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Inscribing Solidarity in Labor Law

Promise and Limitations

Julia López López

1.1 OVERVIEW: INSCRIBING SOLIDARITY IN THE DEBATES ON LABOR LAW

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

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

[1] See Salverda et al. 2016.

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

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

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

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

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

[2] Hepple 2001: 6–12.

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

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

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

1.2 SOLIDARITY AS LABEL: FORMALIZING CONTENTS OF THE PRINCIPLE

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

[3] Bourgeois 2018.

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

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

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

[4] Durkheim 1933. See Schoenfeld & Meštrović 1989.
[5] Stgerno 2011.
[6] Rodotà 2016.
[7] Barnard 2017.

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

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

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

[8] The increasing trend to formalize the segmentation of workers' rights: López López 2015.
[9] Stone & Arthurs 2013.

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

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

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

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

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

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

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

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

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

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

1.4 SOLIDARITY AS HARD-LAW INSCRIPTIONS: COLLECTIVE LABOR RIGHTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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