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EUROPE'S LACK OF SOLIDARITY IN ITS RESPONSE TO THE HUMANITARIAN CRISIS. JEOPARDIZING THE EUROPEAN UNION'S CONSTITUTIONAL IMAGINARY

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Abstract

The European Union's (EU) constitution and constitutionalism is best seen as a sphere of contested imaginaries, competing narratives over the legal-political construction of Europe. These imaginaries have been historically reinforced by EU technocrats and political elites, as well as by various social and economic actors, whether progressive democrats or powerful businesses. When technocrats and elites turned their hands to the project of the constitutionalization of the EU in the early 1990s, what they had in mind was to legitimate the Union. In this respect, constitutionalization was necessary because the Union had ceased to be a typical international organization. Laws, regulations, and policies that were adopted at EU level had an impact on citizens; however, these had no influence over either law-making or policy-making processes. The first segment of this paper addresses the forging of the EU's constitutional identity through the juridification of values, imaginary, and constellations. It then analyses the progressive creation of constitutional imagination at EU level and the effects on this imaginary that the lack of a proper answer to the humanitarian crisis has caused. The paper ends by posing a set of questions that relate the ideological project of European collective identity, the process of political integration and the role that the founding values of solidarity and human dignity may play in these processes.

Key words: imaginary; constellations; constitutional identity; solidarity; human dignity; European Union.

LA MANCA DE SOLIDARITAT D'EUROPA DAVANT LA CRISI HUMANITÀRIA. QÜESTIONANT L'IMAGINARI CONSTITUCIONAL DE LA UNIÓ EUROPEA

Resum

La constitució i el constitucionalisme de la Unió Europea (UE) són concebuts preferentment com un conjunt d'imaginaris en confrontació, és a dir, relats que competeixen sobre la construcció juridicopolítica d'Europa. Aquests imaginaris han estat històricament fomentats per tecnòcrates i elits polítiques de la UE, però també per diversos actors socials i econòmics, ja siguin demòcrates progressistes o bé grups empresarials influents. Quan els tecnòcrates i les elits es van dedicar al projecte de constitucionalització de la UE cap als anys 90, el que pretenien era legitimar la Unió; perquè aleshores la constitucionalització era necessària en esdevenir la Unió una organització internacional no gaire típica. A pesar que les lleis, la normativa i les polítiques que es van adoptar en l'àmbit de la UE van tenir un impacte en els ciutadans, no van afectar els processos legislatius o de presa de decisions polítiques. La primera part d'aquest treball explica com la identitat constitucional de la Unió Europea s'ha forjat mitjançant la fixació legal de valors, imaginaris i constel·lacions. Tot seguit, s'analitza la creació progressiva de l'imaginari constitucional europeu i els efectes que ha tingut sobre aquest imaginari la manca de respostes adequades a les crisis humanitàries. L'article clou plantejant una sèrie d'interrogants que relacionen el projecte ideològic d'identitat col·lectiva europea, el procés d'integració política i el paper que els valors fundacionals de solidaritat i dignitat humana poden desenvolupar en aquests processos.

Paraules clau: imaginari; constel·lacions; identitat constitucional; solidaritat; dignitat humana; Unió Europea.

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Summary

1 European Union values, imaginary, constellations, and constitutional identity.

The European Union's (EU) constitution and constitutionalism is best seen as a sphere of contested imaginaries, competing narratives in the legal-political construction of Europe. These imaginaries have been historically reinforced by EU technocrats and political elites, as well as by various social and economic actors, whether progressive democrats or powerful business groups (Wilkinson). When technocrats and elites turned their hands to the project of the constitutionalization of the EU in the early 1990s, what they had in mind was to legitimate the Union. In this respect, constitutionalization was necessary because the Union had ceased to be a typical international organization. Laws, regulations, and policies that were adopted at EU level had an impact on citizens; however, these were unable to influence either law-making or policy-making processes. As asserted in the famous motto "in varietate concordia", the gap between the citizens and this new post-national legal and political order was expanding. Nonetheless, the traditional constitutional imaginaries of the past were found to fall short in grasping this new development. Many legal authors, philosophers, political theorists, and technocrats agreed that new conditions resulting from the changing institutional structure of the European Community required new constitutional imaginaries. Such imaginaries would help create a post-national community that transcended the imaginaries of the national statehood.

This constitutional tale is fairly familiar, and EU constitutionalism has been a well-studied field. There is no need to rehash old debates. What is needed, if the EU's fundamental constitutional values are to be realized, is critical self-reflection. Our aim in this short chapter is to demonstrate that although the process of formalization of the EU has failed, its key constitutional values *must* and *can* still be rescued. More tellingly, we engage here with a normative meaning of the EU constitution, although our view about normative constitutions differs from that of normativity, whether from a legal positivist or natural law perspective (Loughlin, 2014).

We agree therefore with Fossum and Menéndez on the need to distinguish between different conceptions of the European constitution: the formal, material and normative (Fossum & Menéndez, 2011). Of these, the normative perspective is key to this chapter. The normative dimension of the constitution includes: the process through which the "constitution" of the EU was agreed, the rights granted and enforced by the EU's constitutional order, and the values that shape the frame of the constitution (Fossum & Menéndez, 2011).

In particular, we reflect upon the founding values of the Union listed in Article 2 of the Treaty of the EU (TEU), with a particular focus on the principle of solidarity. More concretely, we examine the implications of the weak, or even lack of rule of law (not under the Anglo-Saxon notion of the term) and of an enforceable principle of solidarity that puts the EU community, its credibility, and its collective imaginary at risk. Solidarity is a fundamental value, as we will argue, for discussing the feasibility of the EU's constitutional imaginaries. The reason we focus on the legal dimension of solidarity is to expound the three normative dimensions, as mentioned above. In procedural terms, the question concerns whether solidarity as a value reflects the democratic imaginations of the European peoples and, if so, to what extent. In terms of rights, the issue is about whether the EU's legal order is obliged to protect the rights of the world's citizens from the standpoint of solidarity and to what extent.

In other words, our point is that solidarity with those who seek support from the EU (e.g., in the case of the refugee crisis) is not to be seen as or collapsed into an act of charity. While valuable, such an act would still be an expression of superiority and of preservation of the hierarchical distinction between "us" and "them". By way of contrast, our approach to solidarity with "others" as a constitutional right is more about the rights of Europeans to act collectively in a humanitarian crisis. In our words, we define solidarity as a relational right and a value through which Europeans can imagine themselves as a legal collective. *Pace* Schmitt's antagonistic dictum of distinguishing "us" from "them" in terms of enmity, in our case solidarity with others creates and recreates collective identity. Defined in this way, solidarity is an identity-consolidating value; that is, it is a way of acting in a "European" way (Von Bogdandy, 2005).

From this argument it follows that the constitutional imagination of the EU is endangered when solidarity is not being practised as a constitutional value or is being violated by more identitarian interpretations of solidarity. Solidarity is constitutive of the constitutional imaginations of the EU, and this point can be made clearer when it is compared with the traditional, constitutional imaginations of the nation-state building

processes. Before we turn to the solidarity principle, we must draw attention to the often-cited issues relating to the legitimacy of the EU constitution.

To start with, a formal constitution needs to be unique as higher norm, and is often written down and socially recognized (Fossum & Menéndez, 2011). The EU constitution fails in this last respect because of the lack of social recognition and real enforcement of many of the constitutional elements.

We believe that the current standpoint of the European constitutional project has not varied much since the picture painted by Grimm and Preuß in their works over twenty years ago (Grimm, 1999). Even more, the failure of the Treaty establishing a Constitution for Europe and a series of crises has intensified some of the doubts and questions predicted by both authors. The understanding of the EU as a "*monstro simile*", where the strength and dominion of the Member States has augmented over the autonomy of the Union, where the role of people is testimonial and the autonomy and effectiveness of the Union is at stake evidence some of the challenges that the Union, its community, and its imaginary are facing. The failure of the EU constitutional treaty demonstrates what Blokker pointed out—the important connection between the effects of populism and the promises of constitutionalism (Blokker, 2019. Populism can be observed in the Member States but also in the EU institutional framework and functioning (Oklopcic, 2015).

The EU constitutional project, like other constitutional projects, is aspirational and uses utopias and goals to forge the *constitutional identity* of Europeans. Each constitution and constitutional project is thus imaginary and has a degree of utopia and aspiration. A major trend in modern constitutionalism and the use of constitutions as founding documents, exemplified by the American constitution, is for it to be seen as the consolidation and norm(alization) of an imagined community. Consider, for instance, the construction of new constitution-making subjects in parallel to constitutional founding. Mexicans, Peruvians, Bolivians, Uruguayans, Argentinians, Chileans, etc., were all creations ex-novo, new, invented countries, with flags, names, and newly invented imagined communities.

If the EU constitutional/technocratic construction had aimed to reproduce an old pattern of modern constitutionalism by virtue of using the normative and sociological functions of a constitution, it would have inevitably encountered serious problems in building a new identity for an imagined post-national community. The nineteenth-century constitutional imaginaries were part of a larger process of emancipation from monarchs, empires, and feudal systems. They are thus linked to the democratic struggles over the domination of empires and privileged classes. Constitutional imaginaries in this age were built on this background, and were tightly linked to a broader social transformation within which legal imaginations were part and parcel.

The EU, however, started its constitutional project in a completely different context and for a very different purpose—identity creation and consolidation that did not require democratic approval or even participation, as happened in the nineteenth-century state-building by technocrats and through legal enforcement. In fact, as Anderson (1991) remarks, all the communities are imagined and are to be distinguished not by their falsity/genuineness, but by the style in which they are imagined. The EU constitutional project, like other constitutional projects, is aspirational and uses utopias and goals to forge a new *constitutional identity* of Europeans. When EU academics, research centres, policy makers, and theorists refer to "European constitution and constitutionalism" they are creating a political imagination; they are stressing the signified component of the concept, they are painting an image of a "constitution" and a "constitutional system" to gain authority, *Herrschaft*, legal supremacy, and the proto-legitimacy that a constitution implies.

In the very concrete casuistry of the EU constitutional imagination there is an aggravated need to reinforce through discourse and narrative the idea and legitimacy of a constitutional framework for the Union. This existential requirement is even more acute because of the lack of explicit democratic support for the EU constitutionalization project. As has been acknowledged (Mac Amhlaigh, 2011), the constitutional character of the Union has its foundation in international treaties and a series of seminal judgments on the nature of the treaty system which established the former European Economic Community (ECC); the EU's judicial arm, the European Court of Justice, then established the foundations for the EU to become a constitutional polity.

This kind of constitutional framework, made behind the backs of the people, has tried to find different sources of legitimacy. By way of example, there has been a theoretical effort to compare the EU's

undemocratic constitutional founding with U.S. constitutional experience since Judge Marshall's famous decision in Marbury v. Madison (Halberstam, Cormac Mac Amhlaigh, et al.). This analogy is arguable and also transplants to the European scenario some of the open debates seen at the U.S. constitutional founding moment between the Federalists and the Anti-federalists.

The undemocratic legitimacy of the European constitutional project evidences a political paradox, since democracy is at the heart of the EU's self-understanding, and the Union has defined democracy as a part of the "cultural, religious and humanist inheritance of Europe", and it is included among the founding values in Article 2 TEU (Scicluna, 2014).

As previously mentioned, the 2004 Constitutional Treaty was, in some ways, an attempt to redress this imbalance between law and politics; though couched in legal terms, it was an attempt to energize and enlarge an incipient European public sphere. The constitution's framer sought to publicize and politicize the EU, in order to democratize it (Scicluna, 2014).

After the defeat of the 2004 Constitutional Treaty, Euro-bureaucrats and constitutional ideologists, ignoring the express opposition of the Dutch and French voters and the massive blow that this gave to the EU project, limited the democratic opposition to mere semantics; that is, to the use of the term "constitution" but not the constitutional essence. The EU constitutionalization path followed by offices, technocrats and stakeholders was based on "post-democratic executive federalism" (Habermas, 2013).

One inconvenience of this kind of post-democratic legitimacy is that it does not take into account the ways that European people (or peoples) imagine their social identity at the highest legal level (the constitution), or, quoting Taylor (2004), "the ways that people imagine their social existence, how they fit together with others, and the deeper normative notions and images that underlie these expectations".

The developments in the aftermath of the constitutional failure seem to heighten the image of the EU as a far-away bureaucratic monster and its constitution as a "product of laboratory" that aims to impose an imaginary instead of accommodating the way in which ordinary European citizens "imagine" the Union and the condition of "European".

Updating Grimm's prediction in 1995 (Grimm, 1995), the EU project is still missing the self-determination of the Union's citizens, the basic decisions are not taken by the people of the Union or in their name; the people of Europe are not the constitutional legislator and the Member States determine the form and the development of the Union.

The Member States are still the "Masters of the Treaties" even though there is sufficient evidence to show that many of the Union's problems require a political treatment that the state framework of the European States cannot effectively provide. The inability to respond effectively to the humanitarian crisis, the lack of an enforcement of the measures of Article 7 TEU against Poland and Hungary, or the lack of the rule of law in the EU, confirm this incapability (Kochenov, 2015).

2 EU constitutional imagination

The EU constitutional imagination is grounded in two dimensions: a normative (2.1) and an ideological one (2.2), which are inter-dependent and inter-connected symbiotically.

2.1 The normative cornerstone is very relevant due to the lack of explicit democratic support for the constitutional project. The EU constitutional idea that technocrats deploy is *purely normative*, based on a Kelsenian understanding of the *Grundnorm*. The purely normative interpretation of the system is remitting in favour of an intrinsic, systemic source of legitimacy based on the principle of the "rule of law".

The European Commission has remarked that the EU is based on the rule of law; every action taken by it is founded on treaties approved voluntarily and democratically by all EU member countries. The rule of law is considered as a founding principle stemming from the common constitutional traditions of all Member States, and is one of the fundamental values upon which the EU is based. According to the European Commission, respect for the rule of law is also a prerequisite for the protection of all fundamental values

listed in the treaties, including democracy and fundamental rights. The circularity of this statement—it is both one of the fundamental values and at the same time a prerequisite for the protection of all fundamental values—is also revelatory of the ideological nature of the statement (Abat, 2019).

Article 2 TEU defines the founding values of the Union, which include the rule of law. The article also establishes respect for human rights as a value, including the rights of persons belonging to minorities. However, in other legal instruments the Union emphasizes that respect for the rule of law is a prerequisite for the protection of all the fundamental values listed in Article 2 TEU.

All EU institutions have a complementary role to play in promoting and maintaining the rule of law in the EU. The rule of law is also conceived as a "common value" of the EU and is protected by the preventive mechanism of Article 7 (1) TEU, which allows the Council to give an EU country a warning before a serious breach has materialized.

However, the principle of "rule of law" is not only understood in the traditional Anglo-Saxon sense (limitation of power and authority), but in the sense of the German false synonyms *Rechtsstaat* and *Herrschaft*, which focus more on the "constitutional state", the "empire of law", both of which stem from a less mystic and romantic idea. The first refers to an attempt to bind state and law together and the second is linked to the concept of *Rationale Herrschaft*, the purposive rationality that characterizes formal legal constitutional systems (Breuer, 2011).

EU technocrats and stakeholders' epistemological use and abuse of the principle of the rule of law combine the ideological element of the concept of *Rechtsstaat* that Weber criticized and the element of rationalization and dominion of the concept of *Herrschaft*.

Due to its pure normative essence, the EU constitutional imagination lies in the legal supremacy and primacy of EU law; supremacy is understood as the highest authority of the (diverse) fundamental norms of the EU over national constitutions—a principle that has been contested since it first emerged 50 years ago. This supremacy implies that European law cannot be overridden by acts of domestic legislation and that, in cases of conflict between EU law and the law of the Member States, EU law must prevail and conflicting national law must be set aside (Méndez-Pinedo, 2016).

The goal of this principle is to assure a uniform and effective application of EU law in all the 28 (BREXIT pending) Member States (Méndez-Pinedo, 2016). The doctrine was created by the case-law of the European Court of Justice (ECJ) in a series of seminal rulings going back to the 1963 and 1964 Van Gend & Loos and Costa/Enel cases, followed by a case in 1970 when the ECJ ruled explicitly that EU law prevails over national constitutions (Case 11/70 *Internationale Handelgesellschaft* ECR 1125), and more recently by Declaration no.17 annexed to the Treaty of Lisbon as well as the *Melloni* Case c-399/11.

The concept of primacy/supremacy has reached a high level of sophistication and, according to EU constitutional texts and case-law, the primacy of the EU is absolute; it has explicit total primacy in application and implicit supremacy in validity and substance. This supremacy/primacy is the essential legitimating element of the EU constitutional imaginary and its self-attributed constitutional character. It is a supremacy that has been imposed on the Member States and which resides in a high degree of technification of EU law. Nevertheless, when the German Constitutional Court first (Solange I and Solange II), and then other Supreme/Constitutional courts of Denmark, Czech Republic, Italy, and Spain contested this principle of EU primacy and supremacy, national sovereignty was said to be jeopardizing the very constitutional essence of the EU.

Acknowledging that the legitimacy of the EU constitutional imaginary resides in the principle of the rule of law, due to the absence of the principle of democracy as a source, the question is whether, as asserted by Kochenov (2015), the principle of the rule of law is lacking in the Union?

2.2 The second cornerstone of the EU constitutional project is ideology and aspiration, or the way in which the EU is creating and enforcing semiotics to build up a constitutional imagination and expectations. This imaginary is necessary because the rule of law is not the EU's institutional ideal (Kochenov, 2015).

The semiotic construction of the constitutional imagination was already included in the agenda of the Union, even when it was conceived to be merely an economic market. After the failure of the Treaty establishing a Constitution for Europe to accommodate the Union in a single norm, there was a progressive constitutional imagination of concepts, symbolism and imaginaries, virtues and values, aspirations and hopes based not only on reality or rationality. Progressively, the Preamble of the founding documents of the Union reproduced the quintessential elements of the narratives and discourses of this social imaginary, of the EU as a political and constitutional actor.

The EU is self-proclaimed as a legitimate inheritor and continuator of some of the most celebrated values of constitutionalism and human rights. Nonetheless, just like all great political communities, it cannot be considered cosmically central despite the medium of sacred language inscribed in the legal text. Rather, the EU is an imagined community, and constitutional imaginaries are key to imagining such community.

This is an idealistic narrative that avoids mentioning or repudiates the fact that we Europeans are also responsible for creating the swastika, as Sartre pointed out when addressing the horrors of European colonization around the world (Sartre, 1956). The European construction has been omitting this dark side of our recent history in its narrative and social imaginary, an omission that has had unforeseeable political consequences.

The European project was thought to be a reaction to ethnic nationalism that wrecked the peace and marred the prospects of all mankind (Churchill, 2009). This nationalism poses a potential threat that seems to be being reproduced in some Member States and which is calling the Union into question. And probably, were it not for its masking of the ideology-building process, the Union would not be facing some of the challenges that it is currently experiencing or would be in a better position and possess better tools to respond.

The imaginary construction of the EU community has not erased or tempered the way in which certain Member States perceive themselves as a great classical community despite the contradictions inherent in a project that comprises multiple identities. The last diplomatic crisis between the Presidency of Mexico and the Kingdom of Spain evidences this potential imaginary identity collision. As the 500th anniversary of the 1521 Spanish conquest of the Aztecs approaches, the President of Mexico, Mr. López Obrador, proposed that the King of Spain and Pope Francis ask forgiveness for the abuses inflicted on the indigenous peoples of Mexico.[1]

The government of Spain deeply regretted that the letter the Mexican president sent to His Majesty the King, whose contents it firmly rejects, was made public, and said in a statement: "The arrival, 500 years ago, of Spaniards to present Mexican territory cannot be judged in the light of contemporary considerations".[2] Other representatives of the two major political parties considered that Spain should instead celebrate its historical role in Mexico "with pride", "the way great nations do, those that have contributed to the discovery of other people", and considered the demand as "an intolerable offence to the Spanish people".[3]

The Spanish response fits perfectly with Anderson's definition of classical community through sacred language and the understanding that the Indian is ultimately redeemable by impregnation with white, "civilized" semen (Anderson, 1991). The point is that this narrative does not align well with the collective imaginary creation of the EU that deviates from the templates of Eurocentric imagination concerning the nature and role of postcolonial constitutions (Oklopcic, 2018). The constitutional identity of modern democratic states is not shaped by a dominant ethnicity or ideology.

The EU has abused social imaginaries, goals, and values. The overdose of symbolism and unenforced "values" is threatening the functionality of the Union in certain relevant areas that were intended to build and strengthen our European identity and the process of political integration.

The transformation of the economic market into a political entity and a social landscape can be considered as the starting point of a political and epistemological strategy emphasizing "social imaginary" (Papakostas &

1 See *New York Times* (2019, March 27).

2 See *The Local* (2019, March 26).

3 See note 1.

Pasamitas, 2015). The Lisbon Strategy process has moved on from creating a well-established social vision by producing a more effective and inclusive discourse in its attempt to achieve hegemony, turning the "myth" into a social imaginary. A myth can be transformed into a social imaginary if it is hegemonized at discourse level or when it becomes clearly legitimated at political level.

Undeniably, "Social Europe" in the Lisbon Strategy process gives greater clarity and depth and has been successful in incorporating many specific social demands in a more coherent fashion (Papakostas & Pasamitas, 2015).

The abuse of social imaginary is evident in *two perspectives*; the first one is more theoretical, and applying the definition proposed by Castoriadis (1975), the EU institutions and policy makers are not attaching meanings, representations, orders, injunctions, or incentives to do or not to do, to consequences.

The lack of functionality to enforce the founding values of the Union, such as solidarity, rule of law, democracy, or human dignity, has shown an image of the Union that Poland's President Andrzej Duda advantageously defined as an imaginary community.[4] The lack of functionality evidences the lack of a link between means and goals or causes and effects, the strict correspondence between the character of the institutions and the "real needs" of the society in question, and the integral and uninterrupted circulation between the "real" and the "rational-functional" (Castoriadis, 1975). Recent events have shown that the Union lacks this necessary circulation; the images and narratives of Article 2 TEU are not in circulation with the "real".

Kochenov (2015) asserts this fact when he describes the functionality problem that the EU is facing due to its inability to enforce the value of the rule of law since it has no enforcement "machinery".

The lack of correspondence between the "real" and the "rational-functional" highlights the sui generis political nature of the Union, the continuous "work in progress" model, the reductionist criticism that characterizes the Union as a bureaucratic and distant political apparatus, the eternal accusation of democratic deficit and the continuous "crises" that the EU has been facing since its process of political integration. Yet, none of these have given any incentive to restraining the use of the social imaginary.

3 Normative accommodation of the ideal of solidarity

Solidarity as a fundamental principle of European integration was mentioned for the first time in the 1950 Schuman Declaration and was subsequently incorporated into the Preamble of the 1951 treaty establishing the European Coal and Steel Community (Giannakopoulos, 2017). The Preamble of the Treaty of Maastricht (1992) served as a sort of "birth certificate", providing a constitutional "home"/"identity" for the concept (Jacobsohn, 2010).

The inclusion of a provision in a preamble has more than just political significance, it is an authoritative recital of the Treaty's purposes and the framers' intent, which are understood to play a role in constitutional interpretation (Leiter, 1990). The reference to solidarity in the preamble reflects the progressive political integration envisioned by the EU. The Preamble of the Maastricht Treaty includes not only an important interpretive principle, but also makes a declarative statement on the purpose that explicates principles of positive law.

The Treaty of Lisbon strengthens the concept of solidarity and Article 2 TEU includes solidarity among the common values of the Member States that must prevail. Its inclusion in this article has strong political and legal implications. A breach of the value of solidarity can trigger the application of the measures prescribed in Article 7 TEU. This special protection aims to give a real applicability and aversive sense to the value, which prevent it from being simply aspirational (Scheppele, 2003). This conceptualization also determines its objectives (*Zielbestimmung*).

Solidarity is now a general legal principle of law in the Union. In this sense, it is not only an abstract value, but also a feature of the EU's constitutional identity. The prominence of solidarity in the Charter of Fundamental Rights of the European Union (CFR) also demonstrates its fundamental importance in the Union (Klamert,

4 See *Financial Times*.

2014). Other primary EU laws that accommodate the principle of solidarity are the Preamble and Chapter IV of the CFR and the "solidarity clause" established by Article 222 of the Treaty on the Functioning of the European Union (TFEU). Solidarity is mentioned in the TEU as a common value and mission of the EU with regard to the mutual relations of Member States, their relations with third countries and relations between all citizens of the Union. Moreover, it is incorporated in articles of primary European law establishing specific guarantees, full rights, and equally full obligations (Giannakopoulos, 2017). Some examples in EU secondary law stemming from the principle of solidarity are the Declaration (No 37) on Article 222 of the TFEU and the Council Decision of 24 June 2014 on the arrangements for the implementation of the solidarity clause by the Union.

The ECJ has applied the principle of solidarity in a case concerning complaints made by self-employed workers against compulsory contributions to the mutual fund established to provide social protection. The court has also cited the solidarity clause to defend certain welfare schemes from the application of competition law, to validate obstacles to free movement and to justify requiring state authorities to provide temporary financial support to immigrant citizens. The ECJ has also become highly influential regarding citizens' rights within the framework of EU solidarity principles (Giannakopoulos, 2017).

The ECJ has had to interpret the principle of solidarity in relation to the principles of sovereignty and autonomy of the Member States. Simultaneously, as remarked by Knodt & Tews (2014), the Court has dealt with different concepts of solidarity pertaining to different actors, peoples of the EU, the Member States, and non-EU actors. The classic concept of solidarity focuses on closer communities, and the nation-state context does not seem to be flexible enough to fit the EU political reality. The problem seems to be that it is not only the individual that is a bearer of solidarity within the EU, but also the Member States as collective actors (Knodt & Tews, 2014).

EU law defines the concept of solidarity imprecisely and with heterogeneity. The EU conceptualization has an ethical dimension and is also related to the concept of identity. The context of solidarity is linked with other principles such as integration, subsidiarity and loyalty (Klamert, 2014). Even in the case of the principle of loyalty in relation to national identities, the principle of solidarity is subject to some pressure. A Union of States, without solidarity, will inevitably breach the principle of loyalty and cooperation when the particular interest of one Member State clashes with the interests of another.

Solidarity in EU law is the expression of a variety of financial obligations and political support which are essential for the functioning of an organization whose *raison d'*être has long been limited exclusively to the economic dimensions of cooperation. The principle of solidarity represents a lofty political goal that compels the Member States to support each other mutually and pursue a common political goal, as well as to be integrated into the Union (Klamert, 2014).

The EU refers continuously to the principle of solidarity but attaches imaginary rather than concrete meanings. In this respect, it is relevant to consider the debate of Chancellor Angela Merkel and the president of the European Commission, Jean Claude Junker, in the Plenary of the European Parliament on the vision for the future of Europe.[5] When addressing the principle of solidarity the participants explained that: "Solidarity is based on tolerance and this is Europe's strength. It is part of our common European DNA […] Solidarity also means that if you weaken the rule of law in one country or attack freedom of press in one country, you do so in the whole of the EU".[6] This is yet another example of the signifier (sound, image) without the signified (concept).

4 The existential crisis and the jeopardizing of the utopia

As Janer Manila (2009) states:

> "The Mediterranean is: Jerusalem, Cairo, Venice, Alexandria, Dubrovnik, Rome, Istanbul, Barcelona, Eivissa, Granada, Izmir, Algiers… the symmetries of the Alhambra so close to the constellations. And Homer, Socrates, Averroes, Ramon Llull, Galileo, Michelangelo, Leonardo, Gaudí, Joan Miró… In the shores of this

5 See press release of European Parliament (2018, November 13).

6 *Ibid*.

> sea all the contradictions of humanity are concentrated. On one side the Parthenon; on the other, the boats with immigrants fleeing, at night, of ancestral famine and misery."

As with the other founding values of Article 2 TEU, the principle of solidarity generates great popular expectations that are encouraged by the "constitutional" narrative and constituent imagination. As Oklopcic (2018) remarks, the practice of visual imagination is inseparable from its affective dimension. In choosing to envision something instead of something else, all jurists manage their own anxieties, and some among them hope to manage the anxieties of others (Oklopcic, 2018). The question is what vision the drafters of the principle of solidarity in Article 2 TEU had and what the means are to enforce it.

The EU needs to decide which boat offers the right version of the visual imagination of Article 2 TEU: the "humanitarian" ship, Proactiva Open Arms, or the "Identitarian" ship, C-star. It is not a simple act of aesthetics but of ethics and *imperium*.

The first ship is operated by Proactiva Opens Arms a non-governmental, non-profit organization from Catalonia whose main mission is to rescue people from the sea who are trying to reach Europe fleeing from war, persecution, or poverty.[7] The Proactiva Open Arms is specialized in surveillance and rescue missions of boats carrying people who need help in the Aegean and Central Mediterranean seas, as well as raising awareness of all the hidden injustices that are happening.[8]

The Proactiva Open Arms has rescued more than 5,000 people from the Mediterranean over the past three years, and was seized on 19 March 2018 after docking in the Sicilian port of Pozzallo.[9] The Italian authorities ordered the detention of the Spanish ship for promoting "illegal immigration and criminal association", after saving more than 200 migrants.[10]

After the order of release issued by an Italian judge, the Spanish authorities blocked the migrant rescue ship from leaving the Port of Barcelona, thereby preventing it from continuing its operations in the Mediterranean.[11]

Meanwhile, the alternative visual imagination is that offered by the C-star, a self-defined Identitarian ship that "defends" Europe by confronting refugees and sending them "back to Africa".[12] Chartered by extremist group "Generation Identity" and registered in Mongolia, the 40-metre (130ft) C-star was financed through a crowd-funding initiative organized by anti-immigration campaigners from France, Italy, and Germany.[13]

The group "Defend Europe" has vowed to "assist" the Libyan coast guard in pushing back the refugee boats when they leave the country's shores and says they want to "monitor" the actions of NGOs such as Save the Children who are operating in the region.[14] They claim these charities are facilitating "human trafficking" to Europe.[15]

The C-star has had several confrontations in its mission to prevent the passage of vessels loaded with migrants trying to reach European coasts. During its "missions", the boat pursued the Aquarius, the Open Arms, and other boats of NGOs that carry out rescue work in the Mediterranean.[16]

In August 2017, the C-star ended its operations after a series of setbacks. The crew who chartered a 422-tonne vessel for their latest efforts were not successful in achieving their goal. According to the organizers, "Defend Europe was a political success and many NGOs sailed in front of the Libyan coasts, like cabs waiting for customers", adding that, "Today, there is only one".[17]

7 See Open Arms website.

8 *Ibid*.

9 See *The Guardian* (2018, April 16).

10 See *El País* (2018, March 19).

11 See *Euronews* (2019, January 14).

12 See *Independent* (2017, July 24).

13 See *France 24* (2017, August 11).

14 See note 12.

15 *Ibid*.

16 See *El Plural* (2017, August 12).

17 See *Independent* (2017, August 21).

The role of the imaginary meanings is to ground a response to these questions that neither "reality" nor "rationality" can answer. These questions are metaphorical, and it is in the *doing* (*dans le faire*) of each collectivity that the answer to these questions is found.[18] So far, according to some interpretations of the principle of solidarity and human dignity, the second ship, the "Identitarian" one, seems to better represent an imaginary that allows the criminalizing and blocking of a boat carrying out a humanitarian task that should be undertaken by the EU. The C-star seems to also represent the spirit that guided the EU's immigration agreement with neighbouring countries (including Libya and Sudan) to act as Europe's border guards.

The externalization policies of the EU have far-reaching consequences. The most affected are the forcibly displaced persons themselves, but these policies also undermine the economic and social development of African nations, forcing them further into neo-colonial relations, strengthening repressive governments, and ultimately also undermining EU interests.[19] By cooperating with many authoritarian and human rights-abusing regimes, the EU legitimates those governments and often strengthens their security forces through training and the provision of equipment, thereby increasing their ability for internal repression.[20]

5 Conclusion

Every society has tried to respond to certain fundamental questions, such as who are we as a collectivity? What are we to each other? What do we want, what do we desire? Societies need to answer these questions in order to define their identities (Castoriadis, 1975).

The EU as a collectivity ,with its own machinery to create imaginary meanings, is not an exception, and we can only find the answer to these essential questions when they are posed to the Union, viz. by looking at its *doing*: if the Union wants to be defined as a collective founded on the principles and values expressed in Article 2 TEU, greater emphasis needs to be placed on its *doing* and its social policies.

Can a normative understanding of the principle of solidarity in the EU cohabit with the images of the Hungarian journalist Petra Lásló kicking a young girl and tripping a man with a child in his arms? This kind of solidarity is understood from an empire state of mind,[21] or an only among "whites" mentality; it is a kind of solidarity that will explain the fact that the pictures of Aylan Kurdi, a three-year old Syrian refugee whose body had washed up on the beach in Bodrum, Turkey, triggered highly emotional responses because the little boy looked Western in the clothes he was wearing and his skin was a pale colour, unlike several other photos of drowned children in which death is much more present, and which did not go viral.[22]

The lack of a rule of law, as explained by Kochenov, and of a real constitution or enough political autonomy of the Union from the Member States cannot be sustained at any price. Breaching human rights, solidarity, and human dignity erodes the EU and its collective imaginary.

Voltaire questioned in his *Dictionnaire Philosophique* (Voltaire, 1994) whether pious fraud should be practised with the people. In a dispute between Bambabef the fakir and Ouang, a disciple of Confucius, the first maintained that the people need to be deceived, the second claimed that one should never deceive anybody. Maybe the EU needs to follow the fakir's advice and not show us things as they are, or maybe, as the disciple of Confucius advocates, if a philosopher wishes to be useful to human society he must announce a God (Voltaire, 1994), a Messiah (Abat, 2019). The risk is that both paths may lead us down the road of fraud.

18 *Ibid*.

19 See Akkerman (2018).

20 *Ibid*.

21 *Ibid*.

22 See Edwards (2016).

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