

The Principle of Solidarity in the Italian Constitution

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Abstract

This article analyses the features of the principle of solidarity in the Italian legal system. It shows that in the Italian constitutional system the principle of solidarity is not directed towards the resolution of social conflict as such. Rather, the principle of solidarity – in combination with other principles – recognises, stabilises, and supports certain levels of conflict to the purposes of social integration via politicisation. After the introduction in section I, section II outlines the conceptual background of solidarity as a *legal* principle, recalling the most influential theoretical frameworks and the works of the Constituent Assembly in 1946-1947. Section III engages in a doctrinal analysis, exploring the personal and objective scope of application of the principle. Section IV, finally, offers an overview of the main applications of the principle in legislation and case law and concludes by referring to the spatial and temporal dimensions of solidarity.

I. Introduction

In most recent years, legal scholarship has witnessed a revival of the principle of solidarity. This trend can be observed not only in national and international legal discourses but also across different fields: (comparative) constitutional law, international law, EU law, legal theory. The reasons for this renewed interest may be individuated in distinct but interlinked phenomena, variably related to the growing spatial and temporal interconnectedness triggered by globalization: financial/economic crisis, climate crisis, global migrations, global supply chain disruption, and, most recently, a global pandemic.¹

Such revival calls for an examination of the *legal* nature of the principle of solidarity, that is, of the analytical and normative elements underpinning solidarity *as a legal norm*. At the same time, the renewed interest for solidarity requires a careful consideration of the specific – historical, ideological, textual, social, economic – features in different legal systems. Only in this way may transnational

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¹ On such profiles, see especially sections V.5-V.6 below.

and comparative legal discourses accurately capture similarities and differences, to the purposes of broader legal reflections and policy proposals.

This article aims to contribute to such debate, by analysing the specific features of the principle of solidarity in the Italian legal system. It offers a relatively thorough and systematic conceptualization, capturing the intellectual, normative, and practical significance of such principle. The central argument is the following: in the Italian constitutional system, solidarity is a *meta*-principle, which encompasses all the constitutional norms aimed at the integration of the people to which the normativity of the Constitution is directed. Already at this introductory stage, such formulation requires some clarification.

Firstly, while solidarity has undoubtedly normative character, it has the legal nature of a principle, ie an ‘optimization requirement’ in the sense of Robert Alexy’s theory of fundamental rights.² This means that it consists of an ought-to-be aimed at the maximization of a (social) result, in turn linked to certain values. With respect to the values emerging from the Italian Constitution - notably democracy, equality, personalism, pluralism, work – the principle of solidarity constitutes a sort of centre of gravity, which dynamically organizes social interactions, while at the same time *triggering* and *mediating* conflicts. In this sense, the prefix ‘meta’ utilized here indicates that the normativity of solidarity emerges mainly – though not exclusively – through other norms that also qualify as principles. As a principle, solidarity is typically subject to balancing,³ which make its application a question of *quantum* and *quomodo* and not of *an*.⁴

Secondly, solidarity is a principle oriented mainly to the fulfilment of duties, namely ‘of political, economic and social’ character (Art 2 of the Constitution). Here, ‘duties’ should be understood as passive legal positions not necessarily correlative to individual rights. In this sense, it is part of the ‘objective value system’ of the Italian Constitution, which permeates the entire legal system, from public law to private law, from criminal law to procedural law, up to ‘horizontal’ contractual relations. In this same sense, while not all constitutional duties are based on the principle of solidarity, all duties of solidarity are to be considered constitutional.⁵

² R. Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002), 47-48: ‘principles are optimization requirements, characterized by the fact that they can be satisfied varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules.’

³ A. Morrone, ‘Solidarietà e autonomie territoriali nello stato regionale’, in B. Pezzini and C. Sacchetto eds, *Il dovere di solidarietà* (Milano: Giuffrè, 2005), 27.

⁴ B. Pezzini, ‘Dimensioni e qualificazioni nel sistema costituzionale di solidarietà (a proposito di uguaglianza ed effettività dei diritti e tematizzazioni della differenza)’, in Id and C. Sacchetto eds, n 3 above, 101.

⁵ B. Pezzini, ‘Dimensioni e qualificazioni’ n 4 above, 99, fn 14. See also A. Pace, *Problematica delle libertà costituzionali* (Padova: CEDAM, 3rd ed, 2003), 56; F. Polacchini, *Doveri costituzionali e principio di solidarietà* (Bologna: Bononia University Press, 2016), 161, 183.

Thirdly, solidarity is aimed at integration. And yet, this integration is not axiologically neutral. In Lombardi's words, it is

‘a fundamental criterion destined to mediate, through duties (...), that minimum of homogeneity without which political life would be reduced to *bellum omnium contra omnes*’.⁶

To use Smend's categories,⁷ the principle of solidarity aims at integration at both the functional level⁸ and at the material level.⁹ In other words, the principle of solidarity and the constitutional and legislative norms that gravitate around it do not aim at *any* kind of social integration, potentially compatible with an authoritarian regime or with constitutional systems exclusively devoted to the protection of economic freedoms. On the contrary, they aim at the preservation and strengthening of an axiological system which belongs to the family of Western post-war constitutionalism but remains in many traits specific to the Italian constitutional experience. In particular, in the Italian legal system, solidarity does not pretend to resolve or deny social conflict. Rather, it *presupposes* and *exploits* social conflict in its dynamic, jurisgenerative potential, in its capacity to initiate processes of social and normative evolution.¹⁰ Especially in economic relations, the application of the principle of solidarity implies that the treatment of different subjects may not conform to purely retributive criteria or theories of justice. Therefore, it may determine a transactional imbalance. In this sense, solidarity is not merely *compensation*, but rather *redress*.¹¹

Paradoxical as it may appear, then, in the Italian Constitution of 1948, solidarity is (also) conflict. Solidarity does not overcome but rather presupposes – and productively exploits – distinctions, contrapositions of interests, claims, legal situations. It

‘expresses a concept of a relational nature, aimed at the multiple forms through which a complex and non-homogeneous community manages to integrate itself into the state structure’.¹²

Further, the dynamic potential – both conflictual and integrative – of the principle

⁶ G. Lombardi, *Contributo allo studio dei doveri costituzionali* (Milano: Giuffrè, 1967), 48.

⁷ R. Smend, ‘Constitution and Constitutional Law’, in A. Jacobson and B. Schlink eds, *Weimar. A Jurisprudence of Crisis* (Berkeley: University of California Press, 2001 (1928)), 213-248.

⁸ Related to the experience, to the fact of commonality so as to deepen the existence of both the community and the individual.

⁹ Related to the participation in material values and conditions of co-existence.

¹⁰ From a broader perspective but in the same direction, see most recently G. Martinico, *Filtering Populist Claims to Fight Populism. The Italian Case in a Comparative Perspective* (Cambridge: Cambridge University Press, 2022).

¹¹ For this distinction, see E. Christodoulidis, *The Redress of Law. Globalisation, Constitutionalism and Market Capture* (Cambridge: Cambridge University Press, 2021), 2.

¹² A. Morrone, n 3 above, 28.

of solidarity does not stop at the boundaries of the community defined by the territory or by the status of citizenship, nor does it take place in an a-temporal dimension. On the contrary, it embraces persons and communities outside those of the territorially identified nation-state; it penetrates the institutional dynamics of sub-state communities; and it extends over time spans beyond a single generation. In this way, solidarity contributes to projecting the normativity – vehicle, again, of *both* conflict *and* integration of the Constitution beyond the boundaries of the here and now.

The article proceeds as follows. After this introduction, section II outlines the conceptual background of solidarity as a legal principle, recalling the most influential theoretical frameworks and the works of the Italian Constituent Assembly of 1946-1947. Section III engages in a doctrinal analysis, exploring the personal and objective scope of application of the principle. Section IV offers an overview of the main applications of the principle in ordinary legislation and case law and concludes by referring to the spatial and temporal dimensions of solidarity.

II. Background

1. Conceptual Background

As an institute of civil law, solidarity dates back to the *obligatio in solidum* of Roman law.¹³ In today's Italian law, one may find it within the general regulation of civil law obligations, under Arts 1292-1313 of the 1942 Civil Code; and, within the scope of tort law, in Art 2055 of the Civil Code. As is known, such institute concerns a situation where two or more persons (co-obligors) are liable in respect of the same liability, and a claimant (oblige/creditor) may pursue an obligation against any of them as if they were jointly liable. However,

‘the person who has compensated for the damage has recourse against each of the others in proportion to the degree of fault of each and to the consequences arising therefrom. In case of doubt, the degree of fault attributable to each is presumed to be equal.’¹⁴

Of such civil law roots, public law scholarship usually emphasizes the communitarian aspect, which refers to an idea of solidity, totality, friendship between co-obligors,¹⁵ both on the external side (towards the creditor) and on the internal side (in the presumption of equality of the degree of fault). However, to

¹³ A. Guarino, *Diritto privato romano* (Napoli: Jovene Editore, 12th ed, 2001), 790-793. It is roughly equivalent to the joint and several liability of common law jurisdictions.

¹⁴ Art 2055 Civil Code.

¹⁵ S. Galeotti, ‘Il valore della solidarietà’ *Diritto e società*, 1-24, 3 (1996); F. Giuffrè, *La solidarietà nell'ordinamento costituzionale* (Milano: Giuffrè, 2002), 10-11, fn 25.

the purposes of constitutional law, equally important is the profile of fragmentation, tension, and at least potential conflict between distinct though legally bound subjects. This profile emerges from the action granted to the co-obligor who compensated for the damage against the other co-obligors; and from the possibility that the exact degree of the individual faults may be determined in court.

From its Roman origins, the history of solidarity leads to the French Revolution. It had already re-emerged in the civil law vocabulary at the end of the seventeenth century¹⁶ and for a certain period it had as a synonym ‘solidity’ (*solidité*).¹⁷ Only with the French Revolution, however, the concept of solidarity assumed *also* a more socio-political meaning,¹⁸ initially in the form of *fraternité*, the third principle of the Revolution along with *liberté* and *égalité*. In the wake of its closest conceptual (Christian) antecedents of *fraternitas* and *caritas*, the revolutionary concept was characterised by the overcoming of the particularism of belonging to a particular community. The *fraternité* of the Revolution was constituted *precisely* by its combination with equality and freedom: no longer a solidarity between subjects belonging to the same corporation, status, group, but rather between individuals considered in the abstract, without societal constraints and *therefore* legally equal.¹⁹ In this context, the concept of *fraternité* was coherent with the *Loi Le Chapelier* of 1791,²⁰ which abolished trade organizations, corporations, and the first forms of trade unions, effectively establishing the principle of business freedom of the emergent bourgeoisie.

Because of such roots,²¹ however, the concept of *fraternité* was still somewhat configured as a pre-political duty or a moral obligation,²² detached from the – concrete, material, historically situated – conditions of interdependence rooted in structures of (social) power. The concept of *fraternité* did not capture class struggles and, as such, tended to an abstract indifferenciation.²³ This would progressively emerge during the post-Revolution years. In the Jacobin-Montagnard constitution of 1793 – which omitted *fraternité* and instead

¹⁶ The concept being recorded in the 1694 *Dictionnaire de l'Académie Française*: see R. Zoll, ‘Solidarietà’ *Enciclopedia delle scienze sociali* (Roma: Treccani, 1998), VIII, 240.

¹⁷ Term still used by Pothier in his *Traité des obligations* of 1761. I rely here on A. Supiot, *Grandeur et misère de l'État social* (Paris: Fayard, 2013), 43.

¹⁸ S. Stjernø, *Solidarity in Europe. The History of an Idea* (Cambridge: Cambridge University Press, 2005), 25 ff.

¹⁹ H. Brunkhorst, *Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft* (Frankfurt: Suhrkamp, 2016), 9-20, 79-138; S. Giubboni, ‘Solidarietà’ *Politica del diritto* 525, 527-553 (2012); F. Pizzolato, ‘Fraternità (principio di)’ *Digesto delle discipline pubblicistiche* (Torino: UTET, 2012), Agg V, 379.

²⁰ Loi des 14-17 octobre 1791 sur les coalitions.

²¹ R. Zoll, n 16 above, 242-243.

²² See M. Ozouf, ‘Fraternité’, in F. Furet and M. Ozouf eds, *Dizionario critico della Rivoluzione francese* (Milano: Bompiani, 1988), 657.

²³ As Marx and Engels pointed out: K. Marx and F. Engels, *Marx-Engels-Werke* (Berlin: Dietz, 1960), VII, 21.

recognized *propriété*²⁴ – duties constituted an instrument to strengthen the participatory elements of citizenship. Individuals would be excluded or included from the community, depending on their ethical-political behavior and revolutionary virtues.²⁵ In the constitution of 1795, duties constituted ‘counterweights to a declaration of rights’ and they were instrumental to property, in turn seen as a means for the ‘determination of the subject and of order,’²⁶ and as an ‘instrument of defense of the interests of the owners.’²⁷ Individualistic and reactionary impulses, then, absorbed the *fraternité* into the other components of the original revolutionary triad. In the Napoleonic proclamation of 18 Brumaire (9 November 1799), solidarity was again replaced by property. Further, Art 1202 of the 1804 French Civil Code provided that

‘joint and several obligation is not to be presumed; it is necessary that it should be expressly stipulated. This rule is only suspended where the joint and several obligation takes place absolutely, by virtue of a regulation of the law’.²⁸

‘Solidarity’ would reappear only in the 1840s, in a profoundly changed context, where workers’ movements began to emerge as a political and ideological force, albeit with the different influences and intentions of their multiple authors and leaders.²⁹ These currents had the merit of ‘thinking’ individuals again in their social context, in their historically situated social interdependences, regardless of and often *beyond* the relationship with the state. These same movements would push rival lines of thought – notably the Catholic and the liberal – to a partial self-reinvention. The affinities of the thesis of solidarity with Catholicism already emerged in the work of the conservative Donoso Cortés,³⁰ and then entered – in the form of subsidiarity – into the Catholic social doctrine with encyclical *Rerum Novarum* of 1891. In 1860, Giuseppe Mazzini invoked as the foundation of the nation not the rights of the (bourgeois) individual, but rather the duties of man.³¹ Likewise, currents of secular liberalism, emerged between

²⁴ See Art 2 Declaration of the Rights of the Man and of the Citizen of 1793.

²⁵ P. Costa, *Civitas. Storia della cittadinanza in Europa* (Roma-Bari: Laterza, 2000), II, 44-68. See Arts 20 to 23 of the 1793 Declaration of the Rights of the Man and of the Citizen and Arts 4 to 6 of the 1793 Constitution.

²⁶ As argued by P. Costa, *Cittadinanza* (Roma-Bari: Laterza, 2005), 93.

²⁷ G. Peces-Barba Martínez, ‘Diritti e doveri fondamentali’ *Digesto delle discipline pubblicistiche* (Torino: UTET, 1990), V, 153. See Arts 1-9 of the section ‘Devoirs’ of the Declaration of the Rights of the Man and of the Citizen of 1793.

²⁸ ‘La solidarité ne se présume point; il faut qu’elle soit expressément stipulée. Cette règle ne cesse que dans les cas où la solidarité a lieu de plein droit, en vertu d’une disposition de la loi.’

²⁹ Cf M.-C. Blais, *La solidarité: Histoire d’une idée* (Paris: Gallimard, 2007); S. Stjernø, n 18 above, 42-58; R. Zoll, n 16 above, 240-241.

³⁰ J. Donoso Cortés, *Essay on Catholicism, Liberalism, and Socialism: Considered in Their Fundamental Principles* (Boonville: Preserving Christian Publications, 2014 (1851)).

³¹ G. Mazzini, *Dei doveri dell’uomo* (Fano: Aras, 2022 (1860)).

the end of the nineteenth century and the beginning of the twentieth century,³² framed solidarity as a principle of political action, aimed at compensating the structural difficulties of post-absolutist liberal states, designed around the interests of the bourgeoisie. From this perspective, solidarity was the essential condition for the realisation of the interests of both individuals³³ and collective actors.³⁴

Importantly, this intellectual magma generated the conceptual framework of what would become the European social democracy. Already at the end of the nineteenth century, solidarism was considered as a third way between individualism/liberalism and socialism/collectivism.³⁵ In different formulations – but under the common influence of the sociology of Comte,³⁶ Fouillée,³⁷ Durkheim,³⁸ Izoulet,³⁹ among others⁴⁰ – the principle of solidarity was derived from the *factual necessity* of interdependence – no longer of individuals considered in the abstract, but rather of human persons on their social environment. This interdependence was considered as the source of an obligation, a *debt* towards the community, in turn leading to the configuration of the state as its guarantor, through economic redistribution and social inclusion.

This intellectual juncture was crucial. Solidarity, originally an institute of civil law, had now become a policy program, a political aspiration, and ultimately a principle of public law, through the intermediation of a state increasingly active in different social spheres. Such trajectory – already emerging in the works of Bourgeois,⁴¹ Renouvier,⁴² and von Stein⁴³ – was consecrated in public law theory by Léon Duguit, the first author to link *social* solidarity, the objective/positive legal order (*règle de droit*), and the state structures in a coherent system. Particularly influenced by Durkheim, Duguit saw in social solidarity an objective norm, which binds public apparatuses (the *gouvernants*). Ultimately, the state would be only an instrument for the realization of solidarity.⁴⁴

³² See especially L. Bourgeois, *Solidarité* (Paris: Armand Colin, 1896).

³³ R. Zoll, n 16 above, 245.

³⁴ See L. Mengoni, 'Fondata sul lavoro: la Repubblica tra diritti inviolabili dell'uomo e doveri inderogabili di solidarietà' *Jus*, I, 3, 11 (1998); U. Volkmann, *Solidarität-Programm und Prinzip der Verfassung* (Tübingen: Mohr Siebeck, 1998), 76.

³⁵ R. Zoll, n 16 above, 245.

³⁶ A. Comte, *Discours sur l'esprit positif* (Paris: Carilian-Goeury et Dalmont, 1844).

³⁷ A. Fouillée, *La science sociale contemporaine* (Paris: Hachette, 1880).

³⁸ É. Durkheim, *De la division du travail social* (Paris: Alcan, 1893).

³⁹ J. Izoulet, *La cité moderne et la métaphysique de la sociologie* (Paris: Alcan, 1894).

⁴⁰ M.-C. Blais, n 29 above; R. Zoll, n 16 above, 240-247.

⁴¹ L. Bourgeois, n 32 above.

⁴² C. Renouvier, *Quatrième essai. Introduction à la philosophie analytique de l'histoire* (Paris: Ladrance, 1864).

⁴³ L. von Stein, *Geschichte der sozialen Bewegung in Frankreich von 1789 bis auf unsere Tage* (Darmstadt: Hildesheim, 1959 (1850)). See more generally F. De Sanctis, *Società moderna e democrazia* (Padova: CEDAM, 1986), 61-81.

⁴⁴ L. Duguit, *Le Droit social, le droit individuel et la transformation de l'Etat* (Paris: Alcan, 1908), 50; D. Grimm, *Solidarität als Rechtsprinzip. Die Rechts- und Staatslehre Léon Duguits in ihrer Zeit* (Frankfurt: Athenäum, 1973), 27-91.

However, many of such lines of thought still saw solidarity in an instrumental way. Solidarity, in other words, was valued primarily as a means for integration, of counter-action to the disruptive pressures of workers', socialist, and anarchist movements. In this period, the definitions of solidarity avoided any reference to antagonistic counterparts.⁴⁵ Von Stein's 'science of society', for example, aimed at 'rationalizing the intervention of the state within the socio-economic fabric' and at

'scientifically demonstrating to the ruling classes that such state intervention, directed at promoting the participation of individuals (who must nevertheless be components of different classes) in the welfare of the whole, was in their own interest'.⁴⁶

In this context, solidarity – that is, the welfare benefits directly or indirectly provided by public apparatuses – was considered as a necessary tool for the state to preserve social peace but still outside its sources of legitimation.⁴⁷ Further, such services were reserved to the political community and linked to the status of citizen.⁴⁸ The introduction in the Bismarckian Germany of the Second Reich, between 1883 and 1884, of the first form of compulsory work insurance, was part of an overall illiberal regime, coherent with the ban of the Social Democratic Party.⁴⁹ In Italy, where Art 25 of Constitution of the Kingdom of Italy, dating back to 1848, limited the scope of the duties to citizens to tax obligations, the first forms of welfare legislation had paternalistic, if not repressive,⁵⁰ features, later further strengthened by Fascist corporatism.⁵¹

Ultimately, the nineteenth-century administrative-liberal state remained a self-limiting Leviathan, even when it instrumentally granted *itself* powers of social intervention or imposed duties of solidarity on its citizens.⁵² In other words, *the state did not need solidarity to justify itself*: religion, monarchy, and nation still competed with human dignity, democracy and (substantive) equality as

⁴⁵ R. Zoll, n 16 above, 240.

⁴⁶ F. De Sanctis, n 43 above, 154 (my translation).

⁴⁷ M. Benvenuti, *Diritti sociali* (Torino: UTET, 2013), 5.

⁴⁸ R. Zoll, n 16 above, 246.

⁴⁹ Cf S. Giubboni, n 19 above, 535.

⁵⁰ Legge 15 April 1886 no 3818; legge 17 March 1898 no 80; legge 25 March 1917 no 481 which, by virtue of a debt of solidarity towards soldiers returned from the war, provided for the compulsory hiring of war invalids; and decreto legge luogotenenziale 21 April 1919 no 603, which introduced the first forms of compulsory insurance for workers.

⁵¹ Regio decreto 4 May 1925 no 653; regio decreto 20 August 1923 no 2277; regio decreto 30 December 1923 no 2841; regio decreto 30 December 1923 no 3158; regio decreto 30 December 1923 no 3184; legge 14 June 1928 no 1312; regio decreto 13 May 1929 no 928; regio decreto-legge 23 March 1933 no 264; regio decreto-legge 4 October 1935 no 1827.

⁵² In German and Italian theory, see C.F. von Gerber, *Über öffentliche Rechte* (Tübingen: Laupp, 1852); P. Laband, *Das Staatsrecht des Deutschen Reiches* (Tübingen: Mohr, 1911); S. Romano, 'La teoria dei diritti pubblici subbietivi', in V.E. Orlando ed, *Primo trattato completo di diritto amministrativo italiano* (Milano: Società editrice libraria, 1900), I, 172.

the basis for justifying political power. In order for this transition to take place, the process of secularization had to develop further, leading the structures of modern states to seek new and more immanent bases of legitimation.

This process was by no means peaceful. Still in 1914, Robert Michaels – one of the thinkers who most contributed to the ideological foundations of Fascism – argued that ‘for the formation of a solidarity group, the existence of a clear opposition is necessary; one is solidal only against someone’.⁵³ The first attempts at constitutionalization of social rights – the norms concretely operationalizing the principle of solidarity – date back to the Mexican constitution of 1917 (Arts 1-29), the German constitution of 1919⁵⁴ (Arts 135-165) and the Spanish constitution of 1931 (Arts 43-50). However, modern constitutionalism had to go through another world war and authoritarian drifts of various kinds, often triggered or accompanied by reactionary liberalism. Even the methodological and ideological disputes of German public law scholarship in the 1920s and 1930s can be read from this perspective. Indeed, the positions expressed by Schmitt, Smend, and Heller among others may more broadly be considered as a debate on the possibility for social integration and on justification of the power in the modern, secular state under conditions of market economy. In such scenario, public law scholarship had to address the issue of how state apparatuses contribute to inequality, alienation, and social exclusion. Even Catholic thought was increasingly oriented towards principles of social inclusion, first in the thought of the Pesch⁵⁵ and then in that of Mounier⁵⁶ and Maritain,⁵⁷ who would have had much influence on Christian-democratic movements.⁵⁸ In this regard, the encyclical *Quadragesimo Anno* of 1931 configured for the first time precise solidarity duties of public institutions.

However, only the constitutionalization of social rights made it possible for economic policies of social emancipation/inclusion to become part of the political functions of the modern state, making them a basis of legitimacy and finally making it a social State under the rule of law.⁵⁹ This emerges in the constitutions of the post-World War II period, and in particular in the preamble of the French Constitution of 1946, in Arts 1 and 20 of the 1949 Basic Law of the

⁵³ R. Michaels, ‘Zum Problem: Solidarität und Kastenwesen’, in Id ed, *Probleme der Sozialphilosophie* (Leipzig-Berlin: Teubner, 1914), 55.

⁵⁴ For a thorough analysis, see most recently M. Goldmann and A. Menéndez, ‘Weimar Moments: Transformations of the Democratic, Social, and Open State of Law’, *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper* No. 2022-12 (June 20, 2022), available at <https://tinyurl.com/28z87kcb> (last visited 30 June 2022).

⁵⁵ H. Pesch, *Lehrbuch der Nationalökonomie* (Freiburg: Herdersche, 1905-1923).

⁵⁶ E. Mounier, *Qu'est-ce que le personnalisme?* (Paris: Éditions du Seuil, 1947).

⁵⁷ J. Maritain, *Christianity and Democracy, the Rights of Man and Natural Law* (San Francisco, Ca: Ignatius, 2012 (1977)).

⁵⁸ S. Stjernø, n 18 above, 203 ff.

⁵⁹ See E.W. Böckenförde, ‘Die Politische Funktion Wirtschaftlich-Sozialer Verbände Und Interessenträger In Der Sozialstaatlichen Demokratie: Ein Beitrag Zum Problem Der, Regierbarkeit’ *Der Staat*, IV, 457 (1976); and U. Volkman, n 34 above, 52-75, 217 ff.

Federal Republic of Germany and, as will be seen, in the Italian Constitution of 1948. Importantly, in post-war constitutionalism, duties of solidarity no longer concern only citizens/individuals as members of a national (or racial) community. Rather, they are increasingly linked to the dignity of the human person and the values connected to it.

Unsurprisingly, in France, where constitutional culture remained largely attached to state-centred paradigms, the debate on the principle of solidarity had little impact on constitutional theory, finding more fruitful paths in legal sociology and labour law.⁶⁰ In the constitution of 1958, both the terms *solidarité* and *fraternité* refer mainly to the relations between peoples and therefore to be essentially collective in nature.

British and, more generally, Anglo-Saxon constitutionalism has followed different paths. Apart from the consideration that the US Constitution was drafted in 1787, it is of particular importance that, in these contexts, progressive movements and, in particular, the English Labour Party, were linked to the syndicalist tradition. The latter was significantly influenced by a liberal political culture emerged in England already in the nineteenth century, rather than continental Marxism. When the workers' movement was emerging, in fact, liberalism had already become the dominant ideology in England, contrary to what happened in Germany, Scandinavia and southern Europe.⁶¹ The specific features of Anglo-Saxon socialism influenced the development of the political-legal vocabulary, where solidarity never became a *constitutional* principle. This even though the policies of economic redistribution typical of contemporary welfare state first emerged in the USA with the Roosevelt New Deal and in the UK with the Beveridge Plan.⁶² Evidence of this juridical-cultural 'rejection' can be found in the failed Second Bill of (Economic) Rights, originally advocated by US President Roosevelt in 1944; the overall demonization (in the US) of political movements that closely linked class issues, solidarity, and civil rights; and, starting in the 1980s, the national and international success of neo-liberal political-economic doctrines.

2. Constituent Assembly

Turning now to the elaboration of the principle of solidarity at the Italian Constituent Assembly of 1946-1947, there is a first element to highlight. Although understood in an at least partially different way by the political forces involved, solidarity was the concept around which a general convergence between the Left and the Catholic wing. Such convergence was reflected in the formulation of what was to become Art 2 of the Constitution, that is, one of its axiological

⁶⁰ See A. Supiot, n 17 above.

⁶¹ S. Stjernø, n 18 above, 132.

⁶² 'Social Insurance and Allied Services', Report by Sir William Beveridge, November 1942 (Cmd 6404).

and normative cornerstones. This article was the result of a protracted elaboration, from which liberal components remained mostly excluded, perhaps in the conviction, still prevalent within the I Subcommittee of the Constituent Assembly, that the provision had a mostly philosophical or moral meaning, in any case to be transferred into a non-binding Preamble. The final text, as approved on 24 March 1947, provides that

‘The Republic recognises and guarantees the inviolable rights of the human being (*uomo*), both as an individual and in the social groups where human personality is expressed. The Republic requires that the mandatory (*inderogabili*) duties of political, economic and social solidarity be fulfilled’.

In such provision, some fundamental connections emerge. Firstly, between rights and duties. Despite some resistance of socialist and liberal members, the formulation clearly linked the recognition and guarantee of ‘inviolable’ rights to the fulfilment of ‘fundamental’ duties, as two sides of the same coin. Secondly, between solidarity, the primacy of the person, and social pluralism. The constituents wanted to bind

‘two conceptions of man and his relationality: that founded on the recognition of the individuality and unrepeatability of the individual and that founded on the recognition of the in-suppressible sociality of experience’.⁶³

Costantino Mortati, referring to the paradigm shift from the previous liberal-individualistic regime, spoke in this regard of a passage ‘from one to another types of homogeneity’.⁶⁴ Thirdly, between the political, economic, and social dimensions of solidarity. Here, too, the intention was to bring out the interdependence between the various dimensions of constitutional duties: no longer only in vertical relationships, that is, between the citizen – soldier, taxpayer, voter – and the state; but also in horizontal relationships, between human beings as such, both as individuals and as members of social formations (family, productive unit, religious confession, political party, territorial community, the international community itself).

In this regard, when it comes to the subject that ‘recognizes and guarantees’ rights and imposes duties, Art 2 significantly refers to the ‘Republic’, understood as the state-order or state-community, as distinct from the whole of the public apparatuses (the government or state-person). Likewise, the recognition/guarantee of rights, on the one hand, and the imposition of duties, on the other hand, are not referred to the citizen but to the human being as such. In this case, the proposal to link the status of citizenship to a ‘determined position of

⁶³ F. Polacchini, n 5 above, 20.

⁶⁴ C. Mortati, ‘Articolo 1’, in G. Branca ed, *Commentario alla Costituzione* (Bologna-Roma: Zanichelli, 1975), I, 9.

collaboration and solidarity⁶⁵ did not find place in the constitutional text.⁶⁶ This element gives the principle of solidarity an apparent internationalist or, in any case, extra-territorial thrust – emerging also in Arts 10 and 11 of the Constitution – and leads the principle of solidarity to perform its integrative functions *beyond* the community residing on Italian territory.⁶⁷

III. Personal Scope of Application

The debate on the personal scope of the duties of solidarity has generally focused on two questions. First, if they are applicable to public subjects or, more generally, to bodies that are part of the state-person or state-apparatus. Second, if they are applicable to foreigners and stateless persons. Here, we shall address such questions in accordance with the coordinates outlined above, namely, considering solidarity as an objective legal principle aimed at the maximization of certain social objectives.

1. Public Actors: Powers/Duties of Solidarity

Both oldest scholarship and the majority of contemporary one substantially agree in referring the principle of solidarity only to private (individual or collective) subjects. Undeniably, this position is supported by textual, historical, and systematic arguments. Indeed, Art 2 refers to the human being (*uomo*) and the development of their personality. Further, in the debates explicitly dedicated to solidarity, the constituents mostly referred to it in a social dimension, that is, in an extra-institutional sense. Finally, the constitutional text, in referring to positions of public bodies or organs which are the object of duties in a broad sense normally uses the terms task, function, relationship. More generally, the lack of means of enforce against the state many provisions referable to the principle of solidarity – for example, the right/duty to work under Art 4 of the Constitution⁶⁸ – has strengthened the idea that it cannot bind the public administration or, more generally, the government.

In more recent literature, this approach has been however questioned. First of all, if one reads the text beyond the conceptual lenses prevailing at the time of the Constituent Assembly, based on a stark separation state and society, Art 2 of the Constitution explicitly mentions ‘man’ in reference to the recognition and

⁶⁵ Put forward by Dossetti in relation to what was to become Art 22 Constitution.

⁶⁶ See D. Boronovo Re, ‘I doveri inderogabili di solidarietà’, in D. Florenzano, D. Boronovo Re and F. Cortese eds, *Doveri inviolabili, doveri di solidarietà e principio di eguaglianza* (Torino: Giappichelli, 2015), 75.

⁶⁷ See also section V.5 below.

⁶⁸ ‘The Republic recognises the right of all citizens to work and promotes those conditions which render this right effective. Every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society.’

guarantee of rights, but is silent on the addressee of the ‘requirement’ for the fulfillment of the duties of solidarity. Secondly, several constitutional provisions certainly referable to the principle of solidarity translate into properly legal duties. Examples are Art 10, para 3, of the Constitution, concerning asylum seekers; Art 34, paras 3 and 4, concerning the provision of economic benefits to make the right to study effective for ‘capable and deserving pupils, including those lacking financial resources’; Art 35, para 3, concerning the promotion of international agreements and organizations aimed at affirming and regulating labor rights; the reformed Art 81, para 6,⁶⁹ concerning the overall sustainability of public debt;⁷⁰ Art 119, para 3, concerning the institution of an equalization fund for territories with a lower fiscal capacity per inhabitant;⁷¹ the recently reformed Art 9, protecting the environment, biodiversity and ecosystems, also in the interest of future generations, and requiring the government to introduce legal protection for animals.⁷² All such provisions impose duties on public bodies without necessarily a corresponding right of other legal subjects – individual or collective – except in an indirect manner. A private individual or a trade union cannot bring political branches of the government to court directly when, for example, such branches do not take action to promote international conventions that affirm the rights of workers. Such norms serve the rights of private individuals only indirectly and their justiciability may emerge in the context of a judgment of constitutional legitimacy, but only after the constitutional bodies have somehow fulfilled their duty (unconstitutionally).

More generally, in Italian law, a legal situation qualifiable as a duty is not necessarily correlative to a right nor, more generally, to a justiciable claim of other subjects. At the same time, a duty may well be fulfilled through exercises of authority. In other words, when referred to public actors, the principle of solidarity may well be configured as regulating a power/duty, in the form of an act of administration or legislation. In Italian legal theory, it was especially Serio Galeotti who spoke, in this regard, of a vertical or ‘paternal’ solidarity,⁷³ emerging in all forms of social intervention aimed, under Art 3 of the Constitution, at

‘removing obstacles of an economic and social nature which, by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the

⁶⁹ See Art 1 legge costituzionale 20 April 2012, no 1.

⁷⁰ See Corte costituzionale 7 April 2014, no 88.

⁷¹ See Corte costituzionale 28 January 2004, no 16; Corte costituzionale 22 September 2005, no 219; Corte costituzionale 13 December 2006, no 451; Corte costituzionale 19 March 2007, no 105; Corte costituzionale 25 February 2008, no 45; Corte costituzionale 13 February 2012, no 22.

⁷² See legge costituzionale 11 February 2022, no 1, which also modified Art 41 Cost (see sections V.2 and V.3 below).

⁷³ S. Galeotti, n 15 above, 11.

political, economic and social organization of the country'.⁷⁴

On the contrary, precisely through solidarity the principle of equality in the formal sense can transcend the narrow confines of citizenship – to which Art 3, para 1, of the Constitution links it. In this regard, Luigi Mengoni saw solidarity as an 'objective legal principle complementary to the principle of equality enunciated in article 3'.⁷⁵ More generally, this approach helps trace the provisions recognizing social rights back to that same dimension enshrined in Art 2 of the Constitution.

Moreover, this holistic and teleological approach to the principle of solidarity helps place within a coherent framework two elements emerging from judicial practice. Firstly, the fact that courts have repeatedly recognised duties of solidarity upon public bodies. Secondly, the fact that courts – in an only apparently contradictory way – have referred to the solidarity of private individuals in terms of a duty, even when the related conduct is undoubtedly a spontaneous and incoercible act.⁷⁶ In the latter cases, the duties emerging from the principle of solidarity are not to be referred to private individuals, but more properly to the lawmakers or, in any case, to the political branches of the government.⁷⁷

2. Private Actors: Rights/Duties of Solidarity

As far as the application to private actors is concerned, it should firstly be pointed out that the Constitution rejects the traditional irreconcilability between right and duty. The same legal situation may simultaneously give rise to and be shaped by both. This does not concern all the norms which constitute the manifestation of solidarity, but it does emerge from the provisions concerning to economic relations. Art 41, para 2, imposes a negative duty, namely that freedom of economic initiative must not be carried out 'in contrast to social utility or in such a way as to damage health, environment, security, freedom and human dignity'.⁷⁸ Similarly, Art 42, para 2, allows at least potentially for a functionalization of private property. But this also emerges from the provisions dedicated to work,⁷⁹ family and parental care,⁸⁰ health,⁸¹ education,⁸² voting.⁸³

⁷⁴ Art 3, para 2, cost

⁷⁵ L. Mengoni, n 34 above, 1998, 13.

⁷⁶ As in the case of volunteering and community service, and even donations to beggars: see Corte costituzionale 15 December 1995 no 519. In relation to the overcoming of the conception of solidarity as a regulatory obligation imposed upon individuals, see also Corte costituzionale 17 February 1992 no 75, holding that volunteering and voluntary action represent 'the most direct realization of the principle of social solidarity'. See also section V.1 below.

⁷⁷ See Corte costituzionale 17 February 1992 no 75; Corte costituzionale 15 April 1992 no 202; Corte costituzionale 8 July 2004 no 228; Corte costituzionale 13 May 2015 no 119; Corte costituzionale 27 January 1972 no 12.

⁷⁸ This formulation follows the recent constitutional reform made with legge costituzionale 11 February 2022, no 1, which introduced the words 'health' and 'environment', thus explicitly constitutionalising such goods as limits to the freedom of economic initiative.

⁷⁹ Art 4, para 2, Constitution.

⁸⁰ Art 30, para 1, Constitution.

Welding together of rights and duties that emerge from the (meta-) principle of solidarity is particularly useful when it comes to the referability of duty – bound legal positions to non-citizens, that is, foreigners and stateless persons. In this context, it should be remembered that only Art 53, para 1, of the Constitution requires ‘everyone’ to fulfil the duty to contribute to public spending, while the other provisions expressing duties are addressed to citizens. However, scholarship generally argue that the question cannot be resolved in a general way for all duties, ‘each of which shows a different preceptive scope, differently operating in the con-fronts of non-citizens’.⁸⁴ Here, too, a holistic/teleological vision of the principle of solidarity comes to help. Indeed, if solidarity is conceived as the normative precept devoted to achieving integration *within* the (potential) conflict, then it seems natural that, as the multi-cultural characteristics of the Republic grow, duties of solidarity can also be demanded by those who are not citizens but are part of the political-social community, that is, of the Republic to which Art 2 of the Constitution refers. On the other hand, this development goes together with the extension of rights – including social rights – to non-citizens. At least in the Italian legal system, this involves a radical change in perspective, also supported by the case law of the Constitutional court:⁸⁵ in the pluralistic state, the fundamental question is no longer about what rights may be extended to non-citizens, but rather what rights may be limited to citizens.⁸⁶

This perspective has been supported by the Constitutional court in decisions concerning the obligation of stateless persons to serve in the army,⁸⁷ to the limits of seizure of retirement pensions,⁸⁸ and to the right to family reunification in connection with the duties of parental care.⁸⁹ This same perspective is coherent with the view, expressed in most recent scholarship, that

‘reasoning about potential constitutional duties of non-citizens means reflecting not on the specific legal obligations to which the system subjects them, but on the solidarity that can be asked them to the purposes of a better social coexistence’.⁹⁰

⁸¹ Art 32, paras 1 and 2, Constitution.

⁸² Art 34, para 2, Constitution.

⁸³ Art 48, para 2, Constitution. See also F. Polacchini, n 5 above, 225-226.

⁸⁴ A. Morelli, ‘I principi costituzionali relativi ai doveri inderogabili di solidarietà’ *Forum quaderni costituzionali – Rassegna*, 20 April 2015, 1-29.

⁸⁵ See, eg, Corte costituzionale 15 November 1967 no 120; and, more recently, Corte costituzionale 9 July 2020, no 186.

⁸⁶ See E. Rossi, ‘Art. 2’, in R. Bifulco, A. Celotto and M. Olivetti eds, *Commentario alla Costituzione* (Torino: UTET, 2006), I, 107-111.

⁸⁷ Corte costituzionale 10 May 1999 no 172.

⁸⁸ Corte costituzionale 20 November 2002 no 506.

⁸⁹ Corte costituzionale 12 January 1995 no 28; Corte costituzionale 17 June 1997 no 203; Corte costituzionale 12 July 2000 no 376.

⁹⁰ F. Polacchini, n 5 above, 167-168.

IV. Objective Scope of Application

1. Solidarity as a Norm Granting Peremptory Nature to Other Norms

With regard to the specific normative content of the principle of solidarity, it should be reiterated that, in the Italian legal system, solidarity is configured as a meta-principle. This means that its normativity goes primarily through *other* constitutional norms with which it interacts dynamically. Here, such norms can only be recalled cursorily. However, some issues can be briefly addressed.

The first issue is the peremptory (*inderogabile*) nature of the duties of solidarity under Art 2 of the Constitution. The exact meaning of that ‘mandatory’ remains relatively underexplored. However, scholarship and jurisprudence⁹¹ tend to agree that it constitutes the equivalent, in terms of duties, of the ‘inviolability’ which Art 2 itself attributes to rights.⁹² This means that, while not all constitutional duties are necessarily to be qualified as duties of solidarity, those falling within the sphere of this principle are peremptory. Likewise, solidarity and the principles that apply to it are configured as supreme, particularly to the purposes of ‘resistance’ to constitutional revision or to the application of external normative sources (international and/or supranational) that may make them ineffective in their core normative content.⁹³ Put otherwise, the instrumentality of other constitutional norms to (the purposes of) solidarity grants them a peremptory/supreme nature.

2. Solidarity as a Norm ‘Opening’ the Set of Constitutional Duties

Another long-standing question linked to the solidarity principle in the Italian system concerns whether the list of the duties is exhaustive or not, that is, whether duties can be identified which go beyond those explicitly or implicitly recognized in the constitutional text and, if so, on the basis of which substantive and procedural conditions.⁹⁴ The generally negative answer given by the scholarship⁹⁵ probably derives from an approach linked to typical schemes of the

⁹¹ Corte costituzionale 17 February 1992 no 75.

⁹² See G. Lombardi, n 6 above; and C. Carbone, *I doveri pubblici individuali nella Costituzione* (Milano: Giuffrè, 1968).

⁹³ See B. Pezzini, n 4 above, 94. The reference here is to the so-called ‘counter-limits’ developed by the Italian Constitutional Court, that is, the ‘supreme principles of the constitutional order’ that prevail against any conflicting norm and even against constitutional reforms infringing upon their core normative value: see Corte costituzionale 18 December 1973 no 183; Corte costituzionale 5 June 1984 no 170; Corte costituzionale 13 April 1989 no 232. See also, for the application of the *controlimiti* theory, Corte costituzionale 22 November 2014 no 238; and Corte costituzionale 23 November 2017 no 24. For an early comparative perspective, see A.-M. Slaughter, A. Stone Sweet and J. Weiler eds, *The European Courts & National Courts. Doctrine and Jurisprudence: Legal Change in its Social Context* (Oxford: Hart, 1998).

⁹⁴ F. Polacchini, n 5 above, 182-185.

⁹⁵ G. Lombardi, n 6 above, 39; C. Carbone, n 92 above, 35; A. Cerri, ‘Doveri pubblici’

liberal rule of law, which has influenced the same interpretation of (especially civil) rights. If limits to freedom are conceived as a compression of some (historical or ideal) pre-existing condition of freedom, they can arise only as an exception and from express provisions. Such approach, which was perhaps one of the reasons for the weak resistance of the liberal component to the inclusion of the duties of solidarity in the Constitution, is also based on Art 23 of the Constitution, according to which ‘no obligation of a personal or financial nature may be imposed on any person except by law’. In the light of such provision, even those authors who have defended the possibility of extending the list of constitutional duties have considered that they

‘are destined to be translated at the level of individual legal positions through precise obligations established, within the framework of the constitutional text, by the ordinary legislator’.⁹⁶

The Constitutional Court, for its part, held that it is up to the legislator to identify the duties of solidarity which citizens are obliged to fulfill, as well as the ways and limits of fulfilling them.⁹⁷ In this way, the practical relevance of the debate on the open or closed nature of constitutional duties has been reduced. Only recently has a part of the scholarship begun to untie duties from their supposed function of mere limitation of freedom, explicitly opening up the possibility that they represent an open-ended list.⁹⁸

Even in this area, however, the debate seems to still be linked to a narrow view of the principle of solidarity, where the latter is identified with the provisions concerning only duties upon private individuals. A broader and more holistic understanding of the principle may lead to outline the issue differently. Firstly, some constitutional provisions expressive of the principle of solidarity may be interpreted as directly binding private individuals, without the need for legislative intermediation, insofar as they require no ‘obligation of a personal or financial nature’ (for example, Art 54 of the Constitution concerning the duty of loyalty to the Republic).⁹⁹ Secondly, if one understands the principle as also directed to government bodies, there is no normative justification to consider the list of duties as closed-ended. Understood in this way, the principle of solidarity functions as a kind of continuous generator of new duties on the part of the political branches of the government, to be checked and, if necessary, adjudicated by the organs of constitutional guarantee, notably the Constitutional Court.

Enciclopedia giuridica (Roma: Treccani, 1989), XII, 1; F. Polacchini, n 5 above, 172-182.

⁹⁶ A. Barbera, ‘Articolo 1’, in G. Branca ed, n 64 above, 99.

⁹⁷ Corte costituzionale 15 July 1983, no 252.

⁹⁸ See S. Rodotà, *Solidarietà. Un’utopia necessaria* (Roma-Bari: Laterza, 2014), 42; F. Polacchini, n 5 above, 184-185.

⁹⁹ See A. Morelli, n 84 above, 6, 9.

3. Macro-Areas of Application and Overlaps

The approach just described also helps reconfigure the tripartition of duties of solidarity outlined in the Constitution itself. Indeed, Art 2 of the Constitution qualifies solidarity as ‘political, economic and social’. These are conventional partitions which, in fact, almost always overlap, especially considering the increasing permeability between the state, the economy, and society at large that characterizes contemporary societies. However, if the principle of solidarity is seen as an *objective* normative precept, aimed at favoring integration around certain material values by sustaining and mediating conflict, one may argue that *political* solidarity concerns situations in which this purpose is carried out through (participation in) the determination of the – legislative or administrative – ‘will’ of the state-person. Economic solidarity is more specifically aimed at managing conflict and promoting integration, in the face of inequalities and imbalances permanently generated by the market economy, or in any case by the capitalist mode of production, which are also recognized in the Constitution. Social solidarity, finally, is a residual category, concerning cases in which conflict and integration take place outside of contexts specifically attributable to the state or the economy.

Thus, political solidarity does not only include the duties of loyalty to the Republic and the fulfillment of public functions with discipline and honor,¹⁰⁰ or the right/duty to vote,¹⁰¹ or the defense of the homeland,¹⁰² but also the norms related to vertical subsidiarity and the unity of the Republic in the decentralized order.¹⁰³ Economic solidarity includes not only the norms concerning the limits of freedom of economic initiative,¹⁰⁴ the social function of private property, its limitation and expropriation,¹⁰⁵ or the ability to pay taxes and the progressiveness of the tax system;¹⁰⁶ but also those relating to the introduction of means and apparatuses to guarantee the rights to assistance and social security,¹⁰⁷ the promotion of cooperation with a mutual character,¹⁰⁸ the public budget and the sustainability of the public debt,¹⁰⁹ the determination and management of the essential services concerning civil and social rights to be guaranteed throughout the national territory,¹¹⁰ the forms of equalization and

¹⁰⁰ Art 54, paras 1 and 2, Constitution.

¹⁰¹ Art 48, paras 1 and 2, Constitution.

¹⁰² Art 52, paras 1, Constitution.

¹⁰³ Arts 5, 87 para 1, 95 para 1; 117; 118 para 1; and 120 para 2 Constitution. See F. Polacchini, n 5 above, 55-60.

¹⁰⁴ Art 41, para 2, Constitution.

¹⁰⁵ Arts 42 paras 2 and 3; 43; 44 Constitution.

¹⁰⁶ Art 53, paras 1 and 2, Constitution.

¹⁰⁷ Art 38 Constitution.

¹⁰⁸ Art 45 Constitution.

¹⁰⁹ Arts 81 para 1 and 6, Constitution, as modified by Art 1 legge costituzionale 20 April 2012, no 1.

¹¹⁰ Arts 117, para 2, lett m), and 120, para 2, Constitution.

financial redistribution.¹¹¹ Social solidarity includes not only the rights/duties of parents to support, instruct and educate their offspring, but also the duty of the 'law' – here understood as the state-administration – to perform such duties in the event of their incapacity or, in a completely different field, the duty to encourage 'the autonomous initiative of citizens, both individuals and associations, to carry out activities of general interest'.¹¹² The examples could continue.

Likewise, there are certainly norms which fall into various forms of solidarity. Those on primary education under Art 34 para 2 or on health, 'fundamental right of the individual and interest of the community'¹¹³ undoubtedly have profiles that fall within the scope of all three categories, insofar as the protection of one's health or education has effects of economic progress and political integration of broader scope. Emblematic examples, however, are those of the right/duty to work and fiscal solidarity.

In the Italian constitutional system, work is not only an activity aimed at ensuring livelihood or economic growth but it is also a 'socially useful activity',¹¹⁴ an instrument for emancipation and the development of the human person in her social relations. In the original intentions of the First Subcommittee of the Constituent Assembly, it was even a qualified ground for participation in the determination of public policies.¹¹⁵ As will be seen, such axiological density contributes to making difficult the introduction in Italy of universal income systems, unrelated to a specific work relationship.

Similar considerations apply to the duty to pay taxes under Art 53, para 1, which, going beyond the liberal vision of the tax as a service corresponding to the provision of benefits for the obliged, reconstructs it as a duty to contribute to the very subsistence of the State. In this way, the tax duty reflects the principle of solidarity both on the economic and on the political level.¹¹⁶ The intrinsic political nature of fiscal solidarity also emerges in the progressiveness informing the tax system.¹¹⁷ The latter expresses an axiological choice with respect to the distribution

¹¹¹ Art 119, paras 3 and 5, Constitution.

¹¹² Art 118, para 4, Constitution. See B. Pezzini, n 4 above, 96-98; F. Polacchini, n 5 above, 60-74. See also Corte di Cassazione 3 April 2015 no 6833.

¹¹³ Art 32 para 1, Constitution.

¹¹⁴ As Giuseppe Dossetti explicitly declared on 4 October 1946 at the Constituent Assembly: see *Atti della Assemblea Costituente, Commissione per la Costituzione, I Sottocommissione*, 4 November 1946, 195-196.

¹¹⁵ *Atti della Assemblea Costituente, Commissione per la Costituzione, I Sottocommissione*, 15 November 1946, 385-398.

¹¹⁶ Corte costituzionale 4 April 1963 no 45; Corte costituzionale 18 March 1965 no 16; Corte costituzionale 16 June 1965 no 50; Corte costituzionale 10 January 1978 no 6; Corte costituzionale 3-18 February 1992 no 51. In the same direction, see also Art 119, para 5, Constitution: '(I)n order to promote economic development, cohesion and social solidarity, to remove economic and social imbalances, to promote the effective exercise of personal rights, or to provide for purposes other than the normal exercise of their functions, the State allocates additional resources and makes special interventions in favor of certain municipalities, provinces, metropolitan cities and regions'.

¹¹⁷ Art 53, para 2, Constitution.

of the tax burden, insofar as it tends towards a more than proportional impoverishment of assets of the subjects endowed with greater wealth and less than proportional impoverishment of the economically weaker subjects, and therefore produces redistributive and not retributive results. But fiscal solidarity also has a purely social profile, insofar as Art 53, para 1, of the Constitution establishes the ability to pay as a guarantee of the situations of private individuals with respect to taxation, insofar as it requires that the levy be linked to objective and non-arbitrary criteria; and at the same time provides special protection against potential unfavorable treatment of social groups considered worthy of protection (eg, religious denominations.)¹¹⁸ In all these cases, (social) solidarity is configured as a barrier against arbitrary or unreasonable drifts of the taxing power of the state.

4. Normative Surplus

To conclude on the objective scope of application, one needs to emphasise what could be defined as the normative surplus of the principle of solidarity with respect to the other norms in connection with which it operates. Every time solidarity comes into play, where the conflict between interests and legal positions could lead to political, economic, or social disintegration, it shifts the normative balance towards integration, in respect of certain values. The objective normative value derivable from the principle of solidarity, then, serves primarily to make ‘the balance between the reasons of economic calculation and those of social development unequal’.¹¹⁹ Here again, the goal is not merely compensation, but rather *redress*. Its application implies or legitimizes asymmetrical outcomes – in purely retributive terms – but in any case aimed at redressing inequalities emerging, continuously and in ever different forms, from political, economic and social spheres, especially as a consequence of the capitalist mode of production.

At the level of its normative operationalisation, this consideration leads to break down the constitutional principle of solidarity into at least three directions: a) as a norm of conduct for private subjects, mostly through the intermediation of implementing legislation; b) as a norm relating to lawmaking; c) as a norm of legal interpretation for courts and other legal operators.

Further analysis of these guidelines, in connection with international and supranational sources, is developed below. In a broad sense, all the welfare legislation is an implementation of the constitutional principles of solidarity and substantial equality. Here, we will proceed in a necessarily fragmentary way, examining the regulatory fields which best show the Janus-faced character of the principle of solidarity, at one and the same time generating conflict and integration.

¹¹⁸ Art 20 Constitution.

¹¹⁹ M. Luciani, ‘Economia (nel diritto costituzionale)’ *Digesto delle discipline pubblicistiche* (Torino: UTET, 1990), V, 378. See also Corte costituzionale 19 November 2012 no 264.

V. Implementing Solidarity

1. Social Security, Healthcare, and Third Sector

A first point of emergence is the legislation on social security. The Constitution outlines an articulated system of welfare and social security protection, imposing promotional and affirmative action obligations upon the legislator and the public authorities, but also recognizing, from a personalistic and pluralistic point of view, the role of private individuals and social groups.

Starting in the 1960s – but building on earlier legislation¹²⁰ – lawmakers began to implement the constitutional system, drawing inspiration from a unitary model of social security. The latter was understood as

‘a complex system through which the public administration or other public bodies achieve the public goal of solidarity by providing benefits (pecuniary or of other kinds) or services to citizens who are in need due to the occurrence of certain risks’.¹²¹

This model, then defined as ‘solidaristic’ in opposition to the mutualistic model,¹²² is characterised by a tendency towards universal coverage; is centered on benefits provided by public bodies; and generally is based on the assumption that the distinction between assistance and social security has a merely organizational nature. Further, such model guarantees both insured workers and uninsured citizens ‘adequate means for their living needs’.¹²³ It is funded in principle by general government budget, through a tax system based on progressive criteria,¹²⁴ and embraces the protection of the right to health,¹²⁵ the family, maternity, childhood, youth,¹²⁶ as well as work, with particular reference to that performed by women and minors.¹²⁷

This model inspired several legislative measures: the extension of the automaticity of social security benefits – provided for in general terms by Art 2116 of the Civil Code in relation to the payment of contributions – to the social protection against disability, old age and in favour of survivors;¹²⁸ the commensuration of pensions to the last income;¹²⁹ the extension of social

¹²⁰ See section II.1 and n 50 above.

¹²¹ M. Persiani, ‘Sicurezza sociale’ *Novissimo Digesto Italiano* (Torino: UTET, 1970), XVII, 304.

¹²² Characterized by the general correspondence between risk and contribution and by a rigorous proportionality between contributions and social security benefits.

¹²³ As provided by Art 38 para 2 Constitution.

¹²⁴ Art 53 Constitution.

¹²⁵ Art 32 Constitution.

¹²⁶ Arts 30 and 31 Constitution.

¹²⁷ Arts 4, 35-37 Constitution.

¹²⁸ Art 27 para 2, regio decreto-legge 14 April 1939 no 636, as modified by Art 23-ter decreto legge 30 giugno 1972 no 267.

¹²⁹ Arts 7-18, legge 30 April 1969 no 153.

security protection beyond the category of employed workers;¹³⁰ the introduction of social pensions funded by the general public budget.¹³¹ The very institution¹³² of the National Health Service (*Servizio Sanitario Nazionale* - SSN), inspired by the principles of universality, equality and globality of healthcare, was regarded as the final affirmation of the ‘solidaristic’ model.¹³³

The Constitutional Court has accepted the distinction between mutualistic and solidaristic models for classification purposes. In this context, it has repeatedly underlined that the solidarity-based model does not imply the necessary correspondence between contributions paid and benefits provided. For example, on the matter of pension ceilings, the Court has referred to the principle of solidarity as a corrective to that of proportionality of the pension to the personal contributions paid;¹³⁴ or to justify the higher withholding of contributions on supplementary special allowances, severance pay, as such institutes have a both retributive¹³⁵ (deferred) and redistributive¹³⁶ nature. However, the Court has never taken a position on the question of which model – mutualistic or solidaristic – is more coherent to the Constitution, especially to Art 38, para 4, according to which ‘Responsibilities under this article are entrusted to entities and institutions established by or supported by the State’.¹³⁷ To be sure, it has stressed on several occasions that the principle of solidarity inspires the entire social security system, especially in its functional aspect.¹³⁸ However, it has deferred the choice of implementation and organisational instruments to the discretion of the political branches,¹³⁹ limiting itself, for example, to affirming that

‘the principle of solidarity (...) does not allow the (...) funding (of private social security) to be entirely exempted from contribution to public

¹³⁰ Legge 2 August 1990 no 233.

¹³¹ Art 26, legge 30 April 1969 no 153.

¹³² Legge 23 December 1978 no 833.

¹³³ A further expansion of such model of healthcare, much later, could perhaps be identified in legge 8 November 2000 no 328, on the ‘integrated system of interventions and social services’ which, together with the case law of the Constitutional Court, contributed to extend it to non-citizens. See also below, at the end of this section.

¹³⁴ Corte costituzionale 27 June 1986 no 173; 26 November 1988 no 1008; 20 February 1990 no 72; 21 February 1990 no 99; 3 May 1990 no 243; 17 February 1992 no 73; 13 December 1993 no 453; 8 June 1994 no 240; 22 June 1994 no 264; 8 March 1995 no 88; 13 July 1995 no 369; 16 May 1996 no 166; 24 November 1997 no 362.

¹³⁵ Corte costituzionale 13 April 1977 no 62; 2 May 1984 no 132; 27 June 1986 no 173; 25 February 1991 no 96; 27 February 1991 no 119; 7 May 1997 no 127.

¹³⁶ Corte costituzionale 10 March 1993 no 99; 20 November 2002 no 506; 13 March 2003 no 87.

¹³⁷ Corte costituzionale 2 May 1984 nos 132 and 133; 23 January 1986 no 31; 25 June 1986 no 169; 7 May 1987 no 171; 26 October 1988 no 1008; 20 July 1995 no 390; 24 November 1997 no 362; 9 June 2008 no 202; 21 February 2018 no 67.

¹³⁸ Corte costituzionale 27 June 1975 no 187; 12 February 1976 no 30; 25 June 1986 no 169; 27 June 1986 no 173; 17 June 2002 no 259.

¹³⁹ Corte costituzionale 13 February 1969 no 22; 27 February 1991 no 119; 22 March 1995 no 99; 7 May 1997 no 127; 22 May 2002 no 227; 20 November 2002 no 506; 25 February 2008 no 47; 7 May 2012 no 119; 6 June 2017 no 194; 20 May 2020 no 122.

social security, especially if backed by medium-high incomes'.¹⁴⁰

Starting from the early 1990s, this flexible stance of the Court has allowed lawmakers to reverse course and to (re)introduce mutualistic, retributive and privatistic elements. This inversion was also justified by the need to address limits that had emerged in a welfare model marked by familism, limited protection of social risks other than old age and disability, relative tolerance of informal work and tax evasion, low efficiency of public administration and poorly controlled public spending. This system began to falter with the first financial crises, in turn linked to the weakening of certain macro-economic assumptions essential to the model's survival: low unemployment, stable demographic trends and a strong network of intergenerational solidarity in family relationships.¹⁴¹

The legislator has thus created, for example, the system of the so-called health ticket, an instrument – introduced in 1989¹⁴² and stabilized in 1993¹⁴³ – with which citizen participate in the financing of medical services in relation to the family economic situation and the health of family members. With a view to boosting the competitiveness of healthcare administrations, the decreto legislativo 30 December 1992 no 502 launched the regionalization of the SSN, confirmed and strengthened first by decreto legislativo 19 June 1999 no 229 and then by legge costituzionale 18 October 2001 no 3. The latter, by reforming Title V of Part II of the Constitution, has made the protection of health a matter of concurrent legislation between the State and the Regions: the State determines the 'essential levels of care', while the Regions have exclusive competence in the regulation and organization of health services in the financing of the health authorities. The regionalization of the SSN has, however, triggered processes of privatization and competition between the Regions, often causing significant imbalances between territories with different levels of income per inhabitant, and thus coming into tension with the ultimate goals of the principle of solidarity. Similarly, starting from law 8 August 1995 no 335 and, more recently, with law 28 June 2012 no 92, the funding of the social security system has gradually abandoned the wage-based method in favor of the contributory method.

The Constitutional Court, for its part, has played a crucial role in extending or legitimizing the application of the principle of solidarity to the overall system of social security. Significant examples are the extension of exemptions from the so-called health ticket;¹⁴⁴ the extension of the survivor's pension to the surviving spouse;¹⁴⁵ the payment to the separated spouse of part of the severance

¹⁴⁰ Corte costituzionale 24 September 1990 no 427.

¹⁴¹ Corte costituzionale 22 October 2020 no 234.

¹⁴² Art 1 decreto legge 25 November 1989 no 382, as modified by legge 25 gennaio 1990 no 8.

¹⁴³ Art 8, paras 14-16, legge 24 December 1993 no 537.

¹⁴⁴ Corte costituzionale 19 April 1993 no 184; 5 June 2018 no 172; 7 April 2020 no 91.

¹⁴⁵ Corte costituzionale 15 June 2016 no 174; 11 March 1999 no 70; 27 October 1999 no 419.

pay;¹⁴⁶ the extension of paid parental leave in cases when the child who is not (yet) co-habiting;¹⁴⁷ the non-suspension of contributions even in the absence of work;¹⁴⁸ the extension to foreigners of the attendance allowance or the civil invalidity pension,¹⁴⁹ or their admission to the national civil service.¹⁵⁰

However, the Constitutional Court has also legitimized the ‘sectorialization’ of the social security system, arguing that

‘the external solidarity of the entire community can only exceptionally and subsidiarily integrate the solidarity of specific categories by reason of the tendency to self-finance of category social security systems’.¹⁵¹

At the same time, the Court has generally legitimized measures of financial austerity adopted in the context as a consequence of the 2008 crisis. With some exceptions concerning measures restricting benefits connected to the exercise of certain professions;¹⁵² regulations that provided for a ‘solidarity contribution’ imposed on a single category of citizens and acquired by the State;¹⁵³ and the lack of revaluation of medium-low pension treatments, the Court has generally rejected questions relating to measures to contain public spending, especially those relating to the freeze on salary increases.¹⁵⁴

A line of case law in which the Janus-face of the principle of solidarity emerges in an evident way, is that relating to vaccination obligations in children and those required to carry out certain work activities. As the preservation of health is *also* a public interest, solidarity provides a basis for the limits¹⁵⁵ to the freedom of private individuals to refuse medical treatment.¹⁵⁶ At the same time, solidarity is the basis of the duty of public bodies to pay in any case a fair compensation – distinct and possibly further than the compensation for tort under Art 2043 of the Civil Code – if the vaccination results, directly or indirectly, in a health damage.¹⁵⁷

Another interesting example is the legislation aimed at combating poverty

¹⁴⁶ Corte costituzionale 17 January 1991 no 23.

¹⁴⁷ Corte costituzionale 7 November 2018 no 232.

¹⁴⁸ Corte costituzionale 3 February 1992 no 52.

¹⁴⁹ Corte costituzionale 11 March 2013 no 40; 27 January 2015 no 22; 7 October 2015 no 230.

¹⁵⁰ Corte costituzionale 13 May 2015 no 119.

¹⁵¹ Corte costituzionale 29 April 2015 no 88; 23 February 1995 no 78.

¹⁵² Corte costituzionale 8 October 2012 no 223.

¹⁵³ Corte costituzionale 3 June 2013 no 116.

¹⁵⁴ Corte costituzionale 8 October 2012 no 223; 4 December 2012 no 304; 10 December 2013 no 310; 15 January 2014 no 7; 21 May 2014 no 154; 9 July 2014 no 219; 5 April 2016 no 96; 5 July 2016 no 173.

¹⁵⁵ Recognized under certain conditions by Art 32, para 2, Constitution.

¹⁵⁶ According to the general rules laid down in Art 33 legge 23 December 1978 no 833 and in specific fields by ad hoc provisions: see Arts 1 and 3 decreto legge 7 June 2017 no 73, as modified by legge 31 July 2017 no 119. See also Corte costituzionale 22 November 2018 no 5.

¹⁵⁷ Corte costituzionale 14 June 1990 no 307; 20 June 1994 no 258; 15 April 1996 no 118; 23 February 1998 no 27.

and income support. In this field, legislation has been particularly confused and disorganized, lacking coherent visions and long-term financial prospects. One thinks of the minimum integration income, introduced with Art 47 of legge 27 December 1997 no 449 and Art 1 of decreto legislativo 18 June 1998 no 237, and then expanded with Art 23 of legge 8 November 2000 no 328; of the ‘income of last resort’;¹⁵⁸ of the ‘inclusion income’;¹⁵⁹ up to the most recent ‘citizenship income’, introduced with Art 1 decreto legge 28 January 2019 no 4, as modified by legge 28 marzo 2019, no 26. Although to varying degrees, all these measures have mostly been configured as aimed at favouring access to the labour market, rather than at tackling the poverty of citizens in a state of need. Especially within the framework of the so-called ‘citizenship income’, the income support is closely linked to the availability to work.

At an axiological level, this approach can be traced back to an interpretation of the model of social security provided for in the Constitution, in which the welfare measures are linked to work *also* understood as a duty, as well as a narrow reading of the concept of involuntary unemployment under Art 38, para 2, Constitution. This explains the ‘conditional’ schemes to which these measures have generally been linked, both to determine admission to the benefit and to continue to receive it. Significantly, among other conditions, the beneficiary of the Citizenship Income is obliged, under penalty of forfeiture, to offer his or her availability for participation in projects managed by the municipalities, useful to the community, with the right to withdraw recognised only for the disabled or those no longer of working age. The axiological - one could say ‘ethical’ - orientation of these solidarity interventions also emerges in the conditions that exclude or suspend from the benefit those who at the time of the application or during pay-out are convicted, even if not definitively, of certain crimes.¹⁶⁰ In spite of such problematic profiles, underlined by the scholarship,¹⁶¹ these conditions have been considered not unreasonable by the Constitutional court.¹⁶²

A final example is the regulation of volunteering. The system in force in the pre-Republican era, headed by legge 17 July 1890 no 6972 (the so-called Legge Crispi) and regio decreto 30 December 1923 no 2841 of 1923, was inspired by criteria of strict state control, in a framework of public control of charitable and welfare institutions of private or religious origin. This system has undergone its first modifications only starting from the 1970s, with some transfers of administrative functions to the Regions,¹⁶³ but still within a rigidly public

¹⁵⁸ Art 3, para 101, legge 24 December 2003 no 350.

¹⁵⁹ Art 1, decreto legislativo 15 September 2017 no 147.

¹⁶⁰ Art 7, para 3, decreto legge 28 January 2019 no, as modified by legge 28 marzo 2019 no 26.

¹⁶¹ See eg M.A. Gliatta, ‘Prima il dovere e (poi) il diritto: alla ricerca degli “ossimori costituzionali” nella cura dei figli’, in F. Marone ed, *La doverosità dei diritti. Analisi di un ossimoro costituzionale?* (Napoli: Editoriale Scientifica, 2019), 221.

¹⁶² Corte costituzionale 20 May 2020 no 122.

¹⁶³ Decreto del Presidente della Repubblica 15 January 1972 no 9; decreto del Presidente della

framework.¹⁶⁴ The decisive push for a greater involvement of private entities – consistent with the ‘social’ inspiration that emerges from Arts 18, 19, 33 and 38 of the Constitution – came in 1988 from the Constitutional court which declared the unconstitutionality of Art 1 of Legge Crispi, for breach of to Art 38, para 5, of the Constitution,¹⁶⁵ as it did not provide that regional and infra-regional welfare and charity bodies could continue to exist by assuming the legal status of private law, when they met the necessary conditions. This decision was followed by legge 11 August 1991 no 266. This law for the first time considered volunteering no longer as a phenomenon to be included (and controlled) in the public apparatus, but as a fundamental dimension of a solidarity-based state, ‘an expression of participation, solidarity and pluralism’¹⁶⁶ having an autonomous constitutional importance. The same law defined volunteering as an activity ‘performed in a personal, spontaneous and free way, through the organization of which the volunteer is part, without profit even indirectly and exclusively for purposes of solidarity.’¹⁶⁷ Almost immediately followed the decision 17 February 1992 no 75 of the Constitutional Court, a milestone for the principle of solidarity and for the discipline of volunteering, defined as

‘the most direct realization of the principle of social solidarity, for which the person is called to act (...) for free and spontaneous expression of the deep sociality that characterizes the person itself. This principle, involving the original connotation of man *uti socius*, is placed by the Constitution among the fundamental values of the legal system (...)’.¹⁶⁸

This judgment also stands out because, insofar as it imposes a general framework at the national level,¹⁶⁹ it highlights the integrative purposes that the principle of solidarity expresses among the various levels of government.

Since then, lawmakers has been committed to the promotion of the voluntary dimension of solidarity, regulating and incentivizing social interventions on the part of private entities, with a view to horizontal subsidiarity, later constitutionalized in Art 118, para 4, of the Constitution.¹⁷⁰ An expression of this trend were Art 4 legge 15 March 1997 no 59; Art 3 decreto legislativo 18 August 2000 no 267 (the so-called TUEL); the decreto del Presidente del Consiglio dei Ministri 30 March 2013; legge 8 November 2000 no 328 on social services,

Repubblica 24 July 1977 no 616.

¹⁶⁴ With the exception of legge 12 February 1968 no 132, which removed from the scope of application of general regulation of legge no 6972/1890 the institutions for the care and hospitalization of the sick, in order to integrate them into the healthcare system.

¹⁶⁵ Corte costituzionale 24 March 1988 no 396.

¹⁶⁶ Art 1, para 1, legge 11 August 1991 no 266.

¹⁶⁷ Art 2, para 1, legge 11 August 1991 no 266.

¹⁶⁸ Corte costituzionale 17 February 1992 no 75.

¹⁶⁹ See Corte costituzionale 15 April 1992 no 202; and 29 December 1993 no 500.

¹⁷⁰ With Art 4 of legge costituzionale 18 October 2001 no 3.

which introduced the discipline of Associations of social promotion, up to legge 6 June 2016 no 106 and the related decreto legislativo 3 July 2017 no 117 implementing it. These last two instruments stand out, in particular, for having defined in a more precise way the ‘Third Sector’ and the subjects that can be included into it¹⁷¹ and, more generally, for having outlined ‘a new economic and welfare policy, set on overcoming the dualism between State and market’.¹⁷²

2. Strike

A second macro-area where the Janus-faced character of the principle of solidarity in the Italian constitutional system emerges is the right to strike. As an intrinsically conflictual conduct and a crucial instrument of self-protection of the collective claims ‘of subaltern social groups that aim to redress their lack of social strength’,¹⁷³ the Constitution turned the strike from a prohibited conduct¹⁷⁴ into a constitutional right, to be exercised ‘within the laws that regulate it.’¹⁷⁵ This protection represents a manifestation of solidarity in several respects.

Firstly, it reinforces the solidarity among workers towards (and against) their employers. Art 4 of legge 15 July 1966 no 604 and then Arts 15, 16 and 24 of legge 20 May 1970 no 300 (so-called Statute of Workers) have rendered null and void any dismissal determined by participation in union activities, and sanction any related form of discrimination, or any conduct by the employer aimed at preventing or limiting the exercise of the right to strike. Secondly, the legal protection of strike indirectly strengthens and stabilizes the role of trade unions as social formations and even *political* actors, even beyond their strictly contractual/economic agendas. This function of the right to strike in the Italian legal system, which in some ways promotes and protects ‘controlled’ levels of social conflict, emerges also in the judicial practice. Indeed, courts have progressively extended the personal scope of application of the right to strike to self-employed workers and, above all, they have broadened the scope of lawful strike to cases such as political-economic strike (qualified as a right),¹⁷⁶ ‘pure’ political strike (qualified as freedom),¹⁷⁷ and ‘solidarity’ strike, that is, the strike

¹⁷¹ Art 1 legge 6 June 2016 no 106; Art 1 decreto legislativo 3 July 2017 no 117.

¹⁷² D. Caldirola, ‘Stato, mercato e Terzo settore nel decreto legislativo no 117 of 2017: per una nuova governance della solidarietà’ *Federalismi.it* (2018), 1. The new legislation has also been strengthened and clarified by the most recent case law of the Constitutional Court: see Corte costituzionale 20 May 2020 no 131 which, building on Corte costituzionale 17 February 1992 no 75, validated regional legislation broadening the range of actors to be included in the ‘Third Sector’ to the purposes of the participation to territorial and urban planning; and 23 February 2022 no 72, concerning the range of non-profit entities that can access specific kinds of public funding.

¹⁷³ G. Giugni, *Diritto sindacale* (Bari: Cacucci 2006), 230.

¹⁷⁴ Under the fascist penal code of 1930: see Arts 502-508, 330 and 333 Criminal Code.

¹⁷⁵ Art 40 Constitution.

¹⁷⁶ Corte costituzionale 13 December 1962 no 123; 12 December 1967 no 141

¹⁷⁷ Corte costituzionale 19 December 1974 no 290; 2 June 1983 no 165. See also Corte di Cassazione-Sezione lavoro 21 August 2004 no 16515.

carried out by workers in solidarity with the claims of other groups or individual workers, although not directly affected or interested in those claims.¹⁷⁸

From the perspective of the principle of solidarity, the regulation of the strike is interesting with respect to its limits. Based on principles already outlined by the Constitutional Court in relation to Arts 330 and 333 of the Criminal Code,¹⁷⁹ with legge 12 June 1990 no 146, the legislator introduced a general framework to regulate the exercise of this right when it affects ‘essential public services’, a framework that has in turn been the subject of numerous modifications and interventions by the Constitutional Court.¹⁸⁰ These limits are defined as those ‘aimed at guaranteeing the enjoyment of the constitutionally protected rights of the individual to life, health, freedom and security, freedom of movement, social assistance and social security, education and freedom of communication’ (Art 1, para 1). Importantly, also in this case, the normative outlook of solidarity – in the form of conflict-driven integration between (the claims of) the workers and the broader community – is not axiologically neutral. Indeed, limitations to the right of strike in the field of ‘essential public services’ are not permissible to protect economic and property rights, even though they are constitutionally guaranteed.¹⁸¹

3. Economic Freedom and Private Property

Moving to economic freedom and private property, Arts 41 and 42 of the Constitution – which recognize them – repeatedly refer to their social utility, social aims and functions. However, the Constitution has not transformed them into public functions, as they are still configured as subjective rights.¹⁸² However, these legal situations, and particularly the right to property, are not configured as an absolute ownership (dominion) over one’s own assets and goods.¹⁸³ Indeed, lawmakers can introduce, ‘following appropriate evaluations and the necessary balancing of the various interests, those limits which ensure their social function’.¹⁸⁴ In this regard,

‘the social function of property reflects the aspiration to solidarity emerging from the overall constitutional system, giving it effectiveness even in the field that historically has created the greatest inequalities and injustices’.¹⁸⁵

¹⁷⁸ Corte costituzionale 13 December 1962 no 123.

¹⁷⁹ Corte costituzionale 13 December 1962 no 123; 27 February 1969 no 31; 15 July 1976 no 222.

¹⁸⁰ Legge 11 April 2000 no 83; decreto legge 6 July 2012 no 95, as modified by legge 7 August 2012 no 135; legge 24 December 2012 no 228; decreto legge 20 September 2015 no 146, as modified by legge 12 novembre 2015 no 182. See also Corte costituzionale 20 February 1995 no 57; 4 July 2001 no 223; 10 July 2018 no 180.

¹⁸¹ G. Giugni, n 173 above, 250-251.

¹⁸² Corte costituzionale 15 July 1983 no 252.

¹⁸³ Corte costituzionale 9 May 1968 no 55.

¹⁸⁴ Corte costituzionale 15 July 1983 no 252.

¹⁸⁵ F. Polacchini, n 5 above, 77.

Importantly, the recent constitutional reform passed at the beginning of 2022, which modified Art 41 in order to explicitly constitutionalise ‘health’ and ‘environment’ as limits to the freedom of economic initiative,¹⁸⁶ may strengthen the solidarity potential *inherent* in the right to private property. However, it is still premature to assess whether the new formulation will bring any significant change in the interpretation and application of the right to property, especially from the perspective of solidarity

The solidaristic potential inherent in the right to private property – as understood by the Constitution – has been developed by the lawmakers especially in relation to real estate, historically more significant for the low- and middle-income segments of the population. This has happened notably through the regulation of the lease of urban real estate,¹⁸⁷ which has introduced the so-called fair rent for real estate used for residential purposes; and in the regulation of expropriation for public utility,¹⁸⁸ in recent years profoundly influenced by European law.¹⁸⁹

In the context of the relationship with private property, it is also particularly interesting that the principle of solidarity is considered as the basis of the legitimacy for compulsory insurance for civil liability deriving from the circulation of vehicles;¹⁹⁰ as well as for the potential liability of the owner of the vehicle for violations committed by the driver.¹⁹¹ With regard to economic initiative, the application of the principle of solidarity has significant socio-economic implications when it comes to the obligation on producers of certain kinds of medicines to apply a discount on the sale price to the distributors and from the latter to the final users.¹⁹²

4. Civil and Criminal Law

The principle of solidarity has played a crucial role in ‘constitutionalizing’ several areas of civil and criminal law, especially those pre-dating the Constitution itself. In this context, it has performed its functions mainly as an interpretative criterion by both constitutional and ordinary courts. In this sense, the principle of solidarity has contributed to making the entire system coherent to the Constitution.

Proceeding only cursorily, one can recall the application of the principle in conjunction with those of good faith and fairness, as well as with the concept of

¹⁸⁶ See n 78 above.

¹⁸⁷ Arts 12 ff, legge 27 July 1978 no 392.

¹⁸⁸ Decreto del Presidente della Repubblica 8 June 2001 no 327.

¹⁸⁹ See section III.5 below.

¹⁹⁰ Corte costituzionale 5 March 1975 no 56; 24 March 1983 no 77; 10 December 1987 no 560; 20 April 1998 no 138.

¹⁹¹ Corte costituzionale 25 January 2001 no 33; 1 July 200 no 319; 1 July 2003 no 323; 12 January 2005 no 27.

¹⁹² Corte costituzionale 3 July 2006 no 279.

abuse of rights. While it is not necessarily true that good faith is a specification of the mandatory duties of solidarity under Art 2 of the Constitution,¹⁹³ solidarity certainly serves to (re)calibrate these concepts, so that they contribute to rebalance unbalanced contractual or social relations. In this context, the principle of solidarity has represented a fundamental legal basis for jurisprudence, in particular to broaden the area of non-pecuniary damage compensable according to Art 2059 of the Civil Code;¹⁹⁴ as well as to attract legal situations previously included in the area of tort liability under Art 2043 Civil Code into the area of liability for breach of contract under Art 1218 Civil Code (so-called liability from qualified social contact),¹⁹⁵ with significant changes in terms of, for example, burden of proof and statute of limitations. In this context, the main cases considered by courts are: the responsibility of the doctor employed by the healthcare facility towards the patient;¹⁹⁶ the responsibility the bank for false information to third parties and for the payment of non-transferable cheques to a subject with no legitimate title;¹⁹⁷ the responsibility of teacher and pupil;¹⁹⁸ the so-called pre-contractual responsibility.¹⁹⁹ Similarly, the principle of solidarity has been used to interpret Art 1385 of the Civil Code on the subject of the deposit, in the sense of allowing the judge to equitably reduce the amount due in the case of manifest disproportion.²⁰⁰

Further, before *de facto* family relationships were recognized in ordinary legislation with legge 20 May 2016 no 76, the principle of solidarity was used by courts to give them legal relevance. Thus, although the various forms of *de facto* cohabitation have never been equated with the marriage-based family, the Constitutional Court had since the 1980s used the principle to solidarity, for example, to legitimize the succession of the cohabitant or the *de facto* separated

¹⁹³ As argued once by the Italian Supreme Court: see Corte di Cassazione 27 October 2015 no 21782.

¹⁹⁴ See Corte di Cassazione 31 May 2003 nos 8827 and 8828; Corte di Cassazione-Sezioni unite 11 November 2008 no 26972; Corte di Cassazione 9 April 2009 no 8703; Corte di Cassazione 15 July 2014 no 16133.

¹⁹⁵ That is, a particular form of contractual liability that arises not from a 'contract' but from a 'social contact', ie from a relationship that is established between two subjects by virtue (not of an agreement between the parties) but of a legal obligation or as a consequence of another contractual relationship established between different subjects than those of the 'social contact.'

¹⁹⁶ Corte di Cassazione-Sezioni unite 30 October 2001 no 13533.

¹⁹⁷ Corte di Cassazione-Sezioni unite 21 May 2018 no 12477.

¹⁹⁸ Corte di Cassazione-Sezioni unite 27 June 2002 no 9346; Corte di Cassazione 19 September 2017 no 21593.

¹⁹⁹ That is, a form of liability arising from failure to comply with the obligations incumbent on the parties during the negotiations and the formation of the contract: see Corte di Cassazione 12 July 2016 no 14188.

²⁰⁰ Corte di Cassazione 20 April 1994 no 3775; Corte di Cassazione 24 September 1999 no 10511; Corte di Cassazione-Sezioni unite 13 September 2005 no 18128; Corte di Cassazione 18 September 2009 no 20106. See also Corte costituzionale 21 October 2012 no 248; Corte costituzionale 26 March 2014 no 77.

spouse in the lease contract.²⁰¹ In criminal matters, in particular with reference to the crime of domestic abuse, the Court of Cassation has established that the term ‘family’ must be understood as referring to any consortium of persons among whom, due to close relationships and customs of life, relationships of assistance and solidarity have arisen for an appreciable period of time.²⁰² On the other hand, in the matter of regulation of patrimonial relations, the Supreme Court held that the concept of family should not be limited to that based on marriage, but can also include other *de facto* ties qualifiable as social formations under Art 2 Constitution.²⁰³ Also in this field, however, the self-restraint of the Constitutional Court should be emphasized: for example, it has recently rejected questions of constitutionality aimed at decriminalizing the crimes of recruitment and aiding and abetting of prostitution voluntarily exercised, which were based on alleged duties of solidarity, preventing the criminal repression of the free economic exploitation of their sexual freedom.²⁰⁴

Still in the criminal sphere, the Supreme Court has now reached a consolidated position on the fact that the principle of solidarity constitutes the basis of omissive crimes, that is, criminal provisions requiring addressees not to refrain from performing actions harmful to the rights and interests of others, but the performance of positive actions, as an expression of an obligation of collaboration between the State and individuals. This applies both to the so-called ‘proper’ omissive crimes, in which there is a rule that expressly punishes the omission;²⁰⁵ and to the so-called ‘improper’ omissive crimes, in which the charge is made by way of failure to prevent the event.²⁰⁶ Similarly to what happens for vaccinations, however, the same principle of solidarity that imposes obligations of active conduct obliges, in case of errors relating to the unjustified breach of personal freedom, the payment of compensation, even in absence of fault or negligence. In this same way, we can explain the regulation on unjust imprisonment²⁰⁷ which, supported and extended by constitutional case law,²⁰⁸ imposes the obligation of compensation regardless of whether the judicial error is linked to fault or malice.

²⁰¹ Corte costituzionale 24 March 1988 no 404; 12 December 1989 no 559.

²⁰² Corte di Cassazione 22 October 2009 no 40727; Corte di Cassazione 22 May 2008 no 20647; Corte di Cassazione 24 gennaio 2007 no 21329.

²⁰³ Corte di Cassazione 22 January 2014 no 1277. See also Corte costituzionale 14 April 2010 no 138; and Corte costituzionale 4 April 2009 no 140.

²⁰⁴ Corte costituzionale 12 June 2019 no 141.

²⁰⁵ Arts 570, 591 and 593 of the Criminal Code; Art 189 of the Codice della Strada. See Corte di Cassazione 23 April 2014 no 17621.

²⁰⁶ Art 40, para 2, Criminal Code. See Corte di Cassazione 6 June 2014 no 23911; Corte di Cassazione 5 December 2014 no 25729; Corte di Cassazione 16 March 2015 no 11136.

²⁰⁷ Art 314 of the Code of Criminal Procedure.

²⁰⁸ Corte costituzionale 18 July 1996 no 310; 16 December 1997 no 446; 24 March 1999 no 109; 24 June 2004 no 230; 11 June 2008 no 219.

5. Solidarity and Space

As already underlined several times, the principle of solidarity in the Italian legal system aims at integration *within* and *through* the conflict, and its normative scope encompasses all fields where conflict emerges in relation to the values and/or interests of subjects that are in some way linked, or at least interdependent. As a consequence of globalization and transnationalisation processes, which have involved an ever-growing interdependence of political and social actors at the global level, the possibilities for the spatial application of the principle of solidarity expand.²⁰⁹ At the same time, such processes, largely dominated by neo-liberal policies since at least the 1980s, have triggered dynamics of competition and individualization in most social sectors, which put under stress the ability of the principle of solidarity to perform its functions, especially because historically the institutions of the welfare state have had a purely territorial dimension.²¹⁰ Here, it is important to highlight the relationship between the principle of solidarity as understood in the Italian constitutional system, and its configuration in international and EU systems.

In this regard, besides the provisions defining the scope of solidarity in internal relations, the norms expressing the ‘internationalist’ scope of the principle and regulating cross-border movements are also axiologically oriented. Such orientation emerges from the conditions giving rise to the right of the foreigner to asylum, namely that she ‘is prevented in his own country from effectively exercising the democratic freedoms guaranteed by the Italian Constitution’;²¹¹ from the conditions that make the consent to limitations of sovereignty legitimate;²¹² or from the obligation to promote labour rights at the international level.²¹³ At the level of domestic legislation, this dimension has emerged especially in the regulation of international cooperation²¹⁴ and in the governance of immigration²¹⁵, albeit with its continuous and erratic modifications, often inspired by instrumental populist drives and short-lived political motivations.²¹⁶

As concerns the case law, besides the decisions concerning the extension to foreigners legally resident of rights or duties recognized to citizens,²¹⁷ the decisions

²⁰⁹ S. Rodotà, n 98 above, 84.

²¹⁰ S. Giubboni, ‘Confini della solidarietà. I modelli sociali nazionali nello spazio giuridico europeo’ *Politica del diritto*, 395, 398-399 (2011).

²¹¹ Art 10, para 3, Constitution.

²¹² Art 11 of the Constitution: ‘Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations.’

²¹³ Art 35, para 3, Constitution.

²¹⁴ Legge 9 February 1979 no 38; legge 26 February 1987 no 49; legge 1 December 2018 no 132. See also Corte costituzionale 28 September 2005 no 360.

²¹⁵ See decreto legislativo 25 July 1998 no 286.

²¹⁶ See most recently decreto legge 4 October 2018 no 113, as modified by legge 1 December 2018 no 132; decreto legge 21 October 2020 no 130, as modified by legge 18 December 2020 no 173.

²¹⁷ See nn 87, 88, and 89 above.

on the duties of protection towards asylum seekers should be noted. In this field, the Constitutional Court has made it clear that, while the duty of solidarity as such does not prevent the State from introducing new crimes in the field of immigration, it must be the basis for the regulation of the prohibitions of expulsion and rejection; of family reunification, of the applicability to undocumented foreigners of the regulations on refugee status and international protection; as well as the non-punishability of the immigrant who does not comply with the order of expulsion for a justified reason (for example, extreme indigence).²¹⁸

At the international level, multiple sources of both binding or non-binding law recognise or mention the principle of solidarity in various ways. In this field, a distinction is made between inter-individual solidarity²¹⁹ and the cooperation obligations of states as such, often in connection with other substantive or procedural rules, related to good faith and due diligence. Traditional international law, understood as inter-state law, focuses mainly on the latter. This emerges from Art 1 and Chapter IX of the 1945 Charter of the United Nations, Art 1 para 2, Art 2 para 1, and Art 11 of the International Covenant on Economic, Social and Cultural Rights of 1966,²²⁰ as well as in instruments such as the 1970 Declaration on Friendly Relations of the UN General Assembly²²¹ or the 1972 Stockholm Declaration on the Human Environment.²²²

While such texts are not considered to be binding per se, they are today considered, at least in part, expressive of norms of customary international law and therefore legally relevant.²²³ However, especially in recent times, the link between inter-state solidarity/cooperation and social welfare has begun to be consistently evoked in international law,²²⁴ especially by those arguing that

²¹⁸ Corte costituzionale 13 November 1997 no 353; 2 July 2001 no 217; 13 January 2004 no 5; 23 February 2004 no 80; 27 September 2004 no 302; 25 January 2006 no 44; 3 May 2006 no 192; 17 May 2006 no 206; 5 June 2006 no 224; 7 May 2008 no 148; 13 December 2010 no 359; 9 July 2020 no 186.

²¹⁹ Arts 1 and 29 of the 1948 Universal Declaration of Human Rights.

²²⁰ See Committee on Economic, Social and Cultural Rights, General Comment 3: The Nature of States Parties' Obligations (Art 2(1) ICESCR), 14 December 1990, E/1991/23, para 13; Committee on Economic, Social and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 ICESCR), 11 August 2000, E/C.12/2000/4, para 45.

²²¹ UN Doc A/RES/2625(XXV) 24 October 1970, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. See J.E. Vinuales ed, *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge: Cambridge University Press, 2020).

²²² UN Doc A/CONF.48/14/Rev 1.

²²³ See H. Keller, 'Friendly Relations Declaration (1970)' *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2009), online version; D. Shelton, 'Stockholm Declaration (1972) and Rio Declaration (1992)' *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008), online version.

²²⁴ Maastricht Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011); Draft declaration on the right to international solidarity and Report of the Independent Expert on human rights and international solidarity (UN Doc. A/HRC/ 35/35 of 25 April 2017); Preamble of the Constitution of the International Labour Organization (ILO) (1919).

peace between states also depends on intra-state social peace. This trend has accelerated in the context of the global COVID-19 pandemic started in 2020.²²⁵ Despite its persistent vagueness, such trend has prompted part of the scholarship to argue that solidarity is emerging in the form of a structural or even constitutional principle of the international legal order,²²⁶ but this position is still contested.²²⁷

In EU law, the principle of solidarity has a relatively clearer normative scope,²²⁸ and today it emerges mainly in three areas: financial solidarity and cohesion policies; fundamental rights; cooperation in migration governance. In these areas, the general goal is the construction of the so-called social Europe, ie the evolution of the welfare systems of member states towards the opening to all EU citizens, without restrictions based on nationality; the extension of non-discriminatory access to the welfare of the host member state even to economically inactive citizens; the cross-border portability of social security benefits guaranteed by each state regardless of nationality.²²⁹ In the area of fundamental rights, solidarity is recognized in Art 2 TEU as one of the founding values of the Union; and Chapter IV of the Charter of Fundamental Rights of the EU (CFREU) is dedicated to it. Particularly relevant in this field are also Art 3, para 3, TEU;²³⁰ Art 42, para 7, TEU on mutual defense; Art 80 TFEU on solidarity and fair sharing of responsibility in the field of asylum, immigration and border controls;²³¹ Art 222 TFEU (solidarity clause in case of a terrorist attack or of a natural or man-made disaster); Art 122 TFEU (financial assistance clause); Art 107, para 2, lett (a) and (c), and para 3 TFEU and Regulation (EU) No 651/2014 on regional state aid;²³² Art 174 ff TFEU on economic, social and territorial cohesion; Art 194 TFEU on energy policy.

However, the ‘genetic’ imprint of European integration, ie the construction

²²⁵ A. von Bogdandy and P. Villarreal, ‘Vaccinating Against Covid-19: Appraising the COVAX Initiative’ 81 *Heidelberg Journal of International Law*, 81-116 (2021).

²²⁶ See generally R. Wolfrum and C. Kojima eds, *Solidarity: A Structural Principle of International Law* (Berlin-Heidelberg: Springer, 2010).

²²⁷ See A. Peters, ‘Global Constitutionalism: The Social Dimension’, in T. Suami, A. Peters, D. Vanoverbeke, and M. Kumm eds, *Global Constitutionalism from European and East Asian Perspectives* (Cambridge: Cambridge University Press, 2018), 277.

²²⁸ For an overview, see most recently Philippe Van Parijs, ‘European Values: Solidarity’ 34 *Ratio Juris*, 95-105 (2021).

²²⁹ Case C-85/96, *María Martínez Sala v Freistaat Bayern*, Judgment of 12 May 1998, available at www.eur-lex.europa.eu; Corte costituzionale 8 July 2020 no 182.

²³⁰ ‘The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.’

²³¹ See generally D. Thym and E. Tsourdi, ‘Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions’ 24 *Maastricht Journal of European and Comparative Law*, 605-621 (2017).

²³² Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance [2014] OJ L 187.

of a common market has led to processes of competition between systems and a race to the bottom in terms of social protection. This trend has been legitimized by the EU Court of Justice with decisions such as the *Viking*²³³ and *Laval*²³⁴ judgments of 2007, which have greatly reduced the possibility of establishing forms of transnational solidarity between trade union movements and, therefore, the strike as an instrument of social demands and struggles at the European level.²³⁵ This effect of European integration is well documented,²³⁶ allegedly leading to the end²³⁷ or at least crisis of social Europe.²³⁸ It has also accelerated as a result of the policies of financial austerity and conditionality following the Eurozone crisis, based on the principles of fiscal and financial responsibility, which have scaled down the capacity of welfare states to redistribute wealth through expansionary economic policies.²³⁹ Also with regard to the governance of migration, solidarity seems to emerge only episodically within the EU, that is, through emergency and intergovernmental mechanisms, which allow only exceptional interference with state competences. This same solidarity is mostly implemented in its vertical dimension – solidarity towards people seeking protection – and in a residual and limited sense. The principle of solidarity, in fact, appears mainly as an emergency tool under Art 78, para 3, TFEU, rather than as a ‘systemic’ norm under Art 80 TFEU.

Paradoxically, the member states that are most opposed to a fair distribution of responsibility for the reception of migrants are among those who benefit most from the solidarity expressed through the cohesion policy. With regard to the social rights recognized in the CFREU, Art 52, para 5, outlines a special regime for its ‘principles’. The latter, unlike ‘rights’, may be implemented by the institutions of the Union and the member states in application of EU law and can be invoked before a judge only for the purpose of interpretation and control of the legality of the acts in question. The ratio of such a category of rules, which echoes that of the so-called programmatic norms rejected by the

²³³ C-438/05 International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti, Judgment of 11 December 2007, available at www.eur-lex.europa.eu.

²³⁴ Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Judgment of 18 December 2007, available at www.eur-lex.europa.eu.

²³⁵ S. Sciarra, *Solidarity and Conflict. European Social Law in Crisis* (Cambridge: Cambridge University Press, 2018), 91 ss.

²³⁶ A. Albi, ‘Erosion of Constitutional Rights in EU Law: A Call for ‘Substantive Co-operative Constitutionalism’ 9 *Vienna Journal of International Constitutional Law*, 291-343 (2015).

²³⁷ K.D. Ewing, ‘The Death of Social Europe’ 26 *King’s Law Journal*, 76-98 (2015).

²³⁸ See generally S. Sciarra, n 235 above; and E. Christodoulidis, n 11 above, 365-430.

²³⁹ M. Benvenuti, *Libertà senza liberazione. Per una critica della ragione costituzionale dell’Unione europea* (Naples: Editoriale Scientifica, 2016). See also P. Kjaer, G. Teubner, and A. Febraro eds, *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart, 2011).

Italian Constitutional Court,²⁴⁰ would seem to be that of ‘anesthetizing’ the effects of the social rights of the CFREU and limiting their judicial application in the absence of legislative implementation.²⁴¹ To a lesser extent, even the individualistic tendencies inherent in the structure of the protection system centred on the European Convention on Human Rights (ECHR) – which, as we know, does not expressly protect social rights, except for trade union freedoms (art. 11) and the right to education (Art 2 Prot I) – seem to have an impact on the normative scope of solidarity. It is sufficient here to recall the conventional jurisprudence on the criteria for determining compensation for expropriation, centred on market value,²⁴² potentially in conflict with a ‘solidaristic’ vision of private property.

Nonetheless, there are signs of change in EU law. The 2020 economic crisis resulting from the COVID-19 emergency – defined as ‘symmetrical’ because it cannot be traced back to allegedly ‘irresponsible’ fiscal or financial conduct on the part of the member states – seems to have established for the first time genuine movements from fiscal responsibility to fiscal solidarity.²⁴³ Significantly, in an updated interpretation of financial conditionality, the EU institutions seem to want to link such solidarity also to the respect for certain values, including the protection of human rights and the rule of law, and the willingness to participate in policies for the relocation of immigrants.²⁴⁴ At the jurisprudential level, the Court of Justice has until recently been reluctant to make bolder use of the principle of solidarity.²⁴⁵ However, in some decisions relating to border controls²⁴⁶ energy policy,²⁴⁷ and conditionality for the protection of the EU

²⁴⁰ Corte costituzionale 5 June 1956 no 1.

²⁴¹ See S. Sciarra and A. Jr Golia, ‘Italy: New Frontiers and Developments’, in M. Bobek and J. Adams-Prassl eds, *The EU Charter of Fundamental Rights in the Member States* (Oxford: Hart, 2020), 239-256, at 252.

²⁴² Eur. Court H.R., *Scordino v Italia*, Judgment of 29 March 2006, available at www.hudoc.echr.coe.it.

²⁴³ M. Ioannidis, ‘Between Responsibility and Solidarity: Covid-19 and the Future of the European Economic Order’ 80 *Heidelberg Journal of International Law*, 773-784 (2020). See European Parliament and Council Regulation (EU, Euratom) no 2092/2020 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (‘Rule of Law Conditionality Regulation’).

²⁴⁴ A. von Bogdandy and J. Łacny, ‘Suspension of EU Funds for Member States Breaching the Rule of Law – A Dose of Tough Love Needed?’ *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper* no 2020-24, available at <https://tinyurl.com/43bjdhdx> (last visited 30 June 2022).

²⁴⁵ D. Schiek, ‘Solidarity in the Case Law of the European Court of Justice - Opportunities Missed?’, in H. Krunke, H. Petersen, and J. Mannes eds, *Transnational Solidarity. Concept, Challenges and Opportunities* (Cambridge: Cambridge University Press, 2020), 252.

²⁴⁶ Joined Cases C-643/15 and C-647/15, *Slovakia v Council and Hungary v Council*, Judgment of 6 September 2017, available at www.eur-lex.europa.eu; Joined Cases C-715/17, C-718/17, and C-719/17, *Commission v Poland, Hungary, and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, Judgment of 2 April 2020, available at www.eur-lex.europa.eu.

²⁴⁷ C-848/19 P, *Germany v Poland*, Judgment of 15 July 2021, available at www.eur-lex.europa.eu.

budget,²⁴⁸ it has given significant signals, expanding the scope of justice of the principle of solidarity, read in connection with the principle of sincere cooperation enshrined in Art 4(3) TEU, and arriving at defining it as one of the fundamental principles of EU law underlying the entire legal system of the Union.²⁴⁹

Whether and to what extent the spatial interdependence, as emerging in the inter-national and supranational legal systems, strengthen or weaken the normativity of the principle of solidarity as understood in the Italian legal system, is a question that lends itself to different answers. On the one hand, given the impossibility that the Italian legal system can, on its own, sustain the challenges arising from global interdependence, it seems desirable that external legal systems should adopt a more axiologically and normatively dense vision of solidarity. From this point of view, it cannot be forgotten that in recent years the case law of the European Court of Human Rights has played an important role in ensuring the respect of the right to asylum²⁵⁰ and the protection of social security and welfare benefits as proprietary claims, whose arbitrary or discriminatory denial, quantification or revocation is to be considered unlawful.²⁵¹ Similarly, the 1961 European Social Charter and the related ‘case law’ of the European Committee of Social Rights – especially the decisions developed in the context of the collective complaints procedure²⁵² – have provided support for decisions of the Constitutional Court in the area of trade union rights.²⁵³ On the other hand, the principle of solidarity and the duties that are its manifestation lend themselves to being a limit against conflicting external sources of various kinds which, in different ways, risk compromising its core normative value.²⁵⁴

6. Solidarity and Time

The ever-expanding national budgets of modern states and, more generally, the techno-industrial capabilities achieved in the most economically advanced countries have led to inter-generational conflict as a new area of emergence of the principle of solidarity. Indeed, as never before, organized communities and states have the capacity to determine long-lasting and potentially irreversible consequences on society and the environment, both locally and globally, with an enormous impact on the enjoyment of rights by future generations. This new

²⁴⁸ C-156/21, *Hungary v Parliament and Council*, Judgment of 16 February 2022, para 129, available at www.eur-lex.europa.eu.

²⁴⁹ So-called ‘rule of law conditionality’: see C-848/19 P n 247 above, para 41.

²⁵⁰ Art 3 ECHR; Art 4 Prot 4 ECHR; Eur. Court H.R., *Hirsi v Italy*, Judgment of 23 February 2012, available at www.hudoc.echr.coe.it.

²⁵¹ Eur. Court H.R., *Stec v United Kingdom*, Judgment of 12 April 2006, available at www.hudoc.echr.coe.it; Eur. Court H.R., *Moskal v Poland*, Judgment of 15 September 2009, available at www.hudoc.echr.coe.it.

²⁵² Introduced with the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints of 9 November 1995 (ETS No 158).

²⁵³ Corte costituzionale 24 June 2015 no 178; 11 April 2018 no 120; 24 February 2021 no 59.

²⁵⁴ See again the ‘controlimiti’ doctrine (n 93 above).

‘power’ creates problems for the modern liberal political theory, presupposing the ability of a community to decide at a given time on itself, and the tendential indifference of external and future communities to such decisions; and for modern constitutionalism itself, which emerged as a normative project that embraces multi-generational arcs.

Among various problems, one concerns the juridical qualification of the interests of those ‘who do not yet exist’ and of the relative weight to be given to them in any balancing with the juridical positions of those who instead are ‘here and now’. In other words, it is a question of determining the legal qualification of a ‘third party included’ which, while not necessarily configuring itself as ‘present’ or as a human subject (the environment or non-human animals could be configured as objects of autonomous protection), can impose duties of solidarity and limitations on rights. This is obviously an ambiguous scenario that lends itself to manipulation, insofar as it can be used to limit present processes of social emancipation, of protection of social rights, and, more generally, of democratic self-determination. By this ambiguity are somehow affected also recent constitutional reforms, namely *legge costituzionale* 20 April 2012 no 1 that introduced the principle of overall budgetary balance into Art 81 of the Constitution²⁵⁵ and re-centralised at the national level the armonization powers of public budgets;²⁵⁶ and *legge costituzionale* 11 February 2022 no 1, tasking the Republic with ‘the protection of environment, biodiversity, and ecosystems, also in the interest of future generations’.²⁵⁷

In judicial practice, concerns for the diachronic dimension of solidarity – especially of social rights – are not new.²⁵⁸ The Constitutional Court has constantly recalled gradualism as a condition for the constitutional legitimacy of reforms in the field of social security and welfare,²⁵⁹ but also the non-intangible nature of the principle of legitimate expectations as well as the reversibility of

²⁵⁵ ‘The State shall balance revenue and expenditure in its budget, taking account of the adverse and favourable phases of the economic cycle. No recourse shall be made to borrowing except for the purpose of taking account of the effects of the economic cycle or, subject to authorisation by the two Houses approved by an absolute majority vote of their Members, in exceptional circumstances. Any law involving new or increased expenditure shall provide for the resources to cover such expenditure. Each year the Houses shall pass a law approving the budget and the accounts submitted by the Government. Provisional implementation of the budget shall not be allowed except by specific legislation and only for periods not exceeding four months in total. The content of the budget law, the fundamental rules and the criteria adopted to ensure balance between revenue and expenditure and the sustainability of general government debt shall be established by legislation approved by an absolute majority of the Members of each House in compliance with the principles established with a constitutional law.’ See also the related implementing legislation: *legge* 24 December 2012 no 243.

²⁵⁶ Art 117, para 2, lett. e), Constitution.

²⁵⁷ See Art 9 Constitution.

²⁵⁸ See only M. Caredda, *Giudizio incidentale e vincoli di finanza pubblica. Il giudice delle leggi prima e dopo la crisi* (Turin: Giappichelli, 2019), 132.

²⁵⁹ See, eg, Corte costituzionale 8 June 1994 no 240.

acquired rights.²⁶⁰ At the same time, the Court had to deal with a relative lack of available options in decision-making techniques, especially when it comes to the modulation of the temporal effects of declarations of unconstitutionality.²⁶¹ Indeed, the potentially disruptive effects on public budgets of such rulings²⁶² and considerations relating to the respect of the discretion of political branches were probably at the basis of a relative self-restraint of the Constitutional Court and, at the same time, of the ‘creation’ of new decisional techniques non explicitly recognized in the governing legislation. For example, this may explain the ‘invention’ and extensive use, between the end of the 1980s and the 1990s, of different kinds of decisions of unconstitutionality stating generic principles, to be further implemented in ordinary legislation.²⁶³

In more recent years, this relatively cautious attitude of the Court has been replaced by a more activist stance. First of all, following scholarly elaborations,²⁶⁴ the Constitutional Court has begun to make explicit reference to the concept of solidarity or intergenerational equity, notably for questions of constitutionality having as a parameter the ‘new’ Art 81 of the Constitution on the overall budgetary balance.²⁶⁵ Secondly, starting with judgment 9 February 2015 no 10, the Constitutional Court, explicitly referring to the principle of solidarity as a basis for justification,²⁶⁶ has begun to modulate the retroactive effects of the decisions of unconstitutionality.²⁶⁷ In this way, the principle of solidarity deploys its normative value even on procedural (constitutional) law, contributing to the overcoming of what has long been a taboo of constitutional and legal theory.

²⁶⁰ Corte costituzionale 12 December 1985 no 349; 12 December 1996 no 417; 7 May 1997 no 127; 16 December 1998 no 457; 10 March 2015 no 56; 22 March 2018 no 89; 19 March 2019 no 108; 21 October 2019 no 240; 11 June 2020 no 135; 22 March 2022 no 136.

²⁶¹ See Art 136 Constitution and Art 30, para 3, legge 11 March 1953 no 87.

²⁶² Corte costituzionale 29 December 1993 no 495; 8 June 1994 no 240; 10 March 2015 no 70.

²⁶³ See A. Jr Golia, ‘Seguito delle additive di principio e auto-produzione del sistema giuridico’ *Giurisprudenza costituzionale*, 2186 (2018).

²⁶⁴ R. Bifulco, *Diritto e generazioni future. Problemi giuridici della responsabilità intergenerazionale* (Milano: FrancoAngeli, 2008); R. Bifulco and A. D’Aloia eds, *Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale* (Napoli: Jovene, 2008); A. D’Aloia, ‘Generazioni future (diritto costituzionale)’ *Enciclopedia del diritto* (Milano: Giuffrè, 2016), Ann IX, 331; F. Polacchini, n 5 above, 188 and 197; G. Palombino, ‘La tutela delle generazioni future nel dialogo tra legislatore e Corte costituzionale’ *federalismi.it*, 5 August 2020, 242-272.

²⁶⁵ Corte costituzionale 7 April 2014 no 88; 6 April 2016 no 106; 11 January 2017 no 6; 14 February 2019 no 18; 15 May 2020 no 115; 22 October 2020 no 237; 10 November 2021 no 235.

²⁶⁶ This line of case law started before and somehow paved the way the mentioned legge costituzionale 11 February 2022 no 1 that ‘constitutionalised’ the interests of future generations. As we write, it is still premature to make an assessment on whether such constitutional codification of the principle of inter-generation solidarity will trigger a process of mutual reinforcement of the related case law of the Constitutional Court.

²⁶⁷ Corte costituzionale 24 June 2015 no 178; 7 March 2018 no 71; 7 March 2018 no 74; 22 October 2019 no 246; 23 June 2020 no 152.

VI. Conclusion

This article aimed to contribute to the growing debates surrounding the principle of solidarity, by analysing the specific features of such principle in the Italian legal system. It offered a relatively thorough and systematic conceptualization, capturing the intellectual, normative, and practical significance of the principle. Being directed to a broader audience and aimed at offering a general overview, such analysis could not delve into the details of each of the analysed legal instruments. What is worth highlighting, again in this conclusion, is however the Janus-faced – simultaneously conflict-solving and conflict-generating – nature of the principle of solidarity in the Italian constitutional experience. Such nature constitutes a specificity deeply embedded in the legal and, more generally, socio-political history of Italy and has been unduly overlooked in comparative legal scholarship. However, this article did not only aim to fill this gap. It further – and more importantly – aimed at contributing to problematising the current discourses on the legitimacy of modern constitutional states, too often stuck in an unresolvable contraposition between allegedly ‘legal’ and ‘political’ constitutionalisms. A (partially) new conception of the principle of solidarity constitutes a conceptual move that may help exit from a scholarly dead end. In this sense, opening new spaces for social conflict *within* the legal perimeter of liberal democracy is the persistent challenge of modern constitutionalism, especially at a time of rising – both old and new – authoritarianisms and populisms.