

# Exploring the Principle of (Federal) Solidarity

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*Over the past few years, legal scholarship has showed a renewed interest in the principle of solidarity. While this notion is entrenched in many legal texts, it is neither easy to conceptualize nor to define its precise legal meaning. Solidarity is commonly understood as a principle sparking positive values such as cooperation, equality, loyalty, mutual help, compassion or assistance, yet it remains an elusive concept that can be explored from many perspectives. In this regard, solidarity finds its most interesting nuances in the specific ambit of federalism. This paper explores the scope of the principle of (federal) solidarity and illustrates its interconnectedness with other doctrines such as Bundestreue, federal loyalty and cooperative federalism. It argues that federal solidarity goes beyond the idea of altruism or philanthropy as it implies duties of reciprocity between the parties involved. It also contends that, while federal solidarity is implicit in (the mostly German concept of) Bundestreue, these concepts are not identical. The paper concludes that federal solidarity encompasses not only a vertical but also a horizontal aspect, in a way that generates interesting applications for federal or otherwise decentralized systems.*

*Au cours des dernières années, le principe de solidarité a connu un regain d'intérêt parmi les juristes. Cependant, bien que cette notion soit reprise dans de nombreux textes juridiques, elle reste difficile à conceptualiser et la définition juridique du concept reste souvent évasive. La solidarité est généralement considérée comme un principe évoquant des valeurs positives telles que la coopération, l'égalité, la loyauté, l'entraide, la compassion ou l'assistance. La solidarité peut être explorée sous divers angles, notamment dans le cadre spécifique du fédéralisme. Cet essai explore donc la portée du principe de la solidarité (fédérale) et illustre particulièrement son interaction avec d'autres doctrines telles que la Bundestreue, la loyauté fédérale et le fédéralisme coopératif. L'essai soutient que la solidarité fédérale va au-delà de l'altruisme ou de la philanthropie car elle implique des devoirs de réciprocité entre les parties. Bien que la solidarité fédérale soit implicite dans le principe de Bundestreue, ces concepts ne sont pas synonymes. L'essai conclut que la solidarité fédérale englobe non seulement une dimension verticale, mais également une dimension horizontale, ce qui génère un potentiel intéressant des mises en œuvre dans les systèmes fédéraux décentralisés.*

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## Introduction

Over the past few years, academic studies in general, and legal scholarship in particular, have shown a renewed interest in the principle of solidarity. Yet, conceptualizing solidarity, especially in its legal mode, is not easy: in fact, although this notion is embedded, more or less explicitly, in several international treaties and constitutional texts across the world, no agreement exists on its exact meaning and scope. As a result, it may be difficult to interpret or translate into practice the numerous solidarity-based principles and provisions ingrained in legal documents. In this regard, one of the least explored — but perhaps most intriguing — avenues of solidarity pertains to federal theory, where the idea of (federal) solidarity is often interlaced with doctrines such as *Bundestreue*, which is federal loyalty or cooperative federalism.

In very general terms, solidarity is understood as a principle that sparks positive values such as altruism, cooperation, equality, loyalty, fairness, mutual help, benevolence, sympathy, compassion, brotherhood, assistance, and kindness to others,<sup>1</sup> and is commonly opposed to sentiments such as selfishness, discordance, hatred, antagonism, or separation.<sup>2</sup> At the same time, solidarity is an ambiguous and elusive concept that can be explored from a variety of perspectives and that displays features of great interest to many disciplines: as a consequence of its multifaceted and complex nature, the characterization of this principle by a political scientist or jurist might be significantly different than that of a philosopher, although these various perspectives may eventually intersect and overlap.

The goal of this paper is to explore the scope and place of the principle of (federal) solidarity in its different nuances to help demystify its actual meaning. By adopting an analytical and comparative approach, this paper begins with a cursory overview of the various implications of solidarity in private, public, and international law (an exercise that helps contextualize the principle). Next, it explores the idea of (federal) solidarity, particularly in its interconnectedness with other related doctrines such as *Bundestreue* (or federal loyalty) and cooperative federalism (the latter being a well-known concept in Canada). The paper concludes that federal solidarity goes beyond the idea of altruism or phi-

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1 Juliane Ottmann, “The Concept of Solidarity in National and European Law: The Welfare State and the European Social Model” (2008) 2:1 Vienna Online J on Intl Const L 36 at 38.

2 The Oxford English Dictionary defines solidarity as “[t]he fact or quality, on the part of communities, etc., of being perfectly united or at one in some respect, esp. in interests, sympathies, or aspirations; spec. with reference to the aspirations or actions of trade-union members.” See *The Oxford English Dictionary*, 2nd ed, *sub verbo* “solidarity”.

lanthropy typical of the moral or philosophical connotation of this principle, as it implies duties of reciprocity among the parties involved instead of an asymmetrical sense of sacrifice on the part of one party. The paper also advances the idea that, while federal solidarity is implicit in *Bundestreue*, and can thus be construed as an expression of it, at the same time the two concepts are not exact synonyms. Finally, and most importantly, federal solidarity encompasses not only a *vertical* (from the centre to the periphery) but also a *horizontal* (at the peripheral level) aspect: appropriately strengthened with suitable legal or constitutional instruments, horizontal solidarity may reveal interesting and novel applications for many federal or quasi-federal systems.

## 1. Overview of the legal meaning of solidarity

Although it pervasively infuses many constitutional texts and international treaties, conceptualizing the principle of solidarity in law is a complex and intricate task for two main reasons. First, solidarity in the legal ambit may acquire different meanings and nuances depending on whether it is entrenched in international or domestic law, in private or public law, or in federal theory. Second, legal solidarity differs from its moral or philosophical counterparts. Moral solidarity can be construed as a voluntary charitable act (or even as philanthropy),<sup>3</sup> consisting of values such as mutual assistance, whereas legal solidarity must be “conceptualized in terms of rights”<sup>4</sup> being it an “obligatory act based on legal rights and duties”<sup>5</sup> as Ottmann points out, although some sentiments of mutual assistance might always come into play.

### a. Solidarity and private law

The more classic version of solidarity in private law finds its roots in Roman Civil Law, which first identified solidarity in the legal concept *obligatio in solidum*: Black’s Law dictionary defines it as “[t]he state of being jointly and severally liable (as for a debt).”<sup>6</sup> French jurists consistently used the term *solidarité* throughout the sixteenth century to refer to the “common responsibility for debts incurred by one of the members of a group”<sup>7</sup> and the term

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3 Ottmann, *supra* note 1 at 40; WT Eijsbouts & D Nederlof, “Editorial: Rethinking Solidarity in the EU, from Fact to Social Contact” (2011) 7:2 Eur Const L Rev 169 at 172.

4 Ottmann, *ibid* at 44.

5 *Ibid* at 39-40.

6 *Black’s Law Dictionary*, 9th ed, *sub verbo* “solidarity”.

7 Steinar Stjernø, *Solidarity in Europe: The History of an Idea* (New York: Cambridge University Press, 2004) at 27.

was also included in Napoleon's *Code Civil* of 1804.<sup>8</sup> To date, this type of solidarity still characterizes several legal systems operating in the civil law tradition.<sup>9</sup> This private law version of solidarity can be considered the only existing undisputed and universally accepted definition of the principle in the legal domain.

## b. Solidarity and public law

In public law, there are at least three ambits where the principle of solidarity is expressed, although the term *solidarity* is not necessarily spelled out. The first relates to so-called "socio-economic rights" and, more generally, to welfare provisions: it is actually in relation to the national welfare state that the legal concept of solidarity has mostly been developed,<sup>10</sup> with issues of redistribution acquiring a prominent relevance. Here, the spirit of solidarity infuses those mechanisms offered by central governments to help citizens protect and enjoy these rights, such as national programs providing health and social services on a universal basis.<sup>11</sup>

The second avenue where solidarity-based tools are most used is in the event of drastic emergencies such as terrorist attacks or natural disasters. This is perhaps the most obvious example of solidarity, intimately connected to sentiments such as mutual aid and assistance, and binding actors at all levels: local and national governments and institutions, states in the international commu-

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8 *Ibid.*

9 Ottmann, *supra* note 1 at 38.

10 *Ibid* at 39. The expression "socio-economic rights" commonly identifies a bundle of rights such as private property, health, education, work, social security, equality of salary between men and women for the same job, etc.

11 As far as "socio-economic rights" are concerned, the *Canadian Charter of Rights and Freedoms* follows the North American tradition whereby more emphasis is given to "individualism" over "communalism": see The Honourable Mr Justice Charles D Gonthier, "Liberty, Equality, Fraternity: the Forgotten Leg of the Trilogy, or Fraternity: the Unspoken Third Pillar of Democracy" (2000) 45:3 McGill LJ 567 at 569; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Consequently, other than the general protection assured to the right to life, liberty and security of the person contained in section 7 of the *Charter*, not much is said in regards to welfare, health, work, personal property or other social rights, differently than what happens in many European constitutions which offer constitutional protection to a number of socio-economic rights such as employment, family, health, social security, etc.: in this regard, see e.g. articles 35, 39, 41 and 43 of the Spanish Constitution (Arts 35, 39, 41, 43 CE) or articles 31, 32 and 38 of the Italian Constitution (Arts 31-32, 38 Cost). The English version of the Italian Constitution is available here: <[https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf)>; the English version of the Spanish Constitution is available here: <[www.congreso.es/portal/page/portal/Congreso/Congreso/Hist\\_Normas/Norm/const\\_espa\\_texto\\_ingles\\_0.pdf](http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf)>.

nity, etc.<sup>12</sup> Similar understandings of solidarity infuse, both at national and international level, areas such as border control, human rights, and asylum rights.

Finally, the third example of public law solidarity may have either a *political* or a *socio-economic* nature, and mainly refers to the general responsibility of the individual towards the community at large: *political* solidarity commonly includes duties performed by subjects such as voting, homeland defense, and military service (when applicable), whilst *socio-economic* solidarity comprises the duty to get proper education, to work, to contribute to public expenses, etc.<sup>13</sup> This type of solidarity moves vertically from the individual to the collectivity or to central institutions and *vice versa*, in a dynamic movement that brings reciprocal benefits to the parties involved.

### c. Solidarity and international law

Solidarity in its extended public law meaning has often been associated with the French term *fraternité*, which was one of the three linchpins inspiring the French Revolution (along with *liberté* and *égalité*).<sup>14</sup> The general notion of solidarity as spelled out in the French Constitution was so powerful and innovative that it was eventually included in the first article of the Universal Declaration of Human Rights. Solidarity also prominently appeared in the papal encyclical *Pacem in Terris*,<sup>15</sup> where Pope John XXIII acknowledged the existence of

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12 References to emergencies are pervasive in the Basic Law for the Republic of Germany (*Grundgesetz der Bundesrepublik Deutschland*): see for instance article 35, which details the legal and administrative type of support that *Länder* shall offer to each other in the event of an adversity (Art 35 GG), but also article 91(1) dealing with solidarity-based provisions in case of internal emergency (Art 91 Abs 1 GG). Also, pursuant to article 104b(1), “the Federation may grant financial assistance even outside its field of legislative powers in cases of natural disasters or exceptional emergency situations beyond governmental control and substantially harmful to the state’s financial capacity”: Art 104b Abs 1 GG. The English version of the German Basic Law is available here: <<https://www.btg-bestellservice.de/pdf/80201000.pdf>>

13 See Giovanna Razzano, “La materia concorrente della produzione, trasporto e distribuzione nazionale dell’energia nella recente giurisprudenza costituzionale, fra leale collaborazione e doveri di solidarietà” (2011) 13 *Federalismi.it* at 12, online: <[14 Gonthier, \*supra\* note 11 at 572. To this date, the adage \*Liberté, Égalité, Fraternité\* remains the official motto of the French Republic, as indicated by article 2 of the French constitution: see Guy Canivet, “La fraternité dans le droit constitutionnel français” in Michel Morin et al, eds, \*Responsibility, Fraternity and Sustainability in Law: In Memory of the Honourable Charles Doherty Gonthier\* \(Markham, ON: LexisNexis Canada, 2012\) 463; Const, Art 2.](http://www.federalismi.it/AppOpenFilePDF.cfm?artid=18394&dpath=document&dfile=28062011112903.pdf&content=La+materia+concorrente+della+produzione,+trasporto+e+distribuzione+nazionale+dell%27energia+nella+recente+giurisprudenza+costituzionale,+fra+leale+collaborazione+e+doveri+di+solidariet%C3%A0++stato++dottrina++>, citing Franco Modugno, ed, <i>Lineamenti di diritto pubblico</i> (Torino: G Giappichelli Editore, 2008) at 598-601 and Livio Paladin, <i>Diritto costituzionale</i>, 2nd ed (Padova: CEDAM, 1995) at 588-593.</p></div><div data-bbox=)

15 Pope John XXIII, “*Pacem in Terris: On Establishing Universal Peace in Truth, Justice, Charity and Liberty*” (11 April 1963), online: <[www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html)>.

two understandings of the principle: a religious one, with human solidarity as a synonym of Christian charity in the specific ambit of refugee's rights (paragraph 107), and a more political one, with active solidarity (paragraphs 98 and 99) crystallized in the need for States to join forces and make unified plans.<sup>16</sup>

More generally, Macdonald posits that solidarity in international law enshrines a duty for states to give "mutual assistance in order to improve their general situation and relations."<sup>17</sup> In other words, his argument is that solidarity "creates a context for meaningful cooperation that goes beyond the concept of a global welfare state; on the legal plane it reflects and reinforces the broader idea of a world community of interdependent states."<sup>18</sup>

It is, however, in the specific ambit of federalism and federal theory that the principle of solidarity acquires some interesting nuances, particularly in its association with such doctrines as *Bundestreue* and cooperative federalism.

## 2. Exploring (federal) solidarity: *Bundestreue* and cooperative federalism

Federalism is a resilient scheme for a division of powers conceived to reconcile unity and diversity, as differences (having a cultural, linguistic and/or socio-economic or political nature) are intrinsic to the federal idea.<sup>19</sup> Federalism and

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16 With specific regards to the latter, it might be helpful to entirely reproduce the commands of John XXIII, *ibid.*:

98. Since relationships between States must be regulated in accordance with the principles of truth and justice, States must further these relationships by taking positive steps to pool their material and spiritual resources. In many cases this can be achieved by all kinds of mutual collaboration; and this is already happening in our own day in the economic, social, political, educational, health and athletic spheres — and with beneficial results. We must bear in mind that of its very nature civil authority exists, not to confine men within the frontiers of their own nations, but primarily to protect the common good of the State, which certainly cannot be divorced from the common good of the entire human family.

99. Thus, in pursuing their own interests, civil societies, far from causing injury to others, must join plans and forces whenever the efforts of particular States cannot achieve the desired goal. But in doing so great care must be taken. What is beneficial to some States may prove detrimental rather than advantageous to others.

17 R St J Macdonald, "Solidarity in the Practice and Discourse of Public International Law" (1996) 8:2 Pace Intl L Rev 259 at 260, citing Emer de Vattel, *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*, vol 1 (London: 1758) at 8, s 13.

18 Macdonald, *ibid* at 260.

19 This paper does not delve into the various meanings of federalism; however, building upon Burgess, Watts and Elazar, federalism is here construed as a philosophical or ideological concept that advocates for a division of authority and a dispersion of powers among and between the different levels of government in society, and as an umbrella term encompassing various experiences. This includes not

solidarity are inextricably interlaced to the point that some scholars contend that solidarity is an intrinsic trait of federalism,<sup>20</sup> even if it may take other names or the principle is not explicitly entrenched in the federal constitution, being rather the product of doctrinal or judicial activity. But what is the actual meaning and scope of federal solidarity?

First, federal solidarity is often linked to the doctrine of *Bundestreue* or federal loyalty, whose literal meaning can be rendered as fidelity, loyalty or faithfulness (*Treue*) to the federal compact (the *Bund*): as De Villiers posits, this principle thus reflects “the comity and partnership upon which the federal constitution is based”,<sup>21</sup> and in fact certain scholars have explained this principle as “federal comity”,<sup>22</sup> as it implies a “constitutional duty to keep ‘faith’ (*Treue*) with the other and to respect the rightful prerogatives of the other”<sup>23</sup> as explained by Kommers. *Bundestreue* also reflects the idea of faith and trust that is expressed in the same etymology of the word federalism (rooted in the concept of *foedus* – or contract, pact – and *fides* – or faith), that is a covenant based upon reciprocal trust and faith.

The *Bundestreue* doctrine developed mainly in the ambit of German constitutionalism but it infuses — although under different names — other federal legal orders, including that of Canada. *Bundestreue* originated in the nineteenth century in Germany with the Reich Constitution of 1871, but reached full maturity as a legal principle only with the enactment of the German Basic Law of 1949 (the *Grundgesetz*) and the ensuing judicial activity of the Federal

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only classic federations modeled on the 1787 US Constitution, but also regional (or quasi-federal) systems and even hybrid supra-national schemes such as the European Union. See Michael Burgess, *Comparative Federalism. Theory and Practice* (Florence, KY: Routledge, 2006); Daniel Elazar, *Exploring Federalism* (Tuscaloosa, AL: The University of Alabama Press, 1987); Ronald L. Watts, *Comparing Federal Systems* (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1999).

20 See e.g. Edmond Orban, “La Cour constitutionnelle fédérale et l’autonomie des Länder en République fédérale d’Allemagne” (1988) 22 RJT 37 at 42.

21 Bertus De Villiers, “Federations: Shared Rule and Self-Rule in the Search for Stable Governance” (2012) 39:3 *Politikon* 391 at 396 [De Villiers, “Federations”]; see also Dirk Brand, “The South African Constitution: Three Crucial Issues for Future Development” (1998) 9:2 *Stellenbosch L Rev* 182 at 186 [Brand, “SA Constitution”].

22 Uwe Leonardy & Dirk Brand, “The Defect of the Constitution: Concurrent Powers are not Co-operative or Competitive Powers” [2010]:4 *J South African L* 657 at 663 [Leonardy & Brand, “Concurrent Powers”].

23 Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1989) at 73, cited in Mark Tushnet, “What Then is the American?” (1996) 38:3 *Ariz L Rev* 873 at 879-880.

Constitutional Court (the *Bundesverfassungsgericht*, or “BVerfG”):<sup>24</sup> in fact, while *Bundestreue* is not explicitly crystallized in the *Grundgesetz*, the BVerfG acknowledged it as a principle intrinsic to the federal nature of Germany, infusing it with concrete meaning over several years of constitutional adjudication. It is thus a consolidated constitutional principle that the BVerfG has invoked as a “regulatory principle” to maintain, as Gaudreault-Desbiens explains, “some equilibrium between the federal government and the *Länder*, and between the *Länder* themselves, as well as inducing respect for core federal values.”<sup>25</sup> In a 1958 decision, the BVerfG explained *Bundestreue* in the following terms:

[i]n a federal state the federal government and the Lander have the common duty to preserve and maintain constitutional order throughout the entire union. Where the federal government does not have the power in its own right to maintain constitutional order, but is dependent on the co-operation of the Lander, such Lander are obliged to act. This follows from the unwritten rule of the duty of *Bundestreue* ...<sup>26</sup>

Elaborating upon the concept of federal loyalty as developed by the BVerfG, scholars have explained *Bundestreue* as follows:

[i]n pursuance of the German *Bundestreue* principle [...] governments in all spheres must promote national unity, respect one another’s status and powers, refrain from encroaching on one another’s integrity and from assuming powers not conferred on them in the constitution, and co-operate in mutual trust and good faith. They must support and consult one another, co-ordinate their actions and in case of conflict exhaust all remedies before turning to the courts. In addition, governments participate in decision-making in other spheres (*eg* through the national council of provinces), may delegate their powers to other spheres, and may intervene in the affairs of another sphere under circumstances that may threaten good governance [...].<sup>27</sup>

As explained by Van Gerven, *Bundestreue* as developed in German constitutionalism appears as an overarching concept that imposes a duty for central

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24 Bertus De Villiers, “Comparative Studies of Federalism: Opportunities and Limitations as Applied to the Protection of Cultural Groups” [2004] J South African L 209 at 215, n 24 [De Villiers, “Comparative Studies”]. For similar definitions made by Kommers on *Bundestreue* as “federal comity” see Vicki C Jackson, “Narratives of Federalism: Of Continuities and Comparative Constitutional Experience” (2001) 51:1 Duke LJ 223 at 284; Jean-François Gaudreault-DesBiens, “Cooperative Federalism in Search of a Normative Justification: Considering the Principle of Federal Loyalty” (2014) 23:4 Const Forum Const 1 at 3. For a more detailed intellectual history of *Bundestreue*, see Daniel Halberstam, “Of Power and Responsibility: The Political Morality of Federal Systems” (2004) 90:3 Va L Rev 731 at 740ff; Geert De Baere & Timothy Roes, “EU Loyalty as Good Faith” (2015) 64:4 ICLQ 829 at 861-66 [De Baere & Roes].

25 Gaudreault-DesBiens, *ibid* at 3.

26 1958 decision by the BVerfG, cited in De Villiers, “Federations”, *supra* note 21 at 396.

27 Leonardy & Brand, “Concurrent Powers”, *supra* note 22 at 661.



and peripheral governments of federal and decentralized systems “to preserve and restore the constitutional order in all its components and on all levels of the State, and to cooperate and assist one another whenever appropriate.”<sup>28</sup> *Bundestreue* is thus premised on the duty of central and peripheral governments to consider their reciprocal interests when carrying out their institutional powers so that some kind of partnership is created between the various levels of government.<sup>29</sup> Consequently, among the many implications of *Bundestreue* there is the need for central and peripheral governments to cooperate in mutual trust and good faith, support and consult one another, coordinate their actions, participate in decision-making in other spheres, and delegate their powers when necessary.<sup>30</sup> And because, as scholars contend, federal loyalty requires “an absolute duty of conciliation between the two orders of government” or the “complementarity” between the two orders of government,<sup>31</sup> cooperative federalism is construed as one of the most classic ways to express the spirit of *Bundestreue*.<sup>32</sup>

Cooperative federalism is commonly opposed to the idea of “competitive” or “dual” federalism premised on the traditional idea of “watertight compartments” and “dual sovereignty” between central and peripheral governments seen as “co-equals” and functioning independently from one another within their own separate spheres of action — the US federal model being the most classic example in this sense.<sup>33</sup> Yet, in the wake of the economic crisis of the 1930s, an awareness emerged in federal states that an overlapping between the central and peripheral spheres of government was almost inevitable, thus leading to an elaboration of the theory of cooperative federalism, according to which federal and local governments “work together and share functions and powers in the same areas as long as these powers and functions do not conflict.”<sup>34</sup>

Over the past few decades, cooperative federalism has prominently emerged in a number of federations such as Canada. The judicial interpretation of the

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28 Walter van Gerven, “Federalism in the US and Europe” (2007) 1:1 Vienna Online J on Intl Const L 25-26.

29 Brand, “SA Constitution” *supra* note 21 at 186, citing Bertus De Villiers, *Bundestreue: The Soul of an Intergovernmental Partnership* (Johannesburg: Konrad-Adenauer-Stiftung, 1995) at 10.

30 Leonardy & Brand, “Concurrent Powers”, *supra* note 22 at 661, 663.

31 Orban, *supra* note 20 at 42, citing HA Schwartz-Liebermann von Wahlendorf, “Une notion capitale du Droit constitutionnel allemande: la Bundestreue (fidélité fédérale)” [1973] RDP 769.

32 De Villiers, “Comparative Studies”, *supra* note 24 at 215.

33 Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009) at 5; Brand, “SA Constitution”, *supra* note 22 at 185.

34 Michael D Reagan, *The New Federalism* (Oxford: Oxford University Press, 1972) at 21, cited in Schütze, *supra* note 34 at 5.

Canadian Supreme Court (“SCC”) has progressively departed from the idea of “watertight compartments” and embraced a more flexible view of federalism, one that encourages intergovernmental cooperation and accepts intrusions of one level of government into the other as long as there is no frustration of purpose or clear conflict in operation.<sup>35</sup> In fact, as argued by the SCC, Canadian federalism “recognize[s] that overlapping powers are unavoidable” and courts have “observed the importance of cooperation among government actors to ensure that federalism operates flexibly.”<sup>36</sup> Similarly, the SCC contended that

[y]et we may appropriately note the growing practice of resolving the complex governance problems that arise in federations, not by the bare logic of either/or, but by seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts. Such an approach is supported by the Canadian constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities. The backbone of these schemes is the respect that each level of government has for each other’s own sphere of jurisdiction. Cooperation is the animating force.<sup>37</sup>

As noted above, even if the doctrine of *Bundestreue* has clearly German origins, its spirit has quickly penetrated — although under different names and often in connection with the idea of cooperative federalism — the constitutional texts or legal systems of a number of federal or quasi-federal states, not only in Europe but elsewhere. For instance, article 41 of the Constitution of South Africa<sup>38</sup> directly builds upon *Bundestreue*<sup>39</sup> to provide that

1. All spheres of government and all organs of state within each sphere must
  - g. exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
  - h. co-operate with one another in mutual trust and good faith by
    - i. fostering friendly relations;

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35 *Reference re Securities Act* 2011 SCC 66 at para 57, [2011] 3 SCR 837 [*Reference re Securities*]; Brand, “SA Constitution”, *supra* note 21 at 185; Gaudreault-DesBiens, *supra* note 24 at 10; Hugo Cyr, “Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism” (2014) 23:4 Const Forum Const 20 at 20.

36 *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 42, [2007] 2 SCR 3.

37 *Reference re Securities*, *supra* note 35 at paras 132-33.

38 The English version of the *Constitution of the Republic of South Africa, 1996*, No 108 of 1996 can be consulted here: <[www.gov.za/documents/constitution-republic-south-africa-1996](http://www.gov.za/documents/constitution-republic-south-africa-1996)>.

39 De Villiers, “Comparative Studies”, *supra* note 24 at 215-16. According to De Villiers, articles 40 and 41 of the South African Constitution are “probably the most elaborate constitutional recognition of the notion of cooperative federalism”: *ibid* at 216; see also Brand, “SA Constitution”, *supra* note 21 at 186.

- ii. assisting and supporting one another;
- iii. informing one another of, and consulting one another on, matters of common interest;
- iv. co-ordinating their actions and legislation with one another;
- v. adhering to agreed procedures; and
- vi. avoiding legal proceeding against one another

Similarly, a principle akin to *Bundestreue* and cooperative federalism is contained in articles 44(1) and (2) of the Swiss Constitution,<sup>40</sup> whereby the central (or confederal) government and the Cantons “shall support each other in the fulfillment of their duties and shall generally cooperate with each other.” Furthermore, “[t]hey owe each other a duty of consideration and support. They shall provide each other with administrative assistance and mutual judicial assistance.” Article 143(1) of the Belgian Constitution likewise mandates that “[i]n the exercise of their respective responsibilities, the federal State, the Communities, the Regions and the Joint Community Commission act with respect for *federal loyalty*, in order to prevent conflicts of interest” (emphasis added).<sup>41</sup> And, in Austria, while the doctrine is not constitutionally entrenched, federal loyalty has been developed by the Constitutional Court under the name of “mutual consideration.”<sup>42</sup>

The constitutional texts of a number of quasi-federal states also contain references to principles reminiscent of federal loyalty. For instance, in Italy, reference is made to the doctrine of “loyal collaboration”<sup>43</sup> whose roots can be traced back to *Bundestreue*:<sup>44</sup> article 120 of the Italian Constitution embeds this principle when dealing with “substitution powers” that the central government may take under certain conditions in the event the peripheral units fail to properly exercise their powers,<sup>45</sup> while in Spain a doctrine analo-

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40 Art 44 Satz 1-2 BV. The English version of the Federal Constitution of the Swiss Confederation is available here: <<https://www.admin.ch/opc/en/classified-compilation/19995395/201506140000/101.pdf>>.

41 Art 143(1), GGW. The English text of the 1993 Belgian Constitution is available online here: <[www.const-court.be/en/basic\\_text/belgian\\_constitution.pdf](http://www.const-court.be/en/basic_text/belgian_constitution.pdf)>. Interestingly enough, the German (official) version of the document talks about “*föderale Loyalität*” and not of *Bundestreue*, the latter being an exclusively German principle. See also Anna Gamper, “On Loyalty and the (Federal) Constitution” (2010) 4:2 Vienna Online J on Intl Const L 157 at 164; Gaudreault-DesBiens, *supra* note 24 at 6; Kamiel Mortelmans, “The Principle of Loyalty to the Community (Article 5 EC) and the Obligations of the Community Institutions” (1998) 5:1 MJECL 67 at 85.

42 Gamper, *ibid* at 160.

43 *Ibid* at 162, n 25.

44 Cristina Bertolino, “La leale collaborazione quale principio cardine dei sistemi multilivello” (2006) *Centro Studi sul Federalismo* Paper Series, at 13, n 19, online: <[www.csfederalismo.it/attachments/article/864/RP\\_Bertolino\\_06.pdf](http://www.csfederalismo.it/attachments/article/864/RP_Bertolino_06.pdf)>.

45 Art 120 Cost; Gamper, *supra* note 41 at 164.

gous to loyal collaboration has been judicially acknowledged by the Spanish Constitutional Court even in the absence of a specific reference to the principle in the Constitution.<sup>46</sup>

While *Bundestreue* and cooperative federalism present many points of convergence, the two concepts are not perfect synonyms as some scholars tend to suggest;<sup>47</sup> in this regard, Jackson talks about cooperative federalism as the “consultative aspects of *Bundestreue*”.<sup>48</sup> In fact, *Bundestreue* is not exhausted in the idea of intergovernmental relations and overlapping jurisdiction between the centre and the periphery, as it encompasses other dimensions as well, dimensions that go back to the idea of mutual aid and assistance that are well incarnated by the concept of solidarity. This will be explained in the following discussion.

### **3. *Bundestreue* and federal solidarity: vertical and horizontal features**

Thus far, we have explored the scope of *Bundestreue* and explained that, at least according to the interpretation given in German constitutional theory, this principle runs in three directions: from the centre to the periphery, from the periphery to the centre, and among peripheral units.<sup>49</sup> In fact, the *foedus* (meaning the compact or covenant) — on which all federal arrangements are premised — implies some form of collaboration and reciprocal respect or trust among all the different components of the federal compact.<sup>50</sup> The idea of cooperative federalism among central and peripheral units described above represents perhaps the most common way to express the spirit of *Bundestreue* in the specific ambit of intergovernmental relations. But, federal loyalty presents other perspectives that help express the idea of comity and faithfulness or fidelity to the federal compact intrinsic in *Bundestreue*: this is where the principle of solidarity comes into play.

However, solidarity in this particular federal sense cannot be unidirectional or univocal: rather, it needs to be reciprocal and polyvocal, thus engaging central and peripheral governments alike, both in a vertical (e.g. from the centre to the periphery and *vice versa*) and in a horizontal (e.g. among peripheral units) dynamic. Both dynamics call for elaboration.

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46 Mortelmans, *supra* note 41 at 85, nn 105-06.

47 Gamper, *supra* note 41 at 161.

48 Jackson, *supra* note 24 at 285.

49 *Ibid* at 284.

50 Gamper, *supra* note 41 at 169.

## a. Vertical solidarity: equalization payments

In many federal or quasi-federal systems, it has become a common practice to constitutionally entrench provisions implementing mechanisms such as equalization payments, usually running from the centre to the periphery (and thus vertically), in order to contain the inevitable fiscal and economic unbalances between richer and poorer areas and thus foster national unity. These mechanisms can be seen as an expression of the principle of federal solidarity construed as an elaboration of *Bundestreue*, here justified more by an “economic approach to redistribution” than an altruistic sentiment, as Ottmann posits.<sup>51</sup> In fact, these instruments bear close resemblance to the welfare state provisions discussed earlier in regards to solidarity and public law. For example, in Canada the *Constitution Act, 1982* contains a section (Part II) devoted to “Equalization and Regional Disparities”: section 36(1) refers to a general “commitment to promote equal opportunities” and it can be seen as a solidarity-based provision binding the provinces and the federal government in promoting services and tools that help curbing inequalities among the various regions. Section 36(2), on the other hand, creates equalization payments, a common solidarity-based legal tool that facilitate the reduction of the unbalances.<sup>52</sup> We can also mention articles 107(1) and (2) of the German *Grundgesetz* containing provisions on distribution of tax revenue, financial equalization among *Länder* and supplementary grants.<sup>53</sup> Article 158 of the Spanish constitution provides for clearing funds to redress “interterritorial economic imbalances” and implement “the principle of solidarity”; similarly, article 138(1) mandates that the State shall safeguard “the establishment of a just and adequate economic balance between the different areas of the Spanish territory and taking into special consideration the circumstances pertaining to those which are islands.”<sup>54</sup> Finally, articles 119(3) and (5) of the Italian Constitution provide for equalization funds for territories with lower per-capita taxable capacity and supplementary resources to promote economic development, social cohesion and solidarity and to reduce economic and social imbalances, respectively.<sup>55</sup>

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51 Ottmann, *supra* note 1 at 45.

52 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 36(1)-(2). As Brun et al indicate, equalization payments in Canada exist since 1957, but they were “constitutionalized” only in 1982: see Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 5th ed (Cowansville, QC: Éditions Yvon Blais, 2008) at 430.

53 Art 107 Abs 1-2 GG. Also article 104b GG contains provisions on financial assistance in specific circumstances.

54 Art 158 CE; art 138(1) CE.

55 Arts 119(3), (5) Cost.

This vertical aspect of solidarity is a mature and well-articulated concept that distinguishes many constitutional arrangements in decentralized states, and that has been extensively studied by federalism scholarship; rather, it is the horizontal counterpart (e.g. the specific relationship, including rights and duties, among and between the constituent units of a federation) that is often disregarded by students of federalism. This concept consequently needs more theorization.

## **b. Horizontal solidarity**

Building upon the *Bundestreue* doctrine, a number of federal or decentralized states have acknowledged the importance of a certain solidarity bond among constituent units of a federal compact (the horizontal aspect of solidarity). Yet, although it is somehow implicit in *Bundestreue*, this component remains under explored and under theorized because of the intrinsic difficulties in practically implementing horizontal solidarity-based instruments. The next section thus addresses the issue of whether there is a need to theorize federal solidarity beyond the classic examples of equalization funds and welfare provisions, so as to encompass a legally binding duty for federated entities to collaborate more actively with each other for the common good of the federation. In order to proceed, I will begin with a comparative overview of horizontal solidarity-based provisions in a selection of federal and quasi-federal states.

### ***i. A comparative overview of horizontal solidarity in federal theory***

In the ambit of EU constitutionalism, it is undisputed that the entire legal framework of the Union is interspersed with solidarity-based provisions, to the point that solidarity is seen as one of the most important pillars of its whole legal architecture: the animating force that informs all types of dynamics, not only among member states and central institutions, or between the Union and the international community, but also among and between its member states.<sup>56</sup> For example, article 4(3) of the Treaty on European Union (“TEU”) provides that both the Union and member states shall “assist each other in full mutual respect in carrying out tasks which flow from the Treaties”<sup>57</sup> and this idea is reiterated in articles 24(3), 32, 267 and 351 TEU.<sup>58</sup> The Treaty on the

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56 As a milestone of EU integration, solidarity was first mentioned in the 1950 Schuman Declaration. For an exhaustive depiction of the meaning of solidarity in EU law see e.g. Peter Hilpold, “Filling a Buzzword with Life: the Implementation of the Solidarity Clause in Article 222 TFEU” (2015) 42:3 *Legal Issues of Economic Integration* 209 at 210.

57 EC, *Consolidated Version of the Treaty on European Union*, [2012] OJ, C 326/01, art 4(3), cited in De Baere & Roes, *supra* note 24 at 834; Gamper, *supra* note 41 at 164.

58 De Baere & Roes, *supra* note 24 at 835, 850.

Functioning of the European Union (“TFEU”), as amended by the Lisbon Treaty, also emphasizes the relevance of solidarity for the EU: for example, article 67 TFEU welcomes solidarity as the guiding principle informing the relationships among member states of the Union, especially when it comes to drafting policies on “asylum, immigration and external border control” and this is reiterated in article 80 of the TFEU. Touching upon the energy sector, article 122 of the TFEU identifies solidarity among member states as the guiding principle of their relationship.<sup>59</sup> Perhaps the most important novelty embedded in the TFEU is Title VII containing the so-called “solidarity clause” which entails a solidarity-based relationship among member states in the event of a terrorist attack or of a natural or man-made disaster. Finally, among the various interpretations offered by the European Courts to the principle of solidarity is that of a “mutual duty of genuine cooperation and assistance between Member States and Union institutions.”<sup>60</sup>

Similarly, article 2 of the Spanish Constitution also spells out a general duty of solidarity among the nationalities and regions that compose the Spanish nation, while at the same time acknowledging their right to self-government.<sup>61</sup> While the reference to solidarity is not as extensive as in the EU treaties, it is noteworthy to underline how also Spain entrenched the (horizontal) solidarity principle in its constitution.

In other federal or decentralized states, this horizontal duty of solidarity among constituent units has been discussed at a judicial level and with specific reference to financial help, absent a specific provision in the constitutional text. For example, in Germany the BVerfG held that the duty of cooperation embedded in the *Bundestreue* runs both vertically (e.g. between the *Bund* and the *Länder*) and horizontally (among *Länder*).<sup>62</sup> Furthermore, in a 1952 decision, the BVerfG ruled that “[t]he federal principle by its nature creates not only rights but also obligations” so that “financially strong states [have]

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59 Article 122 TFEU mandates that “[t]he policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.”: EC, *Consolidated Version of the Treaty on the Functioning of the European Union*, [2008] OJ, C 115/47, art 122.

60 De Baere & Roes, *supra* note 24 at 850.

61 In particular, it provides that “[t]he Constitution [...] recognises and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all.”: Art 2 CE.

62 See e.g. *Housing Funds Case*, 1 BVerfGE 299 at 315 (1952) [*Housing Funds*], cited in De Baere & Roes, *supra* note 24 at 859.

to give assistance within certain limits to financially weaker states.”<sup>63</sup> Next, as explained by Reich, there is a constitutional obligation binding the federal government in its relations with the *Länder* and the *Länder* in their common relations to act in good faith and work in order to achieve mutual understanding.<sup>64</sup> Consequently, this unwritten constitutional principle of reciprocal solidarity guides the relationships between federal and *Länder* governments.<sup>65</sup> Scholars also point out that *Bundestreue* implies “mutual cooperation” — and therefore solidarity — in “exceptional circumstances” both between the federal government and the *Länder* and between the same *Länder*.<sup>66</sup>

Conversely, in decision 176/2012, the Italian Constitutional Court (“ItCC”) took a different approach than the BVerfG, and explained that all equalization interventions shall come from the central government only (not from other regions), in the logic of vertical equalization payments enshrined by the legislator in article 119 of the constitutional text.<sup>67</sup> It thus appears that some disagreement exists on whether to recognize a legally enforceable duty on wealthier component units of a federal or quasi-federal compact to provide help to other federated entities in case of financial difficulties.

Aside from the specific adoption of cooperative federalism by the SCC described above, the Canadian Constitution makes no reference to anything resembling the spirit of *Bundestreue*. Yet some scholars suggest that although the SCC has never justified cooperative federalism on grounds of federal loyalty, and in spite of the lack of reference to anything akin to *Bundestreue*, solidarity represents the normative basis for Canadian cooperative federalism.<sup>68</sup> Furthermore, federal solidarity imbues political practices and constitutional rules, and the SCC itself has acknowledged that

[i]t is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another. Rather, federalism demands that a balance be struck, a balance that

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63 *Finance Equalization Case I*, 1 BVerfGE 117 at 131 (1952), cited in Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed (Durham: Duke University Press, 1997) at 72 [translated by Kommers]; see also De Baere & Roes, *supra* note 24 at 860, n 194.

64 Donald R Reich, “Court, Comity, and Federalism in West Germany” (1963) 7:3 *Midwest J of Political Science* 197 at 209, citing *Housing Funds*, *supra* note 62.

65 *Kalkar II Case*, 81 BVerfGE 310 (1990), cited in Gaudreault-DesBiens, *supra* note 24 at 4 [translated by Kommers, *supra* note 63 at 86].

66 De Baere & Roes, *supra* note 24 at 859-60.

67 See decision 176/2012 of the Italian Constitutional Court.

68 Gaudreault-Desbiens, *supra* note 24 at 14



allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres.<sup>69</sup>

In light of the above, it could be helpful to proceed with a theorization of the principle in Canadian law.

### ***ii. Possible ways to acknowledge horizontal solidarity***

Acting for the ultimate good and benefit of the federation should be the animating force of all federal or quasi-federal states. In this sense, federal solidarity — in its vertical but particularly in its horizontal component — can be conceived as the glue that links together all the components of the federation, the bond that cements and strengthens the relationships among the constituent units of the federal scheme, thus expanding the idea of federal loyalty and cooperation enshrined in the doctrine of *Bundestreue*. For this reason, federal solidarity is intrinsic in the nature of the federal compact even when it is not specifically spelled out in the constitutional text. And while horizontal solidarity implies some sense of collaboration, this concept is not perfectly identical to cooperative federalism. The latter focuses mainly on the conciliation, cooperation, and complementarity among and between the two different orders that compose the federation (e.g. the centre and the periphery), while horizontal solidarity mostly refers to a duty to be supportive and not in competition with one another that should inform the relationship among the constituent units, such as the peripheral entities of the federal scheme. The idea behind horizontal solidarity is one of limiting selfish behaviors by some regions so as not to frustrate its neighbours.

But what are the specific avenues in which the concept of horizontal solidarity may come into play? We noted how federal solidarity — both in the vertical and horizontal components — is most often associated with economic and financial issues, as well as with the redistribution of resources. Is it possible to single out other ambits where horizontal solidarity might be invoked? The scarcity of models from which to seek inspiration does not help in the endeavor, and when solidarity is entrenched in some basic legal text, it is used rather elusively without exactly specifying its actual scope. In this regard, the solidarity-based provisions contained in the EU Treaties and briefly illustrated above may offer some food for thought: areas such as energy redistribution, natural resources, environmental, and immigration or asylum issues may request more collaboration, help, or support from among the constituent units of a federal or quasi-federal state, thus representing the ideal platform where

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<sup>69</sup> Reference re Securities, *supra* note 35 at para 7.

horizontal solidarity could be expressed and strengthened through appropriate legal mechanisms. Immigration and asylum issues are an overwhelming problem in Europe at the moment, with the need to “redistribute” migrants and refugees among member states and, within member states, among the various regions. This is perhaps a good example of the meaning of horizontal solidarity just discussed: should regions within member states (and states within the EU) be entitled to decide whether, and in which measure, to accept migrants, or should there be some horizontal solidarity-based stratagem that requires more prosperous regions to absorb a higher number of them?

An eventual entrenchment or judicial acknowledgement of horizontal solidarity would inevitably raise a number of issues. One concern that certainly needs to be taken into account and carefully addressed pertains to the justiciability or enforceability of horizontal solidarity and, consequently, to its legalization. Positions of various scholars differ. For some, *Bundestreue* — and thus, by extension, federal solidarity — is a justiciable legal principle and in fact it has been developed both judicially and by academic literature,<sup>70</sup> whilst other scholars argue that the obligations created by solidarity are more moral than legal and, consequently, difficult to enforce.<sup>71</sup>

Another concern linked to an eventual entrenchment of horizontal solidarity pertains to whether the assistance provided among and between the constituent units should be more systematic or occasional, offered only under exceptional circumstances. Certainly, each perspective presents its positive and negative aspects. On the one hand, constituent units of a federal or quasi-federal state should always work in solidarity with each other for the ultimate benefit of the federation; on the other hand, systematic interventions might eventually disfigure the uniqueness and variegated nature of constituent units that is at the basis of a federal scheme. Furthermore, it might elicit the discontent of more “successful” territories if called to constantly take charge of the problems affecting other regions, especially in matters of finance; a corollary problem would also be to determine which unit is in a better position to help the others.

Finally, it should be acknowledged that, because of their cross-regional nature, in most federal states issues that engage or pertain more than one constituent unit are part of the exclusive jurisdiction of the federal government: in this sense, horizontal solidarity may blend into the vertical aspect.

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70 Brand, “SA Constitution”, *supra* note 21 at 186.

71 Macdonald, *supra* note 17 at 261, citing de Vattel, *supra* note 17.

In any event, federal solidarity (both in its horizontal and vertical aspects) is a concept that significantly differs from pure altruism or philanthropy, even if sentiments such as collaboration, mutual help, or assistance always lurk behind it: in fact, while altruism implies an act of charity or unilateral help without the expectation of repayment, federal solidarity is based on reciprocity and on the idea of *do ut des*.<sup>72</sup> This goes back to the distinction made before between moral and legal solidarity, where the latter shall be construed in terms of rights. Law creates not only rights but also obligations, so the eventual entrenchment of the principle of horizontal solidarity requires not only the enjoyment of rights but also the recognition of some duties on all the component parts of the federation: in this specific case, a duty not to frustrate each other but rather to collaborate for the ultimate benefit of the federation.

## Conclusion

The purpose of this paper was to explore the place and scope of federal solidarity and ultimately determine its relationship with other doctrines such as *Bundestreue* or federal loyalty and cooperative federalism, as scholarly literature on this topic is still scarce. In this regard, we observed how *Bundestreue* is more or less implicit in most federal and quasi-federal schemes, as it reflects the essential nature of the federal compact. *Bundestreue* (or federal loyalty), federal solidarity — both in its horizontal and vertical aspects — and cooperative federalism are concepts that, although referring to different things, have a common thread. They complement each other and help to better define the nature of the federal compact. Whether entrenched in the federal Constitution or simply acknowledged through judicial activity, the doctrine of *Bundestreue* can be construed as an overarching concept that condenses the very meaning and sense of federalism and it does so in many declinations: in the specific ambit of division of powers, it is expressed through the concept of cooperative federalism, whilst in welfare provisions and equalization funds it takes the form of federal solidarity in its vertical connotation. Federal solidarity may encompass other dimensions as well, such as its horizontal perspective: in fact, the depiction of *Bundestreue* herewith provided would not be complete without taking into account the glue that holds together the various components of the federation, or the “condition of unity” binding the members of a group.<sup>73</sup> In fact, federal solidarity can be traced back to the overall meaning of *Bundestreue* as it is part of the duty to be loyal to the federal compact and to the idea of

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<sup>72</sup> Hilpold, *supra* note 56 at 212-13.

<sup>73</sup> Vestert Borger, “How the Debt Crisis Exposes the Development of Solidarity in the Euro Area” (2013) 9 *Eur Const L Rev* 7 at 10.

cooperation and support with one another. As a result, federal solidarity runs not only vertically but also horizontally as a mechanism that helps soften self-centered behaviours of the constituent units towards each other in the interest of the whole. The concept of (federal) solidarity fortifies the relationships interconnecting the various actors of the complex federal scheme. It goes beyond the idea of philanthropy or altruism, instead mirroring the idea of taking full responsibility for being part of the federal compact.<sup>74</sup>

In conclusion, exhibiting solidarity-based interests among constituent units of a federal scheme (e.g. horizontal solidarity) — whether mediated through the centre or directly — would represent the translation into practical terms of the natural connection that characterizes a federal arrangement, thus offering the perfect platform to define the principle in federal theory: in fact, the spirit of federal solidarity truly reflects the nature of federalism and the theoretical equality of both levels of government in the federal compact.

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<sup>74</sup> Eijsbouts & Nederlof, *supra* note 3 at 172.