

European Policy Brief

Policy implications of TransSOL - European paths to transnational solidarity at times of crisis

Policy Considerations Building on the Analysis of the Legal and Socio-political Background

The EU-funded TransSOL project devoted its first work package to the study of solidarity as a legal and political concept. For this purpose, it has undertaken an in-depth analysis of the legal and institutional framework of transnational solidarity at the level of the European Union and in eight European countries (Denmark, France, Germany, Greece, Italy, Poland, Switzerland and the UK). Findings of these work packages will be triangulated with empirical data gathered in subsequent research tasks. Nevertheless, our findings allow us to sketch preliminary policy considerations.

1- Enhancing legal and policy coherence, simplifying the legal framework and decreasing fragmentation.

The comparative analysis shows that national principles, legislation and policies remain highly country specific. What is more, there is a lack of consistency at even the national level. For example, disability legislation and policies are generally characterised by internal fragmentation. Moreover, in some cases, they are influenced by the regional organisation of the competences. The debate between unity and diversity largely exceeds the borders of our research, as it entails more complex theoretical and empirical analyses at different levels. And yet, it clearly emerges from our research that a less complex normative background, where more coherent national and European policies can be adopted and implemented, would constitute a solid platform of rights and duties that may foster more solidarity in social dynamics.

2- Solidarity as a vaccine and not just an antidote.

Despite the fact that solidarity is explicitly or implicitly enforced in all TransSOL countries' consti-

tutions and in the EU treaties—and despite the fact that at the constitutional level, solidarity has permeated to craft solidaristic legislation—crisis-driven legislation, policies and *ad hoc* measures have generally downplayed solidarity as a sort of 'idealistic' value that has to recede against the imperatives of more 'concrete' principles. But solidarity has often been used in the Courts and by the Courts as a constitutional paradigm in constitutional and/or very relevant adjudication cases in several countries, especially in the litigation of welfare rights and services, equality-related cases and case law concerning the austerity laws to mitigate un-solardistic, harsh measures. During crisis, solidarity has been mainly used as an antidote against the worst effects of crisis-driven measures, especially in the fields of unemployment, disability and immigration and asylum. This is why the 'special work' of solidarity as a transformative legal concept emerges more clearly in case law than in contemporary legislation. Re-evaluating the role of solidarity as a vaccine against the worst effects of marginalisation and social exclusion seems to be urgent. If transnational solidarity is considered by policymakers to be a crucial element of the construction of European citizenship, national and European legislators and policymakers should consider reinstating solidarity as a grounding principle for new legislation.

3- Profiting from the crisis's structural transformations.

As already mentioned, the crisis has increased inequality within TransSOL countries (except for Germany, Switzerland and partially Poland) and among them. It has also generated the tightening of immigration laws. In addition, crisis-driven reforms—e.g., those in respect to the welfare system, labour market, immigration and asylum laws—have marked all countries except Germany and Switzerland. Crisis-driven legislation and measures do not necessarily go in the direction of boosting solidarity, neither at the national nor European level, and rarely can they be ascribed

to the constitutional solidaristic principles. Yet, the legal and institutional 'earthquake' caused by the crisis may engender positive legal and institutional transformation that could boost positive social change in due time. The extensive use of country-specific forms of labour solidarity contracts, which indeed existed before the crisis, contributed to reducing scepticism against this labour contract typology. The widespread adoption of youth targeted measures might help fight youth unemployment, even after the crisis. Furthermore, the political reactions against the supranational refugees and asylum rules may lead to a revision of the Dublin regulation. However, the overlap between the reforms of welfare systems with the increase of political and social awareness of the rights of people with disabilities contributed to accelerating the shift from a medical definition of disability to a socially oriented one, which might engender positive legal, institutional and, above all, societal changes toward a more inclusive and cohesive European society in due time.

4- Extending the applicability range of some interesting national measures intended to uphold solidarity practices.

As of the end of 2015, tax breaks for voluntary donations, if entrenched in the legal system, are only applied nationally. Donations in money or in kind made to non-profit organisations, foundations and associations, charities, religious institutions, universities, university foundations, public university institutions, public research centres, etc. can be deducted from the total declared income of individuals and entities that are subject to company income taxes only if the donations were made to national non-profit organisations, foundations and associations, charities, religious institutions, universities, university foundations, public university institutions, public research centres, etc. Clearly, this is a fiscal instrument designed by the legislator to foster actions of charity, benevolence and solidarity. Enlarging the applicability of this or similar measures to the whole territory of the European Union could represent an important step towards transnational solidarity in both concrete and symbolic terms.

A final note: While considering the political desirability of institutional and legal measures that uphold and foster solidarity (that is in the preliminary phase, even before the identification and the tailoring of specific measures), we should not forget an intrinsic social ambiguity of solidarity as the building block and social cement of the community. Solidarity, as, *mutatis mutandis*, social capital, trust and even citizenship, may have the double dimension of bonding (i.e., enforcing internal cohesion) and bridging (i.e., connecting communities to one another). Strengthening national social cohesion through national solidaristic measures may jeopardise European social cohesion. This is manifest in the debt and refugee crises. We should remember, however, that in the construction of European solidarity, member states still play a crucial role. However, the European Union's perspective of solidarity—as well as *justice*—challenges us to think beyond equating justice with national political self-determination. This is particularly evident from the proposals concerning a supranational *European unemployment insurance scheme*, and in the field of immigration/asylum, from the proposals of 9 September 2015 concerning the relocation of people in need of international protection among EU member states under extreme pressure as well as an EU common list of safe countries of origin. These future EU instruments show the progressive construction of a structural 'European solidarity net' that goes beyond the mere coordination and voluntary actions that have typically characterised solidarity.

In TransSOL terms, 'solidarity' is defined as attitudes and practices geared to help others in struggle or in need, be that by personal contributions or the active support of activities of others (e.g., humanitarian aid of civil society organisations or re-distributional public policies by the state). 'European' or 'transnational' solidarity is consequently any attitude and behaviour that strives to help citizens from other member states within the EU in struggle or in need. This remains the focus of our research in the forthcoming activities.

TransSOL's First Work Package: Research Tasks and Findings

The first work package of the TransSOL project aims to address a set of basic questions related to the institutional and legal fabric of transnational solidarity. What does transnational solidarity mean in legal and political terms? If we consider it a positive element for national and European societies' cohesion, how can it be boosted? What are the legal, institutional and policy pillars on which solidarity is built at both the national and European levels? What are the roles of institutions, legislation and policies in providing a normative and institutional positive environment for solidarity to do its 'special work' as a *transformative* legal concept? Besides the evident financial and budget implications, what is the impact of the crisis on the very structure of rights and duties that define the European citizenry?

The first work package of TransSOL has been centred on providing answers to these questions through an in-depth analysis of eight European countries' legal and institutional frameworks as well as the European Union's. Since June 2015, the national teams of TransSOL have been working extensively to gather and analyse information related to the socioeconomic, political, legal and institutional context of transnational solidarity in Denmark, France, Germany, Greece, Italy, Poland, Switzerland, the UK and the EU. Data for this research have been collected through a combination of desk research from various sources (e.g., policy and legal documents, national, subnational and EU case law), information requests to relevant institutions and semi-structured interviews with national legal and policy experts and academics held between June and October 2015 by the different national research teams.

The scope of this first phase of research has been to set the frame, whereas it will be the task of the forthcoming work packages to empirically prove the existence of concrete, measurable individual attitudes and practices of solidarity as well as of collective forms of solidarity (both in a more traditional and innovative configurations of solidaristic practices). This is with the purpose of understanding their internal mechanisms and logic and of evaluating their impact on the social fabric at the national and European Union levels. To be noticed, TransSOL analysis focusses on three areas of vulnerability: disability, immigration/asylum and unemployment, which have substantial and symbolic dimensions relevant to solidarity.

The European coverage of TransSOL: socioeconomic and political diversity

The eight countries that are the subject of TransSOL analysis present a very diverse constitutional organisation of the State. In fact, they were explicitly selected to encompass a wide spectrum of variability, while remaining in the general frame of contemporary Western liberal democracies. They mirror the diversity of European landscapes in terms of State structure, system of government, rights enforcement and litigation, political system and cultural and socioeconomic background, thereby allowing for systematic comparison. *Sufficit* here to recall, in fact, that the country selection rationale was guided by a combination of 'the most similar' and 'the most dissimilar' case-study selection.

The cleavage between the sole country belonging to the common law system (the UK) and the others, which are characterised by civil law systems, is nuanced, enriched and made more complex by intertwining with other cleavages: centralised versus federal States; symmetric versus asymmetric decentralisation (or devolution); constitutional monarchies versus republics; parliamentary (in various typologies) versus semi-presidential (in various typologies) and directorial systems of government; and diffuse versus centralised (with the presence of a constitutional court) systems of judicial review. Moreover, very diverse mechanisms of rights enforcement and litigation among TransSOL countries (some countries heavily rely on the activism of the Ombudsman and administrative justice, for instance) add further complexity to the analysis of the constitutional and legal framework relevant for the discussion of solidarity as a legal concept.

Diversity is also a keyword in the discussion of political systems, including bi-party systems, pluri-party systems, even-multiparty systems and fragmented party systems. Diversity is also a part of the discussion of the democratic model, which includes majoritarian, consensus, semi-direct and consociational democracies. Finally, it is to be noted that countries also diverge considerably in terms of socioeconomic situation, with Greece being the most deprived and Denmark holding the most privileged position. Notably, other variables such as levels of corruption, clientelism, religious influence and income and wealth distribution strongly contribute to defining our case study's diversity.

The crisis has evidently exerted a strong impact on the socioeconomic structures of TransSOL countries by increasing the differences between them. Except for Germany, Switzerland and partially Poland, the crisis has increased inequality within the countries. It has brought poverty back on the political agenda and into the spotlight of the media debate. It has generated an increase in xenophobia and (except in Poland and Greece) the tightening of immigration laws. It has polarised the political debate. Crisis-driven reforms (e.g., welfare system, labour market and immigration and asylum laws, to name the ones most relevant to TransSOL's analysis) have marked all countries except Switzerland and Germany, where temporary measures were adopted to face the challenges of the crisis. The crisis had a heavy impact on our specific fields of analysis. For unemployment, it led to the adoption of anti-crisis packages and shock-absorber measures, a further liberalisation of the labour market; a re-definition of the role of the unions, reforms of retirement age and the adoption of youth-targeted measures, plus a number of additional measures and reforms that are less generalised and more country-specific. As already mentioned, immigration and asylum laws were generally amended, adopting more restrictive measures except in Poland and Greece. In a large majority of the countries, the crisis led to a reduction of disability grants and allowances and to the introduction of the system-of-means test for services and benefits. Moreover, the reforms of the welfare system generally meant an increase in the vulnerability of the people with disabilities. Quite interestingly, however, the overlap between the early stages of the economic crisis and the initiation of the International Convention on the Rights of Persons with Disabilities led to the extension of anti-discrimination measures in several countries and a shift from a medical definition of disability to a socially oriented one between 2007 and 2014.

The legal and institutional fabric of European solidarity

Against this background, we can start refining our notion of transnational solidarity. Solidarity as a legal concept has a long history that dates back to Roman times at least. However, it is only in the last two centuries that it has become relevant to public and constitutional law. The national communities created in the 18th and 19th centuries recognised the revolutionary principle of *fraternité* as the socio-legal marker of nation-state citizenship, and solidarity was considered a building block of modern political communities and states and was transformed from a philosophical concept into a binding legal stand-

ard. However, it was only at the end of World War II that solidarity came to be fully entrenched in some constitutional texts when a new model of constitution grounded in the value of the person, human dignity and fundamental rights bloomed. In these constitutions, rights and liberties are conceived within a 'solidary' frame; the respect and guarantee of rights and liberties is supposed to be intrinsically combined with the meta-principle of social solidarity. From our perspective, this is a very relevant legal innovation. Either explicitly entrenched in the constitution (as it is in Greece, Switzerland and Italy) or implicitly derived by other constitutional principles and rights (as in Germany, Poland, the UK and Denmark), solidarity is a shared constitutional paradigm in all TransSOL countries, even though it assumes specific features in each of them. Moreover, solidarity permeates several areas of the constitution, including its ethical, social, economic and political aspects as well as its duties. Based upon the constitution, solidarity as a binding legal concept is directly applied to a wide range of specific legislation: family law (in Germany, Italy and France), labour law (Italy, Greece and the UK), tax law (Germany, Greece, Denmark and Poland), international cooperation (France, Italy, Poland and the UK); energy legislation (Poland), volunteering and NGO legislation (Denmark, Greece, Germany, Italy and Poland), health service legislation (the UK), social security (Germany) and social housing (France).

In all TransSOL countries, grounding the legal system on solidarity means that the legal bond between the individual and the state creates a relationship of mutual responsibility that exists not only in a bidirectional vertical dimension but also in a bidirectional horizontal dimension between citizens. Every citizen is responsible for the promotion and guarantee of fellow citizens' rights and needs, and this contributes to social and political cohesion.

At this stage of the research, it was crucial to introduce the dimension of the European Union. What TransSOL focusses on, in fact, is the transnational aspect of solidarity, and in particular the intra-European practices of solidarity that overcome national legal and identity borders.

At the European level, the concept of solidarity has never been clearly defined. An attempt to define it was made by Advocate General Fennelly in his opinion of 6 February 1997 in *Sodemare* (case C-70/95), where he found that "The principle of social solidarity envisages the inherently uncommercial act of involuntary subsidisation of one social group by another" (para. 29). Scholars have

defined the notion of solidarity as a “politically committed re-specification of the social” (Karagiannis, 2007). This means that—throughout different historical experiences—solidarity has given a political spin to the social by translating it into political terms. As has already been mentioned, with regards to internal systems, solidarity is a concept that changes from state to state and is rooted in the national calculation of implementing self-interest motivated by the interconnection of many variables, and it needs to be understood differently depending on the particular historical moment. By placing special emphasis on the European level, solidarity needs to be observed from a further perspective that pays particular attention to the tension—yet unresolved and indeed underscored by the crisis—between national welfare systems and the European Union. This is the main question arising from the standpoint of European integration, which aims to find minimum welfare standards and to safeguard the political, economic, social and cultural identities of each member state at the same time. The same idea is echoed by the motto of the European Union, “United in diversity”.

Moreover, the interpretative activity of the Court of Justice of the European Union (CJEU) plays a fundamental role in the solidarity discourse, that

is in the dialectic between the *de-territorialisation* and *re-territorialisation* of the welfare state in Europe (Giubboni 2012), of the progressive ‘loss’ of member states’ political and territorial (geographical) sovereignty and therefore, of a gradual erosion of national redistribution policies and systems. In fact, the CJEU holds a ‘propulsive’ function: it has indeed elaborated ‘interpretative strategies’ that broaden or restrict the interpretation of expressions contained in EU provisions aimed, according to peculiar circumstances, at subsequently broadening or restricting de-territorialisation and re-territorialisation effects. And it is very important to highlight that the Court has recently changed its attitude in interpreting EU legislation concerning several aspects of European solidarity from a quite optimistic construction of transnational social citizenship at the EU level towards a more restrictive approach. The last very important cases, *Dano*, *Alimanovic* and *Garcia-Nieto*, clearly represent this counter-trend of narrow interpretation of the idea of European social citizenship. This is quite a crucial aspect that the research will continue monitoring and evaluating against the citizens’ perceptions and practices of transnational solidarity to assess the bi-directional dialogue and mutual influence between European citizens and European institutions.



The Idea of European Solidarity is Eroding

Interview with Stefano Giubboni, Professor of Labour Law at the University of Perugia (Italy) and TransSol’s Advisory Board member, realised on the 5th February 2016

Q: From a European Union point of view, which were the most relevant elements of “transnational solidarity” in the EU before 2008? (e.g. financial solidarity; transnational access to social rights, etc..)

A: Before the crisis, we could more or less divide the ideas of solidarity and the relevance of solidarity for Europe into two main fields. On a more general, abstract and normative-constitutional

level, the idea of solidarity was very relevant in the narrative of the integration process and of the treaties. The concept of social market economy and the chapter on solidarity in the EU Charter of fundamental rights were at the very basis of this normative common understanding of the relevance of solidarity within the European Union constitutional context. At the same time, there was the idea that in many material fields solidarity did matter quite a lot. This was the case, for instance, of financial solidarity with the great work made by the structural funds of the EU, especially the Social fund and the policy of regional-territorial cohesion; but also of the transnational dimension of European solidarity with the idea of having a common space of values and a common understanding of the idea of citizenship and free movement. Of course, there were also other traditional classical fields of material solidarity in the EU, like, example, the social chapter of the treaties and the employment policies. Even the *flexibility* discourse was, to a certain extent, linked to the concept of solidarity. Thus, there were quite important elements of this understanding of the multi-dimensionality of the concept of solidarity before the economic crisis that started in 2008.

Q: What has changed in the years of the crisis?

A: Very briefly, I would underline two main points. The first point is a growing asymmetry between member states with very complex lines of conflict: North versus South, West versus East, creditors versus debtors. The idea of a win-win game, where every single member state could achieve some national interests within a more general common interest in the European integration process, has progressively eroded, if not totally collapsed, after the outbreak of the crisis. The other point is the corrosion of the mutual trust between the member states. This has to do with different interests at stake. The fact that the perception of the national interests within the process of European integration has changed also has to do with an increasing erosion of the links of mutual understanding and trust between the member states (and, probably, between their citizenries). This is quite evident, especially in the hard moments of the crisis, like the Greek crisis last year, but also in many other aspects of the management of the crisis within the EU.

Q: What is the impact of these transformations on ordinary citizens?

A: The impact has been quite dramatic, especially in the lives of ordinary citizens living in poor

or 'constrained' member states. Here the conflict between North-South is quite evident, especially if we think of the life of ordinary citizens in Greece, Portugal, Spain, Italy or in some Eastern member states. This situation had a great impact on the ordinary lives of many Europeans and this impact is quite easily discernible in the growing dissatisfaction towards the European institutions and the EU in general, especially in the countries that have been more affected by the crisis. The growing anti-European moods prevailing now in many countries, especially in the Eastern and Southern periphery, are clear signals of the impact of the crisis. Italy is an extraordinary example of that: historically, we had perhaps the most pro-European public opinion ever and now we have very prominent Euro-sceptic movements, and even the governing coalition is significantly influenced by such a Euro-sceptic approach.

Q: Except experts and scholars, ordinary citizens and even policy-makers and opinion-leaders tend to ignore or underestimate the importance of the European Court of Justice. Nonetheless, the Court plays a crucial role in the concrete implementation of EU regulation. Can you briefly outline the landmark cases relevant for our notion of transnational solidarity? What has recently changed in the ECJ jurisprudence?

A: This is a complex issue. To synthesise, I would say that the ECJ moved from a quite optimistic construction of transnational social citizenship at the EU level, with some leading cases at the end of the 1990s and the beginning of the new century, towards a new, more restrictive approach. The last very important cases, *Dano* and *Alimanovic*, clearly represent this counter-trend of restricting the relevance of the idea of European social citizenship, i.e. the idea of building an entitlement to social rights upon the freedom of movement of non-active European citizens. So, I would say that even in the ECJ case law we can detect the trend of the erosion of the common understanding of the constitutional value of solidarity within the European Union and of the erosion of the idea of a common solidaristic or social space. There is no common space. There are national spaces that need to be coordinated, but the coordination cannot imply any kind of significant welfare-redistribution among member states' citizens. This is the essence of the message sent in the *Dano* and *Alimanovic* cases by the Court of Justice. The member states are now allowed to defend their welfare and solidaristic circles, which are national circles, against the alleged opportunistic free movement of European citizens. In this perspective, we can easily detect this kind of retrench-

ment, a stepping back from the optimistic – and maybe not realistic – idea of a certain degree of transnational solidarity cultivated by the Court of Justice about ten years ago.

Q: Beyond the institutional level, do you think citizens perceive the EU as a dimension for solidarity practices between citizens regardless nationality, or is the EU a dimension simply for institutional and inter-state relations?

A: This is a difficult, complex question that also requires sociological competence to be fully addressed. From a legal perspective, I would say that solidarity links between member states were dramatically weakened by the crisis. Solidarity is the real missing trait in the management of the crisis. A prominent Italian lawyer, Stefano Rodotà, defined, for instance, the fiscal compact as a sort of *counter-constitution* where the idea of solidarity is totally eliminated and conditionality is really prominent. So, from an institutional, inter-state point of view, the idea of solidarity has been significantly constrained by the crisis. Yet, this does not mean that societal solidarity and a bottom-up process of mutual support by ordinary citizens across borders cannot arise. But I do not have the instruments to evaluate the potentials for such a sociological phenomenon.

Q: Should you be asked to write the roadmap to European transnational solidarity, which are the most critical points you will put on the agenda?

A: I would use the keyword *mutualisation* for a possible roadmap. This refers to the idea of re-building a common win-win interest around which the interests of member states coalesce. *Mutualising* would be relevant in the management of the sovereign debt crisis, which is still pending. It has relevance in the discussion about the completion of the banking union, because here the new bail-in directive lacks this element of a collective solidaristic dimension of a European *mutualisation*. *Mutualisation* is also very relevant when dealing with the question of immigration and asylum policies within the EU context, which means in this context sharing the burden of the new immigrants and refugees from the Middle East and from Africa. So, I would say, *mutualisation* would be the keyword for a roadmap to European transnational solidarity. But I am very pessimistic that this will happen.

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