

9-1-2021

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Recommended Citation

Tamar H. Brandes, *Solidarity as a Constitutional Value*, 27 Buff. Hum. Rts. L. Rev. 59 (2021).
Available at: <https://digitalcommons.law.buffalo.edu/bhrlr/vol27/iss1/2>

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SOLIDARITY AS A CONSTITUTIONAL VALUE

*Tamar Hostovsky Brandes**

INTRODUCTION

In the face of threats posed by the COVID-19 pandemic, solidarity has become the term of the hour. The World Health Organization (WHO) organized a “solidarity series of events” under the hashtag “together at home.”¹ WHO chose the title “Solidarity” for the ambitious global initiative to find a treatment for the virus, establishing a “Solidarity” response fund.² The pandemic, it was stressed, was a challenge that could only be mitigated through mutual assistance and cooperation among countries and individuals worldwide.

Solidarity was invoked as necessary in the fight against COVID-19 not only in the global arena, but also domestically. While no one is immune from the virus, some are more vulnerable than others. Social distancing measures and various limitations were employed in many countries, their need often stressed as crucial for protecting both society as a whole and vulnerable individuals. In addition, the economic toll of the pandemic raised calls for mutual support. Many states provided some degree of economic relief or assistance.

Yet, as the crisis unfolded, objections to restrictions and requirements emerged. The price that was required, some argued, in terms of

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1. *The Solidarity Series of Events*, <https://www.who.int/news-room/campaigns/connecting-the-world-to-combat-coronavirus/together-at-home> (Aug. 8, 2020).

2. *Help Fight Covid-19*, <https://covid19responsefund.org/en/?ms=wef> (Aug. 8, 2020). The European Union has also established a conjoined solidarity effort to fight Covid-19. See “*Team Europe*” - *Global EU Response to Covid-19 supporting partner countries and fragile population*, EUROPEAN UNION EXTERNAL ACTION, https://eeas.europa.eu/headquarters/headquarters-homepage/77470/%E2%80%9Cteam-europe%E2%80%9D-global-eu-response-covid-19-supporting-partner-countries-and-fragile-populations_en (Aug. 20, 2020).

freedom and economic burdens, was simply too high.³ Indeed, countries differ in the scientific presumptions they rely on for adopting a health strategy to manage the COVID-19 crisis. However, they also differ in their approaches to the basic question of who owes what to whom, and to what extent mutual consideration should turn to mandatory requirements. As a result, different approaches emerged with respect to questions such as the extent to which the state is responsible for compensating those economically affected by the pandemic, the extent to which restrictions and social distancing measures could be imposed, and whether wearing masks could be mandatorily required.⁴

The different approaches in responding to the COVID-19 crisis can, in part, be explained by the different social perceptions of solidarity and the duties that stem from it. The notion of solidarity, explored below, underlies the web of mutual commitments among members of a community, and, in the case of states, among members of the political community.

In this article, I examine the notion of solidarity as a constitutional value. Constitutions entrench the founding principles of the political community.⁵ Narratives of solidarity are woven into Constitutions both implicitly and explicitly. I argue that, despite the prevalence of the notion of solidarity in Constitutions worldwide, constitutional scholarship has paid relatively little attention to it. I call for recognition and discussion of the significance, the potential and perils of recognizing solidarity as a constitutional value or principle.

3. One contentious question brought up in public debates is whether elderly and other vulnerable individuals could be expected to self-isolate for the sake of economic activity. For a rejection of this proposition, see, for example, Florian Fischer et al., *COVID-19 and the Elderly: Who Cares?*, in *FRONT. IN PUB. HEALTH* 151 (Eric Nguemeleu Tchouaket ed., 2020).

4. For reviews of country responses to Covid-19 in various areas, see LexAtlas: Covid-19, lexatlas-c19.org; Ittai Bar-Siman-Tov, *COVID-19 Meets Politics: The Novel Coronavirus as a Novel Challenge for Legislatures*, in *THE THEORY AND PRACTICE OF LEGISLATION* (Ronan Cormacain & Ittai Bar-Siman-Tov eds., 2020); Int'l Lab. Org., *COVID-19 and the world of work*, <https://www.ilo.org/global/topics/coronavirus/lang-en/index.htm> (Aug. 23, 2020) (examining responses of various countries with regard to stimulation of the economy and the protection of employees); European Center for Disease Prevention and Control, *Country responses measurers to COVID-19* (examining health measures employed by EU countries), <https://www.ilo.org/global/topics/coronavirus/lang-en/index.htm> (Aug. 23, 2020); IMF, *Policy Responses to COVID-19*, <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19> (Aug. 23, 2020); Covid-19 Law Lab, <https://covidlawlab.org/> (Aug. 23, 2020).

5. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 215 (William Rehg trans., 1996).

The article examines how different constitutions define and perceive solidarity. I look at constitutionally entrenched notions of domestic, transnational, and cosmopolitan solidarity. I argue that solidarity is the basis of the mutual commitments that exist in a political community, and that in order to ensure that such commitments are defined and imposed in a just manner, it is important to recognize how the boundaries of the solidarity group are defined, who is included and who is excluded from such group, and what the nature of solidarity in a given community is. Constitutional law, I argue, plays a role in shaping these boundaries. Finally, I argue that although constitutional solidarity may intuitively be expected to endorse only intra-state solidarity - solidarity among members of the political community - constitutions can and do endorse notions of transnational solidarity. I thus argue that constitutionalism can be an important source of bottom-up transnational and global solidarity.

The article proceeds as follows: Section 1 examines the notion of solidarity as it is understood in the political theory literature, its relationship to the political community, and, accordingly, to the imposition of duties and the enjoyment of rights. Section 2 examines the role of solidarity as a constitutional notion. Section 3 offers a comparative typology of constitutional references to solidarity as a constitutional principle or value. Section 4 argues that since constitutions are often perceived as the embodiment of a particular social contract, constitutional solidarity may intuitively be associated with intra-state solidarity. However, comparative research demonstrates that constitutions include references not only to intra-state solidarity but also to various forms of transnational solidarity. Section 5 briefly examines the normative implications of the comparative analysis. It suggests that solidarity can serve as a guiding principle in constitutional interpretation, and, in particular, as an anchor for recognizing the rights of and protecting the underprivileged and marginalized members of a society. It also argues, however, that a constitutional principle of solidarity can be a source for encouraging solidarity beyond the domestic political community. In this respect, constitutional law can be an important source for fostering bottom-up transnational solidarity, in a manner that may be perceived as reflective of the “people’s will,” which supplements and strengthens the top-down transnational solidarity that international instruments and institutions attempt to encourage. Section 6 concludes, and outlines questions for further research.

I. WHAT IS SOLIDARITY?

The concept of solidarity is used differently by psychologists, sociologists, and political theorists. Laitinen and Pessi explain that the term derives from Latin, and that in the Roman Law “obligatio in solidum involved the group liability of joint debtors.” “Gradually,” they explain, “the word came to be used in a broader meaning of emotionally and normatively motivated readiness for mutual support.”⁶

Indeed, most uses of the term solidarity revolve around the existence of mutual commitments among members of a group.⁷ Solidarity is a multi-faceted concept. It is used to describe both a set of attitudes and the practices that may derive from these attitudes. Solidarity is applied to characterize the emotions and the acts of individuals, but also describes a social phenomenon.⁸

Questions regarding the existence and nature of solidarity may be asked with respect to various types of groups, like small groups such as families and close-knit communities, large political communities, or even humanity as a whole. Solidarity can be examined in professional contexts and within social classes. The term “solidarity” has played a central role in class struggles across states and continents.⁹ The nature and basis of solidarity thus depends, at least to some extent, on how the group at stake, i.e., the solidarity group, is defined.¹⁰

In their introduction to an edited volume on solidarity in political theory, Keith Banting and Will Kymlicka argue that solidarity among

6. Arto Laitinen & Anne Birgitta Pessi, *Introduction*, in *SOLIDARITY: THEORY AND PRACTICE* (Laitinen & Pessi eds., 2018). For a discussion of the development of the notion of solidarity, see HAUKE BRUNKHORST, *SOLIDARITY: FROM CIVIC FRIENDSHIP TO A GLOBAL LEGAL COMMUNITY* (Jeffrey Flynn trans., 2005).

7. Kurt Bayertz, *Four Uses of Solidarity*, in *SOLIDARITY 3* (Kurt Bayertz ed., 1999). Alejandro Colás argues that “in its most basic formulation, the concept refers to a sense of unity among individuals which arises out of shared socio-historical experiences - or in a weaker form, out of an affective empathy - and which binds these individuals in the collective pursuit of a specific political goal In a stronger, ‘thicker’ rendition of the term, those engaged in ties of solidarity also accept the existence of reciprocal moral duties.” Alejandro Colás, *Taking sides: cosmopolitanism, internationalism and ‘complex solidarity’ in the work of Fred Halliday*, 87(5) *INT’L AFFAIRS* 1051, 1056 (2011).

8. David Miller, *Solidarity and Its Sources*, in *THE STRAINS OF COMMITMENT: THE POLITICAL SOURCES OF SOLIDARITY IN DIVERSE SOCIETIES* 61, 62-63 (Keith Banting & Will Kymlicka eds., 2017) [hereinafter *STRAINS OF COMMITMENT*].

9. See, e.g., Nicholas H. Smith, *Solidarity and Work: A Reassessment*, in *SOLIDARITY*, *supra* note 6.

10. Miller explains that for there to be “solidarity among” members of a group there first needs to be a group. Miller, *supra* note 8, at 63.

members of a political community is a necessary condition for the functioning of “just institutions,” as well as for the existence of a “just society” – one that seeks to protect the vulnerable, ensure equal opportunities, and mitigate undeserved inequalities.¹¹

Banting and Kymlicka focus on what they term “bounded solidarity.”¹² Bounded solidarity can be understood as solidarity among members of a given political community. The “solidarity group” in this analysis encompasses, at the least, all citizens of the state. Bounded solidarity is often perceived to be competing with, if not contradictory to, other forms of solidarity such as transnational solidarity and cosmopolitan solidarity. This perception is based on the belief that emphasizing the special commitments among members of a certain group will undermine the group members’ commitments towards non-members.

Intra-group solidarity has thus been treated with suspicion by internationalists and viewed as damaging to the cosmopolitan enterprise. Alejandro Colás discusses solidarity in what he refers to as “the cosmopolitan-communitarian debate in IR.”¹³ Colás argues that for cosmopolitans, solidarity is, or should be, a global principle. Meanwhile communitarians are doubtful about the ability of establishing solidarity on a global scale and believe that in a “thick” sense, it can only exist in smaller political communities.¹⁴ Simon Derpmann notes that in philosophical literature, the alleged opposition between solidarity and cosmopolitanism is associated with “an opposition between obligations originating in the membership to communities and obligations equally owed to everyone.”¹⁵ He contends that “one could say that obligations of solidarity are not universal, but communal in the sense that not everyone, but only the members of a community have these obligations. And not everyone, but only members of the community can make the corresponding claims.”¹⁶

The association of solidarity with communitarianism has led cosmopolitans and liberal thinkers to stir away from the concept of solidarity. Banting and Kymlicka argue that societal based solidarity has been

11. Keith Banting & Will Kymlicka, *Introduction*, in STRAINS OF COMMITMENT, *supra* note 8, at 6.

12. *Id.*

13. Colás, *supra* note 7, at 1057.

14. *Id.* Fuyuki Kurasawa similarly discusses “cosmopolitans’ distrust of thick social relations — which they equate too readily with the primordialism of ethno-nationalism and other ‘pre-political’ identities.” Fuyuki Kurasawa, *A Cosmopolitanism from Below: Alternative Globalization and the Creation of a Solidarity without Bounds*, 45(2) EUR. J. OF SOC. 233, 234 (2004).

15. Simon Derpmann, *Solidarity and Cosmopolitanism*, 12(3) ETHICAL THEORY & MORAL PRACTICE 303, 303 (2009).

16. *Id.* at 305.

considered by liberal scholars “at best mythical, and at worst dangerous and exclusionary.”¹⁷ They contend that it is essential for the functioning of a state in general and a welfare state in particular.

The argument that some degree of solidarity is necessary for the existence of a modern state is widely accepted. However, there is less agreement on concrete questions regarding the nature and content of solidarity. For example, there are different answers to the questions of what the implied commitments among members of a political community are and who is included in the group within which such commitments exist. There are also different positions regarding the conditions required for solidarity to exist, and whether it can be actively fostered when it is weak or lacking. These three questions can be summarized as the *who*, *what* and *how* aspects of solidarity.

In addition, a question that is of particular importance is whether intra-state, “bounded solidarity” necessarily conflicts with transnational solidarity and cosmopolitan solidarity. Derpmann argues that “the central question in the present discourse [on solidarity and cosmopolitanism] is to what extent cosmopolitan identities and obligations can – or should – compete with national identities and obligations of solidarity.”¹⁸ Cosmopolitans generally argue that all human beings owe moral (and sometimes legal) commitments to one another. Recognizing special commitments among members of the group is often perceived as weakening such universal commitments.¹⁹

If bounded solidarity weakens cosmopolitan solidarity, strengthening intra-state solidarity and strengthening transnational solidarity would be conflicting projects. There is little empirical indication that this is the case.²⁰ Populist, nationalist politicians often portray the two as a dichotomy and as a justification to undermine the legitimacy of international institutions.²¹ However, just as people are capable of having a web of attachments and connections, of different types and levels, they are capable of having similar complex types of solidarity.

The issue of solidarity within a political community can be explored from empirical and normative perspectives.²² From an empirical

17. Banting & Kymlicka, *supra* note 11, at 5.

18. Derpmann, *supra* note 15, at 307.

19. *See id.* at 306-07.

20. Some argue that it is even the other way around, that is, that experiences of trust in one’s close circle may expand externally. For discussion and critique, see Miller, *supra* note 8, at 67.

21. *See* Tamar Hostovsky Brandes, *International Law in Domestic Courts in an Era of Populism*, 17(2) INT’L J. OF CONST. L. 576, 576-77 (2019).

22. For a description of normative and factual facets of solidarity, see Carol C. Gould, *Transnational Solidarities*, 38(1) J. OF SOC. PHIL. 148, 149 (2007).

perspective, one may ask if within a given political community, there is solidarity among all members of society. This is not always the case: minorities, for example, may be excluded from the main and dominant societal solidarity group. To the extent that mutual duties are derived from the notion of solidarity, those excluded from the main group may be perceived as less deserving of social benefits or of protection of the state's institutions.

One may also ask what the basis and nature of solidarity within political communities is. One issue that is disputed among scholars regards the extent to which a shared cultural identity is required for solidarity to exist. Emile Durkheim, the scholar most associated with the notion of solidarity, famously distinguished between mechanical solidarity and organic solidarity as two different types of solidarity, which characterized, simple, non-industrialized societies versus complex, industrialized societies.²³ Some argue that a shared cultural and historical background is the basis of solidarity within a political community. Other argued that even if a “thick” similarity is not precondition for the existence of solidarity, at least a thin shared identity is requited if solidarity is to exist.

David Miller suggests that “no one theory can offer a complete explanation” of solidarity, and highlights three main theories as identifying “factors that plausibly contribute to society-wide solidarity,” in particular, when operating in conjunction.²⁴ The first is the associational theory, which argues that solidarity emerges from “people’s participation in a range of civil and political associations.”²⁵ The second is the identity theory, which contends that solidarity is rooted in a shared identity.²⁶ The third is the institutional theory. This theory suggests that the causes and effects of solidarity might be reversed, and that “solidarity is actually the effect of a society’s policies and institutions rather than their (indirect) cause.”²⁷ Miller argues that each of these three theories correctly identifies factors that promote solidarity, but that “they also seem to be more powerful when operating in conjunction.”²⁸

The scholarly debate on the nature of solidarity often fails to distinguish between the definition of solidarity and the conditions necessary for solidarity to flourish. For example, this is demonstrated in Hart’s response to the claim that a shared commitment to a particular morality is

23. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 174 (George Simpson trans., 2014).

24. Miller, *supra* note 8, at 75. Miller reviews five theories of the sources of solidarity but perceives the above-discussed three to be the central ones.

25. *Id.* at 71.

26. *Id.* at 73.

27. *Id.* at 74.

28. *Id.* at 76.

the basis of solidarity. Hart argues that this claim was empirically unfounded and was only true if solidarity was defined to begin with as having a shared morality.²⁹ Similar claims can be made regarding the thesis that solidarity is based on shared histories, shared experiences, or shared values.³⁰

The minimalist definition of solidarity, which stresses the *existence* of a sense of mutual commitments, without asking why such a sense of commitments exists is helpful in avoiding confusion. Another distinction that should be maintained is the distinction between the predisposition to support and assist members of the group, and the actual duties or acts that may stem from it. This distinction can be thought of as the distinction between the sense or emotion of solidarity, and “acts of solidarity” – the latter being a manifestation of the former.³¹

From a normative perspective, one may ask whether solidarity within specific groups — the family, the state, humanity, etc. — is desired, and if so, why. In addition, one may ask whether particular types of solidarity are morally or normatively legitimate. Thus, for example, a solidarity group may be constructed in an exclusionary manner, so that commitments are not equally owed to members of minorities or may be construed as conditional upon the fulfilment of certain conditions.³² The fact that, from an empirical perspective, a political community embraces a certain ethos of solidarity should not prevent us from critically examining it.

Finally, since solidarity is the basis of mutual duties, it can easily be employed to justify or require limitations on individual freedom. This, in itself, should not hinder us from recognizing the value of solidarity. For example, the requirement to wear face masks, primarily for the protection of others, has been justified as a duty that stems from and manifests solidarity. The claim that it infringes upon individual freedom is formally correct, but it does not imply that the expectation of solidarity is not legitimate in this context.

29. H. L. A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1, 4 (1967).

30. Miller, *supra* note 8.

31. For a discussion of the dispute regarding the centrality of the emotional aspects of solidarity, see Mikko Salmela, *Collective Emotions as “the Glue” of Group Solidarity*, in SOLIDARITY, *supra* note 6.

32. Derppmann, *supra* note 15, at 306. Brunkhorst perceives solidarity as instrumental for the function of modern democracies. BRUNKHORST, *supra* note 6, at 2. Elsewhere, I demonstrated how the lack of solidarity may undermine equality and justice. See Tamar Hostovsky Brandes, *Law, Citizenship and Social Solidarity: Israel’s “Loyalty-Citizenship” Laws as a Test Case*, 6(1) POLITICS, GROUPS & IDENTITIES 39 (2018).

Solidarity may be argued to be valuable both inherently and instrumentally.³³ Inherently, one may argue that having a sense of solidarity is a virtue in itself. I am more interested, however, in the instrumental value of solidarity, and, in particular, the role of solidarity in enabling and facilitating the existence of just societies.³⁴

II. SOLIDARITY AND JUSTICE

Under the minimal definition, the notion of solidarity expresses the commitment of members of a group to each other's well-being. It is thus, arguably, a basis of members' willingness to bear the costs and sacrifices that may be required to secure the well-being of other members of the group. Laitinen and Pessi argue that "solidarity is often based on *welthinking*, it can be separated from not only anti-social egocentrism, but also from one-sided "thou-centrism" such as altruism, sympathy, caring, or Christian charity."³⁵ The latter may also initiate people to contribute to others' well-being, but the manner in which such contribution is made is sporadic and individualistic. The collective and inter-dependent nature of solidarity renders it more a more reliable and stable source for generating a willingness to act in the benefit of others in a constant, ongoing, and recurrent manner. To the extent that a just society is one in which members take care of each other, and if we believe that the existence of such a society is a goal that should be strived towards, solidarity among members of the society is desirable.

What "society" do we refer to when we talk about a "just society?" Normative and political scholarship generally focuses on two types of societies. The first is the political community, and its institutional embodiment, the state. The second is the global society.

Jurgen Habermas explains that "accepting decisions whose consequences have to be borne equally by all requires a form of abstract

33. Miller similarly distinguishes between solidarity as intrinsically valuable, and solidarity as instrumentally valuable. He argues that intrinsically, solidarity may fulfill certain human needs, and that instrumentally, solidarity may promise individuals protection and serve as "a break on inequality." Miller, *supra* note 8, at 66.

34. Colás notes that "solidarity is not a moral end in itself, but merely a means in the attainment of moral goods such as liberty or equality." Colás, *supra* note 7, at 6.

35. SOLIDARITY, *supra* note 6, at 2.

solidarity that was first produced during the nineteenth century between citizens of different nation-states.”³⁶ He further argues that:

Constructed through the medium of modern law, the modern territorial state thus depends on the development of a national consciousness to provide it with the cultural substrate for a civil solidarity. With this solidarity, the bonds that had formed between members of a concrete community on the basis of personal relationships now change into a new, more abstract form. While remaining strangers to one another, members of the same “nation” feel responsible enough for one another that they are prepared to make “sacrifices” – as in military service or the burden of redistributive taxation.³⁷

Habermas perceives solidarity to be the foundation for which concrete duties can be derived. These concrete duties may change over time and place. For example, the COVID-19 pandemic gave birth to a set of duties that did not previously exist, such as the duty to maintain social distance and the duty to wear face masks.

It is self-evident that economic redistribution, military service, and even wearing masks, require members of a state to make concessions for the well-being of other members. In fact, ensuring almost every aspect of justice, from social and economic rights to individual freedom, requires some members of the community to incur a price. This price includes both the fiscal cost of protecting and enforcing such rights, a cost that society as a whole must incur, and the compromises that individuals may be required to make with respect to their own comfort and preferences in order to ensure that the rights of others are realized.³⁸

The concept of solidarity is commonly justified by imposing duties upon individuals and is thus usually associated with the duty side of the rights-duties equation. However, solidarity is also a precondition for the ability of individuals to realize rights, in that it defines who duties are owed to and what duties are owed.

If solidarity is the predisposition that underlies social duties that are required to construct a just society, then political communities that strive for justice, and their institutionalized form as states, have a legitimate interest in protecting, facilitating, and enhancing solidarity. Notions of solidarity can be of varying thicknesses and are often tied to particular perception of justice. A political community may have a thin

36. JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* 17-18 (2001).

37. *Id.* at 64.

38. Banting and Kymlicka distinguish between three different dimensions of solidarity: civil solidarity, democratic solidarity, and redistributive solidarity. Banting & Kymlicka, *supra* note 11, at 4.

notion of solidarity, under which members have a disposition to ensure that all members have the minimum conditions required for survival, or a thick notion of solidarity, under which members consider themselves to be committed to ensure each other a certain standard of living and life-opportunities.

It is important to emphasize that as a factual matter, a political community may endorse a notion of solidarity that does not promote justice. For example, an exclusionary notion of solidarity, one under which certain members of society are perceived as “less deserving” than others to receive social benefits or state protection, is a notion of solidarity that does not facilitate justice. This should not deter us from adopting solidarity as an important notion. To the contrary, precisely in these cases, solidarity is useful as a term that can facilitate a critical discussion on justice in terms of inclusion and substantive citizenship, which the notion of equality alone often fails to capture.

Even if we are able to answer *who* a solidarity group encompasses and *what* types of commitments it consists of, we still must address the question of *how*. How and to what extent can all-encompassing, justice-furthering solidarity be constituted, where it is weak or absent?

As can be expected, this is a highly contested question among political theorists. Within political theory literature, the scholarly debate on the nature and sources of solidarity revolves mostly around the degree to which a shared cultural identity is a necessary condition in constituting solidarity. This debate derives from the scholarship on multiculturalism that proliferated in the 90’s and echoes such scholarship. Accordingly, the political theory scholarship on solidarity focuses, for the most part, on the relationship between diversity and solidarity, on the relationship between cultural majorities and minorities, and on the ability of different types of national identities to sustain inclusive intra-state solidarity.³⁹

The empirical research leads to the unsatisfying, yet apparently unavoidable, conclusion that the conditions that breed solidarity are highly context specific. However, the important conclusion from this body of writing is that solidarity is not predetermined and can be actively encouraged and fostered.⁴⁰ Banting and Kymlicka argue that “politics can play a role in fostering solidarity,” and examine the role political actors, institutions and policies play in this regard.⁴¹

39. See, e.g., Jaclyn L. Neo et al., *Solidarity in Diversity? State Responses to Religious Diversity in Liberal and Non-Liberal Perspectives*, 20 GERMAN L. REV. 941, 942 (2019).

40. Miller, *supra* note 8, at 75.

41. Banting & Kymlicka, *supra* note 11, at 32.

Drawing on this argument, the following sections of this article examine the role that law, in particular, constitutional law, plays in fostering solidarity. If solidarity can be enhanced, constitutional law can be relevant in enhancing it in at least two ways: first, constitutional entrenchment of solidarity allows the court to take it into consideration as a value worthy of protection in constitutional interpretation and constitutional review. Second, the explicit endorsement of solidarity as a value utilizes the expressive functions of constitutional law to send a message regarding the existence of mutual commitments within a society.⁴²

The further sections demonstrate that many constitutions indeed refer to solidarity and explicitly recognize solidarity as a protected principle or value. They also point out that constitutions embrace various and different conceptions of solidarity, which stem from states' different histories, social conditions, culture, perception of national identity, and more. The purpose of this examination is not to offer a comprehensive comparative constitutional analysis of solidarity, but to suggest that constitutional scholarship should pay attention to the notion of solidarity, if only because the concept is so prevalent in constitutions worldwide. It should be stressed that while this section focuses on explicit constitutional references to solidarity or similar terms, such as fraternity, the value or principle of solidarity is interwoven into constitutions inexplicitly, through other terms, and as part of states' "small-c" constitutions.

The normative aspect of the examination regards the role a constitutional value of solidarity can and should play in construing constitutional commitments and duties. Here, I argue that constitutional law can and should enhance multi-layered solidarity. First, I argue that within the state, constitutional solidarity should be employed to ensure inclusive and equal protection of all citizens. Second, I argue that contrary to what may be intuitively assumed, constitutional solidarity can be a source not only for intra-state, bounded solidarity, but also for solidarity beyond the boundaries of the state. Constitutional law can serve, in this regard, as a bottom-up, grassroots source for transnational, cosmopolitan solidarity.

42. See, e.g., Cass R. Sunstein, *Symposium: Law, Economics & Norms: On the Expressive Function of the Law*, 144 U. PA. L. REV. 2021, 2043 (1996).

III. SOLIDARITY AND CONSTITUTIONALISM

A. *Solidarity as a Constitutional Value*

How can recognition of solidarity as a constitutional value be justified?⁴³ The answer rests on the interrelationship between solidarity, constitutionalism, and justice. I argued above that solidarity is instrumentally valuable to the promotion of just societies, especially with the respect to the existence of mutual commitments and with respect to universal applications within society of such commitments. Constitutions also strive to set the foundations for just societies. However, countries differ with respect to the type of justice that constitutions should ensure.

Roberto Garagrella distinguishes, in this regard, between various approaches to the relationship between constitutions and justice. The central distinction he proposes is the distinction between “a procedural approach to the constitution,”⁴⁴ and what he defines as a republican approach to constitutionalism. Garagrella argues that the former concentrates on ensuring “procedural justice” and is “agnostic in terms of distributive justice,”⁴⁵ as opposed to “a constitution that expresses and enforces a comprehensive view of justice.”⁴⁶ Under the republican alternative, he argues, the constitution is “an expression of a social compact that aims to work for the common good.”⁴⁷ The recognition of social rights is associated with this alternative.⁴⁸

It is quite clear why solidarity can be argued to be a central value under a Republican approach to constitutionalism. However, even a procedural, minimal approach needs to answer questions as to who is protected by constitutional guarantees, and what is required to ensure the

43. The proposition that constitutions should foster solidarity is sometimes simply presupposed. Thus, for example, Alex Deagon argues that God should be referenced in constitutions of democracies as a means of enhancing solidarity: “Constitutional recognition of God is a blessing to democracy because it facilitates the consideration of higher meaning and political solidarity, which helps democratic states pursue the good for all members of the community.” Alex Deagon, *The Name of God in a Constitution: Meaning, Democracy, and Political Solidarity*, 8(3) OX. J. L. RELIGION 473, 492 (2019). Without regard to whether this claim is correct, Deagon presumes that it is the role of constitutions to promote such solidarity.

44. Roberto Gargarella, *The Constitution and Justice*, in THE OXFORD HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW 336, 337 (Michel Rosenfeld & András Sajó eds., 2012) [hereinafter OXFORD HANDBOOK].

45. *Id.* at 344.

46. *Id.* at 338.

47. *Id.* at 344.

48. *Id.* at 346.

enjoyment of constitutional rights. Arguably, at least a thin notion of solidarity a precondition for sustaining the latter.

In arguing for recognition of solidarity as a constitutional value, I refer to the term “value” in the broad, ethical sense, as a foundational principle that may or may not be explicitly referred to as a value.⁴⁹ Indeed, Gary Jacobsohn distinguishes between constitutional values and constitutional principles. Constitutional values, Jacobsohn argues, are often “culture and tradition bound,” while the constitutional principles “are associated more often with matters that are less culture-bound than one usually finds in the citation of values.”⁵⁰ However, as Jacobsohn himself admits, the distinction is far from absolute and the two terms are often used interchangeably.⁵¹

Constitutional values play a role in constitutional adjudication and interpretation. The reliance on such values may expose judges to criticism, especially when resorting to values that are not explicitly referred to in the constitution. Despite this, constitutional values are recognized and applied by judges, particularly in controversial, difficult cases.⁵² Jacobsohn argues that the interpretation of principles is part of the dialogical process by which a country’s constitutional identity is developed.⁵³ This is also true for what I define here as constitutional values.

Neomi Rao contrasts “European value-based constitutionalism” with U.S. “rights-based constitutionalism,” by expressing the position that the former undermines the importance of rights by considering them as “just another interest in the democratic balance.”⁵⁴ Writing about the value of human dignity, Rao cautions against “importing the European ideals of human dignity into American constitutional law.”⁵⁵ Considering that this proposition was put forward with respect to the individualistic value of human dignity, one could imagine that Rao would state it with extra force with respect to communitarian values such as solidarity.

49. This definition is similar to the definition proposed in Dennis Davis et al., *Introduction*, in *AN INQUIRY INTO THE EXISTENCE OF GLOBAL VALUES: THROUGH THE LENS OF COMPARATIVE CONSTITUTIONAL LAW* 1, 11 (Dennis Davis et al. eds., 2015) [hereinafter *GLOBAL VALUES*].

50. Gary Jacobsohn, *Constitutional Values and Principles*, in *OXFORD HANDBOOK*, *supra* note 44, at 693.

51. This is particularly true with respect to the notion of solidarity, which both refers generally to the existence of mutual commitments, and thus can be described as a principle, but, when it appears in a constitution, its content is determined by context, history and culture, and thus be classified as a value.

52. See the various chapters in *GLOBAL VALUES*, *supra* note 49.

53. Jacobsohn, *supra* note 50, at 337.

54. Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 4 *COLUM. J. EUR. L.* 201, 204 (2008)

55. *Id.* at 201.

Rao's position represents a certain line of thinking regarding the relationship between rights and values. Focusing on limitation clauses, she argues that values weaken the protection of rights since values can be balanced against rights where such clauses exist.⁵⁶ However, this argument largely ignores the preconditions required for the realization of rights. Precisely because of U.S. constitutional history, one should be aware that prior to the analysis and interpretation of rights exists the preliminary question of *who* is considered as deserving of such rights. The value of solidarity (and, arguably, also of human dignity) addresses this preliminary question. This is not only a question of theory, but very much a question of practice; human history and experience have taught us that those excluded from the dominant solidarity group are also deprived of rights, even if the latter are constitutionally recognized.⁵⁷

If individual clauses of the constitution are to be interpreted in conformity with the general principles and values, a constitutional value of solidarity is particularly important with respect to the interpretation of constitutional rights and duties. Constitutions often include provisions that prescribe the content of rights and duties. The principle of solidarity may be applied to instruct us *who* is entitled to particular constitutional rights and *who* is obliged by particular constitutional duties, as well as, a guiding principle in determining the content of rights, duties and public interests.

B. Constitutional Solidarity: A Proposed Typology

A comparative survey of world constitutions reveals that many constitutions include explicit references to solidarity.⁵⁸ Solidarity is often referred to in constitutions' preambles, but also in specific articles of the constitution. In most instances, solidarity does not appear as a single value or principle, but appears alongside other values.

While many constitutions refer to solidarity or fraternity, there are great variations between constitutions with respect to both the solidarity group recognized, and the basis and nature of solidarity as a value. In this section, I will broadly outline three different constitutional notions of solidarity that are found in constitutions world-wide: intra-state (or "bounded") solidarity, that is, solidarity that refers to the internal

56. *Id.* at 228.

57. Habermas' position is reflective of this realization. HABERMAS, *supra* note 36, at 18.

58. Constitute Project's database coded 99 constitutions as including references to solidarity or fraternity. See Constitute Project, https://www.constituteproject.org/search?lang=en&key=solid&status=in_force&status=is_draft (Jan. 25, 2021).

political community as the solidarity group; transnational solidarity, a term which I use to include both solidarity between states and solidarity among individuals across national borders; and general references to solidarity that do not specifically refer to who is encompassed within the solidarity group. Within each of these groups, there are variations with respect to the nature and content of solidarity: the type of duties it entails, the individuals or institutions obliged by such duties, the particular ideology may be tied to (i.e., socialism, social democracy), and more.

Two preliminary comments are required before turning to examine constitutional provisions. First, the typology below reviews only explicit constitutional references to solidarity or fraternity. However, a constitutional value of solidarity can, of course, be embedded in numerous non-explicit manners: through references to the existence of mutual commitments in various areas; through notions of peoplehood;⁵⁹ and through other, similar values. Such non-explicit references to solidarity can theoretically be classified in the same manner as explicit references to solidarity, that is, as intrastate, transnational, or general. Of course, performing such classification will require a substantive, contextualized reading of the constitution.

Second, we should not attribute too much significance to the mere fact that a given constitution explicitly refers to solidarity. As we well know, the gap between what is written in a constitution and law in action is often wide, and values, as well as rights, enumerated in constitutions are, in many instances, not respected in practice.⁶⁰ Thus, the review below does not suggest that countries the constitutions of which include explicit references to solidarity have higher levels of social solidarity or are more committed to fostering solidarity. Rather, the review supports two more modest claims: first, that the fact that constitutions include solidarity as a value suggests that solidarity has a *potential* of playing a significant role in constitutional interpretation and refutes the claim that the notion of solidarity is irrelevant to constitutionalism. Second, it suggests that national constitutions not only do not reject out-right transnational solidarity, but, in many cases, endorse it.

1. Intra-State (bounded) Solidarity

Of the constitutions that include explicit references to solidarity, most references focus on internal solidarity, i.e., solidarity among

59. On peoplehood and Constitutionalism, see generally JO SHAW, *THE PEOPLE IN QUESTION: CITIZENS AND CONSTITUTIONS IN UNCERTAIN TIMES* (2020).

60. See, for example, David Law and Mila Verseeg's findings regarding the lack of compliance with constitutional right guarantees. David Law & Mila Veraseeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 876 (2013).

members of the political community. Since constitutions are, arguably, the embodiment of the social compact of specific societies, this is not surprising.⁶¹ In these references, the domestic political community is defined as the solidarity group. Who is included in this group depends on how the political community is defined or perceived (arguably, this is also true the other way around: the boundaries of solidarity define the political community). What is emphasized as the basis of solidarity between members of the political community is highly dependent upon history and culture.

Intrastate solidarity may be described as encompassing all those “belonging” to the political community. For example, Article 1 of the Colombian Constitution declares Colombia to be a social state “based on the respect of human dignity, the work and solidarity of the individuals who belong to it.”⁶² Or, it may refer explicitly to citizens. For example, Article 4(1) of the Romanian constitution declares “the State is founded upon the unity of the Romanian people and the solidarity of its citizens.”⁶³

Emphasizing solidarity across inhabitants of all the national territory is also particularly common in states in which there are historical and cultural differences or economic disparities between regions that are often accompanied by political tensions. For example, Article 75(2) of the Argentinian Constitution endorses solidarity as one of the principles that should guide distribution of resources “throughout the entire National territory.”⁶⁴ Article 2 of the Preliminary title to the Spanish Constitution states that “the Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all.”⁶⁵ Article 3 of the Chilean Constitution states that “the State’s organs will encourage the strengthening of the regionalization of the country and the equitable development and solidarity between regions, provinces and communes of the national territory.”⁶⁶ Article 222 of the Angolan Constitution states that “local authorities must promote solidarity with each other on the basis of their specific characteristics, with the aim of

61. On constituent power and the constitutional order, see YANIV ROZNAI, ‘WE THE PEOPLE’, ‘QUI, THE PEOPLE’ AND THE COLLECTIVE BODY: PERCEPTIONS OF CONSTITUENT POWER, *COMPARATIVE CONSTITUTIONAL THEORY* 295 (Gary J. Jacobsohn & Miguel Schor eds., 2018).

62. COL. CONST. art. 1 (Columbia).

63. ROM. CONST. art. 4.

64. ARG. CONST. art. 75 (2).

65. SPAN. CONST. art. 22.

66. CHILE CONST. art. 3.

reducing local and regional imbalances and imbalances in national development.”⁶⁷

In states that endorse an ethnic or cultural national model, a shared cultural identity, rather than citizenship alone, often defines the solidarity group. The Constitution of Bangladesh, for example, states that “the unity and solidarity of the Bangalee nation, which, deriving its identity from its language and culture, attained sovereign and independent Bangladesh through a united and determined struggle in the War of Independence, shall be the basis of Bangalee nationalism.”⁶⁸ Where cultural differences exist within the state, and where they have historically been a source of tension or may be perceived as a threat, solidarity among the different ethnic or cultural groups may be referenced as being of value.⁶⁹

Ethno-national states’ constitutions may define the “solidarity group” to include individuals who are not citizens and do not necessarily reside in the state. For example, the Angolan Constitution refers to solidarity in several places, embracing a bounded notion of solidarity that is generally defined nationally. The solidarity group encompasses not only citizens, but also “Angolan communities” based abroad and “communities who have a relationship with Angola based on origin, consanguinity, culture or history.”⁷⁰ Article 6 of Basic Law: Israel as the Nation-State of the Jewish People, titled “connection with the Jewish people”, states that, “the State shall strive to ensure the safety of members of the Jewish People and of its citizens, who are in trouble and in captivity, due to their Jewishness or due to their citizenship” and that “the State shall act, in the Diaspora, to preserve the ties between the State and members of the Jewish People.”⁷¹

Another facet of intrastate solidarity is intergenerational solidarity. The preamble to the Constitution of Armenia speaks of “freedom, general well-being, and civic solidarity of the generations.”⁷² Article 66(2) of the Constitution of Portugal states that the state is charged with “[p]romoting the rational use of natural resources, while safeguarding their ability to renew themselves and maintain ecological stability, with respect for the principle of intergenerational solidarity,”⁷³ and Article 7 of the Belgium Constitution states that “the Federal State, the Communities and

67. ANGL. CONST. art. 222. References to solidarity among different geographical regions or municipalities within the country are also included in other constitutions. *See, e.g.*, CENT. AFR. REP. CONST. art. 55.; CAMEROON CONST. art. 55.

68. BANGL. CONST. art. 9.

69. CAMEROON CONST. pmbl.

70. ANGL. CONST. art. 86.

71. §§ 6(a)-(b), Basic Law: the Knesset (Isr.).

72. ARM. CONST. pmbl.

73. PORT. CONST. art. 66(2).

the Regions follow the objectives of lasting development in its social, economic and environmental aspects, taking into account the solidarity between the generations.”⁷⁴

Intrastate solidarity is often associated with duties, as may be expected from the notion that the core of it is commitment. An important issue, in this respect, is to whom these duties apply. In some cases, the value of solidarity expresses the state’s commitments towards individual members of the political community (however it is defined), and the duties that stem from this value are imposed, first and foremost, on the state’s institutions. This understanding of solidarity as well as the duties that derive from it is strongly associated with constitutional endorsement of the welfare-state model and with the recognition of social rights. While these policies may ultimately impose derivative duties upon individuals (i.e., the duty to pay taxes), their primary obligations under this notion of solidarity are imposed upon the state.

A different notion of intrastate solidarity emphasized commitments of individual members of the political community towards other members or towards the state. The preamble to the Algerian Constitution mentions the “efforts” and “sacrifices” made by the Algerian army, and states that “those efforts have contributed to strengthening the nationalistic bond and consecrating the spirit of solidarity between the people and their army.”⁷⁵ The Constitution of Bhutan states that: “A Bhutanese citizen shall foster tolerance, mutual respect and spirit of brotherhood amongst all the people of Bhutan transcending religious, linguistic, regional or sectional diversities.”⁷⁶

From a liberal perspective, the imposition of duties upon individuals, in particular towards the state, is reason for concern. Solidarity, from this perspective, may serve as a pretext and excuse for curtaining individual freedom. This may certainly be the case, and constitutions of authoritarian states do indeed include references to solidarity that appear to be designed to achieve this goal.⁷⁷

Contrary to such suspicious notion of solidarity, other constitutional notions of solidarity emphasize commitments and duties towards disadvantaged members of society,⁷⁸ including people with disabilities,⁷⁹ or as

74. BELG. CONST. art. 7bis.

75. ALG. CONST. pmbl.

76. BHUTAN CONST. art. 8(3).

77. *See, e.g.*, BURUNDI CONST. art. 70 (stating “[t]he State can proclaim the solidarity of all in regard to obligations which result from natural and national disasters”).

78. ANGL. CONST. art. 21.

79. *Id.* art. 83.

a value or principle of the education system.⁸⁰ In general, the notion of solidarity often appears in association with other principles relating to social justice or social and economic rights. Solidarity also appears in connection to the rights of workers within the state. Article 64 of the Costa Rican Constitution states, "in the same way, it will recognize the right of employers and workers to organize themselves freely in associations of solidarity, in order to obtain better conditions of life and economic and social development."⁸¹

2. Transnational Solidarity

While most constitutional references to solidarity focus on interstate solidarity, a considerable number of constitutions include references to global or cosmopolitan solidarity. In this section, I use the term transnational solidarity to refer both to solidarity among states or nations, where states are the commitment-owing units, and to cosmopolitan solidarity, which emphasizes solidarity among individuals across borders.

Both types of transnational solidarity can be found in national constitutions. In its preamble, for example, the Algerian Constitution refers to Algeria's "traditions of solidarity and justice," which render "the people...confident of its capacities to work fully for the cultural, social and economic progress of the world, today and tomorrow."⁸² Article 30 of the Algerian Constitution declares that "Algeria shall extend its solidarity to all peoples who are fighting for political and economic liberation, for the right of self-determination and against all racial discrimination."⁸³ Article 1(3) of the Constitution of Nicaragua states that "the struggle for peace and the establishment of a just world order represent fundamental commitments of the Nicaraguan nation. We therefore oppose all forms of colonialist and imperialist domination and exploitation and declare our solidarity with all countries fighting against oppression and discrimination."⁸⁴ Article 25 of the Constitution of Bangladesh refers to solidarity in the context of the management of international relations.⁸⁵

Regional solidarity is another, more confined version of transnational solidarity. References to such solidarity are common in the global

80. Article 14 of the Austrian Constitution states that "Democracy, Humanity, solidarity, peace and justice as well as openness and tolerance towards people are the elementary values of the school, based on which it secures for the whole population, independent from origin, social situation and financial background a maximum of educational level . . ." AUSTRIA CONST. art. 14.

81. COSTA RICA CONST. art. 64.

82. ALG. CONST. pmbl.

83. *Id.* art. 30.

84. NIC. CONST. tit. I, art. 3.

85. BANGL. CONST. art. 25.

south and can be found in many constitutions of Latin-American and African states. The constitution of Morocco includes several references to solidarity, including a declaration that Morocco commits itself “to consolidate relations of cooperation and of solidarity with the peoples and the countries of Africa, notably the sub-Saharan countries and the [countries] of the Sahel.”⁸⁶ The Constitution of Cameroon states that “the salvation of Africa lies in forging ever-growing bonds of solidarity among African Peoples”⁸⁷

Another form of solidarity that extends beyond the state is solidarity that is based on a shared ideology.⁸⁸ Traditionally, the notion of solidarity played a central role in socialist class struggles⁸⁹ and in the context of workers’ rights.⁹⁰ This role is still echoed in some constitutions. Thus, the Constitution of the Republic of Cuba states that it “bases its relationships with countries that edify socialism on fraternal friendship, cooperation, and mutual assistance.”⁹¹

The idea that solidarity should transcend national borders is a pillar of cosmopolitan moralism, which is, as indicated above, suspicious towards intrastate, bounded solidarity, and is perceived as conflicting with the strive towards cosmopolitanism. However, the inclusion of transnational notions of solidarity in national constitutions indicates that, even from a national perspective, this is not necessarily the case, and various layers and types of solidarity are not perceived to be mutually exclusive.

3. General Commitment to Solidarity

While some constitutional references to solidarity specify who the solidarity group is, many constitutions include a general reference to solidarity, without specifying among whom it exists or what specific commitments and duties stem from it.

Solidarity is often referred to, in this context, as a collectivist notion, either alongside other principles of social justice or as supplementing individualistic principles and values, such as human dignity. For example,

86. MOROCCO CONST. pmb.

87. CAMEROON CONST. pmb.

88. Kurasawa suggests that “solidarity from below” can also emerge from “political alliances between individuals and groups from various part on the world,” with respect to various issues. Kurasawa, *supra* note 14, at 325.

89. Banting and Kymlicka argue that “although Marx seldom used the term, his few references concerned solidarity within the working class.” Banting & Kymlicka, *supra* note 11, at 5.

90. See Marion Crain & Ken Mathen, *Sexual Harassment and Solidarity*, 87 GEO. WASH. L. REV. 56, 83 (2019) (discussing labor solidarity in the United States).

91. CUBA CONST. art. 16(n).

Article 5 of the Constitution of Georgia states that: “The State shall take care of strengthening the principles of social justice, social equality, and social solidarity within society.”⁹²

The Preamble of the Constitution of the Indian Constitution states that the State will promote “fraternity, assuring the dignity of the individual and the unity and integrity of the Nation.”⁹³ The Preamble to the Albanian Constitution declares that the constitution is established “with a pledge to protect human dignity and personhood, as well as for the prosperity of the whole nation, for peace, well-being, culture and social solidarity.”⁹⁴ The Bolivian constitution states that: “State based on respect and equality for all, on principles of sovereignty, dignity, interdependence, solidarity, harmony, and equity in the distribution and redistribution of the social wealth.”⁹⁵ Article 1(1) of the Angolan Constitution states that “Angola shall be a sovereign and independent Republic, based on the dignity of the individual and the will of the Angolan people, whose primary objective shall be to build a free, just, democratic, solidary society of peace, equality, and social progress.”⁹⁶ Article 2 of the French Constitution declares that “the maxim of the Republic shall be ‘Liberty, Equality, Fraternity.’”⁹⁷

Many of the constitutions that declare solidarity to be a value or principle, including some of the constitutions surveyed above, refer to more than one type or aspect of solidarity. Constitutions may include general references to solidarity alongside references to transnational solidarity, as well as to intrastate solidarity.

Some constitutions do not include specific references to solidarity, but solidarity can nonetheless be inferred to be a constitutional value from either other explicit values that are closely related to solidarity, from the explicit articulation of constitutional duties that reflect a commitment to solidarity, or from the articulation of social and economic rights that can be perceived as deriving from a value of solidarity.⁹⁸ In other cases, it may be more difficult to argue that solidarity is a constitutional value. One such example is the United States. Ruti Teitel argues that the central U.S. constitutional values are freedom and equality, with

92. GA. CONST. art. V.

93. INDIA CONST. pmb. l.

94. ALB. CONST. pmb. l.

95. BOL. CONST. pmb. l, art. 8.

96. ANGL. CONST. art. 1(1).

97. FR. CONST. art. 2.

98. Albert H.Y. Chen, *Constitutional Values in Three Chinese Societies*, in GLOBAL VALUES, *supra* note 49, at 119, 141.

freedom receiving primacy.⁹⁹ The focus on individual liberty, and the fact that equality jurisprudence has developed mostly to encompass anti-discrimination, render it difficult to locate within current United States constitutionalism communitarian values such as solidarity.

Of course, the fact that solidarity is written into a constitution does not say much about its actual significance or role in a country's constitutional framework. In some cases, it may be a dead letter, or an aspirational value that is not fulfilled. In worst cases it may serve as a pretext for curtailing individual freedom through subordination to alleged collective interests.¹⁰⁰ However, at least in some cases, solidarity can be the premise for evaluating state acts and legislation, while also promoting an array of social and economic rights, such as healthcare, social security, and education.¹⁰¹

The existence of different notions of constitutional solidarity and the existence of more than one type of solidarity within a single constitution suggests that constitutions can serve as the foundation not only of intra-state solidarity but also of transnational solidarity, and, more importantly, of complex, multi-layered solidarity. Like many constitutional terms, the type of work that solidarity may be able to do depends on the way it is interpreted and, more importantly, on the manner and cases in which it is applied. However, the explicit constitutional endorsement of solidarity as a value is important both from an expressive perspective, and as a value to which judges may turn to when interpreting or evaluating legislation as well as policies.

IV. THE CONTENT OF CONSTITUTIONAL SOLIDARITY

A. *Solidarity and Duties*

What does a constitutional value of solidarity entail from a substantive perspective? As demonstrated above, solidarity appears in constitutions in an array of contexts – in the preamble and in specific articles, as a general principle, value, or, with respect to rights and duties, as a

99. Ruti Teitel, *Global Constitutional Values in the United States*, in GLOBAL VALUES, *supra* note 49 at 393.

100. See, e.g., Allan R. Brewer-Carías, *Global Values in the Venezuelan Constitutions: Some Prioritisations and Several Incongruences*, in GLOBAL VALUES, *supra* note 49, at 417 (discussing Venezuela).

101. Fábio Canavvalho Leite and Florian F. Hoffmann state that in Brazil, “the constitution employs the concept of solidarity. Among the purposes of the Brazilian republic listed in article 3 is ‘the construction of a free and just society in solidarity’, as well as ‘the eradication of poverty and exclusion, and of social and regional inequalities.’” Fábio Canavvalho Leite & Florian F. Hoffmann, *Global Values and Local Realities: Brazilian Constitutional Law*, in GLOBAL VALUES, *supra* note 49, at 69, 84.

notion that applies internally, within the political community, or as a notion that applies transnationally. It is impossible to provide a single answer to this question.

However, with the required caution, several characteristics common to the various constitutional notions of solidarity can be sketched. At the core of solidarity is the notion of commitment. Accordingly, constitutions usually refer to solidarity to emphasize duties rather than rights. In some constitutions these are the duties of the state towards individuals, e.g., welfare and social justice.

In other cases, solidarity is presented as the basis of duties of individuals towards each other or towards the political community as a whole. Article 2 of the Greek constitution states that “[t]he State has the right to claim of all citizens to fulfil the duty of social and national solidarity.”¹⁰² Article 75 of the constitution of the Dominican Republic states that one of the fundamental duties of the people is “[t]o act in accordance with the principle of social solidarity, responding with humanitarian action to situations of public calamity or that put the lives or health of people in danger.”¹⁰³ The Cuban Constitution explicitly states that “[t]he exercise of the rights and liberties provided for in this Constitution implies responsibilities. They are duties of Cuban citizens . . . [t]o act, in one’s relations with other people, according to the principle of human solidarity and with respect to the norms of a proper social coexistence.”¹⁰⁴

The association of solidarity with duties may explain why many liberal scholars are suspicious towards its use by the state. Solidarity is a communitarian, collectivist notion, which may impose both direct and indirect duties and burdens upon individuals. Thus, it can easily be employed to limit individual freedom, to prioritize the collective over the individual, and even to invert the relationship between the state and the individual. However, these legitimate concerns, while not unfounded, are not enough to categorically reject the potential contribution of a constitutional value of solidarity to the promotion of justice. Indeed, the concept of solidarity can be a dangerous tool to be used as a justification for hindering freedoms. Nonetheless, the existence of solidarity is necessary to ensure that rights are equally and inclusively enjoyed. Its prevalence in so many constitutions suggests that it should be taken seriously. The question to focus on then, is what types of notions of solidarity should be

102. GREECE CONST. art. 25.

103. DOM. REP. CONST. art. 75.

104. CUBA CONST. art. 90. The Cuban constitution also includes references to solidarity as a general principle and to “solidarity with the assaulted party and with the people who fight for their liberation and self-determination.” *Id.* art. 16(j).

constitutionally recognized, and how should constitutional solidarity be interpreted?

B. Between Bounded Solidarity and Transnational Solidarity

As indicated above, most constitutional references to solidarity pertain to intra-group, bounded notions of solidarity. Banting and Kymlicka argue that such societal based solidarity has been considered by liberal scholars to be “at best mythical, and at worst dangerous and exclusionary.”¹⁰⁵ Since bounded solidarity has, in the recent wave of populism, been employed to fuel the friend/enemy distinction upon which populism thrives,¹⁰⁶ this attitude is somewhat understandable. However, a sweeping dismissal of bounded solidarity as illegitimate and irrelevant is a mistake. If, as argued above, solidarity is a precondition for the existence of a just society and for realization of human rights, then its existence within states is of value and should be encouraged. Inequality, economic disparities, exclusion of minorities, and violations of rights still prevail within states, and states are still the primary political units responsible for the welfare of individuals. In many states, there are groups that are excluded, either *de jure* or *de facto*, from the main solidarity group, and as a result, enjoy inferior legal protection and are vulnerable to violations of rights. As long as this is the case, it is both legitimate and important to encourage an inclusive, all-encompassing intra-state solidarity. But what is the relationship between bounded solidarity and transnational solidarity? Are the two mutually exclusive?

While the interest of liberal scholarship in bounded solidarity has been in decline, the interest in transnational solidarity has been on the rise, even prior to the COVID-19 crisis. The challenges of globalization, in particular the immigration crisis in Europe, have given rise to an abundance of writing on the importance of transnational solidarity. This is particularly evident in the European context. The notion of solidarity is central to the Lisbon Treaty, and there is a large, growing body of scholarship discussing the challenge of European solidarity.¹⁰⁷ COVID-19 has, of course, highlighted both the importance of transnational solidarity and the challenges in achieving it.

The specific question of European solidarity is beyond the scope of this article. However, since much of the recent scholarship on solidarity emerges from the literature on this question, it is worth noting the concept of solidarity in the Lisbon treaty, and, accordingly, the notion of

105. Banting & Kymlicka, *supra* note 11, at 5.

106. JAN-WERNER MÜLLER, WHAT IS POPULISM? 101 (2016).

107. See, e.g., MALCOLM ROSS & YURI BORGMANN-PREBIL, PROMOTING SOLIDARITY IN THE EUROPEAN UNION (2010).

solidarity in the literature on this treaty, refers to solidarity between states, rather than to solidarity between individuals across borders.

The notion of transnational solidarity can be characterized into several versions. One version emphasizes the mutual commitments among states. For example, Article 222 of the Lisbon Treaty enshrines the solidarity among the “Union and its Member States.”¹⁰⁸ Under this version, the states are the entities among which solidarity exists. Another version understands transnational solidarity as the source of duties of states towards alien individuals.¹⁰⁹ The third version, which I characterize as cosmopolitan solidarity, focuses on the solidarity among individuals worldwide, without regard to national borders.¹¹⁰ The different notions of transnational solidarity are not entirely separate, and often overlap.¹¹¹

The majority of the literature on all versions of transnational solidarity builds, to a large extent, on the idea that the principles and elements of national or bounded solidarity should be replicated, on a larger scale, to a larger political unit, be it the European Union or humanity as a whole. Habermas expressed this vision explicitly, arguing that:

By expanding the parameters for the implementation of human rights and democracy, the nation-state made possible a new, more abstract form of social integration beyond the borders of ancestry and dialect. Today we are faced with the task of carrying on this process with a further abstractive step.¹¹²

108. Article 222 (1) determines that:

The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to: (a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack; (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

The Treaty on the Functioning of the European Union, art. 222, Oct. 26, 2012, OJL 326/47-326/390.

109. See, e.g., Sergio Dellavalle, *On Sovereignty, Legitimacy, and Solidarity Or: How Can a Solidaristic Idea of Legitimate Sovereignty Be Justified?*, 16 THEORETICAL INQ. L. 367 (2015).

110. See generally Carol C. Gould, *Solidarity Between the National and the Transnational: What Do We Owe to ‘Outsiders?’*, in TRANSNATIONAL SOLIDARITY: CONCEPT, CHALLENGES AND OPPORTUNITIES 22 (Helle Brunke et al. eds., 2020).

111. See Gould’s description of solidarity as a “web.” *Id.* at 26.

112. HABERMAS, *supra* note 36, at 18.

Like others, Habermas argues that such solidarity can only be developed through the creation of a global space. He recognizes the limits of the post-national political spheres,¹¹³ but nonetheless perceives the way forward as involving slowly weakening the special commitments among members of particular states.¹¹⁴ This process, he hopes, will ultimately lead to the rise of cosmopolitan solidarity through the emergence of post-national personal identities. Habermas perceives cosmopolitan solidarity as necessary for the successful operation of international bodies and institutions, such as the EU and the UN.

While not all advocates of cosmopolitan solidarity condition it on the existence of a world without states, the vision of a political community that transcends the state recurs in the literature on post-national and cosmopolitan solidarity. Rainer Bauböck, for example, recognizes that in the case of the EU “nation building at the level of the supranational polity is categorically ruled out.” In searching for EU solidarity, he nonetheless looks at the state as a model, seeking “kinds of sources that liberal nationalists believe can be best provided by civic or thin nationhood: a sense of strong interdependence between various parts of a polity.”¹¹⁵ This search focuses primarily on the laws and institutions of the EU. Similarities between the EU and states is, thus, at its core.

However, global solidarity does not emerge exclusively from post-national political institutions and does not necessarily depend on the existence of a post-state political world order. Solidarity is a complex, multi-layered phenomenon. In examining the tension between cosmopolitanism and communitarianism, Colás states that “possibilities arise for thinking and acting in solidarity with distant strangers while simultaneously reaffirming the legitimacy of local political communities when addressing questions of rights, justice or freedom.”¹¹⁶ Bounded solidarity does not necessarily conflict with transnational solidarity but can also be based in domestic values and be part of a particular collective identity. As Bauböck and Habermas envision, commitment towards those who are not part of the polity may indeed develop in supra-national spaces. Thus, political communities may cultivate solidarity beyond the polity while, at

113. Bailey explains that Habermas recognizes the economic, cultural and environmental problems created by the interdependencies of economies and societies “cannot be resolved by extending democratic deliberations to the global level, particularly because it is unlikely to be sufficient solidarity among members of different states.” Tom Bailey, *Introduction*, in *DEPROVINCIALIZING HABERMAS: GLOBAL PERSPECTIVES* 1,4 (Tom Bailey ed., 2013).

114. *Id.*

115. Rainer Bauböck, *Citizenship and Collective Identities as Political Sources of Solidarity in the European Union*, in *STRAINS OF COMMITMENT*, *supra* note 11, at 3.

116. Colás, *supra* note 7, at 1058.

the same time, strive to preserve their own collective identity. Solidarity beyond the polity may be perceived as a facet of such identity, rather than a threat to it.

My claim here is that constitutional law can be a source of cultivating transnational solidarity *from below*, i.e., “bottom-up.” The Lisbon treaty is an example of attempts to establish transnational solidarity in a “top-down” manner – through an international treaty which entrenches solidarity between states as a value, and with which states are required to comply. However, when transnational solidarity – whether global, European, or cosmopolitan – is entrenched in a domestic constitution, it is endorsed as part of the state’s own constitutional identity. While “top-down” attempts to establish transnational solidarity have encountered suspicion and been perceived by some as external intervention, constitutional endorsement of transnational solidarity can cultivate such solidarity from a domestic perspective, rooted in a state’s own values and culture. This may supplement “top-down” instruments, addressing the challenge of creating transnational solidarity through a more holistic approach.

V. JUDICIAL APPLICATION OF SOLIDARITY – TOWARDS A JURISPRUDENCE OF SOLIDARITY

Solidarity Beyond the Nation – Decision no. 2018-717/718 QPC

Decision no. 2018-717/718 QPC, delivered by the French Constitutional Council on July 6, 2018, demonstrates the potential a constitutional notion of solidarity may have in fostering transnational solidarity and protecting vulnerable individuals.

The decision regarded the constitutionality of criminal laws, or what have been termed in France as “Solidarity Offences,” that rendered it an offence to assist or facilitate foreign people in entering or staying in France illegally, subject to certain exemptions. Convictions delivered under these laws have been a matter of controversy in France. The most renowned of them is the case of Cédric Herrou, a farmer convicted for transporting and assisting illegal immigrants. Relying on the constitutional principle of *Fraternité*, the Constitutional Council ruled the law under which Herrou was convicted to be partially unconstitutional, expanding the exemptions from criminal responsibility by invalidating part of the law and offering elaborate interpretation of another.

The Constitutional Council based its ruling on the principle of fraternity. The ruling relied on Article W of the Constitution, which determined that “[t]he French Republic’s maxim shall be ‘Liberty, Equality, Fraternity.’” The Preamble and Article 72-3 of the Constitution also refers to the “common ideal of liberty, equality and fraternity.” The Council

states that “[f]raternity is a principle which has constitutional value.”¹¹⁷ It further explained that “[i]t follows from the principle of fraternity the freedom to help one another, for humanitarian reasons, without consideration as to whether the assisted person is legally residing or not within the French territory.”¹¹⁸ The Council explained that the principle of fraternity, as other constitutional principles, was not absolute and was to be balanced against the need to protect public order. However, it found the existing balance to be partially unacceptable, thus reaching the conclusion that the law under which Herrou was convicted was partially unconstitutional.

Benjamin Boudou argues that the importance of the decision is the way the Council employed the principle of fraternity. “Operationalizing the constitutional principle of fraternity and applying it beyond the strict borders of the citizenry,” he argues, “constitutes a giant step towards a cosmopolitan understanding of French republican values and a strong signal that could inspire a more hospitable Europe.”¹¹⁹ Others have similarly hailed the Council’s choice to put the principle of fraternity into practice, infusing it with substantive meaning, rather than leaving it as a merely symbolic declaration.

The Herrou decision received considerable attention in the context of the debate on Europe’s treatment of illegal immigrants, and its immediate importance is, of course, in this regard. However, in the context of an inquiry into the meaning and value of constitutional solidarity, the decision is important in two additional respects. First, it demonstrates that the concept of solidarity is not too vague or ambiguous to have any legal meaning, and that it can play an actual and central role in constitutional adjudication. Second, the decision demonstrates that national courts applying constitutional solidarity will not necessarily apply it in an exclusionary manner, and that they may interpret and apply a constitutional value of solidarity in a manner that will encourage transnational solidarity.

CONCLUSION

This article outlines the potential and the perils of constitutional solidarity in promoting justice and equitable protection of rights. It argues that the tendency of liberal scholarship to treat the notion of solidarity with suspicion is understandable. However, solidarity is a

117. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-717/718 QPC, July 6, 2018, ¶ 7 (Fr.).

118. *Id.* ¶ 8.

119. Benjamin Boudou, *The Solidarity Offense in France: Egalité, Fraternité, Solidarité!*, VERFBLOG (July 6, 2018), <https://verfassungsblog.de/the-solidarity-offense-in-france-egalite-fraternite-solidarite>.

precondition for the existence of just societies and for distributive justice, as well as for ensuring that human rights are equally realized.

As demonstrated in this article, solidarity is endorsed as a value in a large number of constitutions, both explicitly and implicitly. Dismissing the relevance of solidarity as a constitutional value only leaves it to be manipulated by nationalist, populist politics. Constitutional solidarity is a legitimate and important concept; the question to be addressed is what it endorses, and how it is to be applied.

Recognizing solidarity as a constitutional value should play a role in the course of constitutional and legislative interpretation, as well as in evaluating the constitutionality of specific laws. As an overarching value, solidarity may come into play in examining laws in a variety of areas: from welfare through healthcare¹²⁰ to immigration. Explicitly addressing the issue of solidarity with respect to these issues is an important step in defining the boundaries and content of mutual duties in a society. This, in turn, is important in crystallizing what a just society is perceived to be in a given political community. Explicitly addressing these issues allows us both to critically assess such notions, and to promote them, should we find them equitable.

Explicit constitutional references to solidarity render it easier for courts to refer to solidarity as a value than implicit, embedded notions of solidarity. However, this does not imply that the latter is an unattainable task. On the other hand, anchoring decisions in constitutional values exposes courts to criticism. Anchoring them in unenumerated values may indeed raise the odds of such criticism, but it is a consideration that different courts accord different weight to.

Contrary to the simplistic manner in which solidarity is used in identity-politics, the relationship between collective identity and solidarity is complex. Solidarity is a multi-layered phenomenon which can and should be reflected in the constitutional manifestation of solidarity. Constitutions can and should refer to more than one layer of solidarity, and courts can and should play a part in instilling substance to these layers. Where solidarity is recognized as a value, it can serve to examine the effect of laws and policies on under-privileged members of society, and be a source for deriving both duties and rights. In this article, I argued that more scholarly attention should be paid to the notion of solidarity as a constitutional value and outlined some of the issues and questions that arise with respect to this value. Further research, exploration, and

120. Healthcare is actually one of the areas in which solidarity is often referenced, although not in a constitutional context. See, e.g., Nili Karako-Eyal, *Beyond the Ethical Boundaries of Solidarity: Increasing Vaccination Rates Through Mandatory Education to Solidarity*, 6 TEX. A&M L. REV. 345 (2019).

investigation of solidarity as a constitutional value is needed. Such exploration, I believe, can help us better understand the dynamics of solidarity and the role that law, particularly constitutional law, plays and can play in fostering and enhancing solidarity.