup>27</sup>

As reflected in several contributions in this Special Issue, the discussion on EU solidarity is often limited to two specific narratives. The first narrative is concerned with the dichotomy and clash between national solidarity and EU solidarity.<sup>28</sup> The second narrative focuses mainly on the study of ‘interstate solidarity’ as the most common form of ‘solidarity-practice’ in EU law.<sup>29</sup> Arguably, what seems to have slipped scholarly attention and EU institutional practice is attention to ‘interpersonal solidarity’. Although the Treaties mention solidarity as a value which binds together both Member States and their citizens, EU citizens’ experiences of each other and their sense of community are not ascribed equal significance in the larger scheme of European integration. As Banakar puts it, ‘the macro concern with ‘mutual political solidarity among Member States’ clearly overweighs any micro concern with solidarity among the EU citizens’.<sup>30</sup> Following a similar line of reasoning, Sophie Pornshlegel argues that the EU should move towards a definition of the concept that allows for the emergence of ‘interpersonal solidarity’ and should create the conditions necessary for this type of solidarity to be developed.<sup>31</sup> For Pornshlegel,

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Sadowska (eds), *Capacity Mechanisms in the EU Energy Markets: Law, Policy, and Economics* (Oxford University Press 2022) 220, 243. The authors stress that both Articles 194 TFEU and Article 222 TFEU are completely new to the Treaties.

<sup>26</sup> On the scope of Article 194 TFEU, see the *OPAL* cases discussed by Küçük in this Special Issue. See, in particular, Case T-883/16 *Poland v Commission* EU:T:2019:567. According to the General Court (at paras 68-70), ‘That provision, introduced by the Treaty of Lisbon, inserted into the TFEU an express legal basis for the European Union policy on energy which previously rested on the basis, inter alia, of ex-article 95 EC on the completion of the internal market (now Article 114 TFEU). The “spirit of solidarity” referred to in Article 194(1) TFEU is the specific expression in this field of the general principle of solidarity between the Member States, mentioned, inter alia, in Article 2 TEU, in Article 3(3) TEU, Article 24(2) and (3) TEU, Article 122(1) TFEU and Article 222 TFEU. That principle is at the basis of the whole Union system in accordance with the undertaking provided for in Article 4(3) TEU [...]. As regards its content, it should be emphasised that the principle of solidarity entails rights and obligations both for the European Union and for the Member States. On the one hand, the European Union is bound by an obligation of solidarity towards the Member States and, on the other hand, the Member States are bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it’. See also Case C-848/19 P *Germany v Poland* EU:C:2021:598, that confirmed the ruling of the General Court and noted that the principle of solidarity is a legal principle contrary to the claim by the German government that the principle of solidarity has no legal value since it is a political concept which cannot create enforceable rights. Article 194 TFEU was seen as integral part of the fundamental principle of solidarity (see paras 38-44).

<sup>27</sup> See Violeta Moreno-Lax, ‘Solidarity’s Reach: Meaning, Dimensions and Implications for EU (external) Asylum Policy’ (2017) 24(5) *Maastricht Journal of European and Comparative Law* 740, 749. See also Karageorgiou 2018 (n 14) 93.

<sup>28</sup> See Gill-Pedro and Herlin-Karnell in this Special Issue.

<sup>29</sup> See Bergström and Casolari in this Special Issue. See also Jürgen Bast, ‘Deepening Supranational Integration: Interstate Solidarity in EU Migration Law’ (2016) 22(2) *European Public Law* 289, where he argues that solidarity is primarily concerned with 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’.

<sup>30</sup> See Banakar (n 9) 9.

<sup>31</sup> Sophie Pornshlegel, ‘Solidarity in the EU: More hype than substance?’ (2021) *European Policy Center - Issue Paper* 28, 5 <[https://www.epc.eu/content/PDF/2021/EU\\_solidarity\\_IP.pdf](https://www.epc.eu/content/PDF/2021/EU_solidarity_IP.pdf)> accessed 01 August 2023.

there are several mechanisms related to interstate solidarity at the Union level, but almost no interpersonal solidarity between citizens, let alone mechanisms. There are some solidaristic relations between EU citizens in civil society settings, but none that are institutionalized. This is problematic, as it means that citizens have no opportunities to create bonds beyond national borders and cannot create the basis for representative democracy at EU level. One form of solidarity should not trump the other, as both are equally important in a Union of states and citizens. However, both forms must exist if the EU is to remain legitimate in its current form.<sup>32</sup>

Interpersonal solidarity is founded on a common definition of solidarity (support among individuals). But there is no such commonly accepted definition at EU level that also necessitates a common and transnational political space.<sup>33</sup> The concept of ‘interpersonal solidarity’ is closely connected to Habermas’ understanding of solidarity in the EU based on ‘transnational solidarity’ where solidarity is understood as primarily not about justice but rather about the need to achieve the welfare of citizens and promote democracy at EU level. In other words, it is about ensuring that European citizens are ‘intimately linked in an intersubjectively shared form of life’.<sup>34</sup> According to Habermas, it is the lack of transnational solidarity that explains the weak posture of democracy at EU level. For him, transnational solidarity at EU level is not only needed but also feasible.<sup>35</sup> This, however, will not be possible unless the EU, through its law and policies, creates the conditions where all those involved (or subjected to EU regulation) are given an equal voice in processes of integration.<sup>36</sup> And this is not an easy task.

As argued earlier, solidarity in the EU is currently facing new challenges, exacerbated by a ‘crisis of values’ originating from Article 2 TEU; a ‘crisis of values’ which is both internal and external. The external crisis is exemplified by a frontal contestation of the liberal values enshrined in Article 2 TEU by Member States pushing their own illiberal agendas and playing on the chords of national solidarity, polemical to any form of solidarity at EU level.<sup>37</sup> The internal crisis is marked by the dominance of the liberal values over the social values not only within the text and wordings of Article 2 TEU but also in their dominance in adjudication

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<sup>32</sup> Pornshlegel (n 31) 11. As an example of the lack of interpersonal solidarity she discusses the EU’s focus on negative integration and the weakness of positive integration in the social and healthcare domains at EU level.

<sup>33</sup> *ibid* 12-13. Pornshlegel contends that interpersonal solidarity implies that European citizens have a direct link to EU institutions and that a redistributive mechanism exists between different European citizens.

<sup>34</sup> See Jürgen Habermas, ‘Justice and solidarity: On the discussion concerning Stage 6’ in Thomas E Wren (ed), *The moral domain: Essays in the ongoing discussion between philosophy and the social sciences* (MIT Press 1990) 224, 244-245. For a similar account see also the work of the French-Russian jurist Georges Gurvich on social rights.

<sup>35</sup> See e.g., Jürgen Habermas, ‘Democracy, Solidarity and the European Crisis’ (2013) A Lecture delivered at Leuven University on 26 April 2013 <<https://www.pro-europa.eu/europe/jurgen-habermas-democracy-solidarity-and-the-european-crisis/?print=print>> accessed 01 August 2023. See, also in that respect and more broadly, Jürgen Habermas, *Between Facts and Norms Contributions to a Discourse Theory of Law and Democracy* (Translated by William Rehg, MIT Press 1998) and Jürgen Habermas, ‘Why Europe Needs a Constitution’ (2001) 11 *New Left Review* 5.

<sup>36</sup> For a similar point in the context of refugee protection, see Karageorgiou (n 14) 239.

<sup>37</sup> See Sanja Bogojevic and Xavier Groussot, ‘Illiberal Democracy and Rule by Law from an EU Perspective’ in Allan Rosas, Juha Raitio, and Pekka Pohjankoski (eds), *The Rule of Law’s Anatomy in the EU: Foundations and Protections* (Hart Publishing 2023) 45.

and legislation produced by the EU institutions.<sup>38</sup> We consider that this ‘crisis of values’ can only be fully grasped if analysed in relation to the constitutional principles of EU law, the so-called ‘structured network of principles’ that ‘juridify’ and ‘constitutionalize’ the EU values enshrined in Article 2 TEU.<sup>39</sup> In other words, an in-depth study and comprehension of these constitutional principles is necessary in order to be able to concretize the problématique around the ‘crisis of values’.

### 3 THE CRISIS OF VALUES AND THE STRUCTURED NETWORK OF PRINCIPLES IN EU LAW

Articles 2 and 3 TEU reveal that the post-Lisbon Treaty system is defined by specific values and fundamental objectives which translate these fundamental values into tangible effects.<sup>40</sup> This has also been correctly described as ‘a panoply of goals and values, including justice and solidarity’.<sup>41</sup> Together, these values and objectives reflect, as Raz puts it, the EU order’s constitutional ‘common ideology’,<sup>42</sup> as they ‘express the common beliefs of the population about the way their society should be governed’.<sup>43</sup> In a similar vein, they are seen as the basis and justification of the Union’s very existence, as well as the standard for review of all subsequent EU law norms and provisions.<sup>44</sup> According to Vergis, in terms of constitutional architecture ‘placing fundamental values at the top of the text of the TEU underlines their role as the normative compass of the whole system’.<sup>45</sup>

The (potential of) normativity of Article 2 TEU and the nature of European values referred to therein as part of the ‘constitutional principles’ of EU law has been boldly recognised by the CJEU in *Kadi*.<sup>46</sup> The reliance on ‘constitutional principles’ helps in concretizing and ‘legalizing’ the values enshrined in Article 2 TEU.<sup>47</sup> Their significance to

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<sup>38</sup> See for a further discussion on this point, Xavier Groussot and Anna Zemskova, ‘The Resilience of Rights and European Integration’ in Antonina Bakardjieva Engelbrecht and Xavier Groussot (eds), *The Future of Europe: Political and Legal Integration beyond Brexit* (Hart Publishing 2019). This opposition is also reflected in research related to the concept of solidarity at national level, see most notably, Francois Ewald, *The Birth of Solidarity: The History of the French Welfare State* (Duke University Press 2020 – translation), and at EU level, see Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) where Tuori’s theory of sectorial constitutionalism reflects a clash between liberal and social values, what he called in his book ‘the economic constitution’ and ‘the social constitution’.

<sup>39</sup> *ibid.*

<sup>40</sup> See Filip Dorsemont, ‘Values and Objectives’ in Niklas Bruun, Klaus Lörcher, and Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) 50–1.

<sup>41</sup> Maurizio Ferrara and Carlo Burelli, ‘Cross-National Solidarity and Political Sustainability in the EU After the Crisis’ (2019) 57 *Journal of Common Market Studies* 106.

<sup>42</sup> Joseph Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Alexander Larry (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 1998) 152.

<sup>43</sup> *ibid.* 154.

<sup>44</sup> See Stelio Mangiamelli, ‘The Union’s Homogeneity and Its Common Values in the Treaty on European Union’ in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The European Union after Lisbon: Constitutional Basics, Economic Order and External Action* (Springer 2012).

<sup>45</sup> Fotis Vergis, ‘European dys-integration, popular disillusionment and Brexit: could ‘substantive constitutionalisation’ help win back minds and hearts?’ in Ann-Christine Hartzén, Andrea Iossa, and Eleni Karageorgiou (eds), *Law, Solidarity and the Limits of Social Europe Constitutional Tensions for EU Integration* (Edward Elgar Publishing 2022).

<sup>46</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi I* (n 10) paras 303-304. Relevant here is, also, *Opinion 2/13* (n 10) where the Court referred to the EU as an entity with ‘its own constitutional framework and founding principles’ (para 158).

<sup>47</sup> See in general, Xavier Groussot, *General Principles of Community Law* (Europa Law Publishing 2006).



the integration project is such that the EU Treaties ‘in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order’.<sup>48</sup> In light of this, as applicable to other general principles, they must guide the validity, construction, and application of secondary law.<sup>49</sup> As a result, ‘if the wording of secondary [EU] law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the [EU] Treaty rather than to the interpretation which leads to its being incompatible with the Treaty’.<sup>50</sup>

*Opinion 2/13* constitutes one of the key milestones in the methodology of ‘constitutional principles’ following the entry into force of the Lisbon Treaty and the entry into force of the EU Charter which codified the unwritten general principles developed by the CJEU since decades.<sup>51</sup> The CJEU in *Opinion 2/13* stated that the EU is founded on a ‘structured network of principles’.<sup>52</sup> What is the meaning of these words? And how, if at all, is this associated with the ‘crisis of values’?

To answer these questions, it is important to have a closer look at the paragraphs of *Opinion 2/13* where the CJEU for the very first time referred to the ‘structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other’.<sup>53</sup> In this legal structure, the Member States are viewed as engaged in a process of creating an ‘ever closer union’ based on Article 1(2) TEU.<sup>54</sup> The CJEU clarified that this legal structure is specifically founded on Article 2 TEU, which recognizes that all the Member States share common values. And it considered that this provision constitutes the fundamental premise that not only justifies the existence of mutual trust between the Member States but also that it establishes the core source of the obligation to respect the EU values implemented by EU law.<sup>55</sup> In addition, referring to Article 6(1) TEU, the Court emphasized that EU fundamental rights as recognized by the EU Charter lie ‘at the heart’ of the EU legal structure, the respect of which is a condition of the lawfulness of EU acts.<sup>56</sup>

The CJEU resorts only to three opening provisions of the TEU, namely Articles 1(2) TEU, 2 TEU and 6(1) TEU in order to establish the existence of this ‘network of principles’ that binds the Member States. There is no explicit reference to solidarity, yet solidarity does constitute a common value enshrined in Article 2 TEU. Despite there not being a specific listing of the principles forming part of this constitutional network, we can safely deduce that it is formed by the five major structural principles of EU law that ensure the ‘EU rules of the game’ between the Member States and institutions, namely primacy (unwritten principle), direct effect (unwritten principle), loyalty (Article 4(3) TEU), subsidiarity (Article 5(1) TEU), and proportionality (Article 5(3) TEU and unwritten

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<sup>48</sup> See *Kadi I* (n 10) para 304.

<sup>49</sup> On this, see among others, Armin Von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Bloomsbury Publishing 2009) and Tridimas (n 5).

<sup>50</sup> See C-305/05 *Ordre des barreaux* EU:C:2007:383 para 28.

<sup>51</sup> *Opinion 2/13* (n 10).

<sup>52</sup> *ibid* para 167.

<sup>53</sup> *ibid*.

<sup>54</sup> *ibid*.

<sup>55</sup> *ibid* para 168.

<sup>56</sup> *ibid* para 169.

principle).<sup>57</sup> Can it be argued that the principle of solidarity is a structural principle as well? Or is it a principle of a different kind?

All the values enshrined in Article 2 TEU, as a matter of fact, have a substantive dimension reflecting either a liberal or social facet. Most of the values listed in Article 2 TEU are liberal values – several of them affiliated to the idea of justice; solidarity, by contrast, is a value of a social nature which reflects the EU’s ‘social reality’. Solidarity may thus sometimes be understood as the ‘reverse side of justice’ or the ‘other of justice’.<sup>58</sup> It is of common knowledge in the EU judicial and legislative landscapes that liberal values are often prevailing over social values – which are seen, perhaps unjustifiably, as secondary.<sup>59</sup> Nevertheless, solidarity is a founding principle of EU law and forms an integral part of Article 2 TEU. On top of that, solidarity has recently been elevated to the rank of a normative principle by the CJEU following the delivery of the *Budget Conditionality cases* discussed in the introduction of this contribution relating to the rule of law crisis.<sup>60</sup> In that sense, solidarity boasts a clear potential for further development in the EU and should be used, as put by Schiek, as ‘supporting a more inclusive constitutional discourse on European integration than the mere reliance on liberal constitutional principles’.<sup>61</sup>

In practice, this can be achieved if, for instance, the CJEU relies more often on the social objectives enshrined in Article 3(3) TEU, if it ensures that the fundamental rights enshrined in the solidarity Chapter of the EU Charter are applied in a suitable manner, doing justice to its social character, and if it guarantees that the citizenship provisions of the TFEU are not devoid of any meaning by properly balancing the economic and social considerations in a given case.<sup>62</sup>

Importantly, both the rule of law crisis and the COVID-19 health crisis have opened the path to an increasing application of the principle of solidarity in EU legislation and adjudication.<sup>63</sup> This opportunity should not be missed by the EU institutions when dealing

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<sup>57</sup> Looking at the opening provisions of the TEU (Articles 1 to 6 TEU), it can be said that three types of constitutional principles can be discerned in the ‘structure network of EU principles’: interpretative principles (Articles 1 and 3 TEU), structural principles (Articles 4 and 5 TEU), and substantive principles (Article 2 and 6 TEU). This constitutional network is completed by unwritten principles of both structural (primacy and direct effect) and substantive (EU general principles based on Article 6(3) TEU) nature.

<sup>58</sup> See Habermas (n 34 and n 35) and Kommer (n 18).

<sup>59</sup> Xavier Groussot, Gunnar Thor Petursson, and Justin Pierce, ‘Weak Right, Strong Court: The Freedom to Conduct Business and the EU Charter of Fundamental Rights’ in Sionnah Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar 2017) 326.

<sup>60</sup> See also the discussion on the *OPAL* cases (‘Energy Solidarity’) by Küçük in this Special Issue.

<sup>61</sup> Dagmar Schiek, ‘Solidarity in the Case Law of the European Court of Justice – Opportunities Missed?’ in Helle Krunke, Hanne Petersen, and Ian Manners (eds), *Transnational Solidarity* (Cambridge University Press 2020) 252.

<sup>62</sup> See e.g., Groussot et al (n 59). On the difficulties in reconciling the social with the economic, see Ann-Christine Hartzén, Andrea Iossa, and Eleni Karageorgiou ‘Introduction to Law, Solidarity and the Limits of Social Europe’ in Ann-Christine Hartzén, Andrea Iossa, and Eleni Karageorgiou (eds), *Law, Solidarity and the Limits of Social Europe Constitutional Tensions for EU Integration* (Edward Elgar Publishing 2022) xvi.

<sup>63</sup> Although much more could have been done to mitigate the consequences of the pandemic across the Union, it has been argued that the COVID-19 crisis has offered better conditions for EU solidarity to emerge compared to other crises (see Pornshlegel n 31, 6). This is so due to the COVID-19 crisis’s exogenous and absolute nature capable of initiating a form of solidarity distinct from previous cases, including the financial crisis that has mostly nurtured clashes of solidarities, i.e., clash between national solidarity and EU solidarity (see Pornshlegel n 31, 21). See also Ulla Neergaard, ‘Solidarity and the Economic and Monetary Union in Times of Economic Crisis’ in Helle Krunke, Hanne Petersen, and Ian Manners (eds), *Transnational Solidarity* (Cambridge University Press 2020) 103.

with the polycrisis in the future. As explained in the previous section, regarding the individual as the real subject in solidarity debates is key in this respect. To explain why this is the case, we draw on the theory of Georges Scelle which appears to be useful in defining the contours of EU solidarity focusing on its interpersonal dimension.<sup>64</sup>

## 4 A SCCELLIAN APPROACH TO THE STUDY OF THE CONCEPT OF EU SOLIDARITY

### 4.1 SCCELLIAN THEORY: BASIC PREMISES

To grasp the Scellian doctrine, it is necessary to identify its basic conceptual premises which we sketch in the following paragraphs. The French jurist, Georges Scelle (1878-1961), is one of the most influential solidarists of his times.<sup>65</sup>

Scelle's project, a sociologically-based institutionalism, remains even today one of the basic alternatives to a liberal articulation of diplomatic practices in international law. Scelle's left solidarism based international law on the social laws of modernity itself.<sup>66</sup> Following Durkheim, Scelle explained social cohesion as an effect of organic solidarity, grounded in the biology of human needs and leading inexorably to federalism.<sup>67</sup> What premises Scelle's thought is the idea that organic solidarity or solidarity 'by division of labor' is what makes individuals indispensable to each other.<sup>68</sup> In Scelle's thought, solidarity gives birth to objective law (*'droit objectif'*)<sup>69</sup> and corresponds to '*a law of integration and progress*'. Objective law, far from being the product of the will of the state, or, at the international level, the product of a confluence of states' will, develops out of society itself. '*Ubi societas, ubi ius*'. The concept of solidarity and social reality are identical in Scelle's thought; social reality (*'le fait social'*) is nothing other than common interest (*'solidarité'*).<sup>70</sup>

The second conceptual premise of the Scellian doctrine, is related to its aims. Scelle intends to deflate or 'demythologize' the state. Thus the first axiom of his legal thought is the primacy of law as an expression of social solidarity.<sup>71</sup> Scelle's world consisted ('ultimately') of relationships between individuals.<sup>72</sup> Influenced by the French Publicist Leon Duguit's doctrine on the plurality of legal orders, he takes the view that the world community consists of a plurality of communities in which individuals and groups establish mutual relations, starting with the family and moving on to local and regional groupings, up to the

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<sup>64</sup> The search of the interpersonal dimension of solidarity is a theme that can be found within the French institutionalist doctrine post World War II, see also e.g., the work of Georges Gurvich.

<sup>65</sup> Antonio Tanca, 'Georges Scelle (1878 - 1961), Biographical note with bibliography' (1990) 1 *European Journal of International Law* 240.

<sup>66</sup> Martti Koskenniemi, 'International Law as Political Theology: How to Read Nomos der Erde?' (2004) 11(4) *Constellations* 492.

<sup>67</sup> Georges Scelle, *Précis de droit des gens: principes et systématique* (hereinafter *Précis*) 2 Volumes (Recueil Sirey 1932, 1934) I: 2-5.

<sup>68</sup> Emile Durkheim, *The Division of Labour in Society / Emile Durkheim*, translated by W.D. Halls; with an introduction by Lewis Coser (Basingstoke: Macmillan 1984).

<sup>69</sup> Scelle, *Précis* (n 67) II: 297-99 (*hypothèse de bien légiféré*).

<sup>70</sup> Hubert Thierry, 'The European Tradition in International Law: Georges Scelle; The Thought of Georges Scelle' (1990) 1 *European Journal of International Law* 193.

<sup>71</sup> *ibid* 197-198.

<sup>72</sup> Georges Scelle, 'Théorie du gouvernement international' (1935) *Annuaire de l'Institut de droit public*, 66.

state society and at the very top, the world community.<sup>73</sup> Scelle admits though, that the state is ‘*the social milieu where the legal phenomenon is most fully realized*’,<sup>74</sup> that is why its autonomy must be guaranteed by law.

Within these interdependent communities, says Scelle, the exercise of competences or else ‘essential social functions’ is taking place. For Scelle, competences are ‘*the socially guaranteed powers and duties of action*’. These are law-making, adjudication and enforcement endowed to individuals. The mission of individuals is basically to act as administrators reflecting what (objective) law requires.<sup>75</sup> This points us to Scelle’s famous doctrine of ‘role splitting’ (*dédoublement fonctionnel*) – the situation where an individual has been put in a position to administer two or more societies – as where national parliaments or governments also administer international society.<sup>76</sup> Thus, individuals act either on behalf of their state society as rulers or members of the executive, or as state officials (‘agents’).

Another important premise of Scelle’s work is the distinction between objective law and positive law. In Scelle’s thought, objective law plays the role traditionally given to natural law. Yet natural law, as it was conceived in the 18th century, is a product of reason and possesses a static, immutable character. In contrast, objective law conforms to social necessities which change with time and place; it has therefore an evolutive character. Objective law is the source of positive law, and it is the benchmark against which positive law must be assessed, and thereafter approved or rejected. As for positive law, according to Scelle, it is (or ought to be) the ‘translation’ of objective law. This translation is secured by governments who carry out the law-making function by means of ‘role splitting’.<sup>77</sup> Their task is not ‘to create’ law but to ascertain it and express it. The role of will is therefore reduced to its most simple expression. The law-making function does not imply the settlement of conflicting interests but rather, it constitutes the expression of solidarity requirements within the international society. In this context, normative treaties, which are the outcomes of converging wills, are ways of ‘ascertaining and expressing pre-existing rules of objective law, which are thus translated into normative or constructive rules of positive law’.<sup>78</sup>

## 4.2 APPLYING SCCELLIAN THEORY TO THE EU’S CONSTITUTIONAL STRUCTURE

Scelle’s perspectives have enormous potential for explaining the phenomenon of the EU as a community. Scelle’s vision of international law, involving individuals and groups establishing mutual relations beyond national borders, is perfectly illustrated by EU law (in particular in the four freedoms: free movement of persons, goods, services and capital, and the EU citizenship provisions). The very essence of the international community, says Scelle, is constituted by dealings between individuals, and therefore, international law aims at facilitating relations between individuals. Following this line of reasoning, one cannot

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<sup>73</sup> Georges Scelle, *Manuel de droit international public* (Domat-Montchrestien 1948), 18.

<sup>74</sup> Scelle, *Précis* (n 67) I: 73.

<sup>75</sup> Scelle, *Précis* (n 67) I: 9–14.

<sup>76</sup> cf. Scelle, ‘Théorie du gouvernement international’ (n 72) 54–57 and Antonio Cassese, ‘Remarks on Scelle’s Theory of ‘Role Splitting’ (*dédoublement fonctionnel*) in International Law’ (1990) 1 *European Journal of International Law* 210.

<sup>77</sup> Thierry (n 70) 199.

<sup>78</sup> Scelle, *Précis* (n 67) I: 298.

distinguish between the *interstate* dimension of solidarity on the one hand, relating to the allocation of responsibility between states; and on the other hand, the *interpersonal* dimension. For Scelle, the two levels of action are in reality inextricably bound up with each other and indeed constitute but one level of reality.<sup>79</sup>

As exemplified in the previous sections, EU law is becoming less concerned with interstate relations and relates more to facilitating transborder freedoms for individuals. In addition, the Union is a legal system heavily based on the use of competences that exhibits many of the characteristics of a ‘suprastate community’ and fulfils almost completely Scelle’s ‘essential social functions’. The Council and the Parliament (with input from the Commission) approximate a law-making body, and the CJEU adjudicates questions of EU law. With regard to law enforcement, this function is exercised to a lesser extent by Union institutions, i.e., the Commission and the CJEU, and relies to a greater extent on national courts and national legal systems.<sup>80</sup>

Similarly, Scelle puts much emphasis on the ‘role splitting’ concept. Individuals are the only subjects of law, and they are afforded with a dual mission: to take action both in the national legal systems and in the international legal system. This mirrors the role for example of representatives of national governments in EU institutions. National governments are called on to provide for the European system’s legal functions. They must therefore assume law-making, adjudication and enforcement roles. Although Scelle did not explicitly mention this, the concept of ‘role splitting’ implies that when governments act as organs of the international community they are acting in its interest, and not only in their own national interest.<sup>81</sup> This may explain the multiple references to solidarity in the EU treaties. The drafters of the treaties can be seen as acting both on behalf of their home countries but also as agents of the Union, acknowledging the significance of solidarity responsibilities between EU Member States informed by social reality. The theory of ‘role splitting’ is also reflected in the TFEU by the citizenship provisions that allow the individual to be both a citizen of a Member State of the European Union and an EU citizen.

In light of the above, Scelle’s approach appears suitable to explain the EU’s constitutional structure primarily due to its focus on the changing relationship between the individual and the community. A Scellian perception of law, as an expression of solidarity and reflection of social reality makes even more sense, if we look at Article 2 TEU. As discussed in Sections 2 and 3, Article 2 TEU constitutes a special provision – a fundamental premise - enjoying the presumption of being in accordance with objective law or else with the socio-political reality of its time. The polycrisis with which many European states are faced today, underlines the role of solidarity as the basis for European regulation and the need of this to be achieved through a set of measures adopted by the Union. In other words, it legitimizes a set of reforms (positive law) that will contribute to the fulfilment of the objectives of the EU. For instance, if we take the COVID-19 pandemic, it can be said that it has nurtured a ‘common European interest’ (what Scelle would call the ‘objective law’). The specific nature of the COVID-19 crisis had indeed created a suitable condition for

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<sup>79</sup> Cassese (n 76) 211-212.

<sup>80</sup> *ibid* 231.

<sup>81</sup> Thierry (n 70) 203.

reliance on solidarity as a crisis-solution principle and as the basis for legislative action by EU institutions (what according to Scelle would be the ‘positive law’).

In this context, solidarity as a constitutional value and foundational principle of the EU is of an evolutive character, reflecting social reality and designed to address rapidly changing necessities. This explains why it has progressed in various fields of EU law including energy, asylum, free movement, environment, and labour policies from a rather moderate institutional reference to a conciliatory idea that mandates action aiming specifically at fairer patterns of distribution of responsibilities across the Union. What follows is that the implementation of Article 2 TEU should be seen as imposing a range of obligations for measures suited to each particular situation, the management of which is a law-governed process that the EU and its institutions have to guarantee. Following the Scellian thought, solidarity should be seen as the benchmark against which EU measures and national measures falling within the scope of EU law must be assessed, approved, or rejected.

## 5 CONCLUDING REMARKS: TOWARDS A THEORY OF CRISIS IN EU LAW?

Solidarity is a context- and circumstances-specific concept. Hence it is with no surprise that it shines in this time of polycrisis and that Article 2 TEU, where solidarity is articulated, has acquired a normative and fundamental status in EU law in the jurisprudence of the CJEU. The CJEU has concretized the application of the values enshrined in Article 2 TEU through the use of constitutional principles and more specifically by making use of its ‘structured network of principles’. As shown in this contribution, solidarity has a special place in this network constituting a substantive principle that complements the liberal values enshrined in Article 2 TEU, such as the rule of law.

What this contribution has lifted is the methodological need to go beyond the dominant understanding of solidarity as addressing relationships between EU Member States towards an appreciation of the relationships between individuals (‘interpersonal solidarity’) and the way they shape the EU’s constitutional character. Addressing the EU crisis of values, namely the tension between the economic and the social, requires reimagining EU law through the intersection of the transnational, national and local levels. In this context, the relationships between and experiences of individuals subject to EU regulation should be treated as a source of understanding EU law and of balancing conflictual interests. The future of the EU appears to depend on the ability of its institutions to give equal weight to interpersonal solidarity (or the lack thereof) as to Member States’ national interests; this is likely to bring the EU closer to achieving the welfare of citizens and to addressing the democratic deficit at EU level.

The role of solidarity is therefore pivotal in EU political and legal integration.<sup>82</sup> Yet the question remains: how to define a theory of legal integration which is the most suitable to understand the evolution of the EU in the present context of polycrisis? This special context of crisis is recognized in the field of political integration where the so-called theory of post-functionalism has recently been developed to provide an understanding of the process

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<sup>82</sup> See, in general, Ian Manners, ‘Symbols and Myths of European Union Transnational Solidarity’ in Helle Krunke, Hanne Petersen, and Ian Manners (eds), *Transnational Solidarity* (Cambridge University Press 2020).

of EU integration. Lisbet Hooghe and Gary Marks<sup>83</sup> offer a new approach to studying the EU which has shifted from what they call a context of ‘permissive consensus’ to one of ‘constraining dissensus’. Further research on the matter would require answering questions, such as ‘what is the place of (EU) law and solidarity in the context of crisis and in relation to a ‘theory of crisis’ such as post-functionalism?’ This contribution has shown that the concept of solidarity is central to a ‘theory of crisis’; and that an institutionalist and sociological approach to law, such as the approach adopted by Georges Scelle, is of high relevance and importance for the future understanding of solidarity as a dynamic constitutional principle of the EU.

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<sup>83</sup> See Philippe C Schmitter, ‘Neo-Neofunctionalism’ in Antje Wiener and Thomas Diez (eds), *European Integration Theory* (Oxford University Press 2004). See also Liesbet Hooghe and Gary Marks, ‘A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus’ (2009) 39(1) *British Journal of Political Science* 1; Tanja A Börzel and Thomas Risse, ‘Revisiting the Nature of the Beast – Politicization, European Identity, and Postfunctionalism: A Comment on Hooghe and Marks’ (2009) 39(1) *British Journal of Political Science* 217; Hanspeter Kriesi, ‘Rejoinder to Liesbet Hooghe and Gary Marks, “A Postfunctional Theory of European Integration: From Permissive Consensus to Constraining Dissensus”’ (2009) 39(1) *British Journal of Political Science* 221, and Philippe C Schmitter, ‘On the Way to a Post-Functionalist Theory of European Integration’ (2009) 39(1) *British Journal of Political Science* 211.

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