



SANT'ANNA LEGAL STUDIES

STALS RESEARCH PAPER N. 17/2008

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Union”**

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Department of Law
<http://stals.sssup.it>

ISSN: 1974-5656

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Abstract

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

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

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

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

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

Keywords

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

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

Giuseppe Martinico¹

SUMMARY: 1. Goals of the paper: a constitutional language for the cohesion policies - 2. The notion of “Form of State”. - 3 The possibility of a supranational Welfare. - 4. The parallelism: the cohesion policies as a part of the supranational welfare dimension. - 5. The impact of social policies (including the cohesion policies) on the Form of Union. The notion of democratic deficit adopted. - 6. The possibilities offered by cohesion policies.

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

The goal of this paper is to expand some of the traditional concepts of constitutionalism in a twofold direction: first of all, it will be necessary to verify the utility of classic concepts of constitutionalism in order to analyze contemporary institutions. Then, secondly, it will be necessary to ‘apply’ the constitutionalist perspective to the area of the cohesion policies. As Leonardi has pointed out², in fact, the literature on cohesion has been enriched above all by economists and by scholars in public policies and international relations. The mentioned author has never even quoted legal scholars. What will be attempted here, after having traced back the Community process to the paradigm of the ‘federalizing processes’, is to evaluate the impact of social policies (and cohesion policies are to be included here as well) on the form of the Union. This formulation (calling up concepts such as form of State, so dear to constitutionalists) is intended to designate relations between various levels of government (national, regional and supranational); all this stemming from a

¹Lecturer in Law, University of Pisa; *Stals* (Sant’Anna Legal Studies) Senior Assistant Editor (www.stals.sssup.it/site). An earliest version of this work was presented at the International Regional Studies Association Conference “Regions in focus?”, 2-5 April 2007. The contents of such a research paper were partially anticipated in: G.Martinico, *The Constitutional Language of the Cohesion Policies*, *Panóptica, Revista Eletrônica Acadêmica de Direito*, 2007, 187-208.

²R. Leonardi, *Cohesion policy in the European Union. The Building of Europe*, Palgrave, London, 2005, 2-3.

vision of cohesion as a “*dimension of relations among peoples and citizens of Europe*”³.

This endeavor is made difficult, in the case of constitutionalists, by the fact that, historically, in Europe (and even more so in Italy), with a few celebrated exceptions, constitutionalists have not, followed with due consideration the evolution of the Community legal order from its very first steps. I will try to fill this gap through the comparative method by looking at other constitutional experiences⁴

2. The notion of “Form of State”

By “*Form of State*” Costantino Mortati⁵ meant both the relationship between the classical elements of the State (sovereignty, territory and people) and the fundamental aims of the State. In this sense the notion of Form of State is connected to the concept of fundamental high policy goals (i.e. “*indirizzo politico*”). Under the formula “*Form of State*” Mortati grouped classifications related both to the vertical separation of powers (e.g. unitary versus decentred State with regard to the relationship between the territorial entities; Liberal State versus Welfare State with regard to the relationship between market and State) as well as to the horizontal (e.g. democratic versus authoritarian State) separation of powers.

As Mortati himself pointed out the notion of form of State represents the teleological moment of the form of government (that is the whole of relationships between sovereign powers⁶).

By further developing this polysemy, Palermo⁷ concludes that the Form of State concerns both the distribution of powers and the axiological dimension of a legal order.

³L.Campiglio-F.Timpano, *La dimensione economica della coesione sociale: lavoro, famiglia e welfare State*, in A.Quadro Curzio (ed.), *Profili della costituzione economica europea*, Il Mulino, Bologna, 2001, 395-430, 397.

⁴ B.Baldi, *Stato e territorio*, Laterza, Roma-Bari, 2003; A.Pierini, *Federalismo e welfare state nell'esperienza giuridica degli Stati Uniti, Evoluzione e tensioni di un modello neo-liberale di assistenza sociale*, Giappichelli, Torino, 2003; on Canada, see K.Banting, *The Welfare State and Canadian Federalism*, McGill-Queen's University Press, Montreal, 1982.

⁵C.Mortati, *Le forme di governo*, Cedam, Padova, 1973, 1 ff.

⁶Definitively it concerns the different “options/techniques” offered in order to guarantee of the separation of powers (e.g. parliamentary regimes versus presidential regimes).

⁷F.Palermo, *La forma di Stato dell'Unione europea. Per una teoria costituzionale dell'integrazione sovranazionale*, Cedam, Padova, 41 ff.

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

The first step of his study was to verify the strength of such a notion in legal orders different from that of Italy, finding similarities between this notion and other formulas like *Staatform*⁸ in Austria, *forma del poder*⁹, *sistema* or *régimen politico*, *forma de Estado* in Spain, *rule of law* in UK.

In European Studies the only precedent for this research is represented by Caporaso's attempt to distinguish three forms of State: national State, regulatory State (starting from Majone's intuitions¹⁰), and postmodern State.¹¹

The notion of Form of State was also used by political scientist such as Daniel Elazar when he wrote about the presumed dichotomy between Unitary or Federal form of State.¹²

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

*"Although the integration is not an autonomous constitutional subject, it is a constitutionally relevant moment as the glue between the forms of State (integrated and so not exhaustive)".*¹³

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

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

⁸P.Pernthaler, *Allgemeine Staatslehre und Verfassungslehre*, Springer, Wien-New York, 1986, 188 ff.

⁹F.Rubio Llorente, *La forma del poder. Estudios sobre la Constitucion*, Centro de Estudios Constitucionales, Madrid, 1997.

¹⁰G.Majone, *The rise of the Regulatory State in Europe, West European politics*, 1994, 78-102.

¹¹Defined as: "Abstract, disjointed, increasingly fragmented, not based on stable and coherent coalitions of issues or constituencies, and lacking in a clear public space within which competitive visions of the good life and pursuit of self-interested legislation are disused and debated", J.A.Caporaso, *The European Union and forms of State*, in *Journal of Common Market Studies*, 1996, 29 ff.

¹²D.Elazar, *Form of State: Federal, Unitary or...*, <http://www.jcpa.org/dje/articles/formofstate.htm>

¹³F.Palermo, *La forma cit.*, 229.

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

The constitutional law of integration would be similar to the common law, founding itself on a legal order which pre-exists to the State, on a wide production at regulative level, and on the adjudicative activity of a jurisdictional system which is above all remedial.¹⁴

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

As a matter of fact, the EU, like all the other complex systems, is characterized by such features: non-reducibility, unpredictability, non-determinism, non-reversibility. It is suggested here that the notion of complexity can offer a very important contribution (in terms of dynamism) to the multilevel constitutionalism theory. The bridge of this interlaced (from the original meaning of the term *complex*) system is provided by the constant exchanges among levels. By the formula *constitutional synallagma* it is to be understood the whole of flows, practises and rules which circulate from one level to another in a twofold direction (from top to bottom and viceversa) enriching in a mutual way the European Constitution which is a chameleonic and never-ending process of constitutional coordination. The bridge linking the levels is represented by art. 234 ECT: thanks to this provision the ECJ cooperates with the judges producing its interpretative sentences. The latter are typical examples of cultural sources of law which give new blood to the constitutional synallagma.¹⁵

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

It is preferable to use the formula *Form of Union* instead of *Form of State of the Union* in this paper. When writing about the Form of Union Mezzetti¹⁶ chose a similar option and decided to focus on the principles of the EU legal order, privileging in that way the axiological side of the notion.

¹⁴F.Palermo, *La forma cit.*, 232.

¹⁵G.Martinico, *Complexity and Cultural sources of Law in the EU context: from the multilevel constitutionalism to the constitutional synallagma*, in *German law journal*, 2007, 205-230

¹⁶L.Mezzetti, *Principi costituzionali e forma dell'Unione*, in P.Costanzo-L.Mezzetti-A.Ruggeri, *Lineamenti di diritto costituzionale dell'Unione Europea*, Giappichelli, Torino, 2006, 57-145.

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

3. The possibility of a supranational Welfare

Is a supranational welfare possible in a context without an axiological homogeneity?

This question was analyzed in multicultural contexts such as that of Canada by Banting and Kymlicka.

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

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

1) the *misdiagnosis effect*, for which *“MCPs lead people to misdiagnose the problems that minorities face. It encourages people to think that the problems facing minority groups are rooted primarily in cultural “misrecognition”, and hence to think that the solution lies in greater state recognition of ethnic identities and cultural practices. In reality, however, these “culturalist” solutions will be of little or no benefit, since the real problems lie elsewhere”*.¹⁷

2) The *corroding effect* for which: *“MCPs weaken redistribution by eroding trust and solidarity amongst citizens, and hence eroding popular support for redistribution. MCPs are said to erode solidarity because they emphasize differences between citizens, rather than commonalities”*.¹⁸

3) The *crowding out effect*, for which: *“MCPs weaken pro-redistribution coalitions by diverting time, energy and money from redistribution to recognition. People who would otherwise be actively involved in fighting to*

¹⁷ K.Banting-W.Kymlicka, *“Do Multiculturalism Policies Erode the Welfare State?”*, in www.queensu.ca/sps/working_papers/files/sps_wp_33.pdf -

¹⁸K.Banting-W.Kymlicka, *Do Multiculturalism cit.*

*enhance economic redistribution, or at least to protect the WS from right-wing retrenchment, are instead spending their time on issues of multiculturalism”.*¹⁹

The cultural heterogeneity would, in fact, weaken the *trust and national solidarity across ethnic/racial lines*²⁰ then “*multiculturalism policies that recognize or accommodate ethnic groups tend to exacerbate any underlying tension between diversity and social solidarity, further weakening support for redistribution*”.²¹

As Banting concludes “*there is a tension between the ethnic diversity of one’s neighbourhood and levels of trust in neighbours, even when one controls for all the other factors that might influence trust, such as economic wellbeing, education, gender, age and so on*”, but: “*Many analysts simply stop at this point, and assume that diminished trust necessarily weakens support for redistribution... There is no statistically significant negative relationship between multiculturalism policies and growth in social spending across OECD countries*”.²²

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

Some constitutional readings of the Social policies of EU provided so far have emphasized the role of the principle of equality, seen as key to read the Welfare dimension of EU.²³

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

¹⁹K.Banting-W.Kymlicka, *Do Multiculturalism cit.*

²⁰K.Banting, *Multiculturalism and the Welfare State: Recent Evidence about Ethnic Diversity, Multiculturalism Policies and Redistribution*, in www.wcfia.harvard.edu/jwe/events/conferences/may2005/papers/Banting_DiversityandtheWelfareState.pdf

²¹K.Banting, *Multiculturalism cit.*

²²KBanting, *Multiculturalism cit.*

²³G. de Burca (ed.), *EU Law and Welfare States: in search of solidarity*, Oxford University Press, Oxford, 2005.

One could thus surmise that cohesion policies should be read in light of the constitutional principle of solidarity which belongs to the European constitutional heritage. The considerations made by Pizzorusso²⁴ with regard to the impossibility of tracing the principle of substantial equality back to the European constitutional heritage could perhaps lead to a similar conclusion, even in the case of the solidarity principle. According to a reconstruction carried out by Somma,²⁵ it is nevertheless impossible to ignore the several references to a solidarity dimension (read not only as a framework for duties justifiable in the light of superior interests) present in the European constitutions (articles 16, 22 and 24 of the Greek Constitution; Article 81 of the Portuguese Constitution, Article 9 of the Spanish Constitution). Somma also adds all those constitutional provisions related to the substantial side of the equality principle, disconnecting the notion of solidarity from the constitutional duties dimension (see f.e. art. 2 It.Const.). One can also stress the further elements present in the Constitutions of new EU member states: art. 16, 17 Const. of Hungary; art. 28 Const. of Estonia; artt.35 ss. Const. of Slovakia; artt. 64 ss. Const. of Poland).

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

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

²⁴A.Pizzorusso, *Il patrimonio costituzionale europeo*, Il Mulino, Bologna, 2002, 69.

²⁵ A.Somma, *Temi e problemi di diritto comparato*, Giappichelli, Torino, II, 2003, 179-213.

If the first version of solidarity is admittedly vague, the second one is particularly relevant due to the fact that it testifies to the particular nature of the Community. The positive side of this 'community building' with aims other than national aims is given in Article 308 of the Treaty establishing the European Community. This is a genuine "*catch-all clause*" that provides for the possibility of the Council, acting unanimously upon a proposal from the Commission and after consulting the European Parliament, to take the necessary measures for the realization of one of the aims of the Community, should the Treaty not have provided the necessary powers for the Community.

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

Cohesion is one of the tasks of the Community, as is obvious from Article 2 TEC (where, among others, a distinction is made between "economic and social cohesion and solidarity") and Article 3, k)²⁶ of the TEC. It is also mentioned in article 16 TEC regarding services of general economic interest which talks of "*promoting social and territorial cohesion*", leaving out the term 'economical' and replacing it with "*territorial*".

Nevertheless, distinguished scholarship on this issue favors a reading for which a systematic corroboration of Article 16 TEC and Article 3 would be necessary. In this sense it is interesting to stress the choice expressed in the Treaty-Constitution where the word constantly accompanies the notion of economic and social development: eg., art. I-14 which provides that the policies regarding economic, social and territorial cohesion fall within the shared competences areas. Another example is provided by art. III-416 which identifies a limit to the actions of reinforced cooperation in the economic, social and territorial cohesion (together with common market).

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

²⁶ "*For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:*
k) *the strengthening of economic and social cohesion;*"

One also needs to mention here the provisions of Article 136.2, c, where a functional common market is seen as a prerequisite for the harmonization of welfare systems. Free market and welfare objectives are therefore joined together, without viewing the former as an “obstacle” for the realization of general welfare objectives.

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

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

This part of the paper deals with the reductive vision according to which the cohesion policies cannot be brought back to the constitutional principle of

solidarity. The possibility of including the cohesion policies in the welfare dimension of EU depends on this.

In fact, it is submitted, the argument that *“Title XVII...exclusively expresses an objective in terms of the narrowing of the gaps between various levels of economic development”*²⁷ is questionable for five main reasons. The first reason is the wealth redistribution factor (similar to the one characterizing social dynamics within the Member States), even if limited (at least directly) to the territorial level (similar to the principle of Article 119 of the Italian Constitution). Another important example of this argumentation is provided by the Canadian experience of the equalization payments founded on section 36 of Constitution Act of 1982.

Traditionally the redistribution policies are founded on a common sense of belonging, a spirit of solidarity in homogenous community: a confirmation of this could be found, for example, in the history of State-building according to Rokkan’s theory.

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

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

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

The limitation of the redistribution factor to the individual-target policies is a big mistake which does not find confirms in the comparative experience. Another clear proof of the link between social policies and cohesion is given by the rules of the ECT regarding the ESF as was discussed above. The third point is the change of the context of EU. It seems evident that the latest trend of supranational constitutionalism is characterized by the proclamation of the Charter of fundamental rights of EU (although it belongs to the vagueness of

²⁷ E.Balboni, *Il principio della coesione economica e social nell’ordinamento comunitario e nella recente esperienza dell’Unione*, in U.De Siervo (a cura di), *la difficile costituzione europea*, Il Mulino, Bologna, 2001, 19-57, 53.

the soft law). It is impossible to analyze here the several theories advanced in order to give it a strong legal value but one can recall that it codifies many principles contained in ECJ's case law or in the common constitutional traditions of the art. 6 of EUT. Although this charter does not represent an earthquake in the constitutional background of the EU, it does show the political attempt to overcome the only economic version of Communities life. Deep implications for the form of Union (as defined above) come from the horizontal clauses of this document. In this sense if the Treaty-Constitution enters into force the shift toward a strong supranationalism would be evident. A part of this is undoubtedly the language of rights (social rights specifically) which characterizes this phase of European life and it is important to take care in this regard when analyzing the dynamics of the protection of European entities (citizens or countries). Last but not least there are two other "philosophical" points.

The argumentation in question here shows a reductionist vision of the notion of "development" because it neglects Sen's advice about the link between development and human rights as also identified in many European documents, limiting the development to the improvement of productiveness/output. This vision is often refused by official documents of EU, for example the publications related to the cooperation for development. Nevertheless, it reveals a Manichean (black or white) vision of social sovereignty. It is thus contestable whether there was a complete loss of social sovereignty for the States (the idea of negative integration described by Scharpf²⁸).

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

5. The impact of social policies (including the cohesion policies) on the Form of Union.

The notion of democratic deficit adopted

²⁸F.Scharpf, *Governare l'Europa*, il Mulino, Bologna 1999, 51.

The debate on the democratic deficit has always been characterized by one great simplification: the reduction of the question as to the lack of European Parliament's powers.

This approach is questionable because it tends to isolate the question from other connected issues: the weakness of the European parties, the composition of the other European institutions, the restrictions to the access to the ECJ for actors such as the Regions, the perennial violation of the principles of conferral and subsidiarity and the lack of a clear system of legal sources.

As one can easily infer, several of these issues are strongly interrelated: for example the problem of the violation of subsidiarity is linked to that of the lack of direct access for the Regions before the ECJ.²⁹

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

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

6. The possibilities offered by cohesion policies

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

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

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

²⁹M.Dani, *Regions Standing Before the EU Courts - Towards a Constitutional Theory on "Direct and Individual" Participation of the Regions in the EU Decision-Making Processes*, in R.Toniatti-F.Palermo-M.Dani (eds.), *An ever more complex Union*, Nomos, Baden-Baden, 2004, 181 ff.

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

The Court also added that: *“subject to that reservation, Community law does not require Member States to make any change in the distribution of powers and responsibilities between the public bodies which exist on their territory”*. The only condition imposed by the Community judge was that *“the procedural arrangements in the domestic system enable the rights which individuals derive from the Community legal system to be effectively protected and it is not more difficult to assert those rights than the rights which they derive from the domestic legal system”*. In its reasoning, the ECJ admitted that *“in Member States with a federal structure, reparation for damage caused to individuals by national measures taken in breach of Community law need not necessarily be provided by the federal State in order for the obligations of the Member State concerned under Community law to be fulfilled”*. In the *Haim* case, the Court restated that *“Community law does not preclude a public-law body, in addition to the Member State itself, from being liable to make reparation for loss and damage caused to individuals as a result of measures which it took in breach of Community law”*. As was pointed out in the case law commentary,³⁰ it still remains to be clarified whether it would eventually be possible to talk of an exclusive liability of a sub-state public entity or whether this liability will always be concurrent with the one of the State. Moreover, the relationship between the two liabilities remains to be clarified as well. These judgments must be read together with the interesting provisions of the Treaty-Constitution regarding the Protocol on subsidiarity and finally the provisions in III-365, 3. According to this article: *“The Court of Justice of the European Union shall have jurisdiction*

³⁰ A.Saggio, *La responsabilità dello Stato per violazione del diritto comunitario, Danno e responsabilità*, 3/2001, 223-242.

under the conditions laid down in paragraphs 1 and 2 in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives". It is difficult to understand the weight of the cohesion factor on this development but it is interesting to recall the economic profile of the EC evolution. What is meant here is that in the history of the EC the legal label has always come after the economic change. In this sense one could infer that the improvement of the legal status of the Regions is a consequence of their economic weight in the life of the Union. There are two main difficulties in this reasoning: first of all, the terminological issue as it is unclear that economists and lawyers mean the same thing with the term "Region" or "subsidiarity". The problem is the lack of activism of the ECJ in this ambit: this element does not allow us to compare with the American experience the impact of welfare on the relation between the centre and periphery.

As many scholars (see the researches and the projects of the *NewGov project*) have pointed out, the work of the structural funds is, in fact, based on a curious mix between new and old techniques of governance. The aim of the European cohesion policies was rather to create a system of multilevel governance that would have included at least three levels: Community, Member States and regions, with the possibility for the latter to involve the local level, further inserted into the cohesion policies as a genuine fourth level. Private actors, stimulated to invest by structural interventions, can produce a sort of multiplication effort that has an impact on the private sector, setting in motion a cycle of endogenous development that includes production innovation and generates employment in underdeveloped areas. The virtuous circle mentioned would be, nevertheless, unimaginable without a programming activity acting as a framework for structural intervention. As Leonardi³¹ recalls, one of the main advantages of the partnership consists of ending the exclusivity in the implementation of the programs of the state administrations in strongly decentralized contexts. Obviously, not all the states have responded to this in a similar manner. It is in fact possible to identify three different patterns of

³¹R.Leonardi, *Coesione, convergenza e integrazione nell'Unione europea*, Il Mulino, Bologna, 1995, 222.

response³² to these new concepts at a national and regional level and different outcomes are consequently attributable to every category of response. The first type of reaction lies in the 'rejection' of suggested procedures and models, having as a consequence the lack of growth (Lazio and Veneto); the second is the mere formal adaptation with a consequent incomplete utilization of the programs' potentials and resources (Marche, Liguria, Friuli). The third kind, instead, implies a thorough understanding of the opportunities for the renewal of professional skills, for the socialization of procedures and rules, for not only a formal understanding, but also substantial (and also large-scale), of the suggested concepts, rules and procedures, with the consequent full utilization of resources and maximum growth result (Toscana).³³

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

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

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

Expressions of the old governance are as follows; the Treaty bases of the structural funds policies (art. 2 ECT, art. 158-162 ECT), the right of proposal since 1987 of the European Commission and its duty of implementation; the unanimity voting on the design and the financial package in the Council of Ministers; the competencies of the European Parliament (assent on fundamental decisions on structural funds and cohesion funds; the codecision on ERDF and ESF; the consultation on EAGGF/guidance and FIFG); the possibility to give opinions for the ESC and the Committee of Regions; the

³²F.Boccia-R.Leonardi-E.Letta-T.Treu, *I mezzogiorni d'Europa*, Il Mulino, Bologna, 2003, 23 and following

³³See V.Fargion, *I fondi strutturali fra politica e amministrazione nelle Regioni del Centro-Nord*, in V.Fargion-L.Morlino-S.Profeti (eds.), *Europeizzazione e rappresentanza territoriale. Il caso Italiano*, Il Mulino, Bologna, 2006, 125-176, 150 ff.

competence on the jurisdiction for the ECJ and the control of the Court of Auditors for the financial aspects; the use of classic binding sources to give legal bases in this field (Council regulation and Commission decisions)³⁴.

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

In any case, the percentage of the opinions accepted does not reach particularly relevant percentages if compared with those in other fields.³⁵

On this last point we can recall that the Composition of the Committee does not correspond exactly to the notion of Region adopted by the NUTS because of the lack of correspondence between the legal notion of region (usually mentioned in the Constitution of a Country such as in Italy) and the economic notion of Region.

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

The term “*Region*” or “*regionalism*” are used in several contexts: *regional community*, *regional society*, *region-state*, *regional complex*.³⁶

³⁴K.Vida, *New Modes of governance in EU cohesion policy-emergence, evolution and evaluation*, http://www.eu-newgov.org/database/DELIV/D01D16a_Background-Emergence_Cohesion_Policy.pdf

³⁵C.De Micheli, *Il Comitato delle Regioni e il caso italiano*, in V.Fargion-L.Morlino-S.Profeti (eds.), *Europeizzazione e rappresentanza territoriale. Il caso Italiano*, Il Mulino, Bologna, 2006, 333-358, 348-352.

³⁶B.Hettne-F.Söderbaum, *Theorizing the Rise of Regionness*, S.Breslin,-C.Hughes -N. Philips, *New Regionalisms in the Global Political Economy Theories and Cases*, Routledge, London, 1999, 33-47.

Nevertheless, it must be said that a very interesting process is touching the new candidate States and the new member States: it is possible to note a progressive process of adaptation of the internal territorial configuration of the legal order to the criteria used by the NUTS to identify the Regions.³⁷

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

Following the outcome of the research of an Italian group of scholars in public policies and political sciences,³⁸ one can see the effects of the “europeization” (especially with regard to the Italian regions) on the subnational (regional) level. First of all, the complexity of the procedures would give a very important role to the non elected/bureaucratic actors at the disadvantage of the representative actors but the latter can instead be fundamental in the bargaining phases of the cohesion policies procedures thanks to their political skills:

*“Due to their strong focus on problem solving and effectiveness, structural funds clearly appear to privilege the ‘output’ phase of the representation process, rather than the ‘input’ phase”.*³⁹

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

Another factor which should be stressed is the lack of sufficient transparency and accountability in the cohesion policies procedures, which is a negative side of the partnership and the involvement of several actors and of the softness of the instruments used⁴⁰:

³⁷M.Brusis, *Between EU requirements, competitive politics and national traditions: re-creating Region in the Accession Countries of Central and Eastern Europe*, in *Governance*, 2002, 4, 535 ff.

³⁸ V.Fargion-L.Morlino-S.Profeti, *Europeanisation and Territorial Representation in Italy*, *West European Politics*, 2006, 4, 757 - 783; See also V.Fargion-L.Morlino-S.Profeti (eds.), *Europeizzazione e rappresentanza territoriale. Il caso Italiano*, Il Mulino, Bologna, 2006.

³⁹V.Fargion-L.Morlino-S.Profeti, *Europeanisation cit.*, 760.

⁴⁰“Evaluation and monitoring mechanisms - which are supposed to guarantee greater transparency - are not a solution to this problem, as they leave the initial phases of the process largely in the dark precisely when critical decisions are taken on who will benefit and who will be left out from the structural funds game”, V.Fargion-L.Morlino-S.Profeti,

*“First of all, do the mechanisms of representation embodied in and promoted by Cohesion Policy contribute to the export from the European Union to the sub-national level the well known problem of a democratic deficit? Or again, in broader terms, is the European ‘governance model’ a real solution for solving the problem of such a deficit? In this regard, our research revealed the difficulties for less organised/powerful interests in gaining access to the decisional process and the implications – in terms of democratic accountability – of the dominance of non-elected actors in representation activities. In the new procedural context the responsibility for decisions is dispersed and the chain of control becomes unclear”.*⁴¹

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

Previous studies have shown that the flexibility obtained thanks to the soft means implies the difficulty for the European Court of justice to guarantee the respect of the Treaties.⁴²

As cases like *Mangold*⁴³ (which appeared after a long series of cases where the ECJ tried to avoid the comparison with the new governance⁴⁴) show, when the ECJ was forced to face issues relating to which soft legal instruments were involved (albeit partially), it resolved the case referring the general principles⁴⁵. This shift in the legal reasoning of the ECJ has, however, a negative side because it contributes to increase the discretion of the judgements, to decrease its controllability and to change the nature of the ECJ approach which is traditionally more oriented to the pragmatism required by an economic law such as that of EU law .

Another problem linked to the spreading of soft law is the less important role played by the classic and institutional actors (first of all the European Parliament), contributing to the affection of the institutional balance: the risk is

Europeanisation cit., 779.

⁴¹ V.Fargion-L.Morlino-S.Profeti, *Europeanisation cit.*, 779.

⁴² V. Hatzopoulos, *Why the Open Method of Coordination is Bad for You: A Letter to the EU*, *European Law Journal*, 2007, 309-342

⁴³ C-144/04 *Mangold*, ECR., 2005, I-9981

⁴⁴ T-188/97 *Rothmans v. Commission*, ECR, 1999, II-2463; *Standley and Metson*, C-293/97, ECR, 1999, I-2603.; T-135/96, *UEAPME v. Council*, ECR, 1998, II-2335.

⁴⁵ *“Since EC hard legislation will be rare in fields in which some EU coordination takes place, the Court will be obliged to control national measures by reference to general principles and fundamental rights, in order to effectively protect the latter. This, however, is not a commendable development, at least by currently applicable legal standards, and all the judgments above have been strongly criticized”* V.Hatzopoulos, *Why .cit.*

to sacrifice the role of the Parliament in the name of flexibility and this element does not support the reasons of the democratization of Europe.

While such problems are now more evident for the Open Method of coordination strategy than the cohesion policies lines , it seems nevertheless important to point out this risk.⁴⁶

7. Conclusions

In this study I tried to analyze the relationship among integration, constitution and Welfare in the supranational context. If Smend had already stressed the strong relation between the State and the Constitution ("*the integration belongs to the content of constitution*") with regard to the national context, Cappelletti, Weiler and Secombe⁴⁷ studied the supranational dimension of the integration (conceived as proceeding of integration and as the outcome of such a process).

After having included the cohesion policies in the supranational dimension of the Welfare, I pointed out the consequences of the structural funds' functioning on the form of Union (as defined in the first part of the work: axiological dimension of the EU and relationship among the levels of governance and government): empowerment of the role of the Regions, involvement of several non- state actors in the phase of implementation; improvement of the bureaucratic actors at local and regional level because of the complexity of the procedures despite the important role of the elected actors in the phases of political bargaining; limited possibility of intervention for the ECJ due to the spreading of new governance techniques and soft legal instruments used.

The Regions are essential in order to create a common substrate for the decision-making processes and policies. If a society is cohesive public choices are simpler and, above all, there are weaker resistances towards the common

⁴⁶ "*The question of how the use of soft law affects the institutional balance must also be addressed, as the increasing use of instruments not provided for in the Community legal system has a detrimental effect on the use of legislation. This means that more decisions are made outside the framework of the formal Community decision-making process, in which the institutions have been carefully assigned their proper role and power, to reflect a certain institutional balance*" L.A.J.Senden, L. Senden, *Soft law and its implications for institutional balance in the EC*, <http://www.utrechtlawreview.org/publish/articles/000010/article.pdf>, 2005.

⁴⁷M.Cappelletti-M.Secombe-J.H.Weiler (eds.), *Integration through Law, Europe and the American federal experience* I, W. de Gruyter, Berlin and New York, 1985

policies – although this does not produce uniformity nor signify the end of constitutional tolerance. In short, regional cohesion and integration are two sides of the same coin.

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

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

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

By looking at the language used by the documents concerning the structural funds, it seems useful to remark that the subsidiarity principle seems to be limited to its “negative” aspect: the preference conferred upon the subject closest to the citizenship.

At an economic level, it has been said that *“the principle of subsidiarity means that the production of public goods should be attributed to the level of government that has jurisdiction over the area in which that good is public”*⁴⁸.

Starting from this definition that seems to neglect the ‘activist’ side of the principle (that is the one postulating the intervention of the central level for the realization of the mentioned conditions), we can appreciate the remark made with regard to additionality and to a partnership that implies the collaboration among the European, national and regional administrations.

The subsidiarity principle, due to its physiology, requires a system of competences at least tending towards a repartition and at the same time supposes, as was pointed out, an “integrated” system like, for example, a federal system of the cooperative type. This would explain why, within the Community context, subsidiarity has operated as an *“accelerator of centripetal forces”* (Baldassarre) rather than as a factor of valorization of the de-centered realities, in the absence of a formal catalogue of competences. Subsidiarity and

⁴⁸T.Padoa Schioppa, *Economic Federalism and the European Union*, in K.Knop et al. (eds.) *Rethinking federalism: citizens, markets and governments in a changing world*, Vancouver, University of British Columbia Press, 1995, 154 ff., 155.

competence are not, nevertheless, in a relationship of identity: in fact it has been said that the principle of subsidiarity is not intended so much for the formal allocation of *a priori* competences, but rather for the *a posteriori* legitimation of the exercise of competences beyond those formally attributed.⁴⁹ Subsidiarity has successfully operated in a context such as the German one, which does not define competences in the finalistic manner⁵⁰ (as opposed to the French model) of the TEC. This worrying mingling of legal styles explains the destabilization factor that could be introduced by the subsidiarity principle. This is mainly because of its “surreptitious” substitution of the flexibility clause that has allowed the Union (and before, the Community) to acquire ‘slices of competence’ transversally instrumental for the realization of the enounced objectives, without the procedural guarantee of unanimity.

All this appears against the background of a European case law which proves extremely elusive about the principle of subsidiarity and the impossibility for the regions to challenge directly in front of the ECJ those Community acts considered to be in violation of their competences. The Court of First Instance and the ECJ have in fact always preferred not to deal with this ambiguity frontally, solving the cases challenging the cases of legality of Community acts in the light of other arguments (perhaps already tested), without calling into question the issue of subsidiarity.⁵¹

In this respect, it has also been said that the principle of subsidiarity acts as a criterion for the attribution of competences because it “*shifts, even if not in a permanent and formal manner, the level of government that must intervene*”⁵² and, operates as an element of flexibilization in a context generally tending toward rigidity.⁵³

Subsidiarity (together with proportionality) is a post modern criterion of allocation of the power and of resolution of legal antinomies: its flexibility is a

⁴⁹As also pointed out I.Massa Pinto, *Il principio di sussidiarietà- Profili storici e costituzionali*, Jovene, Napoli, 2003, 81.

⁵⁰On the enumeration techniques see: P.Carrozza, *Le "materie": uso delle tecniche di enumerazione materiale delle competenze e modelli di riferimento del "regionalismo di esecuzione" previsto dal nuovo Titolo V della Costituzione* in G.F.Ferrari-G.Parodi (eds.) *La revisione costituzionale del titolo V tra nuovo regionalismo e federalismo*, 2003, 69-124.

⁵¹ C-415/93, *O'Hara/Council and Commission*, ECR.,1994, I-5755; C- 84/94, *United Kingdom/Council*, ECR,1996, I-5755.

⁵² I.Massa Pinto, *Il principio cit.*, 82

⁵³R.Bin, *I decreti di attuazione della «legge Bassanini» e la «sussidiarietà verticale»*, in A. Rinella, L.Coen, R.Scarciglia (eds.), *Sussidiarietà e ordinamenti costituzionali. Esperienze a confronto*, Cedam, Padova, 1999, 169 ff

resource but, at the same time, confers the constitutional adjudicators a great and discretionary power.

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

The only way to limit the discretion of the judge seems to pose procedural guarantees such as those proposed by the Convention for the Constitutional Treaty and contained in the "*Protocol on the application of the principles of subsidiarity and proportionality*".

As a result a form of political monitoring called "early warning mechanism" was provided in that Protocol.

According to it the Commission should transmit a draft legislative act to the national parliaments, giving them six weeks to determine if there is a violation of subsidiarity. If one third of the parliaments decide there is a violation, the Commission is required to reconsider the proposal.

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

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

In this sense it seems useful to recall the solutions suggested by the Italian Constitutional Court⁵⁴: subsidiarity requires a fair cooperation ("leale collaborazione") between the territorial actors, concertative practices and bodies and, finally, a system of agreements among the institutional actors.

Despite the clarity of such a judgement, the real problem is to apply and enforce such principles and many solutions were proposed: the creation of new committees and institutional actors? The improvement of already existing institutions? Is it possible to transplant institutional solutions already experimented within national context (Germany for example) in the supranational level?

Unfortunately this point can not be discussed in depth here, but it was important in this paper, at least to stress the importance of the subnational

⁵⁴Corte Costituzionale, sentenza n. 303/2003, www.cortecostituzionale.it

(regional) level on the constitutional discourse of the EU and on the changing Form of Union.