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The Principle of Subsidiarity in Italy: Its Meaning As A "Horizontal" Principle And Its Recent Constitutional Recognition

By [Andrea Maltoni](#) *

Premise.

The term subsidiarity, which has a multiplicity of meanings^[1], has only recently become a positive principle of the Italian legal system. It is a concept that has been long rooted in philosophical, theological as well as in political thoughts and mainstreams. Just think that among the spiritual fathers of the modern concept of subsidiarity are found such thinkers as Aristotle, Thomas Aquinas, Johannes Althusius, Robert von Mohl, Georg Jellinek, Pierre Joseph Proudhon, and Alexis de Tocqueville^[2]. However, it must be recognized that the principle of "horizontal" subsidiarity finds its most accomplished conceptual definition in the social doctrine of the Roman Catholic Church, beginning with the Papal Encyclical *Quadragesimo anno* of Pope Pius XI, issued in 1931^[3].

From that very encyclical -- *Quadragesimo anno* -- one can ascertain that the principle of subsidiarity can be divided into two separate meanings. On the one hand, it provides for a criterion of favor towards the various expressions of single individuals and of social organizations and activities that are independently exercised by them. This also carries with it the duty of the public authorities to abstain from intervening in those instances in which the action of individuals and non-profit organizations is directed towards accomplishing the same ends. On the other hand, the principle refers to the fact that public institutions replace single individuals and organizations when these do not manage adequately to carry out collective interests^[4].

At present the principle of horizontal subsidiarity is regarded as a criterion that operates in all those relationships between institutional and social entities of diverse dimensions, granting the preference to the lesser entities and legitimizing the actions of larger entities only when their action is meant to enhance the inadequate capacity of the lesser entities^[5]. As regards the benefit that the larger entity must be able to give to the lesser one, the horizontal subsidiarity principle recognizes that the subsidy itself must undergo some limitations: when the first entity, the larger one, has brought the second or lesser one to a level on which it is able to continue on its own strength in attending to its purposes, the larger entity must withdraw and intervene again only when the minor entity is again in a condition of requiring assistance.^[6]

In conclusion, the principle of horizontal subsidiarity implies that society in all its various forms (as a community of persons at the sub-state, state and international level) places itself at the service of the individual human being. The individual is thus considered as both a single entity of social expression and as being within a social pattern in which his/her personality can unfold (in accordance to the maxim: *civitas propter cives, non cives propter civitatem*). In such a context, one can fully grasp the connection between subsidiarity and the principle of social pluralism, as it is expressed in article 2 of the Italian Constitution.^[7]

2. The principle of subsidiarity in the administrative reform of 1997

In the early 1990's, the Italian administrative system underwent some profound reforms, among which are the following important changes: the law governing administrative proceedings; the law on the ordering of local autonomies; the law on the system of controls. More recently, with law no. 59 of March 15, 1997, other reforms have been directed toward enhancing local governments through a vast program of devolution of government functions among the various levels of the sub-state powers.

As far as the devolution of administrative functions and tasks from the central government to the peripheral entities of government is more specifically concerned, law no. 59/97 has particularly contemplated that the exercise of public responsibilities falls by preference to the authorities that are

closest to the citizens.^[8] Thus, law no. 59/97 has overturned the traditional criterion by which the devolution of the functions and the administrative tasks are to be shared by and among the State, the regions and the local governments. The pivotal point of the administrative system has indeed switched from the central State Administration to the county and local levels, since it is now the State that comes to be entrusted only with those functions that are specifically defined and enumerated in the laws.

Although it is clear that it was the vertical dimension of the principle of subsidiarity that was particularly on the mind of the legislators in 1997, it cannot be denied that a kind of horizontal subsidiarity was also introduced. Indeed, law no. 59/97 includes a strict connection between horizontal and vertical subsidiarity. In this respect, it provides that devolution of the administrative functions from central government to local governments must take place “also to permit that families, associations, and/or communities may carry out public functions.”

It is out of this definition that one can thus clearly construe the double meaning of the principle of subsidiarity. It is vertical when it operates in relationship with and among diverse levels of government and horizontal when it becomes a criterion apt to regulate relationships among all social groups in general and among public entities and individuals and private entities more specifically.^[9]

3. The principle of horizontal subsidiarity: from legislative decree no. 112/1998, which enacted law no. 59/97 to the regional legislation implementing legislative decree no. 112/98

The principle of subsidiarity constitutes the pivotal point around which revolves the entire process of devolution of government functions from the center to the periphery. In the framework of chapter I of the law no. 59/97, the principle of subsidiarity has been raised in fact to a fundamental criterion for the re-partition of functions among the different territorial levels of government. Thus, it has become, on the one hand, one of the fundamental criteria and principles for the exercise of delegated power on the part of the Government and, on the other hand, one of the fundamental principles according to which county governments have implemented the laws passed by the Parliament.^[10]

On examining the regional enactment laws of decree no. 112/98 there emerges also a rather complex multi-faceted picture. There are essentially three different models of regional implementation of this legislative decree.

1. Some county governments have adopted a comprehensive set of laws in order to allocate the functions among the many regional and local entities.
2. Other county governments, while still in line with the passing of a comprehensive body of laws, have opted for a law of principles, followed by a specific law whereby specific functions are allocated.
3. Still other county governments have implemented legislative decree no. 112 with a multiplicity of sector interventions in the areas that are the subject of function transfers.

Among these regional laws, the implementation norms of regions like Lombardy and Veneto^[11] are the ones that have reduced the presence of public powers in favor of private entities, and, above all, in favor of not-for-profit organizations.

4. The principle of horizontal subsidiarity and its formal recognition in the Italian Constitution

Constitutional law no. 1 of 1997 set up a parliamentary committee empowered to bring forward proposals to change the second part of the Italian Constitution. In the reform bill regarding the second part of the Constitution, [12] which bore the title of "Federal System of the Republic," the principle of subsidiarity, discussed in the opening of title I, became the foundation of the new model of the Republic. [13] In this respect, article 56 of the bill reads as follows: "As regards the activities that can be carried out by the direct autonomous initiative of the citizens, even through their social groupings, public functions are attributed to local governments, counties and the State on the basis of the principles of subsidiarity and differentiation."

This version of article 56 (which was the second one proposed) granted individuals a particular autonomy and recognized the possibility of their taking on certain initiatives consistent with limitations on public functions. Nevertheless, it did not grant the private sector a sort of priority in the economy and in the management of public services. Rather, at the most, it drew a protective line against the interference by the public sector, admitting that whenever it can be demonstrated that "certain activities can be carried out in a more adequate manner by private individuals or entities, the institutional apparatus must not interfere." [14]

This article, which at first seemed destined to be forgotten following the failure of the parliamentary committee, now appears to have been, as far as its essential content is concerned, to have been redrawn under article 2 of law no. 265 of August 3, 1999 which has amended law no. 142/90. Article 2 states clearly that local governments are entitled to exercise their own functions as well as those that have been conferred unto them by the State and the regions, according to the principle of subsidiarity. It also recognizes that they are to "carry out their own functions even through the activities that can be appropriately exercised by the autonomous initiative of the citizens and by their social groups."

Lastly, in 1999, the process of reform was newly initiated with the presentation of a Constitutional Bill by the then Minister for Institutional Affairs Mr. Giuliano Amato. The bill aimed at transforming the Italian form of government into a federal model, to be approved in accordance to the ordinary procedures contemplated in article 138 of the Constitution.

Following a long parliamentary process that lasted more than two years and led to the modification of significant parts of the original text, the aforementioned Constitutional Bill Amato-D'Alema [15] was approved first by the Parliament. Later, (since the second vote in each Chamber had not achieved a two-thirds majority) in accordance to the sense of article 138, paragraph 3, of the Constitution, a popular referendum confirmed the law on October 7, 2001.

Among the most significant aspects of this constitutional reform, the following are noteworthy:

1. the strengthening of the political autonomy of county governments, not merely with respect to their legislative powers, but also more generally; and
2. the introduction of the principle of subsidiarity in both its vertical and horizontal dimensions. [16]

Devolution of powers from the central State down to local governments, together with the operating consequences derived from the implementation of the principle of horizontal subsidiarity cannot but open the way for dramatic changes in the manner in which public and social services are to be delivered and managed in the future. Some of these are already taking place in parts of Italy, and they show that more activities will be carried out by not-for-profit organizations than was true in the past. The future holds the prospect for more fundamental change in the relationship between the State and not-for-profit organizations as time goes on.

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[1] See A. RINELLA, *Il principio di sussidiarietà: definizioni, comparazioni e modello d'analisi*, in *Sussidiarietà e ordinamenti costituzionali. Esperienze a confronto*, (edited by) A. RINELLA, L. COEN, R. SCARCIGLIA, Padua, 1999, p. 3 and passim.

[2] For a detailed reconstruction of the philosophical basis of the principle of subsidiarity in the works of these illustrious thinkers see, in particular, R. HOFFMANN, *Il principio di sussidiarietà. L'attuale significato nel diritto costituzionale Tedesco ed il possibile e ruolo nell'ordinamento dell'Unione Europea*, in *Rivista italiana di diritto pubblico comunitario*, 1993, pp. 25-26; G. RAZZANO, *Il principio di sussidiarietà nel progetto di riforma della Costituzione della Commissione bicamerale*, in *Diritto e società*, 1997, especially p. 531 ff.; see also A. RINELLA, *Il principio di sussidiarietà*, op. cit. p. 8 and passim, P. DURET, *La sussidiarietà «orizzontale»: le radici e le suggestioni di un concetto*, in *Jus*, 2000, p. 95 and passim. All the abovementioned works draw amply from the analytical historical and philosophical reconstruction provided by C. MILLON-DELSOL, *Le principe de subsidiarité (The Principle of Subsidiarity)*, Paris, 1993.

[3] On the vast literature that has dealt with the principle of subsidiarity in the social doctrine of the Church, see the authors cited in the previous footnote, and more specifically : P. MAGAGNOTTI, *Il principio di sussidiarietà nella dottrina sociale della Chiesa*, Bologna, 1991; G. MORRA, *Alla ricerca del principio di sussidiarietà*, in *Federalismo e società*, III, 4, 1996, 13 and passim; S. CASSESE, *L'aquila e le mosche. Principio di sussidiarietà e diritti amministrativi nell'area europea*, in *Sussidiarietà e Pubbliche Amministrazioni*, Atti del convegno per il 40° della Scuola di Specializzazione in Diritto Amministrativo e Scienza dell'Amministrazione, Bologna, September 25-26, 1995, (edited by), F.A. ROVERSI MONACO, Rimini, 1997, especially p. 74.

[4] In this respect, see G. COCCO, *Cronaca di molte scelte annunciate e di poche perseguite, ovvero Il principio di sussidiarietà nell'ordinamento italiano*, in *Diritto pubblico*, 1998, p. 700.

[5] Cfr. A. SPADARO, *Sui principi di continuità dell'ordinamento, di sussidiarietà*, cit. p. 1053 and passim; R. HOFFMANN, *Il principio di sussidiarietà*, cit. 27 ff. See also A. MINGARELLI, *Il principio di sussidiarietà: un criterio flessibile per la ripartizione delle competenze tra i vari livelli istituzionali, divenuto in Italia norma di diritto positivo, dopo l'entrata in vigore dell'articolo 4 della legge n. 59/97*, in *Rivista di amministrazione della Repubblica italiana*, 1997, pp. 461 and passim, particularly p. 463 and P. RIDOLA, *Forma di Stato e principio di sussidiarietà*, in *La riforma costituzionale*, Atti del Convegno, Rome, November 6-7, 1998, Padua, 1999, specifically pp. 184-185.

[6] See P. MAGAGNOTTI, *Il principio di sussidiarietà nella dottrina sociale della Chiesa (The Principle of Subsidiarity in the Social Doctrine of the Church)*, Bologna, 1991, p. 49.

[7] See F. RIMOLI, at the entry *Pluralism*, in *Enciclopedia giuridica Treccani*, vol. VI, Rome, 1997, pp. 9-10.

[8] In *Il nuovo volto della pubblica amministrazione tra federalismo e semplificazione. Commento organico alle Leggi Bassanini (15-3-1997, n.59 e 15-5-1997, n.127), ai decreti delegati attuativi ed alle circolari interpretative (The New Face of Public Administration between Federalism and Simplifications. Organic Comments to the Bassanini Laws (March 15, 1997 no. 59 and May 15, 1997, no. 127) to the Delegated Executive Decrees and the Interpretive Bulletins)*, Naples, 1997, p. 24, F. CARINGELLA, A. CRISAFULLI, G. DE MARZO, F. ROMANO observe that, following the conferral of the general content of the functions and the tasks to the local authorities of the municipalities, as entities closer to the citizens, such entities became administrations with full competencies, since they are also the true representatives of the primary communities.

[9] See E. BUGLIONE, C. DESIDERI, A. FERRARA, G. FRANCE, G. MELONI, V. SANTANTONIO, V. VISCO COMANDINI, *Per un nuovo regionalismo*, in *Le Regioni*, 1994, p. 1362. On the concept of double meaning, see also A. M. BALESTRERI, *Sussidiarietà, territorio, cooperazione fra mano pubblica e soggetti privati. Spunti per un inquadramento giuridico*, in *Diritto amministrativo*, 1998, pp. 615 and passim, particularly pp. 617-620.

[10] On this particular aspect, see R. BIN, *I decreti di attuazione della "legge Bassanini" e la "sussidiarietà verticale"* in *Sussidiarietà e ordinamenti costituzionali*, op. cit., p. 189. See also A. FERRARA, *Il principio di sussidiarietà come criterio guida*, op. cit., pp. 89-90.

[11] Region Veneto Law no. 11/2001, article 2 not only establishes that the territorial governing bodies and the functional autonomies exercise «their respective tasks and functions even through the participation, the contribution or the initiative of the private citizens, except when the public organization is indispensable to the realization of the general interest that is constitutionally protected», but recognizes also that «the participation, the contribution or the initiative of private citizens, in respecting the principles of transparency and free competition,» can pertain also to the area of economic development and other areas of productive activities, of the land mass and the infrastructures, of services to individuals and to the community as well, and the administrative policy.

[12] On this reform project, see G. FERRARA, *La revisione costituzionale come figurazione: sussidiarietà, legalità e forma di governo nel Progetto della Commissione bicamerale (The constitutional revision as a figure: subsidiarity, legality and form of governance in the Project of the Bicameral Commission)*, in *Politica del diritto (The Political Framework of Law)*, 1998, p. 93 and passim; AA.VV. *Dopo la Bicamerale: i nodi irrisolti (After the Bicameral Commission: the Unresolved Issues)*, edited by G. ZACCARIA, Padua, 1998; AA.VV., *La riforma costituzionale (The Constitutional Reform)*, Acts of the Congress, Rome, November 6-7, 1998, Padua, 1999.

[13] See the presentation of Sen. D'Onofrio, in Parliamentary Committee for constitutional reforms, Reports on the project for the form of government, November 4, 1997, p. 17 and passim.

[14] Similarly, G. COCCO, *Cronaca di molte scelte annunciate e di poche perseguite (The chronicle of many announced choices and of few followed to the end)*, op. cit. p. 707. G. PASTORI, *La sussidiarietà «orizzontale» (Horizontal Subsidiarity)* op. cit. p. 177, observes, among other things, that «the diversity of the terms used, "activity" and "public functions,"» did not translate in «a diversity of any substance and of any meaning,» since even the formula «in respect to the activities (...),» "would not have any reason to exist if it did not pertain to activities that render concrete the exercise of public functions."

[15] On this constitutional bill, see A. FERRARA, *Presentazione*, in *Le autonomie territoriali nella riforma costituzionale*, edited by A. FERRARA, Milan, 2001, p. 1 and passim.

[16] For further details on these issues, see A. MALTONI, *Azione amministrativa e sussidiarietà orizzontale nel settore del turismo*, Rimini March 22, 2002 (forthcoming).