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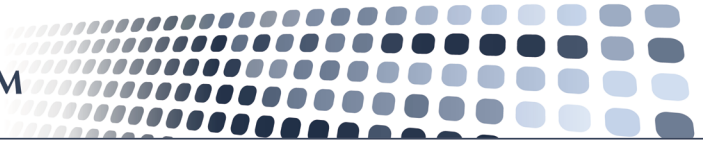


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# The impact of the cohesion policies on the “Form of Union”

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## Abstract

From a “formalistic” point of view the Regions are and have been neglected (especially in the past) in the EU law context.

To express such a situation the German constitutional lawyers used the formula “*Landesblindheit*” (legal blindness towards the territorial subnational entities). This is confirmed in the Treaties (specifically in Article 10, ECT), where it can be seen that the subjects of the Community legal order are the states, as holders of the duty to collaborate with each other, which is instrumental for guaranteeing the effectiveness of the supranational law. It could well be argued that this “regional carelessness” constitutes just one “element” of the democratic deficit of the EU.

Starting from a “broad” concept of the democratic gap (i.e. focused not only on the question of the EU Parliament’s powers) we can in fact conceive the absence of a strong legal status for the Regions as one of the most important “constitutional wounds” of the EU.

Against this legal background, the cohesion policies gave Regions a very important role in the economic dynamics of the EC/EU, forcing the political actors to “deal” with the regional blindness.

On the other hand, some political scientists have identified cases of *negative effects* of the cohesion policies on the form of the Union like, for example, the presumed improvement of the role of non-elected/bureaucratic actors at local level.

## Key-words:

*Landesblindheit*, multilevel governance, cohesion policies, Form of Union, democratic deficit



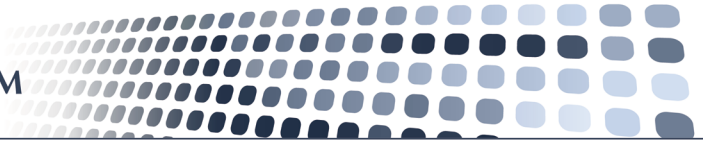
## 1. Goals of the paper: a constitutional language for the cohesion policies

The goal of this paper is to expand some of the traditional concepts of constitutionalism in a twofold direction: first of all, it will be necessary to verify the utility of classic concepts of constitutionalism in order to analyze contemporary institutions. Then, secondly, it will be necessary to ‘apply’ the constitutionalist perspective to the area of the cohesion policies. As Leonardi (2005: 2-3) has pointed out, in fact, the literature on cohesion has been enriched above all by economists and by scholars in public policies and international relations. The mentioned author has never even quoted legal scholars. What will be attempted here, after having traced back the Community process to the paradigm of the ‘federalizing processes’, is to evaluate the impact of social policies (and cohesion policies are to be included here as well) on the form of the Union. This formulation (calling up concepts such as form of State, so dear to constitutionalists) is intended to designate relations between various levels of government (national, regional and supranational); all this stemming from a vision of cohesion as a *‘dimension of relations among peoples and citizens of Europe’* (Campiglio-.Timpano 2001: 397).

This endeavor is made difficult, in the case of constitutionalists, by the fact that, historically, in Europe (and even more so in Italy), with a few celebrated exceptions, constitutionalists have not followed with due consideration the evolution of the Community legal order from its very first steps. I will try to fill this gap through the comparative method by looking at other constitutional experiences (Baldi 2003; Pierini 2003; Banting1982.)

## 2. The notion of “Form of State”

By “*Form of State*” Costantino Mortati (1973: 1 ff.) meant both the relationship between the classical elements of the State (sovereignty, territory and people) and the



fundamental aims 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<sup>1</sup>)

By further developing this polysemy, Palermo (2005: 41 ff.) concludes that the Form of State concerns both the distribution of powers and the axiological dimension of a legal order.

His research attempts to translate one of the most important categories of the Italian Constitutional scholarship in the supranational context.

The first step of his study was to verify the strength of such a notion in legal orders different from that of Italy, finding similarities between this notion and other formulas like *Staatform* (Pernthaler 1986: 188 ff.) in Austria, *forma del poder* (Rubio Llorente 1997), *sistema* or *régimen político*, *forma de Estado* in Spain, *rule of law* in UK.

In European Studies the only precedent for this research is represented by Caporaso’s attempt to distinguish three forms of State: national State, regulatory State (starting from Majone’s intuitions. Majone 1994: 78-102), and postmodern State.<sup>11</sup>

The notion of Form of State was also used by political scientists such as Daniel Elazar when he wrote about the presumed dichotomy between Unitary or Federal form of State (Elazar 1990).

In his pioneering study, Palermo links the notion of integration to the form of State and points out the constitutional relevance of such a connection by insisting on two elements:

‘Although the integration is not an autonomous constitutional subject, it is a constitutionally relevant moment as the glue between the forms of State (integrated and so not exhaustive)’. (Palermo 2005: 229)



In this way, Palermo distinguishes two possible forms of State in the European context: the national and the supranational, which are each assumed to have their own constitutional dimension (Palermo focuses on the axiological meaning of the notion of Form of State).

This shows the interlaced nature of the system between the levels and their mutual implications.

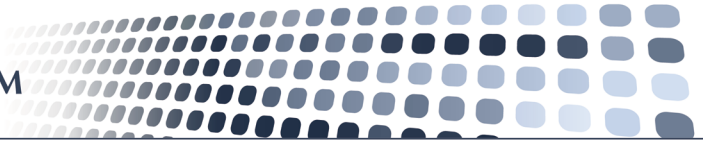
By overcoming the dualism between monism and dualism, Palermo uses the notion of integrated form of State (that is, the whole of fundamental principles of a legal order).

The constitutional law of integration would be similar to the common law, founding itself on a legal order which pre-exists the State, on a wide production at regulative level, and on the adjudicative activity of a jurisdictional system which is above all remedial (Palermo 2005: 232).

Palermo's intuitions represent a starting point, because they insist on the "complex" nature of the European Union.

As a matter of fact, the EU, like all other complex systems, is characterized by such features: non-reducibility, unpredictability, non-determinism, non-reversibility. It is suggested here that the notion of complexity can offer a very important contribution (in terms of dynamism) to the multilevel constitutionalism theory. The bridge of this interlaced (from the original meaning of the term *complex*) system is provided by the constant exchanges among levels. By the formula *constitutional synallagma* it is to be understood the whole of flows, practices and rules which circulate from one level to another in a twofold direction (from top to bottom and vice-versa), enriching in a mutual way the European Constitution, which is a chameleonic and never-ending process of constitutional coordination. The bridge linking the levels is represented by Art. 234 ECT: thanks to this provision, the ECJ cooperates with the judges in producing its interpretative sentences. The latter are typical examples of cultural sources of law, which give new blood to the constitutional synallagma (Martinico 2007: 205-230).

This complexity reveals the interlaced nature of the Form of Union and implies -at the same time- the irreducibility of the EU to one of the legal tradition of its components, as I tried to point out above.



It is preferable to use the formula *Form of Union* instead of *Form of State of the Union* in this paper. When writing about the Form of Union, Mezzetti (Mezzetti 2006: 57-145) chose a similar option and decided to focus on the principles of the EU legal order, privileging in that way the axiological side of the notion.

A focus on the other side of this notion is also to be valued, that is to say, the relationship between the centre and the periphery in the multilevel context, in order to describe the impact of the cohesion policies on the multilevel constitutionalism and governance focusing on the subnational level: precisely, the regional one.

### 3. The possibility of a supranational Welfare

Is a supranational welfare possible in a context without an axiological homogeneity? This question was analyzed in multicultural contexts such as that of Canada by Banting and Kymlicka.

In their study they demonstrate the non exclusive relationship between solidarity and cultural homogeneity.

Those who support the opposite vision identify three kinds of trade-off effects between multiculturalism policies (MCPs) and Welfare policies (WPs):

- 1) the *misdiagnosis effect*, by which 'MCPs lead people to misdiagnose the problems that minorities face. It encourages people to think that the problems facing minority groups are rooted primarily in cultural "misrecognition", and hence to think that the solution lies in greater state recognition of ethnic identities and cultural practices. In reality, however, these "culturalist" solutions will be of little or no benefit, since the real problems lie elsewhere' (Banting- Kymlicka<sup>2004</sup>).
- 2) The *corroding effect*, by which: 'MCPs weaken redistribution by eroding trust and solidarity amongst citizens, and hence eroding popular support for redistribution. MCPs are said to erode solidarity because they emphasize differences between citizens, rather than commonalities' (Banting- Kymlicka<sup>2004</sup>).



- 3) The *crowding out effect*, by which: ‘MCPs weaken pro-redistribution coalitions by diverting time, energy and money from redistribution to recognition. People who would otherwise be actively involved in fighting to enhance economic redistribution, or at least to protect the WS from right-wing retrenchment, are instead spending their time on issues of multiculturalism’ (Banting- Kymlicka<sup>2004</sup>).

Cultural heterogeneity would, in fact, weaken *trust and national solidarity across ethnic/ racial lines* (Banting 2005) then ‘multiculturalism policies that recognize or accommodate ethnic groups tend to exacerbate any underlying tension between diversity and social solidarity, further weakening support for redistribution’ (Banting 2005).

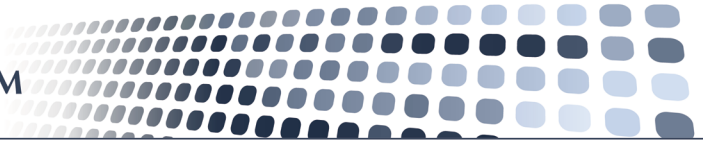
As Banting concludes ‘there is a tension between the ethnic diversity of one’s neighborhood and levels of trust in neighbors, even when one controls for all the other factors that might influence trust, such as economic well-being, education, gender, age and so on’, but: ‘Many analysts simply stop at this point, and assume that diminished trust necessarily weakens support for redistribution... There is no statistically significant negative relationship between multiculturalism policies and growth in social spending across OECD countries’ (Banting 2005).

It is suggested here that these conclusions can be used in order to support the possibility of a supranational dimension. Despite the differences between Canada and the EU expressed, among the others, by Weiler, one can argue that the former can be a good comparison term for the latter.

Some constitutional readings of the Social policies of the EU provided so far have emphasized the role of the principle of equality, seen as a key to read the Welfare dimension of the EU (de Burca 2005).

Other scholars, instead, have focused on solidarity without giving a precise content to this concept. The second reading of the EU social dimension seems more valid, but it is still necessary to add something. First of all: what does solidarity mean in a supranational context? Thus, why are the cohesion policies not included in the content of EU Social policies?

One could thus surmise that cohesion policies should be read in light of the constitutional principle of solidarity, which belongs to the European constitutional

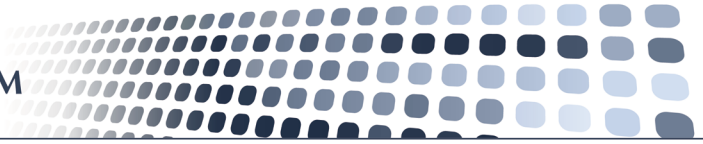


heritage. The considerations made by Pizzorusso (2002: 69) with regard to the impossibility of tracing the principle of substantial equality back to the European constitutional heritage could perhaps lead to a similar conclusion, even in the case of the solidarity principle. According to a reconstruction carried out by Somma (2003: 179-213), it is nevertheless impossible to ignore the several references to a solidarity dimension (read not only as a framework for duties justifiable in the light of superior interests) present in the European constitutions (Articles 16, 22 and 24 of the Greek Constitution; Article 81 of the Portuguese Constitution, Article 9 of the Spanish Constitution). Somma also adds all those constitutional provisions related to the substantial side of the equality principle, disconnecting the notion of solidarity from the constitutional duties dimension (see, for example, Art. 2 of the Italian Constitution). One can also stress further elements present in the Constitutions of the new EU member states: Art. 16, 17 Const. of Hungary; Art. 28 Const. of Estonia; Art. 35 and following of the Const. of Slovakia; Artt. 64 and following of the Const. of Poland).

Starting from these assumptions and looking at national constitutions, European Treaties and other “forms” of EU Law (ECJ case law, normative acts, including soft law and the EU Charter of fundamental rights), it is possible to provide some content to the supranational dimension of solidarity:

- a) Solidarity as a framework of rights of subjects characterized by situations of asymmetry (the reference to consumers as ‘weak subjects’ ceases therefore to surprise). This is solidarity according to the Nice Charter.
- b) Solidarity as a framework of duties (a key example being the second part of Article 2 of the Italian Constitution regarding binding duties), invoking a common belonging (Art. 10 ECT). The positive side of this ‘community building’ is given by Article 308 of the ECT.
- c) Solidarity as a principle aiming to characterize the Union (Preambles of the Union Treaties, Art. I-2 and I-3 of the Constitutional Treaty for Europe (and 2 and 3 of the EUT after the possible entry into force of the Reform Treaty).

If the first version of solidarity is admittedly vague, the second one is particularly relevant due to the fact that it testifies to the particular nature of the Community. The positive side of this ‘community building’ with aims other than national aims is given in



Article 308 of the ECT. This is a genuine “*catch-all clause*” that provides for the possibility of the Council, acting unanimously upon a proposal from the Commission and after consulting the European Parliament, to take the necessary measures for the realization of any one of the aims of the Community, should the Treaty not have provided the necessary powers for the Community.

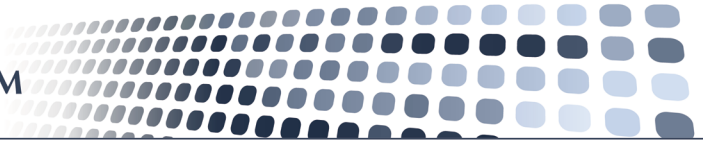
#### 4. The cohesion policies as a part of the supranational welfare dimension

Cohesion is one of the tasks of the Community, as is obvious from Article 2 ECT (where, among others, a distinction is made between ‘economic and social cohesion and solidarity’) and Article 3, k)<sup>III</sup> of the ECT. It is also mentioned in Article 16 ECT regarding services of general economic interest, which talks of “*promoting social and territorial cohesion*”, leaving out the term ‘economic’ and replacing it with “*territorial*”.

Nevertheless, distinguished scholars on this issue favor a reading for which a systematic corroboration of Article 16 ECT and Article 3 would be necessary. In this sense, it is interesting to stress the choice expressed in the Constitutional Treaty (and in the Reform Treaty) where the word constantly accompanies the notion of economic and social development: e.g., Art. I-14 (Art.4 of the Treaty on the functioning of the EU, TFEU, if the Reform Treaty will entry into force) which provides that the policies regarding economic, social and territorial cohesion fall within the shared competences areas. Another example is provided by Art. III-416 (Art. 326 TFEU according to the Reform Treaty), which identifies a limit to the actions of reinforced cooperations in economic, social and territorial cohesion (together with common market).

Nevertheless, however undeniable is the still market-friendly spirit of the Treaty, one ought to point out the presence of some collaborative clauses between the reasons of the market and those of welfare.

One also needs to mention here the provisions of Article 136, c.3, ECT, where a functional common market is seen as a prerequisite for the harmonization of welfare systems. Free market and welfare objectives are therefore joined together, without viewing the former as an “obstacle” for the realization of general welfare objectives.



To overcome the presumed weaknesses of the European social dimension, it is necessary to complete the framework by including in this EU Social model the cohesion policies as well.

In the EC Treaty, an entire Title (the XVII) is devoted to social and economic cohesion and in Article 158 one can find a definition of economic and social cohesion, being understood as instrumental for the aim of pursuing the ‘*overall harmonious development*’ of the Community. The Treaty specifies that ‘the Community shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favored regions or islands, including rural areas’. Article 159 recalls how Member States must coordinate their economic policies, enumerating the instruments of the cohesion policy (the European Agricultural Guidance and Guarantee Fund, the European Social Fund; the European Regional Development Fund, to which the European Investment Bank and other existing financial instruments are added). Among the structural funds, a special role should be recognized to the Social Fund, regulated in Title XI (“Social policy, education, vocational training and youth”) by Articles 146, 147 and 148 of the ECT. The “geography” of the provisions regarding the ESF proves the close connection between social policies (Art. 136 and Art. 137 ECT) and cohesion instruments. Relevant for this reasoning is Title XV of the ECT regarding trans-European networks, given the reference made by Article 154 to the aims spelled out in Article 158, which opens the Title on economic and social cohesion. This sheds light onto the particular connection between market, infrastructure networks and social and economic cohesion and, in certain respects, it is also present in the White Paper on “*Growth, Competitiveness and Employment*”, the so-called Delors Report.

This part of the paper deals with the reductive vision according to which the cohesion policies cannot be brought back to the constitutional principle of solidarity. The possibility of including the cohesion policies in the welfare dimension of EU depends on this.

In fact, the argument that ‘Title XVII...exclusively expresses an objective in terms of the narrowing of the gaps between various levels of economic development’ (Balboni 2001: 53) is questionable for five main reasons. The first reason is the wealth redistribution factor (similar to the one characterizing social dynamics within the Member States), even if limited (at least directly) to the territorial level (similar to the principle of Article 119 of the



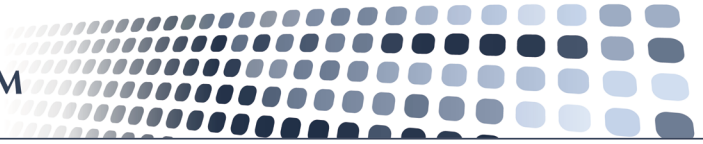
Italian Constitution). Another important example of this argumentation is provided by the Canadian experience of the equalization payments founded on section 36 of the Constitution Act of 1982. Traditionally, redistribution policies are founded on a common sense of belonging, a spirit of solidarity in a homogenous community: a confirmation of this could be found, for example, in the history of State-building according to Rokkan's theory.

Following his reasoning, the ethnic, religious, social and economic disparity of pre-modern Europe has been reduced by the creation of the relatively homogeneous Western European states.

The development of a Welfare State presumes the building of a strong national community and provides a substantive complement to political democracy.

Recently, scholars like Kymlicka, Banting, Alesina (2001) have studied the "tension" between redistribution and heterogeneity in a multicultural context, in order to understand if multiculturalism policies that recognize or accommodate ethnic groups tend to exacerbate any underlying tension between diversity and social solidarity, further weakening support for redistribution.

The limitation of the redistribution factor to the individual-targeting policies is a big mistake, which does not find confirmation in comparative experience. Another clear proof of the link between social policies and cohesion is given by the rules of the ECT regarding the ESF, as was discussed above. The third point is the change of the EU context. It seems evident that the latest trend of supranational constitutionalism is characterized by the proclamation of the EU Charter of fundamental rights (although it belongs to the vagueness of soft law). It is impossible to analyze here the several theories advanced in order to give it a strong legal value, but one can recall that it codifies many principles contained in ECJ's case law, or in the common constitutional traditions of the Art. 6 of EUT. Although the Charter does not represent an earthquake in the constitutional background of the EU, it does show its political attempt to overcome the economic-only version of Community life. Deep implications for the form of Union (as defined above) come from the horizontal clauses of this document. In this sense, if the Reform-Treaty enters into force the shift toward a strong supra-nationalism will be evident. A part of this is undoubtedly the language of rights (social rights specifically) which characterizes this phase of European life, and it is important to take care of this aspect when analyzing the



dynamics of the protection of European entities (citizens or countries). Last but not least, there are two other “philosophical” points.

The argumentation in question here shows a reductionist vision of the notion of “development”, because it neglects Sen’s advice about the link between development and human rights, as also identified in many European documents, limiting development to the improvement of productiveness/output. This vision is often refused by official documents of the EU, for example the publications related to cooperation for development. Nevertheless, it reveals a Manichean (black or white) vision of social sovereignty. It is thus contestable whether there was a complete loss of social sovereignty for the States (the idea of a negative integration as described by Scharpf, 1999: 51).

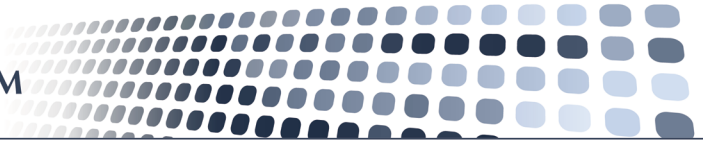
Such an approach cannot see a positive integration because it looks for an exclusive actor of this integration, while positive integration has a multilevel dynamics and it is articulated in a multilevel way: in this sense the State could play a fundamental role in social policies and, at the same time, the EU does not need to centralize this field of public activity.

## **5. The impact of social policies (including the cohesion policies) on the Form of Union. The adopted notion of democratic deficit**

The debate on the democratic deficit has always been characterized by one great simplification: the reduction to the question of the lack of European Parliament’s powers. This approach is questionable because it tends to isolate the question from other connected issues: the weakness of the European parties, the composition of the other European institutions, the restrictions to the access to the ECJ for actors such as the Regions, the perennial violation of the principles of conferral and subsidiarity and the lack of a clear system of legal sources.

As one can easily infer, several of these issues are strongly interrelated: for example, the problem of the violation of subsidiarity is linked to that of the lack of the Regions’ direct access before the ECJ (Dani, 2004: 181 ff).

In this part of the paper I will try to connect the role given to the Regions by the cohesion policies to some of these democratic issues.



As a preliminary stage it ought to be said that it is possible to link cohesion policies to both negative and positive effects on the democratic deficit.

## 6. The possibilities offered by cohesion policies

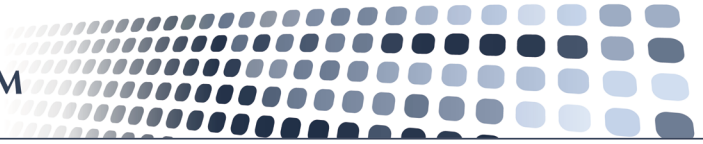
Traditionally, the history of the EC has been ungenerous towards the sub-national entities, but more recently something new has happened thanks to a progressive improvement of the Regions in the EU context.

Cohesion policies, in fact, make regions very important actors in the economic dynamics of the EU and this could contribute to overcome the *Landesblindheit*.

The first proof of the impact of social policies on the Form of Union could be the reevaluation of regions usually neglected in the legal dynamics in Europe.

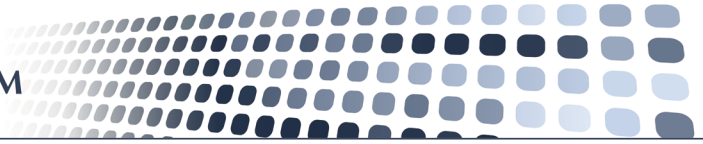
The 'legal' territorial blindness (*Landesblindheit*) of the Union towards the Regions finds its confirmation in the wording of the Treaties (specifically in Article 10, ECT), where it is noted that the subjects of the Community legal order are the States, holders of the duty to collaborate with each other, which is instrumental for guaranteeing the effectiveness of supranational law. Nevertheless, the ECJ has partially reconsidered its own position following the increase in importance of decentralization processes within domestic systems. The *Konle* case, concerning a disagreement between a citizen and the Austrian administration, was the outcome of a preliminary ruling *ex* 234 ECT.

The Court also added that: 'subject to that reservation, Community law does not require Member States to make any change in the distribution of powers and responsibilities between the public bodies which exist on their territory'. The only condition imposed by the Community judge was that 'the procedural arrangements in the domestic system enable the rights which individuals derive from the Community legal system to be effectively protected, and it is not more difficult to assert those rights than the rights which they derive from the domestic legal system'. In its reasoning, the ECJ admitted that 'in Member States with a federal structure, reparation for damage caused to individuals by national measures taken in breach of Community law need not necessarily be provided by the federal State in order for the obligations of the Member State concerned under Community law to be fulfilled'. In the *Haim* case, the Court restated that 'Community law



does not preclude a public-law body, in addition to the Member State itself, from being liable to make reparation for loss and damage caused to individuals as a result of measures which it took in breach of Community law'. As was pointed out in the case law commentary (Saggio: 2001: 223-242) it still remains to be clarified whether it would eventually be possible to talk of an exclusive liability of a sub-state public entity or whether this liability will always be concurrent with the one of the State. Moreover, the relationship between the two liabilities remains to be clarified as well. These judgments must be read together with the interesting provisions of the Constitutional Treaty (and of the Reform Treaty) regarding the Protocol on subsidiarity, and finally the provisions in III-365, 3 (Art. 263 of TFEU after the possible entry into force of the Reform Treaty). According to this article: "The Court of Justice of the European Union shall have jurisdiction under the conditions laid down in paragraphs 1 and 2 in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives'. It is difficult to understand the weight of the cohesion factor on this development, but it is interesting to recall the economic profile of the EC evolution. What is meant here is that in the history of the EC the legal label has always come after the economic change. In this sense, one could infer that the improvement of the legal status of the Regions is a consequence of their economic weight in the life of the Union. There are two main difficulties in this reasoning: first of all, the terminological issue, as it is unclear that economists and lawyers mean the same thing with the term "Region" or "subsidiarity". The problem is the lack of activism of the ECJ in this ambit: this element does not allow us to compare with the American experience the impact of welfare on the relation between the centre and periphery.

As many scholars have pointed out (see the researches and the projects of the *NewGov project*), the impact of the structural funds is, in fact, based on a curious mix between new and old techniques of governance. The aim of the European cohesion policies was rather to create a system of multilevel governance that would have included at least three levels: Community, Member States and regions, with the possibility for the latter to involve the local level too, further inserted into the cohesion policies as a genuine fourth level. Private actors, stimulated to invest by structural interventions, can produce a sort of multiplication factor that has an impact on the private sector, setting in motion a cycle of endogenous development that includes production innovation and generates employment



in underdeveloped areas. This virtuous circle would be, nevertheless, unimaginable without a programming activity acting as a framework for structural intervention. As Leonardi (Leonardi 1995: 222) recalls, one of the main advantages of the partnership consists in ending the State administrations' exclusivity in the implementation of the programs in strongly decentralized contexts. Obviously, not all the states have responded in a similar manner. It is in fact possible to identify three different patterns of response (Boccia et al. 2003, 23 ff.) to these new concepts at a national and regional level, and different outcomes are consequently attributable to every category of response. The first type of reaction lies in the 'rejection' of suggested procedures and models, having as a consequence a lack of growth (Lazio and Veneto); the second is a mere formal adaptation, with a consequent incomplete utilization of the programs' potentials and resources (Marche, Liguria, Friuli). The third kind, instead, implies a thorough understanding of the opportunities for the renewal of professional skills, for the socialization of procedures and rules, for not only a formal, but also substantial (and also large-scale) understanding of the suggested concepts, rules and procedures, with the consequent full utilization of resources and a maximum-growth result (Toscana) (see Fargion 2006 150 ff).

The attention paid to territorial actors reveals the 'operational denouncing' of the territorial blindness (*Landesblindheit*) that has for long characterized the history of European Communities. Nevertheless, there is the risk of overlooking the problems encountered by many federal legal orders: the differences in their respective performances or, in the case of cohesion policies, the varying reaction times of the regions.

The history of these funds is characterized by a progressive shift towards new soft, involving models of governance, without abandoning the old and classical basis furnished by the binding legal acts and the involvement of the classical institutions (Parliament, Commission, Council).

All this permits the possible intervention of the ECJ in defence of the rights or competencies of the institutional actors.

Expressions of the old governance are as follows: the Treaty bases of the structural funds policies (Art. 2 ECT, Art. 158-162 ECT), the European Commission's right of proposal since 1987 and its duty of implementation; the unanimity voting on the project and the financial package in the Council of Ministers; the competencies of the European Parliament (its assent on fundamental decisions on structural and cohesion funds; the



codecision on ERDF and ESF; the consultation on EAGGF/guidance and FIFG); the possibility to give opinions for the ESC and the Committee of Regions; the competence on the jurisdiction for the ECJ and the control of the Court of Auditors for the financial aspects; the use of classic binding sources to give legal bases in this field (Council regulation and Commission decisions) (Vida 2005).

As already stated, over the years a new governance entered the procedures of the funds (most of all after 1987), consisting in the “intrusion” of the Commission into national development programmes and the assertion of the principle of partnership and conditionality. Another factor of novelty is the system of relationships (before inexistent) between Commission and Regions (directly thanks to the Commission initiatives, and indirectly thanks to the partnership); another fundamental element is the increase of sub-national actors' involvement in the implementation phase. This is connected with the more frequent use of soft instruments (e.g. Commission's communications; target-based tripartite agreements). The consequence of such policies is the growing awareness and the increasing role of the Regions, via the Committee of Regions.

In any case, the percentage of the opinions accepted does not reach particularly relevant percentages if compared with those in other fields (De Micheli 2006: 348-352). On this last point, we can recall that the composition of the Committee does not correspond exactly to the notion of Region adopted by the NUTS, because of the lack of correspondence between the legal notion of region (usually mentioned in the Constitution of a country such as Italy) and the economic notion of Region.

All this confirms the schizophrenic nature of the system: the Committee has an important role, but it is not an effective representative body of the actors who should be represented.

The terms “*Region*” or “*regionalism*” are used in several contexts: *regional community*, *regional society*, *region-state*, *regional complex* (Hettne-Söderbaum 2002: 33-47).

Nevertheless, it must be said that a very interesting process is touching the new candidate States and the new member States: it is possible to note a progressive process of adaptation of the internal territorial configuration of the legal order to the criteria used by the NUTS to identify the Regions (Brusis 2002: 535 ff.) .

It seems clear that this uncertainty does not help the solution of the democratic gap.



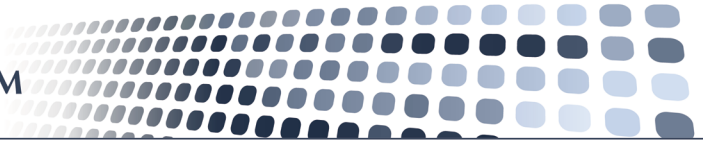
Following the outcome of the research of an Italian group of scholars in public policies and political sciences (Fargion et al. 2006: 757-783), one can see the effects of “Europeization” (especially with regard to the Italian regions) on the sub-national (regional) level. First of all, the complexity of the procedures would give a very important role to the non elected/bureaucratic actors at the disadvantage of the representative actors, but the latter can instead be fundamental in the bargaining phases of the cohesion policies procedures thanks to their political skills:

‘Due to their strong focus on problem solving and effectiveness, structural funds clearly appear to privilege the ‘output’ phase of the representation process, rather than the ‘input’ phase’ (Fargion et al. 2006: 760).

In conclusion, one can generally say that the cohesion policies contribute to improve the regional dimension of the European Union, with an evidently positive outcome to counter the democratic deficit. At the same time, the mechanism of such policies undeniably contributes to bolster the technocratic side at the regional level, spreading one of the most important viruses of the democratic deficit at the supranational level.

Another factor which should be stressed is the lack of sufficient transparency and accountability in the cohesion policies procedures , which is a negative side of partnership and the involvement of several actors, and of the softness of the instruments used<sup>IV</sup>:

‘First of all, do the mechanisms of representation embodied in and promoted by Cohesion Policy contribute to the export from the European Union to the sub-national level the well known problem of a democratic deficit? Or again, in broader terms, is the European ‘governance model’ a real solution for solving the problem of such a deficit? In this regard, our research revealed the difficulties for less organised/powerful interests in gaining access to the decisional process and the implications – in terms of democratic accountability – of the dominance of non-elected actors in representation activities. In the new procedural context the responsibility for decisions is dispersed and the chain of control becomes unclear’ (Fargion et al. 2006: 779).



The last point allows us to introduce another issue related to the nature of the means used, in the implementation phase above all.

Previous studies have shown that the flexibility obtained thanks to the soft means implies the difficulty for the European Court of Justice to guarantee the respect of the Treaties (Hatzopoulos 2007: 309-342).

As cases like *Mangold*<sup>V</sup> (which appeared after a long series of cases where the ECJ tried to avoid the comparison with the new governance<sup>VI</sup>) show, when the ECJ was forced to face issues relating to which soft legal instruments were involved (albeit partially), it resolved the case referring to the general principles<sup>VII</sup>.

This shift in the legal reasoning of the ECJ has, however, a negative side, because it contributes to increase the discretion of the judgments, to decrease controllability and to change the nature of the ECJ approach, which is traditionally more oriented to the pragmatism required by an economic law such as that of EU law .

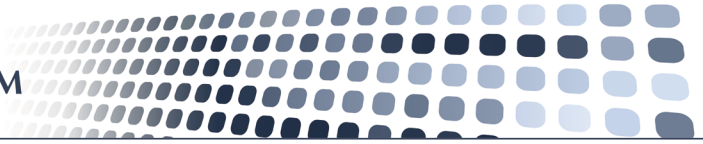
Another problem linked to the spreading of soft law is the less important role played by the traditional institutional actors (first of all the European Parliament), contributing to the weakening of the institutional balance: the risk is to sacrifice the role of the Parliament in the name of flexibility and this element does not support the reasons of the democratization of Europe.

While such problems are now more evident for the Open Method of coordination strategy than for the cohesion policies lines , it seems nevertheless important to point out this risk.<sup>VIII</sup>

## 7. Conclusions

In this study I tried to analyze the relationship among integration, constitution and Welfare in the supranational context. As Smend has already stressed the strong relation between the State and the Constitution ('the integration belongs to the content of constitution') with regard to the national context, Cappelletti, Weiler and Secombe (1985) studied the supranational dimension of integration (conceived as the proceeding of integration and as the outcome of such a process).

After having included the cohesion policies in the supranational dimension of Welfare, I pointed out the consequences of the structural funds' functioning on the form



of Union (as defined in the first part of the work: axiological dimension of the EU and relationship among the levels of governance and government): empowerment of the role of the Regions, involvement of several non-state actors in the phase of implementation; strengthening of the bureaucratic actors at local and regional level because of the complexity of the procedures, despite the important role of the elected actors in the phases of political bargaining; limited possibility of intervention for the ECJ, due to the spreading of new governance techniques and the soft legal instruments used.

The Regions are essential in order to create a common substrate for the decision-making processes and policies. If a society is cohesive, public choices are simpler and, above all, there are weaker resistances towards the common policies – although this does not produce uniformity nor signifies the end of constitutional tolerance. In short, regional cohesion and integration are two sides of the same coin.

Had the formula “integrative regionalism” not already been used, one would have proposed it to describe the fundamental contribution of the Regions to the reasons of integration, which this paper has ultimately endeavored to stress.

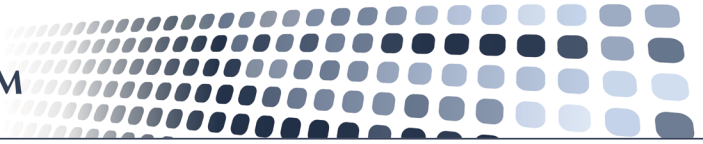
Against this background, the polisemy of the notion of Region contributes to increase uncertainty: the role of the Committee of Regions inevitably suffers from the non perfect identity between the economic and the legal notions of Regions in Europe.

Within this context, a very important role could be played by subsidiarity, but this point requires a preliminary linguistic remark.

By looking at the language used in the documents concerning the structural funds, it seems useful to remark that the subsidiarity principle seems to be limited to its “negative” aspect: the preference conferred upon the subject 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’ (Padoa Schioppa, 1995: 155).

Starting from this definition, that 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 a partnership that implies a collaboration among the European, national and regional administrations.

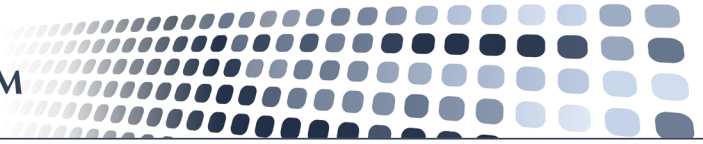


The subsidiarity principle, due to its physiology, requires a system of competences at least tending towards a repartition, and at the same time presupposes, as was pointed out, an “integrated” system like, for example, a federal system of a cooperative type. This would explain why, within the Community context, subsidiarity has operated as an ‘*accelerator of centripetal forces*’ (Baldassarre) rather than as a factor of valorization of the de-centered 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 formal allocation of *a priori* competences, but rather for the *a posteriori* legitimation of the exercise of competences beyond those formally attributed (as also pointed out in Massa Pinto 2003: 81)

Subsidiarity has successfully operated in a context such as the German one, which does not define competences in the finalistic manner (On the enumeration techniques, see Carrozza 2003: 69-124) as the ECT does (as opposed to the French model). This worrying mingling of legal styles explains the destabilization factor that could be introduced by the subsidiarity principle. This is mainly because of its “surreptitious” substitution of the flexibility clause, that has allowed the Union (and before it the Community) to acquire ‘slices of competence’, transversally instrumental to the realization of the declared objectives, without the procedural guarantee of unanimity.

All this appears against the background of a European case law which proves extremely elusive about the principle of subsidiarity, and the impossibility for the regions 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.<sup>IX</sup>

In this respect, it has also been said that the principle of subsidiarity acts as a criterion for the attribution of competences, because it ‘shifts, even if not in a permanent and formal manner, the level of government that must intervene’(Massa Pinto 2003: 82), and operates as an element of flexibilization in a context generally tending toward rigidity (Bin1999: 169 ff).



Subsidiarity (together with proportionality) is a post modern criterion of allocation of power and of resolution of legal antinomies: its flexibility is a resource but, at the same time, confers the constitutional adjudicators a great and discretionary power.

The Court involved in the justiciability of such a principle will be forced to verify the necessity of higher level substitution by carrying out a costs/benefits test.

The only way to limit the discretion of the judge seems to be to pose 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 “early warning mechanism” was provided in that Protocol.

According to it, 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.

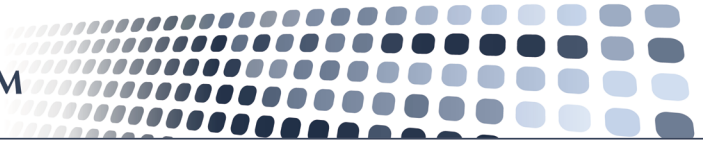
Obviously, the proposal of the Convention does not exhaust the possible solutions to guarantee the role of regional actors at the European level.

Probably the contribution of the constitutional lawyer could consist in the attempt to furnish institutional and legal techniques aimed to rationalize the system and to solve the paradox of the flexible criteria: they are both a resource and a threat for the European legal order.

In this sense, it seems useful to recall the solutions suggested by the Italian Constitutional Court<sup>X</sup>: subsidiarity requires a “fair 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 such a judgement, the real problem is to apply and enforce such principles, and many solutions were proposed: the creation of new committees and institutional actors? The improvement of already existing institutions? Is it possible to transplant institutional solutions already experimented within national contexts (in Germany, for example) to the supranational level?

Unfortunately, this point cannot be discussed in depth here, but it was important to mention it in this paper, at least to stress the importance of the sub-national (regional) level for the constitutional discourse of the EU and for the changing Form of Union.



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<sup>I</sup> Definitely, it concerns the different “options/techniques” offered in order to guarantee the separation of powers (e.g. parliamentary regimes versus presidential regimes).

<sup>II</sup> Defined as: “*Abstract, disjointed, increasingly fragmented, not based on stable and coherent coalitions of issues or constituencies, and lacking in a clear public space within which competitive visions of the good life and pursuit of self-interested legislation are disused and debated*”, Caporaso 1996: 29 ff.

<sup>III</sup> “*For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:*

*k) the strengthening of economic and social cohesion;*”

<sup>IV</sup> “*Evaluation and monitoring mechanisms – which are supposed to guarantee greater transparency – are not a solution to this problem, as they leave the initial phases of the process largely in the dark precisely when critical decisions are taken on who will benefit and who will be left out from the structural funds game*”, Fargion et al. 2006: 779).

<sup>VE</sup>ECJ, Case C-144/04, *Mangold*, 2005, ECR, I-9981

<sup>VI</sup>Court of First Instance, Case T-188/97 *Rothmans v. Commission*, 1999, ECR, II-2463; ECJ, Case C-293/97, *Standley and Metson*, 1999, ECR, I-2603; Court of First Instance, Case T-135/96, *UEAPME v. Council*, 1998, ECR, II-2335.

<sup>VII</sup> “*Since EC hard legislation will be rare in fields in which some EU coordination takes place, the Court will be obliged to control national measures by reference to general principles and fundamental rights, in order to effectively protect the latter. This, however, is not a commendable development, at least by currently applicable legal standards, and all the judgments above have been strongly criticized*” (Hatzopoulos, 2007, 316).

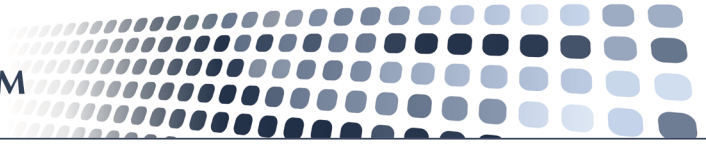
<sup>VIII</sup> “*The question of how the use of soft law affects the institutional balance must also be addressed, as the increasing use of instruments not provided for in the Community legal system has a detrimental effect on the use of legislation. This means that more decisions are made outside the framework of the formal Community decision-making process, in which the institutions have been carefully assigned their proper role and power, to reflect a certain institutional balance*” Senden, 2005).

<sup>IX</sup>ECJ, Case C-415/93, *O'Hara/Council and Commission*, 1994, ECR, I-5755; ECJ, Case C- 84/94, *United Kingdom/Council*, 1996, ECR, I-5755.

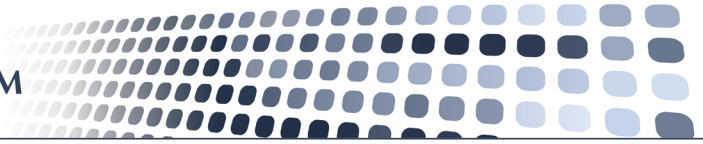
<sup>X</sup>Corte Costituzionale, Sentenza n. 303/2003, [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

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