The constitutionally guaranteed right not only to *receive*, but also to *provide* solidarity

di Pier Luigi Portaluri

1. Despite my role of Professor in Administrative Law, I'm a person fully interested in other branches, as architecture, city life, planning and building, ecological rights, wild animals' life, nature. There's a notion I'm tied to: the "vital minimum", or – as the German doctrine called it – *existenzminimum*. It is a concept transplanted in the Italian urban planning law in 1968, when a glorious battle was won to finally trigger a juridical idea of a sustainable, liveable city; I'm referring to the fabled d.m. no. 1444 of 1968, which – for the first time in our country – made politicians, citizens, people, understand that there were boundaries to decay of houseliving. As Aristotele said, indeed, "living" essentially means "living well"[1].

It basically stands for – I add – living as the well-known Constitution of the United States of America (USA) says: searching – if possible – happiness. We have to try to reach happiness[2]. But this happiness cannot ever be reached without considering "the other", "the neighbour". And that's a thing I deeply feel: there's a well-known serenade by Rodriguez[3], a man that faced from the inside the Cuban Revolution, that says he is happy, really and deeply happy (*muy feliz*), and – at the same time – he apologizes to everyone has suffered for his happiness. Well, I think this is the sense of the real solidarity: to be grateful for everything – and everyone – has let a man, an animal, a *being*, when he could to, live pleromatically (I'm using the unforgettable words of a Master, Luigi Lombardi Vallauri). That is, to live fully and plenty of spirit.

Seizing the day, but also watching prudentially to the future. Here is the topic of the next generations: an issue that I will just touch on.

I said that I'm a jurist, but I love to snoop and look around even in fields that do not typically belong to law. Therefore, there's a famous opera – in my opinion, the most gorgeous of the XXth century – that describes the profound sense of solidarity: Parsifal.

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[1] F. Chiereghin, *"Vivere" e "vivere bene". Note sul concetto aristotelico di πρᾶξις*, in *Revue de Métaphysique et de Morale*, 95e Année, No. 1, Questions d'éthique (Janvier-Mars 1990), 57-74.

[2] The Declaration of independence of (July 4, 1776) states: «*We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness* […]».

[3] Silvio Rodriguez, *Pequeña Serenata Diurna*: «*Soy feliz, / Soy un hombre feliz, / Y quiero que me perdonen / Por este día / Los muertos de mi felicidad*».

Parsifal has born to be «illuminated by *pietas*», by compassion, an expression Wagner gifts us with: «*durch Mitleid wissend*», that is «being illuminated through the *Mitleid*», that is the *cum-pati*, that is – we should say, finally – the Latin *pietas*.

Here is – in my opinion – the deepest, meta-Christian, meta-Buddhist and meta-secular, root of being men raised through the *Mitleid*.

I'm opening a really short digression: we should notice that the first expression of compassion in the opera shows up when Parsifal, callow chevalier even if already chosen, is waited by Gunermanz and Amfortas; well, Parsifal enters the sacred enclosure of the woods, foolishly picks bow and arrows and takes a shoot, killing a swan. He's immediately reproved by Amfortas, who asks «what did these swans did to you? What did these creatures do to you, to deserve this?»[4]; Parsifal realizes the crime he has just done and breaks his bow and arrows on his knee.

A great Italian musicologist – Paolo Isotta[5] – in his work *De nonnullis animalium sermonibus* noticed that the first *Mitleid* – the first act of compassion done by the man that will be the perfect foolish, able to give up for saving others – is done towards non-human creatures.

So I like to imagine that the paths of solidarity will overcome the strict anthropocentric sight, and embrace the consideration already present in the Christian thought – even in the Buddhist one, in a more consubstantial way: that is the idea of compassion as the universal release from the pain. Think about the Latin prayer, Pater Noster: *libera nos a malo* could be a prayer to release us from the pain, and not from a generic ache. But the prayer for releasing us from the pain, from the bad and painful living, probably roots the idea of solidarity and aims to be the law of Creation: that is, a constitutive line for the juridical thought in the path of solidarity.

If so, then the juridical thought has to match with the written text, with the Constitutional norm, in a very free, and deeply creative, way. I remember everyone that *to create* can be translated in Greek with the noun Ποίησις: I will say later about that.

2. In my point of view, solidarity means – first of all – recognizing the other. This consideration may appear obvious, but it's not. It's possible to recognize the other that is «equal to ourselves»: a human being. There are many works by

[4] R. Wagner, *Parsifal, erster Aufzug*. «*Unerhörtes Werk! Du konntest morden, hier im heil'gen Walde, des' Stiller Friede dich umfing? Des Haines Tiere nahten dir nicht zahm, Grüssten dich freundlich und fromm?*» «Opera inaudita! Hai potuto uccidere, qui nella foresta sacra, la cui pace silente t'avvolgeva? Non ti si accostarono mansuete le creature del bosco, salutandoti insieme pie ed amiche?».

[5] P. Isotta, *De nonnullis animalium sermonibus*, in AA.VV., *Tutti gli animali, io pure, si esprimono* (Atti del convegno internazionale BIOGEM "Le Due Culture", VIII ed., Ariano Irpino, 7-11 settembre 2016), Soveria Mannelli 2017,65 ss., esp. 72 ss.

a colleague of ours, Luigi Nuzzo[6] about the shades of personality and person and subject in juridical fields that have been – and still are – in great difficulty to reach the social and economic western realities. For example, the Charter of United Nations still has an incredible art. 73, that consents limitations to self-government to those territories «whose peoples have not yet attained a full measure of self-government»: that is, «*not yet*»[7] civilized.

So, the international law idea of a person that is not always the same – not all men are effectively equal – is hard to die.

The roots of this disparity undermine solidarity thinking: they can be settled in a wonderful – but maybe dangerous, beyond all the fireworks – opera, the last masterpiece by Shakespeare, *The tempest*. We all know the plot. But there's a really interesting scene: a dialogue between men and another, deformed, man. Shakespeare calls him with a weird name: Caliban. But our Author had fun in inventing the so-called malapropisms, that is to crook names giving them a different (opposite) meaning from the normal. That's what he does with Caliban. Caliban means nothing. But just try to pronounce it with a British accent: it can be easily transformed in *Cannibal*; or *Caribbean*. That name can easily be used to identify people – in a certain way – halved in their own being creatures, people that don't have full juridical personality and rights; therefore, people that cannot receive solidarity, because they cannot be recognized by other people. They are not far from non-human creatures: I don't like to call them "animals", because the noun "animal" used to be noble and kind, employed by Dante in his Comedia[8], and then has become heavy and derogatory, declining.

Therefore, the sense of solidarity is wide, and it has to be reconsidered in a new light, far from the narrow text of our Constitution: in which we read – at art. 2 – the expression «duty» of solidarity.

The preparatory papers of the Constituent Assembly give proof of a long argument between Togliatti and Dossetti, with an uncontainable La Pira that had a great fun even in climb over Togliatti to the left wing. Togliatti himself, always firm on the idea "no enemies at left", was in a sincere difficulty: whence his brilliant intuition in telling, about the compromise on the text of the art. 2 Cost., «we perfectly agree on the principle at only one condition: don't ask us why».

That happened because the foundational reasons of that agreement were

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[6] I'm here referring to L. Nuzzo, *Autonomia e diritto internazionale. Una lettura storico-giuridica*, in *Autonomia, unità e pluralità nel sapere giuridico fra Otto e Novecento, Quaderni fiorentini per la storia del pensiero giuridico moderno*, n. 43, tomo II, 2014, 651 ss.

[7] The norm says «*territories whose peoples have not yet attained a full measure of self-government*»: see L. Nuzzo, *op. cit.*, esp. 655.

[8] «*O animal grazioso e benigno*», Paolo calls his beloved Francesca in the famous *Capitulum V dell'Inferno* (see also the beautiful, controversial, critical edition of *Dantis Alagherii Comedia* – edited with the criteria of lachmanniann arms – by F. Sanguineti, Firenze, 2001).

stick on opposite positions. The solidarity principle and the mandatory rights and duties were inserted in Constitution for – not different, as Barbera says, but even – opposite (Dogliani, comment on art. 3) reasons. On one side, the reason was the protection of the individuals against possible collectivist expansions; on the other, it was the perfect opposite. It derived the synthesis today present in art. 2 Cost.

Let's get to more recent times: the fundamental principles in Constitution, the *super Constitution*, that one called by Predieri «the face of Republic».

I'm referring to art. 9 about landscape and cultural heritage. That is a test bench for what I mean by saying solidarity.

As we all know: calm and sleepy, art. 9 used to rest unrealized until the '70's did wake it up from a too long numbness: it's the long wave coming from the USA, for someone; for others, at the opposite, it's an awakening of the conscience of Europe in 1968. The only certainty is that art. 9, in that moment, becomes the centre of a real debate.

In brackets. Even for art. 9 the preparatory works register an extraordinary thing: there's a debate between the catholic and the Marxist stream, and when Aldo Moro – on one side – and Concetto Marchesi – on the other one – proposed to put (even!) in the fundamental principles the protection of landscape, the stenographer records «laughs of the Assembly». That means that in 1948, in a Country destroyed by the Second World War, a norm about the protection of landscape, that means an expression of solidarity to the face of the Republic, was even a funny thing for the Constituents; but Moro and Marchesi had a long eye: that disposition became a fundamental principle.

3. Why am I speaking about landscape? Because the problem of solidarity in the view of the Administrative law, in my opinion, has already had two important test benches that clearly show how narrow is the juridical approach in respect of the good to be protected.

It took several years – we've waited until the 1990's – to have norms (before) and jurisprudence (then) that could fix the forms of trial active legitimation to appeal against administrative acts injurious for landscape.

Another interesting thing. In 1967 Italian legislator posed a weird disposition, art. 31 of the principal city planning law (law no. 1150/1942) as modified by the so-called *legge ponte* (literally *bridge-law*), according to which – pay attention please – «*anybody*» (chiunque) could appeal against acts that were injurious for territory (that means building licenses, *etc.*). That's the era of the participation by private citizens to administrative organizations and action; the doors of Administrative trial are open to everyone; so the urban planning law reaches the first realization of the dream of solidarity among "what has been in the past" (the answer of stones from the past years and centuries), "what is now" and "what we would preserve".

Wonderful disposition; erased too soon. The Council of State immediately stopped it. That «anyone» doesn't mean – against *littera legis* – «anyone», nevertheless it's written so. Because – to attack administrative acts injurious for territory – actors must have some legitimation "filters". Here's a break of solidarity, a wound. What could that filter be? It's still obscure. A never precise, fuzzy, *vicinitas*. That means a sort of proximity to the possible injury, to the damage. A physical proximity. How much proximity? We still don't know. It's a flexible concept. Too flexible. That's the opposite of solidarity! We can imagine an axiological proximity: even those people that are not physically interested to injury can attack the act; not for themselves, but for the territory. That's the concept of solidarity I mean, indeed.

What can I say about all that? I think to the concept of "providing". Solidarity as a right to "providing". That's the point. Is that a right to *receive* solidarity? Or to *provide* it, in the light of subsidiarity? Can we extend the concept of constitutional right to solidarity: not only to receive, but also to provide it. A right with an *active* characterization, not only *passive*.

There's another colleague – and close friend of mine: Vincenzo Tondi Della Mura[9]. He says that – attention – there's a *surplus* situation: there are many and wide margins not covered by the constitutional norm about solidarity, not covered by the public intervention (and today even private, the so-called third sector) but still there are exceeding, unplowed fields, where's space for the right to provide solidarity services. That means that the expression «*duty of solidarity*» we read in Art. 2 of our Constitution can break. It has a more complex sense.

That expression easily breaks: because we untie the concept of solidarity from its deontic connotation. That's a duty no more: or, when it's not a duty as said in that norm, it's still a constitutional "right to". When there's no more duty to provide solidarity, we can see a right to provide it in a precise service. Pay attention: even when the law disposition does not establish a specific service. That's the point.

The right *of* solidarity (and not that *to* solidarity) poses a problem of constitutionality for all legislative dispositions that narrow the field of action of the privates.

In my opinion – from a political point of view – this can be a precious way of thinking because it allows to insert the great private energies in the flaw of solidarity beyond the dispositions that consent that in the third sector. The parameter of solidarity moves, completely changes: it goes out from art. 2 – no

[9] V. Tondi della Mura, *La solidarietà fra etica ed estetica. Tracce per una ricerca*, in *Rivista AIC*, n. 00 del 2.7.2010 See also, by the same Author, *Le prospettive di sviluppo del terzo settore avviate dalle riforme della XIII legislatura*, in *Non profit*, 1/2001, 5 ss.; *Il "tempo" della sussidiarietà: un'introduzione*, in *Federalismi.it*, 4/2013; *Riforma del Terzo settore e principio di sussidiarietà*, in *Non profit*, 3/2017, 47 ss.; *Della sussidiarietà orizzontale (occasionalmente) ritrovata: dalle linee guida dell'Anac al codice del terzo settore*, in *Rivista AIC*, 1/2018, 23 ss.

more duty – and comes in the art. 3, par. 2, it becomes the right (own by the private) to take the great way for catching the sun on the horizon, the sunset that has to be catched pleromatically, I repeat.

This change of the paradigm from *duty* to *right* to solidarity is, in my opinion, guaranteed by art. 3 Cost., so it has protection even against legal disposition that aim to narrow its field.

4. So, now it's only a matter to *activate* this guarantee. Substantially and in trial. I'm doing a necessary referring to all those studies that constitute a background for these reflections of mine: studies of the German civil doctrine, sociological and philosophical, that reflects about subjects and legal order.

I just take my first step from a peculiar opening by Jhering. He said, in the openness of the roman law spirit, that we can never avoid the concept of the "certainty of the claim". This is the subjective right of each of us: one's claiming against another. A vs. V: someone calls it "juridical binarism". But, to get to it, to allow some "A" subject to claim against a "B", it's necessary to have a norm that shines a light on A. That gives him the chance to do this.

And what if "A" doesn't claim? Well. Jhering says that we can do nothing, because «we cannot close clouds in a bag»: if we can determine the claim, there's a possibility; if we cannot, politics' choices cannot be juridified. We need, for this, the subjective right.

Well, this idea is starting to get crisis. Two great studies witness that. I'm referring to Gunther Teubner (Germany) and Pasquale Femia (Italy).

Femia, in a past congress, presented a speech having an extremely argumentative title: «the necessity to put clouds in a bag»; because, today, we cannot be satisfied anymore by the drawing pattern of the politician in the juridical scheme. We must imagine the law is a cloud, and we are in it; so when we pass it, everyone of us has a legitimation to spend. Femia calls this situation "trans-subjective rights".

The idea is therefore launched. It is not, if we want, an idea very far from our juridical culture, or rather, from the juridical culture that we have forgotten: I am referring to the pluri-millenary juridical tradition of Roman law which distinguished between *res nullius* and *res communes omnium*, that is the common goods; that's an idea that – through the karst route of the Middle Ages it slowly subsided until in Italy, with the Rodotà Commission – we recently tried to bring back into vogue; attempt failed, however the problem remains there and we hope it can be recovered.

What does all this teach us? I'm referring to the Ποίησις I mentioned above. We must try to overcome the screen of subjective law through a vision that today may seem bold to us but that probably, in a short time, if we have the courage to experiment, it could appear to be a received right.

This is why the Ποίησις, what Hölderlin said: «*dichterisch, wohnet der Mensch auf dieser Erde*», «poetically lives man on this earth».