

THE CONSTITUTIONAL CONCEPT OF SOLIDARITY IN EU LAW: SOME REFLECTIONS ON THE INTERRELATIONSHIP BETWEEN SOLIDARITY, CONSTITUENT POWER, AND NON-DOMINATION

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The notion of solidarity is a key constitutional concept in EU law, but its exact meaning remains somewhat vague. What, if anything, is ‘constitutional’ about solidarity we may readily ask? It could be argued that solidarity is connected to the structure of EU law and linked to the very idea of trust, loyalty, and interdependence between the Member States. Moreover, solidarity appears to have many traits that are similar to the notions of fairness and justice, and values in the EU. In this article, I will trace and discuss the similarities between solidarity on the one hand and other constitutional concepts such as the idea of a ‘constituent power’ and non-domination on the other in order to further clarify their meaning and interdependence.

1 INTRODUCTION

The idea of solidarity is a key concept in EU law, but what does it mean to refer to this concept? And what, if anything, is ‘constitutional’ about solidarity we may readily ask? It could be argued that solidarity is linked to the structure of EU law and as such connected to the very idea of trust, loyalty, and interdependence between the Member States. Moreover, as an EU constitutional concept, solidarity appears to have many traits that are similar to the notions of fairness and justice, and values.¹ For example, Rainer Forst has argued that a natural duty of justice highlights a kind of solidarity based on justice and that ‘Solidarity expresses a willingness to act with and for the sake of others based on the motive of affirming the collective bond’, i.e., of furthering the common cause or the shared identity, when this is required.²

In EU law, solidarity is commonly linked to the idea of EU citizenship, where the notion of solidarity is central as one of the founding themes.³ In addition, the enforcement of EU law through the template of mutual recognition is constitutionally challenging and interesting, as it is based upon solidarity and trust across European traditions. The history of mutual recognition is interesting as it meant that when goods existed in the common market

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¹ See also articles by Casolari, Gill-Pedro and González Pascual in this Special Issue.

² Rainer Forst, ‘A Critical Theory of Transnational (In-) Justice: Realistic in the Right Way’ in Thom Brooks (ed), *The Oxford Handbook of Global Justice* (Oxford University Press 2021) 451-472.

³ See also articles by Hyllén-Cavallius in this Special Issue. See also Sandra Mantu and Paul Minderhoud, ‘EU citizenship and social solidarity’ (2017) 24(5) *Maastricht Journal* 703, and 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).

there would be no other cross-border obstacles and thus ‘trust’ also became a key concept in European integration law based on a loose, albeit founding idea of solidarity. More recently, in the Budget Conditionality Case,⁴ concerning the lack of compliance in Hungary and Poland with the rule of law and values and whether these countries would be disqualified for funding, the AG was quite clear about the need to respect EU values Article 2 TEU. Specifically, AG Campos Sánchez-Bordona held that in the specific case of Hungary:

Financial conditionality establishes a link between solidarity and responsibility. The European Union transfers funds from its budget to Member States provided that the money is spent responsibly, which means spending it in accordance with EU values, such as the rule of law. Only if the budget is implemented in accordance with EU values will there be sufficient mutual trust between Member States [...]⁵

In other words, the idea of solidarity is also linked to the EU values and the responsibility of the Member States to uphold these values.

The aim of this article is to elucidate the multifaceted notion of solidarity. While the notion of solidarity is mentioned several times in the Treaty, it seems clear that solidarity has a broader conceptual meaning than simply that of a technical legal concept. In this article, I will examine the constitutional meaning of solidarity by first discussing the concept of solidarity properly and thereafter looking at its similarities with other constitutional notions, such as the question of constituent power and that of the broader constitutional question of non-domination.

In other words, the article aims to discuss the constitutional meaning of solidarity and try to pinpoint overlaps between solidarity and other constitutional theory concepts.

The article is structured as follows. The second section looks at solidarity as a constitutional concept and tries to briefly trace its origin and address the question as to why solidarity is an important constitutional principle. The third part moves on and discusses the idea of constituent power and non-domination in the broader context of solidarity. These concepts are relevant in the context of solidarity, as they both concern the wider question of a collective and what the collective ought to do respectively. The fourth part concludes with some reflections on the similarities between solidarity and the debate on constituent power and non-domination respectively.

2 SOLIDARITY AS A CONCEPT

What is meant by solidarity as a concept in EU law? According to Andrea Sangiovanni, solidarity in the EU could be divided into roughly two parts. The first part defines principles for relations between Member States (Member State solidarity), and the second part governs our relations with European citizens and residents (transnational solidarity).⁶ For instance,

⁴ Opinion of AG Campos Sánchez-Bordona in Case C-156/21 *Hungary v Parliament and Council* EU:C:2021:974; Opinion of AG Campos Sánchez-Bordona in Case C-157/21 *Poland v Parliament and Council* EU:C:2021:978. See case note Andi Hoxaj, ‘The CJEU Validates in C-156/21 and C-157/21 the Rule of Law Conditionality Regulation Regime to Protect the EU Budget’ (2022) 5(1) *Nordic Journal of European Law* 131.

⁵ Opinions of AG Campos Sánchez-Bordona in cases C-156/21 and C-157/21 (n 4).

⁶ Andrea Sangiovanni, ‘Solidarity in the European Union’ (2013) 33(2) *Oxford Journal of Legal Studies* 213.

Sangiovanni mentions social insurance schemes are an example of social justice systems. The principle of solidarity is also a vertical notion. For example, the question of Member States' responsibility qua not only to the EU but also vis-à-vis other Member States is reflected in the EU's defense policies as well as broader questions pertaining to the EU's migration and climate policies and sustainability (turning on the question what the EU *should do*). One of the most interesting references in a constitutional context is Article 222 TFEU. This provision stipulates that the EU and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or manmade disaster. Another key provision concerning solidarity is Article 80 TFEU which states that solidarity should guide the EU's action in the area of asylum law.⁷ Also Article 67 TFEU uses the vocabulary of solidarity, and states inter alia, that the EU shall 'ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals'. The idea of solidarity was highlighted in the Covid pandemic which was considered as a successful experiment, centered on the practical and symbolic reconstruction of cross-national solidarity and bonding.⁸ Thus, the notion of solidarity is central across many EU policy fields such as in EU migration policies, in EU defence policies and also EU energy policies (Article 194 TEU).⁹

At the macro level, Margret Kohn has described solidarity as a civic virtue.¹⁰ Likewise, Lawrence Wilde observes that '[i]n essence, solidarity is the feeling of reciprocal sympathy and responsibility among members of a group which promotes mutual support'.¹¹ Wilde discusses the potential of the EU in extending solidarity and points at the central place of solidarity in the writings of Jürgen Habermas, who pointed at the EU as a potential for developing a post-national conception of citizenship.¹² For Habermas, solidarity is the reversed side of justice and a realization of a general will formation.¹³ Solidarity in the EU framework seems to relate to the EU itself: the Member States are required to show solidarity towards the EU. In this context it is often difficult to clearly discern solidarity and the principle of loyalty.¹⁴ Solidarity then, like loyalty, becomes a governance technique in the EU.¹⁵ For example, loyalty in EU governance is often described as a system-building component based on identity, solidarity and trust.¹⁶ Moreover, the EU Court has for a long

⁷ See 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).

⁸ Maurizio Ferrera, 'The European Union and cross-national solidarity: safeguarding 'togetherness' in hard times' (2023) 81(1) *Review of Social Economy* 105.

⁹ See the article by Bergström, in this Special Issue.

¹⁰ Margaret Kohn, 'Radical republicanism and solidarity' (2022) 21(1) *European Journal of Political Theory* 25.

¹¹ Lawrence Wilde, 'The Concept of Solidarity: Emerging from the Theoretical Shadows?' (2007) 9(1) *The British Journal of Politics and International Relations* 171.

¹² *ibid.*, and 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).

¹³ *ibid.*

¹⁴ See e.g., Marcus Klamert, 'Loyalty and Solidarity as general principles' in Katja S Ziegler, Päivi J Neuvonen, and Violeta Moreno-Lax (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar 2022).

¹⁵ On governance as a technique, see e.g., Paul James Cardwell, 'Governance as the meeting place of EU law and politics' in Paul James Cardwell and Marie-Pierre Granger (eds), *Research Handbook on the Politics of EU Law* (Edward Elgar 2020).

¹⁶ Göran von Sydow, 'Trust and Crises in the EU: Exit, Voice and Loyalty' in Antonina Bakardjieva

time been an active player with regard to determining the values to be promoted by the EU, where non-discrimination and dignity have played a crucial role.¹⁷ The EU Court has read values into the idea of loyalty as a holistic mechanism for maintaining and establishing continuing European integration. Many commentators point at the similarities between loyalty and solidarity. Yet, while loyalty is codified in Article 4(3) TEU, it is also a general principle of EU law and, as such, impacts almost all EU law. Solidarity is also a value of the EU, as such it is mentioned in Article 2 TEU. According to Marcus Klamert, solidarity is more horizontal in its application as compared to loyalty.¹⁸ While solidarity is also a vertical concept in connection with the Rule of Law crisis in the EU, we have seen a discussion of the lack of solidarity.¹⁹ For example, in the *Commission v Poland* case concerning refugee quotas, the Court points at the importance of the principle of solidarity and fair sharing of responsibilities between the Member States.²⁰

Interestingly, as Luigi Corrias has explained it, the basic idea underlying solidarity is usually traced back to Roman law, i.e. much longer back in history than that of the French revolution or the writings of Emile Durkheim in the 1890s.²¹ While Durkheim famously developed solidarity as a sociological concept, HLA Hart criticized Durkheim and compared his notion of solidarity to Lord Devlin's enforcement of morals.²² Hart criticized Durkheim's claims that 'mechanical solidarity', springs from men's resemblances and the other, 'organic solidarity', from their differences and interdependence.²³ Interestingly, Hart dismissed solidarity as a moral principle that is not useful in his view, although we may actually ask what is so different from his rule of recognition. Solidarity in the periphery, we can call it, as the duty to obey the law, relies on the fact that others comply with the law.

Yet the idea of solidarity is not new. In Roman Law, the *obligatio in solidum*, each person was individually responsible for the liability of the group; i.e., everybody was liable *in solidum* (= for the whole).²⁴ Solidarity in this regard means that the EU Member States are expected to show solidarity towards the EU and towards one another. Recently, Eleni Karageorgiou and Gregor Noll have interestingly characterized solidarity as an alignment principle, which reaffirms the hard borders of the EU where solidarity is linked to the idea of a 'we against

Engelbrekt, Niklas Bremberg, Anna Michalski, and Lars Oxelheim (eds), *Trust in the European Union in Challenging Times* (Palgrave Macmillan 2019).

¹⁷ See, for example, Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd. v Grogan* EU:C:1991:378; Case C-36/02 *Omega Spielballen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* EU:C:2004:614; Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* EU:C:2010:806.

¹⁸ See Klamert (n 14) 124-125.

¹⁹ Xavier Groussot and Johan Lindholm, 'General principles: taking rights seriously and waving the rule of law stick in the European Union' in Katja S Ziegler, Päivi J Neuvonen, and Violeta Moreno-Lax (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar 2022).

²⁰ Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* EU:C:2020:257.

²¹ On mechanical and organic solidarity in Durkheim's theory see Jeannette L Nolen, 'Mechanical and organic solidarity' (Encyclopaedia Britannica) <<https://www.britannica.com/topic/mechanical-and-organic-solidarity>> accessed 24 April 2023. See also Luigi Corrias, 'Solidarity and Community' (2021) 50(2) *Netherlands Journal of Legal Philosophy* 129.

²² HLA Hart, 'Social Solidarity and the Enforcement of Morality' (1967) 35(1) *The University of Chicago Law Review* 1.

²³ *ibid* 5.

²⁴ *ibid*.

them', i.e., the outsiders.²⁵ Relatedly, Mette Eilstrup-Sangiovanni has pointed out that the growing politicization of immigration and asylum policies and fueled fears of terrorism and transnational crime, there is no 'European fortress'.²⁶ Instead, she argues that there are 27 fortresses behind which individual Member States are increasingly barricading themselves, so in this context not showing solidarity towards the EU nationalistic selfishness. So, while solidarity as understood in sociology as a community concept based on integration, solidarity in EU law seems simultaneously to be a concept for further EU integration.

Moreover, it has been suggested that the pursuit of human solidarity would also require an explicit ethical movement, and points at the idea proposed by Zygmunt Bauman and others of a search for a common humanity.²⁷ In the specific context of the EU this approach has been criticized by more statist oriented theorists suggesting that a cosmopolitan approach which places solidarity in a common humanity disregards the importance of nations as a basis of solidarity.²⁸ Conversely it could be argued that the whole point of solidarity in the context of the EU is that it exists across the borders.²⁹

3 CONSTITUENT POWER AND NON-DOMINATION

In what follows, I will engage with the idea of constituent power that is often considered an important part of constitutional law theory. Constituent power, however, speaks about the people which is a major question and highly important with regard to solidarity.

As noted above, the idea of a community is central when discussing solidarity. In the classic constitutional debate, the starting point for discussing 'constituent power' is 'We the people', where the collective self is exactly the agency that the constitutive power claims to exhibit.³⁰ According to the idea of constituent power, such power is superior to the constitution and any constituted powers and may subvert or alter them at any time.³¹ The concept refers to some special type of collective agency, and we may therefore ask what this might mean beyond the nation state. For example, Peter Niesen explains how the constituent power in state federations lies with the peoples of their constituent states.³² The idea of constituent power is the original, democratic power of the people who confer all authority upon the constitution and, directly or indirectly, on all subsequent legislation. Others, such as Corrias, refer to the doctrine of constituent power to grasp the founding potential of solidarity and where solidarity is born in the smallest actions that slowly but steadily build an atmosphere of trust.³³ For Hans Lindahl, for example, constituent power is a theory that acknowledges that the question about the authority of a constitution can never be fully

²⁵ Eleni Karageorgiou and Gregor Noll, 'What Is Wrong with Solidarity in EU Asylum and Migration Law?' (2022) 4(2) *Jus Cogens* 131.

²⁶ Mette Eilstrup-Sangiovanni, 'Re-bordering Europe? Collective Action Barriers to "Fortress Europe"' (2021) 28(3) *Journal of European Public Policy* 447.

²⁷ Zygmunt Bauman, *Community: Seeking Safety in an Insecure World* (Polity 2002). Also cited in Wilde (n 11).

²⁸ Damian Chalmers, 'Constituent Power and the Pluralist Ethic' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008).

²⁹ Indeed, this was something that Ruti Teitel argued, in the context of international law, in her book on *Humanity's Law* already in 2011, Ruti G Teitel, *Humanity's Law* (Oxford University Press 2011).

³⁰ *ibid.*

³¹ *ibid.*

³² Peter Niesen, 'Two Cheers for Lost Sovereignty Referendums: Campaigns for Independence and the *Pouvoir Constituant Mixte*' (2022) 23(1) *German Law Journal* 44.

³³ Corrias (n 21).

dissociated from the question about its genetic conditions.³⁴ In the context of the EU, this is interesting from the perspective of solidarity and the EU values as well as the question as to what community we are discussing. The second question I will focus on in this section is that of republican theory and the question of non-domination more specifically, which seems highly relevant with regard to transnational relations based on solidarity.

3.1 CONSTITUENT POWER

The idea of constituent power has to do with the origin of the constitution and where the idea of a ‘pouvoir constituant’ signals the historicity of the constitution.³⁵ For Mattias Kumm, ‘the idea of constituent power as a normative concept has a limited but important justificatory role to play within the context of a post-national and post-positivism conception of constitutionalism’.³⁶ So how relevant is the concept of constituent power today? David Dyzenhaus for example, claims that understanding the authority of law as internal to the legal order means that constituent power does not add much.³⁷ Yet Alexander Somek argues that “constituent power” explains how a constitution can be “mine” or “yours” [; it] goes to the heart of self-determination’.³⁸ In this way, constituent power is a shared exercise of both the nation state and the international community.³⁹

Moreover, the infamous jurist Carl Schmitt, has had a huge impact on the interpretation of constituent power as he saw it as no different from sovereignty (and therefore the question of exception) and which has cast a shadow on the concept of a constituent power.⁴⁰ Interestingly, constituent power is important for Emilios Christodoulidis’ in his recent work on what it means to have a redress of law.⁴¹ Specifically, Christodoulidis turns to Antoni Negri, who argued that constituent power poses a ‘radical question’, ‘insofar as it constitutes the political from nothingness’.⁴² Christodoulidis points at Schmitt who stressed the formless nature of constituent power, as this power can ‘change its forms and continually give itself new forms of political existence’.⁴³ From the perspective of a redress of law it makes it impossible to clarify what exactly it entails. Christodoulidis intends to adopt a radical take, but it is unclear to me what is radical with constituent power if it is a redress of law that is sought after. A ‘redress of law’, one would assume, would turn on what it means to have a due process in the present.

³⁴ Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge University Press 2018) 401. Also discussed in Ester Herlin-Karnell, Gerard Conway and Aravind Ganesh, *European Union Law in Context* (Hart Publishing 2021), Chapter 2.

³⁵ Alexander Somek, ‘Constituent power in National and Transnational contexts’ (2012) 3(1) *Transnational Legal Theory* 31.

³⁶ Mattias Kumm, ‘Constituent power, cosmopolitan constitutionalism and post-positivist law’ (2016) 14(3) *International Journal of Constitutional Law* 697.

³⁷ David Dyzenhaus, ‘Constitutionalism in an Old Key: Legality and Constituent power’ (2012) 1(2) *Global Constitutionalism* 229, also discussed in Kumm (n 36).

³⁸ Somek (n 35).

³⁹ Kumm (n 36).

⁴⁰ Joel I Colón-Ríos et al, ‘Constituent power and its institutions’ (2021) 20(4) *Contemporary Political Theory* 926.

⁴¹ Emilios Christodoulidis, *The Redress of Law* (Cambridge University Press 2021), Chapter 2.

⁴² *ibid.* See also Massimo Fichera, ‘The Idea of Discursive Constituent Power’ (2021) 3(2) *Jus Cogens* 159.

⁴³ Benjamin Ask Popp-Madsen, ‘Non-domination and constituent power: Socialist republicanism versus radical democracy’ (2022) *Philosophy and Social Criticism*

<<https://journals.sagepub.com/doi/10.1177/01914537221107401>> accessed 24 April 2023.

While these are broad questions, and more concretely in the context of the EU, Marcus Patberg has argued that constituent power is a democratic category of crucial importance for our understanding of legitimate constitution making and constitutional change.⁴⁴ For Patberg, constituent power stands for the democratic entitlement and capacity of the people to give themselves a constitution, and, in this way, to determine the structure and competencies of public authorities. As such, it describes a dimension of popular sovereignty, which, as a whole, includes democratic control of both constitutional and normal politics. Patberg claims that although the EU has clearly taken on a constitutional character this is not reflected in the institutional setup or the possibility of citizens having any real impact. On the contrary, the phenomenon of constitutional mutation increasingly deepens the decoupling of the EU's constitutional development from democratic control. This, he argues, leads to a growing dissatisfaction with and resistance to European integration; this can be seen, for example, with Brexit and the rule of law crisis in Poland and Hungary.⁴⁵ The logic of popular sovereignty is that the people are the source of all political authority in the polity; therefore, the right to rule derives from subjects being part of a collective.⁴⁶ And this very collective is interesting and relevant with regard to the EU's ambition of creating solidarity and upholding EU values in the Member States.

More specifically, why is constituent power still interesting in the context of constitutionalism and the EU? I argue that the question of constitutionalism in the framework of EU is better understood through the notion on non-domination, which allows for a clearer link with solidarity and EU values.

3.2 DOMINATION AS SUCH

The idea of non-domination is particularly interesting in the context of constitutionalism. How can there be a model of political constitutionalism that is not constrained to the nation state? For Kumm, 'any claim by a state to authoritatively and unilaterally settle justice sensitive externalities in relation to other states amounts to domination if it does not accept a system of international law with a sufficiently robust structure'.⁴⁷ In other words, there would be a duty to enter into an international community. Kumm calls this the notion of reciprocal compliance.⁴⁸ Likewise, Sangiovanni mentioned above, links the question of solidarity to the question of fair return as a question of reciprocity and trust.

Thus, in Philip Pettit's terms, domination means something along the lines of 'living under any agent who possesses the capacity to interfere with choices in an arbitrary manner'.⁴⁹ To be free, therefore, requires one to consciously have the personal, natural, and social resources necessary to be able to satisfy one's will. With arbitrary power, Pettit does not mean a decision that is based upon the subjective judgment or preference of the agent, as such, but rather one based solely upon the agent's pleasure.⁵⁰ This approach has recently

⁴⁴ Markus Patberg, *Constituent Power in the European Union* (Oxford University Press 2020).

⁴⁵ *ibid.*

⁴⁶ Jan Pieter Beetz and Enzo Rossi, 'The EU's democratic deficit in a realist key: multilateral governance, popular sovereignty and critical responsiveness' (2017) 8(1) *Transnational Legal Theory* 22.

⁴⁷ Kumm, 2016 (n 36).

⁴⁸ *ibid.*

⁴⁹ Philip Pettit, *On the People's Terms* (Cambridge University Press 2012), Chapter 1.

⁵⁰ *ibid.*

been criticized by Michael Thompson who suggested that the classic focus on arbitrariness as the central element of domination is mistaken, and what is needed is a Weberian view of domination as informed by societal strictures and centered on his distinction between the ordinary and the extraordinary.⁵¹ In addition, Thompson argues that domination in the modern world is often not arbitrary, but very strategic and routinized.⁵²

While many scholars have criticized the republican take on freedom — that is, democracy as grounded in freedom defined as non-domination, rather than equality — more recently, the question of non-domination has reached the limelight anew, as a more general stricture for understanding power structures.⁵³ Pettit suggests an ‘eye-ball test’ as a criterion for social non-domination, i.e., depending on social context, we can look people in the eyes without the need for ingratiation or deterrence.⁵⁴ He is criticized for not taking into consideration the complex reality of choice and thereby fails to sufficiently consider how choice itself may, in some cases, be an important aspect of dominating structures.⁵⁵ Viewed from the lens of law, this debate seems to be related to the discussion on the value of constitutionalism, as such, where for instance constitutionalism denotes a justificatory approach which does not justify constitutions merely by pointing out the desirability of the contingent desirable outcomes of constitutions.⁵⁶ Furthermore, Martti Koskenniemi has noted that ‘what is important is the use of the constitutional vocabulary to express a fundamental critique of present politics’.⁵⁷

In addition, the idea of non-domination has a social dimension that connects to solidarity. After all, going back to Rousseau, republicanism was to constitute a kind of politics, culture, and consciousness wherein relationships based on domination were to be eliminated. But for Rousseau, as Benjamin Popp-Madsen explains, domination was not simply an analytic category, but rather was inherent in socio-historical constructions of social formations and concerns hierarchical—structural relationships.⁵⁸ In the framework of the EU, this power relationship seems contingent on the principle of proportionality and solidarity. Proportionality is a tool for checks and balances; if the legislator has not done its job properly proportionality is important as an extra safeguard.⁵⁹ Surely, one would not like to have coercive sanctions or intrusive security measures without the principle of proportionality. Without going into the well-trodden debate on proportionality, my point here is concerning the relationship between solidarity and non-domination. Again, what exactly is solidarity? In order to constitute a robust concept in EU law it cannot be utilized in a dominating or a

⁵¹ Steven Klein, ‘Between Charisma and Domination: On Max Weber’s Critique of Democracy’ (2017) 79(1) *The Journal of Politics* 179.

⁵² Michael J Thompson, ‘Reconstructing Republican Freedom: A Critique of the Neo-republican Concept of Freedom as Non-domination’ (2013) 39(3) *Philosophy and Social Criticism* 277.

⁵³ *ibid.*

⁵⁴ Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (Norton 2014).

⁵⁵ Thompson (n 52).

⁵⁶ Alon Harel, ‘Constitutionalism and Justice’ in Ester Herlin-Karnell, Matthias Klatt, and Héctor A Morales Zúñiga (eds), *Constitutionalism Justified* (Oxford University Press 2019).

⁵⁷ Martti Koskenniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization’ (2006) 8(1) *Theoretical Inquiries in Law* 9, 35-36; also discussed in Vicki C Jackson, ‘Paradigms of Public Law: Transnational Constitutional Values and Democratic Challenges’ (2010) 8(3) *International Constitutional Law Journal* 517.

⁵⁸ Popp-Madsen (n 43).

⁵⁹ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012).

disproportionate manner. In other words, solidarity in the EU needs to be in line with the EU values and employed in a non-dominating way (encompassing also proportionality).

This brings us back to the question of solidarity and the external dimension. The EU seeks to promote its values abroad, Article 3(5) TEU. It is only internally that solidarity appears as a constitutional duty. Likewise, in the name of solidarity, Member States are expected to help through various means in the situation of armed aggression, terrorist attack, or a natural disaster (Article 222 TFEU and also Article 42 (7) TEU), as mentioned above. Finally, the whole EU is underpinned by a claimed solidarity principle, but in practice, the idea of solidarity is varied and used inconsistently even if the EU Court insists that it is a justiciable principle. The EU values and objectives tell us that not only shall the EU and its various policies be based on solidarity and trust but the EU should also promote its values abroad. Thus, EU Member States owe solidarity toward one another if taking the Treaty seriously, and externally they shall promote it as one of the values of the EU.

4 CONCLUDING REMARKS

The idea of solidarity is central in EU law both as a constitutional concept and as a governing device. Therefore, the ideal and practices of solidarity must be utilized in a non-dominating way in order to ensure freedom and equality for both EU Member States and their citizens. In EU constitutional theory, we use many concepts such as solidarity, constituent power, and non-domination, but we seldom discuss what the notions are taken to mean, how they are related, and how they should be understood. This article has tried to offer a conceptualization of these notions. The most important message seems to be that the rhetoric of solidarity should not serve as a smokescreen for excessive EU action but should mean something. And this ‘something’ needs to be in line with the EU’s values and idea of fairness and justice. Moreover, the idea of the collective is reflected in both the solidarity principle and the question of constituent power. In the case of the EU however, the constituent power concept has become somewhat redundant and, as is argued in this article, the interesting question lies elsewhere, namely the interconnection between solidarity and non-domination.

LIST OF REFERENCES

Barak A, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012)

DOI: <https://doi.org/10.1017/cbo9781139035293>

Bauman Z, *Community: Seeking Safety in an Insecure World* (Polity 2002)

Beetz JP and Rossi E, 'The EU's democratic deficit in a realist key: multilateral governance, popular sovereignty and critical responsiveness' (2017) 8(1) *Transnational Legal Theory* 22

DOI: <https://doi.org/10.1080/20414005.2017.1307316>

Cardwell PJ, 'Governance as the meeting place of EU law and politics' in Cardwell PJ and Granger MP (eds), *Research Handbook on the Politics of EU Law* (Edward Elgar 2020)

DOI: <https://doi.org/10.4337/9781788971287.00010>

Chalmers D, 'Constituent Power and the Pluralist Ethic' in Loughlin M and Walker N (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008)

DOI: <https://doi.org/10.1093/acprof:oso/9780199552207.003.0016>

Christodoulidis E, *The Redress of Law* (Cambridge University Press 2021)

DOI: <https://doi.org/10.1017/9781108765329>

Colón-Ríos JI et al, 'Constituent power and its institutions' (2021) 20(4) *Contemporary Political Theory* 926

DOI: <https://doi.org/10.1057/s41296-021-00467-z>

Corrias L, 'Solidarity and Community' (2021) 50(2) *Netherlands Journal of Legal Philosophy* 129

DOI: <https://doi.org/10.5553/njlp/221307132021050002003>

Dyzenhaus D, 'Constitutionalism in an Old Key: Legality and Constituent power' (2012) 1(2) *Global Constitutionalism* 229

DOI: <https://doi.org/10.1017/s2045381712000032>

Eilstrup-Sangiovanni M, 'Re-bordering Europe? Collective Action Barriers to "Fortress Europe"' (2021) 28(3) *Journal of European Public Policy* 447

DOI: <https://doi.org/10.1080/13501763.2021.1881585>

Ferrera M, 'The European Union and cross-national solidarity: safeguarding 'togetherness' in hard times' (2023) 81(1) *Review of Social Economy* 105

DOI: <https://doi.org/10.1080/00346764.2021.2024872>

Fichera M, 'The Idea of Discursive Constituent Power' (2021) 3(2) *Jus Cogens* 159
DOI: <https://doi.org/10.1007/s42439-021-00042-5>

Forst R, 'A Critical Theory of Transnational (In-) Justice: Realistic in the Right Way' in Brooks T (ed), *The Oxford Handbook of Global Justice* (Oxford University Press 2021)
DOI: <https://doi.org/10.1093/oxfordhb/9780198714354.013.22>

Groussot X and Lindholm J, 'General principles: taking rights seriously and waving the rule of law stick in the European Union' in Ziegler KS, Neuvonen PJ, and Moreno-Lax V (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar 2022)
DOI: <https://doi.org/10.4337/9781784712389.00026>

Habermas J, 'Justice and solidarity: On the discussion concerning Stage 6' in Wren TE (ed), *The moral domain: Essays in the ongoing discussion between philosophy and the social sciences* (MIT Press 1990)

Harel A, 'Constitutionalism and Justice' in Herlin-Karnell E, Klatt M, and Morales Zúñiga HA (eds), *Constitutionalism Justified* (Oxford University Press 2019)
DOI: <https://doi.org/10.1093/oso/9780190889050.003.0010>

Hart HLA, 'Social Solidarity and the Enforcement of Morality' (1967) 35(1) *The University of Chicago Law Review* 1.
DOI: <https://doi.org/10.2307/1598946>

Herlin-Karnell E, Conway G, and Ganesh A, *European Union Law in Context* (Hart Publishing 2021)

Hoxaj A, 'The CJEU Validates in C-156/21 and C-157/21 the Rule of Law Conditionality Regulation Regime to Protect the EU Budget' (2022) 5(1) *Nordic Journal of European Law* 131
DOI: <https://doi.org/10.36969/njel.v5i1.24501>

Jackson VC, 'Paradigms of Public Law: Transnational Constitutional Values and Democratic Challenges' (2010) 8(3) *International Constitutional Law Journal* 517
DOI: <https://doi.org/10.1093/icon/moq031>

Karageorgiou E and Noll G, 'What Is Wrong with Solidarity in EU Asylum and Migration Law?' (2022) 4(2) *Jus Cogens* 131
DOI: <https://doi.org/10.1007/s42439-022-00059-4>

Karageorgiou E, *Rethinking solidarity in European asylum law: A critical reading of the key concept in contemporary refugee policy* (PhD Thesis, Media-Tryck Lund University 2018)

Klamert M, 'Loyalty and Solidarity as general principles' in Ziegler KS, Neuvonen PJ, and Moreno-Lax V (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar 2022)

DOI: <https://doi.org/10.4337/9781784712389.00014>

Klein S, 'Between Charisma and Domination: On Max Weber's Critique of Democracy' (2017) 79(1) *The Journal of Politics* 179

DOI: <https://doi.org/10.1086/687323>

Kohn M, 'Radical republicanism and solidarity' (2022) 21(1) *European Journal of Political Theory* 25

DOI: <https://doi.org/10.1177/1474885119881313>

Koskenniemi M, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2006) 8(1) *Theoretical Inquiries in Law* 9

DOI: <https://doi.org/10.2202/1565-3404.1141>

Kumm M, 'Constituent power, cosmopolitan constitutionalism and post-positivist law' (2016) 14(3) *International Journal of Constitutional Law* 697

DOI: <https://doi.org/10.1093/icon/mow050>

Lindahl H, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge University Press 2018)

DOI: <https://doi.org/10.1017/9781316819203>

Mantu S and Minderhoud P, 'EU citizenship and social solidarity' (2017) 24(5) *Maastricht Journal* 703

DOI: <https://doi.org/10.1177/1023263x17741271>

Niesen P, 'Two Cheers for Lost Sovereignty Referendums: Campaigns for Independence and the Pouvoir Constituant Mixte' (2022) 23(1) *German Law Journal* 44

DOI: <https://doi.org/10.1017/glj.2022.7>

O'Leary S, 'Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union' in de Búrca G (ed), *EU law and the welfare state: In search of solidarity* (Oxford University Press 2005)

DOI: <https://doi.org/10.1093/acprof:oso/9780199287413.003.0003>

Patberg M, *Constituent Power in the European Union* (Oxford University Press 2020)

DOI: <https://doi.org/10.1093/oso/9780198845218.001.0001>

Pettit P, *On the People's Terms* (Cambridge University Press 2012)

DOI: <https://doi.org/10.1017/CBO9781139017428>

— —, *Just Freedom: A Moral Compass for a Complex World* (Norton 2014).

Popp-Madsen BA, 'Non-domination and constituent power: Socialist republicanism versus radical democracy' (2022) *Philosophy and Social Criticism*

<<https://journals.sagepub.com/doi/10.1177/01914537221107401>> accessed 24 April 2023

DOI: <https://doi.org/10.1177/01914537221107401>

Sangiovanni A, 'Solidarity in the European Union' (2013) 33(2) Oxford Journal of Legal Studies 213

DOI: <https://doi.org/10.1093/ojls/gqs033>

Somek A, 'Constituent power in National and Transnational contexts' (2012) 3(1) Transnational Legal Theory 31

DOI: <https://doi.org/10.5235/tlt.3.1.31>

Teitel RG, *Humanity's Law* (Oxford University Press 2011)

DOI: <https://doi.org/10.1093/acprof:oso/9780195370911.001.0001>

Thompson MJ, 'Reconstructing Republican Freedom: A Critique of the Neo-republican Concept of Freedom as Non-domination' (2013) 39(3) Philosophy and Social Criticism 277

DOI: <https://doi.org/10.1177/0191453712473081>

von Sydow G, 'Trust and Crises in the EU: Exit, Voice and Loyalty' in Bakardjieva Engelbrekt A, Bremberg N, Michalski A, and Oxelheim L (eds), *Trust in the European Union in Challenging Times* (Palgrave Macmillan 2019)

DOI: https://doi.org/10.1007/978-3-319-73857-4_10

Wilde L, 'The Concept of Solidarity: Emerging from the Theoretical Shadows?' (2007) 9(1) The British Journal of Politics and International Relations 171

DOI: <https://doi.org/10.1111/j.1467-856x.2007.00275.x>