

## Solidarity, COVID-19 and a New Social Contract

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Europe is in a critical situation and we need *European solidarity* now more than ever. A new *Social Contract* must be put forward which offers hope. We must not return to the failed *austerity* and policies to drive wages downwards with a view to price competition as happened during the 2008 economic crisis. These policies created fertile ground for the *far-right*.

—E. Lynch<sup>1</sup>

### 5.1 INTRODUCTION

The above observations by the Deputy General Secretary of the ETUC were expressed in 2020 at the start of the COVID-19 pandemic, a third wave of which appears to be underway at the time of writing. The pandemic is perhaps the fifth great global challenge of the last 100 years, though the others – two world wars, and two economic catastrophes – were notably much greater in scale than COVID-19 has been so far. What is striking, however, has been the EU response, which has been very different – at least in tone – from the response to the Euro-crisis and the global financial crisis. Then the talk was of financial discipline and austerity, with one British newspaper hostile to Brexit reminding us recently of Wolfgang Schäuble’s refusal in 2008 to contemplate any unconditional support for member states in distress. On the contrary: ‘the EU went no further than the provision of emergency loans and cheap credit. The bailout money came with painful strings attached, as countries were obliged to launch deeply resented austerity programmes in order to manage their growing debt mountain.’<sup>2</sup>

But as the same source pointed out, the new approach is not only different, but so different as to invite parallels with Alexander Hamilton’s claim in 1790 following the

<sup>1</sup> Lynch 2020.

<sup>2</sup> *The Guardian*, 25 May 2020.

US War of Independence that the pooling of debt between states would strengthen their union.<sup>3</sup> Such talk may be premature and exaggerated, as may be talk of a ‘Marshall Plan for Europe’s recovery’.<sup>4</sup> But hyperbole aside, the initial approach of the EU institutions to COVID-19 is nevertheless remarkable, with Ursula von der Leyen celebrating the work of delivery drivers, factory packers and care-workers. These are people rarely on the radar in such elevated quarters, yet workers to whom we are now all indebted, and to whom even the mightiest amongst us feel obliged to pay tribute.<sup>5</sup> We have also seen the announcement of €750 billion to be made available as part of the EU Recovery Plan to help support jobs,<sup>6</sup> and steps to forge ahead with the social policy agenda laid out previously in the European Social Pillar, including proposals for a new minimum wage.

But is it enough? Here we return to the observations of Esther Lynch on behalf of the ETUC above, observations informed by the trade union experience of ten years or more of austerity, and by concerns about differences within the EU and between member states about the political reactions to the economic effects of COVID-19. In the first place, Lynch makes real the need for solidarity in response to the crisis; and second, she identifies the means by which it can be achieved. Spoiler alert. There is also, however, a third dimension: whether the EU has the means constitutionally to promote a Social Contract of the kind envisaged; and a fourth dimension: whether the EU is able to rise to the challenge politically. In this chapter, I address what I understand solidarity to mean in this context; what a proposed Social Contract would look like; what are the constitutional restraints that may help to define the permissible boundaries of any response; and how that response is being defined by the Social Pillar, which at this stage seems an inadequate basis for von der Leyen’s grand vision.

## 5.2 SOLIDARITY

Solidarity (or *solidaridad*) is a word defined narrowly in English to mean ‘unity or agreement of feeling or action, especially among individuals with a common interest; mutual support within a group’, illustrated with the example of ‘factory workers voiced solidarity with the striking students’. The word is said to have emerged in the nineteenth century from the French word ‘*solidaire*’, which has a wider usage than the English definition would suggest, being used to mean,

<sup>3</sup> Alexander Hamilton to Robert Morris, 30 April 1781 (US National Archives, Washington, DC, available online).

<sup>4</sup> U. von der Leyen, ‘EU Co-ordinated Action to Combat the Coronavirus Pandemic and Its Consequences’, speech to European Parliament, 16 September 2020.

<sup>5</sup> *Ibid.*

<sup>6</sup> See ETUC, ‘MFF and Recovery Plan: ETUC Demands Reinforcement of Social Partners Involvement’, 5 August 2020 (published correspondence suggesting that up to 60 million jobs throughout Europe may be at risk).

depending on the context, ‘inclusive’, ‘supportive’, ‘united’, ‘connected to’, as well as ‘solidarity’. In the sense used in English, solidarity may present in several ways, but it is often associated with empathy, compassion and altruism.<sup>7</sup> It may be associated with a shared commitment by those taking the action, but also by a willingness to make a sacrifice on their part as well. In this sense solidarity is conveying a message: We support your cause, we understand your struggle, and we are prepared to suffer loss as a result.

A good example attracting publicity in recent years is the support given by Scottish engineering workers who refused to repair jet engines that were being used by the Pinochet regime in Chile against its own people. This was action to support others in distress, the beneficiaries completely unknown to those taking the action in question, the latter putting themselves at risk of dismissal as a result.<sup>8</sup> In this sense, although a collective effort by workers acting together, solidarity is likely to be voluntary and spontaneous. Nevertheless, solidarity moved by empathy, compassion and altruism may also be moved by encouragement and leadership and may be much less tangible as a result. A good example is an inspiring speech by Nicola Sturgeon, the First Minister of Scotland, who in addressing the Scottish nation at a critical point during the COVID-19 crisis, called upon the Scottish people in language rarely heard in modern political discourse to ‘be strong, be kind and let’s continue to act out of love and *solidarity*’.<sup>9</sup>

But as English usage suggests, solidarity may be based on ideas of reciprocity as well as altruism:<sup>10</sup> X offers support to Y in time of need, in the expectation that Y will return the support to X when he or she needs it. In this sense solidarity may tend towards being instrumental and transactional as well as reciprocal, rather than tending towards altruism. A sense of this is encountered in one of the very few British cases where the legitimacy of solidarity action by trade unions was recognized judicially. Thus, in the war-time decision in *Crofter Hand Woven Harris Tweed v. Veitch*,<sup>11</sup> the trade union was in dispute with independent producers of Harris Tweed, in the course of which the union asked dockers not to handle supplies to, or the finished product from, the independent producers. In rejecting the claim that

<sup>7</sup> See Titmuss 1973. In his famous study of why people donate blood without payment (as is the case in some – though not all – countries, including the United Kingdom), Titmuss identified altruism as a dominant consideration of this great act of solidarity (1973: 101).

<sup>8</sup> The story is told in the film, *Nae Pasaran* (director, Felip Bustos Sierra, 2018). For a brief account, see the Scottish Documentary Institute, *Nae Pasaran – Feature* (2018) (available online).

<sup>9</sup> Nicola Sturgeon, Address to the Nation, 22 September 2020 (available on Scottish government website).

<sup>10</sup> I am grateful to Guy Mundlak for this insight. See also Titmuss 1973: although altruism is a dominant consideration of blood donors, it is also acknowledged that for some ‘there may be some expectation and assurance that a return gift may be needed and received at some future time’ (1973: 101).

<sup>11</sup> [1942] AC 435. See Brodie 2007. See also on judicial blessing for solidarity action, *Conway v. Wade* [1909] AC 606 (esp. per Lord Loreburn).

the union action was unlawful at common law, it was acknowledged by the court that by taking action of a kind that now has no legal protection in British law,<sup>12</sup>

In the present case the pressure was applied by means of action by the dockers, who were in no sense employees in, or directly connected with, the trade in Harris tweed; but employees in this trade were members of the same union, and the interest of the dockers and the trade employees in the union and its welfare were mutual, and I can see no ground for holding that it was not legitimate for the union to avail itself of the services of its docker members to promote the interests of the union.<sup>13</sup>

In this context the conduct of the dockers – or some of them – may have been moved by altruism, though being directed by the union it is unlikely to have been spontaneous as was the case of the engineering workers supporting Pinochet's victims. Indeed, it is equally possible that the dockers were moved not only by a sense of reciprocity, but also by a sense of expectation, obligation or even coercion. There would be coercion if providing mutual support on the instruction of the union was – directly or indirectly – a condition of membership of the union. That coercion would be underpinned by law, in the sense that the duty to provide mutual support would be legally binding as a contractual obligation to the union, failure to comply with which could lead to the offender's discipline and expulsion. And where closed-shop arrangements operated,<sup>14</sup> that coercion would be reinforced by the ostracism by co-workers, and the risk of dismissal by an employer if a worker lost his or her union membership. For some, that would be an industrial death sentence.

What are the implications of this for the state? The foregoing would suggest that if solidarity is a principled basis for public policy, then the state at least has a negative duty to refrain from any regulatory or other activity that would undermine solidarity as a principle. In the case of labour law, this would mean avoiding steps taken to restrict trade union freedom and the capacity of trade unions to engage in solidarity activities. But it also suggests a positive role for the state, in terms of a duty to encourage, facilitate and promote solidarity activities, whether by (i) voluntary institutions such as trade unions and employers' associations or (ii) the state acting through its institutions as an agent independent of workers, citizens, trade unions and civil society organizations. Solidarity as an instrument of public policy promoted by the state – in fields such as healthcare or social insurance – is likely to be based on reciprocity rather than altruism. Perhaps requiring a sharing of financial resources, it is also likely to be obligatory rather than voluntary, and indeed coercive in terms of sanctions for failure to comply with solidarity obligations.

<sup>12</sup> See *RMT v. United Kingdom* [2014] ECHR 366.

<sup>13</sup> [1942] AC 435, p. 460 (Lord Thankerton).

<sup>14</sup> At that time there would be closed-shop practices in operation by means of which workers would be required to be in membership of the union as a condition of employment, either formally or informally. See McCarthy 1964.

As we have seen, Ursula von der Leyen invoked the spirit of the Marshall Plan as part of her vision for a post-COVID-19 world. Only a few months earlier, Kristalina Georgieva, Managing Director of the IMF, spoke of the need for a Great Reset (notably not a Great Reversal) to deal with the consequences globally of COVID-19.<sup>15</sup> Addressing the need to focus on ‘the social fabric of our societies’ and ‘the expansion of social programs so we take care of the most vulnerable people’, so that in turn ‘we can have a world that is better for everyone’,<sup>16</sup> Georgieva invoked the memory of another iconic text of post-war Europe, albeit one that that was forged in the heat of war. This was Sir William Beveridge’s eponymous report in 1942,<sup>17</sup> which is said to have been one of the foundations of the modern European welfare state.<sup>18</sup> Along with his work on *Full Employment in a Free Society*,<sup>19</sup> Beveridge’s work has been described as ‘the most authoritative historical starting points for the welfare state’, it being noted also that

The Western-European Welfare state can be seen as an organized system of solidarity, historically grown from group solidarity among workers, later between workers and employers, moving towards solidarity between larger social groups: between healthy people and the sick, between the young and the elderly, between the employed and the unemployed.<sup>20</sup>

The seventieth anniversary of the Beveridge Report led to many tributes, recognising what was at the ‘high-water mark of British solidarity’, and the epitome of ‘social solidarity’.<sup>21</sup> Invoking the solidarity of Beveridge in the midst of the COVID-19 pandemic is remarkable, not only because ‘the conditions of society which informed Beveridge’s conclusions have fundamentally altered’,<sup>22</sup> but also because Beveridge – a liberal, not a socialist, though a liberal with a strong commitment to a strong state – had views on free enterprise that would not endear him to the IMF.<sup>23</sup> So far as his famous report is concerned, however, Beveridge proposed that there should be ‘substituted for all the anomalies and inadequacies of the existing arrangements, which had grown up in a haphazard way to meet ad hoc needs, a unified “pooling of risks”, which, being firmly based on insurance, removed all taint of poor law or means test and yet ensured adequate support in times of need’.<sup>24</sup>

<sup>15</sup> Georgieva 2020.

<sup>16</sup> Ibid.

<sup>17</sup> Sir William Beveridge, *Social Insurance and Allied Services*, Cmnd 6404, 1942.

<sup>18</sup> Schuyt 1998.

<sup>19</sup> Beveridge 1943.

<sup>20</sup> Schuyt 1998: 297.

<sup>21</sup> Fabian Society 2012.

<sup>22</sup> *Rethinking Poverty* 2014.

<sup>23</sup> Beveridge 1943: ‘private control of the means of production, with the right to employ others at a wage in using those means, whatever may be said for or against it on other grounds, cannot be described as an essential liberty’ (p. 49).

<sup>24</sup> Bruce 1972: 306.

But while it may be true that ‘the solidarity that underpinned the post-war settlement has been eroded’,<sup>25</sup> solidarity has nevertheless evolved from being (i) a principle of altruistic or mutual support between workers, and subsequently (ii) a principle of public policy informing government programmes, to what is now (iii) a constitutional principle. That principle is to be found in the TEU, where it is referred to on fifteen occasions in the treaty and its protocols, the term being used in multiple different ways to express a foundational value of the EU, solidarity between people and generations, and solidarity between member states. The principle also finds expression in the EU Charter of Fundamental Rights, with a chapter on solidarity consisting of twelve separate articles of varying degrees of precision. But although haphazard, wide-ranging and opaque, *it is nevertheless crucial that in both the TFEU/TEU and the EUCFR we can find solidarity as a constitutional principle to mean both the negative and positive obligations of the ‘state’ and its constituent parts*, to the significance of which we return.

### 5.3 SOLIDARITY AND THE SOCIAL CONTRACT

Before dealing with solidarity as a constitutional principle, it is necessary first to address the Social Contract that Esther Lynch and others have identified as a means for its development and delivery. Here we find that the ETUC and its leading officials are not alone in using the language of the Social Contract as a basis for resetting global, European and national political economies.<sup>26</sup> At this point, however, the term Social Contract invites two preliminary comments. The first is that the term is not used quite as it was by Rousseau in 1762, though modern authors of the term claim nevertheless to draw inspiration from Hobbes, Locke and Rawls as well as Rousseau to inform their own understanding about ‘the basis of state authority over citizens’.<sup>27</sup> Thus, according to the ILO Global Commission on the Future of Work: ‘Individuals agree to certain limits on their inalienable freedoms in exchange for protection of their rights and satisfaction of the interests of society.’<sup>28</sup>

The second point is that although the appeal to a new Social Contract has been used as a basis for responding to COVID-19, it is an idea advanced in recent times pre-pandemic in response to the earlier crisis of globalization and austerity. Thus the ILO Global Commission on the Future of Work starts with the claim that there is a need ‘on the part of governments as well as employers’ and workers’ organizations’ to ‘reinvigorate the Social Contract that gives working people a just share of economic progress, respect for their rights and protection against risk in return for their

<sup>25</sup> Rethinking Poverty 2014.

<sup>26</sup> See also Rodgers 2021 for a thoughtful and more rigorous analysis of some of the issues explored in the pages that follow.

<sup>27</sup> ILO Global Commission on the Future of Work 2019: n. 13.

<sup>28</sup> *Ibid.* The agreement is presumed; no one is asked.

continuing contribution to the economy'.<sup>29</sup> Notably, the Commission claims that to be successful, 'such efforts demand solidarity among people, generations, countries and international organizations'.<sup>30</sup> Located very firmly in the values and aspirations of the ILO Constitution,<sup>31</sup> and offering significant 'resistance' to prevailing orthodoxy,<sup>32</sup> the Commission proposed a Universal Labour Guarantee, expanding time sovereignty, and revitalizing collective representation.<sup>33</sup>

It is commonplace that the Commission's recommendations failed to cut through, and that the ILO Centenary Declaration failed to reflect the Commission's ambitions. On the contrary, the ILO Declaration is a paean to globalization and economic liberalism, reflecting the triumph of the values of the latter over the social democratic values of the Declaration of Philadelphia, which it remains necessary to revisit.<sup>34</sup> Nevertheless, by locating its proposals for a radical reset in the idea of 'Social Contract', the ILO Global Commission on the Future of Work was not alone. Lynch's proposals for a new Social Contract appear as a response to growing concerns about the rise of the far-right, and illiberal democracy. It is a plea for a social democratic turn to counteract the populist movements now appearing throughout Europe. While – like the ILO Global Commission on the Future of Work's proposals – Lynch's demands are given added poignancy by the COVID-19 crisis, it is an idea articulated in the ETUC's Vienna Manifesto, published on 28 May 2019.<sup>35</sup> This was four months after the ILO Global Commission on the Future of Work published its report, and almost a year before the COVID-19 crisis began to seriously to emerge.

Like the ILO Global Commission on the Future of Work's proposals, however, the ETUC Manifesto of 28 May 2019 has proved to be very prescient. It is also very measured, and carefully set in the context of the TEU, Art. 3, which refers to the EU's commitment to a 'social market', a commitment which notably has also been acknowledged by von der Leyen. According to the ETUC,

What is needed is a renewed Social Contract for Europe setting out the relationship between three different groups in society: the state, labour and capital. Institutions have to take responsibility for reinforcing the social market economy. Companies

<sup>29</sup> *Ibid.*, p. 10.

<sup>30</sup> *Ibid.*, p. 54.

<sup>31</sup> *Ibid.*, p. 39.

<sup>32</sup> Novitz 2020.

<sup>33</sup> *Ibid.*, pp. 37–42.

<sup>34</sup> See Ewing 2019.

<sup>35</sup> ETUC 2019–2023. For a different more broadly based EU-wide manifesto, see Countouris and Freedland 2013, epilogue by the editors. Note the especially powerful observation that 'Europe must find again the path to economic growth and the respect of fundamental rights, but it must also rediscover new and old ways to redistribute more equally the wealth that it is still capable of creating and – no less importantly – the wealth that is embedded in what remains one of the most prosperous regions of the world' (p. 495). This has never been more urgent.

should not be able to profit from the single market and at the same time undermine it by exploiting labour or avoiding paying taxes and social contributions.<sup>36</sup>

In responding to this ‘need’, the ETUC Manifesto contains proposals for macro-economic change, constitutional reform, economic governance reform, as well as ‘rebuilding the European social model, by reinforcing and implementing the principles of the European Pillar of Social Rights through policies, legislation, social regulation, collective agreements and sound measures for redistribution and upward convergence’.<sup>37</sup>

The re-emergence of a Social Contract in these ways perhaps has two dimensions especially relevant in the context of solidarity. The first relates to Rousseau’s point not addressed in either of the foregoing texts (the ILO Global Report or the ETUC Manifesto), which reminds us that the Social Contract is rooted in equality. This is his plea for ‘a large measure of equality in social rank and fortune, without which equality in rights and authority will not last long’.<sup>38</sup> The second dimension takes us back to the duty of the state proposed above, ‘to encourage, facilitate and promote solidarity activities, whether by (i) voluntary institutions such as trade unions and employers’ associations or (ii) the state acting through its institutions as an agent independent of workers, citizens, trade unions and civil society organisations’. Both of these dimensions are captured by the ILO Declaration of Philadelphia and by the ILO Global Commission on the Future of Work (though not the ILO Centenary Declaration), but most famously by the Declaration of Philadelphia.

Indeed, particularly notable about the Declaration of Philadelphia are two core provisions in the Bill of Social Rights in Part III,<sup>39</sup> which play to each of these duties of the state. These are first the solemn obligation to promote ‘the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures’ (which plays to the first duty of the state). The second is a solemn obligation to promote ‘policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection’ (which plays to the second duty of the state). It is a striking feature of the ETUC Manifesto in contrast that it is very light in terms of the second dimension, heavily dominated by demands/proposals for ‘state’ support for trade union autonomy.<sup>40</sup>

<sup>36</sup> *Ibid.*, p. 2.

<sup>37</sup> *Ibid.*, p. 3 (Manifesto, para. 4).

<sup>38</sup> Rousseau 1976: 113.

<sup>39</sup> See Supiot 2012. On the idea of a Bill of Social Rights, see also Gurvitch 1946.

<sup>40</sup> It is striking for example that the only substantive as opposed to procedural claims are those relating to equality and the protection of precarious workers. Both might be seen as relating to inclusivity and effectiveness of labour law, rather than the improvement of standards. It may be



By trade union autonomy what is meant for this purpose is trade union engagement in social dialogue, economic governance and collective bargaining; in other words rebuilding what Ruth Dukes has characterized as *The Labour Constitution*.<sup>41</sup> This relates to what Julia López López has referred to as the role of the ETUC as ‘an actor in the regulation of labour rights’.<sup>42</sup> The key word here is ‘regulation’, which points to the trade union role in participating at multiple levels in determining with governments and employers the rules governing working conditions. That regulatory role is the apotheosis of trade unionism,<sup>43</sup> though it is a role that has been displaced in some jurisdictions by economic liberalism, with trade unions performing increasingly a role as service and representative organizations. The ETUC Manifesto nevertheless places emphasis on the role of trade unions rather than the state as a key element in developing the Social Contract as an instrument of solidarity, justified by the need for better trade union integration if their equalizing potential is to be fully realized.

What does this tell us about and how does it relate to Rousseau’s underpinning vision for ‘a large measure of equality in social rank and fortune’, as a precondition of ‘equality in rights and authority’? Notably, Rousseau was writing in a pre-democratic era, and suspicious of representative government, as well as ‘special interests’. He makes no reference as to how that ‘equality in social rank and fortune’ is to be secured, whether (i) directly by the state, (ii) by autonomous processes encouraged by the state, or (iii) by a combination of both. But returning to the ILO Global Commission’s vision of the Social Contract as ‘the basis of the legitimacy of state authority over citizens’, whereby ‘individuals agree to certain limits on their inalienable freedoms in exchange for protection of their rights and satisfaction of the interests of society’,<sup>44</sup> the implicit focus on the state to some extent misses the point, which in contrast is plainly visible in the ILO Constitution itself.<sup>45</sup> As the ETUC Manifesto reminds us, the Social Contract is not only about ends, but just as importantly about means, and the democratization of both the economic and the political spheres.

#### 5.4 SOLIDARITY AND THE SOCIAL CONSTITUTION

The ETUC Manifesto and the case for it reinforced by COVID-19 raises questions about the capacity of the EU to respond, and in particular the capacity of the EU

of course that the support for the Social Pillar meets the demand for better substantive standards (pay and dismissal) to be delivered by the ‘state’.

<sup>41</sup> Dukes 2014.

<sup>42</sup> López López 2013: 354.

<sup>43</sup> See the discussion in Ewing 2005.

<sup>44</sup> ILO Global Commission on the Future of Work 2019: n. 13.

<sup>45</sup> And indeed is recognized elsewhere by clear implication in the ILO Global Commission’s Report: ‘The Constitution of the ILO remains the most ambitious Social Contract in history’ (2019: 23, immediately before cue 13). See also ITUC 2019.

Constitution to respond, in a way that would bring the solidarity principle to life. The starting point for this purpose, however, is the TEU which sets out in Art. 2 the founding values of the EU as being values ‘common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, *solidarity* and equality between women and men prevail’ (emphasis added). Thereafter, Art. 3 not only provides for a single market but also includes a commitment to ‘work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive *social market economy*, aiming at full employment and *social progress*’.

So far so good, though it is not clear in this context what solidarity means. Nor is it clear what the social market economy means, though it is notable that it was referenced by Ursula von der Leyen as ‘unique’, enabling the EU to respond effectively to the COVID-19 crisis.<sup>46</sup> As pointed out above, however, the term solidarity is used multiple times in the TEU, but in different contexts to mean different things:

- Solidarity as a founding value of the EU (TEU, Art. 2);
- Solidarity between generations (TEU, Art. 3);
- Solidarity among member states (TEU, Arts 3, 24, 31, 32);
- Solidarity of member states with the EU (TEU, Art. 24);
- Solidarity among peoples worldwide (TEU, Art. 3); and
- Solidarity in external relations (TEU, Art. 21).

What is striking by its omission from this list is the absence of any social or economic solidarity with or between workers, apart from the oblique and opaque references in TEU Arts 2 and 3. Rather, the focus is principally on the solidarity obligations of member states towards each other and to the EU, with solidarity between workers to be found in the CFR EU, an altogether different conception in an altogether different kind of text.

Solidarity as deployed in the TEU paradoxically has been *wholly destructive* of any notion of a Social Contract of the kind proposed particularly in the ETUC Manifesto. This is to be seen most vividly of course during the eurozone crisis and the solidarity of the European Commission with the workers and citizens of Greece.<sup>47</sup> In a speech in 2012 rooted in TEU, Art. 2, Herman van Rompuy (then President of the European Council) referred to the eurozone crisis as ‘the very first real test of solidarity in the history of the Union’.<sup>48</sup> In the same speech, however, van Rompuy gave examples of the benefits of European solidarity, which included labour market efficiencies ‘already showing in lower labour costs’ in Spain and

<sup>46</sup> Von der Leyen 2020.

<sup>47</sup> See ILO 2011.

<sup>48</sup> Rompuy 2012.

Portugal.<sup>49</sup> This is a theme he had developed on a number of occasions to explain the support for Greece in particular,<sup>50</sup> which revealed the tensions in our understanding of solidarity, and the conflict of solidarity interests. Solidarity *between* states is not necessarily synonymous with solidarity between – or with – workers and citizens *in* states.

That said and as already pointed out, the obligations of EU solidarity are being deployed in a radically different way during the COVID-19 crisis, in a way designed to preserve and protect rather than to degrade and destroy, as we saw in so many countries with MOUs and Country-Specific Recommendations.<sup>51</sup> This difference in approach is to be seen in von der Leyen's State of the Union Address:

When I took office, I vowed to create an instrument to protect workers and businesses from external shocks. Because I knew from my experience as a Minister for Labour and Social Affairs that these schemes work. They keep people in jobs, skills in companies and SMEs in business. These SMEs are the motor of our economy and will be the engine of our recovery. This is why the Commission created the SURE programme. And I want to thank this House for working on it in record time. If Europe has so far avoided mass unemployment seen elsewhere, it is thanks in large part to the fact that around 40 million people applied for short-time work schemes. This speed and unity of purpose means that 16 countries will soon receive almost 90 billion euros from SURE to support workers and companies. From Lithuania to Spain, it will give peace of mind to families who need that income to put food on the table or to pay the rent. And it will help protect millions of jobs, incomes and companies right across our Union.<sup>52</sup>

As von der Leyen says, 'this is real European solidarity in action'. But although a very different kind of solidarity from the solidarity of van Rompuy and although very welcome, it is nevertheless a limited and particular form of solidarity: it is episodic, operating at a governmental level, which is 'state' driven and controlled. It is not using state power to encourage or promote the solidarity institutions of civil society.

This is not the solidarity or the Social Contract sought by the ETUC. Herein lies one problem. The EU Social Constitution is ill-equipped to deliver the type of Social Contract sought by the ETUC Manifesto, to the extent that the latter is based on trade union integration into the structures of political and corporate governance. As the ETUC has suggested, the case for such integration is reinforced by COVID-19, which has led the ETUC's Deputy General Secretary to propose that collective bargaining should be the cornerstone of rescue and recovery plans, highlighting a

<sup>49</sup> Ibid.

<sup>50</sup> BBC News, 24 May 2012: 'We want Greece to remain in the Euro area while respecting its commitments', he told a news conference. 'The eurozone has shown considerable solidarity having already disbursed, together with the IMF [International Monetary Fund] nearly 150bn euros [£120bn; \$188bn] in support of Greece since 2010.'

<sup>51</sup> See Bogg and Ewing 2019.

<sup>52</sup> Von der Leyen 2020.

comprehensive list of ways by which this could be done.<sup>53</sup> But how can it be done under existing constitutional arrangements? And how can it be done when the proposal is to respect the right to organize for collective bargaining,<sup>54</sup> as well as ensuring that ‘necessary institutions are in place to support collective bargaining, in particular sectoral collective bargaining and cross-sectoral bargaining, along with resources and legal backing especially protecting workers and their unions’?<sup>55</sup>

In assessing the deliverability of a Social Contract in which the EU encourages autonomous activity rather than takes responsibility itself, it is important to distinguish between measures (such as the TFEU, Title X) based on solidarity, which help to construct a Social Contract, from measures based on solidarity (such as CFR EU, Chapter IV) that help to protect solidarity measures in place, however constructed. But therein lies the real heart of the problem, in the sense that the TFEU, Title X (the Social Policy Title) falls a long way short of the expectations set by the Community Charter of the Fundamental Social Rights of Workers in 1989, which an earlier European Commission president (Jacques Delors) had falsely promised British trade unionists (then suffering from Mrs Thatcher’s onslaught) would guarantee that every worker would be covered by a collective agreement.<sup>56</sup> The reality has been a patchwork Social Europe with limited means constitutionally to contemplate a Social Contract of the kind proposed by the ETUC.

Apart from the limited legislative powers to advance social solidarity in the form of a Social Contract, a related concern is the contradictory orientations tailored into the EU constitutional texts. Writing in 2012 at the time of the austerity programmes in response to the financial crisis, Julia López López observed the contradiction between the social rights agenda of the EU on the one hand, and the economic policies pursued by the EU in response to the financial crisis in 2008 on the other.<sup>57</sup> That contradiction reflects a number of constitutional contradictions that we see played out in litigation (most famously in *Viking* and *Laval*, though elsewhere as well),<sup>58</sup> but also in the TEU and TFEU themselves. So, while the TEU, Art. 3(3) refers to a ‘social market economy’, the TFEU, Title VIII (Economic and Monetary Policy) refers to an ‘open market economy with free competition’, which sounds very different, suggesting an ideological tension at the heart of the EU project

<sup>53</sup> Lynch 2020. For an outstanding analysis of the extent of the problem from a legal perspective with comprehensive proposals of how to respond, see Novitz 2020.

<sup>54</sup> Including a right of access to the employer’s premises.

<sup>55</sup> Lynch 2020: 4.

<sup>56</sup> Delors 1998, where he referred to ‘three proposals, which were designed to clearly show the social dimension of the European construction’. They included a ‘platform of guaranteed social rights, containing general principles, such as every worker’s right to be covered by a collective agreement’. Since 1988 collective bargaining has collapsed in the United Kingdom. People remember the failure to keep false promises.

<sup>57</sup> López López 2013.

<sup>58</sup> See Case C-426/11, *Alemo-Herron v. Parkwood Leisure Ltd*, 18 July 2013.

tailored into constitutional arrangements, which hitherto has seen the subordination of social rights.

The foregoing tension between the social-market and open-market orientations of the European constitutional order is revealed in the outputs of the European Semester, which at least for the best part of a decade operated in a way that was extremely hostile to the idea of a progressive Social Contract and the underlying principle of solidarity.<sup>59</sup> As Silvana Sciarra noted in 2014, ‘the European Semester does not interact in a constructive way with Social Dialogue and in some cases puts severe limits to it’,<sup>60</sup> while others have documented how the European Semester was instrumental in stripping out collective bargaining systems operating in member states, by requiring the decentralization of collective bargaining arrangements and the deregulation of employment conditions. With its hitherto economically liberal and open-market focus, it is difficult not to be sceptical of current constitutional arrangements as a basis for rebuilding a model in the destruction of which they have played such a conspicuous part. But in view of the constitutional constraints referred to above, there may be no other option.<sup>61</sup>

## 5.5 SOLIDARITY AND THE SOCIAL PILLAR

So, if the ambition is to build solidarity through a Social Contract moulded by a constitution of limited and contradictory formal powers, how is to be done? The answer from the Commission pre-pandemic is by implementing the European Social Pillar, which has been hailed by Sacha Garben (writing on leave from the European Commission) as

a high-profile political reaffirmation of a broad set of social rights and principles, which in line with the Rome Declaration could be taken as an indication that in the future post-Brexit EU27, there may be a stronger commitment to EU social policy. The Pillar’s implementation envisages the deployment of the full array of EU governance instruments: regulations and directives, recommendations and communications, the creation of new institutions, funding actions, and country-specific recommendations. As such, the static imagery evoked by the notion of a ‘pillar’ arguably does not capture the true nature and potential of the initiative, which is dynamic and fluid, wide-ranging, and permeating.<sup>62</sup>

<sup>59</sup> See Bogg and Ewing 2019. But with brilliant insight, Nicola Countouris may have found a way to unravel the constitutional problems by ‘accommodation’ of different constitutional objectives rather than the perpetual dominance of one ideological vision: Countouris 2020.

<sup>60</sup> Sciarra 2014.

<sup>61</sup> Quite apart from the outcomes of the European process, there are serious concerns about the process and its compatibility with the rule of law (on which, see TEU, Art. 2). The latter is a principle designed not only to protect judicial independence (I am thinking here about concerns with Hungary and Poland), but also with wider questions about the nature of a legal system (Lord Bingham 2007; Bingham 2011).

<sup>62</sup> Garben 2019.

Yet although Professor Garben also claims that ‘an equation of the Pillar with the core set of twenty social rights and principles it proclaims similarly fails to capture its true legal and political significance, which lies mainly in its programmatic nature’,<sup>63</sup> it is nevertheless surprising that the ETUC Manifesto should propose as one of its flagship initiatives ‘Rebuilding the European social model, by reinforcing and implementing the principles of the European Pillar of Social Rights through policies, legislation, social regulation, collective agreements and sound measures for redistribution and upward convergence.’ Despite the applause from Professor Garben and others, the Social Pillar is a regressive measure, a pale shadow of the Community Charter of the Fundamental Social Rights of Workers published in 1989, which began expressly by acknowledging the inspiration of the ILO and the Council of Europe’s Social Charter, and includes clear commitments to freedom of association and the right to bargain collectively, two preconditions of solidarity institutions.<sup>64</sup> The Social Pillar in contrast pitches the commitment as an afterthought in this way:

The European Pillar of Social Rights shall not prevent Member States or their social partners from establishing more ambitious social standards. In particular, nothing in the European Pillar of Social Rights shall be interpreted as restricting or adversely affecting rights and principles as recognised, in their respective fields of application, by Union law or international law and by international agreements to which the Union or all the Member States are party, including the European Social Charter signed at Turin on 18 October 1961 and the relevant Conventions and Recommendations of the International Labour Organization.<sup>65</sup>

And what was previously a ‘*right* to negotiate collective agreements under the conditions laid down by national legislation and practice’<sup>66</sup> is now diluted so that the social partners ‘shall be *encouraged* to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action’.<sup>67</sup> The 1989 Charter in contrast did not simply seek to ‘respect’ the right to collective action but purported to embed the *right*.

It is true nevertheless that the Social Pillar has produced already an important Directive on Transparent and Predictable Working Conditions,<sup>68</sup> and that there are now serious proposals for an instrument on the minimum wage. The latter seems designed to implement the ambiguous commitment in the Social Pillar which provides that

<sup>63</sup> Ibid.

<sup>64</sup> Bercusson 1990.

<sup>65</sup> European Social Pillar, Preamble, para. 16.

<sup>66</sup> Community Charter of the Fundamental Social Rights of Workers, para. 12.

<sup>67</sup> European Social Pillar, Preamble, para. 8(a).

<sup>68</sup> Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on Transparent and Predictable Working Conditions in the European Union.

Workers have the right to fair wages that provide for a decent standard of living. Adequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his/her family in the light of national economic and social conditions, whilst safeguarding access to employment and incentives to seek work. In-work poverty shall be prevented.<sup>69</sup>

This is ambiguous in the sense that while there is a ‘right’ to a decent standard of living, only an ‘adequate minimum’ will be ensured, a distinction reflected in proposals from the Commission at the time of writing for a Directive on adequate minimum wages that fails to guarantee a standard consistent with the European ‘decency’ threshold.

As it stands, the commitment to minimum wages reinforce the regressive nature of the Social Pillar: an ‘adequate minimum’ based on the satisfaction of need is an early twentieth-century standard, and as such a significant departure from the ILO Declaration of Philadelphia, which refers to a ‘just share of the fruits of progress’ (which I assume is more than a subsistence wage); the Council of Europe’s Social Charter, which refers to remuneration that will guarantee a ‘decent standard of living’; and the Community Charter of the Fundamental Social Rights of Workers of 1989, which requires all employment to be ‘fairly remunerated’, to which end workers are to be guaranteed an ‘equitable wage’, defined in turn to mean ‘a wage sufficient to *enable* them to have a decent standard of living’. At their best, current proposals from the Commission for a Directive on adequate minimum wages refer to an ‘adequate wage’ that is ‘guided by criteria set to promote adequacy with the *aim* to achieve decent working and living conditions’.<sup>70</sup>

There is, however, a more serious concern about the minimum wage proposal based on the Social Pillar, and the potential adverse effect ‘on the six member states which set wages exclusively through collective bargaining – Austria, Cyprus, Denmark, Finland, Italy and Sweden’.<sup>71</sup> Ursula von der Leyen was required to address this latter concern directly in the Swedish press, where she wrote that ‘The Commission will never request Sweden to introduce a statutory minimum wage’, and that ‘Instead, we want to strengthen collective agreements in countries that have a lot left to do, and we want to do it without disturbing well-functioning systems, such as that in Sweden.’<sup>72</sup> This is curious in light of the steps that had recently been taken by the Commission to require or encourage the dismantling of collective bargaining systems by means of either MOUs or Country-Specific

<sup>69</sup> European Social Pillar, para. 6.

<sup>70</sup> Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, COM (2020) 682 final, Art. 5(1).

<sup>71</sup> Von der Leyen 2020.

<sup>72</sup> ETUC 2020.

Recommendations.<sup>73</sup> Nevertheless, the commitment was repeated in von der Leyen's State of the Union Address where she said that

Dumping wages destroys the dignity of work, penalises the entrepreneur who pays decent wages and distorts fair competition in the Single Market. This is why the Commission will put forward a legal proposal to support Member States to set up a framework for minimum wages. Everyone must have access to minimum wages either through collective agreements or through statutory minimum wages. I am a strong advocate of collective bargaining and the proposal will fully respect national competencies and traditions. We have seen in many Member States how a well-negotiated minimum wage secures jobs and creates fairness – both for workers and for the companies who really value them. Minimum wages work – and it is time that work paid.<sup>74</sup>

So far as von der Leyen's assurances are concerned, it is true that they were welcomed by the ETUC as providing 'much needed clarity about her plans'.<sup>75</sup> It is also true that at the time of writing we now have a proposal for a Directive on adequate minimum wages. It is a matter of some concern, nevertheless, that although there are proposals to promote collective bargaining, the Draft Directive otherwise expresses no preference for collective bargaining over legislation for setting wages, Article 1(2) providing that member states may choose whether to 'set statutory minimum wages or promote access to minimum wage protection provided by collective agreements'. Surprisingly, those countries that have adopted the latter will not be required to 'make the collective agreements universally applicable'.<sup>76</sup> In line with von der Leyen's assurances, however, the proposed Directive by Article 1(3) makes clear that it is not to be construed as requiring a statutory minimum wage to be introduced in those handful of countries 'where wage setting is ensured exclusively via collective agreements'.

Nevertheless, the provisions designed to promote collective bargaining are otherwise consistent with the weak commitment in the Social Pillar, whereby member states 'shall be *encouraged* to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action'.<sup>77</sup> Hugging very closely to this text, the proposed Directive includes obligations to 'promote', 'encourage' and in extreme cases (which would have included

<sup>73</sup> In the case of Greece, it was said famously by the ILO Committee of Experts to have had 'a severely detrimental impact upon the entire foundation of collective bargaining in the country': ILO Committee of Experts, Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Greece, Observation, Adopted 2012, Published 102nd ILC (2013).

<sup>74</sup> Von der Leyen 2020.

<sup>75</sup> ETUC 2020.

<sup>76</sup> Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, Art. 1(3).

<sup>77</sup> European Social Pillar, Preamble, para. 8(a).



the UK) ‘provide for a framework of enabling conditions’.<sup>78</sup> There are no methods prescribed, no rights created and no obvious means of effective enforcement, other than through the Semester process. At best this seems likely to maintain the status quo whereby a small number of states have a preference for collective bargaining over legislation for the regulation of wages, while others continue to rely on an inadequate statutory model that so far has led to a situation in which ‘national statutory minimum wages are lower than 60% of the gross median wage and/or 50% of the gross average wage in almost all Member States’.<sup>79</sup>

So while there are doubts about the proposed Directive’s commitment to collective bargaining, there are also doubts about the commitment to a statutory minimum wage.<sup>80</sup> Intervention is conveniently constrained by treaty restrictions,<sup>81</sup> with the result that it is proposed member states will be required by Art. 5(1) as already pointed out simply to take ‘the necessary measures to ensure that the setting and updating of statutory minimum wages are guided by criteria set to promote adequacy with the aim to achieve decent working and living conditions, social cohesion and upward convergence’.<sup>82</sup> Writing in 1913, Lenin condemned a statutory minimum wage for one million or so British coal miners as ‘a mere deception of the workers’,<sup>83</sup> having written a few months earlier that it ‘cannot bring about any appreciable improvement in their conditions’.<sup>84</sup> It is not necessary to be a disciple of Lenin to understand that little has happened since to redeem the strategy,<sup>85</sup> confidence in

<sup>78</sup> Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, Art. 4.

<sup>79</sup> *Ibid.*, Explanatory Memorandum.

<sup>80</sup> This is despite claims that adoption and implementation of the Directive will lead to a pay increase for 24 million workers: ETUC, ‘24m could get pay rise under EU directive’, 18 February 2021 (available online).

<sup>81</sup> See TFEU, Art. 153. See further, European Commission, Second Phase Consultation of Social Partners under Article 154 TFEU on a Possible Action Addressing the Challenges Related to Fair Minimum Wages, COM (2020) 3570 final, pp. 16–17. The Commission acknowledges that the EU could not ‘take away the freedom of Member States and social partners to set the level of minimum wages’ (p. 17).

<sup>82</sup> See Muller and Schulten 2020. As the authors point out, although the minimum decency threshold of 60 per cent of the gross median wage and 50 per cent of the gross average wage is referenced in Art. 5(3) as a factor to be taken into account in setting the minimum wage at national level, it is not included ‘as a binding criterion’.

<sup>83</sup> Lenin 1970a: 233.

<sup>84</sup> Lenin 1970b: 229. See generally Arnot 1953 on the Coal Mines (Minimum Wage) Act 1912.

<sup>85</sup> See European Commission, Recommendation for a Council Recommendation on the 2020 National Reform Programme of the United Kingdom, COM(2020) 528 final: ‘Real wage growth has also remained slow. Many parts of the United Kingdom are relatively poor with comparatively low levels of investment in skills and infrastructure. Limited career progression prospects for people in low-wage jobs negatively affect both productivity and poverty. This condition is set to continue and may even be exacerbated in the light of the Covid-19 crisis’ (para. 20). The United Kingdom has had a statutory national minimum wage since the National Minimum Wage Act 1998.

which is likely to be diminished still further by a weak Commission proposal that appears to add nothing of substance to existing practice.<sup>86</sup>

## 5.6 CONCLUSION

The concern in this chapter has been to examine the ‘principle’ of solidarity in the context of ‘state’ action. The role of the state in promoting solidarity is twofold: first to support and encourage solidarity through autonomous institutions (trade unions) and processes (collective bargaining, collective action and Social Dialogue); and second to initiate its own solidarity measures and programmes. The concern has also been to examine that ‘principle’ in the context of proposals for renewing the ‘Social Contract’, highlighting different conceptions of the Social Contract, but focusing mainly on that proposed by the ETUC. It is argued, however, that there are both constitutional and institutional problems in relation to EU support for a Social Contract of this kind, these problems relating to an over-rigid constitution and a weak political programme, both of which predate COVID-19, and both of which seem ill-equipped to meet the challenges presented by the pandemic.

The EU constitution is perhaps one of the most economically liberal constitutions in the developed world, consolidated with wretched bad timing on the eve of the global financial crisis, in a period of uncontained confidence in globalization. But as a deeply ideological constitution (despite impressive social democratic values laid out in TEU, Arts 2 and 3) it is also rigid, cumbersome and inflexible, difficult to engage at speed.<sup>87</sup> The weak political programme is the European Social Pillar, which defines institutional policy until 2023 regardless of what gets in the way between its conception in 2016 and its designated delivery date. True, COVID-19 has added urgency to implementation of its twenty principles, which are the consequence of the damage caused by austerity rather than the challenges presented by COVID-19. True too, the final version of the Social Pillar is a marked improvement on the original version which was a hymn to the commodification of labour and the worship of labour markets.<sup>88</sup> But it still falls a long way short of the war-time responses invoked recently from improbable quarters as an indication of the challenges that lie ahead.<sup>89</sup>

<sup>86</sup> See European Commission, Recommendation for a Council Recommendation on the 2019 National Reform Programme of Italy and delivering a Council Opinion on the 2019 Stability Programme of Italy, COM(2019) 512 final, para. 18.

<sup>87</sup> For a less pessimistic view of constitutional possibilities, see Countouris 2020. See also Vergis 2020.

<sup>88</sup> See Bogg and Ewing 2019.

<sup>89</sup> I am thinking here of Kristalina Georgieva (IMF) and Ursula von der Leyen (European Commission), referred to above. Even Boris Johnson in the United Kingdom has been heard to say that ‘In the depths of the Second World War, in 1942, when just about everything had gone wrong, the government sketched out a vision of the postwar new Jerusalem that they

The Social Pillar certainly falls a long way short of the ETUC's Social Charter, and of what is perhaps the most significant war-time response with which policy-makers are yet to engage, namely the Bill of Social Rights in Part III of the Declaration of Philadelphia. But for all that, there are nevertheless signs of optimism, with Silvana Sciarra rightly applauding what she sees as 'pathways to new solidarities'. These include the EU's job support programmes (delivered at speed it ought to be said), and the synergies that COVID-19 has created between the EU and member states for renewed social dialogue.<sup>90</sup> It is notable nevertheless that at the time of writing, the EU solidarity interventions – most notably the SURE programme referenced by von der Leyen in her State of the Union Address – are designed mainly to maintain rather than change the status quo, however impressive and welcome they may be. It thus remains to be seen whether such optimism in the face of the pandemic is justified, or whether because of legal constraints and multiple political failures, COVID-19 takes us closer to a world in which solidarity has an altogether more sinister meaning.<sup>91</sup>

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wanted to build.' Less plausible is his claim 'that is what we are doing now – in the teeth of this pandemic' (*The Guardian*, 6 October 2020).

<sup>90</sup> Sciarra 2020. Sciarra also welcomes the minimum wage initiative as 'a remarkable step, because it revived social dialogue' on 'a very sensitive theme'. The British experience has been different, with trade unions having minimal impact after a period of successful engagement with government at the beginning of the COVID-19 pandemic. See Ewing and Hendy 2020.

<sup>91</sup> Mosley 1934; Schmitt 2001 (first published 1926). See esp. the second edition of the latter.

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