Chapter 4

SOLIDARITY AND CONSTITUTIONAL LAW IN ITALY AND OTHER EUROPEAN COUNTRIES

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ABSTRACT: *The aim of the chapter is a comparative research about the presence, the origin and the meaning of the principle of solidarity within the Constitutional law of some European countries. In particular, the research intends to show if and to which extent the principle of solidarity could be considered as a self-standing principle or, conversely, if it should be read jointly with other constitutional principles. At the same time, the historical-constitutional peculiarities of each country will be analyzed in order to verify their eventual implication on the nature of the said principle. The chapter thus examines whether it could be possible to define a unique and shared constitutional notion of solidarity among the countries under scrutiny. Particular attention is dedicated to Italy – a country in which the principle of solidarity is expressly established by the Constitution – with the aim to verify in what terms it constitutes a founding element of legislation and constitutional jurisprudence.*

KEYWORDS: *Solidarity, constitution, rights.*

SUMMARY: 4.1. Premises. – 4.2. The evolution of solidarity in Italy in the twentieth century: from value to principle. – 4.3. Solidarity and the Constitutional Court. – 4.4. Solidarity in the current emergency: the evolution of a principle. – 4.5. The principle of solidarity among the European Constitutions. – 4.6. Solidarity in the Constitutions and in the Preambles. – 4.7. Implicit and "immanent" solidarity (with focus on rights connected to the welfare state). – 4.8. Solidarity and the political local authorities. – 4.9. Conclusions.

4.1. Premises

The health emergency has placed solidarity at the centre of the political and juridical debate in Italy and Europe. However, just before the beginning of

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this emergency, during a meeting with the Prime Minister of Ireland, the European Commission President proclaimed that "Our mutual solidarity is here to stay".

The crisis caused by Covid-19 has certainly accentuated the need to enhance internal solidarity both among citizens and between EU States but, actually, the issue has been given a very special emphasis for some time now. The Lisbon Treaty already gave a significant boost to the principle of solidarity as leitmotif of the rules of the TEU and the TFEU. However, beyond the declarations of intent, which just made the provisions of the Treaty general and programmatic objectives, few concrete measures have been taken by the EU in order to protect the principle of solidarity among States.

Conversely, solidarity has represented the tool to change many European policies during the pandemic, so as to induce the same EU bodies to decommission the constraint of 3% of debt to GDP, to include SURE funding, to approve the agreements on the Next Generation EU, to reformulate the European Stability Mechanism (ESM). These decisions were unimaginable up to the pre-emergency situation and, mostly, find their roots in reasons of solidarity.

If the attention of the European institutions to the theme of solidarity is relatively recent, the same cannot be said about the focus that the Italian Constitution has always given to this issue. [1]

One of the peculiarities of our Constitution is the inclusion of solidarity among the fundamental principles of the constitutional order, with the purpose to make it not only an essential parameter for the interpretation of every legal provision, but also a substantial tool for assessing and applying the content of other constitutional provisions.

The aim of the first part of this work is therefore to analyze the meaning and the scope of the principle of solidarity in the Italian legal system, how it has evolved over time thanks to the rulings of the Constitutional Court

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[1] The constitutionalist doctrine on solidarity is vast and deals with issues that are partly not homogeneous. Worth to be mentioned, among the many contributions, G. Lombardi, *Contributo allo studio dei doveri costituzionali* (Giuffrè 1967); E. Balboni 'Diritti sociali e doveri di solidarietà' (1987) *Il Mulino,* 709; F. Giuffré, *La solidarietà nell'ordinamento costituzionale* (Giuffré 2002); S. Galeotti, 'Il valore della solidarietà' (1996) *Diritto e società*, 1 ff; A. D'Atena, 'Costituzione e principio di sussidiarietà' (2001) *Quaderni costituzionali*, 13; F. Polacchini, 'Il principio di solidarietà', in L. Mezzetti (ed), *Diritti e doveri* (Giappichelli 2013) 227 ff; S. Rodotà, *Solidarietà. Un'utopia necessaria* (Laterza 2014); A. Morelli, 'Principi costituzionali relativi ai doveri inderogabili di solidarietà', in L. Ventura, A. Morelli (eds), *Principi costituzionali* (Giuffrè 2015) 305 ff.

and, in particular, the way the national legislator has implemented this principle.

4.2. The evolution of solidarity in Italy in the twentieth century: from value to principle

In order to understand the evolution of solidarity in Italy, the analysis must take its premises from art. 2 Const. This provision, as mentioned above, explicitly contains a reference to the principle of solidarity, in a way that Italian Constitution differs from all the other European post-war Constitutions exactly for this element.

The French Constitution refers to the concept of fraternity – also as a legacy of the 1789 Revolution – but it is more a moral obligation than a legal principle[2] and, above all, only in connection with the principle of solidarity can fraternity acquire effectiveness.[3]

In other constitutional contexts, such as the Spanish and the German ones, reference is made to the nature of the welfare state that characterizes these systems. The Italian Constitution of 1948 as well, may be said to be inspired by the principles of the welfare state. Nonetheless, unlike those countries, it includes solidarity as a constitutional legal value, in what seems a clear attempt to strengthen the welfare state principle and go beyond its same features.

It is not possible to speak about welfare state if there is no recognition of solidarity at its root and even before its existence.

It is difficult to identify the reasons for the particular attention paid to this principle within the Constituent Assembly. Surely, the debate on these issues was already present in the original values of Italy, from the debate rose in the Church with the encyclic *Rerum novarum* (1891) and then with the encyclic *Quadragesimo anno* (1931). We cannot forget that the basic social rights, such as education, care for the needy, and health were a prerogative of the Church and clergy. At the beginning it was on voluntary basis, spontaneous; then, during the Second World War, Papa Pio XII formally used for the first time the expression "social doctrine of the Church" based on solidarity among human beings.

Each State, by its nature, must have at its basis an essential minimum of solidarity that allows citizens to live in an associated form, but the Italian Constitution goes further. Art. 2 Const., which establishes the fundamental

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[2] M. Ozouf, 'Fraternité', in F. Furet, M. Ozouf (eds), *Dizionario critico della Rivoluzione francese* (Bompiani 1988) 657.

[3] In this direction, see Rodotà (fn 1) 6.

principles of the first twelve articles, refers to solidarity. A reminder that, once again, characterizes the Italian Constitution as it does not express a declaration of the nature of the State, but contains an acknowledgement of a principle that pre-exists the Constitution itself. A natural right of every man that, as such, cannot be disregarded, be reduced or otherwise be subject to constitutional review. It is, in other words, a "founding principle of our coexistence as a democratic State". [4]

Its initial position in the Constitution is not meaningless: together with the personalist principle and the principle of equality (art. 2 and art. 3 Const.), it characterizes the way in which the whole constitutional order must be understood and interpreted.

Furthermore, substantive equality, as enshrined in the Constitution, presupposes intervention both by the State, the community as a whole and by all the individuals belonging to that community to achieve this common objective. Solidarity thus becomes the mean by which substantial equality can be fulfilled. This is why solidarity, as a "constitutional principle", represents a legal duty that is not circumscribed to the internal sphere of the individual or to charitable behaviours. Solidarity becomes the goal of the community and society as a whole.

The above allows to understand the evolution that the value of solidarity has had over the centuries: from being an expression of will of the individual, also under Catholic and Christian values, to that of constituting a purpose of the State. Furthermore, this development led to the evolution of solidarity into a legal principle and, as such, into a fundamental legal constraint to the State by means of the corresponding rights and duties.

Certainly, the Italian republican history, until recently, has been paid more attention to the theme of the rights than to that of duties. A fact that must be read as a consequence of the strong restriction of rights during the fascist period, with backlashes also in the following period. The issue of duties, although not forgotten, has nevertheless been poorly studied by Italian constitutional doctrine. [5]

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[4] So called by Galeotti (fn 1) 6.

[5] In this direction, see A. Apostoli, 'Il consolidamento della democrazia attraverso la promozione della solidarietà sociale all'interno della comunità' (2016) *Costituzionalismo.it,* 1; B. Pezzini, 'Dimensioni e qualificazioni nel sistema costituzionale di solidarietà', in B. Pezzini, C. Sacchetto (eds), *Il dovere di solidarietà* (Giuffrè 2005) 93; L. Violini, 'I doveri inderogabili di solidarietà: alla ricerca di un nuovo linguaggio per la Corte costituzionale', in R. Balduzzi, M. Cavino, E. Grosso, J. Luther (eds), *I doveri costituzionali: la prospettiva del giudice delle leggi* (Giappichelli 2007) 518.

4.3. Solidarity and the Constitutional Court

The Constitutional Court has always had an essential role in giving meaning and effectiveness to principles, according to the current historical moment. It could be said that the legal force of the Constitution depends mostly on the case law of the Constitutional Court in a given historical, political, institutional context.

It is therefore significant that, in its ruling, the Constitutional Court has been evoking the principle of solidarity in a more pervasive way and, anyway, with the aim to declare the constitutional illegitimacy of laws only since 1990. So far, the Court employed the principle of subsidiarity, but only incidentally and without reference to art. 2 Const. The preliminary referral did not contain an express reference to that provision, that was subject to an independent assessment by the Court. [6]

The opening of the case law to the principle of solidarity has taken place on a topic nowadays definitely central, namely the consequences of the mandatory use of vaccines. In that case, the issue was the use of the vaccine that solved one of the most serious diseases of the first half of the 20th century, i.e. polio, but, on the other hand, resulted in adverse implications on some vaccinated children or on their families as a result of direct personal assistance. In ruling no. 307 of 1990 the Court used the principle of solidarity precisely to declare the constitutional illegitimacy of the legislation in force as it did not provide, at the expense of the State, a fair indemnity in case of damages following the transmission "causally attributable to compulsory vaccination *antipoliomielitica*". It was said that the protection of health and the consequent mandatory health treatments can be assumed pursuant to art. 32 Const. in the name of solidarity towards the others. However, only a proper balance between protection of health and solidarity amidst individuals can determine the recognition of a maximum protection, for the benefit of the person who receives a treatment and suffers damages as a consequence.

Likewise, in its ruling the Court used and referred to art. 2 Const. as a decision parameter, since the judge who deferred the question had limited itself to invoking art. 32 Const.

Of equal importance to understand the value attributed to this princi-

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[6] In any case, these are decisions where the principle of solidarity is invoked to declare the question as groundless and not to pronounce on its unconstitutionality. Some examples can be found, starting from sent. n. 47 of 1969 (on the suspension of procedural time limits for disasters) or in sent. 89 del 1970, where the principle of solidarity is accidentally invoked in the reasoning of the judgment. And, even more, in sent. n. 35/1981; n. 127/1983; 364/1988.

ple, is the subsequent sentence no. 75 of 1992 about volunteering, where the Court defined solidarity every time "the person is called to act not by utilitarian calculation or by the imposition of an authority, but by free and spontaneous expression of the deep sociality that characterizes the person themselves". In this case the human being was understood as *uti socius*, and therefore the value of the solidarity that the individual expresses was placed by the Constitution among the founding values of the legal order. Together with the inviolable human rights, solidarity was there solemnly recognized and guaranteed by art. 2 of the Constitutional Charter as the basis of social coexistence governed by the Constituent Assembly.

Solidarity is thus perceived as a task involving the entire national community, a constraint both for the action of all citizens and, to an even greater extent, of the State, the regions and the autonomous provinces, within the respective constitutional competences. [7]

From this judgment on, reference to the principle of solidarity became increasingly common (or better "started booming").

Alongside the issue of health and volunteering, the principle of solidarity is invoked in constitutional case law, particularly in the field of social security and welfare. Many are the judgments that recall the principle of solidarity, lastly sent. no. 234/2020, [8] which partly reiterates the Court's longstanding interpretation and also reinforces it in the light of the effects of the pandemic.

The several pension reforms that have followed in Italy, grounded on different principles (remuneration until 1996 and then contributions) and providing very different facilities, have led to considerable inequalities between individuals which are difficult to justify under the principle of equality. Hence, the legislator, by one side, and the Constitutional Court, by the other, have introduced compensatory mechanisms or solidarity-benefit levies, especially regarding higher pensions. These pensions were reduced by an intervention that the Constitutional Court itself considered

[7] Constitutional Court, sent. no. 202/1992.

[8] Comments to the judgment can be read in C. Forte, M. Pieroni, 'Nota a prima lettura della sentenza della Corte costituzionale n. 234 del 2020: legittimo il raffreddamento della perequazione per le pensioni più elevate ed illegittima la durata quinquennale del contributo di solidarietà' (2021) *Forum di Quaderni Costituzionali*, 1; F. Angelini, G. Grasso, '"Raffreddamento della dinamica perequativa" e tempo (in)finito della solidarietà nei trattamenti pensionistici (a margine della sentenza n. 234/2020 della Corte costituzionale)' (2021) *Osservatorio Costituzionale*. Previously, the Constitutional Court had ruled on the same issue with sent. no. 173/2016, repeatedly recalled in the most recent decision of 2020 and object of careful comment by L. Pedullà, 'Le "pensioni d'oro" quale paradigma del difficile bilanciamento fra diritti di prestazione sociale ed equilibri economico-finanziari' (2016) *Forum Quaderni Costituzionali*.

to be essentially legitimate (although the levy was only shortened by five to three years), as the amount was based on an assumption of favor due both to the absence of salary ceilings (salary limit) and to the application of the principle of remuneration, that led to what were defined as "golden pensions". According to the Constitutional Court, thus, some «endogenous and exogenous factors», most of the times intertwined, may justify a levy by the legislator on the ground of solidarity. Five significant circumstances are considered legitimate, such as the «international economic crisis, impact on the national economy, unemployment, lack of pension provision, structural reforms of the pension system». A list to which the Court then adds the health emergency, as "having a major impact on the macroeconomic framework, reduces contributory flows and accentuates systemic imbalances".

But perhaps the aspect that more than any other ought to be stressed and that can be inferred from the ruling of the Court, is the emphasis on the duty of inter-generational solidarity, on which the pension system itself is based and that also legitimizes the levy on the higher pensions. In other words, the principle of solidarity must be read in the light of the value of responsibility among generations.

4.4. Solidarity in the current emergency: the evolution of a principle

As mentioned above, the health emergency has certainly given new strength and new impetus to the value of solidarity, as element of the everyday life, as expression of the constant relationship among citizens, between citizens and the State and as legal principle that regulates internal and international relations, in particular with the EU.

The value of solidarity within citizens in the initial period of lockdown has been expressed in various forms in Italy. Economic solidarity, not limited to a general mechanism of taxation linked to the individual's ability to pay, but as generous contributions resulting in massive collections of funds. Solidarity that has been expressed in aid and support for the elderly and weak people, making the survival of these groups easier, through a widespread activation of volunteering and the so said third sector. But one of the major expressions of solidarity has come from those many citizens who, at the risk of their own lives, have declared themselves willing to carry out essential health services, even if out of the role because retired.

Likewise, we have seen solidarity between regions, when hospitals in certain areas were no longer able to guarantee people the same opportunity to be treated in appropriate health care facilities.

Again, we have seen solidarity between EU Member States through the reception of the patients themselves, the overcoming, as already mentioned, of the constraints of the European budget and, especially, the formulation of the Next Generation EU as an unprecedent expression of solidarity.

Before this ambitious initiative that has involved all the EU Members States in times of uncertainty, Italy has now the duty to transform solidarity, as expressed in that EU context, into a project and to use those funds not only in the view of public works and activities, but also as an expression of solidarity among the Italian citizens.

Examining the project Next Generation EU/Italy, set down by the government and now also approved by the Parliament, it seems that the term solidarity is almost ignored, as if the assumptions that animate the project were others. In reality, however, it can be affirmed that, beyond words, the whole text is imbued with solidarity: recognition of the essential nature of the gender equality; the need to introduce special measures for territorial cohesion and in particular for southern Italy, the enhancement of the principles of inclusion and cohesion towards families, young people, the elderly and the weak, are all profiles that can be summarized in the principle of solidarity. It is a project based on solidarity and, in particular, on solidarity among generations.[9]

This is also true from an economic point of view. Even if the resources will now be provided by the EU in order to achieve the goals that concern the situations of greater suffering, greater difficulty and inequality currently present, for the times to come these economic resources will weigh on the future public debt.

Once again, the theme of solidarity, that has prompted the approval of the Next Generation EU and has directed the use of resources to protect the weakest positions, urges a new perspective of solidarity among citizens in the return of funds. In other words, by virtue of the new context and of the enhancement of the principle of solidarity, – often invoked, but perhaps not sufficiently applied – it is necessary to reinterpret some of the principles that are considered as unchallengeable under judicial review.

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[9] This is the profile that, in the final analysis, has drawn the larger attention of the doctrine, in particular with regard to ecological issues, informatics applied to the quality of life, peace, self-determination; see on the point, among others, G. Grasso, 'L'ambiente come dovere pubblico «globale»: qualche conferma nella giurisprudenza del giudice delle leggi?', in Balduzzi, Cavino, Grosso, Luther (fn 5) 386-393; G. Majorana, 'Il dovere di solidarietà e le generazioni future', in Balduzzi, Cavino, Grosso, Luther (fn 5) 403-413; A. Spadaro, 'L'amore dei lontani: universalità e intergenerazionalità dei diritti fondamentali fra ragionevolezza e globalizzazione' (2007) *Diritto e società*, 200; R. Bifulco, *Diritto e generazioni future* (Franco Angeli 2008).

Reference is made in particular to the permanence of the so-called "acquired rights", which have nevertheless arisen and recognized in different contexts, so that their retention could be seen as unreasonable and, in any event, contrary to the principle of solidarity. The Constitutional Court has not always expressed a positive vision on the "freeze" of salary and pension increase or, in any event, on the establishment of a time limit to such reductions, even though they were affecting higher incomes. [10]

In conclusion, the Court's case law seems, however, to pay more attention to the principles of proportionality by virtue of "the limited nature of public resources" that may justify the need for an overall predetermination of the resources that the administration may pay as remuneration and pensions (sent. 124 of 2017) in order to maintain a reasonable limit of the economic treatment of the civil servant. [11]

But the dramatically fast spreading of the principle of solidarity is not enough: it needs to become an effective value in the law provisions.

4.5. The principle of solidarity among the European Constitutions

The reference to solidarity is very common in the European constitutional tradition, even if it is not easy to identify a common notion of the principle of solidarity in the constitutional law of the various countries of Europe.

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[10] See, for instance, sent. 223 of 2012 where the Court reiterates a principle repeatedly stated, with regard to the remuneration of judges, according to which there is a system of automatic adjustment "characterized by the guarantee of a periodic increase in remuneration, which is ensured by law, on the basis of a mechanism which constitutes an «intrinsic element of the structure of remuneration» whose rationale is «the implementation of the constitutional precept of the independence of the judiciary, that must also be safeguarded from an economic point of view (...) avoiding, among other things, their subjection to periodic claims from other powers»".

This principle has been affirmed, mostly, because of the role played by these individuals, but it certainly clashes with the principle of solidarity. It is therefore necessary to understand whether in the future balance that will have to be achieved after the pandemic, the guarantee of autonomy and independence of the judiciary will prevail over everything else or whether in the context of the public service in general a different interpretation can be given, with greater emphasis on the principle of solidarity, also considering the effects on the new generations.

Finally, the Court's case law seems, however, to be more attentive to the principles of proportionality by virtue of "the limited nature of public resources" which may justify the need for an overall predetermination of the resources that the administration may pay as remuneration and pensions (sent. 124 of 2017) in order to maintain a reasonable limit of the economic treatment of the civil servant.

[11] A. Ruggeri, 'L'emergenza sanitaria, la solidarietà dimezzata e… l'uovo di Colombo' (2021) *Consultaonline*.

In the first place, having for now regard only to the letter of the constitutional charters, solidarity does not assume the same weight and the same scope in the different constitutional texts. In some of them, for example, solidarity is not at all directly mentioned[12] but nevertheless this circumstance has not prevented practice and above all case law (not just constitutional) from elaborating solidarity paradigms whose intrinsically constitutional nature has been widely recognized: this is the case of the German Constitution (while some Lander's Constitutions, especially those following the German reunification, expressly refer to solidarity).

In principle, solidarity in constitutional law (more than in the word of the Constitutions) can be observed from different points of view. Along with the properly constitutional dimension – in which solidarity can take the form of a principle, or simply of a value or purpose, [13] or, on the contrary, of a real provision – there is necessarily a normative dimension: how and to what extent solidarity permeates ordinary legislation, especially in certain sectors.

Under a different angle, solidarity can be read in a "horizontal" meaning (and in this context it enters into a dialectical relationship with the various acceptation of the principle of equality), or in a dimension of "national solidarity" (perceived as the initiative of public authorities to create "solidarity" structures), or as a key to read the relations between sub-State territorial entities and between them and the State, especially in federal systems or systems characterized by a strong decentralization (in this specific framework it has also to be examined in relation to the principle of subsidiarity, as well as in relation to the other constitutional mechanisms that govern such relationships).

In the background, it is clear, there is solidarity in a social and cultural sense. Solidarity as a tool to reconcile the individual and the communities, the individual and the society in concrete and at various levels, regardless of a logic (typical of the *ancien régime*) of "advantaged" and "disadvantaged" groups between which a relationship of benefits can be established, in favor of a scheme where "citizens" support each other and at the same time all enjoy of the benefits coming from being part of a community. [14] A

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[12] As far as we know, solidarity is not expressly mentioned – among others – in the Constitutions of Germany, Finland, Austria, the Czech Republic, Ireland, the Netherlands.

[13] Article 1 of the Portuguese Constitution, for example, indicates solidarity as the overall aim of the State, as a sort of value "in itself": "*Portugal is a sovereign Republic, based on the dignity of the human person and the will of the people and committed to building a free, just and solidary society*". See also Article 25 (4) of the Greek Constitution: "*The State has the right to claim off all citizens to fulfil the duty of social and national solidarity*".

[14] V. Federico, 'Conclusion: Solidarity as a Public Virtue?', in V. Federico, C. La-

historical-cultural reconstruction, to which the philosophical thought of the nineteenth and twentieth centuries has accorded a stringent juridical value.

4.6. Solidarity in the Constitutions and in the Preambles

In countries where solidarity is expressly mentioned in constitutional charters, the principle is more prone to be looked at as a paradigm and thus to be evoked (as well as obviously by the legislator as a frame of reference for political choices) also by constitutional judges as a parameter for evaluating the constitutionality of those choices.

In this context, solidarity is also intended to be evoked to strike a delicate balance among possibly conflicting principles and values. Especially in the period of the (more recent) economic emergency – induced by the global crisis triggered by the subprime mortgage crisis in the United States – the tension between solidarity and the management of the public budget increasingly felt as a point of balance between needs, all of constitutional depth, became tangible. In other words, the dialectic between rights and resources has entailed a rethinking of traditional balances where the role of solidarity has necessarily contributed to redesigning entire constitutional scenarios.

We have already seen how in Italy the reference to solidarity included in art. 2 of the Constitution has placed this principle directly in a dialectic of constitutional rights / duties: the latter classified in terms of "mandatory" and therefore suitable for shaping, in practice, the scope of the former. Also in other experiences, such as that of the 1997 Polish Constitution, the reference to solidarity is, shall we say, "oriented", that means, it finds its "topographical" identification in a precise context, which therefore it helps to delineate. In this case, in fact, solidarity is evoked in the framework of the "economic constitution" designed by the Polish constituent in the following terms by art. 20: [15] "a social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland". Polish scholars who have questioned themselves about the value of this express reference to solidarity "in the market"

husen (eds), *Solidarity as a Public Virtue? Law and Public Policies in the European Union* (Nomos 2018) 496.

[15] In the Polish Constitution the reference to solidarity is also included in the preamble: "*We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland*".

have highlighted how it is linked to the particular incidence – also semantic and symbolic – of solidarity in recent Polish history, [16] but also how it has played a significant role in restraining the market economy, especially in connection with that human dignity evoked together with solidarity in the preamble of the Constitution. [17]

There are cases in which the reference to solidarity is not direct, i.e. included in the text of the Constitution, but emerges in constitutional preambles (whose legal value has always been deeply discussed [18]). After all, preambles are notoriously "introductive" paragraphs where the reasons that guide the constituent power are exposed, as well as the aims that it pursues, [19] they therefore represent the appropriate place to evoke a principle that can be very general like solidarity.

The case of France is certainly peculiar. In fact, in the 1958 French Constitution, a reference to solidarity is inserted, but in a relatively limited (albeit relevant) context such as that of "francophonie". [20]

Nevertheless, the address to solidarity as a meta-principle is very strong in ordinary French legislation. Numerous are, in fact, the references to solidarity in the various fields of legislation, such as – by way of example – the "tarif spécial de solidarité" provided for by the Code de l'Enérgie, the "contribution de solidarité territorial" provided for by the Code général des impôts, the "revenu de solidarité active" provided for by the Code de l'action sociale et des familles, the "fonds national de solidarité et d'actions mutualists" provided for by the Code de la mutualité, the "contribution de solidarité pour autonomie" provided for by the Code de la sècurité sociale, the "dotation de solidarité rural" provided for by the Code général des collectivités territoriales.

The constitutional ground of this principle, so pervasive, could not be

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[16] The reference is obviously to the role of the *Solidarnošć* trade union in the fall of the socialist regime, and in the subsequent constituent process, as well as to the famous speech of John Paul II in his 1987 pilgrimage to Poland. On these aspects, see J. Petelczyc, 'Poland', in Federico, Lahusen (fn 14) 143.

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[18] F. Longo, *Struttura e funzioni dei preamboli costituzionali. Studio di diritto comparato* (Giappichelli editore 2018) *passim*.

[19] J. Tajadura Tejada, 'Funzione e valore dei preamboli costituzionali' (2003) *Quaderni costituzionali*, 509.

[20] Article 87 French Constitution: "The Republic shall participate in the development of solidarity and cooperation between States and peoples having the French language in common".

limited to that – indeed rather "poor" – of art. 87. And in fact it was identified by the experts in relation to different principles (for example that of *fraternité*[21] or in the social character of the République), and eventually it was crystallized (also by the Conseil constitutionnel) not in the art. 87 of the Constitution, but in paragraph 12 of the Préambule de la Constitution du 27 octobre 1946, according to which "*la Nation proclaims the solidarité et l'égalité de tous les Français devant les charges qui résultent des calamités nationales*".

As it is well-known, the preamble of the 1946 Constitution is part of the so-called "bloc de constitutionnalité"[22] and therefore works fully – at least since 1971 and then more permanently since 1974[23] – as a parameter for the judicial review by the Conseil constitutionnel.[24] Thanks to this parameter (although not always explicitly mentioned), since the 1980s the case law of the Conseil constitutionnel has been repeatedly bringing out "national solidarity" as a constitutional-level principle to be imposed on the legislator, [25] confirming its absolute value, unrelated to the recurrence of potential natural disasters.

Since 1997, the same Conseil constitutionnel has also been evoking further "exigences de solidarité" linked to other parameters always extracted from the Preamble of 1946 (in particular paragraphs 10, 11 and 13[26]), thus

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[21] S. Arne, 'Existe-t-il des normes supra-constitutionnels? Contribution à l'étude des droits fondamentaux et de la constitutionnalité' (1993) *Revue de Droit Public*, 475.

[22] Y. Poirmeur, 'La réception du préambule de la Constitution de 1946 par la doctrine juridique', in *Le préambule de la Constitution de 1946 [Texte imprimé]: antinomies juridiques et contradictions politiques* (PUF 1996) 100.

[23] Décision n. 74-54 DC du 15 janvier 1975 "*Interruption volontaire de grossesse*".

[24] M. Cavino, *Lezioni di giustizia costituzionale francese* (Editoriale Scientifica 2014) 66.

[25] N. Jacquinot, 'La constitutionnalisation de la solidarité', in M. Hecquard-Théron (ed), *Solidarité(s): perspectives juridiques* (Presses de l'Université Toulouse 1 Capitole 2009) 103. The author observes that the French administrative judge, unlike the Conseil Constitutionnel, has in the past held that the principle of solidarity was not directly applicable in the absence of a law that allowed its application; he subsequently used the principle itself as a general principle of law, without referring to paragraph 12 of the 1946 Preamble.

[26] Par. 10: "The Nation shall provide the individual and the family with the conditions necessary to their development".

Par. 11: "It shall guarantee to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure. All people who, by virtue of their age, physical or mental condition, or economic situation, are incapable of working, shall have to the right to receive suitable means of existence from society".

Par. 13: "The Nation guarantees equal access for children and adults to instruction, vocational training and culture. The provision of free, public and secular education at

substantially amplifying the reference to solidarity even beyond the letter of the Preamble, and confirming that solidarity has a very particular status, such as to contribute to concretely delineate the character of other principles and other rights. [27]

As acutely observed, [28] in the French constitutional context it is likely possible to speak of a "right to national solidarity", [29] that the Conseil constitutionnel considers to be a "droit-créance" (i.e. the right to demand certain benefits by the State, [30] as opposed to the "droits-libertés" [31]), even if the case law has not established yet any sanctions against a possible legislative omission based on non-compliance with this principle (in fact the "droits-créances" give the State a greater margin of appreciation and of maneuver in terms of methods of implementation, compared to the "droits-libertés" [32]).

This case law evolution, however, sets out a type of solidarity that – following categories developed in Italy – we could lead back to "paternal / public solidarity", [33] namely, that which implies a public intervention aimed basically at guaranteeing a condition of substantial equality. [34]

In the recent French experience, however, we find a well-known fact that, by the way of contrary, appears to be inserted on the side of "fraternal / horizontal" solidarity. This is the enhancement of the principle of fraternity following the 2018 decision of the Conseil constitutionnel on a *question prioritaire de consititutionnalité* referred by the *Cour de cassation* concerning the constitutional legitimacy of a criminal provision relating to the aiding and abetting of clandestine immigration (the so-called "solidarity crime"). [35]

all levels is a duty of the State".

[27] For example, decision no. 2003-483 DC of 14 August 2003, in the matter of old-age pensions, according to which "the constitutional need for solidarity resulting from art. 11 implies the implementation of a national solidarity policy in favor of retired workers".

[28] N. Jacquinot (fn 25) 113.

[29] Contra F. Melin-Soucramanien, 'Solidarité, égalité e constitutionnalité', in *La solidarité en droit public* (L'Harmattan 2005) 286.

[30] R. Pelloux, 'Vrais et faux droits de l'homme, problèmes de définition et de classification' (1981) *Revue de Droit Public*, 54.

[31] X. Prétot, 'Les bases constitutionnelles du droit social' (1991) *Droit et Societé*, 194.

[32] L. Gay, 'La notion de «droits-créances» à l'épreuve du contrôle de constitutionnalité' (2004) *Cahiers du conseil constitutionnel* 16.

[33] S. Galeotti, 'Il valore della solidarietà' (1996) *Diritto e società*, 4.

[34] V. Tamburrini, 'I doveri costituzionali di solidarietà in campo sociale: profili generali e risvolti applicativi con particolare riferimento alla tutela della salute' (2018) *Ianus Diritto e finanza*, 29.

[35] Décision n° 2018-717/718 QPC, du 6 juillet 2018, "*M.Cédric H. et autres*". See in-

In that ruling, the Conseil constitutionnel recognised a full constitutional value to the principle of fraternity (which has always been considered the "weak link", on the juridical level, of the "liberté / egalité / fraternité"[36] formula), establishing that from such principle can rise the constitutional right to help others.[37] Although in practice this statement may have had a rather modest result, it is certainly significant on the systematic level and for the overall development of the French constitutional system of solidarity. It contributes, in fact, to confirm the existence and the constitutional relevance also of an interpersonal principle (i.e. not only "mediated" by the State in terms of "national solidarity").

4.7. Implicit and "immanent" solidarity (with focus on rights connected to the welfare state)

The evolution of the French case law about principle of solidarity does not appear too far from those constitutional contexts where there is not an explicit mention of such principle.

In this regard, appears emblematic the German experience where, as we saw above, although the Federal Constitution does not mention solidarity, no one doubts that the principle of solidarity is immanent in the constitutional roots.[38] Evidence of this has been identified in the constitutional conception of humanity, in the establishment of fundamental rights and of a welfare state.[39] In particular, the Bundesverfassungsgericht sets out the notion of human dignity in a sense not only "individualistic", but also highlighting and enhancing the links and connections between man and society. In 1977, for instance, BVerfGE underlined how the Grundgesetz "do not understand this freedom as a freedom of an isolated and autocratic individual, but a community-related and community-bound individual",[40] with

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ter alios A. Gatti, 'La fraternité da valore a principio. Considerazioni sulla sentenza del Conseil constitutionnel francese del 6 luglio 2018' (2018) *Federalismi.it*, 1; M. Cavino, U. Zingales, 'Il Conseil constitutionnel "dà vita" al principio di fraternité Nota alla décision n. 2018-717/718 QPC del 6 luglio 2018' (2019) *Diritto Penale contemporaneo*, 117.

[36] M. Borgetto, 'Sur le principe constitutionnel de fraternité' (2018) *RevueDLF*.

[37] M. Cavino, 'La fraternité non apre le frontiere francesi' (2018) *Lacostituzione.info*.

[38] See, inter alios, M. Piazolo, *Solidarität. Deutungen zu einem Leitprinzip der Europäischen Union* (Ergon 2004), quoted by U. Zschache, 'Germany', in Federico, Lahusen (fn 14) 69.

[39] U. Volkmann, *Solidarität. Programm und Prinzip der Verfassung* (Mohr Siebeck 1998), 220.

[40] BVerfGE, 45, 187. (21 of June 1977), 21.06.1977, Lebenslange Freiheitsstrafe.

the consequent rise of limits to individual freedom connected to the assumption of a social coexistence dimension (e.g., in the health sector). The German Constitutional Judge, therefore, allows the principle of solidarity to be "extracted" (without ever evoking it directly) from this notion of relationship between the individual and society, and from this notion of human dignity in terms of interrelation with the community of reference.

The German constitutional case law allows to infer the existence of a substratum of solidarity also in the set out of certain fundamental rights whose structure necessarily implies a social dimension (such as the right to develop one's personality provided for by Article 2 of the Grundgesetz, or the right of assembly and association). As it has been pointed out, however, the analysis of the solidarity dimension of individual rights did not imply the development of an autonomous and immanent theory of the principle of solidarity, such as to impose itself on the interpretation and expression of individual and collective rights.[41]

Conversely, for social rights properly understood, namely, those positions connected to the welfare state,[42] the principle of solidarity is configured as the very source of the "performance" profile of that category of rights (think, for example, of insurance social security system, the universal health system, the pension system) and of their restraining function of social differences in terms of social justice.[43]

More generally, it is precisely on the terrain of the welfare state that – as in the German experience – it seems possible to concretely give shape to solidarity in those Constitutions that do not directly evoke it.[44] In fact, in this context, "subsystems" can be identified (such as social insurance, the government system, pension mechanisms, family support policies and the right to education, any minimum income guaranteed, etc.) whose intimate structure is conditioned and shaped by the application of the principle of

[41] U. Zschache (fn 38) 77.

[42] The Grundgesetz, in its articles 20 and 28, expressly qualifies Germany as a "social State".

[43] See inter alios BVerfGE 22, 180, *Jugendhilfe*; BVerfGE 76, 256, *Beantermversorgung*; BVerfGE 1 Bvl 16/96.

[44] The Constitution of Denmark of 1849, for example, does not mention in any way the principle of solidarity (also as a consequence of the historical period in which it was originally elaborated), so the effectiveness of this principle must be mainly assessed by in consideration of the modalities of actual realization by the legislator of the "social" rights provided by the Constitution itself, and in particular those connected to social assistance: D. Neriman Duru, T. Spejlborg Sejersen, H.-J. Trenz, 'Denmark', in Federico, Lahusen (fn 14) 37.

solidarity, that precisely in this field fully reveals its function, aimed (among other things) at affirming a principle of substantial equality.

This assumption is confirmed by the fact that the welfare state represents the ground where it is possible to concretely measure the extent of solidarity, even in a legal system without a constitutional chart, as it is the case of the United Kingdom (that, as commonly known, it is characterized by a significant constitutional complexity and by the coexistence of several texts to which a constitutional value is attributed, but in the absence of a centralized system of constitutional justice). Again, the British "constitution" does not expressly mention solidarity in any of its parts, but the principle certainly stands in the background of all that complex regulatory activity based on the so-called Beveridge Report, on which the modern British welfare is founded. Likewise, as already pointed out, the highest point of solidarity as a self-standing meta-principle at the basis of the legislation on the welfare state can be clearly identified in the legislation that set up and consolidated the National Health Service, where the universalism of guaranteed services finds ground exactly on solidarity.[45]

The reference to the welfare state as an elective place for verifying the principle of solidarity at work, does not seem to change in a significant way according to the type of welfare state shaped by each Constitution (and above all national legislations). Both the most advanced systems – such as the one outlined by the Constitution of Denmark – and those of different types (such as Switzerland,[46] Greece, Italy itself), in fact, start from the assumption of inequality and the need to guarantee a certain degree of protection to all – albeit under different premises and conditions. Therefore, the problem of the relationship between the individual and society arises in all legal systems and, even if expressed in different ways, often affected by the cultural and political time, it eventually finds solution through the application of the principle of solidarity.

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[45] T. Montgomery, S. Baglioni, 'The United Kingdom', in Federico, Lahusen (fn 14) 179.

[46] The 1999 Swiss Constitution also contains a reference to solidarity in the preamble: "In the name of Almighty God! The Swiss People and the Cantons, mindful of their responsibility towards creation, resolved to renew their alliance so as to strengthen liberty, democracy, independence and peace in a *spirit of solidarity* and openness towards the world, determined to live together with mutual consideration and respect for their diversity, conscious of their common achievements and their responsibility towards future generations, and in the knowledge that only those who use their freedom remain free, and that the strength of a people is measured by the well-being of its weakest members, adopt the following Constitution".

4.8. Solidarity and the political local authorities

As already seen above, a different but connected profile of the solidarity principle concerns the relationships between different levels of government, especially in federal systems or systems characterized by significant forms of political and administrative decentralization. In these cases, the issue is not to identify the tools to effectively guarantee substantial "horizontal" equality between citizens, but rather to guarantee major equity in relationships (especially economic, but not exclusively) among the political / territorial components of the State.

Once again, an example comes from the German Constitution. Art. 107 of the Grundgesetz, within the legal framework that regulates the distribution among the territorial levels of tax revenues, in fact, provides for the well-known scheme of "Financial equalization among the Länder". Namely, a mechanism through which federal law (approved by the Bundesrat, where the Länder are represented) "ensure a reasonable equalisation of the disparate financial capacities of the Länder, with due regard for the financial capacities and needs of municipalities". This equalization is carried out both on a horizontal level, i.e., by providing financial support from the economically stronger Länder in favor of the weaker ones, and on a vertical level, by providing further federal support in favor of the weaker Länder. [47]

The equalization mechanism certainly presents some deficiencies, underlined in the past also by the BVErfGE. [48] Questionability and inaccuracy of the "horizontal" redistribution criteria, founded on data based on population rather than on actual needs, ordinary nature (instead of the exceptional one, as indicated by the constitutional judge) of federal interventions in favor of the weaker Länder, perverse and disincentivizing effects deriving from a support and equalization system that does not take into account objective and concrete parameters.

On the other hand, however, equalization seems to be an instrument difficult to be renounced in the attempt to allow simultaneously, in a federal context such as the German one, the financial autonomy and the connected responsibility of the Länder, by one side, and the need to avoid areas where population live in intolerably poorer social and economic condi-

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[47] An application of solidarity in favor of territorial autonomies also took place at the time of German reunification, when special taxes were introduced to support the Eastern Lander, objectively characterized by an economic backwardness and an evident financial weakness compared to the West German landers. See A. Voßkuhle, *Solidarität als Rechtspflicht?* (2015), quoted by U. Zschache, 'Germany' (fn 38) 84.

[48] BVerfGE, 2 BvF 2/98, 11 November 1999.

tions compared with the others, by the other. It is therefore an application on a territorial scale of the solidarity principle, that normally operates among individuals: even if the relatively recent reform of art. 72 GG provides as the purpose of the public intervention the pursue of "equivalent" and no longer "uniform" living conditions.

This "inter-territorial" and federal aspect of the solidarity as a reflection of solidarity among individuals within the framework of the principle of human dignity, however, has an even more complex interpretation precisely in Germany, where – as well-known – the Federal Constitution entrusts the territorial autonomies themselves of the realization of the welfare state through the scheme of concurrent legislative competence. Art. 74 GG, in fact, provides that the Länder have concurrent legislative competence also in the matter of "public welfare". Obviously, this competence must be exercised according to the mechanism of art. 72 GG, according to which "on matters within the concurrent legislative power, the Länder shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law".

This scheme, therefore, causes the principle of solidarity (which, as we have seen, is closely connected with the concrete implementation of the welfare state) and subsidiarity to operate jointly, which instead operates on the different level of the division of functions among different levels of governance. If by one side this mechanism makes the importance of solidarity among territories and general equalization even more evident, on the other, it has led to progressive centralization of political choices in the field of welfare in the hands of the Federation, that in turn has chosen to operate on the level of subsidiarity (limiting local interventions) in order to discourage too different (and possibly not very supportive) applications of the welfare state tools, confirming the shape of German federalism – also in this matter – as "executive" federalism.

Even in Spain – that is not a federal State in the strict sense, but anyhow characterized by a particularly accentuated regionalism – the Constitution envisages a mechanism inspired by the principle of "inter-territorial" solidarity. Art. 2 of the 1978 Constitution established the "indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards; it recognises and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the *solidarity* amongst them all". Art. 138, in turn, provides that "the State guarantees the effective implementation of the principle of solidarity vested in Article 2 of the Constitution, safeguarding the establishment of a just and adequate economic balance between the different areas of Spanish territory and taking into special consideration the circumstances pertaining to those which are islands". Even-

tually, art. 156 states that "the Autonomous Communities shall enjoy financial autonomy for the development and exercising of their powers, in conformity with the principles of coordination with the State Treasury and solidarity amongst all Spaniards". In this context, clearly inspired by solidarity, the principle at issue has been read as a limit to the financial (or, more generally, economic) autonomy of autonomous communities, even if the Constitutional Tribunal has never held the existence of a contradiction between autonomy and solidarity.[49]

In practical terms, the principle of inter-territorial solidarity – whose contour is obviously left to the State legislator to be defined – has found its equilibrium through the establishment of a system of "funds" – among which the "Sufficiency Fund" and the "Inter-regional Compensation Fund", which respectively have the aim of guaranteeing the territories the necessary resources for the activities attributed to them, and that of amending the economic imbalances between the communities.[50]

4.9. Conclusions

The principle of solidarity responds to a logic of rebalancing, of assistance and of support. At the level of national Constitutions, it can be explicit or implicit ("immanent"), and can take on various dimensions, all in many ways related to the individual / group / community / society dynamic that characterizes the logic and choices of solidarity. It can be a criterion of interpretation and definition of rights, it can constitute the reference for the construction of a welfare state system, it can constitute one of the keys for implementing the systems of division of competences between the center and periphery in the decentralized or federal systems. In the totality of experiences, it expresses the tendency of constitutional systems to provide forms of intervention on the individual-society dynamics, such as to lead the system towards a perspective of substantial equality.

As we have seen, this happens in the Italian legal system as well as in other legal systems (both those with an expressed reference to solidarity in the Constitution and those without) through the evolution of the constitutional case law – which often highlights the correlation between the principle of "human dignity" and that of solidarity – and the intervention of the

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[49] A. Sanz Díaz-Palacios, 'Il principio di solidarietà e lo "stato autonomistico" spagnolo: un breve commento', in B. Pezzini, G. Sacchetto (eds), *Il dovere di solidarietà* (Giuffré 2005) 221.

[50] J. Martín Fernandéz, 'El nuevo sistema de financiación autonómica' (2002) *Revista de Contabilidad y Tributación*, 131.

legislator, above all in matters concerning social rights and the implementation of the welfare state.

In this scenario, recently, also the welfare state systems have been object of a profound rethinking, in two main directions. On the one hand, we have the "new balances" between constitutional values essentially rising from the global economic crisis. Sometimes this rebalancing has involved a devaluation of solidarity with respect to the need to contain expenditure, aimed to contains the backlashes of the crisis itself. On the other hand, and it seems a paradox, there are new areas of application of the principle of solidarity among individuals, often oriented by public intervention. The reference is to all the "solidarity" issues that emerged in the context of the health crisis resulting from the Covid-19 pandemic, but also – more generally – to the potential new dimensions of the principle of solidarity, that is increasingly oriented "towards the future", in terms of inter-generation solidarity, and that, in this shape, has started receiving a constitutional, as well as a normative, recognition.[51]

[51] The reference is above all to environmental legislation. The Belgian constitution, however, has made this principle penetrate directly into the new article 7bis: "In the exercise of their respective competences, the Federal State, the Communities and the Regions pursue the objectives of sustainable development in its social, economic and environmental aspects, taking into account the solidarity between the generations".