UNIVERSITÀ DEGLI STUDI DI MACERATA

DEPARTMENT OF POLITICAL SCIENCES, COMMUNICATION, AND INTERNATIONAL RELATIONS

PhD COURSE IN
GLOBAL STUDIES. JUSTICE, RIGHTS POLITICS
CYCLE XXXV

TOWARDS A THEORETICAL FRAMEWORK FOR CIVIC PARTICIPATION THROUGH THE COMMONS IN EU CITIES: THE CONTRIBUTION OF HORIZONTAL SUBSIDIARITY IN ITALIAN CITIES

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ACADEMIC YEAR
2023

Ai miei genitori,
e alle altre persone con cui condivido
bellezza e fatica di ogni giorno

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Acknowledgments

Throughout this three-year academic journey many people have offered me their support and constructive criticism. Each one has contributed a valuable piece, and I have tried to treasure all the advices and feedbacks received.

My three supervisors have seen potential in this work within the framework of an innovative PhD course. I thank Prof. Benedetta Barbisan for having always encouraged me in exploring the boundaries of my work through research stays abroad and networking; Prof. Andrea Prontera for his fundamental role in supervising the development of the research throughout the whole journey; Prof. Fulvio Costantino for his valuable insights into the work, especially during the first year.

Over the past years I feel honoured to have had more opportunities for discussion with Prof. Gregorio Arena: I am thankful for his unique ability to value each person's autonomous initiatives (in true subsidiary spirit), and for his inspirational leadership. I would like to thank Prof. Daniela Ciaffi for her attitude towards innovation that encouraged me already during my internship at *Labsus* in 2018, and the other *Labsus* Professors Fabio Giglioni and Filippo Maria Giordano, with whom I engaged in extremely valuable conversations for addressing precise aspects useful in my research. I also thank the wider *Labsus* community that I have the privilege of being part of for having allowed me to see the very concrete side of what I was studying.

The research group *Gruppo progetto città* led by the University of Padova has allowed me to understand the centrality of the theme of the city in public law in my research thanks to many online seminars: I thank Prof. Filippo Pizzolato for having welcomed me.

During these three years, I was lucky enough to have the opportunity to do three visiting research periods within the research group *Government and Law* at the University of Antwerp (6 months), the *Institute for Comparative Federalism* at Eurac Research (2 months), and the *FinEst Centre for smart cities* at Tallinn University of Technology (1 month). In all these places, I had the chance to give presentations of my work, and receive invaluable feedbacks.

I am sincerely thankful to Prof. Patricia Popelier for the fundamental moments of discussion on my research: her sharp eye on research questions and general structure of

the work have been of utmost importance to lay the foundations of my work. I wish to say a big thank you to Prof. Esther van Zimmeren for having been a reference point, welcoming me in the *Metropolitan Legal Lab*: she gave me opportunities for growth and confrontation, and necessary ideas for my present and future research. During my stay in Antwerp, I also wish to mention the significant input that my work received from Prof. Koen van Aeken with concern to methodology, and from the *Commons Lab* on the commons.

Within my Eurac research stay, I would like to thank Prof. Francesco Palermo for his great ability to look at my research in the round, and his long-term supportive vision on how to advance that. My research also benefitted from extremely stimulating conversations with other scholars in the same context: I thank Prof. Jens Woelk, Elisabeth Alber, Karl Kössler, Federica Cittadino, Theresia Morandell for having answered all my questions.

The research was further enriched by interesting observations received within the *FinEst* research period, from a very diverse disciplinary context. I would like to thank Ralf-Martin Soe, Prof. Erkki Karo, Prof. Vasilis Kostakis, Veiko Lember, Jelizaveta Kreniova-Cepilova, Alina Wernick, for their time in giving me their perspective on different research points that intercepted frontier debates on the theme of the city.

Throughout the last two years, two people deserve special mention: Erika Arban, and Martina Trettel. They have accompanied me at various times through more conversations and exchanges: their insights were fundamental for shaping the research.

I also would like to acknowledge useful discussions with the scholars Giovanni Boggero, Elena de Nictolis, Stefania Ravazzi, and with my talented PhD colleagues. Lastly, my gratitude goes to Prof. Francesco Palermo, Elisabeth Alber, Karl Kössler, Martina Trettel, Arianna Porrone, Eleonora Righi, Elmar Gams for having read and commented different parts of my thesis: their advices and remarks have greatly improved the quality of my work.

All these people formed my academic thinking and gave me space for creative experimentation: I feel grateful towards them all and I look forward to building future collaborations.

Introduction

The starting point of the research was the observation of a phenomenon that since the pioneering contribution of the city of Bologna in 2014 started spreading around other Italian cities, and that is making them emerge as laboratories of local democracy. In this work we generally refer to this phenomenon as 'the case of Italian cities' (or 'the Italian case') in order to target all these around 280 cities that started implementing the principle of horizontal subsidiarity included in the Italian constitution through the organizational model of *Shared administration* and, more precisely, through a prototype of municipal Regulation on the commons and its innovative legal tool of the *Collaboration agreement*. Thanks to all that, thousands of (active) citizens started to be supported by public authorities in their bottom-up autonomous initiatives of general interest, within a silent on-going transformation of the relationship between society and the State from a hierarchical to a more horizontal and collaborative one. The interesting aspect of this phenomenon is that it seems to be able to capture within a constitutional and legal framework that is gradually being composed an innovative form of civic participation that is occurring through the so called 'commons' (or 'common goods'). The commons constitute a challenge for our societies – 'the commons challenge' as we define it – in so far as they constitute all those tangible or intangible goods in our communities that are forcing us to rethink our traditional legal categories based on the public-private dualism. In our work we labelled this form of participation as 'civic participation through the commons' (CPC), for referring to an action-oriented type of participation where citizens' engagement is not only aimed at participating in decision-making processes, but also at taking concrete actions of care, regeneration, or shared governance of the commons. In supporting such grass-roots actions of CPC, the role of cities is turning out to be fundamental: on one side, in so far as they are – together with other local authorities – the level of government which is the closest to citizens; on the other, because they are urban human settlements on the rise as autonomous political communities willing to experiment democratic innovations together with their inhabitants. In this way, the support of CPC by cities – which is occurring thanks to the principle of subsidiarity in its horizontal meaning – is giving additional participatory channels to people that are outside representative channels, therefore contributing to democratic legitimation.

What emerges overall from the Italian case is its ability to create an organisational model that is contributing to the bottom-up creation of the city together with its inhabitants thanks to the principle of subsidiarity: in a nutshell, its ability to create a new answer to face a new challenge on the basis of a reinterpretation of constitutional principles. A challenge therefore arises for researchers to map new territories, at a time when the new takes root. There is, indeed, a growing awareness of the importance of this on-going phenomenon which today should still be considered in the early stages of a deeper cultural change: this, however, is mainly occurring within the broader Italian debate, but it hasn't been studied in a wider European public law perspective.

Research context

In order to look at the Italian case within a wider European public law perspective, the first challenge as a researcher was to define the boundaries of the research. The thesis positions itself within the wide-ranging debate on democracy, and more precisely on civic participation in local democracy, within the European Union (EU) borders as the geographical reference context. This has been done through the lenses of European constitutional principles, which means through the constitutional principles belonging to the two legal orders of the EU and of the Council of Europe (CoE) in the context of the wider European legal space. In specific, the strands of literature considered for studying our topic of civic participation in local democracy in the EU were: democracy, participation, subsidiarity, local self-government. In addition to that, the emerging role of the city as an autonomous subject of research was identified when approaching local democracy, and therefore constitutes an important part of the work. This, in fact, reflects a worldwide phenomenon of urbanization where cities are on the rise in claiming their role as protagonists beyond States' borders and traditional administrative structures. The commons challenge, eventually, also constitutes an aspect further covered, but only at a later stage of research in the light of the Italian case. Democracy, participation, subsidiarity, local self-government, cities are therefore key concepts running throughout the whole work, while the commons constitute the concrete challenging new space for action where to apply them. We decided to dedicate the whole Chapter 1 for setting the scene of our work.

Gap in the literature

Within this topic, we identified a major gap in the literature: namely the study of the Italian case in a wider European public law perspective for an English-speaking readership. The reasons for that could be multiple: a) the language barrier at first, of both the Italian scholarship in translating the model in a supranational dimension, and of an English readership in entering in touch with the Italian case itself because of the obstacle posed by the knowledge of the Italian language; b) the fact that the phenomenon is relatively recent; c) the fact that – being born within the administrative law scholarship – a wider public law and constitutional perspective has not been sufficiently explored since not predominant; d) the fact that major efforts have been put so far in strengthening its impact and circulation among Italian cities so as to consolidate it; e) its intrinsic connection with very concrete grass-roots practices of civic participation that imply not only a theoretical, but also an empirical look by researchers.

For these and many other reasons, the underlying interest of this research was to contribute to filling this gap, for which, however, the future work of a wider community of scholars will be needed. So far, all that constituted major obstacles in the circulation and understanding of the Italian case, which we consider as an innovative perspective for the transformation of democracy, where cities' support of initiatives of CPC have found a solid ground on the principle of subsidiarity. The research also recognized that strictly related to this major gap is the lack of a precise European theoretical framework on which all the EU cities that are facing the commons challenge could rely upon in order to support emerging forms of CPC: we chose, however, not to go in this direction, in so far as this would imply a comparative study of the 27 member states, which would obviously go beyond the capacity of a three-year PhD research. Our focus, in fact, is not on a study of all the EU cities (mostly not institutionalised) experiences, but lies instead in addressing the precise contribution of the Italian case, with the consciousness that, however, its findings could also be beneficial in the construction of a future European theoretical framework for all EU cities facing the commons challenge. As the research will demonstrate, this aspect will receive proper consideration at the end of our work in Chapter 7 and in the conclusion, where a research agenda for follow-up research will be offered.

Problem definition

The research underlying major problem related to our topic is the crisis of democracy. This, however, is understood in our work within the need for a re-definition of the problem in so far as – according to our scene setting in Chapter 1 – democracy in the EU should not be considered as in crisis at all its levels and within all its forms: in fact, democracy in its participatory form and at its local level should not be considered as in crisis, but rather in transformation. More and more are, indeed, the new types of civic participation experimented at the local level of government, among which the Italian case finds its place. It is therefore precisely this need to better understand civic participation in local democracy what prompted our analysis, questioning us on the search for (more or less) institutional solutions that can act as a corrective to the shortcomings of contemporary democracy. It is always within democracy, indeed, that solutions to its own crisis are to be sought.

Research question

Within this problem re-definition in the background, and in the light of the major gap identified, the research decided to openly address the framing of the Italian case within a wider European public law perspective through the usage of English as a working language so as to allow the Italian case to better circulate outside the Italian context. The overarching research question (RQ) that our research aims to answer is therefore the following one:

Within the context of civic participation in local democracy in the EU, how does the case of Italian cities supporting the commons contribute to deriving an overarching European theoretical framework for also other EU cities facing the commons challenge?

This RQ can be unpacked into its three components: 1) according to the first one, *"Within the context of civic participation in local democracy in the EU"*, Part I of the thesis was designed so as to delve into our topic of research, namely civic participation in local democracy in the EU; 2) according to the second, *"how does the case of Italian cities supporting the commons contribute to deriving an overarching European theoretical framework"*, Part II was organised so as to present both its constitutional and

administrative law sides; 3) according to the third, *"for also other EU cities facing the commons challenge?",* Part III will offer a general overview of the objective difficulties in looking at commons in EU cities, and pave the way to the future drawing of an European theoretical framework for all EU cities facing the commons challenge through the findings from the Italian case.

These three components reflect the need to take three preliminary steps which are here formulated as sub-questions (SQs), and that are necessary in order to be able to answer the overarching RQ:

- SQ 1: What are the European constitutional principles guiding civic participation at the local level of democracy in the EU, and what are their current limits and challenges? → (Chapter 2 and Chapter 3)
- SQ 2: Why could the case of Italian cities be considered a relevant form of civic participation through the commons (CPC), and what does its constitutional and legal framework consist of? → (Chapter 4 and Chapter 5)
- SQ 3: What are the emerging forms of CPC in other EU cities, and what are the challenges they are facing? → (Chapter 6)

All these SQs constitute the reasoning stages through which the research is articulated, and constitute necessary steps. While Chapter 1 will set the scene, Chapter 7, in the end, will put the pieces together and answer the overall RQ.

It is important to state that the common thread of the whole research that will serve to answer the RQ is the European constitutional principles, because they constitute what all Italian as well as other EU cities have in common, and which provide for the higher umbrella under which the future construction of a common European theoretical framework could be defined. Additionally, we would like to point out that the research looks at 'EU cities' and not 'European cities' in so far as our geographical context of reference is the EU, and not the wider Europe. At the same time, we acknowledge that more legal orders have an impact on EU cities since they are immersed in the wider European legal space, and that's why we will look at the common European constitutional principles emerging from both the EU and CoE legal orders. On the supposed need to elaborate a common (future) European theoretical framework, the work argues that this would be fundamental in order to face the new emerging phenomenon of commons initiatives around EU cities, for which the already existing categories, legal instruments, and traditional interpretation of principles are not enough.

This tripartite research design includes a total of seven chapters.

Aim

Constructed around this RQ, the aim of our research is twofold, one internal and one external. On the internal level, the research aims at linking the Italian case to the wider European public law context, specifically to European constitutional principles, so that the Italian case would have a higher European cover. On the external level, the research aims at identifying those common European constitutional principles that – on the basis of the case of Italian cities – may constitute building blocks for a future theoretical framework for also all other EU cities facing the commons challenge. These two aims have been considered as feasible and realistic within the research borders of our work. In addition to these two, a mere aspiration of the work is to contribute to the European legal debate on the commons. All of that has been pursued in the general conviction that the overall aim of a PhD work should be the exploration of new fields of study for societal development, and that European constitutional principles – the common thread of the whole research – are keepers of unexplored meanings from which implementation possibilities can still be created.

Relevance

This PhD work is significant for different reasons. First of all, because it fills the gap mentioned before, namely the framing of the Italian case within a wider European public law perspective through the usage of English as a working language. This, however, does not constitute the only reason of the relevance of this work, as the following ones could also be mentioned: a) it presents an in-depth study of the Italian case of *Shared administration* of the commons; b) it contributes to the growing literature on cities as autonomous subjects of study within an European public law perspective; c) its findings contribute to shed new light on the on-ground potential application of the European constitutional principles of participation, subsidiarity, local self-government, solidarity; d) it gives a general overview of what is happening around the EU on the commons; e) it draws some preliminary conclusions that point to the key role of cities to experiment with

innovative forms of participation; f) it brings into the academic debate citizens' concrete practices that are currently happening in Italian cities.

For all these reasons and for others that the reader may find, the work is relevant and contributes significantly to the academia. However, its originality allows to believe that it could arouse not only the theoretical interest of scholars. In fact, the work may generate interest also for all those professionals working in public authorities in other EU cities or in European and international organisations that are willing to start looking for reference points among common European constitutional principles for elaborating new organisational models in order to face the commons challenge and emerging new forms of civic participation related to that. The work, indeed, intercepted several research strands, being able to contribute to searches on the following keywords: subsidiarity, local democracy, civic participation, local self-government, cities, *Shared administration* of the commons model, commons, EU cities.

Structure

On the basis of the three essential parts into which the thesis is divided as a reflection of the research question and sub-questions, the work comprises seven chapters, in addition to this Introduction and an overall Conclusion at the end.

Chapter 1 sets the scene by introducing the borders of our work, in order to theoretically position the research. It gives the general premises by providing for a working definition of democracy in the EU according to its forms and levels, and placing our work within the topic of civic participation in local democracy in the EU. This first Chapter redefines the problem asking if it is possible to talk of a transformation rather than a crisis of democracy, and it introduces the fundamental dualism between government and governance as the two complementary perspective from which to look at democracy.

Chapter 2 looks at the principle of participation within the European legal space. After a necessary framing of participation within the scholarly debate, and after having distinguished its related concept of participatory democracy from deliberative and direct democracy, the Chapter describes the constitutional contribution of both the EU and the CoE legal orders to participation as a truly European constitutional principle. Within this background, the Chapter then glances at actual practices and instruments of participation at the local level, using the contribution of the 'democratic innovations' for ordering

initiatives of civic participation. It concludes by reflecting on current limits and challenges confronted by the principle.

Chapter 3 investigates the local level of democracy in the EU, identifying the two European constitutional principles of subsidiarity and local self-government as the guiding principles for that. It then thoroughly investigates the two principles, exploring a forgotten meaning of subsidiarity according to its original debates at the EU level. The Chapter, additionally, could not avoid acknowledging the fact that both the legal scholarship and supranational institutions are shifting from 'local' to 'urban' as a consequence of the rising role of cities as autonomous subjects beyond states' superstructures. The Chapter will finishes by the drawing of some building blocks for a city definition in the EU.

Chapter 4 and Chapter 5 are complementary is so far as they introduce the Italian case presenting both its constitutional and administrative law sides. Chapter 4 is focussed on presenting the novelty of the horizontal subsidiarity principle in the Italian constitution, going in-depth into its subjects, the object, and the action which lies at the core of the principle. After having put it in relation to other constitutional principles, the Chapter argues that an innovative form of action-oriented participation is supported by this principle, also thanks to an interesting match that has been created between this abstract principle and the very concrete topic of the commons. Within this background, Chapter 5 delve into the organizational model of *Shared administration* of the commons that around 280 cities have adopted, and that characterises what we labelled as the Italian case. It introduces its history and first practical implementation through the pioneering Bologna Regulation on the commons in 2014, and it continues by analysing the two tools of this model, namely the prototype municipal Regulation and the *Collaboration agreement*. The Chapter also brings the fundamental contribution of the Italian Constitutional Court which recognized the model in a recent judgement, drawing a very important connection to EU law, and presents the key role of cities in implementing horizontal subsidiarity on ground therefore constituting absolute protagonists in comparison to other governmental levels.

Chapter 6 offers a general overview on the commons in the EU, starting by explaining the objective difficulties of a debate in the making. Within a very wide-ranging not fully legal debate, the Chapter provides for some potential link between the commons and the EU legal order drawing some preliminary connections. It recognises, however, that a theoretical analysis is a hard task, since we are currently in a phase still in its infancy where, rather, it is social practices that play a fundamental role in experimenting with the commons. As a consequence of that, the Chapter draws a picture of the complex reality of

a great variety of practices, projects, experiments on the commons, concluding by pointing out to emerging problems and similarities.

Chapter 7 wraps up the research by providing an answer to the overarching RQ. At first, it explains the reason why to look at EU cities facing the commons challenge; second, it presents the contribution of the Italian case in the light of what emerges from the research overall drawing some fundamental lessons; third – on the basis of the contribution of the Italian case – it outlines the preliminary contours of a future European theoretical framework for EU cities facing the commons challenge. A figure is included so the reader could visualize the answer to the overall RQ.

The Conclusion summarises the main findings and outlines a research agenda for follow-up research.

Methodology

In order to answer our RQ and carry out our work according to the research design previously introduced, the thesis had to confront the methodological discourse. As we saw, the research context outlined a thesis that is situated within the wider European public law scholarship, and that makes use of European constitutional principles as the common thread running throughout the work. These European constitutional principles, on their side, belong to both the EU and CoE legal orders within the wider European legal space, in which also the Italian case together with other national legal orders find their place. It is this complex pluralism of legal orders that, above all, the thesis confronts.

Within this context, the main research method used throughout the whole thesis is doctrinal legal research, founded on traditional sources of legal literature, case-law, and national and EU legislation. This, indeed, was essential in order to approach sources within European constitutional law, Italian constitutional and administrative law, EU law, local government law. In specific, doctrinal legal research was needed for analysing the concepts of democracy, participation, subsidiarity, local self-government, cities, (the Italian principle of) horizontal subsidiarity, the model of *Shared administration*. This was carried out in the consciousness that the role of a legal scholar is to study a new phenomenon by tracing it back to existing categories in order to make room for it.

However, there were certain limits to this method. Doctrinal legal research, indeed, was not enough in so far as there are certain transversal phenomena and concepts that made us realise the need for law to open up towards a wider social sciences perspective,

understanding therefore law as a social science. In specific, the three emerging phenomena of soft-law, governance, and the rising role of cities, all present new challenges to legal scholars, because they undermine traditional legal concepts like the hierarchy of sources, democratic legitimation, state theory. Traditional doctrinal legal research seemed not fully equipped to properly understand these concepts according to traditional state-related categories: this implied a need for thinking outside state concepts, and looking at non-state law produced by non-state actors (like for example citizens or NGOs).

As a consequence of such challenges, the research considered necessary to complement doctrinal legal research with an additional research method, namely interdisciplinarity. Our doctrinal legal research, indeed, needed to be enriched at many points by additional disciplinary perspectives, which were worth being taken into account in so far as functional to better understand concepts, and to answer our overarching RQ of legal nature. This does not mean that the work can be qualified as interdisciplinary research and it never aimed to achieve such goal, but it rather qualifies as a legal research integrated by interdisciplinary components. The study, in fact, builds on literature coming from different auxiliary disciplines including political science, public administration, urban studies, economic theory. Incursions into other fields were made necessary by the particular nature of the subject matter, which is in constant flux, and difficult to frame exhaustively in a single discipline. In fact, concepts such as democracy, participation, the commons can be studied from many different perspectives, and in order to deal with them in our work we had to go beyond the mere doctrinal legal research method so as to better understand them. To this end, concepts outside the purely legal debate such as governance, democratic innovations, and polycentricity were useful to explain central legal concepts such as democracy, participation, and local governments, and therefore found their place in this work. Additionally, another example is the contribution of the statistical criteria developed by the EU for classifying urban settlements which, together with EU urban policies, were useful for understanding what a city is in the context of the EU. All these cases demonstrate that if we want as researchers to look at certain phenomena that are crossing disciplinary boundaries, then we have to equip ourselves with hints coming from also the other disciplines and professional knowledge (for example, institutional reports, policy documents, or civil society organisations' studies) that are already contributing to their understabding.

All in all, this work constitutes also an invitation to approach legal phenomena not only from a traditional doctrinal legal research perspective, but also from an interdisciplinary and practice-oriented one. In this way, the role of legal scholars to create order and provide meaning through their theoretical reconstructions would not cease, but on the opposite it would be enriched by additional perspectives giving originality to their work.

Limitations

In the light of what has been presented so far in our Introduction, it is impossible not to state some general limitations of the research. Despite our choices of how to hedge the subject matter, and according to which disciplinary perspectives conduct the research, some limitations obviously remained, and this work has revealed essentially two of them: 1) the translation on the specific Italian case into the European perspective; 2) the discourse on the commons.

The first limitation essentially includes the difficulty in translating from both a terminological and conceptual perspectives for a non-Italian readership a specific case of innovation that is deeply rooted in the Italian legal order. For the conceptual perspective, this difficulty was addresses by undertaking the research starting from an in-depth investigation of the Italian case. This first step allowed us to identify the conceptual pillars of the Italian case (participation, subsidiarity, cities, solidarity) useful for looking beyond the state borders, and as a consequence of that to define the precise research context of the whole work where to situate our study, namely civic participation in local democracy in the EU. On the other side, the terminological difficulty concerned the translation for an international English readership of substantial concepts related to the precise Italian case. Being obviously context-related, and despite our persistent commitment in providing for definitions and explanations on the context, some concepts explained in our Part II on the Italian case may appear not obvious to grasp because of a different cultural background of the reader. In order to address such difficulties, the wide-ranging and in-depth debate taking place in the Italian legal context was obviously not worth to report in full, but only in so far as it was functional to answering our overarching RQ. According to this need, we did proceed in our work: we are aware of the fact that, however, many further aspects and

shades of the Italian model would require a separate study. We believe this could find place in a future research.

The second limitation concerns the discourse on the commons, and may be considered as such because of the objective difficulties that a researcher faces when approaching this topic. Not only it lies at the intersection between different disciplines, but it also generates the interests of both academic scholars as well as citizens and public institutions, providing for elements for both abstract academic debates and concrete grass-roots initiatives. We described thoroughly the difficulties and challenges in facing the commons discourse in the EU in Chapter 6. In order to address this limitation, we would like to point out that that is not the primary focus of the research, in the sense that it constitutes an auxiliary aspect in the overall construction of our RQ. The Conclusion will outline future research directions to bridge this limitation.

In conclusion, our findings are limited to answering the specific research question presented, its focus being the Italian case. On the basis of these considerations we can therefore state what this thesis surely is not: namely, a thesis fully devoted to the Italian model, nor a comparative work on the commons in the EU. All in all, these two features presented here may constitute also in the eye of the reader a limitation: we believe, however, that our arguments fully justify the choices made in our scientific work for the purpose of this PhD, and that these limitations emphasise the need for more future research.

Definitions

In conclusion of this Introduction, we would like to equip the reader with some basic coordinates about terminology, as this may be of use from a conceptual perspective. Precise definitions are given throughout the whole work when needed: these ones here, however, are the essential ones, and are therefore worth being reported also here. The definitions given here have been elaborated for the purpose of this PhD research, and should not be considered as always valid beyond this work and in different disciplinary contexts.

- European legal space = the wider legal space of Europe, where different legal orders coexist: namely, the EU legal order, the CoE legal order, the national legal orders.

- Civic participation through the commons (CPC) = innovative type of action-oriented civic participation taking place through the commons.
- Commons (or ‘common goods’) = goods whose governance is shared by a community that gets organized according to a set of rules at the intersection between the public and private dichotomy.
- Commons challenge = the emerging challenge faced by different levels of government in dealing with grass-roots initiatives claiming to be commons-oriented in the absence of legislation or constitutional and legal reference frameworks to that.
- *Shared administration* of the commons = organizational model adopted by around 280 Italian cities in order to face the commons challenge, which comprises a prototype of municipal Regulation and the *Collaboration agreement* legal tool.
- City/cities = emergent concept of public law aimed at recognizing autonomous significance to the city in relation to other local governments, willing to capture the *civitas* in its original significance beyond the mere administrative borders of the *urbs* as defined by state structures.

Part I. In search of building blocks among European constitutional principles

Chapter 1. Setting the scene: the transformation of democracy in the EU

1.What democracy in the EU? 2.Forms and levels of democracy. 3.Problem (re)definition: is democracy in crisis? 4.From democratic government to democratic governance. 5.Participation in local democracy as the frontier of democracy in the EU.

1. What democracy in the EU?

Considered as *"a mission - something to be made, created, […] a labour that never ends, a challenge always still to be met in full, a prospect forever outstanding"*[1], the idea of Europe resembles closely the one of democracy. Resulting as the outcome of many crises in the historical development of the European Union, and regarded as something never fully realized nor precisely defined, democracy is assumed as the most distinctive value of the common European identity, alongside with the rule of law, human rights and protection of minorities. Democracy is something we can all agree upon, as it has always been implicit in the European integration process from the very beginning, and constitutionalized with time through an ongoing process of adjustment and refinement[2]. Yet, a clear, shared, and measurable definition of democracy as an EU constitutional principle has not been

[1] Bauman, Zygmund. *Europe: An Unfinished Adventure*. Polity, 2004.

[2] Started as an European Economic Community (EEC) with the signing in 1957 of the Rome Treaty, the European Union developed through the gradual integration of many other fields of cooperation, alongside with a better definition of the principles shared by the Member States. During the European integration process, in parallel to an internal self-definition, the external conditions for applying for the Union membership have also been evolving, becoming more demanding: from geographical criteria, to economic, political, and legal ones. It was in April 1978, in Copenhagen, that the European Council for the first time declared the political condition that needed to be reached in order to gain the Union's membership: *"respect for and maintenance of representative democracy and human rights in each member State are essential elements of membership in the European Communities"* (Declaration on Democracy, Copenhagen European Council, 7-8 April 1978, Bull EC 3/78, p.6). These values later found a clearer expression at the Copenhagen European Council in 1993, that outlined them officially as the 'Copenhagen political criteria' for the EU enlargement that took place in 2004 (with the addition of the protection of minorities). The requirement of democracy as a political essential condition was eventually constitutionalised with Article 6(1) TEU as amended by the Amsterdam Treaty, and subsequently laid down in Article 2 TEU Lisbon Treaty. For a detailed study on democracy and the other political criteria (namely, rule of law, human rights, protection of minorities) as developed for the EU enlargements see Hillion, Christophe. 'The Copenhagen Criteria and Their Progeny'. *In Hillion, Christophe (Ed.) EU Enlargement: A Legal Approach*, Hart, 2004.

agreed upon so far, as also the EU process of self-definition during the enlargement processes has shown[3].

In order to look at democracy within the context of the EU, it is important to recognize its centrality within the wider 'European legal space', considered as the complex legal space where different legal orders coexist[4]: the national ones, the European Union legal order, the international legal order of the Council of Europe (CoE)[5]. All these legal orders contribute today to the definition and shape of democracy as a shared principle, building upon millenary traditions dating back to ancient peoples living in the European space. Lying at the intersection between political and legal theories, democracy constitutes one of the key concepts of constitutionalism[6], and is a principle that can be found in all our national constitutions, in the primary law of the European Union (founding Treaties and unwritten general principles of EU law), as well as in the Statute of the Council of Europe[7].

[3] Kochenov, Dimitry. 'Behind the Copenhagen Facade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law'. *European Integration Online Papers*, vol. 8, no. 10, 2004. For a critical account on the failure of the EU to distinguish between the principles of rule of law and democracy, and to provide them with a content shared between EU countries – on the opposite keeping ambiguity and vagueness on the meaning – see Kochenov, Dimitry. *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law*. Kluwer Law International, 2008. It must be recognized, however, that – in contrast to democracy – the EU's understanding of the rule of law has been consolidating in the latest years through various contributions of the EU Commission, the European Court of Justice, the European Parliament and the Council, so that the principle itself came to be recently defined as a *"well-established and well-defined principle of EU law":* see Pech, Laurent. 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law'. *Hague Journal on the Rule of Law*, 2022.

[4] Defined in von Bogdandy, Armin. 'The Transformation of European Law: The Reformed Concept and Its Quest for Comparison'. *MPIL Research Paper Series*, no. 14, 2016 as the proper doctrinal concept with a spatial dimension for all its involved legal regimes. The European legal space is the space for European law to advance *"common aims under common values"* (p.2). European law, on its side, *"identifies this puzzling complex of interdependent legal orders"*, and does not focus exclusively on EU law, but it is much wider. Similar to the idea of an European legal space is the concept of *"aree geo-giuridiche"* proposed by R. Toniatti for referring to the three legal orders that contribute to define the European constitutional space: the EU, the CoE, and the OECD (on this reference see Palermo, Francesco. *La Forma Di Stato Dell'Unione Europea.* Cedam, 2005, p.9 and further references). Additionally, also the concept elaborated within the Italian scholarship of a *constitutional law of integration* ("diritto costituzionale dell'integrazione") should receive a mention here, being possible to trace it back to the idea of an European legal space in the way we have just explained that. Elaborated in Palermo, Francesco. *La Forma Di Stato Dell'Unione Europea.* Cedam, 2005, this concept was used to refer to the fragmentary discipline of constitutional relations between the EU and its member states, interacting among each other as different complementary spheres.

[5] von Bogdandy, Armin. 'The Transformation of European Law: The Reformed Concept and Its Quest for Comparison'. MPIL Research Paper Series, no. 14, 2016, p.13.

[6] Rosenfeld, Michel, and András Sajó, editors. The Oxford Handbook of Comparative Constitutional Law. Oxford University Press, 2012, p.19. For an introduction on democracy within constitutional theory, see Frankenberg, Günter. 'Democracy'. *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and András Sajó. Oxford University Press, 2012, pp.250-267.

[7] The Statute of the CoE dates back to 1949, and mentions democracy in its preamble (https://rm.coe.int/1680306052). Democracy as a principle was, however, affirmed also later in other Charters and international treaties of the Council, as the fundamental *European Convention on human rights* (1953), which refers generically to 'political democracy' and 'democratic society', or as the *European Charter*

In light of this multitude of layers, it has become necessary for phaenomena and values not to be explained through the lenses of national sovereignty – that however still constitute the original context where they developed –, but through the new lenses provided by the transnational law constantly under construction, with its most developed case being the supranational law of the EU[8]. The EU represents a totally new form of political and legal authority[9], where also principles are being developed in their supranational specificity. Spanning through different legal orders, it can be said that democracy belongs to the constitutional identity of Europe and to European public law[10], and more in specific to the European Union. Sometimes this occurs on a truly substantial level, some others more on paper[11], while some other times as a consequence of a (voluntarily chosen) imposition[12], as it was the case for Central and Eastern European countries (CEECs) in order to guarantee their accession to the EU.

Within the EU legal order, the most important positive basis of democracy lies in Article 2 of the Treaty on European Union (TEU). As it has been noted, this article constitutes the core of the EU identity, defining the constitutional core of the Union as a

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of Local Self-Government (1985), which constitutes the reference point in the European legal space for what has been defined as 'local democracy'.

[8] 'Transnational law' is the broad term used to define that type of legal phenomena that do not fit into the dichotomy of state law and international law and that transcends the limits of the State. 'Supranational law' is a sub-category of transnational law, and it refers to the case when an autonomous legal order is created by two or more states, the most developed and referred case being the European Union. See on this distinction Tuori, Kaarlo. 'Transnational Law: On Legal Hybrids and Legal Perspectivism'. *Transnational Law. Rethinking European Law and Legal Thinking*, edited by Miguel Maduro et al., Cambridge, 2014, pp. 11–58, and Della Cananea, Giacinto. 'Transnational Public Law in Europe'. *Transnational Law. Rethinking European Law and Legal Thinking*, edited by Miguel Maduro et al., Cambridge, 2014, p.321. The supranational law of the European Union is part of (public) transnational law, as it exists in a legal area outside of the Member States. As K. Tuori claims, EU law could also be considered as *"the most advanced epitome of transnational law"* (Tuori, Kaarlo. *Ibid*., p.26). On the perspective of transnational law as an emerging system of law see Bostan, Alexandru. 'Transnational Law – a New System of Law?' *Juridical Tribune*, no. 11, 2021, pp. 332–59.

[9] Von Bogdandy, Armin, and Jürgen Bast, editors. *Principles of European Constitutional Law*. Hart, 2009, p.12.

[10] The concept of European public law defines a legal field that addresses the transformation of public law in Europe, beyond the mere borders of EU law. The concept also aggregates phenomena of various legal orders with the purpose of European unity. See on that von Bogdandy, Armin. 'The Idea of European Public Law Today'. *MPIL Research Paper Series*, no. 4, 2017, pp.13–16.

[11] The reference here goes in specific to those EU countries that, despite declaring themselves democracies, are paving the way to the construction within the EU legal order of a model of so called 'illiberal democracy', which is stepping back from some constitutional guarantees within national borders.

[12] This is the position of Claes, Monica. 'How Common Are the Values of the European Union?' *Croatian Yearbook of European Law & Policy*, vol. 15, no. 1, 2019, p. VII–XVI. She draws attention to the fact that what has been defined as 'common constitutional principles' and 'European values' are, instead, values modelled after Western European traditions and only later absorbed by the new member states in an imitation process. As rightly questioned by the author, it should be under question whether the EU should allow for diversity when it comes to compliance with fundamental values. However, since the European Union law does not accept such a diversity, the challenge for the EU lies, indeed, in the concrete definition of clear standards of such values. Concerning democracy, they still do not exist.

legal-political system[13]. Despite the fact that this article refers to 'values', consolidated legal scholarship[14] already clarified that these 'values' have to be understood as legal 'principles'. The importance in underlining a difference among the two of them lies in the fact that while values refer to ethical convictions, principles constitute solid legal norms. For its part, also when reference goes to 'principles' there is a risk of vagueness, as diverse could be the attributes given to that as well as their legal consequences[15]. More precisely, with regard to the elements of Article 2 TEU, these principles should be defined as 'founding principles', as they constitute the core norms of primary law which determine the general foundations of the Union[16]. Being strictly interconnected with member states' constitutions[17], primary law of the EU in its turn is here understood as constitutional law[18]: in this way, we can state that democracy can be equally defined and referred to as a 'founding principle' of the EU legal order, or as an 'European constitutional principle'.

Despite these doctrinal qualifications of democracy, the primary law of the EU carries no definition of what democracy actually is. In parallel to that, also the Court of Justice of the European Union (CJEU) started to use the concept of democracy as a legal principle in the 1980s[19], drawing inspiration from national democracies, but still not

[13] Klamert, Marcus, and Dimitry Kochenov. 'Article 2 TEU'. *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, edited by Manuel Kellerbauer et al., Oxford University Press, 2019, p.24.

[14] von Bogdandy, Armin. 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch'. *European Law Journal*, vol. 16, no. 2, 2010, p. 106; Kochenov, Dimitry. 'The Acquis and Its Principles: The Enforcement of the "Law" versus the Enforcement of "Values" in the European Union'. *The Enforcement of EU Law and Values*, edited by András Jakab and Dimitry Kochenov, Oxford University Press, 2017, p.9. As it was written, a legal doctrine on principles is important since values discourses *"can easily acquire a paternalistic dimension"*: see Von Bogdandy, Armin, and Jürgen Bast, editors. *Principles of European Constitutional Law*. Hart, 2009, p.20. Additionally, on the legal significance of European values and on their capacity to put in practice integration through (European) constitutional law see Calliess, Christian. 'Europe as Transnational Law – The Transnationalization of Values by European Law'. *German Law Journal*, vol. 10, no. 10, 2009, pp. 1367–82.

[15] A detailed list of all the different attributes given to the term 'principle' within the Treaties can be found in von Bogdandy, Armin. 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch'. *European Law Journal*, vol. 16, no. 2, 2010, p.105. The author specifies that *"principles are special legal norms relating to the whole of a legal order. Founding principles as a sub-category express an overarching normative frame of reference for all primary law, indeed for the whole of the EU's legal order".*

[16] von Bogdandy, Armin, and Jürgen Bast, editors. *Principles of European Constitutional Law.* Hart, 2009, p.12: *"as founding principles those norms of primary law which, in view of the need to legitimise the exercise of public authority, determine the general legitimatory foundations of the Union".*

[17] von Bogdandy, Armin, and Jürgen Bast, editors. *Principles of European Constitutional Law.* Hart, 2009, p.3.

[18] As clearly explained in von Bogdandy, Armin. 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch'. *European Law Journal*, vol. 16, no. 2, 2010, p.16.

[19] See von Bogdandy, Armin, and Jürgen Bast, editors. *Principles of European Constitutional Law.* Hart, 2009, p.47 for a list of case law. In a similar vein, worth mentioning is the contribution of the CJEU to the definition of another European constitutional principle – namely the rule of law – while its recognition was still not included in the EU Treaties: see Case 294/83 *Parti Ecologiste Les Verts v. Parliament* [1986] ECR 1339, para 23.

contributing with a clear definition. The authors of the Treaties have been described[20] as successful in freeing democracy from the nation-states' framework: however, nowadays a general vagueness of democracy as a principle still remains, leaving space for national-level understanding and practices. A step forward was taken with the organisation of Title II (TEU) titled 'Provisions on democratic principles' made by the Treaty of Lisbon. The four articles of this Title (Articles 9, 10, 11, 12 TEU) refer to different aspects that have been qualified as expressions of democracy, namely the concept of EU citizenship, the functioning of the EU as a representative democracy, the open dialogue between citizens and EU institutions through participatory means (and instruments like the European citizens' initiative, ECI), and the role of national parliaments. As it has been observed and as we will investigate later in this work, the complexity of interdisciplinary discussions on the principle of democracy find a reference point in this Title[21].

For the purpose of this work and in accordance to the needs of this introductory paragraph, democracy is understood at its very core as a system of government in relation to the distribution of powers and functions in the society. It is useful to recall the etymological roots of that, as democracy comes from the ancient Greek δημοκρατία (dēmo-kratía), constituted by the two words δῆμος (demos), which means people, and κράτος (krátos), that means power, government: the two words refer to the government of people, whether it is exercised in a direct or indirect form. Among different systems of government[22], democracy is the one that after centuries of development in the relationship between individuals and a public authority came out as the most desirable[23]. That is also the reason why the contemporary debate on the forms of government is oriented towards the diversity of democratic regimes, and not anymore to democracy as one *among* more

[20] As reported in von Bogdandy, Armin. 'European Democracy: A Reconstruction through Dismantling Misconceptions'. *MPIL Research Paper Series*, 2022, p.1.

[21] Observation of A. von Bogdandy, that allows a recognition of the interdisciplinarity surrounding the concept of democracy (and – we may add – the concept of participation). See von Bogdandy, Armin, and Jürgen Bast, editors. *Principles of European Constitutional Law.* Hart, 2009, p.48.

[22] It is not the purpose of this work and chapter to include the wide scholarly debate on the forms of government, which would deserve a diverse research design. May it be considered enough here to refer to some introductory sources: on the classification of forms of State and forms of government, see Amato, Giuliano, and Francesco Clementi. *Forme Di Stato e Forme Di Governo*. Il Mulino, 2012; on democracy as the most developed form of government see Lijphart, Arend. *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries.* Yale University Press, 2012.

[23] Well-known is the observation of Winston Churchill concerning democracy, when on 11 November 1947 said: *"Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time[…]",* (quote reported from the organisation 'The International Churchill Society' (ICS) at winstonchurchill.org).

forms of government[24]. This consideration is, at least, considered to be true in the Western legal tradition[25] and more in specific in the European legal space. Since the dawn of modern constitutionalism[26], and throughout the developments of different forms of constitutional states in continental Europe[27], constitutional democracy based on the supremacy of the Constitution constitutes the current predominant type of democracy within the modern European States. This incorporates much of the liberal constitutional tradition, whose principles are reinterpreted in the light of the new requirements of constitutional democracy – also defined as pluralist democracy as a consequence of its promotion of social, political and institutional pluralism[28]. Today, the core of our contemporary democracy at all its levels within the European Union is an idea of pluralism, openness, diversity, liberty. This idea is closer to the ancient roman concept of *civitas*, which refers to the city as the complexity of all its inhabitants living together under the same legal order despite their religion, ethnicity, language, rather than the Greek *polis,* that was founded on a close and strict perspective of inclusion of only those people sharing the same origin[29]*.* From the ancient monolithic idea of democracy, we can point

[24] See Luciani, Massimo. 'Forme Di Governo'. *Enciclopedia Del Diritto*, 2010. It is interesting to notice that *"even dictators try to legitimize their rule by invoking democratic principles",* in Sommermann, Karl-Peter. 'Citizen Participation in Multi-Level Democracies: An Introduction'. *Citizen Participation in Multi-Level Democracies*, edited by Fraenkel-Haeberle et al., Brill, 2015, p.2.

[25] The concept of 'Western legal tradition' includes together in a single term the legal traditions of the common law and the civil law, and it refers to the common heritage of values that both legal traditions share and have been built upon throughout centuries of evolution and revolutions. Democracy is, in specific, one of those values considered at the core of the Western legal tradition, being a founding value of both civil law and common law legal traditions. The scholar of reference is Harold J. Berman: see Berman, Harold J. 'The Western Legal Tradition in a Millennial Perspective: Past and Future'. *Louisiana Law Review*, vol. 60, no. 3, 2000, pp. 739–63. For further reading see Berman, Harold J. *Law And Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition*. Belknap Pr, 2006 (Italian translation: *Diritto e rivoluzione. L'impatto delle riforme protestanti sulla tradizione giuridica occidentale*, Il Mulino, 2010).

[26] Which is usually traced back to the entry into force of the US Constitution in 1789: see further Rosenfeld, Michel. 'Comparative Constitutional Analysis in United States Adjudication and scholarship'. *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and András Sajó, 2012, p.46.

[27] This huge debate obviously goes far beyond our thesis. As a starting point, we may refer further to Grimm, Dieter. 'Types of Constitution'. *The Oxford Handbook of Comparative Constitutional Law,* edited by Michel Rosenfeld and András Sajó, Oxford University Press, 2012, pp. 98–131.

[28] In contrast to the current predominant model of constitutional democracy among European states, and in the light of the emergence of states advocating for a model of 'illiberal democracy', the liberal tradition has been recently pointed out for its fundamental contribution to democracy in Halmai, Gabor. 'Does Illiberal Democracy Exist?' *Rule of Law vs Majoritarian Democracy*, edited by Giuliano Amato et al., Bloomsbury Publishing, 2021, pp. 171–88. While reflecting on the concept of 'illiberal democracy' the author states that *"that there is no democracy without liberalism, and there also cannot be liberal rights without democracy"* (p.171).

[29] Curi, Umberto. 'Alle Radici Dell'idea Di Città'. *Pizzolato, Filippo, et al., Editors. La Città e La Partecipazione Tra Diritto e Politica*. Giappichelli, 2019, pp. 3–7.; Cacciari, Massimo. *La Città*. Pazzini Editore, 2021. As M. Cacciari observes, the contemporary European Law is rooted on the ancient Roman law in so far as it conceives the city as the space where people accept to be subjected to the same law, despite their diversities. European cities are therefore rooted not in the ancient Greek *polis*, but in the ancient Roman *civitas*.

out to a contemporary constitutional democracy built upon differences in the European legal space. This development could be explained by borrowing the concept of the EU as a 'demoicracy', which refers to the EU as a government of peoples (understood both as states and as citizens) that govern together, but not as one[30]. Democracy in the EU indeed exists without a unique *demos*[31], but encompassing a plurality of its component peoples, its *demoi*. As a consequence, the EU as a *demoicracy* does not consists of a Union of national democracies, nor of a Union as one unique democracy: the EU is a work-in-progress development of a *sui generis* type of democracy that does not replicate the nation-states one, but that is actually inventing[32] a new concept of post-national democracy. Alongside with the term *demoicracy*, many others have been and still are the words used to explain the need for looking for a new term regarding democracy in the EU[33]. One of them is 'transnational democracy'[34], which referes to the new legal order created by the EU, based on states as well as citizens, where democracy is not realized within a State, but in an Union beyond a Westphalian system of international relations[35].

As a legal and political community, the EU is being built on shared values, projects, objectives, and not on one shared identity as it is usually the case for nation-states: this very nature of the EU is putting to the test what has been defined as the 'transformations of democracy'[36]. This idea refers to the historical evolution of the concept of democracy that from direct democracy in the Greek city-states, developed into representative democracy with the nation-states era, and that is currently undergoing a third major

[30] Definition by Nicolaïdis, Kalypso. 'European Demoicracy and Its Crisis'. *Journal of Common Market Studies*, vol. 51, no. 2, 2013, p.352. The idea of *demoicracy* was first articulated in Nicolaïdis, Kalypso. 'The New Constitution as European "Demoi-Cracy"?' *Critical Review of International Social and Political Philosophy*, vol. 7, no. 1, 2004, pp. 76–93. See also Cheneval, Francis, and Frank Schimmelfenning. 'The Case for Demoicracy in the European Union'. *Journal of Common Market Studies*, vol. 51, no. 2, 2013, p.340. In line with that, it is relevant to observe that for the European parliament elections we do not vote as one people, but divided into national level electoral lists.

[31] von Bogdandy, Armin. 'European Democracy: A Reconstruction through Dismantling Misconceptions'. *MPIL Research Paper Series*, 2022.; Weiler, J. H. H., et al. 'European Democracy and Its Critique'. *West European Politics*, vol. 18, no. 3, p.5.

[32] On this point Nicolaïdis, Kalypso. 'The Idea of European Demoicracy'. *Philosophical Foundations of European Union Law*, edited by Julie Dickson and Pavlos Eleftheriadis, Oxford University Press, 2012, p.251; and Mény, Yves. 'De La Démocratie En Europe: Old Concepts and New Challenges'. *Journal of Common Market Studies*, vol. 41, no. 1, 2002, p.13.

[33] Concerning this terminological issue see Nicolaïdis, Kalypso. 'The Idea of European Demoicracy'. *Philosophical Foundations of European Union Law*, edited by Julie Dickson and Pavlos Eleftheriadis, Oxford University Press, 2012, p.249.

[34] Nicolaïdis, Kalypso. 'European Demoicracy and Its Crisis'. *Journal of Common Market Studies*, vol. 51, no. 2, 2013, p.353.

[35] Hoeksma, Jaap. 'Replacing the Westphalian System'. *The Federal Trust*, 2020, https://fedtrust.co.uk/wp-content/uploads/2020/10/Replacing-the-Westphalian-system.pdf.

[36] Dahl, Robert Alan. 'A Democratic Dilemma: System Effectiveness versus Citizen Participation'. *Political Science Quarterly*, vol. 109, no. 1, 1994, pp. 23–34; Dahl, Robert Alan. *Democracy and Its Critics.* Yale University Press, 1989.

transformation in the present times, with the strengthening of the international and transnational orders, and the reduction of the autonomy of nation states[37]. Within this changing international and – in the case of the EU – transnational order, the core issue for the evolution of democracy is the need to understand which type of democracy – additional and complementary to the existing ones – could be capable of embracing the complexity of the European legal space, which is constantly developing alongside with the 'widening and deepening'[38] process of the EU integration. This need represents the starting point for our research, that will eventually come to a point with the end of our work.

Moving towards the conclusion of this introductory paragraph, we can say that despite the lack of a shared and common definition of democracy within the EU legal order (but also European legal space), and despite the lack of a commonly referred index[39] for EU member States for measuring democracy, for the purpose of this work we can refer to democracy as one among the core concepts of the Western legal tradition, and of European constitutionalism more precisely. At the core of democracy as a value we find the recognition of the diversity and pluralism of peoples (*demoi*), that do not constitute one unique *demos* as it is the case for nation states. In addition to the view of it as a value, democracy is also a founding principle of the EU legal order, and an European constitutional principle: as such, it needs to be safeguarded as a cornerstone of our legal space, with provisions of sanctions for its breach and backsliding[40]. In this definitional void

[37] The concept of 'transformation of democracy' dates back to R. Dahl, who described democracy as having gone through these three major transformations. Dahl, Robert Alan, 'A Democratic Dilemma: System Effectiveness versus Citizen Participation'. *Political Science Quarterly*, vol. 109, no. 1, 1994, pp. 23–34. It is useful to recall here also another triple categorisation on democracy, elaborated by another major scholar of democracy, S. Huntington. In Huntington, Samuel. 'Democracy's Third Wave'. *Journal of Democracy*, 1991, he defines three waves of democratization, referring to the major surges of democracy in history: the first one beginning in the 19th century; the second one after the WWII; the third one since the mid-1970s.

[38] When mentioning the 'widening and deepening' process of the EU integration, we refer to the balance between the widening of the Union's borders and the necessity for constant amendments to its structure at every new accession round for allowing further integration. For an overlook of the original debate see Cameron, Fraser. 'Widening and Deepening'. *The Future of Europe Integration and Enlargement*, edited by Fraser Cameron, Routledge, 2004.

[39] When it comes to the measurement of democracy, it is useful to report the existence of many international democracy indexes and databases whose aim is a quantitative approach to democracy. Each one of them uses their own conceptual understanding of democracy, their own categories, indicators, regional areas of interest. They also come up with different working definitions of democracy, and this clearly shows the multitude of perspectives on a concept that is undoubtedly disputed and complex. Among the most recognized democracy measurements, we can list the *V-Dem* dataset and annual Report on the status of democracy in the world (https://www.v-dem.net/); the reports on freedom and democracy, as well as the democracy scores of the world countries made by the Freedom House (https://freedomhouse.org/); the Global State of Democracy Indices and the reports on the status of democracy elaborated by the International Institute for Democracy and Electoral Assistance (International IDEA, https://www.idea.int/); the Policy5 project (http://www.systemicpeace.org/csprandd.html); the democracy index of the Economist Intelligence Unit (EUI, https://www.eiu.com/n/).

[40] Since the literature on democracy backsliding and, more in general, on rule of law and values backsliding is huge, let us here refer to some basic references as an introduction to the topic: Pech, Laurent.

and starting from what has been outlined in the European Union Treaties, which constitute the EU constitutional foundation, we will look at democracy in the EU in its multi-forms dimensions (representative and participatory democracy), and in its multi-level dimensions (EU level, national levels, regional, local levels). As we will argue, those are the two dimensions that are relevant for approaching democracy in this research.

Here the working definition of democracy in the EU that we will use: *'within the EU legal order and in the light of European constitutionalism, democracy is not only a value, but also a constitutional principle that lies at the very core of the EU and the wider European project, and that as such needs to be safeguarded and strengthened. It constitutes a system of government that is based on the recognition of societal pluralism (*demoi*) as well as institutional pluralism. Despite the lack of a definition common to all EU member States, two are the main elements that could be identified in order to qualify democracy: a) a multi-form dimension for referring to the actual forms that democracy is using to include society in the exercise of power (representative and participatory forms); b) a multi-level dimension for referring to democracy as a system of government that is used at all levels (EU, national, regional, local) for the exercise of power'.*

2. Forms and levels of democracy

Our preliminary classification of democracy as multi-form and multi-level constitutes a clarifying necessity in our work, because of the tremendous versatility of this long-established and multifaceted concept[41]. Since it is not the scope of this research to look at all its sides, interpretations, and contexts of understanding, we will define already from here the two dimensions that the research design of this work will refer to: democracy in its participatory form and at its local level. Before reaching that point, however, let us take a

'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law'. *Hague Journal on the Rule of Law*, 2022; Scheppele, Kim Lane. 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union'. *Yearbook of European Law*, vol. 39, no. 1, 2021, pp. 3–121; Kochenov, Dimitry. 'The Acquis and Its Principles: The Enforcement of the "Law" versus the Enforcement of "Values" in the European Union'. The Enforcement of EU Law and Values, edited by András Jakab and Dimitry Kochenov, Oxford University Press, 2017, pp. 9–27; Kochenov, Dimitry. 'Europe's Crisis of Values'. *Revista Catalana de Dret Públic*, no. 48, 2014, pp. 106–18.

[41] With contested and broad concepts such as democracy, for the purpose of this work the invitation extended by Philipp Dann in one contribution was taken up. The scholar advocates for the necessity to be critical towards traditional inherited concepts developed within State contexts, trying to rethink them outside the national level. Additionally, he promotes the conceptualization of *sui generis* terms in the context of European constitutional law as a new direction for legal scholars. See Dann, Philipp. 'Thoughts on a Methodology of European Constitutional Law'. *German Law Journal*, vol. 6, no. 11, 2005, pp. 1453–73.

step backwards: what do we mean for multi-form and multi-level democracy? The two dimensions are undoubtedly intertwined, but different combinations result in different ways of being for democracy.

a) Multi-form dimensions of democracy: representative democracy. Considering the EU as our space of research and investigation, the provisions of the two EU Treaties[42] come handy for us to define the forms that have been included there, which are two[43]: representative democracy and participatory democracy. Article 10(1) TEU outlines that *"the functioning of the Union shall be founded on representative democracy"*, in this way recognizing the foundations of the government in the EU on an indirect participation of its citizens through their representation carried out by elected delegates. Citizens' representation in the EU is founded on a dual legitimation[44]: representatives of citizens are elected to the European Parliament, and elected representatives in the member States participate in the Council and the European Council. Representative democracy is the paradigmatic and widely recognized form of democracy that every modern democratic state and public body rely on[45]. Recognized as the distinctive feature of the liberty of modern people that can afford the enjoyment of their individual rights without bothering about civic duties thanks to the work carried out by their representatives[46], the idea of representation nowadays constitutes the basic frame upon which the relationship between citizens and the State (at all its levels) is built upon. Despite the fact that criticism about this perspective was not lacking[47], it can be said that the method of representation has

[42] Treaty on European Union (TEU) and Treaty on the functioning of the European Union (TFEU).

[43] We are aware of the great number of forms of democracy that have been defined in the literature: among the others, direct democracy, deliberative democracy, liberal democracy, constitutional democracy. They also refer to different disciplinary angles (mainly law and political sciences). For a definitory need, and in accordance to the lenses used in this work which is looking at the EU (European constitutional law) our categorisation of 'forms' is double: representative and participatory. As we will see in Chapter 2, the concept of 'participatory democracy' is wide enough so as to include other labels of democracy that have been considered as self-standing by some scholars.

[44] von Bogdandy, Armin, and Jürgen Bast, editors. *Principles of European Constitutional Law*. Hart, 2009, p.50. See the provision of Article 10(2) TEU.

[45] Dahl, Robert Alan. *Democracy and Its Critics.* Yale University Press, 1989, p. 215, where he refers to representation as an *"essential element of modern democracy".* See also Sommermann, Karl-Peter. 'Citizen Participation in Multi-Level Democracies: An Introduction'. *Citizen Participation in Multi-Level Democracies*, edited by Fraenkel-Haeberle et al., Brill, 2015, p.8, saying that *"representative democracy remains the basic structure of modern democracy and elections will, therefore, continue to be at the centre of democratic self-determination".*

[46] Constant, Benjamin. *The Liberty of Ancients Compared with That of Moderns.* 1819.

[47] Manin, Bernard. *The Principles of Representative Government.* Cambridge, 1997 is in specific worth mentioning for his interesting critical position. According to him, what he defines as 'representative government' is a perplexing phenomenon since it was originally conceived in explicit opposition to democracy. In fact, while nowadays we conceive the relationship between those who govern and those who are governed as democratic, that was originally seen as undemocratic. Representative government, indeed, *"includes both democratic and undemocratic features",* and that explains why still nowadays we cannot consider as democracies many States that – however – are to be categorized as representative systems. All

served the purpose of giving an institutional structure to democracy[48]. Nowadays indeed the institutional structure of representative democracy is based upon the fundamental role of parliaments as those assemblies where the representatives of the people are legitimated by elections, and where the relationship between the representatives and those who are represented is founded on trust[49]. It has to be kept in mind, however, that representative democracy goes far beyond the role of parliaments, and embraces all those institutional arenas where collective decision-making is made by elected representatives of the people: by saying that, we refer to the role that representatives play, for example, in local and regional authorities[50]. This diversity of public arenas is therefore represented by an institutional pluralism that aims at mirroring the societal pluralism[51]. Nevertheless, this is impossible to capture, and as a matter of fact citizens today are more and more reluctant to rely totally on elected representatives to pursue their interests in the decision-making process, but instead are willing to contribute as private actors[52]. Because of that, it is understandable why the concept of participatory democracy started to gain momentum as complementary and not substitutive to representative democracy: the form of participatory democracy, in this way, has been juxtaposed with the representative one with the aim to enhance democracy.

b) *Participatory democracy*. In parallel to representative democracy, which is the indirect form of democracy, the direct form of participatory democracy is also included in the Treaties provisions[53]: in contemporary democracies it is indeed necessary to combine the two of them, as it was already observed some time ago[54]. The essential references to the concept of 'participation' beyond representation in the Treaties can be found in Article

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in all, B. Manin's position is interesting in so far as he was able to point out to us all both the democratic and undemocratic dimensions of a representative government (or system).

[48] von Bogdandy, Armin, and Jürgen Bast, editors. *Principles of European Constitutional Law*. Hart, 2009, p.50.

[49] We are aware of the wideness of the literature debates on crucial concepts of representation, legitimacy, elections, trust, majority rule. However, this work is not the proper place where such a wide debate should be illustrated, as it is not the focus of our contribution. May it be sufficient here to refer to two useful introductory source on such topics: Manin, Bernard. *The Principles of Representative Government*. Cambridge, 1997; Bobbio, Norberto. *Il Futuro Della Democrazia*, 1984 (Reprint). Corriere della sera, 2010.

[50] On the necessary distinction between 'representative democracy' and 'parliamentary State' we may refer to the fundamental pages of Bobbio, Norberto. *Il Futuro Della Democrazia*, 1984 (Reprint). Corriere della sera, 2010, pp.42-44, where he criticises the false conviction that these two concepts have the same meaning, observing that in modern states representation does not refer to the mere role of parliaments.

[51] On the concept of societal pluralism see Bobbio, Norberto. *Il Futuro Della Democrazia*, 1984 (Reprint). Corriere della sera, 2010, p.17-19.

[52] Palermo, Francesco, and Karl Kössler. *Comparative Federalism: Constitutional Arrangements and Case Law*. 2017, pp.114-116

[53] With regard to this classification of direct and indirect democracy as the current result of historical transformations see Sartori, Giovanni. *Democrazia e Definizioni.* Il Mulino, 1957, p.156.

[54] Constant, Benjamin. *The Liberty of Ancients Compared with That of Moderns*. 1819.

10(3) TEU on the right to participate, and in Article 11 TEU, which relates to the necessity for EU institutions to: allow citizens and their representatives to exchange views, and to maintain an open, transparent and regular dialogue; allow citizens' participation through consultations, and through the European Citizens' Initiative (ECI) instrument. In addition to these two articles, it is worth mentioning Article I-47 of the (failed) draft Treaty establishing a Constitution for Europe (TCE)[55], now incorporated in Article 11 TEU, as the title was precisely 'the principle of participatory democracy'; and Article 15(1) TFEU, which states that "*in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible"*. All these opportunities for citizens to participate beyond representation refer to participation at the EU level: the target of all these types of participation are therefore the EU institutions. In addition to that, within the EU Charter of Fundamental Rights (Nice Charter) only two references are included to participation, with regard to the rights of the elderly (Article 25) and the integration of persons with disabilities (Article 26)[56]. As a matter of fact, however, the participatory form of democracy is already taking place through a 'universe of practices[57]' that do not correspond to a unitary design: they are occurring at all levels of government and not only at the EU level. In doing so, they obviously go much beyond the text of the Treaties. The concept of 'participation', indeed, allows a wide variety of interpretations on the basis of which to design concrete practices and actions to implement with and for citizens: this will be investigated in specific in Chapter 2 through the state of the art, current limitations and challenges of the European constitutional principle of participation, and in Chapters 4-5-6 through concrete implementations of participation through the 'commons' in Italy and around the EU. For now, may it be sufficient the recognition in the EU legal order of the form of participatory democracy.

[55] The text of the Treaty can be found at https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_establishing_a_constitution_for_europe_en.pdf. Also referred to as 'the Constitutional Treaty', it was an unratified international treaty intended to create a consolidated constitution for the EU. Although having been signed on 29 October 2004 by both the already Member States and the just entered Central and Eastern Europe Countries (CEECs), it never came into force as a consequence of the rejection of the document by French and Dutch voters in May and June 2005. The TCE was drafted by the *Convention on the Future of Europe*, that was a body established by the European Council held in Laeken on 14-15 December 2001, as a result of the *Laeken Declaration.* As it came out from there, the fact of Europe being 'at a crossroads' needed to be addressed with a reformed Union, in which some challenges needed to be faced: a more democratic, transparent, efficient Union; a better division of competences; a simplification of EU instruments; a more inclusive role for citizens; and eventually a new Constitution for the enlarged EU. In order to replace the unratified Constitutional Treaty, eventually the Lisbon Treaty entered into force on 1 December 2009, modifying the previous Treaties and granting their same legal value to the Charter of Fundamental Rights of the European Union (Nice, 7 December 2000).

[56] We may refer further to Peers, Steve, et al., editors. *The EU Charter of Fundamental Rights. A Commentary*. Bloomsbury Publishing, 2021.

[57] Allegretti, Umberto. 'Democrazia Partecipativa'. *Enciclopedia Del Diritto*, 2011, pp. 295–335.

c) Multi-level dimensions of democracy. Why is it important to look at levels if in the Treaties only the EU level of the representative and participatory forms of democracy is the one referred to? While the Treaties are only referring to the EU level, the same TEU at Articles 4 and 5 points out to the other levels of government where we find democracy in the EU legal order. Article 4(2) TEU relates to domestic democracy and to the levels of territorial autonomies, recognizing the national identities of the Member States "*inclusive of regional and local self-government"*; Article 5(3) TEU, on its side, is relevant for the vertical division of competences in accordance to the principle of subsidiarity between the EU level and the Member States, *"either at central level or at regional and local level"*. While the mentioning of the national level is widespread in the Treaties, an additional implicit and explicit mention of the local level in the Treaties could be found only in the TEU Preamble *"[The Member States are] resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity"*, and in Article 2 of the Protocol on Subsidiarity and Proportionality[58], which states that *"before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged"*. Despite the fact that the internal allocation of powers is on each Member State's constitutional organization[59] and that as a consequence of that the regional and local levels seem to be overlooked in the Treaties[60], all the different levels of democracy are already recognised

[58] Protocol no.2 of the EU Treaties.

[59] Very clear on this point is G. Boggero: *"Each member State is free to determine how its local government system should be arranged and the Union cannot pass measures which directly impinge upon this power. However, one has to bear in mind that local and regional authorities, as they are subject to domestic law, are also subject to EU substantive law […]"*, in Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe.* Brill, 2018, pp.68-69. As we will see later, the contribution of G. Boggero is fundamental in backing the idea that the European Charter of Local self-government of the Council of Europe (CoE) represents the reference point for the establishment of a consistent and coherent common European Constitutional Local Government Law. The objectivity of this point is very clear also in van Zeben, Josephine. 'Local Governments as Subjects and Objects of EU Law: Legitimate Limits?' *Framing the Subjects and Objects of Contemporary EU Law*, edited by Samo Bardutzky and Elaine Fahey, Edward Elgar Publishing, 2017: *"The picture of local government in the EU is one where local governments' legal positions are firmly based on Member States' constitutional arrangements. This is unlikely to change in the foreseeable future"* (p.138).

[60] Also commentaries on EU Treaties do not consider relevant nor comment on the local level (and the regional one) when analysing Article 4 TEU: see for example the commentary on the EU Treaties Kellerbauer, Manuel, et al., editors. *The EU Treaties and the Charter of Fundamental Rights. A Commentary*. Oxford University Press, 2019, pp.35-60. The recognition of the local level is, indeed, totally on each Member State, as also pointed out in Schnettger, Anita. 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System'. *Constitutional Identity in a Europe of Multilevel Constitutionalism*, edited by Christian Calliess and Gerhard van der Schyff, Cambridge University Press, 2019, p.25.

there, the local one included. In the light of that, democracy in the EU[61] can be better understood if we break it down into its levels. In specific, when talking about the multi-level dimensions of democracy, the reference goes to the three (more precisely, four) levels that democracy in the EU could be analysed through: the supranational level of EU democracy; democracy at the national level of the member States; the subnational democracy, as the third level of democracy which includes both the regional and the – much more important in our research – local level (our fourth level)[62]. It is important, indeed, to understand democracy as a system of government according to its different levels, as diverse are the debates depending on the level[63]. The multi-level dimension of democracy therefore refers to the different levels where State-society relations are taking place: on one side, with regard to the (institutional organization of the) democratic form of *representation* in the Union, while on the other with regard to the opportunities for experimenting new forms of citizen *participation*[64].

d) The supranational EU level. The supranational level of democracy refers to democracy at the highest level within the EU legal order: the level of the EU institutions[65]. At the supranational EU level we have both representative and participatory democracy, and the concept of democracy has been developed in its own way, emancipating itself from its understanding in the context of nation States[66]. With concern to representative democracy – whose institutions are, pursuant to Article 10(2) TEU, the European

[61] We are always talking of 'democracy in the EU' and not of 'EU democracy' or 'European democracy'.

[62] Panara, Carlo, and Michael Varney. *Local Government in Europe. The 'Fourth Level' in the EU Multilayered System of Governance.* Routledge, 2013.

[63] We may just mention here that this also raises the question as to whether a multi-level dimension is quintessential to democracy or not: for an introduction on this debate see further Sommermann, Karl-Peter. 'Citizen Participation in Multi-Level Democracies: An Introduction'. *Citizen Participation in Multi-Level Democracies*, edited by Fraenkel-Haeberle et al., Brill, 2015.

[64] Sommermann, Karl-Peter. 'Citizen Participation in Multi-Level Democracies: An Introduction'. *Citizen Participation in Multi-Level Democracies*, edited by Fraenkel-Haeberle et al., Brill, 2015, p.11-12. See also Palermo, Francesco. 'Participation, Federalism, and Pluralism: Challenges to Decision Making and Responses by Constitutionalism'. *Citizen Participation in Multi-Level Democracies*, edited by Cristina Fraenkel-Haeberle et al., Brill, 2015, p.44, who states that the wider the sub-national and local autonomy is, the wider space for participatory experiments exists. We will deal with new forms of participation, in specific, in Part II (Chapters 4 and 5) with the Italian model of civic participation through the commons, and in Chapter 6 for initiatives of participation through the commons in other EU cities.

[65] We are aware of the risk coming from the use of the term 'level' with regard to the EU in the sense that it could imply a hierarchy that is not necessarily given thanks to Della Cananea, Giacinto. 'Is European Constitutionalism Really "Multilevel"?' *Heidelberg Journal of International Law (HJIL)*, no. 70, 2010, pp. 283–317. Accordingly, the other term 'tier' may seem more appropriate to use. However, in this research we will still use the term 'level' in a broad sense, in the consciousness that this refers to the competences that have been conferred to the EU by member states.

[66] von Bogdandy, Armin, and Jürgen Bast, editors. *Principles of European Constitutional Law*. Hart, 2009, p.52.

Parliament[67], the European Council and the Council –, it can exist also without a European demos[68], while on the opposite that is a fundamental element in nation States. When referring to the participatory form of democracy at the EU level, the reference goes to the supranational forms of participation that citizens can exercise for trying to influence the EU level decision-making process[69].

e) The national level. Democracy at the national level refers to the system of government at the national level. While all EU member states are founded on representative democracies, diverse are the provisions on participatory forms of democracy or even other forms, like 'direct democracy', 'deliberative democracy' or other complementary forms of citizens' inclusion in the decision-making processes at the national level. The provisions on forms of democracy at the national level could be found – if existent – in national constitutions or national level legislation[70].

f) The subnational level: regional and local. The subnational level constitutes the level of democracy which is the closest to citizens, and that is constituted of both the regional level and the local one. While the EU seems to consider the regional and local authorities as one level which is the third, sub-national tier of government[71], we will refer in our work to the local level as the fourth level[72] of democracy in the EU as a consequence of the need to look at local authorities as separated from the regional level. Within the context of the EU legal space, we can therefore talk of the third level of democracy when referring to the regional level, and of the fourth level for referring to the local level. While

[67] On the (lack of) representativeness of the European Parliament see further Russack, Sophia. 'EU Parliamentary Democracy: How Representative?' *Representative Democracy in the EU. Recovering Legitimacy*, edited by Steven Blockmans and Sophia Russack, Rowman & Littlefield Publishers, 2019, pp. 45–63.

[68] von Bogdandy, Armin. 'European Democracy: A Reconstruction through Dismantling Misconceptions'. *MPIL Research Paper Series*, 2022, p.1.

[69] This will be included in Chapter 2. For now may it be sufficient to refer to one of the main voices on EU participatory democracy, which is Alberto Alemanno. See, among others, Alemanno, Alberto. 'Europe's Democracy Challenge: Citizen Participation in and Beyond Elections'. *German Law Journal*, 2019, and Alemanno, Alberto, and James Organ. 'The Case for Citizen Participation in the European Union: A Theoretical Perspective on EU Participatory Democracy'. *Citizen Participation in Democratic Europe: What next for the EU?*, edited by Alberto Alemanno and James Organ, ECPR Press/Rowman & Littlefield Publishers, 2021.

[70] For a proper and thorough study on the provisions on the diverse forms of democracy at the national level in each one of the 27 EU member States a comparative study would be needed. However, the national level is not the object of this work, because it does not contribute in answering to our research question. For some examples and comparative considerations on citizen participation in some federal and regional States (Austria, Italy, Switzerland, UK, Canada) see further Fraenkel-Haeberle, Cristina, et al. *Citizen Participation in Multi-Level Democracies*. Brill, 2015, pp.207-308.

[71] This can be seen in the Treaties text, where 'regional and local' always go in pair, and in the denomination of the 'Committee of the Regions', with the local level being absorbed in the wider spectrum of (local and) regional authorities across the European Union.

[72] Panara, Carlo, and Michael Varney. *Local Government in Europe. The 'Fourth Level' in the EU Multilayered System of Governance*. Routledge, 2013.

the representative form of democracy constitutes, once again, the fundamental form of democracy also at the subnational level with representatives of citizens being elected also at the regional and local level (not only at the national), with regard to the participatory form of democracy it is interesting to notice that the subnational level – and more precisely the local one – constitutes the privileged level for innovations. The local level of democracy makes it indeed easier to conduct experimentations that could eventually also influence and bring change to upper levels of democracy: because of this reason, the local level considered as the first level of elected government (the closest to people) is the chosen level in our research work[73].

In the light of our definition of democracy in the EU according to its forms and levels, we can conclude by relating back to the reason for our classificatory need, that is the fact that the current research locates itself among those studies that target the local level of democracy and its participatory form[74]. As a consequence of that, the representative form and the other levels of democracy will not be object of our work as not respondent to the research design and research question. The following table should be of help in visualizing our understanding of democracy in the EU according to its forms and levels on the basis of the Treaties text, and the research context of our work in the light of that (x).

Democracy in the EU

Levels / **Forms**	EU	NATIONAL	SUBNATIONAL	
			REGIONAL	LOCAL
REPRESENTATIVE	–	–	–	–
PARTICIPATORY	–	–	–	x

Table 1. Multi-form and multi-level dimensions of democracy in the EU (author's elaboration).

[73] The centrality of local level democracy in the relationship between the State and its citizens emerges from the conclusive general remarks in Hendriks, Frank, et al. 'European Subnational Democracy: Comparative Reflections and Conclusions'. *The Oxford Handbook of Local and Regional Democracy in Europe*, edited by John Loughlin et al., Oxford University Press, 2012, pp.739-741. As emphasised by the authors, it is indeed local democracy the 'front line' level where innovation occurs as a consequence of intense and tense interactions between public authorities and citizens.

[74] On participation and the participatory form of democracy, Chapter 2 will contribute through an investigation of the principle of civic participation. On the local level of democracy, Chapter 3 will assist through the study of the principles of subsidiarity and local self-government, highlighting the rising role of 'cities' as a specific unit among other local authorities.

3. Problem (re)definition: is democracy in crisis?

When talking about democracy, the central problem usually referred to in the literature as well as in common usage is 'the crisis of democracy'[75]. It is a commonly mentioned and faced topic that refers to diverse meanings within this area of discourse, as well as diverse regions of the world where this phenomenon is applying[76]. As a beginning, it is relevant to point out that when talking about the crisis of democracy within the EU, this is to be read first and foremost within the wider crisis of EU values[77], where not only democracy, but also the rule of law is object of backsliding by some member States[78].

[75] The concept is used in different disciplinary contexts for looking from different angles to the same phenomenon. With no claim to be exhaustive, may it be sufficient to refer, as some starting points, to: Fraenkel-Haeberle, Cristina, et al. *Citizen Participation in Multi-Level Democracies*. Brill, 2015, p.5; Palermo, Francesco, and Karl Kössler. *Comparative Federalism: Constitutional Arrangements and Case Law*. 2017, pp.114-122; Kriesi, Hanspeter. 'Is There a Crisis of Democracy in Europe?' *Polit Vierteljahresschr*, no. 61, 2020, pp. 237–60; Kochenov, Dimitry. 'Europe's Crisis of Values'. *Revista Catalana de Dret Públic*, no. 48, 2014, pp. 106–18; Nicolaïdis, Kalypso. 'European Demoicracy and Its Crisis'. *Journal of Common Market Studies*, vol. 51, no. 2, 2013, pp. 351–69.

[76] Fukuyama, Francis. 'Against Identity Politics: The New Tribalism and the Crisis of Democracy'. *Foreign Affairs*, vol. 97, no. 5, 2018, p.91: *"[…] in recent years, the number of democracies has fallen, and democracy has retreated in virtually all regions of the world […]"*.

[77] Kochenov, Dimitry. 'Europe's Crisis of Values'. *Revista Catalana de Dret Públic*, no. 48, 2014, pp. 106–18. In addition to this important debate, another phenomenon is usually linked to the crisis of democracy in the EU, namely the so called 'democratic deficit'. With this term we refer to a huge branch of literature and debate (that goes much beyond the scope of our research) that refers, in a nutshell, to what is seen as a lack of public engagement at the EU level and the absence of a common public sphere and common demos, as it is for national democracies. May it be sufficient to refer here to some among the main contributions of this line of thought: on the asserted existence of a democratic deficit in the EU see Follesdal, Andreas, and Simon Hix. 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik'. *Journal of Common Market Studies*, vol. 44, no. 3, 2006, pp. 533–62; on the lack of a common sphere and demos see Nicolaïdis, Kalypso. 'European Demoicracy and Its Crisis'. *Journal of Common Market Studies*, vol. 51, no. 2, 2013, pp. 351–69, and Weiler, J. H. H., et al. 'European Democracy and Its Critique'. *Wast European Politics*, vol. 18, no. 3, 1995, pp. 4–39. Of a different opinion is that side of scholars that perceive that the real democratic deficit in the EU should not be referred to the EU institutions *per se*, but to the democratic problems in nation states: see, *inter alia*, Kelemen, R. Daniel. 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union'. Government and Opposition, vol. 52, no. 2, 2017, pp. 211–38, and von Bogdandy, Armin. 'European Democracy: A Reconstruction through Dismantling Misconceptions'. *MPIL Research Paper Series*, 2022, p.17.

[78] In specific, the reference goes to Hungary and Poland, on which there is a vast literature. For a very clear summary of their latest years development towards a model of illiberal democracy see Halmai, Gabor. 'Does Illiberal Democracy Exist?' *Rule of Law vs Majoritarian Democracy*, edited by Giuliano Amato et al., Bloomsbury Publishing, 2021, pp.184-185. For a summary of the initiatives that the EU has taken against their backsliding see Pech, Laurent. 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law'. *Hague Journal on the Rule of Law*, 2022. The model of 'illiberal State' is the one defined by Prime Minister Viktor Orbán's Speech at the 25th Bálványos Summer Free University and Student Camp, 26 July 2014, Tusnádfürdő (Băile Tuşnad), Romania, where he outlined the ideal of a new type of democracy: *"[…] the most popular topic in thinking today is trying to understand how systems that are not Western, not liberal, not liberal democracies and perhaps not even democracies, can nevertheless make their nations successful. The stars of the international analysts today are Singapore, China, India, Russia and Turkey. […] the new state that we are constructing in Hungary is an illiberal state, a non-liberal state"*. More in general on democracy backsliding see the EU project RECONNECT 'Reconciling Europe with its Citizens through Democracy and the Rule of Law' and its output publications, whose goal was to strengthen EU legitimacy through democracy and the rule of law reconnecting the EU governance to its citizens

While crises constitute the history and the soul of the European Union since its very origin, the one of democracy and other founding values represents indeed, more than any other, a systemic challenge to the very core of the EU integration process, representing a dangerous trend at the supranational level within the EU legal order. At the same time, as it has been pointed out[79], crises never really constituted an exception, but an inherent aspect of democracy as a project (and a process[80]) constantly under construction and never finished[81], therefore representing a necessary step in the transformation of democracy. In order to make our point clear, we will use our classification of democracy related to forms and levels, as it is of help in narrowing down the scope for the purpose of our research, since not all dimensions of democracy should be considered as in crisis[82]. Which dimensions of democracy are the ones that could be considered as in crisis?

When it comes to forms of democracy, we can say more precisely that what we are witnessing is a crisis of representation[83], which is occurring at all levels. The relation of trust[84] between the people and their delegates has been constantly diminishing, within a model of democracy that is built around politicians and the party system, elections, and representative assemblies. While the crisis of representation (and of representative democracy as a model) is a constant trend at all the levels, participation as we will see is undergoing a different momentum. If we look at representation at the EU level, we can see that the main actor devoted to representation – the European Parliament (EUP) – has witnessed a decline in total election turnout from 61.99% in the first elections in 1979 to 50.66% of the latest election in 2019, even though the elections turnout in 2019 (50.66%)

(https://reconnect-europe.eu/). On the interconnectedness of rule of law and democracy see Jakab, András. 'What Can Constitutional Law Do Against the Erosion of Democracy and the Rule of Law?' *MPIL Research Paper Series*, no. 15, 2019.

[79] Ercan, Selen A., and Jean-Paul Gagnon. 'The Crisis of Democracy Which Crisis? Which Democracy?' *Democratic Theory*, vol. 1, no. 2, 2014, p.6. A more optimistic view is the one shared by H. Kriesi that thinks that despite the fact that dissatisfaction with (representative) democracy is widespread in the EU, there is no reason to dramatize, as the principle of democracy is still widely supported and shared among European citizens (see Kriesi, Hanspeter. 'Is There a Crisis of Democracy in Europe?' *Polit Vierteljahresschr*, no. 61, 2020, pp.256-257).

[80] Barber, Benjamin R. 'Three Challenges to Reinventing Democracy'. *Reinventing Democracy*, edited by Paul Hirst and Sunil Khilnani, Blackwell Publishers, 1996, p.144.

[81] See also before, Bauman, Zygmund. *Europe: An Unfinished Adventure*. Polity, 2004.

[82] For some critical reflections on the concept of 'crisis' as a barely defined concept see Merkel, Wolfgang, and Sascha Kneip. *Democracy and Crisis Challenges in Turbulent Times*. Springer, 2018, pp.12-18.

[83] Manin, Bernard. *The Principles of Representative Government.* Cambridge, 1997, pp.193-235.

[84] Pernice, Ingolf. 'Multilevel Constitutionalism and the Crisis of Democracy in Europe'. *European Constitutional Law Review*, no. 11, 2015, p.541. On the growing gap between elites and peoples see Mény, Yves. 'Conclusion: A Voyage to the Unknown'. *Journal of Common Market Studies*, vol. 50, no. S1, 2012, pp. 154–64. Additionally, on the collapse of trust, in specific, as a consequence of the lack of proximity as a value see Pepe, Vincenzo. *La Democrazia Di Prossimità Nella Comparazione Giuridica*. Edizioni Scientifiche Italiane, 2015, pp.48-51.

was the highest since 1994 (56.67%)[85]. If we go one level lower to the national level, then – according to data – the voter turnout of parliamentary elections in EU member states is declining almost everywhere[86]. The same declining trend in citizens' participation through representative schemes is also reflected at the subnational dimension. Looking at data, despite the fact that representation has never been fully covering the totality of the represented people, it can be clearly observed that elections and other representative channels have lost throughout decades their appeal and reliability, and capacity to respond to people's needs and expectations. This has led in recent times to consistent percentages of citizens not feeling represented by those running for being elected in the representative arenas, and as a consequence of that to whether feeling indifferent to the public life[87], or looking for alternative channels for taking part in their communities in order to still preserve popular sovereignty[88], on which nation states are founded. The reasons for the crisis of representation are many: in addition to the decline in voter turnout, it is possible to refer to the decline of parties as vehicle of mass participation, the general polarization of the political landscape, and the rise of extremism and populism[89]. The low voter turnout, additionally, questions the legitimacy of (democratically elected) governments, that sometimes happen to be elected by a minority of the totality of voters.

When coming to the participatory form of democracy, at all levels, the discourse is different. While representation, despite its crisis, still constitutes the fundamental structure

[85] Data at https://www.europarl.europa.eu/election-results-2019/en/turnout/.

[86] Data provided by the International Institute for Democracy and Electoral Assistance www.idea.int (more precisely at the link https://www.idea.int/data-tools/regional-entity-view/EU/40?st=par#rep). Austria: from 94,31% in 1945 to 75.59% in 2019; Belgium: from 90,30% in 1946 to 88.38% in 2019 (compulsory voting); Bulgaria: from 83.87% in 1991 to 49,11% in 2021 (compulsory voting from 2017); Croatia: from 84,54% in 1990 to 46.90% in 2020; Cyprus: from 75.85 % in 1970 to 65.72% in 2021 (compulsory voting was abolished in 2017); Czech Republic: from 96,33% in 1990 to 65,39% in 2021; Denmark: from 86,29% in 1945 to 84,60% in 2019; Estonia: from 78,20% in 1990 to 63,67% in 2019; Finland: from 74,87% in 1945 to 68,73% in 2019; France: from 79,83% in 1945 to 48,70% in 2017; Germany: from 78,49% in 1949 to 76,58% in 2021; Greece: from 77,20% in 1951 to 57,78% in 2019 (compulsory voting); Hungary: from 65,10% in 1990 to 69,59% in 2022; Ireland: from 74,25% in 1948 to 62,77% in 2020; Italy: from 89,08% in 1946 to 72,93% in 2018; (compulsory voting abolished in 1993); Latvia: from 81,20% in 1990 to 54,58% in 2018; Lithuania: from 71,72% in 1990 to 47,80% in 2020; Luxembourg: from 91,90% in 1948 to 89,66% in 2018 (compulsory voting); Malta: from 75,74% in 1947 to 85,63% in 2022; Netherlands: from 93,12% in 1946 to 78,71% in 2021; Poland: from 95,03% in 1952 to 61,74% in 2019; Portugal: from 91,73% in 1975 to 57,96% in 2022; Romania: from 79,69% in 1990 to 31,84% in 2020; Slovakia: from 96,33% in 1990 to 65,81% in 2020; Slovenia: from 85,90% in 1992 to 52,64% in 2018; Spain: from 76,96% in 1977 to 71,76% in 2019; Sweden: from 82,74% in 1948 to 87,18% in 2018.

[87] This refers to what has been defined as 'post-democracy' by C. Crouch (Crouch, Colin. *Combattere La Postdemocrazia*. Laterza, 2020.), for talking about the growing alienation of citizens towards representative democracy.

[88] Bilancia, Paola. 'Crisi Nella Democrazia Rappresentativa e Aperture a Nuove Istanze Di Partecipazione Democratica'. *Federalismi.It*, 2017, p.12 argues that the distrust of people towards representation is not anymore sufficient to guarantee people's sovereignty.

[89] Landemore, Hélène. *Open Democracy. Reinventing Popular Rule for the Twenty-First Century*. Princeton University Press, 2020, pp.26-33.

of democracy and as such is not questioned[90], participation constitutes the growing debate on how to further democratization in society, and in specific on how to overcome the shortcomings of the crisis of representation. Participation is also aimed at overcoming failings coming from representative democracy as the 'rule of the majority'. The majoritarian principle is, indeed, a cornerstone of representative democracy[91], but it often fails in granting the proper representation to minority interests (this can happen both outside representative bodies, when their numbers are below the minimum for reaching any representation, as well as inside representative bodies, when despite having the minimum numbers, they may not be enough to stand against the will of the majority)[92]. When talking about the crisis of democracy, we are generally not referring to a crisis of the participatory form of democracy, which is instead going through challenges and facing opportunities that are coming from an ongoing process of transformation of democracy, but mainly to the crisis of representation. However, the democratic participation of citizens is not the same at all levels: what can be noticed is that the higher the level, the more difficult and uncommon participation usually is[93]. While there is usually no talk of a crisis of participatory democracy at the EU level, at the same time it cannot be denied that civic participation on matters related to the EU and its institutions is problematic, as the EU level initiatives have often proved ineffective in engaging citizens[94]. If we then look at participatory practices at the national level, there is a broad variety of practices that are usually defined by legislative acts;

[90] Fraenkel-Haeberle, Cristina, et al. *Citizen Participation in Multi-Level Democracies*. Brill, 2015, p.6-7.

[91] Mény, Yves. 'Conclusion: A Voyage to the Unknown'. *Journal of Common Market Studies*, vol. 50, no. S1, 2012, p.162.

[92] On the negative effects of majority rule over minorities see further Palermo, Francesco, and Karl Kössler. *Comparative Federalism: Constitutional Arrangements and Case Law*. 2017, p.117.

[93] With regard to the EU level, for a critical appraisal of the under-valorisation of participatory initiatives and for the need to institutionalise more stable channels for supranational citizen participation see Alemanno, Alberto. 'Europe's Democracy Challenge: Citizen Participation in and Beyond Elections'. *German Law Journal*, 2019. Despite criticism, it has been suggested that the Conference on the Future of Europe goes in the direction of promoting participatory democracy at the EU level (Alemanno, Alberto. 'Unboxing the Conference on the Future of Europe'. *HEC Paris Research Series*, 2021). On the need for EU citizens to participate to the supranational EU democracy as a remedy to the crisis of democracy, see also the concept of 'multilevel constitutionalism' developed by I. Pernice, as the theoretical concept that can support the active and responsible role of citizens in the EU (see Pernice, Ingolf. 'Multilevel Constitutionalism and the Crisis of Democracy in Europe'. European Constitutional Law Review, no. 11, 2015, p.542 and Pernice, Ingolf. 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitutionmaking Revisited?' *Common Market Law Review*, no. 36, 1999, p.707). With regard to the national level, on the other side, some experiences of 'participatory constitutionalism' have been tried out for example in Iceland and Ireland: see further on that Palermo, Francesco. 'Partecipazione Come Fonte Di Legittimazione? Nuovi Processi Decisionali e Sfide per Il Sistema Delle Fonti'. *Processi Decisionali e Fonti Del Diritto*, edited by Stefano Catalano et al., Edizioni Scientifiche Italiane, 2022, pp.60-63.

[94] We are referring here to European Citizens' Initiatives (ECI), consultations, and other attempts to involve civil society organizations (which tend to be the preferred target of EU institutions rather than citizens). They will be further investigated in Chapter 2.

however, the majority of participatory practices (including deliberative ones[95]) are taking place mainly at the subnational level, and in specific at the local level.

As a consequence of these essential considerations – useful for assigning limits to the concept of democracy in relation to our research – and in accordance to the Chapters that will later contribute to our research, it seems possible to affirm that while we are witnessing a crisis of the representative form of democracy at all levels, the same cannot be said about participatory democracy, and in particular about the participatory practices at the local level, where instead movements and innovations are taking place. Because of that, we prefer talking of a transformation of democracy, looking at its challenges and opportunities coming from its participatory form and at the local level.

4. From democratic government to democratic governance

So far we talked about democracy as a system of *government* focussing on the institutional aspect of it, where there is a clear distinction between those who govern and those who are governed in the relationship between the State and society. In order to look at the participatory form of democracy at the local level, however, it is not enough to define democracy as a system of government, but there is a need to introduce the concept of democracy also as a system of *governance*[96]. This is useful in so far as the concept of governance allows us to refer more broadly to the government's horizontal relationship with a plurality of other actors, and to the environment where it operates. When it comes to participation, indeed, the reference goes to all those subjects that are outside government institutions, but that are contributing to democracy in some ways (beyond representation). The dimension of governance is therefore an horizontal one, in contrast to the vertical dimension of government, and it allows to widen the arena of non-governmental actors involved in the action of governing. This also has an impact with regard to the discourse on public authority and sources of law where, as we will see in this paragraph, also non

[95] For now, may it be sufficient to refer to Dryzek, John S., and et al. 'The Crisis of Democracy and the Science of Deliberation'. *Science*, vol. 363, no. 6432, 2019, pp. 1144–46 and to Chwalisz, Claudia. 'The Pandemic Has Pushed Citizen Panels Online'. *Nature*, 12 Jan. 2021, for the importance of social media in deliberation. Deliberative practices will be further included in Chapter 2.

[96] An interesting reflection on the total overlook of the concept of 'governance' within the (Italian) constitutional law scholarship is advanced in Cassese, Sabino. 'Identità e Funzioni Delle Riviste Pubblicistiche'. *Forum Di Quaderni Costituzionali*, no. 4, 2021, pp. 26–28. The author claims that it is about time for constitutional scholars to start dealing more with topics that go beyond mere constitutional jurisprudence – like the concept of governance itself – and to take the constitution away from the courts. He advocates for a wider commitment of constitutional scholars in dealing with topics that are not object of courts rulings, for the advancement of science beyond the borders of positive law.

legally binding acts (the so called 'soft-law' in the EU) become relevant and widespread normative sources in democratic systems.

Originally conceived in the field of political science, the concept of 'governance' became eventually an all-pervasive concept also in legal studies[97], despite the common and usual difficulties in properly defining and understanding its meaning (often defined as a vague and ambiguous concept, and essentially contested[98]). Defined by scholars through multiple definitions since the 1980s, the term was used as wider and distinct from 'government' for including members of civil society, and it was essentially concerned with the management of networks, particularly in the delivery of services[99]. While 'government' was used for referring to the mere institution – the instrument of public power – 'governance' instead granted a new wider perspective on the public arena[100], implying the necessary interaction between multiple institutions and actors in the decision-making process[101], all of them necessary for solving the complexity and diversity of problems[102]. It

[97] For some introductory reflections on the challenge presented by the governance to traditional categories of constitutional law and on its revolutionary potential with regard to the system of sources of law see the evocative dialogue in Dani, Marco, and Francesco Palermo. 'Della Governance e Di Altri Demoni (Un Dialogo)'. *Quaderni Costituzionali*, vol. 4, 2003, pp. 785–94.

[98] A great criticism and deconstruction of the concept has been elaborated by one of its major critics, Roberto Bin, that considers (European) governance as non-existent in the light of a pure theory of sources of law. See Bin, Roberto. 'Contro La Governance: La Partecipazione Tra Fatto e Diritto'. *Per Governare Insieme: Il Federalismo Come Metodo*, edited by Gregorio Arena and Fulvio Cortese, Cedam, 2011, pp. 3–15. On the opposite, an interesting contribution to the claim of governance as a form of law see Westerman, Pauline. 'From Houses to Ships: Governance as a Form of Law'. *Le Libellio*, vol. 14, no. 4, 2018, pp. 5–16.

[99] For an introductory overview and historical perspective on the term 'governance' as conceived in political science see Kjaer, Anne Mette. *Governance*. Wiley, 2004, pp.1-15. As referred to by the author, the disciplinary perspective on the term excluded from the very beginning the economic perspective, which on its side refers to the concept of 'corporate governance'. The broad and essential definition given by the author on the basis of the previous literature on the concept of governance is that *"governance refers to something broader than government, and it is about steering and the rules of the game"* (p.7), and that it has to do with *"how the centre interacts with society and asks whether there is more self-steering in networks"* (p.11). For additional contributions on the definition of 'governance' see Klijn, Erik-Hans. 'Trust in Governance Networks: Looking for Conditions for Innovative Solutions and Outcomes'. *The New Public Governance? Emerging Perspectives on the Theory and Practice of Public Governance*, edited by Stephen P. Osborne, Routledge, 2010, pp.303-305, and Osborne, Stephen P. *The New Public Governance? Emerging Perspectives on the Theory and Practice of Public Governance.* Routledge, 2010, pp-6-7. As explained by Osborne, the concept of governance in the public arena (the 'public governance') refers to *"public policy implementation and public services delivery"*, which is the object of study of the different theories and regimes of Public Administration (PA), New Public Mangament (NPM), and New Public Governance (NPG) studies. On the theory of NPG as the paradigm for capturing the latest developments in the evolution of the provisions of public services, see Osborne, Stephen P. 'The New Public Governance?' *Public Management Review*, vol. 8, no. 3, 2006, pp. 377–87. Additionally, see Kohler-Koch, Beate, and Berthold Rittberger. 'Review Article: The "Governance Turn" in EU Studies'. *Journal of Common Market Studies*, vol. 44, 2006, pp. 27–49.

[100] The term 'arena' is used here as encompassing both the vertical and horizontal dimension (in contrast to the term 'level'), in line with the meaning given by Hèritier, Adrienne, 'Introduction'. *Common Goods. Reinventing European and International Governance, edited by Adrienne Hèritier,* Rowman & Littlefield Publishers, 2002, pp.2-3.

[101] Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe*. Brill, 2018, p.13.

is, indeed, the decision-making process what lies at the core of governance: it is a concept centred on policy processes, and it looks at who are the diverse actors (and knowledges) taking part in that, and what is the output of their interaction[103]. As it has been outlined, governance consists of *"the production of authoritative decisions which are not produced by a single hierarchical structure, such as a democratically elected legislative assembly and government, but instead arise from the interaction of a plethora of public and private, collective and individual actors"*[104]. It becomes clear therefore that the public power can be (and actually is) expressed not only via vertical public authorities, but also via horizontal networks of subjects that participate in the decision-making process. The relevance of networks is particularly evident when looking at the European legal space, and more in general at the already mentioned transnational law.

The context of the EU is not only the regional context of our research, but constitutes also the perfect scenario where to locate and understand what the shift from government to governance means, through its proliferation of network-like organizations below the level of intergovernmental and supranational institutions[105], and through its capacity to attack the system of hierarchy of sources of law internal to each nation state. Since the creation of the EU, a new space for governance at the supranational level has emerged as a consequence of the necessity to find new ways of governing able to go faster than the traditional tool of legislation, considered too slow in a fast moving

[102] On the concept of 'interaction' and the recognition within a governance perspective of the necessary interdependence among actors see Kooiman, Jan, editor. *Modern Governance. New Government-Society Interactions*. Sage, 1993, p.4: *"No single actor, public or private, has all knowledge and information required to solve complex, dynamic and diversified problems"*. The contribution of J. Kooiman represents a reference point for the debate on the shift from government to governance. In specific, he uses the term 'social-political governance' for referring to governance as the interaction between government and society. In addition to the concept of interaction, governance is strongly linked to the concepts of 'system': *"Governance is system specific. Interactions are in fact the definition of a system"* (Kooiman, Jan, editor. *Modern Governance. New Government-Society Interactions*. Sage, 1993, p.259).

[103] On governance as policy-making see Benz, Arthur. 'Conclusion: Governing under the Condition of Complexity'. *In Nathalie Behnke, Jörg Broschek, Jared Sonnicksen (Eds.) Configurations, Dynamics and Mechanisms of Multilevel Governance*, Palgrave Macmillan, 2019, pp. 387–409.

[104] Christiansen, Thomas and Simona Piattoni, editors. *Informal Governance in the European Union.* Edward Elgar Publishing, 2003, p.6.

[105] It is K.-H. Ladeur that defines Europe as *"a network of (overlapping) networks" where a new space is being created beyond the Westphalian duo of national law and international public law: a new space that is defined 'transnational law'.* He points out to the growing emergence of transnational networks which evolve within Europe, contributing therefore to create an unexplored space. See Ladeur, Karl-Heinz. 'European Law as Transnational Law – Europe Has to Be Conceived as an Heterarchical Network and Not as a Superstate!' *German Law Journal*, vol. 10, no. 10, 2009, pp. 1357–65. He concludes by saying that: *"The nation-state is the product of a specific evolution in European history […]. It is time dependent. This is why the form of the state is in deep crisis at its traditional level. It is linked to the dominance of unity and homogeneity over plurality and fragmentation. […] The EU must be distinctive and it can only follow the new global rationality of difference, plurality, and acentric networks"* (p.1365).

economy[106]. It is indeed the original link with economic priorities what brought harsh criticism to governance in the EU – the 'European governance' – addressed by somebody as a clear *"form of neoliberal governmentality"* that is actually undermining democratic government[107], with private interests entering the public arena as dividing lines between public and private sectors become blurred. In addition to that, also the increasing *"scientification of politics, particularly the use of experts"* put the idea of governance under a questionable light, given the impairment of the role of parliaments as representatives of the people, to the advantage of a *"technocratic model of steering and managing […] and advance a new form of elitism"*[108]. The governance turn in the EU took a precise term, that eventually became a buzzword among both scholars and EU civil servants and politicians: that is 'multilevel governance' (MLG)[109]. The term takes instance from a prominent feature of governance in the EU context, which is its multi-level nature, that points to the interdependence of different actors (state and non-state actors, public and private) operating from diverse territorial levels (supranational, national, regional, local) in a non-hierarchical system of governance[110]. The decision-making power is therefore not monopolised by the governments of the member states, but it is diffused at different levels, among which the local one[111]: in this way, MLG has been described as contributing positively to democracy in the EU thanks to *"the involvement of democratic representative*

[106] On one side, this was the opinion advocating for new tools of governance (i.e. the Commission), while on the other side there was the opinion of those ones preferring to stick to the tool of legislation in the context of the EU (i.e. the national governments). See further Hèritier, Adrienne, editor. *Common Goods. Reinventing European and International Governance*. Rowman & Littlefield Publishers, 2002, p.201.

[107] Shore, Chris. '"European Governance" or Governmentality? The European Commission and the Future of Democratic Government'*. European Law Journal*, vol. 17, no. 3, 2011, pp. 287–303. As the author also underlines, it is not a coincidence that the development of the concept of governance in the EU occurred in parallel to the development of the concept of 'good governance' in the IMF and World Bank, as a dominant theme underlying policies towards aid in developing countries where these organizations were active (p.288).

[108] Shore, Chris. '"European Governance" or Governmentality? The European Commission and the Future of Democratic Government'*. European Law Journal*, vol. 17, no. 3, 2011, pp.297 and 302. Additionally, for a critique of the technocratic governance of the EU institutions see Castells, Manuel. *Rupture. The Crisis of Liberal Democracy*. Polity Press, 2018, p.58.

[109] Among many others, see Stephenson, Paul. 'Twenty Years of Multi-Level Governance: "Where Does It Come From? What Is It? Where Is It Going?"' *Journal of European Public Policy*, vol. 20, no. 6, 2013, pp. 817–37; Panara, Carlo. *The Sub-National Dimension of the EU. A Legal Study of Multilevel Governance*. Springer, 2015; Piattoni, Simona. *The Theory of Multi-Level Governance*. Oxford University Press, 2010. For a critique of MLG see Della Cananea, Giacinto. 'Is European Constitutionalism Really "Multilevel"?' *Heidelberg Journal of International Law (HJIL)*, no. 70, 2010.

[110] Kohler-Koch, Beate, and Berthold Rittberger. 'Review Article: The "Governance Turn" in EU Studies'. *Journal of Common Market Studies*, vol. 44, 2006, p.42.

[111] See Popelier, Patricia. 'Subnational Multilevel Constitutionalism'. *Perspectives on Federalism*, vol. 6, no. 2, 2014: *"The European integration process resulted in a network of complex and interdependent relationships between national states, decentralized entities, supranational authorities, and non-state actors, generally described as a system of 'multilevel governance'" (p.9)*.

territorial authorities in the EU decision-making process"[112] (alongside with, however, corporations and other private, non-democratically legitimated entities). The notion was launched within a study[113] of the renewed European structural policy in the '90s, and became predominant in the governance debate among European integration scholars[114] that were looking for new concepts alternative to traditional state-centric forms of government. Alongside with the descriptive contribution of scholars aimed at explaining the transformations of the EU within the European integration process, the term was also included in the work of the EU Commission and the Committee of the Regions (CoR) that issued two documents[115] that constitute the departing point on the concept within the EU legal order. The CoR, in specific, warned that MLG *"cannot be understood solely through the lenses of the division of powers"*[116], and that it has to be considered as inextricably linked to the principle of subsidiarity (with subsidiarity in its vertical dimension referring to the responsibility of different tiers of government, and MLG to their interaction).

As a consequence of the objective proliferation of subjects in the public arena due to the shift from government to governance, also the normative sources have been multiplying, and this led to a confusion on sources and to what has been defined from a domestic law perspective as the crisis of the sources of law[117]. It goes unquestioned that

[112] Panara, Carlo. *The Sub-National Dimension of the EU. A Legal Study of Multilevel Governance*. Springer, 2015, p.174. The author, however, recognizes also some unresolved issues on the relationship between democracy and MLG: see pp.170-173. The contribution of Panara is key in understanding MLG not only as a political concept, but also with its legal side: he considers it to be a 'procedural principle' of the EU constitutional construction (p.73), that requires the involvement of subnational authorities in the EU policymaking and law-making.

[113] Marks, Gary. 'Structural Policy in the European Community'. *Europolitics: Institutions and Policymaking in the "New" European Community*, edited by Alberta M. Sbragia, The Brooking Institute, 1992, pp. 191–224.

pp. 191–224.

[114] See Marks, Gary, et al. 'European Integration from the 1980s: State Centric v. Multilevel Governance'. Journal of Common Market Studies, vol. 34, no. 3, 1996, pp. 341–78; Hooghe, Liesbet, and Gary Marks. 'Types of Multi-Level Governance'. *European Integration Online Papers*, vol. 5, no. 11, 2001.

[115] Commission, *European Governance. A White Paper*, COM(2001)428, 25 July 2001, and Committee of the Regions. *The Committee of the Regions' White Paper on Multilevel Governance*. 2009. While the CoR talks of MLG, the Commission refers in specific to the concept of 'good governance', and to the principle of participation as underpinning good governance: *"The White Paper proposes opening up the policy-making process to get more people and organisations involved in shaping and delivering EU policy. It promotes greater openness, accountability and responsibility for all those involved […] A better use of powers should connect the EU more closely to its citizens and lead to more effective policies"*. The CoR, on its side, refers to *"the need for local and regional authorities to be closely involved in shaping and implementing Community strategies"*, and sees MLG as reinforcing the democratic dimension of the EU for its contribution on stimulating participatory democracy.

[116] CoR, *The Committee of the Regions' White Paper on Multilevel Governance*. 2009, p.7. For further readings on this link between regions and subsidiarity we may refer further to the contributions collected in Toniatti, Roberto, et al., editors. *An Ever More Complex Union. The Regional Variable as the Missing Link in the EU Constitution?* Nomos, 2004.

[117] The EU legal order does not fit within the Westphalian order founded on, on one side, nation States based on strictly defined internal system of sources of law and, on the other, the separation of powers

the ‘equilibrium’ provided by MLG in the EU has not been legitimized by a constitutional framework, and that as a consequence of that the allocation of competencies is sometimes ambiguous[118]. The system of powers, indeed, is reflected on the system of sources: while the separation of powers and their respective instruments become blurred, the European public arena emerging from the outputs of governance is dotted with acts not constituting legislation, but referring to the regulatory work of new centres[119] producing acts that are relevant for other subjects despite the fact that are not legally binding. This is the case, on first instance, of what has been referred to as ‘soft law’: a term used for defining a variety of instruments that are not legally binding and have no legal sanctioning mechanisms against noncompliance[120], but that still constitute rules of conduct that produce legal[121] and practical effects[122]. Soft law finds its reference in Article 288(5) TFEU in the instruments of recommendations and opinions: however, the list of tools actually used in the practice is much wider, including also frameworks, communications, guidelines, letters, codes, notices, and others[123]. Such tools can be adopted by EU institutions, alone or in

(legislative, executive and judiciary). Instead, it represents a new legal space for transnational law: see Hage, Jaap. ‘Sources of Law’. Introduction to Law, edited by Jaap Hage et al., Springer International Publishing, 2017, pp.2-20. On the progressive dismantling and crisis of the internal system of hierarchy of sources see Bin, Roberto. ‘Cose e Idee. Per Un Consolidamento Della Teoria Delle Fonti’. *Diritto Costituzionale*, no. 1, 2019, pp. 11–29. Following R. Bin, for sources of law we refer to acts produced by bodies endowed with political legitimacy and produced through guaranteed procedures *(“le fonti sono atti prodotti da organi dotati di una legittimazione politica e prodotti attraverso procedimenti garantiti”*, p.24). The author concludes saying that the crisis of the system of the sources of law is a consequence, at its core, of the crisis of politics.

[118] Marks, Gary, et al. ‘European Integration from the 1980s: State Centric v. Multilevel Governance’. *Journal of Common Market Studies*, vol. 34, no. 3, 1996, pp.372-372.

[119] Modugno, Franco. *E’ Possibile Parlare Ancora Di Un Sistema Delle Fonti?* 2008, p.2.

[120] Kohler-Koch, Beate, and Berthold Rittberger. ‘Review Article: The “Governance Turn” in EU Studies’. *Journal of Common Market Studies*, vol. 44, 2006, p.36.

[121] On the legal effects that soft law could eventually produce see Stefan, Oana, et al. ‘EU Soft Law in the EU Legal Order: A Literature Review’. *King’s College London Law School Research Paper* Forthcoming, 2019. According to the author, soft law could *“provide a normative framework for future negotiations and for potential arguments or conflicts; binding the enacting institution and also the institutions’ parties to an interinstitutional agreement; concretizing the duty of institutional cooperation; creating the expectation that the enacting institution will comply with the rules it laid down in a soft law instrument; producing a stand-still effect on the non-conforming conduct of a state or institutions; and influencing the legal rights and obligations of third parties. Soft law can impact on national and European legislation by expressing general principles of EU law, being part of the acquis communautaire, interpreting hard law provisions, and serving as a legal basis for the enactment of national legislation. In a court of law, the effects of soft law include, inter alia: providing the basis for judicial review; being the object of an action for annulment; being used in litigation by the parties to a trial; and serving as an aid in the interpretation of hard law provisions”* (pp.24-25).

[122] This descriptive definition comes from the reference contribution written on soft law, by F. Snyder in 1993 who defined soft law as *“rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effect*”. See Snyder. ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’. *The Modern Law Review*, vol. 56, no. 1, 1993, p.32. Additionally, on mainstays and downsides of soft law see Chalmers, Damian, and Adam Tomkins, editors. ‘Soft Law’. *European Union Public Law*, Cambridge, 2007, pp.137-140.

[123] On the actual wide variety of instruments see Eliantonio, Mariolina, et al., editors. *EU Soft Law in the Member States. Theoretical Findings and Empirical Evidence*. Bloomsbury Publishing, 2021, p.1.

collaboration with non-institutional stakeholders[124], and they have spread widely in the latest years in European governance (despite the fact that, as it has been stated, *"one of the most important drawbacks of soft law is undoubtedly its legitimacy deficit"*[125]*).*

When it comes then to participation at the local level, it hasn't been object of legally binding regulations, but that it has remained mostly in the realm of informality and soft law instruments. In fact, participation constitutes the exemplary field where we are witnessing the overcoming of traditional procedures typical of the representative circuit, and the desire to break out of the rigidity of classic regulatory production schemes and to find new sources of legitimation[126]. In the field of participation there is much soft law and other non-State law: this may create confusion on sources, but it may also be the case that soft law represents the ideal framework for participatory instruments in the EU, in so far as they are not acting in line with representative legitimation, but refer to another form of contribution in democracy[127]. The concept of governance therefore allows us to look at how non-state actors (among which also individuals[128]) are included horizontally in the transformation of democracy also at the local level, where also new normative sources[129] are being experimented: from local government we can therefore talk of local governance, where participation is seen as central[130].

We can conclude by saying that democracy could be conceived both as a system of government and governance, where society could be included not only through institutional representative channels but also through participatory channels that better reflect societal pluralism. The importance of governance at all levels within the EU has been understood by local authorities, that as soon as they become aware of the

[124] Stefan, Oana, et al. 'EU Soft Law in the EU Legal Order: A Literature Review'. *King's College London Law School Research Paper* (Forthcoming), 2019, p.17

[125] Stefan, Oana, et al. *Id.,* p.34. Additionally, also the European Parliament took a negative stance on soft law with the Resolution of 4 September 2007 on institutional and legal implications of the use of "soft law" instruments (2007/2028(INI)), saying that *"the use of soft law is liable to circumvent the properly competent legislative bodies, may flout the principles of democracy and the rule of law under Article 6 of the EU Treaty, and also those of subsidiarity and proportionality"*.

[126] Ferri, Delia. 'L'Unione Europea Sulla Strada Della Democrazia Partecipativa?' *Istituzioni Del Federalismo*, no. 2, 2011, pp. 298–339. As she points out, Article 11 (TEU) would constitute the ideal legal basis on which an EU regulation could have been adopted on the topic of participation, but it has never been done (p.334).

[127] Ferri, Delia. 'L'Unione Europea Sulla Strada Della Democrazia Partecipativa?' *Istituzioni Del Federalismo*, no. 2, 2011, p.335.

[128] van Zeben, Josephine. 'Local Governments as Subjects and Objects of EU Law: Legitimate Limits?' *Framing the Subjects and Objects of Contemporary EU Law*, edited by Samo Bardutzky and Elaine Fahey, Edward Elgar Publishing, 2017, p.123.

[129] The example of the *collaboration agreements* ("patti di collaborazione") that many Italian cities are using will be object of study in Chapter 5 and constitute an example of a new normative source.

[130] On this shift see further John, Peter. *Local Governance in Western Europe*. SAGE Publications Ltd, 2001, pp.1-24 and Kersting, Norbert, et al. *Local Governance Reform in Global Perspective*. VS Verlag für Sozialwissenschaften Wiesbaden, 2009.

opportunities coming from EU policies and funding they also become subjects of a process of Europeanization[131]. All in all, a governance approach is therefore needed in so far as participation goes beyond state actors, their traditional representative legitimation and their system of sources of law: participation enters the domain of non-state actors, and pave the way for new alternative sources of law[132].

5. Participation in local democracy as the frontier of democracy in the EU

Many, in conclusion, are the aspects that come out from looking at democracy in the European Union. From an introductory need to define the European legal space as the conceptual area of investigation, where democracy can be understood as an European constitutional principle according to its multi-form and multi-level dimensions, we argued that it is not appropriate to talk of a general *crisis* of democracy, but it is better to refer to a *transformation* of democracy. This brings to light the challenges and opportunities coming from, in specific, the participatory form of democracy at the local level[133] conceived as a 'universe of practices, procedures and processes'[134]. Moreover, the widening of the scope of democracy not only as a system of *government*, but also as a system of *governance* has allowed us to recognize the contribution that could come from non-State actors to democracy, that through participatory channels of legitimation are able to complement the legitimation coming from representative democracy.

This is precisely the phenomenon occurring in the case of all those around 280[135] Italian local authorities that are supporting their citizens' participation through the commons thanks to the organizational model of *Shared administration* and on the basis of the Italian constitutional principle of horizontal subsidiarity. This innovative type of

[131] John, Peter. *John, Peter. Local Governance in Western Europe. SAGE Publications Ltd, 2001,* p.8.

[132] Palermo, Francesco. 'Partecipazione Come Fonte Di Legittimazione? Nuovi Processi Decisionali e Sfide per Il Sistema Delle Fonti'. *Processi Decisionali e Fonti Del Diritto,* edited by Stefano Catalano et al., Edizioni Scientifiche Italiane, 2022, pp. 49–72.

[133] "*When it comes to assessing concrete and practical models of participation, it is notweorthy that the local level, supported by the regional level, is configurated as a 'laboratory' for participation. This occurs not because of the creativity, variety and richness of the practices, but mostly because it promotes a change in the way society interacts with institutions*", Nicolini, Matteo. 'Theoretical Framework and Constitutional Implications: Participatory Democracy as Decision-Making in Multilayered Italy'. Federalism as Decision-Making, edited by Francesco Palermo and Elisabeth Alber, Brill Nijhoff, 2015, p.447.

[134] Allegretti, Umberto. 'Democrazia Partecipativa'. Enciclopedia Del Diritto, 2011, p.259: *"la democrazia partecipativa costituisce una categoria generale comprensiva di un universo di pratiche e dispositivi (processi, procedure) […] un complesso di fenomeni".*

[135] Data available as at 6 February 2023: for an updated overview see https://www.labsus.org/i-regolamenti-per-lamministrazione-condivisa-dei-beni-comuni/.

participation based on a (mandatory) institutional support for citizens' initiatives is pushing the boundaries of our understanding of democracy further beyond the legitimation based on representative democracy, paving the way for the recognition of a legitimation based on participatory democracy[136]. The field of the commons, in this sense, constitutes an interesting laboratory for new types of civic participation not only in Italian, but also in other EU local authorities. The commons are, indeed, showing a huge space of opportunities for citizens' involvement at the local level, while also revealing hidden challenges in our society that need to be faced and untangled. The local level of democracy emerges as the spatial context and governmental level that, because of its closeness to citizens, is best suited to create a supportive and favourable environment for innovative types of participation, among which the more specific of civic participation through the commons (CPC).

As a consequence of the centrality of the local level of democracy, and of the progressive definition of a new form of civic participation in Italian local authorities, the building blocks considered in Part I are the ones emerging from the current Chapter: namely the principle of participation (Chapter 2), and the local level of democracy, understood through its two guiding principles of subsidiarity and local self-government (Chapter 3)[137]. These building blocks reflect the two dimensions of democracy that constitute the topic of our research.

All in all, the support of citizens' participation to the general interest of society through the commons could, indeed, constitute a 'niche innovation' that in the long term may eventually make a real impact on democracy in the EU by means of local democracy, and bring later a larger scale societal change. Borrowing the idea of niche innovation from the literature on transition[138], the parallel is useful in so far as it refers to the emergence bottom-up of a new experimentation or solution and way of organizing that starts challenging the predominant paradigm up to the point of, eventually, bringing a shift from

[136] See also the reflections in Palermo, Francesco. 'Partecipazione Come Fonte Di Legittimazione? Nuovi Processi Decisionali e Sfide per Il Sistema Delle Fonti'. *Processi Decisionali e Fonti Del Diritto*, edited by Stefano Catalano et al., Edizioni Scientifiche Italiane, 2022, pp. 49–72.

[137] See the conclusive reflections and Table 1 in paragraph 2 of this Chapter.

[138] Loorbach, Derk, et al. 'Sustainability Transitions Research: Transforming Science and Practice for Societal Change'. *Annual Review of Environment and Resources*, 2017, pp.599-626. This contribution is key in understanding the concept of transition and the related one of niche innovation. *"Transitions in their literal sense refer to the process of change from one state to another. In transitions research, the term refers to the process of change from one system state to another via a period of nonlinear disruptive change"* (p.605), and transitions *"are considered to be societal processes of fundamental change including emergent and coordinated characteristics. […] a transition can be coordinated by creating shared future orientations and guiding values and at the same time creating space for experimentation and diversity in the short term* (ed: niche innovations)*, allowing for new solutions and ways of organizing to emerge"* (p.608).

one dynamic equilibrium to another trough a systemic change. A transition is therefore rooted in a niche innovation, and could be here aligned with processes of innovation[139] of local democracy and participation that are currently trying to bring change to the traditional interpretation of these fundamental concepts within the European legal space. In this sense, the principle of democracy in its transnational European dimension is wide enough so as to include the pluralism of innovative experiences coming from the local level.

[139] We will come back to the concept of innovation in Chapter 2 when talking about the 'democratic innovations' within participation.

Chapter 2. The principle of participation in the European legal space

1.The principle of participation: an introduction. 2.Participatory democracy as distinct from deliberative and direct democracy. 3.The constitutional contribution of the EU legal order. 4.The constitutional contribution of the CoE legal order. 5.From the constitutional roots to practices and instruments: the contribution of the democratic innovations*. 6.Limits and challenges.*

1. The principle of participation: an introduction

This Chapter is willing to provide a descriptive analysis of the state of the art within the European legal space of the principle of participation[1] through both its constitutional framework and understanding, and the multitude of practices and instruments that have been developed and created throughout years in order to give a practical meaning to the principle itself. Because of the lack[2] of a widely recognized and shared understanding within a systematic theoretical framework of the field of participation as well as its related concept of 'participatory democracy'[3], the *mare magnum* of their practices and categorisations lead us to consider the principle of participation in the European legal

[1] The literature on the principle of (political) participation is extensive. As an introduction, the following may be helpful: Morison, John, and Adam Harkens. 'Principle of Participation'. *Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL]*, June 2017; Savignano, Aristide. 'Partecipazione Politica'. *Enciclopedia Del Diritto*, vol. XXXII, 1982. For an introduction on participatory democracy see Allegretti, Umberto. 'Democrazia Partecipativa'. *Enciclopedia Del Diritto*, 2011, pp. 295–335.

[2] On the persistent lack of a constitutional theory on participatory democracy see Palermo, Francesco. 'Participation, Federalism, and Pluralism: Challenges to Decision Making and Responses by Constitutionalism'. *Citizen Participation in Multi-Level Democracies*, edited by Cristina Fraenkel-Haeberle et al., Brill, 2015, p.35.

[3] A recent and highly valuable contribution worth mentioning conducted a study on the framing of participatory democracy within constitutional law: see Trettel, Martina. *La Democrazia Partecipativa Negli Ordinamenti Composti: Studio Di Diritto Comparato Sull'incidenza Della Tradizione Giuridica Nelle Democratic Innovations*. Edizioni Scientifiche Italiane, 2020 (on this point see p.17 of the book). On Trettel's work, see also further footnote no.72 in this Chapter. On the other side, also from a political science perspective, contributions trying to give an overview on participatory democracy were not lacking: see, for example, Hubert, Heinelt. *Handbook on Participatory Governance,* Edward Elgar Publishing, 2018 (introduction at pp.1-16, where the author advocates for a need to reconceptualise democracy in a participatory governance perspective beyond the mere governmental one).

space as a melting pot[4], where different interpretations and definitions coexist. At the same time, so far[5] the principle is wide enough so as to allow a multitude of bottom-up practices to develop and bring innovation from the local to the supranational levels, as we will see in the following paragraphs.

Participation refers to a phenomenon of great complexity, rooted in and strictly related to the concept of democracy and its legitimation[6] through means that go beyond the mere representative instruments. First and foremost the concept of participation has to be understood in contrast with the concept of representation: considered as the two legs[7] of democracy, as we saw in Chapter 1 the first one refers to the direct form of democracy while the second to the indirect one, as it is based on delegation. Participation relates, at its core, to the relationship between the State and society, with regard to the way society can take part to the process of decisions affecting itself that is vested in the State[8]. Originated in ancient Greece's city-states, the idea of participation was elaborated in the meaning of 'political participation' for referring to the possibility for citizens to exert influence on the exercise of public powers directly through deliberative assemblies. Later with the development of nation-States, political participation evolved towards the introduction of instruments of representation, in order to adapt the possibility for citizens to influence the decision-making process on a larger scale. Nowadays eventually we are witnessing the challenges coming from the internationalization of democracy and the clear issue of scale in our globalized world, where traditional forms of democratic institutions are in need of searching for new sources of legitimation beyond representation and delegation[9].

[4] The idea of the principle of participation as a melting pot is borrowed from an interesting figure developed by L. Pech for trying to define what the 'European rule of law' is and which are its main traits based on the progressive institutionalisation of national, EU and CoE conceptions. Starting from the different understandings, the author comes up with the elaboration of four main shared traits that, according to him, represent the core of the European rule of law. See Pech, Laurent. 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law'. *Hague Journal on the Rule of Law*, 2022, p.20.

[5] Until a normative reorganization of the principle will be done at the EU and European levels.

[6] Palermo, Francesco. 'Partecipazione Come Fonte Di Legittimazione? Nuovi Processi Decisionali e Sfide per Il Sistema Delle Fonti'. *Processi Decisionali e Fonti Del Diritto*, edited by Stefano Catalano et al., Edizioni Scientifiche Italiane, 2022, pp. 49–72.

[7] Borgonovo Re, Donata. *Le Quattro Stelle Della Costituzione. Per Una Cittadinanza Responsabile*. Il Margine, 2013, p.105.

[8] Nigro, Mario. 'Il Nodo Della Partecipazione'. *Rivista Trimestale Di Diritto e Procedura Civile*, 1980, pp. 225–36.

[9] For these 3 historical transformation of democracy we are referring to Dahl, Robert Alan. 'A Democratic Dilemma: System Effectiveness versus Citizen Participation'. *Political Science Quarterly*, vol. 109, no. 1, 1994, pp. 23–34. The objective limits of representation and delegation can be understood looking at the role of political parties, that seem to be unable anymore to answer people's needs. As a consequence, political participation should be encouraged more not only within political parties, but also through participation to the exercise of public powers via intermediate communities: see on this point Savignano,

If we ask ourselves what is political participation today, this question has become increasingly difficult to answer, as it refers to a wide variety of different situations and people's contributions on the basis of their social capital[10] and competences[11], and as it has an undisputable interdisciplinary understanding. The term started to become widespread as part of the popular political vocabulary since the 1960s, in specific under the students' pulse of requests for more participation on matters affecting themselves, and within democratic theory more in general[12]. The participatory theory of democracy came to existence mainly as an answer to the predominant theory of democracy of that time – the 'classical theory of democracy' – that supported the idea that the only mean for participation of citizens was voting for leaders and taking part in discussions, in this way recognizing as crucial only the participation of the minority élite[13]. The demand for more participation became relevant not only in political decision-making as 'political participation', but also in a wider way encompassing other areas such the workspace and local communities[14]. In this sense, participation can be regarded as having several

Aristide. 'Partecipazione Politica'. *Enciclopedia Del Diritto*, vol. XXXII, 1982, p.13, and on the concept of intermediate communities Grossi, Paolo. *Le Comunità Intermedie Tra Moderno e Post-Moderno*. Marinetti, 2015.

[10] The concept of 'social capital' refers, in essence, to the coming together of individuals in associate forms so as to contribute and participate in their community. The landmark reference on social capital is the work of R. Putnam, who argued that the quality of democracy depends on the level of social capital of its people. He claimed that civic communities should be funded on the fundamental values of mutual trust, social cooperation, and civic consciousness, therefore advocating for a transformation of local institutions rather than the national level. He would refer to social capital as trust, rules regulating common living, civic associations networks, and all those aspects that improve the efficiency of the social organization through the promotion of shared initiatives. See Putnam, Robert. *Making democracy work*. Princetown University Press, 1993 (Italian translation *La Tradizione Civica Nelle Regioni Italiane*. Mondadori, 1993), and additionally Fukuyama, Francis. 'Social Capital, Civil Society and Development'. *Third World Quarterly*, vol. 22, no. 1, 2001, pp. 7–20.

[11] The issue of competences belongs to the long-standing problem of civic competences in democracies, that was lucidly addressed by R. A. Dahl in Dahl, Robert Alan. 'The Problem of Civic Competence'. *Journal of Democracy*, vol. 3, no. 4, 1992, pp. 45–59. He referred to that as an issue affecting all types of democracies, old and new ones alike, in specific increased by the changes of scale of public life, the increasing complexity of political issues, and the changes brought by ICTs and their supply of information about political matters: all these transformations impose *"ever stronger demands on the capacities of citizens*" (p.51).

[12] The widely recognized landmark contribution bringing the argument for a participatory theory of democracy, and the first one talking of 'participatory democracy' is Pateman, Carole. *Participation and Democratic Theory*. Cambridge University Press, 1970. She recognized as the basic postulates of a participatory theory of democracy the works of John Stuart Mill and Jean-Jacques Rousseau: while Rousseau's focus on political systems was on the individual participation of each citizen in political decision-making, Mill was more concerned with the individual to be prepared to participate at the local level and in doing so to learn to govern themselves in order to be able to participate, eventually, also at the national level.

[13] The predominant theory of democracy in those years was the one of Schumpeter, for which see further Schumpeter, Joseph Alois. *Capitalism, Socialism and Democracy*, Geo. Allen& Unwin, 1943.

[14] On this point see Pateman, Carole. *Participation and Democratic Theory*. Cambridge University Press, 1970 and Barber, Benjamin R. *Strong Democracy.* University of California Press, 1984. In specific, Barber defined the concept of 'strong democracy' in relation to participation *"defined as politics in the participatory mode where conflict is resolved in the absence of an independent ground through a participatory process of ongoing, proximate self-legislation and the creation of a political community capable*

functions in democracy: *"it gives citizens a say in decision-making (influence); it contributes to the inclusion of individual citizens in the policy process (inclusion); it encourages civic skills and virtues (skills and virtues); it leads to rational decisions based on public reasoning (deliberation); it increases the legitimacy of decisions (legitimacy)"*[15].

However, because of the difficulties in defining precisely what is participation, a minimalist definition could be employed for the purposes of this introduction, and we could define 'political participation' as a general concept used for referring to all those voluntary activities of citizens directed at the government, the State, politics, or more in general at solving community problems (this is sometimes defined, more in specific, as 'civic participation'[16]) through citizens involvement, empowerment, engagement, inclusion[17]. Because of its implicit reference to citizens, participation has also been referred to as 'citizen participation', which in a nutshell consists in citizen power, that has remarkably been conceived as through a ladder of citizen participation, each rung corresponding to a different gradation of participation[18].

Since the concept of participation can be different depending on the sphere of use, the actors involved and the modes and instruments of involvement, in parallel to what we

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of transforming dependent, private individuals into free citizens and partial and private interests into public goods" (p.132).

[15] These theoretical claims about the contribution of citizen participation were elaborated on the basis of previous participatory scholars' works in Michels, Ank. 'Innovations in Democratic Governance: How Does Citizen Participation Contribute to a Better Democracy?' *International Review of Administrative Sciences*, vol. 77, no. 2, 2011, pp.277–279.

[16] Đurman, Petra. 'Participation in Public Administration Revisited: Delimiting, Categorizing and Evaluating Administrative Participation'. *Croatian and Comparative Public Administration*, vol. 20, no. 1, 2020, pp. 79–120. The author distinguishes between political, civic, and administrative participation. The literature, however, is confusing on the distinction between political and civic participation, often using the 'political' meaning for also including the 'civic' one.

[17] This general and broad definition reflects what emerges from the broad literature according to van Deth. 'A Conceptual Map of Political Participation'. *Acta Politica*, vol. 49, no. 3, 2014, p.353.

[18] The landmark reference here goes to the all-time contribution of S. R. Arnstein, that in her famous article in 1969 defined citizen participation as citizen power arranged in a ladder pattern, where each rung corresponded to *"the extent of citizens' power in determining the plan and/or program"*: see Arnstein, Sherry R. 'A Ladder Of Citizen Participation'. *Journal of the American Planning Association*, vol. 35, no. 4, 1969, pp. 216–24. In her contribution she tried to answer the research question *"what is citizen participation and what is its relationship with the social imperatives of our time?"*, coming to the point that *"citizen participation is a categorical term for citizen power. It is the redistribution of power that enables the have-not citizens, presently excluded from the political and economic processes, to be deliberately included in the future".* Eight were the rungs on Arnstein's ladder of citizen participation: from the lower to the highest degree of citizens' participation we have: 1) manipulation, 2) therapy, 3) informing, 4) consultation, 5) placation, 6) partnership, 7) delegated power, 8) citizen control. For the recent proposal of adding a further rung to the ladder of citizen participation see Ciaffi, Daniela. 'Sharing the Commons as a "New Top" of Arnstein's Ladder of Participation'. *Built Environment*, vol. 45, no. 2, 2019, pp. 162-172(11), where the author suggests the need to recognize a new frontier of participation in the collaborative attitude emerging in many urban (but also rural) contexts where active citizens contribute to the general interest of their community through autonomous initiatives of care for the commons (or 'common goods') on an equal level with public authorities. We will come back to this additional rung to the participation ladder in Part II, where we will investigate the innovative form of civic participation through the commons (CPC) occurring in Italian cities.

define nowadays as 'political participation', the concept of 'administrative participation' came to existence[19]. Both of them are referred to participation in the decision-making process for which the State is responsible, even though through different means. While political participation refers to citizens' participation in the wider public arena through a wide variety of means as we mentioned[20], with administrative participation the reference goes to the specific type of participation by citizens in administrative decision-making procedures, where the interested private individuals cooperate as external actors in procedures of formulating regulations[21]. The administrative activity, indeed, represents a privileged field for citizens to exercise their popular sovereignty beyond the mere process of voting for elections thanks to its closeness to citizens, and participation constitutes a fundamental principle within the European administrative space but also beyond.

A great boost to participation has come in the latest years through the influence of Information Communication Technology (ICT) that has multiplied the participatory channels and the opportunities for people to have their say in the wider public arena through the use of digital tools for political participation. This is the case for what is usually defined as *e-participation*[22], for referring to a wide variety of diverse forms of electronic participation expanding in the whole world.[23] Its aim is to render the public arena more accessible to average citizens, allowing the online engagement of the public in decision-making processes and opinion forming. Diverse are the formats within the scope of e-participation (e-information, e-petitions, e-initiatives, e-campaigning, e-deliberation, e-consultation, e-budgeting, e-voting[24]), as diverse are its functions: according to how they have been systematized by scholars, they could be divided into monitoring, agenda-

[19] For an introduction on participation in administrative procedures in continental Europe see Caranta, Roberto. 'Participation into Administrative Procedures: Achievements and Problems'. *Italian Journal of Public Law*, no. 2, 2010, pp.311-316.

[20] And that will be described later in this Chapter.

[21] For a theoretical overview on the concept of administrative participation see Đurman, Petra. 'Participation in Public Administration Revisited: Delimiting, Categorizing and Evaluating Administrative Participation'. *Croatian and Comparative Public Administration*, vol. 20, no. 1, 2020, pp. 79–120. It is clear, however, that a longer analysis and commentary on that would be not relevant for the purpose on our research, and therefore may this source be sufficient here.

[22] Since it is not our scope to deepen this topic, may it be sufficient for now to refer to Hennen, Lehonard, and et al. *European E-Democracy in Practice*. Springer Open, 2020, and its further references.

[23] United Nations e-government survey 2016, https://publicadministration.un.org/egovkb/Portals/egovkb/Documents/un/2016-Survey/E-Government%20Survey%202016.pdf. As the report interestingly highlights, *"Advances in e-participation today are driven more by civic activism of people seeking to have more control over their lives, rather than by the availability of financial resources or expensive technologies"* (p.5).

[24] For an analysis of all these forms see Aichholzer, Georg, and Gloria Rose. 'Experience with Digital Tools in Different Types of E-Participation'. *European E-Democracy in Practice*, edited by Lehonard Hennen and et al., Springer Open, 2020, pp. 93–130.

setting, and input to decision-making[25]. E-participation is related to what more in general has been defined as e-democracy (electronic democracy)[26], which is *"the support and enhancement of traditional democracy by means of ICTs"*[27]. However, while on one side it remains doubtful whether the wide-spread use of digital tools for increasing participation will actually have an impact on that improving also the quality of democracy[28], on the other side some authors are careful in an evaluation of ICT contribution to democracy, denouncing also some risks.[29] What remains out of question is the evident challenge coming from digital tools to democracy as a system of government and governance, and to both representation and participation: if not included within institutionalized processes, these tools could indeed create new spaces outside the institutions of the public arena, raising questions of legitimacy that could be quite challenging to address[30].

Coming to a conclusion of these introductory observations on the principle of participation, we can say that the general assumption that has come about is that citizen participation contributes to better democracy. Findings so far recognize the objective positive sides of participation that we mentioned before[31]. This comes despite the scarcity

[25] Aichholzer, Georg, and Gloria Rose. 'Experience with Digital Tools in Different Types of E-Participation'. *European E-Democracy in Practice*, edited by Lehonard Hennen and et al., Springer Open, 2020, p.93.

[26] For an introduction see Pratchett, Lawrence, and Robert Krimmer. 'The Coming of E-Democracy'. *Special Issue International Journal of Electronic Government Research*, vol. 1, no. 3, 2005, pp. 1–3.

[27] See the European Parliament resolution of 16 March 2017 on e-democracy in the European Union: potential and challenges (2016/2008(INI)) at https://www.europarl.europa.eu/doceo/document/TA-8-2017-0095_EN.html.

[28] Nijkamp, Peter, and Galit Cohen-Blankshtain. 'Opportunities and Pitfalls of Local E-Democracy'. *Democrazia Partecipativa: Esperienze e Prospettive in Italia e in Europa*, edited by Umberto Allegretti, Firenze University Press, 2010, p.213.

[29] On the risks brought by the unfolding of a form of democracy that would go beyond participation due to the technological development see Morison, John, and Adam Harkens. 'Principle of Participation'. *Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL]*, June 2017. The authors describe the hypothesis of an 'algorithmic democracy' that through the big data would provide a new paradigm in the constitution of knowledge beyond our traditional understanding of participation: *"all the data garnered from the internet of things, and mined by machine learning, is (potentially) much more than the simple 'democracy' obtainable from participation or consultation exercises […]. It is the expression of what people actually do – across a myriad of everyday activities and actions – and, as a result of this, it can predictively infer what people want. […] The need for participation through a political process to reflect what people want seem to [...] suggesting a post-human form of democracy, which blurs divisions between one's self and one's data. The data provides a comprehensive, continually up-dated picture of a calculated 'reality', that can carry much persuasive weight in public discussion […]"*. The authors conclude that of course, *"with information available at this level, the future of participation begins to look very different".*

[30] For an in-depth reflection on the relationship between democratic legitimacy and sovereignty in the age of digital tools see the contribution of Rodotà, Stefano. *Iperdemocrazia Come Cambia La Sovranità Democratica Con il Web*. Laterza, 2013 (in specific, pp. 20-22). The author claims that we are witnessing a turning point in our democratic societies because new technologies are self-legitimating themselves, outside the sovereignty granted by representative channels. The essential question concerns, therefore, the very notion of sovereignty and the possible extent of the democratic process.

[31] The empirical research we are referring to here is the one of Michels, Ank. 'Innovations in Democratic Governance: How Does Citizen Participation Contribute to a Better Democracy?' *International*

of empirical researches on the actual effects of participation, and despite the fact that those ones that have been carried out acknowledge that the number of people that actually get involved is only a small portion of the population and that certain groups remain excluded and therefore underrepresented. Since it is obviously not our aim to develop a theoretical framework of the principle of participation itself for the purposes of this research, will it be enough here to move on with analysing the concept of participatory democracy (paragraph 2), and then to carry out a legal appraisal of what the legal orders that are relevant for the EU member States – namely, the EU legal order and the CoE one – say about participation and participatory democracy (paragraphs 3-4). Later in a second phase we will describe the variety of practices and instruments that have been created and implemented, and that have been circulating stemming from the principle of participation at the national and subnational levels, with a focus on the local level (paragraph 5). The conclusion of this Chapter will reflect on limits and challenges of the current understanding and interpretation of participation and participatory democracy within the European legal space (paragraph 6).

2. Participatory democracy as distinct from deliberative and direct democracy

Within the general principle of participation we can find the roots of what has been defined as 'participatory democracy' (PD). Referring to participation and referring to participatory democracy is not the same thing. On one side, participation refers to a general concept not precisely defined and often ambiguous, whose essence regards the relationship between society and public authorities, and that has links with many other topics like local autonomy, federalism as a method of government and governance[32], and the role of civil society organisations[33]. On the other side, participatory democracy refers to

Review of Administrative Sciences, vol. 77, no. 2, 2011, pp. 275–93, which includes empirical evidence coming from 120 cases in Western countries.

[32] On the link between PD and federalism see Palermo, Francesco, and Karl Kössler. *Comparative Federalism: Constitutional Arrangements and Case Law.* Bloomsbury Publishing, 2017. As they observe, *"there is a link between federalism and participatory democracy and […] it lies in their 'common innate connection with pluralism [...] Both are expressions of pluralism: institutional and societal, respectively'"* (p.114). The authors, therefore, suggest pluralism as the link between PD and federalism.

[33] Allegretti, Umberto. 'Basi Giuridiche Della Democrazia Partecipativa in Italia: Alcuni Orientamenti'. *Democrazia e Diritto*, no. 3, 2006, pp. 151–66: *"perché in effetti la tematica partecipativa si intreccia con altre affini, quali il ruolo delle formazioni sociali, l'associazionismo, il volontariato, la concertazione, la sussidiarietà (quella detta orizzontale o sociale); per altro verso con l'informazione; come pure con la partecipazione al procedimento amministrativo e il diritto di accesso; e con altre ancora diverse, come l'autonomia locale,*

a complex of specific and clearly characterised processes[34]. The two concepts of participation and democracy are however strictly intertwined to the extent that both the expressions 'democratic participation'[35] and 'participatory democracy' are commonly used.

The very first usage of the term 'participatory democracy' dates back to an article published in 1960 that was using the concept for underlining its potential contribution to personal development, playing *"an important role in enabling a person to develop his constructive and creative powers and achieve greater happiness"*[36]. The concept worked as the fundamental inspiration for all those student movements that in the United States in those years were advocating for more participation in the decision-making processes, and it gained widespread importance with the disclosure of the 'Port Huron document' by the Students for a Democratic Society (SDS)[37]. The document served as a reference point for students within the country and outside for demanding participation and a more shared decision-making process not only in universities, but also outside in other governance systems, in opposition to the more conservative and traditional approach of their professors. In parallel to movements in Universities among students, however, the request for a more participatory form of democracy was emerging also from many diverse instances in society and within activists movements of the 1960s, whose main demand was for greater participation in government decision making: among the others, women'

l'articolazione dei diversi livelli di governo e la loro collaborazione, la sussidiarietà detta verticale, e gli istituti di democrazia diretta; e perfino con quella del ruolo delle strutture amministrative, burocratiche e tecniche" (p.152).

[34] On this distinction U. Allegretti is very clear: see Allegretti, Umberto. 'Democrazia Partecipativa: Un Contributo Alla Democratizzazione Della Democrazia'. *Democrazia Partecipativa: Esperienze e Prospettive in Italia e in Europa*, edited by Umberto Allegretti, 2010, p.12; Allegretti, Umberto. 'Basi Giuridiche Della Democrazia Partecipativa in Italia: Alcuni Orientamenti'. *Democrazia e Diritto*, no. 3, 2006, pp. 151–66. See also the study conducted in Trettel, Martina. *La Democrazia Partecipativa Negli Ordinamenti Composti: Studio Di Diritto Comparato Sull'incidenza Della Tradizione Giuridica Nelle Democratic Innovations*. Edizioni Scientifiche Italiane, 2020, pp.65-67.

[35] In our work, however, we will only use the term 'participatory democracy' and not 'democratic participation' since we take it for granted that participation is democratic.

[36] We are referring to Kaufman, Arnold S. 'Human Nature and Participatory Democracy'. *NOMOS: American Society for Political and Legal Philosophy*, no. 3, 1960, pp. 266–89 (the quote could be found at p.273). Additionally, the author suggested that *"participation essentially involves actual preliminary deliberation (conversations, debate, discussion) and that in the final decision each participant has a roughly equal formal say. While this does not imply majority rule, it does preclude rule by a minority of those sufficiently interested to participate"* (p.281), and concluded that *"the main justifying function of participation is development of man's essential powers - inducing human dignity and respect, and making men responsible by developing their powers of deliberate action"* (p.289). The deliberative aspect was already recognized as a fundamental dimension of participation.

[37] The inspiration on the concept of participation came from the work of Kaufman himself (see previous footnote), that was one of the advisors to the students for drafting the document (reported by Cunningham, Frank. *Theories of Democracy: A Critical Introduction*. Routledge, 2002, p.123). The document can be easily found online: among many important claims, it can be read that "*as a social system we seek the establishment of a democracy of individual participation, governed by two central aims: that the individual share in those social decisions determining the quality and direction of his life; that society be organized to encourage independence in men and provide the media for their common participation"*.

movements, peace movements, civil and workers' rights[38]. As it was recognized a few years later[39], the Port Huron document constitutes a fundamental reference in discourses on participatory democracy also because it introduced some essential theoretical 'root principles' of this concept: among the others, an optimistic perspective on human beings' capacities to autonomously govern their lives; their independence not being based on individualism, but on fraternity and capacity to contribute to the common good; the idea that decision-making processes in society at all levels should take place in the more participatory form possible[40]. Since the 1960s opening up to the idea of participatory democracy, its original aspects have been later deepened from a theoretical point of view by other scholars in the field of democratic theories. Accordingly, the participatory turn of democracy aimed at a wider inclusion of people was, on one side, read in the light of a socialist ideal; on the other, linked to radical liberalism[41]. As a consequence, the common core aspect that scholars advocating for a participatory turn of democracy were rejecting was the solely representative dimension of democracy[42], where individuals' political capacities, responsibilities, autonomy, self-government and self-determination, bottom-up social protagonism and virtues of active citizenship were not allowed any space.

A second stage within the debate on participatory democracy was opened in the 1980s, when democracy scholars[43] introduced some novelties in the debate, trying to go 'beyond participatory democracy' and paving the way for the new theoretical paradigm of 'deliberative democracy' (even though still not mentioned in this transition phase)[44]. A first aspect was introduced by a plural understanding of participatory democracy, that was

[38] Pateman, Carole. *Participation and Democratic Theory*. Cambridge University Press, 1970.

[39] By Mansbridge, Jane J. Beyond Adversary Democracy. The University of Chicago Press, 1983, p.376 as reported in Floridia, Antonio. *Participatory Democracy versus Deliberative Democracy: Elements for a Possible Theoretical Genealogy. Two Histories, Some Intersections*. 2013, p.3.

[40] Floridia, Antonio. *Participatory Democracy versus Deliberative Democracy: Elements for a Possible Theoretical Genealogy. Two Histories, Some Intersections*. 2013, p.3-4.

[41] Notably the two contributions of C. Pateman and C. B. MacPherson are the ones that have allowed great circulation to the concept of participatory democracy: Pateman's participatory democracy was the strand more in line with the ideas of the American new left, in accordance with the socialist ideal; MacPherson participatory democracy, on the opposite, was a model of democracy perceived perfectly in line with liberal theory, pursuing the idea of a free and autonomous citizen. See further Pateman, Carole. *Participation and Democratic Theory*. Cambridge University Press, 1970 and Macpherson, C. B. *The Life and Times of Liberal Democracy.* Oxford University Press, 1977.

[42] On this point see Floridia, Antonio. *Participatory Democracy versus Deliberative Democracy: Elements for a Possible Theoretical Genealogy. Two Histories, Some Intersections*. 2013, p.5.

[43] The reference goes to B. Barber and J. Mansbridge, that are considered two important precursors to the deliberative theory of democracy. See further Barber, Benjamin R. *Strong Democracy*. University of California Press, 1984, and Mansbridge, Jane J. *Beyond Adversary Democracy*. The University of Chicago Press, 1983.

[44] A. Floridia considers this period as a 'transition phase' towards deliberative democracy theory (see Floridia, Antonio. *Participatory Democracy versus Deliberative Democracy: Elements for a Possible Theoretical Genealogy. Two Histories, Some Intersections*. 2013, p.10).

possible through an empirical analysis of diverse 'participatory democracies' initiatives, where the common trend was a consensus oriented mode of decision-making in which the participants were standing on an equal basis[45]. A second contribution to the debate was the concept of 'strong democracy'[46], which is worth mentioning in the transition phase as it was conceived as a step forward in the participatory development of democracy with a strong focus on civic virtues. In an ideal strong democracy – which accordingly could be considered as the modern form of participatory democracy back in those years – engaged citizens are capable of pursuing the general interest through participatory institutions and mutual action on the basis of their civic attitudes: civic autonomy should therefore be maintained for avoiding delegation of the governing power.

A later third revival of the participatory form of democracy was led by the experience of the city of Porto Alegre that in 1988 initiated its 'participatory budget' (PB), representing a form of citizen participation in which citizens are involved in the process of deciding how to spend public money[47]. Participatory budgeting was eventually taken as an example and repeated all around the world, but it was not the only participatory tool that started to be gradually institutionalised since many other participatory processes and phenomena started to circulate in diverse territorial contexts and to be institutionalised as well[48]. A later

[45] We are referring to the work of Mansbridge, Jane J. *Beyond Adversary Democracy*. The University of Chicago Press, 1983 where the author used the term *"participatory democracies*" for referring to diverse local communities initiatives: in specific, the author conducted an empirical study of *"a Town Meeting Government"* in a little village in Vermont, and of a *"participatory workplace"*.

[46] It was Barber the one who theorised the idea of strong democracy *"which can be formally defined as politics in the participatory mode where conflict is resolved in the absence of an independent ground through a participatory process of ongoing, proximate self-legislation and the creation of a political community capable of transforming dependent, private individuals into free citizens and partial and private interests into public goods"* (Barber, Benjamin R. *Strong Democracy*. University of California Press, 1984, p.132).

[47] For an introduction on participatory budget see Allegretti, Giovanni. 'Giustizia Sociale, Inclusività e Altre Sfide Aperte per Il Futuro Dei Processi Partecipativi Europei, In'. *Democrazia Partecipativa: Esperienze e Prospettive in Italia e in Europa*, edited by Umberto Allegretti, Firenze University Press, 2010, pp.385.388.

[48] As we will see later in this Chapter at paragraph 5, and as at it was recently recognized by one of the leading scholars of participatory democracy, many years after her pioneering first contribution on the topic (Pateman, Carole. *Participation and Democratic Theory*. Cambridge University Press, 1970): see Pateman, Carole. 'Participatory Democracy Revisited'. *Perspectives on Politics*, vol. 10, no. 1, 2012, pp. 7–19. For now may it be sufficient to refer to Allegretti, Umberto, editor. *Democrazia Partecipativa: Esperienze e Prospettive in Italia e in Europa*. Firenze University Press, 2010 and its overview of participatory processes around Europe. Worth mentioning is the Regional law of Toscana 69/2007 that is among the first laws on participatory democracy in the world that included civic participation in regional and local decision-making processes: the process of institutionalisation occurred, therefore, not at the national level but at the subnational one (see l.r.n.69/2007 on *"Norme sulla promozione della partecipazione alla elaborazione delle politiche regionali e locali"*). See on that Brunazzo, Marco. 'Istituzionalizzare La Partecipazione? Le Leggi Sulla Partecipazione in Italia'. *Istituzioni Del Federalismo*, no. 3, 2017, pp. 837–64. See further Lewanski, Rodolfo. 'Institutionalizing Deliberative Democracy: The 'Tuscany Laboratory''. *Journal of Public Deliberation*, vol. 9, no. 1, 2013 which talks of 'deliberative participation', claiming that deliberative theories were included in civic participation procedures.

remarkable momentum for the institutionalisation[49] of the principle of participation occurred at the international level with the 1998 Aarhus Convention adopted by the United Nations Economic Commission for Europe (UNECE)[50], aimed at fostering citizen participation in public decision-making on environmental matters. Accordingly, public authorities are meant to: enable the public affected and environmental non-governmental organisations to have their say on proposals, plans, programmes affecting the environment; take into account their opinions in the decision-making process, and eventually give explanations on the final decisions.

In parallel to participatory democracy, it must be recognized, however, that when we refer to the principle of participation in its broadest meaning, this does not constitute uniquely the conceptual reference for the participatory form of democracy, but also for a wide variety of phenomena which may also occur at different levels of government. More in general, the principle refers to all those forms of democracy that are not based on representation, but that allows for some forms of citizen participation outside the traditional representative channels. We would like to refer here, in specific, to the two forms of democracy of common usage that can be said to still implement some kind of citizen participation: they are deliberative democracy and direct democracy. Since a full review of this voluminous literature is beyond the scope of this paragraph and research, what is useful here is just a brief mention of the differences and similarities between participatory democracy on one side, and deliberative and direct democracy on the other.

Starting with direct democracy, as a premise we could say that a minimal definition provided by the literature defines it as *"a form of democracy in which the* demos *expresses*

[49] With the concept of 'institutionalisation' the reference goes to *"the process by which organizations and procedures acquire value and stability"*, as observed by Huntington in Huntington, Samuel P. *Political Order in Changing Societies*, Yale University Press, New Haven and London, 1968, p. 21. The concept has also an important significance in the legal discourse, as it refers to the recognition by legal means of certain values and practices already existent within society transforming them into formal rules: since going further into that, however, may take us off-road, may it be sufficient here to refer to the work of two among the forefathers of 'institutionalism', namely Maurice Hauriou and Santi Romano. See further Salvatore, Andrea, editor. *Maurice Hauriou. La Teoria Dell'istituzione e Della Fondazione*. Quodlibet, 2019, and Cavallo Perin, Roberto, et al., editors. *Attualità e Necessità Del Pensiero Di Santi Romano*. Editoriale Scientifica, 2019.

[50] United Nations Economic Commission for Europe (UNECE), *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, Aarhus, 25 June 1998, available at https://unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf. The Convention entered into force on 30 October 2001: for updates and the follow-up process of the Convention see https://unece.org/environment-policy/public-participation/aarhus-convention/status-ratification. The EU and its 27 Member States are all Parties to the Aarhus Convention, which was approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005. As of today, it is considered as the leading international agreement on environmental democracy.

its political will without any intermediate elected body"[51]: the main distinction is therefore with representative democracy that constitutes the indirect form of democracy, but differences are present also with regard to participatory democracy. With its most classical legal instruments being referenda, citizens' initiatives, and the right to petition, direct democracy constitutes a form of democracy that is occasional and punctual in intervening in specific occasions; on the contrary, participatory democracy aspires to a continuous involvement of citizens. Secondly, direct democracy is limited to allowing interventions on specific aspects of a particular issue, with a purpose that is the expression of dissent or consensus, whereas participatory democracy has a more general character. Lastly, the use of voting methods shows that this is a form of weak participation, which is much limited in comparison to the aim of a constant participatory style of democratic participation. While the prevailing constitutional type of democracy is representative democracy, the term 'direct democracy' is not usually explicitly used in worldwide constitutions: on the contrary, the use of referenda is provided by the majority of constitutions worldwide[52].

Switching to what has been defined as 'deliberative democracy[53]' (DD) the discourse becomes more complex. Not present in any constitutional text[54], on the basis of

[51] Definition provided in Gamper, Anna. 'Direct Democracy'. *Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL],* 2019. See this contribution for an introduction on direct democracy and further references. The author understands both participatory and deliberative forms of democracy as variants of direct democracy, considering direct democracy as encompassing all those other forms of democracy that are not representative. Generally speaking, different categorisations of the forms of democracy could be found, and there is no need in this work to reconstruct the various interpretations: because of that, we don't claim to use the correct and shared systematization, but we simply aim at illustrating the main elements of these two forms of democracy in comparison to the participatory one, recognizing in each one a participatory involvement of citizens.

[52] An empirical survey was conducted by A. Gamper in Gamper, Anna. 'Direct Democracy'. *Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL],* 2019 (see paragraphs 10-15).

[53] It should be noted that this form of democracy is currently mainly referred to by scholars of political sciences: it entered the legal debate only recently, where it is usually referred to within the broadest field of participatory democracy, even though the state of the art does not provide us with a sound and shared theory yet.

[54]A very useful online website for conducting comparative research in world's constitutions is 'Constitute', available at https://constituteproject.org/?lang=en. By searching the term 'deliberative democracy' on its research platform it shows no result in any constitution currently in force. On the contrary, the term 'participatory democracy' entered many constitutions (Algeria, Angola, Gambia, Honduras, Maldives, Morocco, Portugal, South Africa, Suriname, Tunisia, Uganda). It is true, however, that the constitutional charters in the majority of cases do not explicitly mention the participatory aspect of democracy (nor the deliberative) usually because of the historical phases where they were adopted, when the concept of participation was not that much widespread (see on this point Allegretti, Umberto. 'La Democrazia Partecipativa in Italia e in Europa'. *Associazione Italiana Dei Costituzionalisti,* vol. 1, 2011, p.7). The term 'direct democracy', on its side, could be explicitly found in 5 constitutions: Ecuador, Georgia, Nicaragua, Ukraine, Vietnam). Last access on 6 February 2023.

previous research[55] it can be argued that the concept originated "*in the sphere of American constitutionalist thought and, specifically, within a very lively debate on the interpretation of the American Constitution and the vision of democracy that it entailed*[56]". Still within debates on democratic theory, the term was for the first time introduced in an important essay[57] published in 1980 that coined the term for adding a new light to the understanding of the American constitution and its system of government. According to that, deliberative democracy was the concept used for referring to the role of elected representatives, who should be able to understand the *"deliberative sense of the community",* that is the expression of the *"public voice"* emerging from citizens and their public debates[58]. As with participatory democracy, also the theoretical field of deliberative democracy is not uniform and has different understandings according to different interpretations that have been elaborated by scholars in diverse disciplinary fields[59], that have developed throughout years in different stages[60], and that eventually have translated into practice through a wide variety of deliberative procedures[61]. More generally, we could talk of a deliberative approach, that puts at the core of democracy procedural rules and the method of argument-based discussion (which is the meaning of 'deliberation') over and above the results, and where all the diverse and contrasting interests and point of views

[55] Floridia, Antonio. *Participatory Democracy versus Deliberative Democracy: Elements for a Possible Theoretical Genealogy. Two Histories, Some Intersections*. 2013. See also Floridia, Antonio. 'Beyond Participatory Democracy, towards Deliberative Democracy: Elements of a Possible Theoretical Genealogy'. *Rivista Italiana Di Scienza Politica*, no. 3, 2014, pp. 299–326.

[56] Floridia, Antonio. *Participatory Democracy versus Deliberative Democracy: Elements for a Possible Theoretical Genealogy. Two Histories, Some Intersections*. 2013, p.27

[57] Bessette, Joseph M. 'Deliberative Democracy: The Majority Principle in American Government'. *How Democratic Is the Constitution?,* edited by Robert A. Goldwin and William A. Schambra, AEI Press, 1980, pp. 102–16. He claimed that *"the Constitution was designed to make the deliberative majority the effective ruling power in the United States"*, in sharp contrast to *"aristocratic"* or *"elitist"* interpretations of the Constitution (pp.112-114).

[58] Bessette, Joseph M. 'Deliberative Democracy: The Majority Principle in American Government'. *How Democratic Is the Constitution?,* edited by Robert A. Goldwin and William A. Schambra, AEI Press, 1980, pp. 102–16.

[59] Among others, there are philosophical, legal-constitutionalist, social theory, and political science approaches. For a summary of those perspectives and their further references see Floridia, Antonio. 'The Origins of the Deliberative Turn'. *The Oxford Handbook of Deliberative Democracy*, edited by Andre Bächtiger et al., Oxford University Press, 2018, p.35.

[60] A. Florida systematizes the development of deliberative democracy as a theoretical model of democracy through the recognition (in his opinion) of 5 stages: see Floridia, Antonio. 'The Origins of the Deliberative Turn'. *The Oxford Handbook of Deliberative Democracy*, edited by Andre Bächtiger et al., Oxford University Press, 2018, p.36.

[61] OECD. *Innovative Citizen Participation and New Democratic Institutions Report. Catching the Deliberative Wave*. 2020. It is curious to notice that also this policy report that carried out an empirical study of 282 cases of 'representative deliberative practices' (from OECD Member countries) placed them within the label of 'innovative citizen participation'. As a consequence, it seems to be possible to claim that the Report considers participation as a wider principle, under which to also include deliberative democracy (and its practices guided by deliberation). Interesting to note is also the data of 52% for referring to all those representative deliberative practices that are occurring at the local level (p.16).

are included. In a nutshell, deliberative democracy refers to all those decision-making processes conducted *"by discussions among free and equal citizens"*[62]. This goes in contrast to participatory democracy, whose more pragmatic perspective is aimed at reaching a concrete output and impact on the decision-making process. While PD relies on the direct action of citizens exercising some power in deciding above issues affecting their lives, DD looks at the process which precedes decisions, that as such should be founded on deliberation[63]. What the two have in common is the fact that they were both conceived as a corrective to the shortcomings of representative democracy and its elitist vision prevailing in that historical context, based on majority rule[64]. That's also the reason why often the difference among the two of them – from both a theoretical level and a more concrete one looking at the tools that have been developed throughout years – is blurred, and there is no consensus in the literature on the relation among the two of them. In fact, some authors claimed that they are two different theories of democracy, but have contrasting views on the precise origins of the two (in specific on PD)[65]; some scholars wrote that DD is a specific type of PD with more circumscribed and defined contours[66], while some others believe the opposite is true[67]; some suggested that they are actually two ways of approaching democracy that are destined to intersect and thus mutually

[62] Definition taken by Elster, Jon, editor. *Deliberative Democracy*. Cambridge University Press, 1998, p.1. Also, *"broadly defined, deliberative democracy refers to the idea that legitimate lawmaking issues from the public deliberation of citizens*" (in Bohman, James, and William Rehg, editors. *Deliberative Democracy Essays on Reason and Politics.* The MIT Press, 1997, p.IX).

[63] Floridia, Antonio. *Participatory Democracy versus Deliberative Democracy: Elements for a Possible Theoretical Genealogy. Two Histories, Some Intersections*. 2013, p.6.

[64] With reference to PD and DD, *"Both aim to attenuate the most negative effects of majority rule, most notably, the marginalisation of minority interests through polarised and polarising yes-or-no decisions"*: see Palermo, Francesco, and Karl Kössler. *Comparative Federalism: Constitutional Arrangements and Case Law*. Bloomsbury Publishing, 2017, p.117.

[65] Floridia, Antonio. *Participatory Democracy versus Deliberative Democracy: Elements for a Possible Theoretical Genealogy. Two Histories, Some Intersections*. 2013, p.7 traces the origin of both – despite in different contexts – in the US (this perspective was the one that seems to be more truthful and that is why we have followed it in this paragraph). The author also recognizes that eventually intersections among the two emerged later, with some partial overlap. Partially deviated from this is the reconstruction that traces the origin of PD to the more concrete case of the participatory budget of Porto Alegre (therefore referring it to Latin America), while the one of DD from the general Anglo-Saxon world: see on that Allegretti, Umberto. 'La Democrazia Partecipativa in Italia e in Europa'. *Associazione Italiana Dei Costituzionalisti,* vol. 1, 2011, p.4 and Bobbio, Luigi. 'Dilemmi Della Democrazia Partecipativa'. *Democrazia a Diritto*, vol. 4, 2006, p.14.

[66] Bobbio, Luigi. 'Dilemmi Della Democrazia Partecipativa'. *Democrazia a Diritto*, vol. 4, 2006, p.14.

[67] Bifulco, Raffaele. 'Democrazia Deliberativa, Partecipativa e Rappresentativa : Tre Diverse Forme Di Democrazia'. *Democrazia Partecipativa: Esperienze e Prospettive in Italia e in Europa*, edited by Giovanni Allegretti, Firenze University Press, 2010.

gain[68], and some have worked on the concept of 'participatory deliberative democracy' as one unique conception of democracy mixing participation and deliberation aspects[69].

Coming to a conclusion, what could be stated here for the purpose of our research is that entering the scholarly debate on participatory democracy is certainly slippery. At first because of a boundary-defining work among competing perspectives and definitions with other theories of democracy, among which direct and deliberative democracy. Secondly because of its wide distribution of theories and practices according to the historical moment, the geographical context and the situation regarding its institutionalisation. As already clarified in Chapter 1 and in the introductory paragraph of this Chapter, and as a consequence of the need to delimit our field of enquiry in such a wide area, we recognise the greatest utility in referring to the participatory form of democracy in relation to a general public and constitutional law perspective, and limited to the European legal space. We recognize the contribution of federalism as a principle and the federal debate[70] when referring to the different levels of participation (in specific, in relation to multi-level states) as we will mainly see in Chapter 3, and the difficulty in locating participatory democracy within a sound legal theory[71], being at the boundary between constitutional law and administrative law[72]. We also prefer talking of participation

[68] Allegretti, Umberto. 'La Democrazia Partecipativa in Italia e in Europa'. *Associazione Italiana Dei Costituzionalisti,* vol. 1, 2011, p.4.

[69] della Porta, Donatella. *Can Democracy Be Saved? Participation, Deliberation and Social Movements*. Polity, 2013, p.8. We understand, however, that many additional doors could be opened in order to provide for an accurate synthesis reflecting the variety of the debate. Since it is not of use for the purposes of this research, may it be sufficient to refer to some collective and extensive works that were published on the topic of deliberative democracy: Bohman, James, and William Rehg, editors. *Deliberative Democracy Essays on Reason and Politics.* The MIT Press, 1997; Elster, Jon, editor. *Deliberative Democracy*. Cambridge University Press, 1998; Bächtiger, Andre, et al., editors. *The Oxford Handbook of Deliberative Democracy.* Oxford University Press, 2018 (in specific, see the chapter of Elstub, Stephen. 'Deliberative and Participatory Democracy'). The work of many deliberative scholars and the development of the deliberative debate could be traced back through these contributions.

[70] This is particularly true in so far as federalism is based on a culture of shared powers and autonomy. Federalist studies, indeed, include a research strand on participation and participatory democracy: Palermo, Francesco, and Karl Kössler. *Comparative Federalism: Constitutional Arrangements and Case Law.* Bloomsbury Publishing, 2017, pp.111-122. For the further contribution of federalism, in specific, to the local democracy and to the identification of the 'city' as an independent subject, see paragraph 4, Chapter 3.

[71] In specific, in relation to a constitutional theory of PD see Palermo, Francesco. 'Participation, Federalism, and Pluralism: Challenges to Decision Making and Responses by Constitutionalism'. *Citizen Participation in Multi-Level Democracies*, edited by Cristina Fraenkel-Haeberle et al., Brill, 2015: "*Above all, the point here is to try to address the aforementioned deficit, i.e. the lack of a sound constitutional theory on participatory and deliberative forms of democracy, complementary to representative and direct forms based solely on the majority principle"* (p.44).

[72] We would like to refer here to the interesting work of Trettel, Martina. *La Democrazia Partecipativa Negli Ordinamenti Composti: Studio Di Diritto Comparato Sull'incidenza Della Tradizione Giuridica Nelle Democratic Innovations.* Edizioni Scientifiche Italiane, 2020. While lamenting the lack of a general legal theory of participatory democracy, the author placed the concept and scholarly debate on that within the field of constitutional law using, in specific, a comparative approach (Austria, Italy, Spain, US, Canada). At the

as the umbrella of reference, instead that of participatory democracy: the concept of participation has indeed already its roots in democracy and democratic theories, and it is the one usually referred to at the constitutional level. Because of that, we will proceed with investigating the contribution of the EU and CoE in the recognition of the principle of participation among their founding principles, and later see how theoretical principles are meeting practical institutions and tools.

3. The constitutional contribution of the EU legal order

The circulation of the concept of participation[73] (and participatory democracy) in the world has also been received in the EU, not only by single member States, but also by the Union itself, which has substantially contributed to defining and appropriating this concept, making it a pillar of its constitutional construction. Conceived as a form of democracy able to foster a political community despite the lack of a common *demos*[74], the EU contributed to the development of the principle of participation in the EU legal order by means of all those attempts and provisions made throughout the EU integration process from its beginning aimed at including civil society and its representatives in the EU decision-making process, with a governance perspective more than governmental one[75]. As it has been proposed[76], the very first step could be traced back to the introduction in 1957 in the Treaty of Rome[77] of the still existing European Economic and Social Committee (EESC), a consultative body composed of the representatives of various social and economic activities[78]: its advisory status aimed at contributing with opinions made by the organised civil society addressed to the EU institutions in charge of talking decisions, so that the voices of interested parties could be taken into account. The same consultative role of

same time, she also recognized the fundamental contribution of administrative law in so far as it is needed to put in practice through precise tools and procedures the constitutional principle of participation.

[73] When referring to 'participation' we are implicitly always referring to political/civic participation, as already explained in paragraph 1, footnote 16.

[74] We already referred to this debate in Chapter 1, paragraph 1 (see footnote n.31 and further references).

[75] Again, for the understanding of the difference among a pure government perspective to a governance one see Chapter 1, paragraph 4.

[76] Siclari, Domenico. 'La Democrazia Partecipativa Nell'ordinamento Comunitario: Sviluppi Attuali e Prospettive'. *Amministrazione in Cammino*, Nov. 2009.

[77] We are referring to the Treaty establishing the European Economic Community (TEEC), signed in 1957 in Rome.

[78] The EESC is defined as a 'transnational participatory forum' in Ferri, Delia. 'European Citizens… Mind the Gap! Some Reflections on Participatory Democracy in the EU'. *Perspectives on Federalism*, vol. 5, no. 3, 2013, p.62.

social parts addressing the action of the Commission in the social policy field was recognized later also in the Treaty of Amsterdam, showing the constant concern of the Commission on citizens' contribution in influencing its decision-making process[79]. A part from these two first inputs, however, it can be stated that the real major introduction of the concept of participation within the European constitutional discourse finds its first explicit expression in the (draft) Treaty establishing a Constitution for Europe (TECE)[80] at Article I-47 titled 'the principle of participatory democracy'. For the very first time, the perspective of a complementary form of representative democracy – namely, that one of participatory democracy – was about to be recognized at the highest constitutional level, providing therefore for a different channel of democratic legitimation. In contrast to almost[81] all the member states whose democratic legitimation is founded – also because of historical reasons – on the principle of representation, the EU constitutes a landmark recognition of a democratic legitimation founded on both representative democracy and elements of participatory democracy, paving therefore the way for a new relationship between the State (or better, the public side) and the society[82]. The content of Article I-47 comprised four parts: 1) the need for public institutions to grant citizens and representative associations the public exchange of their opinion on matters related to the EU's field of action; 2) the need for institutions to *"maintain an open, transparent and regular dialogue with representative associations and civil society*"; 3) the provision of consultations to be carried out by the Commission with parties concerned with its actions; 4) the opportunity to initiate an European citizens' initiative (ECI) addressed to the Commission for proposing a legislative action on a certain matter. The notorious failure of the draft Treaty, however, did not push the substance of Article I-47 provisions out of the EU legal order: its content was later included in the Treaty of Lisbon at Article 11 TEU, even though the explicit term 'participatory democracy' has disappeared.

Looking at the constitutional ground of the EU legal order, explicit references to the principle of participation could be currently found in different articles of the Treaties,

[79] Article 138 Amsterdam Treaty.

[80] For an overview of the Treaty and its institutional pathway see footnote 55, Chapter 1.

[81] Within the EU, the only exception to be found at the constitutional level concerning the inclusion of the participatory form of democracy (in parallel to the representative one) is the Constitution of Portugal at Article 2.

[82] In fact, *"EU democracy is not founded on the principle of popular sovereignty that has been proclaimed in the national constitutions inspired by social contract tradition"* (p.128) and *"the establishment of participatory democracy as one of the EU's normative bedrocks is a potentially important step because it makes clear that representation, that pillar of liberal democracy, cannot be the sole means to a legitimate regime in the EU"* (p.130, quoted from A. Warleigh): see Cuesta Lopez, Víctor. 'The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy'. *European Public Law*, vol. 16, no. 1, 2010, pp. 123–38.

together with some implicit ones also to the concept of participatory democracy[83]. It goes without saying that the core of the constitutional provisions on participation are contained in Title II of the TEU labelled 'Democratic participation', showing clearly the correlation between participation and democracy[84]. This Title comprises four articles, from 9 to 12[85]: Article 9 contains the principle of democratic equality and defines EU citizenship; Article 10 founds the Union on representative democracy, adding to that a citizens' *"right to participate"* to the democratic life of the Union, and defining the principle of transparency and the role of political parties; Article 11 refers to citizens' dialogues and consultations, and defines the European citizens' initiative (ECI); Article 12 outlines the role of national parliaments in the EU legislative process and other processes.

Articles 10(3) and 11, in specific, constitute the most important commitment of the Union to participatory democracy, and as such are at the core of our analysis: it is important to restate that in our research it is fundamental to look at the constitutional roots of participation within the EU space, because the constitutional level is indeed the one that could provide us with the widest and highest cover to participatory practices and experiences at lower levels, and since it constitutes the reference point they all have in common. These two articles refer to the important role of EU citizens and civil society organizations (CSOs) in the governance of the EU, pointing out (even though mostly in such a broad way) to how they could contribute through their participation beyond the

[83] In addition to the provisions at Articles 9-12, further (implicit and explicit) references at the EU constitutional level could be found in other articles contained in the Treaties and in the Charter of Fundamental Rights of the European Union (CFR) (proclaimed in Nice on 7 December 2000, and that according to Article 6(1) TEU has the same legal value as the European Treaties), and precisely at: Article 1(2) TEU on the need for decisions to be taken at the level closest to citizens (principle later referred to also in Article 10(3) TEU); Article 24 TFEU on the European citizens' initiative, on the possibility for every citizen to the right to petition the European Parliament, to apply to the Ombudsman, and to write to any of the EU institutions or bodies; Article 15 TFEU on the participation of civil society and the promotion of good governance, and on the right of access to documents of the Union's institutions, bodies, offices and agencies; Article 42 CFR on the right of access to documents; Article 227 TFEU on the right to petition (also at Article 44 CFR); Article 228 TFEU on the right to write complains to the European Ombudsman (also at Article 43 CFR). See further on this Raspadori, Fabio. 'La Partecipazione Dei Cittadini All'Unione Europea e Lo Spettro Della Democrazia'. *Federalismi.It*, 2022. According to all the Treaties and CFR provisions, he classifies civic participation through 3 different labels: 1) participation as control; 2) participation to public deliberations; 3) participation as information, training and discussion.

[84] As it was observed in Mendes, Joana. 'Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU'. *Common Market Law Review*, vol. 48, no. 6, 2011, pp. 1849–78, *"For the first time at Treaty level participation in decision-making beyond political representation is explicitly linked to democracy. The democracy of the Union now rests, by force of Article 11 TEU, also on the links it establishes directly with its citizens"* (p.1850). At the core of her interesting contribution, the author argues that *"Article 11 TEU postulates a transition from the instrumental usages of participation typical of participatory governance to participation conceived as a basis of participatory democracy. Participation is therefore one of the foundations of democracy in the EU"* (p.1850).

[85] For a comprehensive account on the four articles included in this Title (articles 9-12) see Kellerbauer, Manuel, et al., editors. *The EU Treaties and the Charter of Fundamental Rights. A Commentary*. Oxford University Press, 2019, pp.103-123.

mere representative tools. The provision of citizens' right to participate laid down in Article 10(3) TEU complements the fundamental choice of representative democracy as the Union's democratic model, even though (as it has been pointed out[86]) this right is not conceived there as an enforceable subjective right. Still according to this article, transparency and proximity constitute fundamental aspects of the decision-making processes of the Union so that decisions could be seen as more legitimate, demonstrating the link between participation and the other European constitutional principle of subsidiarity (Article 5(3) TEU)[87]. Building upon this article, the following one goes further in defining what participatory democracy means within the EU legal order, through the definition of specific participatory tools: Article 11 TEU introduces indeed diverse elements of participatory democracy. The first three paragraphs aim at granting effective participation through (1) the involvement of citizens and representative associations by means of better communication[88], (2) a civil dialogue[89] between EU institutions and representative associations and civil society, (3) consultations carried out with parties concerned by the Commission. While paragraphs 1,2,3 constitute a formal recognition of previous institutional practices, paragraph 4, introduces what has been defined[90] as the real major innovation among participatory democracy tools, namely the 'European citizens' initiative' (ECI). Despite the not unanimous account regarding its nature[91], for the purpose of our research it can be brought back to the cover provided by the general principle of

[86] Cuesta Lopez, Víctor. 'The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy'. *European Public Law*, vol. 16, no. 1, 2010, p.130.

[87] On this link among the two see Kellerbauer, Manuel, et al., editors. *The EU Treaties and the Charter of Fundamental Rights. A Commentary.* Oxford University Press, 2019, p.111.

[88] Even though, as it has been pointed out, it is not clear at all what *"publicly exchange their views"* means on a practical level, nor the difference between this public exchange of views and civic dialogues and consultations is defined: see Mendes, Joana. 'Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU'. *Common Market Law Review*, vol. 48, no. 6, 2011, p.1858-1859.

[89] *"The Commission has traditionally engaged in dialogue through external consultations which are expressly encouraged in Article 11.3 TUE. The EP has channelled civil dialogue primarily through informal public hearings"* (Cuesta Lopez, Víctor. 'The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy'. *European Public Law*, vol. 16, no. 1, 2010, p.132). The practice of civil dialogue was initiated by the Commission already a long time before, with its introduction in 1996 by the DG responsible for social policy in order to grant interactions with CSOs in parallel to the interactions occurring with social partners already occurring through the 'social dialogue' (institutionalised already with the Maastricht Treaty, eventually included in Article 155 TFEU). See further on that Ferri, Delia. 'European Citizens… Mind the Gap! Some Reflections on Participatory Democracy in the EU'. *Perspectives on Federalism*, vol. 5, no. 3, 2013, p.66.

[90] Mendes, Joana. 'Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU'. *Common Market Law Review*, vol. 48, no. 6, 2011, p.1849.

[91] Authors like Kellerbauer defines it as a tool of direct democracy (Kellerbauer, Manuel, et al., editors. *The EU Treaties and the Charter of Fundamental Rights. A Commentary.* Oxford University Press, 2019, p.115); others like Alemanno brings it back into the realm of participatory democracy (Alemanno, Alberto. 'Beyond Consultations. Reimagining European Participatory Democracy'. *Carnegie Europe, Reshaping European Democracy,* HEC Paris Research Paper No. LAW-2019-1327, 2018, p.6).

participation, and considered as one among the other tools of participatory democracy that the EU equips its citizens with. Under the condition that a minimum of one million of EU citizens launch an ECI on a certain matter legally relevant for the implementation of the Treaties, the Commission could submit a legislative proposal[92]. High expectations concerning the democratic potential of this tool should, however, be avoided since whatever initiative is subject to the political will of the institutions[93], and its scope of action cannot propose Treaty change nor acts that are not legal.[94] All together, these participatory tools serve the scope of involving EU citizens and civil society organisations in the decision-making process, and therefore in the processes of governance as defined in Chapter 1. Additional channels for ensuring citizen participation are outlined in Article 24 TFEU: the right to petition the European Parliament, and the right to apply to the European Ombudsman[95]. Important to note is the fact that while the tools of participatory democracy in the EU are conceived for granting new channels of involvement in the decision-making processes for EU citizens, on the opposite, with regard to the right to petition the EP and to complain to the Ombudsman they have been extended to all natural or legal persons resident or with their office being registered in the EU, and not only to EU citizens[96].

In parallel to the constitutional ground provided by EU primary law – namely the Treaties (and by some articles of the CFR[97]) – to participatory democracy, it is worth mentioning the contribution of another important act that started referring to the principle of participation even before its introduction in the draft TECE and eventually in the Lisbon Treaty. We are referring to the 2001 White Paper on European governance issued by the European Commission[98], a soft-law document whose principles on good governance (openness, accountability, effectiveness, and coherence, alongside with the principle of

[92] The procedural steps required to launch a ECI are: registration; successful submission; and a positive decision by the Commission. All of that is laid down in Regulation (EU) No 211/ 2011 of the EP and of the Council of 16 February 2011 on the citizens' initiative [2011] OJ L65/1 (regulation which is based on Article 24(1) TFEU). For an exhaustive account on how the ECI works see Ferri, Delia. 'European Citizens… Mind the Gap! Some Reflections on Participatory Democracy in the EU'. Perspectives on Federalism, vol. 5, no. 3, 2013, pp.76 and 79.

[93] Position expressed by Cuesta Lopez, Víctor. 'The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy'. *European Public Law*, vol. 16, no. 1, 2010, pp.136-137.

[94] These two are the main limitations underlined by Kellerbauer, Manuel, et al., editors. *The EU Treaties and the Charter of Fundamental Rights. A Commentary.* Oxford University Press, 2019, p.115.

[95] Further analysis of them could be found in Kellerbauer, Manuel, et al., editors. *The EU Treaties and the Charter of Fundamental Rights. A Commentary.* Oxford University Press, 2019.

[96] Kellerbauer, Manuel, et al., editors. *The EU Treaties and the Charter of Fundamental Rights. A Commentary.* Oxford University Press, 2019, p.111.

[97] Within the EU Charter of Fundamental Rights (Nice Charter), two references are included to participation with regard to the rights of the elderly (Article 25) and the integration of persons with disabilities (Article 26). See also footnote no.56 in Chapter 1.

[98] Commission. *European Governance - A White Paper.* COM(2001)428, 25 July 2001.

participation[99]) have been later constitutionalized at Article 11 TEU, paragraphs 1-3. The White Paper aim was to contribute to increasing the so called 'input legitimacy'[100] through the improvement of citizens' participation, in order to enhance the legitimacy of EU decision-making processes within the European governance. It was indeed the *governance* what was lying at the core of the White Paper, reformed through this document towards a more participatory form: on the opposite, the move to the Lisbon Treaty showed a transition of the principle of participation under a constitutional cover which was concretizing democracy from also a legal perspective[101]. In addition to soft-law, also secondary law contributed somehow to providing legal ground to the principle of participation beyond its mere outlining as a principle: that is particularly evident in EU environmental law, where it emerges that European participation (in environmental matters, but also beyond this sphere) cannot simply be linked to participation the way it is conceived at the national level, but needs to be understood in accordance with a supranational understanding closely related to the concept of European democracy[102]. Lastly, more recent initiatives show us the importance of the principle of participation and of the concept of participatory democracy. Among the others, and for the only purpose of this research, we may refer to the EU urban policy, with its latest "New Leipzig Charter"

[99] As noted by Kellerbauer, Manuel, et al., editors. *The EU Treaties and the Charter of Fundamental Rights. A Commentary.* Oxford University Press, 2019, p.114. See also Cuesta Lopez, Víctor. 'The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy'. *European Public Law*, vol. 16, no. 1, 2010, p.134.

[100] Ferri, Delia. 'European Citizens… Mind the Gap! Some Reflections on Participatory Democracy in the EU'. *Perspectives on Federalism*, vol. 5, no. 3, 2013, pp. 56–87. Input legitimacy is described as a *"discrepancy between the pervasive effects of the regulative power of the EU and the weak authorization of this power through the citizens of the Member States who are specifically affected by those regulations".* (p.57).

[101]This is the core of the contribution of Mendes, Joana. 'Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU'. *Common Market Law Review*, vol. 48, no. 6, 2011, pp. 1849–78.

[102] A full assessment of all rules and provisions on participation contained in secondary Union law would obviously go beyond the scope of this Chapter. May it be sufficient here to refer to one contribution where, in specific, participation in EU environmental law is investigated, through both primary and secondary Union law: Peters, Birgit. 'Towards the Europeanization of Participation? Reflecting on the Functions and Beneficiaries of Participation in EU Environmental Law'. *Citizen Participation in Multi-Level Democracies*, edited by Cristina Fraenkel-Haeberle et al., Brill, 2015, pp.311-333. The author underlines that despite the great variety of legal sources, the Aarhus Convention *"remains the central point of reference for participation in environmental matters"* (p.332). On the Aarhus Convention see footnote no.50 in this Chapter. Additionally, interesting reflections are contained in Etty, Thijs, et al. 'Legal, Regulatory, and Governance Innovation in Transnational Environmental Law'. *Transnational Environmental Law*, vol. 11, no. 2, 2022, pp. 223–33, where the authors claim that the emergence of a transnational environmental law is occurring through parallel legal, regulatory, and governance innovation. For some further introductory references on citizen participation in EU environmental law we may refer to Ammann, Odile, and Audrey Boussat. 'The Participation of Civil Society in European Union Environmental Law-Making Processes: A Critical Assessment of the European Commission's Consultations in Connection with the European Climate Law'. *European Journal of Risk Regulation*, 2022, pp. 1–18, where the authors shed light on the EU legal framework governing civil society participation in EU law-making in connection with European climate consultations.

issued in 2020 defining the principle of participation (together with co-creation) as one of the key principles of 'good urban governance'[103], and to the *Competence Centre on Participatory and Deliberative Democracy*[104] of the European Commission, recently created within the Joint Research Centre directorate-general (JRC) in order to support participatory and deliberative projects and policies at the EU level and to foster best practices in participatory and deliberative democracy across different levels of governance in the EU.

Of course the list of various types of EU contributions to the concept of participation and participatory democracy through binding and non-binding legal acts could be much longer and the points developed so far are certainly not exhaustive. We would like, however, to conclude this paragraph with four brief considerations on participation and participatory democracy in the EU that will be useful for the next steps in our research work: 1) on their limits and underuse; 2) on the relationship between participation and representation; 3) on the lack of a clear legal framework; 4) on their level of application. As it has been observed, it is not a mystery that the different tools of participatory democracy at the EU level *"remain unknown, scattered, and underused by the average European citizen"*[105] and have not *"evolved into a self-standing practice"*[106]. In fact, despite the inclusion of participation within the Lisbon Treaty, the EU governance process remains still far removed from citizens[107], and even worse it seems that the principle of political equality under which all the provisions on participatory democracy should[108] be interpreted is actually not properly applied, in so far as forms of elitism in European public policy-making at the Brussels level[109] continue to occur. Therefore, alongside with its underuse, limits

[103] *The New Leipzig Charter. The Transformative Power of Cities for the Common Good*. Nov. 2020. The Charter (an instrument of soft-law) defines its set of strategic principles of good urban governance providing a framework for EU member states to coordinate their post-2020 urban policies. These principles are: 1) urban policy for the common good; 2) integrated approach; 3) participation and co-creation; 4) multi-level governance; 5) place-based approach. In specific, it is interesting to mention that, despite the vagueness of the meaning of 'participation', the Charter refers to the need to design new forms of (public) participation able to help cities in urban development processes and to strengthen local democracy.

[104] Web page at https://knowledge4policy.ec.europa.eu/participatory-democracy_en.

[105] Alemanno, Alberto. 'Europe's Democracy Challenge: Citizen Participation in and Beyond Elections'. *German Law Journal*, vol. 21, no. 1, 2019, p.175.

[106] Alemanno, Alberto. 'Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission's Public Consultations in Light of the Principle of Political Equality'. *European Law Journal*, no. 26, 2020, p.118.

[107] Ferri, Delia. 'European Citizens… Mind the Gap! Some Reflections on Participatory Democracy in the EU'. *Perspectives on Federalism*, vol. 5, no. 3, 2013, p.80, which defines the EU governance as *"muddy"* and technocratic.

[108] Cuesta Lopez, Víctor. 'The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy'. *European Public Law*, vol. 16, no. 1, 2010, p.131.

[109] Kutay, Acar. 'Limits of Participatory Democracy in European Governance'. *European Law Journal*, vol. 21, no. 6, Nov. 2015, pp.810-811. The author contests the narrow definition of European civil

could also be observed with regard to the actual (limited) inclusiveness of participatory tools[110]. Secondly, what emerges from the EU legal order is the fact that participation is not an autonomous source of legitimation of the Union, but it remains in a subordinate position to representative democracy[111]. The aim of participatory democracy consists therefore in a desire to bring European citizens closer to the institutions, whose legitimacy[112] has already been guaranteed by the principle of representative democracy. The third observation targets all those scholarly arguments on the need for the EU to institutionalise supranational participatory channels through a clear legal framework in order to improve citizen participation[113]. Despite the fact that Articles 10-11 TEU would have provided for an ideal constitutional ground for the enactment of secondary law[114], it seems that so far a more informal approach based on soft-law has been privileged. The last consideration regards the level of application of the EU constitutional provisions on participation and participatory democracy, which is clearly the supranational level. Indeed, the principle of participation and its related concept of participatory democracy within the EU legal order do not refer in any way to the national and subnational levels, but is limited to participation in the EU level decision-making[115].

According to the EU legal order, therefore, participation and participatory democracy should be seen as the two complementary strategies contributing to

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society, that he thinks it is structurally confined only to those associations that are willing and able to participate (p.812).

[110] On this point, Alemanno, Alberto. 'Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission's Public Consultations in Light of the Principle of Political Equality'. *European Law Journal*, no. 26, 2020, pp. 114–35. In specific he criticizes the unconstrained discretion of the EU Commission on consultations (for example, how to frame them, and what to do with the outcome) (p.124), advocating for a re-design of consultations legal and policy framework (p.130).

[111] Alemanno, Alberto. 'Levelling the EU Participatory Playing Field: A Legal and Policy Analysis of the Commission's Public Consultations in Light of the Principle of Political Equality'. *European Law Journal*, no. 26, 2020, pp. 114–35, and Kutay, Acar. 'Limits of Participatory Democracy in European Governance'. *European Law Journal*, vol. 21, no. 6, Nov. 2015, p.818 that says that *"participation relies and depends on representation".*

[112] Again, on the link between participation and legitimation, see Ferri, Delia. 'L'Unione Europea Sulla Strada Della Democrazia Partecipativa?' *Istituzioni Del Federalismo*, no. 2, 2011, p.302.

[113] Alemanno, Alberto, and James Organ. 'The Case for Citizen Participation in the European Union: A Theoretical Perspective on EU Participatory Democracy'. *Citizen Participation in Democratic Europe: What next for the EU?*, edited by Alberto Alemanno and James Organ, ECPR Press/Rowman & Littlefield Publishers, 2021. Additionally, see Ferri, Delia. 'European Citizens… Mind the Gap! Some Reflections on Participatory Democracy in the EU'. *Perspectives on Federalism*, vol. 5, no. 3, 2013, p.81.

[114] *"L'art. 11 TUE offrirebbe una solida base giuridica per l'adozione di un regolamento in quest'ambito, eppure la Commissione non sembra aver mutato la scelta già fatta, rimanendo contraria ad un over-legalistic approach e ancorata al soft law. La limitata positivizzazione della partecipazione esprime al massimo grado il superamento delle procedure tradizionali tipiche del circuito rappresentativo, la volontà di uscire dalla rigidità degli schemi di partecipazione politica e di produzione normativa classici per trovare diverse forme di legittimazione. […]"* (Ferri, Delia. 'L'Unione Europea Sulla Strada Della Democrazia Partecipativa?' *Istituzioni Del Federalismo*, no. 2, 2011, pp.334-335).

[115] This consideration builds on what has previosuly been briefly covered in Chapter 1, paragraph 2.

democracy within the EU, where participatory practices are not meant to replace anyhow political representation. However, what is also true is that thanks to the EU constitutional contribution the principle of participation has become capable of providing for an additional channel of democratic legitimacy, building on a wider supranational governance perspective beyond the mere nation-states' governmental one based on representation. The fact of having only a wide constitutional principle without a legal framework able to systematize and institutionalise its practical application should be seen not only as a negative aspect, but also under a positive light: this lack indeed has not prevented a wide multitude of participatory practices, experiences, tools to develop and circulate beyond nation states' borders, especially at the local level[116], even without any normative support.

4. The constitutional contribution of the CoE legal order

In addition to the contribution of the EU legal order on the principle of participation and the concept of participatory democracy, it is useful to include in our analysis the contribution of the Council of Europe (CoE). The 27 EU member States, indeed, are subject not only to the EU legal order, but also to the legal order[117] of the CoE, whose treaties belong to the sphere of international law and therefore constitute a constitutional commitment for each signatory and ratifying State. Within the CoE, it is interesting to observe that the contribution to citizen participation has occurred in relation to democracy in the broad sense[118], but for the purpose of our research it is particularly interesting to

[116] As we will see in paragraph 5 of this Chapter.

[117] As already explained in Chapter 1, for the understanding of our use of the concepts of *"EU legal order", "CoE legal order"* and *"European legal space",* see von Bogdandy, Armin. 'The Transformation of European Law: The Reformed Concept and Its Quest for Comparison'. *MPIL Research Paper Series*, no. 14, 2016, p.13.

[118] Many and of diverse type are the CoE documents about participatory democracy and the principle of participation, the most relevant ones with an explicit mention of participation (legally binding or not) being the following ones. 1) Council of Europe Conventions: the *European Charter of Local Self-Government.* ETS No. 122, 1985, with its *Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority*, CETS No. 207, 2009; The *European Convention on the Participation of Foreigners in Public Life at Local Level*, ETS No. 144, 1992. 2) Committee of Ministers' Recommendations: *Recommendation CM/Rec(2009)1 of the Committee of Ministers to member states on electronic democracy (e-democracy)*, at https://www.coe.int/t/dgap/goodgovernance/Activities/Key-Texts/Recommendations/Recommendation_CM_Rec2009_1_en_PDF.pdf (which recognizes that information and communication technology (ICT) facilitates wider democratic participation); *Recommendation CM/Rec(2009)2 of the Committee of Ministers to member states on the evaluation, auditing and monitoring of participation and participation policies at local and regional level*, at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d1979 (which includes a self-assessment tool for citizen participation at the local level, the C.L.E.A.R. tool); *Recommendation CM/Rec(2011)14 of the Committee of Ministers to member states on the participation of persons with disabilities in political and public life*; Recommendation CM/Rec(2018)4 of the Committee of Ministers to

analyse participation in relation to the Council's work on local democracy. In fact, while in the EU the relation is between participation and democracy at the EU level, the CoE started focussing since the very beginning of its life on the relationship between participation and the local level of democracy, advocating for a true right to participate in the public affairs of local authorities. For the purpose of our work we will therefore considerate the contribution of the CoE to participation limited to the local level[119].

At the Treaty level, the highest status of the CoE legal instruments, we can find three main texts dealing with participation at the local level, and they constitute the object of our analysis: 1) the *European Charter of local self-government ('the Charter') (1985)*; 2) the *Additional Protocol to the European Charter of local self-government on the right to participate in the affairs of a local authority (2009)*; 3) the *Convention on the participation of foreigners in public life at local level (1992)*. Among them, of paramount importance is without any doubt the Charter[120], that thanks to its constitutional value can be said to have paved the way for establishing an European Constitutional Local Government Law[121]. Serving as the highest-profile output of the CoE on local democracy, since its promulgation in 1985 the Charter imposes international legal standards of local self-government in order to safeguard the principle of local autonomy: within this scope, it is in its very preamble that the first reference to the *"right of citizens to participate in the conduct of public affairs"*

member States on the participation of citizens in local public life, at https://rm.coe.int/16807954c3 (+ its explanatory memorandum https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168077df31. 3) Committee of Ministers' Guidelines: CM(2017)83-final "Guidelines for civil participation in political decision making", at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016807509dd. 4) Congress of Local and Regional Authorities: *Revised European Charter on the Participation of Young People in Local and Regional Life*, adopted by the Congress of Local and Regional Authorities of Europe (10th session – 21 May 2003 – Appendix to Recommendation 128), at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168071b4d6. 4) Conference of INGOs of the CoE: *Code Of Good Practice For Civil Participation In The Decision-Making Process Revised"*, 2019, at https://rm.coe.int/code-of-good-practice-civil-participation-revised-301019-en/168098b0e2. 5) Centre of Expertise for Good Governance of the Council of Europe: the *"Civil Participation In Decision- Making Toolkit"*, 2020, at https://rm.coe.int/civil-participation-in-decision-making-toolkit-/168075c1a5.

[119] This comes as a consequence of our preliminary considerations in Chapter 1 on forms and levels of democracy, when we stated that it was our intention to look at participation at the local level of democracy. As already explained at the end of the previous paragraph, within the EU legal order this was not possible, because the level of application of the EU constitutional provisions on participation and participatory democracy is clearly limited to the supranational level.

[120] Its importance derives also from the status of its ratification: since its promulgation in 1985, it has been ratified by *all* the 46 CoE member states (table of ratifications available at https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=122). Unlike that, the Additional Protocol has been ratified by 21 member states (as of 6 February 2023, data available at https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=207), while the 1992 Convention by 9 (as of 6 February 2023, data available at https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=144).

[121] An unparalleled legal study on the constitutional value of the Charter is represented by the work of Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe*. Brill, 2018.

was unveiled, with the recognition that this right belongs to the constitutional tradition of all the CoE member states. The origin of citizens' right to participate, however, could be traced back much earlier[122] to the Charter adopted by the General Assembly of the Council of European Municipalities (CEM)[123] in 1953, namely the *"European Charter of municipal liberties"*[124]. That Charter proclaimed municipal self-government *"as the bulwark of personal liberties"* against the encroachments of the nation State, recognizing that *"municipal rights are based on centuries-old traditions"*, among them being the right of citizens to work together for the development of municipalities that – on their side – must *"strive to enable them to participate in the town's life"*. Coming back to the 1985 Charter, it commits[125] the Parties in recognising the principle of local self-government in domestic legislation and, if possible, in their Constitution (Article 2). Moreover, it has to be pointed out that the Charter has not only a legal value, but also a political dimension: this emerges from the monitoring work of the CoE's internal body named *Congress of Local and Regional authorities of Europe* ('the Congress')[126], that carries out monitoring missions in the 46 Member States and issues reports and recommendations addressed to States assessing their compliance with the Charter implementation[127]. Constituted by the two

[122] Among the others, it is of this opinion Himsworth, C. M. G. *The European Charter of Local Self-Government: A Treaty for Local Democracy.* Edinburgh University Press, 2015, p.16. See further pp.14-29 of the same contribution for an overview on the origins of the European Charter of local self-government.

[123] It was later enlarged so as to include also Regions, becoming the *Council of European Municipalities and Regions (CEMR)* as it is currently named.

[124] Council of European Municipalities. *European Charter of Municipal Liberties*. 16 Oct. 1953.

[125] On the ambivalence of the Charter see Himsworth, C. M. G. *The European Charter of Local Self-Government: A Treaty for Local Democracy.* Edinburgh University Press, 2015, pp.68-76. The author addresses the well-known critique to the effectiveness of the Charter: while on one side *"it was to be a fully binding treaty, imposing legal obligations"*, on the other *"there was a tendency to weaken the effectiveness of those obligations"*. This gets clearer when looking at Article 12 of the Charter, that permits each State to consider itself bound by only a certain number of paragraphs, which are up to each state to choose.

[126] The Congress of Local and Regional Authorities is an institution of the CoE, responsible for strengthening local and regional democracy in its 46 member states. Originally established in 1957 as the *Conference of local authorities of Europe*, renamed *Conference of local and regional authorities* in 1975, later in 1979 as *Standing conference of local and regional authorities of Europe*, and eventually renamed with its current name in 1994, it is composed of two chambers – the Chamber of Local Authorities and the Chamber of Regions – and three Committees (monitoring committee, governance committee, current affairs committee). Its main aim is to safeguard the implementation of the European Charter of Local self-government, through the assessment of the situation of local and regional democracy in the CoE member states.

[127] On the political value of the Charter and the Congress' work on keeping *"local autonomy issues on domestic political agendas"* see also Himsworth, C. M. G. *The European Charter of Local Self-Government: A Treaty for Local Democracy.* Edinburgh University Press, 2015, pp.129 and 147. The monitoring reports and recommendation for each party State can be found at https://www.coe.int/en/web/congress/congress-reports#{%2254213415%22:[]}. For a comparative analysis between States and compliance with the Charter articles it is very useful to consult the website https://www.congress-monitoring.eu/en/.

elements[128] of political autonomy, and of its democratic nature (Article 3), the principle of local self-government is a right and ability of local authorities, and is regarded as a vital contribution to democracy. At the same time, the Charter recognises that this right should not interfere with all those *"forms of direct citizen participation where it is permitted by statute"* (among which, assemblies of citizens or referendums, as pointed out in Article 3(2)). As it was observed[129], this is *"as far as the text of the Charter itself goes in providing for public participation in local government",* thus constituting an aspect not further covered[130]: not even the Explanatory Report to the Charter went much further, limiting itself to acknowledging the important role of local authorities because of their proximity to citizens and, as such, being the right level of government for offering to citizens opportunities *"of participating effectively in the making of decisions affecting his everyday environment"*[131].

With a view to building upon and completing the Charter's contribution to citizen participation, the *Additional Protocol on the right to participate in the affairs of a local authority* was promulgated in 2009. Being a legal instrument that complements the main Treaty and have its same value, the Protocol is dedicated entirely to citizen participation, taking up the concept of 'right to participate' already proclaimed in the Charter in its own preamble. The right to participate is here further described as *"the right to seek to determine or to influence the exercise of a local authority's power and responsibilities"* (Article 1.2), in order to have *"better policies and services"*[132] at the local level. In order to guarantee that and since the provisions of the Protocol are not self-executing, it is stipulated that subsequent domestic law *"shall provide means of facilitating the exercise of this right"* (Article 1.3). This obligation is better described at Article 2, where – despite criticism raised on the generality of these provisions[133] – it is outlined that this could occur through: a) the empowerment of local authorities *"to enable, promote and facilitate"* the exercise of this right; b) through the establishment of local level procedures for involving

[128] Panara, Carlo, and Michael Varney. *Local Government in Europe. The 'Fourth Level' in the EU Multilayered System of Governance.* Routledge, 2013, p.372.

[129] Himsworth, C. M. G. *The European Charter of Local Self-Government: A Treaty for Local Democracy.* Edinburgh University Press, 2015, p.40.

[130] An implicit reference to citizen participation lies at Article 5 of the Charter, where it is reported the need for consultations of the local community concerned, possibly by referenda, in case of any change in the boundaries of a local authority.

[131] CoE. *Explanatory Report to the Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority*. 2009.

[132] As remarked in the CoE. *Explanatory Report to the Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority*. 2009, p.3.

[133] Himsworth, C. M. G. *The European Charter of Local Self-Government: A Treaty for Local Democracy.* Edinburgh University Press, 2015, p.83.

people, procedures for accessing documents, measures for the inclusion of people that are outside participatory channels, procedures for answering complains and suggestions[134] of citizens concerning the work of local authorities; c) the encouragement for the use of ICTs to foster participation. As it has been observed[135], it seems evident that the Protocol does not confer greater freedom to local authorities, but rather establishes more obligations on them towards their citizens and their rights (the verb 'shall' is repeated multiple times, putting additional emphasis on the necessity for local authorities to support, facilitate, enable citizens' right to participate), therefore limiting their sphere of action through a specific commitment towards citizen participation. What lies at the core of the Protocol is, indeed, the right of everyone within the jurisdiction of the ratifying state to participate in the affairs of a local authority. We can say then that what emerges from the Protocol is the establishment of an individual right of citizens, that goes in parallel (and also in opposition) to the Charter right to local self-government exercised by local authorities[136]. Participatory rights, on their side, should receive a wide interpretation so as to refer not only to 'citizens' *in strictu senso* (as referred to in Article 3.2 of the Charter), but to 'nationals' (Article 1.4.1 of the Protocol), that according to the Explanatory Report to the Protocol[137] it was the term chosen in order to be in line with the terminology used by the CoE in the 1992 *Convention on the participation of foreigners in public life at local level*.

In addition to the international legal guarantee concerning the right to participate provided by the 1985 Charter and the 2009 Protocol, also the 1992 Convention contributed to the principle of participation. The Convention addresses in specific all those 'foreign

[134] Article 2(2), ii, d) outlines that measures for granting the right to participatie in the affairs of a local authority shall secure the establishment of *"mechanisms and procedures for dealing with and responding to complaints and suggestions regarding the functioning of local authorities and local public services"*: using the word 'suggestions' the Protocol in this way seems to welcome any kind of contribution that could come from the citizens' side as a spontaneous initiative towards the local community.

[135] Himsworth, C. M. G. *The European Charter of Local Self-Government: A Treaty for Local Democracy.* Edinburgh University Press, 2015, p.83.

[136] In accordance to a recent critique that has been illustrated, it could actually be better to talk of 'territorial authorities' instead that 'local authorities' if we observe that Article 13 of the Charter considers within *"all the categories of local authorities"* also the regional authorities, therefore creating confusion on the precise target of the Charter. As the author himself however observes, this could also be a consequence of the heterogeneity and complexity in categorizing what is to be included in 'local authorities' and what in 'regional authorities' in all the 46 signatory and ratifying member states with their different legal traditions, in addition to the objective fact that the Charter was written and promulgated in a different historical context where the present categories were still somehow blurred. Despite this confusion, however, the Charter was originally *"intended to apply first and foremost to public territorial authorities with a truly local dimension and not to those higher level authorities from which local authorities are delegated powers and/or are being supervised"* (p.91). See on this point Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe.* Brill, 2018, pp.87-91.

[137] CoE. *Explanatory Report to the Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority*. 2009. See also Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe.* Brill, 2018, p.133.

residents' who are not nationals of the State, but that reside lawfully on its territory (Article 2), granting them participatory rights in the decision-making process: the right of voting and standing for elections in local authorities after five years of residency in the host country; the right to freedom of expression, to freedom of peaceful assembly and to freedom of associations; lastly, the provision for the creation of consultative bodies for the representation of foreign residents in relation to local public life[138]. Through this legal framework there has been an extension of participation rights beyond the mere boundaries of the legal concept of 'citizen'[139].

All in all, what could be considered as the main contribution of the CoE legal order to participation is the inclusion in Treaty level documents of this principle and, more precisely, the connection drawn by the CoE between participation and local democracy. Among the many contributions – of different nature and of different level – of the CoE, the 1985 Charter, its additional Protocol of 2009, and the 1992 Convention are to be considered as the main constitutional[140] contribution of the CoE useful for our work on the principle of participation: this comes despite a general aversion of national courts towards the recognition of the European constitutional value of the Charter[141]. Noteworthy, however, is the failure to mention the concept of participatory democracy in these Treaties, while the terminological presence of this concept is well known, since the Council of Europe itself uses this term in its daily work (it is significant that within the structure of the

[138] *"Local public life"* shall mean all matters, services and decisions and in particular the management and administration of the affairs relating to or concerning a local community (CM/Rec(2018)4).

[139] On this point see also Kirchmair, Lando. 'International Law and Public Administration: The European Charter of Local Self-Government'. *Pro Publico Bono*, vol. 3, 2015, p.133.

[140] Once more, in specific on the constitutional value of the Charter and the consideration of that as a source of public international and EU law see Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe.* Brill, 2018. According to the author, the Charter constitutes the reference point for the gradual establishment of a common European constitutional local government law to which states must adhere.

[141] For a further in-depth reading on the jurisprudence of member states on the status of the Charter see Boggero, Giovanni. 'La Carta Europea Dell'autonomia Locale Nella Giurisprudenza Degli Stati Europei'. *Le Regioni*, no. 5–6, 2015. Among the others, worth mentioning is the experience of the Italian Constitutional Court, that in its latest judgement containing a mentioning of the Charter (Judgment of 24 March 2015, No. 50), qualified the Charter as a mere policy document ("documento di indirizzo") and, because of that, it does not constitute a "parametro interposto" in rulings on the constitutional adjudication of legislation. This is in line with the previous Judgement no.325/2010, where the Court qualified the Charter provisions as essentially generic policy rules: *"va evidenziato che gli evocati articoli della Carta europea dell'autonomia locale non hanno uno specifico contenuto precettivo, ma sono prevalentemente definitori (art. 3, comma 1), programmatici (art. 4, comma 2) e, comunque, generici (art. 4, comma 4)".* For the Italian Constitutional Court experience we recommend reading Boggero, Giovanni. 'La Carta Europea Dell'autonomia Locale Nella Giurisprudenza Degli Stati Europei'. *Le Regioni*, no. 5–6, 2015, pp. 1099–1107. In a similar way, the Charter provisions are seen as being only of programmatic value and *"not sufficiently precise for local governments to directly rely on them in courts"* also in Germany and Austria: see Kössler, Karl, and Annika Kress. 'European Cities Between Self-Government and Subordination: Their Role as Policy-Takers and Policy-Makers'. *European Yearbook of Constitutional Law 2020. The City in Constitutional Law*, edited by Ernst Hirsch Ballin et al., Springer, 2020, p.279.

Secretariat General, there is the *Division of Elections and Participatory Democracy*[142] as part of the Directorate General of democracy and human dignity). All together these international law Treaties could be regarded as constituting the constitutional[143] roots elaborated by the CoE for the participation of citizens to local level democracy.

5. From the constitutional roots to practices and instruments: the contribution of the *democratic innovations*

The majority of the experiences of participatory democracy in the world are occurring at the local level, within municipalities or even smaller districts[144], and the vast majority of them often begins with an informal character[145] before eventually starting to circulate as more structured and institutionalised models considered as a best practice (a clear example of that is the case of the participatory budget of Porto Alegre in Brazil, as we will see in this paragraph). Over the last decades a wide variety of participatory practices has been tried out in Europe, as well as in other parts of the world, at all levels of government, even though the local level seems to be the privileged one because of its proximity with citizens: from this perspective, indeed, the wider local autonomy, the more this level of government can invent and experiment innovative forms of citizen participation[146]. Because of that, in this paragraph we will do a run-through of some common examples of participatory democracy practices, instruments or processes that are

[142] It can be found at https://www.coe.int/en/web/participatory-democracy.

[143] We define the contribution of these CoE Treaties as constitutional in line with that phenomenon defined as the 'constitutionalisation of international law' and 'internationalisation of constitutional law' elaborated in Palermo, Francesco. 'Internazionalizzazione Del Diritto Costituzionale e Costituzionalizzazione Del Diritto Internazionale Delle Differenze'. *European Diversity and Autonomy Papers*, no. 2, 2009. The author in specific elaborated this perspective for referring to the ongoing European integration process with concern to the field of diversities and minority protection for referring to the multitude of legal sources of various national, supranational and international levels influencing each other on that topic. The same, we could say, is occurring with concern to participation and recognition of local autonomy.

[144] Allegretti, Umberto. 'Participatory Democracy in Multi-Level States'. *Citizen Participation in Multi-Level Democracies*, edited by Cristina Fraenkel-Haeberle et al., Brill, 2015, p.211.

[145] Henk, Addink. *Good Governance Concept and Context*. Oxford University Press, 2019, p.140.

[146] Palermo, Francesco. 'Participation, Federalism, and Pluralism: Challenges to Decision Making and Responses by Constitutionalism'. Citizen Participation in Multi-Level Democracies, edited by Cristina Fraenkel-Haeberle et al., Brill, 2015, pp.47: *"To be effective, participation needs to be carried out with some passion, to be moving and even exciting for people, motivating them to engage. Participation is therefore more likely to occur on issues at the heart of people's interests. These issues are normally either very local, or very foundational, such as constitutional questions".* On this consideration see also Trettel, Martina. 'Democratic Innovations in (Subnational) Constitution-Making: The Institutionalized Case(s) of the Italian Provinces of Trento and Bolzano'. *Innovation: The European Journal of Social Science Research*, 2021, p.2, and Nicolini, Matteo. 'Theoretical Framework and Constitutional Implications: Participatory Democracy as Decision-Making in Multilayered Italy'. *Federalism as Decision-Making*, edited by Francesco Palermo and Elisabeth Alber, Brill Nijhoff, 2015, p.447.

occurring at the local level in order to give us an idea of the participatory European scene. It is important to point out that this will be done without any claim to exhaustiveness since such an in-depth study would need to find space in a completely different research, and it would also require the systematisation of a phenomenon that, in its empirical dimension, goes much beyond the references provided by our constitutional analysis. The very empirical dimension of those ground-level participatory experiences constitutes, indeed, not an easy and frequent task for jurists to handle, and we are conscious of the difficulty of systematising such a broad and diversified panorama, since it would also require a diversified methodology and methods. In fact, it is important to point out that there is currently no shared overall understanding nor theoretical framework over participatory democracy practices occurring specifically at the local level and within the EU legal space, whether they have also been institutionalised or not. Rather than typologies and systematisations of participatory practices it is, indeed, more common to find just lists of examples[147]. Additionally, in order to be explained, the overall scenario would require us to take into account also other disciplinary perspectives that would complement the legal one: as mentioned a moment ago, addressing this problem in more detail will therefore remain beyond the scope of our work. Because of that, and for the purpose of the current research, we will instead limit ourselves to borrowing the already existing category defined by political scientists of the so called 'democratic innovations' (DIs) – a field and umbrella term aimed at rethinking the relationship between the State and society by increasing opportunities for civic participation – in order to provide for a brief overview of the main participatory experiences.

On the border between participatory and deliberative traditions, this category has been elaborated by democratic theorists for trying to give some order and systematise within one theoretical framework citizens' forms of participation around the world, which are obviously too many to analyse in detail[148]. Those new types of participation are taking place at the local level also thanks to the governance shift described in Chapter 1: while both the concepts of governance and DIs are rooted in political sciences, however it is also common for all other sciences to talk more generally of ways for contributing to the innovation of democracy. While it can be stated that this term generally suffers from a lack of clarity and elude general characterisation because of the wide diversity among

[147] Among the others, see for example the recent contribution of Sgueo, Gianluca. *The Practice of Democracy. A Selection of Civic Engagement Initiatives*. Study, European Parliament, 2020.

[148] For a worldwide perspective on participatory practices on-ground, the online crowdsourcing platform *Participedia* provides for a useful tool: see https://participedia.net/.

innovations, for the purpose of this work we will use the definition that among many others seems to better describe and frame the phenomenon as the most recent and (almost) all-encompassing. Accordingly[149], democratic innovations could be described as *"processes or institutions that are new to a policy issue, policy role, or level of governance, and developed to reimagine and deepen the role of citizens in governance processes by increasing opportunities for participation, deliberation and influence"*. The role of citizens, in specific, is reimagined so as they could be seen not only as mere voters and receivers of top-down policies and decisions, but as co-producers and problem-solvers that could contribute also as individuals beyond organised civil society groups[150]. What emerges is a clear link between the method of participation (alongside with deliberation and influence) and the concept of governance as a relationship between the State and all those non-State actors that are contributing to democracy in some ways beyond representation[151]. Since the practices of DIs are many and diverse, a recent identification into 4 families is of use[152]: 1) mini-publics, 2) participatory budgeting (PB), 3) referenda and citizens' initiatives, 4) collaborative governance. In addition to these, digital participation (also referred to as e-participation) constitutes a common trend that can be observed in each family[153]. The first family referred to as mini-publics, comprises all those consultative bodies made of citizens who deliberate on specific issues in order to support the work of

[149] Elstub, Stephen, and Oliver Escobar. 'Defining and Typologising Democratic Innovations'. *Handbook of Democratic Innovation and Governance*, edited by Stephen Elstub and Oliver Escobar, 2019, p.11. Before this definition, the only landmark definition providing form some order in relation to other broad concepts of 'social innovation', 'institutional innovation', 'participatory innovation' was the contribution of G. Smith that defined democratic innovations *as "institutions that have been specifically designed to increase and deepen citizen participation in the political decision-making process"* (see Smith, Graham. *Democratic Innovations. Designing Institutions for Citizen Participation*. Cambridge, 2009, p.1). On this recognition see also Elstub, Stephen, and Oliver Escobar. 'Defining and Typologising Democratic Innovations'. *Handbook of Democratic Innovation and Governance*, edited by Stephen Elstub and Oliver Escobar, 2019, p.12.

[150] Elstub, Stephen, and Oliver Escobar. 'Defining and Typologising Democratic Innovations'. *Handbook of Democratic Innovation and Governance*, edited by Stephen Elstub and Oliver Escobar, 2019, p.15. We acknowledge that when mentioning the term 'co-production' we enter the realm of a new and broad literature outside the scope of our research, for which we may refer to further readings: among the others, see Osborne, Stephen P., et al. 'Co-Production and the Co- Creation of Value in Public Services: A Suitable Case for Treatment?' *Public Management Review*, vol. 18, no. 5, 2016, pp. 639–53, and Campomori, Francesca, and Mattia Casula. 'Institutionalizing Innovation in Welfare Local Services through Co-Production: Toward a Neo-Weberian State?' *Italian Political Science Review/Rivista Italiana Di Scienza Politica*, 2021.

[151] For the understanding of the concept of 'governance' and its development from the original conception of 'government' see Chapter 1, paragraph 4.

[152] In the absence of an unique widely recognized classification, the one of Elstub-Escobar seems to be, again, applicable here.

[153] The advent of new information and communication technologies (ICTs), in fact, revitalized the debate over participatory theories in reference to the contribution that digital tools could bring to citizen participation: as an introduction, see Lember, Veiko, et al. 'Engaging Citizens in Policy Making: The Potential and Challenges of e-Participation'. *Engaging Citizens in Policy Making E-Participation Practices in Europe*, edited by Tiina Randma-Liiv and Veiko Lember, Edward Elgar Publishing, 2022, pp. 1–6. We already talked of the influence of ICTs on democracy in this Chapter: see footnote no.22 *et seq*.

political representatives' bodies, providing them with recommendations to be considered in public decision-making. This family is, in turn, diversified, and all those practices of 'citizens' assemblies', 'citizens' juries', 'consensus conferences', 'deliberative polling', and 'planning cells' are considered to be all types of mini-publics. As it has been claimed[154], mini-publics seems to represent the favoured method for the institutionalisation of deliberative democracy, since they have at their core deliberation as a method for reaching a shared position on a specific issue: their deliberation, however, remains connected to representative decision-making[155]. The second family – participatory budgeting (PB) – refers to processes where ordinary citizens can participate through their direct say in deciding how public budget ought to be allocated. It was Porto Alegre[156] in 1989 the first city in the world to elaborate and implement this instrument for engaging citizens in decisions related to public finances: a novelty at that time, it rapidly circulated in a great number of local authorities around the world, becoming a best practice everywhere recognized as such (and institutionalised) for citizen participation[157]. With regard to the referenda and citizens' initiatives – the third family – the reference goes to multiple cases of direct democracy that, in the absence of a general theory, would require a comparative research that should find place in another work. In brief, what could be mentioned here is that these processes of direct democracy have been often institutionalised in EU countries through the contribution of laws or included in Constitutional texts[158]. The initiative could come from both parts – the governmental as well the citizens' one – and its result could be legally binding as well as not[159]. Proceeding with the last family, it has been referred to as

[154] Harris. 'Mini-Publics: Design Choices and Legitimacy'. *Handbook of Democratic Innovation and Governance*, edited by Stephen Elstub and Oliver Escobar, Edward Elgar Publishing, 2019, p.48.

[155] For an introductory overview on mini-publics see further Escobar, Oliver, and Stephen Elstub. 'Forms of Mini-Publics: An Introduction to Deliberative Innovations in Democratic Practice'. *New Democracy*, Research and Development Note 4, 2017, https://www.newdemocracy.com.au/2017/05/08/forms-of-mini-publics/.

[156] For the experience of Porto Alegre see, among the others, Allegretti, Giovanni. 'Giustizia Sociale, Inclusività e Altre Sfide Aperte per Il Futuro Dei Processi Partecipativi Europei'. *Democrazia Partecipativa: Esperienze e Prospettive in Italia e in Europa*, edited by Umberto Allegretti, Firenze University Press, 2010, pp.385-388.

[157] For further readings see Ganuza, and Gianpaolo Baiocchi. 'The Long Journey of Participatory Budgeting'. *Handbook of Democratic Innovation and Governance*, edited by Stephen Elstub and Oliver Escobar, Edward Elgar Publishing, 2019, pp. 77–87.

[158] With concern to referenda, the majority of EU member states have a constitutional provision on them (two exceptions are Cyprus and the Netherlands, which have no mention of them in their Constitutions): see the Constitute project online platform for comparing Constitutions (https://www.constituteproject.org/?lang=en).

[159] May it be sufficient here to refer to Jäske, Maija, and Maija Setälä. 'Referendums and Citizens' Initiatives'. *Handbook of Democratic Innovation and Governance*, edited by Stephen Elstub and Oliver Escobar, Edward Elgar Publishing, 2019, pp. 90–102 for an introductory systematisation of referenda and citizens' initiative within the field of DIs.

the most internally diverse[160]. In fact, under the term 'collaborative governance' we could find a great variety of practices, mostly occurring at the local level, that in a nutshell seek to allow for a collaboration between state actors and citizens often through the mediation of other stakeholders like NGOs or community groups in order to produce specific policy outcomes[161]. Because of its focus on citizens as active contributors to the production and delivery of public policies and services[162], the concept of collaborative governance intercepts not only the stream of democratic theory, but also the one of public administration scholarship[163]. The systematisation provided by the category of democratic innovations is, however, obviously questionable: while on one side it has the advantage of providing for an overall systematisation of diverse types of citizen participation, on the other side it is fair to acknowledge that it is not clear how certain types of participation are included – at least within the four main categories briefly reported – such as participation in urban planning[164], community gardens, neighbourhood theatres[165], or large-scale public debates like the French débat public[166].

[160] By Elstub, Stephen, and Oliver Escobar. 'Defining and Typologising Democratic Innovations'. *Handbook of Democratic Innovation and Governance*, edited by Stephen Elstub and Oliver Escobar, 2019, p.27. For a collection of practices it could be useful to consult the 'Collaborative Governance Case Database' at www.collaborationdatabase.org. For a description of this database see Douglas, Scott, et al. 'Understanding Collaboration: Introducing the Collaborative Governance Case Databank'. *Policy and Society*, 2020. The definition of collaborative governance conceptualized by scholars for the purpose of the database is the following one: *"a collective decision-making process based on more or less institutionalized interactions between two or more actors that aims to establish common ground for joint problem solving and value creation"* (p.4). With reference to the field of collaborative governance, four different strands of research (that we will just mention in this footnote) were suggested: collaborative management; co-creation; collaborative public innovation; participatory and deliberative governance (see Sørensen, Eva, et al. 'Political Boundary Spanning: Politicians at the Interface between Collaborative Governance and Representative Democracy'. *Policy and Society*, vol. 39, no. 4, 2020, p.532). Lastly, among many others, the definition of collaborative governance provided in Ansell, Chris, and Alison Gash. 'Collaborative Governance in Theory and Practice'. *Journal of Public Administration Research and Theory*, vol. 18, no. 4, 2008 still constitutes a reference point: *"A governing arrangement where one or more public agencies directly engage non-state stakeholders in a collective decision-making process that is formal, consensus-oriented, and deliberative and that aims to make or implement public policy or manage public programs or assets"* (p.544).

[161] This could be stated on the basis of the definition provided in Bussu, Sonia. 'Collaborative Governance: Between Invited and Invented Spaces'. *Handbook of Democratic Innovation and Governance*, edited by Stephen Elstub and Oliver Escobar, Edward Elgar Publishing, 2019, p.62.

[162] Bussu, Sonia. 'Collaborative Governance: Between Invited and Invented Spaces'. *Handbook of Democratic Innovation and Governance*, edited by Stephen Elstub and Oliver Escobar, Edward Elgar Publishing, 2019, p.60.

[163] Blomgren Amsler, Lisa. 'Collaborative Governance: Integrating Management, Politics, and Law'. *Public Administration Review*, vol. 76, no. 5, 2016, pp. 700–11.

[164] We may refer here to further readings: see, for example, Laws, David, and John Forester. *Conflict, Improvisation, Governance. Street Level Practices for Urban Democracy.* Routledge, 2015 for the concept of "*doing democracy"* for referring to street level democratic processes and governance in (participatory) urban planning.

[165] These participatory practices could be found, for example, on the online platform Participedia mentioned previously at footnote 148.

[166] These and many other participatory practices cannot be investigated here as not functional for the purpose of our work. On the débat Public, for example, see further Nicotina. 'A Procedural Idea of

In comparison to the contribution of political sciences, that one of law has been much more limited. From this perspective we follow up on the core concept of *legal pluralism* acknowledging that the law does not only derive from the state, but also evolves from society[167]. As a consequence, the institutionalisation of participatory practices via legal means usually comes only at a second phase, after ground-level experiences have already been put in practice and consolidated. In addition to the variety of practices that we have only briefly listed, indeed, it is useful to notice that certain participatory experiences have been later institutionalised at different levels of government[168], even though the majority remains in operation without the need for regulatory frameworks. Interesting to mention is that for all those participatory practices occurring at the local level, the lack of an explicit anchorage in the Constitution and in a law on that does not prevent their realisation. Moreover, sometimes it could even seem that a legal framework is not actually needed as these practices could easily keep on circulating without that. However, it seems fair enough to admit that developing a legal framework would have the advantage

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Environmental Democracy: The "Débat Public" Paradigm within the EU Framework'. *Review of European Administrative Law*, vol. 14, no. 2, 2021, pp. 85–106.

[167] On this point the pathbreaking contribution is the one of Ehrlich, Eugen. *Fundamental Principles of the Sociology of Law.* Harvard University Press, 1936, where he challenged the state centred conception of law using the concept of *"living law"* for referring to the law practiced by society as opposed to law enforced by the State, thus proposing a pluralism of legal orders in parallel to the State's one. According to him, not all legal phenomena have their source in the State. This concept constituted later a starting point for the modern theory of 'legal pluralism', which reconceptualises the relationship between the law and society by claiming a post-modern view of law according to which there are multiple sources of legitimacy outside state law. Legal pluralism is therefore understood as an alternative to the Westphalian model paradigm with its inclusion of both state law and non-state law: for an overview on this theory see Tamanaha, Brian Z. 'Understanding Legal Pluralism: Past to Present, Local to Global'. *Sydney Law Review*, vol. 30, no. 3, 2008, pp. 375–411. For a position in support of legal pluralism as the breeding ground for transnational law see Bostan, Alexandru. 'Transnational Law–a New System of Law?' *Juridical Tribune*, no. 11, 2021, pp. 332–59. Additionally, see Avbelj, Matej. 'The Theory of Principled Legal Pluralism'. *The European Union under Transnational Law,* Hart, 2018, pp. 21–40, where the author argues that new legal pluralism includes collectively binding norms not posited by the State (defined as *"anti-state legal pluralism",* p.26). For the understanding of these concepts, I am thankful to Prof. Koen van Aeken and its course on *"Legal research methodology"* that I attended between October-December 2021 during my visiting research stay at the University of Antwerp.

[168] With concern to the institutionalisation of participatory practices it is interesting to mention the Italian experience. In that regard see for example: 1) Trettel, Martina. 'Democratic Innovations in (Subnational) Constitution-Making: The Institutionalized Case(s) of the Italian Provinces of Trento and Bolzano'. *Innovation: The European Journal of Social Science Research*, 2021 for the institutionalisation of two cases of subnational participatory Constitution-making; 2) Cittadino, Federica, and Martina Trettel. 'Il "Dibattito Pubblico" in Prospettiva Multilivello: Tra Mito Partecipativo e Prassi Istituzionale'. *Istituzioni Del Federalismo*, no. 3, 2020, pp. 563–68 for the institutionalisation of the 'dibattito pubblico'; 3) Brunazzo, Marco. 'Istituzionalizzare La Partecipazione? Le Leggi Sulla Partecipazione in Italia'. *Istituzioni Del Federalismo*, no. 3, 2017, pp. 837–64 and Alber, Elisabeth, and Alice Valdesalici. 'Framing Subnational "Institutional Innovation" and "Participatory Democracy" in Italy: Some Findings on Current Structures, Procedures and Dynamics'. *Federalism as Decision-Making*, edited by Francesco Palermo and Elisabeth Alber, Brill Nijhoff, 2015, pp. 448–78 for the experience of some Italian regions in the institutionalisation of participation at the subnational level through regional legislation. As already explained, it is not possible here to properly go through all the cases of institutionalisation of participatory practices as it would require a comparative work based also on empirical ground that goes far beyond the scope of our research.

of facilitating participatory practices, granting them also a wider legitimation and institutional recognition: a general move towards institutionalisation, indeed, has been underway in the latest years.

Moving towards a conclusion, the aim of this paragraph was to give a general overview of what goes beyond mere constitutional principles and legal texts: that is the social reality of hundreds of participatory practices occurring at all levels of government, that thanks to a generalised governance shift are developing creative types of participation for involving citizens beyond mere representation schemes. Additionally, innovative practices of citizen participation often go beyond doctrinal distinctions between participatory, deliberative and direct democracy, often constituting participatory practices founded on deliberative methods. The category of the democratic innovations was used here as it seemed the functional umbrella term able to depict and systematise the huge variety of practices: it seems clear, however, that despite the diversities among practices what characterises and unites all of them is a common belonging to the broadest field of participation – the keyword and core principle of our Chapter. In a nutshell, therefore, we consider the concrete grass-roots practices of citizen participation under the umbrella term of 'democratic innovations' in so far as they are designed for renovating representative democracy. DIs on their side could however be situated within the broadest field of 'participation'[169] outlined by this principle. As a consequence of that, our reasoning and arguments lead us to say that it is possible to recognise the constitutional significance of local level participatory practices and of what have been defined as 'democratic innovations' as a consequence of their implementation of the European constitutional principle of participation[170].

[169] Evidence coming from other scholars also points out to participation and participatory democracy as the broad field where the democratic innovations are rooted, recognizing the undeniable influence of participation on DIs beyond the mere deliberation: see on this point Elstub, Stephen, and Oliver Escobar. 'Defining and Typologising Democratic Innovations'. *Handbook of Democratic Innovation and Governance*, edited by Stephen Elstub and Oliver Escobar, 2019, p.16 (and their further references), and Asenbaum, Hans. 'Rethinking Democratic Innovations: A Look through the Kaleidoscope of Democratic Theory'. *Political Studies Review*, 2021, p.3.

[170] We would like to remind the reason why we use the concept of 'participation' over that one of 'deliberation': the reason lies in the constitutional terminology within the European legal space, since while national Constitutions as well as EU and CoE constitutional Treaties refer to participation, they never refer to deliberation (which instead seems to be the preferred concept for political scientists).

6. Limits and challenges

In our search for the constitutional and legal roots of the principle of participation in the European legal space some last considerations with regard to current limits and future challenges are needed before moving onwards. As we saw, there is quite a wide gap between the constitutional roots and the on-ground implementation of the principle, which is often left to the original elaboration and practical implementation of local authorities. This, however, does not appear to be a disadvantage, since it leaves freedom for innovation to the various levels of government, particularly the local one, that can therefore come up with democratic innovations. Thus, despite the usual vagueness of constitutional principles, their possibility of allowing different interpretations of them may actually constitute an advantage.

Within the debates on democracy, the overcoming of the representative dimension of democracy has long been a well-known and shared concern in the doctrine, in parallel with an awareness that a true renewal of democracy can only come through an ever greater legitimisation of its participatory dimension. Also thanks to this increasingly widespread consciousness, a growing number of participatory practices is flourishing not only within the EU but also outside, whether they are supported by governments (at all levels) or not. It is clear, however, that full legitimisation of participation has not yet been achieved, and that there are still many limits to be addressed. A first considerable limit could be seen at the EU level, where EU democracy has been accused of *"keeping citizens in a box"*[171]: accordingly, looking at citizen participation in contributing to the EU agenda, criticism has been raised towards the Union's machinery as it seems to keep on perceiving citizen participation as undesirable, and therefore to deal with it in a position of resistance. When it comes to citizens' involvement, indeed, the EU often keeps on being understood by its citizens as a fundamentally elitist and bureaucratic construction within the Brussels bubble that, despite declarations of principles and legal contributions, still struggles to ensure appropriate channels of citizen involvement and to guarantee meaningful forms of participation beyond representation. This limit also reflects a centralized perspective of democracy, still far from the understanding of EU democracy as the sum (and much more) of the many and diverse experiences of local democracy in the territories. Probably this is a consequence of the fact that the subnational level of

[171] Leino, Päivi. 'Disruptive Democracy: Keeping EU Citizens in a Box'. *Critical Reflections on Constitutional Democracy in the European Union*, edited by Inge Govaere et al., Hart, 2019, pp. 295–316.

democracy in the EU, indeed, faces another limit that can be drawn: namely the difficulty in defining a shared EU theoretical framework on participatory democracy at the subnational (and specifically local) level, and a correlated difficulty in systematizing the countless number of participatory practices circulating and being experimented in different contexts. Limits in the overall understanding of participatory democracy within the European legal space therefore can be found at all levels. However, as the category of democratic innovations has shown us, although the contribution of disciplinary lenses other than law is necessary, this cannot put the final word on our attempt at systematisation. In addition to these two limits, a third main one could be drawn in order to understand why so far the contribution of the principle of participation and participatory democracy practices cannot be regarded as enough to reconnect citizens with the public institutions in a broad sense: this is the objective fact that in the majority of cases participatory practices are associated with a top-down mechanism willing to include citizens' input in public decision-making processes[172]. Accordingly, participation in its essence is thus conceived as a *participation in deciding* or in having a say on something for trying to have an influence within a decision-making process where, however, the final decision always remains in the hands of the public power.

This very limit is useful as it points us to the direction of the next challenges in the broad field of participation, and mainly one: that is the challenge of recognizing forms of participation not only in deciding, but also in practically doing something, where citizens are legitimized and empowered for taking practical initiatives in their communities. The frontier of this principle is, therefore, an action-oriented version of participation (a *participation in doing*)[173] with a practical output that allows citizens not only to contribute to a public decision, but also to doing something tangible related to the public sphere through a pragmatic activism[174]. As it has been claimed[175], the two forms of participation aimed at a practical doing consist in: 1) participation as enhanced by the principle of subsidiarity,

[172] On this point see Bherer, Laurence, et al. 'The Participatory Democracy Turn: An Introduction'. *Journal of Civil Society*, vol. 12, no. 3, 2016, p.225.

[173] For the distinction between the two types of *participation in deciding* and *participation in doing* see further Chapter 4, paragraph 2.

[174] On the idea of a *"do-it-ourselves democracy*" based on pragmatic activism and close to an action-oriented version of participatory democracy see further Hendriks, Frank. 'Democratic Innovation beyond Deliberative Reflection: The Plebiscitary Rebound and the Advent of Action-Oriented Democracy'. *Democratization*, vol. 26, no. 3, 2019, pp. 444–64. The author advocates for extending citizen participation through the recognition of practical collective actions beyond the formulation of decisions.

[175] Allegretti, Umberto. 'Democrazia Partecipativa'. *Enciclopedia Del Diritto*, 2011, p.305 is the scholar who qualifies these two forms of participation ('sussidiarietà' and 'autogestione') as having as their object a specific 'doing'. This is carried out within a relationship with public institutions (subsidiarity) or autonomously (self-governance). The author also distinguishes them from other forms of participation within decision-making procedures implemented by institutions.

and 2) participation as self-governance. 1) Starting from participation as self-governance[176], it refers to the ability of individuals to be autonomous in determining the rules underlying their relations with others, rather than relying on the State and governmental authorities[177]. The individual, indeed, is considered by a relevant strand of research[178] as the basic unit in democracy in which the importance of their self-governance through horizontal relationship complements vertical governmental relationships. Any collective unit of self-governance (for example, associations) comes only at a second moment, as created by individuals and their capacity to self-govern themselves[179]. Self-governance has been defined also as the significant characteristic of polycentric systems – which are those systems based on polycentricity as a theory of governance[180]. Polycentricity, on its side, is the concept used to express societal capacity to self-govern through the active participation of citizens that, in time, will eventually bring to *"a complex system of governance institutions"*[181] with many centres of authority, and where rules are not exclusively imposed by the State at all its levels. Self-governance constitutes, therefore, the capacity of individuals to participate by practical means in the societal groups they belong to[182], thanks to the exercise of their individual autonomy. 2) It

[176] Sometimes also referred to as 'self-organisation', see van Zeben, Josephine. 'Polycentricity as a Theory of Governance'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, p.14.

[177] Definition revised from van Zeben, Josephine, and Ana Bobić. 'The Potential of a Polycentric European Union'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, p.2. However, as it has been critically argued, *"pure self-governance […] in reality seldom exists"* (van Laerhoven, Frank, and Clare Barnes. 'Facilitated Self-Governance of the Commons'. *Routledge Handbook of the Study of the Commons*, edited by Blake Hudson et al., Routledge, 2019, p.360).

[178] The reference goes to the studies on self-governance as linked to polycentrism by Vincent Ostrom, which in turn based its research on – among the others – the fundamental reflections on democracy in America written by de Tocqueville: *"The character of a democratic society is revealed by the willingness of people to cope with problematical situations instead of presuming that someone else has the responsibility for them. […] Most people have the opportunity to be active citizens in their local communities in addition to being spectators watching the games of politics being played out in distant places. As de Tocqueville recognized, municipal institutions are the basic sources of vitality in a free society. Citizens cannot achieve self-organizing and self-governing capabilities without the experience of actively associating with their fellow citizens to accomplish tasks that require their joint efforts. Citizens are essential coproducers of the patterns of life constitutive of human communities"* (see Ostrom, Vincent. *The Meaning of American Federalism. Constituting a Self-Governing Society.* Institute for Contemporary Studies, 1999, p.256).

[179] van Zeben, Josephine. 'Polycentricity as a Theory of Governance'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, p.18.

[180] We will further go into this topic in paragraph 4, Chapter 3.

[181] van Zeben, Josephine. 'Polycentricity as a Theory of Governance'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, p.16.

[182] The concept of self-governance is taken up in subsequent studies of Elinor Ostrom on community-based management of common pool resources, where it means that *"the resource users are the ones who define the rules by which the resource is managed"* (van Zeben, Josephine. 'Polycentricity as a Theory of Governance'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, p.19). The landmark work we are referring to is Ostrom, Elinor.

has become clear, however, that the potential for participation as self-governance is better exercised if it receives an institutional support: it is for this reason that there is a need to recognise the importance of the principle of subsidiarity in supporting participation. Subsidiarity constitute, indeed, a great potential for supporting an action-oriented form of participation and for strengthening the principle of participation itself, in so far as public authorities could be allies of individuals contributing to society at diverse levels, providing them with incentives and support for their initiatives. This is, in specific, what emerges from the innovative form of civic participation through the commons (that we will label as 'CPC') – a totally new form of action-oriented participation that goes beyond the mere decision-making process – that is being supported and promoted by local public authorities in Italy in accordance with the constitutional principle of subsidiarity[183]. Recently considered as democratic innovations[184], the commons indeed constitute a new field of experiences, practices and institutions for a new form of action-oriented participation (and democracy), where subsidiarity could play a fundamental role[185].

Because of the consciousness related to the great contribution that subsidiarity can bring to an action-oriented form of participation (a 'participation in doing'), we will study the principle of subsidiarity in the European legal space[186], and at the local level[187] (together with the principle of local self-government). In conclusion, what emerges from the research carried out in this chapter on the principle of participation in the European legal space points to participation in its broad sense as an unfolding phenomenon that is being constructed like a jigsaw puzzle with many pieces being added over time, and that is still difficult to fully grasp and systematise. The puzzle of participation in the EU legal space is composed on one side of the constitutional principle of participation as conceived in the

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Governing the Commons: The Evolution of Institutions for Collective Actions. Cambridge University Press, 1990.

[183] And that will constitute our case study in Part II (Chapters 4-5).

[184] In Asenbaum, Hans. 'Rethinking Democratic Innovations: A Look through the Kaleidoscope of Democratic Theory'. *Political Studies Review*, 2021, pp.6-7, where the author claims that *"commons do not only consist of the resource itself but propose an innovative institutional arrangement, including a set of participatory rules and a community of people".* Previously, on the mentioning of *"urban commons as a democratic innovation"* see Foster, Sheila R., and Christian Iaione. 'The City as a Commons'. *Yale Law Policy Review*, no. 34, 2016, p.326.

[185] We will come back to the commons as a new frontier for an action-oriented civic participation in our case study of Italian cities (Chapters 4-5), and in Chapter 6.

[186] We will not, instead, delve further into the concept and literature of participation as self-governance, but we may refer on that to two essential sources: Ostrom, Vincent. *The Meaning of American Federalism. Constituting a Self-Governing Society.* Institute for Contemporary Studies, 1999 and van Zeben, Josephine, and Ana Bobić, editors. *Polycentricity in the European Union*. Cambridge University Press, 2019.

[187] In this sense, cities has been defined as *"democracy-enhancers*" for referring to their ability to constitute a political space for citizens' practical participation in De Visser, Maartje. 'The Future Is Urban: The Progressive Renaissance of The City in EU Law'. *Journal of International and Comparative Law*, vol. 7, no. 2, 2020, pp. 389–408.

two legal orders of the European Union and of the Council of Europe, while on the other side of a myriad of practices invented, tested and circulating in institutionalised or non-institutionalised forms at all levels of government, with a greater presence at the local level. Participation, at the same time, is unfolding in a new action-oriented form, that is trying to go beyond the mere participation in decision-making processes. Despite their lack of a clear and direct legitimation at the supranational level, we can thus still look at the local phenomena *within* the wider European constitutional space, as a consequence of their presence in this same space of democratic transformation.

Chapter 3. Subsidiarity and local self-government: guiding principles for the local level

1.The local level in the European legal space: an introduction. 2.Subsidiarity and local self-government in the EU legal order. 2.1.Subsidiarity. 2.2.Local self-government. 2.3.A forgotten meaning of subsidiarity grounded in local self-government. 3.Subsidiarity and local self-government in the CoE legal order. 4.Doctrinal contributions to the local level: federalism and polycentricity. 5.The EU institutional contribution: from local to urban. 6.The rising role of cities and their challenge to European public law. 7.Building blocks of a city definition in the EU.

1. The local level in the European legal space: an introduction

On the basis of what emerges from the participation puzzle (Chapter 2), and on the basis of our understanding of the concept of democracy and its levels (Chapter 1), the choice of dealing with the local level of democracy in the European legal space comes as a necessary stepping-stone in our research path. Since the majority of participatory practices (often labelled as 'democratic innovations' as we saw in Chapter 2) are taking place at the local level[1], it becomes fundamental to understand the role played by this level of government in the development and support of these practices related to both the

[1] As claimed by Allegretti, Umberto. 'Participatory Democracy in Multi-Level States'. *Citizen Participation in Multi-Level Democracies*, edited by Cristina Fraenkel-Haeberle et al., Brill, 2015, p.211. See also Hendriks, Frank, et al. 'European Subnational Democracy: Comparative Reflections and Conclusions'. *The Oxford Handbook of Local and Regional Democracy in Europe*, edited by John Loughlin et al., Oxford University Press, 2012, p.741: *"Democratic innovation often centres on the local level. […] Local democracy serves as a field of democratic experimentation that also influences supralocal institutions of democracy. Quite often, democratic innovations travel 'upwards' in the system of home administration. […] Local government is also in the frontline […]"*. More recently, this claim has also been supported in Trettel, Martina. *La Democrazia Partecipativa Negli Ordinamenti Composti: Studio Di Diritto Comparato Sull'incidenza Della Tradizione Giuridica Nelle Democratic Innovations*. Edizioni Scientifiche Italiane, 2020, where the author demonstrates that citizens' participation is more frequent at the subnational level (especially at the local level) as a consequence of the fact that decentralised systems of government allow for a wider space for democratic experimentations: in doing so, she draws a parallel between federalism and participatory democracy and their mutual enrichment. She however recognises that institutional decentralisation is not the only criteria able to support citizen participation, in so far as also other criteria (like the cultural one) should be considered (pp.225-235). See also Palermo, Francesco. 'Regulating Pluralism: Federalism as Decision-Making and New Challenges for Federal Studies'. *Federalism as Decision-Making. Changes in Structures, Procedures and Policie*s, edited by Francesco Palermo and Elisabeth Alber, Brill Nijhoff, 2015: *"the wider the sub-national and local autonomy, the more these levels of government can experiment with forms of participatory democracy"* (p.506).

decision-making and an action-oriented engagement, and the constitutional space granted to that. What will emerge from this constitutional analysis of the local level will constitute our second building block – added to the first one on the principle of participation – that according to our research design will help us in answering our research question.

With 'local level' of democracy we refer to the level of government which is the closest to citizens, and that is the first governmental level constituted through representative schemes. Many and diverse are the terms used for referring to what could be considered as 'the local level'. The most common ones are: 'local governments' (LGs), 'local self-government', 'local autonomy', 'local authorities' (LAs), 'local entities', 'local governance', 'local self-determination', 'municipal government', 'municipalities', and 'cities'. These are used in addition to 'territorial autonomies', 'subnational authorities' (SNAs), 'subnational entities' (SNEs), 'regional and local authorities', which refer indistinctly to the two regional and local dimensions together, or to the regional dimension without real importance and recognition given to the local one which is considered as included in it. The choice of terms could depend on a multitude of aspects, spanning from the disciplinary lenses used, historical reasons, national perspective usage, to the diverse definitions of different branches within the same discipline: for example these ones could be the reasons why scholars with a wider social science approach seem to prefer using 'local governments' while legal scholars 'local authorities/entities'; why 'local governance' is more recent than 'local government' (as a consequence of the governance turn in the EU in the 1990s)[2]; why each national legal tradition have its own terminological preference[3]; or why constitutional and administrative scholars have different terminological preferences. All in all, we consider the local level in the European legal space[4] in an all-encompassing manner for referring to what we label as 'local democracy': as a matter of terminology we will try to stick to the constitutional jargon used by the European Union and the Council of Europe as a guidance in our work.

[2] It should be pointed out, however, that it is very common for the two terms of 'local government' and 'local governance' to be used interchangeably with no distinction among them: as an example, see the usage of them in Vodyanitskaya, Elena. 'Local Government'. *Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL]*, 2016.

[3] Interesting from this perspective is the terminological choice made in the drafting of the CoE European Charter on local self-government: two are the official versions – in English and in French – so as to be able to recognize also the diversity of legal traditions in Europe. Not only 'local self-government' and 'local authorities' were referred to, but also the French concepts of '*autonomie locale'* and *'collectivités locales',* for referring to the concept of autonomy. For further terminology considerations on that see further Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe*. Brill, 2018, pp.12-17.

[4] As already explained in Chapter 1, for the understanding of our use of the concept of *"European legal space",* see von Bogdandy, Armin. 'The Transformation of European Law: The Reformed Concept and Its Quest for Comparison'. *MPIL Research Paper Series*, no. 14, 2016, p.13.

For legal scholars the local level has usually been object of study as a topic of administrative law, while for political scientists as an issue of local governance or local politics: however, until recently there was almost no interest in deepening that from a (European) constitutional law perspective[5]. Up to nowadays the local level has been regulated by national constitutions and by State laws according to the general *de facto* situation of local authorities usually representing the central government and the state administration at its lowest level[6]: this is perfectly in accordance with the Westphalian order based on States as the only actors in an international context[7]. However, what is indisputable is the fact that the local level *predates* States in the form of what we are used to call 'city'. In fact, while modern nation states could provocatively be defined as fictitious creations of the XVII century aimed at recognizing for the first time in history a state-centred territorial sovereignty (as a result coming out from the Peace of Westphalia of 1648), the city actually constitutes the societal organisational form that has been existing from very ancient times and which still exists today. Considered as the space of civilization par excellence, throughout thousands of years the city has never stopped but going through constant transformations, from Neolithic small towns up to the contemporary model of city home of a wide diversity of institutional forms[8]. This constitutes the very first major observation on the terminological distinction between the 'city' and all those other terms listed above including the word 'local': namely, while the city constitutes an autonomous term for referring to a precise spatial and cultural concept, the other terms are all derived from a view of reality filtered through the lens of the State and its government.

Concerning the city as such (and not, more generally, the local level), it is interesting to note that the term is spanning disciplinary differences, as tremendous

[5] As observed by Panara, Carlo, and Michael Varney. *Local Government in Europe. The 'Fourth Level' in the EU Multilayered System of Governance*. Routledge, 2013, p.369.

[6] Well-known is the definition of city provided by G. Frug as a *"powerless creature of the State"*: see Frug, G. E. 'The City as a Legal Concept'. *Harvard Law Review*, vol. 93, no. 6, 1980, pp.1063 and 1120. It is interesting to report some of the author's reflections on participatory democracy at the local level and the State's role in that: *"But surely a more likely source of participatory democracy has always been the cities, in part because of the tradition of local participatory democracy from the colonial era to as recently as de Tocqueville's time. Why are cities today governed as bureaucracies, rather than as experiments in participatory democracy? […] Thus, state control has prevented cities from becoming experiments in participatory democracy"* (p.1073).

[7] On that see Hoeksma, Jaap. 'Replacing the Westphalian System'. *The Federal Trust*, 2020, https://fedtrust.co.uk/wp-content/uploads/2020/10/Replacing-the-Westphalian-system.pdf and his observations on the European Union as the system that is actually replacing the Westphalian system.

[8] *"From its origins onward, indeed, the city may be described as a structure specially equipped to store and transmit the goods of civilization, sufficiently condensed to afford the maximum amount of facilities in a minimum space, but also capable of structural enlargement to enable it to find a place for the changing needs and the more complex forms of a growing society and its cumulative social heritage"* (see Munford, Lewis. *The City in History.* Harcourt Brace Jovanovich Inc., 1961, p.30).

interest in cities has spread long ago throughout human and social sciences, from philosophy[9], to political theory[10], geography[11], history[12], economics[13], urban studies[14], sociology[15], and digital innovation[16] (but the list could be much longer) in a way that our

[9] Among the others, we are thinking of Lefebvre, Henri. Le Droit à la ville. 1967 (Lefebvre, Henri. *Il Diritto Alla Città*. Ombre Corte, 2013, Italian translation), and Weinstock, Daniel. 'Cities and Federalism'. *Federalism and Subsidiarity*, edited by James E. Fleming and Jacob T. Levy, New York University Press, 2014.

[10] For example, see Magnusson, Warren. *Politics of Urbanism. Seeing like a City*. Routledge, 2011. In contrast to Scott's well-known idea of *"Seeing like a State"* (Scott, James C. *Seeing like a State*. Yale University Press, 1998.) on the imaginary of politics through the lens of a sovereign governing state, Magnusson elaborates his approach of *"seeing like a city"* for arguing that a different politics, political theory, and political science could be envisioned looking at the world through the lens of cities: *"When we see like a state, we assume that the state is the necessary solution to the problem of sovereignty […]. To see like a city is to accept a certain disorderliness, unpredictability, and multiplicity as inevitable, and to pose the problem of politics in relation to that complexity, rather than in relation to the simplicity that sovereignty seeks"* (p.120, Magnusson, Warren. *Politics of Urbanism. Seeing like a City*. Routledge, 2011). See further also Barber, Benjamin R. *If Mayors Ruled the World. Dysfunctional Nations, Rising Cities*. Yale University Press, 2013, where the author argues that cities and their mayors are at the forefront in solving problems, and are dealing with them more effectively than States.

[11] Among the others, we are thinking of Harvey, David. 'The Right to the City'. *International Journal of Urban and Regional Research*, vol. 27, no. 4, 2003, pp. 939–41.

[12] For an historical account on the European city as a political entity whose importance has been neglected since the born of nation States, and on its root in the distinction between *urbs* and *civitas* see Hörcher, Ferenc. *The Political Philosophy of the European City: From Polis, through City-State, to Megalopolis?* Lexington Books, 2021, pp.1-12.

[13] On economic challenges occurring in cities see Florida, Richard. *The New Urban Crisis*. Basic Books, 2017.

[14] Among the others, a landmark reference goes to Jacobs, Jane. *The Death and Life of Great American Cities*. Vintage Books, 1961, and Richard Sennett on the concept of 'open city' (Sennett, Richard. 'The Open City'. Urban Age, *LSE Cities*, 2006, https://urbanage.lsecities.net/essays/the-open-city). For the idea of 'creative city' on the use of creativity in cities for solving urban problems by harnessing people's imagination and talent (also through a 'creative bureaucracy') see Landry, Charles. *The Creative City. A Toolkit for Urban Innovators*. Earthscan, 2008.

[15] For example, see Sassen, Saskia. 'The Global City: Introducing a Concepts'. *The Brown Journal of World Affairs*, vol. XI, no. 2, 2005, pp. 27–43.

[16] When referring to the field of digital innovation the reference goes to the contribution of digital means and networks to the transformation and development of cities, which is a phenomenon that usually goes under the name of 'smart city'. See on that Ratti, Carlo, and Matthew Claudel. *The City of Tomorrow Sensors, Networks, Hackers, and the Future of Urban Life*. Yale University Press, 2016 (*La città di domani. Come le reti stanno cambiando il futuro urbano*, Einaudi, 2017 Italian translation), and Morozov, Evgeny, and Francesca Bria. *Rethinking the Smart City. Democratizing Urban Technologies*. Rosa Luxemburg Stiftung, 2018. These authors, in specific, advocate for a bottom-up approach to the smart city paradigm where citizen participation through digital means could shape cities preventing therefore a purely top-down setting. Additionally, see Moreno, Carlos, et al. 'Introducing the "15-Minute City": Sustainability, Resilience and Place Identity in Future Post-Pandemic Cities'. *Smart Cities*, no. 4, 2021, pp. 93–111 (another innovation scholar) for the introduction of the increasingly popular concept of the "*15 minutes-city",* which has been inspired by the idea of the smart city itself, with regard to a model of city based on the four dimensions of proximity, density, diversity, digitalization. According to the authors, *"the need for a 15-Minute City is equally focused on other dimensions, relating to ecological sustainability, promoting social interactions and citizen's participation and addressing automobile dependence by emphasizing on proximity of all basic services"* (p.97), and "*the prompt delivery of services is also at the core of the 15-Minute City concept with the ultimate objective of ensuring that the maximum time is available for urban dwellers to accomplish the aforementioned basic social functions"* (p.101). Lastly, when talking about digital innovation in cities a mention should go to the recent concept of *"platform urbanism",* for referring to what is supposedly *"an evolution beyond the smart city, based on digitally-enabled assemblages that enable novel forms of intermediation"* and which puts the study of digital platforms at the centre for understanding how they *"reshape the nexus between corporations, cities, and citizens"* (Caprotti, Federico, et al. 'Beyond the Smart

times have been defined as "*city century*"[17]. On the opposite, an absolute silence has prevailed until recently in general public law[18], as we will further investigate later in this Chapter (paragraphs 4 and 6). Worth mentioning is also the recent acknowledgement of the role played by cities beyond nation-states within the European integration process itself, that since the very beginning has been the prerogative of nation-states[19]. When turning to public and constitutional law literature in a broad sense within the European legal space, the term 'local government' (alongside with 'local authority') seems to be the one preferred and most commonly used, and because of this reasons the one we will predominantly use in our work[20]. Many and diverse are the constitutional law concepts linked to local government, among which we can find the wide topics of power

City: A Typology of Platform Urbanism'. *Urban Transformations*, no. 4, 2022, p.1). I would like to thank Gianmarco Cristofari for our conversations and his inspiring reflections on the concept of platform, especially with regard to its connection to the topic of the city.

[17] According to Michael Bloomberg that defined the XXI century as the *"city century"* for referring to a new urban age where the predominant institutional actors would be the city: see Bloomberg, Michael. 'City Century. Why Municipalities Are the Key to Fighting Climate Change'. *Foreign Affairs*, Oct. 2015, pp. 116–24.

[18] Within public law, the two landmark contributions that broke the silence are: Hirschl, Ran. *City, State. Constitutionalism and the Megacity.* Oxford University Press, 2020 in constitutional law theory, and Auby, Jean-Bernard. 'Droit de La Ville. An Introduction'. *Italian Journal of Public Law*, vol. 5, no. 2, 2013, pp. 302–06 in administrative law. Additionally, also public international law is a key protagonist in a reawakening of this field of research with respect to the urban age: for a very recent work see Aust, Helmut Philipp, and Janne E. Nijman, editors. *Research Handbook on International Law and Cities*. 2021. For an introduction on this research turn see Nesi, Giuseppe. 'The Shifting Status of Cities in International Law? A Review, Several Questions and a Straight Answer'. *The Italian Yearbook of International Law Online*, vol. 30, no. 1, 2021, pp. 15–36, where the author – despite a very clear position on the primacy of states in international law as the sole actors – recognises the emerging role of cities and other local authorities in implementing international treaties on ground especially through "*transnational city networks"*. One interesting last remark is that G. Nesi recognizes the fundamental role of cities as the appropriate locus for initiatives of participatory democracy: this constitutes an additional confirmation even from the public international law perspective (that does not constitute the perspective of our research) of our need to study the local level from a general public law perspective. For the first works within local government law scholarship on cities in international law see Blank, Yishai. 'The City and the World'. *Columbia Journal of Transnational Law*, 2006, pp. 869–931, and Frug, Gerald E., and David J. Barron. 'International Local Government Law'. *The Urban Lawyer*, vol. 38, no. 1, 2006, and more recently Swiney, Chrystie F. 'The Urbanization of International Law and International Relations: The Rising Soft Power of Cities in Global Governance'. *Michigan Journal of International Law*, vol. 41, no. 2, 2020. For the recent link between human rights (as a specific sub-field of international law) and cities see Oomen, Barbara, and Moritz Baumgärtel. 'Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law'. *The European Journal of International Law*, vol. 29, no. 2, 2018, which recognise the importance of local authorities in the protection and enhancement of human rights in the negligence of nation states. See also the important position of the international law scholar Antonio Papisca on the topic: he was much in favour of a more important role of cities in international law and human rights protection, because cities are much closer to citizens, and constitute the roots of democracy. See Papisca, Antonio. 'Relevance of Humar Rights in the Glocal Space of Politics: How to Enlarge Democratic Practice beyond State Boundaries and Build up a Peaceful World Order'. *The Local Relevance of Human Rights*, edited by Koen de Feyter et al., Cambridge University Press, 2011, pp. 82–108.

[19] On this observation we may refer to Zielonka, Jan. 'The Remaking of the EU's Borders and the Images of European Architecture'. *Journal of European Integration*, vol. 39, no. 5, 2017, pp. 641–56.

[20] This statement has no claim to truthfulness, but it is based on the search by keywords through the documents consulted for writing this specific chapter (about 350 publications). The search has been conducted through the reference management software Zotero.

decentralization, the principle of subsidiarity[21], federalism and the discourse on tiers of government[22], and urban citizenship[23]. However, looking at the local level through the prism of the European legal space leads us to consider it – as we did also with the principle of participation – within the two legal orders of the EU and the CoE: as a consequence, we will look at traces of the local level in the constitutional order of the European Union, and in the one of the Council of Europe[24]. This search points us essentially to the two strictly-related keywords of 'subsidiarity' and 'local self-government', which can be found in the EU Treaties as well as in the CoE constitutional acts, and that constitute the two major concepts we should examine if we want to look at the local level from an European constitutional law perspective.

2. Subsidiarity and local self-government in the EU legal order

In our claim that subsidiarity and local self-government constitute the two keywords introduced at the constitutional level by the EU Treaties, we recognize the potential opposition and complementarity among the two concepts in so far as subsidiarity could be considered as the perspective of the State and the EU itself in the allocation of power and authority, while local self-government as the perspective of local governments, which are willing to maintain the widest possible power and authority against the meddling of higher levels of government. Despite a general overlook of the local level in the Treaties mostly as a consequence of the fact that it belongs to the exclusive competence of each member

[21] As an introduction, on the distinction between subsidiarity and decentralization see Drew, Joseph, and Bligh Grant. 'Subsidiarity: More than a Principle of Decentralization—a View from Local Government'. *Publius: The Journal of Federalism*, 2017, pp. 1–24.

[22] On the awakening of the federalist theory moving from a two-tier systematisation, to a three-tier one see above all Palermo, Francesco, and Karl Kössler. *Comparative Federalism: Constitutional Arrangements and Case Law*. Bloomsbury Publishing, 2017, pp.281-315. For its specific contribution to the local level, we will deepen the research strand on federalism and the city in paragraph 4 of this Chapter.

[23] As an introduction see the *"Urban citizenship"* debate on Verfassungsblog in 2020 at https://verfassungsblog.de/category/debates/urban-citizenship-debates/. In specific, see the Baubock's kick-off (Bauböck, Rainer. 'Cities vs States: Should Urban Citizenship Be Emancipated from Nationality?' *Verfassungsblog.De*, 2020), where he advocates for a multi-level citizenship in which an urban citizenship derived from residence rather than nationality should complement national citizenship. Among the others see the reply of van Zeben, Josephine. 'What's the Added Value of Legalising City-Zenship?' *Verfassungsblog.De*, 2020, where the author considers the legal implication of a post-national view on citizenship, and especially the challenge *"of multiple overlapping citizenships [which] lies in the duplication of such rights and duties in the same legal space, and the possibility for conflict between them".*

[24] The CoE constitutes an international organization, and as such its legal order belongs to the domain of international law. We refer to that, however, for its constitutional relevance building upon the idea already mentioned of the constitutionalisation of international law outlined in Palermo, Francesco. 'Internazionalizzazione Del Diritto Costituzionale e Costituzionalizzazione Del Diritto Internazionale Delle Differenze'. *European Diversity and Autonomy Papers*, no. 2, 2009. See footnote no.144, Chapter 2.

State[25], the explicit recognition of these two concepts as founding principles of EU law can be found most importantly in two points, Articles 4(2) and 5(3) of the TEU[26]. While Article 4(2) TEU recognizes the national identities of each Member States *"inclusive of regional and local self-government"* and, as a consequence, it also recognizes domestic democracy at the level of all territorial autonomies, Article 5(3) matters for the vertical division of competences between the EU and the Member States, *"either at central level or at regional and local level"* (which is the so called 'subsidiarity principle'). In order to place the principle of subsidiarity in the EU legal order, we will begin with a brief overview of the roots of the principle, and then report the debate over its introduction in the EU system and its current (vertical) understanding (sub-paragraph 2.1). We will then move onwards with locating the above mentioned concept of local self-government and the (totally overlooked) role reserved for local governments (subparagraph 2.2), concluding the paragraph with a forgotten meaning of subsidiarity, namely its horizontal dimension towards civil society (subparagraph 2.3)[27].

2.1. Subsidiarity

The roots of subsidiarity are to be traced a long way back in time before the creation of the European Economic Community, in the constant tension between individuals' liberty and autonomy in contrast with the role exercised by an higher authority[28], and in the

[25] On the exclusive competence of each member state on its local level see van Zeben, Josephine. 'Local Governments as Subjects and Objects of EU Law: Legitimate Limits?' *Framing the Subjects and Objects of Contemporary EU Law*, edited by Samo Bardutzky and Elaine Fahey, Edward Elgar Publishing, 2017, p.123, and Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe*. Brill, 2018, p.69. Additionally see Finck, Michèle. 'Challenging the Subnational Dimension of Subsidiarity in EU Law'. *European Journal of Legal Studies*, vol. 8, no. 1, 2015, pp. 5–17, where she says that subnational authorities (SNAs) *"doubtlessly exist; yet the European Treaties largely ignore their existence"* (p.8). An obvious consequence of the EU's lack of competence on the local level is the lack of recognition of cities and other local governments as political communities also by the European judiciary, which therefore views cities as invisible: see on that Nicola, Fernanda. 'Invisible Cities in Europe'. *Fordham International Law Journal*, vol. 35, 2012, pp. 1282–363.

[26] See also Chapter 1, paragraph 2.

[27] By introducing the content of this paragraph, we may report a general disclaimer: since the literature on the principle of subsidiarity is massive, we make no claim to exhaustiveness, but have chosen the sources on the basis of their functionality to the needs of this paragraph (and Chapter). An exhaustive review of the whole literature is therefore entirely beyond our ambitions and intentions.

[28] For an introductory perspective on the political philosophy behind the concept of subsidiarity and the importance of considering it as a constitutional principle see the fundamental contribution of Millon-Delson, Chantal. *Le Principe de Subsidiarité*. Presses Universitaires de France - PUF, 1993 (*Il Principio Di Sussidiarietà*, Giuffrè Editore, 2003 Italian translation).

constant search for a balance between human dignity and the common good[29]. In a nutshell, the principle looks to how the relationship between the State and society should be structured. The core of subsidiarity tackles essentially the issue of competences, starting from a particular anthropology that places the individual and their free capacity to determine themselves and contribute to the broader interests of the community at the centre, in clear opposition to a more centralized approach of any higher authority. It therefore contributes to providing a solution to the problem of scale raised by the fundamental question about the appropriate level where to allocate competencies. Despite the fact that the explicit recognition of the principle as the most important one for societal organization is usually to be found in the Catholic social philosophy in the contribution *Quadragesimo Anno* of Pope Pius XI (1931)[30], this link only constitutes the modern reference to subsidiarity, while references to its implicit and unconscious origin could be traced even further back in time. The earlier reference ever identified[31] goes as far as to Mosaic law, to the suggestion given to Moses to decentralize power as much as possible, so that every lower unit would solve their own issues, while only the biggest ones would reach up to his higher authority. A second earlier reference was found in the Greek political thought of Aristotle, who considered a higher authority's substitution of individuals (specifically, he was looking at the role of the *polis*) under a positive light in so far as that would be of help for individuals to realize their own ends, understanding politics as the government of autonomies. The idea of subsidiarity moved on then from the Greek thought to Medieval Scholasticism and the idea of a subsidiary society articulated in a multitude of

[29] For the explanation of the principle of subsidiarity from the perspective of this balance between human dignity and the common good see Drew, Joseph. *Reforming Local Government*. Springer, 2020: *"The Principle of Subsidiarity seeks to balance the needs of persons and persons in association, on the one hand, with the need to cultivate the common good, on the other. It is a principle that cautions against concentrations of power and competence, and celebrates the plurality of associations critical for human flourishing"* (p.123). The author points to Johannes Messner as *"the greatest interpreter of the Principle of Subsidiarity"* (p.106) whose lucid outlook on subsidiarity was the consequence of his first-hand experience as an advisor to the Chancellor of Austria Dollfuss before the advent of Nazism, through which he understood the importance of this (back then totally neglected) principle, lamenting *"the 'parental' conception that citizens had increasingly transferred onto government"* (p.107).

[30] Pope Pius XI, *Littera Encyclica Quadragesimo Anno,* 1931, at point 80 on the role of the State and the restoration of the social order: "*The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of "*subsidiary function*", the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State*".

[31] By Gussen, Benjamen. *Axial Shift City Subsidiarity and the World System in the 21st Century*. Palgrave Macmillan, 2019, p.200, where he refers to Exodus 18: 13-27. Also Giordano, Filippo Maria. 'Subsidiarity, a Transformative Principle for the Future of European Democracy'. *De Europa*, vol. 4, no. 2, 2021, p.101 refers to Exodus as the possible original source of subsidiarity.

autonomous groups and units cooperating with a view of a common destiny. It could also be found later in federalist thought (among the others, in Althusius[32]), in State theorists (among the others, de Tocqueville and Hegel), in the liberal current advocating for the non-interference by the State towards lower levels of authorities (for example, Locke), and eventually in the Catholic social philosophy of the 19th century[33], whose main worry was the extreme interference of the State in the inner sphere of individuals.

The re-emergence of subsidiarity in the European context has been explained[34] as a result of mainly three reasons: the gradual construction of the EU as a political organization; the crisis of western European States' providentialism as a consequence of the depletion of the public sector; the fall of totalitarianism in eastern European states. The period of time we are referring to is clearly the 1990s. These events have posed the need for European states to balance the demands of autonomy and those of authority within a wider supranational organization, for which the constitutionalisation of the principle of subsidiarity has offered a solution. The Treaty of Rome of 1957 already contained the first implicit traces of the principle in some of its provisions on the division of competences between the Community and the member states[35]. Later the idea of the principle was first included in the text of the Treaty by the Single European Act (1987)[36], before the fully-fledged formulation of 'principle of subsidiarity' was then introduced at Article 3b EC of the Maastricht Treaty[37], where it became a general principle applicable in all areas falling outside the exclusive competence of the community – also thanks to its insertion in the preamble and in Article A (outlining that decisions should be taken *"as closely as possible to the citizen"*). The Maastricht Treaty became later the basis for the further elaboration of the principle in the (failed) Treaty establishing a constitution for Europe[38], and eventually in

[32] See, for example, Arban, Erika. 'An Intellectual History of Federalism: The City and the "Unit" Question'. *Cities in Federal Constitutional Theory*, edited by Erika Arban, Oxford University Press, 2022; Føllesdal, Andreas. 'Survey Article: Subsidiarity'. *The Journal of Political Philosophy*, vol. 6, no. 2, 1998, pp. 190–218; Macdonald, Giangiorgio. *Sussidiarietà Orizzontale. Cittadini Attivi Nella Cura Dei Beni Comuni*. Aracne editrice, 2018.

[33] The reconstruction of these steps is made on the basis of the contribution of Millon-Delson, Chantal. *Il Principio Di Sussidiarietà*, Giuffrè Editore, 2003, pp.7-28.

[34] By Millon-Delson, Chantal. *Il Principio Di Sussidiarietà*, Giuffrè Editore, 2003, p.2.

[35] Articles 100 and 235 EEC: for this historical development of subsidiarity in the EU see Granat, Katarzyna. 'The Subsidiarity Principle in the EU Treaties'. *The Principle of Subsidiarity and Its Enforcement in the EU Legal Order:The Role of National Parliaments in the Early Warning System*, Hart, 2018 (chapter 1).

[36] Article 130r(4) EEC on Community action in the area of environmental policy.

[37] As inserted by Article G(5) TEU. Also known as *"Treaty on European Union",* it was concluded in 1992, and became effective on 1 November 1993.

[38] For a study on subsidiarity in the draft constitution see further Barber, N. W. 'Subsidiarity in the Draft Constitution'. *European Public Law*, vol. 11, no. 2, 2005, pp. 197–205, and Massa Pinto, Ilenia. 'Il Principio Di Sussidiarietà Nel Progetto Di Trattato Che Istituisce Una Costituzione per l'Europa'. *Diritto Pubblico Comparato Ed Europeo*, II, Giappichelli, 2003, pp. 1220–35.

the Lisbon Treaty in Article 5(3) TEU as we know it today[39]. It could be therefore said that the explicit introduction of the principle of subsidiarity in the EU legal order finds its roots in the debate of the 1990s over the allocation of competences between the EU as a political entity and the EU member states. Scholars have pointed to three main roots for the EU's understanding of subsidiarity[40]: 1) Catholic social philosophy; 2) German federalism; 3) British conservative ideology. The already mentioned Catholic social philosophy is founded on the idea that the State has gone much beyond its limits by usurping the functions of smaller societal groups such as the family, small associations, and other local communities: this approach to subsidiarity stands out from the others in particular for its focus on the role that private individuals can play in contributing to the common good, in the conviction that *"small social groups should be autonomous and sovereign in a pluralist society"*[41]. Accordingly, these smaller groups would be able to accomplish more effectively many tasks within societal organization, granting support and recognition to individual energies and talents[42]. Subsidiarity as conceived by German federalism, on its side, advocated for a constitutionalised static division of powers and duties between diverse levels of government, putting emphasis on a need to reach a clear federal structure of the

[39] Article 5(3) TEU: *"Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol".* The author is referring to Protocol no.2 attached to the EU Treaties on the application of the principles of subsidiarity and proportionality.

[40] On these three roots see above all Peterson, John. 'Subsidiarity: A Definition to Suit Any Vision?' *Parliamentary Affairs*, vol. 47, no. 1, 1994, pp.117-119, and Wilke, Marc, and Helen Wallace. 'Subsidiarity Approaches to Power Sharing in the European Community'. *RIIA Discussion Paper No.27*, 1990, pp. 1–43: I thank Maartje de Visser for these useful references on this point. Additionally see Granat, Katarzyna. 'The Subsidiarity Principle in the EU Treaties'. *The Principle of Subsidiarity and Its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System*, Hart, 2018 (chapter 1).

[41] On the principle of subsidiarity as conceived by the Catholic social thought see Peterson, John. 'Subsidiarity: A Definition to Suit Any Vision?' *Parliamentary Affairs*, vol. 47, no. 1, 1994, pp.117-118; Barber, N. W. 'The Limited Modesty of Subsidiarity'. European Law Journal, vol. 11, no. 3, 2005, pp.310-314; Wilke, Marc, and Helen Wallace. 'Subsidiarity Approaches to Power Sharing in the European Community'. *RIIA Discussion Paper No.27*, 1990, pp.12-13; Drew, Joseph, and Bligh Grant. 'Subsidiarity: More than a Principle of Decentralization—a View from Local Government'. *Publius: The Journal of Federalism*, 2017, pp.3-5. The quotation can be found in specific in Peterson, John. 'Subsidiarity: A Definition to Suit Any Vision?' *Parliamentary Affairs*, vol. 47, no. 1, 1994, p.118. Additionally, we may refer further to Mueller, Franz H. 'The Principle of Subsidiarity in the Christian Tradition'. *The American Catholic Sociological Review*, vol. 4, no. 3, 1943, pp. 144–57, and Føllesdal, Andreas. 'Survey Article: Subsidiarity'. *The Journal of Political Philosophy*, vol. 6, no. 2, 1998, pp.207-210.

[42] A well-known representative of this approach to subsidiarity was Jacques Delors, who also became *"the leading exponent of the principle of subsidiarity"* (Wilke, Marc, and Helen Wallace. 'Subsidiarity Approaches to Power Sharing in the European Community'. *RIIA Discussion Paper No.27*, 1990, p.30). On Delors' contribution to European subsidiarity see also Giordano, Filippo Maria. 'Subsidiarity, a Transformative Principle for the Future of European Democracy'. *De Europa*, vol. 4, no. 2, 2021, pp. 99–118 and further references. According to him, *"For Delors, subsidiarity was therefore a "compass" principle of Community integration"* (p.105).

EU on the model of the German federal state[43]. The third and last alternative perspective on subsidiarity was based on the British conservative ideology, whose main concern was to limit the European Community's power to the advantage of nation-states (Britain was indeed refusing any federal idea of the Community): in this sense, subsidiarity was perceived as the proper principle to ensure the primacy of nation states over the Community in decision-making processes. These competing visions did not make it easy for member states to reach a consensus on the actual meaning of subsidiarity: however, eventually the principle of subsidiarity was included in the Maastricht Treaty as an European principle by representing a safeguard tool "*to placate those member states […] who feared that too much power was shifting from the national to the European level*[44]". It was therefore the British line on subsidiarity the interpretation of the principle that became the mainstream one[45] in the European Community[46], in perfect line with a clearly bi-centric perspective (with only the national level and the European one).

Rooted in this debate, the nowadays meaning of subsidiarity in the EU consists in a legal-political[47] principle that constitutes a constitutional cornerstone of the EU construction, committed to defining the allocation of competences among the different levels of government within the EU legal order, according to the idea that public functions should be exercised as closely as possible to citizens. The principle has two sides: a negative one, for its reference to the duty of non-intervention by the centre towards lower levels which are closer to citizens; a positive one, for the possibility for the centre to

[43] Peterson, John. 'Subsidiarity: A Definition to Suit Any Vision?' *Parliamentary Affairs*, vol. 47, no. 1, 1994, p.119.

[44] Barber, N. W. 'The Limited Modesty of Subsidiarity'. *European Law Journal*, vol. 11, no. 3, 2005, p.314.

[45] On this opinion we are following Peterson, John. 'Subsidiarity: A Definition to Suit Any Vision?' *Parliamentary Affairs*, vol. 47, no. 1, 1994, p.119. However, other authors like Granat, Katarzyna. 'The Subsidiarity Principle in the EU Treaties'. *The Principle of Subsidiarity and Its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System*, Hart, 2018 (chapter 1) argues that the main inspiration for European subsidiarity came from the German federalism. Not willing to go further in the debate on which approach was more relevant than the others, we simply would like to put our attention to the existence of all these three diverse roots and understandings of subsidiarity in the EU legal order, which therefore constitute a pluralism of interpretations that cannot be denied on the basis of the mere text of the Treaties.

[46] It was the Maastricht Treaty in 1993 that replaced *"European community"* with *"European union".*

[47] On this double aspect of subsidiarity see, for example, Pazos-Vidal, Serafín. *Subsidiarity and EU Multilevel Governance. Actors, Networks and Agendas.* Routledge, 2019, p.1; Panara, Carlo. 'The Enforceability of Subsidiarity in the EU and the Ethos of Cooperative Federalism'. European Public Law, vol. 22, no. 2, 2016, p.306; Craig, Paul. 'Subsidiarity: A Political and Legal Analysis'. *Journal of Common Market Studies*, vol. 50, no. S1, 2012, pp. 72–87. As C. Panara interestingly writes, *"With specific reference to subsidiarity, Nettesheim has recently proposed the oxymoronic notion of 'politisches Recht' (political law), indicating those legal provisions which are only or principally enforceable through forms of political coordination (politische Koordination). […] Subsidiarity is a constitutional principle of the EU whose observance is achieved by cumulating judicial review and political cooperation in the lawmaking process"* (pp.24 and 27).

intervene in support of lower levels in all those occasions when the same power could be better exercised or a precise goal better achieved at a higher level[48]. Since the Lisbon Treaty there is not anymore a bi-centric approach (EU level and nation-states level), but also an explicit mention of local and regional levels was introduced as a recognition of the subnational dimension pertaining to each member state. However, as it has been claimed[49], the text of the Treaties[50] fails in going beyond a mere acknowledgement of the existence of local authorities, in so far as the understanding of subsidiarity remains anchored in a paradigm of bi-centricity between the EU and the member states, and not of polycentricity[51] among a variety of actors beyond these two levels. The division of competences remains *de facto* distributed between the EU level and the nation-states level, distinguishing between exclusive, shared, or supporting competences[52] among them, but without any further consideration of the subnational levels, since they are conceived by the EU as an exclusive domain of each member state. In all those areas where the EU does not have an exclusive competence the principle of subsidiarity is aimed at safeguarding the authority of member states. This significance of subsidiarity is usually referred to as a vertical approach of subsidiarity ('vertical subsidiarity'[53]), where the focus lies on governments[54], and which has paved the way for a multilevel construction of the EU in its integration process. The principle has a practical impact on legislative

[48] See Martinico, Giuseppe. 'Federalism, Regionalism and the Principle of Subsidiarity'. *Federalism and Constitutional Law. The Italian Contribution to Comparative Regionalism*, edited by Erika Arban et al., Routledge, 2021, pp. 189–205, and Drew, Joseph, and Bligh Grant. 'Subsidiarity: More than a Principle of Decentralization—a View from Local Government'. Publius: The Journal of Federalism, 2017, pp. 1–24, p.5 for this point.

[49] Finck, Michèle. 'Challenging the Subnational Dimension of Subsidiarity in EU Law'. *European Journal of Legal Studies*, vol. 8, no. 1, 2015, pp. 5–17. As the author argues, *"it must thus be concluded that while subsidiarity seemed to bear the promise of recognising local and regional authorities as regulators of EU law, under its current formulation and implementation, Article 5(3) TEU limits this promise to pure rhetoric rather than actual substantive change"* (p.17). See also Finck, Michèle. 'Fragmentation as an Agent of Integration: Subnational Authorities in EU Law'. *ICON*, vol. 15, no. 4, 2017, pp. 1119–34. For a doubtful point of view on subsidiarity in the EU see additionally Palermo, Francesco, and Karl Kössler. *Comparative Federalism: Constitutional Arrangements and Case Law.* Bloomsbury Publishing, 2017, p.19.

[50] We are referring to the text of the Lisbon Treaty, that introduced the reference to also the local and regional authorities: before Lisbon there was no mention of the local level.

[51] We will come back to the theory of polycentricity and its relation with subsidiarity later in this paragraph and, more in depth, in paragraph 4 of this Chapter. May it be sufficient for now to mention above all the contribution of Nicolaïdis, Kalypso, and Josephine van Zeben. 'Polycentric Subsidiarity'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, pp. 78–107.

[52] On the division of competences within the EU the reference goes to Articles 2, 3, 4, 6 TFEU.

[53] Arban, Erika. 'Re-Centralizing Subsidiarity: Interpretations by the Italian Constitutional Court'. *Regional & Federal Studies*, vol. 25, no. 2, 2015, p.129; additionally see Giglioni, Fabio. 'Subsidiary Cooperation: A New Type of Relationship between Public and Private Bodies Supported by the EU Law'. *Rivista Italiana Di Diritto Pubblico Comunitario*, 2010, p.491.

[54] For the complementary perspective on governance see the concept of multilevel governance (MLG) which is used to explain how those different levels of government interact among each other (paragraph 4 of Chapter 1).

procedures: in particular the role of national parliaments[55] has, indeed, been strengthened with the Lisbon Treaty, as well as the one of the Court of Justice[56] in monitoring compliance with the principle, and the one of the Committee of the Regions (CoR)[57]. Despite the fact that subsidiarity as a legal principle of European constitutional law is strictly related to the concept of democracy as its introduction was expected to reduce the EU democratic deficit[58] through the favour for proximity[59], diverse are the critiques and limits to this principle as such, the main ones being three: 1) its difficult justiciability; 2) its centralizing effect; 3) the total overlook of its subnational dimension. With concern to the first critique, since its introduction in the Maastricht Treaty in 1992, the EU principle of subsidiarity has raised questions concerning its justiciability before the Court of Justice of the EU (CJEU)[60], about which many doubted. Despite being relatively scarce, case law of the CJEU on the EU principle of subsidiarity does exist, and the justiciability experience of certain EU member states proves that to be possible[61]: it goes unquestioned, however, the difficulty in doing that, also as a consequence of subsidiarity itself being seen by some a threat[62] to EU integration. Secondly, it has been argued[63] that EU subsidiarity has a rather

[55] See Article 5(3) TEU (second sub-paragraph), Article 12 (b) TEU, and Protocol (No.2) on the application of the principles of subsidiarity and proportionality. National parliaments can have a say in the EU legislative process through the issuing of a reasoned opinion where they state why they believe that the principle of subsidiarity has been violated by an EU draft legislative act: this is what has been defined as 'early warning system' (EWS). Regional parliaments with legislative powers may also be involved in the EWS by national parliaments. On the EWS as a tool for safeguarding the respect of subsidiarity see Finck, Michèle. 'Challenging the Subnational Dimension of Subsidiarity in EU Law'. *European Journal of Legal Studies*, vol. 8, no. 1, 2015, pp. 5–17.

[56] Article 8 of the Protocol (2).

[57] Article 8 of the Protocol (2). On the role of the CoR in the implementation of subsidiarity see Panara, Carlo. *The Sub-National Dimension of the EU. A Legal Study of Multilevel Governance*. Springer, 2015, pp.120-121.

[58] Bartl, Marija. 'The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit'. *European Law Journal*, vol. 21, no. 1, 2015, pp. 23–43.

[59] On the relationship between subsidiarity and proximity see further Cahill, Maria. 'Subsidiarity as the Preference for Proximity'. *The American Journal of Jurisprudence*, vol. 66, no. 1, 2021, pp. 129–43.

[60] For an analysis of the case law on the principle of subsidiarity before the CJEU see, among the vast literature, Panara, Carlo. 'Subsidiarity v. Autonomy in the EU'. *European Public Law*, vol. 28, no. 2, 2022, pp. 269–96. The author counts 44 cases since 1993, and through his study demonstrates that the interpretation of the CJEU of subsidiarity is not a safeguard clause for autonomy of MSs and their sub-national entities, but instead a tool for reinforcing EU governance aim of efficiency. See additionally Nicolaïdis, Kalypso, and Josephine van Zeben. 'Polycentric Subsidiarity'. Polycentricity in the European Union, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, pp.86-88.

[61] For an overview of the most recent case law see Panara, Carlo. 'Subsidiarity v. Autonomy in the EU'. *European Public Law*, vol. 28, no. 2, 2022, pp. 269–96; the two cases that the author, in specific, analyses are Germany and Italy, which have case law on subsidiarity.

[62] As argued by A. Estella, and reported in Panara, Carlo. 'The Enforceability of Subsidiarity in the EU and the Ethos of Cooperative Federalism'. *European Public Law*, vol. 22, no. 2, 2016, p.306.

[63] Among the others, Millon-Delson, Chantal. *Il principio di sussidiarietà*, Giuffrè Editore, 2003, p.67; Nicolaïdis, Kalypso, and Josephine van Zeben. 'Polycentric Subsidiarity'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, pp.86-88; Cahill, Maria, and Gary O'Sullivan. 'Subsidiarity and the City: The Case for Mutual Strengthening'. *Cities in Federal Constitutional Theory*, edited by Erika Arban, Oxford University Press, 2022. Nicolaidis and van zeben

centralizing than decentralising effect: it endorses, indeed, a model of subsidiarity-as-efficiency, allowing an increase of competences concentrated at the EU level because of the 'greater level of efficiency' obtained by higher levels of government, and therefore favouring the EU level anytime that would be possible to the expenses of lower levels of authority. As a consequence of that, while in theory subsidiarity should protect member states and their subnational levels' autonomy, however the practical effects of the principle seem to be more about efficiency than autonomy[64]. In conclusion, the third critique is strictly related to this second one: the total overlook of the regional and local dimensions of subsidiarity[65]. Despite being often considered as the EU principle able to recognize autonomies in the EU, the ability of subsidiarity in providing for any meaningful role in subsidiarity control to local and regional authorities seems actually to be overestimated[66]. Their explicit inclusion in the Lisbon Treaty, in fact, seems to be more a rhetorical stance than an actual substantive turn, despite the fact that the proper recognition of the local (but also regional) level of government as an additional tier within the EU system of multilevel governance would arguably strengthen subsidiarity, and also democracy itself[67].

2.2. Local self-government

The second principle that within the EU legal order – at least on paper – gives some kind of recognition to the local level from a constitutional perspective is the principle of local self-government contained in Article 4(2) of the TEU. While in general the Treaties treat the subnational level as a mere object and receiver of EU law and policies, Article 4(2) foresees a somehow active role for them, recognizing their function of self-government. Self-government is used for referring to all those subnational authorities that

argues that "*the EU's interpretation of the principle of subsidiarity meant to restrain the expansion of EU competences has not been able to stop the expansion of EU competence – and has arguably facilitated it, despite pre-legislative and post-legislative control"* (p.8).

[64] This is the central thesis argued in Panara, Carlo. 'Subsidiarity v. Autonomy in the EU'. *European Public Law*, vol. 28, no. 2, 2022. See also on that Finck, Michèle. 'Challenging the Subnational Dimension of Subsidiarity in EU Law'. *European Journal of Legal Studies*, vol. 8, no. 1, 2015, pp. 5–17.

[65] See Finck, Michèle. 'Challenging the Subnational Dimension of Subsidiarity in EU Law'. *European Journal of Legal Studies*, vol. 8, no. 1, 2015, pp. 5–17; van Zeben, Josephine. 'Local Governments as Subjects and Objects of EU Law: Legitimate Limits?' *Framing the Subjects and Objects of Contemporary EU Law*, edited by Samo Bardutzky and Elaine Fahey, Edward Elgar Publishing, 2017, pp. 123–44.

[66] As reporetd in van Zeben, Josephine. 'Local Governments as Subjects and Objects of EU Law: Legitimate Limits?' *Framing the Subjects and Objects of Contemporary EU Law*, edited by Samo Bardutzky and Elaine Fahey, Edward Elgar Publishing, 2017, p.133, *"the only direct representation of local interests is through the Committee of the Regions (CoR), whose mandate is exclusively advisory".*

[67] Panara, Carlo, and Michael Varney. *Local Government in Europe. The 'Fourth Level' in the EU Multilayered System of Governance*. Routledge, 2013, p.413.

enjoy some degree of autonomy towards the central government, and that are expression of their local community in so far as they have elected representatives[68]. Constitutional law has until very recently[69] rarely dealt with the principle of local self-government (or local autonomy)[70] from a wider EU perspective, that is also reflected in the fact that the reference to local (and regional) authorities was introduced only with the Lisbon Treaty. As it has been proposed, *"local self-government consists of two elements: political autonomy and local democracy"*[71]. Political autonomy *"implies that a local community is entitled to make their own decisions on issues falling within their remit"*, allowing for a certain degree of autonomy in those areas allowed by law or constitutional provisions, so that the local level of government would not be a mere executors of decisions taken at higher levels of authority. Local democracy *"implies that local communities are entitled to elect the governing bodies of local authorities (local council, mayor)"*: this refers, in a nutshell, to the representative dimension of the local level as the first level of democracy. The recognition of the importance of this principle in the EU legal order comes from its constitutionalisation by the CoE in the European Charter of local self-government[72], that since 1985 drew attention to this level of government beyond nation states. However, it is also true that various nation-states constitutions already included a mention to that already since the 18th century[73]. Democracy, on its side, constitutes a fundamental aspect of local self-government, in so far as local governments are recognized to have not only representative channels, but also participatory instruments for citizens' contribution to democracy[74], so that they could be involved at the level of government which is closer to them. The recognition of local self-government in the EU Treaties is, therefore, fundamental for

[68] Panara, Carlo, and Michael Varney. *Local Government in Europe. The 'Fourth Level' in the EU Multilayered System of Governance*. Routledge, 2013, p.20.

[69] As pointed out in Panara, Carlo, and Michael Varney. *Local Government in Europe. The 'Fourth Level' in the EU Multilayered System of Governance*. Routledge, 2013, p.369.

[70] Acknowledging the identification between these two terms, within our work we will predominantly use the term 'local self-government' in accordance to the EU and CoE jargon. Sometimes we will also use the term 'local autonomy' in accordance with the literature found. In this work they should be considered as interchangeable, and this is in line with the Congress of Local and Regional authorities. *A Contemporary Commentary by the Congress on the Explanatory Report to the European Charter of Local Self-Government*. 12 Feb. 2020, https://rm.coe.int/a-contemporary-commentary-by-the-congress-on-the-explanatory-report-to/16809cbf8c.

[71] For this understanding – that we follow – see Panara, Carlo, and Michael Varney. *Local Government in Europe. The 'Fourth Level' in the EU Multilayered System of Governance*. Routledge, 2013, p.372. In order to define local self-government, the authors makes use of the European Charter of local self-government of the CoE (that we will analyse in the next paragraph).

[72] Article 2 of the Charter.

[73] The concept of local self-government found its place in the French Constitution of 1795 for the first time: for a list of historical mentions of this principle among European constitutions see Panara, Carlo, and Michael Varney. *Local Government in Europe. The 'Fourth Level' in the EU Multilayered System of Governance*. Routledge, 2013, pp.374-375.

[74] This was the core of what we saw in Chapter 2.

providing an EU constitutional basis to the local level of government as an actor and not only receiver of the wider EU governance system: this explicit mention, however, *"is not an European guarantee for the existence of such structures"*[75]. It must be recognized, indeed, that the current usual interpretation by the scholarship[76] as well as by the CJEU[77] of Article 4(2) TEU is focussed on the recognition and protection of the 'national identity' and internal constitutional structure of each member state as a reflection of the EU bi-centric structure with the EU level and the national level of member states: it is not focussed, instead, on a sincere attention for subnational authorities, but again it looks at nation-states. The EU seems, in conclusion, not to have fully incorporated the value of autonomy, and of local autonomy in specific: its constitutional recognition is still too broad to wholly acknowledge the decisive contribution of the local level of government and of local democracy itself to the wider EU governance. As it has been already argued, the emerging pictures of the Treaties is of a fundamentally bi-centric Union where the structure is built around the two supranational and national levels, with a legal vacuum with regard to the local level as a consequence of the fact that this level belongs to the exclusive domestic competence of each member state. This comes notwithstanding the fact that *"local governments are routinely affected by, and affect, EU law in their roles as public service providers and conduits for political participation*"[78]: the local level is indeed constantly subject not only to domestic law, but also indirectly to EU substantive law[79]. Indeed it is true that local authorities as a matter of fact are not only passive receivers of EU and national laws, but

[75] Schnettger, Anita. 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System'. *Constitutional Identity in a Europe of Multilevel Constitutionalism*, edited by Christian Calliess and Gerhard van der Schyff, Cambridge University Press, 2019, p.25.

[76] Paradigmatic is one recent commentary on the EU Treaties (Kellerbauer, Manuel, et al., editors. *The EU Treaties and the Charter of Fundamental Rights. A Commentary*. Oxford University Press, 2019), where the concept of local self-government included at Article 4(2) TEU is not even mentioned and explained (see pp.35-60).

[77] On the dominant interpretation of Article 4(2) TEU see, among the others, Martinico, Giuseppe. 'Taming National Identity: A Systematic Understanding of Article 4.2 TEU'. *European Public Law*, vol. 27, no. 3, 2021, pp. 447–64; and de Witte, Bruno. 'Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States'. *European Public Law*, vol. 27, no. 3, 2021, pp. 559–70. De Witte advocates (also through the analysis of some case law) for a strict interpretation of the principle as a mere guarantee for the internal constitutional structure of each member state, against a broader meaning that would open doors *"to abusive and superficial uses of identity as a justification for non-compliance with EU obligations from the side of the member States"* (p.560). Martinico, on his side, warns in particular about the nationalist-sovereigntist interpretation of the principle by some national courts (as the Hungarian case shows) that have carried out an abusive interpretation of the principle, which has gone much beyond the mere respect for the institutional autonomy outlined by the text of the Article.

[78] van Zeben, Josephine. 'Local Governments as Subjects and Objects of EU Law: Legitimate Limits?' *Framing the Subjects and Objects of Contemporary EU Law*, edited by Samo Bardutzky and Elaine Fahey, Edward Elgar Publishing, 2017, p.124.

[79] Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe*. Brill, 2018, pp.68-69.

may also themselves *"influence EU law through their norm-generating capacity"*[80], since EU law often incorporates norms upon inspiration by lower subnational levels of government, which as a consequence should be regarded as protagonists of the EU integration process together with the supranational and national levels of government[81]. The picture of a bi-centric Union is obviously anachronistic in relation to the evolution of the local level – and of cities in particular – as an emerging actor of public law beyond the nation-states' borders and within the wider European legal space we are looking at.

2.3. A forgotten meaning of subsidiarity grounded in local self-government

Within the EU constitutional construction, the principle of subsidiarity puts at its core the relationship between public authorities and citizens not only through a vertical distribution of powers among different levels of government, but also through an horizontal sharing of competences untied from the territorial level between public and private actors. Although the current and dominant interpretation of the principle within the EU legal order as we have explained so far (sub-paragraph 2.1) consists in its vertical dimension, it goes unquestioned that in the original debate in the 1990s a key role was played by the current of thought of the Catholic social philosophy, with its focus on the role played by autonomous private individuals (whether they are associated or not) in contributing to the common good. It is indeed this horizontal dimension of subsidiarity – we argue – (that we

[80] Finck, Michèle. 'Fragmentation as an Agent of Integration: Subnational Authorities in EU Law'. *ICON*, vol. 15, no. 4, 2017, p.1122. The example brought by the author is the Omega case, which established *that "the freedom to provide services, a cardinal pillar of market integration, can be restricted by a municipal measure seeking to protect public policy and human dignity".* The author continues: *"Bonn had prohibited the operation of laser games […]. This was, however, a particular, localized interpretation of human dignity, not shared more widely in Germany or indeed other Member States. […] Bonn took the deeply normative decision to apply a higher standard of protection than it had to as a matter of national constitutional law. The Court not only tolerated that interpretation but moreover accepted that human dignity amounts to a general principle of EU law. In accepting this specific localized interpretation of dignity, it effectively imported Bonn's interpretation of human dignity into EU law"* (pp.1122-1123). The norm-generating capacity of local governments have been summarised by the author by saying that *"cities like Bonn have no formal competence to influence EU law, yet through the interactions of their own norms with those of the Union they can influence supranational law's substantive core. What is striking about Omega and the other rulings subject to analysis here is that the Court treats subnational measures in the same manner as those of the Member States. This technique allows municipal norms to have identical generative effects in EU law that Member State norms are known to have"* (p.1123).

[81] This is the central thesis argued in Finck, Michèle. 'Fragmentation as an Agent of Integration: Subnational Authorities in EU Law'. *ICON*, vol. 15, no. 4, 2017, pp. 1119–34. The author claims that despite the schematic picture drawn by EU primary law which fundamentally envisages a bi-centric structure, the fragmentation of subnational authorities (regional and local) does actually constitute an agent of EU integration in so far as their policies often influences and inspire higher levels of government. Subnational authorities should therefore be regarded not only as receivers but also as exporters of norms.

will refer to as 'horizontal subsidiarity'[82]) the forgotten meaning[83] of the principle, together with its ability to valorise the self-government of the local level in so far as it is the closest level of government to citizens as individuals or associated in minimal societal units like families or associations (what in a broad sense is usually defined as 'civil society'). Indeed, despite the fact that there is no explicit recognition of that in the Treaties as *"the EU seems to overlook the horizontal dimension of subsidiarity operating at different scales"*[84], *"this does not mean the EU law is extraneous to the implicit values of it"*[85], and the EU indeed *"does not exclude this understanding, though the current institutional approach to subsidiarity still centres on the representative model, focussing on decisions made in national parliaments"*[86]. The horizontal dimension of the principle used to be also the perspective of one of the greatest advocates for subsidiarity, Jacques Delors[87], president of the European Commission in those years where the debate on subsidiarity was taking place (1985-1995). He used to have an understanding of subsidiarity based on the centrality of the autonomy of the citizen and its social components, which was actually much wider than the narrow Treaty provision on that, that as we saw is a consequence of the prevailing interpretation given by the British conservative ideology. Horizontal subsidiarity, in fact, strengthens a participatory form of democracy beyond mere representation in a governance perspective aimed at the inclusion of other actors: in a nutshell, we argue here that there may be room in the Treaties to disclose unexplored

[82] Arban, Erika. 'Re-Centralizing Subsidiarity: Interpretations by the Italian Constitutional Court'. *Regional & Federal Studies*, vol. 25, no. 2, 2015, p.129; Føllesdal, Andreas. 'Survey Article: Subsidiarity'. *The Journal of Political Philosophy*, vol. 6, no. 2, 1998, p.196.

[83] As we will claim, this forgotten meaning of subsidiarity has instead found its clearer and more robust application in the context of Italian cities thanks to the introduction of the horizontal dimension of subsidiarity in the Constitution. As a consequence of this constitutional recognition, it will be interesting to delve into its practical implementation through the organizational model of *"Shared administration"* of the commons in many Italian cities (Part II).

[84] Nicolaïdis, Kalypso, and Josephine van Zeben. 'Polycentric Subsidiarity'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, p.81.

[85] Giglioni, Fabio. 'Subsidiary Cooperation: A New Type of Relationship between Public and Private Bodies Supported by the EU Law'. *Rivista Italiana Di Diritto Pubblico Comunitario*, 2010, p.494. The author goes further by saying that *"if horizontal subsidiarity defines an innovative method of managing the general interest, where sharing and integrating responsibilities constitute a distinctive element, it is understandable how this system has significant potential to be welcome into the EU law, that has been testing new models for taking care of general interests since its coming to existence"* (p.497). See also Giglioni, Fabio. 'Alla Ricerca Della Sussidiarietà Orizzontale in Europa'. *Sussidiarietà e Concorrenza*, edited by Daniele Donati and Andrea Paci, Il Mulino, 2010, pp. 131–98 for the author's considerations on the implicit contribution of the principle of subsidiarity understood in its horizontal dimension to democracy in the EU.

[86] Peters, Birgit. 'Towards the Europeanization of Participation? Reflecting on the Functions and Beneficiaries of Participation in EU Environmental Law'. *Citizen Participation in Multi-Level Democracies*, edited by Cristina Fraenkel-Haeberle et al., Brill, 2015, pp. 317.

[87] On J. Delors see Giordano, Filippo Maria. 'Subsidiarity, a Transformative Principle for the Future of European Democracy'. *De Europa*, vol. 4, no. 2, 2021, pp. 99–118.

meanings from constitutional principles, and horizontal subsidiarity – in the light of its original debate in the 1990s – seems to have great potential in that.

Understood in its horizontal dimension, subsidiarity essentially recalls many other constitutional concepts, among which the ones of individuals' sovereignty, solidarity, participation. The link with individuals' sovereignty[88] invokes the concept of self-organization of individuals whom, in the horizontal meaning of subsidiarity, are considered as pro-active and free units of societal organization able to reach certain aims without the need for any public authority intervention[89]. This is also on its side linked to the concept of solidarity: solidarity, indeed, *"operates horizontally"*[90] between groups or organizational units that share a relation of proximity, and refers to a responsibility of the individual towards the community at large or, more broadly, towards 'the common good'[91]. In fact, *"there is increasing empirical evidence that solidarity is an expression of active citizenship in a grass roots political sense"*[92], constituting therefore a *de facto* solidarity and not only a statement of principle. In this sense, new forms of solidarity may emerge at any time within the European space and at any level of government: horizontal subsidiarity, from its side, could contribute to the flourishing of these new forms of solidarity beyond the mere nation-state level. In its horizontal dimension, subsidiarity recalls, additionally, the principle of participation, and especially the local level participation. Subsidiarity could indeed better develop through local democracy, as *"participation is furthered in small communities, since individuals there see the impact of their actions"*[93], bringing a contribution to an action-

[88] On the opposite, the principle of subsidiarity is for obvious reasons seen as a threat to national sovereignty, as essentially more in line with a decentralization rather than centralization perspective (we are aware, however, of the difference between subsidiarity and decentralization thanks to Drew, Joseph, and Bligh Grant. 'Subsidiarity: More than a Principle of Decentralization—a View from Local Government'. *Publius: The Journal of Federalism*, 2017, pp. 1–24).

[89] On horizontal subsidiarity and individuals' sovereignty as self-organization see Gussen, Benjamen. *Axial Shift City Subsidiarity and the World System in the 21st Century*. Palgrave Macmillan, 2019: *"self-organisation, also known as spontaneous order, refers to the ability of acquiring and maintaining a structure without external control" (*p.213) *and "subsidiarity is a principle that is anchored in the concept of sovereignty of the individual, where all other levels of social organisation are given a subsidiary role, taking up only those tasks and responsibilities that are beyond the capacity of the individual"* (p.227).

[90] Gussen, Benjamen. *Axial Shift City Subsidiarity and the World System in the 21st Century*. Palgrave Macmillan, 2019, p.206.

[91] On solidarity as related to the concept of common good see Ross, Malcolm. 'Transnational Solidarity: A Transformative Narrative for the EU and Its Citizens?' *Acta Politica*, 2020, p.5. On the concept of 'common good' and its relation with human dignity see Drew, Joseph, and Bligh Grant. 'Subsidiarity: More than a Principle of Decentralization—a View from Local Government'. *Publius: The Journal of Federalism*, 2017, pp.4-5.

[92] Ross, Malcolm. 'Transnational Solidarity: A Transformative Narrative for the EU and Its Citizens?' *Acta Politica*, 2020, p.2.

[93] Føllesdal, Andreas. 'Survey Article: Subsidiarity'. *The Journal of Political Philosophy*, vol. 6, no. 2, 1998, p.198.

oriented form of participation (a 'participation in doing') beyond a mere 'participation in deciding' (as defined in Chapter 2).

In the light of these traces of subsidiarity in other constitutional principles, its horizontal dimension sheds a new light on the principle of local self-government: in order to understand that, it becomes necessary to recall here the concept of polycentricity[94] and the related concept of 'polycentric subsidiarity'. The polycentric theory[95] contains a view of subsidiarity that asserts the relationship between an horizontal (and not vertical) distribution of power and self-governance, granting recognition to actors other than states and to individuals' capabilities, while at the same time recognizing[96] the importance of different scales of government and mostly the local level. Self-governance[97] as the distinctive feature of polycentric system may therefore be connected with the principle of subsidiarity in so far as we adopt an *horizontal* perspective of subsidiarity able to prioritize the role of the local level of government within its capacity of self-government as a supporter to individuals' initiatives (also within collective action[98]). Individuals' self-governance capacity in polycentric theory should not, indeed, be understood *"as hostile towards, or incompatible with, governmental action. In fact, public officials are considered potential allies and teachers in the process of self-governance by supporting communities to identify and solve common problems"*[99]. This horizontal dimension of subsidiarity clearly backed by polycentric theory was not eventually explicitly introduced in the Treaties, as a consequence of the continued centrality of member states and their disfavour towards horizontal distribution of power[100]. However, it is this meaning of subsidiarity that would allow a wider support granted by public authorities towards the inclusion of bottom-up

[94] See further paragraph 4 of this Chapter. Additionally, we already mentioned that in Chapter 2, paragraph 6.

[95] Whose leading representative was Vincent Ostrom.

[96] Nicolaïdis, Kalypso, and Josephine van Zeben. 'Polycentric Subsidiarity'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, p.96.

[97] That in Chapter 2, paragraph 6, we defined as *"the ability of individuals to be autonomous in determining the rules underlying their relations with others, rather than relying on the State and governmental authorities".*

[98] When mentioning 'collective action', an obligatory passage is the reference to the lifetime work on collective action of Elinor Ostrom, which was notably grounded on Vincent Ostrom's work on polycentricity, and whose contributions include Ostrom, Elinor. *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge University Press, 1990.

[99] van Zeben, Josephine. 'Polycentricity as a Theory of Governance'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, p.20.

[100] On this point see van Zeben, Josephine, and Ana Bobić. 'Conclusions - Pathways to Polycentricity'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, pp.311-312. Curiously, Vincent Ostrom already in 1996 observed that "*Principles of subsidiarity need to be extended to family, neighborhood, and community far beyond the realm of nation-states as contemplated by the Maastricht Accord"* (Ostrom, Vincent. 'Faustian Bargains'. *Constitutional Political Economy*, vol. 7, no. 4, 1996, p.307).

inputs of non-state actors. This would occur as a consequence of a matured awareness of the EU legal system being intrinsically conceived as a polycentric system of governance[101], where there is a need for a proper inclusion of also an horizontal dimension of subsidiarity as a reflection of the EU *de facto* being built as a new kind of democracy where both dimensions of government and governance[102] have a legitimation[103]. Polycentric theory, therefore, can be said to support a vision of subsidiarity which is fully in line with the idea of 'horizontal subsidiarity' in contrast to the vertical predominant interpretation.

In the absence of any explicit recognition of this horizontal dimension of subsidiarity within the Treaties text, only two vague and implicit reference could be traced: in the preamble *("RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity"*), and in Article 10(3) TEU *("Decisions shall be taken as openly and as closely as possible to the citizen"*). Both statements, however, constitute more a declaration of intent than concrete substance. More interesting is the fact that beyond the Treaties text this forgotten meaning of subsidiarity has unconsciously and invisibly survived within the EU space through indirect means thanks to the work of other institutional actors: this is the case of the European Economic and Social Committee (EESC)[104]. It goes without mention that the EESC contribution does not compensate for the lack of its clear entrenchment in EU primary law: this however deserves a mention. The EESC is an advisory body of the EU representing employers' and workers' organisations and other interest groups contributing to the three aspects of economic and social conditions, participatory democracy, and EU integration. Its work is worth mentioning here in relation to the concepts of *"active citizenship"*[105] and *"functional subsidiarity"* (also named horizontal subsidiarity)[106]. With regard to active citizenship the

[101] This is the central thesis argued by van Zeben, Josephine, and Ana Bobić, editors. *Polycentricity in the European Union.* Cambridge University Press, 2019.

[102] We may here refer further to the concept of 'multi-centred governance' as strictly linked to horizontal subsidiarity, used for defining the many political communities that contribute to the system of governance in Nicolaïdis, Kalypso. 'Conclusion: The Federal Vision Beyond the Federal State'. *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, edited by Kalypso Nicolaïdis and Robert Howse, Oxford University Press, 2001, pp.466-480.

[103] See on this Chapter 1, paragraph 4.

[104] We may refer to Giordano, Filippo Maria. 'Subsidiarity, a Transformative Principle for the Future of European Democracy'. *De Europa*, vol. 4, no. 2, 2021, p.107, where EESC's work on subsidiarity has been more deeply analysed.

[105] See Active citizenship. For a better European Society, 6, 2012, in https://op.europa.eu/it/publication-detail/-/publication/1822448a-1e8f-4f3b-bd06-d60eb7fc0b78.

[106] See Opinion of the Economic and Social Committee on 'European Governance — a White Paper'

EESC fundamentally refers to all those units of organized civil society that contribute to their community through various forms of participatory democracy aimed at problem solving, which are able to go much beyond casting a vote every few years. Individuals' capacities are placed at the centre when talking about both active citizenship as well as about subsidiarity, which is conceived by the EESC as *"the most important principle of good governance"*, considering it *"not merely a principle of administrative technique and distribution of powers but the expression of a certain conception of the individual, its freedom, its responsibilities and the society it lives in"*[107]. In parallel to its vertical dimension (also named 'territorial subsidiarity'), subsidiarity is understood by the EESC in its horizontal (or functional) dimension for giving *"recognition to the public role of private players e.g. citizens and representative civil society organisations and to their participation in policy-shaping and decision-making processes, through their specific consultative role, as well as the autonomous legislative role of social partners in the context of European social dialogue. In fact, this concept of horizontal subsidiarity […] is already implicitly recognised by the Treaties under Articles 152, 154 and 155 TFEU[108] on social dialogue and the role of social partners"* [109]. The significance given by the EESC to horizontal (or functional) subsidiarity is still different from its meaning explained until here, in so far as the EESC limits itself to the contribution of private actors mainly through consultations and dialogues, while the wider meaning of horizontal subsidiarity goes further in supporting individuals' capacity of self-governance and their action-oriented method of participation. At the same time, the EESC contribution should be given credit for its acknowledgement – at least on paper – in a governance perspective of the role of private actors acting for the general interest which essentially goes back to the original meaning of subsidiarity provided by the Catholic social philosophy.

Coming to a conclusion, we have to recognize that the horizontal meaning of subsidiarity as originally conceived by the Catholic social philosophy with the individual and its free and spontaneous contribution to the common good at its core has gone lost in the explicit wording of the EU. This came despite its well-known existence in the original

(COM(2001) 428 final) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002AE0357&from=IT

[107] See Opinion of the Economic and Social Committee on 'European Governance — a White Paper' (COM(2001) 428 final).

[108] These articles refer to the role of social partners through consultations and the social dialogue.

[109] Opinion of the European Economic and Social Committee on 'Improving the functioning of the European Union building on the potential of the Lisbon Treaty' and on 'Possible evolutions and adjustments of the current institutional set-up of the European Union' (2016/C 013/27) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2016.013.01.0183.01.ENG&toc=OJ%3AC%3A2016%3A013%3AFULL

EU debate on this principle in the 1990s[110], and despite its inclusion (at different points in time) in the constitutional text of two EU member states (Italy and Poland)[111]. In parallel to that, also the principle of local self-government is totally overlooked in the wording of the EU Treaties, with also a scarce recognition by the principle of subsidiarity. And here comes the link among the two, we argue: the forgotten horizontal meaning of subsidiarity seems to be perfectly suited for strengthening the principle of local self-government, as well as vice versa local self-government places the local level of government in the best position so as to support spontaneous initiatives of individuals in implementing horizontal subsidiarity on ground. As it has been claimed, indeed, the principle of subsidiarity constitutes much more than a mere principle of decentralization[112], and the two could not be equated since subsidiarity goes much beyond a mere decentralization of government. Subsidiarity in fact supports a necessity for the level of government which is the closest to citizens to *"actively promote the formation of associations and provide support – whether*

[110] Not even more recent studies on the principle included any mention to its horizontal dimension, notwithstanding not only its essential contribution to the principle itself, but also the many recent contributions that in the scholarship are advocating more and more for that: we are referring in specific, for example, to the '*Task force on subsidiarity, proportionality and doing less more efficiently*', established on 14 November 2017 by European Commission President Jean-Claude Juncker. The Task force had 3 main aims: 1) make recommendations on how to better apply the principles of subsidiarity and proportionality; 2) identify policy areas where work could be re-delegated or definitely returned to EU member states; 3) find ways to better involve regional and local authorities in EU policy making and delivery. Its outputs can be found at https://ec.europa.eu/info/better-regulation/task-force-subsidiarity-proportionality-and-doing-less-more-efficiently_en.

[111] The implementation of the principle of subsidiarity in its horizontal dimension (Article 118(4) Italian Constitution) in Italian cities will constitute the object of our research in Part II. In the Polish constitution, on the other side, the principle of subsidiarity in its horizontal dimension is only mentioned in the Preamble: *"Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities".* The English official translation of the text of the Constitution can be found at https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm. For an overview of the principle of subsidiarity in Poland see Poplawska, Ewa. 'The Principle of Subsidiarity under the 1997 Constitution of Poland'. *Saint Louis-Warsaw Transatlantic Law Journal*, 1997, pp. 107–20 (the author, in specific, laments the lack of definition of subsidiarity in the Constitution). Additionally, see also Arban, Erika. 'Re-Centralizing Subsidiarity: Interpretations by the Italian Constitutional Court'. *Regional & Federal Studies*, vol. 25, no. 2, 2015, pp. 137-138 (in reporting the Polish case, Arban underlines the *"elasticity of this fundamental principle of EU law"* at p.138).

[112] As argued in Drew, Joseph, and Bligh Grant. 'Subsidiarity: More than a Principle of Decentralization—a View from Local Government'. *Publius: The Journal of Federalism*, 2017, pp. 1–24. The interpretation of subsidiarity as decentralization, they argue, essentially comes from the federalism literature which provides for a government-centric interpretation to the principle *"in an apparent obsession with the geographical proximity and scale of various tiers of government"*, but instead fails in acknowledging the 'positive obligation' as a must *"to provide* subsidium *when lesser associations become unable to perform their function for the common good"* also towards persons within associations. With concern to the relationship between subsidiarity and decentralization, it should be reported that within the EU context it has been claimed that the EU principle of subsidiarity has actually a centralising, rather than decentralising, effect: see on that Cahill, Maria, and Gary O'Sullivan. 'Subsidiarity and the City: The Case for Mutual Strengthening'. *Cities in Federal Constitutional Theory*, edited by Erika Arban, Oxford University Press, 2022.

financial or purely facilitative – in a manner consistent with the concept of subsidium*"*[113] so that it would benefit both individual human dignity and societal common good. In order to move in this direction, we argue that it would not be needed to wait for a Treaty change for an explicit recognition of horizontal subsidiarity: in fact, that is already implicitly inside the European constitutional tradition[114], but it is up to local governments to apply it out of their own free will, recognizing therefore the principle not only as a technical-legal one, but also as harbinger of a new governance culture. Hence the importance of delving into the local level of government and its autonomy as the frontier to look at: the CoE provided an essential contribution to this aim. The following table is meant to help visualizing the two dimensions of subsidiarity in correlation to the two forms of democracy in the EU and their government/governance perspective.

1	Vertical subsidiarity	Representative form of democracy	Government perspective
2	Horizontal subsidiarity	(Action-oriented) participatory form of democracy	Governance perspective

Table 2. Two dimensions of subsidiarity and their potential understanding within the EU legal order (author's elaboration).

3. Subsidiarity and local self-government in the CoE legal order

When looking at the local level of government within the European legal space, the input of the Council of Europe is much more decisive than that of the EU for its constitutional contribution towards the recognition of local authorities beyond nation states' borders. Not only with concern to the principle of participation[115], but also on the principle of local self-government the most important benchmark among the CoE acts is the European Charter of local self-government of 1985. As we already saw, the main contribution of the CoE legal order to the principle of participation is the connection drawn by the CoE between participation and local democracy at the constitutional level through

[113] Drew, Joseph, and Bligh Grant. 'Subsidiarity: More than a Principle of Decentralization—a View from Local Government'. *Publius: The Journal of Federalism*, 2017, p.15.

[114] And, as we saw earlier in this paragraph, inside other European constitutional principles like individuals' sovereignty, solidarity, participation.

[115] As we already saw in Chapter 2, paragraph 4.

the Charter: in this paragraph we will see that the Charter also provides ground for an European Constitutional Local Government Law[116], where both the principles of subsidiarity and local self-government are given recognition as truly European principles. Entered into force in 1988, the Charter is a source of international law which has been ratified by all the 47 CoE member states, and it has binding effects whether only under international law, or through the member states' incorporation of it into domestic law (through direct or indirect effect)[117]. Its status is, however, disputed in each national legal order, as the common trend for national courts is *"to declare provisions as being non self-executing to shield national legal systems from radical changes"*[118]. Unlike other international treaties of the CoE which have been included in EU primary law like the European Convention on Human Rights (ECHR) and the European Social Charter (ESC) that have received an explicit mention respectively at Article 6(2) TEU and Article 151 TFEU, the European Charter of local self-government finds no mention in EU Treaties nor its principles have been defined as general principles of EU law by the CJEU[119], even though some have argued that *"the Charter is the only yardstick setting out the minimum common standards which could be deemed being general principles of EU law and which should as such be abided by EU bodies when passing new legislation"*[120].

The Charter contains the very first implicit recognition[121] of the principle of subsidiarity in an international treaty in Article 4(3): *"Public responsibilities shall generally*

[116] On this point reference goes to the contribution of Boggero, Giovanni. 'La Carta Europea Dell'autonomia Locale Nella Giurisprudenza Degli Stati Europei'. *Le Regioni*, no. 5–6, 2015, pp. 1077–110.

[117] For a comprehensive understanding of the rank of the Charter under domestic law of the CoE member states we may refer to Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe.* Brill, 2018, p.73-82.

[118] Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe.* Brill, 2018, p.74. Usual exceptions occur in Central and Eastern European countries where the Charter is considered to be directly applicable as it has the same status of international treaties on human rights: for a further in-depth reading on the jurisprudence of member states on the status of the Charter see Boggero, Giovanni. 'La Carta Europea Dell'autonomia Locale Nella Giurisprudenza Degli Stati Europei'. *Le Regioni*, no. 5–6, 2015. In particular, the author claims that national courts seem to be rarely conscious of being immersed in an European common legal space where local autonomies are constitutionally recognized beyond national constitutions: *"I giudici nazionali chiamati ad applicare la Carta sembrano dunque scarsamente consapevoli di essere immersi in uno spazio giuridico comune in cui il ricorso alla comparazione diventa essenziale non soltanto per una corretta interpretazione del diritto pattizio, ma anche per assicurare l'effetto protettivo più forte alle autonomie locali garantite dalla Costituzione"* (p.1111). See additionally footnote no.137 of Chapter 2.

[119] Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe.* Brill, 2018, pp.67-68, where he observes that only some opinions by the Committee of the Regions and of the Advocate General have explicitly referred to the Charter as a legally binding source for both the EU itself and the member states.

[120] Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe.* Brill, 2018, p.71.

[121] Himsworth, C. M. G. *The European Charter of Local Self-Government: A Treaty for Local Democracy*. Edinburgh University Press, 2015, p.45.

be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy". Clearly it is the vertical (and not horizontal) dimension of subsidiarity the one the Charter is referring to[122], perfectly in line with the EU follow-up contribution. However, credit must be given to the Charter in so far as it included already since 1985 the recognition of the local level of government in the allocation of power, while the EU reached that recognition – even if on a purely theoretical level – only with the Lisbon Treaty in 2009[123]. This article maintains that unless a certain task would be better treated by an higher level of government because of efficiency or economy requirements (which on its side constitutes the other side of the coin, allowing in such occasions for a centralizing thrust[124]), the most local level of government should be generally entrusted: in this way, subsidiarity is entrenched at the subnational level.

However, while it is the EU the body that gave a fundamental contribution to the principle of subsidiarity, it is the CoE and the Charter (as it emerges from the title itself) that granted a wider attention to the principle of local self-government more than subsidiarity. Outlined in Article 3 of the Charter, the principle provides the first real reference to local authorities (LAs)[125] and their *"right and ability […] within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population"* (Article 3(1) of the Charter). This 'right and ability' consists according to the Charter to the first aspect of the concept of local self-government that pertains local authorities, that could be explained as the political autonomy[126] of local authorities. The concept of 'self-government' matches essentially the one of 'autonomy', as it can be understood from the official version of the Charter in French, which uses the term "*autonomie locale*"[127]. Through the recognition of the political

[122] As observed by Kössler, Karl, and Annika Kress. 'European Cities Between Self-Government and Subordination: Their Role as Policy-Takers and Policy-Makers'. *European Yearbook of Constitutional Law 2020. The City in Constitutional Law*, edited by Ernst Hirsch Ballin et al., Springer, 2020, p.280.

[123] For this observation, Kössler, Karl, and Annika Kress. 'European Cities Between Self-Government and Subordination: Their Role as Policy-Takers and Policy-Makers'. *European Yearbook of Constitutional Law 2020. The City in Constitutional Law*, edited by Ernst Hirsch Ballin et al., Springer, 2020, p.280.

[124] As observed in Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe.* Brill, 2018, p.154-161, whom we may refer to for further in-depth analysis of subsidiarity in Article 4(3) of the Charter.

[125] It is interesting to observe the frequency of use of some terms in the (English text of the) Charter: the term 'local authorities' occurs 36 times; 'local authority' 2 times; 'local government' 1 time; 'local self-government' 15 times; 'local autonomy' 0 times.

[126] It is the contribution of Panara, Carlo, and Michael Varney. *Local Government in Europe. The 'Fourth Level' in the EU Multilayered System of Governance.* Routledge, 2013, p.372 that matches this first aspect of local self-government with (local) political autonomy.

[127] See footnote no.3 of this Chapter.

autonomy of local authorities, the Charter is basically promoting a perspective of institutional pluralism[128] within the European legal space. The second aspect of local self-government is outlined in Article 3(2) of the Charter and has been defined[129] as *"the democratic nature of local self-government"*: local self-government, indeed, is a right and ability that could be exercised by any local authority formed on the basis of representative democracy schemes, which therefore constitute the first democratically elected level of government. It should be noted that the reference to 'local authorities' in the Charter is not without ambiguity, as it has been observed[130]. The reference here is Article 13 of the Charter where it is stated that each ratifying State should specify which categories of *"local or regional authorities"* may be considered as the object of the Charter. The Charter is therefore not providing for any exhaustive list of which public authorities should be considered as entitled to local self-government, but it leaves the choice to any State to clarify that *"when depositing its instrument of ratification*", therefore giving space to a very heterogeneous set of authorities. As it has been suggested[131], Article 13 is not that precise, but despite that it is all those public authorities with a truly local dimension and some kind of relationship with central or regional higher levels what constitutes the real target of the Charter.

The issue that arises at this point concerns the essence of self-government (or autonomy): in fact, currently there is no consensus on how to define what is self-government, nor on how to measure that[132], and comprehensive studies addressing the different components of local self-government within an all-encompassing framework are lacking[133]. Among some attempts, a recent one[134] is worth mentioning as it came up with a Local Autonomy Index (LAI), identifying 7 dimensions of local autonomy[135]: 1) legal

[128] Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe.* Brill, 2018, p.13.

[129] Panara, Carlo, and Michael Varney. *Local Government in Europe. The 'Fourth Level' in the EU Multilayered System of Governance.* Routledge, 2013, p.372.

[130] Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe.* Brill, 2018, pp.87-91.

[131] Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe.* Brill, 2018, p. 91.

[132] Kössler, Karl, and Annika Kress. 'European Cities Between Self-Government and Subordination: Their Role as Policy-Takers and Policy-Makers'. *European Yearbook of Constitutional Law 2020. The City in Constitutional Law*, edited by Ernst Hirsch Ballin et al., Springer, 2020, p. 276.

[133] This is the general claim expressed in Ladner, Andreas, et al., editors. *Patterns of Local Autonomy in Europe.* Palgrave Macmillan, 2019, p.333.

[134] Ladner, Andreas, et al., editors. *Patterns of Local Autonomy in Europe.* Palgrave Macmillan, 2019.

[135] Ladner, Andreas, et al., editors. *Patterns of Local Autonomy in Europe.* Palgrave Macmillan, 2019, pp.333-334. In addition to LAI, we may also mention two other indexes: Ivanyna, Maksym, and Anwar Shah. 'How Close Is Your Government to Its People? Worldwide Indicators on Localization and

autonomy (on whether the local level has received constitutional cover or not); 2) policy scope (concerning the number of tasks a local authority fulfils); 3) political discretion (on whether the local authority has discretion in fulfilling its tasks or not); 4) financial autonomy (on its financial resources); 5) organisational autonomy (the capacity to organise its own administration); 6) non-interference (on the relationship between the local level and upper levels of government); and 7) access (on its capacity to influence higher levels). We recognize, however, that boundaries with precise benchmarks for assessing local autonomy are still blurred and undefined, and the Charter itself does not define precise aspects of local self-government in a measurable way[136]. As a consequence, we merely acknowledge the value of the Charter for its landmark legal contribution to the recognition of a common European constitutional local government law, constituting a *"reference framework offering normative and in particular constitutional guidance for setting up a new local government system from its very foundations at domestic level […] as well as for complementing the constitutional frameworks of those legal orders in which a local government system already exists"*[137]. In contrast with the EU legal system, therefore, local authorities are recognized by the Charter for their role of active players beyond nation states thanks to their right and ability of self-government, finding proper space and consideration within a common European constitutional perspective. They are also recognized a right to associate (Article 10) beyond national borders within international organisations.

All in all what can be said is that local self-government is recognized – together with the principle of (vertical) subsidiarity – and guaranteed in all EU member states, as a consequence of the fact that they are all part to the CoE 1985 Charter, which constitutes the reference framework for a common European Constitutional local government law. On the principle of local self-government, the role of the CoE proves to be significantly more decisive than the one of the EU, while the opposite is true with regard to the principle of subsidiarity. According to the Charter, on one side local self-government comprises a proactive role of local authorities with a political autonomy based on their democratic

Decentralization'. *World Bank Policy Research Working Paper No. 6138*, 2012; and Sellers, Jefferey M., and Anders Lindström. 'Decentralization, Local Government, and the Welfare State'. *Governance*, vol. 20, no. 4, 2007.

[136] Worth mentioning here is the recent Congress of Local and Regional authorities. *A Contemporary Commentary by the Congress on the Explanatory Report to the European Charter of Local Self-Government.* 12 Feb. 2020, https://rm.coe.int/a-contemporary-commentary-by-the-congress-on-the-explanatory-report-to/16809cbf8c.

[137] Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe*. Brill, 2018, p.291.

election, and on the other citizens' right to participate should also be recognized and supported by local authorities (as we saw in Chapter 2, paragraph 4). Within the EU, the local level of government and its local democracy could therefore already count on the constitutional ground provided by the combination of the CoE and EU respective legal orders, notwithstanding the fact that a state-centric vision is still predominant, and notwithstanding the still little awareness of the Charter by society, and of its Constitutional European value by national Courts: this constitutional ground, indeed, already exists.

4. Doctrinal contributions to the local level: federalism and polycentricity

When investigating the growing importance of the local level of government within the European Union it becomes necessary not only to look at the constitutional ground for that, which as we saw is already provided by the combination of the EU and the CoE respective legal orders, but also at the doctrinal contribution provided by scholars to that. In this paragraph in particular we will present the contribution provided by two theories that lately started paving the way to a wider recognition of the local level: the first – federalism – which is looking at the local level from a government perspective; the second one – polycentricity – which is looking at the local level from a governance perspective.

After a general blindness of federalism literature on the local level, it has been a few years as of now that federal scholars have started to question the traditional two-tier approach of federal systems of government, as founded respectively on the national and the subnational levels[138]. Increasingly power is to be shared not only among these two levels, but also with the local level of government, which as a consequence is receiving increasing attention from a constitutional and legal perspective[139], notwithstanding the fact

[138] As already suggested in the literature, the terms 'level', 'tier', 'order' or 'spheres' of government could be used interchangeably (Palermo, Francesco, and Karl Kössler. *Comparative Federalism: Constitutional Arrangements and Case Law.* Bloomsbury Publishing, 2017, p.9). However, for the justification of our use of the term 'level', see footnote no.64 in Chapter 1.

[139] As a starting point on that see Palermo, Francesco, and Karl Kössler. *Comparative Federalism: Constitutional Arrangements and Case Law.* Bloomsbury Publishing, 2017, pp.281-315, which refers to the local level within an internal domestic perspective as a *"third order of government"*. The rise of local entities has also been recently recognised by Popelier, Patricia. *Dynamic Federalism. A New Theory for Cohesion and Regional Autonomy.* Routledge, 2021, p.2. Additionally, more recently Saunders, Cheryl, and Erika Arban. 'Federalism and Local Governments'. *Cities in Federal Constitutional Theory*, edited by Erika Arban, Oxford University Press, 2022 contributed to the local government research strand of federal studies. Earlier considerations on the issue of local governments in the debate on federalism could be found in Steytler, Nico. 'Comparative Conclusions'. *Local Government and Metropolitan Regions in Federal Systems*, edited by Nico Steytler, McGill-Queen's University Press, 2009, pp. 393–436, where the author observes the progressive recognition of local governments: *"it was only after the Second World War that local government*

that its existence dates much before the creation of (federal) nation-states[140]. The main issues that scholars face when talking of local government and federalism concern three main aspects[141], which receive different answers in each federal system: 1) the degree of autonomy of local government, 2) its relationship with other levels of government[142], 3) its place in the constitutional framework. In parallel to these aspects which are usually quite challenging, there seems to be at least three main strength factors that a local level of government would bring to federalism[143]: 1) a contribution to the quality of democracy thanks to the addition of another layer of elected government, allowing for a closer contact between people and their representatives, a more concrete possibility of influencing political outcomes, and more chances of participation and inclusion; 2) the local level of government could be more responsive in both policy-making and service delivery because of its better understanding of the community from which it is elected; 3) lastly, the local tier of government also contributes to the dispersal of power favouring decentralization of authority in contrast to centralising pressures from higher levels of government. The overall input of federalism is of special importance as alongside its long history it has always been committed to understanding the distribution of power (or 'competences', as written in the EU Treaties)[144] in multi-level systems, therefore contributing to the broader field of the theory of the state from a legal (constitutional) perspective, but also through other disciplinary lenses as political science or political philosophy[145]. Federalism, in a

gradually received constitutional recognition, resulting from linking democracy to decentralization" (p.406). Steytler additionally already recognized back in 2009 that *"the importance of local governments as an order of government is likely to grow"* (p.434).

[140] As already seen in paragraph 1 of this Chapter.

[141] As it has been observed in Saunders, Cheryl, and Erika Arban. 'Federalism and Local Governments'. *Cities in Federal Constitutional Theory*, edited by Erika Arban, Oxford University Press, 2022.

[142] For a critical account on how central governments could actually support local authorities within a larger aim to weaken intermediate levels of government see further Dickovick, J. Tyler. 'Municipalization as Central Government Strategy: Central-Regional–Local Politics in Peru, Brazil, and South Africa'. *Publius*, 2009.

[143] As it has been observed in Saunders, Cheryl, and Erika Arban. 'Federalism and Local Governments'. *Cities in Federal Constitutional Theory*, edited by Erika Arban, Oxford University Press, 2022.

[144] The two terms 'powers' and 'competences' are considered as synonyms in Palermo, Francesco, and Karl Kössler. *Comparative Federalism: Constitutional Arrangements and Case Law*. Bloomsbury Publishing, 2017, p.10.

[145] On political philosophy we may refer to two contributions reflecting on federalism and cities: King, Loren. 'Cities, Subsidiarity, and Federalism'. *Federalism and Subsidiarity*, edited by James E. Fleming and Jacob T. Levy, New York University Press, 2014, pp. 291–331 and Weinstock, Daniel. 'Cities and Federalism'. *Federalism and Subsidiarity*, edited by James E. Fleming and Jacob T. Levy, New York University Press, 2014. Despite the acknowledged impossibility of demarcating cities clearly, Weinstock provided for a definition of what a city is in relation to the federalism literature: *"a city is an integrated and organized territory of a certain scale and density within which most residents lead the major aspects of their lives"* (p.269).

nutshell, and in the absence of a widely accepted definition[146], may be described according to one of its most recent theorisations[147] as a value concept which *"refers to maintaining the proper balance between different levels of territorial authority"*[148]: this contributes to the essential function of guaranteeing institutional pluralism[149], possibly within a common constitutional framework. Within the EU legal order, however, it should be noted[150] that it was the principle of subsidiarity – and not federalism – the one that has allowed for the recognition of multiple levels of government in addition to the national and subnational one (the latter one generally referring to the regional level within the EU): namely the supranational EU level, and the local level, which could be regarded as the fourth tier of government within the EU legal order[151]. Federalism on its side has the merit of having introduced one specific term within its academic debate, that aims at circumscribing a specific phenomenon within the local level of government: that is the 'city'. Earlier usage of the concept of city as distinct from other local governments entities has found place among North American federal scholars[152], who realised the limited power

[146] As Palermo and Kossler argue, indeed, federalism could be *"simultaneously understood as a concept, an ideal (and an ideology), a system of government and a set of institutions and instruments"* (Palermo, Francesco, and Karl Kössler. *Comparative Federalism: Constitutional Arrangements and Case Law*. Bloomsbury Publishing, 2017, p.2). However, we may also refer to the most quoted definition being the one suggested by Elazar, according to which it is *"self-rule plus shared rule"*, as *"federalism has to do with the need of people and polities to unite for common purposes yet remain separate to preserve their respective integrities"* (Elazar, Daniel J. *Exploring Federalism*. University of Alabama Press, 1987, pp.12 and 33). It consists in *"at least two entities being part of a larger union while at the same time enjoying autonomy"* (Palermo, Francesco, and Karl Kössler. Comparative Federalism: Constitutional Arrangements and Case Law. Bloomsbury Publishing, 2017, p.18). This research will use the concept of federalism limited to its contribution to the recognition of the local level of government: a broader and deeper study of the academic debate on federalism is, in fact, much beyond our scope.

[147] We are here referring to the landmark contribution of Popelier, Patricia. *Dynamic Federalism. A New Theory for Cohesion and Regional Autonomy*. Routledge, 2021. The author, in specific, outlines a clear terminological distinction between federalism (considered as a value), federalist systems (as political organizations), and federations (as a form of state). In this book, she comes up with a new theory of federalism redefined in terms of autonomy and cohesion (instead of the traditional self-rule and shared rule) able to encompass all forms of multi-tier systems: *"dynamic federalism"* is the way it has been defined.

[148] Popelier, Patricia. *Dynamic Federalism. A New Theory for Cohesion and Regional Autonomy.* Routledge, 2021, p.46.

[149] On this link between federalism and pluralism see Palermo, Francesco, and Karl Kössler. Comparative Federalism: Constitutional Arrangements and Case Law. Bloomsbury Publishing, 2017, p.6.

[150] See also Blank, Yishai. 'Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance'. *Fordham Urban Law Journal*, 2010, p.545.

[151] As advocated by Panara, Carlo, and Michael Varney. *Local Government in Europe. The 'Fourth Level' in the EU Multilayered System of Governance*. Routledge, 2013 and argued in Chapter 1, paragraph 2. As we have already seen, however, it may be claimed that this recognition has arguably occurred only on paper (as claimed by Finck, Michèle. 'Challenging the Subnational Dimension of Subsidiarity in EU Law'. *European Journal of Legal Studies*, vol. 8, no. 1, 2015, pp. 5–17).

[152] See, among the others, Frug and Blank: Blank, Yishai. 'Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance'. *Fordham Urban Law Journal*, 2010, pp. 509–58; Frug, Gerald E. 'Empowering Cities in a Federal System'. *The Urban Lawyer*, vol. 19, no. 3, 1987, pp. 553–68; Frug, G. E. 'The City as a Legal Concept'. *Harvard Law Review*, vol. 93, no. 6, 1980, pp. 1059–154; Frug, Gerald E., and David J. Barron. 'International Local Government Law'. *The Urban Lawyer*, vol. 38, no. 1, 2006.

of cities as traditionally conceived as mere *"creatures of the State"*[153]. These scholars on one side observed the potential of the principle of subsidiarity in having gone further than federalism in foreseeing more city power within States' internal organisation[154], while on the other anticipated the growing importance of cities as independent international actors beyond nation-states within a framework of 'international local government law'[155]. As a solution to recognize and increase city power still within the American system of government, someone has also advocated for a shift from the traditional federal focus on the vertical allocation of powers to a horizontal attention to inter-city relationships[156], where cities should build more participatory forms of societal organization (both internally and externally with other cities) so as to be able to resist centralized control[157]. A more specific meaning to the term 'city' as distinguished from other local government entities, however, has begun to be elaborated by constitutional scholars of federalism only very recently[158], in the wake of a ground-breaking awakening within constitutional law scholarship[159] that supposedly for the first time shed light on the city as an autonomous legal entity. It is originally in the work of Althusius, the forerunner of subsidiarity and federalism in the European space, that a fundamental importance was given to the city as one of the multiple layers of society, alongside with the family (conceived as the primordial form of

[153] This well-known expression comes from Frug, G. E. 'The City as a Legal Concept'. *Harvard Law Review*, vol. 93, no. 6, 1980, p.1063.

[154] Blank, Yishai. 'Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance'. *Fordham Urban Law Journal*, 2010, pp. 509–58.

[155] This is claimed by Frug, Gerald E., and David J. Barron. 'International Local Government Law'. *The Urban Lawyer*, vol. 38, no. 1, 2006, p.11: the author argues that *"there is a role for the international local government law in shaping the future of urban life"* (p.62).

[156] Frug, Gerald E. 'Empowering Cities in a Federal System'. *The Urban Lawyer*, vol. 19, no. 3, 1987, p.565.

[157] In a further contribution, Frug indeed argues that city powerlessness also prevents the realisation of "public freedom" conceived as *"the ability to participate actively in the basic societal decisions that affect one's life"* (Frug, G. E. 'The City as a Legal Concept'. *Harvard Law Review*, vol. 93, no. 6, 1980, p.1068). It should be observed, however, that despite the usage of the precise term 'city', Frug conceived it with no distinction from other local government entities: the 'city' is therefore used by him interchangeably with 'towns', 'neighborhood', 'regional government' (Frug, G. E. 'The City as a Legal Concept'. *Harvard Law Review*, vol. 93, no. 6, 1980, p.1061). Interesting to note is that Frug already back in 1980 was questioning the reason why *"cities are governed as bureaucracies, rather than as experiments in participatory democracy"*, claiming that the local level is the ideal locus for innovative participatory forms of democracy, and that the major responsibility for that lies on State governments and its centralized control (p.1073).

[158] Reference goes to the book edited by Arban, Erika. Cities in Federal Constitutional Theory. Oxford University Press, 2022: the city is here regarded by the contributing scholars as an independent subject within federalism, moving therefore beyond a dual approach to federalism focussed only on the national and subnational levels. Among the contributions in this book, we may refer for the purpose of this paragraph to the following chapters: Arban, Erika. 'An Intellectual History of Federalism: The City and the "Unit" Question'; Saunders, Cheryl, and Erika Arban. 'Federalism and Local Governments'; Cahill, Maria, and Gary O'Sullivan. 'Subsidiarity and the City: The Case for Mutual Strengthening'; Schragger, Richard. 'Conclusion: The City in the Future of Federalism'.

[159] We are obviously referring to the highly cited work of Hirschl, Ran. *City, State. Constitutionalism and the Megacity*. Oxford University Press, 2020.

association among individuals), the collegium, the province, and the commonwealth[160]. Althusius described the city as a *civitas "in the broadest sense, or a body of many and diverse associations",* which consists in a community conceived as *"an association formed by fixed laws and composed of many families and collegia living in the same place". H*e also defined the city as *"a community of citizens dwelling in the same urban area* (urbs)*, and content with the same communication and government* (jus imperii)*"*[161]*.* An urban community settled in the city is distinguished by Althusius from a rural community (usually a hamlet, a village, or a town), and accordingly is meant to have its autonomous powers and governing bodies: the political and economic relevance of the city as such was therefore recognised through a vision of cities as autonomous subjects within a multi-layered society[162]. With the contribution of Althusius recognized[163] as the pioneering one within federal scholarship when it comes to the status of cities, contemporary federal constitutional theory is growingly recognizing the importance of cities (and their networks) within the general phenomenon of rising urbanism[164], and is intensively engaged with a bigger overarching question which as of now remains unsolved: namely whether the city should be constitutionalised as an autonomous level of government or not[165], and as a consequence of that whether it is about time for federalism to go beyond its dual structure

[160] These five are the layers of society identified by Althusius in his work Politica: see Carney, Frederick C., translator. *The Politics of Johannes Althusius*. Beacon Press, 1964.

[161] Carney, Frederick C., translator. *The Politics of Johannes Althusius*. Beacon Press, 1964, pp.34-37.

[162] For a better overview of the understanding of the city in Althusius see Arban, Erika. 'An Intellectual History of Federalism: The City and the "Unit" Question'. *Cities in Federal Constitutional Theory,* edited by Erika Arban, Oxford University Press, 2022.

[163] Arban, Erika. 'An Intellectual History of Federalism: The City and the "Unit" Question'. *Cities in Federal Constitutional Theory,* edited by Erika Arban, Oxford University Press, 2022.

[164] See the introductory reflections on the growing importance of city networks within the rise of urbanism of Petkova, Biljana. 'Federalism in 2030'. *Graz Law Working Paper Series*, no. 1, 2022. She talks of 'horizontal federalism' as an emergent picture for city networks against the decline of traditional vertical (or top-down) federalism: her perspective on the future of federalism lies, therefore, on a shift to horizontal federal forms of cooperation.

[165] Well-known is the positive position on that of Hirschl, clearly expressed in Hirschl, Ran. *City, State. Constitutionalism and the Megacity*. Oxford University Press, 2020, where he manifests his strong endorsement for that as a constitutional entrenchment would allow cities to enjoy significant regulatory initiative and autonomy. Also Arban, Erika. 'Constitutional Law, Federalism and the City as a Unique Socio-Economic and Political Space'. *European Yearbook of Constitutional Law 2020. The City in Constitutional Law,* edited by Ernst Hirsch Ballin et al., 2020, pp. 323–45, is in favour of a constitutional entrenchment of cities: according to her, *"this would allow to experiment new modes of governance for the urban area in constitutional law as opposed to local governments"*. The advocated theoretical framework for cities should, according to Arban, lies at the intersection between constitutional law and federalism theory. At the same time, a more sceptical position is expressed in Saunders, Cheryl, and Erika Arban. 'Federalism and Local Governments'. *Cities in Federal Constitutional Theory*, edited by Erika Arban, Oxford University Press, 2022, where they observe that *"constitutionalisation is not necessarily a panacea. On the contrary, whether constitutionalised or not, local government is often treated as something of a poor cousin in federations across the world".*

towards a three-tiered system[166]. At the same time, it is necessary to acknowledge the contribution of federal scholarship to the drawing of a definition of what a city actually is, which constitutes also a great challenge for the wider constitutional and public legal scholarship (as we will see further in this Chapter). Various and diverse are the understanding of what a city actually is, among which: a) the city as the short-hand for urbanization, with concern to the concentration of people and economic activities; b) the city-as-jurisdiction, for referring to a precise level of government; c) the proprietary or regulatory city; d) the city-as-polity, for referring to a democratic political community[167]. A fairly broad and general definition of the city sees it as a unique socio-economic and political space which deserves its own powers and autonomy, and which *"is strategic for building new modes of governance and reconcile diversity and social cohesion"*[168]. However, the effort of the academic community in reaching a shared definition of city within federal theory is still ongoing, and as a consequence of that an ending point to the debate is still far from being achieved. All in all, we can conclude by saying that federal scholarship is highly relevant to the local level for its more recent contribution to the elaboration of the legal category of the city, despite the lack of a precise and agreed definition of what a city actually is.

Moving onward from federalism to the theory of polycentricity[169], it is appropriate to begin by emphasising that while predominant conceptualizations of federalism look at the local level from a government (or institutional) perspective, polycentricity on the other side looks at the local level from a governance (or societal) perspective. They surely overlap under certain aspects, but we regard them as complementary in accordance to our

[166] As it emerges from the edited volume of Arban, Erika. *Cities in Federal Constitutional Theory*. Oxford University Press, 2022, and more precisely in Schragger, Richard. 'Conclusion: The City in the Future of Federalism'. *Cities in Federal Constitutional Theory*, edited by Erika Arban, Oxford University Press, 2022. The author claims indeed that cities are disadvantaged by state-based federalism, and that cities represent the future of federalism.

[167] We are here using the conclusive reflections and categories of Schragger, Richard. 'Conclusion: The City in the Future of Federalism'. *Cities in Federal Constitutional Theory*, edited by Erika Arban, Oxford University Press, 2022.

[168] This definition is re-adapted from Arban, Erika. 'Constitutional Law, Federalism and the City as a Unique Socio-Economic and Political Space'. *European Yearbook of Constitutional Law 2020. The City in Constitutional Law*, edited by Ernst Hirsch Ballin et al., 2020.

[169] It goes without saying that our reworking of the concept of polycentricity does not aim anyhow to provide for an extensive picture of its rich interdisciplinary debate that crosses the boundaries of many disciplines. We will limit ourselves indeed to what is relevant to know about this theory in relation to our research on the recognition of the local level of government. In doing so, the most relevant contribution that will be of use is the one of the legal scholar J. van Zeben. As claimed in van van Zeben, Josephine, and Ana Bobić, editors. *Polycentricity in the European Union.* Cambridge University Press, 2019, polycentricity is *"a descriptive theory of governance"* (p.2).

understanding of democracy as a system of both government and governance[170], and because of that we will give a general overview of this theory in so far as it could contribute to a wider recognition of the local level of government. The original link between federalism as a government theory and polycentricity as a theory of governance has been drawn for the first time within the American political science scholarship[171]. That regarded (American) federalism not from the angle of administrative decentralization, but from the one of polycentric governance, where an active participation of individuals through a variety of associations led towards a conception of federalism as *"a principle of association"*[172]. Introduced for the first time in 1961[173] with regard to the debate on the problem of government in metropolitan areas[174], the concept of polycentricity (also referred to as 'polycentric governance') defines *"many centres of decision-making which are formally independent of each other"*[175], and where there is *"a complex combination of multiple levels and diverse types of organizations drawn from the public, private, and voluntary sectors that have overlapping realms of responsibility and functional capacities"*[176]. Accordingly, American metropolitan areas were defined as *"polycentric political systems"* (where 'political' stands for 'government')[177], where this widespread distribution of decision-making capacities granted potential for citizen participation, self-governance, and local democracy. Additionally, polycentricity was perceived as capable of

[170] See Chapter 1, paragraph 4.

[171] The reference goes to the fundamental work of Vincent Ostrom, who inspired the connection among these two perspectives for investigating further their contribution to local democracy. The first one among his works where the concept of polycentricity is developed is Ostrom, Vincent, et al. 'The Organization of Government in Metropolitan Areas: A Theoretical Inquiry'. *The American Political Science Review*, vol. 55, no. 4, 1961, pp. 831–42. It requires mention, however, the fact that an even earlier mention of the term can be traced back to Michael Polanyi's 1951 book *The Logic of Liberty*: however, despite being often discussed together, the two works seem not to build the same idea of polycentricity, the one of Ostrom et al. referring to *"the adoption of a society-wide, systematic approach, focusing on the provision of public goods within communities",* while the one of Polanyi refers to *"professional organisation within which people are motivated by professional duties, not membership of a broader society or community"* (see further van Zeben, Josephine. 'Polycentricity as a Theory of Governance'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, pp.12-16).

[172] Wagner, Richard E. 'Self-Governance, Polycentrism, and Federalism: Recurring Themes in Vincent Ostrom's Scholarly Oeuvre'. *Journal of Economic Behaviour & Organization*, no. 57, 2005, p.184.

[173] Ostrom, Vincent, et al. 'The Organization of Government in Metropolitan Areas: A Theoretical Inquiry'. *The American Political Science Review*, vol. 55, no. 4, 1961, pp. 831–42.

[174] Metropolitan areas, indeed, do not constitute a legal entity in the US federal system.

[175] Ostrom, Vincent, et al. 'The Organization of Government in Metropolitan Areas: A Theoretical Inquiry'. *The American Political Science Review*, vol. 55, no. 4, 1961, pp. 831–42, p.831.

[176] McGinnis, Michael, D., and Elinor Ostrom. 'Reflections on Vincent Ostrom, Public Administration, and Polycentricity'. *Public Administration Review*, vol. 72, no. 1, 2011, p.15. They perceive Vincent Ostrom's idea of polycentricity in a nutshell as *"a natural outgrowth of the intrinsic human capacity to work with others"* (p.23).

[177] Ostrom, Vincent. 'Polycentricity'. *Polycentricity and Local Public Economies: Readings from the Workshop in Political Theory and Policy Analysis*, edited by Michael McGinnis D., University of Michigan Press, 1999, p.52.

facilitating co-production[178] of public services between governmental authorities and citizens, conceiving citizens therefore as active contributors in democracy, on the basis of the principle of self-responsibility within their communities[179]. Individuals' capacity of self-governance within polycentric systems constitutes also the breading ground in which the later fundamental theory related to the governance of the commons[180] was elaborated, claiming that natural resource systems can be governed by communities of individuals in a way that they would safeguard them and prevent their degradation better than a central governmental authority or a market actor[181]. In polycentric systems every centre of decision-making enjoys some degree of autonomy, but no one has ultimate authority for making all collective decisions: this element essentially points to the strengthening of individuals' capacity of self-governance as the only way – according to polycentric theory[182] – to counteract the autocratic drifts to which democracies are in danger of heading. This idea of self-governing democracy puts at its core the necessity of having responsible citizens able to carry out self-organized collective actions which are able to solve community problems: and this is where the importance of the local level comes into play. While federalism is traditionally more concerned with vertical relationships (predominantly between the national level and the subnational one)[183], polycentricity indeed puts at its core horizontal relationship among diverse actors, and in doing so the local level represents an additional fundamental level of government that must find its

[178] Since with the mentioning of the term co-production we risk entering a huge new strand of political science literature, may it be sufficient to mention here very briefly only its definition taken from Ostrom, Elinor. 'Crossing the Great Divide: Coproduction, Synergy, and Development'. *World Development*, vol. 24, no. 6, 1996, pp. 1073–87, without going any further into that. Accordingly, co-production could be described as *"the process through which inputs used to produce a good or service are contributed by individuals who are not 'in' the same organization. […] Coproduction implies that citizens can play an active role in producing public goods and services of consequence to them."* (p.1073). see also footnote no.151, Chapter 2.

[179] *"I have come to the conclusion, however, that democratic societies are necessarily placed at risk when people conceive of their relationships as being grounded on principles of command and control rather than on principles of self-responsibility in self-governing communities of relationships"* (Ostrom, Vincent. *The Meaning of Democracy and the Vulnerability of Democracies. A Response to Tocqueville s Challenge*. The University of Michigan Press, 1997, p.4).

[180] Ostrom, Elinor. *Governing the Commons: The Evolution of Institutions for Collective Actions*. Cambridge University Press, 1990.

[181] We will go further into the commons in Parts II and III.

[182] This is the core thesis advocated by Ostrom, Vincent. *The Meaning of American Federalism. Constituting a Self-Governing Society.* Institute for Contemporary Studies, 1991.

[183] According to Ostrom's view on federalism, the interpretation of the founding documents of American federalism has been along centuries mistaken in so far as it has prioritised only a vertical delegation of sovereignty and powers from individuals to States and federal levels of government. On the contrary, he claims that the writers of the United States' Constitutional Convention held in Philadelphia in 1787 clearly aimed to include also a role for individuals in the federal construction: see further on that Nicolaïdis, Kalypso, and Josephine van Zeben. 'Polycentric Subsidiarity'. *Polycentricity in the European Union,* edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, p.92.

place on a par with the national and subnational levels[184]. Furthermore, the local level has the advantage of constituting the level of government which is the most suitable for citizens' participation: on one side, for them to get acquainted with difficulties related to collective problems, and on the other, to actively participate in taking collective action for solving them, instead of presuming that responsibility for them will be taken by the government. In democratic societies, indeed, *"governments only exercise a complement of authority that is necessary for taking collective decisions pertaining collective goods"*[185], while primary responsibility for governing is spontaneously assumed by individuals that in their effort of self-governance need to be facilitated and supported by public authorities[186], and above all by the local level of government. The capacity of polycentric systems to support individuals' self-governance also leads towards a higher levels of individuals' liberty, through their recognition and support: this governmental support of individuals essentially goes back to what we have defined as the 'forgotten meaning of subsidiarity[187]' within the EU, which is indeed the horizontal dimension of subsidiarity towards not public, but societal organizations. For its closeness to the concept of polycentricity, this horizontal dimension has also been referred to as 'polycentric subsidiarity'[188]: as already introduced in paragraph 2.3, with this term we refer to the interpretation of the subsidiarity principle that, in contrast to a mere vertical meaning, *"emphasises the relationship between self-governance and horizontal distribution of power"*[189], in this way being about individuals, intermediary bodies, and States at all their levels, with the aim to *"facilitate the organic development of self-governing collective and individuals"*[190].

[184] For example, as it is reported in Cheneval, Francis. 'Demoicratic Self-Government in the European Union's Polycentric System: Theoretical Remarks'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, p.70, some studies tested successfully polycentric theory regarding local government and the provision of public goods (see further McGinnis, Michael, editor. *Polycentricity and Local Public Economies: Readings from the Workshop in Political Theory and Policy Analysis*, University of Michigan Press, 1999).

[185] Ostrom, Vincent. *The Meaning of American Federalism. Constituting a Self-Governing Society*. Institute for Contemporary Studies, 1991, p.48.

[186] *"Public officials are potential allies and teachers in the process of self-governance by supporting communities to identify and solve common problems"* (van Zeben, Josephine. 'Policentricity'. *Routledge Handbook of the Study of the Commons*, edited by Blake Hudson and Jonathan Rosenbloom, Routledge, 2019).

[187] See paragraph 2.3 of this Chapter.

[188] In Nicolaïdis, Kalypso, and Josephine van Zeben. 'Polycentric Subsidiarity'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, pp. 78–107.

[189] Nicolaïdis, Kalypso, and Josephine van Zeben. 'Polycentric Subsidiarity'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, p.81. In supporting the thesis of a need for redefining the principle of subsidiarity in the EU, the authors believe that *"horizontality in our normative debates around levels of governance […] is undertheorized"* (p.81).

[190] Nicolaïdis, Kalypso, and Josephine van Zeben. 'Polycentric Subsidiarity'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, p.106.

Coming to a conclusion, doctrinal contributions coming from both federalism and polycentric theory are functional to our understanding of the local level of government as an increasingly important player from both a government and governance perspective within State theory. From a government perspective, as we saw, the debate on federalism has the merit of increasingly recognising the local level – and in particular cities – as the third level of government; from a governance perspective, polycentricity has the merit of recognising the local level of government for its potential capacity of better supporting and facilitating self-governance of individuals and communities under an overarching system of shared rules. If we read all this within the EU context, it is eventually possible for us to recognise the potential of these two theoretical perspectives for their ability to shed new light on the role of the local level of government in relation, on one side, to coordination with higher levels of government, and on the other, with associated or individual persons. With respect to the due recognition of the rising role of the local level in the EU legal order, the combined contribution of federalism and polycentricity goes even beyond the well-known conceptual category of multilevel governance (MLG) that so far has been used for explaining the EU institutional development, but which has not proven relevant for the acknowledgement and support of the local level[191].

5. The EU institutional contribution: from local to urban

So far our approach in looking at the local level of democracy within the European legal space has mainly referred to 'local governments' or 'local authorities' as the main

[191] We have already addressed MLG previously in Chapter 1, paragraph 4. As it has been claimed by McGinnis, Michael, D., and Elinor Ostrom. 'Reflections on Vincent Ostrom, Public Administration, and Polycentricity'. *Public Administration Review*, vol. 72, no. 1, 2011, p.18, the EU concept of MLG constitutes a conceptual category that closely resembles the American concept of polycentricity, but at the same time differs under several respects (among which the wider recognition by polycentricity to all arenas of society and not only the political ones: on this point see Stephan, Mark, et al. 'An Introduction to Polycentricity and Governance'. *Governing Complexity. Analyzing and Applying Polycentricity*, edited by Andreas Thiel et al., Cambridge University Press, 2019, pp. 21–44 and van Zeben, Josephine. 'Polycentric Features of the European Union'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, p.38). On the fundamental potential contribution of polycentricity to the EU, see van Zeben, Josephine. 'Polycentric Features of the European Union'. *Polycentricity in the European Union*, edited by Josephine van Zeben and Ana Bobić, Cambridge University Press, 2019, p.32: *"As compared to federalism, polycentricity allows for an additional dimension of crosscutting, overlapping 'issue-specific' jurisdictions and envisages an explicit role for non-governmental bodies, such as private and community-based organisations. This role is particularly important in the light of the EU's sui generis approach to governance and government, which allows for private actors to shape and enforce rules and incorporate new forms of governance"*. As we already saw in paragraph 4, Chapter 1, the EU constitutes indeed a unique system of both government and governance, where governance constitutes a method of regulation.

terms generally used. However, as shown by the most recent literature on federalism, there is a growing interest not only in the local level of government as such beyond the wider sub-national (regional) level of government, but also in the city as a precise unit of analysis separate from other local governments. Apparently this trend is increasingly relevant, and growing interest is paid to cities by both scholars and institutions: this comes despite the lack of a shared definition within the EU of what a city actually is from a legal perspective. If we take a step back, however, we realize that not only does the category of 'city' not have its own definition for EU law, but also the category of 'local government' itself is very heterogeneous as it depends on each EU member state's internal constitutional framework[192]: it could be said, indeed, that the concept of 'local government' serves as a mere *"collective noun"* which has a more appropriate usage in its plural form as 'local governments', and which contains a broad variety of entities different in size, shape, functions[193]. When trying to define who stands, precisely, at the local level within the EU, we must recognize that there is a wide variety of forms of local governments that, as a result of different historical paths, all qualify as the 'local level' of democracy. From 'municipalities' to 'provinces', from 'metropolitan cities' to 'towns', from 'communities' to 'counties': these are only a few of the terms used for public entities considered as belonging to the local level of government among EU member states[194]. At the same time, it seems possible to claim that the concept of 'municipality' constitutes the most recurring

[192] We may refer back to what already observed in paragraph 1 of this Chapter.

[193] Steytler, Nico. *Local Government and Metropolitan Regions in Federal Systems*. McGill-Queen's University Press, 2009, brings this observation on what the 'local government' actually is, stating that it *"is merely a collective noun for a wide variety of governance institutions that come in all shapes and sizes and that perform widely divergent functions. They range from mammoth metropolitan municipalities of mega-cities to small rural entities. […] It would, therefore, be more appropriate to refer to local governments, in the plural. What they do have in common is that there is no order of government between them and the communities they serve. This is also their strength and democratic claim; they are the government closest to the people"* (p.4). As a confirmation of this great fragmentation as to what local government(s) is, it has recently been claimed that a general overview of territorial authorities in Europe led to the argument that a progressive and constant internal differentiation between autonomies at the same level, at any level, is what can be observed as a basic trend across Europe: see Donati, Daniele. 'Architetture e Tendenze Delle Autonomie Territoriali in Europa'. *Diritto Delle Autonomie Territoriali,* edited by Enrico Carloni, Cedam, 2020, pp.181-212.

[194] For a comparative investigation of which public entities, in specific, are considered as local governments within the domestic legal order of many EU member states we may refer to Brezovnik, Boštjan, et al., editors. *Local Self-Government in Europe*. Lex Localis, 2021. In addition to that, it may be useful to consult the declarations attached to the instruments of ratification deposited by each State part to the CoE European Charter of Local self-government in accordance with Article 13 of the Charter, which mandates each State to specify the categories of local (or regional) authorities that ought to be considered as 'local authorities' (for the full list of Reservations and Declarations for the Charter see https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=122&codeNature=0).

term among all member states' legal orders[195], as it is a concept that refers at its core to the basic administrative unit which at the same time *"may coincide with a town, a city, or even a village"*[196].

The *de facto* state of affairs in the EU, however, leads us to recognize a disconnect between the side of law and the side of policies when referring to the local level: while the European constitutional contribution mainly refers to the term 'local' (governments or authorities) without providing for a legal definition of that (not even to mention the concept of 'municipality', which belongs to the legal traditions of nation-states), on the side of EU institutions it is becoming more and more evident the tendency of the latest years to use the terms 'urban' and 'city' in defining policy goals to be achieved within a governance perspective. And it is precisely this development of terminology that constitutes an interesting aspect to be further explored, also in light of the renewed interest in cities mentioned earlier within federalism scholarship and other disciplines[197]. Within the EU, the institution that has long led the way in urban policy efforts despite the lack of any legal basis in the Treaties on that is without any doubt the EU Commission, that paved the way for an EU Urban Agenda back in 1997[198], for having a common framework to address urban issues within EU cities. The Commission understood already back then the importance of creating a common vision able to put the focus back on towns and cities as self-standing beyond the three other levels of government (supranational, national, regional) also thanks to the developments related to urban issues already taking place at the international level. In particular the reference goes to the awakening of the United Nations (UN) on the phenomenon of rapid urbanization worldwide that began to be faced through the UN-Habitat Conferences (Habitat I in 1976, Habitat II in 1996, Habitat III in 2016)[199] and the creation of a specific programme for human settlements and sustainable

[195] This observation of ours is taken on the basis of the recent contribution of Ladner, A., Keuffer, N. and Bastianen, A. (2021). *Local Autonomy Index in the EU, Council of Europe and OECD countries* (1990-2020). Release 2.0. Brussels: European Commission, and in specific on the basis of a comparison among EU member states' most important units of analysis among local governments contained in the comparative Table at pp.10-12.

[196] As observed by Panara, Carlo, and Michael Varney. *Local Government in Europe. The 'Fourth Level' in the EU Multilayered System of Governance*. Routledge, 2013, p.371.

[197] As already mentioned in paragraph 1 of this Chapter.

[198] European Commission. *Communication Towards an Urban Agenda in the European Union* (COM(1997) 197 Final)).

[199] Habitat I took place in Vancouver (Canada); Habitat II in Istanbul (Turkey); Habitat III in Quito (Ecuador). The result of each conference were respective declarations outlining global action plans aimed at tackling urban problems (for the three declarations and more information on the Habitat Conferences see https://www.un.org/en/conferences/habitat). As part of the Quito Declaration in 2016, a "New Urban Agenda" was also adopted, representing a shared vision to drive sustainable urban development at the local level (https://habitat3.org/wp-content/uploads/NUA-English.pdf).

urban development (the UN-Habitat)[200]. Also thanks to these debates and initiatives at the international level, the EU Commission acknowledged the progressive urbanisation of also the European society, and therefore a subsequent need to play a complementary role to the one of nation-states in addressing urban issues, since its policies were indirectly affecting also cities and towns. This supposedly was to be achieved not through the request for additional supranational power, but rather within a governance perspective, with the promotion of more policies coordination and taking advantage of the European level for the opportunity of sharing and facilitating potential solutions[201].

As a reflection of this worldwide phenomenon of urbanization and the growing importance of cities also from an international perspective, the usage of the terms 'urban' and 'city/cities' became more immediate when referring to the local level of government in the EU, flanking and often prevailing over 'local governments' or 'local authorities'[202]. In this sense, the Urban Agenda promoted[203] by the EU Commission constitutes the very first initiative aimed at creating a common vision on urban matters for the EU as a whole: it was not the only one though, as since its 1997 Communication this vision began to be shared by other actors in the EU institutions (Council, European Parliament, European Economic and Social Committee, European Committee of the Regions)[204], as well as among national representatives (informal meetings of Ministers responsible for Territorial Cohesion and/or Urban Development)[205]. Among all the other initiatives taken at the EU level, the most

[200] The United Nations Human Settlements Programme (UN-Habitat) was created in 1977 as an output of the Habitat I Conference: for its work see https://unhabitat.org/. It is useful to mention that since 2015 the UN has integrated UN-Habitat into its Agenda 2030 (in specific, in sustainable development goal n.11 titled "sustainable cities and communities").

[201] European Commission. *Communication Towards an Urban Agenda in the European Union* (COM(1997) 197 Final)), p.3.

[202] See for example *"Cities and urban development"* among the topics of the EU Commission (https://ec.europa.eu/info/eu-regional-and-urban-development/topics/cities-and-urban-development_en).

[203] Starting from the European Commission. *Communication Towards an Urban Agenda in the European Union* (COM(1997) 197 Final)). Other important documents of the Commission are: *Communication from the Commission on the urban dimension of EU policies – key features of an EU urban agenda* (COM(2014)0490) of 18 July 2014; *The Future of Cities Report*, EC/JRC, 2019. For an introduction see Carloni, Enrico, and Manuel Vaquero Piñeiro. 'Le Città Intelligenti e l'Europa. Tendenze Di Fondo e Nuove Strategie Di Sviluppo Urbano'. *Istituzioni Del Federalismo*, no. 4, 2015, pp. 865–94.

[204] Among the other acts, see for example the Council Conclusions on the Urban Agenda for the EU, adopted on 24 June 2016; the resolution of the *European Parliament of 3 July 2018 on the role of cities in the institutional framework of the Union* (2017/2037(INI)); the *Opinion of the European Committee of the Regions - 'Implementation assessment of the Urban Agenda for the EU'*, adopted on 5 July 2018; the *Opinion of the European Economic and Social Committee on the 'Renewed Territorial Agenda of the EU*, the *Leipzig Charter* and the *Urban Agenda for the EU* of 18 September 2020. For a more comprehensive list of reference documents on urban matters see the New Leipzig Charter Annex available at https://futurium.ec.europa.eu/en/urban-agenda/library/new-leipzig-charter-and-implementing-document.

[205] See for example the '*European Spatial Development Perspective – Towards Balanced and Sustainable Development of the Territory of the European Union*' adopted at the Informal Council of Ministers responsible for Territorial Cohesion held in Potsdam, May 1999 (as the first declaration advocating that there should be an EU urban policy); the '*Lille Action Programme*' adopted at the Informal Council of

important one is usually considered to be the 2016 'Urban Agenda for the EU', launched within the 'Pact of Amsterdam' agreed at the informal meeting of Ministers on urban matters[206]. This constitutes still nowadays the reference point for the EU urban policy, though its achievement became possible only thanks to the common commitment of a variety of actors at the EU level, and the large amount of previous declarations and other documents[207]. Among these, the 2007 'Leipzig Charter on Sustainable European Cities' requires special mention for constituting a milestone in the EU urban development path, with its ambition to promote an integrated and sustainable urban development, and thus improve overall living conditions in deprived neighbourhoods within the context of European cities more in general[208]. The 2016 Urban Agenda for the EU is considered as an innovative framework for all urban policies (working as an 'umbrella' for all these initiatives), which was able to bring the principle of multi-level governance down to cities[209], with the ambition of involving urban authorities in the European decision-making

Ministers responsible for urban development held in Lille on 3 November 2000 (with the introduction of the urban issue in the *acquis communautaire*); The '*Urban Acquis*' adopted at the Informal Council of Ministers responsible for urban development held in Rotterdam on 29 November 2004; The '*Bristol Accord*' adopted at the Informal Council of Ministers responsible for urban development held in Bristol on 6-7 December 2005 (that introduced the term 'sustainable communities'); the '*Leipzig Charter on sustainable European cities*', adopted at the Informal Council of Ministers responsible for urban development and territorial cohesion held in Leipzig on 24-25 May 2007 (which constitutes a milestone towards the 2016 Urban Agenda); the '*Declaration of Ministers towards the EU Urban Agenda*' – the Riga Declaration, adopted at the Informal Council of Ministers responsible for territorial cohesion and urban development held in Riga on 10 June 2015 (which links the Urban Agenda with 'better regulation'); the Urban Agenda for the EU - '*Pact of Amsterdam*', adopted at the Informal Council of Ministers responsible for urban development held in Amsterdam on 30 May 2016; the Bucharest Declaration - '*Towards a common framework for urban development in the European Union*' adopted at the Informal Council of Ministers responsible for urban development held in Bucharest on 14 June 2019; the '*New Leipzig Charter: the transformative power of cities for the common good'* adopted by the EU Ministers responsible for urban matters on 30 November 2020 in Leipzig.

[206] For an overall analysis of the 2016 Urban Agenda see Pazos-Vidal, Serafín. *Subsidiarity and EU Multilevel Governance. Actors, Networks and Agendas.* Routledge, 2019, pp.168-189.

[207] See the two previous footnotes.

[208] *"We increasingly need holistic strategies and coordinated action by all persons and institutions involved in the urban development process which reach beyond the boundaries of individual cities. Every level of government - local, regional, national and European – has a responsibility for the future of our cities. To make this multi-level government really effective, we must improve the coordination of the sectoral policy areas and develop a new sense of responsibility for integrated urban development policy"* (p.2) of the 2007 Leipzig Charter, available at https://territorialagenda.eu/wp-content/uploads/leipzig_charter_2007.pdf. It has recently been reviewed during the German EU Council Presidency with the document '*The New Leipzig Charter: the transformative power of cities for the common good'.*

[209] *"The Urban Agenda for the EU […] has enabled cities, Member States, the European Commission and other key stakeholders to come together to jointly tackle pressing urban matters and deliver concrete outputs for the benefit of EU citizens":* EU COM. *Urban Agenda for the EU (UAEU). Multi-Level Governance in Action 2021 Update*. Nov. 2021. The three overarching objectives defined by the 2016 Pact of Amsterdam are: 'better regulation' (for a more city-friendly design of European legislation), 'better funding' (with regard to funding opportunities) and 'better knowledge' (for encouraging an expansion of knowledge sharing). To achieve these, 14 Thematic Partnerships on different topics related to urban issues were established: see further the Urban Agenda at https://futurium.ec.europa.eu/en/urban-agenda/library/pact-amsterdam.

process more. This was later reinforced and built upon by the 'New Leipzig Charter'[210] adopted in 2020 by the informal meeting of ministers on urban matters, which provided for a renewed overarching framework on urban policies post-2020 built on five key *"good urban governance"* principles: an urban policy for the common good, an integrated approach, participation and co-creation of citizens in order to strengthen local democracy, multi-level governance (including civil society and the private sector, alongside with the local level and upper levels), and a place-based approach.

In parallel to the Urban Agenda and other policies[211], many others have been the initiatives[212] and funding[213] focussing on cities developed especially by the EU Commission, which is playing a leading role among other European actors. However, acknowledging that *"there is an increasing mismatch between cities as administrative entities and the reality of modern urban life"*[214], and that also small and medium-sized cities[215] should be given recognition beyond capitals and other bigger cities, it is interesting to report that the Commission recently undertook the commitment to developing a global, people-based definition of 'cities' within its leadership of other international organisations[216]. It is well-known, indeed, that to date there is a lack of a common EU (or European) definition of what in practice the 'city' is, not even to mention a global definition on that: definitions vary widely from country to country, on the basis of a wide range of criteria of aspects considered (administrative boundaries, population size, density, history, competencies, rights, etc.) and methodologies. Nonetheless, within the context of the EU two are the remarkable steps taken in the direction of filling this gap by two institutions:

[210] Available at https://ec.europa.eu/regional_policy/en/information/publications/brochures/2020/new-leipzig-charter-the-transformative-power-of-cities-for-the-common-good.

[211] While the Urban Agenda, as already mentioned, constitutes the overarching framework of urban policies (but still a policy itself), also other Commission's policies have been targeting urban issues: above all, we may refer to the Cohesion policy (also known as regional policy of the EU) within the sphere of competence of the Directorate-General for Regional and Urban Policy (DG-REGIO, https://ec.europa.eu/regional_policy/home_en), grounded in Article 174 TFEU. The priority themes for EU cities that are target of urban policies could be found at https://ec.europa.eu/info/eu-regional-and-urban-development/topics/cities-and-urban-development_en.

[212] We are referring for example at the initiatives related to the European capital of culture, European capital of innovation, European green capital; the Community of Practice on Cities; the Covenant of Mayors for Climate and Energy, the Urban Data Platform Plus. For a full list see https://ec.europa.eu/info/eu-regional-and-urban-development/topics/cities-and-urban-development/city-initiatives_en.

[213] For example, we are referring to Urban Innovative Actions (UIA); URBACT; Horizon 2020. See further the institutional webpage https://ec.europa.eu/info/eu-regional-and-urban-development/topics/cities-and-urban-development/funding-cities_en.

[214] EU COM. *Urban Agenda for the EU (UAEU). Multi-Level Governance in Action 2021 Update*. Nov. 2021, p.22.

[215] EU COM. *Urban Agenda for the EU (UAEU). Multi-Level Governance in Action 2021 Update*. Nov. 2021, p.23.

[216] OECD, World Bank, Food and Agriculture Organization (FAO), International Labour Organization (ILO) and UN-HABITAT. The commitment was formally undertaken during the Habitat III Conference in 2016.

precisely, there was not only the Commission's commitment in this direction as we have just mentioned (in partnership with the OECD), but also that of the European Parliament, both important to report. Starting with the definition provided by the EU Commission, this is the output of a commitment shared with the OECD that resulted in two official reports (in 2012 and 2020)[217], which elaborated a definition of 'city' based on grid cells used for statistical purposes[218]. Accordingly, the most recent 2020 definition is people-based, purely founded on density and total population, and it uses the so called 'population grid cells'[219] as the form of measurement, in order to classify settlements of the same size in the same way. In this sense, *"cities consist of contiguous grid cells that have a density of at least 1500 inhabitants per km² or are at least 50% built up. They must have a population of at least 50.000".* The tripartite classification into a) cities, b) towns and semi-dense areas[220], c) rural areas[221] was done according to the 'degree of urbanisation' method (approved by the UN Statistical Commission in March 2020), which was designed to reflect the urban-rural continuum so as to overcome the problem posed by dividing the territory into the only two parts (city-rural areas)[222]. Additionally, in the same report a second distinction was made between a 'city' and its 'functional urban area' (FUA, also called 'metropolitan area'): a FUA consists of both the city and its 'commuting zones', which are the city's surrounding zones which capture the full economic function of a city with its high level of travel-to-work flow[223]. Without needing to proceed further into the more technical

[217] EU COM, and OECD. *Cities in Europe. The New OECD-EC Definition*. 2012 and OECD-EC. Cities in the World. A New Perspective on Urbanisation. 2020, https://www.oecd.org/publications/cities-in-the-world-d0efcbda-en.htm.

[218] The data collection for city statistics in the EU is undertaken jointly by the National Statistical Institutes, the Directorate-General for Regional and Urban Policy (DG-REGIO) and Eurostat: see the website of Eurostat at https://ec.europa.eu/eurostat/web/cities/background.

[219] The population grid cells is the tool used to describe the spatial distribution of population for statistical purposes.

[220] Towns and semi-dense areas were on their side split into 3 categories: dense towns; semi-dense towns; suburban or peri-urban areas. See further OECD-EC. *Cities in the World. A New Perspective on Urbanisation*. 2020, p.32. For a critical perspective on the issue of defining what a 'town' is and on how small and medium-sized towns (SMSTs) have been generally neglected by urban research despite the fact that around the 27 per cent of EU population actually live in SMSTs, and not in bigger urban areas see further Servillo, Loris, et al. 'Small and Medium-Sized Towns in Europe: Conceptual, Methodological and Policy Issue'. *Tijdschrift Voor Economische En Sociale Geografie*, vol. 108, no. 4, 2017, (p.366 for the percentage reported).

[221] Rural areas were also split into 3 categories: villages, dispersed rural areas, mostly uninhabited areas. See further OECD-EC. *Cities in the World. A New Perspective on Urbanisation*. 2020, p.32.

[222] For more on the degree of urbanisation method see further Dijkstra, Lewis. 'Applying the Degree of Urbanisation to the Globe: A New Harmonised Definition Reveals a Different Picture of Global Urbanisation'. *Journal of Urban Economics*, no. 125, 2021.

[223] OECD-EC. *Cities in the World. A New Perspective on Urbanisation*. 2020, p.10. Accordingly, *"local units in the commuting zones have at least 15% of their working population commuting to the city for work"* (p.23): this percentage, however, is strictly related to the OECD-EC sphere of work, and should therefore not be extended as a general rule for defining a commuting zone in other contexts.

aspects of this EU COM-OECD statistical approach to defining the city (which nonetheless may have a relevance on a legal approach), what is relevant to highlight for the purposes of our research is without any doubt the meticulous work in progress of the Commission itself in pursuing a concrete and shared definition within the EU (but also beyond) of what a city actually is[224].

A different path is the one undertaken by the European Parliament (EUP), whose contribution to defining what the city is can be traced back to a 2018 resolution on the "*role of cities in the institutional framework of the Union*"[225]. While it recognises that "*there is no single definition of what constitutes the city in terms of population, area, function or level of autonomy, but only in terms of degree of urbanisation and concentration of residents, and that each Member State, therefore, may and will have a different approach to the term*", at the same time it elaborates a very general definition of cities according to its own understanding. Accordingly, cities are indeed *"understood as towns, cities and urban and metropolitan areas, as well as small and medium-sized cities"*[226], therefore placing all forms of urban settlements which are not rural under the same wide label. The Parliament showed awareness on the fact that, since more that 70% of European population lives in urban areas, most of EU policies and legislation are primarily implemented at the local level even if the EU has no competence on that, and cities are the level of politics best understood by the public and hold great potential as places for active citizenship. As a consequence, cities understood in a broad sense should be better involved in EU decision making, particularly regarding legislation that affects them directly. In the same way of the acts of the Commission, however, also this resolution of the Parliament does not constitute a legally binding definition on the city: this resolution belongs indeed to what we have already described as instruments of soft-law[227], and it consists in the most used governance tool with no legal value that the Parliament can adopt *"to seek commitments from the other EU institutions"*[228].

[224] Some additional consulted documents are EU COM. *The Future of Government 2030+.* 2019; Eurostat. *Applying the Degree of Urbanisation. A Methodological Manual to Define Cities, Towns and Rural Areas for International Comparisons*. 2021; Eurostat. *Urban Europe. Statistics on Cities, Towns and Suburbs*. 2016.

[225] European Parliament resolution of 3 July 2018 on the role of cities in the institutional framework of the Union (2017/2037(INI)), *OJ C 118*, 8 April 2020, pp.2-9.

[226] European Parliament resolution of 3 July 2018 on the role of cities in the institutional framework of the Union (2017/2037(INI)), *OJ C 118*, 8 April 2020, p.5.

[227] See paragraph 4, Chapter 1.

[228] On Parliament resolution see further Hart, Nina M. 'A "Legal Eccentricity": The European Parliament, Its Non-binding Resolution, and the Legitimacy of the EU's Trade Agreements'. *University of Bologna Law Review,* vol. 5, no. 2, 2020, p.329.

Before coming to a conclusion, it should be mentioned that, in addition to the EU Commission and Parliament, also a wide variety of organisations and networks[229] started to operate as advocates representing the interests of European cities, among which also the other biggest international organization in the European legal space – namely the Council of Europe –, which has long been involved in the development of a shared understanding of the urban space and the city itself as an autonomous subject in parallel to other local authorities[230]. Although EU cities can find – in the capacity of local authorities – a constitutional coverage already in the European Charter of local self-government[231], the CoE has developed a specific "*European Urban Charter*" back in 1992[232], which evolved into the "*Manifesto for a new urbanity. European urban charter II*" in 2008[233], and that will eventually advance into an "*Urban Charter III*", a draft of which will be presented for adoption to the Congress of Local and Regional authorities during its October 2023 Session[234]. While the 1992 Charter constitutes a milestone in Europe for the recognition of the urban phenomenon with its inclusion of an *"European Declaration of Urban rights"*, its content was deepened and developed further in the 2008 Manifesto so as to establish a body of common principles and priorities enabling *"towns and cities"* to meet the current challenges of urban societies and to rely on a common European urban blueprint based on *"humanist values, individual freedom, economic prosperity, social solidarity, care for the planet and living culture*"[235]. With the two Urban Charters the contribution of the CoE

[229] Worth mentioning are the most well-known ones like Eurocities (https://eurocities.eu/), United Cities and Local Governments (UCLG) (www.uclg.org), The Council of European Municipalities and Regions (CEMR) (https://www.ccre.org), Intercultural Cities (https://www.coe.int/en/web/interculturalcities), Energy Cities (https://energy-cities.eu), Local Governments for Sustainability (ICLEI) (https://iclei.org), Human Rights Cities (https://humanrightscities.net/). City networks however go far beyond European cities and constitute a growing phenomenon active worldwide: as an example we could refer to the C40 network on the climate crisis (https://www.c40.org/), and the Sharing Cities Action on platform economy (https://www.sharingcitiesaction.net/). These are just some examples, but the list could be much longer.

[230] For a critical view on the (over)emphasis on 'urban' (compared to 'rural') see Congress of Local and Regional authorities. *Developing Urban-Rural Interplay*. 2020, https://rm.coe.int/developing-urban-rural-interplay-governance-committee-co-rapporteurs-w/1680a0628b. The Report claims that *"there is a need to pay more attention to the interdependence between urban and rural areas and suburban areas connecting them, to strengthen the relationships between all these areas and to foster their linkage to ensure greater territorial cohesion, sustainable local development and prevent further fragmentation"* (p.1).

[231] Which is a legally binding Treaty, as seen in paragraph 3 of this Chapter.

[232] Text available here https://rm.coe.int/168071923d. The Charter was adopted by the Council of Europe's Standing Conference of Local and Regional Authorities of Europe (CLRAE) on 18 March 1992, a Session held during the annual Plenary Session of the CLRAE (17-19 March 1992, Strasbourg).

[233] Text here https://rm.coe.int/urban-charter-ii-manifesto-for-a-new-urbanity-publication-a5-58-pages-/168095e1d5.

[234] The project of the Charter (considered as *"a kind of Urban Constitution of local authorities"*) was presented during a debate in the sitting of the Chamber of Local Authorities on 26 October 2022, at the 43rd Congress Session: news at https://www.coe.int/en/web/congress/-/towards-a-new-urban-charter-of-the-congress-how-to-build-participative-inclusive-and-sustainable-cities-and-towns.

[235] Congress of Local and Regional authorities. *Manifesto for a New Urbanity. European Urban Charter II.* 2008, p.34.

demonstrates to be aimed at highlighting certain European principles seen as common to all European cities, and at providing a basis for future developments on urban rights: a concrete definition of what a city actually is, however, to date has not occurred. Additionally, it is important to report that these urban Charters constitute mere instruments of soft-law.

In conclusion[236], it has to be recognized that the contribution of the EU and other European institutions to the local level of government has mainly occurred through governance tools taking the form of policies or other initiatives which put at the core the terminology of 'urban' and 'city', instead that the one of 'local'. Along with urban policies and initiatives, there have also been attempts (of the Commission and the Parliament) to give a shared EU definition of what the city is: however, it should be acknowledged that to date the contribution of EU institutions in terms of definition is non-binding and has not reached yet a concrete definition of city that goes beyond statistical needs. It may be suggested then that here lies a creative space for law, in which to try to define what the city in the EU is.

6. The rising role of cities and their challenge to European public law

In light of the urban turn taking place within institutional actions, and considered the lack of a shared definition within the EU legal order of what a city actually is, it is worth taking a look at the doctrinal contributions coming from the broad public law field in so far as the city as a specific unit of analysis has recently aroused a great deal of interest within discourses on the transformations of public law[237]. This is essentially attributable to the

[236] It is not our intention to provide for an in-depth analysis of the urban policies and other governance instruments briefly described in this paragraph, since only a very general overview of the contribution of European institutions is useful for our research. For some overall considerations on European urban policies see Falcone, Matteo. 'Le Politiche Europee per Le Città: Agenda Urbana e "Aree Interne"'. *Diritto Delle Autonomie Territoriali,* edited by Enrico Carloni and Fulvio Cortese, Cedam, 2020. For an extensive and thorough research work see further Tati, Elisabetta. *L'Europa Delle Città. Per Una Politica Europea Del Diritto Urbano.* FrancoAngeli, 2020. Interesting to mention is one of the latest initiatives taken by the EU Commission, namely the "*European Urban Initiative (EUI)"* Secretariat, which since September 2022 has been advancing the Urban Agenda for the EU as the responsible unit on behalf of the Commission, supporting *"cities of all sizes"*: https://www.urban-initiative.eu/.

[237] For the emerging role of the city from a general perspective on public law transformations see Della Cananea, Giacinto. 'Jean-Bernard Auby e Lo Ius Publicum Europeum'. *Il Nuovo Diritto Pubblico Europeo: Scritti in Onore Di Jean-Bernard Auby*, edited by Giacinto Della Cananea and Jacques Ziller, Giappichelli, 2019, where it is highlighted the emerge of an European public law beyond nation-states, in which the city is increasingly playing a key role as a political community. The guide for looking at these transformations should be the common layer of European constitutional principles.

rise of a globally acknowledged *"new urban age"*[238] phenomenon already widely acknowledged by other sciences[239]. From a strictly legal point of view, the same growing interest can be found on one side at the international level, where cities are increasingly becoming protagonists of an emergent new world order[240], in which the leading actors are no longer only nation-States as defined in the post-Westphalian order, but also cities themselves as non-State actors together with other non-governmental organisations; on the other side within a European (supranational) and domestic public law perspective, where both constitutional law and administrative law have started to question themselves on the city as an autonomous legal category. The emerging debate is essentially aimed at understanding one fundamental issue: whether we are witnessing the emergence of a new category of law in relation to the city as an autonomous subject with respect to other local authorities, and under which a new autonomous field of 'city law' could also be delineated beyond constitutional-administrative disciplinary divisions and beyond traditional administrative as well as nation-states borders. This is relevant first and foremost for understanding the role and power of cities in relation to the innovation of (local) democracy from both a domestic and European perspective, and their reach in supporting citizen participation.

Among the first reflections on the city as an autonomous unit within public law, in 2013 for the first time a landmark contribution put forward the idea of a *"droit de la ville"*[241] for referring to the contemporary important phenomenon of a political and economic *"renaissance of cities*[242]*,* through an all-embracing approach referred to as *"the law of cities"*[243] applicable to the various dimensions of the functioning of cities[244]. Accordingly,

[238] Bloomberg, Michael. 'City Century. Why Municipalities Are the Key to Fighting Climate Change'. *Foreign Affairs*, Oct. 2015, p.117.

[239] See paragraph 1 of this Chapter.

[240] This is what has been observed by international lawyers: see, for example, Swiney, Chrystie F. 'The Urbanization of International Law and International Relations: The Rising Soft Power of Cities in Global Governance'. *Michigan Journal of International Law,* vol. 41, no. 2, 2020, pp.275-278. Additionally, see footnote no.18 of this Chapter.

[241] We are primarily referring to the scientific contribution of the French scholar Jean-Bernard Auby, initiated with Auby, Jean-Bernard. *Droit de La Ville. Du Functionnement Juridique Des Villes Au Droit à La Ville.* LexisNexis, 2013. For the development of this idea in the latest years see Auby, Jean-Bernard. 'Droit de La Ville. An Introduction'. *Italian Journal of Public Law*, vol. 5, no. 2, 2013, pp. 302–06; Auby, Jean-Bernard. 'Per Lo Studio Del Diritto Delle Città'. *Il Diritto Che Cambia*, edited by Mario Chiti et al., Editoriale Scientifica, 2016, pp. 205–10; Auby, Jean-Bernard. 'La Città, Nuova Frontiera Del Diritto Amministrativo?' *La Città e La Partecipazione Tra Diritto e Politica*, edited by Filippo Pizzolato et al., Giappichelli, 2019, pp. 9–20; Auby, Jean-Bernard. 'Droit à La Ville et Droit de La Ville'. *Constructif,* no. 63, 2022, pp. 29–33.

[242] Auby, Jean-Bernard. 'Droit de La Ville. An Introduction'. *Italian Journal of Public Law*, vol. 5, no. 2, 2013, p.303.

[243] The label of this field could still be considered as a work in progress: for the English version of that as the *"law of cities"*, for now we may refer to Auby, Jean-Bernard. 'Droit de La Ville. An Introduction'. *Italian Journal of Public Law*, vol. 5, no. 2, 2013, p.305.

this *droit de la ville* should be conceived as the general label aimed at including all the three different aspects[245] of a) the physical aspect of the city, for referring to urban public and private spaces, and infrastructures; b) the dynamics of the city, in relation to land use, urban planning and requalification of places, economic activities, and sustainable development; c) the politics of the city, in relation to the government of the city (inclusive of citizen participation in its governance), the public services provided by the city, and the so called *"right to the city"*[246]. The need for a new transversal categorisation[247] comes as a consequence of the fact that contemporary boundaries of municipalities and other legally defined local authorities are no longer up to the task of managing urban areas that have now expanded far beyond mere administrative boundaries[248], in order to be able to deal with growing problems and challenges (demographic, economic, cultural, social, climatic, fiscal) that need an interrelation between diverse areas of expertise and a rethinking of existing legal categories. That is in line with the emerging necessity of defining *"the city beyond the municipality"*[249] not as an attempt to define a new law aimed at substituting the

[244] The main legal angles considered within this perspective are urban law, local government law, administrative law.

[245] These are the three different areas in the legal regulation of the city that, according to J.-B. Auby, should be included within the label *"droit de la ville".*

[246] The landmark reference on this concept is the book *Le droit à la ville* by Henry Lefebvre published in 1968 (translated in Italian: Lefebvre, Henri. *Il Diritto Alla Città*. Ombre Corte, 2013), whose main ideas came out in a previous article: Lefebvre, Henri. 'Le Droit à La Ville'. *L'Homme et La Société*, no. 6, 1967, pp. 29–35. The core meaning of the right to the city refers, in a nutshell, to the claim that the right to basic urban amenities (among the others, housing, security, access to basic services) should be considered as a fundamental human right. The right to the city, in this sense, defines the city and the urban space as a political field. In parallel to the right to the city, also a *"right through the city"* has been developed for referring to the claims of many global protests for basic rights or political issues that are actually taking place through the physical occupation of public places and streets: see further Nicholls, Walter, and Floris Vermeulen. 'Rights through the City: The Urban Basis of Immigrant Rights Struggles in Paris and Amsterdam'. *Remaking Urban Citizenship: Organizations, Institutions, and the Right to the City*, edited by Michael Peter Smith and Michael McQuarrie, Transactions Publishers, 2012, pp. 79–96. The right to the city also became the core of the *World Charter on the Right to the City* adopted by the World Social Forum initiative in 2005 (text available at https://www.right2city.org/wp-content/uploads/2019/09/A1.2_World-Charter-for-the-Right-to-the-City.pdf).

[247] *"The law of cities can be simply apprehended as the law applicable to various essential dimensions of cities functioning: […] and it is possible to go through these various issues without too much wondering whether you are in the field of constitutional law, administrative law, planning law or whatever"* (Auby, Jean-Bernard. 'Droit de La Ville. An Introduction'. *Italian Journal of Public Law*, vol. 5, no. 2, 2013, p.303).

[248] As it has been claimed, there is an *"insufficient institutional match"*: Auby, Jean-Bernard. 'Droit de La Ville. An Introduction'. *Italian Journal of Public Law*, vol. 5, no. 2, 2013, p.304. Within the EU space, this can also be understood in the light of the need for the EU Commission to develop the new Functional Urban Area (FUA) concept described in paragraph 5 of this Chapter.

[249] For this idea and new research direction we mainly refer to Giglioni, Fabio. 'Verso Un Diritto Delle Città. Le Città Oltre Il Comune'. *Diritto Delle Autonomie Territoriali*, edited by Enrico Carloni and Fulvio Cortese, Cedam, 2020, pp. 267–84, and Cortese, Fulvio. 'Il Nuovo Diritto Delle Città: Alla Ricerca Di Un Legittimo Spazio Operativo'. *Smart City: L'evoluzione Di Un'idea*, edited by Giuseppe Franco Ferrari, Mimesis, 2020, pp. 79–103. The contribution of F. Giglioni is of special value as it matches the idea of the city with the ancient Roman one of *civitas*, and on the basis of that claims cities as both original and derived entities. Cortese, on his side, qualifies the city as that space where new governance dynamics are emerging

different legal fields already existing, but rather as a wider label able to contribute with additional tools to address the societal challenges that increasingly arise in urban areas. The city beyond the municipality aims at capturing the many flows as well as networks passing through – people, services, production, ideas, policies, capital, goods – and it aims at encompassing not only residents (of the municipality), but all those people who actually live there as a community like foreigners or commuters (in the perspective of what has been defined as 'urban citizenship'[250]). The city is also on one side the place where different legal orders coexist, and where so many among the legal acts passed by other higher levels of government find their concrete and ultimate application. On the other side, it is also the place where citizens' experiences of informality could be given value and supported by the public side in a governance perspective: this is what has been defined as 'informal public law'[251], with the aim to recognize the social origin of law, and for referring to all those rules that are being created in the city even in the absence of an explicit link to formal legality[252]. In a nutshell, if we look at cities as the essential phenomenon of human settlement from a realistic and objective perspective, we cannot avoid but observing that the *civitas* has gone much beyond the borders of the *urbs*, in the sense that the political community of the city – with its problems and challenges – nowadays increasingly exceeds the borders of its physical environment as defined throughout decades by States. As previously observed[253], indeed, the concept of city long predates the idea of the State itself and of any international or supranational order, and its contemporary renaissance seems to reawaken its original vocation as a political community beyond its constriction within

more and more in parallel to the traditional government founded on representative channels (p.94), and considers the city itself as capable of creating law thanks to its local autonomy (p.90). Additionally, see Cortese, Fulvio. 'Dentro Il Nuovo Diritto Delle Città'. *Munus*, no. 2, 2016, pp. v–xi, and Cavallo Perin, Roberto. 'Beyond the Municipality: The City, Its Rights and Its Rites'. *Italian Journal of Public Law*, vol. 5, no. 2, 2013, pp. 307–15, who describes cities as *"networks of networks"*, and as places which enable *"individuals to specialise. The city therefore means plurality and differentiation"* (pp.308-309).

[250] On the concept of 'urban citizenship' see the previous footnote n.23 of this Chapter.

[251] On the city as the place of the so called *informal public law* ("diritto pubblico informale") we refer to the landmark contribution within the Italian legal context of F. Giglioni, whose work in specific on Italian cities will be of great use in Part II. His main claim is that experiences of informal public law constitute the concrete ground for cities to perform their autonomy and pave the way for a law of cities. As a beginning, see Giglioni, Fabio. 'Order without Law in the Experience of Italian Cities'. *Italian Journal of Public Law*, vol. 9, no. 2, 2017, pp. 291–309. For further contributions, see Giglioni, Fabio. 'Il Valore Giuridico Dell'informalità per l'interesse Generale. L'esempio Delle Città'. *La Città Informale*, edited by Maria Vittoria Ferroni and Giovanni Ruocco, Castelvecchi, 2021, pp. 79–94; Giglioni, Fabio. 'Nuovi Orizzonti Negli Studi Giuridici Delle Città'. *Città, Cittadini, Conflitti: Il Diritto Alla Prova Della Dimensione Urbana*, edited by Alessandro Squazzoni et al., Giappichelli, 2020, pp. 1–46; Giglioni, Fabio. 'Le Città Come Ordinamento Giuridico'. *Istituzioni Del Federalismo*, no. 1, 2018, pp. 29–74; Di Lascio, Francesca, and Fabio Giglioni. *La Rigenerazione Di Beni e Spazi Urbani. Contributo al Diritto Delle Città.* Il Mulino, 2017. See further paragraph 4 in Chapter 5.

[252] See footnote no.168, Chapter 2.

[253] In paragraph 1 of this Chapter.

State superstructures. Indeed, not only are there debates on the city beyond the municipality, but also the scholarship is starting to look at '*cities beyond State*'[254]. This phenomenon is looking at cities essentially within an international or supranational European perspective, and at their capacity of constituting horizontal networks[255] capable of promoting a new method of governance complementary to the one of nation-States for facing global as well as local challenges and problems, while at the same time advocating for more autonomy. This awakening brings new issues not only with concern to the practical organization of the city (as an object of study of administrative lawyers), but also with regard to a concrete and shared legal definition and prospect of constitutionalisation within domestic as well as supranational law (for constitutional scholars).

As a consequence of this urban development and of growing organizational issues, also constitutional lawyers started questioning the emerging of the city as an autonomous legal subject, first and foremost within a federalist debate as we have already acknowledged[256] and which has the merit of having introduced the term 'city' within the federalism scholarship, but also in a wider constitutional law perspective. The constitutional scholars' position is essentially concerned with the empowering of cities through their recognition in Constitutions[257]: sometimes this is more concerned with the recognition of 'megacities' (or metropolitan cities), but generally speaking the concern is devoted to whatever should be qualified as 'city' not depending on the size[258]. Taking into

[254] In this regard, it is important to mention the work of an Italian research group of public law scholars who are studying cities as emerging subjects of law, and whose latest work is precisely on the idea of the city beyond the State. The research group – based at the University of Padova – is called Gruppo Progetto Città, and as an affiliated I benefited greatly from the numerous debates on the topic of the rising role of the city within public law scholarship. The two collective contributions output of the group work are: Pizzolato, Filippo, et al., editors. *La Città e La Partecipazione Tra Diritto e Politica*. Giappichelli, 2019, and Pizzolato, Filippo, et al., editors. *La Città Oltre Lo Stato*. Giappichelli, 2021. A first elaboration of my research was published there: see Salati, Chiara. 'La Libertà Dei Cittadini Attivi Oltre Lo Stato: Prime Considerazioni Sull'amministrazione Condivisa in Unione Europea'. *La Città Oltre Lo Stato*, edited by Filippo Pizzolato et al., Giappichelli, 2022, pp. 83–93.

[255] More in general, on the EU as based on reticular governance, while nation-states on pyramid government see Bobbio, Luigi. 'Invece Dello Stato: Reti'. *Parolechiave*, no. 34, 33-46, p. 2005.

[256] Within constitutional scholarship, it is mainly thanks to federal scholars if the concept of 'city' has become more and more a buzzword: see paragraph 5 of this Chapter.

[257] The landmark reference is Ran Hirschl contribution denouncing the constitutional silence on cities (more in specific, he addresses the 'megacities') despite the recognition of the urban age among all other sciences: Hirschl, Ran. *City, State. Constitutionalism and the Megacity*. Oxford University Press, 2020.

[258] Cities, therefore, as distinct from other local governments: for some reference contributions see further De Visser, Maartje. 'Constitutionalizing Cities: Realizing Government Agendas or Sites for Denizen Engagement?' *Unlocking the Constitutional Handcuffs on Canadian Cities: New Possibilities for Municipal Power*, edited by Flynn et al., McGill-Queen's University Press (forthcoming), 2022; Hirsch Ballin, Ernst, et al., editors. *European Yearbook of Constitutional Law 2020. The City in Constitutional Law*. Springer, 2020, and in specific De Visser, Maartje, et al. 'Introduction: The City as a Multifaceted and Dynamic Constitutional Entity'. *European Yearbook of Constitutional Law 2020. The City in Cosntitutional Law*, edited by Ernst Hirsch Ballin et al., T.M.C. Asser Press, 2020; Saunders, Cheryl, and Erika Arban. 'Federalism and Local Governments'. *Cities in Federal Constitutional Theory*, edited by Erika Arban, Oxford University Press, 2022;

account, for example, the EU territory, the great majority of EU cities are medium-size, and not 'megacities' in the way we could consider many cities in other part of the world, like in the Global South[259]. Within the European legal space, we have seen that it is essentially thanks to the CoE 1985 European Charter of Local self-government if the city has received – together with other local authorities – constitutional recognition from an European perspective, in specific in relation to its political autonomy[260]. However, as previously observed, the city is recognised as an independent legal subject by European constitutional law only in so far as it is legally determined within the domestic legal order of each member state[261], since an EU (or European) shared legal definition of what a city actually is has not been agreed upon yet. On the basis of the 1985 Charter, therefore, the city in the European legal space is one among other local authorities without a clearly defined and legally binding definition: on its side, the city can however rely on a non-legal definition on the basis of precise population and size-based criteria used for statistical needs within the EU[262]. With concern to the question on whether to constitutionalize the city as such within nation-states constitutions or not, the debate is still open, and despite many scholars lean towards a positive answer on that, still diverse are the drawbacks that risk not benefitting anyone: among others, the risks of generating more unnecessary complications among levels of government, of overburdening bureaucracies, of deepening the divide between urban and rural areas[263]. On the other side, a constitutional entrenchment (at a domestic level, but within our research essentially from an EU and European level) of cities as separate subjects from municipalities and other local

Shaw, Jo, and Igor Štiks. 'The Constitutionalisation of Cities and the Future of Global Society'. *Identities*, 2021.

[259] For some critical observations on the landmark contribution of Hirschl, Ran. *City, State. Constitutionalism and the Megacity.* Oxford University Press, 2020; see Arban, Erika. 'City, State: Reflecting on Cities in (Comparative) Constitutional Law'. *I•CON*, vol. 19, no. 1, 2021, pp. 343–57. The essential points that Arban brings to the table and that are useful for our research are: a) European cities are not megacities, so a different work should be done specifically on cities within the European legal space; b) a definition of 'city' and of 'megacity' is actually not provided at all for the purposes of constitutional empowerment.

[260] As also observed in Falcone, Matteo. 'Le Politiche Europee per Le Città: Agenda Urbana e "Aree Interne"'. *Diritto Delle Autonomie Territoriali*, edited by Enrico Carloni and Fulvio Cortese, Cedam, 2020: *"il valore della Charter è principalmente quello di aver dato rilievo giuridico alle città a livello europeo"* (p.244), and "*la Carta individua come caposaldo dell'autonomia locale l'autonomia politica"* (p.241). Also the Charter *"provides some basis to believe that European cities may be better off than their counterparts in the United States, Canada, or Australia. It protects the basic prerogatives of local government"* (Hirschl, Ran. City, State. *Constitutionalism and the Megacity*. Oxford University Press, 2020, p.17.10).

[261] Even if clearly defined as separate from other local authorities in nation-states Constitutions, cities are still considered in the majority of cases *"as creatures of the state, fully submerged within a Westphalian constitutional framework and assigned limited administrative local governance authority"* (Hirschl, Ran. City, State. *Constitutionalism and the Megacity*. Oxford University Press, 2020, p.17.9).

[262] As seen in paragraph 5 of this Chapter.

[263] Arban, Erika. 'City, State: Reflecting on Cities in (Comparative) Constitutional Law'. *I•CON*, vol. 19, no. 1, 2021, pp. 343–57

governments may have also some positive effects: among others, the most relevant for our research would be the legal recognition of the city as a political community seat of both a democratic government and governance with its citizens, with a higher level of autonomy so as to deal with contemporary borderless problems and challenges. This prospect to date is obviously utopian, and it is not even certain that it is desirable: the debate is still immature, without even a shared definition of what a city actually is. What seems to be, above all, the essential contribution of constitutional law to the rising role of cities is the recent rediscovery of the principle of subsidiarity[264]. The European principle of subsidiarity, in fact, seems to be capable of providing a guiding light within all the three dimensions[265] of cities relationship: a) with the international or supranational (European) institutions; b) with the other institutions within the national constitutional architecture; c) with its own inhabitants. Someone in the literature has also tried to put forward some options for reaching a higher level of city autonomy[266] building upon a valorisation of the principle of subsidiarity: a) with relation to international institutions and organisation, to *"globalise the city at the extra-constitutional level"*, for referring to the idea of freeing cities from their dependency on the state; b) with relation to other institutions within the national constitutional architecture, to *"institutionalise the city at the constitutional level"*, which essentially aims for a constitutional entrenchment of the city as a political community; c) with its own inhabitants, *"to democratise the city at the sub-constitutional level"*, which means fostering *"citizen participation in democratic processes"*. Specifically, it is the innovative potential that subsidiarity can bring to the relationship between the city and its inhabitants that interests us most[267]: a subsidiarity-as-democracy idea is in fact very much in line with the horizontal dimension of subsidiarity, as a consequence of its recognition of the capacity of cities to support their citizens on practical actions of general interest (which as we saw constitutes a forgotten meaning of European subsidiarity). This democratic

[264] For two starting points we suggest: De Visser, Maartje. 'Constitutionalizing Cities: Realizing Government Agendas or Sites for Denizen Engagement?' *Unlocking the Constitutional Handcuffs on Canadian Cities: New Possibilities for Municipal Power*, edited by Flynn et al., McGill-Queen's University Press (forthcoming), 2022, and Cahill, Maria, and Gary O'Sullivan. 'Subsidiarity and the City: The Case for Mutual Strengthening'. *Cities in Federal Constitutional Theory*, edited by Erika Arban, Oxford University Press, 2022.

[265] For the identification of these 3 categories see De Visser, Maartje, et al. 'Introduction: The City as a Multifaceted and Dynamic Constitutional Entity'. *European Yearbook of Constitutional Law 2020. The City in Constitutional Law*, edited by Ernst Hirsch Ballin et al., T.M.C. Asser Press, 2020.

[266] Cahill, Maria, and Gary O'Sullivan. 'Subsidiarity and the City: The Case for Mutual Strengthening'. *Cities in Federal Constitutional Theory*, edited by Erika Arban, Oxford University Press, 2022.

[267] This is what has been defined as *"denizen-centric approach"* in De Visser, Maartje. 'Constitutionalizing Cities: Realizing Government Agendas or Sites for Denizen Engagement?' *Unlocking the Constitutional Handcuffs on Canadian Cities: New Possibilities for Municipal Power*, edited by Flynn et al., McGill-Queen's University Press (forthcoming), 2022, p.9.

reading of the European principle of subsidiarity has actually already found its application in many Italian cities, as we will see in Part II. All in all subsidiarity, indeed, may offer hope to city scholars – as it has been claimed[268] – as it *"provides a paradigm […] for greater autonomy"*, and more precisely the European principle of subsidiarity could provide for this paradigm for EU cities.

At this stage, however, our reference point remains the observation of reality, from which emerges a clear growth in the importance of the city as a place of democracy and, consequently, of citizen participation. Looking at cities from a realistic perspective, it can be claimed in fact that cities considered as human settlements with their own identity and sense of belonging beyond administrative borders a) can vary tremendously in terms of territorial and population size; b) contribute to economic prosperity, and are considered as the place able to generate innovation and ideas, and to promote policies able to overcome immobility of the State on certain topics; c) are the strategic place to support citizen participation on daily concrete matters. In a nutshell, it can be claimed that cities beyond the municipality constitute the strategic laboratory where problem-solving and challenges are the object not only of a government elected at the closest level by citizens, but also of an informal governance of public authorities together with their inhabitants. In specific, as the focus of our research lies on citizen participation at the local level, the city detects as the urban area where local democracy is best placed for experimenting with innovative forms of participation, which as it has previously been observed may also take place through informality[269]. Cities have long predated States as the strategic places for citizen participation within a political community in the European territory, and as we saw in Chapter 2 the local level is the level of government best suited for pushing the boundaries of participation further. In light of the European turn towards the urban discourse and cities, we may therefore start referring to European cities as the places for local democracy from a transnational perspective. This does not mean that local democracy and participatory practices are only to be found in cities as urban areas and not in rural areas[270] and in other local authorities with clearly defined administrative borders:

[268] Cahill, Maria, and Gary O'Sullivan. 'Subsidiarity and the City: The Case for Mutual Strengthening'. *Cities in Federal Constitutional Theory*, edited by Erika Arban, Oxford University Press, 2022. The authors argue that in order to strengthen the project of city autonomy it is unavoidable for scholars to come to a definition of both concepts of 'city' and 'autonomy'.

[269] In this same paragraph, we referred to the concept of *informal public law* (footnote no.251).

[270] For the understanding of cities as urban areas in contrast to rural areas we refer to the (few) considerations on that contained in the *European Parliament Resolution of 3 July 2018 on the Role of Cities in the Institutional Framework of the Union* (2017/2037(INI)), OJ C 118, 8 April 2020, pp.2-9. For an introduction on the relationship between urban and rural areas, and the constitutional silence on that see

democracy and participatory practices, indeed, could be found in all these places, but for the purpose of this work we are limiting ourselves to cities since they are the ones faced with more complex problems and challenges. One last aspect when talking about the city as a political community based on democratic government and governance should be mentioned: in fact, the important focus on the city as a political community is also the idea behind the growing concerns towards the top-down implementation of the so called 'smart city' paradigm. We are aware that it would be appropriate to open a whole new chapter on this topic[271], but since it is not functional for the purposes of our work, we will just briefly mention the aspect that interests us, which is citizen participation in smart city governance. Essentially dealing with the involvement (and transformations) of technological infrastructures for addressing urban issues, the smart city idea was born as a top-down implementation by corporations of technologically advanced innovative solutions for urban infrastructure. Only recently a new bottom-up push has placed the role of citizens back at the centre as participant in its democratic governance[272]. Citizen participation in the context of the smart city has been so far primarily focussed on the ownership and management of data, which constitute a first obvious concern[273]; however, recently also the wider issue of citizen participation in the governance of the city in the broadest sense started to be debated, on the basis of the recognition of the city as a political community

further Hirschl, Ran. 'Constitutional Design and the Urban/Rural Divide'. *Law & Ethics of Human Rights*, vol. 16, no. 1, 2022, pp. 1–39.

[271] In this chapter we will only touch upon the topic of the smart city in so far as it concerns citizen participation. For an introduction on the topic of the smart city from a public law perspective see Ranchordás, Sofia. 'Smart Cities, Artificial Intelligence and Public Law: An Unchained Melody'. *Artificial Intelligence and Human Rights*, edited by A. Quintavalla and J. Temperman, Oxford University Press, 2023, which presents the smart city as a corporate narrative that is causing growing urban inequalities between public authorities and citizens. Additionally, Ranchordás observes that there is not one shared definition of smart city, nor only one model, but every city adopts its own definition and model based on different strategies and approaches. Within this consciousness, the author claims that *"a smart city is at the same time a strategy to ameliorate urban centres, a technological product, a narrative, and a process"*. Additionally, for understanding the position of municipalities towards the idea of the smart city and the challenges it poses (through the case study of the city of Amsterdam), see Voorwinden, Astrid. 'Regulating the Smart City in European Municipalities: A Case Study of Amsterdam'. *European Public Law*, vol. 28, no. 1, 2022, pp. 155–80. See also Voorwinden, Astrid, and Sofia Ranchordás. 'Soft Law in City Regulation and Governance'. *Edward Elgar Research Handbook on Soft Law*, edited by U. Morth et al., 2022 for the growing role played by soft law in smart cities. For a literature review from an interdisciplinary perspective see Angelidou, Margarita. 'The Role of Smart City Characteristics in the Plans of Fifteen Cities'. *Journal of Urban Technology*, vol. 24, no. 4, 2017, and Soe, Ralf-Martin, et al. 'Institutionalising Smart City Research and Innovation: From Fuzzy Definitions to Real-Life Experiments'. *Urban Research & Practice*, 2021.

[272] Carlo Ratti provided for a landmark contribution on this understanding: see Ratti, Carlo, and Matthew Claudel. *The City of Tomorrow Sensors, Networks, Hackers, and the Future of Urban Life*. Yale University Press, 2016 (Italian translation: *La città di domani. Come le reti stanno cambiando il futuro urbano*, Einaudi, 2017).

[273] See the fundamental reflections of Morozov, Evgeny, and Francesca Bria. *Rethinking the Smart City. Democratizing Urban Technologies.* Rosa Luxemburg Stiftung, 2018: they essentially advocate for a citizen-led technological sovereignty in smart cities, where resources as urban data should be owned, controlled, and managed as commons.

beyond smart city technology, and that as such should find ways to support bottom-up inputs of an active citizenship[274]. Ultimately, what it is useful to emphasise here is that the problem of democratic participation in the smart city still needs to be resolved, with a view to creative and spontaneous initiatives by citizens being valorised and channelled through democratic instruments[275].

Moving towards a conclusion for this paragraph, we are forced to acknowledge that the rising phenomenon of urbanisation which is bringing attention to the leading role of cities is being increasingly recognized by EU institutions mainly through policies, as well as by the public law scholarship with growing interest among federal, constitutional and administrative scholars: this is occurring despite the lack of any legally binding definition, but still within the general overarching framework of some European constitutional principles, like subsidiarity and local self-government. Despite the fact that EU law is still blind towards cities, EU policies are not, and are already reaching out to cities essentially through funding opportunities.

7. Building blocks of a city definition in the EU

In the light of the previous paragraph on cities, and taking into account the discussion held so far in our work, we would like to conclude this Chapter with the proposal of some building blocks for a definition of European cities – more precisely, of cities in the EU – for the purpose of our work. It may be argued that a definition of cities in the EU is actually not needed: many are the limits, among which a still undefined field, a great heterogeneity of types of cities around the EU, the predominant constitutional silence on them, the little knowledge of the CoE 1985 Charter and its proclaimed right of local autonomy. On the opposite, we claim that European public law scholarship should keep on working on a definition as an essential need coming from the observation of a reality of

[274] Keymolen, Esther, and Astrid Voorwinden. 'Can We Negotiate? Trust and the Rule of Law in the Smart City Paradigm'. *International Review of Law, Computers & Technology*, 2019, pp. 1–21. In specific, they advance negotiation as the method for opening up the city to active citizens' contributions. For the importance of maintaining and creating even more space for the political dimension of the smart city – which is essentially related to the key topic of the governance of smart cities – interesting reflections comes from Pizzolato, Filippo. 'Città e Diritti Fondamentali: Le Ambivalenze Della Politicità Dei Diritti'. *Istituzioni Del Federalismo*, no. 1, 2022, pp. 155–86: against the uniformity pursued by platforms, the author advocates for a plural participation of civic as well as territorial autonomies able to build up democracy bottom-up.

[275] For some overall critical reflections on this issue, see Spiller, Elisa. 'Citizens in the Loop? Partecipazione e Smart City'. *La Città e La Partecipazione Tra Diritto e Politica*, edited by Filippo Pizzolato et al., Giappichelli, 2019, pp. 289–300.

increasing urbanization around us. Among the others, some main challenges in doing so are related to: the idea of an urban citizenship, the smart city as an emerging paradigm, the growing role of soft law and city networks, the possibility of constitutional reforms, the great interdisciplinarity and combination of research methods, and last but not least innovations with regard to citizen participation and democracy itself. Conscious of the countless number of definitions provided in the literature as well as in policy reports and within international and supranational institutions and organizations' acts, we would like nonetheless to sum up our understanding of the city in relation to democracy with drawing the main elements that according to our study so far are foundational. Precisely:

a) the city in the EU is the place where transformations of democracy are concretely taking place, in both a government and governance perspectives;
b) the city is the place where citizen participation is more common, and where democratic innovations may be designed and applied;
c) as a local authority, the city is also the place for local self-government within urban areas, as distinct from local authorities in rural areas;
d) it is the subsidiarity principle in its vertical dimension, in specific, the European constitutional principle able to provide for a constitutional paradigm for cities advocating for more autonomy;
e) lastly, the city as a public autonomy has itself the capacity of supporting civic autonomies to pursue the general interest of their communities thanks to the horizontal dimension of subsidiarity.

All these aspects considered, the network of local democracy in cities around the EU could contribute to the renewal of democracy in the EU, fundamentally thanks to the subsidiarity principle. While under EU law cities and other local authorities are not considered as active subjects, but only as passive receivers[276], on the opposite EU soft law is increasingly reaching out to cities relying upon their democratic role and potential as

[276] van Zeben, Josephine. 'Local Governments as Subjects and Objects of EU Law: Legitimate Limits?' *Framing the Subjects and Objects of Contemporary EU Law*, edited by Samo Bardutzky and Elaine Fahey, Edward Elgar Publishing, 2017, p.138. As it has been observed, looking at cities and other local governments as only passive receivers constitutes the risk that the EU Urban Agenda also runs into, in so far as it proceeds in the local implementation of European policies rather than in the bottom-up transmission of demands from below to the European level: for this perspective (upon which we will come back later in our work, in Part III) see Pizzolato, Filippo. 'Il Civismo e Le Autonomie Territoriali'. *Il Mostro Effimero. Democrazia, Economia e Corpi Intermedi,* edited by Franco Bassanini et al., Il Mulino, 2019, pp. 71–82.

political communities[277]: the city is, therefore, the crucial place where this intersection between government and governance is currently taking place, and subsidiarity seems to constitute the archetypal European principle. Not fully legal nor fully political, the city seems to be at the intersection among the two.

This Chapter may be concluded by saying that the two principles that we have found as characterising the local level in the EU (local self-government and subsidiarity) can be clearly seen in the phenomenon of cities and their desire for more autonomy with respect to traditional forms of local government and for dealing with emerging participatory demands coming from outside representative channels. The city in the EU – considered in its earliest desire for autonomy untied from subsequent nation-state structures – may therefore constitute a laboratory for transformations of local democracy through participatory forms together with its inhabitants on the basis of the European principle of subsidiarity.

[277] De Visser, Maartje. 'The Future Is Urban: The Progressive Renaissance of The City in EU Law'. *Journal of International and Comparative Law*, vol. 7, no. 2, 2020, pp. 389–408. She refers to the role of cities as *"democracy enhancers".* Additionally, she reasonably claims that "*soft-law should sistematically be included when researching Europe's cities*".

Part II. Horizontal subsidiarity in Italian cities: a constitutional ground for initiatives of civic participation through the commons (CPC)

Chapter 4. The constitutional roots of the model of *Shared administration* of the commons

1.Introducing the Italian case. 2.From participation in deciding *to* participation in doing*: a necessary premise. 3.The novelty of horizontal subsidiarity in Article 118(4) of the Italian Constitution. 3.1.The subjects: the State and the citizens. 3.2.The object: the activities of general interest. 3.3.The action: the support for autonomous initiatives. 4.Horizontal subsidiarity and its relation with other constitutional principles. 5.The general interest applied to the commons.*

1. Introducing the Italian case

In the light of the limits and challenges of the current state of the art regarding the transformation of democracy in the EU in its participatory form and at the local level of government, the puzzle pieces emerging from Part I useful for moving forward in our research are essentially three: 1) an action-oriented version of participation that may be considered as the frontier of participation, thanks to its ability to allow citizens to contribute beyond the decision-making process with practical actions; 2) an horizontal interpretation of the European subsidiarity principle that has gone lost until now, but that is nevertheless deeply rooted in the European constitutional debate; 3) the rising role of cities as autonomous subjects among other local authorities, considered as urban areas challenging traditional nation-states' structures, and capable of capturing the *civitas* beyond mere administrative boundaries. The research conducted so far allows us to foresee a great potential still unexplored contained in the European constitutional principles in recognising and providing cover for a broad variety of experiences aimed at renewing democracy starting from the local level. In specific, the choice of deepening in Part II (Chapters 4-5) into the implementation of the principle of subsidiarity in its horizontal dimension in many Italian cities comes as a necessary stepping-stone in so far as a precise constitutional cover has been developed for providing a solid ground to an innovative form of participation by means of the 'commons' (or 'common goods') at the local level. For the purpose of our work, we will label this form of participation as 'civic

participation through the commons' under the acronym of CPC, and the implementation of the Italian constitutional principle of horizontal subsidiarity in Italian cities constitutes the case at the core of our research because it allows for a precise organizational model (namely, the *Shared administration* of the commons) with its own legal framework (the *Regulation on the commons*, and the *Collaboration agreement*) through which CPC may take place (and actually is *already* taking place). The Italian experience constitutes an interesting case for three main reasons: 1) because the Italian constitution is the only one that outlines subsidiarity in a horizontal dimension (together with the Polish one that however, has a brief mention of that only in the Preamble[1]), and that provides for a description of that[2]; 2) because its theoretical inclusion in the Constitutional text has found a practical application through the organizational model of *Shared administration* that an increasing number of cities and other local authorities – starting from the year 2014 – have introduced for innovating their relationship with citizens; 3) because the model of *Shared administration* of the commons has become increasingly institutionalised to the point of drawing the contours of a form of CPC that has no equal in other experiences on the commons in the EU[3]. Therefore, the choice of putting at the core of our research question the case of Italian cities came naturally in the light of the advanced evolution of this experience that – pros and cons included – constitutes an unique phenomenon. An in-depth investigation of this case is for us instrumental for answering our overarching research question, and can be situated in the context of civic participation in local democracy in the EU according to Part I. More in specific, the Italian case constitutes a concrete case that refers to what we labelled as *"the forgotten meaning of subsidiarity"*: thanks to this meaning, this principle is allowing cities and other local authorities to promote an action-oriented idea of participation, built on the commons as its hallmark. The Italian case, indeed, not only fits well into the European legal space and EU legal order that we draw so far, but also may be useful for paving the way to the development of similar theoretical frameworks by other EU cities and local authorities that are faced with related problems and challenges. In conclusion, we recognize the limits of including a full in-depth analysis of only one case study – the Italian case – and not doing a comparative work[4]: this, however, constitutes a precise choice clearly outlined already in the research

[1] See footnote no.111 of Chapter 3.
[2] Article 118(4) of the Constitution.
[3] As we will see in Chapter 6.
[4] As it has been outlined, the choice of using one case study can be used to generate hypotheses that may be further investigated in subsequent steps of a research: Flyvbjerg, Bent. 'Five Misunderstandings About Case-Study Research'. *Qualitative Inquiry*, vol. 12, no. 2, 2006, p.220.

question, which seems to be justified in the light of its high level of institutionalisation through a constitutional and legal framework developed throughout years by multiple levels of government. As a consequence of that, we acknowledge that our research constitutes only the beginning in understanding the contribution that an horizontal understanding of the EU principle of subsidiarity could give to concrete initiatives of civic participation through the commons in EU cities. Because of that, in Part II we will not come up with secure generalisations, but only with the precise experience of the pioneering theoretical (but also practical) contribution of the Italian case, which brings to the table an additional perspective on the principle of subsidiarity. In conclusion, two reading guidelines: the first one is that every time we will refer to *'the Italian case'* or '*the case of Italian cities'* we will be dealing with the application of the principle of subsidiarity in its horizontal meaning in many Italian cities. Secondly, because of the fact that Part II is entirely devoted to an in-depth investigation of the Italian case, every time the Constitution or constitutional principles will be mentioned, they actually refer to the Italian constitution, and not to European constitutional principles.

2. From *participation in deciding* to *participation in doing*: a necessary premise

While approaching the case of Italian cities, why starting from the concept of participation[5]? When talking about participation many are the meanings and practices related to that. Undoubtedly, this concept represents a slippery ground related to the difficulties that representative democracies are facing not only in Italy, but as we saw[6] also around the European Union and beyond. From a general public law perspective, participation refers, at its core, to the idea of taking part in a process of decision by the ones who are outside the designed roles, complementing the decision-making process of those who are competent for that. On one side, therefore, we have the State in its organizational structure, and on the other one we have the society with its pluralism. With participation, both the State and society are going towards each other in an attempt to

[5] Nigro, Mario. 'Il Nodo Della Partecipazione'. *Rivista Trimestrale Di Diritto e Procedura Civile*, 1980, pp. 225–36.

[6] In paragraph 3, Chapter 1.

include ‘more society within the State’, and ‘more State within the society’[7]: this process requires an organizational framework regarding the subjects, the spaces, and the interests of participation, and it is up to legal scholars to define it.

Despite the difficulties in having one shared definition of participation, in the Italian legal context we mainly refer to two different meanings: the first one is the ‘administrative participation’, which is the participation of private individuals in administrative proceedings; the second one is the ‘political participation’, their participation in public decision-making processes, also through instruments of participatory or deliberative democracy. Much have been written on both of them, and it is not the purpose of this Chapter to further investigate them[8]. Rather, the aim is to understand what has been defined as a third form of participation[9] that is paving the way for a revolutionary idea of relationship between the State and society: this goes under the name of *Shared administration*[10]. This third form of participation also constitutes an organizational model, which will be deeply analysed in Chapter 5, and represents the theoretical framework able to support an innovative form of participation where citizens – individually or associated – share resources and responsibilities for solving societal problems of ‘general interest’ on an equal level with the State. Doctrinal contributions gave a meaningful label to this new form of participation: that is “partecipazione al fare”, which means *participation in doing*, as it stands in parallel with “partecipazione al decidere” that means *participation in deciding*[11]. While the idea of

[7] In the wording of Nigro, Mario. ‘Il Nodo Della Partecipazione’. *Rivista Trimestrale Di Diritto e Procedura Civile*, 1980, pp.230-236.

[8] For some references on the first model see Caranta, Roberto. ‘Participation into Administrative Procedures: Achievements and Problems’. *Italian Journal of Public Law*, no. 2, 2010; Giglioni, Fabio, and Sergio Lariccia. ‘Partecipazione Dei Cittadini All’attività Amministrativa. *Enciclopedia Del Diritto*, 2000, pp. 943–79. On the second model see Allegretti, Umberto. ‘La Partecipazione Come “Utopia Realistica”’. *Le Regole Locali Della Democrazia Partecipativa. Tendenze e Prospettive Dei Regolamenti Comunali,* edited by Alessandra Valastro, 2016; Allegretti, Umberto. ‘Democrazia Partecipativa’. *Enciclopedia Del Diritto*, 2011, pp.295-335; Bobbio, Luigi. ‘Dilemmi Della Democrazia Partecipativa’. *Democrazia a Diritto*, vol. 4, 2006, pp. 11–26. In Italy the first scholar who talked about the idea of participatory democracy is P.L. Zampetti: see Zampetti, Pier Luigi. ‘L’art. 3 Della Costituzione e Il Nuovo Concetto Di Democrazia Partecipativa’. *Studi per Il Ventesimo Anniversario Dell’Assemblea Costituente, II – Le Libertà Civili e Politiche*, Vallecchi Editore, 1969.

[9] On this third form of participation see Arena, Gregorio. ‘Amministrazione e Società. Il Nuovo Cittadino’. *Rivista Trimestrale Di Diritto Pubblico*, no. 1, 2017, p.50; Bobbio, Luigi. *Op.cit*.; Valastro, Alessandra. ‘La Partecipazione Alla Prova Dei Territori: Dal “Decidere” al “Fare”’. *Labsus*, 2016, https://www.labsus.org/2016/08/la-partecipazione-alla-prova-dei-territori-dal-decidere-al-fare/.

[10] Arena, Gregorio. ‘Introduzione All’amministrazione Condivisa’. *Studi Parlamentari e Di Politica Costituzionale*, 1997, pp. 29–65. See also Rocca, Enrica. ‘The City, Between Innen and Aussen: The Revolution of the Horizontal Subsidiarity Principle in Italy’. *Birkbeck Law Review*, vol. 5, no. 1, 2017, pp. 135–47.

[11] On the distinction *see* Valastro, Alessandra. ‘La Democrazia Partecipativa Alla Prova Dei Territori: Il Ruolo Delle Amministrazioni Locali Nell’epoca Delle Fragilità’. *Le Regole Locali Della Democrazia Partecipativa. Tendenze e Prospettive Dei Regolamenti Comunali*, edited by Alessandra Valastro, 2016, p.30; Valastro, Alessandra. ‘La Democrazia Partecipativa Alla Prova Dei Territori: Tendenze e Prospettive Dei Regolamenti Comunali’. *Osservatorio Sulle Fonti,* no. 3, 2016, p.14; Cotturri, Giuseppe. ‘Storia Del

participation in deciding refers to the involvement of citizens in having their own say in the decision-making process, the concept of *participation in doing* is trying to capture those types of citizens' participation aimed at practically doing something and solving problems for the general interest of the community.

This innovation in the understanding of participation is drawing a true paradigm shift[12] in the relation between individuals and the public authority[13]. The predominant public law paradigm of the 20th century has been (and still is) indeed a bipolar paradigm[14], which defines a conflict between citizens and the State: on the State side, the principle of authority guides those who administer; on the citizens' side, the limits of the authority on them is granted by individuals' fundamental rights. There is therefore an opposition between those who administer and those who are administered as well as between authority and freedom: within this paradigm, the State and the community are considered as two opposite poles. In the most recent decades, however, what starts to emerge is the development of a new modality of relation between the two: from the bipolar paradigm where citizens are considered as users or consumers, the new trend is going towards a more collaborative and equivalent relationship where citizens become allies of public authorities, defining a new public law paradigm that has been defined as 'subsidiarity

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Principio Di Sussidiarietà in Costituzione'. *Il Valore Aggiunto: Come La Sussidiarietà Può Cambiare l'italia,* edited by Gregorio Arena, Carocci, 2010, p.59. Also Pizzolato, Filippo. 'Il Civismo e Le Autonomie Territoriali'. *Il Mostro Effimero. Democrazia, Economia e Corpi Intermedi*, edited by Franco Bassanini et al., Il Mulino, 2019, talks about this dualism of participation in deciding and in doing (p.73).

[12] Kuhn, Thomas. *The Structure of Scientific Revolutions*. The University of Chicago Press. 1962. A paradigm shift is foreseen by the scholar F. Benvenuti with regard to the form of the State: from a State based on the opposition between the State itself and its citizens, to a collaboration between the two where a broad autonomy is granted to all the levels of government. The democratic State, for the scholar, should be referred to the broadest participation of citizens to the administrative functions of the State, allowing therefore new forms of participation to emerge beyond the elections. Civic participation is seen, in this paradigm shift, as the core of the new dimension of the State. Benvenuti, Feliciano. 'Il Ruolo Dell'amministrazione Nello Stato Democratico Contemporaneo'. *Democrazia e Amministrazione. In Ricordo Di Vittorio Bachelet*, edited by Giovanni Marongiu and Gian Candido De Martin, Giuffrè Editore, 1992, pp.13-31. See also Duret, Paolo. 'L'amministrazione della società e l'emersione del principio della sussidiarietà sociale'. *Amministrare*, no. 2, 2018, pp.219-220.

[13] Arena, Gregorio. 'User, Customers, Allies : New Perspectives in Relations Beween Citizens and Public Administrations'. Public Administration, Competitiveness and Sustainable Development, edited by Gregorio Arena and Mario Chiti, Firenze University Press, 2003.

[14] The term comes from Cassese, Sabino. 'L'arena Pubblica. Nuovi Paradigmi per Lo Stato'. *Rivista Trimestrale Di Diritto Pubblico*, vol. 3, 2001, pp. 601-650. Cassese's work on the bipolar paradim draws upon two fundamental works: Romano, Santi. *Corso di diritto amministrativo*, Cedam, 1930, p.83, *"[…] la distinzione che ci sembra fondamentale, […] è quella fra soggetti attivi e soggetti passivi della potestà amministrativa. […] bisogna, cioè, contrapporre, da un lato, i soggetti che amministrano, […] dall'altro lato, gli "amministrati"[…]";* Giannini, Massimo Severo. *Lezioni di diritto amministrativo*, Giuffrè, 1950, p.71, *"[...] nelle comunità statali attuali […] da un lato vi sono le autorità pubbliche, che si esprimono nello Stato-organizzazinoe; dall'altra, le persone, o soggetti privati, o cittadini […]. Vi sono perciò, nelle comunità statali, due forze, l'autorità e la libertà, […]".*

paradigm'[15]. This new public law paradigm, anchored to Article 118(4) of the Italian Constitution, embodies citizens' *participation in doing*, where individuals are not only bearers of needs and demands, but also of capabilities that can contribute to the general interest of a community. It is, indeed, this shift from the question 'which rights does a person have?' to the question 'what can a person be and what can they do?'[16] that captures the spark for citizens' spontaneous activation in practically *doing* something instead that only participating in the decision-making process. This shift has to be read under the light of the capabilities approach[17], whose core focus lies on what individuals are actually able to do, drawing attention to the personal potential freely and responsibly performed for contributing to the development of society.

This idea of *participation in doing* constitutes, therefore, the origin for a new meaning to be given to participation – so that it can complement the *participation in deciding* –, in order to serve as an enabler for the spontaneous exercise of an active freedom[18] by all those active citizens[19] willing to contribute to the constitutional duty of solidarity[20] with practical actions towards the general interest of society.

3. The novelty of horizontal subsidiarity in Article 118(4) of the Italian Constitution

This new idea of participation has found a strong cover in Article 118(4) of the Italian Constitution on the principle of subsidiarity in its horizontal dimension: in contrast with the principle of vertical subsidiarity (Article 118(1)) on the division of administrative functions between the different levels of government[21], horizontal subsidiarity looks at the

[15] See further Donati, Daniele. *Il Paradigma Sussidiario. Interpretazioni, Estensione, Garanzie*. Il Mulino, 2014. Additionally, see Arena, Gregorio. 'Democrazia Partecipativa e Amministrazione Condivisa'. *Le Regole Locali Della Democrazia Partecipativa. Tendenze e Prospettive Dei Regolamenti Comunali*, edited by Alessandra Valastro, Jovene, 2016, p.233.

[16] Valastro, Alessandra. 'La Democrazia Partecipativa Alla Prova Dei Territori: Il Ruolo Delle Amministrazioni Locali Nell'epoca Delle Fragilità'. *Le Regole Locali Della Democrazia Partecipativa. Tendenze e Prospettive Dei Regolamenti Comunali,* edited by Alessandra Valastro, Jovene, 2016, pp. 15-16.

[17] The reference goes to economic and philosophical theories on capabilities and the capability approach developed by Amartya Sen and Martha Nussbaum.

[18] Benvenuti, Feliciano. *Il Nuovo Cittadino. Tra Libertà Garantita e Libertà Attiva*. Marsilio, 1994.

[19] Arena, Gregorio. *Cittadini Attivi*. Laterza, 2006.

[20] Rodotà, Stefano. *Solidarietà. Un'utopia Necessaria.* Laterza, 2014.

[21] Frosini, Tommaso Edoardo. 'Sussidiarietà (Principio Di) (Dir.Cost.)', *Enciclopedia Del Diritto*, 2008, pp. 1135-1136; Rescigno, Ugo. 'Principio Di Sussidiarietà Orizzontale e Diritti Sociali'. *Diritto Pubblico*, no. 1, 2002, pp.17-24.

relationship between the State and the community[22]. At the same time, while vertical subsidiarity works as a guarantee of institutional pluralism, horizontal subsidiarity could be said to reflect societal pluralism[23].

Despite having been explicitly introduced in the Constitutional text only in 2001, the principle of subsidiarity finds its roots many decades before, outside the juridical and scientific debate[24]. Referred to as one of the strongest ideas of contemporary constitutionalism, it is considered as a principle with a disruptive relevance equal to the principle of separation of powers at the time it was introduced[25]. Coming from the latin word *subsidium* with reference to the military reinforcements meant to provide support during a battle (the so called *subsidiariae cohortes*)[26], the origin of the principle in the Italian legal order as a relation between the State and the community dates back to the Christian social doctrine[27]. It was Pope Pius XI, in his Encyclical Letter *Quadragesimo Anno* in 1931[28], the one that for the first time clarified the concept of subsidiarity as the guiding principle for societal organization, taken from social philosophy. Observing the

[22] "Horizontal subsidiarity" is a doctrinal category introduced in the literature by the scholar Antonio d'Atena in 1996: for a historical reconstruction of the debate see D'Atena, Antonio. 'Sussidiarietà e Proporzionalità Nelle Dinamiche Multilivello e Nelle Relazioni Pubblico-Privato'. *Federalismi.It*, no.4, 2022, p.339. Since then it has been widely used and constitutes the ordinary label used for referring to Article 118(4).

[23] D'Atena, Antonio. 'Sussidiarietà e Proporzionalità Nelle Dinamiche Multilivello e Nelle Relazioni Pubblico-Privato'. *Federalismi.It*, no.4, 2022, pp.341-342.

[24] D'Atena, Antonio. 'Costituzione e Principio Di Sussidiarietà'. *Quaderni Costituzionali*, no. 1, 2001, pp. 13–33. For some essential references to the principle of subsidiarity in general Massa Pinto, Ilenia. *Il Principio Di Sussidiarietà. Profili Storici e Costituzionali.* Jovene, 2003 (in specific, pp. 52-66, 135-159). For a study on subsidiarity as a principle of political philosophy see Millon-Delson, Chantal. *Le Principe de Subsidiarité.* Presses Universitaires de France - PUF, 1993 (*Il Principio Di Sussidiarietà*, Giuffrè Editore, 2003, Italian Translation). On the original ambiguity of the principle see Cassese, Sabino. 'L'aquila e Le Mosche. Principio Di Sussidiarietà e Diritti Amministrativi Nell'area Europea'. *Il Foro Italiano*, vol. 118, no. 10, 1995, pp.373-378. For some essential references on the horizontal dimension of subsidiarity see Albanese, Alessandra. 'Il Principio Di Sussidiarietà Orizzontale: Autonomia Sociale e Compiti Pubblici'. *Diritto Pubblico*, no. 1, 2002; Duret, Paolo. 'La Sussidiarietà «orizzontale»: Le Radici e Le Suggestioni Di Un Concetto'. *Jus Online*, no. 1, 2000, p. 95; Arena, Gregorio. 'Il Principio Di Sussidiarietà Orizzontale Nell'art.118, u.c. Della Costituzione'. *Astrid Online*, 2003.

[25] Of this idea D'Atena, Antonio. 'Il Principio Di Sussidiarietà Nella Costituzione Italiana'. *Rivista Italiana Di Diritto Pubblico Comunitario*, 1997, p.627.

[26] Frosini, Tommaso Edoardo. 'Sussidiarietà (Principio Di) (Dir.Cost.)', *Enciclopedia Del Diritto*, 2008, p.1134.

[27] On this aspect see Citterio, Ferdinando. 'Sussidiarietà e Dottrina Sociale Della Chiesa'. *Storia, Percorsi e Politiche Della Sussidiarietà*, edited by Daniela Ciaffi and Filippo Maria Giordano, Il Mulino, 2020, pp.135-145; Pizzolato, Filippo. 'La Sussidiarietà Nell'eclisse Del Bene Comune: La Mediazione Costituzionale'. *Il Lato Oscuro Della Sussidiarietà*, edited by Filippo Pizzolato and Paolo Costa, Giuffrè Editore, 2013, pp. 103-138; Macdonald, Giangiorgio. *Sussidiarietà Orizzontale. Cittadini Attivi Nella Cura Dei Beni Comuni*. Aracne editrice, 2018, pp.13-27. See also Wilke, Marc, and Helen Wallace. 'Subsidiarity Approaches to Power Sharing in the European Community'. *RIIA Discussion Paper*, No.27, 1990, pp.11-13; Peterson, John. 'Subsidiarity: A Definition to Suit Any Vision?', *Parliamentary Affairs*, vol. 47, no. 1, 1994, pp.117-118. The origins of the Christian Social doctrine are attributed to Pope Leo XIII and his Encyclical Letters *Aeterni Patris* (1879) and *Rerum Novarum* (1891).

[28] Pope Pius XI, *Littera Encyclica Quadragesimo Anno,* 1931, at point 80 on the role of the State and the restoration of the social order: see footnote 30, Chapter 3.

complexity of society, and the growing power of States in regulating individuals' lives (also to the expense of the Church itself), the Pope's call to subsidiarity was essentially aimed at protecting the individual and its freedom against the growing power of the State: according to him, individuals should be considered as competent and responsible participants in society, also within the autonomy of intermediate bodies, and supported while not suppressed by the State in achieving their freedom in accordance with the common good.

The explicit introduction of subsidiarity in the Italian Constitution in 2001, however, was not a consequence of the elaboration of this principle from the Catholic Church (also thanks to the work of other Popes after Pius XI) nor from the legal scholarship[29], but it was more directly a consequence of its introduction in EU law by the Maastricht Treaty at article 3 B (today's Article 5 TEU)[30], and to a lesser extent of the provision of Article 4(3) of the European Charter of Local self-government adopted in 1985 by the Congress of Local and Regional Authorities within the Council of Europe[31]. As already described, it is interesting to note that despite the fact that the EU debate on subsidiarity in the nineties originally included the meaning of this principle as elaborated by the Christian social doctrine, however, the prevailing meaning among concurrent approaches was the British conservative ideology, which advocated for building EU subsidiarity as the principle for the allocation of powers: its goal was indeed to limit the EU's powers to the advantage of member States at their central, regional or local level[32].

[29] As Antonio D'Atena claims, the Italian legal scholarship demonstrated a belated interest in the principle of subsidiarity, in comparison to the German legal scholarship where the debate among scholars has been wider: see D'Atena, Antonio. 'Il Principio Di Sussidiarietà Nella Costituzione Italiana'. *Rivista Italiana Di Diritto Pubblico Comunitario*, 1997, pp.603-606. As also highlighted by the Author, the only prominent exception is to be found in the jurist Egidio Tosato: his perspective – rooted in the Christian social doctrine – was the only one recognizing also the legal dimension of the principle of subsidiarity, with the centrality of the person with their freedom to actively participate in the general interest of the society, and the promotional role of the State towards individuals. See Tosato, Egidio. Sul Principio Di Sussidiarietà Dell'interevento Statale, *In Nuova Antologia (Now in Persona, Società Intermedie e Stato, Giuffrè Editore, Milano, 1989)*, 1959, pp.85-101: *"[…] è da osservare anzitutto che il principio di sussidiarietà, per quanto esaminato finora sul piano della filosofia e dell'etica sociale, si pone, di per sé, come un principio di diritto. Esso si riferisce infatti al problema fondamentale dei rapporti fra ente sociale e i suoi membri, fra enti minori ed enti sociali maggiori, problema che si pone in termini di diritti e doveri; quindi di lecito e illecito, fra i soggetti del rapporto. Si tratta quindi, specificamente, di una questione di diritto, anche se la soluzione di essa si ricollega, necessariamente, a presupposti di ordine teologico, filosofico, e morale"* (88). It is interesting to note, additionally, how the human being was considered by Tosato as the starting point and centre of the whole legal system: their right of free initiative (their *"libertà sociale",* 96) belongs to them independently from any societal permission (p.90).

[30] See footnote 39, Chapter 3.

[31] Even if the principle of subsidiarity is never mentioned in the Charter, it is referred to in its vertical dimension at Article 4(3): see paragraph 3, Chapter 3. See also D'Atena, Antonio. 'Costituzione e Principio Di Sussidiarietà'. *Quaderni Costituzionali*, no. 1, 2001, pp.26-27.

[32] On the three roots of the subsidiarity principle see footnote no.40 in Chapter 3. In addition to the sources there, see Poggi, Annamaria. 'A Vent'anni Dalla Legge Bassanini: Che Ne è Della Sussidiarietà Orizzontale?' *La Sussidiarietà Orizzontale Nel Titolo V Della Costituzione e La Sussidiarietà Generativa*,

The meaning of subsidiarity as the support given by the State to free initiatives of individuals as active members of their community (according to the Christian social doctrine) is explicitly written and described, among the European Constitutions, only[33] in the post-2001 Italian Constitution in Article 118(4)[34], which has been defined as 'horizontal subsidiarity' (or 'social subsidiarity'[35]). The text agreed for Article 118(4) in the constitutional reform states that:

"*the State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity*".

It is thanks to those few lines that the centrality of the person was explicitly recognized in its social and relational dimension as included in the works of the Constituent Assembly[36] and as promoted by the Christian social doctrine, and its practical

edited by Remo Realdon, Cedam, 2018, p. 147; Scaccia, Gino. *Sussidiarietà Istituzionale e Poteri Statali Di Unificazione Normativa*. Edizioni Scientifiche Italiane, 2009, pp.8-28.

[33] The EU countries that have an explicit mention of subsidiarity – in its vertical meaning – in their Constitution are: Austria, France, Germany, Portugal. Poland is the only country that have an explicit mention of subsidiarity in its horizontal meaning: unlike Italy, however, this mention is contained only in the Preamble without any further description. For subsidiarity in Poland see footnote no.112 in Chapter 3.

[34] However, some authors already foresaw the implicit existence of the principle in the Italian constitution before its introduction in 2001: see Luther, Jörg. 'Il Principio Di Sussidiarietà: Un «principio Speranza» per Il Diritto Costituzionale Comune Europeo?' *Il Foro Italiano*, vol. 119, no. 4, 1996, pp. 184–92.

[35] 'Horizontal subsidiarity' has also been defined as 'social subsidiarity', while 'vertical subsidiarity' as 'institutional subsidiarity' in Pastori, Giorgio. 'Sussidiarietà e Diritto Alla Salute'. *Diritto Pubblico*, no. 1, 2002, p.85. Traces of subsidiarity in its vertical and horizontal dimensions are also to be found in: a) the work of the 1997 Bicameral Committee for the reform of the second part of the Italian Constitution (*Bicamerale D'Alema*) at Article 56 (whose work eventually did not succeed); b) law no.59/1997 (also known as '*legge Bassanini*', named after the then Minister of the public function Franco Bassanini, who initiated a process of reform known as 'administrative federalism') on the reform of the public administration at Article 4, III, a) attributing to public authorities the role to support families, associations and communities in functions and activities of social importance; c) law no.328/2000 at article 5(1) on social services. See Cotturri, Giuseppe. 'Storia Del Principio Di Sussidiarietà in Costituzione'. *Il Valore Aggiunto: Come La Sussidiarietà Può Cambiare l'italia*, edited by Gregorio Arena and Giuseppe Cotturri, Carocci, 2010, p.41-53.

[36] During the works of the Italian Constituent Assembly (25 June 1946 - 31 January 1948) worth mentioning is the important Report presented by Giorgio La Pira in the First subcommittee on rights and duties of citizens within the Committee for the Constitution, where the claim of the priority of the person in front of the State in contrast to the dependence of the citizen on the State was clear. The Report also contained a definition of the person as strictly related to their natural communities (the family, the religious community, the work community, the local community, etc.), in contrast to both the individualist and the totalitarian approaches. An important contribution came also from Giuseppe Dossetti on 9 September 1946: notwithstanding the different and opposite ideological approaches among the members of the Committee, he firmly believed in an agreement on the recognition of the individuals' rights in a societal dimension of solidarity, where the person finds their realization within the different communities ("comunità intermedia") where their relationships take place. Within this relationship, the State should be allowed to intervene only as a support whenever those communities are incapable of achieving their goals. *See* Commissione per la Costituzione, Prima sottocommissione, *Resoconto sommario della seduta di lunedì 9 settembre 1946*, https://www.camera.it/_dati/costituente/lavori/I_Sottocommissione/sed003/sed003.pdf. For an overview of the traces of the principle of horizontal subsidiarity in the Constitutional Assembly debate see Cerulli Irelli,

implementation through the organizational model of *Shared administration* permitted. In the following sub-paragraphs (3.1, 3.2, 3.3) we will analyse the three main pillars of horizontal subsidiarity: its subjects, its objects, the action.

3.1. The subjects: the State and the citizens

While trying to better understand this new paradigm of public law – the subsidiarity paradigm – allowed by Article 118(4) of the Italian constitution, it becomes necessary to realize what significance has been given by the literature to the two sides of this new relationship, namely the State and the citizens. This is necessary in order to give a solid constitutional ground to the practical implementation of the subsidiarity paradigm by the organizational model of *Shared administration* of the commons that many Italian cities have adopted[37].

On the side of the State, according to Article 118(4), the subsidiarity paradigm refers to the *State, regions, metropolitan cities, provinces and municipalities* as the actors designed to support citizens' activities of general interest. All together and on an equal base, they constitute the Republic – as outlined in Article 114(1) of the Constitution – and therefore it can be said that the Republic as a whole and in all its constituent parts is responsible for the role stated at Article 118(4): that is a role of support, promotion, facilitation, enablement towards the citizens[38]. Concerning which, among the others, is the competent level in this enabling role, the answer lies in the vertical dimension of subsidiarity, which envisages a predominant role for the local level of government because of its closer connection to citizens, and an obligation for higher levels to intervene only as long as the lower levels are unable to accomplish their tasks (Article 118(1)) and in accordance to the division of competences between levels of government (Article 117). A relevant aspect of the subsidiarity principle is the equivalence between all the autonomous entities in the Italian legal system, which is a polycentric legal system where institutional and social pluralism is constitutionally granted by what has been labelled as the *Republic*

Vincenzo and Cameli, Renato. Il Principio Di Sussidiarietà Orizzontale Nei Lavori Dell'Assemblea Costituente. *Astrid Online*, www.astrid-online.it. For an historical understanding of the role of the *intermediate communities* ("comunità intermedia") see Grossi, Paolo. *Le Comunità Intermedie Tra Moderno e Post-Moderno*. Marinetti, 2015 and Rosboch, Michele. *Le Comunità Intermedie e l'avventura Costituzionale.* Heritage Club, 2017.

[37] As we will see in Chapter 5.

[38] The committment of the State at all its levels towards citizens' initiatives through the principle of horizontal subsidiarity has been brought back to the concept of "diritto promozionale" in Giglioni, Fabio. 'Le Città Come Ordinamento Giuridico'. *Istituzioni Del Federalismo*, no. 1, 2018, pp. 29–74.

of subsidiarity ("Repubblica della sussidiarietà")[39]. Within this new role for the State in its wider sense, the State itself should be perceived as a community where both individuals' rights and their participation within intermediate communities are guaranteed[40].

In addition to the State, the Constitution refers to *citizens, both as individuals and as members of associations* as the other subject. The meaning given to 'citizens' allows us to understand the innovative scope of horizontal subsidiarity. There is indeed a strict relationship between the principle of horizontal subsidiarity and the topic of citizenship: subsidiarity is a principle capable of extending the legal *status* of citizenship, encompassing also all those individuals who are willing to get involved in activities of general interest, but that do not have the Italian legal citizenship[41]. The core rationale behind that lies in the support given by horizontal subsidiarity to individual freedom exercised as a social commitment[42]: individual freedom is at the centre of the promotional role of the State at all its levels, as long as it is aimed at the benefit of the society. The precise term of *active freedom* ("libertà attiva"[43]) is the one that has been used as a forerunner for this form of freedom before its introduction in the Constitution: it looks at individuals as bearers of capabilities that they are willing to put at the service of their community. This active freedom refers to a contemporary idea of liberty for individuals to personally participate in the exercise of the public power not only accordingly to a private interest, but also for a personal desire to put into practice that general duty of solidarity outlined in the Constitution (Article 2). Active freedom is imagined as a new form of freedom, that goes beyond the liberty of ancients (conceived as based on a collective freedom), as well as beyond the liberty of moderns (based on the defence of individuals'

[39] Bassanini, Franco. 'La Repubblica Della Sussidiarietà. Riflessioni Sugli Artt. 114 e 118 Della Costituzione'. *Astrid Rassegna*, no. 12, 2007.

[40] On the concept of the State as a community ("Stato-comunità") see Benvenuti, Feliciano. *Il Nuovo Cittadino. Tra Libertà Garantita e Libertà Attiva*. Marsilio, 1994, p.28; Benvenuti, Feliciano. *L'ordinamento Repubblicano*. Cedam, 1996, p. 49, where he states that the Republic consists in the State as a community, inclusive of all subjects with juridical personality and organisms without. On the concept of *Repubblica-comunità* comprehensive of both institutional levels and social bodies, see also La Porta, Salvatore. *L'organizzazione Delle Libertà Sociali*. Giuffrè, 2004,p.61.

[41] Giglioni, Fabio. 'Forme Di Cittadinanza Legittimate Dal Principio Di Sussidiarietà'. *Diritto e Società*, 2016; Arena, Gregorio. 'Immigrazione e Cittadinanze'. *Poteri Pubblici e Laicità Delle Istituzioni. Studi in Onore Di Sergio Lariccia*, edited by Riccardo Acciai and Fabio Giglioni, Aracne editrice, 2007, pp.113-128; Giglioni, Fabio. 'La Sussidiarietà Orizzontale Nella Giurisprudenza'. *Il Valore Aggiunto. Come La Sussidiarietà Può Cambiare l'Italia*, edited by Gregorio Arena and Giuseppe Cotturri, 2010, p.164. With regard to the recognition of a wider concept of *administrative citizenship* ("cittadinanza di residenza") aimed at including also migrants in actions of care, regeneration, management of the commons see judgement no.119/2015 of the Constitutional Court. See further footnote no.109 in this Chapter.

[42] Sen, Amartya. 'Individual Freedom as Social Commitment'. *India International Centre Quarterly*, vol. 25(4) and 26(1), Winter-Spring 1999-1998.

[43] Benvenuti, Feliciano. *Il Nuovo Cittadino. Tra Libertà Garantita e Libertà Attiva*. Marsilio, 1994.

freedom against the power of the public authorities)[44]: a responsible and supportive exercise of individuals' freedom is what allows participation in an widened culture of liberties, where citizens can exercise not only a private autonomy, but also a civic autonomy[45].

The exercise of an active freedom is the distinctive feature of a new model of citizen that has been defined within the Italian legal scholarship as *active citizen*[46], and has found its legal foundation in the model of citizen portrayed in Article 118(4) of the Constitution. In an attempt to define an imaginary citizenship ladder, four categories of citizens have been defined[47]: *normal citizens* ("cittadini normali"), the ones who fulfil their basic duties outlined in the Constitutions as paying taxes, or voting in the elections; *parasitic citizens* ("cittadini parassiti"), the ones that do not fulfil their basic duties nor do anything for their community, but only take advantages for themselves – also defined as free riders; *volunteers* or *extra citizens* ("cittadini extra"), those extra-ordinary citizens who take up additional duties with perseverance as a personal desire to implement solidarity. *Active citizens* (cittadini attivi) is the fourth new doctrinal category introduced with the principle of horizontal subsidiarity, for all those individuals that spontaneously decide to take responsibility within a limited action of care. Simply belonging to a community is not enough for actually being a citizen: active citizenship appears as a new way to exercise individuals' sovereignty through participation out of a free choice, going therefore beyond the paradigm of delegation within

[44] On these two forms of liberties see the famous speech of Benjamin Constant "The Liberty of Ancients Compared with that of Moderns" of 1819.

[45] In parallel to public autonomy, F. Benvenuti clarifies a distinction between two forms of individual autonomy: *private autonomy* ("autonomia privata"), when the exercise of an individual freedom is meant to bring an advantage to the individual themselves; *civic autonomy* ("autonomia civile"), referring to all those individuals willing to exercise their active freedom on an equal level with public authorities. In the author's ideal future scenario of democracy, the so called *demarchia*, citizens firsthand participate through an exercise of their active freedom in putting into practice their constitutional duty of solidarity, therefore becoming themselves participant in the production of the legal system as members of the *polis*. Benvenuti, Feliciano. *Il Nuovo Cittadino. Tra Libertà Garantita e Libertà Attiva.* Marsilio, 1994, pp.60-64 and 80.

[46] On the concept of *active citizens* ("cittadini attivi") see Arena, Gregorio. *Cittadini Attivi*. Laterza, 2006; Arena, Gregorio, and Giuseppe Cotturri. 'Introduzione'. *Il Valore Aggiunto. Come La Sussidiarietà Può Cambiare l'Italia*, edited by Gregorio Arena and Giuseppe Cotturri, Carocci, 2010, pp.11-40. In Cotturri, Giuseppe. *La Forza Riformatrice Della Cittadinanza Attiva*. Carocci, 2013, pp.11-41, the author refers to a *citizens' practical sovereignty* ("sovranità pratica del Cittadino") referring to the practical participation of citizens in the construction of the public sphere within the laboratory of the Italian context, at the forefront in the creation of a new model of bottom-up democracy based on active citizens. On the concept see further Arena, Gregorio. *I Custodi Della Bellezza.* Touring, 2020, where the author foresees an opportunity for the revival of democracy thanks to active citizens. Additionally, see Pizzolato, Filippo. *I Sentieri Costituzionali Della Democrazia*. Carocci, 2019 for the understanding of local democracy as a proximity democracy, where active citizens have the foundational role. For a perspective on citizens' duties within a community see Bertolissi, Mario. 'L'habitat Della Democrazia'. *La Città e La Partecipazione Tra Diritto e Politica*, edited by Filippo Pizzolato et al., Giappichelli, 2019, pp. 21–30, pp. 21–30. On the distinction between active citizenship and passive citizenship see Bobbio, Luigi. 'Dilemmi Della Democrazia Partecipativa'. *Democrazia a Diritto*, vol. 4, 2006.

[47] On those four categories see Arena, Gregorio. *Cittadini Attivi*. Laterza, 2006, pp.149-157.

representative channels[48]. Active citizens are normal citizens that at some point in life decide to take up an autonomous initiative: it is a model of *practised citizenship* ("cittadinanza praticata"[49]) where the spontaneous and autonomous activation of citizens is aimed at contributing to solving problems of general interest[50] in collaboration with public authorities.

When talking about citizens, it is important to remark that the Constitutional text states that citizens could be both *individuals and members of associations*. In our societies, it is usually up to volunteers or members of the third sector[51] to practice actions of general interest (or at least, this is the predominant form until now). However, what starts to be clear is the emergence of a new form of citizens' commitment, related to the subsidiarity paradigm, where also individuals without any formal recognition or legitimation[52] are entitled by the Constitutional provision of Article 118(4) to contribute to the general interest of their communities. The constitutional provision referred to citizens *as members of associations* is therefore related to third Sector[53] organisations in their pursuit of solidarity, civic and social benefits through activities of general interest in an accountable and transparent way. Organisations of the third Sector cooperate with public authorities for activities of general interest in accordance with horizontal subsidiarity and other constitutional principles like the duty of solidarity (Article 2), the full development of the human person and their effective participation (Article 3), their civic duty to perform an activity or a function that contributes to the material or spiritual progress of society (Article 4), their right to form associations freely (Article 18). The cooperation among the two parts

[48] On the distinction between 'citizenship as belonging' and 'citizenship as participation' within the Constitution see Arena, Gregorio. 'La Cittadinanza Attiva Nella Costituzione'. *Dallo Status Di Cittadino Ai Diritti Di Cittadinanza*, edited by Fulvio Cortese et al., Editoriale Scientifica, 2014, pp.241-250.

[49] For this concept see Giglioni, Fabio. 'Forme Di Cittadinanza Legittimate Dal Principio Di Sussidiarietà'. *Diritto e Società*, 2016, pp.313-318.

[50] On the 'general interest' see further paragraph 3.2 in this Chapter.

[51] The term 'third sector' was coined in Etzioni, Amitai. 'The Third Sector and Domestic Missions'. *Public Administration Review,* vol. 33, no. 4, 1973, pp. 314–23, for referring to a third alternative between the two dominant State (public) and the market (private) sectors. For the Italian constitutional debate related to the third sector see further Gori, Luca. *Terzo Settore e Costituzione*. Giappichelli, 2022.

[52] Gori, Luca. 'La Disciplina del volontariato individuale, ovvero dell'applicazione diretta dell'art.118, ultimo comma, Cost.' *Associazione Italiana Dei Costituzionalisti*, no. 1, 2018.

[53] With the introduction of the Code of the Third Sector (CTS) with the Legislative Decree No.117 of 3 July 2017, a common label was given for not-for-profit organizations such as voluntary organisations, associations for social promotion, philanthropic entities, social enterprises (including social cooperatives), associative networks and mutual associations, recognized and not recognized associations, foundations and other private entities different from for-profit companies: all of them are now considered as *Entities of the Third Sector* (ETS), and registered in a national register (*Registro unico nazionale del Terzo settore*). For an introduction on the relation between the principle of horizontal subsidiarity and the third sector, *see* Gori, Luca. 'La "Saga" Della Sussidiarietà Orizzontale. La Tortuosa Vicenda Dei Rapporti Fra Terzo Settore e P.A.' *Federalismi.It*, 2020; and Arena, Gregorio. 'Sussidiarietà Orizzontale Ed Enti Del Terzo Settore'. *I Rapporti Tra Pubbliche Amministrazioni Ed Enti Del Terzo Settore. Dopo La Sentenza Della Corte Costituzionale n. 131 Del 2020*, edited by Antonio Fici et al., Editoriale Scientifica, 2020, pp.25-35.

usually occurs through co-planning and co-design activities in order to understand needs and implement solutions. However, since 2001 the novelty of the principle of horizontal subsidiarity lies in the inclusion of not only associated citizens, but also individual ones[54]. In this way, the State at all its levels is required to promote the autonomous initiatives also of all those citizens who do not belong to any third sector organisation, and therefore are excluded by the third sector Code[55]: among many others, they could be individual citizens, informal groups, neighbourhood committees. Together with associated citizens, also individual citizens may practise their active freedom for the general interest.

Within the 2001 constitutional reform, the novelty therefore consists in the introduction of the pursuit of the general interest not only as a task to be performed by the State, but also as an opportunity for private individuals or associated citizens that can autonomously contribute and take part in this commitment. There is, however, one essential aspect to highlight: citizens' autonomous initiatives for the general interest according to Article 118(4) do not refer to privatization procedures related to handing over the control of public services to private enterprises. In fact, the horizontal subsidiarity principle is not about moving functions and services from the public sector into the private sector, but it is referred to a new alliance between the State and its citizens, built upon a free and autonomous initiative of citizens towards their community. In citizens' exercise of their active freedom there is not an economic private interest (which is, on the contrary, the reason for the involvement of private actors in privatization procedures), but their personal interest is addressing the wider general interest[56] of the community as a whole.

In this paradigm shift, alongside with individual and associated citizens, it is disputed if also the private sector and its profit-making private enterprises could become active citizens and therefore implement horizontal subsidiarity: the issue is whether for-profit enterprises could exercise a *corporate active citizenship* ("cittadinanza attiva d'impresa"[57]) by becoming involved in some specific actions of care for the general interest without receiving any economic advantage, or not. According to those in favour of this option, for-profit enterprises could indeed support public institutions or citizens through the sharing of their organizational, human, economic resources, according to the subsidiarity

[54] Rossi, Emanuele, and Luca Gori, editors. *Ridefinire Il Volontariato*. 2020.
[55] See footnote 53 of this Chapter.
[56] The difference between general interest, public interest, private interest will soon be explained in the first lines of paragraph 3.2. of this Chapter.
[57] Arena, Gregorio. *I Custodi Della Bellezza.* Touring, 2020, pp.55-56.

paradigm based on the collaboration with the State for matters of general interest: in this way, a new alliance would take place based on collaboration and not competition[58].

All things considered, according to the principle of horizontal subsidiarity active citizens could be regarded as *liquid volunteers*[59], within a new type of relationship between private individuals and the State outside associated entities. In fact, despite living a condition of constant mobility and change in contemporary society, active citizens still want to freely, autonomously and responsibly contribute to the general interest of the society. Accordingly, we could start talking of a transformation of civil society, where it is still unknown the long term effects and impact of this shift from organizations to individuals' commitment for the general interest.

3.2. The object: the activities of general interest

When it comes to defining the object of the collaboration between the State and active citizens – which is the object of what the doctrine defined as a new form of *participation in doing* – the simple notion of *activities of general interest* laid down in Article 118(4) remains too vague to refer to a specific content: the Constitutional text does not contribute to defining that[60]. Broadly speaking, the general interest, refers to an activity that satisfies the interest of the plurality of people who are part of a community: the central

[58] On the possibility also for for-profit enterprises to act for the general interest see Ozzola, Filippo. 'Dal Dire al Fare. La Sussidiarietà Orizzontale in Pratica'. *Il Valore Aggiunto. Come La Sussidiarietà Può Salvare l'Italia*, edited by Gregorio Arena and Giuseppe Cotturri, Carocci, 2010, pp.239-241. Arena, Gregorio. *Cittadini Attivi*. Laterza, 2006, pp. 132-141; Gori, Luca. 'La Disciplina del volontariato individuale, ovvero dell'applicazione diretta dell'art.118, ultimo comma, Cost.' *Associazione Italiana Dei Costituzionalisti*, no. 1, 2018, p.6; Giglioni, Fabio. 'Forme Di Cittadinanza Legittimate Dal Principio Di Sussidiarietà'. *Diritto e Società*, 2016, p.318. Against the possibility for for-profit enterprises to act according to the horizontal subsidiarity principle see Consiglio di Stato n.1440/2003: in this judgement, the State Council drew a difference between for-profit enterprises (that are not the target of article 118(4)), and individual/associated citizens, that are considered in their relational dimension as representatives of a "societal citizenship" (*cittadinanza societaria*). Only the second ones can implement, according to the Council, the principle of horizontal subsidiarity, as they autonomously take on responsibility and get committed in solving general problems. For the concept of "cittadinanza societaria" (elaborated within a sociological perspective) see Donati, Pierpaolo. *La Cittadinanza Societaria*. Laterza, 2000: it will be enough here to say that the author's thesis is that it is possible to define citizenship not as a legal category, but as a social relation between an active civil society and the political system (pp.26-30). For the author, within the paradigm of societal citizenship, individuals are considered citizens through their relationships, and not for membership or concession (p.378). For the Court's judgement see Razzano, Giovanna. *Il Consiglio di Stato, il principio di sussidiarietà orizzontale e le imprese*, in www.associazionedeicostituzionalisti.it. For the purpose of this work, we find ourselves in line with the first perspective, in favour of the possibility to implement Article 118(4) Constitution also for for-profit enterprises.

[59] Arena, Gregorio. 'Amministrazione e Società. Il Nuovo Cittadino'. *Rivista Trimestrale Di Diritto Pubblico*, no. 1, 2017, p.46.

[60] Trimarchi Banfi, Francesca. 'La Sussidiarietà Orizzontale'. *Amministrare*, no. 2, 2018, pp.212-213.

aspect is the utility to the community as a whole brought by the action, notwithstanding the nature of the subjects. The reference to subjects, instead, is fundamental when talking about the public and the private interests. While the private interest refers to the interests pursued by private individuals, with public interest the reference goes to the interest of the State, that is constituted by all those interests that, according to the law, are to be fulfilled by the public authorities. The public interest therefore differs from the general interest, because the general interest can be achieved by both public authorities and private individuals together, according to the new paradigm defined by the principle of horizontal subsidiarity[61].

When private individuals pursue the general interest, they are not acting at the service of the State (as public authorities are doing in their activities of public interest), but out of an autonomous initiative in line with the principle of horizontal subsidiarity, which has to be supported by the State: their actions respond to a free choice of contributing to their community, and not to an obligation established by law. The general interest usually matches with activities already object of a public interest, but sometimes it can also coincide with actions object of a private interest, whenever there is an individual action that could generate positive externalities[62]. The general interest is, however, broader than the public and the private interest, as it represents all those situations where there is a common goal (and therefore a collaboration) between the private and the public sides, and it represents a third pole[63] in addition to the pole of the public interest and the one of the private interests.

[61] It is important to note that the Italian concept of public interest (*interesse pubblico*) referring to the interest pursued by the public administration as a body serving the State and not the community, does not coincide with the Anglo-Saxon tradition of 'public interest' nor with the ancient Roman law concept of *res publica*. For this explanation see Arena, Gregorio. *Cittadini Attivi*. Laterza, 2006, p.110.

[62] Rescigno, Ugo. 'Principio Di Sussidiarietà Orizzontale e Diritti Sociali'. *Diritto Pubblico*, no. 1, 2002, p.29; Arena, Gregorio. 'Introduzione All'amministrazione Condivisa'. *Studi Parlamentari e Di Politica Costituzionale*, 1997, p.58. A very classic and basic example of a private interest that could be coincident with the general interest is the case of a citizen whose house is in front of a not well-tended and dirty public flowerbed. The reasons for the public flowerbed to be in those conditions could be various: among the others, lack of maintenance by the public administration because of resource scarcity or rudeness of people. Despite not being the subject designed for taking charge of it, an (active) citizen could decide to take an autonomous initiative to take care of the public flowerbed because they have a private interest in the cleanness and good appearance of that flowerbed and its living environment. The private interest would therefore in this case coincide with the general interest of the community as a whole, because the action carried out by that active citizen would bring improvement to many beyond themselves. It is correct to say that while the State (through the public administration) does the maintenance of the flowerbed, active citizens can exercise their freedom by taking care of that flowerbed. In this sense Article 118(4) of the Italian Constitution lays down a duty to support those spontaneous initiatives of general interest within a framework of collaboration between the State and active citizens.

[63] Arena, Gregorio. 'Sussidiarietà Orizzontale Ed Enti Del Terzo Settore'. *I Rapporti Tra Pubbliche Amministrazioni Ed Enti Del Terzo Settore. Dopo La Sentenza Della Corte Costituzionale n. 131 Del 2020*, edited by Antonio Fici et al., Editoriale Scientifica, 2020, pp.25-35.

Since its introduction in the Constitution in 2001, the meaning of 'general interest' has been defined on single occasions by the citizens willing to put into practice the principle of horizontal subsidiarity together with the public authorities[64]. In a nutshell, it consists in an autonomous exercise of citizens' individual sovereignty (in accordance to Article 1 of the Constitution)[65]. The activities of general interest do not coincide with the administrative functions strictly considered[66], which compete to the public authorities, but can coincide with public functions in the way that citizens can participate in the State's activity[67]. The general interest recognizes the possibility for citizens to take action also in a responsible and supportive way towards others, instead that just for a personal interest.

Within the scope of the general interest, therefore, private for-profit initiatives and public administration's functions are not included: what it is left consists in services and goods distribution beneficial for the individual within the community and for the community itself. After many (conflicting) judgments trying to give a more precise content to the general interest[68], an important point occurred thanks to judgment no.131/2020 by the Constitutional Court (which will be deeply analysed in paragraph 3, Chapter 5), stating that the activities of general interest are the ones implemented by citizens not seeking profit, but pursuing civic and supportive aims of social utility. Thanks to Article 118(4) of the Constitution, the State is not anymore the only actor designed for pursuing the interest of

[64] Of this idea Trimarchi Banfi, Francesca. 'La Sussidiarietà Orizzontale'. *Amministrare*, no. 2, 2018, pp.212-213, and Arena, Gregorio. *Cittadini Attivi*. Laterza, 2006, pp.108-118. For a study on the dark side of subsidiarity see Pizzolato, Filippo, and Paolo Costa, editors. *Il Lato Oscuro Della Sussidiarietà*. Giuffrè Editore, 2013. The work, in its understanding of subsidiarity as a principle for societal organization based on an individual freedom in relation with the society, warns about the risks of a societal chaos with a prevailing hybris of private individuals in case of a misunderstanding of the relational dimension of the principle; see also Duret, Paolo. 'L'amministrazione della società e l'emersione del principio della sussidiarietà sociale'. *Amministrare*, no. 2, 2018, pp.228-229. For the opposite perspective see Camerlengo who asserts the need for the 'general interest' to be determined by law: Camerlengo, Quirino. 'Art. 118'. *Commentario Alla Costituzione*, edited by Raffaele Bifulco et al., Utet, 2006 (paragraph 2.7.2. "Le attività di interesse generale").

[65] Franca, Simone. 'Beni Comuni e Amministrazione Condivisa'. *Labsus*, 2018, p.5.

[66] In this way Cerulli Irelli, Vincenzo. 'Sussidiarietà (Diritto Amministrativo)'. *Enciclopedia Giuridica,* Treccani, 2003, p. 5. See also Rescigno, Ugo. 'Principio Di Sussidiarietà Orizzontale e Diritti Sociali'. *Diritto Pubblico*, no. 1, 2002, who claims that horizontal subsidiarity can never refer to powers of command *("non può mai riguardare i poteri di comando",* p.19), but only services and goods distribution, and activities related to social rights (p.23).

[67] Of this idea Nigro, Mario. 'Il Nodo Della Partecipazione'. *Rivista Trimestale Di Diritto e Procedura Civile*, 1980, p.235 *"mediante la partecipazione, la società si fa Stato".* See also Benvenuti, Feliciano. *Il Nuovo Cittadino. Tra Libertà Garantita e Libertà Attiva*. Marsilio, 1994; Pastori, Giorgio. 'L'insegnamento Di Un Maestro'. *Rivista Trimestrale Di Diritto Pubblico*, no. 1, 2017, p.149.

[68] For a detailed overview *see* Pellizzari, Silvia. 'Il Principio Di Sussidiarietà Orizzontale Nella Giurisprudenza Del Giudice Amministrativo: Problemi Di Giustiziabilità e Prospettive Di Attuazione'. *Istituzioni Del Federalismo*, no. 3, 2011, pp. 593–621; Giglioni, Fabio. 'La Sussidiarietà Orizzontale Nella Giurisprudenza'. *Il Valore Aggiunto. Come La Sussidiarietà Può Cambiare l'Italia*, edited by Gregorio Arena and Giuseppe Cotturri, 2010, pp.159-182.

the community as a whole, but it can be complemented by autonomous activities of private citizens.

3.3. The action: the support for autonomous initiatives

Moving forward in our investigation of Article 118(4), a fundamental question arises with regard to the autonomous initiatives of individual or associated citizens, and the promotional role accorded to public authorities. Those two aspects of the principle of subsidiarity allow us to understand the core of this provision and the reasons for its peculiarity within the wider EU legal context, serving as a great inspiration for the rediscovery of the horizontal dimension of the principle in the meaning that was also originally present in the EU debate on subsidiarity in the nineties[69]. The Constitution affirms that the State, regions, metropolitan cities, provinces and municipalities *shall promote the autonomous initiatives* of citizens: we will start with understanding the meaning of citizens' autonomous initiatives, while subsequently deepening into the role of the State. Citizens' autonomous initiatives – related to activities of general interest – have to be considered as forms of *participation in doing*, in the sense explained before.

As it has been observed[70], horizontal subsidiarity can take place only if active citizens take action: citizens are the only ones who can bring the principle to life, as its effects depend on their spontaneous initiative, and not on a decision of public authorities[71]. The initiatives should be autonomous, meaning that the full self-determination of citizens (as long as it is in line with the general interest) is legitimated and given value by the Constitution, and even more they have to be supported by the State, as we will see later in this paragraph. The autonomous aspect of the initiative means that no salary can be

[69] For the EU debate on subsidiarity see paragraph 2 of Chapter 3.

[70] Arena, Gregorio. 'Il Principio Di Sussidiarietà Orizzontale Nell'art.118, u.c. Della Costituzione'. *Astrid Online*, 2003, p.3; Arena, Gregorio. *Cittadini Attivi*. Laterza, 2006, pp.63-64. The author clarifies that while usually the direction of the power goes from the public authorities to citizens, in this case it is the opposite, as it is up to active citizens' initiatives to bring to life the principle of subsidiarity and to allow that to become effective in our legal order.

[71] It must be noticed, however, that the autonomous initiative of citizens sometimes could come as a consequence of a public call: in this case, there would be an invitation by public authorities to present spontaneous initiatives for the general interest that would eventually be supported by them. It is clear, however, that also in this case for Article 118(4) to be effective the core of the principle remains the autonomous initiative of individual or associated citizens. On this point, see Polito, Nicola. 'Strumenti per La Sussidiarietà Orizzontale: Un'ipotesi per l'applicazione Dell'art. 118, Quarto Comma, Della Costituzione'. *Astrid Online*, 2008, pp.4-5, http://www.astrid-online.it/static/upload/protected/Poli/Polito_sussidiariet-_saggio2008.pdf.

corresponded[72], while only some assistance could be given by public authorities as a support for the freely exercised action of citizens. Citizens' actions, however, cannot expect to be always upheld: the power to decide whether an action is in line with the general interest or not remains on the public authorities, and for this reason the principle of horizontal subsidiarity defines a collaboration among the two parts, and not a substitution. Additionally, the support for an autonomous initiative cannot create a disadvantage for others: because of that, concurring initiatives should always be considered by public authorities, which need to guarantee also third parties' needs[73].

The collaboration among the two parts drawn in Article 118(4) envisages a relationship between two autonomous parts: the public autonomy and the private (civic[74]) autonomy. The principle of horizontal subsidiarity therefore consists of an equal relationship between autonomies, based on what has been defined a *relational autonomy* ("autonomia relazionale"[75]). This concept looks at autonomy not only as the guiding principle to safeguard and recognise local authorities against a centralised power (that in the Italian constitution is granted in Article 5), but also as the underlying principle in a pluralist society for an equal relationship between different private and public interests. The recognition by public authorities of an equal capacity of citizens to contribute and take responsibility for initiatives of general interest is an enhancement of the full development of the human person (Article 3(2) of the Constitution)[76] also through their *participation in doing* in accordance with horizontal subsidiarity: this recognition on equal terms allows an empowerment of citizens thanks to the public support to their commitment.

The paradigm shift from the bipolar to the subsidiarity paradigm[77] is allowing a new relationship between the public authority and individual freedom: at this point, it becomes necessary to understand why citizens' *autonomous initiative* in line with Article 118(4) of the Constitution should be regarded as a new type of liberty elaborated through the case-law of the Constitutional Court over the years and qualified as social liberties ("*libertà*

[72] Giglioni, Fabio. 'Sussidiarietà Orizzontale e Terzo Settore'. *Astrid Online*, 2002, http://www.astrid-online.it/static/upload/protected/Gigl/Giglioni-SO-e-III-settore.pdf., p.2. It is interesting to notice how the author highlights that the autonomous initiatives of citizens could be in line with the general interest at Article 118(4) not only as defined by the public authorities, but also thanks to the awareness and capability of citizens to understand social needs of their community that are new or simply undervalued by the State.

[73] Giglioni, Fabio. 'Forme Di Cittadinanza Legittimate Dal Principio Di Sussidiarietà'. *Diritto e Società*, 2016, p.332.

[74] See footnote 45 of this Chapter.

[75] Arena, G. 'Le Diverse Finalità Della Trasparenza Amministrativa'. *La Trasparenza Amministrativa*, edited by Francesco Merloni, Giuffrè, 2008, p.22.

[76] Arena, Gregorio. *Cittadini Attivi*. Laterza, 2006, p. 77

[77] See paragraph 3 of this Chapter.

sociali"[78]). Within the subsidiarity paradigm, the relationship that is occurring between the public[79] and the civic autonomy in the exercise of its social liberties is creating a new legal space[80] where a collaboration can take place for the general interest. A very first mention occurred in 1998[81], when the principle of social liberty was invented[82] by the Constitutional Court with reference to all those activities that take place occasionally and without seeking profit. At that time, relationships based on social solidarity as an exercise of one's individual freedom were already recognized by the Court[83] as a constitutional legitimation of the different forms of solidarity put in practice by volunteers. A second mention of the term occurred with judgement no.300/2003 where banking foundations were considered among those subjects or legal entities entitled to the 'organization of social liberties' according to Article 118(4)[84]. A third mention came with judgement no.185/2018 when the Court acknowledged the autonomous capacity of third Sector organizations (as private bodies), to exercise their social liberties as granted by Article 2 of the Constitution to implement actions of social solidarity[85]. The latest recognition of this new type of liberty came with judgement no.131/2020. This can be considered a ground-breaking judgement under different perspectives, but the one relevant here is the connection established by the Court between Article 118(4) Constitution and the social liberties. In fact, according to the Court, the principle of horizontal subsidiarity represents a new framework for social liberties not dependent on the State or on the market, but on all those forms of social

[78] Not to be confused with social rights. See Tiberi, Giulia. 'La Dimensione Costituzionale Del Terzo Settore'. *Astrid Online*, 2008, pp.7-23; La Porta, Salvatore. *L'organizzazione Delle Libertà Sociali*. Giuffrè, 2004, pp.27-70.

[79] On the concept of public autonomy see Merloni, Francesco. Le Autonomie Nella Costituzione Repubblicana, *Astrid Rassegna*, n.108, 2010 (3), http://www.astrid-online.it/static/upload/protected/Merl/Merloni_Le-autonomie-nella-Costituzione-repubblicana.pd; Police, Aristide. 'Le Autonomie Pubbliche Come Ordinamenti Giuridici'. *Attualità e Necessità Del Pensiero Di Santi Romano*, edited by Roberto Cavallo Perin et al., Editoriale Scientifica, 2019, pp. 101–18.

[80] Giglioni, Fabio. 'Forme Di Cittadinanza Legittimate Dal Principio Di Sussidiarietà'. *Diritto e Società*, 2016, p.323, where this new legal space is regarded as a "*zona franca*".

[81] Constitutional Court judgement no.50/1998.

[82] Pace, Alessandro. '*Violazione della "libertà sociale" o, piuttosto, restrizione della "libertà individuale"?'*, *Giurisprudenza Costituzionale*, 1998, 2, p. 584.

[83] Constitutional Court judgement no.75/1992. Individuals' freedom to put in practice the principle of social solidarity was later reaffirmed in Constitutional Court judgement no.309/2013: *"[…] principio di solidarietà sociale, per il quale la persona è chiamata ad agire non per calcolo utilitaristico o per imposizione di un'autorità, e la partecipazione a tali forme di solidarietà deve essere ricompresa tra i valori fondanti dell'ordinamento giuridico, riconosciuti, insieme ai diritti inviolabili dell'uomo, come base della convivenza sociale normativamente prefigurata dal Costituente"*.

[84] Constitutional Court judgement no.300/2003: *"[…] anche in considerazione di quanto dispone ora l'art. 118, quarto comma, della Costituzione - le fondazioni di origine bancaria tra i soggetti dell'organizzazione delle «libertà sociali» (sentenza n. 50 del 1998), non delle funzioni pubbliche […]".*

[85] Constitutional Court judgement no.185/2018.

solidarity freely and autonomously exercised by citizens[86]. The Court states that autonomous initiatives of citizens through activities with a social function should be regarded as a new form of freedom – a social liberty – that can be exercised thanks to its recognition and legitimation by the Constitution through Articles 2 and 118(4). Therefore, horizontal subsidiarity gives value to the social and responsible use of citizens' active freedom[87], not only through third Sector organisations and their volunteers, but also as private individuals. As addressed in the previous paragraph, on the practical level citizens' autonomous initiatives consist in activities of general interest referred to the production of goods or services for the community, or to complement public authorities in guaranteeing social rights.

In parallel to citizens' autonomous initiatives, the second aspect of the provision under study is the role of the State, regions, metropolitan cities, provinces, municipalities: the Constitution states that they shall promote[88] ("favoriscono") those initiatives. The verb used in the constitutional provision is key in understanding the dynamic of the relationship. Originally essential doubts regarded the State's role of promotion, on whether it should be considered as a possibility or as an obligation. However, how it has been clearly outlined by the scholarship[89], if the Constitutional reform provided for a mere possibility, then the provision would add nothing new; instead, it is indeed the introduction for an *obligation* on the State at all its levels to support the autonomous initiatives of citizens the real element of innovation brought by the Constitutional reform of 2001. The public authorities are not asked to support citizens' autonomous initiatives in every case, but only when they consist of activities of general interest in accordance with Article 118(4) Constitution. The role of

[86] See further paragraph 3, Chapter 5. In brief here we may mention for now: "*Si è identificato così un ambito di organizzazione delle «libertà sociali» (sentenze n. 185 del 2018 e n. 300 del 2003) non riconducibile né allo Stato, né al mercato, ma a quelle «forme di solidarietà» che, in quanto espressive di una relazione di reciprocità, devono essere ricomprese «tra i valori fondanti dell'ordinamento giuridico, riconosciuti, insieme ai diritti inviolabili dell'uomo, come base della convivenza sociale normativamente prefigurata dal Costituente» (sentenza n. 309 del 2013)*". For an exhaustive study of this judgement *see* Pellizzari, Silvia, and Borzaga, Carlo. *Terzo Settore e Pubblica Amministrazione. La Svolta Della Corte Costituzionale*. Euricse, 2020, p.36.

[87] See footnote 43 in this Chapter.

[88] English translation provided by the official translation of the Senate at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

[89] Rescigno, Ugo. 'Principio Di Sussidiarietà Orizzontale e Diritti Sociali'. *Diritto Pubblico*, no. 1, 2002, pp.29-32. For a clear analysis of this obligation see also the contribution of Donati, Daniele. 'La Sussidiarietà Orizzontale Da Principio a Modello: Dinamiche, Limiti e Ruolo Della Concorrenza'. *Sussidiarietà e Concorrenza Una Nuova Prospettiva per La Gestione Dei Beni Comuni*, edited by Daniele Donati and Andrea Paci, Il Mulino, 2010, pp. 199-231; Arena, Gregorio. 'Il Principio Di Sussidiarietà Orizzontale Nell'art.118, u.c. Della Costituzione'. *Astrid Online*, 2003, p.28.

public authorities is a supportive role[90], and it could occur in two different moments[91]: as a support after citizens have already taken action; or as a support in advance, in order to create the proper conditions (through communication, transparency, and promotion of participation) for citizens to become aware of the opportunity given to them by the Constitution and of their active freedom. In this second case, however, public authorities can never go beyond the creation of the proper conditions, because citizens remain autonomous and free in their decision of whether to take action or not: if they decide to participate through a practical activity, then a parallel obligation to support them will fall on the public authorities. This supportive role of the State towards private initiatives has been associated[92] with the public role given to the so called enabling State[93]: a model of public support for private responsibility in social welfare. Even if the new role given to the State by Article 118(4) Constitution does not have a label yet, and even if under a certain extent this association may seem correct, we must recognise that the difference among the two approaches is still clear. In fact, the diversity lies at first in the aim of the private citizens' initiatives, that within the subsidiarity paradigm is the activation of their social liberty, while within the enabling State model is a market-oriented approach. Secondly, private citizens acting for the general interest do not do that for getting a profit, while in the other case they do. In sum, it can be said that in the enabling State model private citizens are substituting public responsibility for social needs, while in the subsidiarity paradigm active citizens are freely complementing public authorities out of social solidarity reasons. All things considered, citizens' free choice to contribute to their community with an assumption of responsibility through practical actions of care for the general interest on one side, and the

[90] Violini, Lorenza. 'Il principio di sussidiarietà'. In Vittadini (ed.) Sussidiarietà. La riforma possibile, Milano, 1998, p.58; Frosini, Tommaso Edoardo. 'Sussidiarietà (Principio Di) (Dir.Cost.)', *Enciclopedia Del Diritto*, 2008, p.1136 e pp.1140-1141.

[91] Donati, Daniele. 'La Sussidiarietà Orizzontale Da Principio a Modello: Dinamiche, Limiti e Ruolo Della Concorrenza'. *Sussidiarietà e Concorrenza Una Nuova Prospettiva per La Gestione Dei Beni Comuni*, edited by Daniele Donati and Andrea Paci, Il Mulino, 2010.

[92] Chiti, Mario. 'La Rigenerazione Di Spazi e Beni Pubblici: Una Nuova Funzione Amministrative?' *La Rigenerazione Di Beni e Spazi Urbani. Contributo al Diritto Delle Città*, edited by Francesca Di Lascio and Fabio Giglioni, Il Mulino, 2017, pp. 15–40, pp.29-40; Gaspari, Francesco. 'Città intelligenti e intervento pubblico'. *Il diritto dell'economia*, no. 98, 2019, pp. 79-86.

[93] The concept of enabling State was firstly defined in the US context as an evolution of the model of the State: from the welfare State to the enabling State. It defines a new model for financing and producing social welfare, as a public support for private responsibility: this occurs within a market oriented approach to social welfare. The reference goes to Gilbert, Neil, and Gilbert, Barbara. *The Enabling State: Modern Welfare Capitalism in America*. Oxford University Press, 1989, pp.163-172, and Gilbert, Neil. *Transformation of the Welfare State: The Silent Surrender of Public Responsibility*. Oxford University Press, 2002, where the author warns of the risk of *"a silent surrender of public responsibility"* (p.193). On the distinction between the welfare State, the regulatory State, and the enabling State see Cassese, Sabino. 'The Administrative State in Europe'. *The Max Planck Handbooks in European Public Law. The Administrative State*, edited by Armin von Bogdandy et al., Oxford University Press, 2017, pp.76-77.

supportive role of the State[94] on the other, are defining a new type of relationship between citizens and public authorities on equal terms, and this is the deep innovation brought by the principle of horizontal subsidiarity.

4. Horizontal subsidiarity and its relation with other constitutional principles

The new form of civic participation permitted by the principle of horizontal subsidiarity is taking place in accordance with the wider constitutional perspective, in line with fundamental principles[95] which are guaranteeing a solid ground for active citizens' initiatives.

The first link is between horizontal subsidiarity and the principle of sovereignty at Article 1(2) of the Constitution[96]. Up until now individuals' sovereignty has been taking place mainly through the instruments of representative democracy, through the voting system, the political representation, the party system. In the latest years, instead, we started witnessing a decline in those instruments and in the model provided us by representative democracy, in Italy as well as in many other democracies[97]. In this scenario, all those autonomous initiatives of active citizens taking place according to Article 118(4) should be considered[98] as part of a new form of democratic participation, that is going beyond the traditional forms of participation – administrative participation and politic participation – and that is empowering citizens in practically contributing to democracy bottom-up. For citizens the choice to take actions for the general interest consists of a new way for exercising their sovereignty and participate in their community. A

[94] On the supportive role of the State, the latest judgements of the Constitutional Court are becoming clearer and clearer in stating an obligation on the State and the other local and regional autonomies to actively support the autonomous initiatives of active citizens (mainly within third Sector organisations) according to Article 118(4): an obligation to support that is very different from a mere passive permission of doing. Among the others see Constitutional Court judgement no.52/2021: "*6.4 […]Il principio di sussidiarietà impegna le Regioni a favorire e sostenere l'autonoma iniziativa e la partecipazione attiva dei cittadini, singoli e associati, nello svolgimento di attività di interesse generale. Tale impegno non può ritenersi rispettato dalla circostanza, dedotta dalla difesa della Regione, che l'intervento regionale si limiti a non ostacolare quelle stesse iniziative, poiché le Regioni sono tenute a valorizzare e promuovere il ruolo degli enti del Terzo settore, favorendone senza discriminazioni il più ampio coinvolgimento, in conformità al loro ruolo nella società civile*".

[95] In the Italian Constitution, the fundamental principles are the ones enshrined in Articles 1-12.

[96] *"Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution"*.

[97] See paragraph 3, Chapter 1.

[98] Frosini, Tommaso Edoardo. 'Sussidiarietà (Principio Di) (Dir.Cost.)', *Enciclopedia Del Diritto*, 2008, pp. 1139-1140.

thought-provoking issue in this sense regards citizens' exercise of their sovereignty through activities of general interest: does that consist in a mere freedom (an active freedom to exercise a social liberty, as outlined in the previous paragraphs), or could it be foreseen also as a specific right to take care of the general interest by citizens? As it has been claimed[99], it could be the case that a new type of right – the right to autonomously pursue the general interest of the community, out of a social liberty, and to be supported by public authorities in doing that – is coming into existence: time and Courts' jurisprudence will say if that is the case or not.

The second fundamental principle enhancing horizontal subsidiarity is the constitutional recognition of pluralism enshrined in Article 2[100]. Despite the fact that the core of horizontal subsidiarity is the prevalence of the human being over the State and society, the support given to that by pluralism is the recognition that activities of general interest could be implemented also by citizens through intermediate bodies. In addition to the recognition of pluralism, the article goes further in requiring the fulfilment of *"fundamental duties of political, economic and social solidarity"*. The added value of horizontal subsidiarity to solidarity lies in its recognition of the possibility for citizens to freely contribute to the general interest as a consequence of an individual active freedom, and not of a duty. This development must be attributed to the different historical times related to the two articles[101]: while Article 2 reflected the bipolar paradigm existing in 1947, the principle of horizontal subsidiarity introduced in 2001 is an attempt to draw the new emerging subsidiarity paradigm through a new role given to citizens as equal partners of the Republic in the achievement of the general interest. In this sense, the principle of horizontal subsidiarity could be regarded as the new frontier for the principle of solidarity[102], through its contribution of creating a framework for the development of active citizenship and civic participation[103].

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[99] Arena, Gregorio. 'La Sussidiarietà Come Libertà Solidale e Responsabile'. *Storia, Percorsi e Politiche Della Sussidiarietà*, edited by Daniela Ciaffi and Filippo Maria Giordano, Il Mulino, 2020, pp.87-88; Arena, Gregorio. 'Un Nuovo Modo Di Amministrare'. *Rivista Italiana Di Comunicazione Pubblica*, no. 19, 2004, p.8.

[100] *"The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled"*. See Albanese, Alessandra. 'Il Principio Di Sussidiariet`a Orizzontale: Autonomia Sociale e Compiti Pubblici'. *Diritto Pubblico*, no. 1, 2002, pp.66-72.

[101] Arena, Gregorio. *I Custodi Della Bellezza.* Touring, 2020, p.42-44.

[102] Florenzano, Damiano, Borgonovo Re, Donata, Cortese, Fulvio. *Diritti Inviolabili, Doveri Di Solidarietà e Principio Di Uguaglianza*. Giappichelli, 2012, p.101.

[103] For an unparalleled legal contribution to the principle of solidarity as a legal principle more than a moral value see Rodotà, Stefano. *Solidarietà. Un'utopia Necessaria.* Laterza, 2014. The author draws the utopia of a new European constitutional paradigm based on solidarity, differentiating it from fraternity or charity. Rodotà claims the need for the institutional framework to create an enabling environment for the

Horizontal subsidiarity is also anchored in Article 3(2)[104] referred to the role of the State in supporting the full development of human beings and their participation in society. Accordingly, the proactive role of the State – which is reflected in Article 118(4) – should guarantee all those individuals that, while realizing themselves through an active freedom, are also having a positive impact on their community through actions of social solidarity. Participation could be seen, under this light, as a method of governance aimed at contributing to pursue a substantial equality of human beings[105]. This can be pursued only by giving new meanings to the concept of participation[106], and by extending that beyond formal citizenship requirements: in this sense, it has been argued[107] that also migrants could demonstrate their belonging to a local community through civic participation, and that would allow them to implement actions of participation in doing even if being unable to perform a political or administrative participation. Additionally, the joint reading of Articles 3(2) and 118(4) favours the creation of a new political space, where also minorities are granted the chance of contributing to their community and to collaborate with public authorities[108]. This new political space for this third form of participation – that as we saw at the beginning of this Chapter goes beyond political participation as well as administrative participation – constitutes the ground for a new idea of citizenship elaborated by the legal doctrine, the so called *administrative citizenship*[109], with concern to

production of solidarity, and to grant civic participation for that aim. He also talks about the latest forms of collaboration between citizens and public authorities for the general interest of the community through actions of care and regeneration of the commons under the light of solidarity (pp. 110-129). See also Rodotà, Stefano. *Vivere La Democrazia*. Laterza, 2018 (pp.93-131) for the link between solidarity and the commons.

[104] "*It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country*".

[105] As claimed in Valastro, Alessandra. 'La Democrazia Partecipativa Come Metodo Di Governo: Diritti, Responsabilità, Garanzie'. *Per Governare Insieme: Il Federalismo Come Metodo. Verso Nuove Forme Della Democrazia*, edited by Gregorio Arena and Fulvio Cortese, Cedam, 2011, p.164.

[106] Idea supported in De Martin, Gian Candido. 'Partecipazione e Cittadinanza a Confronto'. *Per Governare Insieme: Il Federalismo Come Metodo. Verso Nuove Forme Della Democrazia*, edited by Gregorio Arena and Fulvio Cortese, Cedam, 2011, p.68.

[107] Busatta, Lucia. 'Stranieri e Città: La Partecipazione "Estesa" Quale Strumento Di Accoglienza e Inclusione'. *La Città e La Partecipazione Tra Diritto e Politica*, edited by Filippo Pizzolato et al., Giappichelli, 2019, pp.159-173.

[108] Giglioni, Fabio. 'Il Contributo Del Principio Di Sussidiarietà Alla Cittadinanza'. *Cittadinanze Amministrative*, edited by Antonio Bartolini and Alessandra Pioggia, Firenze University Press, 2016, p.238.

[109] *Administrative citizenship* ("cittadinanza amministrative") is considered by Cavallo Perin as a *status* that defines individuals' belonging to a local community because of their residency and not because of their legal citizenship status: thanks to the residency requirement, individuals would be legitimated to claim rights of participation and duties of solidarity. Cavallo Perin, Roberto. 'La Configurazione Della Cittadinanza Amministrativa'. *Diritto Amministrativo*, no. 1, 2004, pp. 201-208. On the link between the administrative citizenship, participation, and the principle of horizontal subsidiarity *see* Arena, Gregorio. 'La cittadinanza amministrativa. Una nuova prospettiva per la partecipazione'. *Espaço Jurídico*, vol. 11, no. 2, 2010, pp. 522–29. On the transformation of cities as the proper context for the development of the administrative citizenship

the relation between public authorities and individuals outside dynamics of representation. In contrast to the indirect role of citizens within representative democracy instruments, this new concept of citizenship advocates for a direct involvement of citizens drawing on their participation at the local level. This would guarantee a more participated individual sovereignty, and a shift in the consideration of citizens from mere users and consumers to active resources for the community, in line with the principle of horizontal subsidiarity[110].

An additional link to horizontal subsidiarity is provided by the proclaim of civic duties at Article 4(2)[111]. The Constitution outlines citizens' duties to contribute to the development of society in accordance to their capabilities and their free will. This must be understood[112] as an assumption of responsibility of every citizen towards their community, so as to put in practice activities that would help the society to develop both from a material and spiritual level. This assumption of responsibility, however, should not be understood as an imposition by the State, but as an invitation[113], and this should be granted by a promotional role of the law and the legal system.

The last one among the main constitutional principles serving as a support to horizontal subsidiarity is the principle of autonomy in Article 5[114]. Autonomy consists in a recognition and promotion of the local communities on a territory against a central power, and is aimed at safeguarding the institutional pluralism of the Italian legal system. As we will see in Chapter 5, the principle of horizontal subsidiarity has found a core ally in the regulatory autonomy of local authorities for supporting all those citizens autonomously taking initiatives for the general interest. Among other local authorities, municipalities, in particular, are demonstrating their proactive role in enhancing democracy and civic

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see Gaspari, Francesco. 'Città intelligenti e intervento pubblico'. *Il diritto dell'economia*, no. 98, 2019, p.72. Concerning the relation between duties of solidarity and the administrative citizenship see Pieroni, Serenella. 'I Doveri Nella Nuova Frontiera Della Cittadinanza'. *Cittadinanze Amministrative*, edited by Antonio Bartolini and Alessandra Pioggia, Firenze University Press, 2016, pp.391-402. On the centrality of social rights beyond the administration, and even more of the recognition of a right of civic participation before public authority and the society itself Pastori, Giorgio. 'Le Cittadinanze Amministrative'. *Cittadinanze Amministrative*, edited by Antonio Bartolini and Alessandra Pioggia, Firenze University Press, 2016, pp. 429-436.

[110] Arena, Gregorio. 'La cittadinanza amministrativa. Una nuova prospettiva per la partecipazione'. *Espaço Jurídico*, vol. 11, no. 2, 2010, p.524.

[111] *"Every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society"*.

[112] Pieroni, Serenella. 'I Doveri Nella Nuova Frontiera Della Cittadinanza'. *Cittadinanze Amministrative*, edited by Antonio Bartolini and Alessandra Pioggia, Firenze University Press, 2016, p.393.

[113] Stacca, Serena. 'Il Dovere Di Lavorare per Il Progresso Materiale o Spirituale Della Società'. *Rivista Trimestrale Di Diritto Pubblico*, 2021, pp.29-47.

[114] *"The Republic is one and indivisible. It recognises and promotes local autonomies, and implements the fullest measure of administrative decentralisation in those services which depend on the State. The Republic adapts the principles and methods of its legislation to the requirements of autonomy and decentralisation".*

participation, and therefore emerging as a new player in the support of citizens' social liberties according to the principle of horizontal subsidiarity[115]. A further interpretation[116] derives from Article 5 also the concept of relational autonomy, considering autonomy as an organizational principle between public authorities and local communities, able to guarantee equal relationships between private and public interests. In this sense, the result of a widespread realization of Article 118(4) would be a network of collaborative relationships among autonomous subjects, each one of them contributing with their resources and realizing their interests, thanks to an autonomous assumption of responsibility: the autonomy of citizens, the autonomy of intermediate bodies, the autonomy of public authorities, and others[117].

All things considered, this glance at the constitutional principles strengthening horizontal subsidiarity is essential for drawing the constitutional framework of the organizational model of *Shared administration* of the commons. In Chapter 5, indeed, we will go through this model which is the practical implementation of the horizontal subsidiarity principle.

5. The general interest applied to the commons

Before entering in Chapter 5 the practical side of the Italian innovation rooted in Article 118(4) Constitution, one last fundamental aspect should be introduced: the interpretation of the constitutional concept of general interest through practical activities related to the commons (or 'common goods'). In addition to activities of general interest referred to the production of goods or services for the community and to the fulfilment of social rights[118], there is another interpretation rooted in Article 118(4) that paved the way for thousands of autonomous and responsible initiatives of care, regeneration and

[115] Pizzolato, Filippo. 'La Città Come Dimensione Del Diritto e Della Democrazia'. *La Città e La Partecipazione Tra Diritto e Politica*, edited by Filippo Pizzolato et al., Giappichelli, 2019, pp. 31–43.

[116] Arena, Gregorio. 'Introduzione All'amministrazione Condivisa'. *Studi Parlamentari e Di Politica Costituzionale*, 1997, pp.46-51. The author is in line with the reflection of Benvenuti, in Cortese, Fulvio. 'L'organizzazione Amministrativa e Le Autonomie Territoriali Nel Pensiero Di Benvenuti'. *Rivista Trimestrale Di Diritto Pubblico*, no. 1, 2017, p.80. For the concept of relational autonomy see footnote no.75 in this Chapter.

[117] Arena, Gregorio. 'Introduzione All'amministrazione Condivisa'. *Studi Parlamentari e Di Politica Costituzionale*, 1997, p.48.

[118] Rescigno, Ugo. 'Principio Di Sussidiarietà Orizzontale e Diritti Sociali'. *Diritto Pubblico*, no. 1, 2002, p.23.

management of common goods around the country[119]. With regard to the first interpretation, a great contribution in the definition of activities of general interest came in 2017 with the third Sector Code, that outlines in Article 5 a detailed list of all those activities that third Sector organisations can pursue[120]. However, that list does not represent the completeness of the possibilities given to individual or associated citizens by the principle of horizontal subsidiarity. In fact, between the introduction of the principle of horizontal subsidiarity in the Constitution in 2001 and the definition of the list of activities of general interest to be pursued by third Sector organisations in 2017, the constitutional term of general interest already started to be already filled with content thanks to the broad concept of 'common goods' or 'commons' ("beni comuni")[121].

Despite the fact that research aimed at drawing the scientific boundaries of this concept is still a work in progress with the involvement of many disciplines[122] (from law to economics, to political science), within the international scientific legal debate on the commons, the most developed legal theorisation can be found only in the Italian context[123]. From this perspective, the common goods refer to a legal category and administrative practice that in the Italian legal scenario started to be defined in recent years, with regard to all those tangible, intangible, digital goods of private or public property that are functional to the individual and collective wellbeing, and whose governance could be sometimes collaborative and some other times conflictual. The

[119] The original academic contribution of the scholar G. Arena and the work of the network *Labsus-laboratiorio per la sussidiarietà* founded by him represent the reference point in Italy for this interpretation of Article 118(4) of the Constitution and for its on-ground implementation in hundreds of Italian local authorities through the organizational model *Shared administration* of the commons (https://www.labsus.org/).

[120] See also the previous footnote no.51 in this Chapter. Article 5 of the Third Sector Code (legislative decree no.117/2017) considers as activities of general interest the following ones: social actions and social services; healthcare services; education and vocational training; environment protection and education; protection and enhancement of the cultural heritage and landscape; degree and post-degree education; scientific research of social interest; cultural, artistic, recreational activities of social interest, included voluntary activities; community broadcasting; touristic activities of social, cultural, religious interest; after-school activities to prevent bullying and educational poverty; development cooperation; fair-trade organisation; services for the inclusion in the job-market of disadvantaged workers and workers with disabilities; social housing; humanitarian aid and social integration of migrants; social agriculture; the organization of amateur sport activities; charity; promotion of legality, peace, non-violence, disarmed defence; promotion and safeguard of human rights, civil rights, social and political rights, consumer rights; international adoptions; civil protection; requalification of public goods and of assets seized to the organized crime.

[121] In this paragraph we will merely introduce the concept of commons in relation to the Italian concept of general interest. An introduction on the Italian debate on the commons will be provided in paragraph 1, Chapter 5. An overall picture on the commons within the EU will be the object of Chapter 6.

[122] Miccichè, Calogero. Beni comuni: risorse per lo sviluppo sostenibile. Editoriale Scientifica, 2018, pp.11-16. Cerulli Irelli, Vincenzo, and Luca De Lucia. 'Beni Comuni e Diritti Collettivi'. *Politica Del Diritto*, no. 1, 2014, pp.3-5.

[123] Cortese, Fulvio. 'I Beni Mutanti. Fisiologia e Sfide Del Dibattito Sui Beni Comuni'. *Munera*, no. 1, 2018, p.17.

common goods refer to many ground-level disjointed experiences that started to appear at the boundaries of law, and that are still in need for a clear legal and constitutional framework. Within this context, the principle of horizontal subsidiarity has been so far the only constitutional principle able to serve as a reference point for all those bottom-up experiences of care, regeneration, and shared governance[124] of the common goods implemented by active citizens, and able to provide them with a clear and legit organizational framework rooted in the Constitution. Horizontal subsidiarity was able indeed to intercept a phenomenon taking place in the society, connecting that within a constitutional and legal framework.

The reference point for the global academic debate on the commons dates back to the year 1968, when the biologist Garrett Hardin denounced to the world the *"tragedy of the commons",* with reference to the problem of the free access to resources, that leads to over-exploitation of a good that eventually becomes unavailable for future generations[125]. Despite the fact that problems related to the degradation of resources in common were highlighted also before Hardin[126], he has the merit of having opened the academic debate on the commons (and their tragedy) for the first time. Later, an attempt to answer this dilemma came from the Nobel prize winning scholar Elinor Ostrom[127]: her economic contribution to the construction of a theory of the commons represents a reference point not only for economic and social studies worldwide, but also for the legal scholars that in Italy are taking part in the elaboration of a commons theory within a constitutional and legal framework. Trying to search for a third way to go beyond the two solutions given by economists until then of privatization or enforcement imposed by outside force (the

[124] The three terms 'care', 'regeneration' and 'shared governance' refer to the three terms *'cura', 'rigenerazione'* and *'gestione condivisa*' used by the first Bologna Regulation in 2014 for referring to the three types of collaboration activities between active citizens and public authorities. See further paragraph 2.1, Chapter 5.

[125] The well-known article we are referring to is Hardin 1968 The tragedy of the commons. *"Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all. […] Every new enclosure of the commons involves the infringement of somebody's personal liberty."* Hardin, Garrett. 'The Tragedy of the Commons'. *Science*, vol. 162, no. 3859, 1968, pp.1244, 1248.

[126] As reported in Ostrom, Elinor. *Governing the Commons: The Evolution of Institutions for Collective Actions*. Cambridge University Press, 1990, pp.2-3, the problem that *"much of the world is dependent on resources that are subject to the possibility of a tragedy of the commons*" was clear to Aristotle *("what is common to the greatest number has the least care bestowed upon it. Everyone thinks chiefly of his own, hardly at all of the common interest"*, Politics, Book 2, Ch.3); Hobbes (his *"parable of man in a state of nature is a prototype of the tragedy of the commons: men seek their own good and end up fighting one another"*); William Forster Lloyd (that *"sketched a theory of the commons that predicted improvident use for property owned in common"*); H. Scott Gordon (who wrote that *"everybody's property is nobody's property*").

[127] Ostrom, Elinor. *Governing the Commons: The Evolution of Institutions for Collective Actions*. Cambridge University Press, 1990.

dualism between a governance of the State or of the market), Ostrom's theory led the way towards community self-organization and self-governance of the commons, through the elaboration of eight design principles[128]. In specific, it is interesting to note the importance given by Ostrom to the community: in fact, she emphasises the advantage of cooperative behaviours, and the necessity of participatory democracy and of an organized civil society. While in the economic theory the commons are defined as non-excludable and rival goods in their consumption, the category seems to be much more complex and undefined than that, as many are the terms related to that[129]: among the others, commons, common pool resources, global commons, new commons, tangible common goods, intangible common goods, digital common goods, social goods, public goods, collective properties, rights of civic uses. The economic classification and definition reflects only one aspect of the concept[130]: from here the need for legal scholars to contribute to the category rooting the concept within legal traditions[131].

One of the earliest intuitions regarding the connection between the principle of horizontal subsidiarity and the common goods came in 2004 with the Charter of Subsidiarity[132] elaborated by *Labsus-Laboratorio per la sussidiarietà*, a research group of scholars (that later became an association with its online scientific journal of legal-social basis) devoted to the study of the on-ground application of the principle of horizontal

[128] The eight design principles are: *"1) Clearly defined boundaries* [of the CPR, for individuals who have the rights to withdraw resources unit from it]*; 2) Congruence between appropriation and provision rules and local conditioons; 3) Collective-choice arrangements; 4) Monitoring; 5) Graduated sanctions* [for those who violate operational use]*; 6) Conflict-resolution mechanisms; 7) Minimal recognition of rights to organize* [external government authorities should not challenge CPR institutions]; *8) Nested enterprises. Appropriation, provision, monitoring, enforcement, conflict resolution, and governance activities are organized in multiple layers of nested enterprises."*, Ostrom, Elinor. *Governing the Commons: The Evolution of Institutions for Collective Actions*. Cambridge University Press, 1990, p.90.

[129] Miccichè, Calogero. *Beni comuni: risorse per lo sviluppo sostenibile*. Editoriale Scientifica, 2018, p.32.

[130] Miccichè, Calogero. *Beni comuni: risorse per lo sviluppo sostenibile*. Editoriale Scientifica, 2018, p.37-40.

[131] We will come back to the commons debate in Chapter 6.

[132] The Charter was approved by the First national Convention on subsidiarity, that took place in Rome on 12 March 2004. For its clarity and foresight the whole text is worth being consulted at https://www.labsus.org/la-carta-della-sussidiarieta/. Deserving specific attention are the points no. 5,6,7,9, that will be translated into English here. Point no.5: Activities of citizens aimed at the production, care and valorisation of common goods, carried out on a non-profit basis in compliance with the principles of solidarity, responsibility, equality and legality, are in the general interest. Common goods are those goods, tangible and intangible, for which citizens by their free choice share the responsibility of care with the administration". Point no.6: "Citizens through the care of the commons create the conditions for the full development of each human being and first and foremost of themselves, implementing together with the institutions the constitutional principle of equal opportunities for all. Point no.7: Enterprises realise forms of active corporate citizenship both by supporting citizens' autonomous initiatives and by directly taking care of common goods". Point no.9: "Active citizenship and participation are complementary but distinct, as active citizenship entails not only participation in consultative and decision-making processes and public policy-making, but also a direct and autonomous contribution to the care of the commons.

subsidiarity. The concept of general interest was in this way translated into practical actions of care, regeneration and management of the common goods, putting at the core (active) citizens and their capabilities exercised through autonomous initiatives[133]. Active citizen is the keyword for defining a new role for citizens, willing to share resources and responsibilities with public authorities for guaranteeing the collective use of common goods, and for offering shared solutions to common problems[134]. The category of common goods – used in a legal meaning, which differs from the strictly economic definition – was in this way used in order to promote a new model of society, based not on an opposition, but on a collaboration between public authorities and individuals' active freedom. The official recognition of this interpretation came with the municipal *Regulation for the Shared administration of the urban commons* adopted by the municipality of Bologna in 2014. For the very first time in Italy – and within the international context – a clear legal framework on the care, regeneration, and shared governance of the commons as a collaboration between citizens and public authorities was elaborated, creating an unprecedented model for also other local authorities, as we will see in Chapter 5.

In conclusion, the principle of subsidiarity in its horizontal dimension represents the constitutional cover for all those practical actions of citizens carried out in collaboration with public authorities[135]. Within that, the interpretation of the concept of general interest as the constitutional basis for the institutional recognition and promotion of autonomous initiatives of care, regeneration, shared governance of the common goods constitutes the reference point for the spreading of bottom-up initiatives related to a new model of democracy that we can foresee, where citizens are supported in their practical actions of *participation in doing*, that we will label as civic participation through the commons (CPC).

[133] Going back in time, we can understand more about how this match between the concept of general interest and practical actions on the commons took place through Arena, Gregorio. 'Beni Comuni. Un Nuovo Punto Di Vista'. *Labsus*, 2010, and Arena, Gregorio, and Pasquale Bonasora. 'Il Vertice Di Labsus Cambia per Fare Spazio a Nuove Energie!' *Labsus*, 2021, where Arena recalls the original reasons for the connection among the two concepts.

[134] Arena, Gregorio. *Cittadini Attivi*. Laterza, 2006. pp.142-167; Cotturri, Giuseppe. *La Forza Riformatrice Della Cittadinanza Attiva*. Carocci, 2013, pp.11-41; Arena, Gregorio, and Iaione, Christian. *L'Italia Dei Beni Comuni*. Carocci, 2012. See also the previous footnote no.46 in this Chapter.

[135] Allegretti, Umberto. 'Democrazia Partecipativa, *Enciclopedia Del Diritto*, 2011, pp.305 and 318.

Chapter 5. *Shared administration* and its instruments: the Regulation and *Collaboration Agreements*

1.An introduction to the Italian legal contribution to the commons theory. 2.The organizational model of Shared administration of the commons. 2.1.The Bologna Regulation and beyond. 2.2.The Regulation put into practice: the Collaboration agreement *legal tool. 3.The recognition of the model by the Constitutional Court: judgement no.131/2020. 4.Defining cities and a new facilitating role for them. 5.CPC in Italian cities: conclusive remarks.*

1. An introduction to the Italian legal contribution to the commons theory

The mainstay of the Italian contribution to the commons theory is the work carried out by legal scholarship, in an attempt to participate to the debate alongside with other social scientists that started dealing with the topic much earlier. Italy represents the first juridical culture questioning itself on the classification and on the governance of the commons/common goods ("beni comuni")[1], therefore constituting an interesting forerunner for other EU countries[2]. Despite the fact that the reference point in the Italian legal debate

[1] In Part II and in our overall work, the two English terms commons and common goods are used as synonyms for translating the Italian concept of "beni comuni", as a consequence of the fact that Italian legal scholars have been translating "beni comuni" with both the English terms mentioned. However, we are aware of the fact that the debate is far from being over, especially as a consequence of the fact that this concept straddles economics and law: see as an introduction Fidone, Gianfranco. 'Beni Comuni in Senso Giuridico e Commons in Senso Economico: Un Confronto Tra Due Categorie Non Coincidenti'. *ApertaContrada*, 2018, https://www.apertacontrada.it/2018/03/07/beni-comuni-in-senso-giuridico-e-commons-in-senso-economico-un-confronto-tra-due-categorie-non-coincidenti/2/.

[2] The first attempt to come to a classification was initiated by a group of scholars in a conference on 6 June 2006 that took place at the Accademia Nazionale dei Lincei, with the aim of rethinking public property in relation to their social utility: works collected in Mattei, Ugo, et al. *Invertire La Rotta : Idee per Una Riforma Della Proprietà Pubblica*. Il Mulino, 2007. In specific, for the reflection of the need for including a third type of goods – the commons – between private and public goods see Rodotà, Stefano. 'Linee Guida per Un Nuovo Codice Dei Beni Pubblici'. *Invertire La Rotta : Idee per Una Riforma Della Proprietà Pubblica*, edited by Ugo Mattei et al., Il Mulino, 2007. p.361. It is useful to notice that the need for a reform of the public property was already clear in the 1960s to M.S. Giannini (as reported by Marinelli, Fabrizio. 'Beni Comuni'. *Enciclopedia Del Diritto*, 2014, p.157). Concerning the other aspect related to the commons – their governance – an introductory reference goes to Arena, Gregorio. *Cittadini Attivi*. Laterza, 2006. Additionally, it is important to mention that the history of the Italian legal recognition of the commons found its momentum in a referendum

is the work of Elinor Ostrom[3], more concurring meanings attributed to the concept of commons have developed in the past years, this leading to the impossibility to reach one shared definition, given the broadness and diversity of interpretations[4]. In addition to the current interpretations of the commons, it is important to mention that the Italian legal debate is also shaped by the historical significance given by legal scholars in the previous centuries to the concept of 'common', from the ancient Roman law (with the *res communes omnium*) to medieval institutes (with the experiences of civic uses, *usi civici*)[5].

in 2011 on water as a commons against the privatisation of water supplies: see further on that Mattei, Ugo. 'Protecting the Commons: Water, Culture, and Nature: The Commons Movement in the Italian Struggle against Neoliberal Governance'. *South Atlantic Quarterly*, vol. 112, no. 1, 2013, pp.367-371.

[3] Ostrom, Elinor. *Governing the Commons: The Evolution of Institutions for Collective Actions*. Cambridge University Press, 1990, and Hess, Charlotte, and Elinor Ostrom, editors. *Understanding Knowledge as a Commons*. The MIT Press, 2007. Among the others, important keywords of her work are the following ones: 1) 'collective action', referred to those situations where people need to collaborate to achieve a result; 2) 'commons', general term to define all those shared resources of a group of people that can create a social problem (Ostrom uses 'commons' as a general term for referring to public goods or common pool resources); 3) 'common pool resources' (CPRs), natural or man-made shared resource systems that are independent of particular property rights, and that are sufficiently large as to make it costly (but not impossible) to exclude potential beneficiaries from obtaining benefits from its use; 4) 'public goods', goods available to everyone and whose usage from someone does not prevent other people from joining; 5) "common property", a legal regime, a jointly owned legal set of rights.

[4] Vanni, Maria Beatrice. 'Understanding the commons: the reception of Elinor Ostrom's work in Italian legal scholarship'. *Ius Publicum*, 2014, p.2. The author offers an outline of the Italian legal reception of the work of Elinor Ostrom on the commons in Italy up until 2014.

[5] Originally, the concept of common goods could be traced back to the Roman law of the second and third centuries AD with the term *res communes omnium*. The reference goes to the jurist Marciano, that elaborated this category in addition to the *res publicae* (public goods): his text could be found in Justinian's codification, the *Corpus Iuris Civilis* (in Institutiones 2.1. and 2.1.1.; Digest 1.8.2.). The *res communes omnium* consist of those goods that are in common to everyone and that cannot be classified within the private goods nor within public goods, and therefore do not belong to anyone in particular (rivers, air, the sea, the seashore). For further on this point see Vanni, Maria Beatrice. 'Understanding the Commons: The Reception of Elinor Ostrom's Work in Italian Legal Scholarship'. *Ius Publicum*, 2014, pp.10-13, and Talamanca, Mario. *Istituzioni di diritto romano*, Giuffrè, 1990, pp.382-382. However, as it has been clarified in Miccichè, Calogero. *Beni comuni: risorse per lo sviluppo sostenibile*. Editoriale Scientifica, 2018, pp.17-18, while the *res communes omnium* were referred to abundant resources, the nowadays meaning of common goods refers to goods that are whether scarce or problematic in their management. Some centuries later, the medieval practice of *civic uses* ("usi civici") came into use: while being a wide and blurred phrase that includes many diverse institutes and disciplines, it broadly refers to collective rights of use of goods in common among a precise group of people, mainly developed in rural and mountain contexts. The very first attempt of regulation dates back to Law no.1776/1927, while the latest came in 2017 with law no.168 *"Norme in materia di domini collettivi*". Despite not having provided for an all-encompassing classification of the different existing institutes, Law no.168 has the merit of having recognized all the "domini collettivi" however named. *See* further Albanese, Rocco Alessio, and Elisa Michelazzo. *Manuale Di Diritto Dei Beni Comuni Urbani*. Celid, 2020, p.243-246; Miccichè, Calogero. *Beni comuni: risorse per lo sviluppo sostenibile*. Editoriale Scientifica, 2018, p.32; Stella Richter, Paolo. 'I Beni Comuni'. *Diritto Amministrativo e Società Civile. Volume II: Garanzie Dei Diritti e Qualità Dei Servizi*, Bononia University Press, 2019, pp.291-296; Genio, Giuseppe. 'Gli Usi Civici Nella Legge n. 168 Del 2017 Sui Domini Collettivi: Sintonie e Distonie attraverso La Giurisprudenza Costituzionale e Il Dibattito in Sede Costituente'. *Federalismi.It*, 2018; Grossi, Paolo. 'I Beni: Itinerari Fra "moderno" e "Pos-Moderno"'. *Rivista Trimestale Di Diritto e Procedura Civile*, no. 4, 2012, pp.1077-1083. On the acknowledgment of the fact that the so called commons do not necessarily refer to civic uses (that is a form of collective property), but to a new form of governance see De Lucia, Luca. 'L'autogoverno Dei Beni Comuni: L'uso Civico'. *Gestire i Beni Comuni Urbani. Modelli e Prospettive. Atti Del Convegno Di Torino, 27-28 Febbraio 2019*, edited by Rocco Alessio Albanese et al., Rubbettino, 2020,

Understanding the Italian wider debate on the commons will allow us to grasp the context in which the model of *Shared administration* of the commons developed, and the influence of other perspectives on that.

The present concurring doctrinal approaches and interpretations of the Italian concept of "beni comuni" could be essentially divided into two branches[6]: the first one (more ideological) is focussed on the ownership of the commons; the second one is concerned with their governance, not depending on their legal status. The first position is constituted by those scholars that challenge the governance of the commons in the latest decades because too much oriented towards privatizations, globalization and a neoliberal agenda. They contest the capacity of the State to safeguard and guarantee the public goods for future generations, and therefore advocate for a new legal category referred to the common goods to be introduced in addition to the two already existing of public goods and private goods[7]. They consider the common goods as a new form of ownership, and their main goal is to come to a clear definition of them through a legislative initiative that would introduce this category in the Civil code. The second approach, on the other side, has developed mainly within a public law perspective, and it doesn't aim at reaching a legislative amendment to the Civil Code, but it is focussed instead on finding governance solutions for the commons so that they could already be taken care of in the absence of a State law on them[8]. They are mostly concerned with organisational and procedural rules, so they put at the centre the method more than the object itself[9].

Despite the fact that a great problem of definition still exists nowadays, and that different approaches have different definitions of the commons[10], throughout the years these two doctrinal approaches have contributed to the effort of defining what the common

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p.158. For an overall legal-historical overview of the concept of commons see Dani, Alessandro. 'Il Concetto Giuridico Di "Beni Comuni" Tra Passato e Presente'. *Historia et Ius*, vol. 6, 2014.

[6] On this distinction Cortese, Fulvio. 'Che Cosa Sono i Beni Comuni?' *Prendersi Cura Dei Beni Comuni per Uscire Dalla Crisi*, edited by Marco Bombardelli, Editoriale Scientifica, 2016, pp.37-61; and Cortese, Fulvio. 'What Are Common Goods (Beni Comuni)? Pictures from the Italian Debate'. *Polemos*, vol. 11, no. 2, 2017, pp. 417-453.

[7] Among the others, some of the contributions that serve as a reference point of this approach are Mattei, Ugo, et al. *Invertire La Rotta: Idee per Una Riforma Della Proprietà Pubblica*. Il Mulino, 2007; Mattei, Ugo. Beni Comuni. Un Manifesto. Laterza, 2011; Mattei, Ugo. 'I Beni Comuni Come Istituzione Giuridica'. *Questione Giustizia*, 2017; Lucarelli, Alberto. *La Democrazia Dei Beni Comuni*. Laterza, 2013; Marella, Maria Rosaria. 'The Commons as a Legal Concept'. *Law Critique*, 2016. The scholars belonging to this first approach usually come from a private law perspective, with their studies being focussed on property rights. However, there are some exceptions like A. Lucarelli, who is a public law scholar.

[8] This approach embraces a public law perspective, mainly constitutional and administrative law. Arena, Gregorio, and Iaione, Christian. *L'Italia Dei Beni Comuni*. Carocci, 2012.

[9] Cortese, Fulvio. 'I Beni Mutanti. Fisiologia e Sfide Del Dibattito Sui Beni Comuni'. *Munera*, no. 1, 2018.

[10] Rodotà, Stefano. 'Linee Guida per Un Nuovo Codice Dei Beni Pubblici'. *Invertire La Rotta : Idee per Una Riforma Della Proprietà Pubblica*, edited by Ugo Mattei et al., Il Mulino, 2007, p.364.

goods are. Even if as of today a legally binding definition is still missing at the constitutional and legislative level, we have two major well-known contributions that are being used as reference points in the Italian legal debate: namely the draft law elaborated by the Rodotà Commission in 2007 (headed by the jurist Stefano Rodotà)[11], and the definition provided by the first Municipal *Regulation for the collaboration between citizens and the public administration for the care and regeneration of the urban commons* designed by the municipality of Bologna with the support of the research group of *Labsus-Laboratorio per la sussidiarietà* in 2014[12] (also referred to as the *Bologna Regulation*). Appointed by the Minister of justice on 21 June 2007 with the aim of drafting a bill to delegate the Government to reform the Civil Code concerning the discipline on the public goods, the Rodotà Commission came up with a division of assets into three categories: public goods, private goods, and common goods (*beni comuni*). Within this new classification, common goods were referred to all those goods that express a functional benefit to the exercise of constitutionally protected fundamental rights[13] as well as to the autonomous development of the person. According to the definition provided by the Commission, they have to be upheld and safeguarded by the legal system, also for the benefit of future generations, and their owners can be both private persons or public legal entities; notwithstanding their title, their collective fruition must be safeguarded according to the law[14]. Specific commons listed are rivers, torrents and their springs; lakes and other waterways; the air; parks as defined by law; forests and woodlands; high altitude mountains; glaciers and snowlines; shores and coastlines declared natural reserves; the protected flora and fauna; archaeological, cultural, environmental goods and other

[11] *Commissione Rodotà - per la modifica delle norme del codice civile in materia di beni pubblici* (14 June 2007).

[12] *Comune di Bologna 2014 Regolamento* http://www.comune.bologna.it/sites/default/files/documenti/REGOLAMENTO%20BENI%20COMUNI.pdf. For a translation in English http://www.comune.bologna.it/media/files/bolognaregulation.pdf. The research group and its socio-legal online journal can be found at www.labsus.org.

[13] On this shift from the economic analysis of goods to the constitutional theorisation of the commons as linked to fundamental rights see Camerlengo, Quirino. 'Città e Cittadini: Uno Spazio per i Beni Comuni?' *Città, Cittadini, Conflitti*, edited by Barbara Biscotti et al., Giappichelli, 2020, pp.84-87.

[14] Art.1, c.3 c) Commissione Rodotà - per la modifica delle norme del codice civile in materia di beni pubblici (14 giugno 2007) - Proposta di articolato: *"[…] beni comuni, ossia delle cose che esprimono utilità funzionali all' esercizio dei diritti fondamentali nonché al libero sviluppo della persona. I beni comuni devono essere tutelati e salvaguardati dall' ordinamento giuridico, anche a beneficio delle generazioni future. Titolari di beni comuni possono essere persone giuridiche pubbliche o privati. In ogni caso deve essere garantita la loro fruizione collettiva, nei limiti e secondo le modalità fissati dalla legge. […] Sono beni comuni, tra gli altri: i fiumi i torrenti e le loro sorgenti; i laghi e le altre acque; l' aria; i parchi come definiti dalla legge, le foreste e le zone boschive; le zone montane di alta quota, i ghiacciai e le nevi perenni; i lidi e i tratti di costa dichiarati riserva ambientale; la fauna selvatica e la flora tutelata; i beni archeologici, culturali, ambientali e le altre zone paesaggistiche tutelate".* Works of the Commission available at www.giustizia.it/giustizia/it/mg_1_12_1.wp?previsiousPage=mg_1_12&contentId=SPS47624.

protected landscaped areas. Two important innovative aspects of the Commission were the introduction of the possibility for assets to be not only tangible, but also intangible; and the classification of goods not depending on their property regime, but on their social utility, in relation to the fundamental rights of individuals outlined by the Constitution (Articles 1, 2, 3, 5, 9, 41, 42, 43, 97, 117)[15]. With the fall of the government in 2008, a few months after the presentation of the draft, the proposal, however, did not have any follow-up[16].

The second major reference point in the Italian debate on the commons is constituted by the definition originally written in the innovative municipal Regulation for the commons in 2014 in Bologna, and eventually replicated in similar Regulations adopted by hundreds of Italian local authorities[17]. The work carried out for reaching this innovative Regulation came up with a definition not of the commons, but of the 'urban commons': despite being a more delimited concept, as we will see it constitutes a flexible label that has the capacity to stretch and include a large variety of assets related to the urban context, and therefore constituting a truly innovation in the global arena on the commons. According to the Regulation, the urban commons are "*the goods, tangible, intangible and digital, that citizens and the Administration, also through participative and deliberative procedures, recognize to be functional to the individual and collective wellbeing, activating consequently towards them, pursuant to Article 118(4), of the Italian Constitution, to share the responsibility with the Administration of their care or regeneration in order to improve*

[15] Messinetti, Raffaella. 'Beni Comuni e Nuovo Fondamento Del Diritto Soggettivo'. *Federalismi.It*, no. 8, 2019.

[16] The draft law was presented to the Senate again a few months later by the Regional Council of Piedmont, with no follow-up (*Disegno di Legge n.2031 (24-feb-2010) Delega al Governo per la modifica del codice civile in materia di beni pubblici*). Three other draft laws on the reform of public goods and the introduction of a category of the commons were presented in 2019, also without any consequence so far (proposals by members of Parliament D'Ippolito, Nugnes, Fassina): the draft laws can be found here https://www.commissionepopolarebenicomuni.it/materiali-di-lavoro/.

[17] The up to date number of local authorities that have adopted the same type of Regulation (or a similar one) can be found at https://www.labsus.org/i-regolamenti-per-lamministrazione-condivisa-dei-beni-comuni/. It is important to clarify that while the Bologna Regulation represents the original inspiration for its replication all around Italy, other cities has adjusted the Regulation according to local needs and peculiarities. For the prototype of the Regulation as realized by Labsus see https://www.labsus.org/wp-content/uploads/2017/04/Regolamento-Prototiopo-Labsus.2022.pdf (updated to the 2022 version).The Regulation and its innovative model have also been further developed by the Co-City protocol, which is a methodology developed by *LabGov-the Laboratory for the Governance of the City as a Commons* (https://labgov.city/) based on five design principles for the governance of the urban commons: collective governance, enabling state, pooling economies, experimentalism, and technological justice. See Foster, Sheila R., and Christian Iaione. 'Ostrom in the City. Design Principles and Practices for the Urban Commons'. *Routledge Handbook of the Study of the Commons*, edited by Blake Hudson et al., Routledge, 2019, p.240; and Iaione, Christian. 'The Right to the Co-City'. *Italian Journal of Public Law*, 2017, pp. 80–142.

the collective enjoyment"[18]. In opposition to the first interpretation explained above, the definition contained in this special Regulation does not aim at giving a legal classification to some goods (the commons), but rather to create a label[19] for some goods to be governed differently in a functional way. Accordingly, it is the role of the community around a specific good what becomes essential for the recognition and transformation of a public or private good into a commons. The common goods, therefore, do not represent a *tertium genus* between private goods and public goods, but a qualification to be added to them[20]: in line with this perspective, the commons have been associated to the constitutional principle of horizontal subsidiarity[21], deriving the legitimation of their *Shared administration* (or co-management[22]) from Article 118(4) of the Constitution[23]. It is indeed this direct legitimation of the municipal Regulation from the Constitution what allows a practical implementation of the principle of horizontal subsidiarity through a ground-level governance of the commons, and this is happening without the need to wait for a legislative act introducing a commons legal classification in property law[24]. In addition to that, a second merit coming from the connection established between horizontal subsidiarity and the commons is the opportunity created by the Regulation for innovative and creative experimentations at the local level. It is important to note that this second perspective on the commons draws also on the definition offered by the Rodotà Commission, linking the commons with the fulfilment of human beings' fundamental needs, in line with the Constitution. It goes however much further by bridging the gap between what remained so far a theoretical proposal, and a ground-level action, which is permitted by the Regulation and its legal tool of *Collaboration agreements* ("patti di

[18] Regulation, section 2 on definitions.

[19] Cortese, Fulvio. 'What Are Common Goods (Beni Comuni)? Pictures from the Italian Debate'. *Polemos*, vol. 11, no. 2, 2017, p.423.

[20] Giglioni, Fabio. 'I Regolamenti Comunali per La Gestione Dei Beni Comuni Urbani Come Laboratorio per Un Nuovo Diritto Delle Città'. *Munus*, 2016, p.290.

[21] Arena, Gregorio. *Cittadini Attivi*. Laterza, 2006, p.116.

[22] Cortese, Fulvio. 'What Are Common Goods (Beni Comuni)? Pictures from the Italian Debate'. *Polemos*, vol. 11, no. 2, 2017, p.423.

[23] As we will see, and as it has been observed in Pavani, Giorgia. 'European Sharing and Collaborative Cities: The Italian Way'. *European Public Law*, vol. 28, no. 1, 2022, p.98, *"on the theoretical level, the shared administration was supported by all the elements which compose the legal system: the legislative formant […]; the jurisprudential formant […]; the scholarly formant […]"*. With regard to the legislative formant, the author refers to the principle of horizontal subsidiarity contained in the Constitution and to some regional laws that so far have been passed (as we will explain, however, up to date there is no national-level legislation on that). The jurisprudential formant refers, among other judgements, to judgement no.131/2020 of the Constitutional Court which constitutes the most important so far; for the scholarly formant the reference goes to the emerging 'law of cities' field.

[24] Bombardelli, Marco. 'La Cura Dei Beni Comuni: Esperienze e Prospettive'. *Giornale Di Diritto Amministrativo*, no. 5, 2018, p.563.

collaborazione"[25]), and more in general by the innovative organizational model of *Shared administration* of the commons. As a consequence of what emerges up until here, the commons could therefore be qualified as all those resources around which community relations take place, functional to guaranteeing the satisfaction of the community's needs, and that require access to be allowed to everyone, a shared governance, and their preservation for the future. This perspective goes beyond the primary and exclusive role of the State in taking care of the *res publica*, and the traditional paradigm of property: notwithstanding the legal ownership of those goods, the commons are distinguished by their open destination to the community, and the community's active role in their care[26].

A confirm of the direction suggested (and implemented on ground) by the innovative municipal Regulations on the urban commons came by the jurisprudence of the *Corte di Cassazione* in a landmark judgement in 2011[27]. Even though the judgement came three years before the elaboration of the Bologna Regulation, we can find in that an additional *ex ante* legitimation of its model: so far this contains the only definition offered by the jurisprudence of a high Court to what can be legally defined as a commons[28]. According to the Court, the common goods are all those goods that, notwithstanding their legal status, are functional to the general interest of the community, and because of that they are in need of a specific governance model. Two are the key elements elaborated by the Court: a) the shift from the property title to the criteria of functionality towards the general interest of the community of a good in order to be considered as a commons; b) a public governance model of the commons. The Court underlines the need to look at public goods beyond a mere property perspective, but within a wider constitutionally oriented

[25] See paragraph 4 of this Chapter.

[26] Bombardelli, Marco. 'La Cura Dei Beni Comuni: Esperienze e Prospettive'. *Giornale Di Diritto Amministrativo*, no. 5, 2018, pp. 559–68, pp.560-563.

[27] Corte di Cassazione, Joint Chambers, 14 February 2011, no.3665. The definition of the commons could be found here: *"Ne deriva quindi che, là dove un bene immobile, indipendentemente dalla titolarità, risulti per le sue intrinseche connotazioni, in particolar modo quelle di tipo ambientale e paesaggistico, destinato alla realizzazione dello Stato sociale come sopra delineato, detto bene è da ritenersi, al di fuori dell'ormai datata prospettiva del* dominium *romanistico e della proprietà codicistica, "comune" vale a dire, prescindendo dal titolo di proprietà, strumentalmente collegato alla realizzazione degli interessi di tutti i cittadini. […] si deve tener conto in modo specifico del duplice aspetto finalistico e funzionale che connota la categoria dei beni in questione. Ne consegue ancora che la titolarità dello Stato (come Stato - collettività, vale a dire come ente espositivo degli interessi di tutti) non è fine a se stessa e non rileva solo sul piano proprietario ma comporta per lo stesso gli oneri di una* governance *che renda effettivi le varie forme di godimento e di uso pubblico del bene."* For a comment see Cortese, Fulvio. 'Dalle Valli Di Pesca Ai Beni Comuni: La Cassazione Rilegge Lo Statuto Dei Beni Pubblici?' *Giornale Di Diritto Amministrativo*, no. 11, 2011, pp.1170-1178.

[28] While this is the only definition given by the jurisprudence, we can find references to the concept of common goods in many judgements, even though with no definitions: for an overview *see* Quarta, Alessandra. 'Beni Comuni, Uso Collettivo e Interessi Generali: Un Percorso Giurisprudenziale'. *Rassegna Di Diritto Civile*, no. 3, 2019, pp. 933–42.

direction towards the realization of individuals' fundamental rights. This definition was later confirmed in other judgements of the same Court[29].

Before proceeding with an analysis of the organizational model of *Shared administration* of the commons – which constitutes the model adopted by the Italian cities object of the research – one additional definition needs to be presented, this time looking at practical institutionalised[30] experiences. Beyond the model of *Shared administration*, in the Italian context the most relevant concrete and institutionalised (and unique) experience of governance of the commons has been implemented in the city of Naples (the so called "Neapolitan way"[31]). Since 2011, and being the first one in Italy, the city has a definition of common goods in line with the one given by the Rodotà Commission enclosed in the municipal statute[32]. In order to implement ground-level experiences, the ancient juridical instrument of the 'civic use' – used since medieval times for granting collective rights over lands and pastures to communities[33] – was innovatively reinterpreted as *urban civic and collective use* ("uso civico e collettivo urbano"). Accordingly to that, a right of collective use[34] needed to be granted to all those goods that have been referred to as common goods. The discipline of civic uses was therefore for the first time linked to the concept of

[29] Later judgements are: Corte di Cassazione, Joint Chambers, 16 February 2011, no. 3811; Corte di Cassazione, Joint chambers, 16 February 2011, n. 3813; Corte di Cassazione, Joint Chambers, 18 February 2011 no.3937; Corte di Cassazione, Joint Chambers, 18 February 2011, no.3938.

[30] We refer to institutionalised experiences of governance of the commons as all those cases where the community around a commons was able to create a collaboration or receive a formal recognition by the public authorities. We will not refer in this work to informal experiences on the commons as it is beyond our scope.

[31] For the qualification of the experience of the *"Neapolitan way"* as a *"radical democratic approach"* in comparison to *"a public law school, the Bologna Model, which champions city regulations for urban commons with a constitutional anchor",* see Kioupkiolis, Alexandros. 'Transforming City Government: Italian Variants on Urban Commoning'. *Administrative Theory & Praxis*, vol. 44, no. 3, 2022, p.200.

[32] Delibera del Consiglio comunale (municipal resolution) no.24/2011 introduced that: "*Il Comune di Napoli, anche al fine di tutelare le generazioni future, riconosce i beni comuni in quanto funzionali all'esercizio dei diritti fondamentali della persona nel suo contesto ecologico e ne garantisce il pieno godimento nell'ambito delle competenze comunali*". https://www.comune.napoli.it/flex/files/9/b/8/D.5ce508de66d661496d2b/Deliberazione_di_c.c._n._24_del_22_settembre_2011.pdf. For an overview of the neapolitan experience see De Tullio, Maria Francesca. 'Commons towards New Participatory Institutions. The Neapolitan Experience'. *Exploring Commonism – A New Aesthetics of the Real*, edited by Pascal Gielen and Nico Dockx, Valiz, 2018, pp. 299–310, http://www.exasilofilangieri.it/wp-content/uploads/2018/09/2018-De-Tullio-in-Gielen-Dockx-Commonism.pdf; Albanese, Rocco Alessio, and Elisa Michelazzo. *Manuale Di Diritto Dei Beni Comuni Urbani*. Celid, 2020, pp.247-251; Albanese, Rocco Alessio. 'Usi Civici e Beni Comuni Urbani. Tra Presente e Passato, Tra Pubblico e Privato'. *Gestire i Beni Comuni Urbani Modelli e Prospettive*, edited by Rocco Alessio Albanese et al., Rubbettino, 2020, pp. 115–28. For the institutional reference to the local administration's initiatives on the commons see https://www.comune.napoli.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/16783.

[33] See footnote 5 of this chapter.

[34] For a critical analysis of this innovative juridical definition see Giglioni, Fabio. 'Le Città Come Ordinamento Giuridico'. *Istituzioni Del Federalismo*, no. 1, 2018, pp.42-43.

urban commons[35]. In specific, the Neapolitan practical experience on the urban commons dates back to the year 2012, when the former Asilo Filangeri (a publicly owned building) was occupied by cultural workers and other activists demonstrating against unemployment, precarious working conditions, and national cultural policies they considered as inefficient and unequal: after many assemblies, they decided to consider themselves not as occupants, but as commoners[36]. They wrote collectively a *Declaration of urban civic and collective use*[37], and transformed the place into an independent cultural centre self-governed in a horizontal and collaborative way, while trying to carry out activities of general interest. The civic and collective urban use of the building as a commons was eventually formally recognized at a later stage with two resolutions by the city council[38], paving the way for the formal recognition of the urban civic and collective use of also many other public assets that in those years started to be directly administered ("gestione diretta") by people as commons. The Neapolitan case shows that the recognized right to civic and collective use does not require a change in the property title, but simply the guarantee of a model of self-government and a collective right of use[39]. It also reveals that the commons could be regarded as political spaces aimed at countering privatization[40], trying to lead the way beyond the dualism State versus market, and towards the self-government of communities[41]. The recognition of common goods in

[35] Albanese, Rocco Alessio. 'Usi Civici e Beni Comuni Urbani. Tra Presente e Passato, Tra Pubblico e Privato'. *Gestire i Beni Comuni Urbani Modelli e Prospettive*, edited by Rocco Alessio Albanese et al., Rubbettino, 2020, p.120.

[36] De Tullio, Maria Francesca. 'Commons towards New Participatory Institutions. The Neapolitan Experience'. *Exploring Commonism – A New Aesthetics of the Real*, edited by Pascal Gielen and Nico Dockx, Valiz, 2018, pp. 299–310.

[37] The Declaration can be found here http://www.exasilofilangieri.it/regolamento-duso-civico/.

[38] Delibera di Giunta, no.400/2012, and no.893/2015. For an accurate perspective on the Neapolitan case from inside the local Administration, see Pascapè, Fabio. 'Usi Collettivi Urbani e Rapporto Tra Il Membro Della Comunità e La Pubblica Amministrazione Locale Nell'esperienza Gestionale Del Comune Di Napoli'. *Gestire i Beni Comuni Urbani. Modelli e Prospettive. Atti Del Convegno Di Torino, 27-28 Febbraio 2019*, edited by Rocco Alessio Albanese et al., Rubbettino, 2020, pp.161-176. The author recalls the legal, social and cultural dilemma of the local administration before those cases of clearly illegal occupations, but where the self-governance of the 'occupants' was actually bringing a decisive benefit to the community as a whole with the provision of essential services related to health, education, legal aid and much more that the public authorities were not able to supply.

[39] Capone, Nicola. 'Urbanistica e Beni Comuni Di Uso Civico e Collettivo. Considerazioni Preliminari'. *Avere Memoria, Costruire Il Futuro*, edited by Francesco De Notaris, La scuola di Pitagora, 2020, p.106.

[40] Micciarelli, Giuseppe. 'Le Teorie Dei Beni Comuni al Banco Di Prova Del Diritto La Soglia Di Un Nuovo Immaginario Istituzionale'. *Politica & Società*, no. 1, 2014, p.131; De Tullio, Maria Francesca. 'Commons towards New Participatory Institutions. The Neapolitan Experience'. *Exploring Commonism – A New Aesthetics of the Real*, edited by Pascal Gielen and Nico Dockx, Valiz, 2018, pp.307-308.

[41] For scientific accuracy, it should be mentioned that within the Italian legal debate the self-government of the commons has been theorised as possible not only through the institute of civic uses, but also through the two private law instruments of the foundation and the trust: these are cases that have not or little been explored in Italy to date, and for which we may refer further to Albanese, Rocco Alessio, et al. *Gestire i Beni Comuni Urbani. Modelli e Prospettive. Atti Del Convegno Di Torino, 27-28 Febbraio 2019.*

Naples represents an ongoing movement[42] that is leading the way for similar experiences around the country.

Moving towards a conclusion, it is important to note some drawbacks of the Neapolitan model that could make it harder for citizens to have a positive impact in their communities, and for its replication in other contexts. At first, the strong political connotation of many experiences of governance of the commons may jeopardize the free access, use and care also of those people that feel far from the political belonging and beliefs of the first arrived ones: sometimes, in fact, it could be the case that commons become the exclusive use of a specific group of people, therefore failing in guaranteeing their constitutionally oriented mission. The second downside is the fact that this model is constantly dependant on a recognition by the local government: all those alike experiences start with a *de facto* illegal occupation of a public or private asset, and live in abusiveness until they receive a formal recognition through a resolution of the city government. The recognition, in addition, would come only if the local government perspective is in line with the model of self-governance of the commons, while it could be the case for some similar experiences not to be formally recognized if the government is not[43]. Lastly, even if the government is in favour of granting a legal cover to initiatives like those ones, not necessarily the formal recognition comes promptly (it could come also after many years). For all those reasons – and for many others that are usually shared by all initiatives on commons around the country, like the lack of a category of positive law, the lack of a clear organizational structure in municipalities for dealing with the commons, and the lack of competent professionals on the topic – we could foresee some difficulties in a wide and stable circulation of the Neapolitan model of the commons. In the light of that, a collaboration between commoners and public authorities for the governance of the commons within a strong institutional, constitutional and juridical framework seems to be necessary, so that the potential of the commons could have a decisive impact in

Rubbettino Editore, 2020, and in particular the contributions of Antonio Vercellone 'La fondazione' (pp.87-102), and Annapaola Tonelli 'Trust e beni pubblici: un nuovo ed efficiente percorso' (pp.103-114).

[42] De Tullio, Maria Francesca. 'Commons towards New Participatory Institutions. The Neapolitan Experience'. *Exploring Commonism – A New Aesthetics of the Real*, edited by Pascal Gielen and Nico Dockx, Valiz, 2018, p.307. Many are the bottom-up initiatives that in the latest years are trying to advocate for the commons and implementing ground-level solutions, from Naples and beyond: for a list of the "emerging common goods" see the work of the national network *Rete nazionale beni comuni emergent e a uso civico* and the list of current experiences on goods considered as commons at https://www.retebenicomuni.it/.

[43] Also Pascapè, Fabio. 'Usi Collettivi Urbani e Rapporto Tra Il Membro Della Comunità e La Pubblica Amministrazione Locale Nell'esperienza Gestionale Del Comune Di Napoli'. *Gestire i Beni Comuni Urbani. Modelli e Prospettive. Atti Del Convegno Di Torino, 27-28 Febbraio 2019*, edited by Rocco Alessio Albanese et al., Rubbettino, 2020, p.174.

communities. Local authorities need therefore to go through an internal process of renovation, so that they could become more flexible and supportive in recognizing all those practical experiences of proactive citizens that are already *doing* something for the general interest of the community. Despite this room for improvement, Naples shows that the capacity of the commons to serve as laboratories of civic participation is undeniable: what emerges also here is a model of *participation in doing* that is allowing citizens to take action for their community, in an attempt to draw a new model of democracy based on citizens' independent initiatives for the general interest, without waiting for the State.

2. The organizational model of *Shared administration* of the commons

It has been written[44] that all the commons theories possess a *"parasitic aptitude"* of the juridical category they aim at introducing – the commons –, through the promotion of new meanings for the relationship between citizens and the State. Among them all, the most effective parasitic interpretation seems to be the one that associates the commons with the constitutional principle of horizontal subsidiarity in Article 118(4) using local autonomies and their regulatory capacity to lead the change. The silent transformation dealing with the governance of the commons firmly rooted in horizontal subsidiarity and occurring within a clear juridical framework in accordance with public authorities is led by the organizational model of *Shared administration* of the commons. Originally not linked with the commons, the model was elaborated in 1997[45] with reference to a new model of

[44] *"Common goods also represent a need for institutionalisation that tends to outgrow the confines of public property or administrative participation and relaunch a new concept of form of State, citizenship and the role of the public-private dichotomy […]. Common goods, basically, always presuppone a different State and administration from the existing ones",* in Cortese, Fulvio. 'What Are Common Goods (Beni Comuni)? Pictures from the Italian Debate'. *Polemos*, vol. 11, no. 2, 2017, p.435.

[45] Arena, Gregorio. 'Introduzione All'amministrazione Condivisa'. *Studi Parlamentari e Di Politica Costituzionale*, 1997. The idea of *Shared administration* has moved forward throughout years since then, thanks to dozens of contributions by the same scholar and others. Among the most relevant contributions of G. Arena see Arena, Gregorio. 'Il Principio Di Sussidiarietà Orizzontale Nell'art.118, u.c. Della Costituzione'. *Astrid Online*, 2003; Arena, G. 'Le Diverse Finalità Della Trasparenza Amministrativa'. *La Trasparenza Amministrativa*, edited by Francesco Merloni, Giuffrè, 2008; Arena, Gregorio. 'User, Customers, Allies : New Perspectives in Relations Beween Citizens and Public Administrations'. *Public Administration, Competitiveness and Sustainable Development*, edited by Gregorio Arena and Mario Chiti, Firenze University Press, 2003; Arena, Gregorio. 'Beni Comuni. Un Nuovo Punto Di Vista'. *Labsus*, 2010; Arena, Gregorio. 'Un Nuovo Diritto per l'amministrazione Condivisa Dei Beni Comuni'. *La Città Come Bene Comune*, edited by Tommaso dalla Massara and Marta Beghini, Edizioni Scientifiche Italiane, 2019, pp. 1–13; Arena, Gregorio. 'Il Principio Di Sussidiarietà Orizzontale Nell'art.118 u.c. Costituzione'. *Studi in Onore Di Giorgio Berti*, Jovene, 2005; Arena, Gregorio. *Cittadini Attivi*. Laterza, 2006; Arena, Gregorio. 'Immigrazione e Cittadinanze'. *In Acciai, Riccardo Giglioni (eds.) Poteri Pubblici e Laicità Delle Istituzioni. Studi in Onore Di Sergio Lariccia*, Aracne, 2007; Arena, Gregorio. 'La cittadinanza amministrativa. Una nuova prospettiva per la partecipazione'. *Espaço Jurídico*, vol. 11, no. 2, 2010, pp. 522–29; Arena, Gregorio. 'Valore e Condizioni

collaboration between citizens and public administrations for issues of general interest. The model was developed within an administrative law perspective in order to suggest a reform of the bipolar paradigm based on the division between those who administer and those who are administered (the dualism authority versus liberty)[46], suggesting a shift towards a collaborative paradigm based on an equal alliance between the public and the citizens in sharing resources and responsibilities. However, its practical circulation is showing that it has gone much further beyond the mere boundaries of administrative law, drawing a constitutionally oriented new public law paradigm on the relation between the citizens and the State through the key role of local authorities, providing for a constitutional anchor to an innovative form of civic participation (through the commons, a CPC), and giving shape to a new model of democracy.

The legal framework of this organizational model has been consolidating throughout years, and from 1997 until today it has established itself with a solid and clear legal framework: 1) at the highest level of the hierarchy of sources we have the Constitutional principle of subsidiarity in its horizontal dimension; 2) since the pioneering contribution of the city of Bologna in 2014, this principle has been directly applied by local authorities within their regulatory autonomy (Article 117(6) of the Italian Constitution) through a prototype of municipal Regulation on the commons[47], without the need for a (national or regional) legislative intermediation; 3) the practical implementation of the Regulation is occurring through an innovative legal tool named *Collaboration agreement* ("Patto di collaborazione") which is signed by the two parts, active citizens and public authorities. The model was reinforced in the latest years also thanks to essentially three initiatives: the

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Della Democrazia Partecipativa'. *Democrazia Partecipativa: Esperienze e Prospettive in Italia e in Europa*, edited by Umberto Allegretti, Firenze University Press, 2010; Arena, Gregorio. 'Le Città Come Beni Comuni'. *Labsus*, 2013; Arena, Gregorio. 'L'amministrazione Condivisa 18 Anni Dopo. Un'utopia Realizzata'. *Labsus*, 2015; Arena, Gregorio. 'Che Cosa Sono e Come Funzionano i Patti per La Cura Dei Beni Comuni'. *Labsus*, 2016; Arena, Gregorio. 'Sussidiarietà Orizzontale Ed Enti Del Terzo Settore'. *I Rapporti Tra Pubbliche Amministrazioni Ed Enti Del Terzo Settore. Dopo La Sentenza Della Corte Costituzionale n. 131 Del 2020*, edited by Antonio Fici et al., Editoriale Scientifica, 2020, pp.25-35; Arena, Gregorio, and Iaione, Christian. *L'Italia Dei Beni Comuni*. Carocci, 2012; Arena, Gregorio, and Giuseppe Cotturri, editors. *Il Valore Aggiunto. Come La Sussidiarietà Può Salvare l'Italia.* Carocci, 2010; Arena, Gregorio, and Fulvio Cortese, editors. *Per Governare Insieme: Il Federalismo Come Metodo. Verso Nuove Forme Della Democrazia.* Cedam, 2011; Arena, Gregorio. 'Nuove Risorse e Nuovi Modelli Di Amministrazione'. *Prendersi Cura Dei Beni Comuni per Uscire Dalla Crisi*, edited by Marco Bombardelli, Editoriale Scientifica, 2016; Arena, Gregorio, and Marco Bombardelli, editors. *L'Amministrazione Condivisa*. Editoriale Scientifica, 2022.

[46] See Chapter 4, paragraph 1.

[47] For the presentation of the Regulation *see* Arena, Gregorio. 'Un Regolamento per La Cura Condivisa Dei Beni Comuni'. *Labsus*, 2014, https://www.labsus.org/2014/02/beni-comuni-un-regolamento-cittadini-attivi-piu-forti/. See also Iaione, Christian, and Elena de Nictolis. 'The City as a Commons Reloaded: From the Urban Commons to Co-Cities Empirical Evidence on the Bologna Regulation'. *The Cambridge Handbook of Commons Research Innovations*, edited by Sheila R. Foster and Chrystie F. Swiney, Cambridge University Press, 2022, pp. 128-129.

national-level legislation on the third Sector (the third sector Code)[48] aimed at better defining the activities of general interest, co-planning and co-design related to the third sector organizations, and thanks to two regional laws related to the shared governance of the commons (regions Lazio and Toscana)[49] addressed to both single and associated citizens. Another important normative reference is to be found in the consolidated text on local authorities ("Testo Unico Entil Locali") that in Article 3(5) outlines that municipalities and provinces perform their functions also through activities that can be adequately exercised by the autonomous initiative of citizens and their social groups[50]. It is important to remind, however, that up to date[51] no comprehensive legislation has been passed at the national level on the model of *Shared administration* of the commons itself. In parallel to this legal framework, many local authorities are renovating their internal organization and culture in order to embrace this paradigm shift, as well as thousands of citizens are becoming more aware of their active and social liberty ensured by the constitutional principle of subsidiarity.

As already discussed in the previous Chapter[52], since 2001 the principle of horizontal subsidiarity is outlining on one side a new supportive and facilitating role for the State for activities of general interest, and on the other the new form of active and social liberty for active citizens. This constitutional framework is drawing a subsidiarity paradigm[53] that has found its practical implementation in a new form of civic participation through the common goods (CPC) thanks to the alliance with public authorities. The added value of the organizational model of *Shared administration,* therefore, lies in its capacity to translate into the practice a constitutional principle that otherwise might have remained

[48] "Codice del terzo Settore", legislative decree no.117/2017. On the procedure of co-planning ("co-programmazione") and co-design ("co-progettazione") see Articles 55-56. For the list of the activities of general interest see Article 5, and footnote no.120 in Chapter 4. For a general overview of the third Sector in Italy see the previous footnote no.53 in Chapter 4. For the model of *Shared administration* and its relationship with third sector organisations see further Sacchetti, Silvia, and Gianluca Salvatori. '"Shared Administration" as a New Relationship between the Public Sector and the Social Economy'. *Euricse Working Paper Series,* no. 126, 2023.

[49] The law of Toscana for the care, regeneration and shared management of the commons with *l.r. 24 luglio 2020, n.71 "Governo collaborativo dei beni comuni e del territorio, per la promozione della sussidiarietà sociale in attuazione degli articoli 4,58 e 59 dello Statuto".* The law of Lazio on the promotion of the Shared administration of the commons with *Regione Lazio, legge 26 giugno 2019, n. 10 "Promozione dell'amministrazione condivisa dei beni comuni"*.

[50] Article 3(5) of the "*Testo Unico Entil Locali"* (Law no.267/2000): *"[…] I comuni e le province svolgono le loro funzioni anche attraverso le attività che possono essere adeguatamente esercitate dalla autonoma iniziativa dei cittadini e delle loro formazioni sociali"*. On this reference see Giglioni, Fabio. 'Forme e Strumenti Dell'amministrazione Condivisa'. *L'Amministrazione Condivisa*, edited by Gregorio Arena and Marco Bombardelli, Editoriale Scientifica, 2022, p.77 and further references.

[51] As of January 2023.

[52] Paragraphs no.3.1, 3.2, 3.3, Chapter 4.

[53] See footnote no.15 in Chapter 4.

only on paper[54]. However, in addition to its capacity to practically implement the principle of horizontal subsidiarity, the constitutional entrenchment of *Shared administration* was also able to constitute a model in line with other constitutional principles: democratic sovereignty of individuals (Article 1(2)); social solidarity of individuals in participating to the general interest (Article 2); an effective civic participation (Article 3(2)); the exercise of civic duties (Article 4(2)); local autonomy (Article 5); the social function of cooperation (Article 45); trust between citizens and public authorities (Article 54); regulatory autonomy of local authorities (Article 117(6)).

Also defined as *collaborative governance*[55], the model of *Shared administration* is designed to be a collaborative and not conflictual relationship[56] that constitutes a new alliance between active citizens and public authorities. It basically represents a relationship among two autonomies – the public autonomy, and the private (or civic[57]) autonomy – that is working for a caring society[58], and that may even contribute to a reform of the form of the State[59]. Active citizens represent a huge potential for bringing within an institutional framework an useful point of view in understanding and dealing with problems in our communities, and therefore their spontaneous and responsible initiatives have to be safeguarded and supported by public authorities, and not suppressed and fought. The creation of a legal framework based on the subsidiarity paradigm for active citizens' initiatives and creativity is allowing citizens not only to *be* citizens accordingly to a mere legal status, but also to *practice* their being citizens, through their autonomous initiatives of care for the commons (their *participation in doing*). In this way, the organisational model of *Shared administration* is granting an institutional structure for the creation of a new space at the boundaries between public law and private law, with the emergence of the general

[54] Arena, Gregorio. 'Amministrazione e Società. Il Nuovo Cittadino'. *Rivista Trimestrale Di Diritto Pubblico*, no. 1, 2017, p.49; Arena, Gregorio. 'Nuove Risorse e Nuovi Modelli Di Amministrazione'. *Prendersi Cura Dei Beni Comuni per Uscire Dalla Crisi*, edited by Marco Bombardelli, Editoriale Scientifica, 2016, p.293.

[55] For example, in Iaione, Christian. 'The CO-City: Sharing, Collaborating, Cooperating, and Commoning in the City'. *American Journal of Economics and Sociology*, vol. 75, no. 2, 2016, pp. 427.

[56] On the necessity for a shift for a State-citizens relation from an adversarial to a collaborative one based on trust see Arena, G. 'Le Diverse Finalità Della Trasparenza Amministrativa'. *La Trasparenza Amministrativa*, edited by Francesco Merloni, Giuffrè, 2008.

[57] See Chapter 4, para 2.1 (footnote no.44).

[58] On the idea of a *"società della cura"* see Arena, Gregorio. 'La "Società Della Cura" e Il Valore Politico Dei Piccoli Gesti Quotidiani'. *Labsus*, 2018, https://www.labsus.org/2018/01/la-societa-della-cura-un-progetto-fondato-sullempatia/.

[59] In this way Gustavo Zagrebelsky, as mentioned in Realdon, Remo, editor. *La Sussidiarietà Orizzontale Nel Titolo V Della Costituzione e La Sussidiarietà Generativa.* Cedam, 2018, p.36.

interest beyond the public and private ones (a so called *third pole of interest*[60]). This new space is safeguarding the collaborative relations for activities of general interest, contributing to the establishment of what has been defined the *"Third Pillar"* beyond the dualism State versus market, namely the community[61]. In the model of *Shared administration* the community is encouraged and supported by public authorities in its autonomous initiatives of care for the common goods: its constitutional and legal framework is therefore the added value of this model preserving citizens' liberty to do something for the general interest. A fundamental aspect concerns what the community include: as investigated before[62], the subsidiarity paradigm not only refers to third sector organizations, but also to all those active citizens that do not belong to any formal organization. Everyone and in whatever way organised is able to contribute to the general interest of society and, limited to that, deserves public support.

The significance of *Shared administration* within a wider public law paradigm becomes clearer when trying to define the form of democracy coming out from this new type of collaborative relationship between citizens and the State (through the key role of local authorities). Contributing to shape a new form of participation, this model has been studied[63], in specific, in relation to the concept of participatory democracy: a challenging investigation. Horizontal subsidiarity and its derived model of *Shared administration* have been suggested to be complementary to the different types of participatory democracy, since both of them represent structures for participation, the first one realizing a *participation in doing*, while the second one a *participation in deciding*[64]. Defined in its turn

[60] Arena, Gregorio. 'Sussidiarietà Orizzontale Ed Enti Del Terzo Settore'. *I Rapporti Tra Pubbliche Amministrazioni Ed Enti Del Terzo Settore. Dopo La Sentenza Della Corte Costituzionale n. 131 Del 2020*, edited by Antonio Fici et al., Editoriale Scientifica, 2020, p.25. Additionally, see footnote no. 63 in Chapter 4.

[61] We are referring to the groundbreaking book of Rajan, Raghuram. *The Third Pillar How Markets and the State Leave the Community Behind*. Penguin, 2019. On the role of the community as the third actor beyond the State and the market, and its role in pursuing a civil economy see also the lifetime works of Stefano Zamagni. As an example, see further Bruni, Luigino, and Stefano Zamagni. *Civil Economy. Another Idea of the Market.* Agenda Publishing, 2016.

[62] See para 3.1, Chapter 4. See also Arena, Gregorio. 'Sussidiarietà Orizzontale Ed Enti Del Terzo Settore'. *I Rapporti Tra Pubbliche Amministrazioni Ed Enti Del Terzo Settore. Dopo La Sentenza Della Corte Costituzionale n. 131 Del 2020*, edited by Antonio Fici et al., Editoriale Scientifica, 2020.

[63] Valastro, Alessandra, editor. *Le Regole Locali Della Democrazia Partecipativa. Tendenze e Prospettive Dei Regolamenti Comunali.* Jovene editore, 2016 (in specific, contributions written by Arena, Valastro, Allegretti). On the connection between participatory democracy and the principal of horizontal subsidiarity see Arena, Gregorio, and Fulvio Cortese, editors. *Per Governare Insieme: Il Federalismo Come Metodo. Verso Nuove Forme Della Democrazia*. Cedam, 2011 (contributions of Arena, De Martin, Antonelli, Allegretti)

[64] Valastro, Alessandra. 'La Democrazia Partecipativa Alla Prova Dei Territori: Il Ruolo Delle Amministrazioni Locali Nell'epoca Delle Fragilità'. *Le Regole Locali Della Democrazia Partecipativa. Tendenze e Prospettive Dei Regolamenti Comunali*, edited by Alessandra Valastro, Jovene, 2016, pp.29-30. On horizontal subsidiarity as a form of participation in *doing*, carried out in collaboration with public authorities see also Allegretti, Umberto. 'Democrazia Partecipativa, *Enciclopedia Del Diritto*, 2011, pp.305-

as complementary to representative democracy and direct democracy, the concept of participatory democracy as we saw in Chapter 2 is a wide concept lacking of a general theory not only in the wider international panorama, but also in the Italian legal context. Despite that, it could be said to define a universe[65] of different participatory practices and procedures with the aim of strengthening democracy as a function of community governance[66]. The concept of participatory democracy is also receiving the influence of the concept of deliberative democracy[67], referring to the inclusive and deliberative method of decision-making processes. What participation and participatory democracy seem to have in common with *Shared administration* is that both are looking at the relationship between the State and society, with the aim to empower citizens in order to answer the crisis[68] of representative democracy. It is important to notice, however, that while the model of *Shared administration* constitutes a form of *participation in doing*, it is correct to say that it

305, 318-319; Allegretti, Umberto. 'La Democrazia Partecipativa in Italia e in Europa'. *Associazione Italiana Dei Costituzionalisti*, vol. 1, 2011, pp.4-5. See also paragraph 2, Chapter 4.

[65] Allegretti Democrazia partecipativa, Enciclopedia del diritto, 2011, p.295. On the same line Bobbio, Luigi. 'Dilemmi Della Democrazia Partecipativa'. *Democrazia a Diritto*, vol. 4, 2006, pp.11-26, where the author says that participatory democracy doesn't have a well-defined form, but has to be reinvented each time. On the need for a juridical foundation of the concept of participation see Allegretti, Umberto. 'Basi Giuridiche Della Democrazia Partecipativa in Italia: Alcuni Orientamenti'. *Democrazia e Diritto*, no. 3, 2006, pp. 151–66. In the lack of a general theory, for a study on participatory democracy within a comparative public law perspective see Trettel, Martina. *La democrazia partecipativa negli ordinamenti composti: studio di diritto comparator sull'incidenza della tradizione giuridica nelle democratic innovations*. Edizioni Scientifiche Italiane, 2020, where the author suggests that the different forms, practices and procedures of participatory democracy should be considered as a method of governance. The first organic law in the world related to participatory democracy was passed by the region of Toscana (Italy), with the regional law no.69/2007 (*Legge regionale 27 dicembre 2007, n. 69 "Norme sulla promozione della partecipazione alla elaborazione delle politiche regionali e locali").*

[66] For a more elaborated definition of participatory democracy see De Toffol, Fabiola, and Alessandra Valastro, editors. Dizionario Di Democrazia Partecipativa. Regione Umbria, 2012, pp. 75-76. For a collection of participatory practices worldwide *see* the platform Participedia at https://participedia.net/.

[67] For a more elaborated definition of deliberative democracy see De Toffol, Fabiola, and Alessandra Valastro, editors. Dizionario Di Democrazia Partecipativa. Regione Umbria, 2012, p.72-73. In the Italian legal context it is argued whether it is participatory democracy the one that includes the model of deliberative democracy, or vice versa. Of the first opinion Bobbio, Luigi. 'Dilemmi Della Democrazia Partecipativa'. *Democrazia a Diritto*, vol. 4, 2006; of the second opinion Bifulco, Raffaele. 'Democrazia Deliberativa, Partecipativa e Rappresentativa: Tre Diverse Forme Di Democrazia'. *Democrazia Partecipativa: Esperienze e Prospettive in Italia e in Europa,* edited by Giovanni Allegretti, Firenze University Press, 2010, p.69. A third way is defined by Allegretti that suggests a mutual influence of the two on each other, while still recognizing the different origins (participatory democracy with a Latin-American origin, while the deliberative democracy having North-American and Anglo-Saxon roots): see Allegretti, Umberto. 'La Democrazia Partecipativa in Italia e in Europa'. *Associazione Italiana Dei Costituzionalisti*, vol. 1, 2011, p.4.

[68] Allegretti, Umberto. 'Democrazia Partecipativa: Un Contributo Alla Democratizzazione Della Democrazia'. *Democrazia Partecipativa: Esperienze e Prospettive in Italia e in Europa*, edited by Umberto Allegretti, Firenze University Press, 2010, pp.25-26. Participatory democracy is seen by Allegretti as a contribution to the 'democratization of democracy'. See further Bobbio, *Norberto. Il Futuro Della Democrazia*, 1984 (Reprint). Corriere della sera, 2010, p.23.

also includes a dimension of deciding[69]. In fact, the practical actions of doing carried out by active citizens are happening thanks to the collaboration with public authorities within a procedure of co-design[70] where the two autonomies (the public autonomy and the civic autonomy) plan together the actions of general interest to be implemented in accordance with Article 118(4) Constitution. Both *Shared administration* and participatory democracy are contributing to local democracy, proving to be able to transform local authorities bottom-up thanks to the contribution of all those individuals willing to be part of their community. The change of perspective from a model of top-down democracy based on the delegation of power through representative structures to forms of bottom-up democracy based of citizens' initiatives leads us towards a shift from the question 'what is a human being entitled to?' to 'what can a person be and do?'[71]: those questions represent the shift from a rights approach to a capabilities approach, suggesting an institutional promotion of citizens' capabilities (therefore, of their active social liberty)[72].

All things considered, while it could be pointed out that *Shared administration* originated as a mere theoretical organizational model in 1997, it also has to be recognized that since its concrete realisation thanks to the Bologna Regulation in 2014 it is spreading fast and aspires to increasingly structured networking, by providing local authorities with a clear constitutional and legal framework and a concrete structure for supporting citizens' *participation in doing*. The concept of participation itself is strengthened by the principle of horizontal subsidiarity, including not only a participation in decision-making processes, but also an action-oriented participation in problem solving[73] as two complementary aspects of civic participation to the *res publica* in its broader sense. Within the progressive spreading

[69] Allegretti, Umberto. 'La Partecipazione Come "Utopia Realistica"'. *Le Regole Locali Della Democrazia Partecipativa. Tendenze e Prospettive Dei Regolamenti Comunali*, edited by Alessandra Valastro, Jovene, 2016, p.246.

[70] The procedure is named "co-progettazione": see para 2.2 of this Chapter.

[71] This was observed by Valastro, Alessandra. 'La Democrazia Partecipativa Alla Prova Dei Territori: Il Ruolo Delle Amministrazioni Locali Nell'epoca Delle Fragilità'. *Le Regole Locali Della Democrazia Partecipativa. Tendenze e Prospettive Dei Regolamenti Comunali*, edited by Alessandra Valastro, Jovene, 2016, pp.15-16. The scholar advocates for the need to link the capabilities approach (elaborated by Amartya Sen) to constitutional law, and in specific to the concept of participatory and deliberative democracy. Participatory (and deliberative) democracy is associated by the author within the field of constitutional law, and of the same opinion is Trettel as far as it is committed to implementing on a practical level constitutionally granted rights (Trettel, Martina. *La Democrazia Partecipativa Negli Ordinamenti Composti: Studio Di Diritto Comparato Sull'incidenza Della Tradizione Giuridica Nelle Democratic Innovations*. Edizioni Scientifiche Italiane, 2020, p.17).

[72] As we saw in paragraph 3.3 in Chapter 4.

[73] Valastro, Alessandra. 'La Democrazia Partecipativa Alla Prova Dei Territori: Il Ruolo Delle Amministrazioni Locali Nell'epoca Delle Fragilità'. *Le Regole Locali Della Democrazia Partecipativa. Tendenze e Prospettive Dei Regolamenti Comunali*, edited by Alessandra Valastro, Jovene, 2016, p.30.

of the model of *Shared administration*, the role of local authorities is becoming more and more pivotal for the strengthening of democracy from the local level.

2.1. The Bologna Regulation and beyond

Shared administration was developed for the first time in a city: Bologna. Elaborated for the first time on paper in 1997[74], on 22 February 2014 the model was put into practice in Bologna, after two years of work and research, through the *Regulation for the collaboration between citizens and the public administration for the care and regeneration of the urban commons*[75]. From the pilot city of Bologna, since that year the Regulation spread in at least other 280[76] local authorities, showing that the role of local governments beyond the State is increasing with regard to the promotion of forms of civic participation aimed at solving problems of general interest through actions of care for the common goods. Starting from the analysis of the key aspects of the Regulation, we will then focus on the emerging role of local authorities in realizing the aims of Article 118(4) of the Constitution.

In order to find the proper tool for implementing horizontal subsidiarity, the choice for a municipal regulation came in response to the need for a simple, flexible, and adaptable legal tool, so as to make it easier for it to circulate and being replicated by many other local authorities around the country. The Regulation, however, implements not only horizontal subsidiarity, but also the constitutional principle of regulatory autonomy (Article 117(6) Constitution), that guarantees a normative capacity for all the territorial autonomies ("autonomie territoriali")[77] without the need for a legislative intermediation of the State[78].

[74] Arena, Gregorio. 'Introduzione All'amministrazione Condivisa'. *Studi Parlamentari e Di Politica Costituzionale*, 1997, pp. 29–65.

[75] For a brief summary of that day see footnote no.47 of this Chapter. The English translation of the Bologna Regulation on the commons could be found online at the link http://www.comune.bologna.it/media/files/bolognaregulation.pdf.

[76] This number is updated to January 2023. For the up to date number of cities that have approved the same Regulation and that are trying to promote (with more or less success) the collaborative model of Shared administration see the dedicated page on the webite of Labsus https://www.labsus.org/i-regolamenti-per-lamministrazione-condivisa-dei-beni-comuni/.

[77] For the principle of autonomy related to territorial autonomies see Cortese, Fulvio. *Diritto Delle Autonomie Territoriali.* Edited by Enrico Carloni, Cedam, 2020, pp.3-10.

[78] The absence of a national law that would serve as a strong enhancer of the model has been underlined as a critical point in Carlotto, Ilaria. 'I Beni Comuni e i Regolamenti per l'amministrazione Condivisa'. *La Sussidiarietà Orizzontale Nel Titolo V Della Costituzione e La Sussidiarietà Generativa*, edited by Remo Realdon, Cedam, 2018, pp.214-218. A great endorsement, however, arrived in 2017 when the Court of Auditors (*Corte dei Conti*) stated that the constitutional principle of horizontal subsidiarity has to be applied also without a legislative intermediation, therefore guaranteeing a firm support for the Regulations for

This regulatory reserve is what allows municipalities to have a wider scope for action in relations with citizens and the management of urban areas. The Regulation[79] is essentially divided into seven different parts: a) general provisions and definitions; b) procedural provisions; c) actions of care, regeneration and shared governance of the commons; d) forms of support to citizens' initiatives from the State's side; e) communication, transparency and evaluation of initiatives; f) responsibility; g) final and transitional provisions. a) This introductory part of the Regulation outlines the constitutional principles that serve as a framework for the Regulation to have a legit ground (Article 118(4) on horizontal subsidiarity and Article 117(6) on the regulatory autonomy of local authorities), and clarifies that citizens' autonomous initiatives (notwithstanding residency and citizenship criteria) should be supported by the State when they come out from citizens' free will, as well as when they are freely exercised by citizens as a consequence of an invitation of local authorities. Central importance is also given to definitions (urban commons; active citizens; *Shared administration*; collaboration proposal; collaboration agreement; care, regeneration and shared management of the commons), and to the guiding criteria for the collaboration between the two sides for activities of general interest (mutual trust; transparency and communication of the collaboration proposals; mutual responsibility; inclusivity and openness; equal opportunities and opposition to any discrimination; children participation; sustainability with reference to economic resources, the environment, and future generations; proportionality in public authorities' intervention; appropriateness and differentiation in the forms of collaboration; informality in the relation between citizens and public authorities; civic autonomy; proximity in the initiatives of care for the commons). b) The procedural provisions suggest that an Office of *Shared administration* could be created within local authorities, so as to facilitate the collaborative

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the Shared administration of the commons. *"Tuttavia, benché il principio di sussidiarietà orizzontale non si presti ad essere applicato in assenza di una norma di legge che gli dia attuazione, è altrettanto vero che le norme costituzionali di principio debbono (nei limiti del possibile) essere applicate direttamente, anche in mancanza di una interposizione legislativa, in quanto le stesse vincolano l'esercizio della funzione amministrativa nell'ambito del margine di discrezionalità spettante alle autorità pubbliche. Sotto tale profilo, il principio di sussidiarietà opera alla pari di altri principi costituzionali che regolano l'attività della pubblica amministrazione, quali i principi di legalità, imparzialità e buon andamento. Deve pertanto ritenersi che la funzione di stimolo e promozione della cittadinanza attiva, il cui valore sociale trova riconoscimento anche per le attività dei singoli volontari, può essere esercitata dai Comuni con modalità di collaborazione che trovino diretto fondamento nell'autonomia regolamentare concessa dall'art. 117, sesto comma, della Costituzione"*, (Corte dei Conti no.26/2017, pp.12-13).

[79] Our analysis on the Regulation uses the prototype elaborated by *Labsus-Laboratorio per la sussidiarietà* as it represents the reference point and most up to date text for all those cities that decide to approve the same Regulation: they usually take this text and adopt it in accordance to their territorial needs. For the prototype see https://www.labsus.org/wp-content/uploads/2017/04/Regolamento-Prototiopo-Labsus.2022.pdf.

relations between active citizens and public authorities. The collaboration – occurring through *Collaboration agreements* ("patti di collaborazione") – could occur with ordinary Collaboration agreements ("patti ordinary") or with complex ones ("patti complessi"): while the first ones refer to smaller and easier actions, the second ones usually refer to more complex ones with concern to the display of resources and planning[80]. c) With concern to actions of care, regeneration and shared management of public assets and spaces, in specific, the Regulation states that also cultural goods and confiscated assets to the organized crime could be object of a collaboration agreement. d) From the State's side, public authorities are invited to support citizens' initiatives through different supportive measures. From the signing of specific insurances designed for active citizens, public authorities could grant active citizens some economic advantages like the free use of public assets, the public cover of active citizens' initiatives expenses, the free use of needed material instruments; they could also grant exemptions and benefits from taxes; they could facilitate procedural and bureaucratic rules, and simplify required documents for them. Other forms of support from the State's side towards active citizens could consist of initiatives of education to active citizenship, and facilitation towards self-funding initiatives. e) With concern to communication, public authorities are invited to spread through their channels all the activities of collaboration on the commons, so that the model of *Shared administration* could circulate in the local community. The transparency of the initiatives is also essential in order to preserve the inclusive character of the activities, and so as to contribute to the necessary evaluation of the real impact of them. f) Civil liability is also included in the Regulation, with active citizens being personally responsible, but with the possibility for the public authorities to provide specific insurances for them. An attempt of reconciliation is also introduced in case of a need for settlement between active citizens and public authorities. g) Among the final and transitional provisions, it is interesting to note a last clause on the favour of the Regulation for an interpretation of the whole text closer to active citizens' needs, rather than to the public authorities' needs.

2.2. The Regulation put into practice: the *Collaboration agreement* legal tool

After a theoretical study of the model of *Shared administration* and its prototype Regulation, this paragraph is meant to dig deeper into the most practical and concrete tool

[80] See further footnote no.85 in this Chapter.

introduced by this model. The core innovation brought by the Regulation is, indeed, the legal tool defined *Collaboration agreement* ("patto di collaborazione"), which represents the practical juridical instrument able to transform hidden capabilities[81] of active citizens into actions of care, regeneration and shared governance of the commons in collaboration with the public authorities. *Collaboration agreements* constitute innovative normative sources rooted in the constitutional principle of horizontal subsidiarity, and they take the form of written agreements.

According to Article 118(4) of the Constitution and to the prototype of Regulation, there are two signatory parties: on the public side, the signature of the Collaboration agreement could come from one or more political members of the local government, or from one or more public servant within the administrative body; on the civic side, on the other hand, the signatories are active citizens as individuals or associated[82]. The object of the collaboration agreement is constituted by one or more activities of general interest. In the majority of cases, on the practical level they are actions of care, regeneration, shared governance for tangible, intangible or digital commons; however, that is not always the case, as many times the object of the *Collaboration agreement* is not a commons, but an activity or a service of general interest. This represents an interesting aspect, as the tool has been used so far also with a perspective of solving problems at the local level, therefore constituting a way for reforming the governance of the local level of democracy bottom-up[83]. While on the public side the signatory is always one, on the civic side we could have as many signatories as active citizens (individuals and associated) who are willing to participate to the specific actions defined by the Collaborative agreement. Collaboration agreements have the capacity to gather a diverse variety of actors around one main goal: in this respect, the access to the agreement is always permitted also after the official signing with the public authorities, as the tool recognizes the possibility for other civic actors to join at a later moment in so far as they are willing to collaborate for the same aim. As it has been pointed out[84], the autonomous initiative of active citizens willing to contribute to the general interest is not to be understood as charity work, but as an individual' private interest that coincides with a wider general interest: in the case of

[81] Arena, Gregorio. 'Che Cosa Sono e Come Funzionano i Patti per La Cura Dei Beni Comuni'. *Labsus*, 2016.

[82] For an overview of the diversity of subjects that could be active citizens see Chapter 4, paragraph 3.1.

[83] Michiara, Paolo. 'I Patti Di Collaborazione e Il Regolamento per La Cura e La Rigenerazione Dei Beni Comuni Urbani. L'esperienza Del Comune Di Bologna'. *Aedon*, no. 2, 2016, p.7-8.

[84] Arena, Gregorio. 'Introduzione All'amministrazione Condivisa'. *Studi Parlamentari e Di Politica Costituzionale*, 1997, p.55.

initiatives carried out under the cover of Article 118(4) Constitution, the satisfaction of a private interest satisfies at the same time also the wider community. The general interest at the core of each *Collaborative agreement* could bring to two forms of agreement: ordinary or complex ones[85]. Ordinary Collaboration agreements are the ones that have as their target small-claims actions: as an example, they could be actions of cleaning, painting, minor maintenance actions, gardening, local promotion, social gathering, communication, as well as exhibitions, street furniture, and cultural or educational activities. While ordinary collaboration agreements are the easiest ones to design and implement, complex collaboration agreements require a highest level of negotiation between the two sides because they consist in more elaborated actions: those types of collaboration agreements usually refer to interventions of care and regeneration of tangible commons (spaces and buildings mainly) that have an historical or cultural importance, or with a considerable dimensions or high economic value[86]. Ordinary collaboration agreements rely on default texts: complex ones, on the contrary, need a highest level of details and are usually dependant on a more difficult procedure for their approval[87].

With regard to the procedure leading to the implementation of a *Collaboration agreement*, four could be considered the steps to be followed.

Figure 1: The 4 steps of a Collaboration agreement (author's elaboration).

The first moment consists in the proposal of an activity of general interest: the proposal usually comes as an autonomous initiative of active citizens in accordance with Article 118(4) Constitution, but sometimes can also come as a consequence of an invitation to submit proposals by the local authorities. Secondly, the phase of co-design takes place between the two parties[88]. This consists in a dialogue between active citizens and the public authorities, where they come to the mutual recognition of a specific good as

[85] Bombardelli, Marco. 'La Cura Dei Beni Comuni: Esperienze e Prospettive'. *Giornale Di Diritto Amministrativo*, no. 5, 2018, p.563. See also Errico. 'Modelli Di Gestione Dei Beni Comuni i Patti Di Collaborazione'. *Foro Amministrativo*, vol. II, no. 12, 2019, p.2206-2212.

[86] Articles 6-7 of the prototype of Regulation.

[87] Bombardelli, Marco. 'La Cura Dei Beni Comuni: Esperienze e Prospettive'. *Giornale Di Diritto Amministrativo*, no. 5, 2018, p.564.

[88] The term used is "co-progettazione", and has been recently recognized as the usual working procedure for third sector organisations in Article 56 of the third Sector Code (see also footnote no.48 of this Chapter).

a commons or of a specific action for the general interest, and negotiate in detail the content of their collaboration to be written in the Collaboration agreement. Necessary aspects included in every Collaboration agreement are: the two signatory parties; the aim of general interest target of the collaboration; the commons object of the actions of care, regeneration and shared governance that will take place; tasks, resources and responsibilities of each side; the supportive measures provided by the public authority; the place where the activities are taking place; possible insurances; duration of the collaboration. The third step consists in the official signing of the *Collaboration agreement* by the two sides. Lastly, a follow-up fourth phase of monitoring of the agreement by the public authorities is included. An aspect of interest is the provision of an attempt at reconciliation (included in the prototype of the Regulation at Article 20) in case of any rising dispute among the two sides or among the two sides and third parts: the attempt should be made in front of a reconciliation committee composed of three members (one designed by the public authority, one by the side of active citizens signatories of the collaboration agreement, and the third one designed by the two sides together or – if any – by the third part).

Interesting data about the use of the Collaboration agreement are coming from a recent quantitative and qualitative survey on a national-level overview on the usage of this tool published in 2022[89]. On the basis of data collected for that study, the survey revealed that the majority of *Collaboration agreements* (53%) were signed in local authorities with more than 250.000 inhabitants, with a discrete number (27%) also in local authorities with a number of inhabitants between 60.000-250.000. This accounts for a 80% of *Collaboration agreements* signed in urbanised areas. With regard to the signatories on the civic side, the major actors are associations (40%), followed by individual citizens (20,97%), informal groups (13,3%), schools (6,96%), for-profit enterprises (6,08%), social enterprises (3,44%), followed in lower percentages also by ecclesiastical entities, foundations, other public entities, professionals and universities. The commons object of the *Collaboration agreement* are mostly tangible (63,14%): often there is a coexistence of

[89] The survey was conducted by a research team of *Labsus* between October 2021 and January 2022 in which I also took part, and it was aimed at providing for the most up to date national-level overview on the usage of the Collaboration agreements. The difficulties of analysis were objectively many, first and foremost related to the retrieval of the information sought from the websites of local authorities. Out of a sample of 252 local authorities with the Regulation on the commons, 62 were those that had active Collaboration agreements as at 30 September 2021 (deadline for research), with a total number of 1001 on-going Collaboration agreements analysed by the survey. The final report is available online at https://www.labsus.org/rapporto-labsus-2021/. We suggest consulting that for having access to a wide variety of graphs and data beyond the ones provided here.

tangible and intangible (24,48%), while the number of the agreements signed on intangible (7,09%) and digital (1,10%) is very little. Sometimes, as we were mentioning before, it is also possible that the object of the agreement is a general interest and not a specific commons (this occurred for the 4,20%). The average duration is between one and three years (41%), with also a relevant number of *Collaboration agreements* being signed for one year (32%), or more than three years (14%). Usually there is always a possibility of renewal beyond the agreed duration. The last useful data to report are the ones related to the forms of support provided by public authorities to the active citizens' side, since some kind of support is apparently almost always provided (99%). Accordingly, usually public authorities supply materials (23%), promote and publicise the *Collaboration agreement* initiatives (19,34%), give tax benefits (10,53%), provide for technical support (10,35%), make a symbolic economic contribution (8,75%), provide insurance cover (8,69%), concede bureaucratic simplification (3,67%), or gives a free availability of spaces (1,83%). Often several concessions are given at the same time (10,17%). All in all, these data provide an interesting insight into the use of the tool, but are only part of a phenomenon that is still difficult to map accurately.

The nature of this legal tool, additionally, remains to date highly disputed. As it has been observed[90], this issue becomes problematic on a practical level also for the determination of the proper judge that would be entitled to resolving a dispute (within the Italian legal system, whether an administrative judge or a civil one)[91]. In the literature interpretations are mainly two: the first one connects them to contracts of private law ("contratti"), the second to agreements of public law ("accordi")[92]. Even if both the

[90] Carlotto, Ilaria. 'I Beni Comuni e i Regolamenti per l'amministrazione Condivisa'. *La Sussidiarietà Orizzontale Nel Titolo V Della Costituzione e La Sussidiarietà Generativa*, edited by Remo Realdon, Cedam, 2018, pp.214-218.

[91] Up to date, there seems to have been only one case of appeal, which occurred on a collaboration agreement in Bologna and that regarded the protection of third parties not included in one Collaboration agreement. The case was submitted to an administrative judge, who acknowledged its jurisdiction. See further on that Muzi, Laura. 'L'amministrazione Condivisa Dei Beni Comuni Urbani: Il Ruolo Dei Privati Nell'ottica Del Principio Di Sussidiarietà Orizzontale'. *La Rigenerazione Di Beni e Spazi Urbani*, edited by Francesca Di Lascio and Fabio Giglioni, Il Mulino, 2017, pp.134-137.

[92] For the diverse interpretations of doctrine on the nature of the Collaboration agreements an all-embracing analysis was carried out in Giglioni, Fabio. 'Le Città Come Ordinamento Giuridico'. *Istituzioni Del Federalismo*, no. 1, 2018, pp.55-70. For the most recognised positions, on the first interpretation linked to private law the reference goes to Arena, Gregorio. 'Democrazia Partecipativa e Amministrazione Condivisa'. *Le Regole Locali Della Democrazia Partecipativa. Tendenze e Prospettive Dei Regolamenti Comunali,* edited by Alessandra Valastro, Jovene, 2016, pp.235-237; of the same idea is Cerulli Irelli, Vincenzo. 'L'amministrazione Condivisa Nel Sistema Del Diritto Amministrativo'. *L'amministrazione Condivisa*, edited by Gregorio Arena and Marco Bombardelli, Editoriale Scientifica, 2022, p.29. On the opposite side, for the classification of the collaboration agreements as agreements of public law we would refer to the observations on Article 11, law no.241/1990 as an archetype ("norma archetipo") in Giglioni, Fabio, and Andrea Nervi. *Gli Accordi Delle Pubbliche Amministrazioni*. Edizioni Scientifiche Italiane, 2019, pp.33-43, 272-276. The two

perspectives take as a reference point Law no.241/1990 on the administrative procedure, the first one is rooted in Article 1 (paragraph 1-bis) affirming that the public administration, when adopting acts of a non-authoritative nature, operates accordingly to private law, while the second one links them to Article 11 of the same law, which refers to agreements between the public administration and private actors[93]. A third perspective[94], connects them to the law on public contracts and public procurements, in specific to the institute of the public-private partnerships (PPPs), perceiving the collaboration agreements as innovative forms of PPPs where the partnership is occurring not only between public and private interests, but also with civic ones[95]. According to what emerges from the debate, the legal nature of this innovative tool should be further investigated, as to date there is not a solid and concordant view among scholars. As it has been put forward[96], however, it could also be the case for this new legal tool to take on in the future an independent nature related to its capacity to contribute to the governance of local authorities, without the need to link it to existing legal norms.

The *Collaboration agreement* represents, as described so far, an institutionalized recognition of autonomous initiatives of citizens who are willing to enter into a more equal relationship with public authorities on matters of general interest. Notwithstanding the still unclear classification of the instrument, it appears significant that it constitutes a fully-fledged area of liberty at the borders between private law and public law concerning all what can be defined as general interest, where the role of the community is emerging beyond the dualism State and market[97]. Among the challenges of this legal tool – additionally to a proper classification – time and practice and further research will be able to address, on one side, its capacity to engage with citizens who find themselves in areas

authors see the *accordo* of Article 11 (law no.241/1990) as a negotiation between public administrations and private subjects that, accordingly to a hybrid system, would operate at the border between private law and public law: considered in this way, they see in the *accordo* a great innovative potential still unexplored, that could also include all those relationships grounded in Article 118(4) of the Constitution. More recently see Giglioni, Fabio. 'Forme e Strumenti Dell'amministrazione Condivisa'. *L'Amministrazione Condivisa*, edited by Gregorio Arena and Marco Bombardelli, Editoriale Scientifica, 2022, pp.86-93.

[93] This different perspective on the nature of the tool is also reflected in the texts of the municipal Regulations, each city defining them accordingly to Article 1 or Article 11 according to their own view.

[94] This is the position advanced in Iaione, Christian, and Elena de Nictolis. 'The Role of Law in Relation to the New Urban Agenda and the European Urban Agenda'. *Law and the New Urban Agenda*, edited by Nestor M. Davidson and Geeta Tewari, Routledge, 2020, p.61.

[95] The two authors refer to what could be referred to as public-community partnerships.

[96] Michiara, Paolo. 'I Patti Di Collaborazione e Il Regolamento per La Cura e La Rigenerazione Dei Beni Comuni Urbani. L'esperienza Del Comune Di Bologna'. *Aedon*, no. 2, 2016, pp.16-17.

[97] See footnote no.61 in this Chapter.

of protest, extra-institutional forms of actions, or indifference[98] and, on the other, its adequacy and flexibility in being of use in a wide diversity of situations and initiatives.

3. The recognition of the model by the Constitutional Court: judgement no.131/2020

Judgement no.131/2020 of the Constitutional Court already found a mention in our research with reference to the concept of general interest and social liberties[99]. Its innovative contribution goes however much beyond that, as it is becoming the landmark judgement for the model of *Shared administration* itself. The ruling came as a consequence of a constitutional review promoted by the national government against a regional law that, through the provision of the use of Article 55 of the third Sector Code also for community cooperatives, supposedly extended the list of third Sector subjects to these new subjects in the absence of a national law on them[100]. The real interest in this judgement is sparked by the judicial reasoning, where the Court had the chance to elaborate more on many aspects related to the dispute: namely the relationship between public authorities and third sector organisations (based on Article 55, third Sector Code), the principle of horizontal subsidiarity, activities of general interest, social liberties, the model of *Shared administration*, and the relation with EU law.

Starting from the interpretation of Article 55 that states that public administrations have an obligation[101] to include third sector organisations in the co-planning and co-design of activities of general interest, the Court said that this form of collaboration constitutes to date one of the most significant applications of the constitutional principle of horizontal subsidiarity. Since the publication of this judgement, third sector organisations and public authorities, therefore, should favour a collaborative and not competitive relationship among them: as it has been written, this judgement constitutes the beginning of a constitutional

[98] Bartoletti, Roberta, and Faccioli, Franca. 'Public Engagement, Local Polities, Civic Collaborations'. *Social Media + Society*, 2016, p.7.

[99] See paragraphs 3.2 and 3.3 in Chapter 4.

[100] The question was eventually declared unfounded by the constitutional review of the Court, as community cooperatives ("cooperative di comunità") have to be included within social enterprises ("imprese sociali").

[101] Rossi, Emanuele. 'Il Fondamento Del Terzo Settore è Nella Costituzione. Prime Osservazioni Sulla Sentenza n. 131 Del 2020 Della Corte Costituzionale'. *Forum Di Quaderni Costituzionali*, no. 3, 2020, p.53.

law of the third sector[102], with the third sector organisations having been recognized as direct enhancers of the constitutional principle of horizontal subsidiarity. At the same time, the Court recognized that this is not the only application of Article 118(4) Constitution. The Court also acknowledged the value of other subjects that do not belong to the third sector[103], underlining how individuals' creativity for implementing actions of solidarity took many different forms throughout history. The introduction of horizontal subsidiarity in the Constitution, indeed, enabled the legal system to go beyond the idea that only public authorities are entitled to deal with the general interest, recognizing the role that active citizens can also play in that with their autonomous initiatives. The Court recognized, however, the need for a legislative intervention on the regulation of active citizens' autonomous initiatives, since up to date there hasn't been any, with Article 118(4) of the Constitution being the only reference point[104].

The second major point of reflection elaborated by the Court consists in the recognition of a channel of *Shared administration* ("*un canale di amministrazione condivisa"*) between public authorities and third sector organisations, which is alternative to the one of the market since it assumes a diverse model of action not founded on utilitarian exchanges, but on solidarity actions based on mutual exchanges. The area of application is therefore a new and unexplored one, paving the way for public-private relationships based on a logic of sharing and mutual consent[105]. As it has been claimed[106], this leading case made the model of *Shared administration* an integral part of the Italian Constitution, even if so far the Court set up the framework only for third sector organisations, and not also for individual active citizens. The clear recognition of active citizens' contribution to their community with activities of general interest should be seen, indeed, as the next frontier for development in the legislation and in the jurisprudence of the Court.

[102] Gori, Luca. 'Sentenza 131/2020: Sta Nascendo Un Diritto Costituzionale Del Terzo Settore'. *Impresa Sociale*, 2020; Rossi, Emanuele. 'Il Fondamento Del Terzo Settore è Nella Costituzione. Prime Osservazioni Sulla Sentenza n. 131 Del 2020 Della Corte Costituzionale'. *Forum Di Quaderni Costituzionali*, no. 3, 2020.

[103] Constitutional Court judgement no.131/2020, para 2.1. Gori, Luca. 'Terzo Settore Come Protagonista Dell'attuazione Della Costituzione'. *Terzo Settore e Pubblica Amministrazione. La Svolta Della Corte Costituzionale*, edited by Silvia Pellizzari and Carlo Borzaga, Euricse, 2020, p.39.

[104] Gori, Luca. 'Terzo Settore Come Protagonista Dell'attuazione Della Costituzione'. *Terzo Settore e Pubblica Amministrazione. La Svolta Della Corte Costituzionale*, edited by Silvia Pellizzari and Carlo Borzaga, Euricse, 2020, p.39.

[105] Pellizzari, Silvia. 'Sentenza 131/2020: Attuare Con Responsabilità l'art. 55 Del Codice Del Terzo Settore'. *Rivista Impresa Sociale*, 2020.

[106] Giglioni, Fabio. 'L'Amministrazione Condivisa è Parte Integrante Della Costituzione Italiana'. *Labsus*, 2020.

A third crucial part of this leading case has to be found in the idea of a third space beyond the dualism between the State and the market that is constituted by the organization of social liberties, a space where relationships are designed so as to implement solidarity. In this sense, it is interesting how the reasoning of the Court glances at EU law, claiming that supranational law recognizes not only the principle of competition, but also the one of solidarity. In this regard, the Court believes that member States have a competence to create organizational models inspired not by competition, but by solidarity with concern to all those activities that have a strong social significance[107]. The EU principle of solidarity is, indeed, recognized by the Court as the reference point in EU law for all those experiences related to a social commitment. Moreover, solidarity is used by the Court as an additional reinforcement of the principle of horizontal subsidiarity.

One last element requires a short consideration: despite the fact that the judgement does never mention the word 'common goods', nevertheless this should be considered as implicit in so far as the Court referred to the model of *Shared administration* in the way we have illustrated. Following a logical thread, we can say that since the Court has traced the channel of *Shared administration* back to the EU principle of solidarity, and that in turn *Shared administration* has been concretised through concrete initiatives on the commons, then we could argue that implicitly the commons themselves can find constitutional coverage under the EU principle of solidarity. For the purposes of our research, this judgement with all the aspects underlined constitutes, therefore, a substantial and solid landmark useful for moving forward on the path to answer to our research question, and we will come back to this in Chapter 7.

4. Defining cities and a new facilitating role for them

As previously explained, the Regulation represents the practical application of the principle of horizontal subsidiarity without the need for any legislative intermediation. The Bologna Regulation has been intentionally conceived as a pilot Regulation, and as such became a prototype for also other local authorities that adopted it and adapted it according to local needs: in this sense, it should be regarded more as a statutory regulation, rather

[107] Corte Costituzionale no.131/2020, paragraph 2.1. Gori, Luca. 'Terzo Settore Come Protagonista Dell'attuazione Della Costituzione'. *Terzo Settore e Pubblica Amministrazione. La Svolta Della Corte Costituzionale*, edited by Silvia Pellizzari and Carlo Borzaga, Euricse, 2020, p.38.

than as a procedural one[108]. Together with the *Collaboration agreement* tool, the Regulation is perceived as an instrument that, despite being a mere administrative act, has the potential of reforming bottom-up the governance of local governments[109], shifting the focus from the mere administration to the relationship between the State at all its levels and citizens. From the State's perspective, the key role in this collaborative relationship with citizens advocated by the Regulation is led by local authorities: they are, indeed, turning out to be at the forefront of the experimentation of a new transnational law of cities[110], that in Italy has found a constitutional cover in horizontal subsidiarity. The relationship derived from that is built as a collaboration between autonomies (the public autonomy and the civic one), and is elaborating an 'informal public law' able to be creative and innovative in coexistence with the positive law[111]. The idea of an informal public law refers to a concept used for defining the capacity of Italian cities to give a juridical cover to informal experiences of the local community, as among the others the model of *Shared administration* is doing. Social practices of the local community, indeed, have always been considered as outside the legal system for not being rooted in the positive law. On the opposite, the concept of informal public law is a label willing to capture social experiences already happening that have value for the community and bring them under a legal cover. Five are indeed the models of informal public law that have been identified in the Italian context that are useful for understanding the relationship between the State and citizens' experimentations[112]. The first model, defined 'the tolerance model', consists in all those situations where social experiences devoted to the community are simply tolerated by public authorities even if they are formally illegal[113]. The second model, defined 'the

[108] Of this opinion Michiara, Paolo. 'I Patti Di Collaborazione e Il Regolamento per La Cura e La Rigenerazione Dei Beni Comuni Urbani. L'esperienza Del Comune Di Bologna'. *Aedon*, no. 2, 2016, p.9.

[109] Michiara, Paolo. 'I Patti Di Collaborazione e Il Regolamento per La Cura e La Rigenerazione Dei Beni Comuni Urbani. L'esperienza Del Comune Di Bologna'. *Aedon*, no. 2, 2016, p.8.

[110] On the idea of a transnational law of cities see Giglioni, Fabio. 'L'Unione Europea per Lo Sviluppo Dei Beni Comuni'. *Labsus*, 2015, https://www.labsus.org/2015/09/unione-europea-per-lo-sviluppo-dei-beni-comuni/.

[111] On the concept of informal public law (*diritto pubblico informale*) see Giglioni, Fabio. 'Order without Law in the Experience of Italian Cities'. *Italian Journal of Public Law*, vol. 9, no. 2, 2017, pp. 291–309, and Giglioni, Fabio. 'Il Diritto Pubblico Informale Alla Base Della Riscoperta Delle Città Come Ordinamento Giuridico'. *Rivista Giuridica Dell'edilizia*, 2018, pp.3-21. See previously footnote no. 251 in Chapter 3.

[112] For the elaboration on the first four models *see* Giglioni, Fabio. 'Order without Law in the Experience of Italian Cities'. *Italian Journal of Public Law*, vol. 9, no. 2, 2017, pp.295-300. See Giglioni, Fabio. 'Nuovi Orizzonti Negli Studi Giuridici Delle Città'. *Città, Cittadini, Conflitti: Il Diritto Alla Prova Della Dimensione Urbana*, edited by Alessandro Squazzoni et al., Giappichelli, 2020, pp.19-20 for the additional fifth one.

[113] This is the case, for example, of the Baobab Centre experience in Rome, where a group of associations starting from the year 2004 occupied an abandoned private area in order to provide assistance to a significant number of migrants in transit through Rome. Public authorities, unable to assist those people,

recognition model', is the one where public authorities have formally recognized the value of a specific social experience even if for a temporary period of time. The third model has been called as 'the original legal qualification model' and refers to the formal recognition *ex post* by public authorities of social experiences of general interest[114]. The fourth model is the one represented by the Collaborative agreements within *Shared administration*, where the legitimacy of the informality principle[115] of this innovative tool of public law is ensured by the Regulation and the Constitution itself. The fifth model refers to the 'reuse of assets in transition', and is aimed at targeting all those assets that are going through a process of change in their property regime (for example, public goods undergoing a privatization process, or confiscated assets to organized crime shifting from a private to a public ownership). The informal relations receiving a juridical and constitutional cover under the principle of horizontal subsidiarity represent, indeed, a new perspective for public law[116], where forms of civic participation in deciding and in doing are shaping a new relationship between citizens and the State outside mere positive law.

At this point of our investigation what is needed is an explanation for our usage of the terms 'cities', 'municipalities' and 'local authorities' within Part II, used until here in an interchangeable way for referring to the local level of government within the Italian legal order. The reason for that is that actually – in a similar way to the transformations occurring at the local level in the European legal space as we saw in Chapter 3 – we find ourselves in a field that is still blurred. On one side, it seems to be preferable to use the term local authorities in accordance to the term used by the Congress of Local and Regional Authorities of the Council of Europe in elaborating the 1985 Charter[117], also for recalling the emphasis on their right to local self-government (the inclusion of national entities within the term local authorities was let to individual member States, for Italy being municipalities, provinces, metropolitan cities[118]). On the other side, despite the fact that

for a certain period did not enforce positive law, *de facto* tolerating that informal and illegal activity of help (however, in the latest years many have been the clearing out of the activities: see the story at https://baobabexperience.org/presidi/).

[114] This is the Neapolitan case (see paragraph 1 of this Chapter).

[115] The informality principle is enshrined in the Bologna Regulation and in the Regulation prototype among the general principles (Article 3), where it is stated that the collaboration between active citizens and public authorities occurs in a formal way *only* in those cases when it is required by law, while flexibility and naturalness should be granted in all the rest of cases.

[116] Giglioni, Fabio. 'Order without Law in the Experience of Italian Cities'. *Italian Journal of Public Law*, vol. 9, no. 2, 2017, pp.308-309.

[117] For an overall account on the Charter in relation to the principles of participation, local self-government and subsidiarity we may refer to paragraph 4 in Chapter 2, and paragraph 3 in Chapter 3.

[118] The internal structure and organisation of Italian local authorities is regulated exclusively by ordinary legislation, and not from the Constitution itself. The reference point is law no.267/2000 (D.lgs. 18 agosto 2000, n. 267 *Testo unico delle leggi sull'ordinamento degli enti locali*, also referred to as the TUEL),

until nowadays the Regulation has been adopted by also metropolitan cities (almost all of them[119]) and by some local authorities' associations (mountain communities, and unions of municipalities)[120], it is undeniable that the great majority of local authorities that have adopted the Regulation consist in municipalities. In line with this, it may be recommendable to refer to municipalities as the promoter of this new relationship between the State and citizens. However, alongside with these terms, it cannot remain unnoticed that there is a growing convergence in the literature as well as in institutional practices in the use of the term cities[121], for referring to a 'law of cities' ("diritto delle città")[122] that goes beyond mere administrative units, where cities are perceived as communities of citizens worth receiving an autonomous attention by the legal doctrine[123]. In the light of that, we will

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where local authorities are defined as the six listed entities at Article 2 (together with municipalities, provinces and metropolitan cities, the TUEL includes also three types of local authorities' associations: mountain communities, island communities, unions of municipalities). The concept of local self-government is enshrined at Article 3(1) with the statement that *"the local communities, organised in municipalities and provinces, are autonomous"*.

[119] Torino, Milano, Genova, Bologna, Venezia, Firenze, Bari, Reggio Calabria. The city of Rome is undergoing a process of adoption of its own Regulation in the beginning of the year 2023 (last update: 31 January 2023).

[120] Last update on 2 November 2021, at https://www.labsus.org/i-regolamenti-per-lamministrazione-condivisa-dei-beni-comuni/.

[121] As described in paragraphs 5 and 6 in Chapter 3.

[122] Referring to the law of cities is not the same as the concept of "the right to the city". With right *to* the city the reference goes to the renowned Marxist inspired contribution of Henri Lefebvre on *Le Droit à la Ville* in 1968 (for the text in Italian see Lefebvre, Henri. *Il Diritto Alla Città*. Ombre Corte, 2013) where the author paved the way for a new perspective on cities as spaces for claiming individuals' urban rights to transform urban spaces as a fight against growing urban inequalities. On the same line is the contribution of Harvey, David. 'The Right to the City'. *International Journal of Urban and Regional Research*, vol. 27, no. 4, 2003, pp. 939-941, where he explains this right as a right of access and a right to make the city different.

[123] On those new ideas elaborating on a 'law of cities', on 'the city beyond the municipality', and more in general of a political autonomy of cities within the Italian legal doctrine see Giglioni, Fabio. 'Verso Un Diritto Delle Città. Le Città Oltre Il Comune'. *Diritto Delle Autonomie Territoriali,* edited by Enrico Carloni and Fulvio Cortese, Cedam, 2020, pp. 267-284; Cortese, Fulvio. 'Il Nuovo Diritto Delle Città: Alla Ricerca Di Un Legittimo Spazio Operativo'. *Smart City: L'evoluzione Di Un'idea*, edited by Giuseppe Franco Ferrari, Mimesis, 2020, pp. 79–103; Cortese, Fulvio. 'Dentro Il Nuovo Diritto Delle Città (Editoriale)'. *Munus*, no. 2, 2016, pp. v–xi; Giglioni, Fabio. 'I Regolamenti Comunali per La Gestione Dei Beni Comuni Urbani Come Laboratorio per Un Nuovo Diritto Delle Città'. *Munus*, 2016; pp. 271-313; Pizzolato, Filippo, et al., editors. *La Città e La Partecipazione Tra Diritto e Politica.* Giappichelli, 2019; Cavallo Perin, Roberto. 'Beyond the Municipality: The City, Its Rights and Its Rites'. *Italian Journal of Public Law*, vol. 5, no. 2, 2013, pp. 307–15; Giglioni, Fabio. 'Le Città Come Ordinamento Giuridico'. *Istituzioni Del Federalismo*, no. 1, 2018; Iaione, Christian. 'The Right to the Co-City'. *Italian Journal of Public Law*, 2017, pp. 80–142; Labriola, Giulia Maria. 'Città e Diritto. Brevi Note Su Un Tema Complesso'. *Istituzioni Del Federalismo*, no. 1, 2018, pp. 5–28; Pavani, Giorgia. 'From Smart to Sharing? Presente e Futuro Delle Città (al Di Là Delle Etichette)'. *Istituzioni Del Federalismo*, no. 4, 2019, pp. 849–59; Pizzolato, Filippo, et al., editors. *La Città Oltre Lo Stato*. Giappichelli, 2021. From an international and transnational perspective, research on this recently new-found centrality of cities in constitutional and administrative legal scholarship can be found, among the others, in Auby, Jean-Bernard. 'The Role of Law in the Legal Status and Powers of Cities. Droit de La Ville. An Introduction'. *Italian Journal of Public Law*, vol. 5, no. 2, 2013, pp. 302–06; Hirschl, Ran. *City, State: Constitutionalism and the Megacity*, Oxford, 2020; Arban, Erika. 'City, State: Reflecting on Cities in (Comparative) Constitutional Law'. *I•CON*, vol. 19, no. 1, 2021, pp. 343–57; De Visser, Maartje. 'The Future Is Urban: The Progressive Renaissance of The City in EU Law'. *Journal of International and Comparative Law*, vol. 7, no. 2, 2020, pp. 389–408. We already talked about that previously: see paragraphs 4 and 6, Chapter 3.

start using the terms city/cities for referring in a broad way to the local level of government dealing with innovative forms of civic participation.

Originated within a wider public law perspective[124], the idea of a law of cities has to be included within the transformations of public law in the current era in the wider European legal space (but also beyond that), and it should be considered as an important historical phenomenon regarding the political renaissance of cities as major levels of government (and governance). In the specificity of our case, the model of cities that Italian scholars are referring to is a more open and flexible one, where a bottom-up contribution of citizens (considered not only as those people having the legal *status*, but also as all those people living within the local community[125]) is giving space to innovations and experimentations at the local level[126]. When talking about cities, the reference in fact doesn't go restrictively to the 14 metropolitan cities established by the Italian law in accordance to the Constitution[127], but to a wider concept beyond metropolitan cities and municipalities building on the original distinction in Roman law between *urbs* and *civitas*[128]. While the *urbs* was used to refer to the urban physical dimension of a city or municipality (what is nowadays the object of study for the discipline of urban law), *civitas* was the term used for the exercise of citizenship rights by Roman citizens. The concept of *civitas* itself is also wider than the one of *polis*: while the Greek *polis* was a closed entity granting rights only to people of the same origin, the Roman *civitas* referred to a wider idea of city where people are subject to the same law[129]. This emphasis on the role of the citizens and

[124] See our previous paragraph 6 in Chapter 3.

[125] This wider understanding of the concept of citizenship should shift from the need for a political participation to the opportunity of participate in activities of general interest through practical actions of care for the urban commons. This collaboration with public authorities could facilitate the social inclusion of non-citizens within local communities, giving therefore a new perspective to the integration of regularly resident migrants. This perspective is recalled by the concept of 'administrative citizenship', mentioned in footnote 109 in Chapter 4. Of this opinion Bonomo, Annamaria. 'L'inclusione Dei "Non Cittadini" Attraverso La Rigenerazione Urbana'. *Istituzioni Del Federalismo*, no. 1, 2020, pp. 187–206.

[126] Cortese, Fulvio. 'Dentro Il Nuovo Diritto Delle Città (Editoriale)'. *Munus*, no. 2, 2016, pp. v–xi.

[127] We are referring to law no.56/2014 (*Legge 7 aprile 2014, n. 56, Disposizioni sulle città metropolitane, sulle province, sulle unioni e fusioni di comuni*). The metropolitan cities in Italy are Bari, Bologna, Cagliari, Catania, Firenze, Genova, Messina, Milano, Napoli, Palermo, Reggio Calabria, Roma Capitale, Sassari, Torino, Venezia. On the process of (failed) reforms of local government in urban areas in Italy and, in particular, on the confusing discipline of metropolitan cities see Medda, Roberto. *Il Governo Locale Delle Aree Urbane in Italia*. Edizioni Scientifiche Italiane, 2022. For another critical discussion see Longo, Erik. 'Local Governments and Metropolitan Cities'. *Federalism and Constitutional Law The Italian Contribution to Comparative Regionalism*, edited by Erika Arban et al., Routledge, 2021, pp. 152–66.

[128] This observation was laid out in Giglioni, Fabio. 'Verso Un Diritto Delle Città. Le Città Oltre Il Comune'. *Diritto Delle Autonomie Territoriali*, edited by Enrico Carloni and Fulvio Cortese, Cedam, 2020, pp.267-269. The Italian correspondent for cities beyond municipalities is "città oltre il comune".

[129] On this observation on the two concepts of *civitas* and polis see Curi, Umberto. 'Alle Radici Dell'idea Di Città'. *La Città e La Partecipazione Tra Diritto e Politica*, edited by Filippo Pizzolato et al., Giappichelli, 2020, pp. 3–7, where the scholar points to the concept of *civitas* and not to the one of *polis* as the one that should serve as an inspiration for the future city.

communities has to be underlined by the consciousness that cities are not only the creation of States (which they even precede with their history dating back to Greek cities, Roman cities, and eventually Medieval European towns[130]), but also of individuals living there[131]. Originally conceived as bulwarks of defence of individuals' freedoms against the intrusion of the State, the current idea of a law of cities claims that the advantage of decentralising more powers to cities would be *"the possibility of experimentation, of local laboratories*[132]**"** where to allow a greater participation of citizens through democratic city institutions[133].

In this sense, Italian cities seem to be on their way to become these local laboratories for a collaborative relationship between citizens and public authorities, able to grant a juridical cover to informal activities of CPC. There seems to be a need to open up to juridical innovations in public law coming from sources outside the positive law[134]: we are referring to all those experiences that are being created not accordingly to legislation, but to their social context and that are given a juridical value thanks to the constitutional principle of horizontal subsidiarity. This innovative system of rules overlook the law as a formal legal source of the legal system, so as to affirm a more effective order with regard to the general interest of citizens and their communities:[135] it is important to notice, however, that this informal public law[136] is still based on the involvement of public authorities. A juridical importance to social experience could be given, indeed, not only by

[130] As depicted in paragraph 1 of Chapter 3.

[131] In this sense, it is of interest to mention the well-known contribution of Frug, G. E. 'The City as a Legal Concept'. *Harvard Law Review*, vol. 93, no. 6, 1980, pp.1059-1154, where he deplores the powerlessness of cities, which as a consequence prevents the realisation of public freedom, conceived as the ability of people to actively participate in societal decisions affecting their lives (p.1068). He states that *"State law […] treats cities as mere creature of the State"* (p.1063*), "yet they were also partly creations of the individuals who lived within them"* (p.1076). Worth noticing and in line with the concept of "city" currently under our investigation is the author's definition of "city" as a wide concept including *"towns and any other local government entity"* (p.1061). He also reflects on the importance of civic participation in cities *("why are cities today governed as bureaucracies, rather than as experiments in participatory democracy?"*, p.1073).

[132] Frug, G. E. 'The City as a Legal Concept'. *Harvard Law Review*, vol. 93, no. 6, 1980, p.1151.

[133] Frug, Gerald E. 'Empowering Cities in a Federal System'. *The Urban Lawyer*, vol. 19, no. 3, 1987, pp. 553–68. The author stresses the need to change our perspective on cities: from the issue of division of powers and request for autonomy, the crucial question should become how to create democratic inter-local relationship between citizens and the city. In this sense, he points to civic participation as the suggested perspective. Similar considerations on the fact that true decentralisation goes beyond mere organizational criteria, but refers to citizens' liberties and capacity to participate at the local level are to be found in Nobile, Vanessa. 'Autonomie Locali. La Sfida Dell'autogoverno Tra Rappresentanza e Partecipazione'. *La Città e La Partecipazione Tra Diritto e Politica*, edited by Filippo Pizzolato et al., Giappichelli, 2019, pp. 119–31.

[134] This very important reflection is to be found in Giglioni, Fabio. 'I Regolamenti Comunali per La Gestione Dei Beni Comuni Urbani Come Laboratorio per Un Nuovo Diritto Delle Città'. *Munus*, 2016, where the scholar observes how the roots of EU law are to be found not only in the rule of law, but also in a pluralism of other sources that deserve our recognition.

[135] Giglioni, Fabio. 'Il Diritto Pubblico Informale Alla Base Della Riscoperta Delle Città Come Ordinamento Giuridico'. *Rivista Giuridica Dell'edilizia*, 2018, p.14.

[136] See also footnote no.111 in this Chapter.

legislative acts, but also by the work of jurisprudence and doctrine, and this is the case for all the spontaneous initiatives of CPC carried out by active citizens in collaboration with (local) public authorities in Italy. Local authorities in Italy are, therefore, experimenting their right to local self-government through a bottom-up approach based on active citizens' initiatives for the general interest. In the light of this focus on local authorities' right to self-government (that as we already saw constitutes their local autonomy), it is possible for us to use the term 'cities' for giving more value to them as political communities beyond mere administrative boundaries and nation-states' categorisation.

All things considered, it can be stated that cities, in their wider meaning, have to be considered as the proper habitat where constitutional liberties but also duties of solidarities of individuals take place[137], and as the new dimension for political participation of citizens through all those activities of general interest that are moving beyond the mere representative tools[138]. Within the emerging field of the law of cities, cities – small ones, medium, big, and mega cities – are considered as political spaces custodian of pluralism[139], able to resist the risk of national closure thanks to civic participation at the local level. Italian cities are the space of urban commons, and they can even be considered as commons themselves[140]. The emerging field of the law of cities that is being experimented at the local level in Italy is proving cities to be at the frontier in the enhancement of democracy through the supportive and promotional role[141] of legal instruments and of public authorities, which is taking place through the public support

[137] Pizzolato, Filippo. 'La Città Come Dimensione Del Diritto e Della Democrazia'. *La Città e La Partecipazione Tra Diritto e Politica*, edited by Filippo Pizzolato et al., Giappichelli, 2019, p.34. See also Bertolissi, Mario. 'L'habitat Della Democrazia'. *La Città e La Partecipazione Tra Diritto e Politica*, edited by Filippo Pizzolato et al., Giappichelli, 2019, pp. 21–30.

[138] Scalone, Antonino. 'Le Aporie Della Rappresentanza e La Dimensione Locale'. *La Città e La Partecipazione Tra Diritto e Politica*, edited by Filippo Pizzolato et al., Giappichelli, 2019, pp. 47–57.

[139] Labriola, Giulia Maria. 'Città e Diritto. Brevi Note Su Un Tema Complesso'. *Istituzioni Del Federalismo*, no. 1, 2018, pp. 5–28.

[140] On the idea of the *city as a commons* itself see further Iaione, Christian. 'Città e Beni Comuni'. *L'Italia Dei Beni Comuni*, edited by Gregorio Arena and Christian Iaione, Carocci, 2012, pp.109-150; Iaione, Christian. 'La Città Come Bene Comune'. *Aedon*, 2013; Arena, Gregorio. 'Le Città Come Beni Comuni'. *Labsus*, 2013; Foster, Sheila R., and Christian Iaione. 'The City as a Commons'. *Yale Law Policy Review*, no. 34, 2016, pp. 281–349; Arena, Gregorio. 'Un Nuovo Diritto per l'amministrazione Condivisa Dei Beni Comuni'. *La Città Come Bene Comune*, edited by Tommaso dalla Massara and Marta Beghini, Edizioni Scientifiche Italiane, 2019, pp. 1–13. Further in Foster, Sheila R., and Christian Iaione. 'Ostrom in the City. Design Principles and Practices for the Urban Commons'. *Routledge Handbook of the Study of the Commons*, edited by Blake Hudson et al., Routledge, 2019, p.240 the two authors elaborate 5 design principles for the urban commons: 1)collective governance or co-governance; 2)enabling state, which *"expresses the role of the state (usually local public authorities) in facilitating the creation of urban commons and supporting collective governance arrangements for the management and sustainability of the urban commons";* 3)social and economic pooling; 4) experimentalism; 5) tech justice. See also further footnote no.21 in Chapter 6.

[141] On this promotional role of the law see Giglioni, Fabio. 'Le Città Come Ordinamento Giuridico'. *Istituzioni Del Federalismo*, no. 1, 2018, p.53, and further references.

given to active citizens taking action for the general interest within the framework of the *Shared administration* of the commons. In conclusion, the collaboration occurring between active citizens and public authorities in Italian cities cannot be considered as a mere issue of administration, as a consequence of the fact that it is shaping a totally different concept of relationship between the State and its citizens. This goes beyond the formal borders between constitutional law, administrative law[142], urban law (and other disciplines). In thise sense, a new light is shed on the creative role of the law itself, of cities, and citizens for actions related to the general interest of a community, in a wider dimension of (local) governance.

5. CPC in Italian cities: conclusive remarks

Coming to an end of Part II on the Italian experience, it gets clearer how its constitutional and organizational contribution are consolidating and outlining a new form of civic *participation in doing*: namely, a civic participation through the commons (CPC). The model of *Shared administration* in this sense is a model that has the advantage of institutionalising social practices of CPC and giving them legal cover. The constitutional principle of horizontal subsidiarity in Article 118(4) constitutes a clear and solid constitutional anchorage for this new form of civic participation. As it has been described, citizens' *participation in doing* does not exclude the decision-making aspect, as a phase of co-design is included within the procedure leading to the signature of a collaborative agreement. Contrary to the concept of *participation in deciding*, the added value of the *participation in doing* lies, therefore, in the chance for citizens to additionally implement with practical actions themselves what has been agreed. Notwithstanding the fact that the legal tool of the Collaboration agreement is still fairly new, leaving so unsolved questions related to its real usefulness and impact[143], it is turning out to be a space for bottom-up

[142] Cortese, Fulvio. 'Dentro Il Nuovo Diritto Delle Città (Editoriale)'. *Munus*, no. 2, 2016, p.xi. The author is particularly aware on the challenge of going beyond the division between constitutional law and administrative law, in a wider public law perspective.

[143] It could be argued that creating a new legal tool is not actually needed as the same aim could be reached with already-existing instruments; additionally, also the impact of the tool could be questioned, as doubts related to its capacity to make a real change in the collaboration between citizens and public authorities could be raised. It may be still too early to provide a positive or negative evaluation: what emerges, however, from the data collected from the only national level investigation that has been carried out every year since 2015 on the development of the model (by *Labsus-Laboratorio per la sussidiarietà*), is a fast and growing spread of the model with the Regulation and the Collaborative agreement tools, leading to the penetration of this new collaborative culture within many public authorities and active citizens themselves. Additionally, another interesting observation was pointed out in the study conducted in Iaione,

innovations, creating a free-zone where collaboration and negotiation is possible beyond divisions and ideologies. Collaboration agreements seem to be spaces able to unite people around a general interest, where each person can exercise their liberty in contributing to the community. Individuals and their active and social liberty are at the core of this new form of civic participation, supported by a new facilitative role of public authorities (and a more creative administration) grounded on horizontal subsidiarity. This is also eventually drawing the contours of a different type of democracy based on citizens' initiatives for the general interest. It may even be the case that instead of *Shared administration* it would be better to refer to a shared governance, where the role of cities is to foster their citizens' capabilities. The Italian specificity is that, unlike other similar experiences which exist usually within mere projects, since 2001 there are a solid constitutional linkage and a juridical framework with its own instruments (the Regulation and *Collaboration agreements*) with the capacity to transform community experiences into juridical and institutional ones.

It is true that there are still obscure and precarious aspects related to the case of Italian cities. Among the others, first and foremost the major critique is that there are cases of misapplication and misunderstanding of the two instruments of the Regulation on the commons and the *Collaboration agreements* by public authorities in so far as the adoption of the Regulation in some cases constitutes a *"cut and pasting of laws"*. This is true in so far as some cities "*have uncritically adopted the regulations, without attention to the local context"*[144], and therefore they have not really understood the paradigm shift underneath, but have implemented a mere façade attempt. Second, sometimes the Collaboration agreement tool is seen by citizens according to a mere private interest perspective allowing them to avoid using traditional competitive procedures, and not according to the different subsidiarity logic underneath. Third, this (subsidiarity) paradigm shift is likely to occur in social contexts that have certain favourable features and not in others, therefore raising the question of objective cultural difficulties. Lastly, the fourth major precarious

Christian, et al. 'Valutare: La Valutazione Dei Patti Di Collaborazione'. *Culture e Pratiche Di Partecipazione*, edited by Roberta Paltrinieri, FrancoAngeli, 2020, pp. 67–99, where the evidence collected proves the effectiveness of *Collaboration agreements* in engaging citizens that never undertook previous initiatives of pcivic participation. While in the short term it could still be seen as a minor innovation, only future research (and bottom-up practices) will be able to give a major assessment of this silent revolution of active citizens in Italian cities. The term 'silent revolution' comes from Giordano, Filippo Maria. 'Una Rivoluzione Silenziosa Percorsi: Quando La Democrazia Incontra l'amministrazione Condivisa'. *Labsus*, 2019. For the 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022 Labsus annual reports see www.labsus.org.

[144] As observed by Foster, Sheila R., and Christian Iaione. 'Ostrom in the City. Design Principles and Practices for the Urban Commons'. *Routledge Handbook of the Study of the Commons*, edited by Blake Hudson et al., Routledge, 2019, p.246.

aspect is the way in which the organisational model of *Shared administration* anchored in the principle of subsidiarity is in fact taking hold: that is, from below, and in the absence of a state law to provide a legislative framework. As we saw, the state law on the third sector, two regional laws, and the Constitutional Court contributed in fundamental ways to building up a constitutional and legal framework around this model: this, however, should not be considered enough for ensuring future stability and dissemination of the model.

Notwithstanding that, the research wanted to capture in these pages this wide process of change taking place in the Italian context. This is happening primarily thanks to the constitutionalisation of the horizontal meaning of subsidiarity, and equally to an increasingly close attention by a vast amount of Italian public law scholars, which are creatively rethinking legal paradigms and suggesting new categories (among others, 'law of cities', and 'informal public law') according to emerging phenomena, needs, and opportunities coming from the urban social context. The Italian case, in fact, shows that social practices can generate normative changes, and from being unrecognised can bring new legal order thanks to innovative answers being created by the legal scholarship (for example, the theorisation of the model of *Shared administration* of the commons), the jurisprudence (for example, judgement no.131/2020 by the Constitutional Court), by the legislation (for example, the two regional laws on the shared governance of the commons by Toscana and Lazio). Additionally, the on-going process of definition of a so called *law of cities* is shedding light on practices of informal public law, that in this way may receive recognition despite being outside positive law boundaries. This however should not lead to the assumption that the positive legal order should be substituted. On the opposite, the idea of a law of cities capable of capturing and recognizing from a legal perspective the value of experiences of informal public law aims at finding its place in parallel and complementary to the order coming from positive law that, as such, is not capable of capturing the whole manifestations of those social practices able to have an impact as societal rules. The two orders of positive law and informal public law, therefore, should be considered both within and under the wider cover of the Constitutional order[145]: the essential difference in the two of them lies in the different source of democratic legitimation, that in the case of positive law may be traced back to the channel of representation, while in the law of cities – we argue – to the channel of civic participation. It needs to be emphasised that the focus on cities and urban areas does not mean that the

[145] For this important reflection we may refer further to Giglioni, Fabio. 'Nuovi Orizzonti Negli Studi Giuridici Delle Città'. *Città, Cittadini, Conflitti: Il Diritto Alla Prova Della Dimensione Urbana*, edited by Alessandro Squazzoni et al., Giappichelli, 2020, p.45.

same (subsidiarity) paradigm shift may not occur also in rural areas: indeed the model of *Shared administration* can also be applicable to the relationship between public authorities and citizens in rural areas, but, however, we focus on cities because a general phenomenon of urbanisation is occurring everywhere, and that is leading to a greater concentration of problems and challenges in cities (as we saw in Chapter 3)[146].

In conclusion, although the time is still too early to give an assessment of the concrete impact that this new form of civic participation (a CPC) based on horizontal subsidiarity has on democracy, the overview we have given in Part II is intended to report some essential objective data of this cultural process in the Italian social and legal context. That is, in a nutshell, more than 280 cities having adopted the Regulation for the *Shared administration* of the commons, and thousands of *Collaboration agreements* being signed between local authorities and active citizens within this new subsidiarity paradigm. Within this constitutional and legal framework, five could be defined in a nutshell as the main pillars coming from the Italian case that could contribute to our research: 1) the principle of horizontal subsidiarity and its essential implementation through a supportive role of public authorities towards citizens' initiatives for the general interest; 2) the practical implementation of horizontal subsidiarity through the organizational model of *Shared administration* (consisting of the Regulation and *Collaboration agreements*); 3) an action-oriented innovative form of civic participation supported by *Shared administration*: namely, a civic participation through the commons (CPC); 4) the EU principle of solidarity as the reference point for this new type of collaboration occurring between public authorities and citizens based on *Shared administration*; 5) the emergence of the city as a legal category looking beyond administrative boundaries, where informal activities could be given legal value outside positive law, under the cover of an informal public law. With all its limitations, we consider the case of Italian cities paradigmatic for its ability to respond to new challenges and phenomena through, on the one hand, a solid anchoring to constitutional principles, and on the other, a creative use of law.

[146] The same consideration was done with regard to EU cities as urban local authorities in contrast to rural local authorities: see footnote no.270 in Chapter 3.

Part III. Facing the commons challenge in EU cities

Chapter 6. EU cities as laboratories for the commons

1.The commons in the EU: objective difficulties of a debate in the making. 2.The commons and the EU legal order. 3.Commons initiatives in EU cities: a complex picture. 4.From problems to similarities of commons in EU cities.

1. The commons in the EU: objective difficulties of a debate in the making

In order to be able to come up with a full answer to our research question in the last step of our research (Chapter 7), this Chapter constitutes a necessary stepping-stone so as to be able to understand the overall context of the commons in cities around the EU. As we will argue, indeed, innovative forms of civic participation through the commons (CPC) are happening not only in Italian cities, but also in other cities around the EU. In looking at commons initiatives around the EU, our starting point is the case of all those Italian cities that have adopted the Regulation on the commons analysed in Part II. This case study was, indeed, fundamental in our research in order to show how this innovative form of civic participation can be institutionalised within a constitutional and legal framework, and to what extent that is paving the way for a new form of horizontal collaboration between cities and their citizens through the organizational model of *Shared administration*. As already argued[1] and as we will see in this Chapter, the case of Italian cities' constitutional and legal framework allowing them to support concrete initiatives of CPC constitutes a unique case in European legal studies on the commons. Moreover[2], the contribution of the Italian legal scholarship on the commons is relevant not only for the *Shared administration* model putting into practice the horizontal subsidiarity principle (which constitutes our case study), but also for two other main achievements, namely the draft law elaborated by the Rodotà Commission in 2007 containing a constitutionally oriented definition of the commons, and the Naples case with the declaration of urban civic and collective use of many common

[1] Paragraph 1 in Chapter 4.
[2] As seen in paragraph 1 in Chapter 5.

goods[3]. All together, these contributions of the legal scholarship put what we may call the 'Italian legal approach to the commons' at the forefront when talking about legal innovations on the commons in the European Union, but also beyond[4]. This introductory reminder is useful in so far as it seems possible to argue that, in our search for CPC in EU cities, no other process of institutionalisation has gone as far and as deep with concern to durability, dissemination, and entrenchment at constitutional, legislative and regulatory levels as the case of Italian cities' Regulations on the commons founded on the principle of horizontal subsidiarity[5]. As a consequence, we are referring to the commons in the EU as 'a debate in the making' since the overall picture is still too blurred to allow us to give a clear overview of the state of legal recognition of them, and untangling this matter is not easy at all. Nevertheless, we will try in this paragraph to give a general broad overview of the major current developments on the commons in the EU, using an essentially descriptive perspective on an issue that is still very fluid and non-legal.

Some preliminary considerations on problems and challenges must be expressed so that our field of investigation is delimited, and our analysis is handled with care. First of all, when looking at the commons in the EU we are overwhelmed by the question of definition: what is a 'commons', and to what extent it differs from the concepts of 'common goods' and 'common good', often used in the same sense? Not only, indeed, there is not a unique definition in the Italian context as we saw[6], but even more the supranational and the international contexts reflect the lack of one shared definition, providing rather for so many (non-legal) definitions that risk leading to the conclusion that if everything is a

[3] As seen in paragraph 1 in Chapter 5.

[4] For some introductory remarks on the peculiarity of the Italian experiences and scientific debate on the commons see Simonati, Anna. 'The (Draft) European Charter of the Commons - Between Opportunities and Challenges'. *Central European Public Administration Review*, vol. 16, no. 2, 2018, p.101. Additionally, it is interesting to report a reflection contained in Vercellone, Claudio, et al. 'Managing the Commons in the Knowledge Economy'. *d-cent Project*, 2015, https://shs.hal.science/halshs-01180341. The authors explain the uniqueness of the Italian legal contribution to the commons through the work of the Rodotà commission and the municipal Regulations on the commons (in addition to the grass-roots initiatives across the country of commoners) in this way: *"the historic inheritance of a tradition of decentralisation and local self-government that dates from the Revolution of the Comune in the 12th Century, the belated birth of a unified State and the fragility of its legitimacy, the intensity of social movements that have crisscrossed it since the crisis of Fordism, partly contribute to explaining why Italy is, in Europe, the place in which the same legal deliberation on common goods has been brought further ahead and faced in the most explicit way"*.

[5] This statement comes as a result of the search among contributions not only of the (very interdisciplinary) literature, but also of leading activists on the commons, and not only in the European but also international panorama.

[6] This is despite the fact that the one contained in the municipal Regulations on the commons seems to have spread considerably, and to be implemented more and more. It should be mentioned, additionally, that the Italian usage of the term *beni comuni* has been equally used for translating the English terms commons as well as common goods (as already seen in footnote no.1 in Chapter 5).

commons, then nothing in fact is[7]. This issue is naturally reflected in language barriers, and in different understandings dependant on national or even local contexts, which obviously show the limitations (as well as the impossibility to date[8]) of giving a common meaning to the concept of the commons in the EU[9]. Secondly, this difficulty in defining the boundaries of the commons as an object of study is on its side the reflection of two other challenges, namely, the interdisciplinarity and transdisciplinarity revolving around the topic of the commons: interdisciplinarity in so far as there is a high level of contamination between different disciplines that seek to explain the same developing phenomenon through different categories, methods and understanding, sometimes leading to a terminological confusion that prevents from developing a shared language[10], or to an incorrect appropriation of terms from other disciplinary contexts[11]; transdisciplinarity in so far as, when researching the commons, the knowledge from outside the academic world (in specific, coming from the 'commoners'[12] and the concrete experiences of 'commoning' practiced in concrete ways) should also be looked at and integrated within academic knowledge[13]. This confusion of approaches, knowledge, and understandings leads us to a third problem, which is the one of classification. Many indeed have been the attempts at providing for taxonomies of the commons, often once again transplanted from one

[7] About this risk a strong denunciation was issued by Rodotà, Stefano. 'Constituting the Commons in the Context of State, Law and Politics'. Economics and the Common(s): From Seed Form to Core Paradigm. 2013, http://boellblog.org/wp-content/uploads/2013/10/ECC-Rodota-keynote.pdf where he said that *"we must escape the temptation of the extension of the qualification as commons to every good or service. We are risking the inflation. We risk losing the specificity of the common. If all is a common, nothing is a common".*

[8] An opposite scenario would occur if there would be an introduction of the concept of 'commons' as a legal concept within EU primary law.

[9] On the relationship between law and language in the EU legal context and on the fact that, however, *"despite the lack of correspondence among EU categorical and conceptual structure, legal language, court enforcement and spirit of the people (social group), shared contexts of meanings within the EU and the national contexts are already flourishing"* see further Ioriatti, Elena. 'Common Contexts of Meaning in the European Legal Setting: Opening Pandora's Box?' *International Journal for the Semiotics of Law*, 2022.

[10] For some observations on interdisciplinarity when researching the commons see Fennell, Lee Anne. 'Ostrom's Law: Property Rights in the Commons'. *International Journal of the Commons*, vol. 5, no. 1, 2011, pp.22-23.

[11] An example of that comes from the Italian case where legal scholars most commonly when defining "beni comuni" start from the economic definition given by Elinor Ostrom to the commons, appropriating a category that economists instead translate with another term ("beni collettivi"): on this mismatch between the legal concept of "beni comuni" and the economic one of "beni collettivi" see Gios, Geremia. 'Beni Collettivi o Beni Comuni? Una Lettura Della Distinzione Tra Profili Dominicali e Modelli Di Gestione in Base Alla Teoria Economica'. *Prendersi Cura Dei Beni Comuni per Uscire Dalla Crisi*, edited by Marco Bombardelli, Editoriale Scientifica, 2016, pp. 93–102. Additionally, see footnote no.1 in Chapter 5.

[12] 'Commoners' is the term generally used for referring to activists involved in commons initiatives. On commoners and *"the transformational language of the commons"* as a result of larger collectives see the introduction in Bollier, David, and Silke Helfrich. *The Wealth of the Commons. A World beyond Market and State*. The Commons Strategy Group, 2013.

[13] On transdisciplinarity we may refer further to Rigolot, Cyrille. 'Transdisciplinarity as a Discipline and a Way of Being: Complementarities and Creative Tensions'. *Humanities and Social Sciences Communications*, vol. 7, no. 100, 2020.

disciplinary field to another without taking into account the field of origin of a specific qualification. Among the others, the commons have been qualified as 'natural commons'[14], 'information and knowledge commons'[15], 'urban commons'[16], 'cultural commons'[17], 'global commons'[18], 'digital commons'[19]. The most well-known attempt at classifying different categories of commons has been so far the one that used the generic label of 'new commons'[20]. More and more categories are emerging and different authors like to

[14] Also considered as 'traditional commons', natural commons are for example communal lands, water reserves, fisheries, or forests: they constituted the object of research of E. Ostrom in Ostrom, Elinor. *Governing the Commons: The Evolution of Institutions for Collective Actions*. Cambridge University Press, 1990. As it has been written, "*the traditional commons of North-West Europe, whether conceived of as lands or rights, are remnants of the premedieval land use systems where significant use rights were held jointly by the local population and managed by their customs*": see Berge, Erling. 'Protected Areas and Traditional Commons: Values and Institutions'. *Norsk Geografisk Tidsskrift/Norwegian Journal of Geography*, vol. 60, 2005, p.72.

[15] Hess, Charlotte. 'The Unfolding of the Knowledge Commons'. *St Antony's International Review*, vol. 8, no. 1, 2012, pp. 13–24, where knowledge is considered *"as all useful ideas, information, and data in whatever form in which it is expressed or obtained. […] whether indigenous, scientific, scholarly, or non-academic. It included creative works—music and the visual and theatrical arts"* (pp.14-15). The author recognises that knowledge commons are also global commons (p.20). She gives also a general definition of the commons as *"a resource shared by a group of people that is subject to social dilemmas"* (p.14). For deepening the concept of knowledge commons, and the application of the 'Governing Knowledge Commons (GKC) framework' to smart cities we suggest the forthcoming book Frischmann, Brett M., et al., editors. *Governing Smart Cities as Knowledge Commons*. Cambridge University Press, 2023.

[16] This label refers generally speaking to all those commons situated in an urban environment. Also for this definition, however, there is no shared understanding on what it includes, whether only tangible goods or also intangible goods in the urban context. The first contribution mentioning the urban commons is Foster, Sheila R. 'Collective Action and the Urban Commons'. *Notre Dame Law Review*, vol. 87, no. 1, 2011, pp. 57–133. *"Urban commons"* in specific is the label that has been used in the Italian Regulations, with the precise definition given in Chapter 5. The first international conference on the urban commons was organised in Bologna in 2015 (more information at http://urbancommons.labgov.city/).

[17] They are defined as *"cultures expressed and shared by a community. Cultures can be generally recognized as systems of intellectual resources […]. Some examples include languages, the cultural atmosphere and image of cities, the type of a renowned wine such as Barolo, the traditional knowledge held by indigenous communities and the creativity expressed by a designers' community or an artistic movement"* in Bertacchini, Enrico, et al. 'Defining Cultural Commons'. *Cultural Commons A New Perspective on the Production and Evolution of Cultures,* edited by Enrico Bertacchini et al., Routledge, 2012, p.3. For a contribution advocating for a participatory governance of cultural heritage (considered as a commons) see Iaione, Christian, et al. 'Participatory Governance of Culture and Cultural Heritage: Policy, Legal, Economic Insights From Italy'. *Frontiers in Sustainable Cities*, vol. 4, 2022. For a recent contribution on the cultural commons as arenas of transformation (and with a claim towards EU institutions to support the commons through cultural policies) see Cirillo, Roberto, and Maria Francesca De Tullio, editors. *Healing Culture, Reclaiming Commons, Fostering Care. A Proposal for EU Cultural Policies.* 2021.

[18] Global commons are for example climate change, high seas, biodiversity, atmosphere, sustainability, globalization, knowledge, the space. The list however is not exhaustive: see Hess, Charlotte. 'Mapping the New Commons'. *Paper presented at the 12th Biennial Conference of the International Association for the Study of the Commons. Conference title: Governing Shared Resources: Connecting Local Experience to Global Challenges*, 14-18 July 2008, pp.31-33.

[19] Knowledge, software, and design are considered as digital commons in Bauwens, Michel, et al. *Peer to Peer: The Commons Manifesto.* University of Westminster Press, 2019.

[20] Hess, Charlotte. 'Mapping the New Commons'. *Paper presented at the 12th Biennial Conference of the International Association for the Study of the Commons. Conference title: Governing Shared Resources: Connecting Local Experience to Global Challenges*, 14-18 July 2008. As she says, *"simply put, new commons (NC) are various types of shared resources that have recently evolved or have been recognized as commons. They are commons without pre-existing rules or clear institutional arrangements".* In order to capture the new types of commons, the author draws a map (p.13) according to which new

introduce their own categories. Additionally, many concepts have been read under the lenses of commons, like for example 'city as a commons'[21], 'food as a commons'[22], 'the commons as a model of global governance'[23]. Many more are the qualifications of commons that could be found in the literature: as we were saying, however, to date there is no shared taxonomy of what commons are, and it is not possible to provide for an exhaustive list of the countless interpretations that this concept has received among scholars worldwide[24]. Notwithstanding that, according to the most quoted definitions and theorisations on the commons within the international panorama[25], on a general level the commons could be said to refer to a resource whose governance is shared by a community that gets organized according to a set of rules which are not the ones of the market nor the ones of the state. This seems to occur in a space at the intersection between the private and the public, according to cooperative and not competitive schemes. In a nutshell, this has also been more recently defined[26] according to three keywords: 'community', an activity of 'commoning', and a 'common property' whose forms of management and ownership are not the traditional ones of the state and the market.

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commons include: cultural commons, knowledge commons, medical and health commons, neighbourhood commons, infrastructure commons, market as commons, traditional commons, and global commons.

[21] The well-known theorisation of the city as a commons has to be traced back to Foster, Sheila R., and Christian Iaione. 'The City as a Commons'. *Yale Law Policy Review*, no. 34, 2016, pp. 281–349. According to this theory and starting from the definition given by Elinor Ostrom of the commons, cities themselves are identified as commons, as a consequence of the fact that they have a great variety of resources that are produced, used and managed in a shared way. The theory is based on a survey of experiences all around the world carried out within a 5-year project, and tries to put forward some design principles that collaborative cities should rely upon: namely, 1) collaborative governance, 2) an enabling state, 3) social and economic pooling, 4) legal experimentalism, 5) technological justice. Together with a precise policy cycle, and some tools, the five outlined design principles constitute the so called 'Co-city Protocol', which has been used by the two authors throughout many contributions in order to theorise a policy framework that cities worldwide can adopt in their transition for becoming a collaborative city (indeed, a co-city). The website of the project is http://commoning.city/. The most recent contribution to this theory is Foster, Sheila R., and Christian Iaione. *Co-Cities.* The MIT Press, 2022. See also previously footnote no.140 in Chapter 5.

[22] See further the recent work of Vivero-Pol, Jose Luis, et al. *Routledge Handbook of Food as a Commons.* Routledge, 2019: the book contributes to understanding how food and food systems can be thought, interpreted and practiced around the paradigms of commons and commoning.

[23] See further Deleixhe, Martin. 'Conclusion: Is the Governance of the Commons a Model for a New Global Governance?' *The Commons and a New Global Governance*, edited by Samuel Cogolati and Jan Wouters, 2018, pp. 322–32.

[24] Even the two sources (online pages) of the *International Association for the study of the Commons* (https://iasc-commons.org/) and the *Digital library on the commons* of Indiana University (https://dlc.dlib.indiana.edu/dlc/contentguidelines#information_commons) that are considered as among the reference points for scholars on commons worldwide do not provide for a clear understanding of how to classify properly the filed.

[25] Ostrom, Elinor. *Governing the Commons: The Evolution of Institutions for Collective Actions.* Cambridge University Press, 1990.

[26] Bollier, David. *Think Like a Commoner: A Short Introduction to the Life of the Commons*. New Society Publishers, 2011 as reported in Bauwens, Michel, and Yurek Onzia. *A Commons Transition Plan for the City of Ghent.* City of Ghent and P2P Foundation, 2017, p.8.

2. The commons and the EU legal order

In the light of the fact that the 'commons' has become *de facto* a buzzword, and that its complexity is a sign that research still has a long way to go, we will look, more specifically, at the existing or potential legal contributions to the field of the commons in the context of EU primary law, with the consciousness, however, that to date there are no studies linking the subject of the commons to European constitutional law, nor comparative legal studies on the state of the art regarding the commons in the 27 member states[27]. As a consequence of that, there is a need for our work to provide for a preliminary framing of that.

According to our investigation, seven seem to be the main aspects and potential domains to consider for looking at the commons within the EU legal order: a) property, b) governance, c) state aid, d) public private partnerships, e) the social dimension of the EU, f) services of general interest, g) human rights[28]. A) Concerning the first aspect, the contribution of law has been primarily focussed on the investigation concerning the definition and the legal regime of what the economic literature[29] has defined as 'commons'. Since the problem of property was already contained in the economic debate on the commons[30], it is natural that among legal scholars the first connection to the topic was found by property scholars, who therefore saw private law – and more precisely the field of property law – as the appropriate ground to be used for giving a theoretical framework to the commons[31]. This occurred also within a wider critique to economic and political transformations determined by neoliberalism[32]. However, a more extensive debate about

[27] It is interesting to mention that also the most recent and authoritative collective publications on the commons contain no contributions glancing at the European constitutional law in the EU legal context, nor at a comparative analysis among EU member states. We are referring, for example, at Hudson, Blake, et al. *Routledge Handbook of the Study of the Commons*. Routledge, 2019, and Foster, Sheila R., and Chrystie F. Swiney. *The Cambridge Handbook of Commons Research Innovations*. Cambridge University Press, 2022.

[28] This outline is according to the main contributions that we have found in the literature. This, however, remains our perspective, and we therefore make no claim to generality. Additionally, it goes far beyond the aim of this work to go deeper into each one of these aspects: our intention within this Chapter is limited to providing for a general overview. In order to provide for an in-depth account of all these identified aspects further research should be carried out as a potential follow-up of this work.

[29] Ostrom, Elinor. *Governing the Commons: The Evolution of Institutions for Collective Actions.* Cambridge University Press, 1990.

[30] Fennell, Lee Anne. 'Ostrom's Law: Property Rights in the Commons'. *International Journal of the Commons*, vol. 5, no. 1, 2011, pp. 9–27.

[31] This is very clearly illustrated in Marella, Maria Rosaria. 'The Commons as a Legal Concept'. *Law Critique*, 2016, p.4.

[32] For example, see Mattei, Ugo, and Alessandra Quarta. 'Right to the City or Urban Commoning? Thoughts on the Generative Transformation of Property Law'. *The Italian Law Journal*, vol. 1, no. 2, 2015, pp. 303–25.

commons/common goods exists in domestic legal orders of single EU member states[33], and not in relation to the EU legal order for one fundamental reason which is contained in Article 345 TFEU: namely, the fact that *"the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership"*. The EU has, indeed, no competence on the system of property ownership[34]. As a consequence of that, many scholars have long been advocating for a shift in approaching the commons looking not at their ownership, but at their governance (or management) together with the community around them[35]. B) The governance of the commons through other legal means beyond looking at property ownership constitutes the second aspect that we may trace back within the contribution of law. What is interesting about this shift in perspective is that this thesis seems to be supportable also in light of Ostrom's own thinking: at its core, indeed, her original thesis on the governance of the commons had as its starting point a refutation of the thesis on the tragedy of the commons[36], claiming that it is possible for natural resource systems to be successfully managed by communities of individuals beyond the traditional dualism State control – privatization of resources. The idea that it is possible to get out of the dualism between private property and public property leads, indeed, towards the issue of governance (or management) of a commons notwithstanding its ownership regime. It is very common in fact that the ownership of a good (whether it is tangible or intangible) does not always matches its usage: in the light of that, when looking at the commons in the EU scenario we may therefore recognize the governance route that looks at the functionality of a good as more viable than the ownership route. As an example, this shift constitutes the core aspect of the Regulations on the commons that many Italian cities – as we saw – have adopted in order to deal with the grass-roots initiatives of care, regeneration, and shared governance of the commons coming from active citizens. This shift looking at the

[33] An analysis of property law arrangements in relation to the commons in the EU member states is obviously outside our field of research, and we suggest looking further at comparative legal studies on that. As an introductio, we may refer further to Spanò, Michele. 'Private Law Arrangements for the Commons A New Comparative Perspective'. *The Commons, Plant Breeding and Agricultural Research,* edited by Fabien Girard and Christine Frison, Routledge, 2018.

[34] Very clear on that are Giglioni, Fabio. 'Beni Comuni e Autonomie Nella Prospettiva Europea: Città e Cittadinanze'. *Prendersi Cura Dei Beni Comuni per Uscire Dalla Crisi*, edited by Bombardelli, Editoriale Scientifica, 2016, pp.160-161, and Cornella, Samuel. 'Beni Comuni e Disciplina Europea Sugli Aiuti Di Stato'. *Prendersi Cura Dei Beni Comuni per Uscire Dalla Crisi*, edited by Marco Bombardelli, Editoriale Scientifica, 2016, pp.219-225.

[35] Among the others, Simonati, Anna. 'The (Draft) European Charter of the Commons - Between Opportunities and Challenges'. *Central European Public Administration Review*, vol. 16, no. 2, 2018 writes that *"it may be useful changing the point of view: from the kind of ownership to the rules about the management of the commons, possibly with a direct involvement of the communities of users"* (p.94).

[36] Hardin, Garrett. 'The Tragedy of the Commons'. *Science*, vol. 162, no. 3859, Dec. 1968, pp. 1243–48.

functionality of a good and not at its ownership has allowed the model of *Shared administration* to spread around the country notwithstanding the lack of a legally binding category of common goods in property law: on the opposite, it relied on the constitutional principles of horizontal subsidiarity, participation, and regulatory autonomy of local governments which as we saw have their correspondents also among European constitutional principles. However, problematic aspects are far from being non-existent here: first and foremost, it may be difficult to establish in a governance perspective whom actually decides upon what should be considered as commons, and which are the subjects that should deal with its governance. For now, what could be observed is that, as opposed to the first research strand looking at commons property from a private law perspective, this second approach to the governance of the commons essentially comes from a public law perspective. C) The third aspect we identified in the search for legal elements in relation to the commons in the EU legal order is the matter of state aid[37]. Addressed in Articles 107 and 108 TFEU, within the legal order of the EU state aid essentially constitutes *"any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods […], in so far as it affects trade between Member States"*. According to EU law, they *"shall […] be incompatible with the internal market"*[38]. As it is usually the case with any rule, the Treaties provide for some exceptions[39] towards enterprises that contribute to the safeguarding or the promotion of goods that the doctrine has actually qualified as commons: this is the case, for example, of the possibility of state aids towards the promotion of culture and heritage conservation, and for environmental protection. As it has been argued[40], the matter of state aid therefore may show that – despite the fact that it is occurring in an indirect way – the EU actually already provides for some support towards the commons. D) The fourth aspect that may be an indication of a potential contribution of EU law to the commons debate comes from the delivery of public services through public private partnerships (PPPs), within the wider

[37] Fundamental on this link is the contribution of Cornella, Samuel. 'Beni Comuni e Disciplina Europea Sugli Aiuti Di Stato'. *Prendersi Cura Dei Beni Comuni per Uscire Dalla Crisi*, edited by Marco Bombardelli, Editoriale Scientifica, 2016, pp.219-248.

[38] Article 107(1) TFEU.

[39] The exceptions are contained in Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance, *OJ L 187*, 26 June 2014, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2014:187:TOC.

[40] This is the central thesis argued in Cornella, Samuel. 'Beni Comuni e Disciplina Europea Sugli Aiuti Di Stato'. *Prendersi Cura Dei Beni Comuni per Uscire Dalla Crisi*, edited by Marco Bombardelli, Editoriale Scientifica, 2016, pp.219-248. We suggest this contribution for a more in-depth analysis on this point.

EU law discipline of the regulation of public procurement, which constitutes a key aspect of the EU internal market integration[41]. Briefly speaking, some authors have argued[42], indeed, that within the broad discipline on PPPs it is possible to experiment newly conceived public partnerships not only with the private sector, but also with civil society and local communities. In particular, according to that there may be a chance to use this legal tool for defining collaborations on certain goods or services conceived as commons, so that new Public-Community partnerships (PCPs)[43], or Public-Civic Partnerships (PCPs)[44], or Public-Commons Partnership[45] (as they have been theorised) or further other types of hybrid partnerships[46] could eventually be used for supporting initiatives on the commons. So far, however, we may only say that the situation is not clear yet on how the legal tool of partnerships could actually be used on the commons. E) The fifth aspect concerns the social dimension of the EU, and more precisely the development of a *"social market economy"*, for referring to the constitutionalization within the Lisbon Treaty of a vision outlining the contours of an EU economic integration not only founded on the single market based on the principle of competition, but also complemented by a social solidarity dimension[47]. Grounded in Article 3(3) TEU[48], the concept of social market economy has no

[41] As an introduction on partnerships within public procurement we may refer further to the chapter "Procurement and partnerships" in Bovis, Christopher H. *EU Public Procurement Law*. Edward Elgar Publishing, 2012.

[42] Iaione, Christian, and Elena de Nictolis. 'The Role of Law in Relation to the New Urban Agenda and the European Urban Agenda'. *Law and the New Urban Agenda*, edited by Nestor M. Davidson and Geeta Tewari, Routledge, 2020, pp.58-61.

[43] Also defined as Public Private People Partnerships (PPPPs) in Iaione, Christian, and Elena de Nictolis. 'The Role of Law in Relation to the New Urban Agenda and the European Urban Agenda'. *Law and the New Urban Agenda*, edited by Nestor M. Davidson and Geeta Tewari, Routledge, 2020, p.59.

[44] This is what the city of Amsterdam together with the organization Commons Network is working on: see on that Ciaffi, Daniela, and Thomas de Groot. From the Netherlands the idea of Public-Civic Partnership as a declination of sharing administration. *Labsus*, 2021.

[45] This term was defined by Tommaso Fattori for proposing a tool for institutions to enable and empower the collective/social peer-creation of common value: see on that Fattori, Tommaso. *Public-Commons Partnership and the Commonification of that which is Public*, available at https://commonsblog.files.wordpress.com/2007/10/fattori-commonification-of-that-which-is-public.pdf. For an additional explanation of this idea, the work of the commoners community of the P2P Foundation could be consulted at the online page https://wiki.p2pfoundation.net/Public-Commons_Partnership.

[46] In addition to the partnerships already mentioned, when searching for innovative forms of partnerships, many are the phrases used by scholars and practitioners (often using different labels for referring to the same idea), and just as examples of this attempt to experiment we can mention: Public-Private-People Partnerships (PPPPs) (for example, see on that Nesti, Giorgia. 'Defining and Assessing the Transformational Nature of Smart City Governance: Insights from Four European Cases'. *International Review of Administrative Sciences*, vol. 86, no. 1, 2020, p.29); Public-Civil Partnerships (PCPs) (for example, see on that Holemans, Dirk. *Introducing the Partner State: Public-Civil Partnerships for a Better City*. 21 June 2019, https://www.nesta.org.uk/blog/introducing-partner-state-public-civil-partnerships-better-city/); Public-Private-Civic Partnerships (PPCPs) (Iaione, Christian. 'La Città Come Bene Comune'. *Labsus*, 2011).

[47] For an introduction we may refer further to Ferri, Delia, and Fulvio Cortese, editors. *The EU Social Market Economy and the Law.* Routledge, 2019 (see in specific their introduction).

[48] Additionally remarked in Article 9 TFEU: *"In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the*

concrete legal implication by itself, but nonetheless it constitutes the European constitutional reference point for the development of social policies in different fields. This is indeed the direction pursued by the EU Commission[49] in its work-in-progress commitment to the elaboration of an overarching framework for what goes under the name of 'social economy'. This term refers to all those entities providing for goods and services *"with different business and organizational models"* operating in a large variety of economic sectors which share as main principles and features *"the primacy of people as well as social and/or environmental purpose over profit, the reinvestment of most of the profits and surpluses to carry out activities in the interest of members/users ("collective interest") or society at large ("general interest") and democratic and/ or participatory governance"*[50]. According to the Commission, the main types of entities which are considered as belonging to the sector of social economy are cooperatives, foundations, associations (including charities), mutual benefit societies, and social enterprises; however, social economy actors can actually assume a multitude of legal forms. In a nutshell, it seems possible to argue that the broad label of social economy is relevant to the commons in so far as it applies to sectors that are primarily organised on the basis of the solidarity principle, on which therefore EU competition rules do not apply in full. The commons core feature of (tangible or intangible) goods around which a community gets organized beyond the traditional logics of the state and the market, indeed, seems to be in line with the idea of a social economy field in the EU first and foremost because they both highlight the inadequacy of the public-private dichotomy, and they are both evidence of a search towards the definition of a new space based on social and solidarity logics[51]. For example, some evidence of this relation between the commons and, in specific, social enterprises is already coming from recent studies showing how informal activities of care of the commons can eventually develop in more structured entities of social economies,

guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health".

[49] So far, indeed, there is not an overarching legal framework on social economy because of its highly cross-sectoral policies. The Commission is however working on that: see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Building an Economy That Works for People: An Action Plan for the Social Economy.* 2021. For following the developments of the Commission's policy on the social economy action plan see https://ec.europa.eu/social/main.jsp?catId=1537&langId=en. Additionally, see European Economic and Social Committee. *Recent Evolutions of the Social Economy in the European Union, by Monzon J. L. and Chaves R.* 2017.

[50] EU COM. Communication *Building an Economy That Works for People: An Action Plan for the Social Economy.* 2021, p. 5.

[51] Rieiro, Anabel. 'The Commons and the Social and Solidarity Economy'. *Encyclopedia of the Social and Solidarity Economy*, Edward Elgar Publishing in partnership with United Nations Inter-Agency Task Force on Social and Solidarity Economy (UNTFSSE), 2023, p.10.

and how social enterprises can (and already are) contributing to the shared governance of commons[52]. The commons, indeed, may be instrumental in starting social economy initiatives, and vice versa the further development of a framework for social economy could contribute to the further definition of the commons within the EU legal order. F) Strictly related to the topic of partnerships (within EU public procurements) and to the field of social economy is the concept *of "services of general (economic) interest"* (SGIs) included in EU primary law at Article 14 TFEU, Article 106 TFEU, Protocol no.26, and Article 36 of the Charter of fundamental rights of the European Union. Since the concept is not defined there, fundamental is the Quality Framework[53] elaborated by the Commission, where it is explained that SGIs are all those services that are considered by public authorities of the Member States as being of general interest (as they cannot be adequately supplied by market forces alone), and therefore subject to specific public service obligations. They could be economic as well as non-economic: while services of general economic interest (SGEIs) are subject to the rules on competition (Article 106 TFEU), non-economic services of general interest are not bound by internal market and competition rules but they can be provided, commissioned, organized autonomously by member states' domestic law (Article 2, Protocol 26). In the light of that, the relation[54] between SGIs and the commons lies, therefore, in the potential development of a governance framework for all those non-economic services of general interest that would consider themselves as commons, and therefore allow for an involvement of the community in their governance because of their very nature of general interest. A very clear example of this connection among the two is the Right2Water campaign, the first successful European Citizens Initiative (ECI) in 2013: this started a transnational European water movement[55] advocating for a constitutional and legal recognition of water as a commons against its liberalisation in accordance with the internal market rules, and as such was claiming for a more *"citizen-driven (rather than public/state) governance of public services"*[56]. G) The last one among the aspects we

[52] See the research conducted on communities cooperatives by Burini, Cristina, and Jacopo Sforzi. 'Imprese di comunità e beni comuni. Un fenomeno in evoluzione'. *Euricse*, 2020, p. 93.

[53] See the fundamental EU COM. Communication A Quality Framework for Services of General Interest in Europe. 2011, and especially the definitions provided at page 3.

[54] On this connection see the contribution of Cornella, Samuel. 'Beni Comuni e Disciplina Europea Sugli Aiuti Di Stato'. *Prendersi Cura Dei Beni Comuni per Uscire Dalla Crisi*, edited by Marco Bombardelli, Editoriale Scientifica, 2016, pp.231-236.

[55] See their website at http://europeanwater.org/.

[56] Blokker, Paul. 'Constitutional Mobilization and Contestation in the Transnational Sphere'. *Journal of Law and Society*, vol. 45, no. S1, 2018, pp. 52–72: *"The Right2Water claim for a legal redefinition of water as a public rather than a private good, […] can be further read as part of a larger campaign that understands the future of Europe as an economic order based on the idea of the Commons, with an emphasis on civic*

identified in EU primary law that contributes to the debate on the commons is human rights, in so far as the commons – whether they are tangible or intangible – constitute the concrete ground on which many activists today claim rights they consider of primary importance: from the right to essential services to the right to housing, from the right to water to the right of association, from the right to participate to the right to internet. Also the right to the city itself is related to the commons, in so far as the city may be considered as a commons itself[57]. These are obviously only a few among the rights which are claimed more and more by activists as well as by scholars. Above all, this inner connection between human rights and the commons has been made explicit within the EU legal context by the Italian draft law on the common goods elaborated by the Rodotà Commission that – as we already saw[58] – theorized the commons as all those *"things that express a functional utility for the exercise of fundamental rights and the free development of the person"*[59]. To conclude, what is worth highlighting is that when searching for the contribution of law on the commons in the EU legal order no explicit mention of the commons (or common goods) can be found in EU primary law and legislation. Notwithstanding that, as we briefly commented, it may still be possible to implicitly link the commons to certain aspects of EU law which in the future may eventually constitute the ground for the development of a more explicit conceptualization of the commons.

All in all, it can be said that the commons in the EU constitute a debate in the making first and foremost due to the current difficulties in providing for an overall understanding and institutionalisation of this concept for which a wide variety of actors have (and still are) contributing. With concern to the legal contribution to this debate, the legal aspects underlined here and linked somehow to EU primary law essentially lead us to the affirmation of an essential point, which is the following one: despite the fact that EU primary law does not contain any explicit reference to the commons as such, it is possible to trace some indirect connections to fundamental legal aspects which are part of the EU legal order. This leads us to say that the Treaties to date contain an yet unexplored legal

participation and the local, bottom-up and citizen-driven (rather than public/state) governance of public services" (p.S70).

[57] This is very clear in Harvey, David. 'The Right to the City'. *International Journal of Urban and Regional Research*, vol. 27, no. 4, 2003, pp. 939–41, where the author claims a right to the city is a *"new urban commons, a public sphere of active democratic participation"* (p.941).

[58] See paragraph 1 in Chapter 5.

[59] Unofficial translation from the Italian draft law. All around the EU, the Italian jurist Stefano Rodotà is well known among commoners, and its legal contribution is widely considered as the pioneering contribution for the institutionalization by legal means on the commons as a legal and constitutional category. See one of his international speeches on this topic: Rodotà, Stefano. 'Constituting the Commons in the Context of State, Law and Politics'. Economics and the Common(s): From Seed Form to Core Paradigm. 2013, http://boellblog.org/wp-content/uploads/2013/10/ECC-Rodota-keynote.pdf.

potential – which also goes beyond the seven aspects that we have emphasised – thanks to which one or more European constitutional hooks could be found for the commons in the future. This, however, constitutes a task for future research, that could proceed according to essentially two lines of research: 1) a comparative approach towards legal developments on the commons in each EU member state; 2) a wide European constitutional law perspective aimed at drawing an overarching legal framework on the commons. This obviously would answer other research questions, and it may be argued that so far the context is still too early for the law to give a definitive answer to the challenges posed by the topic of the commons, which are still too much ongoing. For the purpose of our own research, however, we may now move onwards by turning to the confusing landscape of what is happening in EU cities on the commons.

3. Commons initiatives in EU cities: a complex picture

Beyond the legal contribution to this commons debate in the making in the European Union, contributions to this matter have come also from other disciplinary angles, from more political initiatives, and above all from grass-roots initiatives, experiments and projects taking place in both urban and rural contexts. In line with our research question, our focus will be on commons in an urban environment, also defined as 'urban commons' although there is no agreed taxonomy of what it is meant by this concept within the EU[60]. In this paragraph we will give a broad overview of what is already happening in cities around the EU, despite the objective limitations of such a reconstructive attempt first and foremost for the great variety of findings from such a search. Before that, however, one second, contribution to this topic by what we can call 'political' initiatives (to differentiate them from the legal aspects considered so far) deserve our attention. This political contribution came from both inside and outside the European institutions. Among the others, two are the most relevant initiatives that deserve to be briefly mentioned: the first one is the establishment within the EU Parliament of an intergroup[61] on the commons; the second one is the definition of an European Charter of

[60] For the purpose of our research we will mainly keep on using the general term 'commons', but also the one of 'urban commons' should not be conceived as inappropriate because the spatial context we are looking at are cities (as clearly outlined in our research question).

[61] It may be important to point out that intergroups are *"unofficial groupings of MEPs who are interested in a particular topic that does not necessarily fall within the scope of the European Parliament's normal work but may be of interest to wider society. Intergroups hold informal discussions and promote*

the Commons thanks to the joint efforts of a group of scholars and activists. Established on 12 February 2015[62] and launched on 25 May of the same year[63], the *"Intergroup of Common Goods and Public Services"* main aim was to seek a shared understanding of the commons so as to be able to influence the political agenda of the Parliament. Despite the fact that its works are nowhere to be found online, probably its major contribution has been to network and bring together the different European actors who have been dealing with the commons until now, for example contributing to the launch of the first European Commons Assembly (held in Brussels on 15-16 November 2016)[64]. The second initiative concerns the draft of an *European Charter of the commons* by a group of multi-disciplinary scholars as a result of a seminar held at the International University College of Turin in 2011[65]. Recognizing that a closed catalogue of commons was impossible to define because of different perceptions on the commons, the authors provided for a wide definition outlining that commons consist of all those *"collective goods or services to which access is necessary for a balanced fulfilment of the fundamental needs of the people"*[66]. What is interesting of the Charter is that what emerges is the need for an explicit protection of the commons at the constitutional level of EU primary law[67]. All in all, both initiatives were aimed at contributing to an institutionalisation of the commons: so far they have not, however, been followed up.

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exchanges between MEPs and civil society. As intergroups are not official bodies of Parliament, they cannot express Parliament's views. They may not engage in any activities which could be mistaken for Parliament's official activities" (see the dedicated online page at https://www.europarl.europa.eu/news/en/faq/9/what-are-intergroups-and-how-are-they-formed).

[62] Brief report on that at https://www.epsu.org/article/public-services-and-commons-intergroup-set.

[63] The opening contribution was the one of the Italian legal scholar Stefano Rodotà, who drew attention to the need for a legal recognition of the commons also at the EU level, also in relation to individuals' fundamental needs. Report on that available at https://www.epsu.org/sites/default/files/article/files/report_final_May_26th_COMMONS.pdf, and conference recording at https://www.youtube.com/watch?v=2WYHEWTHDek.

[64] The idea of an European Commons Assembly originated in Villarceaux, France in May 2016 when 28 activists from 15 European countries met for 3 days to develop a shared agenda for the commons. Information on that could be found at https://www.netcommons.eu/index.html%3Fq=news%252Feuropean-commons-assembly.html. A second European Commons Assembly was held in Madrid on 25-28 October 2017 (this time was not anymore in cooperation with the EUP Intergroup).

[65] For an exploration of the draft Charter see Simonati, Anna. 'The (Draft) European Charter of the Commons - Between Opportunities and Challenges'. *Central European Public Administration Review*, vol. 16, no. 2, 2018.

[66] Simonati, Anna. 'The (Draft) European Charter of the Commons - Between Opportunities and Challenges'. *Central European Public Administration Review*, vol. 16, no. 2, 2018, p.95.

[67] Simonati, Anna. 'The (Draft) European Charter of the Commons - Between Opportunities and Challenges'. Central European Public Administration Review, vol. 16, no. 2, 2018, p.98 writes: *"The invitation to the European legislator is formulated in very specific terms. Concerning its relationship with the Member States, "a Directive should be issued [...] to provide for the protection of the commons". As regards, instead, the European system itself, the draft states that the Commission should introduce "a new form of legitimate and democratic European Constitutional Law" and should "take all the necessary steps in order for the European Parliament [...] to be granted Constitutional Assembly Status in order to adopt a Constitution of the Commons".*

In addition to the legal and the political contribution – as we were saying – if we look at how the commons phenomenon is actually unfolding, fundamental are the experimentations reclaiming the commons in cities around the EU: in fact, we have an incredible amount of local level practices that connect themselves to the commons, and that claim the right to be institutionalised. Since there is no 'one fits all' solution, every initiative on a commons needs to be contextualised in its own legal, social, political, cultural, geographical context and in accordance to the community around that specific commons. Despite that, generally speaking the main spark of commons movements and initiatives around the EU seems to be a shared critique[68] of existing legal and constitutional structures, within which the privatization waves constitute its culmination. The dissatisfaction and ambition to change the present order has taken place essentially in two ways. The first is an outlawed way, mainly with reference to the case of all those social movements and activists occupying abandoned spaces as sources of common utility, and claiming them as commons outside the public/private binomial and beyond the logic of privatization. At its core, this way practices intentional acts of civil disobedience aimed at challenging existing property laws[69]. The second way has essentially taken place within the constituted legal and constitutional order through the creation of innovative experiences (self-managed, or through some kind of agreements with public or private entities). It is not possible to collect all the projects, research collectives, practical activities

[68] For an introduction, see Blokker, Paul. 'Commons, Constitutions and Critique'. *Lo Squaderno*. Explorations in Space and Society, 2014, https://ssrn.com/abstract=2376431 and Rodotà, Stefano. 'Constituting the Commons in the Context of State, Law and Politics'. Economics and the Common(s): From Seed Form to Core Paradigm. 2013, http://boellblog.org/wp-content/uploads/2013/10/ECC-Rodota-keynote.pdf. It is important to mention here also the well-known contribution of some commons thinkers and research collectives that from outside the academia (mostly within research collectives) provided with well-renowned reflections and ideas to commons movement worldwide, within a wider critique of existing economic and social structures. We are referring first and foremost to David Bollier and his research blog (https://www.bollier.org/); to Michel Bauwens and his theorization of the concept of *"peer to peer"* (P2P) for referring to the relational dynamic in distributed networks among equal participants, used for explaining new forms of peer production which aims at creating alternative economic models (this work is being carried out, among the others, by the *P2P Foundation* https://p2pfoundation.net/, and by its advocacy hub *CommonsTransition* https://commonstransition.org/); to the P2P Lab, a research collective focussed in specific on free/open source technologies and commons-based practices (https://www.p2plab.gr/en/). Additionally, further reference sources in the international commons action-oriented debate can be found in the collaboratory Commons Network, which explore new models for economy and society based on the idea of commons (https://www.commonsnetwork.org/).

[69] It is obviously impossible to give an account of all these experiences here. As an example, in specific on the experience of Italian property outlaws, see further Quarta, Alessandra, and Tomaso Ferrando. 'Italian Property Outlaws: From the Theory of the Commons to the Praxis of Occupation'. *Global Jurist,* vol. 15, no. 3, 2015, pp. 261–90, and Bailey, Saki, and Ugo Mattei. 'Social Movements as Constituent Power: The Italian Struggle for the Commons'. *Indiana Journal of Global Legal Studies*, vol. 20, no. 2, 2013, pp. 965–1013. For squatters experiences in spaces commons-oriented around the EU (essentially in Amsterdam and Berlin) see Kimmel, Jens, et al. Urban Commons Shared Spaces. *Commons Network and raumlaborberlin*, 2018, https://www.commonsnetwork.org/wp-content/uploads/2018/11/SharedSpacesCommonsNetwork.pdf.

of commoning, or urban policies related to the commons, nor is it possible to capture the complexity of the wide diversity of actors involved, from academic scholars to commons thinkers, from local public authorities to activists and social movements to social economy actors. Additionally, publications on the matter are lacking[70] due to an objective difficulty in mapping the experiences of commons in EU cities. However, some projects dealing with the commons in cities around the EU are helpful in our search, in so far as they have constructed concrete maps aimed at networking experiences of various kind related to the topic, and since they can provide us with some data[71]. According to our searches, the most recent and up to date database is the one elaborated by the GeCo project[72], whose main aim was, indeed, to try to fill this gap through the mapping of urban commons initiatives around EU cities: because of that, we will use the preliminary case work already carried out by this project in order to give an overview of commons initiatives. Moreover, its categorization of the mapped experiences on commons into essentially the two categories of *"communities of citizens"* (for referring to those experiences carried out by formal and informal groups), and *"public initiatives"* (for referring to policies implemented by municipalities or other public institutions to promote and support the establishment of urban commons) seems to be the appropriate fundamental distinction in trying to bring order to the great variety of experiences also in relation to the findings emerging from other databases[73]. However, it should be acknowledged that such a minimal classification

[70] This is also recognised in Quarta, Alessandra, and Antonio Vercellone. 'The Rise of Urban Commons in Europe'. *Blogdroiteuropeen*, 20 Jan. 2021, https://blogdroiteuropeen.com/2021/01/20/the-rise-of-urban-commons-in-the-europe-by-alessandra-quarta-and-antonio-vercellone/.

[71] We are referring to the data elaborated within two main projects: the GeCo project (funded by an EU Horizon 2020 programme) that came up with a map (https://bit.ly/3Gq6cvv) and a database (https://generative-commons.eu/database/) on urban commons around the EU, and the Co-Cities map (https://cocities.designforcommons.org/co-cities-map/) that constitutes the basis for the publication of the Co-cities open book (https://cocities.designforcommons.org/the-co-cities-open-book/) elaborated by the LabGov think tank (https://cocities.designforcommons.org/). Additionally, we may also include other maps on the commons that can be found online: the one elaborated by the city of Grenoble (http://umap.openstreetmap.fr/it/map/carto-des-communs-grenoble_451121#13/45.1806/5.7824), and the collection of commons initiatives in Italian cities (but also in some few other EU cities) on the website of the research collective Labsus (https://www.labsus.org/). Worth mentioning is also a recent research of the organisation Commons Network, that published a study on commons in the two cities of Amsterdam and Berlin while making references to a wide variety of other commons experiences throughout EU cities: Kimmel, Jens, et al. Urban Commons Shared Spaces. *Commons Network and raumlaborberlin*, 2018, https://www.commonsnetwork.org/wp-content/uploads/2018/11/SharedSpacesCommonsNetwork.pdf. All these sources have been consulted for the purpose of this Chapter.

[72] Website available at https://generative-commons.eu/. The database of GeCo includes 220 cases from 16 EU countries, according to data presented on the closing conference of the GeCo project, which can be found at https://generative-commons.eu/ge-co-living-lab-final-event/. Started in February 2019, the project was concluded in February 2022. The last conference held within the GeCo project (namely "The international conference on the urban commons") was held at the University of Turin on 21-22 June 2021: a summary has been published in Elia, Mattia. 'International Conference of Urban Commons'. *Global Jurist*, vol. 21, no. 3, 2021, pp. 483–96.

[73] See previous footnote no.70.

according to which a wide range of 'experiences' can be qualified as common good is still extremely broad: this seems to show us that it is too early to define precisely what the commons in the European space are, since there are so many ongoing experiments that refer to the commons. In fact, scrolling through the analysed cases and willing to summarise, among the "communities of citizens" we can basically find: a) the work of social and solidary entities with a legal status like cooperatives, associations, NGOs; b) bottom-up citizen initiatives without any formal legal structure, like communities creating open source technologies, mutual aid initiatives, activists occupying building or other spaces for reclaiming basic rights or for cultural initiatives, crowdfunding campaigns; c) communities sharing the governance of certain spaces (beyond the ownership of that asset[74]) within some sort of agreement with public or private entities or through the self-management of the space: for example, makers spaces, fab labs, green areas and urban forests, collaborative and multifunctional spaces, co-working spaces, art and cultural centres, community hub and social centres. On the other side, among municipalities' *"public initiatives"* we can find a wide variety of ways[75] to promote or support activities that may be qualified as commons-oriented (sometimes also through the availability of public funds): for example, among the listed ones in the GeCo database we can find the promotion of policies related to participatory budgeting, civic engagement and solidarity economy, civic participation in decision making processes related to managing urban spaces, citizens platforms promoting participatory processes, urban regeneration of places and temporary uses, and projects to support cultural and solidarity activities. It seems, however, that what is being defined as commons goes far beyond these mapped experiences[76], and to date projects that have attempted to map the urban commons are

[74] With reference to the ownership of certain assets, among the 'experiences' related to the commons it is interesting to report the Community Land Trust. Originated in the US, and founded of the idea of land as a common good, the CLT is a tool of private law (a form of trust) that promotes an innovative model of ownership where the land is separated from buildings, and where a non-profit organisation owns and develops land for the benefit of the community by guaranteeing affordable housing and participatory community activities. In the EU, one of the earliest example is the Community Land Trust Brussels (CLTB) established in Brussels in 2013 (https://www.cltb.be/).

[75] It should be mentioned that the Regulation on the commons that many Italian municipalities have adopted is qualified as a public policy: we do not agree with this classification in so far as the Regulation constitutes – as described and analysed in Chapter 4 and 5 – a legal instrument well rooted in the Italian constitution and around which there is an ongoing process of institutionalisation that starting from 2014 led to the elaboration of the two regional laws of Toscana and Lazio, to the spreading of the Regulation to other Italian municipalities, and to the issuing of the important judgement no.131/2020 of the Constitutional Court.

[76] For example also energy communities and a wide-range of repair movements may be considered as commons. For energy communities as commons see further Pappalardo, Marta. 'Energy Communities and Commons. Rethinking Collective Action through Inhabited Spaces'. *Local Energy Communities*, edited by Gilles Debizet et al., Routledge, 2022. For initiatives qualified within the repair movement like repair cafès and 'Bike Kitchens' (in addition to fab labs and makers spaces that were already included in the GeCo

actually unable to give us a definitive answer as to what the commons are. What the project, on the other side, was perfectly able to capture are the main problems faced throughout the commons experiences[77]: namely economic sustainability, and the legal and bureaucratic obstacles. Both aspects essentially reflect the difficulties of the commons in finding their place within the traditional dualism public-private: more precisely, however, it is the relationship with the public authorities the one towards which expectations of finding forms of support are the highest.

Among the public initiatives explicitly aimed at creating a political or legal framework for commons initiatives, worth deserving a brief mention are the ones elaborated by three cities: Barcelona (Spain), Ghent (Belgium), Grenoble (France). Until today, leaving aside the case of Italian cities having adopted the Regulation for the commons within the organizational model of *Shared administration*, these three cities constitute the most advanced contributions[78] to the definition of institutional frameworks explicitly related to the commons by the local public authorities within the EU panorama. The city of Barcelona started to seek a way to provide a framework for the commons as a precise political commitment of the list *Barcelona en Comú,* which won for the first time the municipal elections in 2015. In parallel to some other policy initiatives aimed at supporting the development of a commons-oriented economy[79], a concrete legal way to provide for an institutional support of civic participation through the commons was created through the definition of a programme for a participatory governance of certain assets belonging to the public (civic) heritage (*patrimoni ciutadà*[80]), in specific socio-cultural facilities. A participatory governance of certain public assets already existed back then as a specific form of civic participation (the so called *gestió cívica*); however, it was since the development of a new conceptual framework[81] developed in 2016 that the participatory

database) see further Zapata Campos, Maria Jose, et al. 'Urban Commoning Practices in the Repair Movement: Frontstaging the Backstage'. *Economy and Space*, 2020, pp. 1150–70.

[77] As it emerges from the GeCo survey results available at https://generative-commons.eu/wp-content/uploads/2020/12/Summary-of-survey-results.pdf.

[78] This can be claimed on the basis of the literature consulted for writing this Chapter.

[79] We are referring essentially to the support for a 'commons collaborative economy' within a wider Municipal Action Plan on social and solidarity economy in Barcelona: see further on that Bauwens, Michel, and Vasilis Niaros. *Changing Societies through Urban Commons Transitions*. P2P Foundation, 2017, pp.34-37, and Bauwens, Michel, et al. 'Commons Economies in Action. Mutualizing Urban Provisioning Systems'. *Sacred Civics. Building Seven Generation Cities*, edited by Jayne Engle et al., Routledge, 2022, pp.219-220. Within a commons-oriented approach was also the digital platform *Decidim*, designed for citizen participation in the design of public policies (https://decidim.org/).

[80] The *Programa Patrimoni Ciutadà d'Ús i Gestió Comunitària* (known as *Patrimoni Ciutadà*) was developed by the city in 2017. The webpage of that could be found at the institutional website of the municipality of Barcelona: https://ajuntament.barcelona.cat/participaciociutadana/ca/patrimoni-ciutada.

[81] Published in 2016, the conceptual framework *"Comuns urbans - Patrimoni Ciutadà. Marc conceptual i propostes de línies d'acció"* can be found at

governance of these assets was defined in a commons-oriented perspective, in the conviction that public goods and services can become commons by promoting new forms of public-community cooperation between local public authorities and communities. The process for reaching an overarching standardised legal framework for the shared governance of the commons, however, has stalled to date due to difficulties in the process[82]. So far, what is interesting to highlight, in our perspective, is that the Barcelona case is showing us that in that context the commons seem to be paving their way under the wider umbrella of citizen participation, which has been identified by the city government as the overarching ideal concept. The second case is the one of the city of Ghent, which has been conducting a pioneering study[83] on the functioning of urban commons and the possibility of regulating public-commons cooperation and partnerships. The study underlined on one side the huge number of already existing commons-oriented initiatives – even though not formally recognized as such – as a reflection of a very active civil society; on the other, the distinctiveness of the city's public administration in having a relatively strong supportive and facilitating role towards many among the citizens' initiatives, usually supported either officially or indirectly in different ways. However, the relation between the public administration and commoners was depicted as problematic in so far as they are not officially recognized in their distinctiveness from civic society actors – the commoners being more informal than civil society actors[84]. As a consequence of that, the study went further in outlining some major recommendations to the city government in order to become a 'partner city' by explicitly supporting the commons as *a*

https://ajuntament.barcelona.cat/participaciociutadana/sites/default/files/documents/comuns_urbans_patrimoni_ciutada_marc_conceptual_i_propostes_de_linies_daccio_2.pdf. The conceptual framework was followed by a document advancing proposals for a legal framework: https://ajuntament.barcelona.cat/participaciociutadana/sites/default/files/documents/comuns_urbans_patrimoni_ciutada._marc_juridic_i_propostes_normatives.pdf. For an explanation of the Barcelona commons framework in progress since 2016 see the document *"Barcelona City Council Commons Policy: Citizens Asset Programme and Community management of public resources and services*" at the institutional webpage of the Barcelona municipality at https://ajuntament.barcelona.cat/participaciociutadana/sites/default/files/documents/barcelona_city_council_commons_policy_citizen_assets_programme.pdf.

[82] For an in-depth analysis of the difficulties in this process we may refer further to Bianchi, Iolanda. 'The Commonification of the Public under New Municipalism: Commons–State Institutions in Naples and Barcelona'. *Urban Studies*, 2022, pp.12-15.

[83] The study, issued in 2017, was externally commissioned and carried out by Michel Bauwens and Yurek Onzia. It mapped around 500 experiences that according to the authors could have been considered as commons-oriented: see Bauwens, Michel, and Yurek Onzia. *A Commons Transition Plan for the City of Ghent*. City of Ghent and P2P Foundation, 2017.

[84] On the commons as *"a challenge to traditional civil society organisations"* see Bauwens, Michel, and Vasilis Niaros. *Changing Societies through Urban Commons Transitions*. P2P Foundation, 2017, pp.25-26: *"contemporary citizens are also less likely to join old style membership organizations, preferring the informality and contributory logic of the commons. In conclusion, urban commons create their own new civil society institutions, while also creating a transformative pressure on the existing CSOs"* (p.26).

"dynamic and economically functional sector"[85]. Among the long list of recommendations, what is worth noticing from our perspective is the one advocating for the adoption of a city regulation on the commons similar to the well-known Bologna Regulation on the commons, that would constitute the legal framework for supporting citizens' 'right to initiative' and for signing commons agreements between the city and commoners on specific commons-oriented initiatives[86]. According to that, these agreements would form a commons version of public-private partnerships, under the name of 'public-civil' or 'public-commons' agreements[87]. Notwithstanding the great hype and spread of that pioneering study, the city eventually did not follow the recommendations and did not proceed further in developing an institutionalised legal framework on the commons. This, however, did not prevent commoners' initiatives to continue spreading through other means[88]. The last case – and among these three, the more promising for its legal foundation and explicit commitment to the commons – is the one of Grenoble[89]. In March 2022 the city adopted the innovative municipal resolution *Principes pour une administration coopérative* which establishes the first legal framework in France explicitly supporting citizens' participatory actions through the commons[90], within a wider paradigm of 'cooperative democracy'[91]. Grounded on a solid history of cooperatives and cooperation[92], thanks to many years of public and civic debates and initiatives on the concept of 'commons'[93], and thanks to the

[85] Bauwens, Michel, and Vasilis Niaros. *Changing Societies through Urban Commons Transitions*. P2P Foundation, 2017, p.47.

[86] Bauwens, Michel, and Vasilis Niaros. *Changing Societies through Urban Commons Transitions*. P2P Foundation, 2017, p.69.

[87] Bauwens, Michel, and Vasilis Niaros. *Changing Societies through Urban Commons Transitions*. P2P Foundation, 2017, p.67.

[88] I would like to thank Michel Bauwens for a recent (January 2023) update of the follow-up of this study.

[89] On the case of Grenoble, I would like to thank Olivier Jaspart for answering all my questions related to the legal developments on the commons.

[90] The resolution with its annexes can be found online at https://drive.google.com/file/d/1hQQf-Aru2qQRK9feSdoLhzd12wcy3hi5/view.

[91] As outlined in the municipal Resolution, *"la démocratie coopérative consiste à proposer aux personnes d'agir concrètement en modifiant leur cadre de vie et les services publics, les considérant comme une acteurtrice à part entière, à l'initiative de solutions possibles".* According to the Resolution, the paradigm of cooperative democracy should be added as a fifth dimension of local democracy in parallel to the four other dimensions of democracy: namely "*représentative, directe, d'interpellation et participative*".

[92] Grenoble is considered as the city at the origin of the social and solidarity economy movement in France since the very first mutual aid society of glove makers was created there in 1803 (a brief history of that can be found online at https://www.alpesolidaires.org/actualites/grenoble-lorigine-du-mouvement-mutualiste-en-france).

[93] A list of the various initiatives that have been taking place for years in Grenoble on the commons can be found at https://wiki.lescommuns.org/wiki/Grenoble?fbclid=IwAR18kyT1AdFHBBpwT3lZztU4fQEechroFNC1xxsySiUQY5dnD5xwnQy-cxo.

contribution of the group of jurists *Les juristes embarqués*[94]*,* the city of Grenoble defined its legal framework on the commons articulated in this way: a) the municipal Resolution as the legal framework which defines the concrete principles for an *administration cooperative*[95]*;* b) the *pacte de coopération*, which constitutes the legal tool institutionalising agreements on specific initiatives aimed at sharing the governance of the commons between citizens and the public authority[96]; c) and the *certificat d'action citoyenne*, which consists in a certificate that proves somebody's participation in citizen actions which can be used for professional purposes. On the basis of the Resolution, what can be observed is that the notion of commons (*biens communs*) is still very much connected with the one of public services (*service public)*, and in this way not granted a full autonomy. This may also be a consequence of the fact that a concrete definition of commons is actually not provided for in the Resolution. In addition to that, it may be interesting to observe that this Resolution and its instruments have been conceived as a way to broaden the opportunities of participation for citizens in local level democracy.

Coming to a conclusion, all we can do for now is to report the very complex picture of a work-in-progress development of legal (and policy) frameworks on the commons in cities around the EU. The lack of legally entrenched definitions on the commons at the national and supranational levels is allowing for an increasing spread of various local initiatives that declare themselves as commons-oriented and for which it is not obvious to receive support from public authorities. Not even the three cities of Barcelona, Ghent, and Grenoble so far have been able to contribute to the commons debate with an explicit definition of what the commons are, and so far their political or legal contribution has not been replicated in other cities, nor constitute a solid legal framework. However, we recognise the limitations of our investigation in so far as this, as mentioned before, would

[94] *Les juristes embarqués* is an action-oriented research project led by a group of lawyers from different legal disciplines who have worked on different experiences of urban commons around France. The project was piloted by the association *27ème Région* (https://www.la27eregion.fr/) – a laboratory for the transformation of public policies – on behalf of various national or local administrations. *Les juristes embarqués* constitutes a follow-up project to the previous project "Enacting the commons" (2018-2020) which explored commons initiatives in Europe (website of the project here https://enactingthecommons.la27eregion.fr/). The final report of *Les juristes embarqués* can be found at https://www.la27eregion.fr/9261-2/.

[95] The principles defined are: cooperation, accessibility and support for empowerment, valorisation of citizens' expertise, legal innovation, cooperative administration, citizens' contribution (which is not aimed at replacing the public), respect for the commons.

[96] The idea of this *pacte* builds upon the long-standing jurisprudential concept of occasional collaboration in the public service (*collaboration occasionnelle au service public*), that within French law allows citizens to contribute to the achievement of a public service mission under the control and direction of the public authority. However, the *pacte de cooperation* distinguishes itself from that in so far as the initiative may now come from the citizen who asks to undertake an activity of general interest.

require another totally diverse work of mapping and researching: for the purpose this work may it be sufficient this general overview, and the mentioning of our three cases of Barcelona, Ghent, Grenoble as a consequence of having been recognised in the literature as the most advanced.

4. From problems to similarities of commons in EU cities

Notwithstanding the complex picture coming out so far, what can be stated beyond doubt is that there is a phenomenon with different guises that is taking place in cities around the European Union: for many that goes under the name of 'commons', and it essentially consists of citizens' governance of certain goods of general interest according to new logics which are challenging bottom-up the existing domestic legal orders defined until nowadays by the clear dualism between public and private law. These commons initiatives contain constitutional claims and seek for institutional support or recognition: an explicit legal recognition of the commons as such, however, so far is nowhere to be seen at the EU level, and also the domestic levels are having difficulties in capturing by legal means the phenomenon (Italian case aside) since we are still in the early days of such a new phenomenon which is questioning us. At this stage when the commons phenomenon is emerging more and more, however, some obstacles seem to be relatively widespread, and they could be summarised as the following ones: 1) the lack of legal frameworks; 2) a project-based thinking; 3) bureaucratic and economic problems. 1) With concern to the lack of legal frameworks around the EU – the Italian model of *Shared administration* constituting the most advanced for its constitutional and legal ground –, as we have seen so far the law has not been able to contribute to the explicit concept of 'commons' since to date this topic is itself in search of a shared definition, and jurists to date are unable to fully understand and categorise the phenomenon. It may be argued that, however, it is thanks to this lack of a clear legal framework at the EU and nation-states' levels that there is more room for cities to experiment bottom-up with innovative and creative solutions: legal innovations on the shared management of the commons have, indeed, already been tried out in many cities around the EU in different ways. Notwithstanding that, the lack of clarity on a legal framework is often perceived by both the public and the citizens sides as a difficulty in dealing with the emerging phenomenon of the commons. 2) The second problematic aspect consists in a generalised project-based thinking and practice: without

any doubt, so far this approach has been experimenting different ways to support the commons; however, the limitation of such an approach consists in the difficulty of fostering a structural support which could be replicated as a best practice in all contexts of commons-public authorities relationship, and which at its core brings us back again to the lack of a legal framework. 3) The last essential obstacle refers to the fact that, in front of a widespread will of citizens to participate to their communities through the commons by getting committed to activities of general interest, bureaucratic and economic problems still prevail: citizens' initiatives are, indeed, challenging the constituted legal order in so far as they are requiring a change of mentality, action, support, tools on the side of public authorities, and as a consequence they often clash with bureaucratic structures or fail to use traditional funding channels.

In parallel to these three main obstacles that are also confronted as a constant in the commons phenomenon, there are also certain similarities that may be observed on the basis of the general overview we presented in the previous paragraph: these similarities, we claim, may constitute an opportunity for deriving some background connections among commons initiatives. The similar traits essentially boil down to the following aspects: 1) self-governance and shared governance of the commons; 2) participation; 3) initiatives of social and solidary economy; 4) democracy; 5) the role of cities and urban policies; 6) the reference to the Italian cities' Regulation on the commons as a model to look at. 1) With the first aspect we refer to the consideration that commons-oriented initiatives seem to take place essentially in two ways: a) as self-governance, in so far as the community dealing with a commons is doing so in an autonomous (legal or outlaw) way; b) according to a shared governance with public authorities, where the leadership for this collaboration may come from both the public and the civic sides, respectively in the case where it is the public authority that wants to create a regulatory or policy framework, or where it is a grass-roots citizen initiative that asks for a public support. In both cases, the role of citizens is not replaceable in so far as they constitute the community around a specific commons. 2) Secondly, all commons initiatives may be qualified as innovative forms of civic participation that go beyond a mere decision-making dimension[97], in so far as citizens are concretely doing something, putting into practice an action-oriented version of participation[98]: in this sense, commons have been rightly qualified as democratic

[97] A decision-making phase is still present in the participatory definition of rules by the community around a commons.

[98] See on that paragraph 6 in Chapter 2, and paragraph 2 in Chapter 4.

innovations[99]. The commons, in fact, seem to constitute the label for a new form of participation that is increasingly asking for being institutionalised, and which is shifting the focus form the actual property regime of a good to its participatory governance. 3) The third aspect is the shared acknowledgment among many initiatives that fundamentally the commons are also about economic change: commons-oriented initiatives usually act, indeed, outside the logic of the EU internal market governed by the competition rule, but rather more in line with the idea of social economy. In this way, they aim at paving the way for a new economic model based on the principle of solidarity, which is achievable only thorough the creation of institutions founded on cooperation and mutualism among individuals: these institutions usually take the form of cooperatives, associations, foundations. According to this renewed basic economic approach, the new anthropology of *homo cooperans* has been theorized for referring to the emergence in a wide variety of contexts of citizen collectives through which citizens get organized and *"take matters into their own hands to address local problems"*[100]. As we saw through the case of the three cities of Ghent, Barcelona, Grenoble (but this is the case also for Bologna), commons-oriented initiatives seem to have a better ground in favourable contexts, where the logic of cooperation is historically strong and established. 4) As a natural consequence of a governance perspective on the commons where citizens play a primary role in taking care of certain goods and services, of an innovative form of action-oriented citizen participation, and of a grass-roots solidary design of new economic institutions, also democracy itself seems to be heading towards new directions. In this sense, the contribution of citizens to the commons has led to the qualification of democracy in new ways, so as to distinguish it from traditional forms of representative, direct, deliberative and participatory democracy. Among others this is the case, for example, of the conceptualization of a 'contributory democracy' coming from the case of Ghent[101], and of a 'cooperative democracy', outlined by the Grenoble resolution[102], both willing to capture an initiative-oriented attitude coming

[99] Asenbaum, Hans. 'Rethinking Democratic Innovations: A Look through the Kaleidoscope of Democratic Theory'. *Political Studies Review*, 2021, pp.6-7.

[100] De Moor, Tine. *Homo Cooperans*. Inaugural lecture held at University of Utrecht, 30 August 2013, p.6.

[101] Contributory democracy is the term used for referring to *"a democracy of the doers"* around the commons which stands in parallel to representative democracy: see Vasilis Niaros. *Changing Societies through Urban Commons Transitions*. P2P Foundation, 2017, pp.23-24. See further also the debate within the French context on a *démocratie contributive* in the issue "Démocratie contributive: une renaissance citoyenne" in *La Tribune Fonda*, no.232, 2016, at https://www.fonda.asso.fr/tribunes/democratie-contributive-une-renaissance-citoyenne.

[102] The idea of a *démocratie cooperative* consists in *"à proposer aux personnes d'agir concrètement en modifiant leur cadre de vie et les services publics, les considérant comme un-e acteur-trice à part entière,*

from citizens taking action for the general interest. This existing search for more appropriate terms able to capture bottom-up citizens' initiatives towards the commons which are not waiting for any top-down ignition by public authorities, all in all, seems to be another similar trait shared by the various commons experiences. 5) Concerning the fifth similar trait, commons initiatives seem to highlight the fundamental role of cities in experimenting urban policies that may be considered as commons-oriented even in the absence of any explicit mention of the commons, and notwithstanding the lack of an EU or national level legal frameworks defining what the commons actually are. The overview provided in our research stresses, indeed, cities and other local governments as the concrete *locus* where commons-oriented initiatives actually take place, and where public authorities – which are challenged with a wide diversity of citizens' actions – have the opportunity to creatively draft policies solution within their local self-government. 6) A last consideration should go to a curious aspect, namely the fact that in our search for commons-oriented initiatives many commons activities and scholars[103] look at the Bologna Regulation on the commons as the paramount achievement so far of institutionalisation of the commons within the European legal context, and attempts have also been made at translating the model of *Shared administration* of the commons for example into the French[104] and Spanish[105] legal debates. This last aspect essentially indicates that there is

à l'initiative de solutions possibles" (see the Grenoble Deliberation 'Principes Pour Une Administration Coopérative'. 28 Mar. 2022, https://drive.google.com/file/d/1hQQf-Aru2qQRK9feSdoLhzd12wcy3hi5/view).

[103] See for example Bauwens, Michel, et al. *Peer to Peer: The Commons Manifesto*. University of Westminster Press, 2019. They refer to the Bologna Regulation on the commons as a paradigmatic case for developing new institutional processes for public-commons partnerships (pp.59-60, 61-63).

[104] For the French legal debate we may refer to the contribution of the legal scholar Olivier Jaspar, that theorised *le droit administratif des biens communs* (the administrative law for the commons) for referring to a new discipline of public law in the making aimed at rethinking public services and services of general interest so as to develop new forms of action with respect to the commons, creating true public-commons partnerships which would work according to cooperative and not competitive rules. See further on that Marzolf, Emile. 'Olivier Jaspart : "Comment Les Partenariats Public-Commun Vont Réinterroger Le Droit Public"'. *Acteurpublique*, 11 Mar. 2022. The Bologna Regulation on the commons was also transposed into French by Jaspart (available online at https://media.licdn.com/dms/document/C561FAQFmHL3ss1JrvA/feedshare-document-pdf-analyzed/0/1621115998862?e=1674691200&v=beta&t=LIJrE_TK3pv8GhbDbv8-_6PUkom9HMe3zY5F1ZqfPy8 and presented here http://rpubliquepourquoifaire.unblog.fr/2019/08/30/presentation-dun-modele-de-reglement-dadministration-mise-en-commun/).

[105] For the Spanish legal debate we may refer to the legal scholar Joaquìn Tornos Mas, that theorised an *administración compartida* (shared administration) between citizens and public authorities for the governance of the commons. Unable to rely on the principle of horizontal subsidiarity because not included in the Spanish constitution, the scholar proposed to entrench the model of *administración compartida* in Article 9(2) of the Spanish constitution which reads as follows: *"it is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life".* See further on that Tornos Mas, Joaquìn. 'Primeros Pasos Hacia La Administración Compartida En La

a widespread opinion among commons-oriented initiatives that a clear legal (and constitutional) framework would be helpful for the further development and institutionalisation of the phenomenon of the commons with as yet undefined boundaries. Moreover, a legal framework seems to be of great use on one side also as a vehicle for scaling up commons-oriented experiences, and on the other side for spreading a well-grounded way for citizens and public authorities to collaborate with regard to the commons.

All in all, what emerges from this Chapter to date in relation to the commons around the European Union is a complex picture made of a huge diversity of experiments and solutions which are being implemented by communities in order to complement or create an alternative to what is currently provided by whether the state or the market. We would like to point out, however, that the current variety of commons-oriented experiences (and the objective impossibility to properly collect and categorise them in the lack of legal definitions) should not be regarded as a problem: rather, they constitute a transition phase where both public (local) authorities and the civic side have the opportunity to experiment innovative solutions for dealing with what we may refer to as 'the commons challenge'.

Administración Local de Cataluña'. *Labsus*, 2017, and Tornos Mas, Joaquìn. 'Bienes Comunes y Administración Compartida'. *Los Retos Actuales Del Derecho Administrativo En El Estado Autonómico*, edited by Luis Míguez Macho and Marcos Almeida Cerreda, vol. 2, 2017, pp. 635–46.

Chapter 7. From Italian to other EU cities: towards a theoretical framework for the commons challenge

1.From commons in Italian to other EU cities: too long a jump? 2.The contribution of Italian cities. 3.CPC in EU cities: in search for a future theoretical framework.

1. From commons in Italian to other EU cities: too long a jump?

This last Chapter will focus on answering the overarching research question of this work in the light of what has been said so far and drawing out some essential considerations. Its view angle is the one of European public law[1] in so far as it is looking at European constitutional principles, that are what all the 27 EU member states have in common within the wider European legal space and constitute the highest reference horizon in which to place the case of Italian cities. Within this consideration, however, it was essential to provide a general overview of the complex picture of commons initiatives in the EU[2], and especially of the main problems in the legal (but not only) debate[3], and of the similarities that this first attempt at analysis has revealed[4]. While being focussed on the case of Italian cities, the research question however looks at also other EU cities: this is a consequence of its commitment to understand how the case of Italian cities can contribute to the (future) construction of an overarching theoretical framework to which all cities around the EU may refer in order to support initiatives of civic participation through the commons (CPC). The underlying assumption is that, obviously, the Italian case alone cannot draw an overarching theoretical framework for other EU cities: its centrality, however, to the research question lies in the strong belief that it can provide for a fundamental contribution to the future construction of a common theoretical framework

[1] As seen in Chapter 1.
[2] As seen in paragraph 3 in Chapter 6.
[3] As seen in paragraphs 1 and 2 in Chapter 6.
[4] As seen in paragraph 4 in Chapter 6.

because of its high level of constitutional and legal entrenchment[5], despite being only a piece of a bigger EU puzzle.

The perspective towards other EU cities as potential receiver of this common theoretical framework is grounded on the acknowledgement that it is the cities' front that can experiment democratic innovations by supporting new forms of citizen participation[6]. At the same time, we realised that if we want to look at cities in a EU perspective, then they should be given a post-national level of meaning[7]. In this sense, it is possible to talk about a transnational law of cities[8] where they can rely on a common European constitutional local government law[9] in order to find their place as political communities beyond a Westphalian order[10]. The EU, indeed, constitutes a space of legal pluralism[11] where a growing number of networks of cities are emerging with the aim to tackle a great diversity of challenges, and in doing so they are collaborating in a governance perspective with citizens. Arguably this is contributing to rethinking the public-private divide that has characterised so far the State-market dualism, and that may see civil society as one of its drivers of transformation[12]. Among these emerging challenges, the commons challenge is growingly being recognised as a puzzling phenomenon that needs to be framed and accompanied by public authorities in cities. While the Italian cities have found (among the others) a constitutional hook in the principle of subsidiarity in its horizontal dimension for creating an organizational model (the *Shared administration*) able to support citizens' initiatives through the commons, on the opposite the broad complex picture emerging from Chapter 6 points out the lack of a constitutional and legal framework first and foremost at the EU level, but additionally also at the national levels, where it seems that we are still in an experimentation phase where the commons phenomenon is still in search for definition and recognition. The move from Italian cities to other cities around the EU, therefore, constitutes a stepping-stone which aims at introducing the Italian legal contribution to the commons to the wider European legal debate still entirely in the making, and that as we saw presents objective difficulties of analysis.

[5] As seen in Chapters 4 and 5.
[6] As seen in paragraph 5 in Chapter 2.
[7] Dann, Philipp. 'Thoughts on a Methodology of European Constitutional Law'. *German Law Journal*, vol. 6, no. 11, 2005, pp. 1453–73.
[8] See footnote no.110 in Chapter 5.
[9] Boggero, Giovanni. *Constitutional Principles of Local Self-Government in Europe*. Brill, 2018.
[10] See footnote no.7 in Chapter 3.
[11] See footnote no.167 in Chapter 2.
[12] This is claimed in Micklitz, Hans-W. 'Rethinking the Public/Private Divide'. *Transnational Law,* edited by Miguel Maduro et al., Cambridge, 2014, pp. 271–306. The two other drivers of the transformation of the public-private divide are, according to the author, economy and technology.

In conclusion, it may be argued that the commons as an emerging phenomenon of an innovative form of civic participation in local democracy constitute a challenge for cities in so far as they demand either a renewal and creative effort of public authorities in granting institutional recognition to these emerging experiences, or to coexist outside the established legal order in a self-managing manner. An interplay among diverse EU cities is already occurring within transnational networks or EU-funded projects[13], and that is allowing for best practices to circulate: in an equal way we believe that a common framework grounded in European constitutional principles – and not in policies or projects – could constitute a safe and solid reference for cities to face the commons challenge and confront diverse recurring obstacles. A common European theoretical framework could therefore provide for legal clarity to cities willing somehow to deal with initiatives of CPC. All in all, Italian and other EU cities constitute the locus for local democracy in the EU, and as such can find common ground on the same European constitutional principles.

2. The contribution of Italian cities

Constituting the core of our research question, the Italian case as we saw is relevant essentially for one objective aspect: namely, that it depicts a widespread bottom-up phenomenon that has increasingly been recognized and institutionalised through a constitutional and legal framework within the Italian legal system. The Italian (local) phenomenon, however, should not be observed within the mere nation-state' borders: on the opposite, it is worth being object of research in a wider transnational European perspective, in so far as it constitutes the arguably pioneering case study able to give recognition to a phenomenon that is already taking place in different guises also around other EU cities. The Italian case offers, indeed, new evidence that has been able to challenge the predominant paradigm in order to propose alternative solutions: in fact, the organizational model of *Shared administration* that more than 280 cities started adopting since 2014 shows that the predominant bipolar paradigm in the relationship between the State and citizens could be complemented by the subsidiarity paradigm through public authorities' support for initiatives of CPC.

What are the main fundamental lessons that can be learnt from the Italian case that may contribute to answering our overarching RQ? We argue that lessons can be drawn on

[13] As seen in paragraph 5 in Chapter 3.

two sides: on the internal dimension, and on the external one. Starting from the internal dimension[14], we refer to the innovation capacity of the Italian case within the Italian legal order, and overall five are the main lessons that can be learnt[15]: they regard 1) the principle of horizontal subsidiarity; 2) the commons as a new form of civic participation; 3) the definition of the organisational model of *Shared administration*; 4) the recognition of the EU principle of solidarity by the Italian Constitutional Court; 5) the rising role of local authorities and the emergence of the city as a legal category.

1) The inclusion of the principle of subsidiarity in its horizontal dimension in the Italian constitution (Article 118(4)) has represented a great treasure for the Italian legal order: in fact, it allowed the emergence of a new type of relationship[16] between two autonomies – public autonomies and civic autonomies[17] – based on the subsidiarity paradigm, where an obligation for public authorities is foreseen to support citizens' autonomous initiatives of general interest[18]. Horizontal subsidiarity was able to give primary centrality to the role of the local level of government being the closer to citizens, and at the same time to encourage contributions coming from the society: in this sense, both an institutional and societal pluralism are recognised and promoted. In doing so, horizontal subsidiarity constitutes the unique principle the has been able to intercept the phenomenon of the commons taking place in society, granting a constitutional cover to that[19].

2) Thanks to the potential contained in horizontal subsidiarity and its related concept of general interest[20], the phenomenon of the commons was able to receive a legal cover that moved it away from the field of ownership to the one of governance. In fact, the will of horizontal subsidiarity to draw a new type of relationship between the State (at all its levels) and society essentially points to a question of shared governance of the commons notwithstanding their (private or public) ownership. This shared governance of the commons between public authorities and citizens is actually bringing out an innovative type of action-oriented civic *participation in doing* that goes beyond a mere *participation in deciding*[21]: for the purpose of this work, we have defined it as civic participation through the commons (CPC).

[14] The internal dimension corresponds to what has been investigated in Part II.
[15] The considerations expressed here build upon our conclusive remarks in paragraph 5, Chapter 5.
[16] As seen in paragraph 3.3 in Chapter 4.
[17] As seen in paragraph 3.1 in Chapter 4.
[18] As seen in paragraphs 3.2 and 3.3 in Chapter 4.
[19] As seen in paragraph 5 in Chapter 4.
[20] As seen in paragraph 5 in Chapter 4.
[21] As seen in paragraph 2 in Chapter 4.

3) The innovative form of CPC that is emerging in the Italian legal context under the constitutional cover of the horizontal subsidiarity principle eventually has found practical realisation in the organisational model of *Shared administration*[22], which has been developed within the public law scholarship and concretely implemented in local governments since the pioneering Bologna Regulation in 2014. Thanks to its legal tools of the Regulation on the commons and the *Collaboration agreements*[23], the model of *Shared administration* has been able to institutionalise *de facto* social practices of CPC and give them legal cover. In doing so, *Shared administration* does not constitute a mere theory, a policy, or a project, but a sound organizational model with clear normative references of a general nature that fully legitimise it in our constitutional order.

4) *Shared administration* has been eventually recognized[24] by the Constitutional Court in a recent judgement which has been elaborating on that as an ideal third space between the dualism state-market, and which may find its archetypal constitutional principle at the supranational EU level in the EU principle of solidarity. Accordingly, the EU principle of solidarity is perceived by the Court as the reference principle running in parallel and in addition to the EU principle of competition, that could serve as the reference point for all those type of relationships between public authorities and citizens oriented towards the general interest that are not to be traced back to EU competition. The contribution of the Court constitutes a first attempt at framing the Italian case within the wider European constitutional context: it has the great merit to have contributed to finding a reference point that could eventually also serve other similar initiatives on the commons in other member states.

5) The last among the main lessons to be learnt from the Italian case is the rising role of local authorities and the emergence of the city as a legal category. Thanks to the principles of horizontal subsidiarity and local autonomy (Article 5), and in line with the constitutional provision of regulatory autonomy (Article 117(6)), local authorities in Italy are experimenting their right to local self-government by supporting citizens' bottom-up initiatives: in doing that, they are serving as true laboratories for civic participation[25]. In this way, those local authorities that have adopted the *Shared administration* model can be said to have found a way to give juridical value to *informal public law*, for referring to all

[22] As seen in paragraphs 1 and 2 in Chapter 5.
[23] As seen in paragraphs 2.1 and 2.2 in Chapter 5.
[24] As seen in paragraph 3 in Chapter 5.
[25] As seen in paragraph 4 in Chapter 5.

those social experiences already happening outside mere positive law borders[26]. More precisely, practical activities of care, regeneration, and shared governance of the commons are granted legal (and constitutional) cover by all those local authorities that choose to adopt the *Shared administration* model, putting therefore into practice the constitutional principle of horizontal subsidiarity despite the absence of national legislation on that. Within this context, the idea of 'city' looking beyond mere administrative boundaries can be seen as an emerging category of public law, constituting the core subject of the emerging wider field of the *law of cities*. According to the specific focus of our research, cities may therefore constitute the concrete ground where societal pluralism finds its democratic legitimation not only through the traditional representative channel based on positive law, but also through the participatory channel via the institutionalisation of informal activities under the cover of the informal public law. All in all, it may be the case that cities are giving shape to a new form of democracy which is grounded on the inclusion of CPC thanks to horizontal subsidiarity[27].

These five aspects constitute the fundamental lessons that can be learnt from the Italian case on its internal dimension. On the external dimension towards the European legal space[28], instead, we can point out other five essential lessons: they concern 1) democracy in the EU; 2) the principle of participation; 3) the principle of subsidiarity; 4) the principle of local self-government; 5) the rising role of cities. It is important to specify, however, that the lessons learnt from the Italian case – EU principle of solidarity aside – are not rooted in European constitutional principles, but specifically in Italian public and constitutional law. Notwithstanding that, we believe it is possible to create links between the Italian case and other European constitutional principles, and so we will elaborate these further connections here.

1) On democracy in the EU, we qualified it as a distinctive system of both government and governance[29], where non-state actors play a fundamental role in parallel to state actors, also by challenging traditional sources of law paving the way for complementary sources of soft-law. It seems to be a kind of democracy different from the one of nation-states, by founding its legitimacy on both representative and participatory channels[30]. In the light of that, we argued that it is not possible to talk of a crisis of

[26] As seen in footnote no.111 in Chapter 5.
[27] As seen in paragraph 5 in Chapter 5.
[28] The external dimension corresponds to what has been investigated in Part I, and the considerations expressed here build upon what emerges overall from its chapters (Chapters 1, 2, 3).
[29] As seen in paragraph 4 in Chapter 1.
[30] As seen in paragraph 4 in Chapter 1, and paragraph 2.3 in Chapter 3.

democracy as such, but of a transformation of that[31], essentially thanks to many emerging types of democratic innovations (DIs) that are contributing to providing the European principle of participation with additional values[32]. With relation to this first aspect, the Italian case seems to fit well into this definition of democracy, and it seems possible to include *Shared administration* within DIs (and its field of collaborative governance).

2) The principle of participation foresees for citizens a right to participate in both the EU and CoE legal orders, thanks to Article 10(3) TEU and Article 1.2 of the *Additional Protocol on the right to participate in the affairs of a local authority* to the 1985 Charter. It was the CoE, however, that created a strict connection between the right to participate and local democracy, with the provision for a symmetrical empowerment of local authorities to enable, promote, facilitate the exercise of this right also responding to suggestions of citizens regarding local public services[33]. Overall the poor explanation of the content of participation makes it an European principle still allowing for great space for interpretation: in this sense, as we saw the frontier of this principle constitutes an action-oriented version of it[34]. With relation to this second aspect, the Italian case was able to put in practice an innovative form of action-oriented participation, which we labelled as CPC.

3) The principle of subsidiarity within the European legal space has been receiving more attention by the EU legal order rather than the CoE. The EU contribution is, indeed, fundamental in shedding light on this principle first and foremost on the basis of its original debate in the nineties, where the three roots of subsidiarity were equally present[35]. As we argued, one of these roots – namely, the meaning of subsidiarity according to the Catholic social philosophy – has gone totally forgotten, therefore depriving the Treaties of an explicit recognition of the fundamental contribution that could be spontaneously given in democracy by private individuals on the basis of their self-governance. We argued, however, that it is possible to find traces of this forgotten meaning of subsidiarity implicitly in the EU legal order: firstly, in the other EU constitutional principles of solidarity, sovereignty, and participation; secondly, in the TEU preamble, and Article 10(3) TEU[36]. Outside the Treaties, also the theoretical contribution of the EESC in the recognition of private actors in a governance perspective in democracy has been given credit for an implicit valorisation of the forgotten meaning of subsidiarity. We therefore argued that the

[31] As seen in paragraph 3 in Chapter 1.
[32] As seen in paragraph 5 in Chapter 2.
[33] As seen in footnote no.134 in Chapter 2.
[34] As seen in paragraph 6 in Chapter 2.
[35] As seen in paragraphs 2.1 and 2.3 in Chapter 3.
[36] As seen in paragraph 2.3 in Chapter 3.

forgotten meaning of subsidiarity is already implicit in the European constitutional tradition, and being elastic enough[37] there is no need for a Treaty change: as a consequence, it is up to local governments to apply it as a harbinger of a new governance culture. A democratic reading of the EU principle of subsidiarity in both a government and governance perspective – according to a subsidiarity-as-democracy idea[38] – discloses an innovative potential for the relationship between public authorities and citizens. With relation to this third aspect, the Italian case constitutes a perfect example of constitutional recognition of this forgotten meaning of subsidiarity, therefore paving the way for other public authorities around the EU to disclose this unexplored – but intrinsic – meaning of the principle.

4) The principle of local self-government has not been fully incorporated by the EU legal order: that's why the constitutional contribution of the CoE is fundamental, therefore equipping EU local authorities with that[39]. This also constitutes the reason why in order to look at local authorities in the EU we had to be aware of the multiple legal orders that have an impact on them, and as a consequence the research looked at the constitutional contribution of the wider European legal space (EU and CoE). While the EU has a more state-centric perspective, the CoE already recognised local authorities beyond nation states' borders since its 1985 fundamental *European Charter on local self-government*, therefore giving an European constitutional value to institutional pluralism and more precisely to local democracy. With relation to this fourth aspect, the Italian case provides for a great example of local authorities making use of their local self-government in supporting civic participation initiatives through the model of *Shared administration* and its Regulation.

5) With concern to the last aspect – the rising role of cities – we acknowledged the ongoing process of transformation of public law in the European legal space, in so far as they are emerging as political communities (*civitas*) beyond mere administrative borders (*urbs*). Their contemporary renaissance reflects a worldwide general phenomenon of urbanization, and claims their essence of human settlements with an original vocation as political communities beyond their constriction within state superstructures. This phenomenon has also been observed in the growing contribution of EU institutions through policies and other soft-law instruments[40] related to what is more and more defined as

[37] As seen in footnote no.111 in Chapter 3.
[38] As seen in footnote no.267 in Chapter 3.
[39] As seen in paragraphs 2.2 and 3 in Chapter 3.
[40] As seen in paragraph 5 in Chapter 3.

'urban' or 'city/cities': this is occurring in the lack of competence of EU law on local authorities which are traditionally considered within the EU bi-centric structure only as passive receivers and not also as active subjects. Cities as such, in fact, are emerging more and more (often in networks) as laboratories for transformations of local democracy through participatory forms together with their inhabitants, lying therefore at the intersection between a government and a governance perspective[41]. With relation to this fifth aspect, the growing conceptualisation of the idea of 'city' also within the Italian doctrinal debate shows a desire to claim its original vocation of a political community made of public authorities and citizens that together may contribute to the renewal of local democracy.

All these aspects considered, we are able to suggest the following four European constitutional principles as potential reference points that can contribute to an overarching European theoretical framework for also other EU cities dealing with the commons:

- participation
- subsidiarity
- local self-government
- solidarity

We believe that there is still room in the Treaties to discover unexplored meanings from constitutional principles, and in the light of the Italian case these four seem to have great potential in that. In addition to their constitutional contribution, we recognize also the fundamental contribution of EU soft-law that in a truly governance perspective is reaching out to cities. It goes without saying that the Italian case is up to date still a work in progress and cannot be considered as the predominant model: in fact, the subsidiarity paradigm in the relationship between public authorities and citizens does not constitute yet the rule first and foremost because it implies a change in culture and mindset on both sides. However, whenever there are best practices emerging – like the case of around 280 Italian cities having adopted the model of *Shared administration* of the commons – it is the task of legal scholars to give a proper doctrinal cover to such bottom-up innovations: all this by using the constitutional principles and the objective evolution of the reality as guidelines. Three among the four European constitutional principles identified by our research on the Italian case seem to be traceable also among the similarities emerging from the commons

[41] As seen in paragraph 7 in Chapter 3.

phenomenon in EU cities[42], in this way supporting our argument: 1) participation, which is emerging in a very action-oriented dimension through the commons; 2) solidarity, which is emerging by paving the way for grass-roots collective actions among citizens[43], in line with an economic model not based on competition; 3) local self-government, with reference to the active role played by EU cities as political communities by collaborating with their citizens in looking for new solutions.

In conclusion, with all its limitations, we consider the case of Italian cities paradigmatic for its ability to respond to the commons challenge through, on the one hand, a solid anchoring to Italian and European constitutional principles, and on the other, a creative use of law: in the light of that, it was possible to identify the four European constitutional principles outlined above that could serve also other EU cities facing the commons challenge.

[42] As seen in paragraph 4 in Chapter 6, where we pointed out to six main emerging similarities, that could serve for future research: 1) self-governance and shared governance of the commons, 2) participation, 3) initiatives of social and solidary economy, 4) democracy, 5) the role of cities and urban policies, 6) the reference to the Italian cities' Regulation on the commons as a model to look at. Despite the fact that these similarities have been extracted from a small number of sources (as a consequence of the objective difficulties explained in paragraph 1 in Chapter 6), they are still very significant in giving a preliminary overview of some references that we may draw so as to serve cities willing in the future to face the commons challenge.

[43] Ross, Malcolm. 'Solidarity - A New Constitutional Paradigm for the EU?' *Promoting Solidarity in the European Union*, edited by Malcom Ross and Yuri Borgmann-Prebil, Oxford University Press, 2010, pp. 23–45. See also footnotes no.91-92 in Chapter 3.

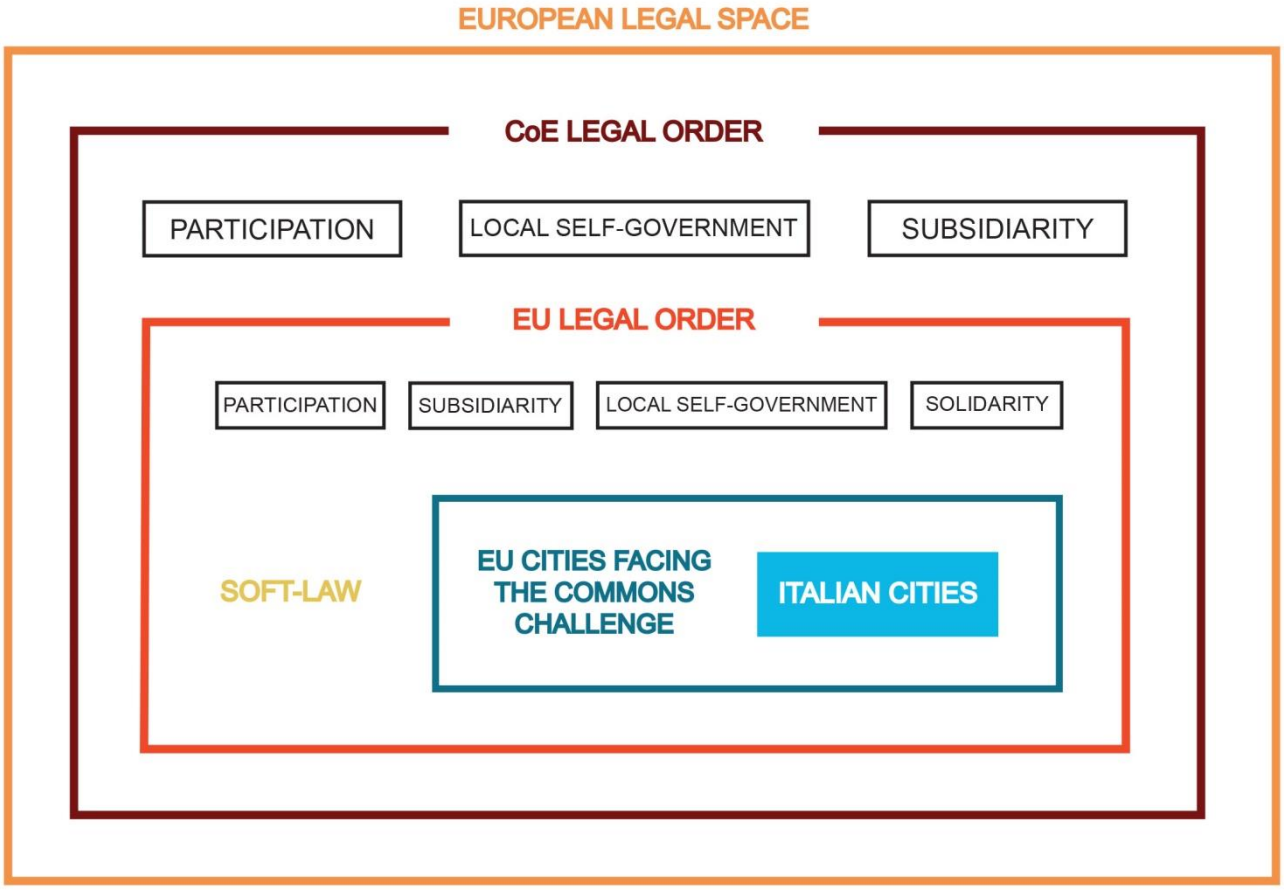

Figure 2: The contribution of the Italian case (author's elaboration).

3. CPC in EU cities: in search for a future theoretical framework

These European constitutional principles could be the reference points for also other EU cities to anchor themselves in developing their own organisational models on the commons. According to the research question, it was not the aim of this work to actually draw an overarching European theoretical framework for all EU cities dealing with the commons, and that would constitute the aim of another work based on a different research question. Moreover, this may seem inappropriate to date in light of the fact that the phenomenon of commons in the EU is rather recent, and great future research and institutional progress still needs to be done before making that possible.

However, the future existence of a common theoretical framework would be useful and make a difference in comparison to not having that. At this stage when the law is still in its laboratory phase of understanding and trying to order this new social phenomenon spreading in EU cities and in need for recognition, a theoretical framework based on

European constitutional principles seems to be extremely useful in order to provide references primarily for cities themselves, being at the forefront of dealing with this phenomenon. In this way, despite the absence of national level legislation, EU cities could rely on some common European constitutional principles in order to try to elaborate their own organisational models, regulations, or policies to support civic participation through the commons. We recognise that the biggest limitation of drawing such a framework would be the highly theoretical nature of such an umbrella of abstract doctrine, and that could be seen as overly simplistic in front of a highly fragmented number of diverse cases. In fact, that would still require a need for each city to take into account their own national legal order: as a consequence, while a common theoretical framework would serve as an enabler, then it would be up to national contexts to take over. Notwithstanding that, we believe that an European theoretical framework in this sense could serve as a higher reference frame for local level experiments to take place so that grass-roots initiatives of CPC could be supported: a prolonged absence of that, instead, would simply not equip EU cities with an additional guidance in dealing with the commons challenge.

In conclusion, the need for the scholarship to be able to draw sooner or later in the future an overarching theoretical framework for EU cities should be perceived as a concrete commitment to give cities solid constitutional and legal reference points under which they can face problems and challenges coming from the commons. So many are indeed the commons-oriented initiatives around EU cities that are already searching for institutionalisation or support and promotion by public authorities. A common theoretical framework could therefore be useful not to standardise, but to support what is already happening in different guises around the EU. All in all, a theoretical framework, indeed, refers to the ability to imagine what is not yet there, but that on the basis of certain elements could still be foreseen and imagined. This research claimed that some evidence can already be derived from the contribution of Italian cities to the commons in the light of the European constitutional principles.

Conclusion

Findings

Rooted in the debate on forms of civic participation in local democracy within the EU, the aim of our work was to understand the contribution of the case of Italian cities to the drafting of an European theoretical framework for all those EU cities that are facing the commons challenge. In order to do that, Part I addressed the European constitutional debate on the principles concerning civic participation at the local level of democracy: namely participation, subsidiarity, local self-government; Part II carried out an in-depth investigation of the case of Italian cities supporting the commons linking it to the European constitutional principles; Part III offered a general overview of the commons debate and initiatives around EU cities, eventually coming to an answer to the overarching research question of our work.

Chapter 1 set the scene entering the European legal space by defining democracy in the EU according to forms and levels. On the basis of that, it claimed that it is not true that democracy as such is in crisis, because a closer look would point out to the flourishing of democracy at the local level through participatory forms that are paving the way for a democratic legitimation beyond mere representative forms. As a consequence, the concept of governance was introduced because functional to better explain the uniqueness of democracy in the EU as a system of both government and governance, where both channels of representation and participation contribute to the transformation of democracy.

Chapter 2 entered the debate on the principle of participation in the European legal space tracing its roots at the intersection between legal and political scholarship, and shedding light on the constitutional contribution on that of the two legal orders of the EU and the EU. While the EU contribution is mostly concerned with participation at the CoE level, the CoE was given credit for having granted constitutional recognition to the connection between civic participation and local democracy thanks to its 1985 European Charter on local self-government. With this constitutional contribution in the background,

the Chapter gave an overview of the great and countless amount of democratic innovations occurring at the local level of democracy around the EU as a proof of an emerging trend of participatory practices and instruments occurring often in the absence of normative provisions on them. The main challenge observed in the debate on participation, was the emerging recognition of an action-oriented dimension, aimed at pushing the boundaries of participation beyond the mere decision-making.

Chapter 3 dealt with the local level of democracy within the European legal space, identifying the two principles of subsidiarity and local self-government as the guiding principles for that, which can be found in both the CoE and EU legal orders. While the EU was recognised for having contributed greatly to the principle of subsidiarity, the CoE on its side has the merit of having granted an European constitutional cover to local self-government, therefore constituting a reference point for all those local authorities that in the bi-centric EU legal order find an insufficient recognition. While deepening into the original EU debate in the 1990s on subsidiarity, an additional horizontal meaning of this principle was discovered: this is what we labelled as *the forgotten meaning of subsidiarity*, for referring to the original interpretation of this principle given by the Catholic social philosophy claiming the need for public authorities to support all those citizens taking action for the general interest. Being already implicitly inside the European constitutional tradition and some hints of this being traceable in the EU Treaties, the Chapter argued that it is up to local governments to apply the principle according to this additional meaning, as a consequence of the fact that it is indeed the local level of government the closest to citizens. In the light of that, and according to the need to better understand what is there at the local level, a general shift from ‘local’ to ‘urban’ was observed especially through the rising role of the city as an emerging autonomous subject beyond traditional administrative state structures. This was observed in both doctrinal contributions and EU institutional action through soft-law tools, effectively creating a new challenge to European public law. In this way, the city as such seemed to be willing to reawaken its original vocation of human settlement before its constriction within states’ superstructures. In doing so, the city is essentially claiming its fundamental role as the primary laboratory for democracy transformations, where a growing number of participatory demands are coming from outside representative channels: in the light of that, the forgotten meaning of subsidiarity was presented as the viable archetypal European principle for EU cities as political communities.

Chapters 4 and 5 introduced the case of all those (around 280) Italian cities that have found a constitutional and legal way to support innovative types of civic participation through the commons (that we defined by the acronym CPC). As it was clarified, indeed, CPC represents an innovative form of participation because it goes beyond a mere *participation in deciding*, constituting instead a *participation in doing* where not only a decision-making but also an action-oriented part is included. Chapter 4 argued that the public support for CPC was possible thanks to the constitutional principle of horizontal subsidiarity included in the Italian constitution at Article 118(4), that foresees an obligation for public authorities to support individual or associated citizens in carrying out autonomous initiatives of general interest. Finally, a connection was drawn between horizontal subsidiarity and the commons in so far as it was this principle that, through its concept of 'general interest', was able to intercept the commons phenomenon taking place in the society, providing for a constitutional cover to that. Under this constitutional legitimation, and after a brief overview of the Italian legal debate on the commons, Chapter 5 then thoroughly analysed the organizational model *of Shared administration* of the commons that through a prototype municipal Regulation on the commons and the *Collaboration agreement* tool has widespread in more than 280 cities since the pioneering Bologna contribution in 2014. *Shared administration* was found to have gone much beyond the mere boundaries of administrative law, by drawing a new subsidiary paradigm in the relationship between the citizens and the state through the outline of an horizontal collaborative relationship among the two, and in which the local level of government plays a key role. Within an on-going process of institutionalisation of *Shared administration*, fundamental was the contribution of the Constitutional Court that in a recent judgement traced the model back to the EU principle of solidarity, outlining that it constitutes an alternative to the profit and market channel which, on its side, is based on the principle of competition. This link explicitly created between EU solidarity and *Shared administration* (and implicitly with the commons), was given credit for constituting a milestone in the European debate on the commons from a constitutional perspective, whose revolutionary scope has yet to be fully understood. Chapter 5 then continued by looking at local authorities, and observing that in parallel to the phenomenon observed in the European public law context, also in the Italian context the idea of the city as an autonomous subject beyond administrative borders was recognized as emergent. In this sense, a law of cities is in the making as a consequence of the commitment of cities to give legal recognition to those social experiences already happening outside positive law, namely experiences of

informal public law. Among those experiences of informal public law, the Chapter concluded by saying that the initiatives of civic participation through the commons started to be supported by public authorities with the *Shared administration* model thanks to the principle of horizontal subsidiarity.

Chapter 6 gave a broad overview of the commons in the EU, pointing out first and foremost to the objective difficulties of a debate in the making (definition and language barriers, interdisciplinary and transdisciplinary contributions, classification). As a preliminary step, what seemed possible to affirm is that the commons constitute a resource whose governance is shared by a community according to a set of rules in a third space between the state-market dualism. Despite the fact that to date a real commons legal debate in the EU could not be traced, legal hints have been identified in the fields of property, governance, state aid, public private partnerships, the social dimension of the EU, services of general interest, and human rights. In parallel to that, the Chapter recognised that it is the complex picture emerging from commons-oriented initiatives already taking place around EU cities what could provide for some insights into common problems and similar aspects. Among the common problems preliminarily identified, the Chapter pointed out the lack of a legal framework providing for a legitimation and support by public authorities, a project-based thinking, bureaucratic and economic problems; among the similarities, their shared or self-governance, a connection with participation, their social and solidarity economy imprint, their democratic nature, the role of cities and urban policies in enhancing them, the reference to the Italian case as a model to look at. All in all, the Chapter unveiled a very complex theoretical as well as practical picture, in which the great diversity of approaches and experiments pointed to EU cities as true ongoing laboratories for the commons.

Chapter 7 constitutes the core of our work in so far as it eventually answered the research question of our work. It claimed that the case of Italian cities supporting the commons contributes to an overarching European theoretical framework for also other EU cities dealing with the commons pointing to the four European constitutional principles of subsidiarity, participation, local self-government, and solidarity as reference points. According to what emerges from the Italian case, these four were considered as the suggested building blocks for drawing a future theoretical framework. A special additional mention was given to EU soft-law for its contribution on city-related matters that could be of use also on the commons challenge. In addition to these four principles, it was demonstrated that the significant and inspirational innovation of the Italian case lies in its

ability to set up a constitutionally entrenched organizational model for the governance of the commons (*Shared administration*). In conclusion, the Chapter argued that the essential lesson to be learnt from the research is that by building upon these four European constitutional principles also other EU cities could experiment their own organizational models for supporting CPC.

The way forward

The case of Italian cities is only a small part of a much bigger puzzle that still needs to be pieced together. Without any doubt, however, it constitutes a pioneering case worth disseminating for having outlined a constitutional and legal framework supporting the commons, and it establishes only the beginning of what appears to be a long-term innovation in the relationship between citizens and public authorities. With our research we contributed by lying some foundational building blocks that should be taken into account for the future construction of an overarching European theoretical framework. This should be composed of constitutional and legal pieces at different levels of government that cities could use as a higher cover for supporting commons-oriented initiatives. The commons challenge, in fact, is much wider than the Italian case, and targets local democracy in cities around the whole EU. As a consequence, we would like to point out the following two main aspects as desirable next research steps: 1) a legal study on the commons in EU member states; 2) a legal study trying to validate the contribution of the Italian case identified in our work in all other EU member states.

1) The first aspect could arguably be investigated by a comparative work on the commons in the legal orders of the 27 EU member states. This comparative work should ideally be organized and carried out by a team of national experts willing to understand to what extent the commons are already institutionalised or traceable in their legal orders, and which are the on-going experiments carried out. Since, as we have seen, the commons lie at the intersection between public and private, it would be better to have two national experts per each country, able to provide for both perspectives on the commons, namely a public law perspective as well as a private one. Such a research would contribute to filling the existing gap on an overall legal picture on the commons in the EU.

2) The second aspect could also be explored by a collective work involving one national expert from each EU member state. The aim would be to understand if the European constitutional principles of subsidiarity, local self-government, participation, and

solidarity could serve or not as ideal reference points for other EU cities to elaborate at the local level – and according to their national legal orders – their own organizational models on the commons. This type of research on one side would validate the findings from our work; on the other, it would be able to complement our findings with the identification of other European constitutional principles that could serve for facing the commons challenge.

These two aspects constitute to date open questions that suggest new paths for future research. In parallel to the contribution of the scholarship, however, it is important to state that desirable steps could also come from public authorities within the European legal space, and more precisely from cities themselves. In fact, no lack of constitutional or legal framework prohibits cities from experimenting new ways in order to face the commons challenge. On the opposite, despite their precariousness in comparison to having clear constitutional references and legislation, local authorities' regulations have the advantage of constituting potential pioneering bottom-up experiments that may pave the way for a long-term systemic change.

All things considered, these aspects constitute the research agenda for the future development of an overarching European theoretical framework for EU cities facing the commons challenge. All of that demonstrates that we are only at the beginning, and all these various paths ahead – among others – still need to be explored: the overall long-term ambition is to unleash the creative potential of EU cities in supporting active citizens exercising an innovative form of civic participation through the commons. Cities are, in fact, composing themselves around new institutionalisation processes together with their inhabitants: it will take a lot of practice to implement this ideal vision.

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