

The Principle of Solidarity in national, European and international law.

An interdisciplinary and comparative study of the theory of solidarity

1. Summary

The notion of solidarity is used in many different ways. Its meaning changes according to the context in which it is used. The ambiguity of the concept of solidarity has resulted in the absence of a coherent theory of solidarity until now. Despite this absence of a comprehensive theoretical foundation, most Western legal systems enforce forms of solidarity, relying mainly on concepts of welfarism, but lacking a deep justification for this enforcement.

The research project consists of the examination of the philosophical, sociological and legal theoretical framework of a theory of solidarity. The methodology of interdisciplinary legal theory provides with an integrated perspective and allows to articulate the normative and factual context of the conceptualisation of solidarity in the welfare state.

The results obtained from the interdisciplinary investigation of the concept of solidarity will then be compared to the legal concepts at three levels: national law, European law and international law. The study will apply a method of vertical or intra-cultural comparison.

The objective of the proposed project is to present a comprehensive rational theory of solidarity which is apt to justify the enforcement of solidarity. The theory of solidarity will lay the theoretical foundation for a principle of solidarity, which applies to national law, European law and international law. It will be suggested that solidarity is a coherent principle which allows for gradual differentiation between different stages or forms of solidarity at different levels of law.

RESEARCH QUESTION

The notion of solidarity is used in many different ways. It appears in a large variety and type of discourses: politics, philosophy in general, and legal and social philosophy more specifically, sociology, law, and literature. Throughout this multifaceted use, it is presupposed that solidarity has a self-evident extension. However, the meaning of solidarity is not self-evident. Its meaning changes depending on the context in which it is used, and it also changes over time. The synchronic and diachronic polysemy as opposed to its purported self-evidentiary meaning easily leads to a serious ambiguity. This ambiguity has resulted in the absence of a coherent theory of solidarity until now. Despite the absence of a coherent theory, most Western legal systems show a tendency to enforce some forms of solidarity. A deep justification of this enforcement is lacking. This lack of justification jeopardises the legitimacy of a legal system in general.

The research question of this proposal is dedicated to a critical investigation of the theoretical foundations of the concept of solidarity. Based on an in-depth examination of the main theories in philosophy and sociology, this project aims to present a rational theory of solidarity. As a rational theory, it provides a justification for the enforcement of solidarity.

The present study will suggest that solidarity is a legal principle which applies to national, European and international legislation and adjudication. As a principle, solidarity is a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.¹ It will be argued that there are different stages or forms of solidarity which vary gradually as to the intensity of obligations derived from them.

THEORETICAL BACKGROUND

The theoretical framework of the theory of solidarity, which is the topic of this research project consists in three levels: philosophy, sociology and legal theory.

I. Philosophy

1. Solidarity between charity or benevolence and justice

Historically speaking, the concept of solidarity is used in its political philosophical sense for the first time in the middle of the 19th century by the French socialist Pierre Leroux. This perspective is embedded in the doctrine known as saint-simonisme. Leroux intended to develop solidarity as an explicit counter-part to benevolence. According to him, the “natural law of solidarity” established a right to existential protection of every individual by the community. However problematic this argumentation may be in detail, it shows the attempt to base solidarity not on an emotional relation between individuals, but on the notion of equality. More specifically, Leroux considers solidarity the essential constitutive element of society, and with that he paves the way for the more embracing theory later developed by Emile Durkheim.

In this sense, the difference between solidarity and benevolence lies in the assumption that individuals are equal and thus entitled to expect help from the others in case of helplessness. Solidarity amounts to a claim for social justice, which creates the basis for the full participation of the individual in a political community, taking the shape of a right to equality which has to be guaranteed by the state. An argumentation like this replaces solidarity by justice and is likely to turn solidarity from a moral principle into a legal one.

¹ Cf. Dworkin, *Taking Rights Seriously*, p. 22

More recently, Jürgen Habermas, who discussed the term from his discourse theoretical perspective, places solidarity between benevolence and justice. He claims that justice refers to equal liberties of autonomous individuals. Solidarity for its part is related to the welfare of a form of life which is intersubjectively shared by its associates, and thus to the preservation of this form of life as such. Solidarity is here understood as an universal moral principle being “the other side of justice”. It does not merely serve as “heuristic inspiration of norms” but allows to consider the particularity of each single case in the application of rules and principles.² To some extent this notion of solidarity resembles the Aristotelian concept of equity.

2. *The universality of solidarity*

From a philosophical point of view, the question for the universality of solidarity is raised. According to Richard Rorty, for example, solidarity is based on our capacity to see “the other” as “one of us” understanding that Men are equal in their capacity to suffer from pain and humiliation.³ This resembles the doctrine of Jean-Jacques Rousseau according to which there exists a social bond between people independent of a state. It equally reminds of the utilitarian approach of Jeremy Bentham and John Stuart Mill as well as Schopenhauer’s moral principle, stating that one should “harm nobody, but help others as much as you can”. For Schopenhauer the basis for a morality is to be found in metaphysics; at the level of reality there can be no distinction between individual selves, so in reality I harm myself as much as I harm others, and if I refuse to help another I am foregoing something I myself need.⁴

However, such a notion of “universal solidarity” based on a feeling of philanthropy or on metaphysics overtaxes the moral capacity of the individual, imposing a moral duty on him or her to help every other individual. Here, the question becomes one not only of the foundations but also the limits of solidarity.

3. *The epistemological issue*

The epistemological questions attached to the notion of solidarity have mainly been explored by German moral philosophy, namely the *materiale Wertethik* of Max Scheler and Nikolai Hartmann. Scheler was influenced by the political-sociological dimension of solidarity, however, also Christian ideals played a dominant role in this thinking.

2 ² J. Habermas, *Gerechtigkeit und Solidarität*, p. 70

3 ³ R. Rorty, *Contingency, Irony and Solidarity*, p. 290 et seq.

4 ⁴ A. Schopenhauer, *Die beiden Grundprobleme der Ethik*, p. 157

According to Scheler, through the principle of solidarity, the entire moral world is transformed into one entity, where every individual is responsible for the acts, the will, the responsibility and the merits of each other individual. Thus, there exists not only the individual responsibility and merit of each person, but also a common responsibility (*Gesamtschuld*) and a common merit (*Gesamtverdienst*) in which every individual takes part. In this context, Scheler speaks of a “*Gesamtperson*” to which he ascribes an independent existence as collective individual (*Kollektivindividuum*). The ontological aspect of Scheler’s philosophy thus also applies to his notion of solidarity.⁵

Hartmann defines solidarity as “a commitment, an obligation where each person is jointly responsible for each other person”⁶. He distinguishes between different forms or stages of solidarity, namely legal solidarity, solidarity as charity, solidarity based on a common religion, and historical generations.

For both, Scheler and Hartmann, the question of epistemology in relation to values is one of emotional cognition (*Werterkenntnis*). The experience of value is neither intellectual nor sensual, but emotional. Different kinds of emotions relate to something that has a value, in a manner parallel to the way in which perception relates to something that has sensory quality. In creating a separate realm of values to which we have access via emotional cognition this phenomenological approach avoids a naturalistic fallacy, however, it only explains the cognition of values but it cannot explain their valuation (*Wertung*).

The philosophical examination of the matter shows that a principle of universal solidarity leads to a moral obligation of each individual to be solidarity with every other individual. However, a principle of solidarity as universal as this overtaxes the moral capacity of a person to fulfill the moral duty to help every other individual. This insight will be taken into account by the legal theory of solidarity by raising the question not only of the theoretical foundations but also the limits of a principle of solidarity.

In particular, the principle of solidarity must correspond to the possibility of its realisation. This means that the theory of solidarity will not only provide for the justification for the enforcement of solidarity, but it will also take into account the aspect of the efficiency of such a principle. Therefore, the theory of solidarity will adopt Hartmann’s concept of different stages or forms of solidarity. This allows for a differentiation as to the intensity of the duties deriving from a principle of solidarity. In this way, the intensity of solidarity obligation corresponds to gradual difference between legal solidarity, solidarity as charity and historical solidarity with future generations.

5 ⁵ M. Scheler, *Der Formalismus in der Ethik und die materiale Wertethik*, p. 210

6 ⁶ N. Hartmann, *Ethik*, p. 489

In respect to the epistemological questions the theory of solidarity will as well abstain from the articulation of the naturalistic fallacy. It will, however, not remain with a model of emotional cognition, but develop a rational account that permits valuation and graduation.

II. Sociology

From a sociological point of view, solidarity is seen in two different ways: as a bond based on an inner link between the people of a community or a nation (Tönnis, Renan) or as a functional or instrumental relationship between individuals living in a society (Comte, Durkheim, Weber, Parsons). In both ways, the term is used to describe the alleged relationship between people. However, solidarity does not only have a descriptive meaning, but it also entails a normative connotation. In relation to the group-identity within a community or a society, Durkheim, for example, uses the term "social solidarity" in a descriptive manner, but develops from it the normative claim "to be solidly behind the group"⁷.

The question remains, how the gap between the descriptive level and the normative claim is to be bridged. Some scholars try to connect these two dimensions of solidarity by making use of a concept of reciprocity, suggesting that the individual relies on a community when he or she creates his or her identity and is thus reciprocally obliged to identify himself or herself with that community. He or she therefore has to support the community even at the cost of interference with his or her own private interests.⁸ Such an argumentation, however, amounts to a naturalistic fallacy, since it does not take the analytical difference between descriptive statements and normative claims into consideration.

On this account, the enforcement of solidarity by law as a form of integration is taken for granted. On the idea that solidarity is, from a sociological perspective, a scientific category, this includes the risk of merging fact and value. As a result, any legal enforcement of solidarity turns out to be *ipso facto* justified. Even stronger, solidarity becomes an instrument to create legitimacy without being itself normatively justified.

This preliminary investigation of the concept of solidarity from a philosophical and a sociological perspective raises the question as to its normative foundation. Unless this justification is provided, law becomes an instrument for the enforcement of certain political ideas or even ideals. A mere philosophical or sociological analysis of solidarity is not apt to provide such a basis. The former includes the risk of being an abstract theory that has

⁷ E. Durkheim, *La division du travail social*, pp.241 et seq.

⁸ G. Khushf, *Solidarität als moralischer und politischer Begriff*, p. 126

no relation with social reality; the latter, in sticking to observable facts, will easily turn into an ideology because of the merging of facts and values.

The theory of solidarity avoids the confusion of descriptive elements and normative claims. On a descriptive level, it will rely on the insights gained from the sociological concepts of "community-solidarity" and "social solidarity" insofar as they show that altruistic behaviour of individuals is either limited to the members of a group or is based on the functional links between members of a society. In particular, the theory of solidarity will use these descriptive element merely in connection with questions about the efficiency of a principle of solidarity. Normative claims in regard to the justification of such a principle will be confined to the philosophical and legal theoretical investigation of the matter.

III. Legal Theory and law

Both, the philosophical and sociological level of the analysis demand a third level of analysis from a more integrated perspective. As from its origin, solidarity as a philosophical and a sociological concept, suffers from the absence of any integrated perspective or foundation. If it is rightly considered tantamount to the current notion of the welfare-state, there is only a weak connection between the two concepts.

The paradigm of current legal theory is apt to provide such a foundation. On this paradigm, theoretical legal research must adopt an interdisciplinary model in order to be able to articulate its research questions.⁹ The combination of the philosophical level and the sociological level of this research project satisfies this requirement.

1. The conceptualisation of solidarity in the welfare-state

The concept of the welfare state combines several perspectives: philosophical, sociological and legal, among others. Only legal theory as an interdisciplinary research method allows for an in-depth study of this concept. The combination of the philosophical, sociological and legal method of study introduces a new paradigm of research on this multifaceted concept.

Legal scholarship is divided about the question whether the welfare-state is, or should be, grounded on a theory of justice or a concept of solidarity. A number of scholars see the theoretical foundation of the welfare-state to be provided by considerations of justice. John Rawls, for his part, bases his principles of justice not on the notion of fraternité or solidarity, but on the idea of justice as fairness.¹⁰ Others oppose this view and claim that a principle of distributive justice is neither necessary nor useful to legitimate a welfare-regulatory state. They reject such a concept of justice as metaphysical and suggest to build the welfare-state on a theory of “operationalized solidarity”.¹¹

The methodology of interdisciplinary legal theory allows for a conceptualisation of solidarity by articulating its normative and factual context in the welfare state. In locating solidarity and the welfare state “between facts and norms” (Habermas), it opens a new perspective between a purely philosophical and a mere sociological discussion of these concepts.

2. Solidarity as a legal concept in legislation and adjudication at the level of national, European and international law

⁹ M. van Hoecke, *What is Legal Theory?*, p. 76 et seq.; *idem.*, *Law as Communication*, p. 125 et seq.

¹⁰ J. Rawls, *A Theory of Justice*, p. 203

¹¹ W. Kersting, *Theorien der sozialen Gerechtigkeit*, p.376; G. Khushf, *Solidarität als moralischer und politischer Begriff*, p. 111 et seq.

From the interdisciplinary investigation of the concept of solidarity as it is embedded in the welfare state the study leads to a comparison of the legal concept of solidarity at different levels of law: national law, European law and international and human rights law. These three levels will be studied in a comparative way, whereby the role of the concept of solidarity will be considered in regard to legislation as well as adjudication.

a. The concept of solidarity in national welfare legislation

In general, national legal systems refer explicitly or implicitly to the concept of solidarity in their constitution or its preamble. Constitutional provisions have legal force, while the preamble of a constitution is legally not binding. Hence, as part of the former, solidarity has the character of a legal principle, as part of the latter, it rather serves as a leitmotiv.

The German constitution does neither in its preamble nor in the constitutional provisions mention the term, but it paraphrases the idea of solidarity in the principle of the welfare state (*Sozialstaatsprinzip*). It is also this principle of the welfare state that the constitutional court refers to when it considers matters of solidarity. In national private and criminal law, the term solidarity does not occur, however, a number of rules and case law transform the harm-principle from a moral principle into a legal duty.

A preliminary inquiry shows, that both the concept of solidarity and the welfare state suffer from a lack of systematic treatment. On the national level, the concepts are reflected in the distributive and re-distributive role of the state (taxation, subventions, social security), however, their enforcement in legislation and judicial decisions is operated on a legal basis, which lacks theoretical reflection. Mostly, enforcement of solidarity relies on ad hoc political programs, and not on a coherent theory of solidarity in relation to the welfare state.

b. European law and international law

On the level of the European Union, the concept of solidarity plays a role in Community law as well as in decisions of the Court of the European Communities.¹² In particular, article 2 of the Treaty of the European Communities stipulates “solidarity between the Member States”. The Court of the European Communities developed a principle of “national solidarity” in regard to social security law.¹³

¹² ¹² Cf., e.g., decision of the Court of the European Communities in the case T-319/99 (“Fenin”) on 4 March 2003 and in the case C-186/01 (“Dory”) on 11 March 2003

¹³ ¹³ Cf. the joined cases C-159/91 and C-160/91 (“Poucet and Pistre”) at [1993] ECR I-637

In international law, the idea of the welfare state is absent due to a lack of an institutional apparatus. Here, the concept of solidarity plays a role mainly in international treaties. The preamble of the Treaty of the Helsinki conference (1975), for example, mentions the “solidarity between the peoples”, and the Banjul Charta of the African States (1986) stipulates in its article 23 that “the relationships between the states are governed by the principles of solidarity and friendship”. On this level, there exists no enforcement of solidarity, but it is most of the time referred to in terms of “collaboration”, “co-operation” and “friendship”, while these terms only apply to the relations between states, and not between groups or persons.

c. Human Rights

On the level of the European Convention of Human Rights current legal scholarship shows the development of sc. “solidarity rights” (Vasak, Garzon Valdez). These rights are based on the assumption of a form of life shared by the participants of a society. This form of life can be taken to be the welfare state for which, on this level too, a theoretical framework is missing. More specifically, human rights are considered a vertical relation between persons and the state. This includes a negative delimitation of the power of the member states. The current development of human rights as a horizontal relation between persons opens a larger, though yet undeveloped, perspective on the legal enforcement of solidarity rights.

A preliminary inquiry of these three levels shows, that a coherent conceptualisation of solidarity does not exist, neither in respect to the welfare state nor in regard of a comprehensive principle of solidarity. The proposed study aims to develop the theoretical framework for a principle of solidarity which allows for gradual distinction between different stages or forms of solidarity and thus is applicable to all three levels of law.

METHODOLOGY

The research question is related to a variety of scientific disciplines and to different levels of law. It thus requires an approach which allows for methodological multiplicity: The development of a theoretical framework of the theory of solidarity calls for an interdisciplinary method; the formulation of a principle of solidarity demands comparative research.

The study will commence with an in-depth investigation and systematisation of the main theories of solidarity in philosophy and sociology. It will concentrate on a critical examination of the relevant literature and the related philosophical and sociological scholarship by conducting comprehensive bibliographical research relying on electronic and library resources.

To develop the philosophical, sociological and legal theoretical framework of a theory of solidarity the study will apply the methodology of interdisciplinary legal theory. Legal theory, as it is understood here, is interdisciplinary in its methods as it draws insights from a variety of disciplines.¹⁴ In regard to the present study, theoretical legal research will benefit from the philosophical and sociological method of the examination of the concept of solidarity, while its focus will remain with legal categories and legal methods. Though emphasising a synthesising, integrating and globalising approach, the project will seek theoretical insights into, and explanations of the concept of solidarity from a legal angle.

The results obtained from the interdisciplinary investigations of the concept of solidarity will then be compared to the legal concepts of solidarity. The present study proceeds from the underlying assumptions that on the one hand, legal theory can draw insights from comparative law and its methodology, while on the other hand, theoretical insights are essential for the development of comparative law.¹⁵

The study will analyse and compare the concepts of solidarity used at three different levels of law: national law, European law and international. More specifically, it will apply a method of vertical or “intra-cultural” comparison, which will allow to develop a coherent principle of solidarity and differentiate between the various stages or forms of solidarity and their gradual differences.

In particular, the study will concentrate on a critical analysis of the concept of solidarity used in welfare-regulatory provisions of national constitutions as well as the respective case law. This also permits to draw conclusions for a prospective European Constitution. Moreover, the study will focus on the welfare-legislation of the European Union and the decisions of the Court of the European Communities. In regard to international and human rights law, it will concentrate on the European Convention on Human Rights as well as the adjudication of the European Court of Human Rights.

The interdisciplinary examination of the philosophical, sociological and legal theoretical concepts of solidarity together with the comparative research on legal concepts of solidarity will result in the presentation of a rational theory of solidarity which serves as a theoretical foundation of a coherent principle of solidarity applicable to national law, European law and international law.

¹⁴ M. van Hoecke, *What is legal theory?*, p. 76; *idem*, *Law as Communication*, p. 125 et seq.

¹⁵ *Cf.* J. Bell, *Comparative Law and Legal Theory*, p. 20; M. van Hoecke and M. Warrington, *Towards a New Model for Comparative Law*, p. 498