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## **The transformation of the euro: law, contract, solidarity**

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## 1 INTRODUCTION

The ideas of great minds like Durkheim and Parsons are enlightening when it comes to social solidarity and its capacity to generate cohesion and unity. Much of their work, however, focuses on *individuals* within settings that do not exceed the confines of *nation-state societies*.<sup>1</sup> Only on rare instances do they look beyond them. In the *Division of Labor in Society*, for example, Durkheim finds signs of awakening social ties in Europe when he states that:

[T]he different nations of Europe are much less independent of another, because, in certain respects, they are all part of the same society, still incoherent, it is true, but becoming more and more self-conscious. What we call the equilibrium of Europe is a beginning of the organization of this society.<sup>2</sup>

Parsons even dares to leave individuals as the object of inquiry, explicitly focusing instead on solidarity between states, when he writes:

‘It is also of particular importance to note that these solidarities that exist between formally “sovereign” states do not occur entirely in mutually exclusive groups, but that there are important cross-cutting elements ... This means that the most significant nearly “ultimate” units do not function simply as “individual” units, or as a “mass”, but are involved in a complex network of solidary associations ...’<sup>3</sup>

The present research builds upon these thoughts to examine the concept of solidarity in a different context. In line with Durkheim, it shifts its focus from

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■ This chapter contains and/or builds on previously published work by the author. See especially Vestert Borger, ‘How the Debt Crisis Exposes the Development of Solidarity in the Euro Area’ (2013) 9 *EuConst* 7.

1 Nowadays, social theory is still accused of ‘methodological nationalism’ as it regards nation-state societies as the ‘basic units’ of inquiry, which makes it difficult to apply its insights and instruments to other entities such as the Union. See Hans-Jörg Trenz, ‘Social Theory and European Integration’ in Adrian Favell and Virginie Guiraudon (eds), *Sociology of the European Union* (Palgrave Macmillan 2011) 198.

2 Émile Durkheim, *The Division of Labor in Society* (George Simpson tr, The Free Press 1933) 121.

3 Talcott Parsons, *Politics and Social Structure* (The Free Press 1969) 302.

the level of nation-states to that of the Union. And inspired by Parsons, it exchanges the individual as the unit of analysis for the state. In short, it aims to conceptualise solidarity between the member states. This conceptualisation, in turn, allows for an understanding later in this study of why states acted in the interest of the collective during the crisis and how this generated a transformation of the euro.

The chapter will conduct the conceptualisation in three steps. It starts by analysing the nature of political obligation. From times immemorial 'consent' has been an appealing source for such obligations, in particular when given through the conclusion of a contract. Agreements or contracts, this study argues, can indeed lead to political obligations, but not because they are based on consent. Rather, they are one of many instances in which people incur obligations through being *jointly committed* to a particular cause or goal. This chapter discusses how and why such commitments give rise to obligations, including those of a political nature, and shows that they may not only exist between individuals, but also between states.

Attention then shifts to the issue of political obligation and solidarity between states. Parsons' concept of solidarity as a normative obligation will serve as a starting point of analysis. This normative dimension forms a very important element of solidarity, but it does not capture the phenomenon it in its entirety. A thorough account of solidarity needs to recognise that a state's solidary actions may not only result from the political obligation to which it is subject but also from a desire to serve its own interests. This chapter aims to develop such an account by approaching the concept of solidarity on the basis of two spectrums. The first spectrum is the most important one and relates to the reasons for solidary behaviour. Its ends are taken up by *normative* and *factual* solidarity respectively.<sup>4</sup> The second spectrum is subsidiary in nature and relates to the kind of solidary behaviour displayed in the interest of the whole. Its ends are formed by *negative* and *positive* solidarity.<sup>5</sup>

The third part of the chapter deals with the relation between joint commitment and Union law. When the member states signed and ratified the Treaty

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4 See also Kurt Bayertz, 'Four Uses of "Solidarity"' in Kurt Bayertz (ed), *Solidarity* (Kluwer 1999) 3: "'Solidarity" is now comprehended as a mutual attachment between individuals, encompassing two levels: a *factual* level of actual common ground between the individuals and a *normative* level of mutual obligations to aid each other, as and when should be necessary'.

5 The distinction between positive and negative solidarity in this study should not be equated with a similar distinction made by Durkheim, *The Division of Labor in Society* (n 2), 115-132 according to whom 'negative solidarity' corresponds to a certain class of legal rules 'linking things to persons, but not persons among themselves' (ie 'real rights', see text at 116-117) as opposed to 'positive solidarity', which can be subdivided in 'mechanical' and 'organic' solidarity. This study is not the first to distinguish between negative and positive solidarity in the context of the Union (legal system). See eg Epaminondas A Marias, 'Solidarity as an Objective of the European Union and the European Community' (1994) 21 LIEI 85, 94.

of Maastricht in 1992-93 they not only created a legal regime for their currency union, they also incurred a political obligation to uphold this very regime through the joint commitment that was established by these acts. What is more, they incurred an obligation to uphold the single currency, and even the Union itself. Treaty conclusion or amendment, however, are only two of many instances in which states can create joint commitments and consequently incur political obligations. Some of these other instances take place within the confines of Union law, such as when the European Council takes decisions by consensus. Others occur outside its boundaries or may even coincide with the establishment of new legal regimes. In each of these cases, however, states may incur political obligations that require them to act in the interest of the collective, yet not necessarily in a way that conforms to Union law.

## 2 POLITICAL OBLIGATIONS IN STATES AND BETWEEN THEM

### 2.1 The nature of political obligation

Does one have an obligation to 'obey the law' of the state or, more generally, to 'uphold its political institutions'?<sup>6</sup> It is one of the classics of political philosophy and over time many who have tried to answer it positively have done so by seeking to ground the obligation in 'consent'.<sup>7</sup> People are under an obligation to uphold their institutions, so they reason, because they have consented to their 'authority'.<sup>8</sup> This line of thinking is old and has its roots in the works of great philosophers regarding a 'covenant' or 'contract' as the source of such consent.<sup>9</sup> Hobbes argued in his *Leviathan* that men could get

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6 Political obligation encompasses more than just an obligation to 'obey the law'. See on this John Horton, *Political Obligation* (Palgrave Macmillan 2010) 14 who argues that 'although certainly part of the problem of political obligation, this way of formulating the question fails to encompass other aspects of it. Political obligation is not necessarily reducible simply to an obligation to obey the law of the polity of which one is a member. There may be other obligations or responsibilities ... which are not enshrined in the law'. Consequently, this study rather speaks of a duty to 'uphold political institutions', an expression used extensively by Margaret Gilbert in *A Theory of Political Obligation: Membership, Commitment, and the Bonds of Society* (Clarendon Press 2006). For a discussion of the fact that political obligation goes beyond a duty to obey the law in the context of the Union see text to n 126 (ch 2).

7 John A Simmons, *Moral Principles and Political Obligations* (Princeton University Press 1979) 57; Gilbert, *Political Obligation* (n 6) 56.

8 Simmons, *Moral Principles and Political Obligations* (n 7) 57: 'The heart of this doctrine is the claim that no man is obligated to support or comply with any political power unless he has personally consented to its authority over him'.

9 Horton (n 6) 21-24 (also pointing out that it can even be traced further back in time to the work of Socrates and Plato). Over time a great variety of contract theories have been proposed, each with their own understandings and implications. For a general overview

out of the brutal state of nature, characterised by a 'war where every man is enemy to every man', through the conclusion of a covenant whereby they dispose of their natural freedom in exchange for a 'sovereign' securing 'their peace and common defence'.<sup>10</sup> Although less dismissive of the state of nature,<sup>11</sup> Locke too saw a contract as being key to political obligation. In *The Second Treatise on Government* he describes how men can 'enter into society to make one people, one body politic' through unanimous consent and can subsequently devise a proper system of government by 'consent of the majority'.<sup>12</sup> And also Rousseau, already referred to in the previous chapter, resorted to a contract in order to conceptualise the act of association through which each undertakes to obey the general will.<sup>13</sup> In his *Du Contrat Social* he argues that any such act precedes the establishment of a government, whose task is to implement the general will.

Consent, or contract, theory goes a long way in explaining the normativity pertaining between the state and its people,<sup>14</sup> but it has been criticised as well. Arguably, the most important and straightforward point of criticism relates to the fact that most people will not have expressly given their consent through the conclusion of such an agreement or by joining an already existing one.<sup>15</sup> Even if one allows for the possibility of 'tacit' consent,<sup>16</sup> the group of consenters will be modest.<sup>17</sup> Proponents may respond that this does not

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see Johann Sommerville, 'The Social Contract (Contract of Government)' in George Klosko (ed), *The History of Political Philosophy* (OUP 2011) 573-585.

- 10 Thomas Hobbes, *Leviathan* (first published 1651, John CA Gaskin ed, OUP 1998), especially chs 13 and 17.
- 11 For a comparison between Hobbes' and Locke's different conceptions of the state of nature see A John Simmons, 'Locke's State of Nature' in Christopher W Morris (ed), *The Social Contract Theorists: Critical Essays on Hobbes, Locke, and Rousseau* (Rowman and Littlefield Publishers 1999) 97-115.
- 12 John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (first published in 1689, John Shapiro ed, YUP 2003), paras 87-133 (*Second Treatise*).
- 13 See text to n 147 (ch 1).
- 14 The present discussion does not concern so-called 'hypothetical contracts', that is: contracts that people would have entered into under imaginative, ideal circumstances. For such an account see John Rawls, *A Theory of Justice* (CUP 1999). On the difference between 'actual contract theory' and 'hypothetical contracts' see also Gilbert, *Political Obligation* (n 6) 55, 73.
- 15 See in this regard Simmons, *Moral Principles and Political Obligations* (n 7) 79 who states that 'The paucity of express consentors is painfully apparent. Most of us have never been faced with a situation where express consent to a government's authority was even appropriate, let alone actually performed such an act'. See also George Klosko, *The Principle of Fairness and Political Obligation* (Rowman & Littlefield Publishers 2004) 145; Horton (n 6) 38; Gilbert, *Political Obligation* (n 6) 71.
- 16 Gilbert, *Political Obligation* (n 6) 73.
- 17 As Gilbert, *Political Obligation* (n 6) 73 points out, 'tacit' consent is not the same thing as an 'implicit agreement', which covers situations in which 'there is neither an explicit agreement nor a tacit agreement...strictly speaking'. In such situations, however, real consent is lacking. Simmons, *Moral Principles and Political Obligations* (n 7) 88-93 illustrates this point by reference to actions like the use of public facilities or voting in elections. Such

invalidate the theory. It may simply mean that the number of people subject to political obligation is indeed limited.<sup>18</sup> Yet, such a reasoning sits uncomfortably with the fact that despite not having concluded or joined any agreement, many people consider themselves to be part of a 'political society' and, moreover, subject to political obligation.<sup>19</sup> From the perspective of contract theory the conclusion would have to be that they are mistaken.<sup>20</sup>

Considering this conclusion intuitively unattractive, Margaret Gilbert offers an interesting alternative reading of political obligation that stays close to contract theory but has a larger reach in terms of 'membership'.<sup>21</sup> Central to her reading is the notion of *joint commitment*. People are subject to political obligation not because they are necessarily party to an agreement, but because they participate in a joint commitment obliging them to support the political institutions of their society.

## 2.2 Joint commitments as emergent phenomena

Understanding the make-up of joint commitments and their obligating nature requires a return to Durkheim's notion of social fact. As shown in the previous chapter, Durkheim used it to describe the social structures that originate from individuals, yet at the same time have an existence of their own and exercise a controlling restraint on them.<sup>22</sup> Most importantly, he argued that social facts are general in nature and not reducible to the individuals from which they stem. This feature of social facts becomes especially apparent in the following passage from his book *Suicide*:

'Of course, the elementary qualities of which the social fact consists are present in germ in individual minds. But the social fact emerges from them only when they have been transformed by association since it is only then that it appears. Association itself is also an active factor productive of special effects. In itself it is therefore something new.'<sup>23</sup>

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actions, he argues, will normally not qualify as the giving of one's consent. The reason lies in the fact that they may be regarded as 'implying consent', which means that they are indicative of consent had the person in question been requested to give this, but not as actual 'signs of consent'. Only such a sign of consent constitutes a genuine 'expression of the actor's intention to consent'. See also Horton (n 6) 36-38.

18 Gilbert, *Political Obligation* (n 6) 71.

19 Gilbert, *Political Obligation* (n 6) 72.

20 Gilbert, *Political Obligation* (n 6) 74.

21 Gilbert, *Political Obligation* (n 6) 73, 183-286.

22 See text to n 184 (ch 1).

23 Émile Durkheim, *Suicide: A Study in Sociology* (John A Spaulding and George Simpson trs, The Free Press 1966) 310.

The above passage raises an important question when studied carefully. How, if at all, is it possible for a social fact to be grounded in, and stem from, individuals, yet at the same time form a new, '*sui generis*' entity?<sup>24</sup> Moreover, how can such a social fact generate effects which the individuals from which it originates cannot?<sup>25</sup> These questions are hotly debated in social philosophy and the present study does not intend to provide a definite answer. Instead, it draws on one particular theory, that of *relational emergence*, and uses it in the context of joint commitments.

A thorough account of this theory is given by Dave Elder-Vass.<sup>26</sup> He explains how it centres around the idea that 'wholes' can have certain particular qualities, called 'emergent properties', that do not belong to the 'parts' of which they are built.<sup>27</sup> Parts as well as wholes constitute 'entities'.<sup>28</sup> Any entity is made up of parts brought together in a 'structured combination', as a result of which its nature exceeds that of an ordinary 'aggregation'.<sup>29</sup> Moreover, an entity has the 'quality of persistence', which means that it has the ability to exist for more than just a brief moment.<sup>30</sup> Given these characteristics, Elder-Vass describes an entity as 'a persistent whole formed from a set of parts that is structured by the relations between these parts'.<sup>31</sup> Basic examples of entities are molecules or cells, yet they can also be much more complex and difficult to apprehend.<sup>32</sup> Indeed, as this study will argue below, groups of people can be entities too. This already shows that 'wholes' and 'parts' are relative notions as the same entities can serve as wholes as well as parts depending on the setting and level of examination.<sup>33</sup> Cells, for example, are built of molecules, whereas molecules themselves are made up of atoms.

A 'property' is the capacity of an entity to bring about causal effects.<sup>34</sup> It is 'emergent', Elder-Vass explains, when it belongs to the whole and not to the parts of which this whole is built.<sup>35</sup> Only because the parts are related, or 'structured', in a certain way does the whole have this capacity.<sup>36</sup> The obvious example of an emergent property is water.<sup>37</sup> Hydrogen and oxygen form the parts of water. Yet, their individual properties do not suffice to bring

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24 R Keith Sawyer, *Social Emergence: Societies As Complex Systems* (CUP 2005) 103-105.

25 Sawyer (n 24) 103-105.

26 Elder-Vass, *The Causal Power of Social Structures: Emergence, Structure and Agency* (CUP 2010).

27 Elder-Vass (n 26) 16-17.

28 Elder-Vass (n 26) 16.

29 Elder-Vass (n 26) 16-17, 21.

30 Elder-Vass (n 26) 16-17, 23.

31 Elder-Vass (n 26) 17.

32 Elder-Vass (n 26) 16.

33 Elder-Vass (n 26) 17, 19.

34 Elder-Vass (n 26) 17, 40-63 (containing a detailed analysis of 'causal power' in this context).

35 Elder-Vass (n 26) 17.

36 Elder-Vass (n 26) 20-21.

37 Elder-Vass (n 26) 17.



about the specific qualities possessed by water. They will not allow you to wet your hair, irrigate land or extinguish a fire.<sup>38</sup>

It is important to stress the implications of the emergent property thesis. The fact that an entity has an emergent property, Elder-Vass reasons, does not mean that one cannot *explain* it by reference to its constitutive parts.<sup>39</sup> In relation to water, for example, one can describe the properties of oxygen and hydrogen atoms and show how they form water when they exist together in a certain combination. However, the fact that one can explain an entity in terms of its parts does not mean that one can do away with its original causal power. Hydrogen and oxygen atoms brought together in such a composition 'just is water'.<sup>40</sup> Elder-Vass explains it very clearly:

[I]f we explain a causal power in terms of (a) the parts of an entity *H*; plus (b) the relations between those parts that pertain only when they are organized into the form of an *H*; then because we have explained the power in terms of a combination – the parts and relations – that exists only when an *H* exists, we have not eliminated *H* from our explanation. The entities that are *H*'s parts would not have this causal power if they were not organized into an *H*, hence it is a causal power of *H* and not of the parts.<sup>41</sup>

If the properties of an entity can only be understood by reference to its constitutive parts and their relations, one implicitly makes this superior entity part of the examination.<sup>42</sup>

Now, Gilbert argues that joint commitments are emergent phenomena and shows that by discussing the everyday activity of 'walking together'.<sup>43</sup> Imagine that two persons, say Stefaan and Jorrit, are walking through the city of Leiden towards the law faculty. They are both aware of the fact that they are walking together and they also realise that each of them has this awareness. In other words: this is 'common knowledge between them'.<sup>44</sup> Stefaan, however, walks much quicker than Jorrit, up to the point that the latter can no longer keep pace with his colleague. At a certain moment Jorrit may therefore urge him: 'Take it easy Stefaan, I'm having difficulty keeping up!' Realising

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38 Or to put it in the words of Kevin Mihata (also referred to by Elder-Vass (n 26) at p 17): '[O]ne cannot quench thirst or put out a fire with oxygen and hydrogen'. See Kevin Mihata, 'The Persistence of "Emergence"' in Raymond A Eve, Sara Horsfall and Mary E Lee (eds), *Chaos, Complexity, and Sociology: Myths, Models, and Theories* (SAGE Publications 1997) 31.

39 Elder-Vass (n 26) 23-26, 53-58 .

40 Elder-Vass (n 26) 57.

41 Elder-Vass (n 26) 24.

42 Elder-Vass (n 26) 24, 26, 57 (calling this 'the redescription principle').

43 See Gilbert, *Political Obligation* (n 6) 101-116. The present discussion of walking together is based on that of Gilbert.

44 Gilbert, *Political Obligation* (n 6) 103, 121 (containing detailed analysis of 'common knowledge').

that Jorrit is in a position to criticise him for going too quick, Stefaan slows down, stands still for a moment, and then starts walking next to him.

In another scenario Stefaan and Jorrit are walking together just fine until all of a sudden Stefaan decides that he no longer wants to go to the law faculty and, without giving any further explanation, turns round and starts walking in a different direction. Surprised that Stefaan has unexpectedly withdrawn from their walk Jorrit may object: 'What are you doing? We're going to the law faculty!' Things could be very different if prior to discontinuing their walk Stefaan says to Jorrit: 'I'm terribly sorry, but I just realised that I have to pick up my sons from school in 15 minutes'. One can picture Jorrit replying: 'What are you waiting for, hurry up!'

These simple examples of walking together show, according to Gilbert, how being engaged in a 'joint activity' gives rise to several special phenomena.<sup>45</sup> First, those engaged in a joint activity are entitled, or rather have the 'standing', to require that one acts in ways conducive to the joint activity and to issue 'rebukes' if such acts remain undone.<sup>46</sup> If Stefaan draws ahead of Jorrit during their walk, the latter can therefore require the former to adjust his pace and criticise him for not doing so. Second, the fact that he has this standing also shows that the parties to a joint activity have 'rights' and 'correlative obligations' towards each other.<sup>47</sup> Thus, Stefaan is under an obligation to lower his pace when he draws ahead of Jorrit so as to return to walking next to him. Third, those performing a joint activity cannot 'unilaterally' set or change the terms of the activity or stop taking part in it.<sup>48</sup> If Stefaan out of the blue stops walking towards the law faculty, instead going somewhere else, Jorrit may therefore rightly feel taken aback and consider he is acting 'out of line'.<sup>49</sup> On the other hand, if Jorrit concurs with Stefaan about his departure he will probably not have this feeling as it has received their joint approval.

What 'grounds' these standings, rights and obligations associated with joint activities?<sup>50</sup> An agreement? That is possible, even sufficient, but not indispensable according to Gilbert.<sup>51</sup> Indeed, Stefaan and Jorrit may have started walking together without having agreed on this. Perhaps Stefaan bumped into Jorrit on the street, telling him that he was going to the law faculty. Jorrit says: 'What a great initiative to go there! Give me a second to tie my shoes'. 'No problem',

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45 Gilbert, *Political Obligation* (n 6) 103-105.

46 Gilbert, *Political Obligation* (n 6) 104.

47 Gilbert, *Political Obligation* (n 6) 105-106 (calling this 'the obligation criterion').

48 Gilbert, *Political Obligation* (n 6) 106-115 (calling this 'the concurrence criterion').

49 Gilbert, *Political Obligation* (n 6) 107.

50 Gilbert, *Political Obligation* (n 6) 44 (talking about the 'grounding criterion' of political obligation)

51 Gilbert, *Political Obligation* (n 6) 116-121. The following illustration is again based on that of Gilbert.

Stefaan responds. The shoes tied, Stefaan and Jorrit subsequently proceed to the law faculty. What is essential, therefore, is not so much the presence of an agreement, but ‘mutual expressions of readiness to engage in a joint activity’ which, moreover, are ‘common knowledge’ to each of the participants.<sup>52</sup>

Through such expressions of readiness, Gilbert argues, the participants create a ‘joint commitment of the will’.<sup>53</sup> This means, generally speaking, that ‘the parties jointly commit to do X as a body’.<sup>54</sup> A joint commitment is therefore an emergent phenomenon as a result of which, as explained above,<sup>55</sup> it cannot be equated with the distinct aims and intentions of the individual parties.<sup>56</sup> It belongs to them as a ‘single body’, or ‘plural subject’.<sup>57</sup> It is due to these joint commitments that the parties have rights and obligations connected to the implementation of the activity.

### 2.3 Commitment and political obligation

Participating in a joint commitment may give rise to obligations, but what does having an obligation actually mean? Answering that question requires consideration of the notions of *reason* and *normativity*. Acting intentionally, Joseph Raz explains, means that one is acting ‘for a reason’.<sup>58</sup> Reasons, in turn, are ‘facts in virtue of which those actions are good in some respect and to some degree’.<sup>59</sup> This makes them ‘inherently normative’ to the extent that one is acting rationally when one has the capacity to grasp the existence and importance of reasons and act as they require.<sup>60</sup>

An obligation, Gilbert argues, gives one ‘sufficient reason to act’.<sup>61</sup> This means that, not taking into account any other relevant considerations, rational-

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52 Gilbert, *Political Obligation* (n 6) 121.

53 Gilbert, *Political Obligation* (n 6) 122-147. Besides Gilbert several other scholars have introduced theories about joint commitment and collective intentionality. See eg John R Searle, *Making the Social World: The Structure of Human Civilization* (OUP 2010); Raimo Tuomela, *Social Ontology, Collective Intentionality and Group Agents* (OUP 2013); Michael E Bratman, ‘Shared intention’ (1993) 104 *Ethics* 97.

54 Gilbert, *Political Obligation* (n 6) 136-137.

55 See also Elder-Vass (n 26) 123 (fn 8).

56 Gilbert, *Political Obligation* (n 6) 136-138, 157.

57 Gilbert, *Political Obligation* (n 6) 137, 144-146. Gilbert here also explains that the use of the first person plural pronoun is often indicative of the existence of such subjects. In other words, if someone speaks in terms of ‘we agree...’, ‘we intend...’, or ‘we value...’ chances are that a joint commitment is present.

58 Joseph Raz, *Engaging Reason: On the Theory of Value and Action* (OUP 1999) 22-23.

59 Raz, *Engaging Reason* (n 58) 23.

60 Raz, *Engaging Reason* (n 58) 68.

61 Gilbert, *Political Obligation* (n 6) 27-30. Gilbert prefers to speak of ‘having reason to act’ instead of ‘having a reason to act’ as she considers the latter formulation to focus too much on the nature of the act that needs to be performed, whereas a decision or obligation to perform the act may in itself give one (sufficient) reason to carry it out.

ity demands that one acts in the way prescribed by one's obligation. In principle, therefore, it takes precedence over one's 'personal inclinations' or 'self-interest'.<sup>62</sup> One may be obligated to act in a certain way even though it conflicts with one's well-being or prosperity. Having an obligation, however, does not necessarily constitute an 'absolutely conclusive reason' to act.<sup>63</sup> In other words, the situation may be such that rationality demands one not to act in line with one's obligation even though it gives one sufficient reason to act. Those who are jointly committed to commit a terrorist attack, for example, have sufficient reason to carry out this attack, yet moral considerations make it rational not to act on it.<sup>64</sup>

Not every sufficient reason, however, constitutes an obligation. What, then, defines an obligation? Following HLA Hart,<sup>65</sup> Gilbert emphasises that one of its characteristics is that it only exists between particular persons. More specifically, one 'owes' an obligation to certain persons who have a 'correlative right'.<sup>66</sup> This provides the key to understanding why and how joint commitments give rise to obligations. Once a joint commitment is formed one can say that the parties together, as a plural subject, 'own' the acts in line with the joint commitment of each party individually, whereas each 'owes' the collective these acts until they are displayed.<sup>67</sup> Such 'obligations of joint commitment' give each sufficient reason to carry out the required act, in principle 'trumping' their own inclinations or self-interest.<sup>68</sup> They also ground the standing of each party, as a member of the plural subject, to require compliance of others and rebuke them if they fail to deliver.<sup>69</sup>

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62 Gilbert, *Political Obligation* (n 6) 32-33. See also Simmons, *Moral Principles and Political Obligations* (n 7) 7; Horton (n 6) 12.

63 Gilbert, *Political Obligation* (n 6) 31-32. Joseph Raz defines an 'absolute' reason such that one has an absolute reason to perform a certain act when there is no 'fact which would override it'. See Joseph Raz, *Practical Reason and Norms* (Hutchinson of London 1975) 27-28.

64 To put it in the words of Simmons, *Moral Principles and Political Obligations* (n 7) 7: '[T]o say that an obligation (or duty) is a requirement is not to say, as it might at first seem, that the existence of an obligation establishes an absolute moral claim on our action, or that obligations override all other sorts of moral considerations'. Gilbert, *Political Obligation* (n 6) 159-161 is even more specific by arguing that, contrary to obligations resulting from a joint commitment, 'moral requirements' are 'context sensitive'. This means that a moral requirement may 'disappear' if the circumstances change since a different moral requirement with another substance may take precedence. As a result, moral requirements cannot 'directly conflict'. Gilbert's conception of political obligations as not being moral in nature has been criticized. See eg Horton (n 6) 155-156.

65 See HLA Hart, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Review* 175, 179 (fn 7). It should be noted, however, that Hart identifies two other characteristics of obligations – that they 'may be incurred voluntarily' and 'that they do not arise out of the character of the actions that are obligatory but out of the relationship of the parties' – which are left out of the equation here.

66 Gilbert, *Political Obligation* (n 6) 39-40.

67 Gilbert, *Political Obligation* (n 6) 154-155.

68 Gilbert, *Political Obligation* (n 6) 156-158.

69 Gilbert, *Political Obligation* (n 6) 161.

The concept of joint commitment not only sheds light on everyday activities like walking together, Gilbert argues, but also on much more complex phenomena involving large groups of people characterised by considerable ‘anonymity’ and ‘impersonality’, including political obligation.<sup>70</sup> Those belonging to a ‘political society’ are under an obligation to uphold its institutions if, and to the extent that, they are jointly committed to do so.<sup>71</sup> More specifically, they owe each other observance of the commitment and enjoy corresponding rights. Such a commitment may stem from an agreement, but in large political societies it is unlikely that most members will have concluded or joined one. What suffices, however, is the existence of ‘population common knowledge’, which means that (most of) those making up a population have indicated to the others their willingness to engage in a joint commitment comprising (most of) the population.<sup>72</sup>

It is important to emphasise what such political obligation specifically amounts to. It is possible to be politically obligated to obey,<sup>73</sup> say, a law setting the minimum age for the consumption of alcohol without participating in a joint commitment to uphold that particular law. One only needs to be jointly committed to support a state’s political or constitutional system.<sup>74</sup> The obligation to abide by the laws or other demands produced by the system derives from this more fundamental or ‘basic’ joint commitment.<sup>75</sup> One could say the latter forms the social contract that turns people, to use Rousseau’s words, from a simple ‘aggregation’ into an ‘association’.<sup>76</sup>

Gilbert considers it very conceivable that states form political societies held together by a joint commitment between their subjects to uphold their institutions, although she points out that when exactly such ‘large-scale plural subjects’ are present is an empirical issue.<sup>77</sup> Others, drawing on her work,

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70 Gilbert, *Political Obligation* (n 6) 173ff. Some disagree with the view that large groups of people can constitute plural subjects held together by a joint commitment, or consider it highly unlikely that such conditions can be met in practice. See eg A John Simmons, ‘Associative Obligations’ (1996) 106 *Ethics* 247, 258-259; Horton (n 6) 155; Abner S Greene, *Against Obligation: The Multiple Sources of Authority in a Liberal Democracy* (HUP 2012) 88-90.

71 Gilbert, *Political Obligation* (n 6) 185-214, 238-260.

72 Gilbert, *Political Obligation* (n 6) 174-179 (containing an analysis of ‘population common knowledge’).

73 On the difference between ‘being obliged’ and ‘being obligated’ and the fact that only the latter indicates the existence of an obligation proper see HLA Hart, *The Concept of Law* (3<sup>rd</sup> edn, OUP 2012) 82ff. See also Gilbert, *Political Obligation* (n 6) 30-31.

74 Gilbert, *Political Obligation* (n 6) 140-141, 212-214.

75 Gilbert, *Political Obligation* (n 6) 141.

76 Gilbert, *Political Obligation* (n 6) 15. On Rousseau and his vision of the social contract as an ‘act of association’ see text to n 147 (ch 1).

77 Gilbert, *Political Obligation* (n 6) 180, 242-245, 293-294. Indicative of such plural subjects, Gilbert argues, is the use of the pronoun ‘we’ in relation to internal affairs and international relations and related sentences such as ‘our government’, ‘our constitution’ etc. See also n 57 (ch 2).

leave out this disclaimer and simply argue that states can be seen as social groups with intentions that may differ from those of the people of which they are composed.<sup>78</sup> The present study adopts the presumption that the member states of the Union are indeed political societies held together by joint commitments,<sup>79</sup> leaving the empirical verification of this claim to others. Its purpose is to construe a *plausible* account of solidarity between these states. It neither pretends that it is the only account possible, nor that it is immune from refutation. Yet, it does claim such an account is helpful to understand the transformation of the currency union's setup during the crisis and its implications for Union law.

Crucially, the moment one regards states as political societies based on joint commitments it becomes clear that political obligations may not only exist *within*, but also *between* them. Gilbert puts it as follows:

'Once authorities have been designated in several associations, it is possible that the authorities from the different associations make an agreement or treaty on behalf of their associations. In so agreeing they may be said to create a further social group – one of a special kind. This is a group whose constituents are groups. According to my interpretation of agreements, the constitutive groups have together jointly committed themselves to endorse as a body the decision expressed in the agreement.'<sup>80</sup>

In other words, states may be jointly committed to uphold as a body certain goals and, consequently, be subject to political obligations. Take the Treaty on the European Stability Mechanism, which will be discussed in detail in chapter 5.<sup>81</sup> When the states of the currency union signed this Treaty on 2 February 2012 and subsequently ratified it, they formed or rather confirmed the existence of a special plural subject, one consisting of the states in the euro area. In so doing, they jointly committed themselves to uphold the ESM Treaty. In virtue of this joint commitment, then, each state is not only *legally* but also

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78 See eg Alexander Wendt, 'The State as Person in International Theory' (2004) 30 *Review of International Studies* 289; John M Parrish, 'Collective Responsibility and the State', (2009) 1 *International Theory* 119, 133-134 (in particular fn 35).

79 By taking the view that states can be seen as plural subjects this research does not follow the view of those who deny the reality of such collectives. Such a view shines through, for example, in the work of Karl Popper according to whom 'the "behaviour" and the "actions" of collectives, such as states or social groups, must be reduced to the behaviour and to the actions of human individuals'. See Karl R Popper, *The Open Society and Its Enemies – Volume II The High Tide of Prophecy: Hegel, Marx and the Aftermath* (Princeton University Press 1971) 91. See on this point also Geoffrey M Hodgson, 'Meanings of methodological individualism' (2007) 14 *Journal of Economic Methodology* 211, 215-216. See also text to n 122 (prologue).

80 Margaret Gilbert, *Joint Commitment: How We Make the Social World* (OUP 2014) 352.

81 See text to n 308 (ch 5).

*politically* bound to respect the Treaty and enjoys a corresponding right to demand this of others as well.

Finally, a word of caution. In arguing that states can be seen as associations of people held together by joint commitments this research does not pronounce itself on their legal character, nor on that of the people. In the realm of law these notions have a meaning of their own, which may differ from the one given here.<sup>82</sup> Nonetheless, and as this chapter will show in greater detail below,<sup>83</sup> the argument has great relevance for the law, not least as it shows that states are capable of incurring a political obligation to respect it.

### 3 THE SOLIDARY COHESION BETWEEN THE MEMBER STATES

#### 3.1 Time, commitment and solidarity

Having explained the character and nature of political obligation between states, this study now turns to the solidary cohesion that exists between them. The previous chapter described how the concept of social solidarity has evolved over time, starting with Aristotle's account of friendship and ending with Parson's normative solidarity. According to Parsons, solidarity only comes into play in situations where one is normatively obliged to act for the sake of the integrity of the collective, the common good.<sup>84</sup> Faced with the choice of acting in line with either one's own or collective orientation, one shows solidarity, and thereby takes responsibility, to the extent that one acts in line with what the integrity of the collective requires. This normative dimension undeniably forms an important component of solidarity, yet does not capture solidarity in its entirety.

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82 For an account of the diversity of meanings attributed to the notion of 'people' and a discussion of its legal significance see WT Eijsbouts, 'Wir Sind Das Volk: Notes About the Notion of 'The People' as Occasioned by the *Lissabon-Urteil*' (2010) 6 *EuConst* 199, 207ff. The fact that the legal notion of the people has a meaning of its own does not mean it cannot coincide with the plural subject one presented above. Margaret Gilbert herself states in this regard: 'That does not mean that the plural subject notion has no relevance to the situation of most of those who are citizens, legally speaking, of a given nation-state. Given that the concept of joint commitment is a fundamental element in the thought of human beings ... a large multitude *approximating* the citizenship of a nation-state may come to constitute a genuine plural subject'. See Margaret Gilbert, 'A Theory of Political Obligation: Responses to Jeske, Horton, Stoutland and Narveson (Review Symposium)' (2013) 4 *Jurisprudence* 301, 306.

83 See text to n 126 (ch 2).

84 See text to n 239 (ch 1).

To understand why it does not, one has to take into account the importance of 'time'.<sup>85</sup> Marx once famously stated that 'men make their own history, but they do not make it just as they please in circumstances chosen by themselves; rather they make it in present circumstances, given and inherited'.<sup>86</sup> He thereby made two things clear. First, the social environment is 'prior' to the individual.<sup>87</sup> Individuals do not 'create' their social environment, it 'pre-exists' them.<sup>88</sup> One is not born in a social vacuum. On the contrary, we enter a world that is already there and influences our being to a great extent.<sup>89</sup> Nevertheless, and this leads to the second point, individuals do possess the capacity to *influence* their social environment, to 'make their own history' as it were.<sup>90</sup> Through their actions they can 'reproduce' or 'transform' their environment.<sup>91</sup>

Marx's statement relates to the social environment in its entirety, yet it is equally significant for specific parts of it, such as joint commitments. A sole focus on the normative dimension to solidarity, in the form of acts in line with such commitments, would leave out the significance of their participants. Solidary behaviour, whether displayed by individuals or larger groups of them such as states, would amount to little more than that of a puppet acting in accordance with the normative strings of the collective.<sup>92</sup> Yet, whereas joint commitments 'contribute' to the actions of their participants, they do not 'determine' them.<sup>93</sup> In other words, it is possible that a state acts on its political obligations flowing from joint commitments, thereby upholding this part of social structure, but one cannot take it for granted. A state may take the initiative to change the substance of a commitment or to 'terminate' it altogether, even though the actual realisation of such a change or termination

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85 Margaret S Archer, *Realist Social Theory: The Morphogenetic Approach* (CUP1995) 154-161 (emphasis added). See also Roy Bhaskar, *The Possibility of Naturalism: A Philosophical Critique of the Contemporary Human Sciences* (Routledge 2000) 37.

86 Karl Marx, 'The Eighteenth Brumaire of Louis Bonaparte (Terrell Carver tr)' in Mark Cowling and James Martin (eds), *Marx's Eighteenth Brumaire: (Post)modern interpretations* (Pluto Press 2002) 19. See also Elder-Vass (n 26) 3.

87 Bhaskar (n 85) 33-34. See also Archer (n 85) 137-140.

88 Bhaskar (n 85) 33-34. To put it in Bhaskar's own words (at p 36): '[P]eople do not create society. For it always pre-exists them and is a necessary condition for their activity. Rather, society must be regarded as an ensemble of structures, practices and conventions which individuals reproduce or transform, but which would not exist unless they did so'.

89 Bhaskar (n 85) 33; Archer (n 85) 139.

90 Elder-Vass (n 26) 3.

91 Bhaskar (n 85) 33-34. See also Archer (n 85) 140.

92 Parsons has indeed been criticised for portraying actors as 'cultural dopes', following norms in a servile way. See eg Jeffrey C Alexander, 'The Centrality of the Classics' in Anthony Giddens and Jonathan H Turner, *Social Theory Today* (Polity Press 1987) 42.

93 Elder-Vass (n 26) 123-126, 134-138. See more generally on 'structure' and 'agency' Bhaskar (n 85) 35-36. Archer (n 85) 153-154 argues in this regard that 'the structural conditioning of action (by constraints or enablements) is *never* a matter of "hydraulic pressures"'. 'The conditional effects of structure upon action', she continues, should rather be conceptualized 'in terms of supplying reasons for different courses of action to those who are differently positioned'.



is subject to the approval of the other parties.<sup>94</sup> It can also decide to disregard a commitment and thereby disobey the obligation to which it is subject.<sup>95</sup>

Reversely, states may also support cohesion for reasons other than those relating to political obligation. What is more, they may do so because it serves their own interest. Parsons admits himself that actors can act in the interest of the collective without experiencing the normative constraints imposed on them. Given that in such cases the actor does not face the dilemma between self and collective orientation due to the fact that his own interest corresponds to that of the collective, the solidary obligations would be 'latent'.<sup>96</sup> Yet, this does not take away the fact that in such cases the actor still supports cohesion. In fact, and as chapter 5 will show, solidary behaviour may very well be inspired by a blend of normative and self-interested considerations. The dilemma of choosing between one's own or collective orientation, and thus of whether or not to show solidarity and take responsibility, may indeed occur but certainly not in each and every situation.

A thorough account of solidarity, therefore, needs to take into account the normative structure within which states operate, as well as a state's own capacity to decide on and shape its actions. Solidary behaviour may result from both.

### 3.2 The strands of solidarity

A thorough account of solidarity needs to recognise that solidary behaviour can be inspired by motives or reasons other than those relating to joint commitments in which states participate. More specifically, it needs to recognise that cohesive action can also be motivated by reasons of self-interest. This can be realized through a model consisting of two spectrums.<sup>97</sup> The cardinal spectrum deals with the different reasons for solidary action. In the realization that solidary behaviour may not only have normative roots, the two poles of the first spectrum are taken up by *normative* and *factual* solidarity. The second spectrum is subsidiary in nature and deals with the kind of solidary behaviour displayed by states. Here, the two poles constitute *negative* and *positive* solidarity. Each of the two spectrums will be discussed in turn.

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94 Gilbert, *Political Obligation* (n 6) 135, 138-144 (stressing the impossibility to 'unilaterally' make or 'terminate' a joint commitment). See also text to n 48 (ch 2).

95 Gilbert, *Political Obligation* (n 6) 143 (explaining that such disobedience in principle 'will not cancel the commitment').

96 Talcott Parsons, *The Social System* (Routledge 1991) 99.

97 The account of solidarity discussed here was already presented in rudimentary form in Vestert Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 *EuConst* 7. The present account, however, is modified at several points compared to the previous one.

As far as the first spectrum is concerned, at one end lies *normative* solidarity. This kind of solidarity stems from the social structure in which states operate,<sup>98</sup> more specifically their joint commitments. As explained above,<sup>99</sup> states taking part in a joint commitment are subject to a political obligation to act in a way conducive to the commitment's goal or, one could say, the *common good*. Given that all of them have these obligations, and are therefore *reciprocally* bound, each has a right to compliance by others as well. The commitment thereby gives them the standing to demand such actions of each other and issue rebukes if these remain undone.

When a state acts in line with the political obligations that exist in the group, it takes, to borrow Parson's words,<sup>100</sup> responsibility for the group. Solidarity and responsibility are therefore not each other's opposites, as one may think when reading Chancellor Merkel's statement at the beginning of this study.<sup>101</sup> There, she argues that financially distressed member states have to take responsibility for themselves (*Eigenverantwortung*) by implementing austerity measures and reforms, which should be met by other states with solidarity in the form of assistance. Both groups of states, however, take responsibility for the collective to the extent they are acting on their political obligations. Each therefore shows solidarity, be it of a different kind. Distressed states show solidarity by reforming their economies and budgets, whereas the others display it by granting assistance. That in doing so they all take responsibility for the group has also been recognised by Merkel herself as she has stated on several occasions that all members of the currency union have a shared responsibility (*gemeinsame Verantwortung*) for the euro.<sup>102</sup> In fact, as chapter 5 will show, all national political leaders recognised this shared responsibility at an early stage of the crisis.<sup>103</sup>

Obviously, normative solidarity is not limited to *European* states. Indeed, any group of states may enter into joint commitments amongst themselves. This also follows from Parsons' statement, cited at the beginning of this chapter,<sup>104</sup> about solidary associations between states. Characteristic of such associations, he argues, is that they constitute 'communities of interest' which are

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98 See in this respect also Jürgen Habermas, *The Lure of Technocracy* (Polity Press 2015) 23: 'What differentiates...appeals to solidarity from law and morality is the peculiar reference to a "joint involvement" in a network of social relations. That involvement grounds both another person's demanding expectations, which may even go beyond what law and morality command, and one's own confidence that the other will behave reciprocally in the future if need be' (footnote omitted).

99 See text to n 70 (ch 2).

100 See text to n 243 (ch 1).

101 See text to n 1 (prologue).

102 See eg Regierungserklärung von Kanzlerin Merkel zum Europäischen Rat und zum Eurogipfel, Berlin, 26 October 2011; Pressekonferenz von Bundeskanzlerin Merkel zum ausserordentlichen Treffen der Staats- und Regierungschefs der Eurozone, Brussels, 7 July 2015.

103 See text to n 51 (ch 5).

104 See text to n 3 (ch 2).

embedded in some degree of 'normative order' capable of cohesion beyond the use of 'sheer power'.<sup>105</sup> Parsons observed such associations among all kinds of states, not necessarily European ones.<sup>106</sup> Yet, the joint commitments that exist between the member states of the Union are of such scope and depth that the influence they exercise on them is much more significant than that of most other commitments between states.

As explained above, however, states are not completely controlled by their joint commitments. Although these condition their acts, they do not determine them given that states have the capacity to reflect on an obligation, weigh it against other norms and interests, and decide on how to act. In recognition of this capacity, the other end of the spectrum is formed by *factual* solidarity. It reflects the fact that behaviour in support of the collective may not only result from the normative structure within which member states operate, but also from a desire to safeguard own interests.

The account of solidarity given here, therefore, is less dismissive of self-interest than Durkheim's. As the previous chapter showed,<sup>107</sup> Durkheim considered self-interest to be a fragile, unworkable basis for solidarity due to its inability to unite actors on a durable basis. The present account takes a different stance, one that is closer to Aristotle's reading of political friendship. It should be recalled that Aristotle argued that political friendship is based, at least initially, on advantage. A special kind of advantage, however, that is common in nature and of which all citizens benefit by participating in the *polis*.<sup>108</sup> By incorporating factual solidarity, the present account similarly argues that a member state's support of cohesion can also result from a desire to serve its self-interest.<sup>109</sup> A variety of situations may occur in which a state's self-interest is bound up with that of the collective. This variety is of such magnitude that it cannot be fully grasped by theoretical models on an *a priori* basis. Two situations, however, should be singled out as they are particularly telling of this kind of solidarity between states: *interdependence* and *common destiny*.

The idea that interdependence between states, especially in the context of the European Union, can lead to solidary behaviour is not new. On the

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105 Parsons, *Politics and Social Structure* (n 3) 301-302.

106 Parsons, *Politics and Social Structure* (n 3) 301 (mentioning NATO, which of course includes, but is not limited to, European states).

107 See text to n 218 (ch 1).

108 See text to n 95 (ch 1).

109 Habermas (n 98) 23 argues in this regard: '[A]ppeals to solidarity refer to an interest in the integrity of a shared form of life that includes one's own well-being' (emphasis added, footnote omitted). Bayertz (n 4) 18 also reasons that 'in many solidary performances there are overtones of an expectation of potential mutuality and the hope of simultaneously serving one's own interests'. See also Esin Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance' (2016) 23 MJ 965, 967.

contrary, it can be traced back to one of Europe's founding fathers, Robert Schuman. When he announced his plan to pool the production of coal and steel of France and Germany through the creation of the European Coal and Steel Community on 9 May 1950, he famously declared:

'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity.' (*L'Europe ne se fera pas d'un coup, ni dans une construction d'ensemble: elle se fera par des réalisations concrètes créant d'abord une solidarité de fait*).<sup>110</sup>

This statement of Schuman indicates that factual solidarity, based on the actual interdependence of member states, forms an important basis for cohesion.<sup>111</sup> Indeed, pooling the production of coal and steel made a Franco-German war much more difficult, even though Schuman himself realised such interdependence would eventually not suffice to sustain cohesion.<sup>112</sup>

The importance of actual interdependence for bringing about cohesion has not stayed confined to the Schuman Declaration, but has come to feature prominently in several theories of European integration which have clarified its meaning and content. One such theory is the *liberal intergovernmentalism* of Andrew Moravcsik.<sup>113</sup> He identifies economic interdependence as one of the main drivers for policy coordination among member states.<sup>114</sup> When the attainment of a member state's policy aims is conditional on the actions of other states, 'policy externalities' may develop, which means that the policies of one member state lead to 'costs and benefits' for actors situated outside its own borders.<sup>115</sup> Especially in situations where such externalities are 'negative' and the policies of one member state have a disadvantageous impact on the realisation of policy aims of one or more other states, coordination becomes urgent.<sup>116</sup>

In the case of common destiny, solidary behaviour results from the fact that a state's 'survival' or 'welfare' is tied up with that of the collective.<sup>117</sup>

110 Schuman Declaration, Paris, 9 May 1950.

111 See also WT Eijsbouts and D Nederlof, 'Rethinking Solidarity in the EU, From Fact to Social Contract' (2011) 7 *EuConst* 169, 170.

112 Eijsbouts and Nederlof (n 111) 170.

113 Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 *JCMS* 473.

114 Moravcsik (n 113) 485-486.

115 Moravcsik (n 113) 485. See also Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 *Oxf J Leg Stud* 213, 223-232 who defends a model of solidarity between member states focusing on 'the fair return' they 'owe one another' based on 'the level at which each state would insure against the potential losses' resulting from European integration 'had they known the distribution of risks but not their place in that distribution' (see text at 229-230).

116 Moravcsik (n 113) 485.

117 Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 349. Note that Wendt himself employs the notion of 'common fate'. This study prefers common *destiny*.

Common destiny and interdependence are often treated as one and the same, yet there is a notable difference between the two. Interdependence presupposes a situation of 'interaction' in which the actions of states have a bearing on each other's results.<sup>118</sup> No such interaction, however, is required in the case of common destiny. A common destiny arises as a result of a 'third party' by which certain states perceive of themselves as a collective.<sup>119</sup> Such a third party can be another state, as in the situation of Nazi-Germany whose military aggression made other states on the European continent share a common destiny during the second World War.<sup>120</sup> Yet, it can also be a more abstract entity, like an environmental disaster or financial markets.<sup>121</sup> In fact, as chapter 5 will show, the factual solidarity that developed during the debt crisis among the member states of the currency union to a great extent resulted from financial market turbulence which made them share in a common destiny.<sup>122</sup>

Two remarks should be made about the account of normative and factual solidarity that is presented here. First of all, it does not pretend to give a complete explanation of the ways in which structure and member states interact. Its mission is more modest, focusing on a particular part of this structure, that of joint commitments and the political obligations flowing from them, and showing how they *condition* the acts of member states. These commitments and obligations, however, do not *determine* their acts, given that member states possess the capacity to reflect on them and take into account other demands of the situation, including their own interests. Normative and factual solidarity together, then, provide different insights into why member states act in the interest of the collective: either because they are normatively obligated to do so or because their own interest is bound up with it.

Secondly, and following from the above, the account does not aspire to capture all the reasons that member states may have for acting in support of cohesion. By focusing on normative and factual solidarity it does, however, single out two especially important ones which, moreover, may very well inspire one and the same action. When a member state acts in support of cohesion its actions can be infused by a mix of normative and factual solidarity. It is in such cases that the importance and quality of factual solidarity becomes apparent. If a member state were always confronted with the Parsonian dilemma of choosing between its own interests or those of the collective,

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118 Wendt, *Social Theory of International Politics* (n 117) 349.

119 Wendt, *Social Theory of International Politics* (n 117) 349.

120 Wendt, *Social Theory of International Politics* (n 117) 349.

121 Wendt, *Social Theory of International Politics* (n 117) 349: 'Having a common fate can sometimes be good....but in international politics it is often bad, typically being constituted by an external threat to the group. The threat may be social, like that which Nazi Germany posed to other European states, or material, like the threat of ozone depletion or nuclear war'.

122 See text to n 10 and n 297 (ch 5).

showing solidarity would become unduly difficult, requiring a member state to choose on a continuous basis. Mostly, however, there is no such dilemma. Nonetheless, when a state's (perceived) self-interest does not provide a compelling reason for action in support of cohesion or, even more so, when it calls for action contrary to such cohesion, the strength of normative solidarity becomes apparent. Being confronted with the dilemma of individual or collective orientation, it is especially in such situations that a member state's political obligation makes it reflect on its normative position and decide whether or not to take responsibility for the collective. Or to speak in the words of Rousseau, it is in such situations in particular that a state is required to consult its reason before listening to its inclinations.<sup>123</sup>

The second spectrum is subsidiary in nature and subordinate to the first. Its added value lies in the fact that it specifies what *kind* of solidary actions member states display when they act in support of cohesion. The spectrum's ends are taken up by *negative* and *positive* solidarity respectively. Negative solidarity occurs when the acts displayed by a state in the interest of the collective mainly relate to itself. Such solidary acts are negative in nature as they are focused on a state's own condition, thereby aiming to support the interest of the collective. In the case of positive solidarity, on the contrary, a state's acts directly relate to other states. When a state displays such solidarity, its acts directly benefit one or more others for the sake of the collective. Contrary to normative and factual solidarity, which may inspire one and the same action, negative and positive solidarity are mutually exclusive. A solidary action is *either* negative *or* positive in nature. It is possible, however, that a member state carries out *several* solidary actions, negative and positive, in support of cohesion. A member state may, for example, display positive solidarity by granting financial assistance to another state, whilst at the same time showing negative solidarity by implementing austerity measures.<sup>124</sup> Moreover, the two kinds of solidarity represent ideal types. Not every act in support of cohesion lends itself for clear categorisation as either positive or negative. As subsequent chapters will show, however, the two types do clarify what kinds of acts states originally had to pursue in support of their currency union and what has changed in this regard since the crisis.<sup>125</sup>

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123 See text to n 158 (ch 1) (discussing Rousseau's statement that the 'general will' makes man 'consult his reason before listening to his inclinations').

124 For an analysis of the link between the two kinds of solidarity during the crisis see text to n 89ff (ch 5).

125 See especially chs 3 and 5.

## 4 COMMITMENT AND UNION LAW

A final issue that needs to be addressed is the relationship between joint commitment and Union law. Above, this chapter explained how the conclusion of a treaty forms one way of creating a joint commitment.<sup>126</sup> As a result, treaty conclusion has an intriguing, dual function. On the one hand, it gives rise to a legal regime regulating a certain topic or area between the contracting parties. But on the other hand, it also creates a joint commitment between these parties in virtue of which they have a political obligation to uphold, or one could say 'obey', the treaty. When the six founding member states concluded and ratified the ECSC Treaty in 1951-52 they not only created a legal regime regulating the pooling of coal and steel, they also jointly committed themselves to uphold it. Likewise, by concluding and ratifying the Treaty of Maastricht in 1992-93 member states did not simply establish a legal system for their currency union that institutionalises a stability paradigm. They also incurred a political obligation to uphold this system.<sup>127</sup> The Union Treaties, then, are much more than simply a set of laws. They form the object of a fundamental joint commitment, a 'Founding Contract', between the member states.

This coincidence between treaty conclusion and the formation of joint commitments may lead one to think that for member states of the Union, being subject to political obligation is reducible to a duty to obey the law. This, in turn, may cause one to conclude that the issue of political obligation is not a very pressing one for these states, as it coincides with the legal obligations that Union law places on them. Such a conclusion, however, is misplaced for two reasons in particular.<sup>128</sup> The first has to do with the *object* of their joint commitment. The obligation to uphold the Treaties entails more than a duty to respect the individual rules set out in them. As Article 1 TEU makes clear, through the Treaties the member states *establish* the Union. Rules of primary and secondary Union law play an essential role in regulating this Union, but they should not be equated with it. In other words, states are not only committed to Union law, they are committed to the Union itself, including its currency union. They are therefore under a political obligation to uphold the Union, not just the laws governing it.<sup>129</sup>

The fact that the object of the Founding Contract covers more than just the law is instrumental for an adequate understanding of why the member states preserved their unity during the crisis and how this put strain on the

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126 See text to n 80 (ch 2).

127 For a detailed discussion on the character and nature of this stability union see ch 3.

128 See also Horton (n 6) 14 (stressing the fact that political obligation encompasses more than just an obligation to obey the law). See on this point also n 6 (ch 2).

129 This conceptual distinction between the law and its object is diminished by Union law itself, not only by Art 1 which states that the member states establish the Union but also for example by Art 3 TEU which sets out the tasks of the Union, among which is the establishment of an 'economic and monetary union whose currency is the euro'.

single currency's legal set-up. As this study will show later on, since states are committed to the Union they are under a political obligation to protect it, even if that means implementing actions that push, or even exceed, the boundaries of what law permits.<sup>130</sup> Such actions carry great normative weight, but not necessarily with a legal origin, at least at first sight, which creates huge difficulty for constitutional courts, national and European, that have to assess their permissibility.

The second reason concerns the *capacity* in which member states act and the *occasions* on which they can establish joint commitments. First the capacity in which they act. When ministers or national leaders meet in the Council or the European Council, states act in their *executive* capacity.<sup>131</sup> The same goes for other executive fora such as the Eurogroup or the Euro Summit. The Eurogroup is an informal body consisting of the ministers of finance of the states in the currency union.<sup>132</sup> Protocol 14 to the Union Treaties indicates that the Commission also takes part in its meetings and that the Bank is invited to participate.<sup>133</sup> The Euro Summit, which was created at the instigation of former French President Sarkozy during the financial crisis in 2008 and which has subsequently received legal recognition in the Treaty on Stability, Coordination and Governance, provides for a similar arrangement at the highest political level.<sup>134</sup> In principle,<sup>135</sup> the euro area heads of state or government take part in the summit, together with the president of the Com-

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130 See especially ch 5.

131 WT Eijsbouts and J-H Reestman, 'In Search of the Union Method' (2015) 11 EuConst 425, 429. See also Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 Yale L J 2403, 2430.

132 The Eurogroup was established by the European Council in December 1997. See European Council, Presidency Conclusions, Luxembourg, 12-13 December 1997, para 44. It met for the first time on 4 June 1998 in Luxembourg. For an extensive analysis of the Eurogroup's (informal) working practices see Uwe Puetter, *The Eurogroup: How a secretive circle of finance ministers shape European economic governance* (Manchester University Press 2006). For recent judicial confirmation of the Eurogroup's informal nature see Joined Cases C-105/15 P to C-109/15 P *Mallis and others* [2016] ECLI:EU:C:2016:702, paras 46-47, 49, 61.

133 Art 1 of Protocol No 14 on the Eurogroup.

134 Art 12 TSCG.

135 Art 12(3) TSCG makes clear that Contracting Parties that have ratified the TSCG but have not (yet) adopted the single currency shall participate in 'discussions of Euro Summit meetings concerning competitiveness....the modification of the global architecture of the euro area and the fundamental rules that will apply to them in the future' as well as issues concerning the implementation of the TSCG. Summits involving all Contracting Parties shall take place when appropriate and at least once a year. See Art 12(3) TSCG; Council of the European Union, Rules for the Organisation of the Proceedings of the Euro Summits, Brussels, 14 March 2013, Point 5(3) ('Rules for the Organisation of Euro Summits').



mission and the president of the summit itself. The president of the Bank is also invited to take part in the meeting.<sup>136</sup>

However, member states can also act in their *full* capacity, for example when they amend the Union Treaties. As Article 48 TEU indicates, regardless of whether use is made of the ordinary revision procedure laid down in its first to fifth paragraphs or the simplified procedure in the sixth, amendment requires ratification or approval by states in accordance with national constitutional requirements.<sup>137</sup> Consequently, it is not just the executives that are acting, but states as full entities. States equally act in their full capacity when they conclude and ratify a separate international treaty.

Due to the fact that *occasions* for the conclusion of joint commitments extend well beyond those of Treaty amendment, states may incur political obligations, in their executive capacity or in full, that are not accompanied by a change of Union law. Take the European Council. In principle, it takes its decisions by consensus.<sup>138</sup> When it issues conclusions or adopts statements on a future line of action, these will give rise to political obligations as political leaders have expressed their readiness to engage in a joint commitment. The Euro Summit too, may be a site of creation of such obligations given that any statement it wishes to make needs to be similarly based on consensus among its members.<sup>139</sup> In both cases, member states, acting in their executive capacity, can incur political obligations that are not reflected in, or even conflicting with, Union law. When states conclude and ratify an international treaty or otherwise establish a separate legal regime outside the Union Treaties, they can even be bound in full by such obligations as they express their readiness to engage in a joint commitment in their entirety.

It should now be clear why the political obligation that flows from the most fundamental joint commitment between the member states, their Founding Contract, is not reducible to a duty to obey the law. This obligation requires more than simply obeying the specific rules set out in the Treaties and it can be changed without a corresponding amendment of Union law. In fact, it is precisely moments other than treaty amendment that have been crucial for

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136 Art 12(1) TSCG. Art 12(5) TSCG makes clear that the president of the European Parliament may only be invited to be heard. Point 4(3) Rules for the Organisation of Euro Summits determines that the president of the Eurogroup may be invited to attend.

137 Art 48(4) TEU stipulates that in case of the ordinary revision procedure the envisaged amendments that have been determined by a conference of representatives of the governments of the member states only 'enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements'. Under the simplified revision procedure, laid down in Art 48(6) TEU, approval must be given in relation to the decision of the European Council amending all or part of the provisions of Part III of the TFEU.

138 Art 15(4) TEU.

139 Point 6(3) Rules for the Organisation of Euro Summits.

the solidarity that states displayed during the crisis, thereby creating great tension between their *legal* and *political* obligations.

## 5 CONCLUSION

A thorough account of the solidarity that exists between the member states in the Union is crucial for understanding why, and in what way, they maintained their unity during the crisis and how this has sparked a transformation of the euro. This chapter has therefore conceptualised this solidarity in three steps. First of all, it has shown that states can incur political obligations through their participation in joint commitments. By jointly committing themselves states form a plural subject, which means that they intend to perform certain acts or achieve certain goals as a body. Consequently, each state has an obligation to act in conformity with the commitment as it owes such behaviour to the others in their capacity as members of the plural subject. In the same vein, each state also has the right to demand conformity with the commitment of others and rebuke them if they fail to deliver.

Hereafter, the issue of solidarity between states was examined. Two spectrums served as guides disentangling its different strands. One relates to the reasons for acting in the interest of the collective, the other deals with the kind of solidary behaviour displayed. The poles of the first spectrum are taken up by *normative* and *factual* solidarity. Normative solidarity relates to the joint commitments of states. When a state displays normative solidarity it acts in line with the obligations that flow from such commitments. Factual solidarity occurs when a state supports the collective because its own interest is served by it. Normative and factual solidarity may very well coincide. In fact, the real strength and significance of normative solidarity only becomes apparent in the absence of factual solidarity, forcing a member state to decide between acting on its obligations, thereby taking responsibility for the collective, or serving its own interest. The poles of the second spectrum are *negative* and *positive* solidarity. Negative solidarity occurs when the acts displayed by a state in the interest of the whole relate to itself. Positive solidarity, on the other hand, occurs when a state acts in the interest of the collective by directly benefitting another state. Negative and positive solidarity are mutually exclusive, meaning that a solidary act is either negative or positive in nature. It is possible, however, for a member state to combine several solidary actions, negative and positive, when supporting the collective.

The last step of the conceptualisation concerned the relation between joint commitment and Union law. As the conclusion of a treaty or agreement forms a species of creating joint commitments, member states not only established a stability minded legal regime for their single currency when they signed and ratified the Treaty of Maastricht. They also incurred a political obligation to uphold it. It is not a given, however, that the creation of, or change in,

political obligations always coincides with a change in Union law. They may arise out of European Council meetings or fora that have received no formal recognition in Union law at all, like the Euro Summit. They may even be created through the establishment of new legal regimes, such as when member states conclude a separate international treaty. Although each of these occasions are very different in nature, they all share in their capacity to generate political obligations requiring member states to display solidarity, but not necessarily in a way that conforms to Union law. In fact, as chapters 5 to 7 will show, this is exactly what has happened during the crisis.

Let us now turn to the single currency's original legal framework and see what kind of currency union it is that the member states originally committed themselves to.

