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The Normative Development of State and Regions

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Content

1 Preamble

It's been more than 10 years now that the horizontal subsidiarity principle has been introduced in our Constitution, at article 118, paragraph 4. Since then, this principle has been discussed, evoked, praised, deprecated, forgotten and mentioned either in the political speech and the legal doctrine, with few concrete results and many speculations.

As a matter of fact, pressed by European resolutions, the economic emergencies and the increasing growth of the Third sector, nowadays we find ourselves staring at the possibilities that this principle is opening to our future, a future made of social economy, redefinition of the boundaries between public and private in terms (so far unseen) of cooperation and not antagonism, still unable to build that new model of society the principle allows and fosters.

Conscious of the challenge that every major change delivers to the scientific speech about institutions, but also comforted by the increased relevance and affirmation of this topic (such as the Nobel prize to Elinor Ostrom in 2009 for her studies on the common goods), the only solid anchor to which we can hold our speech is the analysis of what our legal order has been able to produce in these years.

Therefore, in the pages that follow a framework of state and regional law-making, which directly or indirectly, embodied and implemented the principle of horizontal subsidiarity in the Italian landscape, is proposed. This reconstruction, based on the constant research work made in these years within the LabSus[1] section called "Norme"[2], aims at reporting on the consistency of the phenomenon and on the actual interest that this principle raised in the legislators.

In terms of method, we therefore begin by considering, on the one hand, some different formulations of the principle as enunciated in the State laws and in the Italian Constitution and, on the other hand, the corresponding regional provisions. A chronological order is substantially followed and the most relevant aspects are from time to time isolated.

This review is therefore essentially divided in two stages:
a) the first one (1997-2000) considers the rules enacted starting from the "devolution" process, after the approval of the law 59 of 1997;

1 LabSus – Laboratory for Subsidiarity is an association, an online review and a laboratory, created in 2006, for the enforcement of the principle of horizontal subsidiarity, where scholars elaborate ideas, gather cases and materials of any sorts and promote new initiatives. LabSus is available online at http://www.labsus.org.

2 Regulations.

b) the second one (2001-2010) is based on the (already mentioned) new wording of the Part II, Title V of the Italian Constitution, thus on article 118, paragraph 4, which introduces the principle of horizontal subsidiarity; further attention is given to the laws passed afterwards:

- regional statutes enacted after the constitutional reforms of 1999 and 2001;
- subsequent regional laws that clearly followed the constitutionalization of the principle;
- (the very few and very recent) interventions in the State legislature.

Through the reading of these sources, the principle of subsidiarity is analyzed as a source and as a method of regulation and administration, in order to see the wide prospects and the many potentialities that the principle stresses.

It can be argued and noted – without anticipating the results of a report like this one – that these laws brought, in different times and places, to solutions and answers which are really diverse from each other. Now, though it can be argued that a constitutional principle, somehow physiologically, knows a wide range of interpretations and therefore different possible applications[3] by politicians and public administrations, in the case of subsidiarity, it is impossible not to notice the breadth of the interpretations roused by this principle. Moreover, the ways in which it can be combined are so diverse that it may be almost forgotten the textual data of the different laws where subsidiarity is enunciated and it may be finally suggested that, although the scholars' intense work, subsidiarity remains an *"ambiguous principle, with at least thirty different meanings, program, magic spell, alibi, myth, epitome of confusion, fig leaf"* (Cassese 1997: 73 and 1995: 373).

2 Introduction of the Principle of Subsidiarity in the Italian Legal Order

It is thus useful (and coherent with the way we decided to set this report) to begin by presenting and considering first of all those formulations with which the principle made its appearance in the Italian legal order.

The first one is that in the law of March 15, 1997, n. 59, "Delegation to the Government for the transfer of functions and tasks to the Regions and local government, for the Public Administration reform and administrative simplification" that further enhancing the local governments, implements a

3 In this respect, see Zagrebelsky (1998: 208).

radical process of devolution, devolving functions and tasks of the State to regions, provinces and municipalities.

The *"fundamental principles"* that are set to govern this process are listed in article 4, paragraph 3 of the provision. The first among these ones (in the letter *a*) consists in the attribution *"of the generality of the duties and administrative functions to municipalities, provinces and mountain communities, according to the respective territorial, associative and organizational dimensions, with the exclusion of the only functions that are incompatible with the same dimensions"*. This is *"even in order to facilitate the discharge of functions and tasks of social relevance by families, associations and communities, to the authorities territorially and functionally closer to the people concerned"*. This formulation immediately urges some considerations:

- first of all, subsidiarity (here without adjectives or distinguished by following vertical or horizontal directives) is in the provision in question, the principle according to which there is a correlation between the assignment of administrative expertise and the best territorial dimension in which the respective public interest is satisfied. The legislature then prescribes that the responsibility for certain functions and certain tasks should be given to the institutional level, which is more likely to fulfill the respective needs, because of the features of the social, economic and territorial context[4]. It is therefore by detecting the needs and by analyzing the optimal dimension for their fulfillment that the determination of the administrative competence must start. In other word, here *"subsidiarity is ability and responsibility"*[5];
- however, the regulation introduces afterwards a preferential criterion, which is the downright *vorrangentscheidung* of the provision, when it is stated that, as a rule, it should be preferred the institution closer to the citizens who are the recipient of the administrative decisions or services. This may result in the a priori and completely abstract statement that the local level is always preferable and therefore in the presumption of its appropriateness. However, this holds if, and until, it is proved that in a specific case, because of the extent of the interest involved or depending on other contextual conditions, the higher level authority has to fulfill a specific task or function. In this way the principle of subsidiarity reflects and responds to both the assumptions that guide the entire reform season of the Italian administrative system during

4 The acknowledgement of the local fabric differences, or rather the end of the presumed homogeneity of the same, and the consequent difference among the system of competences was actually introduced by article 3 of the law 142/1990. See, in this case, as the earlier commentary on the mentioned provisions already understood the relevance of such a change in Vandelli (1991).

5 In this respect, see Melica, entry *Sussidiarietà,* in Cassese (2006).

the 90s[6]. Namely not only the administrative activities, in order to fulfill the general needs, should be assigned to the territorial level which is appropriated to the task, furthermore if they are carried out close to the citizens who are the recipients, it follows that there are a series of indirect advantages (a closest observation and then the best judgment of the civil service fulfillment) and direct ones (a better performance). In other words, subsidiarity as graveness/ proximity and effectiveness;

- finally, although it is not clearly stated, a third prescription stands out, which is the one that concerns us more closely, namely that the ultimate end of the system described above is to create *"not only the greater proximity or closeness of the administration to the citizens, but also, wherever possible, the identification of the administration with the social fabric, through which the organization of society itself is expressed"* (Pastori 1997: 752). As the two previous ones, this statement as well digs up and ratify a conception hitherto never expressed in the Italian positive law[7], namely that private individuals can take responsibility not only concerning activities related to their individual interests, but they have the qualifications, and also the resources, for carrying out activities that fulfill general or public interests. In this regard, it is worthwhile to note as the prospect of an "openness" of the administration horizontally applies, at least for the cases covered here, only to *"functions and (...) tasks of social relevance"*. Therefore, the individuals involved (although vaguely indicated) are the most expressive ones of civil society, namely *"family, associations and communities"*.

What drives the legislator in this direction is without doubt, in those years, the idea that through subsidiarity it could be reached to maintain unchanged the social welfare level, without increasing (or possibly reducing) the administrative apparatus costs[8].

In fact, however, the law in question starts a juridical and political discussion towards some other perspectives. It also begins to shape a model of public administration, in which the rethink of the institutional architecture, started by the law 142 of 1990[9] (which finds space and is concrete especially

6 The milestones of this deep transformation of the Italian public administration are marked by law 241 of 1990, law 142 of 1990 and law 59 of 1997, to which reference is made in the text.

7 A rethink of the citizens' role and of the relations between them and the public administration had already been started, but without reaching such outcomes, by the very considerable openness made by the law 241/1990.

8 See, in a critical sense, Podda (2007: 361).

9 The law of June 8, 1990, n. 142, *Ordinamento delle autonomie locali*, inaugurates a long reform season of the Italian public administration, reshaping not only the organizational structure and the provinces and municipalities tasks, but coming, in essence, to full reassessment of these

in defined and limited geographical areas, at the time that the administration becomes a essentially local function[10]) converged, together with the evolution, started by the law 241 of 1990[11], of the administration decision-making processes, which are now opened up to citizens and resources of which they are bearer, as provided in the provisions on transparency and participation.

In the end, it should be noted, however, as the same delegated decree enacted, based on the regulations of the law 59 of 1997, didn't lead to any essential realization of the principle, thus debunking its potentialities.

The only notable exemption is perhaps the legislative decree 469 of 1997, which fulfilled the transfer of functions and tasks to the regions and the local authorities on the labor market. Indeed, in article 10, it provided for *"enterprises, enterprises groups, cooperatives, non-commercial bodies subject to ministerial authorization to carry out mediation between demand and supply of labor"*.

The second formulation of the principle of subsidiarity[12] can be found in what is now article 3 of the legislative decree of August 18, 2000, n. 267 – Unified code of laws on local governments13 (called T.U.E.L.).

By defining the *"autonomy of municipalities and provinces"*, the law, in the paragraph 4, lists the different forms of autonomy itself (*"statutory, regulatory, organizational and administrative"* as well as *"tax and financial"*). It also specifies in the following paragraph that *"municipalities and provinces hold their own functions and the ones conferred upon them by the State and the regional law, according to the principle of subsidiarity. Municipalities and provinces carry out their functions also through the activities that can be properly exercised by the citizens' independent initiative and by their social formations"*.

The law presents some confirmations and some differences compared to the previous formulation. Confirmations concerns:

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institutions role, that from this point forward are put by the legislator in the center of an important series of innovations, first of all the direct election of mayors, ex law 81/93.

10 See Battini et al. (2005: 330). See also, in almost identical terms, Cammelli (2001: 1278).

11 The law of August 7, 1990, n. 241 *Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*, continues the path to reform started by the law 142/90, which precedes it of few weeks. For the first time (also pursuing the German law) the Italian legislator establishes the principles of the administrative procedure, which thus becomes, inspired by the principles of transparency and participation, a place of comparison between public and private interests, which are involved in the public administration decisions.

12 Introduced by article 2, paragraph 1 of the law of August 3, 1999, n. 256, which replaces in full article 2 of the law 142/90.

13 See for an extensive review Vandelli and Barusso (2004).

- the object of the subsidiarity phenomenon, which still corresponds to the "functions" (and the "tasks" will appear implicit);
- the preference for the municipal level in the assignment of administrative functions (the principle, in the law, is only invoked in this regard);
- the local dimension of the horizontal subsidiarity phenomenon. Therefore, there is still, in the perception and in the intention of the legislator, the conviction that the subsidiarity model is practicable above all and first of all at the municipal level, that it is possible wherever there is a close connection between institutions and citizens, and a mutual awareness of the available resources.

Five are the substantial differences of the law as in the 159/97:

- potential interventions by private individuals require a prior evaluation, as it must be "adequate";
- potential interventions by private individuals are, in any case, one of the resources with which the local governments perform the functions within their competence;
- every reference to the action of "encouraging" disappears;
- the number of the private subjects broadens to citizens and social formations and it loses some of that closely family-social connotation that it had in the former law;
- it is required that the subsidiarity action is both effect and result of the autonomy of the individuals themselves and thus the result of their ability to self-determination.

A (partly contradictory) model, which sees the inclusion of the private enterprise within the local government functions, is presented. These functions can be carried out "also through" the adequate contribution "of the citizens and their social formations", which also must be activated independently.

If the rule had to show that it had taken the possibility offered by the law 59/97 of setting up subsidiarity also horizontally (actually, in those years, this case had already been discussed also by the Bicameral Commission for reforms), the result is certainly beyond the intentions. Indeed, while in the law 159/97 it could be read only the intention to activate private autonomy towards aims of general and social purpose, what is suggested here is an absolutely different subsidiarity. It therefore aims at focusing public and private resources on local functions, in a prospective that draws some scholars' attention and criticism, as they are worried about a new "social and economic dirigisme" [14],

14 On this topic see Quadrio Curzio (2002: 42).

but that will anyway meet with success in some of the regional legislation[15]. The (still) autonomous free enterprise seems indeed described as one of the credit entries of the local budget, to "calculate" among the authority potential income.

If this is the provision reading, the ideal pattern is therefore completely similar to the one which, after the reform of article 118, paragraph 4, will be considered unconstitutional by part of the Italian Constitutional Court in two long judgments concerning foundations with banking origins (n. 300 and n. 301 of 2003). In this case, it will be stated that, precisely because of that principle, in the subsidiarity dynamic private entities should be exempted from any form of guidance and control by local governments, and hence their free resources should not be used and channeled to specified purposes, even partially, by public authorities.

The third and last formulation, which precedes the constitutionalization of the principle of subsidiarity, is the one in article 5 of the law of November 8, 2000, n. 328[16], *"Outline law for the implementation of an integrated system for interventions and social services"*.

First of all, it should be remembered (albeit briefly) the fate of this law which, after decades of waiting, managed to regulate in a full and organic way the system of human services (other than health care). Finally, it not only implements a complex system of intervention and universal protection, but it recognizes, for the first time, welfare benefits as a real right (article 2). Actually, few months before its enactment, the law is largely overcome by the constitutional reform[17], which, on the subject, assigned to regions the full legislative competence, while to municipalities the administrative one.

However, for the purposes of interest here, the law suggests in article 5, which is dedicated to the *"Role of the third sector"*, a complex series of provisions (still now in force in the Italian legal order). They begin (paragraph 1) by stating that *"in order to facilitate the implementation of the principle of subsidiarity, local authorities, regions and the State, within available resources according to the plans in articles 18 and 19, promote actions to support and qualify the subjects working in the third sector also through training policies and interventions for improved access to credit and European Union funds"*.

15 See infra following paragraph.

16 See on the topic Franchi Scarselli (2000: 1405); Finocchi (2001: 113); Rampulla and Tronconi (2001: 1).

17 See on the topic Ferrari (2002: 99) and the essays collected in Balduzzi and Di Gaspare (2002).

In this rule, which also refers specifically to the social services field[18], we find some important statements and some innovations. If on the one hand the active role of the local authorities and the need of their targeted intervention is indeed reactivated to "facilitate" the implementation of the subsidiarity model, on the other hand it appears uncommon that (consistently with the unanimous involvement of all the government levels in the realization of the social security system and, at the same time, with what happens in the National Health System) the opening towards subsidiarity is not considered an exclusive feature of the local level, but it is also responsibility of regions and State.

According to the law in question, the principle consists rather in the predisposition for affirmative action to help private individuals, and here, for the first time, it provides a definition. They may be in fact divided into:

a) actions in support of players in the third sector;
b) actions for the qualification of same subjects;
c) training policies;
d) interventions for improved access to credit;
e) interventions for improved access to European Union funds.

It is about a series of direct measures (a, b, c) and indirect ones (d and e), aimed at recognizing and professionalizing the contribution of social formations, which have to be implemented in the subsidiarity way.

In the end, in the same law, the costs of these actions are charged to the resources that, on the one hand, the National and Regional plans for interventions and social services (article 18) and, on the other hand, the Municipalities local plans (article 19) provides.

Beyond this precise regulation, there are also other provisions in the same law, which are worthy of attention. Indeed, in the paragraph 2 of the same article 5 it is provided that *"in order to assign the services provided in this act, public bodies, it being understood what is stated in article 11*[19]*, promote*

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18 Article 1, paragraph 2 of the law in question refers, for a definition, to article 128 of the legislative decree 112/1998, which identifies social services in *"all activities relating to the prearrangement and delivery of free or pay services or economic performances, designed to remove and overcome a state of need and difficulty that the human person encounters in the course of his life, except only the ones provided by the welfare and health systems, as well as the ones provided in the administration of justice"*.

19 …which defines a system of "Authorization and accreditation" by assigning the functions, concerning public run residential and semi-residential services and structures, to the municipalities. The authorization is issued in compliance with the requirements established by the regional law, which incorporates and integrates, in connection with the local needs, the national minimum requirements as determined accordance with article 9, paragraph 1, letter *c)*, by the Minister for Social Solidarity decree. These national minimum requirements are immediately applicable to newly established services and structures; to services and structures operative on the date of entry

actions to favor transparency and administrative simplification as well as the recourse to forms of adjudication or negotiation to enable the subjects working in the third sector to have full expression of their projects, by making use of analysis and checks that consider the quality and the features of the offered services and the personnel qualification".

Now the impression is that in this second provision a new additional assumption is introduced compared to the previous paragraph.

Indeed, while the first paragraph is devoted to define the model of subsidiarity described so far, in the second one a system of outsourcing for social services is developed, which responds to a quite distinct logic and therefore to different rules, typical of every process of outsourcing.

This view is further confirmed in the last two paragraphs of article 5 that are dedicated to define the role of regions:

- on the one hand, on the basis of an act of direction and coordination of the Government, regions take, in the manner provided by article 8, paragraph 2[19], specific guidelines to regulate the relations between local authorities and third sector, with particular reference to the assignment system for the social services;
- on the other hand, and in a different way, regions regulate the different ways to enhance the contribution of the voluntary work in the delivery of services, based on the principles of the same law 328/2000 and of the guidelines taken, in the way just mentioned.

Please pay attention to how the regional guidelines should cover the whole relations between the municipality, the province and the subjects from the non-profit organizations, and *"in particular"* (but not only!) the dynamics for the assignment of social services.

After further thought it is in this sense that the whole system of the law 328/2000 seems to move. We will read again (and rebuild) its *"General principles and purposes"*, as stated in article 1.

In article 1 (paragraph 1) it is stated that, in accordance with the constitutional principles of human dignity, equality and dutifulness of social assistance[20], it is up to the Republic to ensure individuals and family an

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into force of the law. Still responsibility of the municipalities is to provide for the accreditation by corresponding, to the qualified subjects, fees for the services provided in the context of regional and local planning. For their part, regions, within the guidelines set by the National Plan, regulate the procedures for the issue by municipalities of the authorizations to deliver experimental and innovative services, for a maximum period of three years; in the same provision, regions define the tools to verify the results.

20 See articles 2, 3 and 38 of the Constitution of the Italian Republic, that reads: article 2: "The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and

integrated system of intervention and social services in order to guarantee *"the quality of life, equal opportunities, non-discrimination and citizenship rights"*, as well as to prevent, eliminate or reduce *"conditions of disability, need, and individual or family distress, resulting from inadequate income, social difficulties, and non-autonomy conditions"*.

In order to pursue these goals (article 1, paragraph 4) all levels of government, within their respective competences, should recognize and facilitate the role of individuals working in the third sector[21] in the organization, management of the integrated system of intervention, and social services. In particular then (article 1, paragraph 5) just for what concerns benefits management and offer, the competence of the public is affirmed, giving the private sector, as active subjects, a role in the planning and in the concerted implementation of all these actions.

Up to here it is the discipline of the coordinated intervention within what are the real public services to the person.

It is only then that the law deals with the subsidiarity model, putting in place a different solution for the "integration" of the two systems. It is indeed expected at the end of the same article 5 (and almost to mark the difference between the two solutions) that *"the integrated system of intervention and social services has among its aims also the promotion of the social solidarity through the enhancement of initiatives by people, families, self-help forms and reciprocity and organized solidarity"*. These are therefore different and additional goals to those stated earlier.

Consistently, in the list (descending in intensity) of the possible forms of interaction between public and private entities, paragraph 6 also refers to the active participation of the citizens, the contribution of trade unions, of social

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in the social groups (…)"; article 3: "All citizens have equal social dignity and are equal before the law (…).It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality the citizens, thereby impeding the full development of the human person (…)"; article 38: Every citizen unable to work and without the necessary means of subsistence is entitled to welfare support. Workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment. Disabled and handicapped persons are entitled to receive education and vocational training. Responsibilities under this article are entrusted to entities and institutions established by or supported by the State (…)".

21 As specified in paragraph 2 in a long and detailed list that includes non-profit organizations of social utility, cooperation bodies, associations and agencies for social promotion, foundations and institutions of patronage, voluntary organizations, religious denomination recognized bodies with which the State has entered into pacts, agreement or arrangements in the planning sector; paragraph 5 adds voluntary organizations and other *"private individuals"*.

associations and user protection associations, to achieve the same goals as in paragraph 1.

In order to try to make a very brief assessment of the first stage in which the principle of subsidiarity was stated in the Italian legal order, what stands out a mile is without doubt the multiplicity of approaches and goals – which are really different from each other – in rules in which the principle is invoked. They range indeed from provisions on devolution to those on local authorities and on the social service system, and this leads us to think about the extent of the "principle" of subsidiarity. More precisely, whether subsidiarity represents an "idea" of relation between institutions and citizens so general, strong and wide to be placed in guidance and control of a phenomenon or sectors very different or whether the reference to it is a general invitation and a hope for a different set of these relations, a call rather than a prescriptive statement.

In any case, it should be noted that, in all the three cases mentioned, the principle is stated with a phenomenological approach, through the description of the different forms that subsidiarity takes and the exposition of what it entails, rather than with the assertion of a choice. And it is only by reading "between the lines" of the three provisions that it emerges a more precise system of values, which:

- puts in a close connection the vertical reassignment of administrative functions and tasks with the growth of the citizens' role and their call to be involved in taking care of the general interests;
- consequently, in both provisions (and perhaps here there is the essence of the principle), it aims at stating the greater "proximity" possible between the action aimed at fulfilling a certain need and the citizens, which are the recipients of that action;
- it does not deliver precise, "operational" choices to the territorial institutions or citizens, but it rather encourages an attitude of flexibility and differentiation on the basis of the specific conditions of each territorial context.

3 Regional legislation for the implementation of the administrative devolution

At this stage, the legislative activity of the regions, in the perspective we are interested in, mainly focuses on the implementation of the new administrative structure through the enactment of a series of provisions (some of which are also subsequent to 2001). Though following different paths, these measures aim at fulfilling the devolution provisions of the law 59/1997 already mentioned.

As a matter of fact, after 10 years in which the attention was focused almost exclusively on the local level, the regions are in the center of the administrative reforms: they become the subjects of the main characters of the devolution implementation and therefore, potentially, of the principle affirmation also horizontally. This happened mostly because of their ability to affect in a deeper and also more moderate way the administrative action carried out by municipalities and provinces that are the levels at which concretely – for the reasons just stated – the principle finds its greatest expansion.

The regional legislation implementing the provisions in the law 59/97 (and in the legislative decree 112 of 1998, which carries out to the delegation) can bring to three different models:

a) In some cases, there is the enactment of a real organic law for the devolution. This is the case of the regional laws of Abruzzo, law 11 of 1999; Basilicata, law 7 of 1999; Emilia-Romagna, law 3 of 1999; Lazio, law 4 of 1999; Marche, law 10 of 1999 and Molise, law 34 of 1999, to which, two years later, the regional laws of Lombardia, law 1 of 2000; Veneto, law 11 of 2001 and Calabria, law 34 of 2002 must be added.

b) In other cases, there is a two-stage implementation, through the enactment of a law of principles, to which a more detailed law for the assignment of functions follows. This is the direction followed by the regional laws of Piemonte, law 34 of 2008 and 44 of 2000; Umbria, law 34 of 1998 and 3 of 1999 and afterwards of Friuli-Venezia Giulia, law 23 of 1997 and 15 of 2001.

c) Finally, in other cases, there is the implementation of a series of sector interventions exclusively (the choices made by Toscana and Liguria are the clearest cases of this third model).

In the laws we classified under *b)* and *c)*, references to horizontal subsidiarity are completely absent or limited to the mere enunciation of the principle, perhaps in connection with specific sectors or areas, or certain topics. The only exception is maybe represented by article 3 (*Horizontal Subsidiarity*) of the Friuli-Venezia Giulia regional law 15 of 2001 that, however, within a more modest formulation than the one in compliance with the law 59 of 1997 (according to which territorial authorities *recognize*, and do not *favor* private individuals) also includes businesses among private individuals, targeted by subsidiarity.

The laws under the group *a)*, written in a more detailed and careful way, are therefore the ones that suggest (at least in the statement and consistent with the provision in article 4, paragraph 3 of the law 59 of 1997) not only a strong continuity, in the devolution process, between vertical and horizontal

subsidiarity. They indeed suggest also a variation that, by defining the new principle, integrates the reformed administrative structure.

However, it is interesting to note the degree of differentiation they offer, by retracing and consolidating the disparate readings that, though in a sketchy way, we already found in the three state laws.

For example, consider the different purposes that, within the different regions, are attributed to the subsidiarity process. On the one hand, the Emilia-Romagna regional law 3/1999, in article 1, paragraph 1, letter *a)* envisions that the identification of activities and services that can be delivered by private individuals should contribute to "the improvement and the reduction of the bureaucratic apparatus" (the first among the general guidelines for the future structure of the functions). On the other hand, the Lombardia regional law 1/2000, after recognizing and enhancing "private individuals' autonomy also through their social formations and their associations" in order to carry out functions and tasks retained by the region or assigned to local authorities (article 1, paragraph 9), states that region, provinces, municipalities, mountain communities and functional autonomies develop and coordinate the implementation of activities and services of their own competence, by promoting and improving social formations and private individuals' participation, with particular reference to civil society representative structures and non-profit organizations (article 1, paragraph 10).

Furthermore, the Lazio regional law 14/1999 distinguishes the specific role of the different subjects through a clear grading. Therefore:

- it recognizes and enhances the role of the associations in general, in all their forms, to which it allocates interventions and "economic and financial incentives" (article 28);
- it gives voluntary associations, according to the law of August 11, 1991, n. 266 ("free expression of participation, solidarity and pluralism"), the ability to offer a "completing contribution, but not substitute, in the execution of functions and administrative tasks" (article 27);
- finally, it states that, on the basis of special agreement, the execution of functions and administrative tasks can be assigned to functional autonomies "under cost and management effectiveness standards" (article 25).

In these laws once again strongly emerges the topic of the "adequacy" of the potential contribution of the private sector, which we already underlined while reading article 3, paragraph 4 of the legislative decree 267/2000, the Unified code of laws on local governments.

In contrast with what the Unified code on local governments states, here there is not only the need of a judgment on the private individuals' ability

"itself", rather to make a real predicting comparison, based on the results that would be reached through the implementation of the subsidiarity model or holding the activities in the hands of the administration.

It switches then from a judgment on the "adequacy" to an evaluation on the "greater adequacy" that therefore does not take as standards of appreciation some static and predetermined requirements, set beforehand. Otherwise, it approaches and compares the elements that characterize the two options, in the light of the purposes to pursue.

Now, it is interesting to note how these purposes are inevitably left vague by legislators, which in this way do not really choose, but refer to other places (and other conveniences) for an exact determination of the goals to pursue.

See in this case the Emilia-Romagna regional law 3/1999, that in article 1, paragraph 1 provides for the assignment to subjects, which are external to the administration, for all the activities that "can be more usefully undertaken in that form on the basis of an objective evaluation through standards like effectiveness, efficiency and quality". Or the Lombardia regional law 1/2000, that in article 1, paragraph 11 requires instead that the region, local governments and functional autonomies, choose the private individuals to whom assign the management of functions and tasks as a result of "assessments that detect opportunities in economic and technical terms, and after the identification of the quality minimum levels". Or, finally, also the Basilicata regional law 7/1999, article 7 states to continue, in accordance with the principles of effectiveness and efficiency (and after consulting with the Standing Conference of Autonomies[22]), in the assignment through agreements to "subjects outside the system of local autonomies" of functions and activities, that can "more usefully be carried out by private individuals or social private sector, ensuring compliance with the principles of competitiveness, transparency and impartiality".

Furthermore, other elements of perhaps secondary relevance deserve also, in our view, a brief review.

It should be then remembered:

a) *The exclusions*: see, in this case, the Marche regional law 10/1999, article 9, which prevents private individuals from being charged of the implementation of procedural steps, which involve the exercise of discretionary powers.

b) *The elimination of procedural constraints* as activities aiming at

22 The Standing Conference of Autonomies (Conferenza Permanente delle Autonomie) is a representative body adopted by the regions during the Nineties, as an ordinary place for periodical comparison between regional government and local governments representatives, variously designated in compliance of appropriate regional laws.

encouraging the pursuit of private subsidiarity activities (see in this respect the Emilia-Romagna regional law 3/1999, article 2, paragraph 4, letter *b)*).

c) *The assignment not of services, but of procedural steps or administrative functions to private individuals*: see in this respect the Lombardia regional law 1/2000, article 2, paragraph 79, which provides for the possibility of assigning to private individuals the preliminary inquiry connected with *regional interventions in support of businesses*, and also the evaluation of specific aspects, expected results and the effectiveness of the interventions themselves. Or, furthermore, the Emilia-Romagna regional law 3/1999, article 4, for justified reasons of economy, effectiveness and efficiency, hypothesizes to leave to subjects outside the administrations the implementation of "preparatory activities leading to the adoption of final measures, or the carrying out of material activities to support the execution of their functions". Or, finally, the Marche regional law 10/1999, that in article 9, paragraph 2 provides for the assignment to "third parties" of the award of grants, contributions, subsidies and financial aids, subject to determination, by the public authority, of standards and procedures, which the subjects must follow.

d) *the involvement of private individuals in different kind of activities* of the administration: so, while the Lombardia regional law 1/2000, article 4, paragraph 11, imagines that individuals are present both in the planning stage, and in those of implementation and service offering, the Emilia-Romagna regional law 3/1999, article 159 suggests that monitoring on the performance of public works may be carried out also through reliance on public and private entities, through specific agreements.

The result is a wide and articulated picture, where – against the indifference of many legislators – those few who pay attention to the subsidiarity hypothesis, however, prove to be able to "implement" the principle in its different conjugations and applications. They are willing to enhance its potential even if with solutions, that cannot always be considered rigorous.

Accordingly, from a "subjective" point of view, regional legislators (with rare exemptions) exceed the close attention of the State law to the local dimension and seem to consider the generally "subsidiarity" dynamics as suitable for an application on all the different levels of government, both regional and sub-regional. On the opposite side of the non-institutional actors (except the already mentioned case of the Friuli-Venezia Giulia law 15/2001, where businesses are included), while the non-profit sector is identified as a privileged beneficiary of the subsidiarity phenomenon, there are also the so-called

functional autonomies, introduced in the devolution process by the law 59/97 and representing a very special case of the subsidiarity phenomenon[23].

Above all other considerations, it strikes, however, the extent of tools, solutions and dimensions, in which the principle is combined. But also the indefiniteness connected with aims, purposes and the value to be assigned to the subsidiarity choice, which remains so open to support logics and dynamics, which are sometimes even completely diverted, if compared to those which originated it.

4 The constitutionalization of the principle and succeeding state legislation

The work on the interpretation of the principle of subsidiarity, in these years, does not take place, however, only in the regional legislation. It focuses indeed on the discussion about the wording of the constitutional reform, which is framed within the *Parliamentary Committee on Constitutional Reforms* (the so-called "Bicamerale D'Alema"), established by the constitutional law of January 24, 1997, n. 1. Article 56[24] of that law (June 1997) states that: *"The functions that can no more be adequately performed by private individuals' autonomy are shared among Local Communities, organized in Municipalities, Provinces, Regions and the State, in compliance with the principle of subsidiarity and differentiation, in compliance with the functional autonomies, recognized by the law. The ownership of the functions is up to the authorities, which are closer to the citizens' interests, in accordance with the homogeneity and adequacy of the organizational structures and with respect to the same functions. The ownership of the functions is respectively up to Municipalities, Provinces, Regions and the State, according to the principles of homogeneity and adequacy"*.

This formulation, which is definitely based on the comparative assessment methodology and the "greatest adequacy" criterion, is replaced a few months later (November 1997) by a different wording. It reads: *"In respect of the*

23 On the topic, scholars suggest some interesting explanations. In this respect, see D'Atena (2001: 457); Poggi (2001). For further details about functional autonomies, see the next sections.

24 The wording drafted by the Committee focuses on the Part II of the Italian Constitution, devoted to the "Federal Order of the Republic". Article 56 is therefore the second one affected by the reform proposal and it is in the Title I "Municipality, Province, Region, State", after article 55, in which it is basically suggested the formulation adopted today in the article 114 of the Italian Constitution.

activities that can be effectively carried out by the autonomous initiative of citizens, also through social formations, public functions are assigned to Municipalities, Provinces, Regions and the State, on the basis of the principles of subsidiarity and differentiation. The ownership of the functions is respectively up to Municipalities, Provinces, Regions and the State, according to the criteria of homogeneity adequacy. The law shall guarantee the functional autonomies. Most of the regulatory and administrative functions are assigned to Municipalities, also in the areas of legislative competence of the State or the Regions, with the exception of the functions expressly conferred by the Constitution, constitutional laws or the law to Provinces, Regions or the State, without duplicating functions and identifying the respective responsibilities (...)". Here subsidiarity is seen as a proximity/graveness criterion, leading municipalities to be natural recipients of the administrative function. But as for all the activities, which can be adequately performed by *"citizens, also in their social formation"*, it is prescribed, for public institutions, a simple "respect" and a necessary observance, an element that requires a necessary consideration in planning and implementing the different government choices. But finally, the Committee failed to carry out its mandate.

The formulation, which was constitutionalized at the end of the legislature, in 2001, after a basically partisan enactment of the bill by the center-left majority alone, is not only deeply different from those formulated in 1997. But it is indeed significantly set at the end of article 118 of the Italian Constitution, which is devoted to state the criteria for the assignment of the administrative power.

It states that:

1. Administrative functions are attributed to the Municipalities, unless they are attributed to the provinces, metropolitan cities and regions or to the State, pursuant to the principles of subsidiarity, differentiation and proportionality, to ensure their uniform implementation.
2. Municipalities, provinces and metropolitan cities carry out administrative functions of their own as well as the functions assigned to them by State or by regional legislation, according to their respective competences.
3. State legislation shall provide for coordinated action between the State and the Regions in the subject matters as for article 117, paragraph 2, letters *b)* and *h)*, and also provide for agreements and coordinated action in the field of cultural heritage preservation.
4. The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as

members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity.

In these pages, whose main goal is to read the signs of the evolution of the principle of horizontal subsidiarity in the normative development of the law, we cannot report the many considerations that the norm – in its content and its architecture – has aroused. Nor can we suggest an accurate and thorough analysis of the wording in article 18, last paragraph.

It is necessary, however, because of the goals set, to offer some essential considerations and interpretations of the wording.

First of all, it is to note that article 118 of the Italian Constitution, both in the paragraph 1 and 4, invokes a principle without adjectives or dimensions, on the whole, but once again it describes the effects and it does not state it. In both rules, a relational dynamics of the subsidiarity takes shape between an active and a passive individual, and the respective roles are described[25]. While the first paragraph of article 118, through a relational formulation, states a value, a choice that consists in the assignment of the administrative function to the local level, because of its proximity to the recipients[26], the same wording in paragraph 4 does not state in an explicit way a *vorrangentscheidung*, or any preferential standard.

This does not mean that any reference value cannot be found in the last paragraph of article 118. The principle that regulates this relation is indeed, also *verbatim*, the same "principle of subsidiarity", already stated in paragraph 1, which is then to be read in the same sense, as an assertion of the value of proximity, and so of the priority of the subsidiarity choice compared to every other.

The provision, in other words, requires that, on the basis of the principle of proximity the citizens, which should be considered since the beginning (and until the contrary is ascertained), suitable and appropriate to accomplish that task.

Such a syntactically simple formulation, but soft and complex at the same time in terms of interpretation, has led, in fact, to a very wide range of readings, to which not only different, but also conflicting, solutions have followed. It seems, in other words, that in the case of subsidiarity, as it is typical of every principle, there has not been a physiological, and indeed desirable combination of different theories and policies, which, however, went in the direction of the same shared value. Otherwise, it should be noted – among the scholars, in the law and, finally, in the administrative practice – a

25 On this topic see Arena (2003).

26 In this respect, see D'Atena (2001: 18).

completely pathological conflict among solutions taking subsidiarity for really different purposes, sometimes even aberrant if compared to the constitutional formulation and to the final goal that it expresses and it pursues.

It should be noted that, having in mind "other" purposes, extraneous to the rule, it not only subverts the wording in the last paragraph of article 118. At the same time, we forget indeed – and perhaps above all – the fact that, like any other principle, also subsidiarity can succeed only through the relations with the other constitutional values. In this sense, the discussion focuses, in particular, on the principles of dignity and freedom (whose most immediate reference is in article 2[27] and article 13 of the Italian Constitution[28]) and on the principle of formal and substantive equality (as in article 3, paragraph 1 and 2[29]), for which it represents a link, an uncommon tool for their connection in the direction of a kind of freedom, which is responsible and aware of the others.

For a closer assessment of the developments after 2001, we should pay attention (although very briefly) to the four interpretative variables that paragraph 4, article 118 of the Italian Constitution presents, namely:

- in what the verb "promote" materializes;
- the reference for the "autonomous initiative";
- the identification of "citizens, both as individuals and as members of associations" (namely the private individuals, who take part of the subsidiarity relation)
- the definition of the activities of general interest (namely the object of the subsidiarity relation).

With regard to the action of promoting, it should be noted that it is to be understood as immediately prescriptive, as a constitutional limitation, in the

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27 Article 2, Italian Constitution: "The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups (…)".

28 Article 13, Italian Constitution: "Personal liberty is inviolable. No one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law (…)".

29 Article 3, Italian Constitution: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country".

sense of "have got to promote" [30], because if it were a mere option, the whole provision would be made superfluous.

In this respect, we can imagine:

- Merely preliminary and preparatory interventions, aiming at creating the necessary conditions (for participation and active citizenship) to the achievement of the subsidiarity model[31].
- Positive actions to promote the achievement of subsidiarity (delivery of goods or services).
- Negative actions (subtraction of encumbrances or charges).

According to some scholars (Maltoni 2005: 205 and Boscolo 2001: 372), this last argument represents the beginning of the activities as in article 19, law 241/90[32].

In this regard, the latest developments are worthy of attention. The legislator has indeed recently provided, in this case, for an interesting simplification for controls, explicitly invoking, in its support, the principle of subsidiarity. Article 30 of the law of August 6, 2008, n. 133[33] establishes

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30 In this respect, see Rescigno (2002: 29). The author considers that *"this option (...) has always existed"* and that if the provision in the article 118, paragraph 4 were interpreted *"as a mere allocation of powers, it would not say anything new, it would be a completely useless constitutional provision, because it has always been present in our legal order"*. Nevertheless, some may argue, with some justification, that article 118, paragraph 4 introduces something new, namely that State and public institutions can promote, but following the principle of subsidiarity. This remark, however, represents an argument for the other interpretation. So, what does the principle of subsidiarity indeed say? It says that between two parties, A and B, the one to choose is the recipient of the subsidiarity action, rather than the promoting one, except if there are some good reasons to replace the first one with the second one. Just by applying the principle of subsidiarity, the provision must be read as if it says: "State, Regions, Metropolitan Cities, Provinces and Municipalities must promote the autonomous initiative of the citizens, both as individuals and as members of associations, relating to activities of general interest, following the principle of subsidiarity".

31 This is a suggestion also made by Cerulli Irelli.

32 Article 19, law 241/1990: *"Every act of authorization, license, non-constitutive concession or permission, including applications for registers or roles required to pursue business, trade or craft, whose release exclusively depends on the assessment of the requirements and prerequisites in the law or in administrative acts with general content, and there is no limit or total quota or specific sectional planning tool for the issues of the acts themselves, is replaced by the submission of a report by the person concerned, with the only exclusion of documents issued by administrations responsible for the national defense, public safety, immigration, asylum, citizenship, administration of justice, administration of finances, including the acts for networks of acquisition of revenue, also resulting from game, as well as those prescribed by the regulations for the construction in seismic areas and those (...) imposed by the Community law (...)"*.

33 …which, see *infra* in this essay, contains the first two references to the principle, which can be found in the Italian state legislation after its constitutionalization, seven years later.

indeed that periodical administrative controls and any other check activity carried out by a public institution (included the renewal or the upgrading of necessary permissions for the beginning of certain activities), is replaced by an environmental or quality certification issued by accredited certifying entity, in accordance with the Community or international law. Public institutions are in charge of a kind of meta-control, but aiming exclusively at verifying the topicality and completeness of the certification issued by private individuals. Not only: in compliance with paragraph 2, in the case in point, the essential levels of services – concerning civil and social rights that must be guaranteed throughout the national territory in accordance with article 117, paragraph 2, letter *m)* of the Italian Constitution must be respected. On the topic, the Constitution reserves exclusive legislative power to the State, while the regions and local governments, in compliance with their respective powers, can guarantee additional levels of protection.

The implications of these solutions cannot be avoided. Subsidiarity, as stated by the legislator, appears here as an alternation of private certifiers to the detriment of the public ones and then the *favor*, which is the main topic of these pages, is in essence a substantial privatization of the assessment activities. This is, in many ways, a paradigmatic case, because of the many contradictions of the idea, already considered as inadmissible in the previous paragraph, according to which subsidiarity immediately replaces public intervention, for the benefit of the private sector[34].

Let's consider indeed the results:

- In terms of the connection, although acceptable, between administrative simplification and subsidiarity, effects are even aberrant, as there is, in the facts, a doubling of the levels of control. The productive activity, or service, which requires quality or environmental certifications, is controlled by private certifiers, who must undergo different checks by the public administration.
- Private certifiers do not become active through their own "autonomous initiative", but, as it should be according to their point of view, they carry out those activities in an entrepreneurial way, driven by the prospect of gain and profit. This is, as we will see in the following pages, has nothing to do with the constitutionalized model of subsidiarity.
- It is thus completely to prove, and it is indeed impossible, that there is a lowering of the business costs, if to the costs associated with the administrative intervention (which will continue to be ensured by tax contribution) the private certifiers' salaries should be added.

34 In this regard, see Albanese (2007: 119).

- Finally, in view of a non-lowering of the overall costs for the implementation of this control (which is, among other things, unavoidable in the cases the provision deals with, which relates to environment protection or production quality), there is not even an increase of the level of assurance. Indeed, the idea of a direct relation between private individuals around such sensitive profiles, whose compliance is essential for the continuation of the business activities, raises some fears concerning cases of corruption or, at least, a lowering of the attention threshold.

After all, only an idea is still of some interest; in other words that the respect for the rules fixed by subsidiarity, even though through an assumption, which is completely extraneous, is guaranteed as an essential level of performance. This not only has a collateral value for the following regional legislation, but also in absolute terms, representing the assumption of subsidiarity and its implications within the ranks of the civil and social rights.

Another representation of the "promotion" in form of omission, in other words of not doing, is expressed in the wording, completely doctrinal, of the so-called "no authorities creation" [35], stated in some of the regional laws that we will see in the next pages.

As far as the expression "free, single and associated citizens" is concerned, besides referring to the very ample doctrine that during these years has been focusing on investigating the active dimension of the citizenry[36], we can barely report on the ample debate that has been developed around the possible inclusion of this group of economic-entrepreneurial enterprises. The debate has lately been focused on the lucrative nature of these activities, considering that our legislator has in time foreseen different kinds of enterprises, in which, originally and specifically, profit-making, at least subjective, was completely absent[37].

Therefore it is not superfluous to remember the general discipline given to the case in point (and in an apparently risolutive manner) with the legislative decree of March 24, 2006, n. 155, *The Discipline of Social Enterprise* , *Under the law of June 13, 2005, n. 118.*

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35 This is not a new idea at all: since 1968, J. Isnesee supported the idea that it was not possible to create public entities where there are some private individuals, who can provide the desired result at a lower cost or in an overall more efficient way.

36 For all, see Arena (2006).

37 In the case in point, article 90, law of December 27, 2002, n. 289, *Regulations for Amateurish Sport Activities*, at paragraph 1 extends the regulations of the law of December 16, 1991, n. 398, together with the other tributary regulations concerning amateur sports clubs, also «*non profit making amateur sports clubs*».

In fact the decree seems to move along the line hypothesized here, allowing "*all private organizations, including the institutions of volume V of the Civil Code, that perform an economic activity in a stable and primary manner, organized for the purpose of producing and exchanging goods or services of social utility, aimed at achieving goals of general interest*"[38] to acquire the qualification of private enterprise. Such organizations, in order to achieve this qualification, must meet two requirements:

a) social utility (article 2), that is:

- having as a main activity the "production and exchange of goods and services of social utility", in determinate sectors[39], where "main activity" means the one for which the relative gains are higher than the seventy per cent of the overall gains of the organization that performs the social enterprise; or, alternatively,
- performing an entrepreneurial activity, aimed at the professional integration of individuals who must be i) workers at disadvantage [40] or ii) disabled workers [41], whose number must not be inferior to thirty per cent of the workers employed in any capacity in the business.

b) absence of profit-making, that is to say, using the profits and the surplus revenues for the development of the charter activity or for the increase of the assets, since the distribution, even if indirect, of profits and advances, as well as funds, savings and capitals in favor of trustees, partners, participants, workers or collaborators, is forbidden.

In conclusion, it is to be noted how in this same sense extensive perspectives of some interest seem to be opening up. These perspectives are moving towards the affirmation of a "social responsibility of enterprise" as a "voluntary integration of social and ecological concerns of the companies and organizations in their commercial activities and in their relationships with the interested parties".[42]

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38 Article 1, paragraph 1, legislative decree 155/2006.

39 The sectors are social assistance; health assistance; education and training; environmental and ecosystem protection; the value of cultural heritage; social tourism; university and post-university training; research and supply of cultural services; extra -curricular training aimed at the prevention of scholastic dispersion and at scholastic and training success; services instrumental in ensuring social enterprise.

40 … In accordance with article 2, paragraph 1, letters f), points i), ix) e x), of rule (EC) n. 2204/2002 of the Commission, December 5, 2002, concerning the applications of articles 87 and 88 of the EC treaty regarding State aid for occupation.

41 ... in accordance with article 2, first paragraph 1, letter g), of the regulation mentioned above (EC) n. 2204/2002.

42 Article 2, paragraph 1, letter f) of the legislative decree of April 9, 2008, n.81, *Implementation*

As far as "autonomous initiative" is concerned, it can be pointed out that it could signify a spontaneous activation in the spirit of social solidarity and therefore, at least according to some people, far from any form of direct and full "remuneration "[43]. Therefore it looks like we should exclude from the list of subsidiarity cases, also all cases of outsourcing of public services, on which we will see how the regional legislation has strongly insisted.

It is appropriate to point out how the first explicit mention of the principle under examination, seven years after its constitutionalization, is the one according to the law n. 133 of August 6, 2008 (conversion of the decree of June 25, n. 112), which at the article 23-bis sets up a new model of the management of local public services of economic relevance.

In it, it is stated (paragraph 1) that «*the entrustment and management of local public services of economic relevance"* must occur by "*ensuring an adequate level of protection of the users according to the principles of subsidiarity, proportionality and loyal cooperation"*, values that are guaranteed through the highest level of competition among suppliers. In this sense (paragraph 10, letter g)) it is important to "*limit, according to criteria of proportionality, horizontal subsidiarity and economic rationality, all cases of sole provident management of local public services, while liberalizing the other economic activities of provision of services of general interest of local competence compatible with the guarantees of universality and accessibility of the local public service".*

The idea of subsidiarity expressed here, is, according to what we have said, quite far from what seems to be the letter of the Constitution, which here is reduced to a mere (and therefore useless), justification of privatization processes and opening to the market. What has been said appears to be even more true when we consider that there is certainly no "*autonomous initiative"* of the citizens in all cases where, under any form, their activities and resources are subjected to a public planning system or to different forms of "hetero-

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of Article 1 of the law of August 3, 2007, n.123, regarding the Protection of Health and Safety in the Workplace.

43 The use of the term is deliberately non- technical. In fact, we are well aware that doctrine and jurisprudence have long been questioning the principles of article 36, paragraph 1 of the Constitution. (according to which "*the worker is entitled to the wages in proportion to the quantity and quality of his work and in all cases sufficient to ensure him and his family free and dignified life.*") and on the formulation of article 2121 of the Italian Civil Code, which defines it – to the sole end of calculating the indemnity in lieu of notice – such as "*commissions and productivity bonuses, profit and product sharing and any other kind of ongoing remuneration, with the exclusion of reimbursements*", until the Corte di Cassazione, ruling Section Unit 1/04/93 n.388 claimed that there is not a unitary legal concept of remuneration, and its individuation depends on the interpretative approach of the wording.

direction". On the contrary, it should consist of a social spontaneism as far as possible self governed and submitted to a specific system of responsibilities, ulterior and different from the one of politics and administration. Which, obviously, does not eliminate, but reinforces the hypothesis of an evaluation of their results, or the respect of the rules and standards.

If what we have said so far is true, the "*activity of general interest"* cannot consist of an activity that isn't already included in the ownership of public administrations.

It is not our intention to exclude from the subsidiary model only the administrative functions in a proper sense, that is to say those activities that imply an exercise of authoritative power, hence the use of strength[44].

Our intention here is to highlight the distance between the category of public interests and the one of general interests (concerning the constitutional norm under examination). Even though we admit that both expressions are often used without particular attention, we cannot miss the fact that in time the best doctrine has forcefully pointed out the distinction between them, and this can be summed up in the statement according to which the public interest is the general interest "made public by public powers" . The general interest, the one that constitutes the object of the subsidiary model, is therefore the interest of a community as such, not yet risen to public powers, but left by them – as provided by the principle under examination – to the care of the very same citizens. Which, as is self-evident, moves the focus towards completely new spaces, interests and goods; it bestows upon the sovereign citizens the primal and essential choice of what they deem important for the community (or rather, the "communities") to whom they belong; and it opens a third dimension to the traditional and limited choice between State and market. Doctrine has forcefully pointed out[45] the distinction between them, and this can be summed up in the statement according to which the public interest is the general interest "*made public by public powers"*[46]. The general interest, the one that constitutes the object of the subsidiary model, is therefore the interest of a community as such, not yet risen to public powers, but left by them – as provided by the principle under examination – to the care of the very same citizens. Which, as is self-evident, moves the focus towards completely new spaces, interests and goods; it bestows upon the sovereign citizens the primal and essential choice of what they deem important for the community

44 Rescigno (2002).

45 See on this topic Giannini (2000: 25); Cassese (1989: 49 and 225); Sorace (2008: 21); Corso (2008: 178).

46 In this sense see Corso (2008).

(or rather, the "communities") to whom they belong; and it opens a third dimension to the traditional and limited choice between State and market.

5 Regional rules after the reform of Title V, Part II of the Constitution

5.1 The statutes

The conditions of the regions soon after the constitutional reform, at least based on the standpoint we adopted in these pages, is completely different from the one that came after the decentralization of 1997.

Under a normative point of view, despite the extension of the power assigned to the regions, made possible especially by the reversal of the previous criterion of assignment of competences, and therefore assigning to the regions the residual competences of every subject that was not exclusively assigned to the State or its competitors, the regions do not seem to assert or expand their role in any significant way. We have first of all to consider the incertitude that, at least initially, characterizes the renewed dimension of the regional legislative power.

Essentially, as far as the definition of a subsidiary model is concerned, the regional legislators have to come to terms with the exclusive assignment to the State of:

- the definition of the basic levels of services related to civil and social rights (*ex* article 117, paragraph 2, letter m)), through which outcome standards are created for most activities that might gain significant affirmation in the subsidiary model;
- the regulation of civil jurisdiction (ex article 117, paragraph 2, letter l)), according to which the general discipline concerning the subjects of the third sector can be dictated.

A special consideration must be devoted to the exclusive assignments that are assigned to the State of the regulation of the "fundamental functions of Municipalities, Provinces and Metropolitan Cities" (*ex* article 117, paragraph 2, letter p). In fact, if we add that contextually, under the administrative profile, the reform doesn't only assign the generality of functions and assignments to the local bodies (as we have anticipated) but that it also has a significant ability of regulating such activities, especially through regulamentary power, it is quite easy to notice how the regional legislators have a decisive reduction of their space of intervention for the affirmation of the principle. And neither do

the instruments at their disposal seem suitable for the concrete implementation of the subsidiary phenomena that have had their greatest expansion at a local level.

The most interesting occasion for our review seems therefore to be the appointment with the reform of the regional Statutes, made urgent by the reforms of 1999 and 2001.

Actually the first impression is quite disappointing, if we consider that in the seven texts that we have examined[47] (Abruzzo, Campania, Friuli-Venezia Giulia, Lazio, Marche, Sicilia and Umbria), there either is a mere repetition of the constitutional norm, or, at the most, they propose, in formulation and content, innovations of very little purpose, more or less linking the principle of horizontal subsidiarity with the recognition and valorization of voluntary work and associations.

In a little more significant way:

- The Statute of Friuli-Venezia Giulia, while defining the principles of the administrative activity, establishes how such activity should also favor adequate conditions for active citizenship, by recognizing and valorizing the autonomous initiative, defining the principles of the administrative activity, establishes how such activity should favor adequate conditions of active citizenship, recognizing and valorizing the autonomous initiative of single and associated citizens, for activities of general interest (article 66);
- In the Statute of Umbria there is a specific reference to article 13 (*The Right to Health*), where it is established that the protection of health as a universal right is provided by assuring the involvement of users, citizens, volunteering associations and non-profit organizations of social utility and by guaranteeing the quality of the services.
- In the Statute of Marche, on the other hand, at the article 2 it is stated that the Region (paragraph 5) guarantees the most ample participation of the social force in the practice of the legislative and administrative activity; (paragraph 6) it valorizes the functional autonomies and it favors their participation in its

47 Statute of Abruzzo – Text approved in second reading by the Regional Council on September 12, 2006, published in BURA, January 10, and that came into effect on the following day; Statute of Friuli-Venezia Giulia, constitutional law of January 31, 1963, n. 1, as modified from the constitutional law of January 31, 2001, n. 2 (G.U. general series. n. 26 of .2.2001) and from the law of December 27, 2002, n. 289 region Marche, March 8, 2005, n. 1, statutory law Lazio, November 11, 2004, n. 1; Statute of Campania – Text approved by the regional Council in second reading, pursuant to article 123 of the Constitution of the Italian Republic by resolution n. 8/L of the September 18, 2004; Statute of the Sicilian region approved with R.D.L. on May 15, 1946, n. 455, as modified from the law of January 31, 2001, n. 2 (published in the Official Gazette of the Italian Republic n. 26 of February 1, 2001). Statutory law of Umbria of April 16, 2005, n. 21.

activity; (paragraph 7) it favors, on the basis of the principle of subsidiarity, the initiative of single and associated citizens for the development of activities of general interest.

Of a certain interest are the at least partially innovative solutions proposed by Basilicata, Liguria, Piemonte and Puglia[48], where the subsidiary model as defined by the constitutional text gets such a degree of close examination in order to offer to the regulation on which at the article 118, paragraph 4, development and further consistency. In the same way, in the Statute of Basilicata, it is specified that horizontal subsidiarity will be practiced through:

- the promotion and the safeguard, even with fiscal and economic-like instruments, of the freedom of choice of the citizens between public services provided by public organizations and by private organizations;
- the promotion, with suitable actions, of the organization of the services of collective interest, with particular attention to the population with limited means.

On its part the Region Puglia in its own Statute states to exercise its function of government by implementing the principle of subsidiarity (article 1, paragraph 4):

- as a "*primary responsibility of those institutions that are nearest to the needs*";
- as a "*constant integration with the initiatives of social formations and the voluntary work of general interest and public protection of universal rights*".

Besides, article 8, paragraph 2, the Region is committed to favoring the participation of the local and functional autonomies as well as the social formations in the exercise of the legislative activity.

The Statute of Liguria presupposes (article 2, paragraph 2, letter c) the applicability of the "*subsidiarity as an institutional method of legislative action"* and not only administrative, as well as a founding principle of the relationship among institutions, functional autonomies and communities, while in the Statute of Piemonte there is a commitment to valorize "*the establishment of all associations that intend to participate in the life of the Region, and particularly to sustain the initiatives for the realization of rights and that favor the forms of social solidarity, voluntary associations and*

48 Respectively in the texts: Statute of Basilicata, Statute Bill, of May, 2005 n. 1; Statute of Puglia, Text approved by the regional Council, in first reading, pursuant to article 123 of the Constitution of the Italian Republic by resolution n. 155 of October 21, 2003 and confirmed, in second reading, with resolution n. 165 of February 3, 4 and 5, 2004; Statute of Piemonte, approved by the regional Council on first decision on August 6, 2004 and on second decision on November 19, 2004.

voluntary work by ensuring their participation and consultation during the execution of regional functions" (article 2, paragraph 3).

However, the Statutes that provide the most significant ideas are those of Calabria, Emilia-Romagna, Toscana and Lombardia[49] , that is to say that they attempt a deep and serious job of connecting the principle to the political-administrative system.

Case in point is the Statute of Calabria which opens with the general statement of willing to implement the principle of subsidiarity by "*promoting and valorizing the autonomous initiative of social formations, functional autonomies and single and associated citizens for the practice of activities of general interest, the fulfillment of rights and the realization of social solidarity"* (article 2, paragraph 2, letter e) and indicating among its goals

- at the letter l) the realization of an integrated system of intervention and services, also favoring associations and volunteer work aimed at guaranteeing the rights of social security, education, the health of the citizens, […] operating in order to ensure a basic level of services in every community of the regional territory;
- at the letter m) the participation of the people and local autonomies in the legislative and administrative functions, also in the control of the action of public powers.

However, unlike the Statutes examined so far, here there is a concretization of what previously stated. In fact, article 54 states that the Region, in order to recognize and favor the intervention of the local and social autonomies and private subjects in promoting the economic, social and cultural developments, "*gears its intervention only toward the functions of general interest, the determination of standards and the guarantee of the correct functioning of services* ", making an absolutely new choice and also being very firm in pursuing the goal of subsidiarity to lighten the load on public services and in the overhaul of the respective roles of citizens and institutions.

The Statute of Emilia-Romagna lays down the subsidiary model by mainly focusing its attention on a number of punctual regulations concerning voluntary associations and social formations.

Article 7 (*Promotion of voluntary associations*) states that "*the Region valorizes the forms of association and self protection of the citizens and, in order to achieve this, it operates to:*

49 Respectively in the texts: statutory law of Calabria of October 19, 2004, n.25; statutory law Emilia-Romagna, March 31, 2005, n. 13; statutory law of Lombardia, August 30, 2008, n. 1; statutory law of Toscana, approved by the regional Council by first decision on May 6, 2004 and by second decision on July 19, 2004, published in BURT n. 12 of February 11, 2005, first part.

a) favor forms of participatory democracy in the choices of regional and local institutions, guarantees a suitable mode of information and consultation;
b) guarantee equal opportunities to the associations and organizations of the Region in representing the various interests during the normative procedure;
c) protect consumers in the exercise of their rights of association, information, transparency and control of single services and products".

Article 9 (*The Social Formations*) It is also establishes that, concerning the legislative function, the function of guideline and the function of planning and control, "*the Region recognizes and valorizes":*
a) the autonomous initiative of the people, single or associated, for the practice of activities of general interest and social relevance […] ensuring the universal character of the system of social guarantees;
b) the function of social formations through which the dignity of the person is expressed and developed, and, in this case, also the specific social role of the family".

Later in the text, article 64 (*Organizations, firms, companies and associations*) establishes that the Region can, by law, "promote and create organizations and firms with functional and administrative autonomy or participate in firms, associations or foundations". This occurs by "*respecting the principles of proportionality"* and it must be finalized "*to the achievement of activities of general interest of single and associated citizens*". The law establishing organizations and regional companies, besides determining the general principles of their autonomies, activities and organization, also determines the methods of ensuring the participation and control of the users and subjects directly interested in the activity performed by organizations and companies (paragraph 2).

Conversely, in the case in which the Region avails itself of organizations that are promoted autonomously by single and associated citizens, for the goals stated above, the law also establishes the methods of control and verification to which they are subjected (paragraph 3).

The Statute of Toscana, after stating at article 3 (*General Principles)*: "*the principles of social and institutional subsidiarity*" and to be willing to recognize and favor "*the social formations and their free development*", at article 58 (*Principle of Subsidiarity*), claims to be willing to conform its activity to the principle of subsidiarity and to operate, to this end, to bring the organization of social life and the exercise of public functions, as far as possible closer to the citizens".

In this sense, the following article 59 (*Social Subsidiarity*) commits the Region to "*favoring the autonomous initiative of aggregations of citizens for*

the direct practice of activities of recognized general interest" (paragraph 1), directing (paragraph 2) the implementation of the principle of social subsidiarity preferentially: to the improvement of the level of services; to overcome economic and social inequalities; to favor the collaboration of the citizens and social formations according to their specificities, with the purpose of valorizing the person and the active development of communities.

Finally, at article 72 it is specified that regional laws promote, according to the principle of article 3, the participation of the citizens, residents and organized social subjects in the different forms:

- as an autonomous initiative towards the administration,
- as a free proactive contribution to the regional initiatives,
- as an intervention in the formal phases of consultation,
- as a contribution to the verification of the effects of regional policies.

On the other hand, the statute of Lombardia, statutory law of August 30, 2008, n. 1, makes a different choice stating at article 3 (*"Subsidiarity")* the intention of guaranteeing the contribution of privates (identified not only as single or associated citizens, but also as families, formations and social institutions and civil and religious organizations) "*in the planning and realization of the different interventions and public services , according to modalities established by the regional law".*

Furthermore, at article 5, paragraph 1) the region declares its commitment to recognize and promote the role of functional autonomies as "*exponential subjects of a community joined around public interests of regional relevance"* and to coordinate its own legislative and administrative action with the activities performed in the territory.

This is a completely different line of approach, aiming at the inclusion of the subsidiary phenomenon, notwithstanding its autonomy, into the activities of public interest, hence its institutionalization.

Besides the general outline described so far, it seems appropriate to point out also a few "transversal topics" that concern the "statutory production", focusing on the profiles concerning the functional autonomies, the participatory processes and the inclusion of privates in the administrative bodies.

The organizations that are expression of a functional autonomy have been given special attention ever since subsidiarity has made its appearance in the Italian legal system (Poggi 2001). In fact the law 59/97, in laying out the ample proxy for administrative decentralization, established, at article 3 paragraph 1 letter b), in following delegative decrees to "*point out, within every single topic, the functions and assignments to bestow upon the regions also for the purpose stated in article 3 of the law of June 18, 1990, n. 142, and*

following the principle of subsidiarity about which at article 4, paragraph 3, letter a), of the present law, or to bestow upon local and territorial bodies". In this way, functional autonomies became one of the possible recipients of the transfers or delegations of functions and assignments alongside local autonomies. Faithful to the general regulation and the regulations of principle is the legislative decree 112/98[50], which, however, in defining, sector by sector and subject by subject, the residual competences of the State, and those that have to be assigned to other subjects who are the recipients of appointments, it almost completely forgets the exponential subjects of functional autonomy[51].

But the occurrences in which subsidiarity and functional autonomies are linked do not end here. In fact, in 2005 the Senate approves in second reading (but not with a two- thirds majority) the text of the constitutional law that brings further "*Modifications to Part II of the Constitution*" (the so-called "*devolution*"), which introduces a few modifications to the article 118 paragraph 4 of the Constitution of 2001, which not only confirm such connection, but they also reinforce the idea that autonomous functionalities play their own role, and significantly so, in the horizontal dimension of subsidiarity.

In fact, article 40 of this constitutional law established that "*Municipalities, Provinces, metropolitan cities, Regions and the State recognize and favor the autonomous initiative of single and associated citizens, for the practice of activities of general interest, based on the principle of subsidiarity, also through fiscal measures. They also recognize and favor the autonomous initiatives of the bodies of functional autonomy for the same activities and based on the same principle. The general regulation of the bodies of functional autonomy is established by law. (...)".*

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50 Here in fact, local and functional bodies, at least in the regulations of principle, always appear together. See article 1, where it is stated that (paragraph 1) "*The present legislative decree regulates, pursuant of Charter I of the law of March 15, 1997, n. 59, the assignment of functions and administrative assignments to regions, provinces, municipalities, mountain communities or other local bodies and, in the cases specifically indicated, to functional autonomies* (…)"; and that (paragraph 4) "*In no way can the regulations of the present decree be interpreted in the sense of assignment to the State, its administrations or national public bodies, of functions and assignments that are transferred, delegated or anyway assigned to regions, local bodies and functional autonomies* (…)".

51 The only relevant exception is the one on which at article 20 (categorized under Title II - *(Economic development) (productive activities*, Chapter III – *Industry)* which establishes that the chambers of commerce, industry, handicraft and agriculture perform the functions performed by provincial metric offices and provincial offices for industry, commerce and handicraft, including those regarding patents and the protection of industrial property. As far as this topic is concerned, see the comment by Falcon (1998).

Clearly the regions are not indifferent to these urgings, since they indicate this connection in numerous cases.

So does Umbria (article 17 of the regional statute), who only commits to valorizing the role of functional autonomies also for the practice of activities of general interest; and so does Toscana (article 60 of the regional statute) who also commits to favoring their participation in its own activity and in the activity of the local bodies.

Significantly Lombardia devotes only one norm of its own statute to functional and social autonomies, confirming (article 5 paragraph 1) its commitment to recognize and promote the role of functional autonomies as "*exponential subjects of a community joined around public interests of regional relevance"* and to coordinate its legislative and administrative action with the activities performed in the territory.

Calabria on the other hand (article 55 of the regional statute) commits to recognizing and favoring in a parallel way, "*within the initiatives for economic development, cohesion and social solidarity"* on one hand (paragraph 1) "*cooperation based on mutuality and without speculation purposes"* and, on the other "*the contribution of functional autonomies to the private activity and to the activity of the local bodies according to the principles of subsidiarity and solidarity."*

Finally Basilicata (statutory bill) is distinctly committed to promoting forms of collaboration with the University and the Scholastic Institutions (article 62) and the cooperation of the Chambers of Commerce, Industry, Handicraft and Agriculture (article 63) with the purpose of favoring the regional economic development.

Another transversal and important aspect of the statutory norms on subsidiarity is the one with the (more and more widespread and diversified) participatory practices, that however distinguish themselves from the subsidiary model in that their goal is to implement the spectrum of the interests represented in the preliminary procedural, and, basically, to enrich the knowledge at the disposal of the public administration for the acquisition of their own[52]. In other words, following a widespread wording, it's a "participation in saying" and not "in doing", just like in the case of subsidiarity. What the two phenomena have in common is the rethinking, the reassessment of the role of the citizens in their relationship with public institutions, and therefore their activation, which, as we have said, acquires different forms according to the cases.

52 On this topic, see the contribution of Valastro (2009).

In the norms examined here, subsidiarity and participation often appear paired, differently, but always strictly linked.

For example, the statute of Piemonte at article 2 "*Autonomy and participation"* states that it recognizes the participation of the citizens "*in public choices, in the legislative and administrative function and in the control of public powers" as the "basic condition for the development of democratic life and for the safeguard of the rights of equality and freedom of all citizens".* And at the following (and already mentioned) article 3 devoted to the principle of subsidiarity, paragraph 4 associates the *favor* for the subsidiary action to the valorization of the forms of cooperation based on mutuality and without speculation purposes, of social solidarity, voluntary associations and volunteer work, "*ensuring their participation and consultation while carrying out regional functions".*

Emilia-Romagna, article 7 of the regional statute devoted to the "*Promotion of Voluntary Associations"*, in specifying the forms of valorization of the subjects of the third sector, enumerates three hypotheses that are completely part of the group of practices of participation:

a) the forms of participatory democracy of the choices of regional and local institutions, guaranteeing suitable modalities of information and consultation;
b) the guarantee of equal opportunity for the associations and organizations of the region in representing different interests during the normative procedure;
c) protecting the consumers in the exercise of their rights of association, information, transparency and control over the single services and products.

And also the statutory law 1/2008 of Lombardia, at article 5, paragraph 2, "*Functional and social autonomies*", social autonomies are recognized and guaranteed "*as an expression of the natural process of aggregation of the people"* ensuring "*their participation in the formation of the general directions of the regional policy".*

This regulation calls to mind article 1, paragraph 6 of the regional law 1/2000 of Lombardia, which established that "*for the implementation of the policies of strategic relevance that require the joint intervention of the State, of the local bodies, of functional autonomies, and of private subjects"* the region avails itself of the instruments of negotiated planning.

Piemonte, with a more generic formulation, (regional statute, article 4 "*Planning*") states that it wants to acquire the method of planning and institutional collaboration for the actions that involve in a vertical way the different levels of sub regional government (paragraph 2), and "*to kindle and valorize all the energies, to commit to use all the resources and to favor all contributions in establishing and satisfying the needs of regional*

communities (paragraph 3), while the statute of Abruzzo at article 11 devoted to "*Consultation*" establishes that in function of the role and the function of organizations of workers and entrepreneurs (paragraph 1) and also of functional and professional autonomies, of social forces and voluntary associations (paragraph 2) "*ensures*" their "*participation and consultation while carrying out regional functions by means of formal phases of consultation and exchange of ideas".*

The last of the transversal topics that we deem appropriate to point out can be found in the diffusion of the method of the concerted decision, and in the proliferation of collegial organs.

The region Toscana foresees (article 61 of the regional statute) the institution, as an autonomous structure within the regional council, of the permanent Conference of social autonomies. The regional statute barely establishes that this Conference must convene in at least three annual sessions, and that its main assignment is to come up with suggestions and opinions for the council in order to create the instruments of economic, social and territorial planning, and also (paragraph 2) to evaluate the outcome of regional policies. Every other detail is referred to the law. It is only in 2007, with the regional law n. 20, that this organization, which is "*an expression of social subsidiarity in the Regions*" (article 1) took shape.

It can formulate propositions on the formations of the instruments of planning within the topics of its competence, and carries out consultative functions, through

- the obligatory opinion on some of the most relevant instruments of economic, social and territorial, general and sectoral planning within the jurisdiction of the Regional Council;
- the facultative opinion on the other instruments of economic, social and territorial, general and sectoral planning submitted to the scrutiny of the Regional Council, if requested by a permanent council commission, or by a fifth of the councilors or by the presidents of at least three council groups to which, overall, not less than one fifth of the councilors must adhere.

The region Puglia, at article 46 of its statute set up, within the regional council, a permanent regional Conference for the economic, territorial and social planning. "*Consultative Organ"* of the region, is made up of the delegates of functional autonomies, social formations and the third sector, based on "*criteria of effective representativity"* (paragraph 3). It convenes in almost two annual sessions and, just like the conference set up in Toscana, it formulates propositions and directions, gives opinions on general documents of planning of the region and on the financial law and writes the document

on the evaluation of effectiveness, efficiency and inexpensiveness of planned actions, also through the punctual supervision of the final balances of the region and the organizations, companies and agencies connected to it.

On the other hand, Lombardia (Regional Statute, article 54) establishes a "*Council of local autonomies"* with up to forty five members who represent the local bodies only of up to fifteen representatives of functional and social autonomies in order to express their opinion on the Statute, the regional development program and its updates, the plans and programs concerning technologic and economic innovation, on internationalization and competitiveness. Regarding the opinion expressed by the council of local autonomies on these instruments, the regional Council and the municipality can express their disagreement through an explanation regarding the single opinions.

5.2 The regional laws

Finally, our examination must take into consideration the regional laws approved after the constitutional reform. In fact, despite the overall situation that we have illustrated in the beginning, there are numerous laws that, directly or indirectly, explicitly or implicitly, take their inspiration from the principle of horizontal subsidiarity.

First of all, it is to be noted that there are few "organic" norms that give an interpretation, hence a transversal and ample application, to the principle.

We can recall the regional law of Umbria n. 16 of 2006, the regional law of Campania n. 12 of 2011 and the regional law of Calabria n. 29 of 2012.

The regional law of Umbria 16/2006, "*Regulation of the relations between the autonomous initiative of the citizens and the social formations and the action of Municipalities, Provinces, Regions, other Local Bodies and Functional Autonomies regarding the performance of activities of general interest according to the principles of subsidiarity and simplification",* in total coherence with the constitutional setting previously described, paves the way for new, functional and effective prospects and solutions.

Setting as its goals (article 1, paragraph 3) the promotion of social citizenship, participation, social responsibility and co-participation, this law states to be willing to direct the principle of subsidiarity and simplification firstly toward:

- the improvement of the level of services;
- the overcoming of political and social inequalities,

- the favoring of the collaboration of the citizens and social formations, according to their uniqueness, in order to valorize the person and the solidarity development of the community (article 1, paragraph 1).

In other words, far from logic of mere privatization or outsourcing, this is an attempt at enacting a system that is no more antagonistic between the public system and privates, who are being urged to take action either in the forms of participation than in the more concrete forms of subsidiarity and the care of activities of general interest. Also in this case, the norm under examination turns out to be innovative for its specificity and openness. In fact the list of these activities is not vague, on the contrary, a punctual one is offered, which consists of:

- the public social services;
- the cultural services;
- the services geared towards the valorization of work and enterprise and toward the reinforcement of local productive systems;
- the services to the person;

and all services that are useful to the generality of citizens and the disadvantaged categories with special reference to forms of supply and the performance of services that favor freedom of choice and self-maintenance in a logic of collaboration and territorial co-planning.

The activities regarding the national health service (which, ever since the law 833/78[53], have firmly belonged to the public institutions), and those that are strictly economic-entrepreneurial and completely estranged from the subsidiary model, are consistently excluded.

In the light of this structure, article 4 of the Regional law of Umbria 16/2006 outlines a fully fledged procedure at the initiative of those subjects who intend to promote initiatives for the practice of activities of general interest. These subjects must lay out "*specific projects consistent with the objectives of the general and sectoral regional planning"*. These projects will be evaluated by the regional committee and, if considered eligible, they will give the right to obtain economic-financial measures, either regarding the reduction and exemption from rates and fees (but also benefits and fiscal facilitations); or regarding the exemption from the forms of payment for any document released or treated by the subjects of horizontal subsidiarity.

Along the same lines of the law of Umbria is the regional law of Campania 12/2011, "*Authorization of paragraph 4 of article 118 of the Constitution on horizontal subsidiarity",* which, ten years after the constitutional reform,

53 Law of December 23, 1978, n. 833, *The Institution of the national health service.*

implements paragraph 4 of article 118 of the Constitution through an accurate analysis of the principle of horizontal subsidiarity, "*regulating the relations between the autonomous initiative of single and associated citizens, and social formations for the practice of activities of general interest (...) and the action of Municipalities, Provinces, Regions and other Local Bodies and Functional Autonomies"*. The citizens' initiative for the practice of activities of general interest, defined "*free*" and "*not subject to authorization and censorship*", in function of the principle of subsidiarity, is finalized, just like in the regional law of Umbria, to the improvement of the level of the services, to overcoming inequalities and the promotion of an active humanitarian citizenry, here defined as the "*effective participation of the citizens in the solidarity organization of the community, taking an active interest in the civic, cultural and moral good of the same community*", favoring a collaboration "*with the joint administration of the public affair for the valorization of the person and the solidarity development of the community*" (article 2). The activities of general interest are mentioned here too. The citizens can take responsibility for these activities "*especially because of the inactivity of the representative institutions*" (article 4), activities that the Region is committed to favoring also by urging Provinces, Municipalities, other Local Bodies and functional Autonomies (article 5). Just like in the Umbria law, an administrative procedure of evaluation and supervision of the projects concerning the activities of privates on the part of the public organizations is established.

Along the same lines of Umbria is also the case of the regional law of Calabria 29/2012. The law makes, in a very virtuous way, choices concerning some elements that the constitutional provision leaves blurred, by defining in articles 3 and 4 what are the subjects and the object of horizontal subsidiarity. Therefore, on the one hand, we have among the subjects citizens, single or associated, families, businesses and *"subjects of the third sector"*, and on the other hand, it is stated that among the activities considered of general interest there may be those *"concerning public social services, cultural services, services for the valorization of labor and social economic initiative aimed at strengthening local production systems, services to the person and services of utilities to the general public and the disadvantaged, with special reference to forms of delivery and performance of services that favor free choice and self-guidance in a logic of collaboration and co-management"*. The activities regarding the national health service and those which are purely economic and entrepreneurial are specifically excluded (as in the case of Umbria).

Furthermore, it is interesting to note as the whole law, in the provision on *"Principles"* in article 2, aims at intersecting the principle of subsidiarity

with that of the *"promotion of humanitarian active citizenship, to be seen as effective participation of citizens to the supportive organization of community, by taking an active interest in the civic, cultural and moral welfare of the community itself and fostering the collaboration of citizens and social formations, according to their own specificity, to the joint administration of the public sector, in order to valorize individuals and the joint development of the community"* (article 2, paragraph 2). Finally, among the principles, it is also interesting to stress the important clarification in article 2, paragraph 1, which states that the initiative of the citizens for the implementation of activities of general interest is not submitted to any authorization or censorship, and the only restriction is the necessary respect for the principle of legality.

Besides these fortunate exceptions, if we should want to put an order to the regional laws that were approved during this phase, they could be categorized into four different groups, according to their topic:

- laws on the integrated system of social services and on the implementation of the mentioned framework law on voluntary work, n. 328/2000;
- laws on the promotion and valorization of active citizenry, voluntary associations, on the third sector;
- laws on the promotion of the family, on motherhood, on childhood and youth;
- laws that are devoted to specific topics and special areas (especially those on the assistance to the victims of domestic violence and on culture and education).

The secure regional legislative competence in the subjects of social assistance services, health services, and services to the person, and the strong direction already given to the system by the law 328 of 2000, creates the possibility, as made evident by the outline, that this very field, these very sectors, are the ones in which the principle of horizontal subsidiarity can be applied.

From a general point of view, we can first of all state that, in the regional legislation the distinction between the forms of management of public services and the subsidiary model suggested here are not noticed at all: in fact, in all these regulations there are different forms of outsourcing of social services that are labeled as "subsidiarity", or also the statement of the "right of choice" of the users in a plurality of public and private offer.

The reading of these regulations (in the same way as the state regulations on local public services already mentioned), reveals a partial vision that mostly deviates from the constitutional regulation. A vision that seems to reinforce and renew a "neo-liberal" outlook that is completely unrelated not only to the

ratio of article118, last paragraph of the Constitution, but also to the origins of the idea it self within the liberal and Catholic political thought.

Perhaps the most disquieting aspect is the "functionalization" of individual autonomy and of the forms of association. In fact, their activities and resources are understood as optionally feasible and performed in an alternative way with choices of public management. Therefore they are considered to be willing to be hetero-directed and regulated. To be brought back into public programming. This use of subsidiarity, or, to be more precise, its failed use, its misunderstanding, its reduction to a generic reference that involves (even appropriately) the subjects of the Third Sector, is translated into the various regional regulations or missed choices, postponements, mere statements, or it creates confused solutions that reverberate on all the aspects characterizing the principle.

Therefore, while very little is said about the role and the propulsive capacity of public subjects, the list of private subjects is very wide, ranging from single citizens, families, family associations, to voluntary work organizations; social cooperatives and cooperation organizations, benefit associations, foundations and institutions of patronage.

References to parish recreation centers (regional law of Lombardia 22/2001) or to enterprises (regional law of Umbria 16/2001) are more rare.

Sometimes, especially in the laws regarding the promotion of the third sector (regional law Emilia-Romagna, and regional law of Marche); there is the inclusion of some regulations regarding the procedures and requirements of the organization of the subjects of private social organizations that modify pursuant to the regional law, those offered by the state legislation. And this, based on what we have said in the previous paragraph, leaves room for some doubts of constitutional legitimacy, due to the state statutory reserve on which at article 117, paragraph 2, letter l) of the Italian Constitution. In fact, while we completely agree with the fact that the region fully regulates the relations between public and private subjects, on the other hand, it appears obvious that only the state legislator can establish the characteristics of the different forms of private subjects.

The list of the actions geared toward favoring the achievement of subsidiarity is very wide too. It includes the measures regarding the system of services to the person, the involvement in the services and the measures of support of private subjects as such.

For the first case in point it is interesting to remember the case of the public preliminary investigation on common planning (regional law Emilia-Romagna, 2/2003), with which the observations and proposals of the

participants are collected and more innovative and experimental projects are identified. Afterwards their definition and the forms and modalities of a joint action are entrusted to the local bodies, in agreement with the private subjects that are willing to collaborate.

Sicilia, Calabria and Puglia, in their respective laws on the family introduce the "local exchange and trading systems", through which willing people can offer part of their time for free in order to offer their care and assistance and to get in touch with subjects or families in need through associations of family solidarity.

Concerning support interventions carried out by privates, we can find:

a) economic support interventions such as:
- the supply of contributions;
- the establishment of investment funds.

b) interventions of exemption and cost reduction such as:
- exemption or reduction of the fiscal load;
- reduction and exemption from rates and fees;
- exemption from forms of payment for every document produced or treated by subjects of horizontal subsidiarity.

Furthermore, some laws expressly foresee the awarding of an express and specific right of access on behalf of third sector organizations; or the more generic right of associations to be informed about public initiatives.

In other cases, the directions of an informative system of social services continue to be defined (Emilia-Romagna regional law 2/2003).

Sure enough, the deceitful interpretation of subsidiarity as a form of "management of the public services" also reverberates on the instruments of connection and the systems of controls.

In the first aspect, conventions are by far the most utilized instrument. Alongside this we find a wide range of similar solutions, such as contracts, agreements and memorandums of understanding.

The institutions linked to planning and regional plans are also remarkably widespread.

Concerning this, it is nevertheless appropriate to point out a few distinctions and make some observations. In fact, in the regional laws under examination (just like in the Statutes previously mentioned), two models have been identified.

On the one hand, the initiative of privates is understood as a phenomenon that is added to – or replace – the one of territorial institutions (in this sense the regulations of Emilia-Romagna, Marche, Toscana and Puglia are especially identified).

On the other hand, (the laws of Lombardia and Veneto are headed towards this direction), the contribution of private resources is included in a strong planning process which, even though it is participated in, it depends completely on the responsibility and decisions of the regions.

In the first case, the privates and the local bodies work alternatively and operate on differentiated activities, pointing out the need to collaborate "on the field", and therefore to get organized around concrete actions.

In the second case, it is the users who get to choose within a vast range of options provided by suppliers who are indifferently public or private. These suppliers must establish beforehand the requirements and criteria of their own participation, and subsequently must compete for the spaces and the spreading in an "almost market" of services.

It will not go unnoticed that, because of the standpoint supported here, the first model is the one that seems more coherent with the constitutional dictate.

In fact, and despite the substantial overall misunderstanding of the outline suggested by article 118, last paragraph, it is only in the first case that a full allocation of specific activities in a subsidiary logic is presupposed. Conversely, in the second model, the affirmation of the institution of institutional credit[54] presupposes an acceleration of the privatization of activities. However, those activities remain strictly within the ownership of the region and of the local bodies.

The obvious consequence of the misunderstanding that we have written about so far is the diffusion in every region, as far as the system of social services is concerned, of control systems created beforehand through the institutions of authorization (as an act that ensures the exercise of social activities) and credit (as a necessary qualification for the establishment of contractual agreements with the public system).

Similarly diffused instruments are the institutions of registers (of the region, the province and the municipality), with qualifying or even constitutive effects for the associations.

Something completely different must be said about the solution of "control in retrospect", on the results, that seem to be perfectly in line with the idea of horizontal subsidiarity.

In the Umbria regional law 16/2006, it is the regional council that establishes the qualitative and management standards of the services and performances, ensuring the participation of the citizens and users, and that defines the monitoring and verification systems (article 5).

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54 Among recent studies, and specifically about these topics, see Albanese (2007: 119).

In other cases, the writing of a service charter is required. The aim of the charter is to protect the users and to guarantee transparency in the supply of services. In this sense it is appropriate to point out the particular case of the "Charter of the rights of the social citizenship" about which in the Toscana regional law 41/2005, which not only contains the map of the paths and the types of services and social interventions, but also the social opportunities offered by the territory, the references to the essential levels of the services regulated by zonal planning, the goals and programs of the improvement of the quality of life, and the development of forms of protection and active participation of the citizens for the improvement of the services of the person.

6 Conclusions

What we have so far described and systematized into a possible scheme of reading is an amalgam of legislation that reaches far or near, produces significant or irrelevant consequences, sorts different effects.

There are few things we can affirm for sure, and definitely, reading these legislations with an eye on the empirical experience.

Let's try a list:

a) horizontal subsidiarity, properly or not, now is the backbone of some of the most significant choices on welfare. Given the (not always founded) suspicion that permeates the inclusion of corporations and market in these dynamics, subsidiarity has known fortune and spread its influence mostly in the fields of non-economic activities, such as social services, complementary health assistance, the public cultural offer;

b) on the other hand, subsidiarity works better and more efficiently where the community has already established horizontal relationships, where the human capital has found ways and means to grow and affirm a role on its own, where the citizenship is informed and active, where public institutions have had the chance and the foresight of including them in decision making processes. As for Italy, this has caused a significant diversity in the implementation of the principle between regions and areas with different traditions and attitudes;

c) for sure, subsidiarity works better at a local level, where the specific solutions adopted are able to fit the offer of the association and active citizens for engagement. Relations are easier, closer, solutions can be negotiated in detail, the knowledge of the different areas of intervention is deeper and constantly monitored.

Nevertheless, as we have seen, the Italian legislation is still struggling to set in place the actual meaning of subsidiarity.

From small, irrelevant applications to broad reforms, the same concept of subsidiarity is stretched and shaped more to fit the political goals than to understand its real potential and its possible actualization.

Let's try to understand the reasons for this uncertainty, which is not only of the law makers, but also affects the courts, if it's true that in over 10 years the Constitutional Court has never mentioned the 4th comma of article 118.

In my opinion, the main cause that explains the weakness in implementing this principle resides basically in the fact that discussing subsidiarity means discussing the boundary between private and public.

If this is true, it is easy to understand the caution and the attention of legislators, administrative bodies and judges to take a stand and write with clear words what subsidiarity implies. Consequences might be unmanageable, and reach much further than expected.

In the end, declaring a view of subsidiarity means to declare the essence of a specific political view about the government, the market, their reciprocal roles and their limits.

Or even more, and more challenging, is the fact that this principle forces to put under investigation the idea if the old categories of State and market are still applicable and relevant, and if the interests at stake can still be divided into public and private ones.

There are several symptoms that suggest a different conclusion. A third scope seems to emerge, and grow constantly: the one we cannot define or label, and still call, in negative and by difference, Third Sector or Non-Profit. A country like Italy produces about 5% of N.P.G.. employs almost 700.000 people and involves over 4 million volunteers donating their knowledge, their time and effort to help others for free.

In this third scope people deny the traditional division between a State that pursues public interests and individuals (or market actors) pursuing their own private ones, and shows that a different balance is possible, finding people that act and engage themselves for the general good. For the commons. And aims to a cooperation among the 3 precincts, and not the antagonism that has always been characterizing the relationships between State and market.

Of course this topic is related to many others, like corporate social responsibility, which represents a direct effect of the change this new horizon is producing in our societies.

What worries a jurist, is the substantial lack of any regulation of this third scope, while, during the last centuries either State and market have known a

large production of ideas and rules for their containment. Rule of law for the public administration and competition for the market seemed to be the ultimate norms we have been able to find. The Third Sector, mostly just because it is not being recognized and affirmed explicitly as another option, has not found its founding rule yet.

On the bright side, we can say that after the egalitarianism that lead the building of our first welfare systems and, as a reaction, the return to that neoliberalism that has been the winning ideology in the Western world since the end of the 80's, subsidiarity seems to find a mediation between Equality and Freedom, seeking a new era of Conscious and Responsible Freedom, where individuals have the chance to second their skills and will, without forgetting the effects those choices have on others, even at a global level.

It is then anachronistic, and essentially wrong, to read the subsidiarity option in terms of that old dilemma, or using it to foster one of the two old options, as many seem to do in the cases we told in the pages above.

What is in front of us is the challenge to build, step by step, a new way of thinking about our societies, and in Constitutional terms, to affirm the role of a secular Solidarity as the third column able to hold in place, with Freedom and Equality, the architecture of our democracies.

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