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(Article begins on next page)

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ARTICLES

The Principle of Proportionality in Comparative Perspective

By Margherita Poto[*]

A. Introductory Remarks

This contribution will contain an analysis of important European dynamics, particularly at this moment when it seems to be necessary to restart the process of a unified European identity, which was, in a way, compromised after the failure of the EU Constitution[1] and the difficulty of giving effectiveness to democracy:[2]

> the EC professes democracy without being democratic. Thus the fragility of its political institutions, inherently perilous, necessarily reflects on the legitimacy of its legal order, while the constitutional balance intrinsic to the separation of powers ideal is dangerously absent. In other words, while in every Member State, the administrative law system forms part of a working system, this is not the case in the Community.[3]

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[1] The Treaty establishing a Constitution for Europe (TCE), commonly referred to as the European Constitution, is an international Treaty intended to create a constitution for the European Union. Despite its name, it only covers the European Union. It was signed in 2004 by representatives of the Member States of the Union but was subject to ratification by all member states which has, to date, proved impossible to obtain. The constitutional treaty was signed by representatives of the Member States on October 29, 2004 and was in the process of ratification by the Member States until 2005 when French (May 29) and Dutch (June 1) voters rejected the Treaty in referenda. Had it been ratified, the Treaty would have been entered into force on November 1, 2006, but this is now impossible.

[2] For an analytical examination of the democratic deficit in Europe, *see* D. BEACH, THE DYNAMIC OF EUROPEAN INTEGRATION: WHY AND WHEN EU INSTITUTIONS MATTER (2005). In particular, *see* page 258.

[3] C. Harlow, *European Administrative Law and the Global Challenge*, *in* THE EVOLUTION OF EU LAW 266 (P. Craig & G. de Burca eds., 1999).

One of the possible causes of this fragility has been found in the opposing tendencies which presently cross Europe. Over the past few decades, as has been observed, two separate and apparently contradictory trends have occurred in the development of a European system:

> the first reflects the internationalization or globalization of government in certain spheres, with an increasing number of issues being allocated to or addressed by international and supranational levels of authority; […] a second trend, at least within western political systems, is that of localization, in the sense of an emergence of stronger local and regional politics, with a renewed interest in more direct democratic participation under the influence of republican and communitarian political theories.[4]

Consequently, a sort of "third trend," maybe more latent and invisible, but all the same considerably strong, might be recognized within the context of the decreasing centrality of the State, addressing the dissolution of boundaries between private and public spheres of regulation and control: "it concerns the evolution […] of a concept of governance which transcends the more traditionally conceived private/public divide and which challenges previous […] assumptions about the locus of political and economic authority."[5]

The trends toward internationalism, regional politics and vanishing barriers between the public and private domains are therefore guidelines to follow when we want to find solutions to the lack of democratic participation in the EU. And, of course, the main hurdle then becomes ways to reconcile these solutions. A first answer to this question can be found through a reading of European subsidiarity and proportionality principles, by analyzing them from both a normative and a case law perspective.

For this purpose, the above-noted principles can be considered a good connection between globalization and decentralization. Moreover, these principles can be considered as an initial response to overcome public and private barriers insofar as

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[4] G. de Burca, *Reappraising Subsidiarity's Significance after Amsterdam*, HARVARD JEAN MONNET WORKING PAPER, 7/99, (2000).

[5] *Id*.

they regulate the intervention not only of European institutions and Member States, but also of other institutions public and private, and of citizens as well. Both concepts will be analyzed in the following paragraphs in order to understand their nuances and the effectiveness of their application.

B. The Subsidiarity Principle, the Role of National Parliaments and the New Control of Proportionality

Subsidiarity was enshrined in the Maastricht Treaty in Article 3b[6]. It guaranteed, as a basic principle of the performance of the European Community, the prior right to act to the lower levels of governments, all the while implicitly determining a space for the activity and the expansion of EC competencies. In order to give substance to the prior participation of lower-level governments, the role of national Parliaments has been highlighted, connecting the subsidiarity principle with the legitimacy of power.[7] In easing the tensions between the EU and decentralized levels, subsidiarity played a precise role and was thus duly enshrined in the new Treaty as a fundamental precept of EC law. Hence, the emphasis given by the Protocol annexed to the Amsterdam Treaty in 1997 affirmed the application of subsidiarity and the related concept of proportionality as key elements of democratic legitimacy and flexibility.[8]

In this sense, it is also worth noting that the European Constitution, although it has not entered into force,[9] contains several applications of the principle, recalling its role as a pillar in a "healthy" democracy. For instance, Article 1-47, titled "The Principle of Participatory Democracy" is to provide:

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[6] Article 3b: "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

[7] R. Macrory and S. Turner, *Participatory Rights, Transboundary Environmental Governance and EC Law*, 39 COMMON MARKET LAW REVIEW (C.M.L. REV.) 489 (2002). *See also* I. Cooper, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, 44 JOURNAL OF COMMON MARKET STUDIES 281 (2006).

[8] A. G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 C.M.L. REV. 239 (1992). For recent writings on subsidiarity, *see* N. W. Barber, *Subsidiarity in the Draft Constitution*, 11 EUROPEAN PUBLIC LAW 197 (2005), *and* N.W. Barber, *The limited modesty of Subsidiarity*, 11 EUROPEAN LAW JOURNAL 308 (2005). The principle can be found then in canon law: *see* A. Dashwood, *The Relationship Between the Member States and the European Union/European Community*, 41 C.M.L. REV. 366 (2004).

[9] For this aspect *see,* more properly, note 4.

> 1. The Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. 2. The Institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. 3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent. […].[10]

Moreover, another interesting mechanism, unfortunately up to now in name only, is the so called "early warning system" (EWS), featured by the Protocol in the Application of the Principles of Subsidiarity and Proportionality, annexed to the Constitutional Treaty.[11] In this procedure, the Commission would send each new legislative proposal directly to national Parliaments for their consideration:

> Article 4. The Commission shall forward its draft European legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator. The European Parliament shall forward its draft European legislative acts and its amended drafts to national Parliaments. Upon adoption, legislative resolutions of the European Parliament and positions of the Council shall be forwarded by them to national Parliaments.[12]

The introduction of principles of subsidiarity and proportionality as leading criteria to evaluate the draft legislative act is then mentioned at Article 5: "Draft European legislative acts shall be justified with regard to the principles of subsidiarity and proportionality […]."[13]And, of course, it is necessary to provide "a detailed statement making it possible to appraise compliance with the principles of

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[10] Art. 1, European Constitution.

[11] 2. Protocol on the application of the principles of subsidiarity and proportionality, 16 December 2004, *Official Journal of the European Union*, C310/207, *available at* www.eur-lex.europa.eu.

[12] Art. 4, European Constitution.

[13] Art. 5, European Constitution

subsidiarity and proportionality." Article 5 contains as well some guidelines to be followed in providing the statement; in particular, it should contain "some assessment of the proposal's financial impact and, in case of a European framework law, of its implications for the rules to be put in place by Member States, including, when necessary, the regional legislation."[14]

If the national Parliament decides that a measure would violate subsidiarity, it can submit a "reasoned opinion" to the Commission, whose task is to formally review whether one third of all the votes allocated by National Parliament objects to that measure (Article 7).[15]
The final part of this procedure gives jurisdiction to the Court of Justice to hear actions for annulment brought by any Member State for a violation of the principle of subsidiarity:

> Article 8. The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution of Member States, or notified by them in accordance with their national Parliament or a Chamber of it.[16]

Some authors point out that the benefits derived from this mechanism, if only it were in force, would include the possibility of improving compliance of EU regulations and of alleviating the "democratic deficit."[17] However, it is noted that in any case, there is one important element missing: "it empowers national Parliaments to review EU legislation for conformity with subsidiarity but not with proportionality, its 'sister principle.'[18] On closer inspection, this omission is shown not only to be flat-out illogical, but also likely to inhibit the kind of argument that would make the EWS effective."[19]

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[14] *See* A. Peters, *European Democracy after the 2003 Constitution*, 41 C.M.L. REV. 37, 61 (2004).

[15] Art. 7, European Constitution.

[16] Art. 8, European Constitution.

[17] Cooper, *supra* note 7.

[18] *Id*. at 279.

[19] Cooper, *supra* note 7.

At present, the principles of subsidiarity and proportionality and the new mechanisms conceived to reinforce them have been analysed from the normative point of view; in the next section, their effectiveness will been examined through some examples taken from EU case law. Nevertheless, the doubt remains the same: may an "*ex ante* verification" of subsidiarity, committed to national Parliaments, revive the feeble European breath of democracy? The decisive deficit of democracy is, in my opinion, something difficult to eradicate, for it is intrinsically a part of the system itself. It has been acutely observed that in Europe

> there is no feeling of being a nation. There is no European public opinion, except perhaps among the narrow *élite* who actually run the Community. If there was a European Government responsible to the European Parliament, voters would feel just as alienated as they do at present. Each nation would regard itself as being in a permanent minority: there would be no sense of belonging. Voters would not feel that the European President or Prime Minister speaks for them: they would not regard the European Government as *their* government. This is the dilemma of European democracy.[20]

C. ECJ, Grand Chamber, 12 July 2005, Joined Cases C-154/04 and C-155/04: Are Subsidiarity and Proportionality Really Instruments for Decentralization?

In the case decided by the European Court of Justice (ECJ), Grand Chamber, on 12 July 2005, the main characteristics of subsidiarity and proportionality were well exemplified and, at the same time, the attitude of the Court towards the principles clearly emerged. And so, before briefly analyzing the framework of the decision, it is worth noting its full compliance with the general trend of the Court of Justice case law. In this regard, it has been pointed out that:

> while the justiciability of the principle cannot any longer be doubted, the case law indicates equally clearly that an annulment of a measure on the grounds that it offends subsidiarity is likely to

[20] T. C. HARTLEY, CONSTITUTIONAL PROBLEMS OF THE EUROPEAN UNION 21 (1999), *explaining* this has been pointed out by a number of writers, for example A. Dashwood, *States in the European Union*, 23 EUROPEAN LAW REVIEW 201 (1998).

> occur only in extreme circumstances. The Court of Justice is understandably reluctant to apply in a robust way a principle which is so heavily political.[21]

In other words, the author outlines how difficult is the judges' task, who are called upon to manage such a delicate and political matter.

The case concerned the validity of Articles 3, 4, and 15, of Directive 2002/46/CE of the European Parliament and of the Council of June 2002 on the approximation of the laws of the Member States relating to food supplements. According to the preamble to the directive, there are an increasing number of products marketed in the Community as foods containing concentrated sources of nutrients and presented as supplements to the normal diet for the intake of those nutrients. In order to ensure a high level of consumer protection and to facilitate consumer choice, products must be safe and bear appropriate labelling to be put on the market. This should have been the task of Member States: to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by July 2003.

The claimants (two trade associations representing around 580 companies, the majority of which were firms which distributed dietary products in the United Kingdom) maintained that the provisions of the Directive were incompatible with Community law and, consequently, had to be declared invalid. The infringement upon the principles of subsidiarity and proportionality were among the reasons cited for the Directive's invalidity. In both cases, the claimants submitted that the provisions interfered with the power of Member States in a sensitive area involving health, social, and economic policy.

However, the Court firmly disagreed with this construction, noting on the contrary the definition of subsidiarity provides "that the Community, in areas which do not fall within its exclusive competence, is to take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."[22]

Moreover, the Court added that Paragraph 3 of the Protocol annexed to the Treaty, states that the principle of subsidiarity does not call into question the powers

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[21] Dashwood, *supra* note 8 at 368.

[22] C. ECJ, Grand Chamber, 12 July 2005, Joined Cases C-154/04 and C-155/04, para. 101.

conferred on the Community by the Treaty, as interpreted by the Court of Justice. Hence, the ECJ concluded that:

> the principle of subsidiarity applies where the Community legislature makes use of Article 95 EC, inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions of its establishment and functioning by eliminating barriers to free movement of goods and the freedom to provide services or by removing distortions of competitions.[23]

Thus, the reason behind the prohibition on marketing food supplements that do not comply with Directive 2002/46 may be found, according to the Court, in the objective of removing barriers resulting from differences between the national rules, whilst ensuring a high level of human-health protection. Briefly, to leave Member States the task of regulating trade in food supplements, which do not comply with Directive 2002/46 "would perpetuate the uncoordinated development of national rules, and consequently, [an] obstacle to trade between Member States."[24] The objective pursued by Article 3 cannot be satisfactorily achieved by Member States and could be better achieved at Community level. Furthermore, the Court affirmed that no infringement upon the proportionality principle would be recognized, because the measures of Directive 2002/46 are "appropriate for achieving the intended objectives."[25] This decision does not differ from the opinion

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[23] *Id.,* para. 103. The leading case is Case C-491/01, *Queen v. Secretary of States for Health (ex parte British American Tobacco [Investments] Ltd and Imperial Tobacco Ltd.)*, 2002 E.C.R. I-11453. *See*, moreover, O. Fiumara, *La nuova normativa comunitaria sulla lavorazione, presentazione e vendita dei prodotti del tabacco (direttiva 2001/37/CE)*, RASSEGNA DELL'AVVOCATURA DELLO STATO 34 (2002); M. Selmayr, H.G. Kamann & S. Ahlers, *Die Binnenmarktkompetenz der Europäischen Gemeinschaft,* EUROPÄISCHES WIRTSCHAFTS UND STEUERRECHT (E.W.S.) 49 (2003). For a complete framework concerning the proportionality principle in foodstuff matters, *see also* F. Spagnuolo, *Il principio di proporzionalità come parametro di legittimità nelle sentenze della Corte di Giustizia sulle normative nazionali relative alla circolazione delle merci e alla tutela dei consumatori*, RIVISTA IT. DIR. PUBBLICO COM 1544 (2003).

[24] C. ECJ, Grand Chamber, 12 July 2005, Joined Cases C-154/04 and C-155/04, para. 106.

[25] The case law addressing the proportionality principle and its interactions with the precautionary principle is copious. For a detailed comment on it, *see* K. Lenaerts, *"In the Union we trust": Trust-Enhancing Principles of Community Law*, 41 C.M.L. REV. 317 (2004), which cites Case-180/96, *United Kingdom v. Commission*, 1998 E.C.R. 1-2265; Case C-352/98, *P. Laboratoires pharmaceutiques Bergaderm v. Commission*, 2000 E.C.R. I-5291; Case C-3/00, *Denmark v. Commission*, 2003 E.C.R. I-2643. See also P. Dabrowska, *GM Foods, Risk, Precaution and Internal Market: Did Both Sides Win the Day in the Recent*

of Mr. Advocate General Geelhoed delivered on 5 April 2005 in another case involving the Directive:

> [T]he question therefore is whether the objective of the Directive could be better achieved at Community level. […] [T]he Directive's objective is to eliminate barriers to intra-Community trade in food supplements raised by existing differences of national rules regarding the composition, manufacturing specifications, presentation or labeling of food, whilst ensuring a high level of health and consumer protection in accordance with Article 95(3) EC. Such an objective cannot be sufficiently achieved by the Member States individually and calls for action at Community level, as is also demonstrated by the many complaints received by the Commission and by the case-law of the Court.[26]

In this sense, European judges continue to provide an interpretation perfectly in accordance with previous case law,[27] from which emerges the caution of the Court in employing principles, so heavily political, under the cover of coordination of development.

It is remarkable how attentive the Court of Justice is to not invading the political sphere of subsidiarity, the boundaries of which are traced by Art. 3b ECT. As such, there are reasons to doubt the apprehension about the Court of Justice's role and the connected risk of a "judicialization" of the concept.

If the disaffection of large parts of the European citizenry toward the European integration process is surely based on the lack of perceptible political issues,[28] it will

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Judgement of European Court of Justice? 5 GERMAN LAW JOURNAL 151 (2004), *available at* www.germanlawjournal.com/article.php?id=383.

[26] *In* 2005 E.C.R.I-1135, paras. 93-95.

[27] *Ex multis*, Judgment of the Court of 13 May 1997, Case C-233/94, *Federal Republic of Germany v. European Parliament and Council of the European Union*, 1997 E.C.R. I-012405. *See* the case note of M. Dreher and K. Newmann, ENTSCHEIDUNGEN ZUM WIRTSCHAFTSRECHT 159 (1997).

[28] T. Koopmans, *Subsidiarity, Politics and the Judiciary*, 1 EUROPEAN CONSTITUTIONAL LAW REVIEW 115 (2005).

not be cured by keeping down judicial power.[29] If it is true that integration is based also on a citizen's trust in politics, this might not be undermined by the intervention of the judiciary, which, on the contrary, tends to be more objective and technical in verifying the effectiveness of the principles in the EU Treaty.[30]

D. Some Remarks on Possible Means to Give Effectiveness to Subsidiarity and Proportionality Principles

The stagnant situation which Europe seems to have fallen into in the last few years has attracted discussions from two opposite poles concerning the most suitable model to address it: integration theory on the one hand, and democratic theory on the other.[31] Scholars have observed that:

> integration theory and democratic theory both have an important role to play in our understanding of the nature of the Community. We should not, however, ignore the lessons which one might have for the other. Theories of integration are often premised, explicitly or implicitly, on assumptions about human motivation and preferences which have significant implications for issues of democracy and legitimacy. Our very concerns with democracy and legitimacy cannot be considered in isolation from the integration forces which have generated and shaped the Community. The debate about the nature of the Community will doubtless continue, as it properly should. It will be all the richer if the

[29] *See* D. U. Galetta and D. Kröger, *Giustiziabilità del principio di sussidiarietà nell'ordinamento costituzionale tedesco e concetto di "necessarietà" ai sensi del principio di proporzionalità tedesco e comunitario*, RIV. ITAL. DIR. PUBBLICO COM. 928 (1998). *See also* R. CARANTA, GIUSTIZIA AMMINISTRATIVA E DIRITTO COMUNITARIO 142 (1992).

[30] *See* G. Amato, *The European Convention: First Achievements and Open Dilemmas,* 1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 361 (2003).

[31] *See*, for instance, T. Risse, *Neofunctionalism, European Identity, and the Puzzles of European Integration,* JOURNAL OF EUROPEAN PUBLIC POLICY 291 (2005). *See also* E. B. HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES 1950-1957 (1958). For more, *see also* T. A. Börzel, *Mind the Gap! European Integration Between Level and Scope,* JOURNAL OF EUROPEAN PUBLIC POLICY 217 (2005).

> participants in the two discourses cross the green line dividing the room more often.[32]

The two opposite forces are well represented by two images: the network, to justify the integration necessity, and the image of the discourse, to represent the form of participative democracy, shaped on the Habermasian idea of deliberative democracy, as the ideal development of Kant's conception of Perpetual Peace.[33]

E. Integration (Through Networks) and Democracy (Through Discourse)[34]

As discussed above, it is possible to find at least two conceptions of cooperation, the network classification and that of communicative power. That is to say, as a contribution to the possible ways of cooperation amongst European institutions, Member States, and citizens, in the European context, it is possible to build a sort of theoretical frame. On the one hand, through the metaphor of networks, it is possible to understand how the dynamics in the European context can be interrelated without a hierarchical structure, in a way in which public and private barriers are vanishing, as a result of horizontal relationships amongst the actors. On the other hand, the deliberative democracy sums up the language in which the actors of the network can communicate, that is to say through a transparent and open dialogue.

The exchange of information by way of regulation in a networked system was first studied by A. M. Slaughter.[35] Such a phenomenon took its origin from the European Community foundation, in 1957, when Member States were requested to transfer government powers to central European institutions, but chose to leave implementation and enforcement of European norms to their national administrations.

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[32] P. CRAIG & G. DE BÚRCA (eds.), THE EVOLUTION OF EU LAW 50 (1999). *See also*, S. ANDERSEN & K. ELIASSEN (eds.), THE EUROPEAN UNION: HOW DEMOCRATIC IS IT? (1996); J. BUCHANAN, THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN (1975); P. CRAIG & C. HARLOW, LAWMAKING IN THE EUROPEAN UNION (1998).

[33] I. KANT, ZUM EWIGEN FRIEDEN: EIN PHILOSOPHISCHER ENTWURF (1795). *See also* V. GERHARDT, IMMANUEL KANTS ENTWURF "ZUM EWIGEN FRIEDEN," EINE TEORIE DER POLITIK (1995). With respect to the influence of Kant's conception of Perpetual Peace and Habermas theories, *see* R. Alexy, *Basic Rights and Democracy in Habermas's Procedural Paradigm of the Law*, 2 RATIO JURIS (1994); N. Bobbio, *Scienza del diritto ed analisi del linguaggio (1950)*, *in* DIRITTO E ANALISI DEL LINGUAGGIO (U. Scarpelli, ed., 1976).

[34] For more details, *see* P. Craig, *The Nature of the Community: Integration, Democracy, and Legitimacy*, *in* THE EVOLUTION OF EU LAW (P. Craig & G. De Búrca eds., 1999).

[35] A. M. SLAUGHTER, A NEW WORLD ORDER 40, 43 (2004). *See also* E. Chiti, *The Emergence of a Community Administration,* C.M.L. REV. 329 (2000).

"More and more, international cooperation is occurring through networks of government regulators that exchange information, develop common regulatory standards and assist one another in enforcing such standards."[36] Therefore, the transgovernmental network is a system in which power is not located in a hierarchical system, but rather in "a set of relatively stable relationships which are of non-hierarchical and interdependent nature between a variety of corporate actors."[37]

In order to understand how appropriate the network metaphor is to explain the new trends of European legal system i.e. increasing globalisation, the tendency towards decentralisation, and the vanishing barriers of private and public law, it seems useful to focus on some of the characteristics of the concept:

> 1. the concept refers to bodies that exercise both private and public powers;
>
> 2. the level of institutionalization in the network system is low;
> the heart of the network system is the links between the various bodies;
>
> 3. networks are institutions regulating the interactions among subjects;
>
> 4. networks facilitate the development of behavioral standards and working practices.[38]

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[36] The multiplicity of meanings hidden behind the Net-metaphor can be used it as an instrument to disclose the best way to assess the effectiveness of the legal system. C. Möllers, *Netzwerk als Kategorie des Organisationsrechts*, *in* DEZENTRALE NICHT-NORMATIVE STEUERUNG (J. Oebbecke ed., 2005); *see also* R. WOLFRUM, VORBEITENDE WILLENSBILDUNG UND ENTSCHEIDUNGSPROZEß BEIM ABSCHLUß MULTILATERAL VÖLKERRECHTLICHER VERTRÄGE (2001).

[37] T. Börzel, *Policy Networks – A New Paradigm of European Governance?*, EUI WORKING PAPERS, RSC 97/19 5 (1997); Chiti, *supra* note 28 at 339; F. Van Waarden, *European Harmonization of National Regulatory Styles?*, *in* COMPLIANCE AND ENFORCEMENT OF EUROPEAN COMMUNITY LAW, 95 (J.A.E. Vervaele, et. al. eds., 1999).

[38] Chiti, *supra* note 28 at 329. *See also* G. Majone, *The New European Agencies: Regulation By Information,* 42 JOURNAL OF EUROPEAN PUBLIC POLICY 262 (1997); K. Hanf & L. J. O'Toole, *Revisiting Old Friends: Networks, Implementation Structures and the Management of Inter-organizational Relations*, 21 (1/2) EUROPEAN JOURNAL OF POLITICAL RESEARCH 163 (1992); G. Jordan & K. Schubert, (eds.), *Policy networks*, 21 (1/2) EUROPEAN JOURNAL OF POLITICAL RESEARCH 187 (1992).

It has been said that the general optimism about the network system coexists with a certain level of frustration: first, there is really no agreement on how to define policy networks. Second, it seems difficult to utilize the concept to move beyond mere description and into the more interesting field of policy explanation.[39]

There seems to be general agreement in the literature that the strength of the concept lies in its descriptive value and yet there are serious shortcomings when it comes to explaining policy change, because such networks are but one component to explaining policy outcomes:
as a descriptive category, the network concept is useful because it indicates the hybridity of transnational administrative cooperation between formalization and informality, between consensus and majoritarian decisionmaking of the participant states, and between public and private law mechanisms. But more than an analytic framework cannot be delivered by the network concept.[40]

As noted above, a second model of cooperation, deeply connected with the first one, is inspired by Habermas's discourse theory on democracy.[41] Habermas's "principle of democracy" (or "democratic principle") is a particularization of the discourse principle. Whereas the discourse principle addresses the justification of the action norm in general, the democratic principle concerns only the justification of the legal norms that are to govern a particular community: "the democratic principle states that only those laws may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation, which in turn has been legally constituted."[42]

In this context, Habermas has developed a notion called the "communicative concept of power." The explanation of this conception can be found in an interesting study by H. Baxter, where he observed that the precondition of the so

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[39] J. Blom-Hansen, *A "New Institutional" Perspective on Policy Networks*, 75 PUBLIC ADMINISTRATION 669 (1997), according to which: "*defining policy networks seems to be a never-ending story.*"

[40] Möllers, *supra* note 36, at 387.

[41] *See* J. HABERMAS, DISCOURSE ETHICS: NOTES ON A PROGRAM OF PHILOSOPHICAL JUSTIFICATION 65 (1990). The essential implications of this theory can be summarized as follows: equal participation of all who are affected; the postulate of unlimitedness, i.e. the fundamental unboundedness and openness concerning time and persons; the postulate of freedom from constraint (*Zwangslosigkeit*), i.e., the freedom, in principle, of discourse from accidental and structural forms of power; and the postulate of seriousness or authenticity (*Ernsthaftigkeit*), i.e., the absence of deception and even illusion in expressing intentions and in performing speech acts.

[42] J. HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 111 (1998).

called "jurisgenerative" power of the citizens[43] is the existence of "undeformed public spheres of political discussion that are linked to the formal institutions in which law is made." Cite. In turn, the precondition for undeformed public spheres is a "vibrant" civil society, or network of voluntary associations that are autonomous from state control.[44] In this sense, Habermas's idea of democracy involves much more than formal governmental institutions and periodic voting rituals. It requires broad, active, and ongoing participation by the citizenry. By means of participation, it is possible to influence the exercise of administrative power. Also, legitimate law, in Habermas's view, is both the product of democratic lawmaking and the mechanisms that define the structures of official command and obedience that Habermas terms administrative power.

Law, in other words, is a mechanism for effecting and regulating "the conversion of communicative into administrative power: legitimate law is generated from communicative power and the latter in turn is converted into administrative power via legitimately enacted law."[45] In such a context, the general discourse principle operates differently in different kinds of discourse: moral, ethical and pragmatic.[46]

From the point of view of ethical political discourse, the content of discourse theory is not to require consensus as to the substantive norm in question, but instead, discourse as to the lawmaking procedures through which consensus is to take place.

Natural objections to this second model include problems of guaranteeing rights and democratic accountability in practice, in a system centred on government by bureaucrats. Both network and discourse theories risk remaining purely in the abstract, because of an inability to find an effective application.[47] Hence the attempt of European democracies to put into practice the aspiration to a democratic model.

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[43] H. Baxter, *Habermas's Discourse Theory of Law and Democracy*, 50 BUFFALO LAW REVIEW 266 (2002). The terms "jurisgenesis" and "jurisgenerative," he notes, are most closely associated with the work of Robert Cover. *See* R. M. Cover, *Nomos and Narrative*, 97 HARVARD LAW REVIEW 4, 11, 25, (1983).

[44] For Habermas's conception of civil society as a network of voluntary associations, *see* HABERMAS *supra* note 42, at 175, 358, 359 and 367.

[45] HABERMAS, *supra* note 42, at 169.

[46] J. HABERMAS, *In the Pragmatic, Ethical, and Moral Employments of Practical Reason*, *in* JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS 50 (C. P. Cronin, trans., 1993).

[47] It is worth to noting, however, that the network model has had good results in cooperation between competition authorities. *See* S. Roebling, T. Ryan & L. Sjöblom, *The International Competition Network (ICN) Two Years On: Concrete Results of a Virtual Network*, 3 COMPETITION POLICY NEWSLETTER 37 (2003).

F. An Example to Put Into Practice the Instances of Democracy: The Proportionality Principle

I. Federalism as the Right Direction To Be Followed

The quest for legitimacy can be satisfied through the application of subsidiarity and proportionality principles by the Constitutional Courts of the Member States themselves. In particular, it is interesting to analyze the German model, where the principles originated, and the Italian model, where they have been applied. That these principles are subject to the possibility of judicial review, in fact, can provide an example of making them effective, which in turn leads to greater enforceability.

Both principles took origin in a Federal system, wherein different types of political issues that need different types of institutions to address them coexist. Some affect only a local area, while others are more widespread in their scope. The institutions of government should reflect this. The idea that government should be based solely on strong central institutions is out-of-date. In a federal system, the power to deal with an issue is held by institutions at a level as local as possible, only as central as necessary. This is the famous principle of subsidiarity. The second major feature of a federal system is that it is democratic. Each level of government has its own direct relationship with the citizens. Its laws apply directly to the citizens and not solely to the constituent states. In a federal system, power is dispersed, but coordinated. For this reason, federalism is often seen as a mean of protecting pluralism and the rights of the individual against an over-powerful government.[48]

With the above explanation, Richard Laming, a member of the Executive Committee of Federal Union, introduced the main features which characterize a "federalist Union." As a result of the temporary halt to the European process, Laming sought to encourage and reinvigorate the resumption of the implementation of this vision for Europe. This would require the joint effort of Europe in its entirety, each Member State's legal system, and its citizens. The common sentiment is that Europe presently requires "an injection of democracy, with terms of reference, which can be discussed in detail without all too soon coming up against the boundaries of the field of competence in question, within which pan-European public opinion can be formed and within which it is accountable to the European public with regard to the fulfilment of its tasks."[49]

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[48] R. Laming, *An Introduction to Dederalism*, 1 FEDERAL UNION (2003), *available at* www.federalunion.org.uk.

[49] U. Fastenrath, *The EU As a Federal Commonwealth*, *in* GOVERNING EUROPE UNDER A CONSTITUTION 414 (H. J. Blanke & S. Mangiameli eds., 2006); R. Kwiecień, *The Primacy of European Union Law over National*

Of great interest will be the analysis of the pivotal German system from which the principle was derived and transferred to article 3b of the EU Treaty. Then, as a sample of the so-called "descendant phase of communitarian law" (that is, the application of EC law into domestic law), a study of the Italian system, where subsidiarity and proportionality principles are now expressly "constitutional principles" will follow.

In order to understand the mechanisms of the proportionality principle, the situation in Germany will be described. Here, according to the federal principle, the subsidiarity principle has developed and followed two main directions. First, it appears in the relationship between EU and national powers, and second, according to the same logic, it appears in the relationship between the *Bund* (Federation) and the *Länder* (States).[50]

The second part of this paper will examine the Italian model, where quite contrary to the proportionality principle, the subsidiarity principle is explicitly referred to as the relationship between the State and the Regions. The principle of subsidiarity here has been introduced to allocate the administrative functions (Art. 118 cost.), according to the provisions under Art. 117 Cost., which deals with the division of legislative powers.

As will be explained, these functions must now be carried out by the institutions "closest to the citizens […] unless they are attributed to the provinces, metropolitan cities and regions, or to the State, pursuant to the principles of subsidiarity, differentiation, and proportionality, to ensure their uniform implementation."[51] Except for a generic reference to the necessity of respecting "communitarian principles," no mention is made of the relationship between the EU and State. Moreover, there is another fundamental difference. The Italian system, unlike the German one, is not quite a federal system. Italy's Regions do not effectively have legislative powers, as the German *Länder* do. Italian Regions indeed have their own legislative competences, as set out in Article 117 of the Constitution, but there

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Law under the Constitutional Treaty, 6 GERMAN LAW JOURNAL: SPECIAL ISSUE –UNITY OF THE EUROPEAN CONSTITUTION 11 (2005).

[50] For an extensive bibliography on German public and administrative reforms, *see* K. Stern, *Der moderne Staat: Aufgaben, Grenzen und reformgedanken*, TEORIA DEL DIRITTO E DELLO STATO: RIVISTA EUROPEA DI CULTURA E SCIENZA GIURIDICA 216 (2002).

[51] For this and a further bibliography, *see* T. Groppi & N. Scattone, *Italy: the Subsidiarity Principle*, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 131 (2006); C. Tubertini, *Public Administration in the Light of the New Title V of the Italian Constitution*, 12 EUROPEAN PUBLIC LAW 35 (2006).

is no strong characterization of a branch of Parliament, as is the case for the *Bundesrat* in Germany, where representative members of Regions can actively participate in the decision-making processes of the State's legislative acts.

The two models, German and Italian, will then be compared to Art. 3B of EU Treaty, which clarifies the role played by the Community. Here, subsidiarity encompasses only the relationship between EU and Member States. Other local entities are seemingly forgotten.

By collating and comparing the relevant constitutional provisions, both European and national, different nuances of the subsidiarity principle may be derived. Three relate to administrative functions, whilst one relates to the legislative. They are as follows:

> 1. subsidiarity in the case of action of the Community and inaction of the Member State (Art. 3B Treaty);
>
> 2. subsidiarity in the case of action of the Community and inaction of local entities (Art. 23 GG);
>
> 3. subsidiarity in the case of action of the State and inaction of local Government (Art. 72 GG and Art. 118 Cost. It.); and
>
> 4. subsidiarity as a legislative parameter in order to guarantee not only "executive" competences, but also legislative participation (Art. 23-24 GG).[52]

The proportionality principle and, more generally, the aspirations that give rise to the subsidiarity principle, are still considered fundamental concepts that regulate any federalist system and generally indicate the guidelines of "common administrative law," which refuses the logic of hierarchy between national and European levels.

In this regard, it has been observed that administrative proceedings can be divided into three components: "the national, the supranational, and the infra-national, . . .

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[52] For detailed descriptions of subsidiarity models, *see* M. NETTESHEIM & P. SCHIERA (eds.), DER INTEGRIERTE STAAT: VERFASSUNGS- UND EUROPARECHTLICHE BETRACHTUNGEN AUS ITALIENISCHER UND DEUTSCHER PERSPEKTIVE (1999).

[m]any are familiar with the first two, but the third, the infra-national element, which is constituted by horizontal dialogue among national administrations, is less known."[53]

The above-mentioned dialogue can assume different connotations. To understand whether, and in what way one may note these multilevel administrations of public matters, it is necessary to investigate whether the different national principles may be read in a synoptic way. It is critically important to understand how the subsidiarity principle has been translated in national sources of law. Two examples will therefore be analyzed: the German constitutional system, artificer and creator of the principle, having given impulse to the "ascendant phase" of the concept; and the Italian system, where the principle, in the Constitutional Law of 10 October 2001, n. 3, was recognized at a Constitutional level at the end of the so-called "descendant phase."

G. German Constitution: Federalism and Standards For Allocating Competences Amongst Bund and Länder

I. The Federation and the States: Arts. 23, 24, 28-34, 37 GG

The primary point of departure when studying German administrative law from a European comparative perspective, is an analysis of the *Grundgesetz* (GG-(Basic Law for the Federal Republic of Germany). It was promulgated, as known, on May 23rd, 1949 (first issue of the Federal Law Gazette), and as amended up to and including December 20th, 1993.[54]

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[53] S. Cassese, *European Administrative Proceedings*, 68 LAW AND CONTEMPORARY PROBLEMS 21 (2004).

[54] For an overview of the Federal Republic of Germany's roots, *see* L. Watts and P. Hobson, *Fiscal Federalism in Germany*, Institute of Intergovernmental Relations, Queen's University, Kingston, Ontario, Canada and Department of Economics, Acadia University, Wolvifille, Nova Scotia, Canada, 2000: "The Federal Republic of Germany established in 1949 has historical roots in earlier experience of the German Empire (1871-1918), the Weimar Republic (1919-34), the failure of the totalitarian centralization of the third Reich (1934-35), and the immediate postwar influence of the allied occupying powers. In 1949, the Länder of West Germany became the Federal Republic of Germany. Thirty one years later, the reunification of Germany in 1990 provided for the accession of five new Länder from had previously been the Democratic Republic of Germany." One of the first authors, to recognize the importance of then new concept of federalism in the *BundesStaat*, even if he referred to a period antecedent to the *Grundgesetz*, was G. JELLINEK, ALLGEMEINE STAATSLEHRE (1929). On the conceptualization of sovereignty in Jellinek and also in the Kelsen studies *see* the recent work of S. Griller, *The Impact of the Constitution for Europe on National Sovereignty*, *in* A CONSTITUTION FOR EUROPE: THE IGC, THE RATIFICATION PROCESS AND BEYOND 160 (I. Pernice & J. Zemanek eds.,2005). For a detailed introduction to the Jellinek study, *see* V. E. ORLANDO, GIORGIO JELLINEK E LA STORIA DEL DIRITTO PUBBLICO GENERALE (1949). *See also* H. Meibom, *Die Wirkung der Mitgliedstaaten in der Rechtsetzung der EWG*, *in* ZUR STELLUNG DER MITGLIEDSTAATEN IM EUROPARECHT (H. Bülek ed., 1967); H. E. BIRKE, DIE DEUTSCHEN BUNDESLÄNDER IN DEN EUROPÄISCHEN GEMEINSCHAFTENM (1973).

Art. 23 of the GG ("The European Union"), which concerns the organization of different levels of power, reads:

> 1. With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by the Basic Law. To this end the Federation may transfer sovereign powers with the consent of Bundesrat […]. 2. The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. […]. 4.The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subjects falls within domestic competence of the Länder. 5. Insofar, in an area within the exclusive competence of the Federation, interests of the Länder are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. To the extent that the legislative powers of the Länder, the structure of Land authorities, or Land administrative procedures are primarily affected, the position of the Bundesrat shall be given the greatest possible respect in determining the Federation's position consistent with its responsibility of the Federation for the nation as a whole […]. 6. When legislative power exclusive to the Länder is primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be exercised with the participation and the concurrence of the Federal

> Government; their exercise shall be consistent of the Bundesrat.[55]

Before analyzing the administrative structure outlined in Article 32 above, it is important to note that in 1992, due to the influence of the Maastricht Treaty and, more particularly, of the subsidiarity clause in Art. 5 (ex Art. 3B), the German Constitution was significantly amended. The ratification of the Maastricht Treaty was likewise preceded by an amendment of the constitutional provisions in order to reserve to the Federation some exclusive powers in matters related to currency.[56] But, as has been observed "besides the amendment of monetary provisions, Germany also introduced a general clause confirming participation in a unified Europe, and on the delegation of State competences in this respect (Art. 23), as well as a number of amendments concerning various specific aspects of EU membership."[57]

Many German authors have discussed the necessary amendment of the German Constitution together with the affirmation of the subsidiarity principle at a Constitutional level. In particular, Prof. R. Streinz, commenting on Art. 23 GG, notes that the subsidiarity principle chiefly aims to encompass the exercise of devolution and to narrow down the powers in cases of non-exclusive subjects of the Community. The clause sets out the unique, dual relationship that exists between Member States and the Community as follows:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the

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[55] With respect to the revision of the Constitution after the reunification of the two Germanies in 1990, *see* G.H. Gornig & S. Reckewerth, *The Revision of the German Basic Law: Current Perspectives and Problems in German Constitutional Law*, PUBLIC LAW 137, 144 (1997), who observe on Article 23: "the new Article 23 B.L. deals extensively with the participation of German national and state organs in the affairs of the European Union. In the final analysis, it was the states (*Länder*) that played the predominant role in shaping the new provision, particularly the wording which makes German participation in European unification contingent upon the principles of federalism and subsidiarity and which offers to the states rights to participate directly, as a compensation for the loss of other state (*Länder*) powers."

[56] *See, infra*, Section G, III, the analysis of fiscal federalism.

[57] On this aspect, *see also* H. Beckendorf, *Neuere Entwicklungen in der Bildungspolitik der Europäischen Gemeinschaft*, 2 NVWZ 125 (1993).

> scale or effects of the proposed action, be better achieved by the Community.[58]

The challenge was therefore the manner in which the provisions of Art. 3 B would be enlarged to include the various components of "Member State" that would realize the Länder's legislative aspirations and consequently their will to exercise administrative powers.

Central and innate to Germany is its "federal" constitution. This was the compelling issue that made it necessary to involve the interested components of the State so that the European institutions would also be involved in the decision-making process. The Länder themselves were keen on the subsidiarity principle and ought to have been included to play a new and important role at a Constitutional level.

Despite the complexity of the discussion, it led to important results. Hence, the framework of the German Constitution in relation to the federal powers changed.[59] First of all, the participation of the Federal Republic of Germany in the development of Europe was clearly characterized by the subsidiarity principle, which is now a valuable constitutional principle set up to delimit the borders of EU and State power (Art. 23, para 1).

Secondly, the entire content of Art. 23 GG seems to be a logical consequence of the subsidiarity principle. This impression emerges from the formal structure of the article. No mention is made of the European Union's intervention. On the contrary, what has been clearly underlined is the central role of the Federal Republic, its organization of powers in Bundestag, Bundesrat, and Länder, all of which, together, participate in the decision-making process by transferring their power to the Union (See para 2: "The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. The Federal Government shall take the position of the Bundestag into account during negotiations"). Deeply connected with the above-noted provision is Art. 50 GG, which remarkably declares the relationship between the Länder and the Bundesrat

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[58] E. di Salvatore, *Integrazione europea e regionalismo: l'esempio tedesco*, *in* DIRITTO PUBBLICO COMPARATO E EUROPEO 518 (2001), who notably recollects the Länder's keen desire for the subsidiarity principle even though their proposal was not precisely accepted and Art. 3 B had content different from what they really wanted, excluding *de facto* the role of Länder themselves.

[59] On Art. 23 GG's amendment *see* S. Hölscheidt & T. Schotten, *Die Erweiterung der Europäischen Union als Anwendungsfall des neuen Europaartikels 23 GG?*, 5 DIE ÖFFENTLICHE 187 (1995); W. Fischer, *Die Europäischen Union im Grundgesetz: der Neue Artikel* 23, ZPARL. 32 (1993); F. Wilhelm, *Europa im Grundgesetz: Der Neue Artikel 23*, BAYVBL 705 (1992).

as follows: "the Länder shall participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union."[60]

Thirdly, the participation of the Länder has two main levels of protection--in the event Länder interests are infringed or when their exclusive legislative competence is undermined. Within the exclusive competence of the Federation, should the interests of Länder be affected, the Federal Government would take the position of the Bundesrat into account. Moreover, at the second level, which is a clear expression of subsidiarity, if the Länder's exclusive legislative powers are fundamentally infringed, then the exercise of power shall be delegated to a representative of the Länder as designated by the Bundesrat.

In other words, it is clear that the structure of Art. 23 GG is built according to the logic of subsidiarity. Highest respect is paid to the Land, which is the object of protection and towards which the European Union shall guarantee "*subsidium*," its own protection. It is interesting to note what authors and case law say of the concept of "devolution" (*Übertragung*). This concept ought not to be understood literally as a "transfer" of power. Rather, it should to be understood as a logical consequence of the necessity to integrate different powers. Subsidiarity does not deal with hierarchy, but with a multilevel perspective.

A unilateral transfer of powers from one level to another may not be accepted.[61] This constitutional provision could be sufficient to reveal the essence of subsidiarity and its deep connection with democracy. Similarly, other examples illustrate this relationship. Particularly indicative of the Land's power is the provision of Article 28 GG, which promises the "[f]ederal guarantee of Land constitutions and of local self-government." Here, it is possible to find the constitutive principles of Land government, with provision of a representative body chosen in general, free, equal, and secret elections. Moreover, the "*Öffnungsklausel*" (opening clause) invites the concept of "European citizenship" by allowing citizens of any member state of the European Community to be elected in accordance with European law. It is evident that the *Öffnungsklausel* is a suitable measure to deter the risk of excessive "parochialism."[62]

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[60] Article 51, on "Composition," outlines the effective make up of the *Bundesrat*. *See* C. Hillgruber, *German Federalism – An Outdated Relict?* 6 GERMAN LAW JOURNAL (2005).

[61] R. Streinz, *Sub Art. 23 GG* cit., 958; BVerGE 37, 271, 279. For an analysis of the judgment, *see* J.A. Frowein, *Das Maastricht-Urteil und die Grenzen der Verfassungsgerichtsbarkeit*, ZAÖRV 1 (1994).

[62] M. Nierhaus, *Sub Art. 28*, *in* GRUNDGESETZ KOMMENTAR 1040 (M. Sachs ed., 2003).

The self-regulation of local affairs is guaranteed by a financial autonomy that, according to constitutional principles, is based on the right of municipalities to a portion of tax revenues upon their jurisdiction and upon the right to establish the rates at which these sources shall be taxed.
It is worth briefly noting that local government is the lowest of the three levels of the administrative system within Germany, which can be broken down as follows: federal, state (*Länder*) and local level. The local level is then subdivided into counties (*Kreise*) and municipalities or communes (*Gemeinde*).[63]

As has been observed, with regard to Art. 28 GG: "Local government in Germany has a comparatively strong constitutional position. According to Article 28 of the Federal Constitution, communes enjoy local autonomy […] and neither federal nor state government is allowed to intervene within this sphere."[64] It is important to recall that Article 28 GG is the outcome of a more complex reform of the fiscal part of the German Basic Law[65] in which all revenue sharing rules are contained in Art. 106, entitled "Apportionment of Tax Revenue."

In Germany's federal system, an efficient administration aims, firstly, to guarantee that legislative power lies at the federal level with the effective cooperation of Länder through their representative members in the Bundesrat. Secondly, a federal system aims to organize administrative power at the Land level. Therefore, as a summation of fiscal federalism, it is possible to say with respect to the subsidiarity principle that the Basic Law distinguishes between the right of each level of government to legislate on specific taxes and the right to appropriate the proceeds of taxes. The exclusive federal power to legislate on taxes is in practice restricted to customs, duties and fiscal monopolies (Art. 105 1). The power to legislate on all taxes wherefrom the revenue is shared is concurrently held. The Länder can therefore use the Federal Bundesrat as their vehicle for shaping federal tax legislation.

On the whole, Federal Law in a certain way "boasts priority" over Land legislation. The footprints of this trend may be found in Art. 31 GG, which states: "Federal law shall take precedence over Land law" (the so called *Kollisionsnorm*). In case of a conflict between the Bund's and the Land's law, the general federal interest should prevail.[66]

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[63] For further details, *see* C. Reichard, *Local Public Management Reforms in Germany*, 81 PUBLIC ADMINISTRATION 345 (2003).

[64] *Id.* at 347.

[65] For further detail, *see* Nierhaus *supra* note 62 at 1061.

[66] P. M. Huber, *Sub Art. 31*, *in* GRUNDGESETZ KOMMENTAR 1100 (M. Sachs ed., 2003).

Article 32, concerning "Foreign Relations," is also remarkable. It reads: "1. Relations with foreign states shall be conducted by the federation." It further outlines the right of the Land to be consulted. Insofar as the Länder have power to legislate, they can conclude foreign treaties only after the consent of the Federal Government.[67]

Nevertheless, even if the general conception of public administration is strongly centralized (although it is worth underscoring that in Germany's federal system, the Länder have effective participation in the Bundesrat), it is significant that general public principles of good administration are expressly referred to the Land's administration. Therefore, Article 33 affirms equality of rights and duties with respect to the Land: "1. Every German shall have in every Land the same political rights and duties."

The process of constructing a "good administration" is another result of the pivotal role of the Länder and of the effective cooperation between them and the Federal administration. This refers to the necessity of cooperation in cases of natural disasters or accidents, with the provision for collaborative assistance between all federal and Land authorities (Art. 35 "Legal and Administrative Assistance, Assistance During Disasters"). The cooperation amongst the Länder is known as "*Dritte Ebene*," the third level of federalism. This means that beyond the Länder and Bund levels, there is a recognized sphere of action in which all Länder should cooperate.[68]

II. Federal Legislative Powers: Arts. 70-74

Chapter VII of the German Constitution, and more precisely, Articles 70 through 82, sets out in detail the functioning of Federal Legislation with a clear separation of the exclusive legislative power of the Federation (Art. 71), and of the concurrent legislative power (Art. 72), respectively followed by the numbering of subjects of exclusive legislative power (Art. 73), and by the numbering of subjects of concurrent legislation (Art. 74).

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[67] J. Bauer & M. Hartwig, *Verträge der Länder des Bundesrepublik Deutschland mit ausländichen Staaten über Fragen der Kommunalen Zusammenarbeit*, NWVBL 41 (1994). For further information, *see also* R. Streinz, *Sub Art. 32*, *in* GRUNDGESETZ KOMMENTAR 1111 (M. Sachs ed., 2003).

[68] F. OSSENBÜHL, *Föderalismus und Regionalismus in Europa. Landesbericht Bundesrepublik Deutschland*, in ID., *op. cit.*, 140; *see also* W. ERBGUTH, *Sub Art. 35*, *in* M. SACHS, (eds.) *Grundgesetz Kommentar*, cit., 1196.

According to Article 70 "Division of Legislative Powers Between the Federation and the Länder": "1. The Länder shall have the right to legislate insofar as this Basic Law does not confer legislative power to the Federation. 2. The division of authority between the Federation and the Länder shall be governed by the provisions of this Basic Law respecting exclusive and concurrent legislative powers." In this regard, it is significant that Art. 70 be read and construed in connection with the systematic order of European Law. In a telling example, Prof. C. Degenhar, in particular, titles the mentioned part as "Distinction of functions among Bund, Länder and European Community". This accords with the ideal "*fil rouge*" among European and national competencies.[69] Article 70 unquestionably expresses a strong necessity to give voice to the instance of democracy.

As mentioned, Art. 72 GG describes the so-called "concurrent legislative powers of the Federation and the Länder." This follows as a logical consequence the affirmed "exclusive legislative power of Federation" in Art. 71. The article, amended in 1994, reads as follows: "1. On matters within the concurrent legislative power, the Länder shall have power to legislate so long and to the extent that the Federation has not exercised its legislative power by enacting a law. 2. The Federation shall have the right to legislate on these matters if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest […]."

As it has been affirmed, in Article 72 (2), it is easy to recognize "an expression of the principle of subsidiarity with which European law has made us familiar."[70] In agreement with G. Taylor's comments, it should be recognized that the Federal competence is organized into two levels: the subsidiarity principle and the so-called "subject-matter competence." But Art. 72 has played a decisive role in the affirmation of federalism as recently as October 2002, when the German Federal Constitutional Court decided its first case under the amended statutory provisions.

The case law will be more fully analyzed below. Presently, however, it is important to underline the admission of a judicial review on criteria listed in paragraph 2, which delimits the Federal legislative power on concurrent matters "if and to the extent that the establishment of equal living conditions throughout the federal

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[69] C. Degenhart, *Sub Art. 70 GG*, *in* GRUNDGESETZ KOMMENTAR 1496 (M. Sachs ed., 2003).

[70] G. Taylor, *Germany: The Subsidiarity Principle*, INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 115 (2006). On Art. 72, *see* E. Buoso, *L'art. 72, II comma GG davanti al Bundesverfassungsgericht*, 5 LE REGIONI 959 (2003), which also provides an excellent bibliography.

territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest."[71]

Looking through Articles 73 and 74, it is notable that the "edge criterion" of competences is based on subjects, with the provision of "areas of federal framework legislation."

In conclusion, it is important to remember that the federal structure of the German State is guaranteed by the so-called "eternity clause" of Art. 79 para 3, prohibiting amendments which would abolish the Länder. It provides: "[a]mendments to the Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."

III. Execution of Statutes and Federal Administration (Arts. 83-91 GG) and Joint tasks (Arts. 91a and 91b)

The entire corpus of provisions governing federalism are fulfilled by a few legislative prescriptions relating to administrative functions. The same federal and subsidiarity logic that governs legislative matters is centred on the distribution of authority between the Federation and the Länder. Examples of this include the following:

> 1. Art. 83 reads that "The Länder shall execute federal laws in their own right insofar as the Basic Law does not otherwise provide or permit;"
>
> 2. Articles 87 to 91 list the subjects of federal administration. the Federation executes laws through its own administrative authorities or through federal corporations or institutions established under public law pertaining to all these subjects.

Finally, Articles 91a and 91b relate to the possibility of cooperation between the Federation and the Länder in promoting research institutions and research projects of supra-regional importance.

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[71] Taylor, *supra* note 70 at 116; M. Herdegen, *After the TV Judgement of the German Constitutional Court: Decision-making Within the EU Council and the German Länder*, C.M.L. REV 1369 (1995).

The Federal Constitutional Court therefore plays a decisive role, as the "watchdog" of all Constitutional provisions and rules on the interpretation of the Basic Law:

> - in the event of disputes concerning the rights and duties of a supreme federal bodies;
> - in the event of disagreement or doubts respecting the formal or substantive compatibility of federal law or Land law with the Basic Law;
> - in the event of disagreements whether a law meets the requirements of paragraph 82 of Article 72, on application of the Bundesrat or of the Government or legislature of a Land;
> - in the event of disagreement respecting the rights and duties of the federation and the Länder especially in execution of federal law by the Länder and in the exercize of federal oversights and on other dispute involving public law between Federation and the Länder;
> - on constitutional complaints, that can be filed by any person alleging that one of his basic rights has been infringed by a public authority, and also on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self government has been infringed under Article 28;
> - in the case of infringement by a Land law; however, only if the law cannot be challenged in the constitutional court of the Land.[72]

The sub-topic that follows shall compare the new formula and the way the German Constitutional Court uses it, to the Italian approach

H. The Italian Constitution: New Title V. Subsidiarity clause Between State and Regions

I. Legislative Competences and Subsidiarity Principles in Administrative Functions

The influence of Art. 3B of the EU Treaty on the Italian Constitutional system was felt in 2001 when the Constitutional Law n. 3, 18 October 2001 enshrined the

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[72] L. Woelk, *La Germania. Il difficile equilibrio tra unitarietà, solidarietà e (maggiore) competizione, in* FEDERALISMI FISCALI E COSTITUZIONI 191 (V. Atripaldi & R. Bifuclo eds., 2001).

subsidiarity principle as a constitutional principle. Then, the recognition was limited to Parliamentary Law (L. Bassanini n. 59/1997 and D. Lgs. n. 267/2000).[73]

Although through a perusal of the list of local autonomies in Art. 114 one notes the revolutionary inversion of order, whereby mention is first made of Municipalities and Provinces, then Regions, then State, in descending order, the most important changes are enunciated in Articles 117 and 118.

The Italian Constitution, similarly to Art. 23 GG, recognizes at the outset the European principles that are now explicitly at the same level as constitutional principles. Art. 117 (1) outlines that "legislative power belongs to the State and the Regions in accordance with the constitution and within the limits set by European Union law and international obligations."

The first evident difference, however, is that subsidiarity does not appear in Art. 117, where the relations between States and Regions are codified. Here, for two main reasons, it is not possible to speak of a "pure federalist system." Firstly, Regions do not participate in the decision-making process and subsidiarity is called for as a requirement of administrative action, not as a criterion for separating legislative power.[74] In any case, it is easy to find the second main characteristic of a federal system, which is the division of subjects for legislative power of the State and Regions.

It is worth noting that even before the revision in 2001, the Italian Constitution enshrined not only the principle of "unity of the State," but also the so-called "decentralization" principle. The latter principle is enunciated particularly in Art. 5 of the Constitution "Local Autonomy:" "The Republic, one and indivisible, recognizes and promotes local autonomy; it fully applies administrative decentralization of state services and adopts principles and methods of legislation meeting the requirements of autonomy and decentralization."

In light of the "subsidiarity logic," one may possibly give a new and different interpretation to the above-mentioned article. The point should now be the decentralization of functions, in respect of unity and indivisibility of the Republic,

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[73] On this subject, *see* G. Cartei & V. Ferraro, *Reform of the Fifth Title of Italian Constitution: a Step Towards a Federal System?*, EUROPEAN PUBLIC LAW 445 (2002).

[74] For a comparison between Italian devolution and German federalism, *see* S. Mangiameli, *Continuità e riforma della Costituzione*, 2 TEORIA DEL DIRITTO E DELLO STATO, RIVISTA EUROPEA DI CULTURA E SCIENZA GIURIDICA 466-467 (2002).

whereas before the Constitutional Law n. 3/2001, the focus was on "unity and indivisibility of Republic."

Article 117 of the Const. confirms the attention paid to local autonomy and to the institutions "nearest to the citizens." This provision first lists the subjects of exclusive legislative competence of the State (so-called exclusive State matters). It then lists defined "transversal standards," where competences are shared between State and Regions, but where the State maintains the power to set out the framework of fundamental principles (so-called concurrent subjects). Finally, it lists a residual legislative competence of Regions.[75]

Following the division of legislative powers noted above is the amended Art. 118 Cost, which states as follows. "(1) Administrative functions belong to the municipalities except when they are conferred to provinces, metropolitan cities, regions, or the state in order to guarantee uniform practice; the assignment is based on the principles of subsidiarity, differentiation and adequacy. […] (4) State, regions, metropolitan cities, provinces and municipalities support autonomous initiatives promoted by citizens, individually or in associations, in order to carry out activities of general interest; this is based on the principle of subsidiarity." What is clearly evident is the most important change relating to the constitutionalization of the principle of subsidiarity, as well as the emphasis given to differentiation and adequacy.

Moreover, within the meaning of subsidiarity it is possible to distinguish two different forms: the first one is known as "vertical subsidiarity," because it refers to levels of government that, even though not ordered in hierarchy, may in some way be organized in an ideal "vertical order," as provided by Art. 114.[76] The second construction of subsidiarity, accords with the geometrical metaphor. This is the so-called "horizontal subsidiarity," noted in the last paragraph of Art. 118. Here relations are established at a level where State, regions, metropolitan cities, provinces, and municipalities are juxtaposed against the citizens, both as individuals and as members of associations.

In this sense, the jurisprudence of the Constitutional Court has up to now affirmed that subsidiarity, at both levels, cannot operate as a mere verbal formula believed to

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[75] Art. 117 (4). The Regions have exclusive legislative power with respect to any matters not expressly reserved to State law."

[76] In this regard, both the jurisprudence and secondary writings have pointed out that this first acceptance of subsidiarity has a double meaning. *See* Tubertini, *supra* note 51 at 37; and *also* R. Bin, *La funzione amministrativa nel nuovo Titolo V della Costituzione*, LE REGIONI 373 (2002).

have magical force that would realize the division of competence between different levels of governance.[77] On the contrary, subsidiarity requires that effective capacities be scrutinized and has to be combined with the "loyal cooperation" principle.

Two challenges are evident in ensuring the effectiveness of the subsidiarity principle. The first concerns applying the constitutional provisions, and the second is finding the best instruments to coordinate the principle with the division of legislative and administrative competences. In respect of the first challenge, the legislature has attempted to provide a solution through Law No. 131 of June 5, 2003 ("Provisions For the Adjustment of the Legal System of the Republic in Constitutional Law No. 3/2001"), but has been unsuccessful. For the second challenge, instruments of agreements and understandings have been written, and committees and networks of communications created. Before concentrating on the current position, and on the recent approach of Constitutional Court which clearly demonstrates awareness of the instances of a "bottom-up subsidiarity," it is useful to complete the framework, by highlighting new provisions in the financial system of local autonomies.

Article 119 on "Financial Autonomy" provides that: "(1) Municipalities, provinces, metropolitan cities and regions have financial autonomy regarding revenues and expenditures. (2) Municipalities, provinces, metropolitan cities and regions have autonomous resources. They establish and implement their own taxes and revenues, in harmony with the constitution and in accordance with the principles of coordination of the public finances and the taxation system. […]."

Here, just as in the German Constitution, after enumerating the legislative and administrative competences, the constitutional revision provides for financial autonomy as a logical consequence of the division of functions. But this new provision differs significantly from the *Finanzverfassung* (Constitution for Financial Matters) of German federalism. In Italy, the effectiveness of dispositions on fiscal federalism has been delegated to law.[78]

The difficulty in giving effect to Article 119 of the Constitution is one of the reasons for skepticism over the revision of Title V: "Da questo punto di vista l'elaborazione

[77] *See* Corte Costituzionale, 1 October 2003, 6 RIV. CORTE CONTI 181 (2003).

[78] Mangiameli, *supra* note 74 at 478.

italiana è ancora indietro e la stessa applicazione dell'art. 119 Cost. sembra conoscere delle difficoltà insormontabili."[79]

I. Two Decisions Compared: The Proportionality Flips

This final part will consist of a comparison of the transformation of the German and Italian Constitutional Courts' attitudes toward the proportionality principle. This comparison will be made through an analysis of the judgment of the *BundesverfassungGericht* (BVerfGE Federal Constitutional Court) announced on October 24th, 2002[80] and a judgment of the Italian Corte Costituzionale regarding GMO problems.

I. German Case Law

The German judgment is well-known because it is considered the German Constitutional Court's first response to the amended Art. 72 GG. As noted previously, the 1994 amendment to Art. 72 GG introduced the possibility for judicial review of the discretionary power of Federal legislation. With the 2002 judgment, the Court paved the way for the admission of an effective review of federal power and moreover focused its attention on the requirements of a legitimate intervention of the State. In its judgement, the BVerfGE refused to grant a judicial review on the basis of the "necessity of Federal intervention," under the sphere of "discretionary power of Federal legislator."[81]

The question the Court examined concerned the legitimacy of a Federal Law on geriatric assistance (*Altenplegegesetz, AltpflG*), which contained some amendments to the law on sanitary assistance (*Krankenpflegegesetz*). The State of Bavaria contested the new law in Court by challenging the necessity of a federal law dealing with a "sanitary subject," which regulated the education and vocational training in case of sanitary assistance. The statute, according to the petitioners, dealt very generally with the training of geriatric care assistants and expressly left many details to the states.[82]

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[79] Transl.: From this point of view, the Italian system is not yet completely developed and the effectiveness of Art. 119 Const. is seriously discussed.

[80] *Bundesverwaltungsgericht* [BVerwG] [Highest Administrative Court] 24 October 2002, II Sen., 24 available at www.bundesverfassungsgericht.de/entscheidungen.html.

[81] BVerfGE, 2, 213 ss; 10, 234; BVerGE, 15, 127; BVerfGE, 33, 224, 229, in www.bundesverfassungsgericht.de/entscheidungen.html. For more information, *see* E. Buoso, *L'art. 72, II comma, GG davanti al Bundesverfassungsgericht,* LE REGIONI 958 (2003).

[82] Taylor, *supra* note 70.

The Constitutional Court, after having acknowledged the important amendment of Art. 72 GG in 1994, affirmed the necessity of considering, through a "balanced evaluation," the subjects of exclusive and concurrent legislative competence.

In this sense, the Court strongly affirmed that the entire sphere of legislative competence, including the Federal one, has to be submitted to judicial review.[83] Article 72 GG, following the amendment, refers to the "[n]ecessity" to exercise federal legislative power and no longer to the "Need" of a Federal regulation, as it was before the 1994 amendment.

Beyond the external metamorphosis of the "Need-clause" (*Bedürfnisklausel*) into the "Necessity-clause" (*Erforderlichkeitsklausel*), the Court includes the possibility of a judicial review. In this way, the obstacle of discretionary power is tempered by instruments of proportionality.[84]

II. Italian Case Law

Judgment n. 116/2006 of the Italian Constitutional Court is interesting, because it concerns the allocation of legislative competences between State and Regions in matters relating to GMOs (genetically modified organisms). More precisely, the Regione Marche contested the legitimacy of some provisions of the Decree 22 November 2004 n. 279.[85] This was in relation to the problem of co-existence between GMO and organic cultures, and of the effects of contamination from both an agricultural and an environmental point of view. The co-existence between the GMOs and the organic cultures refers to the ability of farmers to make a practical choice between conventional, organic, and GM crop production in compliance with the legal obligations with labelling and purity criteria. Co-existence measures therefore aim at protecting farmers of non-GMO crops from the possible economic consequences of accidentally mixing their crops with GMOs.[86] The appeal focused

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[83] F. Pestalozza, *Sub Art. 72, Abs. 2, Rn. 1-47*, *in* DAS BONNER GG- KOMMENTAR (H.V. Mangolt, F. Klein & F. Pestalozza eds., 2002).

[84] Tansl.: Urgent provisions to solve the problem of coexistence between transgenic, conventional and biological cultures. For a detailed analysis of judicial review on the "Necessity-clause" *see* Galetta and Kröger, *supra* note 29.

[85] In coordination with Law 28 January 2005, no. 5 in G.U. n. 22 of 28 January 2005.

[86] *See* Commission Recommendation on 23 July 2003, *available at* www.europa.eu.

on allocations of legislative competences in order to find the best measures the Italian State could adopt.[87]

In particular, the complaints were based on a statutory provision which conferred to the State the power to legislate, even if the contamination problem concerned not only a subject of exclusive legislative competence ("*Tutela della salute*", a health safeguard), but also of concurrent competence ("*Tutela dell'ambiente*", an environmental safeguard) and exclusive competence of Regions (agricultural matters).

The Regione Marche asserted that the provision was vague, and conferred "indefinite power" to the State. The Court accepted the argument recognizing the lack of legitimacy of the law and affirming that the co-existence measures should not go beyond what is necessary to ensure that accidental traces of GMOs stay beyond EU labelling thresholds, in order to avoid any unnecessary burden for the operators concerned.

Art. 3 of the Law which relates to regulation of co-existence refers to an indefinite State provision, whereas, to the contrary, it should have been more appropriate a legal provision; literally, the Court considered illegitimate the provision of a generic State act.

Moreover, the Court stated that the further provision developing the above-noted "framework norms" conflicts with the Regional legislative competence in agricultural matters. The Constitutional Court followed two main steps: first, in accordance with EU law, it recognized that, to avoid any unnecessary burden for the operators concerned, co-existence measures should not go beyond what is necessary to ensure that accidental traces of GMOs in non-GM products remain below EU labelling thresholds. Second, measures should be scientifically based and proportionate, and therefore must be adapted to local conditions. Hence, the necessity for the Regional power to legislate and to guarantee a proportionate action at the level closer to individual farms. The judgment highlights therefore a new attitude of constitutional jurisprudence towards decentralization by the means

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[87] *See* S. Francescon, *The New Directive 2001/18/EC on the Deliberate Release of Genetically Modified Organisms into the Environment: Changes and Perspectives*, 10 RECIEL 309 (2001). *See also* M. Poto, *I traguardi in tema di sicurezza alimentare tra ordinamento comunitario ed ordinamenti interni*, *in* LA SICUREZZA ALIMENTARE TRA UNIONE EUROPEA, STATO E REGIONI DOPO LA RIFORMA DEL TITOLO V DELLA COSTITUZIONE (M. Poto, E. Rolando & C. Rossi eds., 2006).

of the principle of proportionality. It appears as though the Court is changing its course of action by reversing its previous "State-centered" approach.[88]

Case n. 116/2006 reflects a new orientation of the Court, which is increasingly in favor of a decentralization of power. This is apparent in two cases, both decided in June 2006 (1 June 2006, n. 214 and 28th June 2006, n. 246). In both decisions, the regional legislative competence is at last recognized, the former a case regarding government of territory and the latter regarding determination of levels of energy.[89]

J. Conclusions

In summary, a more effective judicial review for allocating choices is becoming possible, thanks to the increasing ability of the Court to do so through the lens of the proportionality principle. The control of proportionality is therefore used by the European Court of Justice and by the National Courts as an instrument to verify whether the choices of the Public Administration have been made properly, according to the criteria of subsidiarity. That is to so say, it becomes an instrument to gauge if power is administrated according to the logic of devolution. Brought forth from a German background, it has inspired the European Treaty and strongly influenced the Member States' legal systems, starting with the German system itself and followed by the Italian, where the Constitution has been revised with the precise intent to give effectiveness to the principles of subsidiarity and proportionality.

The difference between the two systems can be summarized in the following terms: whereas in Germany the trend is aided by the new formulation of proportionality criteria according to the amended constitutional provisions, in Italy, consolidation is occurring thanks to the jurisprudential channel.

Let us hope that these tendencies will raise an awareness among the courts, legislators, and jurists of a new definition of good administration - "one of the cornerstones of modern administrative law"[90] in terms of the development of administrative law, which is closely bound up with the idea of establishing judicial protection as a counterweight to public power.[91] The effectiveness of the principles

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[88] *See* Corte cost., 26 luglio 2002, n. 407, in *Giur. cost.*, 2002, 2940, with a note from F. S. Marini, *La Corte costituzionale nel labirinto delle materie "trasversali."*

[89]Both are available on the Constitutional Court's website *at* www.cortecostituzionale.it.

[90]T. Fortsakis, *Principles Governing Good Administration*, 11 EUROPEAN PUBLIC LAW 207 (2005).

[91] As compiled by Fortsakis, *id.*. This list is quite similar to that collected by E. SPILIOTOPOULOS, GREEK ADMINISTRATIVE LAW para. 82 (2004).

of good administration have to deal with a proper balance of powers, reachable by enforcing the awareness of the courts, of legislators, and of jurists. In the development of this awareness, the evolution of the proportionality principle is playing a central role.