

The forgotten meaning of the EU principle of subsidiarity

Horizontal subsidiarity in Italian local governments

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Abstract

This paper explores how Italian local governments are implementing the constitutional principle of subsidiarity in its horizontal meaning through the organisational model of shared administration. Since 2014, this principle has allowed around 280 local governments to collaborate on equal terms with citizens on matters of common interest through institutional support for civic participation through the commons.

Based on that, this paper asks whether the Italian case can offer a new perspective to the EU principle of subsidiarity. In fact, the European Union has traditionally understood this principle only in its vertical dimension, referring to the allocation of competences among governmental levels, and not in its horizontal one.

By shedding a light on the original debate that introduced the principle within the EU legal order, and by looking at its pre-legal, centuries-old conceptualisation, the paper argues that horizontal subsidiarity constitutes the forgotten meaning of this principle whose traces can be found in the current EU legal order. The rediscovery of this interpretation is particularly relevant for local governments in so far as a horizontal understanding of subsidiarity could strengthen their role in furthering local democracy in multi-level systems.

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Keywords

EU Subsidiarity, Local Governments, Italy, Horizontal Subsidiarity, Shared Administration, Participation, Commons.

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Horizontal subsidiarity in Italian local governments

Introduction¹

A silent transformation is taking place in Italian local democracy. The constitutional principle of subsidiarity is allowing local governments to collaborate on equal terms with citizens on matters of common interest. Horizontal subsidiarity facilitates that. The municipality of Bologna first put horizontal subsidiarity into practice in 2014 through the organizational model of shared administration (*"amministrazione condivisa"*). This constitutionally entrenched model comprises a prototype of municipal regulation and the innovative legal tool of the collaboration pact (*"patto di collaborazione"*) and is being concretely implemented through the commons. The commons are shared resources which must be governed through collaboration between private and public actors. Put differently, this model favours democratic participation through the inclusion of persons that are outside representative channels by means of the shared governance of the commons. In doing so, this contributes to reinforcing democratic legitimation.

Looking at the Italian case is beneficial for local governments in other countries within the wider context of the European Union (EU). There, subsidiarity has traditionally been understood and applied only in its vertical dimension for referring to the allocation of competences between different levels of government (the EU, national, regional, and local levels). Hence, also the literature on the principle of subsidiarity has been predominantly concerned with this vertical dimension. However, as this paper explores, traces of the forgotten horizontal meaning of subsidiarity can also be found in the original EU debate on the principle and in some features of the current EU legal order. Indeed, the principle of horizontal subsidiarity is grounded in the centuries-old pre-legal tradition of Europe. This understanding shows potential for innovation towards a more horizontal and participatory relationship between public authorities – mainly local – and citizens.

The essential research question of this paper is the following: *what new perspective does the implementation of horizontal subsidiarity in Italian local governments offer to the EU principle of subsidiarity?* The paper starts by presenting the principle of horizontal subsidiarity and its implementation through the model of shared administration in Italian local governments. After that, it gives an overview of what is meant by the principle in the EU legal order. Special attention is given to local governments. Local governments in fact are an ever more important pillar in multi-level systems and they constitute the ideal level of government to favour civic participation, a role that is explicit in the Italian meaning of subsidiarity, and implicit in the one given by the EU.

¹ I would like to thank Elisabeth Alber for earlier comments on the paper, Petra Malfertheiner for the support in the publication process, and Claire Evangeline D'Alessio for the linguistic revision.

1 Horizontal subsidiarity in the Italian context

Referred to as one of the strongest ideas of contemporary constitutionalism², the principle of subsidiarity was explicitly introduced in the Italian constitution in Article 118 with the 2001 constitutional reform. Its roots, however, can be traced back many decades outside the juridical and scientific debate: more precisely, the Christian social doctrine. The Christian social doctrine, in turn, took it from social philosophy³. Pope Pius XI in 1931⁴ first clarified the concept of subsidiarity as the guiding principle for societal organization. In doing so, he referred to the relationship between the State and its community, motivated by a fear of the growing power of States to regulate individuals' lives (also at the expense of the Church itself). His call to subsidiarity was essentially aimed at promoting, on one side, individuals as competent and responsible actors in society (also within the autonomy of intermediate bodies), and on the other, the need for the state to support their actions whenever they would be for the common good.

In the Italian constitutional context this original understanding of a horizontal promotional-type subsidiarity was later complemented by a second interpretation. The new understanding sees subsidiarity as the reference principle for the vertical allocation of competences among different levels of government. It was influenced by the significance given to that principle within the wider European legal space⁵: namely by the European Union legal order (Article 3B of the Maastricht Treaty, today's Article 5 TEU) and by the Council of Europe legal order (Article 4(3) of the European Charter of Local self-government⁶). The Italian constitution incorporates these two meanings respectively at Article 118(1) – vertical subsidiarity – and 118(4) – horizontal subsidiarity. Vertical subsidiarity is, however, thoroughly studied⁷. Horizontal subsidiarity⁸, the focus of this paper, has received much less attention.

Article 118(4) outlines that: “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”. There are three main elements worth underlining: the subjects, the object, and the action.

Starting with the subjects, horizontal subsidiarity foresees governmental authorities on one side and citizens on the other. The Constitution refers to all levels of government: the state, regions, metropolitan cities, provinces, and municipalities. In parallel to the public side, the civic side refers to individual or associated citizens, be they individuals, informal groups, or organizations (companies, associations, institutions). Contrary to the predominant understanding of citizens within the traditional forms of volunteers or association members, this principle does not refer only to those belonging to the so-called Third sector⁹, but is innovative in so far as it also addresses individuals on their own or within informal groups.

² D'Atena A, 'Il Principio Di Sussidiarietà Nella Costituzione Italiana' [1997] *Rivista Italiana di diritto pubblico comunitario* 627.

³ Luther J, 'La Sussidiarietà Come Principio Sussidiario Del Diritto Pubblico Comune Europeo' in Daniela Ciaffi and Filippo Maria Giordano (eds), *Storia, percorsi e politiche della sussidiarietà. Le nuove prospettive in Italia e in Europa* (Il Mulino 2020) 209-225.

⁴ Pope Pius XI, *Littera Encyclica Quadragesimo Anno*, 1931, at point 80 on the role of the State and the restoration of the social order.

⁵ 'European legal space' refers to the complex legal space where different legal orders coexist: the national ones, the European Union (EU) legal order, the international legal order of the Council of Europe (CoE): von Bogdandy A, 'The Transformation of European Law: The Reformed Concept and Its Quest for Comparison' [2016] *MPIL Research Paper Series* 2-13.

⁶ Even if the principle of subsidiarity is never mentioned in the Charter, it is referred to in its vertical dimension at Article 4(3).

⁷ Arban E, 'Re-Centralizing Subsidiarity: Interpretations by the Italian Constitutional Court' (2015) 25 *Regional & Federal Studies* 129-44. Additionally, Martinico G, 'Federalism, Regionalism and the Principle of Subsidiarity' in Erika Arban, Giuseppe Martinico and Francesco Palermo (eds), *Federalism and constitutional law. The Italian contribution to comparative regionalism* (Routledge 2021) 189-205.

⁸ Horizontal subsidiarity is a doctrinal category introduced in the Italian literature by A. d'Atena in 1996, and since then it constitutes the ordinary label used for referring to Article 118(4) of the Constitution. D'Atena A, 'Sussidiarietà e Proporzionalità Nelle Dinamiche Multilivello e Nelle Relazioni Pubblico-Privato' [2022] *Federalismi.it* 339; Arena G, 'Il Principio Di Sussidiarietà Orizzontale Nell'art.118, u.c. Della Costituzione' [2003] *Astrid Online*.

⁹ Coined in Etzioni A, 'The Third Sector and Domestic Missions' (1973) 33 *Public Administration Review* 314-23, the term Third Sector refers to a third alternative between the two dominant State (public) and the market (private) sectors. For horizontal subsidiarity and the third sector in the Italian context, see Arena G,

When it comes to defining the object of the subsidiary relationship between the public and the civic sides, the Constitution refers to unspecified activities of general interest. These do not coincide with the administrative functions strictly considered, which remain the responsibility of the public authorities, but refer to the collaborative production of services for the community and to the fulfilment of social rights¹⁰. In 2020 the Constitutional Court helped clarify what is meant by general interest with judgment no.131¹¹. There the Court stated that the activities of general interest are the ones implemented by citizens pursuing civic and supportive aims of social utility and not seeking profit. Accordingly, the State is no longer the only actor designed to pursue the interest of the community. It is complemented by autonomous initiatives of private citizens. Concretely speaking, this established an additional constitutional cover for two other essential contributions, which before that had provided practical substance to this concept: 1) a list of activities related to the general interest laid out in Article 5 of the Third Sector Code (legislative decree no.117/2017, with some examples being social actions and social services, healthcare services, protection and enhancement of the cultural heritage and landscape, requalification of public goods and assets seized from organized crime associations); 2) the organizational model of shared administration with its identification between the general interest and the commons. The latter refers to the operationalization of subsidiarity that we will introduce in the next section.

The third main element of horizontal subsidiarity is the action foreseen by Article 118(4): support for citizens' autonomous initiatives. Accordingly, on the civic side, the full self-determination of citizens through initiatives is recognised and given value by the Constitution. Going further, this also places an obligation on the public side to support citizens in so far as their initiatives pertain to the general interest. In fact, the Constitution requires collaboration among the two parts, not substitution. In this way, it envisions a relationship between two autonomies: the public autonomy and the private (civic¹²) autonomy. To understand this relationship, the verb used is key: "*favoriscono*" indeed means that the public side has an obligation – and not merely an opportunity – to support such initiatives¹³.

All in all, the greatest innovation brought by constitutionalized horizontal subsidiarity lies in the mandatory support outlined for all levels of government towards citizens' autonomous initiatives of general interest. The novelty of the Italian Constitution, therefore, consists of the introduction of the pursuit of the general interest not only as a task to be performed by the State, but also as an opportunity to which private individuals or associated citizens may autonomously contribute. This constitutes what has been essentially defined as the subsidiarity paradigm ("*paradigma sussidiario*"¹⁴), in which individuals are considered not only as bearers of needs and demands but also of capabilities to contribute to the general interest of a community.

'Sussidiarietà Orizzontale Ed Enti Del Terzo Settore' in Antonio Fici, Luciano Gallo and Fabio Giglioni (eds), *I rapporti tra pubbliche amministrazioni ed enti del terzo settore. Dopo la sentenza della Corte Costituzionale n. 131 del 2020* (Editoriale Scientifica 2020) 25-35.

¹⁰ Cerulli Irelli V, 'Sussidiarietà (Diritto Amministrativo)', *Enciclopedia giuridica* (Treccani 2003) 5, and Rescigno U, 'Principio Di Sussidiarietà Orizzontale e Diritti Sociali' [2002] *Diritto Pubblico* 23.

¹¹ We will come back to this in section 3.

¹² In parallel to public autonomy, F. Benvenuti clarifies a distinction between two forms of individual autonomy: private autonomy ("*autonomia privata*"), when the exercise of an individual freedom is meant to bring an advantage to individuals themselves; civic autonomy ("*autonomia civile*"), referring to all those individuals willing to participate firsthand on an equal level with public authorities for matters of common interest. Benvenuti F, *Il Nuovo Cittadino. Tra Libertà Garantita e Libertà Attiva* (Marsilio 1994) 60-64 and 80.

¹³ Donati D, 'La Sussidiarietà Orizzontale Da Principio a Modello: Dinamiche, Limiti e Ruolo Della Concorrenza' in Daniele Donati and Andrea Paci (eds), *Sussidiarietà e concorrenza. Una nuova prospettiva per la gestione dei beni comuni* (Il Mulino 2010) 199-231; Arena G, 'Il Principio Di Sussidiarietà Orizzontale Nell'art.118, u.c. Della Costituzione' [2003] *Astrid Online* 28.

¹⁴ Donati D, *Il Paradigma Sussidiario. Interpretazioni, Estensione, Garanzie* (Il Mulino 2014). Additionally, Arena G, 'Democrazia Partecipativa e Amministrazione Condivisa' in Alessandra Valastro (ed), *Le regole locali della democrazia partecipativa. Tendenze e prospettive dei regolamenti comunali* (Jovene 2016) 233.

2 The model of shared administration of the commons

The concept of general interest has begun to be associated with the concept of commons (or common goods). This gives a concrete dimension to the principle of horizontal subsidiarity. The Charter of subsidiarity¹⁵ elaborated by the research group of *Labsus-Laboratorio per la sussidiarietà*¹⁶ represents one of the earliest intuitions on this. First, in point no. 5, the Charter states that the commons are those goods, tangible and intangible, for which citizens by their free choice share the responsibility of care with the administration. Additionally, the Charter outlines that activities of citizens aimed at the production, care and valorisation of common goods are in the general interest. This occurs in so far as they are carried out on a non-profit basis in compliance with the principles of solidarity, responsibility, equality, and legality. Furthermore, point no.9 clarifies that active citizenship and participation are complementary but distinct. In fact, active citizenship entails not only participation in consultative and decision-making processes and public policymaking, but also a direct and autonomous contribution to the care of the commons. Eventually, it was what has been defined as shared administration (*"amministrazione condivisa"*) that made it possible to operationalize this correspondence between the general interest and the commons.

First conceived in 1997¹⁷ and not originally linked with the commons, shared administration constitutes an organizational model designed as a collaborative alliance between citizens and the state. This was initially developed within an administrative law perspective to suggest a reform of the traditional bipolar paradigm based on the (often conflictual) clear division between those who administer and those who are administered¹⁸. However, its practical circulation shows that it has gone far beyond the mere borders of administrative law. Indeed, it draws a new subsidiarity paradigm in the relationship between the state and society, where local governments have a frontline role in the promotion and support of citizens' autonomous initiatives related to the commons.

Shared administration was developed for the first time in 2014 at the local level of government in the municipality of Bologna. After two years of work and research, this was achieved essentially through the design of two instruments: the *Regulation for the collaboration between citizens and the public administration for the care and regeneration of the urban commons* ('the Bologna Regulation')¹⁹, and the collaboration pact. The choice for a municipal regulation to directly implement horizontal subsidiarity came in response to the need for a simple, flexible, and adaptable legal tool. In this way, such a tool could also circulate and be replicated by other local governments around the country thanks to their regulatory autonomy (Article 117(6) Constitution), without the need to wait for a legislative intermediation. After the pilot city of Bologna, the regulation has spread to at least other 280 local governments. This led to the signing of thousands of collaboration pacts and to the elaboration of a regulation prototype on the commons that municipalities can freely adjust and adopt²⁰. The regulation prototype essentially determines: a) general provisions and definitions (for example, of urban commons, active citizens, shared administration, collaboration agreement); b) procedural provisions according to the type of collaboration (ordinary collaboration pacts, which are the ones that refer to smaller actions, and complex ones, that refer to a greater display of resources and planning); c) actions of care,

¹⁵ Approved by the first national Convention on subsidiarity (Rome, 12 March 2004): see <https://www.labsus.org/la-carta-della-sussidiarieta/>.

¹⁶ This later became an association with its online scientific journal of legal-social basis devoted to the study of the on-ground application of the principle of horizontal subsidiarity: see <https://www.labsus.org/>.

¹⁷ Arena G, 'Introduzione All'amministrazione Condivisa' [1997] *Studi parlamentari e di politica costituzionale* 29. This has been later referred to also as collaborative governance: Iaione C, 'The CO-City: Sharing, Collaborating, Cooperating, and Commoning in the City' (2016) 75 *American Journal of Economics and Sociology* 427.

¹⁸ Also referred to as the dualism authority versus liberty: Cassese S, 'L'arena Pubblica. Nuovi Paradigmi per Lo Stato' (2001) 3 *Rivista trimestrale di diritto pubblico* 602.

¹⁹ English version at <http://www.comune.bologna.it/media/files/bolognaregulation.pdf>.

²⁰ The up to date number of local governments that have adopted the same type of Regulation (or a similar one) can be found at <https://www.labsus.org/it/regolamenti-per-lamministrazione-condivisa-dei-beni-comuni/>. A regulation prototype updated on a regular basis is developed by Labsus and made available: see <https://www.labsus.org/wp-content/uploads/2017/04/Regolamento-Prototipo-Labsus.2022.pdf>. The stories of many collaboration pacts are collected at <https://www.labsus.org/category/beni-comuni-e-amministrazione-condivisa/patti-collaborazione/>.

regeneration and shared governance of the commons; d) forms of support for citizens' initiatives from the State's side: for example, the provision of insurances for the involved citizens, economic advantages (like the free use of public assets, public cover of active citizens' initiatives expenses, free use of needed material instruments, exemptions and benefits from taxes), simplification of procedural and bureaucratic rules and facilitation of self-funding initiatives; e) communication, transparency and evaluation of initiatives; f) responsibility; g) final and transitional provisions.

The regulation, however, provides the mere administrative cover for the real innovation: the legal tool of collaboration pacts. They constitute normative sources defined by mutual agreement between the public and civic sides. They take the form of a flexible written agreement, whose disputed nature still oscillates between placing them among private law contracts, public law agreements, or hybrid types²¹. There are four main steps for implementing a collaboration pact. Everything starts with a proposal of an activity of general interest. This could come as an autonomous initiative of citizens according to Article 118(4) Constitution or as a consequence of an invitation from public authorities to submit proposals. The second stage is the co-design phase, where the two sides recognize together a certain good as a commons and identify a specific action to be taken for the general interest. Accordingly, they negotiate in detail the content of their cooperation to be written in the collaboration pact. Necessary aspects to be included are the aim of the collaboration; the commons object of the actions; the concrete tasks, resources, and responsibilities of each side; the supportive measures provided by the public authority; the place in which activities are carried out; insurance policies if relevant; and duration of the collaboration. The third step consists in the actual signing of the collaboration pact by the two sides. Monitoring constitutes the final phase. All in all, it could be said that collaboration pacts provide for recognition via legal means of citizens' autonomous initiatives that are supported by public authorities instead of being disconnected from institutional structures.

The constitutional and legal framework supporting the model of shared administration with its two tools of the municipal regulation and collaboration pacts has been consolidating throughout the years also beyond the local level. As explained above, the principle of horizontal subsidiarity is its backbone, and together with other constitutional principles it provides for the highest constitutional cover. Additionally, like a jigsaw puzzle, many pieces are being added over time, defining a picture still difficult to fully grasp and systematise. We are mainly referring to the national-level legislation of the third sector, which partly defines the activities of general interest, and the four regional laws related to the shared administration of the commons, which have only recently encompassed the practices flourishing at the local level (Lazio, Tuscany, Emilia-Romagna, Umbria²²). Additional support can be found in the national law on local authorities ("*Testo Unico Enti Locali*", law no.267/2000) that in Article 3(5) outlines that municipalities and provinces perform their functions also through activities that can be adequately exercised by the autonomous initiative of citizens and their social groups. Furthermore, a landmark piece of the puzzle was put in place in 2020 by the Constitutional Court through its judgement no.131. The Court not only recognized the value of solidarity actions of individuals outside third sector organisations but also explicitly referred to a 'channel of shared administration' where actions between public authorities and third sector organisations are founded not on utilitarian, but mutual exchanges. Consequently, the Court elaborated the idea of a third space beyond the state-market dualism, where relationships should be built under the guidance of the EU principle of solidarity and not competition²³. Doing so, the Court essentially reconnected actions taking place according to the Italian principle of horizontal subsidiarity to the EU principle of solidarity, providing for additional legitimation of the shared administration model.

Even though up to date no comprehensive legislation on the implementation of horizontal subsidiarity through shared administration has been passed at the national level, this principle has been taken out of its abstract conceptualisation through the model of shared administration. The added value of this

²¹ More recently on this debate Giglioni F, 'Forme e Strumenti Dell'amministrazione Condivisa' in Gregorio Arena and Marco Bombardelli (eds), *L'Amministrazione condivisa* (Editoriale Scientifica 2022) 86-93.

²² Regional law no.10/2019 (Lazio); regional law no.71/2020 (Tuscany); regional law no.3/2023 (Emilia-Romagna); regional law no.2/2023 (Umbria).

²³ Pellizzari S and Borzaga C, *Terzo Settore e Pubblica Amministrazione. La Svolta Della Corte Costituzionale* (Euricse 2020).

model, in sum, lies in its capacity to translate a constitutional principle into practice that otherwise would have remained only on paper.

3 Civic participation through the commons in Italian local governments

These phenomena are allowing for the emergence of a new form of civic participation, which we will refer to as civic participation through the commons. Originating in the American political science scholarship²⁴, and after their juxtaposition with the concept of general interest in the 2004 Charter of subsidiarity, the commons received a legal definition in the 2014 Bologna regulation and started spreading to other local governments through the regulation prototype. This outlines that the commons are all those tangible, intangible and digital goods that citizens and public authorities – also through participative and deliberative procedures – recognize to be functional to the individual and collective wellbeing, and for which together they share the responsibility for their care or regeneration. Nowadays in the Italian context this regulation constitutes the pioneering legal arrangement – together with its collaboration pact tool – that deals with the commons in an institutionalized manner. Furthermore, this has granted local governments a prominent role in governing commons-oriented initiatives. The type of commons in these pacts varies greatly, and there is no exhaustive list. Some examples include public squares and streets, green areas, buildings, schools, cultural centres, sport, social inclusion, education, historical memory, and data.

This type of civic participation through the commons rooted in horizontal subsidiarity is flourishing first and foremost at the level of democracy which is the closest to citizens: local democracy. Specifically, its distribution is greater in urban areas than in rural areas. Evidence of that comes from a recent quantitative and qualitative survey conducted on the usage of collaboration pacts around the country published in 2022²⁵. This shows that 80% of collaboration pacts were signed in urbanised areas: 53% in local governments with more than 250.000 inhabitants, and 27% in local governments with populations between 60.000-250.000.

Thanks to the model of shared administration and based on the principle of horizontal subsidiarity, local governments are signing pacts with their citizens. The local level is therefore emerging as a laboratory for civic participation, where shared administration constitutes another piece of the bigger puzzle of democratic innovations. Considered as those *“processes or institutions that are new to a policy issue, policy role, or level of governance, and developed to reimagine and deepen the role of citizens in governance processes by increasing opportunities for participation, deliberation and influence”*²⁶, democratic innovations constitute a field and umbrella term aimed at rethinking the relationship between the State and society by increasing opportunities for civic participation. In line with that, shared administration is, indeed, contributing to reforming the governance of local governments from the bottom up. It is doing so by bringing under a legal cover citizens’ informal experiences of participation through the commons, contributing to what has been defined as informal public law (*“diritto pubblico informale”*)²⁷. This refers to the recognition by legal means of social practices of the local community that otherwise would be considered as outside the legal system because they are not rooted in positive law.

²⁴ Ostrom E, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press 1990).

²⁵ The final report is available online at <https://www.labsus.org/rapporto-labsus-2021/>.

²⁶ Elstub S and Escobar O, ‘Defining and Typologising Democratic Innovations’ in Stephen Elstub and Oliver Escobar (eds), *Handbook of Democratic Innovation and Governance* (2019) 11.

²⁷ Giglioni F, ‘Order without Law in the Experience of Italian Cities’ (2017) 9 *Italian Journal of Public Law* 291–309.

All in all, local governments and citizens seem to be mutually reinforcing each other thanks to horizontal subsidiarity: local governments in so far as they hold a leading role in the adoption and spread of the regulation on the commons; citizens in so far as they have an additional democratic channel of civic participation through the commons in local democracy. Still, however, it may be too early to evaluate the extent to which this new form of participation rooted in horizontal subsidiarity is affecting democracy. Furthermore, many aspects are still obscure and precarious. First, we may refer to some cases of misapplication and misunderstanding of the model of shared administration, occurring through the mere cutting and pasting of the regulation prototype, without a critical adoption of that according to each specific local context²⁸. This risks leading to a more celebrated rather than actual participation, creating a façade narrative that does not correspond to the real understanding of the cultural paradigm shift underneath. Secondly, sometimes the collaboration pact is seen by citizens according to private interests allowing them to avoid using traditional competitive procedures, and not according to the different subsidiarity logic underneath. Third, it may be true that the (subsidiarity) paradigm shift is more likely to occur in certain contexts rather than others as a consequence of more favourable cultural and social conditions. Fourth, the last major precarious aspect of the implementation of horizontal subsidiarity through the model of shared administration seems to be the actual way in which it is taking hold: that is from below and in the absence of a state law to provide a clear legislative framework which could instead ensure future stability and further dissemination of the model.

For all these reasons it may be wise to be cautious when evaluating the real transformative power of shared administration. However, what is beyond any doubt is that the great innovation of the model lies in its capacity to intercept and respond to a challenging phenomenon emerging in society – namely, civic participation through the commons – through a solid anchoring of that to the constitutional principle of horizontal subsidiarity. The Italian specificity is that, unlike other similar experiences which exist usually within mere temporary projects, since 2001 there is a puzzle of constitutional, legislative, and regulatory aspects progressively being pieced together that allow for the transformation of local community experiences into juridical and institutional ones. This is primarily happening thanks to the leadership of local governments.

4 The rising role of local governments in multi-level systems

Local governments are on the rise not only in Italy, but also in other multi-level systems around the world, especially in the EU. The Italian case constitutes only a small piece of the larger phenomenon of rapid urbanization²⁹ that is proving the local level – especially cities among other local governments³⁰ – to be the most relevant level of government in charge of facing the greatest challenges in contemporary society. Furthermore, the category of local governments³¹ is very heterogeneous as it depends on each state's internal constitutional and legal framework and is therefore an area where there is still much to explore.

In more recent years, federal studies has been the main field that started looking at the local level as an additional order of government in multi-level systems. This came as a consequence of the need to further recognize its importance because of its closeness to people and its contribution to power sharing. After a general blindness of federalism literature towards that reality, scholars recently started to question the traditional two-tier approach of federal systems of government as founded on the national and sub-national levels. In fact, the local level is paving its way as the “third order of

²⁸ See further on that Foster SR and Iaione C, ‘Ostrom in the City. Design Principles and Practices for the Urban Commons’ in Blake Hudson, Jonathan Rosenbloom and Dan Cole (eds), *Routledge handbook of the study of the commons* (Routledge 2019) 246.

²⁹ Monitored by the UN-Habitat Conferences (Habitat I in 1976, Habitat II in 1996, Habitat III in 2016): <https://www.un.org/en/conferences/habitat>.

³⁰ Arban E (ed), *Cities in Federal Constitutional Theory* (Oxford University Press 2022).

³¹ Used in the plural form as suggested in Steytler N, *Local Government and Metropolitan Regions in Federal Systems* (McGill-Queen's University Press 2009) 4.

government”³², or the “fourth level” if we look at the multi-level system of the EU³³. Increasingly, power is being shared not only among two levels of government, but also with the local one, and its constitutional and legal recognition also within the federal scholarship becomes therefore more and more important to guarantee institutional pluralism. This comes notwithstanding the fact that the existence of local-level authorities with various degrees of self-government existed before the creation of (federal) nation-states. More precisely, the local level predates States in so far as it constitutes the basic societal organizational form and the space of civilization *par excellence* that, since the Neolithic era, has undergone constant transformations until the emergence of the contemporary model of the city³⁴.

Federal scholars face three main issues when looking at the relationship between federalism and local governments³⁵: 1) the degree of autonomy of local governments; 2) their relationship with other levels of government; 3) their place in the constitutional framework. These receive a different answer according to each federal system, and these differences are the topic of comparative studies³⁶. What seems to emerge, however, is that a valorisation of the local level of government would strengthen federalism for three main reasons³⁷. First, it would contribute to the quality of democracy thanks to the addition of another layer of elected government that allows for a closer contact between people and their representatives. This also creates more concrete possibilities of influencing political outcomes as well as more chances for participation by citizens. A confirmation of that comes from the fact that most participatory practices – also labelled as ‘democratic innovations’ – are taking place at the local (and sub-national) level, because this is the level of government that can more flexibly experiment with innovative forms of civic participation³⁸. Secondly, the local level of government is more responsive in policymaking and service-delivery because of its better understanding of the community from which it is elected. Thirdly, the local tier of government also favours decentralization of authority by contributing to the dispersal of power, in this way opposing the centralising pressures from higher levels of government.

For these and other reasons it becomes clear why local governments constitute the frontier to be studied not only for the principle of subsidiarity but also for federal studies. It should be noted, however, that in the context of the European Union, the EU legal order allows for the recognition of multiple levels of government (among which is the local one) thanks to the explicit recognition in writing of the principle of subsidiarity³⁹.

³² Palermo F and Kössler K, *Comparative Federalism: Constitutional Arrangements and Case Law* (Bloomsbury Publishing 2017) 281-315. Additionally, Popelier P, *Dynamic Federalism. A New Theory for Cohesion and Regional Autonomy* (Routledge 2021) 2, and Saunders C and Arban E, ‘Federalism and Local Governments’ in Erika Arban (ed), *Cities in Federal Constitutional Theory* (Oxford University Press 2022). Previously, Steytler N, ‘Comparative Conclusions’ in Nico Steytler (ed), *Local Government and Metropolitan Regions in Federal Systems* (McGill-Queen’s University Press 2009) 393-436.

³³ Panara C and Varney M, *Local Government in Europe. The ‘Fourth Level’ in the EU Multilayered System of Governance* (Routledge 2013).

³⁴ Mumford L, *The City in History* (Harcourt Brace Jovanovich Inc 1961) 30.

³⁵ Saunders C and Arban E, ‘Federalism and Local Governments’ in Erika Arban (ed), *Cities in Federal Constitutional Theory* (Oxford University Press 2022).

³⁶ Among others, Brezovnik B, Hoffman I and Kostrubiec J (eds), *Local Self-Government in Europe* (Lex Localis 2021).

³⁷ Saunders C and Arban E, ‘Federalism and Local Governments’ in Erika Arban (ed), *Cities in Federal Constitutional Theory* (Oxford University Press 2022); Steytler N, ‘Local Governments in Federal Systems: Deepening Federal Democracy?’ in John Kincaid and J Leckrone (eds), *Teaching Federalism. Multidimensional Approaches Elgar Guides to Teaching* (Edward Elgar Publishing 2023).

³⁸ Allegretti U, ‘Participatory Democracy in Multi-Level States’ in Cristina Fraenkel-Haeberle and others (eds), *Citizen Participation in Multi-Level Democracies* (Brill 2015) 211. Additionally, Hendriks F, Loughlin J and Lindström A, ‘European Subnational Democracy: Comparative Reflections and Conclusions’ in John Loughlin, Frank Hendriks and Anders Lindström (eds), *The Oxford Handbook of Local and Regional Democracy in Europe* (Oxford University Press 2012) 741: “Democratic innovation often centres on the local level. [...] Local democracy serves as a field of democratic experimentation that also influences supralocal institutions of democracy. Quite often, democratic innovations travel ‘upwards’ in the system of home administration. [...] Local government is also in the frontline [...]”. See also Palermo F, ‘Regulating Pluralism: Federalism as Decision-Making and New Challenges for Federal Studies’ in Francesco Palermo and Elisabeth Alber (eds), *Federalism as Decision-Making. Changes in Structures, Procedures and Policies* (Brill Nijhoff 2015) 506. More recently, Trettel M, *La Democrazia Partecipativa Negli Ordinamenti Composti: Studio Di Diritto Comparato Sull’incidenza Della Tradizione Giuridica Nelle Democratic Innovations* (Edizioni Scientifiche Italiane 2020) 225-235.

³⁹ See also Blank Y, ‘Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance’ [2010] *Fordham Urban Law Journal* 533.

5 Subsidiarity in the EU and its forgotten meaning

Shifting our gaze from subsidiarity in Italy to subsidiarity in the legal order of the European Union, Article 5 TEU clearly provides only for the vertical significance of subsidiarity. In a nutshell, through this article, the EU legal order recognizes as (vertical) subsidiarity the allocation of competences among the different levels of government – supranational, national, regional, local – making it a legal-political⁴⁰ principle which stands as a constitutional cornerstone of the EU multi-level construction. The principle has a concrete impact on legislative procedures where, according to the Lisbon Treaty, the role of national parliaments has been strengthened, together with that of the Court of Justice of the EU (CJEU) in monitoring compliance with the principle, and that of the Committee of the Regions.

There are three main interconnected criticisms raised by scholars, which make us question the EU's full understanding of the principle of subsidiarity: its difficult justiciability; its centralizing effect; and the complete disregard of its subnational dimension. The first criticism points to the objective difficulties in safeguarding subsidiarity before the CJEU: that is because the Court's usual interpretation uses the principle as a tool for reinforcing the EU's aim of efficiency, instead of as a safeguard clause for autonomy of member states and their subnational entities⁴¹. This leads to the second aspect, which is the centralising rather than decentralising effect of the principle, through the endorsement of a model of subsidiarity-as-efficiency: this in practice allows an increase of competences concentrated at the EU level⁴². Thirdly, because of that, the ability of subsidiarity to provide for any meaningful role in subsidiary control to local and regional authorities seems to be totally overestimated according to its current formulation and implementation⁴³.

All of that brings us back to the original debate in the 1990s over the allocation of competences between the EU as a political entity and the member states. Back then the first explicit introduction of subsidiarity in EU primary law⁴⁴ was seen as a solution to this issue. It is interesting to report that this debate originally included three main understandings of the principle⁴⁵: 1) British conservative ideology; 2) German federalism; 3) Catholic social doctrine. The first perspective was essentially advocating for subsidiarity as a reflection of a major concern about limiting the European Community's power and advancing nation-states' primacy. German federalism, on the other hand, advocated for subsidiarity in accordance with the need for a constitutionalised static division of powers and duties between levels of government, with a long-term vision of the EU as a federal structure on the model of the German federal system. Lastly, the Catholic social doctrine approach to subsidiarity stands out from the two others for its focus on the role that private individuals can play in contributing to the common good. This was also grounded in the idea that the State has gone much beyond its limits by interfering in the inner sphere of individuals and usurping the functions of smaller societal groups (the family, small associations, other local communities). In the light of that, this perspective envisioned subsidiarity as the principle able to grant support and recognition to smaller groups and individuals, which accordingly would be able to accomplish tasks related to societal organization more effectively. All in all, among

⁴⁰ Pazos-Vidal S, *Subsidiarity and EU Multilevel Governance. Actors, Networks and Agendas* (Routledge 2019) 1; Panara C, 'The Enforceability of Subsidiarity in the EU and the Ethos of Cooperative Federalism' (2016) 22 *European Public Law* 306; Craig P, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 *Journal of Common Market Studies* 72-87.

⁴¹ Panara C, 'Subsidiarity v. Autonomy in the EU' (2022) 28 *European Public Law* 269-296.

⁴² Millon-Delson C, *Il Principio Di Sussidiarietà* (Giuffrè Editore 2003) 67 (translated from the original *Le Principe de Subsidiarité*, Presses Universitaires de France 1993); Nicolaïdis K and van Zeven J, 'Polycentric Subsidiarity' in Josephine van Zeven and Ana Bobić (eds), *Polycentricity in the European Union* (Cambridge University Press 2019) 86-88; Cahill M and O'Sullivan G, 'Subsidiarity and the City: The Case for Mutual Strengthening' in Erika Arban (ed), *Cities in Federal Constitutional Theory* (Oxford University Press 2022).

⁴³ Finck M, 'Challenging the Subnational Dimension of Subsidiarity in EU Law' (2015) 8 *European Journal of Legal Studies* 5-17; van Zeven J, 'Local Governments as Subjects and Objects of EU Law: Legitimate Limits?' in Samo Bardutzky and Elaine Fahey (eds), *Framing the Subjects and Objects of Contemporary EU Law* (Edward Elgar Publishing 2017) 123-44.

⁴⁴ Before that, it should be noted that the first implicit introduction of subsidiarity as a legal principle can actually be traced back to Article 4(3) of the 1985 European Charter of local self-government of the CoE: Himsworth CMG, *The European Charter of Local Self-Government: A Treaty for Local Democracy* (Edinburgh University Press 2015) 45. Additionally, Boggero G, *Constitutional Principles of Local Self-Government in Europe* (Brill 2018).

⁴⁵ On these three roots, Peterson J, 'Subsidiarity: A Definition to Suit Any Vision?' (1994) 47 *Parliamentary Affairs* 117-119, and Wilke M and Wallace H, 'Subsidiarity Approaches to Power Sharing in the European Community' [1990] *RIIA Discussion Paper* no.27 1-43.

these competing visions, it was the first one that prevailed and became the mainstream one, in line with a clearly bi-centric perspective that looks only at the vertical dynamic between the EU and national levels of government⁴⁶. The horizontal dynamic between levels of government and private individuals and groups, therefore, was in this way completely left out of the wording of Article 5 TEU⁴⁷. In this sense the Treaties do not contain a *summa* of subsidiarity, but a limited and far from all-inclusive version of it.

This pluralism of meanings of subsidiarity, however, cannot be denied merely based on the text of the Treaties, and it is clear that the meaning that was eventually given to the EU principle of subsidiarity constitutes only a partial understanding of it in so far as it shapes subsidiarity according to EU member states' needs by looking only at levels of government. Notwithstanding that, it is interesting to observe that the horizontal meaning provided by the understanding of the Catholic social doctrine which has been left out is fundamental in the European constitutional discourse for two main reasons: on one hand, because it is the one that grants recognition to the role that private individuals can play; on the other hand, and most importantly, because it has effectively taken up the centuries-old tradition of social philosophy.

In fact, subsidiarity concerns not only territorial organisation but also, essentially, the organisation of State-individual relations. In this sense, it constitutes a pre-legal principle, whose roots are to be found in the constant tension between individuals' liberty and autonomy in contrast with the role exercised by a higher authority⁴⁸, and in the constant search for a balance between human dignity and the common good⁴⁹. Subsidiarity as a legal principle builds upon centuries-old conceptualisations⁵⁰: from Mosaic law as the earlier reference ever identified, which advocated for the highest possible decentralization of power⁵¹, to the Greek political thought of Aristotle, who understood politics as the government of autonomies; from Medieval Scholasticism and the idea of a subsidiary society articulated in a multitude of autonomous groups and units cooperating with a view of a common destiny to the later federalist thought (among the others, Althusius); from State theorists (de Tocqueville and Hegel among others), to the liberal current which advocates for non-interference by the State towards lower levels of authorities (for example, Locke). The Catholic social doctrine of the 19th century constitutes only the modern reference to subsidiarity, which, however, builds on the previous centuries-old tradition of social philosophy. In light of that, subsidiarity should be regarded as a truly European principle which concerns the tradition of the history of thought.

In the light of all this, if there is no question that the contemporary EU understanding of subsidiarity is limited to its vertical dimension, at the same time it cannot go unnoticed that some implicit traces of the forgotten horizontal dimension of this principle are present in some aspects of the EU legal order. Firstly, in the TEU preamble (*"decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity"*) and in Article 10(3) TEU (*"decisions shall be taken as openly and as closely as possible to the citizen"*), even though both statements constitute more a declaration of intent than concrete substance. Secondly, its substance is recalled by some other constitutional principles: this is

⁴⁶ Subsidiarity was introduced as a safeguard tool *"to placate those member states [...] who feared that too much power was shifting from the national to the European level"*: Barber NW, 'The Limited Modesty of Subsidiarity' (2005) 11 *European Law Journal* 314. See further Peterson J, 'Subsidiarity: A Definition to Suit Any Vision?' (1994) 47 *Parliamentary Affairs* 119.

⁴⁷ Vincent Ostrom already in 1996 observed that the EU principle of subsidiarity *"need to be extended to family, neighborhood, and community far beyond the realm of nation-states as contemplated by the Maastricht Accord"* (Ostrom V, 'Faustian Bargains' (1996) 7 *Constitutional Political Economy* 307).

⁴⁸ Millon-Delson C, *Le Principe de Subsidiarité*. (Presses Universitaires de France - PUF 1993).

⁴⁹ Drew J, *Reforming Local Government* (Springer 2020) 123; Drew J and Grant B, 'Subsidiarity: More than a Principle of Decentralization—a View from Local Government' [2017] *Publius: The Journal of Federalism* 4-5.

⁵⁰ The reconstruction of the following steps is made on the basis of the contribution of Millon-Delson C, *Le Principe de Subsidiarité*. (Presses Universitaires de France - PUF 1993) 7-28.

⁵¹ Gussen B, *Axial Shift City Subsidiarity and the World System in the 21st Century* (Palgrave Macmillan 2019) 200, and Giordano FM, 'Subsidiarity, a Transformative Principle for the Future of European Democracy' (2021) 4 *De Europa* 101.

the case, for example, of individuals' sovereignty⁵², solidarity⁵³, participation⁵⁴. Thirdly, outside EU primary law, it is worth mentioning the work of the European Economic and Social Committee (EESC) in so far as it contributed to the development of the concept of functional (or horizontal) subsidiarity, used for giving recognition to the public role of private players⁵⁵.

Conclusion: Horizontal subsidiarity for reinforcing local governments

In conclusion, the Italian understanding of the principle of subsidiarity differs from the traditional meaning given to this principle by the EU legal order. While the first one refers to both its vertical and horizontal dimensions (Article 118 Constitution), its EU counterpart foresees only the vertical one (Article 5 TEU). The essential difference lies in the Italian interpretation of subsidiarity not only according to the territorial (vertical) division of competences among governmental levels, but also by looking at the societal (horizontal) relationship between governmental levels and private individuals. Therefore, the innovative perspective the Italian case offers to the EU principle of subsidiarity is the rediscovery of a centuries-old tradition of the principle, together with the constitutional entrenchment of its horizontal meaning. This is also what allowed for the implementation and consolidation of the distinctive organizational model of shared administration of the commons within a wider renaissance of local governments.

However, in light of the EU's original debate in the 1990s and the historical pre-legal conceptualisation of subsidiarity, it is possible to argue that the horizontal dimension constitutes the forgotten meaning of this truly European principle. We believe indeed that there is still room in the Treaties to disclose unexplored meanings from constitutional principles, and subsidiarity has great potential in that. As we have seen, its horizontal meaning has found its most robust application in the Italian constitution, but also another member state's constitution (Poland) has preserved and rediscovered this horizontal meaning⁵⁶.

So far, the Italian case constitutes the pioneering laboratory where the forgotten meaning of subsidiarity is granting major importance to local governments in supporting new concrete forms of civic participation. In light of this experience, two main aspects should be further investigated as next research steps: 1) the growing importance of local governments around the EU that, thanks to the rediscovery of the horizontal meaning of subsidiarity, may find new ways to better support citizens in their actions towards the common good (also through the development of their own organizational models); 2) the extent to which the bottom-up norm-generating capacity of Italian local governments can influence EU law, in so far as local governments are not only passive receivers of EU and national

⁵² Gussen B, *Axial Shift City Subsidiarity and the World System in the 21st Century* (Palgrave Macmillan 2019) 227.

⁵³ In fact, "solidarity operated horizontally" (Gussen B, *Axial Shift City Subsidiarity and the World System in the 21st Century* (Palgrave Macmillan 2019) 206), being "an expression of active citizenship" towards the common good: see Ross M, 'Transnational Solidarity: A Transformative Narrative for the EU and Its Citizens?' [2020] *Acta Politica* 5.

⁵⁴ Since "participation is furthered in small communities", Føllesdal A, 'Survey Article: Subsidiarity' (1998) 6 *The Journal of Political Philosophy* 198.

⁵⁵ EESC considers subsidiarity as "the most important principle of good governance [...], not merely a principle of administrative technique and distribution of powers but the expression of a certain conception of the individual, its freedom, its responsibilities and the society it lives in" ('Opinion of the Economic and Social Committee on "European Governance — a White Paper"' (COM (2001) 428 final), OJ C 125. See further Giordano FM, 'Subsidiarity, a Transformative Principle for the Future of European Democracy' (2021) 4 *De Europa* 99-118.

⁵⁶ In the Preamble, even though only in a very broad way ("Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities". The English official translation of the text of the Constitution can be found at <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>). See Poplawska E, 'The Principle of Subsidiarity under the 1997 Constitution of Poland' [1997] *Saint Louis-Warsaw Transatlantic Law Journal* 107-20, and Arban E, 'Re-Centralizing Subsidiarity: Interpretations by the Italian Constitutional Court' (2015) 25 *Regional & Federal Studies* 137-138 (in reporting the Polish case, Arban underlines the "elasticity of this fundamental principle of EU law" at page 138).

laws, but also exporters of norms thanks to their capacity to influence higher levels of government⁵⁷. All of that becomes very relevant also considering the growing importance of local governments in multi-level systems, which federal studies has already anticipated and started to address.

After all, the horizontal meaning of subsidiarity is already implicit in the European constitutional tradition: this understanding may constitute the archetypal principle able to empower local governments and their fundamental role in furthering local democracy not only in Italy but also around the EU.

⁵⁷ On this fundamental point, Finck M, 'Fragmentation as an Agent of Integration: Subnational Authorities in EU Law' (2017) 15 *International journal of constitutional law* 1119-1134.