

The principle of proportionality analysed through the lens of a comparative perspective

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ABSTRACT: The development of the EU principles, particularly of the subsidiarity principle and of the proportionality principle, follows different directions, according to the different legal systems of Member States. In Germany, where the principles took origin, the structure of the Constitution itself has been deeply transformed. In Italy, even if less strongly than in German system, the devolution of powers from the State to the Regions is inspired to the same criteria. The Constitutional Courts of both the Member States are becoming familiar with these principles as well, in order to satisfy the needs of their effectiveness. The possibility of a judicial review, technical and impartial, may be used as a fundamental tool to trespass the threshold of "discretionary power" and to make the subsidiarity principle more enforceable.

Summary: 1. Introduction: Federalism as the right direction to be followed 2. German constitution: Subsidiarity clause between EU and Germany and between Bund and Länder. 2.1 The Federation and the State: art. 23, 24, 28-34, 37 GG 2.2. Federal legislative powers: art. 70-74 GG 2.3 Execution of Statutes and Federal Administration (art. 83-91 GG). Joint tasks (Art. 91 a and 91 b) 3. The Italian Constitution: New Title V. Subsidiarity clause between the State and the Regions 3.1 Legislative competences and Subsidiarity principle in administrative functions. 4. Two compared decisions: Judgment of Oct. 24.2002 BVerGE, 2 BvF1/01 and OGM Corte cost.: the proportionality principle flips! 4.1 German case law; 4.2 Italian case law. 5. Conclusions

1. Introduction: federalism as the right direction to be followed

"The most important aspect of a federal system is that it recognises that there are different types of political issue which need different types of institution to deal with them. Some affect only a local area, others are more widespread in their scope. The institutions of government should reflect this. The idea that government should be based solely on strong central institutions is old-fashioned and out-of-date. In a federal system, the power to deal with an issue is held by institutions at a level as low as possible, and only as high as necessary. This is the famous principle of subsidiarity. The second major feature of a federal system is that it is democratic. Each level of government has its own direct relationship with the citizens. Its laws apply directly to the citizens and not solely to the constituent states. In a federal system, power is dispersed but coordinated. For this reason,

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federalism is often seen as a mean of protecting pluralism and the rights of the individual against an over-powerful government"².

With these words, Richard Laming, a member of the Executive Committee of Federal Union, introduces the main features which characterise the conception of a "federalist Union", towards which Europe, and, with Europe, each system of Member States, and citizens, should look at, at this moment, where fundamental is the need to find new energies to "restart" after the temporary halt of European process.

The common feeling is that Europe at the moment requires "an injection of democracy, with terms of reference, which can be discussed in detail without all too soon coming up against the boundaries of the field of competence in question, within which pan European public opinion can be formed and within which it is accountable to the European public with regard to the fulfilment of its tasks"³.

The paper will analyse the problem of proportionality in European allocation of competences and also, in a comparative perspective, in allocation of competences in some of Member States: most of all, the pivotal system of Germany, from where the principle has been transferred to article 3b of EU Treaty; then, as a sample of the so called "descendant phase of communitarian law" (i.e. the application of EC law in domestic law), the Italian system, where subsidiarity and proportionality principles are now expressly "constitutional principles".

In order to understand the mechanisms of proportionality principle it will be shown the situation in Germany, where, according to the federal principle, the development of subsidiarity principle follows two main directions: at a first level, it appears in the relationship between EU and national powers, and at a second level,

² R. LAMING, *An introduction to federalism*, Article n. 1, Federal Union, 2003, in www.federalunion.org.uk.

³ U. FASTENRATH, *The EU as a federal commonwealth*, in H. J. BLANKE – S. MANGIAMELI (ed.), *Governing Europe under a Constitution*, Springer Berlin – Heidelberg, 2006, 414; ID., *Struktur der erweiterten Europäischen Union*, in U. EVERLING (ed.), *Von der Europäischen Gemeinschaft zur Europäischen Union, Europarecht*, Supplement 1/1994, 101, 114, 120; S. ALBIN, *Das Subsidiaritätsprinzip in der EU – Anspruch und Rechtswirklichkeit*, in *NVwZ*, 2006, 6, 629; R. KWIECIEN, *The Primacy of European Union Law over National Law under the Constitutional Treaty*, in *German Law Journal*, Special Issue –Unity of the European Constitution, 6, 11, 2006, 1479; M. KUMM and V. FERRERES COMELLA, *The Future of Constitutional Conflict in the European Union: Constitutional Supremacy after the Constitutional Treaty*, Jean Monnet Working Paper 5/04, 8-10; see also O. AUDÉOUD, *Les collectivités locales et la communauté européenne*, in O. AUDÉOUD, *Les régions dans l'Europe – L'Europe des Régions*, Baden Baden, Nomos Verlagsgesellschaft, 1999, 154; J. SCHWARZE, *Kompetenzverteilung in der Europäischen Union und föderales Gleichgewicht*, in *Deutsche Verwaltungsblatt* 1995, 1269; F. OSSENBÜHL, *Föderalismus und Regionalismus in Europa. Landesbericht Bundesrepublik Deutschland*, in ID., *Föderalismus und regionalismus in Europa*, Baden Baden, Nomos, Verlagsgesellschaft, 1990, 140; P. HÄBERLE, *Europäische Verfassungslehre*, Nomos Verlagsgesellschaft, Baden Baden, 2002; L. LACCHE', *Europa una*

according to the same logic, it appears in the relationship between Bund and Länder⁴.

In the second part of the paper, it will be examined the Italian model, where, on the contrary, the subsidiarity principle is explicitly referred to the relationship between the State and the Regions. The principle of subsidiarity here has been introduced to allocate the administrative functions (art. 118 cost.), according to the provisions settled down by art. 117 Cost., which deals with the division of legislative powers.

As it will be explained, these functions have now to be carried out by the institutions "closest to the citizens [...] unless they are attributed to the provinces, metropolitan cities and regions, or to the State, pursuant to the principles of subsidiarity, differentiation, and proportionality, to ensure their uniform implementation"⁵. No mention for the relationship between EU and State, with the

et diversa. *A proposito di ius commune europaeum e tradizioni costituzionali comuni*, in *Teoria del diritto e dello Stato*, 2003, 40.

⁴ For a rich bibliography on German public and administrative reforms, see K. STERN, *Der moderne Staat. Aufgaben, Grenzen und reformgedanken*, in *Teoria del diritto e dello Stato. Rivista europea di cultura e scienza giuridica*, 2002, 216.

⁵ At this purpose, also for further bibliography, see T. GROPPPI, N. SCATTONI, *Italy: the Subsidiarity Principle*, in *International Journal of Constitutional Law*, 2006, 131; C. TUBERTINI, *Public Administration in the Light of the New Title V of the Italian Constitution*, in *European Public Law*, vol. 12, Issue, 1, 2006, 35; G. CARTEI – V. FERRARO, *Reform of the fifth title of Italian Constitution: a step towards a federal system?*, in *European Public Law*, 2002, 445. On Title V of the 1948 Constitution see v. CERULLI IRELLI – C. PINELLI, *Normazione ed amministrazione nel nuovo assetto costituzionale dei pubblici poteri*, in *Verso il Federalismo*, Bologna, 2004, 67; S. BARTOLE, *Collaborazione e sussidiarietà nel nuovo ordine regionale*, in *Le Regioni*, 2004, 578; R. BIN, *La funzione amministrativa nel nuovo titolo V della Costituzione*, in *Le Regioni*, 2002, 373; LIBERTINI-CAEDDU, *La prima attuazione della Riforma costituzionale*, in *Urb. e appalti*, 2003, 1245; PAGANETTO, *Riforma del titolo V della Costituzione e ripartizione delle competenze legislative tra Stato e Regione: prime interpretazioni della Corte Costituzionale*, in *Giur. cost.*, 2003, 1189; ANZON, *Il difficile avvio della giurisprudenza costituzionale sul nuovo titolo V della Costituzione*, *ibidem*, 2003, 1149; MATTIONI, *Sull'idea di una "nuova" potestà concorrente della Regione*; in *Quaderni cost.*, 2003, 33; TOSI, *Riforma della riforma, potestà ripartita, interesse nazionale*, in *Le Regioni*, 2003, 547; F. PIZZETTI, *La ricerca del giusto equilibrio tra uniformità e differenza: il problematico rapporto tra il progetto originario della Costituzione del 1948 e il progetto ispiratore della riforma costituzionale del 2001*, *ibidem*, 2003, 599; FOLLIERI, *Le funzioni amministrative nel nuovo Titolo V della parte seconda della Costituzione*, *ibidem*, 2003, 439; T. GROPPPI, *Attuazione o revisione del Titolo V?*, *ibidem*, 2003, 397; ZANETTI, *La disciplina dei procedimenti amministrativi dopo la legge costituzionale 3/2001*, *ibidem*, 2003, 27; DICKMANN, *Spetta allo Stato la responsabilità di garantire il pieno soddisfacimento delle "istanze unitarie" previste dalla Costituzione*, in www.federalismi.it; CINTIOLI, *I lavori pubblici e la riforma del Titolo V della Costituzione*, in *Urb. e appalti*, 2002, 506; F. MERLONI, *Il destino dell'ordinamento degli enti locali (e del relativo Testo Unico) nel nuovo titolo V della Costituzione*, in *Le Regioni*, 2002, 409; L. TORCHIA, *"Concorrenza" tra Stato e Regioni dopo la riforma del Titolo V: dalla collaborazione unilaterale alla collaborazione paritaria*, *ibidem*, 2002, 647; C. E. GALLO, *Le fonti del diritto nel nuovo ordinamento regionale. Una prima lettura*, Torino, 2001, 91; CORPAI, *Revisione del titolo V della parte seconda della Costituzione e sistema amministrativo*, in *Le Regioni*, 2001, 1259; FOLLIERI, *Le funzioni amministrative nel nuovo titolo V della parte seconda della Costituzione*, in *Le Regioni*, 2001, 380; TOSI, *La legge costituzionale n. 3 del 2001: note sparse in tema di potestà legislativa e amministrativa*, in *Le Regioni*, 2001, 1240; S. CASSESE, *L'amministrazione nel nuovo titolo quinto della Costituzione*, in *Giorn. Dir. Amm.*, 2001, 1193. About constitutionality issues of artt. 117 e 118 cost. see Corte cost., 1 ottobre 2003, n. 303, in *Foro it.*, 2004, II, 1003, con

exception of a generic reference to the necessity of being respectful of "communitarian principles". Moreover, it is possible to find another fundamental difference: Italian system is not exactly a federal system, because there is not an effective participation of Regions to the legislative powers, as it is possible to find in German system. Regions have indeed their own legislative competences, as set up in article 117 Cost., but there is not a strong characterization of a branch of Parliament, as it happens for the Bundesrat in Germany, where representative members of Regions can actively participate to the decision making process of State's legislative acts.

The two models, German and Italian, should be then compared to the provision of art. 3B of EU Treaty, in which it is clear the role played by Community. Here, subsidiarity encompasses only the relationship between EU and Member States. Other local entities seem to be forgotten.

Different nuances of subsidiarity principle are therefore achieved, by collecting and comparing all the constitutional provisions, both European and National: three of them connected with administrative functions, one with legislative functions:

- 1) subsidiarity in case of action of Community and inaction of Member State (art. 3B Treaty)
- 2) subsidiarity in case of action of Community and inaction of local entities (Art. 23 GG)
- 3) subsidiarity in case of action of State and inaction of local Government (Art. 72 GG and art. 118 Cost. It.)
- 4) subsidiarity as legislative parameter, in order to guarantee not only "executive" competences, but also legislative participation (art. 23-24 GG)⁶.

The proportionality principle and, more in general, the aspirations to give content to the subsidiarity are still considered fundamental concepts to regulate any federalist system, and, more in general, to indicate the guidelines of that "common administrative law" that refuses the logic of hierarchy among National and European levels.

nota di F. FRACCHIA, *Dei problemi non "completamente" risolti dalla Corte costituzionale: funzioni amministrative statali nelle materie di competenza regionale residuale, norme statali cedevoli e metodo dell'intesa*, e R. FERRARA, *Unità dell'ordinamento giuridico e principio di sussidiarietà: il punto di vista della Corte costituzionale*. For a critical point of view, see RUGGERI-SALAZAR, *Le materie regionali tra vecchi criteri e nuovi (pre)orientamenti metodici di interpretazione*, in www.federalismi.it.

⁶ For a detailed description of subsidiarity models, see M. NETTESHEIM, P. SCHIERA, (hrsg.), *Der integrierte Staat. Verfassungs- und europarechtliche Betrachtungen aus italienischer und deutscher Perspektive*, Duncker & Humblot Berlin, 1999; in particular, see S. CASSESE, *Die Privatisierungen Rückschritt oder Neuorganisation des Staats?*, 31; A. D'ATENA, *Das Subsidiaritätsprinzip in der italienischer Verfassung*, 105; C. TOMUSCHAT, *Das Endziel der*

At this regard, it has been observed that the administrative proceedings may be broken down into three components: "the national, the supranational, and the infranational. The first two are the more familiar, the third, infranational element, which is constituted by the horizontal dialogue among national administrations, is less well known"⁷.

The mentioned dialogue may assume different connotations. In order to understand whether and in which way is possible to realise these multilevel administration of public matters, it seems therefore indispensable to search if the different National principles may be read in a synoptic way. It is so indispensable to understand how subsidiarity principle has been translate in national sources of law. Two examples will be therefore analysed: German constitutional system, artificer and creator of the principle, having given impulse to the "ascendant phase" of the concept; and Italian system, where the principle has been recognised at a Constitutional level at the end of the socalled "descendant phase" in 2001, Constitutional Law of 10 October 2001, n. 3.

2. *German constitution: Federalism. Standards for allocating competences amongst Bund and Länder*

2.1 *The Federation and the States: art. 23, 24, 28-34, 37 GG*

Any approach to the study of German administrative law, in a European comparative perspective, has its fundamental point of departure in the analysis of the Basic Law for the Federal Republic of Germany (Grundgesetz GG), promulgated, as known, in 23 May 1949 (first issue of the Federal Law Gazette, dated 23 May 1949), as amended up to and including 20 December 1993⁸.

europäischen Integration: Maastricht ad infinitum?, 155; M. CHITI, *Das Ziel der europäischen Integration: Staat, internationale Union oder „Monstro simile“?*, 177.

⁷ S. CASSESE, *European Administrative Proceedings*, in F. BIGNAMI and S. CASSESE, *The Administrative Law of the European Union*, School of Law. Duke University, vol. 68, Winter 2004, n.1, 21.

⁸ For an overview of the Federal Republic of Germany roots seer. L. WATTS and P. HOBSON, *Fiscal Federalism in Germany*, Institute of Intergovernmental Relations, Queen's University, Kingston, Ontario, Canada and Department of Economics, Acadia University, Wolfville, Nova Scotia, Canada, 2000: "The Federal Republic of Germany established in 1949 has historical roots in earlier experience of the German Empire (1871-1918), the Weimar Republic (1919-34), the failure of the totalitarian centralization of the third Reich (1934-35), and the immediate postwar influence of the allied occupying powers. In 1949, the Länder of West Germany became the Federal Republic of Germany. Thirty one years later, the reunification of Germany in 1990 provided for the accession of five new Länder from had previously been the Democratic Republic of Germany". One of the first authors, who recognised the importance of the new coined concept of federalism in BundesStaat, even if he referred to a period antecedent to the Grundgesetz was G. JELLINEK, *Allgemeine Staatslehre, Berlin*, Verlag von Julius Springer, 1929: "In der Zusammenfassung der Organe der Staaten zu einem kollegialisch organisierten Organ des Bundesstaates prägt sich namentlich dessen föderalistischer Charakter aus, während die übrigen Organe ein durchaus unitarisches Gepräge tragen". About the conception of Sovereignty in Jellinek and also in Kelsen studies see recently S. GRILLER, *The impact of the Constitution for Europe on national sovereignty*,

One of the first provisions concerning the organization of different levels of power is precisely Art. 23 GG ("The European Union") which reads: "1. With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by the Basic Law. To this end the Federation may transfer sovereign powers with the consent of Bundesrat [...]. 2. The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. [...]; 4. The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subject falls within domestic competence of the Länder. 5. Insofar, in a area within the exclusive competence of the Federation,

in I. PERNICE, J. ZEMÁNEK (eds.), *A Constitution for Europe: The IGC, the Ratification Process and Beyond*, Nomos Verlagsgesellschaft, Baden Baden, 2005, 160. For a detailed introduction to Jellinek study, see V. E. ORLANDO, *Giorgio Jellinek e la storia del diritto pubblico generale*, Milano, 1949. See also H. MEIBOM, Die Wirkung der Mitgliedstaaten in der Rechtsetzung der EWG, in H. BÜLEK, Zur Stellung der Mitgliedstaaten im Europarecht, Berlin, Duncker et Humblot, 1967; H. E. BIRKE, Die deutschen Bundesländer in den Europäischen Gemeinschaftenm Berlin, Duncker et Humblot, 1973; in general, about federalism in Europe, see also A. CHITI-BATELLI, Le Regionalisme en Europe, Compte rendu d'une session scientifique, Tome IV, Intégration européenne et pouvoirs des Régions – Le Régions transfrontalières: une bibliographie, Bayerische Landeszentrale für Politische Bildungsarbeit, München, 1983. About federalist matter, it is remarkable the article of K.-E. HAIN, *Zur Frage der Europäisierung des Grundgesetzes*, in *Deutsches Verwaltungsblatt*, 2002, 148; see also M. HERDEGEN, *Europarecht*, 3. Aufl., München, 2001, 190; H.-W. RENGELING, *Gedanken zur „Europäisierung des Verfassungsrechts*, *Juristische Blätter* Bd, 122, 2000, 750; D. H. SCHEUING, *Zur Europäisierung des deutschen Verfassungsrechts*, in Kreuzer u.a. (Hrsg.), *Die Europäisierung der mitgliedstaatlichen Rechtsordnungen in der europäische Union*, Baden Baden, 1997, 87.; J. SCHWARZE, *Auf dem Wege zur einer europäischen Verfassung – Wechselwirkungen zwischen europäische Integration*, in Schwarze (Hrsg), *Verfassungsrecht und Verfassungsgerichtsbarkeit im Zeichen Europas*, Baden Baden, 1998, 81; A. VON BOGDANDY, *Zweierlei Verfassungsrecht*, der Staat, Bd., 39, 2000, 163; F. OSSENBÜHL, (Hrsg.), *Föderalismus und Regionalismus in Europa*, Verfassungskongreß in Bonn 14-16. September 1989, Nomos Verlagsgesellschaft, Baden Baden, 1990. Recently, for a detailed description of German structure of Federal Government, in comparison with United States, see P. DANN, *The Gubernative in Presidential and Parliamentary Systems - Comparing Organizational Structures of Federal Governments in the USA and in Germany*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2006, 66/1, 1. And moreover, D. ELAZAR, *Federal System of the World. A Handbook of Federal, Confederal, and Autonomy Arrangements*, Harlow, Essex, UK, Longman, 1991, 105; R. L. WATTS, *Comparing Federal Systems*, Second Edition, Montreal and Kingston, McGill-Queen's University Press, 1999, 272; ID., *German Federalism in Comparative Perspective*, in C. JEFFERY (ed. by), *Recasting German Federalism: The Legacies of Unification*, London, Pinter, 1999, 272; U. LEONARDY, *The Institutional Structures of German Federalism*, *ibid.*, 12. About cooperative federalism in Federal Republic of Germany, see W. KEWENIG, *Kooperativer Föderalismus und Bundestaatliche Ordnung*, in *AöR*, 93, 1968, 433; P. LERCHE, *Föderalismus als nationaler ordnungsprinzip*, in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehre*, Berlin, Walter de Gruyter, 1964, 21, 66. For further bibliography, see E. DI SALVATORE, *Integrazione europea e regionalismo: l'esempio tedesco*, in *Diritto Pubblico Comparato e Europeo*, 2001, II, 516; H. C. H. HOFMANN, *A Critical Analysis of the new Typology of Acts in the Draft Treaty establishing a Constitution for Europe*, in *European Integration online Papers (EIoP)*, vol. 7, 2003, 9.

interests of the Länder are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. To the extent that the legislative powers of the Länder, the structure of Land authorities, or Land administrative procedures are primarily affected, the position of the Bundesrat shall be given the greatest possible respect in determining the Federation's position consistent with responsibility of the Federation for the nation as a whole [...]. 6. When legislative power exclusive to the Länder are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be exercised with the participation and the concurrence of the Federal Government; their exercise shall be consistent of the Bundesrat"⁹.

Before analysing the structure of the mentioned article, it is important to remember that in 1992 the German Constitution underwent a revision significantly broadening, because of the influence of Maastricht Treaty and, particularly, of subsidiarity clause in art. 5 (ex art. 3B). The ratification of Maastricht Treaty was likewise preceded by an amendment of the constitutional provisions in order to reserve to the Federation some exclusive powers in matter of currency¹⁰, but, as it has been observed "besides the amendment of monetary provisions, Germany also introduced a general clause on participation in a unified Europe, and on the delegation of State competences in this respect (art. 23), as well as a number of amendments concerning various specific aspects of EU membership"¹¹.

The necessary amendment of Constitution, with the affirmation of subsidiarity principle at a Constitutional level, has been outlined also by German authors. In particular Prof. R. Streinz, commenting art. 23 GG, says that the scope of subsidiarity principle is exactly to encompass the exercise of devolution and to narrow down the powers in case of non exclusive subjects of the Community: "Das gemeinschaftsrechtliche Subsidiaritätsprinzip [...] beschränkt die Ausübung übertragener und damit bestehender Befugnisse im Bereich der nicht ausschließen

⁹ About the revision of Constitution after the reunification of the two Germanies in 1990, see G.H.GORNIG, S. RECKEWERTH, *The Revision of the German Basic Law. Current Perspectives and Problems in German Constitutional Law*, in *Public Law*, 1997, 137, 144, who observe on article 23: "the new Article 23 B.L. deals extensively with the participation of German national and state organs in the affairs of the European Union. In the final analysis, it was the states (*Länder*) which played the predominant role in shaping the new provision, particularly the wording which makes German participation in European unification contingent upon the principles of federalism and subsidiarity and which offers to the states rights to participate directly, as a compensation for the loss of other state (*Länder*) powers".

¹⁰ See *infra*, the analysis of fiscal federalism.

¹¹ F. TORRES, A. VERDUN, C. ZILIOLI, H. ZIMMERMANN (eds.), *Governing EMU – Economical, Political, Legal and Historical Perspectives*, July, 2004, in www.iue.it/alumni/; on this aspect see also H. BECKENDORF, *Neuere Entwicklungen in der Bildungspolitik der Europäischen Gemeinschaft*, in *NVwZ*, 1993, Heft 2, 125.

Gemeinschaftskompetenzen (deren Bestimmung dadurch gesteigerte Bedeutung erlangt)"¹².

As known, the clause involves uniquely the dual relationship between Member States and Community, with the following provision: "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community"¹³.

The thorny problem was exactly to give voice to the legislative aspiration of Länder, and consequently, to their will to exercise administrative powers, in order to enlarge the provision of art. 3 B to the various components of "Member State".

The inner nature of Germany is precisely its "federal" constitution, and this was the struggling point for outlining that, also in the decision making process with European institutions, it was necessary to involve the interested components of State. Subsidiarity was strongly wanted by Länder, and so Länder themselves should have been a new important role also at a Constitutional level.

The complexity of discussion could in any case led to important results, and that is why the framework of German Constitution, concerning the federal powers, had been deeply changed¹⁴:

¹² R. STREINZ, *sub Art. 23, Verwirklichung der Europäischen Union, Beteiligung des Bundesstages und des Bundesrates*, in M. SACHS (hrsg.), *Grundgesetz Kommentar*, Verlag C. H. Beck, München, 2003, 954.

¹³ At this purpose, see broadly E. DI SALVATORE, *Integrazione europea e regionalismo: l'esempio tedesco*, cit., 518, who remembers that the principle of subsidiarity itself was strongly wanted by Länder, even if their proposal was not precisely accepted and art. 3 B had a content different from what they really wanted, excluding de facto the role of Länder themselves: "In Germania, nell'ottobre del 1987, in occasione della Ministerpräsidentenkonferenz annuale, i Regierungschefs dei Länder avevano approvato le c.d. "10 tesi di Monaco", tra le quali figurava appunto "la realizzazione del principio di sussidiarietà". Due anni dopo, la Conferenza avrebbe istituito un gruppo di lavoro, avente il compito di redigere un rapporto sul tema „Europa der Regionen –Beteiligung der Länder an der interregionalen Zusammenarbeit sowie Fortentwicklung der Rechte und politischen Wirkungsmöglichkeiten der Regionen in Europa". Nel maggio del 1990, pertanto, il gruppo di lavoro presentava un rapporto dettagliato ai Länder, nel quale, tra l'altro si concludeva che [...] si sarebbe dovuto accogliere il principio di sussidiarietà nel testo della TCEE. La formulazione della disposizione proposta, tuttavia, risultava più ampia di quella attuale: "Die Gemeinschaft übt die nach diese Vertrag zustehenden Befugnisse nur aus, wenn und soweit das Handeln der Gemeinschaft notwendig ist, um die in diese Vertrag genannten Ziele wirksam zu erreichen und hierzu Maßnahmen der einzelnen Mitgliedstaaten bzw. der Länder, Regionen und autonomen Gemeinschaft nicht ausreichen". See also R. THEISSEN, *Der Ausschluß der Regionen (Artikel 198 a-c EG Vertrag). Einstig der Europäischen Union in einen kooperativen Regionalismus?*, Berlin, Duncker & Humblot, 1996.

¹⁴ On the revision of Art. 23 GG see S. HÖLSCHIEDT and T. SCHOTTEN, *Die Erweiterung der Europäischen Union als Anwendungsfall des neuen Europaartikels 23 GG?*, in *Die Öffentliche*, 1995, Heft 5, 187; FISCHER, *Die Europäischen Union im Grundgesetz: der Neue Artikel 23*, *ZParl.*, 1993, 32; WILHELM, *Europa im Grundgesetz: Der Neue Artikel 23*, in *BayVBl*, 1992, 705.

- 1) first of all, the participation of the Federal Republic to the development of Europe was clearly characterised by subsidiarity principle, that has now a value of constitutional principle, set up to delimitate the borders of EU and State power (Art. 23, para 1);
- 2) second, the entire content of art. 23 GG seems to be a logical consequence of subsidiarity principle. This connotation emerges from the formal structure itself of the article: European Union intervention is not mentioned but, on the contrary, what has been clearly underlined is the central role of the Federal Republic, its organisation of powers in Bundestag, Bundesrat, Federal Government and Länder which, all together, participate in the decision making process, by transferring their power to the Union (See para 2: "The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. The Federal Government shall take the position of the Bundestag into account during negotiations"). In deep connection with this provision, it is remarkable what in the following art. 50 GG declares about the relationship between the Länder and the Bundesrat: "The Länder shall participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union".¹⁵
- 3) third, the participation has two main levels of protection, in case of affection of Länder interests and in case of violation of their own exclusive legislative competence: in case of exclusive competence

¹⁵ In article 51 „Composition“ is then enriched in details about the effective composition of the Bundesrat: „1. The Bundesrat shall consist of members of Land governments, which appoint and recall them, Other members of those governments may serve as alternates. 2. Each Land shall have at least three votes; Länder with more than two million inhabitants shall have four, Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes. 3. Each Land may appoint as many members as it has votes. The votes of each Land may be cast only as a unit and only by Members present or their alternates“. See, at this purpose, C. HILLGRUBER, *German Federalism – An Outdated Relict?*, in *German Law Journal*, Vol. 6, n. 1, 2005, who observes that: “the founders of the Basic Law deemed this participation in the legislative procedure of the Federation as a form of allied cooperation to be such an important structural decision molding the identity of the German federal state that they declared the basic principle to be immune to constitutional change“. According to article 79 § 3 GG, in fact. “Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process [...] shall be inadmissible“. The author, moreover, recalls the statement of the member of Parliament, A. Süsterhenn, at the main board of the Parliamentary Assembly, Jö 1, n. F. (1951), p. 582: to the nature of a federal state also belongs “the participation of the Länder in the formation of the federal will. C. Hillgruber adds in any case that, on the contrary, “the Länder do not just participate in their own legislation: this legislation is their proper responsibility and is therefore respective to its use not a topic for the federal constitution. This is different for the distribution of legislative

of the Federation, if interests of Länder are affected, the Federal Government shall take position of the Bundesrat into account; moreover, and this second level is clearly expression of subsidiarity, if legislative exclusive powers to the Länder are primarily affected, the exercise of power shall be delegated to a representative of the Länder designated by the Bundesrat.

In other words, it is clear that the structure of art. 23 GG is built up according to a subsidiarity logic, with the highest respect to the Land, that is considered as the target of protection, towards which the European Union shall guarantee its "*subsidium*", its own protection. At this purpose, it seems interesting to report what the authors and case law say about the concept of "devolution" ("Übertragung"), that shouldn't be read literally as a "transfer" of power, but rather as a logical consequence of the necessity of integrate the different powers, to remark, once again, that the subsidiarity doesn't deal with hierarchy, but with a multilevel perspective.

A unilateral transfer of powers from one level to the other may not be accepted: "Der Begriff der "Übertragung" darf, wie das BVerG ausdrücklich hervorhebt, "nicht wörtlich genommen werden". Wesentlich ist, dass aus dem Begriff nicht verfehlte Schlussfolgerungen, wie z.B. die sog. „Hypothekentheorie“, gezogen werden; diese müssen allerdings wiederum klar von den bestehenden Schranken der Integrierermächtigung und ihren Folgen unterschieden werden"¹⁶.

powers between the Federation and the Länder". At this purpose, see also K.-E. HAIN, *The Grundsätze des Grundgesetzes*, 413, 1999.

¹⁶ R. STREINZ, *Sub Art. 23 GG* cit., 958; BVerfGE 37, 271, 279 „Solange I“: Art. 24 GG spricht von der Übertragung von Hoheitsrechten auf zwischenstaatliche Einrichtungen. Das kann nicht wörtlich genommen werden. Art. 24 GG muß wie jede Verfassungsbestimmung ähnlich grundsätzlicher Art im Kontext der Gesamtverfassung verstanden und ausgelegt werden. Das heißt, er eröffnet nicht den Weg, die Grundstruktur der Verfassung, auf der ihre Identität beruht, ohne Verfassungsänderung, nämlich durch die Gesetzgebung der zwischenstaatlichen Einrichtung zu ändern. Gewiß können die zuständigen Gemeinschaftsorgane Recht setzen, das die deutschen zuständigen Verfassungsorgane nach dem Recht des Grundgesetzes nicht setzen könnten und das gleichwohl unmittelbar in der Bundesrepublik Deutschland gilt und anzuwenden ist. Aber Art. 24 GG begrenzt diese Möglichkeit, indem an ihm eine Änderung des Vertrags scheitert, die die Identität der geltenden Verfassung der Bundesrepublik Deutschland durch Einbruch in die sie konstituierenden Strukturen aufheben würde". About the judgement, see J.A. FROWEIN, *Das Maastricht-Urteil und die Grenzen der Verfassungsgerichtsbarkeit*, in *ZaöRV*, 1994, 1. See also BVerfGE 102, 147 – Bananenmarktordnung; BVerfGE 89, 155 – Maastricht; BVerfGE 88, 103 – Streikeinsatz von Beamten; BVerfGE 81, 156 – Arbeitsförderungsgesetz 1981; BVerfGE 77, 308 – Arbeitnehmerweiterbildung; BVerfGE 75, 223 – Kloppenburg-Beschluß; BVerfGE 73, 339 – Solange II; BVerfGE 68, 1 – Atomwaffenstationierung; BVerfGE 58, 1 – Eurocontrol I; BVerfGE 52, 187 – 'Vielleicht'-Beschluß, all published on website www.oefre.unibe.ch. On the Constitutional implications of the decisions, see S. J. BOOM, *The European Union after the maastricht decision: Will Germany be the „Virginia of Europe“*, 43, *American Journal of Comparative Law*, 77 1995; M. ERDEGEN, *Maastricht and the German Constitutional Court: Constitutional Restraints for an „Ever Closer Union“*, 31, *Common Market Law Review*, 235, 1994. For the relationship between subsidiarity, integration and federalism, see also K.

This constitutional provision could be sufficient to reveal the essence of subsidiarity and its deep connection with democracy, but there are a few remarkable examples that can likewise illustrate this relationship.

Particularly incisive about the Land's power is the provision of article 28 GG, "Federal guarantee of Land constitutions and of local self-government": here it is possible to find the constitutive principles of Land government, with the provision of a representation by a body "chosen in general, free, equal and secret elections" ("Art. 28. 1. [...] In den Ländern, Kreisen und Gemeinden muß das Volk eine Vertretung haben, die aus allgemeinen, unmittelbaren, freien, gleichen und geheimen Wahlen hervorgegangen ist"). Moreover, the following clause seems to open the doors to the concept of „European citizenship“, by allowing persons who possess a citizenship in any member state of the European Community to be elected in accord with European law, with respect to the so called "Öffnungsklausel" ("opening clause"). It is evident that the mentioned clause is suitable to keep away the risk of an excessive "parochialism": "Mit dieser Neuerung wird –allerdings nur für die Unionbürger– der langjährige Streit um die Verfassungsmäßigkeit der Einführung eines Kommunalwahlrechts für Ausländer beendet"¹⁷.

The self-regulation of local affairs is anyway guaranteed by a financial autonomy that, according to the constitutional principles, has its basement on the right of municipalities to a source of tax revenues upon their own abilities and upon the right to establish the rates at which these sources shall be taxed.

It is worth briefly mentioning that local government is the lowest of three levels of the administrative system within Germany (federal, state (Länder) and local level. Local level is then subdivided into counties (Kreise) and municipalities of communes (Gemeinde)¹⁸.

KINKEL, *Das Subsidiaritätsprinzip in der Europäischen Union*, in J. BURMEISTER (hrsg.), *Verfassungsstaatlichkeit, Festschrift für Ius Sarni zum 65. Geburtstag*, C.H. Beck'sche Verlagsbuchhandlung, München, 1997, 1288: „Vielmehr fungierte die Subsidiarität als erst in der Schlussphase verhandelter Ersatz für die nicht durchsetzbare Einführung der föderalen Struktur in den Unionsvertrag, Föderal war das Unwort für die Gegner von Integrationsritten, weil es der Union aus ihrer Sicht eine Staatsähnliche Qualität verleihen könnte. [...] Deshalb blieb nur ein Ausweichen auf das allgemeinere Substrat des Föderalismus, auf die Subsidiarität, oder –präziser– auf das Prinzip der möglichst bürgernahen Entscheidungsebene“.

¹⁷ M. NIERHAUS, *Sub Art. 28*, in M. SACHS (hrsg.), *Grundgesetz, Kommentar*, cit., 1040; in case law, see BVerG, 99, 1, Bayerisches Wahlvorschlagsrecht, in www.oechr.unibe.ch.

¹⁸ For furthermore details, see C. REICHARD, *Local public management reforms in Germany, Public Administration*, vol. 81, No. 2, 2003, 345: "altogether the communes consist of 439 counties (including non-county municipalities) and roughly 14000 municipalities. The total workforce at the local level is 1.5 million (33 per cent of total public employment), with most of these being public employees and only a few employed as civil servants (*Beamte*)". See also P. B. SPAHN and W. FOTTINGER, *Germany*, in T. MINASSIAN, (ed.), *Fiscal Federalism in Theory and in Practice*, Washington, International Monetary Fund, 1997, 239. For further details see M. NIERHAUS, *Sub. Art. 28 cit.*, 1062.

As it has been observed, with regard to Art. 28 GG: "Local government in Germany has a comparatively strong constitutional position. According to article 28 of the Federal Constitution, communes enjoy local autonomy [...] and neither federal nor state government is allowed to intervene within this sphere"¹⁹.

It is important to recall that Article 28 GG is the result of a more complex reform of the fiscal part of the German Basic Law²⁰, in which all revenue sharing rules are contained in art. 106 "Apportionment of tax revenue", whereof the most relevant passages read as follows "5. A share of the revenue from income tax shall accrue to the municipalities, to be passed on by the Länder to their municipalities on the basis of the income taxes paid by their inhabitants. Details shall be regulated by a federal law requiring the consent of the Bundesrat. This law may provide that municipalities may establish supplementary or reduced rates with respect to their share of the tax. 5(a) From and after January 1st, 1998, a share of the revenue from turnover tax shall accrue to the municipalities [...]".

Beyond the economic motivations which determined the tax reform, briefly summed up in the necessity to find an alternative solution to the heavily attacked trade tax (*Gewerbeertragsteuer*)²¹, what is important to underline is the attention given to municipalities.

For an efficient administration the first aim is to guarantee that legislative power lies at the federal level, with the effective cooperation of Länder, through the voice of their representative members in the Bundesrat, and, secondly, that administrative power could be organised at the Land level.

And so, to sum up about fiscal federalism, it is possible to say that, in respect of subsidiarity principle, the Basic Law distinguishes between the right of each level of government to legislate on specific taxes, and the right to appropriate the proceeds of taxes. The exclusive federal power to legislate in taxes is in practice restricted to customs duties and fiscal monopolies (Art. 105 1); the power to legislate on all taxes the revenue from which is shared is concurrent, and so, the Länder can use the Federal Bundesrat as their vehicle for shaping federal tax legislation.

¹⁹ C. REICHARD, *Local public management reforms in Germany* cit., 347.

²⁰ Gesetz v. 27.10.1994 and 4.8.1997: at this purpose, see M. NIERHAUS, *Sub. Art. 28 II 3* cit., 1061.

²¹ For a detailed analysis, see H. FEHR and W. WIEGARD, *German income tax reforms: separating efficiency from redistribution*, in FOSSATI, AMEDEO and HUTTON, JOHN (eds.), *Policy Simulations in the European Union, London and New York*, 1998, 235. See also C. REICHARD and H. WOLLMANN (eds.), *Kommunilverwaltung im Modernisierungsschub?*, 1996, Basel and New York, Birkhäuser; W. SEIBEL, *Administrative Reforms*, in K. KÖNIG and H. SIEDENTOPF (eds.), *Public Administration in Germany*, 2001, Baden Baden, Nomos, 73.

On the whole, Federal Law in a certain way "boasts priority" on Land legislation: the footprints of this trend may be found in art. 31 GG, which states: "Federal law shall take precedence over Land law" (the so called "Kollisionsnorm").

In case of collision between Bund's and Land's law, the general federal interest should prevail: „Kollisionen zwischen Bundes und Landesrecht sind einer bundesstaatlichen Ordnung immanent. Zu ihrer Auflösung bedarf es deshalb einer griffigen Formel, die im Interesse der Rechtssicherheit jeglichen Streit über die Vorrangfrage möglichst vermeidet: Dies ist die Funktion von Art. 1 (Kollisionsnorm).“²²

It is also remarkable Article 32, concerning "Foreign relations", which reads "1. Relations with foreign states shall be conducted by the federation", and states the right of the Land to be consulted; on the contrary, insofar as the Länder have power to legislate, they can conclude foreign treaties only after the consent of the Federal Government²³.

Nevertheless, even if the general conception of public administration is strongly centralised -although it is worth to mentioning once again that in Federal system, the Länder have effective participation in Bundesrat- it is significant that general public principles of good administration are expressly referred to the Land's administration: and so, in Article 33 ("Equal citizenship: professional civil service"), the equality of rights and duties is affirmed with respect to the Land: "1. Every German shall have in every Land the same political rights and duties".

Moreover, it seems important to mention that Article 34 GG, which contents the general definition of liability for violation of official duty, is just in the heart of the Constitution concerning the relations between the Federation and the Länder ("If any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him. In the event of intentional wrongdoing or gross negligence,

²² P. M. HUBER, *Sub Art. 31*, in M. SACHS (eds.) *Grundgesetz Kommentar* cit., 1100; in case law see BVerfGE 26, 116 *Besoldungsgesetz*: „Art. 31 GG ist eine Kollisionsnorm; sie bestimmt, welches "Recht" im Falle kollidierender Normsetzung des Bundes- und des Landesgesetzgebers gilt. Der für diesen Fall verfassungskräftig festgesetzte Vorrang des Bundesrechts mit der Folge der Nichtigkeit der entsprechenden Normen des Landesrechts greift nur dort durch, wo beide Gesetzgeber denselben Gegenstand, dieselbe Rechtsfrage geregelt haben" (part. II, 1); see also BVerfGE 98, 145 - *Inkompatibilität/Vorstandstätigkeit*; BVerfGE 96, 345 - *Landesverfassungsgerichte*; BVerfGE 93, 386 - *Auslandszuschlag*; BVerfGE 36, 342 - *Niedersächsisches Landesbesoldungsgesetz*, all available on website www.oefre.unibe.ch.

²³ J. BAUER - M. HARTWIG, *Verträge der Länder des Bundesrepublik Deutschland mit ausländischen Staaten über Fragen der Kommunalen Zusammenarbeit*, in *NWVBl*, 1994, 41. At this purpose, see also R. STREINZ, *Sub Art. 32*, in M. SACHS (eds.), *Grundgesetz Kommentar* cit., 1111, who underlines the relationship between art. 23 and art. 32 GG („Verhältnis des Art. 32 zu Art. 23“).

the right of recourse against the individual officer shall be preserved. The ordinary court shall not be closed to claims for compensation or indemnity")²⁴.

Another symptom of the pivotal role of Länder and of the effective cooperation amongst them and the Federal administration, in the process of building up the "good administration", is the reference to the necessity of cooperation in case of natural disasters or accidents, with the provision of a collaborative assistance amongst all federal and Land authorities (Art. 35 "Legal and administrative assistance, assistance during disasters").

The cooperation amongst Länder is called "Dritte Ebene", the third level of federalism, with the meaning that, after the Länder's level and Bund's level, it is possible to recognise a sphere of action, in which all Länder should cooperate: "Das Grundgesetz bot in seiner ursprünglichen Fassung das Bild eines "vertical" gegliederten Föderalismus in zwei Ebenen: die Ebene der unverbunden nebeninanderstehenden Gliedstaaten (Länder) und die Ebene des Bundes. Daneben existierte jedoch eine historisch überkommene, im Verfassungstext nicht sichtbare "Dritte Ebene", auf der die Länder in Kooperation und Koordination zusammenwirkten und auch heute noch zusammenarbeiten"²⁵.

2.2 Federal legislative powers: art. 70-74

In Chapter VII of German Constitution, and more precisely from article 70 to article 82 it is set up in details the functioning of Federal Legislation, with a clear separation of exclusive legislative power of the Federation (Art. 71), and of

²⁴ About liability for violation of official duty, see F. OSSENBÜHL, *Staatshaftungsrecht*, München, V ed., 1998; K. WINDHORST – H. D. SPROLL – S. DETTERBECK, *Staatshaftungsrecht*, München, 2000; B. BENDER, *Staatshaftungsrecht*, Heidelberg, 1981; about article 34 GG and its connection with civil liability see B. S. MARKESINIS, *The German Law of Obligations, Volume II, The Law of Torts: A Comparative Introduction*, Oxford, 1997, 904: "the State's activity cannot be engaged if the requirements of § 839 BGB are not satisfied. Looking at them, however, one sees clear signs of a protective philosophy which may have made sense at the turn of the century but which nowadays appears less convincing"; MAHENDRA P. SINGH, *German Administrative Law in Common Law Perspective*, Heidelberg, 2001, 257, who affirms "this part of the German law corresponds to the distinction which the French law draws between the *faute personnelle* and the *faute de service* and the English law draws between the acts in the course of employment and those not in course of employment. In the French law the distinction between the *faute personnelle* and the *faute de service* has led to the evolution of the principle of *cumul* which creates wider scope for the victim of tort to recover damages from the state. The German law has not evolved to that extent and remains closer to the common law in this respect. However, the German courts have given up a narrow or restrictive approach to the interpretation of the exercise of public authority and would like to enable the individual to recover damages from the state".

²⁵ F. OSSENBÜHL, *Föderalismus und Regionalismus in Europa. Landesbericht Bundesrepublik Deutschland*, in ID., *op. cit.*, 140; see also W. ERBGUTH, *Sub Art. 35*, in M. SACHS, (eds.) *Grundgesetz Kommentar*, cit., 1196: „Wiewohl die Bestimmung nicht Ausfluss einer einheitlichen Staatsgewalt ist, soll sie doch auf Integration des auf verschiedene Träger verteilten Staathandelns hinwirken –womit zugleich die Grundsätze der Bundestreue bzw. des kooperativen Föderalismus angesprochen sind“.

concurrent legislative power (Art. 72), respectively followed by the numbering of subjects of exclusive legislative power (Art. 73), and by the numbering of subjects of concurrent legislation (Art. 74).

According to Article 70 "Division of legislative powers between the Federation and the Länder": "1. The Länder shall have the right to legislate insofar as this Basic Law does not confer legislative power to the Federation. 2. The division of authority between the Federation and the Länder shall be governed by the provisions of this Basic Law respecting exclusive and concurrent legislative powers".

At this regard, it seems once again significant that this provision has to be read in deep connection with the systematic order of European Law: in particular, prof. C. Degenhart entitles the mentioned part as "Kompetenzverteilung zwischen Bund, Länder und Europäischer Gemeinschaft", following that ideal "fil rouge" amongst European and national competencies²⁶.

Article 70 expresses unquestionably a strong necessity to give voice to democratic instances. It is what the Federal Constitutional Court has remarked in many of its decisions: „Nun hat sich das Grundgesetz für die *Demokratie* als Grundlage des staatlichen Aufbaus entschieden (Art. 20, 28 GG): Die Bundesrepublik ist ein demokratischer Bundesstaat. Die verfassungsmäßige Ordnung in den Ländern muß den Grundsätzen des demokratischen Rechtsstaates im Sinne des Grundgesetzes entsprechen. Der Bund gewährleistet, daß die verfassungsmäßige Ordnung der Länder dem entspricht. Zur Demokratie, wie sie das Grundgesetz will, gehört nicht nur, daß eine Volksvertretung vorhanden ist, die die Regierung kontrolliert. [...] Der Bund, der nach Art. 28 Abs. 3 GG die Gewähr auch dafür übernimmt, daß das vornehmste Recht des Bürgers im demokratischen Staat, sein Wahlrecht, nicht im Widerspruch zur Landesverfassung verkürzt wird, verstößt gegen diese Pflicht, wenn er seinerseits ohne Zustimmung des Landesvolks eine nach der Landesverfassung fällige Wahl verhindert [...]“²⁷.

As mentioned, Art. 72 GG describes the so called "concurrent legislative power of the Federation and of the Länder", as a logical consequence of the affirmed „exclusive legislative power of Federation" in art. 71.

²⁶ C. DEGENHART, *Sub Art. 70 GG*, in M. SACHS, *Grundgesetz Kommentar*, cit., 1496.

²⁷ BVerfGE 1, 14, 82, SüdwestStaat; see also BVerfGE 108, 1 - Rückmeldegebühr Baden-Württemberg; BVerfGE 107, 286 - Kommunalwahl-Sperrklausel II; BVerfGE 107, 27 - Doppelte Haushaltsführung; BVerfGE 106, 51 - Aktenvorlageverlangen; BVerfGE 105, 73 - Pensionsbesteuerung; BVerfGE 103, 310 - DDR-Dienstzeiten; BVerfGE 101, 1 - Hennenhaltungsverordnung; BVerfGE 99, 185 - Scientology; BVerfGE 99, 1 - Bayerische Kommunalwahlen; BVerfGE 98, 365 - Versorgungsanwartschaften; BVerfGE 95, 243 - Restitution bei öffentlicher Trägerschaft; BVerfGE 95, 1 - Südumfahrung Stendal; BVerfGE 84, 9 - Ehenamen; BVerfGE 81, 310 - Kalkar II; BVerfGE 77, 84 - Arbeitnehmerüberlassung; BVerfGE 77, 1 - Neue Heimat; BVerfGE 68, 1 - Atomwaffenstationierung, all published on website www.oefre.unibe.ch.

The article, reformed in 1994²⁸, reads as follows: "1. On matters within the concurrent legislative power, the Länder shall have power to legislate so long and to the extent that the Federation has not exercised its legislative power by enacting a law. 2. The Federation shall have the right to legislate on these matters if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest [...]"

As it has been affirmed, in article 72 (2) it is easy to recognise "an expression of the principle of subsidiarity with which European law has made us familiar"²⁹.

Following the footprints of G. Taylor, it should be affirmed that the Federal competence is organised into two levels, one of these is the subsidiarity principle, the other is the so called "subject-matter competence". But Art. 72 has played a decisive role for the affirmation of federalism only in October 2002, when the German Federal Constitutional Court decided its first case under the revised version.

The problem will be better analysed *infra*, by the moment it is important to underline the admission of a judicial review on criteria listed in paragraph 2, which delimits the Federal legislative power on concurrent matters "if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest"³⁰.

²⁸ Law 27 October 1994, in *BGBI*, 3146.

²⁹ G. TAYLOR, *Germany: The Subsidiarity Principle*, in *International Journal of Constitutional Law*, 2006, 115. On art. 72, see E. BUOSO, *L'art. 72, II comma GG davanti al Bundesverfassungsgericht*, in *Le Regioni*, 2003, 5, 959, with excellent further bibliography.

³⁰ See G. TAYLOR, *The subsidiarity principle* cit., 116: "It is also quite clear that the requirements of article 72 (2) were meant to be justiciable. We know that this not only from the debates leading up to this amendment but also from one of the associated amendments made at the time": a clause (no.[2A]) was added to article 93 (1) of the basic Law specifically empowering the Federal Constitutional Court to determine whether the subsidiarity criteria set forth in article 72 (2) are satisfied. The question to be dealt with here, however, is whether a court can sensibly carry out such a function". At this purpose, it is important to remember that, before the revision in 1994, art. 72 was interpreted as provision strongly addressed to the centralisation of Federal powers: see at this purpose: BVerGE 1, 89, in *Riv. It. Dir. Pubbl. Com.*, 449, note L. PIAZZA, *Televisione e attività culturali tra competenza comunitaria e degli Stati membri: il caso della Germania*; at this purpose, the author was expectful of a revirement of Constitutional case law after the revision: "La speranza, allora, è che alla prossima occasione la Germania possa rivedere la propria posizione nei confronti del diritto comunitario, avendo, se è possibile, un maggiore riguardo verso i diritti costituzionali dei Länder. This opinion is also rooted in German literature. See U. HÄDE, *Anmerkung BVerGE*, in *EuZW*, 1995, 284: "Eventuell werden die Bestrebungen der Kommission und insbesondere Frankreichs, die Quotenregelung in der Fernseh-Richtlinie zu verschärfen, dem BVerGE künftig wieder einmal Gelegenheit dazu geben". See also J. GERKRATH, *L'arrêt du Bundesverfassungsgericht du 22 mars 1995 sur la directive „télévision sans frontières“: les difficultés de la répartition du 22 mars 1995 sur trois niveaux de législation*, in *R.T.D.E.*, 1995, 539 ; M. HERDEGEN, *After the TV Judgement of the German Constitutional Court : Decision-making within the EU Council and the German Länder*, in *Common Market Law Review*, 1995, 1369.

Looking through Article 73 and 74, it is easy to notice that the “edge criterion” of competences is shaped on subjects, with the provision, in any case, of “areas of federal framework legislation”. Art. 75 at this purpose reads as follows: “1. Subjects to the conditions laid down in Article 72, the Federation shall have power to enact provisions on the following subjects as a framework for Land legislation: 1. the legal relations of persons in the public service of the Länder, municipalities, or other corporate bodies under public law [...]; 1a. general principles respecting higher education; 2. the general legal relations of the press; 3. hunting, nature conservation [...]; 4. land distribution, regional planning, and the management of water resources; 5. matters relating to the registration of residence or domicile and to identity cards; 6. measures to prevent expatriation of German cultural assets. [...] 2). Only in exceptional circumstances may framework legislation contain detailed or directly applicable provisions. 3). When the Federation enacts framework legislation, the Länder shall be obliged to adopt the necessary Land laws within a reasonable period prescribed by the Law”.

To conclude, it is important to remember that the federal structure of the German State is guaranteed by the so called “eternity clause” of art. 79 para 3, prohibiting amendments which would abolish the Länder: “Amendments to the Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible”.

Here, as in the analysed articles focusing on federalism, it is strong the attention to cooperate with European Union, in order to preserve that common core of principles –in which cooperation may be considered the drawing power– enounced at art. 23 GG: “Von dem Verbot können [...] solche Änderungen des GG nicht ausgenommen sein, die sich –gestützt auf Art. 23 I und Art. 24 I [...]-verfassungsextern vollziehen. Infolgedessen hat die in Art. 23 I 3 getroffene Anordnung, dass Art. 79 III für die Übertragung von Hoheitsrechten auf die Europäische Union „gilt“ lediglich deklaratorische Bedeutung”³¹.

2.3 Execution of Statutes and Federal Administration (art. 83-91 GG). Joint tasks (Art. 91 a and 91 b)

The entire corpus of provision stating on federalism is moreover fulfilled with a few prescriptions about administrative functions, that in the same federal and subsidiarity logic that governs legislative matters, is centred on the distribution of

³¹ J. LÜCKE, *Sub Art. 70*, in M. SACHS, *Grundgesetz Kommentar*, cit., 1648. See the mentioned BVerGE 89, 155.

authority between the Federation and the Länder. Some examples can be made at this purpose:

1. Art. 83 reads that "The Lander shall execute federal laws in their own right insofar as the Basic Law does not otherwise provide or permit";

2. From Art. 87 to Art. 91 are listed the subjects of federal administration (Establishment and powers of the Armed Forces; the Federal Defense Administration; Air transport administration; Federal railway administration; Post and telecommunication; the Federal Bank; Federal Waterways and highways). In all these subjects, the Federation executes laws through its own administrative authorities or through federal corporation or institutions established under public law. Here, according to Art. 86: "the Federal Government shall, insofar as the law in question contains no special provision, issue general administrative rules. The federal Government shall provide for the establishment of the authorities insofar as the law in question does not otherwise provide".

Finally, two provisions, in articles 91a and 91b about the possibility of cooperation between the Federation and the Länder, in the promotion of research institutions and research projects of supraregional importance.

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

- in the event of disputes concerning the rights and duties of a supreme federal bodies;
- in the event of disagreement or doubts respecting the formal or substantive compatibility of federal law or land law with the Basic Law;
- in the event of disagreements whether a law meets the requirements of paragraph 82) of Article 72, on application of the Bundesrat or of the Government or legislature of a Land. This new formula, and its use by the Constitutional Court, will be compared in the following pages with the Italian system;
- in the event of disagreement respecting the rights and duties of the federation and the Länder especially in execution of federal law by the Länder and in the exercise of federal oversights and on other dispute involving public law between Federation and the Länder;
- and moreover, on constitutional complaints, which may be filed by any person alleging that one of his basic rights has been infringed by public authority, and also on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self government under Article 28; in the case of

infringement by a Land law, however, only if the law cannot be challenged in the constitutional court of the Land³².

3. *The Italian Constitution: New Title V. Subsidiarity clause between State and Regions*

3.1 *Legislative competences and subsidiarity principles in administrative functions.*

The influence of Art. 3B EU Treaty on Italian Constitutional system occurred in 2001, when the Constitutional Law n. 3, 18 October 2001 enshrined subsidiarity principle as a constitutional principle, as far as that moment recognised only with Parliament's Law (L. Bassanini n. 59/1997 and D. Lgs. n. 267/2000)³³.

The most relevant changes are visible in Articles 117 and 118, even though in the list of local autonomies in Art. 114 it is possible to see the "revolutionary" inversion of order, whereas at first place are mentioned Municipalities and Provinces, then Regions, then State: "114.(1) The Republic consists of Municipalities, Provinces, Metropolitan cities, Regions, and the State. (2) Municipalities, provinces, Metropolitan cities, and Regions are autonomous entities with their own statutes, powers, and functions according to the principles defined in the constitution. (3) Rome is the capital of the republic. State law regulates its legal status". In the previous version, at first place there was State, followed by Regions, Provinces, and Municipalities.

Even in Italian Constitution, as well as in Art. 23 GG, there is first of all a recognition of European principles, that are now explicitly at the same level of constitutional principles: "Art. 117 (1) Legislative power belongs to the State and the Regions in accordance with the constitution and within the limits set by European union law and international obligations".

The first evident difference, is that subsidiarity doesn't appear in Art. 117, where are mentioned the relations amongst States and Regions. Here, it is not possible to speak about "pure federalist system", for two main reasons: Regions don't participate to the decision making process and subsidiarity is indicated as a requirement of administrative action, not as a criterion for separating legislative

³² L. WOELK, *La Germania. Il difficile equilibrio tra unitarietà, solidarietà e (maggiore) competizione*, in *Federalismi fiscali e Costituzioni*, a cura di V. ATRIPALDI-R. BIFUCLO, Torino, 2001, 191

³³ On this subject, see G. CARTEI – V. FERRARO, *Reform of the fifth title of Italian Constitution: a step towards a federal system?*, *European Public Law*, 2002, 445; E. FERRARI, *Planning, Building and environmental law after the recent Italian devolution*, *European Public Law*, 2002, 357; see also C. CASONATO, "Devolution" and basic rights

power³⁴. In any case, it is easy to find the second main characteristic of federal system, that is the division of subjects for legislative power of State and Regions.

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

In the "subsidiarity logic", it is possible to give a new, different interpretation of the mentioned article: the coal point should be now the decentralization of functions, in respect of unity and indivisibility of the Republic, whereas before the Constitutional Law n. 3/2001, the focus was on "unity and indivisibility of Republic".

The attention to the local autonomy and to the institutions "nearest to the citizens", is confirmed in Article 117 Cost., where are, at first, listed the subjects of exclusive legislative competence of the State (so-called exclusive State matters)³⁵; then there is a list of so defined "transversal standards", where competences are shared between State and Regions, but where State maintains the power to set out the framework of fundamental principles (so-called concurrent subjects)³⁶; finally, a residual legislative competence of Regions³⁷.

between unity, equality and diversity: the Italian case, in www.unitn.it, to be published in *Regional and Federal Studies*.

³⁴ About the differences between Italian devolution and German federalism, see S. MANGIAMELI, *Continuità e riforma della Costituzione*, in *Teoria del diritto e dello Stato, Rivista europea di cultura e scienza giuridica*, 2002, 2, 466-467.

³⁵ "Art. 117 (2) The State has exclusive legislative power in the following matters: a) foreign policy and international relations of the state; relations of the state with the European union; right of asylum and legal status of the citizens of states not belonging to the European union; b) immigration; c) relations between the republic and religious denominations; d) defense and armed forces; state security; weapons, ammunitions and explosives; e) money, protection of savings, financial markets; protection of competition; currency system; state taxation system and accounting; equalization of regional financial resources; f) state organs and their electoral laws; state referenda; election of the European Parliament; g) organization and administration of the state and of national public bodies; h) law, order and security, aside from the local administrative police; i) citizenship, registry of personal status and registry of residence; l) jurisdiction and procedural laws; civil and criminal law; administrative tribunals; m) determination of the basic standards of welfare related to those civil and social rights that must be guaranteed in the entire national territory; n) general rules on education; o) social security; p) electoral legislation, local government and fundamental functions of municipalities, provinces and metropolitan cities; q) customs, protection of national boundaries and international prophylactic measures; r) weights, units of measurement and time standards; coordination of the informative, statistical and information-technology aspects of the data of the state, regional and local administrations; intellectual property; s) protection of the environment, of the ecosystem and of the cultural heritage".

³⁶ Art. 117 (3) The following matters are subject to concurrent legislation of both the State and Regions: International and European union relations of the regions; foreign trade;

After the mentioned division of legislative powers, it follows the revision of Art. 118 Cost, stating that "(1) Administrative functions belong to the municipalities except when they are conferred to provinces, metropolitan cities, regions, or the state in order to guarantee uniform practice; the assignment is based on the principles of subsidiarity, differentiation and adequacy. (2) Municipalities, provinces and metropolitan cities have their own administrative functions and, in addition, those conferred to them by the law of the state or the region according to their respective fields of competence. (3) State law provides for forms of coordination between the State and the Regions in the matters referred to in letters b) and h) of Art. 117 (2); it also provides for forms of understanding and coordination in the matter of the protection of the cultural heritage. (4) State, regions, metropolitan cities, provinces and municipalities support autonomous initiatives promoted by citizens, individually or in associations, in order to carry out activities of general interest; this is based on the principle of subsidiarity". It is easy to notice that the most relevant change is the constitutionalisation of the principle of subsidiarity, but also the emphasis given to differentiation and adequacy.

Moreover, in the meaning of subsidiarity it is possible to distinguish two different acceptations: "the first one is known as "vertical subsidiarity", because it refers to levels of government that, even though not ordered in hierarchy, they may anyway numerated in an ideal "vertical order", as disposed by Art. 114³⁸.

The second acceptation of the meaning of subsidiarity, in accordance with the geometrical metaphor, is the so called "horizontal subsidiarity", mentioned in the

protection and safety of labour; education, without infringement of the autonomy of schools and other institutions, and with the exception of vocational training; professions; scientific and technological research and support for innovation in the productive sectors; health protection; food; sports regulations; disaster relief service; land-use regulation and planning; harbours and civil airports; major transportation and navigation networks; regulation of media and communication; production, transportation and national distribution of energy; complementary and integrative pensions systems; harmonization of the budgetary rules of the public sector and coordination of the public finance and the taxation system; promotion of the environmental and cultural heritage, and promotion and organization of cultural activities; savings banks, rural co-operative banks, regional banks; regional institutions for credit to agriculture and land development. In matters of concurrent legislation, the Regions have legislative power except for fundamental principles which are reserved to State law.

³⁷ "Art. 117 (4) The Regions have exclusive legislative power with respect to any matters not expressly reserved to State law". As known, up to 2001, Regions could legislate on a limited number of subjects, within the framework set up by State's law. See, at this purpose, C. TUBERTINI, *Public Administration in the Light of the new Title V of Italian Constitution*, cit., 35.

³⁸ At this regard, it has been pointed out, both by jurisprudence and authors, that this first acceptation of subsidiarity has a double meaning: "on one hand, this principle suggests a general preference for the municipalities that, for being closer to the citizens, may better express the needs and the interests of the respective community. [...] On the other hand, however, the principle also establishes and justifies the provisions of administrative functions to the other local governments". See C. TUBERTINI, *Public Administration in the Light of the New Title cit.*, 37; and also R. BIN, *La funzione amministrativa nel nuovo Titolo V della Costituzione, Le Regioni*, 2002, 373.

last paragraph of Art. 118. Here there relation is established on a level, where are juxtaposed State, regions, metropolitan cities, provinces and municipalities on the one hand, on the citizens, both as individuals and as members of associations, on the other hand.

In this sense, the jurisprudence of Constitutional of Court has up to now affirmed that subsidiarity, in both acceptations, cannot operate as a mere verbal formula believed to have magical force, to realise the division of competence amongst different levels of governance³⁹.

On the contrary, subsidiarity imposes a scrutiny on effective capacities to rule out a function and on the nature of the function itself, and has to be combined with "loyal cooperation" principle.

Two are the main problems jointed with the effectiveness of the principle: the first one, is to give application to constitutional provisions, and the second one is to find the best instruments to coordinate the principle with the division of legislative and administrative competences. For the first one, the legislator has attempted to provide a solution with Law N. 131 of June 5, 2003 ("Provisions for the adjustment of the legal system of the Republic in constitutional law No. 3/2001"), with scarce results, as a matter of fact, having the Law approximately repeated the content of art. 117 and 118, Cost., without significant additions.

For the second problem, one of the answers could be found in the instruments of agreements and understandings, also through the creations of committees and network of communications. Before concentrating on actual status, and on the recent approach of Constitutional Court, which demonstrates awareness of the instances of a "bottom up subsidiarity", anyway I think it is useful to complete the framework, by giving some spots of new provisions in financial system of local autonomies.

According to Article 119 "Financial Autonomy", "(1) Municipalities, provinces, metropolitan cities and regions have financial autonomy regarding revenues and expenditures. (2) Municipalities, provinces, metropolitan cities and regions have autonomous resources. They establish and implement their own taxes and revenues, in harmony with the constitution and in accordance with the principles of coordination of the public finances and the taxation system. They receive a share of the proceeds of state taxes related to their territory. (3) The law of the state

³⁹ See Corte Costituzionale 1st October 2003, n. 303, in *Riv. Corte conti*, 2003, 6, 181, in which is clearly affirmed the necessity to consider subsidiarity as a flexible criterion, in order to give a correct application to the division of competences: "Il nuovo art. 117 Cost. distribuisce le competenze legislative in base ad uno schema imperniato sulla enumerazione delle competenze statali; con un rovesciamento completo della previgente tecnica del riparto sono ora affidate alle Regioni, oltre alle funzioni concorrenti, le funzioni legislative residuali.. alle finalità che si intenda raggiungere; ma se ne è comprovata un'attitudine Stato [...]".

establishes an equalization fund to the benefit of areas where the fiscal capacity per inhabitant is reduced, with no restrictions as to the allocation of its proceeds, (4) The funds deriving from the sources mentioned in the previous paragraphs have to enable municipalities, provinces, metropolitan cities and regions to finance in full the functions attributed to them. (5) In order to promote economic development, social cohesion, and solidarity, to remove economic and social inequalities, to foster the actual exercise of human rights, to pursue ends other than those pertaining to the exercise of their ordinary functions, the state may allocate additional resources or carry out special actions to the benefit of certain municipalities, provinces, metropolitan cities and regions. (6) Municipalities, provinces, metropolitan cities and regions have their own assets, assigned to them according to general principles established by state law. They may only contract loans in order to finance investment expenditure. State guarantees on such loans are excluded”.

Here, as in German Constitution, after numerating the legislative and administrative competences, the Constitutional revision provided some disposition about financial autonomy, as a logical consequence of division of functions.

But the new provision seems so far from that “Finanzverfassung” of the German federalism: the effectiveness of dispositions on fiscal federalism is delegated to law: “Quanto al federalismo fiscale è ampiamente noto che il sistema delineato dall’art. 119 Cost., per quanto possa rappresentare un rafforzamento dei meccanismi previsti dalla vecchia formulazione e la costituzionalizzazione di istituti sinora previsti dalla legge ordinaria, non rappresenta affatto una formulazione del c.d. federalismo fiscale. Questo, infatti, si sostanzia nella scrittura di una Costituzione della finanza (*Finanzverfassung*), e cioè di una previsione direttamente in Costituzione della distribuzione del potere impositivo e dei criteri di perequazione, restringendo il ruolo della legge statale (sia pure partecipata dai rappresentanti regionali) alla disciplina dei profili organizzativi del sistema”⁴⁰.

The difficulty to give effectiveness to Article 119 Cost. is one of the reasons of skepticism about the revision of Title V: “Da questo punto di vista l’elaborazione italiana è ancora indietro e la stessa applicazione dell’art. 119 Cost. sembra conoscere delle difficoltà insormontabili”⁴¹.

⁴⁰ S. MANGIAMELI, *Continuità e riforma della Costituzione* cit., 478.

⁴¹ S. MANGIAMELI, *Continuità e riforma della Costituzione* cit., 267. At this regard, see also G. G. CARBONI, *La responsabilità finanziaria nel diritto costituzionale europeo*, Torino, 2006, in part. pag. 226: “Dai vincoli posti dall’ordinamento comunitario, ai quali l’art. 119 Cost. sottopone la legislazione statale e regionale, discende l’obbligo per le Regioni e gli enti locali di concorrere all’equilibrio finanziario dello Stato. [...] L’esistenza di diversi livelli di decisione sollecita la creazione di strumenti di coordinamento per attuare il principio della corresponsabilità finanziaria. Le recenti vicende del federalismo tedesco e di quello spagnolo indicano che la distribuzione dei poteri e delle responsabilità finanziarie deve avvenire bilanciando l’esigenza dell’autogoverno con quella dell’equilibrio finanziario complessivo”.

4. *Two compared decisions: Judgment of Oct. 24.2002 BVerfGE, 2 BvF1/01 and OGM Corte cost.: the proportionality flips!*

4.1 *German case law*

In this final paragraph, it will be interesting to compare the change of attitude of the two Constitutional Courts, the German and the Italian one vis-à-vis the proportionality principle.

In particular, it will be analysed a judgement of the Bundesverfassungsgericht of 24 October 2002⁴² and a recent judgment of the Italian Corte Costituzionale on GMO problems.

The German judgment is well known because it is considered the first response of the German Constitutional Court to the reformed art. 72 GG, by enlarging its "self restraint" within the so called "konkurrirende Gesetzgebung". As seen, the revision of 1994 changed the provision by introducing the possibility of a judicial review on the discretionary power of Federal legislation. With the judgment of 2002, the Court paved the way for the admission of an effective review of federal power and moreover focused its attention on the requirements of a legitimate intervention of the State. As far as the judgement of October 2002, the BVerfGE refused a judicial review: the motivation behind was the "necessity of Federal intervention", under the sphere of "discretionary power of Federal legislator"⁴³

The question examined by the Court concerned the legitimacy of a Federal Law on geriatric assistance (Altenpflegegesetz, AltpfG), which contained some revisions of the law on sanitary assistance (Krankenpflegegesetz). The mentioned law was challenged in Court by the State of Bavaria, which contested the necessity of a federal law in "sanitary subject" to regulate the education and vocational training in case of sanitary assistance. The act, according to the proponents, contented itself with very general provisions regarding the training of geriatric care assistants and expressly left many details to the states⁴⁴.

The Constitutional Court, after having recognised the important revision of art. 72 GG in 1994, affirmed the necessity of considering through a "balanced evaluation" the subjects of exclusive and concurrent legislative competence: „Das

⁴² BVerfGE, II Sen., 24 October 2002, in www.bundesverfassungsgericht.de

⁴³ BVerfGE, 2, 213 ss; 10, 234; BVerfGE, 15, 127; BVerfGE, 33, 224, 229. At this purpose, see E. BUOSO, *L'art. 72, II comma, GG davanti al Bundesverfassungsgericht*, in *Le Regioni*, 2003, 958; see also M. KETTNER, *Der Föderalismus ist (doch) justiziabel – Anmerkungen zum "Altenpflegegesetzurteil" des BVerfG*, in *NVwZ*, 2003, 822; ID., *Normgeberwille und Verfassungsinterpretation – zur „historischen“ Auslegung von Art. 72 Abs. 2 GG n. F.*, in *VBIBW*, 1999, 289.

⁴⁴ G. TAYLOR, *Germany: subsidiarity principle*, in *International Journal of Constitutional Law*, 2006, 115.

Bundesverfassungsgericht hatte sich erstmalig nach der Grundgesetzänderung von 1994 grundlegend mit der Vorschrift des Art. 72 GG zu befassen. Dieser Norm kommt als Kompetenzverteilungsregel auf dem Feld der Gesetzgebung für die Balance zwischen Bund und Ländern eine besondere Bedeutung zu. Danach sind die Länder für die Gesetzgebung grundsätzlich zuständig und bleiben es, wenn der Bund untätig geblieben ist. Erst dann, wenn der Bund eine in Art. 74 oder Art. 74 a GG genannte Materie an sich zieht, ist sie für die Länder gesperrt. Art. 72 Abs. 2 GG wiederum begrenzt die Kompetenz des Bundes und bindet sie an bestimmte Voraussetzungen“.

In this sense, the Court strongly affirmed that the entire sphere of legislative competence, even the Federal one, has to be submitted to judicial review⁴⁵. The provision of Article 72 GG, according to the reformed version, refers to the “Necessity” to exercise federal legislative power (“[...] wenn und soweit die Herstellung gleichwertiger Lebensverhältnisse im Bundesgebiet oder die Wahrung der rechts- oder Wirtschaftseinheit im gesamtstaatlichen Interesse eine bundesgesetzliche Regelung erforderlich macht”) and no more to the “Need” of a Federal regulation, as it was before the Reform of 1994 (“ [...] soweit ein Bedürfnis nach bundesgesetzlicher Regelung besteht”).

Beyond the external metamorphosis of the “Need-clause” (*Bedürfnisklausel*) into “Necessity-clause” (*Erforderlichkeitsklausel*), it is indeed hidden the possibility of a judicial review by the Court. This way, the obstacle of discretionary power may be faced by the instruments of a proportionality control⁴⁶.

⁴⁵ F. PESTALOZZA, *Sub Art. 72, Abs. 2, Rn. 1-47*, in H. V. MANGOLT, F. KLEIN, F. PESTALOZZA, *Das Bonner GG- Kommentar*; C. NEUMEYER, *Der Weg zur Neuen Erforderlichkeitsklausel für die konkurrierende Gesetzgebung des Bunde*, 19 ss..

⁴⁶ For a detailed analysis of judicial review on “Necessity-clause” see D.U. GALETTA, and D. KRÖGER, *Giustiziabilità del principio di sussidiarietà nell’ordinamento costituzionale tedesco e concetto di “necessarietà” ai sensi del principio di proporzionalità tedesco e comunitario*, in *Riv. It. Dir. pubbl. comunitario*, 1998, 905; see also E. BONELLI, *Sussidiarietà, necessarietà e proporzionalità/adequatezza nell’ordinamento comunitario ed in alcune esperienze europee*, in *Diritto e cultura*, 2002, 27: “la modifica dell’art. 72, cpv. 2, GG, si è resa indispensabile, proprio per consentire la giustiziabilità del principio di sussidiarietà, che è la strada battuta da sempre dal legislatore tedesco”. The connections between justiciability on discretionary powers and the development of proportionality principle are therefore more than one. As known, in fact, even if proportionality principle is not expressly set put in Basic Law, it concerns the amount of the core which must be left in a Basic Right. The Federal Constitutional Court regards it as inherent in the Constitutional State principle, applying to laws themselves, but also to the way in which those laws are implemented. It is composed of three elements: 1) Appropriateness: the law must be appropriate for attaining its objective. The Federal Constitutional Court decided that it was inappropriate for the legislator to require a falconer to have technical knowledge about weapons, when he used none (BVerGE 55, 159); 2) Necessity: the law must be necessary for attaining its objective, and not go too far; 3) Balancing: the purpose and method of the law should be weighed against each other: they should not be out of proportion to each other. This requirement is the one which is most commonly breached. The legislator might make serious interferences with liberty for a comparatively trivial purpose. R. YOUNGS, *Sourcebook on German Law*, 2nd Ed., I Law, Cavendish Publishing Limited, Great Britain, 2002, 108

4.2 Italian case law

The judgement n. 116/2006 of Italian Constitutional Court is also interesting, because it concerned the allocation of legislative competences between State and Regions in GMO's matters. More precisely, the Regione Marche contested the legitimacy of some provisions of Decree 22 November 2004 n. 279 ("Disposizioni urgenti per assicurare la coesistenza tra le forme di agricoltura transgenica, convenzionale e biologica")⁴⁷, concerning the problem of coexistence between GMO and organic, and of the effects of contamination both from the agricultural and environmental point of view.

The coexistence between the GMOs and the Organic cultures refers to the ability of farmers to make a practical choice between conventional, organic and GM crop production, in compliance with the legal obligations with labelling and purity criteria. Coexistence measures therefore aim at protecting farmers of non GMO crops from the possible economic consequences of accidental mixing crops with GMO⁴⁸. The appealed law was precisely focused on allocations of legislative competences, in order to find the best measures to be adopted by the Italian State⁴⁹.

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

The Regione Marche contested the vagueness of the provision, which conferred "indefinite power" to the State. The Court accepted the appeal recognising the lack of legitimacy of the law and affirming that the coexistence measures should not go beyond what is necessary to ensure that accidental traces of GMO's

⁴⁷ Coordinato con la Legge di conversione 28 gennaio 2005, n. 5 recante: "Disposizioni urgenti per assicurare la coesistenza tra le forme di agricoltura transgenica, convenzionale e biologica", in G.U. n. 22 del 28 gennaio 2005.

⁴⁸ At this purpose, see Commission Recommendation on 23 July 2003, in www.europa.eu.

⁴⁹ See S. FRANCESCON, *The New Directive 2001/18/EC on the Deliberate Release of Genetically Modified Organisms into the environment: Changes and perspectives*, *RECIEL*, 10, (3), 2001, 309; M. MATTHEE, D. VERMERSCH, *The International Integration of European Precautionary Measures on Biosafety*, *European Environmental Law Review*, 2001, 183. Si veda diffusamente anche L. BUONANNO, *Politics versus science: apportioning competency in the European Food Safety Authority and the European Commission*, in www.polisci.berkeley.edu/; M. POTO, *I traguardi in tema di sicurezza alimentare tra ordinamento comunitario ed ordinamenti interni*, in M. POTO, E. ROLANDO, C. ROSSI, *La sicurezza alimentare tra Unione Europea, Stato e Regioni dopo la riforma del Titolo V della Costituzione*, I Quaderni del Dipartimento, Torino, 2006.

stay beyond EU labelling thresholds, in order to avoid any unnecessary burden for the operators concerned.

Art. 3 of the Law, about regulation of coexistence⁵⁰, refers to a indefinite State providing, where it should have been on the contrary more appropriate a legal provision; literally, the Court considers out of legitimacy the provision of an "atto statale dalla indefinibile natura giuridica (cui peraltro si attribuisce la disciplina di materie che necessiterebbero di una regolamentazione tramite fonti primarie)".

Moreover, the Court states that the further provision of developing the mentioned "framework norms"⁵¹ fights against the Regional legislative competence in agricultural matter: "la previsione di sviluppo ulteriore di tali norme quadro tramite piani regionali di natura amministrativa (art. 4) costituisce l'espressione di scelte lesive della competenza legislativa delle Regioni nella materia dell'agricoltura, dal momento che non può essere negato, in tale ambito, l'esercizio del potere legislativo da parte delle Regioni per disciplinare le modalità di applicazione del principio di coesistenza nei diversi territori regionali, notoriamente molto differenziati dal punto di vista morfologico e produttivo"⁵².

Two are the main steps followed by the Constitutional Court: first of all, in accordance with EU law, it recognises that the coexistence measures should not go beyond what is necessary to ensure that accidental traces of GMO's in non GM

⁵⁰ Art. 3. *Applicazione delle misure di coesistenza* 1. Al fine di prevenire il potenziale pregiudizio economico e l'impatto della commistione tra colture transgeniche, biologiche e convenzionali, con decreto del Ministro delle politiche agricole e forestali, d'intesa con la Conferenza permanente per i rapporti tra lo Stato, le regioni e le province autonome di Trento e di Bolzano, emanato previo parere delle competenti Commissioni parlamentari, sono definite le norme quadro per la coesistenza, anche con riferimento alle aree di confine tra regioni, sulla base delle linee guida predisposte dal Comitato di cui all'articolo 7. Il suddetto decreto è notificato alla Commissione europea nell'ambito della procedura prevista dalla direttiva 98/34/CE del Consiglio, del 22 giugno 1998. 2. Nell'ambito dei piani regionali di coesistenza le regioni e le province autonome, in coerenza con la Raccomandazione della Commissione 2003/556/CE, del 23 luglio 2003, possono individuare nel loro territorio una o più aree omogenee".

⁵¹ "Art. 4. *Piani di coesistenza* 1. Le regioni e le province autonome adottano, con proprio provvedimento, il piano di coesistenza in coerenza con il decreto di cui all'articolo 3; tale piano contiene le regole tecniche per realizzare, la coesistenza, prevedendo strumenti che garantiscono la collaborazione degli enti territoriali locali, sulla base dei principi di sussidiarietà, differenziazione ed adeguatezza. 2. Le regioni e le province autonome, nello svolgimento delle procedure di cui al comma 1, assicurano la partecipazione di organizzazioni, associazioni, organismi ed altri soggetti portatori di interessi in materia. 3. Le regioni e le province autonome promuovono il raggiungimento, su base volontaria, di accordi tra conduttori agricoli, al fine di adottare le misure di gestione previste dal piano di coesistenza di cui al comma 1 per assicurare la coesistenza tra colture transgeniche, convenzionali e biologiche. 3-bis. Le regioni e le province autonome, al fine di prevedere un equo risarcimento per gli eventuali danni causati dalla inosservanza del piano di coesistenza, ferme restando le previsioni dell'articolo 5, comma 1-bis, possono istituire un apposito fondo, finalizzato a consentire il ripristino delle condizioni agronomiche preesistenti all'evento dannoso, il cui funzionamento e' determinato con le modalità stabilite dal decreto di cui all'articolo 3, comma 1".

⁵² Para 7 of the judgement.

products stay below EU labelling thresholds in order to avoid any unnecessary burden for the operators concerned.

Second step, according to the judgement, measures should be science based and proportionate, and therefore have to be adapted to local conditions. Hence, the necessity for the Regional power to legislate and to guarantee a proportionate action at the level closer to the individual farms.

The judgment highlights therefore a new attitude of constitutional jurisprudence towards the decentralisation, by the means of principle of proportionality. It seems that the Court is changing its course of action, by reversing its previous trend strongly "State centred"⁵³.

The case n. 116/2006 reflects a new orientation of the Court, which is increasing its tendency towards decentralisation of power; particularly in two cases, both dating June 2006, (1st June 2006, n. 214 and 28th June 2006, n. 246) the

⁵³ See Corte cost., 26 luglio 2002, n. 407, in *Giur. cost.*, 2002, 2940, con nota di F. S. MARINI, *La Corte costituzionale nel labirinto delle materie "trasversali"* cit. *supra*, and *ivi*, 2002, 3347, note G. PAGANETTO, *Potestà legislativa regionale e "limiti alle competenze esclusive statali"*; ne *Le Regioni*, 2003, 312, note M. CECCHETTI, *Legislazione statale e legislazione regionale epr la tutela dell'ambiente: niente di nuovo dopo la riforma costituzionale del Titolo V?*; e di S. MANGIAMELI, *Sull'arte di definire le materie dopo la riforma del Titolo V della Costituzione*; Corte cost., 26 giugno 2002, n. 282, who strongly affirmed the necessity of giving power to the Regions as well: "la nuova formulazione dell'art. 117, terzo comma, rispetto a quello previgente dell'art. 117, primo comma, esprime l'intento di una più netta distinzione fra la competenza regionale a legiferare in queste materie e la competenza statale, limitata alla determinazione dei principi fondamentali della disciplina"; the judgement is published in *Giur. cost.*, 2002, 2026, note A. D'ATENA, *La Consulta parla...e la riforma del titolo V entra in vigore* e di D. MORANA, *La tutela della salute, fra libertà e prestazioni, dopo la riforma del Titolo V. A proposito della sentenza 282/2002 della Corte costituzionale.*; in *Foro amm. CdS*, 2002, f. 23, 2791, note C. E. GALLO, *La potestà legislativa regionale concorrente, i diritti fondamentali ed i limiti alla discrezionalità del legislatore davanti alla Corte costituzionale*, nota a C. cost. 26 giugno 2002 n. 282, e in *Sanità Pubblica e Privata*, 2003, 74. Corte cost., 27 marzo 2003, n. 88, in *Giur. cost.*, 2003, f. 2; in *Foro Amm. CdS*, 2003, 1233, note A. CORSINI, *Cautela della Corte sui "livelli essenziali delle prestazioni sanitarie"*; in *Foro It.*, 2003, I, 2915; Corte cost., 25 marzo 2005, n. 120, in *Giust. cost.*, 2005, f. 2 e in *Foro Amm. CdS*, 2005, f. 3, 683, See also Corte Cost., 1° ottobre 2003, n. 303, in *Foro It.*, 2004, I, 1004, note C. VIDETTA. Moreover, R. FERRARA, *Unità dell'ordinamento giuridico e principio di sussidiarietà: il punto di vista della Corte costituzionale* e a F. FRACCHIA, *Dei problemi non (completamente) risolti dalla Corte costituzionale: funzioni amministrative statali nelle materie di competenza regionale residuale, norme statali cedevoli e metodo dell'intesa sull'interpretazione dell'art. 117, 2° comma, lett. m) cost.*, and Corte cost., 12 aprile 2005, n. 145, in *Giur. cost.*, 2005, f. 3. E. BONELLI, *In tema di attuazione del nuovo titolo V della Costituzione: la problematica redistribuzione della funzione legislativa ed amministrativa*, in *Riv. amm. R. It.* 2002, II, 447. Sul punto, v. R. CARANTA, *La tutela della concorrenza, le competenze legislative e la difficile applicazione del Titolo V della Costituzione*, in *Le Regioni*, 2004, 990; M. POTO, *La Corte Costituzionale e la determinazione dei livelli essenziali delle prestazioni sui diritti civili e sociali*, in *Resp. Civ. e Prev.*, 2006, f. 3; see also P. VERONESI, *I principi in materia di raccordo Stato-Regioni dopo la riforma del Titolo V*, in *Le Regioni*, 2003, 1007; L. VIOLINI, *Meno supremazia e più collaborazione nei rapporti tra i diversi livelli di governo? Un primo sguardo (non privo di interesse) alla galassia degli accordi e delle intese*, *ibidem*, 691.

regional legislative competence is at last recognised: in case of government of territory in the first; in determination of energetic levels in the second.⁵⁴

5. Conclusions

To sum up, it can be observed that a more effective judicial review of allocating choices is getting possible, thanks to the increasing ability of the Court to make judicial review through the lens of proportionality principle.

If in Germany this trend is aided by the new formulation of proportionality criteria according to the revised constitutional provisions, in Italy, it is also consolidating thanks to the jurisprudential channel.

Let us hope that this tendency could raise awareness -amongst the Courts, the Legislators and the Jurists in large sense- towards a new meaning of good administration, "one of the cornerstones of modern administrative law"⁵⁵ in terms of the development of administrative law, closely bound up with the idea of establishing judicial protection, as a counterweight to the public power⁵⁶.

⁵⁴Both of them are available on Constitutional Court website www.cortecostituzionale.it. See also Corte cost., 1st June 2006, n. 213; Id., 23 March 2006, n. 129, *ibidem*.

⁵⁵T. FORTSAKIS, *Principles Governing Good Administration, European Public Law*, 2005, 11, 2, 207.

⁵⁶As enshrined by T. FORTSAKIS, *Principles Governing Good Administration* cit., 108, this list basically echoes that compiled by Professor Spiliotopoulos, in his *Greek Administrative Law*, Preface by Professor Jeffrey Jowell Q. C., Ant. N. Sakkoulas, Athens & Bruylant, Brussels, 2004, para 82.