

**RETHINKING
HORIZONTAL
SUBSIDIARITY
IN THE EUROPEAN
UNION**

**New instruments for community
welfare in the Italian experience:
the Collaboration Pacts**



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Introduction

Filippo Maria Giordano

This Handbook begins with a general reflection that is intended to give a sense of continuity to the articulation of its parts, highlighting the role of the principle of horizontal subsidiarity in strengthening participatory democracy in the European Union. The reflection begins with the concept of participation and finds an ideal reference in the 1978 essay “The Power of the Powerless” by Václav Havel. The founder of the Charter 77 movement questioned himself about the relationship between the individual and power, and the role of individual conscience and responsibility as a decisive factor for change. His essay raised the question of the exercise of individual freedom (active freedom) and the autonomy of each person to act in their own spheres of action, however small they might be, within a broader context in which everyone was responsible and called upon to participate. The European Treaties also explicitly refer to the principle of subsidiarity in order to bridge the gap between the institutions and civil society and give citizens explicit power, i.e. ‘the right to participate in the democratic life of the Union’, specifying that decisions should be ‘taken as openly and as closely as possible to the citizen’ (Article 10(3) TEU). (Art. 10.3 TEU). Although the Treaty still lacks a more detailed legal framework for putting this into practice, it considers participation to be a citizens’ right and establishes subsidiarity as the main principle of this democratic orientation. In other words, the Treaty clearly calls for participatory democracy experiences to accompany representative democracy (Article 10.1).

In the Italian Constitution, this principle, more clearly defined (art. 118.4), has given rise - also thanks to more precise regulations (municipal regulations and regional laws) - to processes of regeneration of democratic action, ‘favouring’ in fact the creative potential of citizens and civil society organisations in the action of caring for the commons in the general interest. This has led to the emergence of new forms of participation, some of which - such as shared administration - have enabled citizens to experience democracy in the ‘active witness’ form of its fundamental principles and in active collaboration with institutions and local administrations in order to solve real problems in small communities, strengthening social cohesion (collaboration pacts). Collaboration or subsidiarity pacts are a full expression of democracy and political action - in the ancient sense of participating in and caring for the life of the city. They activate broad and modular forms of participation, facilitate aggregation and communication in local governance and problem solving. They are structured with the aim of tackling common problems and, by sharing tasks, they overcome differences (social, cultural, institutional, etc.) which are transformed into a creative plus (constructive pluralism) in the service of the general interest. In this way, new expressions of (subsidiary) democracy emerge, strengthening the social fabric and the relationship with the institutions, giving each citizen, willing to collaborate in the general interest, real and quantifiable power to act in terms of concrete results. This is a form of active democracy that does not invalidate, but consolidates and strengthens representative democracy. Thus, to the power of electoral judgement exercised through voting or that which manifests itself in public opinion, or even to that which derives from the involvement of citizens in the deliberative and decision-making process, one can add the power of direct action of democratic behaviour in the construction of factual (public/private) micro-communities - not “voice” but “action” -, founded on the desire to share commons (material and immaterial), expanding their use to facilitate the formation of social and socio-institutional networks through structured dialogue.

The question we are asking ourselves is, therefore, the following: is it possible today, starting from the Italian experience, to translate the power of the powerless into the power of active citizens who find in subsidiarity a tool for direct participation in democratic action? And is it possible for this to happen on a European scale, taking Articles 10 and 11 of the Treaty on European Union as a reference? And again, can the Italian model of shared administration constitute a virtuous precedent that can be exported and replicated, albeit in a different way, in the rest of the European Union? The Handbook that we are presenting here intends to try to answer these questions, articulating through the essays that it collects an ideal path marked by horizontal subsidiarity, which, enunciated in principle in the European Treaties, finds instead in the Italian Constitution and in a municipal regulation a way of concreteness and full application in the initiative of active citizens, engaged in the shared care with local administrations of commons and of entire communities.

In the first chapter, Filippo Maria Giordano provides an overview of the use and potential of the horizontal subsidiarity principle at EU level. Although concise, the essay presents, together with a picture of the principle's functions, a number of critical issues in terms of the democratic nature of its horizontal application, and presents a number of possible developments that converge on the Italian experience. This is followed by the contribution of Chiara Salati, who in the second chapter draws a more incisive comparison between participatory democracy and active democracy. The author questions the possible developments of subsidiary democracy at a European level and shows how in Italy such an experience has been underway for more than five years thanks to what is called the shared administration of commons. The third chapter, written by Fabio Giglioni and Roberta Tonanzi, goes into the heart of this experience and explains how the principle of subsidiarity has been used to renew the conditions for regulating the institutional and social pluralism that characterises the Italian Constitution, opening up new developments in terms of democratic participation in the care of the commons. The new paradigm of shared administration has in fact opened up new scenarios, not only in the field of the material care of cities and urban spaces (what the Romans called *urbs*), but more concretely in the experimentation of new forms of social aggregation, public/private cooperation, unexplored models of welfare and original initiatives in the field of the democratic and shared management of common spaces, making citizenship (what the Romans called *civitas*). The fourth chapter offers a broader view of this experience. Daniela Ciaffi presents a reflection from an international perspective on the interest that shared administration has aroused in commoners working in the rest of the world, from France to Spain, from South Africa to the United States. The fifth and final chapter focuses on the spread of this subsidiary model and its ability to adapt to the needs and respond to the demands of the various contemporary citizens. Pasquale Bonasora closes the Handbook by describing the experience of Bright, a project that uses shared administration and subsidiary democracy to improve the living and working conditions of women working in agriculture. A project that aims to combat the tragic difficulties in this area with respect to violations of fundamental rights, gender discrimination and overcoming obstacles to accessing gender- and culture-sensitive public services.

The Handbook, therefore, proposes to move beyond theoretical abstraction regarding the principle of horizontal subsidiarity in order to demonstrate how the Italian model of shared administration, supported by all the European principles of participation and subsidiarity, can effectively offer an example of renewal of European democracy.

Chapter I

SUBSIDIARITY, A TRANSFORMATIVE PRINCIPLE FOR THE FUTURE OF EUROPEAN DEMOCRACY

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Filippo Maria Giordano

1.1

The three coordinates of subsidiarity: participation, inclusion and collaboration

A little more than a decade after the economic and financial crisis that hit most of the western world at the beginning of the new millennium (2008), marking profound changes not only in terms of geopolitical arrangements, but also and above all in terms of economic and social models, we are once again facing a challenge of global dimensions, triggered by the pandemic and the Covid-19. These crises have severely tested the pre-existing balances, and in Europe and Italy, as in the rest of the world - and we are only at the beginning - have initiated a profound reflection on the need to reconfigure power relations and the sustainability of our governance models at the national, European and international levels. The pandemic, like the previous crisis, is creating a climate of fear and uncertainty, but also of anger and despair, foreshadowing new forms of inequality and poverty, as well as major social imbalances. All this can only invite us to take a critical look at the global order and the social, economic and political systems that characterise it, imagining, especially in Europe, initiatives designed to radically rethink the society in which we live, its points of reference and to review the paradigms to which we are accustomed and with which we identify.

However, the crisis, as its etymology indicates, is also an opportunity to confront the past and to stimulate the search for solutions in the present for the future. Subsidiarity can be understood as just such a solution. It opens up opportunities for change, suggesting new types of socio-economic and socio-political relations that are more sustainable and capable of dealing with the complexity of global challenges. It is not a question of inventing anything new, but only of taking an ancient concept belonging to our social and political tradition and adapting it to the needs of contemporary society - as has happened in part and is still happening. It needs to be put into a legal context so that it can act as a leaven capable of mobilising social energies, promoting a renewed spirit of participation and directing the logic of Community governance towards the European common good.¹

Subsidiarity is still a principle capable of grasping the deepest instances of society and of promoting, in its horizontal sense, thanks to civic activism, unprecedented paths of renewal, social regeneration and democratic participation. Hence the need to outline, firstly, a synthetic profile of subsidiarity both from a historical-conceptual point of view and with regard to its areas of action and the contexts in which it operates on a horizontal level in the European Union and in Italy. This will make it possible, secondly - and this will be the subject of the following chapters - to clarify the method, the practices and the effects of subsidiarity, especially in Italy - which is in a privileged position of advanced experimentation compared to other European countries - and thus to highlight

1. G. Arena, Europa, bene comune? Ci sono oggi, in Italia e altrove, politici capaci di ridare un'anima all'Europa?, Labsus, 2019 (<https://www.labsus.org/2019/05/europa-bene-comune/>; consulted 31 march 2021).

its potential with respect to the issues addressed in the handbook. The aim is thus to describe the “indirect” effects of subsidiarity on social inclusion, on overcoming divisive and stigmatising stereotypes, on promoting pluralism and participation, and the “direct” effects which, on the other hand, concretely favour collaborative practices and integrative models that complement traditional systems of democracy and governance.

1.2

A richly nuanced identity principle that comes from afar

As mentioned above, subsidiarity is a principle that comes from afar and, in its positive codification, belongs to the European legal culture, as Giuseppe Cotturri already observed: “outside Europe there is no concept or principle of subsidiarity”.² However, talking about subsidiarity raises some difficulties, especially with regard to its interpretation. Some have defined it as an “ambiguous principle, with [...] different meanings”, but capable of promoting “a very rich reflection”³; others have accepted it as an innovative idea that, from an ethical-political point of view, “presents itself as a very rich principle, comparable, in terms of its disruptive force, to the principle of the separation of powers at the time of its first historical appearance”⁴. This innovative charge affects “the very essence of democracy, the development of its values, the way of being a citizen”⁵ and makes it an essentially European socio-political-cultural concept, which has been established with legal certainty in the construction of the Community, but with potentially universal application. The principle, therefore, does not lend itself easily to rigid formulations without risk of misunderstandings or without incurring in over-simplifications. Consequently, it is not easy to conceptually circumscribe the idea underlying the principle itself and to describe the numerous implications (ethical-value, social, political, legal, economic, urban-regional, etc.) that it entails, including with regards to social and political integration processes and the sense of care that characterises the communities that have transposed and accepted its guidelines on a regulatory level, especially at the horizontal level of application.

It is precisely in the latter meaning that the original nature of subsidiarity can be grasped, as a system of relations that develops from the social base and then progresses towards more complex and articulated forms of political organisation, as the adage “*civitas propter cives, non cives propter civitatem*”⁶ recalls. The principle is ancient and ideally dates back to Aristotle, traces of which can already be found in Plato and, before that, in the book of Exodus; it was then taken up and reworked by Thomas Aquinas in an interpretation that places the person and his fulfilment always at the centre of the general interest and gives society as a whole, understood organically, the aim of achieving the common good. The principle has spanned the centuries, declining itself vertically and horizontally, changing appearance and adapting to the emerging context, always with the aim of harmonising individual and collective, private and public interests, providing the conditions for a dialogue that is always open to conciliation. Its internal dynamics tend to favour and combine the free and autonomous initiative of individuals and associated realities with the responsibilities of civil

2. G. Cotturri, *Potere sussidiario. Sussidiarietà e federalismo in Europa e in Italia*, Carocci, Roma, 2001, p. 11. His comment was part of the debate opened around the principle on the occasion of its inclusion in the Italian Constitution with the reform of Title V in 2001, but also referred to the European treaties that had introduced subsidiarity in the framework of European “public law” only less than ten years earlier. Cotturri looked at the Community experience of the early 1990s as the start of a phase of great perspectives and changes, in which subsidiarity marked the way forward in a “moment of transition to a stronger and more cohesive configuration of supranational institutions, for which the name of Union was adopted”. However, observing also the Italian experience, in which work was being done to recover and insert the same principle into the Fundamental Law - which had long remained implicit in the Constitution, present in a fragmented manner in the values mentioned in the first part -, he sensed the potential of that insertion which in Italy, more clearly than in the EU, opened up new dynamics and suggested the virtuous “circularity” between horizontal and vertical subsidiarity (Ibid.).

3. S. Cassese, *L'aquila e le mosche. Principio di sussidiarietà e diritti amministrativi nell'area europea*, in “*Il Foro italiano*” (1995), IV, p. 373.

4. A. D'Atena, *Il principio di sussidiarietà nella Costituzione italiana*, in “*Rivista italiana di diritto pubblico comparato*” (1997), p. 627.

5. G. Arena, G. Cotturri, *Introduzione. Il “valore aggiunto” della cittadinanza attiva*, in G. Arena, G. Cotturri (a cura di), *Il valore aggiunto. Come la sussidiarietà può salvare l'Italia*, Carocci, Roma, 2010, p. 28.

6. This is the phrase used by Pius XII in his radio message of 11 September 1956, in which the Pope referred to the tradition of the Social Doctrine of the Church, of which subsidiarity is the third of the four cornerstones together with the dignity of the person, solidarity and the common good. See *Discours et messages-radio de S.S. Pie XII, XVIII, Dix-huitième année de Pontificat, 2 mars 1956 - 1er mars 1957*, pp. 425-435, in https://www.vatican.va/content/pius-xii/fr/speeches/1956/documents/hf_p-xii_spe_19560911_medici-cattolici.html; consulted on 31 March 2021).

living, while respecting a solidarity-based vision of the social and political community. Examples of such an architecture, aimed at the collaboration and active solidarity of its members, can be found in the thinking of many European figures of the past, who saw subsidiarity as a balm against social conflicts and the arrogance of political and economic power. Among these, the best known is that of the jurist and theologian Johannes Althusius, who used to compare the plural society - which he called “symbiotic” - to a harmonious concert of instruments tuned by subsidiarity: “as from strings of different tones, harmonically tuned, a very sweet sound and a gentle melody are born, [...], so in the same way in the State there is agreement and bonding between [...] people of different ranks”, from which “a most sweet and fitting harmony arises” which, if well orchestrated, produces “a praiseworthy, happy, almost divine and very lasting concord”⁷. A similar harmony had already been described in images centuries earlier by Ambrogio Lorenzetti in his frescoes depicting the allegory of “Good and Bad Government” and their effects on the city and the countryside. The Sienese painter’s work gives rise to a social and political philosophy that he figuratively summarises in the concerted participation of the citizens of the Republic of Siena in the care of the common good. With a subsidiary logic, the citizens and the “Good Government” cooperate harmoniously in the material and immaterial care of the city, both of the urbs, understood as the set of structures and buildings, and of the civitas, the living community with its interests and needs.

Subsidiarity has thus traversed the centuries and the history of Europe, characterising the formation of its various social and political communities, and has left its mark on a long series of local experiences of varying extents, eventually assuming the features of a principle of identity, with which many European citizens can today identify themselves. It is no coincidence that the principle, sometimes suggested by the legal cultures of the Member States themselves⁸ (Germany and Italy first and foremost), was finally incorporated into the Community Treaties, finding legal form and guiding the process of European integration. It is a principle that has fostered the diversity and plurality of the subjects it brings into communication, building networks of cooperation, of “sharing, the fruit of coexistence, not of separate and mutually distracted lives”; in other words, subsidiarity reduces distances, encourages civic activism, increases participation and promotes “the political culture of federalism [...] of proximity and mutual attention”.⁹ Jacques Delors recalled how “les origines mêmes, les racines de notre réflexion politique sur le fédéralisme, la subsidiarité et la démocratie ont donc de forts ancrages dans la pensée chrétienne et œcuménique. Chaque groupe chrétien ayant eu un apport décisif indispensable et spécifique dans l’élaboration de ces concepts fondamentaux à travers la rationalisation du droit naturel, qui a permis de dégager des principes communs métapositifs à la théorie de l’organisation politique contemporaine”.¹⁰ We are therefore faced with a principle that is dense with values and aimed at the good of the person and the communities that surround him or her.

1.3 A principle wanders around Europe (in search of confirmation)

For thirty years now, the history of the European Union and the dynamics of its integration have been confronted with the principle of subsidiarity. It is possible to trace and attribute some of the major transformations that the Community system has undergone over time to this principle, and

7. J. Althusius, *Politica methodice digesta et exemplis sacris et profanis illustrata*, Herbomae Nassoviorum, Ex officina C. Corvini, 1603, I, 36. See also the version translated into Italian, edited by C. Malandrino, J. Althusius, *La politica Elaborata organicamente con metodo e illustrata con esempi sacri e profani*, testo latino a fronte, Claudiana, Torino, 2009.

8. See L. Barbaini, F.M. Giordano, S. Quirico, *Europa, identità e democrazia. Crisi di un paradigma e nuove prospettive*, Aracne, Roma, 2020. See also C. Malandrino (Ed. by), *Un popolo per l’Europa Unita. Fra dibattito storico e nuove prospettive teoriche e politiche*, Olschki, Firenze, 2004, in particular pp. 123-139 (F. Ingravalle, *Principio di sussidiarietà, potere sussidiario e “popolo europeo”*).

9. G. Cotturri, *Potere sussidiario. Sussidiarietà e federalismo in Europa e in Italia*, cit., p. 32. See also G. Arena, F. Cortese (eds.), *Per governare insieme: il federalismo come metodo. Verso nuove forme della democrazia*, Cedam, Padova, 2011.

10. J. Delors, *Introduzione*, in F. Citterio, L. Vaccaro (a cura di), *Quale federalismo per quale Europa. Il contributo della tradizione cristiana*, Morcelliana, Brescia, 1996, p. 34.

it is also possible, going back to the very beginning of the integration process, to observe how this principle was already ideally enshrined in the original project.¹¹ It is also well known that the idea of subsidiarity was present in the political culture of the Founding Fathers, who found in the principle "a criterion for legitimising power that was not created by man or time, but corresponded to the existence of a permanent truth"¹². On the other hand, the principle of subsidiarity is not only a political and/or administrative rationale that concerns the attribution of powers to public bodies and establishes the extent of their intervention, but, looking beyond its instrumental application, it is possible to glimpse its anthropological origin and the social philosophy that more specifically concerns the relational nature of man and his moral sphere. Subsidiarity cannot, therefore, remain on the surface and be reduced to a simple "technical-legal criterion" aimed at coordinating political initiative in areas that do not fall within the exclusive competence of the EU, but must go deeper and be taken up first and foremost as a "culture of government"; in other words, its meaning must be extended without making it rigid in its vertical projection, which is sometimes intended to guarantee the sovereign prerogatives of the Member States, and sometimes to reduce them to the benefit of the Union. The dynamic of subsidiarity, in fact, while having practical needs to articulate itself in organisations of power in time and space, "refers first and foremost to the constitution of subjects, to the recognition of collective identities, to the sense of multicultural exchanges, to bonds of solidarity and conflicts of autonomy"; in other words, our principle "is inscribed in the culture of man, not of administrative machines: it is the political and social sciences that can provide tools, not the mechanics of power or the geometry of competences"¹³.

In this sense, subsidiarity can be said to be a specifically European principle that invites the legislator to go down into the concrete world of social life to observe how citizens decide to form "communities of meaning" through shared interests and, thus, initiate participatory processes and collaborative practices. In this way, subsidiarity becomes once again a vital principle that restores centrality to the citizen in the exercise of his freedoms and responsibilities (rights/duties) and that has a fundamental impact on the substance of living together, on the way of understanding "making community" and, consequently, on the quality of democracy.

In 1991, Jacques Delors, while working on the reform of the European treaties, identified the principle of subsidiarity (and solidarity) as a regulatory instrument of power relations capable of reformulating inter-institutional relations at all levels of European governance, also on the basis of the centrality of the autonomy of citizens and their social components (Anta 2004: 60-71 and 87-92). Only a few years earlier, the Council of Europe had implicitly referred, for the first time in these terms at international level, to the principle of subsidiarity in a document aimed at promoting the recognition and enhancement of the representative bodies of regional communities, as organic socio-political realities in which the natural interests of citizens and their communities are manifested and composed. In 1985, the international organisation had thus anticipated the Union, drawing up the European Charter of Local Self-Government, with which it intended to protect the identities of local authority communities, giving them a central role in national constitutional systems. Local authorities were not only recognised from an institutional point of view, but also from a "functional" point of view in accordance with the principle of subsidiarity, according to which public decisions must be taken as close as possible to the citizens, who are the ultimate recipients of their consequences¹⁴. The vertical projection of subsidiarity emerges from the Charter, however, with regard to the smallest entities, i.e. those that identify with regional communities, where civic

11. See D. Ciaffi, F.M. Giordano (a cura di), *Storia, percorsi e politiche della sussidiarietà. Le nuove prospettive in Italia e in Europa*, Il Mulino, Bologna, 2020.

12. Maria Grazia Melchionni, Il principio di sussidiarietà nella prospettiva storica, dalla tradizione di pensiero cattolica al trattato di Maastricht, in "Rivista di Studi Politici Internazionali", Vol. 80, No. 2 (2013), p. 170. The author refers to Jean-Louis Loubet Del Bayle's considerations in *Les non-conformistes des années 30. Une tentative de renouvellement de la pensée politique française*, Seuil, Paris, 1969, p. 331. See also F. Ingravallo, *La sussidiarietà nei trattati e nelle istituzioni politiche dell'UE*, in «Working paper», n. 55, Università del Piemonte Orientale, Dipartimento POLIS (October 2005).

13. G. Cotturri, *Potere sussidiario. Sussidiarietà e federalismo in Europa e in Italia*, cit., p. 21.

14. In this respect, Article 4(3) of the Charter was very clear: "Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy". See European Charter of Local Self-Government, Strasbourg, 15.X.1985 (<https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007a088>; consulted on 31 March 2021).

participation is more lively and therefore it is easier to find convergence with the horizontal axis of the principle¹⁵. In this sense, Delors argued, subsidiarity "ce n'est pas seulement une limite à l'intervention d'une autorité supérieure vis-à-vis d'une personne ou d'une collectivité qui est en mesure d'agir elle-même, c'est aussi une obligation pour cette autorité d'agir vis-à-vis cette personne ou de cette collectivité pour lui donner les moyens de s'accomplir"¹⁶. In view of the Maastricht reform, his objective was not only to find a criterion capable of modulating and regulating the competences of the Member States within the supranational framework of the European Community, but also to restore to the human being, first and foremost, and to his being a citizen of a smaller community, an active role not only in the democratic life of his own country but also in that of the future European Union - thus integrating the Community representative system with new instruments of participation. Moreover, as Delors reiterated, "la subsidiarité procède d'une défense morale, qui fait du respect de la dignité et de la responsabilité des personnes qui la composent, la finalité de toute société"¹⁷. For him, "la subsidiarité s'applique à deux ordres différents : d'une part la délimitation entre la sphère privée et celle de l'Etat, entendue au sens large du terme ; d'autre part, la répartition des tâches entre les différents niveaux de la puissance politique"¹⁸. Among these, the first, "trop souvent négligé", remains the most important "pour choisir les critères d'attribution de pouvoirs à la puissance publique, en fonction d'une finalité essentielle : l'épanouissement de chaque individu"¹⁹. Following this direction, however, "suppose des hommes et des femmes capables d'assumer des responsabilités en vue de réaliser le bien commun"²⁰ and, we would add, of having the space and tools to become concrete protagonists of democratic action on the national and European public stage. In this way, the then President of the European Commission deeply rooted the principle of subsidiarity, ontologically as well as legally, in the organic fabric of European citizenship, wishing to give the new citizen of the Union a social dignity and a political space for action which, starting from individual autonomy and responsibility, could enable him to contribute, together with state and community institutions, to the definition and implementation of policies at all levels of decision-making. For Delors, subsidiarity was therefore a "compass" principle of Community integration, suitable for regulating the dynamics of European as well as national and supranational democracy, and was to be understood in the full sense, without the staggering of planes with which it is usually classified²¹.

As is well known, following the reform of the treaties, in which Delors played a leading role together with the governments of the member states, subsidiarity was understood mainly in its vertical sense, while the horizontal projection faded away almost completely, reduced to the idea of the proximity of the European institutions to the citizen within the framework of broader multilevel governance. This horizontal idea of subsidiarity was therefore only vaguely sketched out in the preamble, which stated that the parties undertake to ensure that decisions are "taken as closely as possible to the citizen". The situation did not change much in the course of the subsequent reforms, during which the vertical meaning of the principle continued to be discussed, although important and substantial corrections followed. Not even in 2002, when the debate on subsidiarity was opened in the European Convention (Working Group I), at a time when the Union's strong democratic deficit was being lamented, did the debate go much further²². And yet, Giovanni Moro observed at

15. In this regard, it should be remembered that in the Italian Constitution, municipalities, understood as exponential bodies of their own community, representing the interests of citizens and of the various communities organised on the territory, enjoy a regulatory reserve that allows them a certain degree of autonomy, especially as regards relations with citizens and models for managing urban areas and the territory.

16. J. Delors, *Le nouveau concert européen*, Editions Odile Jacob, Paris, 1992, p. 165. This is a speech on *Le principe de subsidiarité*, given at the Institut Européenne d'Administration Publique in Maastricht on 21 March 1991 and reproduced in the abovementioned volume.

17. *Ibid.*

18. *Ibid.*, p. 163.

19. *Ibid.*, pp. 163-164.

20. *Ibid.*, p. 164.

21. Cfr. J. Barroche, *La subsidiarité chez Jacques Delors. Du socialisme chrétien au fédéralisme européen*, in "Politique européenne", N. 23 (2007/3), pp. 153-177 ; M. Feix, *Subsidiarité, proportionnalité et construction européenne*, in "Revue d'éthique et de théologie morale", N. 267 (2011/4), pp. 59-70.

the time, the principle of horizontal subsidiarity, if it were reconsidered within the framework of the Union and suitably developed, "would give that constitutional meaning to the presence of every citizen at the European level that everyone says they hope for: one is a European citizen also insofar as one collaborates in the care of the general interest through actions, not only through voting". Moreover, by projecting itself in this strong direction of civic activism, which is vital and widespread at European level through the plurality of movements and voluntary organisations, subsidiarity could become the direct interpreter of civil society's desire to participate, granting it the most appropriate level of public dialogue and thus promoting a different way of making democracy in the Union, complementary to those already existing and consolidated, but more attentive and adherent to the stimuli emerging from grassroots communities and social formations. At the moment, none of the formulas adopted at Community level has this scope, Moro recalled, neither "the neo-corporative one of civil dialogue, which [...] reduces civil society to a set of interest groups", nor that of participatory democracy, which ends up incorporating civic organisations into the representative political process, giving rise to various short circuits". In any case, he concluded, "in policy making at European level, especially in relation to and thanks to the work of the Commission, there are ways of working and experiences that, albeit with the limitations mentioned above, constitute precedents that cannot be ignored".

1.4

The forms of participation in the Union according to the Treaty

Participatory democracy, as an institution of the Union, was recognised and incorporated into the Treaties with the 2008 Lisbon reform. The legal bases for this constitutive element of European democracy are described in Articles 10 and 11 of the Treaty on European Union (TEU). While the first article establishes (in the third paragraph) the general framework within which the institution is framed, according to which "every citizen has the right to participate in the democratic life of the Union", with the recommendation that decisions be "taken as openly and as closely as possible to the citizen", the second describes the ways in which participatory democracy is implemented in the Union's policies²⁷. The latter, which are certainly innovative in terms of opening up to the participation of civil society with respect to the previous vacuum, can for simplicity's sake be divided into two types, both subject to a constitutive limit. The first, in short, is the direct participation of individual citizens in the formation of policies and is expressed through different channels, the most important of which is the European Citizens' Initiative, which allows one million European citizens to submit a legislative proposal to the European Commission. The second involves citizens taking part in policy-making more indirectly, i.e. through civil society organisations engaged in dialogue with the European institutions. In this case, the area of action envisaged is that of consultations on policies or individual measures and develops a positive interaction between the European institutions and European social groups²⁸. This latter mode thus makes it possible

22. In the Treaty establishing a Constitution for the European Union of 2004, however, alongside the principle of representative democracy, the idea of citizen participation in the definition of European policies through dialogue and exchange between civil society organisations and the EU institutions by means of a bottom-up logic finds its place for the first time.

23. G. Moro, *Sussidiarietà orizzontale e riforma della Unione europea*, relazione al convegno "Sussidiarietà circolare e costituzione europea", organised by Cittadinanzattiva and "Quelli del 118", Bologna, 28 March 2003, p. 5 (<http://www.giovanmoro.info/documenti/g.moro%20bologna%2003.pdf>; consulted on 31 March 2021). On this subject see G. Moro, *Cittadini in Europa. L'attivismo civico e l'esperimento democratico comunitario*, Carocci, Roma, 2009.

24. *Ibid.*

25. *Ibid.*

26. For a reflection on the relationship between subsidiarity and democracy in the EU, see N. MacCormick, *Democracy, subsidiarity, and citizenship in the 'European Commonwealth'*, in "Law and Philosophy", No. 16 (1997), pp. 331-356.

27. Article 11 is divided into four paragraphs and reads as follows: "1. The institutions shall give citizens and representative associations, through appropriate channels, the opportunity to make known and publicly exchange their views in all areas of Union action. 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. 3. In order to ensure the consistency and transparency of the Union's actions, the European Commission shall carry out broad consultations with stakeholders. 4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. The procedures and conditions required for a citizens' initiative shall be established in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union".

to shorten the distance between organised civil society and the European Union. However, it should be noted that "in both cases the definition of participatory democracy reflects the point of view of the institutions and takes into account their concerns and their specific interest in increasing their legitimacy in a situation of low trust on the part of the citizens"²⁹. In other words, the European narrative of participatory democracy suffers from "a kind of 'institutional egocentrism', according to which the institutions are the main actors in the democratic life of the Union, while the citizens are invited to participate in their activity"³⁰. Nonetheless, the idea and practice of participatory democracy have taken root in the Union - as will be discussed in the second chapter - and in the future may broaden the spectrum of applications and ways in which this institution is implemented³¹.

1.5

The views of the European Economic and Social Committee on "subsidiarity and participatory democracy"

Participatory democracy has been and is supported above all by the European Economic and Social Committee (EESC), which considers it "an integral part of the European model of society" and dependent on the correct interpretation and application of the principle of subsidiarity³². Indeed, the Committee stresses how, thanks to Article 10(3) of the Treaty on European Union (TEU), the participation of citizens and their organisations has become a "right" and "subsidiarity a cornerstone of participatory democracy"³³. Similarly, it notes the importance of Article 11 (paragraphs 1 and 2), which proposes procedures and concrete actions to complement representative democracy with participatory democracy, by enlarging and strengthening "structures for dialogue with civil society at European level, but also at national, regional and local levels"³⁴. It considers it necessary to implement Article 11, which is seen as "a decisive opportunity to go beyond the already existing processes of consultation and participation of civil society, which have been developed at European level since the publication of the White Paper on European Governance in 2001"³⁵. With regards to the White Paper³⁶, the EESC had already issued an important opinion highlighting the fundamental value of the principle of subsidiarity, the "most important principle for good governance"³⁷. The Committee pointed out that this principle did not concern "only the technical-administrative distribution of powers, but expressed a specific conception of the individual, of his freedoms and responsibilities, and of the society in which he operates"³⁸. In other words, the EESC grasped the essence of subsidiarity, presenting it as a fundamental criterion for "good" European governance, for guaranteeing citizens' participation in the decision-making process, and suggested linking the vertical and horizontal axes of the principle:

28. On these issues, see M.C. Marchetti, *L'Europa dei cittadini. Cittadinanza e democrazia nell'Unione Europea*, FrancoAngeli, Milano, 2016; Ead., *Democrazia e partecipazione nell'Unione*, FrancoAngeli, Milano, 2014.

29. G. Moro, *Cittadini in Europa. L'attivismo civico e l'esperimento democratico comunitario*, cit., p. 77.

30. Ibid.

31. See, D. Siclari, *La democrazia partecipativa nell'ordinamento comunitario: sviluppi attuali e prospettive*, in "amministrazione in cammino" 2009 (<https://amministrazioneincammino.luiss.it/wp-content/uploads/2010/04/Siclari.pdf>; consulted on 31 March 2021).

32. EESC (Various activities group – Group III), *La democrazia partecipativa in 5 punti*, Bruxelles, 2011 (<https://www.eesc.europa.eu/resources/docs/pd-in-5-points-it.pdf>; consulted on 31 March 2021).

33. Ibid.

34. EESC, *Parere del Comitato economico e sociale europeo sul tema "Principi, procedure e azioni per l'applicazione dell'articolo 11, paragrafi 1 e 2 del trattato di Lisbona (parere d'iniziativa)*, SOC/423, Bruxelles, 14 November 2012, p. 8 (<https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52012IE0766&from=IT>; consulted on 31 March 2021).

35. Ibid.

36. European Commission, *La governance europea – un libro bianco*, COM(2001) 428 definitivo, Bruxelles, 25 July 2001 (<https://ec.europa.eu/transparency/regdoc/rep/1/2001/IT/1-2001-428-IT-F1-1.Pdf>; consulted on 31 March 2021).

37. EESC, *Parere del Comitato economico e sociale sul tema "La governance europea - Libro bianco"*, (COM(2001) 428 def.), (2002/C 125/13), Bruxelles, 27 May 2002, p. 62 (<https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52002AE0357&from=IT>; consulted on 31 March 2021).

38. Ibid.

Society would function better if citizens could see that decisions affecting them are taken at the most appropriate level. This level depends not only on territorial criteria (European, national, regional and local), but also on functional criteria determined by specific competences (public administration, business, social partners and other civil society organisations). When deciding who should be involved in the decision-making process, "territorial (vertical) subsidiarity" must be taken into account alongside "functional (horizontal) subsidiarity". These two principles guarantee, each in its respective field, greater effectiveness and responsiveness to citizens' concerns. These two levels of subsidiarity should function in a related way, complementing each other. The European Economic and Social Committee acts as an interface between territorial and functional subsidiarity, thus providing real added value for better European governance³⁹.

Although not explicitly defined in the Treaties, the two strands of subsidiarity are nevertheless present in the body of European law and in the political-administrative philosophy of the EU institutions and in that of many EU Member States⁴⁰; and if their application were "interrelated" and coordinated, subsidiarity could significantly strengthen European democracy and perhaps promote explorations in democratic practices in European countries that are linked to the principle itself - as in the case of diffuse democracy in Italy⁴¹. In a 2015 EESC opinion on tools for improving the functioning of the Union, exploiting the potential of the Lisbon Treaty, reference was once again made to the importance of the combined action of the two projections of subsidiarity and, with regard to horizontal subsidiarity, it was suggested that its application be strengthened and extended, including "to broader policy areas, through structured civil dialogue"⁴². Moreover, the horizontal axis enshrines "the recognition of the public role of private actors, such as citizens and representative civil society organisations, and their participation in policy-making and decision-making processes, through their specific consultative role, as well as the autonomous legislative role of the social partners within the European social dialogue"⁴³. Finally, it again recommended that this method should be "complemented by a strengthening of vertical subsidiarity, with an enhanced role for national parliaments in EU policy-making and greater cooperation between them and the European Parliament"⁴⁴; in other words, it reiterated the importance of coordinating the axes of subsidiarity.

1.6 The potential of 'active citizenship' in the context of horizontal subsidiarity

Beyond these prerogatives, which guarantee civil society important spaces for participation, thanks also to the logic of proximity that promotes subsidiarity, a full development of the principle in a horizontal sense is still desirable. In other words, a development that is not only "passive" but goes beyond the recognition of consultative practices and dialogue-based ways of involvement⁴⁵, and

39. Ibid., pp. 62-63.

40. One thinks first of all of the constitutions of federal states, such as those of Austria, Belgium, Germany and Switzerland, where the principle of subsidiarity is closely linked to the functioning of the federal system, but also of those of other European countries, such as the Netherlands, Spain, Portugal, Denmark, etc., where an implicit reference to subsidiarity can be found. See J. Luther, *La sussidiarietà come principio sussidiario del diritto pubblico comune europeo*, in D. Ciaffi, F.M. Giordano (eds.), *Storia, percorsi e politiche della sussidiarietà. Le nuove prospettive in Italia e in Europa*, cit., pp. 209-225.

41. G. Arena, *I custodi della bellezza. Prendersi cura dei beni comuni. Un patto per l'Italia fra cittadini e istituzioni*, Touring Club Italiano, Milano, 2020, pp. 50-56.

42. EESC, *Parere del Comitato economico e sociale europeo in merito a "Migliorare il funzionamento dell'Unione europea sfruttando le potenzialità del trattato di Lisbona e a possibile evoluzione e adeguamento dell'attuale struttura istituzionale dell'Unione europea"*, (2016/C 013/27), Bruxelles, 16 September 2015, p. 190 (<https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52015AE3264&from=IT>; consulted on 31 March 2021). The opinion had been prepared at the request of the European Parliament, at the same time as the two reports of the Committee on Constitutional Affairs, the Bresso-Brock report (*Improving the functioning of the European Union by exploiting the potential of the Lisbon Treaty / Migliorare il funzionamento dell'Unione europea sfruttando le potenzialità del trattato di Lisbona*) and the Verhofstadt report (*Possible evolution and adaptation of the current institutional structure of the European Union / Possibile evoluzione e adeguamento dell'attuale struttura istituzionale dell'Unione europea*).

43. Ibid., p. 189. It should be noted that the concept of horizontal subsidiarity, sometimes also referred to by the EESC as "functional subsidiarity", is also transposed and recognised in Articles 152, 154 and 155 TFEU on social dialogue and the role of the social partners. Unlike civil dialogue, with reference to the above-mentioned articles, social dialogue "is a mechanism with quasi-legislative powers, with a quasi-constitutional status, and is clearly defined in terms of participants, powers and procedures. This distinct function derives from the specific powers and responsibilities of the participants, who exercise their role autonomously. Their roles and responsibilities cannot therefore be transferred to other actors or policy areas. Social dialogue is therefore an excellent example of the concrete implementation of the principle of participatory democracy" (Various Interests Group - Group III, *Participatory democracy in 5 points*, cit.).

44. EESC, *Parere del Comitato economico e sociale europeo in merito a "Migliorare il funzionamento dell'Unione europea sfruttando le potenzialità del trattato di Lisbona e a possibile evoluzione e adeguamento dell'attuale struttura istituzionale dell'Unione europea"*, cit., p. 189.

pushes itself forward to promote forms of "active" participation in the life of the Union with direct actions - one could speak of democracy in action - which, by unfolding autonomously from the countless regional communities of which it is composed, are part of a coherent overall framework that has the principle of subsidiarity as a firm reference for regulatory guidance. The connection between the Union and the communities could be made through a flexible and indirect system that takes into account national legal differences - those in which the idea of subsidiarity has found acceptance - and leads to the activation, with references to the principle (in the vertical and bidirectional bottom-up, top-down sense), of the appropriate institutional and regional levels so that they work to promote the correlation between the axes of subsidiarity through methods and institutions sanctioned by national law, those that already allow local administrations to operate on the level of horizontal subsidiarity. In this way, the principle would activate the energies of European civil society, also stimulating its active citizenship, ready to commit itself in practical terms on the ground, in the various communities, in order to create experiences of broad, inclusive and cooperative participation within the framework of the values of pluralist and diverse European democracy. In another document, the EESC recalled the importance of civic activism, which is a different matter from the involvement of civil society in decision-making processes, and stressed that active citizenship "[was] crucial to society at all levels and for many reasons - bringing political, social, cultural and individual benefits"⁴⁶. Its mobilisation and involvement are also decisive in stimulating the application of the principle of horizontal subsidiarity and in triggering new participatory processes that take into account the enormous resources that active citizenship offers, not only in terms of mere consultation, as part of civil society, but also in terms of the operational implementation of rights and responsibilities, thus filling democratic action with practical sense:

In a democratic society, all individuals and groups have the right to participate in democratic practices and institutions. That seems to imply a responsibility to ensure that no one is excluded. It could be argued that active citizenship is all about balancing rights and responsibilities. But whereas rights can be set out in lists and charters, responsibilities are more difficult to enumerate. A catalogue of the activities that could qualify as active citizenship would be wide-ranging and extensive, and together they build a healthy, participative democracy. They cover voting and standing for election, teaching and learning, donating to good causes, recycling and caring for the environment, campaigning and volunteering. They may take place in a professional, political or personal context. They can be on an international scale, or simply target the neighbour next door.⁴⁷

This definition leads one to think that active citizenship goes beyond the opportunities offered by participatory democracy and, by interacting with horizontal subsidiarity through appropriate regulatory and procedural tools, can develop, as "practised citizenship"⁴⁸, models of "participated" or, even better, "diffused"⁴⁹ democracy. What emerges here is a qualitative difference with respect to participatory democracy and an additional step in the process of democratizing European society, in which horizontal subsidiarity - which remains at the basis of the inspiration of participatory democracy because of the idea of proximity that it expresses - suggests and promotes integrative

45. On the progress, limits and prospects for the development of participatory democracy and civil dialogue in the EU, see the EESC's systematic study Civil Dialogue and Participatory Democracy in the Practice of the European Union, Bruxelles, 2015 (<https://www.eesc.europa.eu/sites/default/files/resources/docs/qe-02-15-397-en-n.pdf>; consulted on 31 March 2021). On the EESC website you can find, together with the above-mentioned study, the following documents in appendix: ANNEX Legal Scholarship, ANNEX II Bibliography, ANNEX I A Mapping.

46. EESC, Active Citizenship. For a better European society, Bruxelles, 2012, p. 6 (<https://op.europa.eu/it/publication-detail/-/publication/1822448a-1e8f-4f3b-bd06-d60eb7f0b78>; consulted on 31 March 2021).

47. Ibid

48. F. Gigliani, Forme di cittadinanza legittimate dal principio di sussidiarietà, in "Diritto e Società", n. 2 (2016), pp. 305-336. The reference is to p. 313.

49. It should be noted that horizontal subsidiarity is often and not always correctly traced to the phenomena of participatory democracy. Marcello Cecchetti, with specific reference to the Italian case (under art. 118, fourth paragraph, of the Constitution), explains how this consists "in reality, not in participation in processes that in any case culminate in a decision by the representative or administrative public institution, but in the performance of activities of general interest by individual and associated citizens". The difference therefore lies precisely in the "performance of activities", i.e. in the practical implications and concrete action that citizens and social groups can carry out independently together with the public authorities M. Cecchetti, Democrazia e partecipazione nella costituzione, in F. De Sanctis (ed.), La partecipazione nel governo del territorio in Toscana, Regione Toscana, Firenze, 2020, p. 14 (<https://www.regione.toscana.it/documents/10180/22524463/la-partecipazione-nel-governo-del-territorio-in-toscana.pdf/55582065-3881-0bf2-d3c0-c954c860c715?t=1595416023733>; consulted on 31 March 2021).

forms of democracy that are more ramified and profound and which, at the same time, urge the various national legal cultures to adapt and to seek or rediscover in the principle of subsidiarity a common denominator of European democracy, as well as an identifying principle of the Union. In this way, subsidiarity would activate the energies of European civil society, stimulating its active citizenship, ready to commit itself concretely on the ground, in the various communities, in order to give life to experiences of enlarged, inclusive and cooperative participation within the plural framework of the values of European democracy. A citizenship that would be in the front line, committed together with local administrations to the daily construction of solidarity networks aimed at including and reducing inequalities through dynamic practices of collaboration between citizens, social partners and public bodies at all levels. In this ideal development, the Italian experience could suggest some interesting paths.

1.7

A principle wanders around Italy (with some important confirmations)

In Italy, horizontal or social subsidiarity has found fertile ground, thanks to its inclusion in the Constitution in 2001 (art. 118, paragraph 4). Since the end of the last century, subsidiarity has been at the centre of a wide-ranging debate in Italy, which in fact continued, albeit with different intentions at national level, the debate that had started within the European Community in the 1970s and 1980s and which then, as mentioned above, led to the adoption of the principle in the 1990s at Maastricht. In the debate, an attempt was made to define the legal physiognomy of subsidiarity on the basis of certain political demands, both vertically and horizontally, while at the same time discussing the ethical-value aspects and the social and economic physiology that the principle inspires. At the turn of the millennium, therefore, subsidiarity became not only a guiding principle, but a real 'hope principle'⁵⁰ that seemed to suggest, in highly plural and differentiated societies, the best way to govern globalisation. In Italy, unlike what happened in the EU, the horizontal projection of the principle finally found an explicit juridical arrangement and immediately aroused lively reflections on ways of living and rethinking democracy⁵¹, also launching experimental paths, in a phase of general distrust in this fundamental institution. Gregorio Arena writes that this has opened up unexplored spaces for public bodies "to carry out their constitutional mission, allowing them to work alongside public institutions and private individuals not just as instruments of their action [...] but as autonomous, aware and responsible allies in the fight against a common adversary, the complexity of the problems posed by the modern world and for a common goal, the full realisation of each human being"⁵². In 2014, with the Bologna Municipal Regulation⁵³ that implemented the principle of horizontal subsidiarity expressed in the Constitution, to activate forms of collaboration between citizens and the administration for the care and regeneration of urban commons through collaboration pacts, the practice of shared administration⁵⁴ was actually

50. J. Luther, Il principio di sussidiarietà: un "principio speranza" per l'ordinamento europeo?, in "Foro Italiano", V (1996), pp. 183-192.

51. The last paragraph of Article 118 states: "Stato, Regioni, Città metropolitane, Province e Comuni favoriscono l'autonoma iniziativa dei cittadini, singoli e associati, per lo svolgimento di attività di interesse generale, sulla base del principio di sussidiarietà".

52. G. Arena, Cittadini attivi. Un altro modo di pensare all'Italia, cit., p. 78.

53. See http://www.comune.bologna.it/media/files/pregolamentoamministrazionecondivisa_new_w03dib.pdf; consulted on 31 March 2021.

54. Shared administration refers to an organisational model governed by the Regulation on the shared administration of common assets (<https://www.labsus.org/2017/04/regolamento-beni-comuni-il-nuovo-prototipo-di-labsus/>) which, in implementation of the constitutional principle of horizontal subsidiarity laid down in Article 118(4), allows citizens and the public administration, especially the municipality, to carry out activities of general interest on an equal footing, concerning the care, regeneration and shared management of common assets. In this respect, 'active citizens' can be defined as all citizens (individuals, associations and collectives) who, regardless of residence or citizenship requirements, are active in carrying out the above-mentioned activities of general interest. This is an organisational model that in fact allows for an "alliance" in the general interest between citizens and administrations and that differs "both from the participation of private individuals in the administrative procedure and from other forms of participation in public decision-making processes, such as participatory and deliberative democracy. In shared administration, citizens and administrations share not the exercise of power, but responsibilities and resources for the solution of problems of general interest". Amministrazione e società. Il nuovo cittadino, in "Rivista trimestrale di diritto pubblico", a. LXVII, fasc. 1 (2017), p. 50 (https://www.labsus.org/wp-content/uploads/2017/09/Gregorio_Arena_Amministrazione_e_societa_il_nuovo_cittadino-1.pdf); consulted on 31 March 2021.

launched, a new paradigm already theorised by Arena in the late 1990s in the midst of the debate on public administrative reform and subsidiarity in Italy⁵⁵. Since then, shared administration has given rise to new experiences across the country with the effect of promoting active citizenship, extending the participation of civil society in the care and regeneration of the commons in collaboration with local administrations, leading in Italy to shared and inclusive management of part of the national cultural heritage, both tangible and intangible. In this sense, horizontal subsidiarity has released energies and increased the social and political value of citizenship, actively practised on this heritage within the particular horizon of the plurality of national communities in the general interest. This practice not only extends the scope of democratic action, but also helps to strengthen existing and traditional forms of democracy (representative, direct, participatory and deliberative), creating social value, trust between citizens and institutions and a society more aware of the value of care.

Moreover, this new paradigm responds to the need for correlation between horizontal and vertical subsidiarity, in that it constitutes an organisational model in which the idea of vicinity or, better, proximity finds effective and concrete implementation in the convergence on activities of general interest that collaboration between citizens and public bodies identifies and achieves⁵⁶. In fact, observing the Italian experience of shared administration, “vertical subsidiarity and horizontal subsidiarity intersect one with the other or, to put it better, fade one into the other”⁵⁷. Thus, “when the problem is that of the allocation of functions among the various institutional levels, subsidiarity (understood as vertical subsidiarity) makes it possible to identify the most appropriate level for the performance of a given function not so much on the basis of the criterion of ‘proximity’ to the citizens of the various levels as on the basis of the capacity of each of these levels to satisfy the general interest” which - understood as the expression of the alliance and collaboration between public subjects and citizens - “leads to the creation of the conditions for the full realisation of each human being” and can develop forms of participatory and widespread, diffused democracy⁵⁸. In this way, vertical subsidiarity allows “the allocation of public functions not on the basis of an abstract institutional geometry, but rather on the basis of a concrete objective of the growth of the individual and the defence of his dignity”⁵⁹. Understood in this way, the vertical guideline of subsidiarity, even before being the disciplinary rule that calls into question a superior agent, involved in the resolution of local problems, should activate through local institutions the channel of listening to civil society, the one ready to participate (active citizens, volunteering associations, etc.). Local authorities are the only ones able to tune in to the frequency of citizenship and then, as subsidiarity unfolds horizontally, become its valuable allies and jointly identify shared areas for action as a concrete expression of general interest. Horizontal subsidiarity would thus enable the institutions responsible for public functions “to pursue the general interest not on their own, but together with citizens, both individual and associated”⁶⁰ and allow them to practise citizenship as the foundation and expression of democracy.

This is certainly a perspective that has found application in Italy thanks to a series of favourable legislative and jurisprudential conjunctures⁶¹ - as will be seen in chapter three -, launching innovative forms of democracy that we could call, in

55. See G. Arena, *Introduzione all'amministrazione condivisa*, in “Studi parlamentari e di politica costituzionale”, nn. 117/118 (1997), 29-65.

56. According to Arena, the general interest is “the bridge that joins art. 3, para. 2 [concerning substantive equality for the development of the human being and effective participation] and art. 118, last paragraph, public subjects and citizens: in one case this interest is pursued directly by the public authorities, in another by the active citizens, but supported by the public subjects, in a ‘subsidiary’ relationship in the most literal sense of the term, in that it is a relationship of reciprocal collaboration and help to achieve a common objective which interests both” (G. Arena, *Cittadini attivi. Un altro modo di pensare all'Italia*, cit., p. 77.)

57. *Ibid.*, p. 78.

58. *Ibid.*

59. *Ibid.*

60. *Ibid.*, p. 79.

61. Gregorio Arena, *I custodi della bellezza*, cit., pp. 47-48.

Arena's words, "widespread", just as "the presence of active citizens engaged in the care of the commons is widespread throughout the territory"⁶². This is an attitude that, beyond the peculiar Italian experience - which many international observers are looking at with interest⁶³ - could stimulate in the European institutions, and in particular in those EU actors and interlocutors who are more sensitive to the involvement of active citizenship and civil society in the political life of the Union, new reflections both on the iteration and correlation between vertical and horizontal subsidiarity and on participatory forms of democracy. In other words, the Italian experience could indicate complementary solutions to those already existing to build a citizens' Europe and suggest different ways to respond to the need for democratic participation in accordance with Articles 10 and 11 of the Treaty on European Union. In the same way, the regulatory path followed in recent years in Italy could offer a new interpretation of the principle of "functional" subsidiarity that has characterised the Community experience so far, perhaps rethinking it in the more concrete terms of an effective cooperation between Community institutions, public administrations, the economic world, volunteering, social partners, civil society and active citizenship.

Moreover, the principle of subsidiarity, writes Arena, has "an innovative charge that goes well beyond that already highlighted with regard to administration and that instead [...] concerns the very essence of democracy, the development of its values, the way of being citizens"⁶⁴. Arena is referring here to the potentialities deployed by the inclusion of the principle in the Italian Constitution with the 2001 reform, and takes into consideration first of all the horizontal deployment of subsidiarity (art. 118, fourth paragraph), but the sense of that consideration can easily be extended to the positive effects that subsidiarity can theoretically generate when employed. If we add to this the circular logic of the principle, which tends to make the State, the Market and the Community, i.e. the public, private and civil forces, dialogue by grafting the vertical axis onto the horizontal one, subsidiarity could really encourage the reconstruction of the very idea of State and political community at all levels. Gustavo Zagrebelsky is also convinced of this and, in recognising the transformative potential of subsidiarity, starting from a reflection on art. 118.4, he emphasises how its horizontal use calls for "an overall reconsideration of our being together, of being a society. It is almost a modification of the form of the State," he observes, "if this consideration is pushed to its limits"⁶⁵. This reflection leads us, therefore, to reconsider the logic of subsidiarity, appropriately placing its aggregative (participation), reconstructive (inclusion/cohesion) and transformative (collaboration) force at the base of the social and political pyramid, overturning it.



ph_Jacques Delors

62. Ibid, p. 53.

63. Ibid, pp. 56-57.

64. Gregorio Arena, *Cittadini attivi. Un altro modo di pensare all'Italia*, Laterza, Roma-Bari, 2006, p. 163.

Chapter II

THE EUROPEAN PATH OF PARTICIPATION AS A REFERENCE FOR THE ITALIAN MODEL OF SHARED ADMINISTRATION OF COMMONS

—

Chiara Salati

2.1

Something we do not yet know what it is

With the approval of the first Regulation for the Shared Administration of Commons in the city of Bologna in 2014, a silent⁶⁶ revolution has been set in motion in Italy, thanks to which citizens - individuals and associations - can exercise their desire for freedom by taking care of commons. In their caring actions, they are also recognised by the Republic for their contribution, through a collaborative process that takes place within a precise legal and institutional framework. This desire for freedom on the part of individuals is succeeding in putting into practice Article 3, Paragraph II of our Constitution: through caring for the commons, people participate in the full enhancement of themselves and their community.

The aim of this contribution is to try to question ourselves on how this form of freedom of Italian citizens to be active in the general interest for the care of commons - which is expanding more and more on the national territory - can be imagined also for all European citizens. This will therefore be an exercise in imagination, in which we will try to anchor the Italian model of shared administration of the commons to one of the founding principles of the European Union. We will look for a common source in the European Treaties that can recognise the freedom of all European citizens to take care of the commons. In this search, we will be accompanied by the thought of Václav Havel, whose timeless reflections still indicate revolutionary and coherent keys to interpretation in always keeping the individual at the centre. We can say, to introduce this contribution, that we find ourselves in uncharted territory. In his *Apologo sull'onestà nel paese dei corrotti* (A Defense of Honesty in the Land of Corruption), Calvino wrote that in a country that was based on illegality and where each group identified its power with the common good, there was an exception to this, namely a certain category of citizens who were always working hard to survive in the folds of the dominant society: a real counter-society that had the pretension of living its own diversity, and that “a questo modo magari avrebbe finito per significare qualcosa d'essenziale per tutti, per essere immagine di qualcosa che le parole non sanno più dire, di qualcosa che non è stato ancora detto e ancora non sappiamo cos'è”⁶⁷ (in this way perhaps would have ended up meaning something essential for everyone, to be the image of something that words can no longer say, of something that has not yet been said and we do not yet know what it is) .

66. Filippo Maria Giordano, *Una rivoluzione silenziosa*, Labsus, 2019, <https://www.labsus.org/2019/10/una-rivoluzione-silenziosa/>

67. Italo Calvino, “Apologo sull'onestà nel paese dei corrotti”, in *Romanzi e racconti*, volume III, *Racconti e apologhi sparsi*, i Meridiani, Arnoldo Mondadori editore. Published in *La Repubblica*, 15th March 1980, with the title “Apologo sull'onestà nel paese dei corrotti”

The silent revolution of active citizens who take care of the commons is precisely something that we do not yet know what it is: perhaps we can glimpse in it a new model of democracy which, through incalculable actions from below, is reconstructing everything essential that has been missing in recent times.

2.2

Czechoslovakia, 1978: Václav Havel's Power of the Powerless

In October 1978, the dissident and future first President of free Czechoslovakia Václav Havel found himself under constant surveillance and interrogation by the communist regime of the Czechoslovak Socialist Republic. As the spokesman of Charter 77 - the civic initiative created to denounce human rights violations by the government through an appeal to mobilise the forces of civil society - he played a leading role in awakening individual consciences from the Prague Spring of 1968 until the Velvet Revolution and the fall of the Czechoslovak communist state in November 1989. In the space of a few weeks, in a hurry as he himself later claimed, and before he was imprisoned for his opposition to the regime, he managed to write down some fundamental reflections in the essay *Il potere dei senza potere*⁶⁸ (The Power of the Powerless), in which he questions - and is guided by - the power of the Communists. In which he questions - and still questions us today - the relationship between the individual and power, and the role of individual conscience and responsibility as a decisive factor for change.

In the historical context of the regime's oppression of individual freedoms, Havel recognises in each person's ego a stockpile of unique resources, which no power will ever be able to definitively eradicate, and which, if aimed at living in the service of truth, are capable of profoundly influencing reality from below. However, these resources of each individual must begin to be structured and self-organised in some way, even through exploratory and embryonic attempts, in order to create over time and with patience a true parallel polis, which with new structures addresses the authentic needs of life and problems of society. Havel believed in structures oriented not to the technical aspect of the exercise of power, but to the meaning of this exercise; these structures must be open, dynamic and small, like communities, and founded on the principle of the autonomy of individuals. They must be capable of self-control and self-discipline and capable of valuing individual responsibility. It is these communities that from below constitute those informal societies that operate without the possibility of visible and immediate success, but that over time contribute to creating a parallel polis, in which the creative potential of each person must be valued. The power of the powerless is therefore, for Havel, the power of individuals to exercise their freedom and autonomy in their own spheres of action, however small they may be, within a larger context in which everyone is responsible and called upon to participate.

These ideas were later taken up by Havel in his political testament⁶⁹, written during his second Czechoslovak presidency in the summer of 1991. Havel reflected a great deal on the need to create a culture of relationship between the State and the citizen - also with reference to the economic development of the country - which can only be accelerated through the civilisation of individuals and their ability to think about future generations.

He also speaks out against what he considers as the dictatorship of parties, since the political space must guarantee the widest possible pluralism of associations,

68. Václav Havel, *Il potere dei senza potere*, Itaca, 2013

69. Václav Havel, *Summer meditations*, Vintage Books, New York, 1992

organisations and movements of citizens willing to work for the common good. Havel is against any form of centralism or centralisation, because citizens must be able to exercise shared responsibility in a highly decentralised State where trust is strong between citizens and local governments, starting with community relations in blocks of flats, streets and neighbourhoods. From the collapse of an ideology that has emptied the individual, making him functional to the system, Havel claims the role of society and its structures in contributing to the development of everyone's capacities, towards the recognition of an autonomy of individuals that must increasingly be defended, on a par with the autonomy of each individual European State in the perspective of the process of European integration. In any case, Havel's home remains Europe: a common home that can guarantee security and freedom for everyone only insofar as each person chooses to participate by assuming their share of responsibility.

2.3

Italy 2021: the power of active citizens in shared administration

The informal societies of which Havel speaks, which contribute to building the parallel polis, are today a concrete reality visible in the thousands of collaboration pacts⁷⁰ aimed at valuing the responsibility, autonomy and creativity of individuals. These Pacts are allowing the informal society to emerge, become active, structure itself, self-organise and be recognised by the institutions from a perspective that is aimed at collaboration and not conflict. This parallel polis, which for now can only be glimpsed, is made up of thousands of active citizens who, by activating themselves as custodians of beauty⁷¹, are helping to strengthen a model of diffuse democracy from below. Recognition of the free activation of individuals in our national context is permitted thanks to the principle of horizontal subsidiarity provided for in Article 118 of the Italian Constitution, last paragraph. This constitutional principle has allowed the creation of the organisational model of the Shared Administration, recognising the power of active citizens to sign collaboration pacts for the care of commons with public administrations under the auspices of the Regulations for Shared Administration. The autonomous initiative of individual and associated citizens to carry out activities in the general interest has recently been recognised by the Constitutional Court with sentence no. 131/2020⁷²: the Court recognised for the first time the right of citizens to carry out autonomously activities for the general interest, and the corresponding duty of the public administration to promote and support citizens in the exercise of their social freedoms⁷³. This freedom to take care of the general interest can now be defined as the power of active citizens.

2.4

European Union, 2021: some questions

What is happening in Italy today is expanding through a steadily increasing number of municipalities adopting their own Regulations for the Shared Administration of Commons⁷⁴. Parallel to this, a greater awareness is being created among people that everyone has the right under the Italian Constitution to exercise their (active)⁷⁵ freedom to look after the general interest through the care of the commons. At the

70. For an up-to-date overview of signed Cooperation Agreements in Italy see the section Cooperation Agreements on the Labsus website <https://www.labsus.org/category/beni-comuni-e-amministrazione-condivisa/patti-collaborazione/>

71. Gregorio Arena, I custodi della bellezza, Labsus, 2020, <https://www.labsus.org/2020/08/i-custodi-della-bellezza/>

72. Fabio Giglioni, L'Amministrazione condivisa è parte integrante della Costituzione italiana, Labsus, 2020 <https://www.labsus.org/2020/07/l-amministrazione-condivisa-e-parte-integrante-della-costituzione-italiana-ets/>

73. Silvia Pellizzari, Carlo Borzaga (edited by) Terzo settore e pubblica amministrazione. La svolta della Corte costituzionale, Euricse, 2020 <https://www.euricse.eu/it/publications/terzo-settore-e-pubblica-amministrazione-la-svolta-della-corte-costituzionale/>

74. For an up-to-date list of adopted Regulations for the Shared Administration of Commons see the Regulations section on the Labsus website <https://www.labsus.org/i-regolamenti-per-lamministrazione-condivisa-del-beni-comuni/>

75. Gregorio Arena, Amministrazione e società. Il nuovo cittadino, Rivista trimestrale di diritto pubblico, 2017, 1, 43-55 https://www.labsus.org/wp-content/uploads/2017/09/Gregorio_Arena_Amministrazione_e_societa_Il_nuovo_cittadino-1.pdf

centre, therefore, is the freedom of the individual. It is now appropriate to start asking ourselves some questions in order to broaden the field to the European dimension: if a European citizen wanted to be active in the general interest of his community by taking care of a common good, could he do so? What exactly could he do? What tools would he or she have? Would he or she be recognised by national and European public institutions as a resource or not? And if recognised, would he/she be facilitated in its autonomous initiative?

2.5

We need a common starting point, a common principle: but which one?

It is difficult⁷⁶ to answer these questions today, because the national and local peculiarities of the various European States do not yet allow a dialogue in which the same categories are discussed. What is needed, then, is a common starting point to be identified in the principles of the European Union, which would also allow the other States and European citizens to have a clear reference point to allow the freedom of each to act in the general interest. The care of the commons could, thus, be recognised at a legal and institutional level. Just as Charta 77 had sought in the principles established in supranational charters of rights a solid point of reference for its own internal battles, so too our efforts today must move in the higher direction of the European Treaties in order to find a strong point of reference for our model. Which European principle(s) are, therefore, the reference point for the model of shared administration of commons (and its instruments), already legitimised by the Italian Constitution in art. 118, last paragraph?

In spite of the difficulty in speaking of principles when addressing European Union law, several possible options emerge from the text of the Treaties - between principles⁷⁷, values, concepts - that could represent the reference we are looking for. The references are to be found in the Treaty on European Union (TEU) in Title I "Common Provisions" (Art. 2, 4, 5, 6) and Title II "Provisions on Democratic Principles" (Art. 10, 11).

In Article 2 TEU we find the concepts of pluralism and solidarity as fundamental features of European society. The institutional and social pluralism recognised by the EU guarantees the diversity of the social formations of European citizens, which also includes the pluralism of the forms through which Italian citizens are taking care of the commons. European solidarity, for its part, is seen as one of the most important pillars of the European constitutional architecture, but not so much for its moral and philosophical dimension aimed at forms of altruism and philanthropy, as for its legal dimension aimed at rights and duties⁷⁸. Perceived as a relational principle and interpreted as the willingness to share resources with others, it has the capacity to renew democracy starting from the local level. This is an opportunity, as yet little studied, to forge new alliances and partnerships, not so much at the level of European institutions and Member States, but rather at the level of the responsibility of individuals towards the community, starting with the cities⁷⁹. Solidarity as a founding principle of the entire legal order⁸⁰ has also been recognised by the Italian Constitutional Court itself (sentence no. 131/2020), which has qualified it as an alternative principle to competition in the EU for the organisation of activities of social value such as those in line with the Shared Administration. With respect to solidarity, the commons manage to "structure" this principle by becoming assets on which it is possible to develop collaborative and participatory behaviour: in short, the commons are increasingly the new institutions of solidarity.

76. Fabio Giglioli, L'Unione europea per lo sviluppo dei beni comuni, Labsus, 2015, <https://www.labsus.org/2015/09/unione-europea-per-lo-sviluppo-dei-beni-comuni/>

77. Armin Von Bogdandy, Founding Principles of EU Law: A Theoretical and Doctrinal Sketch, *European Law Journal*, Vol. 16, No. 2, 2010, 95-111

78. Erika Arban, Exploring the principle of (federal) solidarity, *Review of Constitutional Studies*, vol. 22(2), 2017, 241-260.

79. European Commission, Solidarity in Europe. Alive and Active, 2018, https://ec.europa.eu/research/socialsciences/pdf/polic_y_revie_ws/solidarityin_europe.pdf

80. Stefano Rodotà, *Solidarietà. Un'utopia necessaria*, Laterza, 2014

A second reference for the Italian model could be found in Art. 4(2) TEU in the concept of autonomy. The care of the commons by active Italian citizens is in fact taking place in collaboration with the local and regional autonomies⁸¹, and especially with the cities within a perspective increasingly aimed at recognising a real law of the cities as subnational entities in which one of the great challenges of recent times is being played out: the enlargement of democratic participation⁸².

The third reference is to the principle of subsidiarity (Art. 5 TEU). However, this is understood in its vertical meaning to guarantee the distribution of competences (exclusive, concurrent, parallel, according to Art. 2 of the Treaty on the Functioning of the European Union (TFEU)) between EU institutions and Member States: its interpretation according to the horizontal meaning provided for in Art. 118, last paragraph of the Italian Constitution and original source of the model of Shared Administration, is to be excluded⁸³. In order to be able to use this principle as a point of reference, therefore, its interpretation should necessarily be extended to the important Italian contribution: a hypothesis that does not seem realistic at the moment.

The reference in Art. 6 TEU to fundamental rights as general principles of EU law is the fourth possible reference. Through participation in the care of the commons, in fact, Italian citizens realise their fundamental rights: on the basis of this concept, in 2007 the Rodotà Commission defined the commons as "things that express functional utility for the exercise of fundamental rights as well as the free development of the person". Specifically, the rights present in the Charter of Fundamental Rights of the European Union and referred to in Art. 6 TEU that could be a source of legitimacy for the Italian model seem to be these: Art. 1 on human dignity, Art. 6 on the right to freedom of every person, Art. 12 on freedom of assembly and association in the civic field, Art. 41 on the right to good administration.

2.6

Participation in Articles 10(3) and 11(2) TEU as a common principle

The fifth possible reference for the model of Shared Administration of commons consists of the democratic principles established in Title II: the Treaty, in fact, speaks of participation, alongside representative democracy. This is the principle which, to date, seems to us to be the most viable way forward in our search for a common starting point. There are essentially two references to participation: Articles 10(3) and 11(2) TEU. Article 10(3) TEU stipulates that every citizen has the right to participate in the democratic life of the Union, and Article 11(2) TEU states that the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. In addition to these, it is worth mentioning Article I-47 of the (failed) draft Treaty establishing a Constitution for Europe, now incorporated in Article 11(2) TEU, as the title was precisely the principle of participatory democracy; and Article 15(1) TFEU, which states that in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.

2.7

The limit of European participation: participation in saying

It is necessary to emphasise how, to date, the predominant interpretation of these articles and of

81. Enrico Carloni, Fulvio Cortese, *Diritto delle autonomie territoriali*, Cedam, 2020

82. Frank Hendriks, John Loughlin, Anders Lidström, "European subnational democracy: comparative reflections and conclusions", in John Loughlin, Frank Hendriks, Anders Lidström (eds.), *The Oxford Handbook of Local and Regional Democracy in Europe*, 2010

83. Fabio Giglioni, "Alla ricerca della sussidiarietà orizzontale in Europa", in Daniele Donati, Andrea Paci, (a cura di) *Sussidiarietà e concorrenza*, Il Mulino, 2010, 131-198

the concept of participation itself, at the European level, consists in the participation in decision-making processes by citizens. This interpretation aims at enabling citizens to become more involved in national and European public decision-making through various participatory channels. Therefore, participation understood as the care of the general interest through commons by citizens and local and regional autonomies does not seem, to date, to find a solid and explicit recognition.

The text of the Treaties speaks of participation and not of participatory democracy. The meanings are different: participatory democracy consists of a heterogeneous set of ways of relating between society and institutions in which the former is able to influence the latter in the decision-making process delegated to them, but which, as has been argued, has no clearly defined form and must be reinvented each time⁸⁴. Participation, on the other hand, means many different participatory practices: from the European Citizens' Initiative (ECI) provided for in Article 11(4) of the TEU, to other forms not provided for in the Treaties but tried out at local level, including participatory budgeting, certain forms of public debate and civic juries, and participatory urban planning. The practices of civic participation are many⁸⁵, and they all undoubtedly contribute to the democratisation of democracy⁸⁶. The common trait of all these practices does not, however, consist in a 'participation in doing' - such as the participation of citizens in the care of the commons in shared administration - but only in a 'participation in saying' insofar as it is a participation aimed at decision-making processes⁸⁷. The main limitation that emerges in European participation as conceived to date is its failure to understand and include the potential of doing. In their totally new and revolutionary experience, active citizens in Italy are doing, i.e. they are contributing with concrete actions to the strengthening of democracy, through the care of commons in their own communities.

2.8

Future prospects: European participation in doing

The heart of the reflection that we want to propose here, however, aims at arguing that today there is unexplored potential in the Treaties from which possibilities can still be extracted. In particular, from the European concept of participation and its presence in the Treaties we can now try to extract a new meaning, namely that of the participation of European citizens together with public institutions, both national and supranational, in the care of the commons: a participation aimed at doing. There is an urgent need today to find innovative paths of participation⁸⁸, which are able to allow European citizens to act as citizens⁹⁰, and not only to be citizens. Paths that allow individuals - individuals and associations - to contribute with their abilities⁸⁹ to transform the territory and the cities. One is not a citizen (Italian, but also European!) just because a law recognises this qualification, but also because one participates in the care of the commons of one's own territory. The common starting point for European citizens can therefore be a participation that broadens its forms with a new modality: participation in doing through the care of commons, in collaboration with European local and regional autonomies.

The essential points of this conception of participation aimed at doing are essentially

84. Luigi Bobbio, *Dilemmi della democrazia partecipativa*, in *Democrazia e diritto*, n.44, 2006, 11-26

85. Gianluca Sgueo, *The practice of democracy. A selection of civic engagement initiatives*, Study, European Parliamentary Research Service, 2020

86. Umberto Allegretti, "Democrazia partecipativa: un contributo alla democratizzazione della democrazia", in Umberto Allegretti (a cura di), *Democrazia partecipativa: esperienze e prospettive in Italia e in Europa*, Firenze University Press, 2010

87. On the distinction see Alessandra Valastro, "La democrazia alla prova dei territori: il ruolo delle amministrazioni locali nell'epoca delle fragilità", in Alessandra Valastro (a cura di) *Le regole locali della democrazia partecipativa. Tendenze e prospettive dei regolamenti comunali*, Jovene, 2016, 30; Giuseppe Cotturri, "Storia del principio di sussidiarietà in Costituzione", in Gregorio Arena, Giuseppe Cotturri (a cura di), *Il valore aggiunto. Come la sussidiarietà può cambiare l'Italia*, Carocci, 2010, 59

88. Filippo Pizzolato, *I sentieri costituzionali della democrazia*, Carocci, 2020

89. Carlo Donolo, *Sui beni e sulle capacità. La sussidiarietà come processo di capacitazione*, Labsus, 2011, <https://www.labsus.org/2011/02/sui-beni-e-sulle-capacita/>

90. Fabio Giglioli, *Che cosa è il diritto delle città*, Labsus, 2017, <https://www.labsus.org/2017/05/che-cosa-e-il-diritto-delle-citta/>

three: doing as a civic action aimed at contribution; the inclusiveness of doing; commons as the practical object of this doing. Democracy rests on two legs: representation and participation. Participation must, however, broaden to include Havel's idea of valuing the autonomous vision and response capabilities of active citizens, in which politics is conceived as a widespread civic action, to which anyone who cares about the *res publica* can do by contributing, even outside party circuits. It is a type of participation where responsibility is diffused, i.e. where everyone can contribute in their own communities: not only organised civil society groups, but also individuals or informal groups, and above all also all those inhabitants who belong to local communities but do not have the formal requirement of national citizenship. These people, in fact, even though they cannot exercise their rights of political citizenship (right to vote and stand for election), can still contribute as active citizens to the general interests of their community. These, finally, as the Italian experience has shown, coincide on a practical level with the commons, which are the object of this "participation in doing": even in the absence of a common European definition of the commons, these could turn out to be what unites us and what we have in common, thus opening the way to the possibility for active European citizens to collaborate in their care.

So what could be the possible ways to include this participation in doing - following the example of the Italian model of Shared Administration of Commons - in the European Union? Perhaps it would be useful to start from an acknowledgement of the limits of participation as currently conceived at European level, as well as at national level, in order to extend it to new forms of participation such as the Italian model and to democratic innovations that are emerging from below in many European contexts.

2.9

Proposal: What if we included a reference to European participation in the Italian Regulations?

If waiting for a change of perspective on the part of European law seems to be too slow a way, a concrete and much faster step could instead be taken already in the prototype of the Regulation on Shared Administration. The proposal is to insert a short but decisive reference in the Regulations to European law, perhaps in Article 1, after the reference to the articles in the Italian Constitution. In this way we could begin to outline a path for other European citizens as well, starting from the Italian model. Such a reference would certainly be irrelevant for the active citizens and institutions that already participate in the care of the commons in Italy. On the contrary, it could become the starting point for anyone and anywhere in the other European States, to start paths in their own national systems and to create a new legal and institutional space, aimed at recognising the freedom of individuals to take action in the general interest for the care of the commons.

91. Donata Borgonovo Re, *Le quattro stelle della Costituzione. Per una cittadinanza responsabile*, *Il Margine*, 2013, 105 e 182-207

92. Rainer Bauböck, *Cities vs States: Should Urban Citizenship be Emancipated from Nationality?*, *VerfBlog*, 2020, <https://verfassungsblog.de/cities-vs-states-should-urban-citizenship-be-emancipated-from-nationality/>

93. Alberto Alemanno, *Europe's Democracy Challenge: Citizen Participation in and Beyond Elections*, *German Law Journal*, 2019, vol.21, n.1, 171-178

94. Stephen Elstub, Oliver Escobar (eds.), *Handbook of Democratic Innovation and Governance*, Edward Elgar Publishing, 2019

95. Il prototipo di Regolamento sull'Amministrazione condivisa dei beni comuni è disponibile al link <https://www.labsus.org/wp-content/uploads/2017/04/Regolamento-Labsus-Definitivo.pdf>

2.10

Concluding remarks: a new model of democracy

The intervention of the law with respect to what is not yet fully outlined must be aimed at 'reforms that create the future', tracing the main guidelines of social dynamics through a technique that is that of 'legislation for principles [...] articulated in general, flexible maxims, fertile with future consequences'⁹⁶.

Therefore, we need imagination: this is the right time to imagine the European framework of thought in which the Italian model and models in other European States of care for the commons, starting from the freedom of individual European citizens, can first be thought of and then affect the European community starting from local communities. The principle in European Union law that seems to us to be the new reference point is therefore participation, which we would like to contribute to declining in its meaning of doing. This leads us to imagine a new model of democracy based on the initiative of individuals, which has been defined in various ways to date: creative, collaborative, diffuse, contributory, local, democracy of the commons. Today, it is perhaps too early to agree on a precise label, but the key features of this new model of democracy are already clear: the freedom of each individual to be active, widespread responsibility in taking care of the general interest, commons as the concrete object of each individual's civic commitment, active citizenship broader than political citizenship, cooperation between active citizens and local authorities based on trust, participation aimed at doing, social pluralism beyond party politics, recognition of the spontaneous initiative of individuals or informal groups beyond the categorisation of civil society.

On the other hand, if Havel's story is also our story as European citizens, why couldn't the story of active Italian citizens become that of other European citizens? It is therefore necessary to compose a framework of new thinking. It is urgent to ask ourselves: if at national level the reference is the principle of horizontal subsidiarity, at European level can it be participation? From *The Power of the Powerless* we can support a power of European active citizens, whether individual or associated, to increasingly expand that parallel polis that active citizens are already building in Italian cities, and to which we could also contribute at European level.



ph_Václav Havel at Prague Castle, 1992 (Source: Václav Havel Library)

96. Stefano Rodotà, "Ideologie e tecniche della riforma del diritto civile", in *Riv.dir.comm.*, 1967, I, 83-99, c.d. Prolusione Maceratese

Chapter III

THE LEGAL EXPERIENCE OF SUBSIDIARITY IN ITALY

—
Fabio Giglioni, Roberta Tonanzi

3.1

The principle of subsidiarity in Italy: origins and development

The principle of subsidiarity was introduced into the Italian Constitution in 2001 through the amendment of Article 118. There is a rather unanimous belief among scholars that this passage originated from the European legal system, which had already recognised it in the Single European Act of 1986 and then in a much more decisive way with the Maastricht Treaty of 1992. This historical truth would, however, be misleading if it were to lead one to believe that the Italian legal system had merely transposed what was envisaged at European level. In fact, the development of the principle in Italy has had unprecedented applications in the European legal system, so that it can also be presented as an interesting case study.

This is partly due to the obvious consideration that every principle introduced into a legal system is called upon to be conditioned by other principles and values, so that it has to carve out a space that is necessarily original and different from all other systems. It is, therefore, natural to see some discordant application of principles when they are placed in different legal contexts. Secondly, it must be considered that the principle of subsidiarity is a principle with a binding force that is not preemptory, requiring political adaptations and mediations. If, to some extent, this can be said of any legal principle, which is characterised by the indication of guidelines rather than definitive solutions, in the case of subsidiarity this is even more true. Political adaptation makes its legal sanction more difficult, as the European legal system itself testifies. Finally, as far as Italy is concerned, the novelty lies in the fact that the principle is recognised not only in its vertical dimension, but also in its horizontal one. And it is precisely with reference to this last point that the Italian contribution to the application of the principle of subsidiarity stands out for its originality and interest.

In fact, in this key, the principle of subsidiarity has been used to renew the conditions for regulating the institutional and social pluralism that characterises the Italian Constitution. If the pluralistic connotation of the Italian Constitution was already known before the introduction of the principle of subsidiarity, its introduction, with particular reference to its horizontal declination, has produced a significant innovation in the framework of the rules concerning the relationship between institutions and citizens, strengthening its democratic elements. This contribution intends to highlight the main legal innovations that the principle has introduced in Italy over the last twenty years, along the following lines: in the second paragraph some of the most significant legal innovations related to the principle of horizontal subsidiarity will be highlighted (Regulations and collaboration pacts); in the third paragraph reference will be made to the introduction of a new real model of administration whose origin is due to the horizontal subsidiarity, capable also of generating a new general principle (the principle of collaboration); in the fourth paragraph, finally, the contribution produced by the jurisprudence that has measured itself against the theme of subsidiarity will be highlighted. Finally, the last paragraph will be devoted to concluding remarks.

3.2

Direct implementation of the Constitution: the Regulation for the Shared Administration of Urban Commons and the collaboration pacts

3.2.1

The Regulation for the shared care and administration of urban commons

After the introduction of the principle of subsidiarity in the Constitution, which has already been mentioned, its horizontal declination remained unimplemented for a long time. However, in the most recent years, thanks to several factors, economic and financial as well as social, the public authorities, especially local ones, have developed tools that, implementing the constitutional dictate, have allowed this principle to express its potential.

In a context characterised by a scarcity of economic and financial resources, local authorities have encountered numerous difficulties both in caring for the public city, which is increasingly abandoned to neglect and decay, and in responding to the multiple and heterogeneous demands expressed by society. However, society has shown that it is not only an expression of needs to be satisfied, but also an extraordinary group of people with not only financial but also professional and technical resources and knowledge to make available to local institutions and, in general, to the whole community. Thus, in the face of abandoned urban spaces deprived of their social function, of urban commons left to neglect and degradation, an increasing number of citizens have taken action to take direct care of them, so as to make them fully available to the community. We are, therefore, witnessing an attempt by private citizens to regain possession of the places in their city⁹⁷, but not to exploit them for their own personal benefit, but to donate them to society as a whole.

The activation of the community in this sense, its participation in the care of the urban commons, i.e. in their regeneration, has prompted local public authorities to identify instruments capable of giving legal recognition to these activities, which are undoubtedly of general interest, but which were nevertheless born outside the traditional legal paradigms⁹⁸.

It is, therefore, to the principle of horizontal subsidiarity that local institutions have resorted to in order to legitimise some of these instruments, by virtue of which they favour private individuals or associations in carrying out activities of general interest and, at the same time, recognise a legal value to them that would otherwise be absent. In fact, by exploiting one of the peculiarities of the principle of horizontal subsidiarity, namely that of being an immediately operational principle, i.e. directly implementable by any level of government, without the need for prior legislative intermediation - state or regional -, as of 2014, some Italian municipalities have begun to adopt Regulations aimed at regulating these forms of collaboration between active citizens and the local administration for the care and regeneration of the commons⁹⁹.

These regulatory acts are a novelty within the national legal scene, on the one hand, because, despite their nature of secondary sources, they do not implement any legislative provision, but rather implement directly the constitutional provisions (ex art. 118, paragraph 4, Constitution); On the other hand, because by adopting them, local authorities have placed within a well-defined legal framework unprecedented forms of cooperation that would otherwise have been difficult

97. See F. Cortese, *Dentro il nuovo diritto delle città*, in "Munus", 2016, pp. 5-11.

98. See F. Gigliani, *Il diritto pubblico informale alla base della riscoperta delle città come ordinamento giuridico*, in "Rivista giuridica dell'edilizia", 2018, pp. 3-21.

99. See F. Gigliani, *I regolamenti comunali per la gestione dei Beni comuni urbani come laboratorio per un nuovo diritto delle città*, in "Munus", 2016, pp. 271-313.

100. See L. Muzi, *L'Amministrazione condivisa dei beni comuni urbani: il ruolo dei privati nell'ottica del principio di sussidiarietà orizzontale*, in F. Di Lascio, F. Gigliani (eds.), *La rigenerazione di beni e spazi pubblici. Contributo al diritto delle città*, Bologna, Il Mulino, 2017, p. 124.

to achieve, also due to the fear of the institutions themselves of assuming responsibility and, consequently, of incurring possible sanctions¹⁰⁰. The Regulation on collaboration between citizens and the administration for the care and regeneration of the urban commons regulates every aspect of the relationship between private individuals and associations and the public authorities, from the identification of the commons to be cared for to the determination of the jurisdiction to which the case should be referred in the event of disputes arising in the context of these activities of general interest. Therefore, what characterises this Regulation as an innovative instrument is not only the source from which it draws its legitimacy, but also its content, since it offers a legal framework to an equally peculiar alliance between citizens, who take action together with public institutions to take care of the often abandoned and degraded places and commons in cities.

Despite the fact that the decision to directly implement constitutional provisions by means of a Regulation has been described as a "big jump without a parachute"¹⁰¹, since February 2014, when the Municipality of Bologna first adopted this instrument, more than 250 local authorities have resorted to it to recognise these new forms of participation legal value. The wide diffusion of the Municipal Regulation for the management of urban commons is due to the speed with which it was adopted and to its flexibility, which makes it easy to modify and adapt to the different needs of the community. In fact, some municipalities, following the adoption of the Regulation by the Bologna municipality, fully incorporated its content into their own acts, while others had no difficulty in adapting it to the needs of their territory. Today, however, it is no longer only these municipalities that have adopted the instrument in question, but also Unions of Municipalities¹⁰², Provinces¹⁰³, Metropolitan Cities¹⁰⁴, Regions¹⁰⁵ and some public economic bodies¹⁰⁶ for the same purposes.

3.3

The alliance between citizens and public institutions: the collaboration pacts

The alliance between citizens and public authorities, which finds its legitimacy in the above-mentioned Regulation, is crystallised in an equally peculiar act, namely the Collaboration Pact. The Collaboration Pact is, in fact, "the instrument with which municipalities and active citizens agree on all that is necessary for the implementation of interventions for the care and regeneration of commons"¹⁰⁷. It is the act through which the relationship between the parties is detailed, e.g. in terms of its duration, the aims to be pursued, the means by which these are to be achieved, the responsibilities and commitments undertaken. Thus, while the Regulation outlines the general aspects of collaboration between active citizens and institutions, without detailing all its elements, the Pact regulates it in detail, in relation to the action of care, management and regeneration of the common good that is to be achieved.

The Collaboration Pact is characterised by the fact that it is an instrument whose nature is not authoritative, since the parties are called upon to decide together on all its contents, without one of the two, in particular the public institution, being recognised as having the power to define them autonomously, as, on the contrary, happens in the case of the adoption of an administrative measure. Therefore, the Collaboration Pact represents the final result of a process of co-planning between two parties placed on the same level, which, by allying themselves, jointly identify

101. G. Calderoni, I patti di collaborazione: (doppia) cornice giuridica, in "Aedon", 2/2016.

102. Such as the Bassa Reggiana Union, the Union of "Valtenesi" municipalities, and the Romagna Faentina.

103. To date only the province of Chieri has adopted this act.

104. Reference is made to the Regulation adopted by the Metropolitan City of Milan in 2019.

105. So far, only the Lazio Region has adopted its own Regulation on the shared administration of commons, implementing the provisions of Regional Law No. 10 of 26 June 2019, entitled "Promotion of the shared administration of commons" ("Promozione dell'amministrazione condivisa dei beni comuni").

106. Specifically, we refer to the Regulations adopted by the Milan Public Housing Authority.

107. Art. 5 of the Bologna Regulation on cooperation between citizens and administration for the care and regeneration of the urban commons.

all that is necessary for the pursuit of a general interest, which is the ultimate goal to which the activities governed by this act must in any case tend. As a consequence, if the implementation of the latter may jeopardise the fulfilment of the general interest identified, or that of other interests, the parties may withdraw from the agreement without incurring any sanction or penalty¹⁰⁸.

Another element that characterises the Collaboration Pact is its informality, which is a consequence of the need to ensure flexibility and simplicity in the relationship between active citizens and the public administration. The regulations themselves recognise this feature¹⁰⁹, pointing out, however, that the relationship between the parties only takes place in compliance with specific formalities when this is provided for by law. The potential of this characteristic can be grasped to a greater extent when attention is paid to the individuals that can be part of the alliance sealed with the Collaboration Pact.

3.3.1

The parties of the alliance: active citizens and public institutions

As mentioned above, the Pact represents the final result of a process of co-planning, in which the public administration and active citizens work together. In this process, the public administration has to favour the participation of private individuals in carrying out the activities of care and regeneration of the urban commons, as enshrined in article 118, paragraph 4, of the Constitution, and, for this to happen, it is called upon to change its *modus operandi*, orienting it according to certain principles, such as collaboration, mutual trust, autonomy, responsibility and informality. By virtue of these principles, the municipal authority places itself on an equal footing with the citizens, whose autonomous initiative to take action to care for and regenerate abandoned or disused commons is encouraged, but from whom, at the same time, commitment is required to ensure that these activities are carried out in practice. Thus, on the one hand, the administration is responsible for ensuring that private individuals achieve the general interest, for example by cutting red tape or simplifying certain bureaucratic procedures, but, on the other, the active citizens themselves are responsible for implementing the activities favoured by the former¹¹⁰.

Active citizens are the other fundamental part of this unprecedented alliance; it is only through their activation that the principle of horizontal subsidiarity can actually be achieved, since otherwise public institutions would have no activities of general interest to promote¹¹¹.

All citizens can sign the collaboration pacts, and according to the last paragraph of Article 118 of the Constitution, they can do so either as individuals or as associations. It should be pointed out that, when reference is made to the case of active citizens who sign pacts, the concept of citizenship that underlies them does not coincide with the legal one, so it follows that even those who are not Italian citizens, but who live in a given territory and intend to take care of it, may also subscribe to such acts. At the same time, private individuals who do not reside in the local authority's territory, but who work or study there, may also sign a Collaboration Pact with a local authority.

Regardless of this broad meaning attributed to citizenship, in general, the range of private actors who can enter into a pact with public institutions is very wide. Indeed, it is with reference to the

108. This lack of sanctions is explicitly provided for in Article 12 of the City of Milan Regulation.

109. See Bologna Regulation, art. 3, par. 1, lett. h); Prototype Regulation - Labsus, art. 3, par. 1, lett. l).

110. See L. Muzi, L'Amministrazione condivisa dei beni comuni urbani: il ruolo dei privati nell'ottica del principio di sussidiarietà orizzontale, in F. Di Lascio, F. Gigliani (a cura di), La rigenerazione di beni e spazi pubblici. Contributo al diritto delle città, op. cit., p. 125.

111. For G. Arena, Amministrazione e società. Il nuovo cittadino, in "Rivista trimestrale di diritto pubblico", 2017, p. 50, in fact, the principle of horizontal subsidiarity lives only if citizens make it live.

multitude of individuals eligible to be potential signatories of Pacts that at least two innovative elements can be identified, which contribute to characterising these instruments, differentiating them from those which traditionally govern the relationship between public authorities and recognised voluntary associations. First of all, signatories of collaboration pacts can also be individual citizens who do not belong to any well-structured organisation but who, autonomously and spontaneously, when faced with the neglect and degradation of the places in which they live, decide to take care of them. This recognition, in line with the provisions of the last paragraph of Article 118 of the Constitution, marks a 'break' with the legislation regulating the Third Sector, which has always favoured structured and organised entities as counterparts to be entrusted with the care of certain general interests¹¹². There is also a break with the aforementioned legislation when the regulations recognise as possible signatories of pacts even informal groups, neighbourhood committees, or unstructured associates, who can also be defined as 'volunteers for a day'¹¹³. Obviously, recognised and structured voluntary associations can also sign a Collaboration Pact with public administrations, as can profit-making companies.

However, the informality that characterises the Pact, or rather the collaborative relationship that is regulated by it, is redimensioned when it provides for compliance with certain minimum formal requirements, which, from the point of view of private actors, consists in identifying the formal representative, i.e. the direct interlocutor with the public administration, or the list of active citizens who make up the informal group that signs¹¹⁴. These minimum indications, which must therefore be observed irrespective of the nature of the signatories, aim to strengthen the commitment that active citizens undertake to fulfil vis-à-vis public institutions.

Although up to now reference has always been made to the Collaboration Pact as an instrument through which the public administration and active citizens, either individually or in association, agree on all that is necessary for the implementation of interventions for the care and regeneration of the commons, it should be pointed out that the parties that may sign it may be more than two. In fact, what leads to the stipulation of a Collaboration Pact is a process of open co-planning - aimed at guaranteeing the greatest possible inclusiveness -, which translates into recognising the possibility for several individuals to intervene, even in itinere, and to make their skills and resources available. The participation of a greater number of subjects, both private and public, in the process of defining the contents of the Collaboration Pact can also be understood as an attempt to guarantee the widest possible democratic nature of choices¹¹⁵, destined to produce important effects on the territory and the entire community.

3.3.2 L'animus donandi of the collaboration pacts

Each Collaboration Pact has its own specificities, due both to the type of goods covered by the agreement and to the skills made available to the signatory parties. However, it is possible to distinguish two types of pacts, which differ in the degree of complexity of the activities to be carried out. Depending on whether it is a simple or a complex Collaboration Pact, what generally changes is its approval process, the public bodies involved in it, and the time required to reach its signature.

Despite the different complexity of the process, in both cases, the process starts when the parties make a proposal for collaboration. It is this proposal that triggers the co-planning process, at the

112. Even the definition of "volunteer" that is provided in Article 17(2) of Legislative Decree No 117 of 2017 is still very much centred on traditional voluntary activities.

113. Thus G. Arena, *Amministrazione e società. Il nuovo cittadino*, cit., p. 46.

114. See. F. Giglioli, A. Nervi, *Gli accordi delle Pubbliche amministrazioni*, Napoli, Edizioni Scientifiche Italiane, 2019, p. 274.

115. Cfr. L. Muzi, *L'Amministrazione condivisa dei beni comuni urbani: il ruolo dei privati nell'ottica del principio di sussidiarietà orizzontale*, in F. Di Lascio, F. Giglioli (a cura di), *La rigenerazione di beni e spazi pubblici. Contributo al diritto delle città*, op. cit., p. 123.

end of which the Collaboration Pact is adopted and signed. This proposal may come from the public administration, which invites private individuals to take action on a specific common good, or it may be put forward by active citizens themselves.

Whichever party first expresses an interest in collaborating to take care of the common good, once the other party has shown its willingness to start such a relationship, both are called upon together to define all its contents.

The collaboration referred to does not have a synallagmatic character, since the Pacts do not relate to property. In fact, citizens act spontaneously to take care of certain commons, without receiving any remuneration from the public administration for the activities carried out. The public authorities, in order to facilitate the implementation of the latter, may provide incentives, such as insurance cover for individuals or payment for the utilities used by them to carry out activities in the general interest, but these elements do not, however, contribute to characterising the Pact as an agreement with remuneration. On the contrary, it is the *animus donandi* of active citizens that characterises collaboration pacts¹¹⁶, a cause that is difficult to find in contracts for pecuniary interest and which, therefore, helps to exempt the former from European and national rules on public procurement.

3.4 The Shared Administration of Commons

The instruments with which the principle of horizontal subsidiarity has been implemented - and which have found their legitimacy in it - namely the Regulation and the collaboration pacts, define a new model of administration, theorised since the end of the 1990s and referred to as Shared Administration. At the basis of this new model, in fact, is the idea that equal collaboration between citizens and public institutions, sealed with the Pacts, can allow for a better solution to the problems affecting the community, compared to models of administrative action based on the opposition between the administration and the administered. With Shared Administration, there is no longer any antagonism between the two poles, public and private, which, on the contrary, join forces to pursue general interests and meet the needs of the community.

The affirmation of this model of administration, which sees collaboration between the parties as its distinctive feature, requires a radical change both in the principles that guide administrative action and in the vision that public institutions have of citizens, who are no longer mere recipients of decisions but active participants in their construction. In fact, in this paradigm, citizens become allies, to be listened to and involved in defining and implementing activities of general interest. Their participation must be encouraged (ex art. 118, paragraph 4, Const.), incentivised and guaranteed, and in this sense the Regulations on Shared Administration, however they are called, have contributed significantly.

Public institutions are called upon to place their trust in citizens who voluntarily place themselves at their "disposal"; however, this must not result in the exploitation of private resources and capacities. Shared administration presumes that the two parties work together, each according to their own competencies, in pursuit of the general interest; in fact, the many experiences of caring for the commons, through collaboration pacts, show how citizens are not left alone by public institutions in carrying out the defined activities, but how they are supported by them, both in the co-planning and operational phases. At the same time, the activation of

116. So notes P. Michiara, I patti di collaborazione e il regolamento per la cura e la rigenerazione dei beni comuni urbani. L'esperienza del Comune di Bologna, in "Aedon", 2/2016.

117. This refers to the essay by G. Arena, Introduzione all'Amministrazione condivisa, in "Studi parlamentari e di politica costituzionale", 1997, pp. 29-65.

private individuals in taking care of certain commons does not mean that the public institutions are withdrawing from the action carried out in that area; for example, the care activities promoted by citizens in relation to urban green spaces do not replace the maintenance activities usually carried out by municipal offices, but complement them to better meet the needs of the community.

Moreover, the principle of collaboration that characterises the paradigm of Shared administration is not limited to the relationship between citizens and public authorities, but also characterises the relationship within the offices of the latter. This translates into a change in the *modus operandi* within public administrations themselves, where offices, used to working in watertight compartments, are instead called upon to collaborate with each other in order to facilitate the action of active citizens¹¹⁸.

The latter, in the new model of administration, by becoming active in the shared care, management and regeneration of the commons, shed their traditional role as administrators and put on that of co-administrators. In defining the content of the Pacts, in fact, together with the public institutions they identify the general interest to be protected, the methods and everything necessary to fulfil it. They become, together with the institutions, responsible for the fulfilment of the general interest.

With Shared Administration, therefore, we are witnessing an evolution on both sides of the relationship, with private individuals no longer in a position of subordination to the public administration, which, placing itself on the same level as them, favours them and helps them to make their resources and knowledge available to the entire community.

To date, the model of shared administration, an expression of the principle of horizontal subsidiarity, is not regulated by any national legislation, although it is gradually gaining important recognition, especially jurisprudential. The Constitutional Court, in its ruling of 26 June 2020, no. 131, recognised shared administration as an alternative model to that of profit and the market, in which the relationship between the public and private sectors is not of a synallagmatic nature, as is the case with contracts.

3.5 The principle of horizontal subsidiarity and legal standing

An equally interesting application of the principle of horizontal subsidiarity in the legal system is the one made by administrative jurisprudence in order to expand the number of individuals entitled to take legal action for the protection of various diffuse interests, such as environmental interests¹¹⁹. Indeed, recourse to the principle has not always been useful in achieving this extension, since it is possible to identify several rulings in which, although referred to, the principle of horizontal subsidiarity has only contributed to strengthening certain legal institutions already consolidated in the system¹²⁰.

In these contexts, therefore, this principle has not been recognised as having any innovative force, a characteristic which, on the contrary, is attributed to it by that

118. On the organisation of offices by some local authorities see P. Bonasora, C. Leggio, *Come si organizzano gli uffici per l'Amministrazione condivisa?*, in "Rapporto Labsus 2019", pp. 40-1.

119. In the doctrine there are several authors who have dealt with the relationship between horizontal subsidiarity ex art. 118, paragraph 4, Const. and the role of privates in the process, among them see the works of P. Duret, *Riflessioni sulla legittimatio ad causam in materia ambientale tra partecipazione e sussidiarietà*, in "Diritto processuale amministrativo", 2008, pp. 688-788; Id, *Taking "commons" seriously: spigolature su ambiente come bene comune e legittimatio ad causam*, in "Rivista quadrimestrale di diritto dell'ambiente", 1/2013, pp. 2-65; F. Giglioli, *La legittimazione processuale attiva per la tutela dell'ambiente alla luce del principio di sussidiarietà orizzontale*, in "Diritto processuale amministrativo", 2015, pp. 413-56.

120. Among the many, it is sufficient to mention Consiglio di Stato (Council of State), section IV, 2 October 2006, no. 5760; Consiglio di Stato, section V, 19 February 2007, no. 826; Consiglio di Stato, section VI, 13 September 2010, no. 6554.

group of rulings according to which a wider range of individuals are identified as having the legitimacy to take legal action, for the protection of general interests, by virtue of their participation in the administrative procedure which led to the adoption of the harmful act. On the basis of this orientation, in essence, the care of diffuse interests, of which the private subjects admitted to the procedure are the interpreters, continues also in court.

Highly innovative is the interpretation of the principle of horizontal subsidiarity provided by case law, which recognises the *locus standi* of certain individuals not because of their subjective characteristics, but to guarantee effective protection in court of a widespread interest. In these terms, the purpose attributed to the constitutional principle is primarily that of guaranteeing widespread social control of general interests. It is from this interpretation that, consequently, it is assumed that it is necessary to grant to a greater number of individuals, including those social organisations lacking significant levels of representativeness, the legitimacy to take legal action, in order to guarantee a stronger protection to these interests, threatened by the act that one intends to challenge.

3.6 Concluding remarks

The analysis carried out in the preceding paragraphs provides an image of the principle of horizontal subsidiarity capable of introducing significant innovations in our legal system, from at least three points of view. First of all, from a normative point of view, since its immediately operational character has allowed public authorities, especially local ones, to implement it directly through the adoption of Regulations for the shared administration of material and immaterial commons. These instruments, in the absence of legislative regulations, define a certain legal framework within which to bring experiences of collaboration between active citizens and administrations, which have arisen outside the traditional legal paradigms. The adoption of these instruments has enabled institutions to favour the carrying out of activities of care and regeneration of the tangible and intangible commons by active citizens, who, by providing their resources and skills, have proved to be valid allies in guaranteeing the pursuit of various general interests.

The horizontal declination of the principle of subsidiarity by the aforementioned Regulations and collaboration pacts has, therefore, also brought about considerable innovations in the relations between public institutions and active citizens, whether individuals or associations. In fact, by recognising the distinctive character of collaboration between the parties, the Shared Administration model sees the public authorities place themselves on the same level as active citizens and collaborate with them to pursue the general interest, identified in synergy. At the same time, therefore, the way in which private citizens are conceived also changes, as they become subjects capable of integrating the skills and competences present within public administrations, making their own resources and knowledge available to them. However, the collaborative spirit that characterises the new model of administrative action is not limited to the relationship between public authorities and active citizens, but also concerns the bodies within the administrations themselves. In fact, it is only by orienting internal and external relations within the administrations towards this principle of collaboration that it is possible to effectively implement the provisions of the constitutional article 118, last paragraph, and thus favour the performance of activities of general interest.

121. Ex multis see Consiglio di Stato, section IV, 2 October 2006, no. 5760; T.A.R. Puglia-Lecce, section I, 5 April 2005, no. 1847; T.A.R. Emilia-Romagna - Bologna, section I, 6 July 2007, no. 1618.

122. See in particular the considerations made by T.A.R.. Liguria, section I, sentence 18 March 2004, no. 267; T.A.R.. Lombardy-Milan, sec. II, sentence 22 October 2013, no. 2336; T.A.R.. Lazio-Roma, section II-quater, sentence 20 April 2007, no. 3518.

However, the legal innovations attributable to the application of the principle of horizontal subsidiarity are not limited to those just mentioned. By resorting to this principle, it has been shown that case law has even been able to innovate consolidated institutions in our legal system, such as the legitimacy to appeal before the courts for the protection of diffuse interests. In fact, it is by virtue of the original legal interpretations that have been given to this principle that a wider plethora of private individuals have been recognised as having the possibility of bringing an action before the courts and, therefore, of protecting the general interests threatened by the act considered illegitimate.

In the light of what has been emphasised in this work, it is undeniable that horizontal subsidiarity is a principle driving the transformations of the legal system, some of which have not yet been fully expressed, that mark the passage of new phases in democratic systems and the active participation of citizens.



ph_ Giuseppe Bruno - Vazapp - Contadinner in Corigliano Rossano, Azienda Agricola Favella

Chapter IV

AN INTERNATIONAL GLANCE ON THE ITALIAN PANORAMA OF THE SHARED ADMINISTRATION OF COMMONS

—
Daniela Ciaffi

Labsus has seen its involvement in international relationship grow over the years with a sharp acceleration in recent months. Sometimes it is a matter of continuous exchange of experiences and reflections that last for years, as is the case of the bridge that we carry on building between Italy and France or Spain. Other times surprise doorways opened to unexpected contexts, as when we have been contacted by commoners halfway across the world, in Cape Town as well as in Seattle.

The incredible feature is that a community of affinity is being created woven on a network of interests to change the administrative law of the respective countries. It's one thing to have the same sustainable world view based on the shared use of common resources, and another being able to go to any public administrator with a device that thousands of Italians are already using in their daily life to take care of commons together with their local public administrators.

Even before being something, the commons are a way of seeing tangible and intangible things. In this perspective, resources are not public or private so much as commons: they are those particular goods of general interest, whose access must always be guaranteed to all. However extreme and provocative this definition may seem, it manages to inspire different communities of people active for decades, scattered all over the world and increasingly interconnected.

Exactly fifty years ago, the American ecologist Garrett Hardin published a fundamental essay on Science. He titled it "The Tragedy of Commons" because he argued that the non-regulated initiative in the management of a common good would lead to the ruin of all. The example that is most frequently taken up by this article is that of a pasture open to the use of anyone who wants to use it. Inexorably, the carrying capacity of the

pasture would go into crisis because the number of shepherds who would like to exploit it by increasing their flock would grow continuously. Thus, the tragedy of the commons would be consummated.

So, what to do? The answers Hardin found were: sell them to private individuals or keep them public, as long as access and use is regulated.

The author made the most diverse hypotheses about how to do it, ranging from drawing lots, to merit-based criteria, up to "first come, first served". This is a fundamental step to retrace, because it clearly calls into question the traditional bipolar paradigm "administrators / administered", which today, instead, has a possible alternative in the collaborative paradigm: commons can be the object of alliances between public, private and Third sector, in the name of the general interest and according to the principle of subsidiarity set out in Article 118 of the Italian Constitution. This is a profoundly innovative rule because it actually recognizes "communities of general interest", capable of independently activating themselves in the interest of all.

This perspective is not at all new to humanity. Benjamin Coriat is a French theorist and activist who argues that we are experiencing a return to the logic of the commons. In the winter of 2018, we were invited together to the "Rendez-vous des managers territoriaux" in Strasbourg. It was a historic event for Labsus: the invitation consisted on illustrating the shared administration of commons to hundreds of senior managers and officials from French local public administrations. This is an event that the Institut National des Etudes Territoriales organizes every year to promote public innovation in cities and territories. Overcoming my shyness, I asked Benjamin: "Why do you think they invited the two of us?".

He replied: “Because I give them a theoretical framework on the care of commons, and Labsus shows that it can be done for real!”.

For years we have been continuing to reflect together on the fact that for the French administration, which is very dirigiste, this model that comes from Italy represents an enormous challenge. In French administrative law, it seems that there is a unique case in which the active inhabitant can collaborate with a public official as equals: it is when the city is on fire! Only then the “volunteer firefighters” can collaborate on an equal footing with local public officials. On the contrary, in all European municipalities one should ask the question that in Italy hundreds of municipalities and two regions are now asking themselves: are we capitalizing enough the capabilities of individuals, informal groups and associations and their desire to take care of commons together with the responsible public administrators?

International observers often emphasize that the Italian model is attractive but the principle of horizontal subsidiarity is not present in the other European Constitutions. Is it just a question of law or also of a change of attitude? If today many people are confused about the concept of general interest, it is also because many public managers have more and more often delegated private subjects to manage commons. We can here mention just a couple of emblematic examples. If road safety and public health are considered commons in Europe, we should no longer witness the collapse of motorway bridges or scandalous delays in the distribution of health masks and vaccines. Time will end in which the different of

state levels delegate their responsibilities to private managers. Furthermore, too many experiences over the last few decades have revealed the serious dysfunction of a number of private organizations, who had received the complete trust of public power.

Jean-Louis Bancel, the president of Cooperatives Europe, said in a recent interview on Labsus : “If we don’t do something, we could be the losers: the European citizens, the civil society actors. [...] Let us not leave modesty misplaced, let us not be intimidated. Obviously, the European vision does not correspond to our local action: it is not a matter of invoking the creation of gigantic superstructures, threatened by managerial or bureaucratic drifts, but of developing networks of structures, mostly small or medium-sized, close to citizens, connected, freely, among themselves, also understood beyond the borders of the state and at the level of the European continent. [...] I think we could act by combining «Italian-style» horizontal subsidiarity and «European» vertical subsidiarity, combining these two lines of force in «a diagonal of subsidiarity».”

Our feeling is that along this subsidiarity diagonal many innovative policy makers are already active, from the municipalities of Barcelona and Madrid in Spain, to give an example of local political leaders, to the OECD itself, to cite a global actor with whom we are in dialogue on the concept of co-creation, up to non-governmental organizations such as ActionAid and Greenpeace, with whom we are carrying out advocacy activities on the field and training activities about the approach of the shared administration of commons.



ph_ Andrea Couvert – Demonstration to defend the PHA from speculation, Cape Town, South Africa

Chapter V

THE BRIGHT PROJECT AND THE SHARED ADMINISTRATION MODEL

Pasquale Bonasora

How to promote the improvement of the living and working conditions of women employed in agriculture? How, starting from this perspective, can we define public policies that focus on the issue of gender discrimination and equal opportunities, access to gender-sensitive public services and culture? The BRIGHT project wants to answer these questions with the tools of Shared Administration by activating local communities through collaboration pacts.

The challenge, therefore, is to build inclusive and co-responsible decision-making processes by enhancing the "autonomous initiative of citizens" through formulas that make it possible to overcome the current limits of local authorities and the rigidities of the traditional model of participation. In this way, local communities, institutions and citizens will be able to release their generative energies and make the most of their heritage of skills, knowledge, relations and resources.

5.1

What are the most relevant aspects compared to the existing model?

The BRIGHT project, well beyond its specific objectives, raises a general question: the needs of communities are growing more than the state's ability to meet them, and so we are all called upon to change the institutional, social, economic and cultural paradigm, where the idea of the 'distributive state' is flanked by that of the 'distributive society', where relational capital has the same value (at least) as financial capital. In this framework, the community becomes the perimeter within which to redefine everyone's roles, the quality of relations, and the effectiveness of the actions of each subject active in a given area.

The traditional dichotomies of public/private and state/market no longer work, they simply prove to be inadequate and unsuited to the transformations underway. The ever-increasing weight of financial capitalism, the radical change of the world of work, the ageing of the population, the ever-increasing number of people living in conditions of poverty and exclusion, the new needs of the population in relation to the new models of organisation of society as a whole, all produce new and growing demands for social protection. The word emancipation in the Treccani dictionary is described as "the process by which a people or a social class removes itself from a subjection, a subordinate situation and obtains recognition of its rights". The evolution of the collaboration pacts within the Cambia Terra programme, from the first experimentation in the municipality of Adelfia in the province of Bari in 2017 to the present day, can be described as a process of emancipation: the overcoming of the 'bipolar paradigm' and the consequent opposition between citizens and administration, in favour of a new definition of the balance between government responsibilities and autonomous bottom-up initiatives, starting from the protagonism of women employed in agriculture, no longer considered as bearers of needs but as subjects capable of bringing about positive change for the entire community.

The actions of communities, organisations, associations, committees and ordinary citizens are leading to a redistribution of power, particularly at local level, in which the institutions have the task of 'encouraging' the autonomous initiative of many different subjects who contribute, with their skills and competences, to solving problems affecting the community.

This is not a substitution for the tasks of the institutions, but the assumption of shared responsibility; it is not the exercise of power as an end in itself, but the building of bonds of trust. This was the hope when the first cooperation agreement was signed in Adelfia in 2017. Today, alongside the confirmation of what was said then, a greater awareness of the potential of this instrument is emerging in all the actors involved in the processes and the desire to go beyond mere testimony on the part of an ever-increasing number of active citizens, administrators, and civil servants who contribute to creating, testing, and defining the boundaries and characteristics of this legal institution capable of translating into practice the principle of horizontal subsidiarity enshrined in Article 118 of the Constitution.

5.2

The most significant challenges faced and the lessons learned

The local authority, as the level of government closest to the citizen, is the ideal place to apply this innovative relational model, which, in the face of problems that the administration cannot solve alone, enables it to multiply resources by allying itself with citizens. The construction of this relationship was the challenge that each of the actors involved in the BRIGHT project had to face. The analysis of the context, the emergence of needs and resources requires the mutual recognition of the limits, criticalities as well as the skills and competences of each of the actors.

The Community lab was the methodology used with the aim of creating opportunities and conditions so that the local contexts of the territorial area involved could innovate relationships, alliances, relations between institutions and citizens, and increase the contribution of the community to change both in public policies and in the collective organisations involved. The co-planning meetings involved first of all women labourers together with local institutions, third sector organisations, agricultural entrepreneurs, and associations that, together, contributed to defining the structure, the objectives, and the care actions of the collaboration pacts. The quality of the relationship and the consequent definition of shared commitments had to face three levels of criticality: the awareness of acting in territories with a high deprivation of public services, without this meaning the expression of a value judgement on the commitment of administrators; the lack, in particular, of gender- and culture-sensitive services and the consequent impediment to the effective exercise of rights; the fight, also in community relations, against gender inequalities and the protection of women's rights in terms of work-life balance, access to the right to health, participation in the democratic life of the communities of reference.

Through the community lab, a network of actors was created who began to exchange experiences, get to know each other, and observe the surrounding reality through the eyes of women labourers. To imagine and define community welfare policies not for them but with them, aware that the issue of gender- and culture-sensitive services concerns the quality of life for the entire community.

If, on the one hand, the collaboration pacts have allowed the construction of a network that has started to work together, in a territory where collaborations between institutions and communities represent a little-experienced innovation, on the other hand, it is necessary to support the co-planning paths for those commitments that each one has undertaken. Co-planning is the instrument through which rules and creativity meet, the moment in which institutions and citizens confront each other. It is through co-planning that social demands can become the engine of real change

that affects both institutions and the community. Only in this way can the collaboration pacts signed within the BRIGHT project prove to be a space for developing a new way of administering, but also an expression of a new political subjectivity. It is increasingly evident in daily practice how effective co-planning determines the success or not of a Collaboration Pact. Shaping relations in this way must result in mutual recognition and legitimisation to share solutions that promote an improvement in the quality of life in the territories.

Certainly, the quality of the relations built and the effectiveness of the actions planned in the territory has had to be measured against the time of the pandemic and the consequent limitations linked to the lockdown. Promoting trust and the sharing of responsibilities through a computer screen, trying to define the right proximity has irreparably distorted the process and lengthened the time, but it has forced everyone to be essential to face the path.

5.3 The most relevant changes produced

The BRIGHT project, working on the value of relationship as a distinctive feature for the construction of community welfare policies, represents an attempt, unique in its kind in the Italian and European panorama, to define gender- and culture-sensitive hybrid services through an articulated system of collaboration pacts. Hybrid services because they are more responsive to people's needs and requirements through the involvement of inhabitants and collective organisations and are generative for the whole community from a social and economic point of view. Therefore, active citizens should not replace institutional tasks, but enhance widespread skills and consolidate social networks of reference. An articulated system of pacts, because the ambitious objectives of the project can only be pursued by linking together different territories and collective subjects working in an extra-regional network articulated at local level through collaboration pacts linked through the direction of the Citadel of Sharing (Cittadella della Condivisione). The Citadel of Sharing is a place for discussion, experimentation, and the development of local policies, in which women play a leading role alongside businesses, the third sector, institutions and agricultural enterprises. The Citadel is conceived as a hybrid service of information and training among women, for the generation of shared paths with the community for access to the rights of women employed in agriculture. It is intended as the fulcrum of a system of relations to accompany and support in order to make the actions undertaken at local level increasingly effective and coordinated.

5.4 Perspectives

"Ultimately, I believe that the future of social work, and more generally, of the Welfare State, does not depend on classifications or procedures, nor on a reductionist attitude towards the variety and complexity of human needs and problems. It depends, instead, on the moral standards of the society in which we all live. It is these ethical standards, much more than the rationality and accuracy of social workers, that are in crisis and in jeopardy today". Bauman's words give us the measure of the work ahead of us. No reform will be possible, no initiative will obtain results, no model will be successful if the logic of competition remains the pillar around which social relations are defined.

Generative welfare becomes the conceptual tool for building a model of sustainable development, a new way of understanding production and community relations. More than new, perhaps it would be better to define it as innovative with respect to the prevailing model, if already as for Adriano Olivetti "The factory cannot only look at the profit index. It must distribute wealth, culture, services and democracy. I think the factory for the man, not the man for the factory, right? We need to overcome the divisions between capital and labour, industry and agriculture, production and culture".

The horizon can only be that of the construction of an economic and social model that can balance the difficulties of the state in guaranteeing citizens the essential levels of rights and, at the same time, make the entire community a protagonist without leaving anyone behind. This goes, first of all, through the identification of some essential elements such as: the territory, the subjects, the relationships.

The territory is not simply a space delimited on the basis of legal and administrative rules, it can be equated with an ecosystem in which a plurality of subjects act, from collective subjects (institutions, businesses, associations, families, etc.) to individual citizens. All of them enter into a relationship with the assets in which a territory is rich. These goods may be public and private, but also common, i.e. those goods that "allow social life to unfold, collective problems to be solved, and man's subsistence in his relationship with the ecosystems of which he is part. They are necessarily shared in that they provide their best qualities when they are treated and, therefore, also governed as goods 'in common', accessible to all, at least in principle". In relation to the concept of territory, commons are those goods capable of bringing together a community of people around them. The territory, thus, becomes the place where identities, cultures, economic, social and cultural interests are measured and compared, a system of relations and innovative processes that involve people, collective subjects and institutions, combining resources and needs in a perspective of generative social change.

Generative and circular welfare, therefore, produces effects on the subjects and organisations involved. The experiences that are born, grow and develop throughout Europe show how, beyond their legal form, an essential characteristic of the actors acting in a given territory is their hybrid organisation, which produces innovative and generative effects, not only in the community of reference but also in the organisational models.

The entrepreneurial landscape presents a wide and diversified range of actors and models, from non-profit to for-profit, characterised by an orientation towards the production of value, i.e. forms of enterprise that are aware of their role in society and set their action alongside cooperation and competition.

An essential role in generative processes is played by public institutions, starting with those closest to the citizens who, due to their high level of knowledge of reality, are the ones capable of making the most effective decisions. The role of the public administration is increasingly that of promoting social relations between the various players active in a given territory and acting as a facilitator of the processes of a local development model capable of enhancing the resources, skills and knowledge of each person.

The different actors interact in the territory through a system of unprecedented and variable alliances to determine the general aims to be pursued and the necessary resources, the design and implementation of the intervention, the evaluation and measurement of the social impact of the actions. The definition of relations between different actors in a collaborative and non-competitive way produces new relational models with repercussions on the reference community. The principle of subsidiarity also has an impact on the construction of a quality relationship. In government processes involving very different levels, from European institutions to municipalities, the principle of subsidiarity contributes to the construction of an open, inclusive and sustainable democracy. Subsidiary action by citizens also operates in a supra-local dimension, capable as it is of influencing, on several levels, public administration understood not as a chain of command, a transmission belt of orders from the centre to the peripheries, to the citizens. In this sense, horizontal subsidiarity, i.e. the possibility for citizens, enterprises and the third sector to take care of activities of general interest, also qualifies vertical subsidiarity, i.e. the division of competences between the different branches of the state.

A project or action can be interpreted in the light of the area in which it is implemented, depending on the players who are involved and promote it, and the relationships it builds. A community welfare with these characteristics becomes a model capable of responding to the vulnerability of territories and to the conditions of fragility of their inhabitants through a system of relations between social, entrepreneurial and institutional actors capable of promoting social, economic and cultural innovation through the production and/or shared management of commons aimed at reducing inequalities and increasing levels of well-being and social cohesion. In this sense, the next step can be represented by the definition of a Collaboration Pact framework shared by the whole European network promoted by BRIGHT, which will be articulated following what is the journey of working women, and not an experience faced alone and towards the unknown but supported by the community that the Cambia Terra programme is building: a community born from below and expression of an idea of Europe capable of creating solidarity links.

The sections according to which to articulate the pact will be: The departure, we want to recall some possible transnational actions between Italy, Bulgaria, and Romania that see as protagonists the partner organisations of BRIGHT, the labourers already in Italy, the women workers who intend to leave, in a network of mutual aid that works on the awareness of the rights and the indispensable information necessary to avoid falling into the network of exploitation; Reception, building a network of solidarity that prevents resorting to illegal systems of labour intermediation; Permanence, defining those actions of care, proximity services, consolidation of relations that arise from the collaboration between women labourers already in Italy, associations and organisations of the Third Sector, informal groups of citizens, enterprises, institutions.



ph_ Giuseppe Bruno - Vazapp - Whorkshop in Corigliano Rossano, Azienda Agricola Favella

Conclusions

Citizens and institutions working together to achieve what neither can do alone, this is one of the cardinal principles of the Shared Administration model. In Gregorio Arena's essay published in 1997, in issue 117-118 of the legal journal "Studi parlamentari e di politica costituzionale", entitled "Introduzione all'amministrazione condivisa" (Introduction to Shared Administration), it was stated that "at the current stage of development of Italian society, the conditions exist for setting up the relationship between administration and citizens in such a way that the latter leave behind the passive role of the administered and become co-administrators, active subjects who, by integrating the resources they possess with those of the administration, assume a share of responsibility for solving problems of general interest". That essay led to the Regulation for the care of the commons, presented in Bologna in February 2014.

Since then, a lot of ground has been covered, and today almost 300 municipalities have adopted the Regulation and more than six thousand collaboration pacts have been signed. But numbers are certainly not enough to describe the hard work, enthusiasm, critical issues and results achieved, which have seen and continue to see the commitment of public administrators, civil servants, ordinary citizens, associations and all those active in their areas.

The success of the model of shared administration of commons and collaboration pacts has also crossed national borders. The Italian experience has become a positive example in Europe and beyond, not only because of the uniqueness of the constitutional principle of horizontal subsidiarity, but also because of the effectiveness and originality of the forms of collaborative governance based on trust and shared responsibility.

What are the prospects? What space does shared administration open up in a project framework such as BRIGHT? We need to invest in our communities as reservoirs of latent resources, to meet people as allies, bearers

of values, principles and skills rather than as problems. It is the society of care, both that of people and that of commons, around which a new model of life in our cities can be built. Innovating the welfare system, then, means first and foremost being able to experience a new right, that of taking care of public services as commons, it also means redefining welfare services as hybrid and shared. In this sense, a Collaboration Pact is an attempt to change reality for real through a system of rules and principles, the Regulation for Shared Administration, capable of freeing the energies present in our communities without departing from the general principles of transparency, impartiality, efficiency and effectiveness that govern the action of public administration.

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Woman leader's speech - Ph Dolinda Cavallo



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