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Dating Cinderella: On Subsidiarity as a  
Political Safeguard of Federalism in the  
European Union

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# DATING CINDERELLA: ON SUBSIDIARITY AS A POLITICAL SAFEGUARD OF FEDERALISM IN THE EUROPEAN UNION

Giuseppe Martinico\*

## GOALS OF THE PAPER

The aim of this paper is to provide a brief overview of the debate on the subsidiarity principle. Subsidiarity is one of the most ambiguous and debated notions in law and it definitively belongs to all the legal disciplines; from EU law to constitutional and administrative law<sup>1</sup> passing through human rights law<sup>2</sup>. The debate on this principle has been enriched recently by a number of papers and books focused on the new provisions concerning national parliaments included in the Lisbon Treaty.

When dealing with subsidiarity, the impression, at the first glance, is that of a Cinderella principle because of its evanescent nature (rule or principle?) and of its difficult justiciability. This paper suggests that just a strong change in the ECJ's case-law might transform our Cinderella into a real constitutional principle.

Despite the vast existing literature<sup>3</sup>, I have decided to focus on a few, in my view, fundamental readings on this point, by attempting to describe the noble design behind the introduction of the subsidiarity principle in EU law and the re-evaluation of the weight of this concept in the practice of courts. In doing so, I started from the very recent contribution of Robert Schütze, in chapter 5 of his book, *From Dual to Cooperative Federalism: The Changing Structure of European Law*<sup>4</sup>, which defines subsidiarity as a “political safeguard” of EU federalism.

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<sup>1</sup> See the special issue of the *International Journal of Constitutional Law* (ICON) focused on subsidiarity, Vol. 4, Issue 1, 2006.

<sup>2</sup> P. Carozza, “Subsidiarity as a Structural Principle of International Human Rights Law”, *American Journal of International Law*, 97, 2003, 38 ff.

<sup>3</sup> G. Davies, “Subsidiarity: the wrong idea, in the wrong place, at the wrong time”, *Common Market Law Review*, 2006, 63-84; P. Syrpis, “In Defence of Subsidiarity”, *Oxford Journal of Legal Studies*, 2004, Vol. 24, 323-334; A. Estrella, *The EU Principle of Subsidiarity and Its Critique*, OUP, 2002; “Subsidiarity and Self-Interest: Federalism at the European Court of Justice”, *Harvard International Law Journal*, Vol. 41, No. 1, 1-128; G. Berman, “Taking Subsidiarity Seriously”, *Columbia Law Review*, 1994, 331 ff.

<sup>4</sup> R. Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law*, OUP, 2009.

The first part of the paper thus will be devoted to the analysis of this work. As will be evident after a few lines, I share the comparative approach chosen by Schütze but, despite this methodological convergence, our conclusions are different.

In the second part of the paper, I will try to show how the interpretation of subsidiarity as followed by the ECJ is misleading and, consequently, how the choice of the Lisbon Treaty to rely on the national parliaments as the most suitable watchdogs of subsidiarity<sup>5</sup> has to be regarded as unsatisfactory.

## SECTION I

### DEALING WITH COMPARISON IN EUROPEAN (LEGAL) STUDIES

#### A COMPARATIVE APPROACH TO THE EU

*From Dual to Cooperative Federalism: The Changing Structure of European Law* by Robert Schütze is grounded on a strong criticism of the classic European thought that asserts the non-comparability of the EU system with other constitutional experiences. As the author says in the Introduction, “*Coming to Constitutional Terms*”, in order to conceptualize the hybrid nature of Community law – neither international nor national law: “*European thought invented a new world – supranationalism – and proudly announced the European Union to be sui generis... The sui generis idea is not a theory. It is an anti-theory, as it refuses to search for commonalities; yet, theory must search for what is generic... However, this conceptualization simply can no longer explain the social and legal reality inside Europe*”<sup>6</sup>. Starting from these considerations, Schütze chose the federal label to describe the EC/EU, with a wish to venture a “*constitutional comparison with another Union: the United States of America*”<sup>7</sup>.

After the Introduction, the author moves on to what he calls “*the general part of the volume*”, composed of the first two chapters. In the first chapter, Schütze describes the EU as a federal union, since it is based on the idea of divided sovereignty and on the necessity to preserve diversity within unity. Nevertheless, federalism is a tricky formula which means different things, especially if compared with the constitutional dynamics in the USA; that is why in the second chapter Schütze looks at the USA in order to specify precisely what type of federation the EU is.

According to the argument in the second Chapter, both the EU and the USA are characterized by the transition from dual to cooperative federalism (and Chapters 3 and 4 are focused on the causes,

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<sup>5</sup> I. Cooper, “The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU”, *Journal of Common Market Studies*, 44, 2, 2006, 281-304.

<sup>6</sup> R.Schütze, *From Dual cit*, 3.

<sup>7</sup> *Ibidem*, 4.

conditions and consequences of such a passage in Europe), a transition characterized by the decline of constitutional and legislative exclusivity (which constitutes the premise of dual federalism). However, in the author's view, there is an important distinction between these two experiences: *"What is striking about the transition from dual to cooperative federalism in the European legal order is that – unlike its American counterpart – this development has been 'constitutionalized'"*<sup>8</sup>. How has Europe constitutionalized such a development? According to Schütze, the answer can be found in the constitutionalization of the subsidiarity principle and in the recognition of complementary competences, both defined as the "political safeguards" of the EU's federalism, borrowing the language from the American comparative law scholars, namely, the concept of the "political safeguard" of federalism used in 1954 by Herbert Wechsler<sup>9</sup>.

The fifth Chapter is devoted to this idea, and concludes the second part of the book, concentrating on the comparative excursion proposed by Schütze. According to Schütze, subsidiarity was conceived to safeguard a *"legislative space for the Member States, by restricting European legislation to situations where 'the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason for the scale or effects of the proposed action, be better achieved by the Community' (Art. 5(2) EC)"*<sup>10</sup>. It would thus represent a confirmation of the attempt to constitutionalize the shift from dual to cooperative federalism, since subsidiarity implies and can work in a field of shared competences. Another political safeguard is represented by complementary competences: their goal is to limit the legislative capacity of the supranational level, keeping a safe room for the national legislators.

These two instruments represent, in Schütze's view, a clear choice for cooperative federalism in the EU and the most important difference between the American and the European experiences: *"However, even if the exact degree of legislative space guaranteed to the Member States under the principle of subsidiarity and Europe's complementary competences is still unclear, the very existence of both safeguards represents, in and of itself, a constitutional choice in favour of cooperative federalism. Europe's constitutional commitment to this federal philosophy thus contrasts with the laissez-faire approach in the American federal order"*<sup>11</sup>.

The sixth chapter is an *excursus*, as the author acknowledges, devoted to the particular case of the domain of foreign affairs – at first glance, a real exception to the cooperative federal trend which characterizes Europe. Actually, as Schütze points out, although in this field the federal philosophy historically followed by the EU is that of dual federalism, the ambiguity of some leading cases, like

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<sup>8</sup> Ibidem, 9.

<sup>9</sup> H. Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government", *Columbia Law Review*, 1954, 543 ff.

<sup>10</sup> R.Schütze, *From Dual cit.*, 284.

<sup>11</sup> Ibidem, 286.

*ERTA*<sup>12</sup>, and the emersion of shared competences in the external sphere<sup>13</sup> seems to favour a shift toward more cooperative federal dynamics in this area as well.

In the concluding chapter Schütze sums up the main steps of his reasoning by insisting on the necessity of abandoning the outdated philosophy of dual federalism, as not capable of tackling the co-existence of standards which characterizes many policies.

In my view, this volume presents two important merits; the constitutional and comparative approach adopted, and the subsequent importance given to the federal vision in understanding the “*changing structure of European Law*”.

As for the comparative approach, recalling what Schütze writes in the *Introduction*, it can be said that in Europe the premise of EU studies is to stress the peculiarity of the EU and the impossibility of categorizing it by looking at other historical experiences. In the United States, instead, the premise of such comparative lawyers is the comparability between the US federal experience and the EU integration process. Nevertheless, such a clear-cut dichotomy has known relevant exceptions: for example, it is possible to recall that Cappelletti and Dehousse, European authors (although Cappelletti taught at Stanford too), do not share the former methodological strategy.

In this respect Stein, Hay and Friedrich (among others) *de facto* operated a process of scholarly “exchange”, studying Europe in the light of the US experience, because the latter was the most well-known experience for them (although many of them were Europeans transplanted to the US and became very important scholars there). This kind of comparison has also been pursued by the first pupils of such masters; the Italian Maurizio Cappelletti is one example<sup>14</sup>.

Schütze’s book is indeed a direct, if late, offspring of this scholarship, and his work has another important merit: it brings the federal option to the heart of the debate (it is well-known that in European studies federalism is sometimes referred to as the “infamous F-word”<sup>15</sup>). In this respect, Schütze’s attempt may be contextualized within an atmosphere of a general rethinking of the *Federal Vision* (from the title of the famous volume recently edited by R. Howse and K. Nicolaidis)<sup>16</sup>, and Schütze’s volume will certainly make an important contribution to the “rehabilitation” of the federalist approach.

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<sup>12</sup>ECJ, C- 22/70, *Commission vs. Council* (ERTA), *ECR*, 1971, 263.

<sup>13</sup> See the examples given at *ibidem*, 342, footnote no 204.

<sup>14</sup>Cappelletti was the co-editor of one of the most important editorial projects in EU studies in 1985; M. Cappelletti-M. Seccombe- J.H. Weiler (eds.), *Integration through Law*, Walter de Gruyter, Berlin, NY, 1985.

<sup>15</sup>M. G. Puder, “Constitutionalizing the European Union. More than a Sense of Direction from the Convention on the Future of Europe”, *Fordham International Law Journal*, 2003, 1562 ff., 1583.

<sup>16</sup> K. Nicolaidis -R. Howse (eds.), *The Federal Vision. Legitimacy and Levels of Governance in the US and EU*, OPU, Oxford, 2001.

## SECTION II

### SUBSDIARITY AS A CONSTITUTIONAL PRINCIPLE: ITS IMPACT ON THE “FORM OF UNION”

#### SUBSDIARITY AS A “NOBLE DREAM”: ITS IMPORTANCE IN A MULTILEVEL SYSTEM

After having summed up the main contents of Schütze’s recent volume, I will move to the section devoted to subsidiarity by attempting to show how this concept was originally conceived and how the practice frustrated the original design.

Subsidiarity has a very important role in the functioning of the EU, working as an elevator in the relationship between the EU’s centre and the periphery, which constitutes the heart of the notion of the “form of Union”. This notion recalls the formula “form of State” by which Costantino Mortati<sup>17</sup> meant, on one hand, the relationship among the classical elements of the State (sovereignty, territory and people) and, on the other, the fundamental goals of the State. In this sense, the notion of “form of State” is connected to the concept of fundamental high policy goals (i.e., “political lines”). Under the formula “form of State” Mortati grouped classifications related both to the vertical separation of powers (e.g. unitary versus de-centralized State, with regard to the relationship between the territorial entities; Liberal State versus Welfare State, with regard to the relationship between market and State), as well as to the horizontal separation of powers (e.g. democratic versus authoritarian State). As Mortati himself pointed out, the notion of “form of State” represents the teleological moment of the form of government (that is, the whole of relationships between sovereign power)

By further developing this polysemy, Palermo<sup>18</sup> concludes that the “form of State” concerns both the (vertical and horizontal) distribution of powers and the axiological dimension of a legal order.

In this paper I am going to focus on the first meaning of this formula, understanding the “form of Union” as the relationship between the centre and the periphery in the multilevel context. In a multilevel system subsidiarity works as an element connecting the different levels of governance and government and as a technique of making flexible the map of competences drawn by the Treaties or the Constitutions. As we know, despite the importance, from a formal point of view, of the application of such a principle, it has encountered many difficulties and the ECJ’s case law has remained, over the years, extremely ambiguous. Confirmation of such ambiguity may be found in the European legislation. When looking at the language used in the documents concerning the

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<sup>17</sup> C. Mortati, *Le forme di governo*, Cedam, Padua, 1973, 1 ff.

<sup>18</sup> F. Palermo, *La forma di Stato dell’Unione europea. Per una teoria costituzionale dell’integrazione sovranazionale*, Cedam, Padua, 2005, 41 ff. L. Mezzetti, “Principi costituzionali e forma dell’Unione”, in P. Costanzo, L. Mezzetti and A. Ruggeri (eds), *Lineamenti di diritto costituzionale dell’Unione Europea*, Giappichelli, Turin, 2006, 57-145.

structural funds, for example, the subsidiarity principle seems to be limited to its “negative” aspect: the preference conferred upon the subjects closest to the citizen.

At an economic level, it has been said that “*the principle of subsidiarity means that the production of public goods should be attributed to the level of government that has jurisdiction over the area in which that good is public*”<sup>19</sup>. Starting from this definition, which seems to neglect the “activist” side of the principle (that is, the one postulating the intervention of the central level for the realization of the mentioned conditions), we can appreciate the remark made with regard to additionality and to partnership that implies collaboration among the European, national and regional administrations.

However, as defined in the *Oxford English Dictionary*, subsidiarity implies the concept “*that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level*”<sup>20</sup>. This implies both a constitutional preference for the exercise of a competence by the periphery and a “*constitutional restraint on the exercise of those competences*”<sup>21</sup> for the centre. As a result such a notion means both a aspect (restraint on the exercise of the power) and a aspect (preference for the exercise of the power given to the periphery). In the accordance with a preference for the local level, subsidiarity has been conceived as acknowledging “*responsibility [to the EU] only for those matters which the Member States are no longer capable of dealing with efficiently*”<sup>22</sup>.

This reference to efficiency is important since it paves the way to a control on the possible EU recall of the competence that cannot be adequately exercised at local level, making subsidiarity justiciable and verifiable. This conception of subsidiarity is also present in the European Parliament’s Draft Treaty (1984) whose Preamble aimed to “*entrust common institutions, in accordance with the principle of subsidiarity, only with the powers required to complete successfully the tasks they may carry out more satisfactorily than the States acting independently*”<sup>23</sup>.

The subsidiarity principle, due to its physiology, requires a system of competences at least tending towards a repartition, and at the same time presupposes an “integrated” system like, for example, a federal system of a cooperative type. As a matter of fact, the principle, as provided in the old Article 5 of ECT, refers to a relationship between two institutional actors (a lower actor, the periphery, and a higher actor, the centre) sharing the same power and whose exercise is preferentially given, at first instance, to the subject who is closer to the citizens (i.e., the local level). Scholars usually label this

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<sup>19</sup> T.Padoa Schioppa, *Economic Federalism and the European Union*, in K. Knop et al. (eds.) *Rethinking Federalism: Citizens, Markets and Governments in a Changing World*, University of British Columbia Press, Vancouver, 154 ff., 155.

<sup>20</sup> Oxford English Dictionary, entry “Subsidiary” and “Subsidiarity”.

<sup>21</sup> R. Schütze, *From dual cit*, 246.

<sup>22</sup> Commission, *Report on European Union*, 1975, 11 ff.

<sup>23</sup> Draft Treaty, Last Recital, quoted by R. Schütze, *From dual cit*, 248.

first instance as the negative side of subsidiarity since it implies the duty of non-intervention by the centre. At the same time, this principle allows the possibility to substitute the chosen local actor if the same power can be exercised in a better or in a more efficient way by the higher subject. This way subsidiarity works as an elevator with regard to certain fungible acts that can be exercised by two institutional subjects and the substitution can be caused by an objective impossibility to carry out the requested action for the preferred actor.

Another important fact is that such an impossibility to carry out the functions has to be temporal, this way there will be no obstacles to the restitution of the power. In this respect, it has been pointed out that the subsidiarity principle works, actually, as a criterion for shifting, although not in a definitive way, the level that is supposed to intervene<sup>24</sup> and, because of its constitutional relevance, works as an element of flexibility in the system<sup>25</sup>.

This would explain why, within the Community context, subsidiarity has operated as a “*method of policy centralisation*”<sup>26</sup> rather than as a factor of valorization of the de-centred realities, in the absence of a formal catalogue of competences. Subsidiarity and competence are not, nevertheless, in a relationship of identity: in fact, it has been said that the principle of subsidiarity is not intended so much for the *a priori* formal allocation of competences, but rather for the *a posteriori* legitimation of the exercise of competences beyond those formally attributed<sup>27</sup>.

Subsidiarity has successfully operated in a context such as the German one, which does not define competences in the finalistic manner<sup>28</sup> as the ECT does (following to the French model). This worrying mingling of legal styles explains the destabilization factor that could be introduced by the subsidiarity principle, and that is why when it was introduced Toth described it as “totally alien” to the EU since it “*contradicts the logic, structure and wording of the founding treaties and the jurisprudence of the European Court of Justice*”<sup>29</sup>. This is mainly because of its “surreptitious” substitution of the flexibility clause, which has allowed the Union (and before it the Community) to acquire “*slices of competence*”, transversally instrumental to the achievement of the declared objectives, without the procedural guarantee of unanimity.

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<sup>24</sup> I. Massa Pinto, *Il principio di sussidiarietà- Profili storici e costituzionali*, Jovene, Naples, 2003, 82.

<sup>25</sup> R. Bin, “I decreti di attuazione della «legge Bassanini» e la «sussidiarietà verticale»”, in A. Rinella, L. Coen and R. Scarciglia (eds), *Sussidiarietà e ordinamenti costituzionali*, Cedam, Padua, 1999, 169 ff.

<sup>26</sup> G. Davies, “Subsidiarity as a Method of Policy Centralisation”, Hebrew University International Law Research Paper No. 11-06, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=921454](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921454).

<sup>27</sup> Massa Pinto, *Il principio di sussidiarietà*, cit., 81.

<sup>28</sup> On the enumeration techniques, see P. Carrozza, “Le ‘materie’: uso delle tecniche di enumerazione materiale delle competenze e modelli di riferimento del ‘regionalismo di esecuzione’ previsto dal nuovo Titolo V della Costituzione”, in G.F. Ferrari and G. Parodi (eds), *La revisione costituzionale del titolo V tra nuovo regionalismo e federalismo. Problemi applicativi e linee evolutive*, Cedam, Padua, 2003, 69-124.

<sup>29</sup> A. Toth, “The Principle of Subsidiarity in the Maastricht Treaty”, *Common Market Law Review*, 1993, 1079 ff.

What is matter of discussion is the high level of political discretion which would characterize the application of such a principle, because of the political nature of the control base and on the difficult verification of the efficiency and opportunity of the action. As Schütze pointed out:

*“The Maastricht definition of subsidiarity restricted the principle known under the Single European Act. Its formulation now includes two tests. The first may be called the national insufficiency test. The Community could only act where the objectives of the proposed action could not be sufficiently achieved by the Member States. This appeared to be an absolute standard. But how could this test be squared with the second test in Article 5(2) EC? That test was a comparative efficiency test. The Community should not act unless it could better achieve the objectives of the proposed action”<sup>30</sup>.*

Against this background an important contribution in the identification of the core meaning of subsidiarity was given by Commission communication on subsidiarity and by the conclusions of the European Council held in Edinburgh and the guidelines of this European Council were crystallized in the *“Protocol on the Application of the Principles of Subsidiarity and Proportionality”*:

*“For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States’ action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.*

*The following guidelines should be used in examining whether the abovementioned condition is fulfilled:*

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;*
- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States’ interests;*
- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States”.*

Now, these documents strongly connect subsidiarity and proportionality, conceiving the control on the former in a clear procedural way. As we will see later on in this work, such a connection will be taken again by the ECJ.

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<sup>30</sup> R.Schütze, *From dual cit.*, 250.

**SECTION III**  
**LAW IN ACTION (IF ANY)**  
**ITS MISLEADING APPLICATION**

All this appears against the background of the ECJ's case law, which proves extremely elusive about the principle of subsidiarity, and the impossibility for the regions (one of the favorite victims of subsidiarity misapplication) in order to challenge directly in front of the ECJ those Community acts considered to be in violation of their competences. The Court of First Instance and the ECJ have in fact always preferred not to deal with this ambiguity frontally, solving the cases challenging the legality of Community acts in the light of other arguments (perhaps already tested), without calling into question the issue of subsidiarity.

If taken seriously, control on subsidiarity would lead the ECJ to verify the necessity of higher level substitution by carrying out a costs/benefits test<sup>31</sup>. On the contrary the European case law has been ambiguous since the Tribunal of first Instance and the ECJ has almost always avoided dealing with the issue frontally<sup>32</sup>.

It is possible to distinguish several phases within the ECJ's case law in this respect and an important line in this context is represented by the Amsterdam Protocol. A first generation of cases is characterized by a very careful and integration-friendly approach followed by the ECJ in C-84/94<sup>33</sup> and C-233/94<sup>34</sup>, especially in the first case, where the Court, in responding to the British and German governments – which had linked the respect of the subsidiarity principle to the necessity of an adequate motivation for an EC act – stated:

*“Once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonize the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action, which otherwise, as in this case, leaves the enactment of the detailed implementing provisions required largely to the Member States. The argument that the Council could not properly adopt measures as general and mandatory as those forming the subject-matter of the directive will be examined below in the context of the plea alleging infringement of the **principle of proportionality**... As to judicial review of those conditions, however, the Council must be allowed a wide discretion in an area which, as here, **involves the legislature** in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion **must therefore be limited to examining***

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<sup>31</sup> See P.Mengozzi, “Il principio di sussidiarietà nel sistema giuridico delle Comunità europee”, available at , [www.lumsa.it/Lumsa/Portals/File/.../Mengozzi.pdf](http://www.lumsa.it/Lumsa/Portals/File/.../Mengozzi.pdf)

<sup>32</sup>ECJ, C-415/93 *O'Hara v. Council and Commission*, ECR1994, I-5755; ECJ, C-84/94 *United Kingdom v. Council*, ECR, 1996, I-5755.

<sup>33</sup>ECJ, C-84/94 *United Kingdom v. Council*, ECR,1996, I-5755.

<sup>34</sup>ECJ, C-233/94, *Germany v. Parliament and Council*, ECR, 1997, I-2405.

*whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion*” [emphasis added].

It is possible to infer at least four fundamental concepts from these sentences:

1. The ECJ conceives the test on subsidiarity to be an application of the proportionality test;
2. The ECJ conceives the control on subsidiarity to be a sort of *extrema ratio*, exploitable just in case of manifest error or misuse of power;
3. The control on subsidiarity touches the sensitive field of the legislative discretion and this reveals the “political” nature of this test;
4. Subsidiarity is a principle rather than a rule.

The control on subsidiarity has a strong procedural nature, it looks like the administrative control on the “*excès de pouvoir*” and this explains why a very important role in this test is played by the analysis of the motivation of the EU acts.

In another case, C-233/94, the ECJ again focused its control on the existence of a motivation:

*“Although the Parliament and the Council did not expressly refer to the principle of subsidiarity in Directive 94/19, they complied with the obligation under Article 190 of the Treaty to give reasons, since they explained why they considered that their action was in conformity with that principle, by stating that, because of its dimensions, their action could be best achieved at Community level and could not be achieved sufficiently by the Member States”*<sup>35</sup>.

After the Amsterdam Protocol something seemed to change, since the ECJ insisted on the procedural elements being taken into account in its control, the best example of this is case C-376/98<sup>36</sup>.

This was an important, although ambivalent, decision although it has not been followed in later case law (see, for instance, C-491/01<sup>37</sup>). By the way, the ECJ has always insisted on the idea of connecting proportionality, subsidiarity and deference for the legislative branch and that is why

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<sup>35</sup> ECJ, C-233/94, *Germany v. Parliament and Council*, ECR, 1997, I-2405

<sup>36</sup> ECJ, C-376/98 *Germany v. Parliament and Council*, ECR, 2000, I-8419: “Those provisions, read together, make it clear that the measures referred to in Article 100a(1) of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it”.

<sup>37</sup> ECJ, C-491/01 *British American Tobacco (Investments) and Imperial Tobacco*, ECR, 2002, I-11453.

some scholars sadly concluded that “*despite its literally presence, the principle of subsidiarity has remained a subsidiary principle of European constitutionalism*”<sup>38</sup>.

This case law explains why in the last few years all the attempts to reform the principle of subsidiarity have attempted to emphasize the procedural side of such a control, entrusting a crucial role to the national legislatures as the provisions included in the Constitutional Treaty and in the Lisbon Treaty show. The only way to limit the legislative discretion seems to be to impose procedural guarantees such as those proposed by the Constitutional Treaty and contained in the “*Protocol on the application of the principles of subsidiarity and proportionality*”.

As a result, a form of political monitoring called the “*early warning mechanism*” was provided in that Protocol. Under this measure, the Commission should transmit a draft legislative act to the national parliaments, giving them six weeks to determine if there is a violation of subsidiarity. If one-third of the parliaments decide there is a violation, the Commission is required to reconsider the proposal. In the Lisbon Treaty, there was some change<sup>39</sup>, because the time allowed for national parliaments to scrutinize draft law is raised from six to eight weeks. If one-third of national parliaments object to a draft legislative proposal on the grounds of a breach of subsidiarity – the “*yellow card*” mechanism<sup>40</sup> – the Commission will then reconsider it. In addition, if a simple majority of national parliaments continue to object, the Commission refers the reasoned objection to the Council and Parliament, which will decide the matter – the “*orange card*”<sup>41</sup>. In any case, unlike in the “*red card mechanism*”, the Commission may challenge the national parliaments’ position.

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<sup>38</sup> R.Schütze, *From dual cit.*, 256.

<sup>39</sup> See the new version of the Protocol:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0201:0328:EN:PDF>.

<sup>40</sup> Article 6 of the Protocol, “*Any national parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity*”. The yellow card mechanism is provided by Article 7.3 of that Protocol: “*Where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments ... the draft must be reviewed.... After such review, the Commission ... may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.*”

<sup>41</sup> Art. 7.4 of the Protocol: “*Furthermore, under the ordinary legislative procedure, where reasoned opinions on the noncompliance of a proposal for a legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the proposal must be reviewed. After such review, the Commission may decide to maintain, amend or withdraw the proposal.*

*If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of the national Parliaments, will have to be submitted to the Union legislator, for consideration in the procedure:*

*(a) before concluding the first reading, the legislator (the European Parliament and the Council) shall consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission;*

*(b) if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration”.*

This idea confirms the deference shown by the ECJ towards the legislatures: since subsidiarity involves political control, the best thing is entrusting its control to the political/legislative competitors of the European Parliament and Council: the national parliaments, tasked with the mission to be the watchdog of subsidiarity.

This idea relies on the view that the primary democratic organs in Europe are the national parliaments but, as the German Constitutional Court recently pointed out in its *Lisbon Urteil*<sup>42</sup>, sometimes the national parliaments underestimate this role, giving up competences or not fully understanding the importance of their role.

In this respect the *Lisbon Urteil* has been wrongly considered as a euro-skeptical judgement: the German Court did not understand the *Lisbon Urteil* as inconsistent with its basic norm, on the contrary, it considered the national legislation<sup>43</sup> strengthening the rights of the German chambers as unconstitutional. The judgement is based on a strong criticism addressed to the German Parliament, the real custodians – together with the other national parliaments – of democracy in the EU context, since it easily gave up competences, not exploiting the possibility offered by the Lisbon Treaty and not being aware of their fundamental task. This is an important case since it shows the risks existent behind the choice of relying on national parliaments as the watchdog of the multilevel system.

## FINAL REMARKS

The contribution of the constitutional lawyer to this debate probably consists in the attempt to furnish institutional and legal techniques aimed to rationalize the system and to solve the paradox of the flexible criteria that are both a resource and a threat for the European legal order. Probably a more active role for the ECJ in this field is possible, trying to connect subsidiarity and sincere cooperation between the levels of government better. In this sense, it seems useful to recall the solutions suggested by the Italian Constitutional Court: subsidiarity requires a “sincere cooperation” (“*leale collaborazione*”) between the territorial actors, concerted practices and bodies and, finally, a system of agreements among the institutional actors.

Despite the clarity of this Italian judgement, the real problem is to apply and enforce such principles, and many solutions were proposed, including the creation of new committees and institutional actors or the improvement of already existing institutions. Is it possible to transplant

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<sup>42</sup> Lisbon Case, BVerfG, 2 BvE 2/08 from 30 June 2009, available at:

[http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html).

<sup>43</sup> The object of the case was represented by three distinct statutes: first of all, the Act Approving the Treaty of Lisbon, secondly, the Act Amending the Basic Law (Articles 23, 45 and 93) and finally, the Act Extending and Strengthening the Rights of the German Federal Parliament (Bundestag) and the German Federal Council of States (*Bundesrat*) in European Union Matters.

institutional solutions already experimented within national contexts (in Germany, for example) to the supranational level?

The ECJ well knows this principle, making it autonomous from the mere internationalist principle of the *pacta sunt servanda*<sup>44</sup>. The ECJ recalled this principle for referring to different obligations: to give full implementation and application to the EU law<sup>45</sup> to provide information to the Commission<sup>46</sup>, passing through not to adopt measures in contrast with the EU acts coming into force<sup>47</sup>). The ECJ stressed its binding nature for all the State members' bodies, including national judges<sup>48</sup> and, of course, for all the European institutions<sup>49</sup>.

The principle of sincere cooperation has been codified as a fundamental element of the form of Union in Article I-5 of the old Constitutional Treaty and Article 4 of the EU Treaty<sup>50</sup> after the new Lisbon Treaty, when looking at these provisions we can appreciate the strong connection between the respect of constitutional identity of the Member States (Art. 4 EUT<sup>51</sup>) and the principle of cooperation (Art. 4(3) EUT), since the Court is also the guarantor of this respect, it will be forced to take cooperation seriously, abandoning its *administrative* approach to subsidiarity, based on its

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<sup>44</sup> See G. Ferraiuolo, "Leale collaborazione: un principio costituzionale supremo?" In S. Staiano (ed.), *Giurisprudenza costituzionale e principi fondamentali. Alla ricerca del nucleo duro delle costituzioni*, Giappichelli, 2006, 691-727, 718 ff.

<sup>45</sup> ECJ, C-71/76 *Thieffry v. Council de l'ordre des avocats de la Cour de Paris*, ECR.1977, 765; C-54/81 *Fromme v. BALM*, ECR.1982, 449; C-68/81 *Commission v. Greece*, ECR. 1989, 2965.

<sup>46</sup> ECJ, C-30/90 *Commission v. United Kingdom*, ECR,1992, I-829; C-82/03 *Commission v. Italy*, ECR,2004, I-6635.

<sup>47</sup> ECJ, *Commission v. United Kingdom*, ECR. 1981, 1045.

<sup>48</sup> ECJ, C-94/00 *Roquette Frères*, ECR 2002, I-9011; C-344/98 *Masterfoods and HB*, ECR 2000, I-11369.

<sup>49</sup> ECJ, C-99/02 *Commission v. Italy*, ECR, 2004, I-3353; C-344/01 *Germany v. Commission*, ECR.2004, I-2081.

<sup>50</sup> Art. 4 EUT: "1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

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manifest error standard- and serving as a more neutral arbiter in relations between national and European institutions, otherwise mere parliamentary monitoring might be insufficient, as the recent *Lisbon Urteil* case shows.

Another important innovation is of course represented by the introduction of a competence list in the Treaties: as we saw, subsidiarity and competence are two distinct yet strongly related concepts and, in this respect, a detailed distribution of powers in the form of Union might be useful for the ECJ, since it might help this latter implementing the constitutional nature of the subsidiarity principle under lesser political pressure.