

# Inscribing Solidarity in Labor Law

## *Promise and Limitations*

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### 1.1 OVERVIEW: INSCRIBING SOLIDARITY IN THE DEBATES ON LABOR LAW

What solidarity means and the impact this principle exerts in lived experiences (Borgmann-Prebil and Ross 2010) have long been themes of inquiry – and debate – not only for academics but also for public institutions and social actors. The last decade has been a time of fundamental transformation in societies due to a chain of economic and social crises that have brought about repeated humanitarian challenges and systemic difficulties along with an increase in inequality in many contexts.<sup>1</sup> Actors and institutions have often relied on the solidarity principle in their response to these new challenges but that reliance poses as many new questions as it answers. Some of these questions are related to the fact that invocations of the solidarity principle have thus far largely failed to effectively reverse the tendency toward growing inequality. However, many important regulations and policies have been elaborated under the rubric of the pursuit of solidarity. Exactly how this principle can be put to use or “inscribed” in concrete regulatory approaches and forms of action is the central question underlying this book.

Among the perspectives analyzed in these pages is an examination of how the use of a given “label” for concerns and principles underlying new regulatory objectives or arrangements in effect signifies the very consequential choice by the subjects of a paradigm for their endeavors transforming or implementing concrete policies and behaviors (Collins, Lester, & Mantouvalou 2018: 7). The reliance of actors on the solidarity principle has broad and complex implications that include overarching directions of evolution within democracy itself, conditioning how actors respond to the crisis of democratic capitalism (Wolgang 2011). In such endeavors, this principle

<sup>1</sup> See Salverda et al. 2016.

has served to support efforts to guarantee that dignity and human rights form central parts of contemporary democracy (Rodotà 2018: 149–150).

As we show, however, the reliance on this paradigm has also introduced certain significant challenges for the proponents of progressive and socially inclusive outcomes. Much of our work in this volume concerns ways in which the adoption of the solidarity label has shaped efforts to pursue equality, examining the implications of the solidarity–equality nexus for debates in labor law.

In the context of the neoliberal era, the use of the label of solidarity as a principle underpinning policies intended to address the needs and problems of groups and individuals in need has posed the challenge of how this principle can be “inscribed” in new programmatic formulations by the European Union (EU) and other transnational entities. The commitment to solidarity holds humanitarian advantages in its ability to focus attention on a wide array of vulnerable groups and also some political advantages in its capacity to elicit support from actors outside the social democratic core of the historic proponents of worker interests. However, it is with some difficulty that the solidarity principle is translated into very concrete policies, laws, and institutions – the process labeled here as that of *inscription*. Those actors that have been engaged in the agenda of forging – and interpreting – new directions in labor law have often needed to search out ways to formalize the implications of solidarity in new elaborations of global, transnational, and national regulatory systems.

An understanding of the solidarity principle and its implications is of vital importance for a fully adequate understanding of recent debates and developments in labor law, particularly with regard to sources of regulation and, crucially, enforceability. Both hard-law and soft-law regulations have often been framed as ways to formalize this principle, in effect inscribing solidarity in new regulatory outcomes. A central factor in the role played by solidarity is the increasing use of difficult-to-enforce soft-law instruments in regulatory systems. And even when the principle is rendered in various hard-law inscriptions, these have often suffered from legal deficits in their enforceability. The challenge of enforceability is a major theme in our work.

The growing importance of the solidarity principle as a label underscores the great significance of the relationship between this principle and the fundamental right of equality and nondiscrimination, particularly in the construction of an inclusive solidarity. In pioneering work on this issue, Catherine Barnard argues that solidarity is part of the process of implementing equality but goes beyond that (Barnard 2004: 14). In his broad examination of equality and discrimination, Bob Hepple has defined equality through a distinction between four types: formal equality or consistency, substantive equality understood as equality of results, equality of opportunity, and equality of human dignity.<sup>2</sup> All of these understandings of equality are of potential relevance for the solidarity principle.

<sup>2</sup> Hepple 2001: 6–12.

A broad focus on inscriptions of solidarity thus leads us into a new and important terrain that explores the interactions – in application – between the principles of solidarity and equality, underscoring the usefulness of efforts to build synergies between those two legal framings or “labels” for initiatives designed to protect vulnerable sectors of the population, constructing an inclusive solidarity. In practice, actors have faced choices about how to frame policies that address crucial social needs. For example, the treatment of conciliation between life and work in the Charter of Fundamental Rights of the EU is undertaken in the Chapter on Solidarity, not in the elements of the Charter devoted to the right of equality and non discrimination.

The volume’s contributions cover developments over the last couple of decades with a multilevel approach that explores dynamic interactions in pursuing and adjudicating the solidarity principle in complex models of regulation in which national dynamics are connected with global (Blackett & Trebilcock 2015) and transnational (Bogg, Costello, & Davies 2016) arrangements and outcomes. The guiding conceptualization of the volume’s scholarship is multilevel, as is reflected not only in the focus on interactions between regulatory systems as such but also in the study of dynamics involving actors and institutions that operate locally, nationally, and in supranational arenas (Craig & Lynk 2006). Our analysis of inscriptions of solidarity examines hard- and soft-law instruments at the transnational level – for example in the International Labor Organization (ILO) and EU – and within national cases. The inscription of solidarity is also studied through its relation to the application of recognized freedoms and rights including, among others, the freedom of circulation; equality and nondiscrimination; freedom of association; the welfare state and dignity (Hepple 2015).

Our focus in *inscribing solidarity* looks well beyond the response to crisis and efforts to scale back labor rights. In examining “inscriptions” of the solidarity principle, and the challenges encountered in attempts to render this important principle as law, policy, or practice, we turn to a broad set of concrete questions and dynamics that bring to light the opportunities and difficulties posed by framing progressive initiatives as an application of the solidarity principle. I now turn to an elaboration of several key issues and challenges in the inscription of solidarity as a way to elucidate the central analytical challenges to be addressed in studying how reliance on the solidarity principle conditions various elements of the broader effort to address the concerns and needs of socially vulnerable groups.

## 1.2 SOLIDARITY AS LABEL: FORMALIZING CONTENTS OF THE PRINCIPLE

The intellectual foundations for what we do in this volume involve a long and distinguished tradition of thought. Solidarity was classically defined by Bourgeois<sup>3</sup> as a concept without precision and scope, but that can be summarized as the “mutual

<sup>3</sup> Bourgeois 2018.

responsibility between two or more people.” Among the most influential scholarly formulations of the concept, Durkheim wrote that it constitutes “a bond of unity between individuals, united around a common goal or against a common enemy, such as the unifying principle that defines the labor movement.”<sup>4</sup> He connects this with forms of justice, elaborating the distinct notions of “mechanical” and “organic” solidarity. Simmel constructed the notion of sociology of conflict in close connection with the study of within-group and cross-group forms of solidarity in modern societies (Simmel 1908).

The study of solidarity has been an interdisciplinary field in the European intellectual tradition<sup>5</sup> and in legal studies. In the analysis of legal forms and expressions of solidarity, a pioneering contribution has been offered by Rodotà on the constitutionalization of the principle and its enforcement in the EU’s Charter of Fundamental Rights. In his perspective, the connection between solidarity and democracy holds important implications for the future,<sup>6</sup> offering an avenue to the construction of a livelier democracy (Rodotà 2018). Supiot takes the strength of solidarity as a fundamental principle for legal order, with connections to the principles of freedom, equality, and justice in the EU legal order. The relation between the supranational legal order and the national level has been studied as integral to analyses of the frame of principles and rights that regulate labor relations (Prassl: 42) with special emphasis in the Charter of Fundamental Rights (O’Cinneide 2016: 191). Barnard emphasizes the connection of solidarity and legitimacy,<sup>7</sup> while Freedland and Countoris have studied the elaboration of solidarity in policies – in essence what I call here the inscribing of solidarity – as an essential requirement for the re-mutualization of social risk in the European context of economic crisis. Sciarra has studied the reaction of courts against austerity and cutbacks of fundamental social rights as an approach to solidarity. Scholarly work on the construction of solidarity from below by de Sousa Santos and Rodriguez-Garavito (de Sousa Santos and Rodriguez-Garavito 2005: 1–27), on actors working together transnationally (Estlund 2015: 260), or on “voices at work” (Bogg & Novitz 2014), offer significant examples of research on the construction of solidarity from popular actors. The importance of the solidarity principle is both deep and broad, thereby underscoring the importance of our effort in this volume to delineate and analyze how this principle is actually inscribed in concrete policies, legislation, and arrangements,

I identify below the significance of solidarity in the debates on labor law of recent decades. Those debates have dealt with a wide array of issues and dynamics including globalization – with a focus on multinationals and the challenges of freedom of

<sup>4</sup> Durkheim 1933. See Schoenfeld & Meštrović 1989.

<sup>5</sup> Stgermo 2011.

<sup>6</sup> Rodotà 2016.

<sup>7</sup> Barnard 2017.

circulation – climate change and its implications for labor; the technology-induced transition to a new paradigm of labor organization; new forms of organization of the working class; and crucially the increasing prevalence at the transnational level of soft-law regulations in contrast with hard-law ones. The shifting regulatory terrain that these debates seek to understand has been constituted by the outcome of political conflicts over the redefinition, or in some cases the reduction, of existing understandings of social rights. In a very overarching sense, economic and social crises have conditioned such efforts to either redefine or reduce fundamental rights as a consequence of the marketization of society. Whether this process will lead to robust new guarantees and rights for the socially vulnerable or only to an evisceration of pre-existing forms of protection is obviously a matter of broad significance. This is the scenario in which the “inscription” of the principle of solidarity needs to be studied and understood.

A major and very concrete challenge for labor law in this context involves ways of dealing with growing differences or distinctions within the working class that challenge the legal boundaries of work regulation (Fudge, McCrystal, & Sankaran 2006) and the frontiers of labor law (Davidov & Langille 2006). In actual practice, labor law has been immersed in a long and continuous process of segmentation and flexibilization,<sup>8</sup> creating a complex universe of employment relations, in which the application of a long-standing principle that has served worker interests greatly – the right of equality and nondiscrimination – has become increasingly difficult because of the challenges posed by delineating the parameters of comparison between workers in defense of the fundamental right to equal treatment for equal or similar work. The difficulties in applying antidiscrimination policies in a flexible and segmented context also hold consequences for pro-equality policies. It is precisely for this reason that it has become very important to reconstruct the universe of the fundamental right of equality and nondiscrimination with a basis in the fundamental principle of solidarity. Efforts to elaborate very concrete applications of the solidarity principle face the task of finding ways to offer guarantees or forms of protection that can cover what seem to be the waning abilities of the equality and nondiscrimination principles to “do the work” they have done in the past. This is one of the central challenges posed by efforts to inscribe solidarity “rethinking workplace regulation.”<sup>9</sup>

Although inscriptions of solidarity offer new opportunities for the elaboration of social guarantees in the legal and institutional orders, our analysis and earlier work also serve to underscore the value of the fundamental right of equality and nondiscrimination as pillars of a social democratic understanding of rights that has long provided for integrative policies that have in effect provided bases for solidarity. Analytically, the two approaches should be differentiated from one another but in

<sup>8</sup> The increasing trend to formalize the segmentation of workers' rights: López López 2015.

<sup>9</sup> Stone & Arthurs 2013.

actual practice they are often woven together in ways that have been highly useful. Solidarity as a programmatic principle has offered important value to social democracy, especially in order to achieve labor rights, but as our study of solidarity inscriptions demonstrates, if this principle is articulated without an explicit linkage to equality as such, it presents important deficits. These deficits include the lack of accountability and enforceability of many assertions of solidarity, thereby limiting the contribution offered to progress in the implementations of labor rights. Yet despite the existence of such potential deficits, the principle that we study is of potential relevance for a wide range of socioeconomic outcomes that encompass broad patterns in the organization of the economy. In the important literature on *varieties of capitalism*, the impact of solidarity has been studied in analyses of industrial relations, vocational educational, and training and labor institutions (Thelen 2014). Research on such connections offers an interesting approach to study the inscriptions of solidarity.

### 1.3 THE SOLIDARITY ECONOMY AS AN ILO INSCRIPTION: SOFT LAW, SUBSIDIARITY, AND DECENTRALIZATION OF POLICIES

The evolution of the international legal order has as a central feature the move from a hard regulation model to a hybrid one with strong components of soft law. The new generation of ILO Conventions has placed a decreasing emphasis on hard-law guarantees of labor rights, instead turning toward broader soft-law instruments with important consequences in terms of accountability and enforceability. The inscription of solidarity in ILO instruments has contributed to the elaboration of new soft-law instruments but these instruments have lacked certain points of strength of earlier hard-law conventions. The increasing influence of multinationals as powerful actors that put in place transnational arrangements and outcomes has created growing challenges for effectively elaborating an inclusive solidarity in contemporary democracy (López López 2021). It is in the light of this challenge introduced by globalization that the practice of transnational or supranational entities such as the ILO gains special significance.

In the initiatives of the ILO, one of the most important inscriptions of solidarity is the effort to construct what this entity has labeled a *solidarity economy*. Among the main components of this ILO goal are cooperatives emblematic of the approach elaborated in broad but “soft” instruments such as the ILO Declaration of Social Justice for a Fair Globalization, and the ILO 2030 Agenda: A Plan of Action for People, Planet and Prosperity. This last ILO instrument seeks to reinforce the role of cooperatives in a “revitalized Global Partnership for Sustainable Development, based on a spirit of strengthened global solidarity, focused in particular on the needs of the poorest and most vulnerable and with the participation of all countries, all stakeholders and all people.”

Such soft-law regulations, understood here as inscriptions of solidarity, reinforce ILO Recommendation 193 about the Promotion of Cooperatives (2002). The ILO's framing of the significance of cooperatives is quite explicit in underscoring their linkage to the principle of solidarity, specifying that cooperatives offer "the fullest participation in the economic and social development of all people," and defining cooperatives as "stronger forms of human solidarity at national and international levels [that] are required to facilitate a more equitable distribution of the benefits of globalization." This emphasis on cooperatives is intended to promote at least two main concerns of this entity: the spirit embodied in the Declaration of Philadelphia that "labor is not a commodity," and the realization of decent work for workers everywhere as a primary objective of the ILO. In this understanding, cooperatives organize production systems in ways that humanize the workplace (Restakis 2010) and question the concentration of powers by multinationals challenging democratic institutions (Leonard 2019). This framing of the solidarity economy in ways that identify its connection with democracy and equality underscores how the ILO is strongly oriented toward the advancement of solidarity inscriptions. More concretely, the ILO agenda on cooperatives is also intended to foster a form of organization for firms that provides the strongest possible participation of members and the defense of both equality and nondiscrimination for members and workers within these firms. In this and other cases, the promotion of solidarity is understood as a way of assuring quite tangible results in the conditions enjoyed by workers within firms – and in the broader polity.

One important point of the ILO's support for an economic model that enhances the role of cooperatives concerns the value of these organizations for encouraging the modernization of production under new technologies and as a source of decent work. The quality of the work process is among the concerns that the ILO assumes are likely to be addressed in a spirit of solidarity in cooperative enterprises. Thus, for a variety of reasons, the ILO Recommendation encourages governments, worker's associations, and employers' associations to promote cooperatives within the solidarity economy. However, it should be underscored that this broad support for cooperatives is in essence a soft-law recommendation, not a hard-law and enforceable set of requirements for the practices of enterprises.

A separate but crucial theme concerns a key pillar of EU practice: the subsidiarity principle. This principle has been formulated as the orienting framework to regulate the relations between supranational and national level decision-making in the EU. I will turn later to this theme, but for now it is important to note that in effect the subsidiarity approach involves the formulation of soft-law objectives at the EU level and their translation into hard-law instruments that achieve – or in some cases may fail to achieve – those objectives at the national level. Solidarity-centered initiatives at the supranational and international level have tended to follow this dynamic, thereby widely extending the principle of solidarity but limiting the extent to which

it serves as a hard guarantee for affected persons and collectivities at the country level.

Thus, ILO and EU initiatives articulated around the principle of solidarity present their most difficult challenge in the translation from soft-law regulation at the transnational level to hard law within the national geographies. The inscription of solidarity in terms of hard regulation and enforceability typically moves from the international level to the national one. In one example of the dynamic at the country level, Spain has enacted not only a law at the national level but also initiatives within some *comunidades autónomas* such as pro-cooperatives legislation in the Basque Country, the home of one of the most successful cooperatives anywhere, the Mondragón Group (Flecha & Ngai 2014).

The solidarity economy as a label for a very broad and important objective initially takes the direct form of soft law, which is then implemented through the subsidiarity principle and hard-law regulation at the national level. The solidarity economy formulation is intended to combine efficiency with the promotion of democratic workplace organization and in this sense offers an alternative at the enterprise level to the tendencies that some authors have named new neo-feudalism.<sup>10</sup>

#### 1.4 SOLIDARITY AS HARD-LAW INSCRIPTIONS: COLLECTIVE LABOR RIGHTS

The significance of solidarity for labor law and for the welfare of workers and other citizens is, of course, not limited to the forging of legal and regulatory instruments. The evolution of workers' representation and of collective rights is closely linked to processes of organized solidarity by social actors such as the labor movement (Hyman 2001) with implications often for the emergence of democracy itself (Fishman 1990). Unions have suffered the impact of an often hostile external environment in many national contexts and in the world economy in the neoliberal era, but they continue to hold great importance for the themes that we study here. Despite the external and internal crisis of unions and workers' representation structures, collective rights have permitted social actors to achieve some spaces of social progress, countervailing the most untamed forms of capitalism (López López 2015). The trilogy of collective rights such as freedom of association, collective bargaining, and collective protests – including strikes – has constructed a foundation for solidarity in various forms to reinforce the collective interests of workers in the face of the neoliberal era's increasing promotion of individualism (López López 2019). However, along with unions and other forms of collective action, legal structures hold great importance in the attainment of objectives expressive of the solidarity principle. The process that Rodotà has called “the devaluation of

<sup>10</sup> See Stone & Kuttner 2020. The private capture of entire legal systems by corporate America goes far beyond neoliberalism. It evokes the fiefdoms of the Middle Ages.

constitutions” makes it more important than ever to revitalize structures that guarantee the right of equality (Rodotà 2011: 85) as is the case of collective rights.

In this context, a main piece in the construction of inscriptions of solidarity is the EU’s Charter of Fundamental Rights under Article 2 and Article 6 of the EU Treaty. The Charter is understood to form part of the EU’s primary law through the application of Articles 6 and 52 of the Treaty. This crucially implies both accountability and enforceability for the Charter when the courts of member states apply EU law. In substantive terms, the Charter’s structure recognizes in Title I Dignity, in Title II Freedoms, in Title III Equality, and in Title IV Solidarity from Article 27 to Article 38. Paragraph 7 of the Charter’s Article 5/1 specifies that the text constitutes a valid aid both for EU judges and for those of the member states. As CH Amalfitano has argued, “the Charter thus substantially reproduces in a written catalogue the general principles of law set forth by the ECJ in its jurisprudence, developed over the years. It is only their inclusion in the Charter that determines their final consecration as binding ‘principles’ or ‘rights’ in the EU legal system.”

The Chapter of Solidarity, in other words, Title IV of the Charter, includes broad *inscriptions* of both individual and collective content. Articles 27 to 34 bear directly on employment and industrial relations: workers’ right to information and consultation (Article 27). The rights to collective bargaining and action (Article 28) are recognized as part of the solidarity principle.

A fundamental feature of the Charter’s approach is that it divides its treatment of equality and solidarity into separate Chapters. Crucially, some matters that had previously been treated under the label of equality are now elaborated under the heading of solidarity. To put this somewhat differently, some of the Charter’s important inscriptions of the principle of solidarity were previously treated as inscriptions of the principle of equality. I will examine later the significance and implications of this shift in the underlying principle that is used to frame the specific and tangible discussion of rights and outcomes, that is to say “inscriptions.”

An important element of the new formulation is the inscription of solidarity in the provision of collective rights such as labor organization and collective action. Participation, information, freedom of association, and collective action are all now found in the Chapter of Solidarity. This conception of democratic solidarity offers a strong constitutional base for these fundamental rights. Solidarity in the Charter of Fundamental Rights is understood to function through two overarching and interrelated instruments: the subsidiarity principle and (as a result) the diversity of national regulations.<sup>11</sup>

Inscriptions of collective rights at the transnational level are to be found in various provisions. The ILO has defined freedom of association as a fundamental right, as a

<sup>11</sup> Article 152. The Union recognizes and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.

pillar of labor rights. The ILO has developed its treatment of collective rights within two important Conventions, Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) and Right to Organize and Collective Bargaining Convention, 1949 (No. 98). At the transnational level, the inscription of underlying principles in the elaboration of collective rights takes two forms: the hard international regulation provided by these ILO Conventions and more recently by the Chapter of Solidarity with its invitation to national level elaborations. Collective rights have been enacted as a fundamental right or freedom at the national level by member states, in some cases in their constitutions or laws of development. Through the twin approaches of subsidiarity and national-level diversity, the regulation of collective rights is handled in a fundamentally multilevel fashion that provides for some elements of commonality along with a good deal of difference between national cases. This complex process suggests that we can usefully think of much that goes on inscribing solidarity as the elaboration of collective rights within the legal order – albeit in ways that vary in their enforceability.

Understanding solidarity as collective rights enacted by the legal order makes it possible to understand the tendency toward a layered multilevel form of enforceability and accountability of the principle. From this perspective, it is crucial to construct an inclusive solidarity because of the spillover that such an understanding of solidarity generates with regard to collective rights. The layering, with its articulation of transnational and national instruments and institutions, does enable many important inscriptions but it also limits their uniformity and opens the door to possible shortfalls or deficits in some national contexts. Those deficits are especially evident with regard to the enforceability of very general principles provided by soft-law instruments.

### 1.5 INSCRIPTIONS OF SOLIDARITY AS FAIR LABOR CONDITIONS: SUBSIDIARITY AND HYBRID MECHANISMS OF WORKERS' PROTECTION

Solidarity as fair labor conditions and protection against unfair dismissal is inscribed in a variety of soft and hard regulatory instruments. Among the most important examples are the construction of the notion of decent work in the ILO Agenda and Article 151 of the Treaty on the EU with its commitment to improve working conditions.<sup>12</sup> Also of great significance is the Charter of Fundamental Rights in

<sup>12</sup> “The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social

the Chapter of Solidarity.<sup>13</sup> The first of these is a soft-law instrument and the second is an example of hard law.

However, the inscription of solidarity in these ways has taken place in the context of – and sometimes in response to – strong counter-currents. The evolution of labor law during recent decades marked by cutbacks in labor rights has challenged the development of inscriptions of solidarity as fair labor conditions. In this setting an especially important debate concerns protections against unfair dismissal, defined in the Charter of Fundamental Rights as a matter of solidarity. This theme has been extensively covered in EU legislation and policies through discussions of the “flexi-security” model.

Applications of the flexi-security model have promoted liberalization of the regulation of dismissal in various ways, including: defining the period of causes, the pre-notice period, procedural requirements, and conceptualizing effects of unlawful dismissal as an economic cost. National law within the EU is not uniform on such matters; the regulation of a wide array of questions – including causes, procedural requirements such as probationary period, pre-notice, severance payments, and the legal treatment of consequences of unfair dismissal – differs among member states.

This national-level diversity in protections against unfair dismissal is one of the clearest examples of the use of the subsidiarity principle. Unfair dismissal is defined in legal terms at the national level. The EU considers protection against unfair dismissal as part of the solidarity principle, but the enforceability and accountability of what that really mean in concrete terms differs among the member states. Maximum protection against unfair dismissal is offered when there is held to be a violation of fundamental rights, but after the legal reforms of labor market regulations (in many instances under pressure from the EU), the protection is weaker when dismissals are held to be caused by economic reasons. The protection against unfair dismissal is, then, understood as an inscription of the principle of solidarity but its concrete manifestation in hard law suffers from the problem of diversity in the definition of this content because of the subsidiarity principle. The indirect and varied connection between the general principle and concrete legal expressions of it tends to produce an imbalance of power between workers and employers in bringing cases to the courts.

protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.”

<sup>13</sup> The Solidarity Chapter of the Charter of Fundamental Rights, includes: Right of access to placement services (Article 29), Protection in the event of unjustified dismissal (Article 30), Fair and just working conditions (Article 31), Prohibition of child labor and protection of young people at work (Article 32), Family and professional life (Article 33), and Social security and social assistance (Article 34). The four remaining articles in the Solidarity Chapter are: Healthcare (Article 35), Access to services of general economic interest (Article 36), Environmental protection (Article 37), and Consumer protection (Article 38).

The debates on protection against unfair dismissal take place in a complex legal and sociopolitical setting. Disagreements over how to handle precarious work and temporary contracts form part of broader debates on the pathway to protecting the principle of solidarity in the context of instability in the definition of work contracts. Among the themes subject to debate is the relation between national regulation and the Charter of Fundamental Rights (Barnard 2014: 303).

In terms of solidarity as a precept held to offer protection against unfair dismissal, inscriptions of this principle should fortify the right of stability of the contractual nexus in those cases where there is no legal reason to terminate the labor relation. However, concrete elaborations of that general guideline are extremely varied and provide many avenues to an effective reduction of hard-law protections for workers.

Under the heading of solidarity, protection against dismissal is recognized by the ILO Conventions, the EU Charter of Fundamental Rights, the EU Treaty, and EU Directives setting requirements for collective redundancies, information and consultation, and fixed-term and temporary work. These Directives provide a common minimum level of protection for workers in all member states. Thus, there is an underlying grid of worker protection linked to the principle of solidarity.

All these previous references on protection against termination reveal the complexity of the protection against unfair dismissal as inscriptions of solidarity. However, even though the very general solidarity-based shared elements of protection have proved to be compatible with very large-scale reductions in such protections within some national cases and with major differences *between* national cases, there is some advantage even in soft-law commitments to worker protection. The common commitment to the spirit of protection against unfair dismissal has helped underpin the crafting of more complete legal references to obtain better worker protection and to countervail the national-level differences imposed by the subsidiarity principle.

One more point should be added. Solidarity is written into transnational labor law through primarily soft-law promises of protection against unfair dismissal, attributing this protection to the principle that we are examining. However, this labeling – and the related soft-law treatment – of unfair dismissal fails to produce real guarantees at the transnational level. This shortfall exists precisely because of the use of the subsidiarity principle in application of the transnational promise and, relatedly, the soft-law character of many EU and ILO formulations.

The deficits in protection against unfair dismissal are pointed out by Collins,<sup>14</sup> who argues that there are three ways in which the legal regulation of unfair dismissal is inconsistent with the principles of the European Convention on Human Rights: the narrow personal scope of protection, the lax standard of review applied by the tribunals, and the inadequate remedies available to claimants.

<sup>14</sup> Collins 2018. See also Collins 2021.

There is a second important theme introduced in Article 32 of the Charter of Fundamental Rights, in the Solidarity Chapter, with regard to fair labor conditions and the rights of young workers. The text includes a reference to the prohibition of child labor and the protection of young people at work as objectives linked to the principle of solidarity. Young people admitted to work must have working conditions appropriate to their age and must be protected against economic exploitation as well as any work likely to harm their safety, health, or physical, mental, moral, or social development or to interfere with their education. Crucially from my perspective, there is a connection between the inscriptions of solidarity in legislation on unfair dismissal and in protections for the youngest from exploitation, because in both cases an approach that is limited to a general affirmation of the solidarity principle lacks specificity and enforceability. This deficit is clearly evident in the failure to provide tangible forms of protection for workers. I argue that a crucial pathway to generate more enforceable guarantees for young workers is to link the elaboration of the solidarity principle to the EU's policies on equality and nondiscrimination by age. Thus, I suggest that a labeling of social guarantees that focuses exclusively on the solidarity principle – without making explicit and elaborating the long linkage to the equality principle – tends to suffer from certain characteristic deficits.

An important example of the results produced by the existing approach is to be found in the treatment of problems faced by young workers. In the context of the EU an important initiative is the recommendation of March 15, 2018 on a European Framework for Quality and Effective Apprenticeships.<sup>15</sup> This soft law helps to construct the conceptualization of exploitation by “precarization” and instability that young workers suffer in the labor markets. The Recommendation cited stipulates that quality apprenticeships “lead to a combination of job-related skills, work-based experience and learning, and key competences [that] facilitate young people’s entry in the labor market, as well as adults’ career progression and transition into employment” and calls upon member states to implement “criteria for quality and effective apprenticeships.” The EU calls on member states to develop this agenda, in an application of the subsidiarity principle. The results have varied considerably among countries especially in the regulation of rights.<sup>16</sup> As a consequence, despite the concerns and objectives expressed in the EU soft law, young workers are potentially subject to both unpaid and precarious work.

I argue that despite the EU's positive framing of apprenticeships, creating and normalizing legal opportunities for unpaid traineeships and poorly paid apprenticeships has created a dynamic of cheap labor that predominantly affects young people in the workforce. For many young workers, this crystallizes in a series of precarious post-traineeship contracts, which has significant and concerning consequences for

<sup>15</sup> [2018] OJ C153/1.

<sup>16</sup> See Stewart et al. 2018.

young people's professional careers and social security rights. Together, these consequences amount to a pattern of increasingly entrenched systemic age discrimination that affects the growing numbers of young people who are struggling to enter the labor market. In practical terms, despite the invocation of the solidarity principle in the soft-law treatment of this matter, young workers are left in circumstances that generate consequences that provide unequal results essentially on the basis of age.

Thus, there is at present a vicious circle of informal employment and precarious work that effectively creates a dynamic of systemic discrimination for young workers. In recent decades, the development and implementation of policies that are directly or indirectly linked to the pressure to liberalize labor regulation have increased the prevalence of systemic age discrimination.<sup>17</sup> Systemic discrimination is a pattern, practice, or policy of discrimination that has a broad impact on a class or category of persons within an industry, profession, company, or geographic area. If the inscription of solidarity in policies oriented toward young workers is explicitly tied to guarantees against systemic discrimination – in effect connecting solidarity to the principle of equality and nondiscrimination – the effect is to produce stronger protections of fair labor conditions for young workers. A clear conclusion is that a regulatory approach that addresses the problem of systemic discrimination, building on the principles of *both* solidarity and equality, is required if the rights of young workers are to be fully protected.

#### 1.6 THE LABEL OF SOLIDARITY FOR POLICIES OF CONCILIATION BETWEEN FAMILY AND WORK: PROMOTING EQUALITY AND NONDISCRIMINATION POLICES BY GENDER

As a general matter I argue that some of the deficits identified here are addressable by linking solidarity to the principle of equality; when that is done each principle can ultimately serve to reinforce the other. Solidarity can contribute an agenda or map of vulnerable groups requiring attention under the equality principle. In turn the principle of equality can provide crucial enforceability support to the inscriptions of solidarity. This linkage is in some instances already to be found in existing practice. An important example concerns the use of the labels in the Charter of Fundamental Rights. As already noted, the Charter clearly opts for placing policies of conciliation of family and work within the Chapter on Solidarity, in effect labeling such policies as an inscription of the solidarity principle and leaving them outside the separate treatment of equality and nondiscrimination in a different Chapter of the Charter. Nonetheless, in practice, the development of family–work conciliation policies has been closely linked to law on equality and

<sup>17</sup> On age as a factor of discrimination, see Numhauser-Henning, Julén Votinius, & Zbyszewska 2017; López López 2017; López López 2019.

nondiscrimination that has proved to be crucial for underpinning the binding character of work–family guarantees in the legal order. This clearly suggests that formally understanding and labeling this thematic area as exclusively a matter of solidarity is insufficient and could at worst undermine the basis for treating family–work conciliation rights as binding. From this perspective the linkage of solidarity to the principle of equality is underscored in actual EU practice in this area. I argue that this linkage should be extended to other areas, thereby strengthening inscriptions of solidarity, enhancing their enforceability.

The different inscriptions of solidarity studied in this introductory chapter include efforts to build a solidarity-based economy (for example, through cooperatives), the elaboration of collective rights relating to forms of joint action or representation, the conciliation of family and work, and protections against unfair dismissal. These matters are taken up at the transnational level through soft-law instruments that tend to promote the process of policy decentralization, displacing crucial decisions to member states or lower-level entities. However, many of these matters – understood to form points of central relevance in constructing an inclusive solidarity – are potentially also subject to treatment by the legal order through the use of the principle of equality and nondiscrimination. This alternative legal approach has often been deployed at the transnational level in ways that make use of hard-law instruments such as EU Directives and ILO Conventions. The equality approach has also been relied upon within sovereign states in Constitutions and national law. This hard-law approach generates binding effects and enforceability with regard to concrete policies, advantages that have often been missing in inscriptions of the solidarity principle. However, the solidarity principle has proved very useful as a way to ground and broaden measures intended to address the problems of vulnerable sectors. Emphasizing this connection builds on the basis provided by important scholarly work. Barnard’s contribution is especially relevant with regard to how hard-law instruments have been developed by their interface with soft law and the decisions of the ECJ, all of this building the relation between the pursuit of solidarity and equality (Barnard 2010: 214). There is a strong foundation to argue for the usefulness of synergies between these two principles, thus underscoring the importance of this volume’s extensive analysis of solidarity inscriptions.

As I have argued, this is very much evident in the area of family-work conciliation policies. Concretely, several soft and hard instruments in both transnational and national regulation declare the right to conciliate family and work, placing this right within the overarching right to equality and nondiscrimination. The explicit prohibition of direct and indirect sex discrimination creates an array of follow-on guarantees, some of which apply to statutory social security schemes (Directive 79/7/EEC) and to self-employment (Directive 2010/41/EU). Sex discrimination is also prohibited in access to and the supply of goods and services (Directive 2004/113/EC). In addition, some directives apply to specific groups, such as the Pregnancy Directive (92/85/EEC), the Parental Leave Directive (2010/18/EU), or the Part-time

Work Directive (97/81/EC). The great majority of part-time workers in the EU being women, the requirement of equal treatment of part-timers and full-timers is also relevant for them.

In another area of relevance, the Racial Equality Directive (2000/43/EC) prohibits discrimination on the ground of racial or ethnic origin in a broad range of fields, including employment, social protection and social advantages, education, and goods and services available to the public, including housing. The Employment Equality Directive (2000/78/EC), however, is limited to the field of employment and occupation but covers the grounds of religion or belief, disability, age, and sexual orientation. This wide range shows the broad coverage of effects provided by the right to equal treatment and nondiscrimination and the binding, hard-law character of those effects. It is this broad and binding character that is much needed if the frequent enforceability deficit of many inscriptions of solidarity is to be overcome.

With regard to another major area of discrimination, the EU Gender Equality Strategy presents policy objectives and actions to make significant progress by 2025 towards a gender-equal Europe. According to this Strategy, the goals are ending gender-based violence; challenging gender stereotypes; closing gender gaps in the labor market; achieving equal participation across different sectors of the economy; addressing the gender pay and pension gaps; closing the gender-care gap; and achieving gender balance in decision-making and in politics. The Strategy is based on a gender mainstreaming approach and the notion of intersectionality serves as a basic supporting principle. The Strategy also integrates the policy on pay transparency, which is very important to reduce the gender salary gap and discrimination in retribution by gender.

In the ILO framework, equality and nondiscrimination stand as fundamental rights. Several ILO Conventions protect against discrimination, for example the Discrimination in Employment and Occupation Convention no. 11 and the Equal Remuneration Convention no. 100. In the 1998 ILO Declaration of Fundamental Principles and Rights at Work, member states are called on to promote and realize within their territories the right to be free from discriminatory employment practices. The objective of conciliation between family and work has been inserted in the EU level and in the domestic member-state level as part of the treatment of equality and nondiscrimination legislation. Nonetheless, as noted above, the EU Charter of Fundamental Rights labels this policy an inscription of solidarity rather than equality. However, this new labeling does not modify the underlying significance of the equality guarantee for the foundational basis of hard-law regulation on the conciliation between family and work. However, the labeling of conciliation between work and life as a matter of solidarity does reinforce the need for public policies through which the state provides the resources needed to attain this objective with its significance for the broad principles of solidarity, equality, and nondiscrimination. Moreover, the pursuit of a genuinely inclusive solidarity in the

area of conciliation requires the incorporation of guarantees against discrimination not only on the basis of gender but also by age and country of origin.

### 1.7 INSCRIPTIONS IN PURSUIT OF INCLUSIVE SOLIDARITY AS GOAL

Due to the COVID pandemic, the EU has faced strong economic and social challenges that have been met in part by articulating responses through reference to the principle of solidarity. This opens up a new angle on the study of solidarity inscriptions, examining new possibilities – or limitations – linked to the framing of policies through this approach. This new scenario also provides us with a fresh and important opportunity to examine the connection between solidarity and equality as either alternative or complementary frameworks for underpinning policies that address human needs and rights.

A major point of departure in the EU's analysis of the pandemic crisis suggests that people will need time to overcome the current situation and that inequality may increase in the period of recovery. In the formulation of the Commission's Work Program for 2020, it is maintained that "Europe showed that it can act fast when it needs, show real solidarity when it must and collectively change things when it wants fair and inclusive recovery." This "real solidarity" means for the Commission ensuring that all workers in the EU earn a decent living, closure of the gender pay gap, and the provision of reinforced youth employment support that will help young people get into work, training, or education.<sup>18</sup>

Building on the analysis of the past but looking toward the future, several points deserve emphasis. As suggested above, the COVID crisis holds great significance for this examination of solidarity inscriptions. The pandemic has opened a new scenario for labor rights within the frame of the EU Charter of Fundamental Rights. The economic crisis caused by this malady was of such magnitude that the EU was pushed to enact measures to rescue not only financial institutions but also ordinary people – in very large numbers. This offers a way to achieve not only a real solidarity but also an inclusive solidarity. One arena that will be of great significance in the next years will be the construction of more fair labor conditions for all. The global scenario created by the pandemic-related crisis is an opportunity to think in solidarity terms about the regulatory framework for employment, and this demands new rules on decent work based not only on programmatic declarations but also on hard-law regulations that establish mechanisms of accountability and enforcement of the elaborated rights. Solidarity is a principle that can potentially help to achieve agency and rights for the most vulnerable members of society. Such inscriptions in specific

<sup>18</sup> Brussels, 30.9.2020, COM(2020) 580 final, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions (2020), Rule of Law Report.

policies and practices can help to build stronger democracies that are rooted in a demos characterized by solidarity.

Finally, the two principles discussed here – solidarity and equality – are both of potential usefulness, offering synergies in the construction of what Stone, Sweet, and Ryan (2018) call a “cosmopolitan legal order” in which labor law plays an important role in the enforceability of human rights as fundamental social rights. The processes and challenges that we examine also hold importance for the depth of democracy and for the ability of the political system to successfully address a wide range of citizen concerns (Robert 2021). How broad principles such as solidarity are mobilized or drawn upon in the elaboration of policies and regulatory arrangements is a matter that has a technical legal side and a broadly political one. The resulting inscriptions are intended to achieve better societies with stronger links among community members engaged in the reconstruction of the conditions to recover “the democratic dialectic”<sup>19</sup> in contexts conditioned by new developments such as artificial intelligence.<sup>20</sup>

## 1.8 PLAN OF THE BOOK

The volume’s contributors analyze the inscriptions of solidarity with a range of substantive emphases. This chapter, the volume’s Introduction, by Julia López López, formulates central analytical and practical challenges posed by efforts to inscribe solidarity in concrete policies or regulatory arrangements. This introductory chapter identifies both promises and limitations of reliance on the solidarity label and offers analytical perspectives on useful ways to think about and study both advantages and potential disadvantages of that reliance. To that end, a number of substantive themes are taken up and examined. Many of the arguments offered in the Introduction also serve to identify common threads discussed in the contributing chapters. Those common threads include the relation between hard- and soft-law instruments as well as decentralization of regulatory regimes and the multilevel dynamics of solidarity inscriptions, both of these being themes that shed light on the important matter of enforceability. The introductory chapter also argues for the usefulness of synergies between the principles of solidarity and equality to construct inclusive solidarity.

Chapter 2, authored by Tonia Novitz, is entitled “Sustainability as Solidarity Unbound: Labor Rights and Collective Voice in the United Nations Sustainable Development Goals and the European Union.” This chapter argues that solidarity should be understood as being “unbound” by geographical or temporal borders. The chapter examines the United Nations Sustainable Development Goals adopted in 2015, identifying their recognition of inclusive solidarity in the context of decent

<sup>19</sup> See Rodotà 2011: 90–91.

<sup>20</sup> Bales & Stone 2020: 41.

work and their potential limitations. Her analysis of unbound solidarity examines both intra- and intergenerational dimensions as well as hard- and soft-law manifestations. The substantive themes taken up include solidarity from below, sustainability links with fair labor conditions, and both United Nations and EU programs on equality and nondiscrimination.

Reingard Zimmer is the author of Chapter 3, “Solidarity as a Central Aim of Collective Labor Law?” This chapter takes as its starting point the fact that solidarity is one of the rights that the Charter of Fundamental Rights of the EU mentions as a central value in its preamble and is the title of chapter IV. The elaboration in the chapter concludes that inclusive as well as exclusive solidarity may be detected in the work of trade unions and (European) works councils and is an important characteristic of their endeavors. The argument suggests that the architecture of collective labor law, both in Europe and more specifically in Germany, contains solidarity as a central element of its structure. This chapter links solidarity, defined in the Charter at the EU-transnational level, with the definition at the national level of freedom of association as right or freedom and with the role of social actors in pursuing equality and nondiscrimination.

Gian Guido Balandi and Stefania Buoso author Chapter 4, “Solidarity: Different Issues in a Community Perspective.” This chapter argues that community is the space of expression of solidarity, the key word that connects the inscriptions of solidarity in different issue terrains: in social security, in the transnational perspective of the EU, in the gig economy era, in the labor law of the pandemic. Solidarity may provide for the transfer of money or services, with their cost being borne, entirely or partially, by others who are not the users of the services themselves. In their analysis, the fragmentation of employment imposes on us the need to articulate the answer to the need for protection. It is important to widen the dimension of solidarity towards universalism; the perspective they defend is a system of general taxation in which solidarity should remain the point of reference, adapting this principle to new realities, also in the pandemic era.

K. D. Ewing addresses a new challenge for the principle of solidarity in Chapter 5, entitled “Solidarity, Covid-19 and a New Social Contract.” This chapter explores the concept of solidarity in the context of Covid-19, with a view to examining its role as we pass through the pandemic and as we rebuild afterwards. The focus is on the social dimension, social rights and workers’ rights in the context of EU law, and the EU response in particular. The text seeks to (i) explore the meaning of solidarity; (ii) understand its multiple constitutional dimensions under EU treaties; (iii) examine its role as a conceptual underpinning of a new social contract as proposed by the ETUC and others; and (iv) consider the problems of its development as revealed by the social pillar and the proposed Minimum Wage Directive. The chapter examines multilevel dynamics and insists on both the soft- and hard-law dimensions of solidarity. The text also examines multiple actors – including unions – and discusses

a new social contract that connects solidarity with the fight against poverty and inequality.

Scott L. Cummings in Chapter 6, “Solidarity in the City,” draws on a study of the labor movement’s challenge to inequality in Los Angeles from 1992 to 2008. The chapter presents a critical analysis of the city as a site of solidarity. It shows how, in order to build local labor law, the labor movement must promote solidarity not just among workers but among different progressive movements, which become inter-linked around campaigns to reshape low-wage work, while also promoting related goals including immigrant inclusion, expanding affordable housing, and promoting environmental justice. Building decentralized power as a way to rebuild labor law, this chapter suggests, requires conceptualizing solidarity as a local, city-wide project, with two related components: inter-movement solidarity between labor and allied movements; and intra-movement solidarity, which is located within movements among workers fighting together for better lives. The chapter argues that while both visions of solidarity are necessary to build local labor reform, there are tensions between the two that must always be managed.

Alexandre de le Court in Chapter 7 addresses “Regulation of the Access of Undocumented Migrants to Social Protection: Exploring the Boundaries of Solidarity.” This contribution takes the case of undocumented migrants as an opportunity to ask important questions about solidarity toward especially vulnerable groups. Based on the concepts of inclusive and exclusive solidarity, the chapter centers on the regulation of the access of undocumented migrants to different aspects of social protection (social insurance, insurance against accidents at work, social assistance, and healthcare) in continental welfare states. Drawing on the different rationales behind solidarity on which those different aspects of social protection are built – primarily reciprocity, the guarantee of dignity, and the commitment to protection of vulnerable persons – it analyses critically the logic of exclusion manifested by the subordination of social protection to immigration policy and argues that there are legal arguments in favor of more inclusive systems of social protection.

Rui Branco and Daniel Cardoso are co-authors of Chapter 8, “Solidarity in Hard Times: The Politics of Labor Market and Social Protection Reform in Portugal (2010–2020).” How did Portuguese domestic politics and institutions matter in shaping employment and social protection statuses – crucial bases for solidarity towards the vulnerable – in the decade spanning the Great Recession and the COVID-19 pandemic? Their chapter examines how cooperation between government, opposition parties, and social partners, and the Portuguese Constitutional Court, worked to moderate external pressures to liberalize labor market regulation and social protection regimes during the Great Recession. After the crisis, the “Geringonça” Socialist government and its left partisan and trade union allies enacted inclusive and solidaristic policies that de-segmented atypical and independent work, bettered the work–family balance, and improved outcomes for the

working poor, unemployed youth, and elderly. In a context shaped by the aftereffects of crisis, the role played by the law enacting solidarity as an inclusive agenda for the “Geringonça” with special impact on equality and nondiscrimination objectives led to very concrete policies on protection against poverty, conciliation between family and work, and protection of the elderly.

The substantive and focused analysis presented in these chapters provides strong evidence of both the promise and the challenges of reliance on the solidarity label as a platform for the defense of socially vulnerable sectors. As the work brought together in this volume shows, it is only by studying the actual inscriptions of the solidarity principle that we can genuinely understand the implications of growing reliance on this principle. In a world that continues to suffer from a wide range of social needs and problems, the insights to be learned from our study of solidarity inscriptions hold wide significance for both analytical and practical purposes.

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