Department of Political Science

Bachelor Degree in Politics, Philosophy and Economics

Chair of Public Law

Comparative analysis of the legal regulation of non-profit sector in Italy and France

Supervised by

Prof.ssa Cristina Fasone

Co-supervised by

Prof.ssa A.M. Lecis Cocco Ortu

Candidate:

Simone Lepore

Matr. 098432

Academic Year 2022/2023

ACKNOWLEDGEMENT/RINGRAZIAMENTI

Ringrazio la Prof.ssa Cristina Fasone e la Prof.ssa Anna Maria Lecis Coccu Ortù per i loro insegnamenti in ambito giuridici e per l'aiuto e la disponibilità dimostratami nella stesura di questo elaborato finale

Dedico questa tesi a mio nonno Filippo, per il bambino che hai lasciato e uomo che hai cresciuto.

Desidero inoltre ringraziare i miei genitori e la mia famiglia per il loro immenso supporto e per avermi incoraggiato in ogni fase del mio percorso accademico. Il loro amore, sostegno e fiducia in me sono stati fondamentali per il raggiungimento di questo obiettivo.

TABLE OF CONTENTS

INTRODUCTION

The non-profit represents an important resource for the economic and social development of many countries. In Italy and France, third sector organizations play a fundamental role in promoting civic participation and social solidarity. In fact, it is perceived as the main actor in the development of a complex systems of subjects that impart the solidaristic aspect over the economical one. In this sense, the new persecution that we are going to analyse are detached from the traditional ones, where the non-profit was perceived as facilitated by the State. However, despite the cultural and historical affinity that characterizes the two countries, there are significant differences in the structure and regulations.

This dissertation aims at making a comparative analysis of two countries, the Italian Republic, and the French Republic. Specifically, the main focus concerns the identification of the non-profit's role in the juridical field that can be consider as an expression of the values of French and Italian culture and values. As a consequence, the work will stress specific points including horizontal subsidiarity, territorial organizations, and the relationship between public administration and third sector organizations.

The principle of horizontal subsidiarity was introduced in the Maastricht Treaty in 1992 and is based on the idea that decisions should be made as close as possible to citizens. This principle represents an important pillar of European governance and, in particular, of local governance. In essence, the principle of subsidiarity suggests that the best decision-making occurs when it is made closest to the people it affects. This principle is often used in the context of government, where it is believed that local authorities are better equipped to make decisions on matters that primarily affect their communities, rather than a centralized government. The principle of subsidiarity is often viewed as a way to promote decentralization, participation, and democracy.

When comparing the territorial organization, it refers to the way a country or state is divided and organized into smaller units of governance. This can include the division of a country or state into regions, provinces, departments, or other administrative divisions, as well as the distribution of power and responsibilities among these units. The territorial organization determines how decisions are made, resources are allocated, and services are provided at different levels of government, from the national or federal level down to the local or municipal level. Territorial organization is an important aspect of governance, as it affects how citizens interact with the government and how policies are implemented across different regions or areas of a country or state.

The relationship between non-profit organizations and public administration can take many forms, depending on the specific context and the goals of each organization. Non-profit

organizations often work alongside public administration to provide services and resources to communities, particularly in areas where government agencies may be unable to provide support. Public administration, on the other hand, may provide funding and support for non-profit organizations, particularly those that are engaged in delivering public services or addressing social issues. Government agencies may also work closely with non-profit organizations to ensure that policies and programs are responsive to the needs of the community.

In the first chapter of this dissertation, a general description and theoretical review of the historical development in the two countries will be made. Firstly, an overview of the historical background regarding the development of the non-profit sector. Starting in Italy, where the development of this system represented an answer to some of the deepest needs of the society because of a clear absence of a public network of services aimed at the protection of social rights. Secondly, a review of France historical development will be presented. Only on the 1st of July 1901 thanks to Pierre Waldeck-Rousseau, "President du Conseil" at the time, the adopt of a law on *contrat d'association* introducing for the first the right to freely associate without any kind of previous authorization. The law of freedom, which was be erected in principle with constitutional value, put an end to the restrictive regime and preventive prohibition imposed by *loi Le Chapelier*. Such principles issued of the French Revolution of 1789 will only apply after more than one century.

The second chapter will focus on the analysis of the of the French and the Italian administrations in light of the principle of horizontal subsidiarity. Frist of all, particular emphasis will be put in the the principle of horizontal subsidiarity. In Italy, horizontal subsidiarity was introduced in the Constitution in 2001 and provides for the active participation of citizens in the management of public activities. Law 328/2000 then defined the regulatory framework for the promotion and regulation of third sector organizations. In France, however, horizontal subsidiarity was only recently introduced, with the 2003 reform on local autonomy. This reform gave greater competences to local authorities and promoted citizen participation in the management of public activities. Secondly, Italy and France have territorial organization of both countries. They have a system of regions or departments, the way these units are organized and the degree of autonomy they possess differs significantly. Namely Italian system give greater level of autonomy. In this sense, we have to recognise the great impact of horizontal subsidiarity in Italy which influenced the way local government operates. In France, while there has been some decentralization of power in recent years, the degree of autonomy granted to the departments remains limited.

This dissertation's third chapter will focus on the relationship between the public and the non-profit sector. The non-profit growth finally pushes public administration to face with more decisiveness social problems through effective process of collaboration which are giving a new shape to the modus operandi, similarly, also non-profit sector has changed a lot. Still, there are main differences between the two models. On one hand (subsection 3.1), in Italy, third sector organizations have historically had a closer relationship with the state, often performing functions that are traditionally the responsibility of public administration. As a matter of fact, they are actively involved in the process of co-designing and co-programming. On the other hand (subparagraph 3.2), in France, third sector organizations are seen as more independent actors, with less direct involvement in public activities.

CHAPTER 1 : THE ORIGIN AND THE DEVELOPMENT OF THE NON-PROFIT SECTOR IN ITALY AND IN FRANCE

Section 1 : Italy

1. Origins of mutual aid and cooperatives

The first observation of solidaristic activities in the Italian peninsula can be dated back to 1200, when the phenomenon was strictly correlated with the religious environment. However, there is no evidence of an existing collaboration with the State. In fact, public intervention only arose four centuries later. More specifically, it was registered in Piedmont, in the 17th century, thanks to the intervention of Vittorio Amedeo II (1666-1732) and Andrè Guevarre[1]. These two personalities were able to introduce a new system in the Kingdom that allowed private charity and management of assistance under the supervision of the state. More distinctively, King Vittorio Amedeo II theorized a system of control of poverty and urban marginalization through the foundation of the "*Congresso di Carità*", while André Guevarre created a new system which institutionalized spontaneous individual charity under state control.

Later, at the beginning of the 19th century, the expansion of the charitable system through "Opere Pie[2]" and "*Congregazione di carità*" allowed state to have direct control of no-profit entities while keeping the management in the hands of local nobles. In this context, it is important to highlight that any other form of charity was limited and not independent. However, the first clear change come in 1890 when the Crispi Law was

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[1] **Di Paolo**, *L'evoluzione storica del Terzo Settore: nascita e progressiva affermazione*, Lavoro@confronto, http://www.lavoro-confronto.it/archivio/numero-15/levoluzione-storica-del-terzo-settore-nascita-e-progressiva-affermazione-prima-parte .

[2] **Opere Pie** are Italian charitable and assistance institutions; the first expriences date back to the Middle Ages, but they reached an impressive development during the 1500s. They did their utmost to ensure, for those who had no means, assistance in sickness, education, instruction and the teaching of some trade. The first legislation concerning the Opere Pie was a royal decree of 1862, by which a Congregazione di Carità (Charity Congregation) was set up in every municipality of the Kingdom, with the aim of administering the funds allocated to the poor or directly to the Opere Pie. The management of the latter was entrusted to a board elected by the municipal council. With the Crispi Law of 1890, a legal definition was implemented, which is still valid today. Giolitti entrusted their coordination to the 'Council for Assistance and Public Charity'. In 1929, with the regulations annexed to the Lateran Pacts, autonomy from the State was recognised only for those religious bodies that had a religious purpose.

enacted, introducing drastic changes in the juridical framework of reference. Namely, *Opere pie* lose their private or ecclesiastical nature and become public institutions. This last aspect was emphasized by the public check system and by the so-called *disciplina della trasformazione*, according to which the administration can change the nature of entities if they fail in the pursuit of their solidaristic aims or if these ones are no longer considered to be in the interest of the public charity.

We can say that after its unification, the Italian state decided to regulate all non-profit institutions through public law, which increase state's levels of control and interference. Moreover, the Crispi Law removed the charities from the influence and control of the Catholic Church[3], and allowed for the extension of public supervision even over those organizations potentially hostile to the liberal State. From the point perspective, of civil society, the reform was perceived as a limitation of individual freedom and of the right of individuals to interact and organize among themselves to collectively express, promote, pursue, and defend common interests. The law remained formally in force until the beginning of the new millennium, when it was repealed through the Framework Law for the implementation of the integrated system of interventions and social services.

In the post industrialization period[4], the Italian peninsula experienced great difficulties in the field of health service and social aid. Moreover, the political fracture, inherited by the *Legge Crispi* make it difficult to intervene at national level, incentivizing the local aid of civil society and religious entities. Given their ability of those entities to respond to the widespread poverty wage, outcome of the industrial revolution, there was again a clear increase in the influence of religion. Among the most important example, we can mention the Society of Saint Francis de Sales which primarily operate shelters for homeless or at-risk youths in schools, technical, vocational, and language instruction centres. The distinguishes feature of these organizations is the double entity since they were religious congregation affiliated to lay associations.

Furthermore, we can outline the raise of benefit societies[5]. These organizations unlike the previous one, lack of a religious aspect, but they were boosted by the willing of cooperation for mutual gaining. As a matter of fact, these organizations or voluntary associations were formed to provide aid, benefit and for instance insurance to relief from sundry difficulties of its members. However, the state decided to provide a clearer

[3] **Addis, Ferioli e Vivaldi**, *Il terzo settore nella disciplina normativa italiana dall'Unità a oggi* (1861-2011), paper
[4] End of the 60s and beginning of the 70s of the XX century

definition with the law 318/1886 when they were introduced in the Italian legal order for the firs time. The driving force and heart of these organizations was the sharing of labour risk, which configured them as associations between people from the same social class, who worked to improve their conditions.

The first example of benefit society developed in Pinerolo, Piedmont. Subsequently, the number of these kind of organizations increased exponential, but not uniformly in all the regions (most of them were established in the North of Italy). In fact, most mutual guaranteed societies were professionally based. Another purpose of mutualism was the education and protection of workers' savings by savings banks. In 1886, after a heated political debate, the Italian state introduces a new act on mutual organization, the so-called *Legge Berti*[6].

2. From 900 to the second after war

The advent of fascism radically changed the outlook, lashing out against all forms of republican, Catholic and socialist cooperation. This leadership included a less solidaristic spirit at an economic level and a deep devotion to the fascist party. As far as large organisations were concerned, the fascists appropriated them through "extraordinary managements", which meant entrusting their direction directly to some leading figures within their ranks[7]. this was not implemented through the suspension of existing organizations but by subjecting them to the public power. The State action fund its roots in art. 1 of the Labour Charter of 1927, according to which corporativism established an ethical principle of social solidarity and a principle of coordination of private interest under the supervision of the state.

Contextually, the Crispi Law was reinforced in terms of its implementation. On one hand, there was an intensive promotion of all the organisation that had not been affected in 1890. On the other hand, the fascist state implemented the tools of state control, and the most prominent figures in the cooperative world were forced to collaborate with the regime or cease all activities. The totalitarian state replaced the non-profit sector, limiting the right of association only to fascist organisations. Social security and assistance were entrusted to the party and the regime's bureaucratic machine through the National Social Security Institute.

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[5] Società di muto soccorso

[6] **Domenico Berti** (Cumiana1, 17 December 1820 - Rome, 22 April 1897) was an Italian essayist, politician and academic.

[7] **Zanobini**, *Corso di diritto corporativo*, IV ed, Milano, 1939

In 1924 the hand of fascism began to strike the associationism and cooperative world directly. Local prefects took the role of supervising and vigilante on single institutions; they were given the power to dissolve organisations and confiscate their assets if they acted against the fascist regime. In 1929, with the enter into force of the Lateran Treaty, the public's view of religious entities changed as well. Despite their assistance nature, the State decided to recognise just those entities who had just religious aims.

Finally, in 1939 with the beginning of the Second World War the government abolished the last evidence of Crispi Law. Additionally, the fascist state was able to preserve the maintain the principle of the ethics state while imposing its pervasiveness on every aspect of private life, thereby limiting individual protections to the capability of the state.

With the end of World War II and the tragic experience of dictatorship, the Constituent Assembly considered social pluralism as one of the fundamental principles in the reconstruction of the country. The Constitution of 1948 represent a clear separation both from the fascist state and the liberal model. It was aimed at the creation of a welfare state focused on making the public institutions responsible to guarantee social rights. As well, full autonomy of social formations and recognized their subsidiary activity in the defines of certain fundamental rights; the Constituents, after twenty years of limitations and abuses, had a deep respect and devotion to individual freedom and the right of association, so much that they feared any sort of legislative intervention that might minimally limit them; considering also that many forms of political and social associationism had taken a leading role in the liberation of the country.

There were no direct references to the no-profit sector as we know it today, but there was insistence on the cardinal principles of organised solidarity, as we can see from Article 2 of the Constitution, in which the social experiences of civil society are defended, highlighting them as the moments and places where the personality of the individual is expressed and formed. The Constitution recognizes the existence of human rights which cannot be denied by the State (because they are considered pre-existing to the State itself) and which indeed must be protected, because they allow everyone to fully develop their own personality. It should be noted that we are speaking of "human" rights, not "of the citizen": fundamental rights must also be guaranteed to foreigners (judgment n.105 of 2001). Furthermore, the Charter knows man is not an island but lives together with others and weaves various relationships with them, giving life to groups or, in constitutional language, intermediate "social formations" between the individual

and the State. There are therefore both rights of social formations (for example, trade union freedom) and rights of the individual within them. The major group to which every citizen belongs is, of course, that of the Republic, understood as a community of people who not only live in the same territory, but also have a common heritage of history, culture and values. It is from this point of view that the "imperative duties of solidarity". So, It was important for the Constituents to reaffirm as much as possible the superiority of the individual over the State, or rather how the latter lives in function of the former, and the importance of civil society taking an active part in collective life.

In this prospective, the real and effective subsidiarity was able to affirm thanks to the ordinary legislator and to different "programs" defined by the constitution[8]. The constitution introduced a significant transformation of the current model, mainly based on the introduction of the welfare system mainly aimed at empowering public institution to guarantee those rights who are historically knows as social rights. The reality of facts is however different, as subsidiarity principle, which is at the base of the Welfare model, was and still is realized thanks to the ordinary law. One of the greatest examples is art. 32 of the Constitution, despite it recognized and guarantee free medical treatment only for the "*indigent*", the legislature decided to provide citizens a free national care system based on a universal model (law n.833/1978).. This last prospective, was introduced at first by a constant state management of social protection: the general care of the individual was considered as state competence and therefore public institution were considered responsible. At this time, private entities were responsible for providing interests.

At the end of the 1970s, we can observe a clear change mainly due by the implementation at regional level which, beyond the different legislative and administrative competences, were also delegated by state to provide social assistance. These changes were mainly implemented by two ordinary law: the first one is "*legge 16 maggio 1970 n. 281***"** , it defines regional tax revenues (taxes and fees), the existence of regional assets and the creation of an inter-regional fund, as well as the possibility for municipalities to provide services, also in a private or associated form with private individuals while the second one, "*Legge 22 luglio 1975, n. 382*", complete the administrative decentralization of the State to the Regions with ordinary Statute, initiated by Law n. 281 of 1970.

The growth of expenditure between the 1950s and 1980s in social security, coupled with ever-increasing demands of citizens and the sustenance of economic growth, if on

the one hand favoured social policies, on the other was the beginning of the end of the welfare state. The right to assistance in sickness or old age was reserved to each citizen, who paid in the form of taxes to finance such services for himself and the whole community. This criticism, matched with the growing concept of vertical subsidiarity gained ground led to a "modernisation of the public administration" and a profound rethinking of the welfare-state began in the wake of the new convictions of New Public Management[9]. The idea was to apply principles typical of private enterprise such as cost-effectiveness, best practices, or customer satisfaction in the public sector. Deeply relevant to the growth of the non-profit sector was the transformation concerning the production of goods and services, which are outsourced and privatized with a consequent state downsizing in the field of social protection. During the 2000s, a second season of the modernisation process of the PA began. The position of the state regarding its role as social protector was again discussed. The possibility of setting up networks of people and entities became the means to enhance and increase social activity. These new changes were also insert in the context of the constitutional reform of Title V with l. Cost. 3/2001, fully implementing art. 5 of the C., which recognizes local autonomies as exponential entities pre-existing the formation of the Republic. The Municipalities, the Metropolitan Cities, the Province, and the Regions are exponential bodies of the populations residing in a given territory and are required to take charge of their needs. Government action takes place at the lower level and as close to the citizens, except for the power to replace the immediately higher level of government in the event of the impossibility or default of the lower level of government. The reform was necessary to give full implementation and constitutional coverage to the reform called "Federalismo a Costituzione invariata" (law 59/1997).

3. The Terzo Settore reform of 2017

1.3.1. Law n. 106/2016

The roots of the new legislation can be dated in 2014 when Renzi government put on the political agenda the renewal and strengthening of the non-profit sector, which was increasingly providing services for citizens. On 12 April 2014, the "Guidelines for a reform of the Third Sector" were drafted, from which the government's intention to strengthen the non-profit world, making Third Sector organisations and the Public Administration more accountable. The ambition was to create a balance between the

[8] **Addis, Ferioli e Vivaldi**, *Il terzo settore nella disciplina normativa italiana dall'Unità a oggi* (1861-2011), paper

independence and autonomy of social enterprises, the pursuit of general interests and a careful public control of the purposes and methods of non-profit organisations. The guidelines and the enabling act have highlighted the priorities necessary for the implementation and enhancement of the reform: the redevelopment of the principle of subsidiarity understood both horizontally and vertically, the clarification and stabilisation of the financing of non-profit organisations and above all greater accountability and transparency of the activities undertaken. After a complex parliamentary process, the reform of the Third Sector was approved by the law of 6 June 2016.

Going in deep, the delegated act aimed at emanating legislative decrees to regulating the following aspects:

1. Title II of the first book of the Civil Code regarding associations, foundations and other non-profit entities which are recognised as legal persons or not;
2. The special regulations and other provisions in force concerning the non-profit sector, including the tax regulations applicable to such entities, through the drafting of a specific Non-profit Code;
3. The regulations on social enterprise.
4. The regulations on national civil service[10].

Article 2 sets out the principles according to which the government must adhere when issuing decrees. The legislator has placed great emphasis on the right of association and the value of social formations, in which the individuals have the opportunity to express their selves. These entities also play an instrumental role in promoting and fulfilling the principles of democratic participation, solidarity, subsidiarity, and pluralism, pursuant to Articles 2, 3, 18 and 118 of the Constitution. The second part of Article 2 focuses instead on the relevance of the Third Sector's activities, and how these activities must be recognised and increased with the aim of raising the protection of civil and social rights. The third part invites the government to create an efficient regulatory framework that does not limit the autonomy of organisations. In Article 3, on the other hand, the legislature asks the executive to simplify the existing legislation to ensure its 'legal, logical and systemic consistency'. In the first subsection, the government is given the task of facilitating the recognition of legal personality under private law to increase the guarantees of third parties and those who work within non-profit entities. All this should be accompanied by a major effort to

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[9] **Denhardt & Denhardt**, *The New Public Service: Serving Rather than Steering, paper*

[10] **Santuari**, *Le organizzazioni non profit e le forme di partnership con gli enti pubblici nella riforma del Terzo settore.* Bononia University Press, Bologna, 2018.

strengthen control and information regarding the actions of non-profit organisations, especially in cases where there is an intention in their statute to act as a business.

1.3.2. Il codice del Terzo Settore

Article 4 of Law 106/2016 clearly reiterates the intent of regulatory simplification. The legislator invites the government to create a *Codice del Terzo Settore* in which all legal-organisational expressions of the non-profit world are collected. The first among these is biodiversity: Article 4 paragraph 1 lett a) states "identifying rules applicable to all third sector entities", lett c) "respecting the specialities of the individual categories". The government therefore had to inspect and control the economic dimension, the use of public resources, the ability to raise funds, etc., etc. Article 4(1)(b) explains the existing relationship between the activity carried out and tax benefits for non-profit organisations. "The provision establishes a necessary link between the granting of tax concessions and the performance of activities in the general interest, which can be identified through criteria that always take into account civic, solidarity and socially useful purposes as well as those set out in Legislative Decree N 155/2006[11] (social enterprise). Subparagraphs e) and f) of subsection 1 again focus on profits and their hypothetical distribution, and on how the government should intervene to monitor the different activities carried out, focusing on the business activity, which must only be auxiliary in the pursuit of the objectives established in the organisation's statute. Sub-paragraph g) regulates accountability obligations towards the various stakeholders through model 231[12], which is a form of protection for the organisation, but above all for those who work within it. In point h), the legislator places the responsibility on the government to check that, in the observance of public contracts by non-profit organisations, there is the application of economic conditions that are never inferior to those of national public employment contracts. Letter i) dwells on controls, which are useful to strengthen the protection of the recipients of the services, and at the same time confirms the intention to recognise an institutional purpose to the activities of non-profit organisations, including economic-entrepreneurial activities, which as emerged earlier must be marginal and functional to the organisation's primary purposes. Letter l) sets out one of the most difficult tasks for the government, namely that of identifying a

[11] **Santuari**, *Le organizzazioni non profit e le forme di partnership con gli enti pubblici nella riforma del Terzo settore*. Bologna University Press, 2018.
[12] The 231 model takes its name from Legislative Decree 231/2000, which regulates the liability of entities and companies when a crime is committed in the interest of the company and/or employees. https://www.studiocataldi.it/articoli/26452-il-model-231-che-cosa-e-e-come-si-compila.asp

proportionality between the different economic situations and regulating their limits and publicity duties with respect to transparency.

Letters (m) and (n) respectively delegate the reorganisation of registers through the foundation of *Registro Nazionale del Terzo Settore* and the definitions of the specificities in which the PA obtains anti-mafia certification. Letter o) can be divided into two parts, the first provides for the role of non-profit organisations in the planning of social and health services. It will be up to the Regions to identify and define the ways to implement the principle indicated. The second part delegates to the government the definition of criteria for entrusting non-profit organisations with the provision of services of general interest, and how standard levels of quality, objectivity, transparency must be respected without contradicting national law and European discipline; and finally, it calls for the establishment of assessment tools and criteria to verify the effectiveness of results.

The law on 3/08/2017 after on 3 July. With its entry into force of Legge del Terzo Settore, the law on voluntary work (266/91), the law on social prevention associations (383/2000) and parts of the law on ONLUS (460/97) were repealed. All the different types of organisations are grouped under the name of *Enti del Terzo Settore* and divided into different categories.

These entities are obliged to enrol in the *Registro Nazionale del Terzo Settore* in order to benefit from protection. The Register is managed and updated by the regions but is based at the Ministry of Labour and Social Policies Those registered in the register will have to comply with certain obligations set out in the decree concerning the organisation's internal democracy, budget transparency, insurance for volunteers, labour relations, and the use of profits. At the same time, they will be able to benefit from tax exemptions and concessions, as a sign of recognition and appreciation of the work done in the general interest of the community. They are also indicated as a primary channel for collaboration with the Public Administration, which is urged to encourage the culture of volunteering through the concession of movable or immovable property for events, or on free loan as venues or at a concessionary rent for redevelopment; also through work to promote the sector within public schools or in the involvement of ETSs in the management of social services even if it is made explicit "if more favourable than resorting to the market").

Finally, art, 55 of the Italian Third Sector Code, which introduced co-planning and co-designing between public administrations and third sector organizations. Despite some initial uncertainty, the practice gained traction and popularity among local governments, who saw it as a way to achieve social results otherwise not possible.

However, doubts remained about the legitimacy of these instruments until the Constitutional Court's ruling in July 2020. The court affirmed the constitutionality of Article 55, noting its connection to the principle of subsidiarity enshrined in the Constitution. The court recognized the role of the third sector in pursuing activities of general interest and emphasized the importance of social solidarity. The ruling is expected to have a significant impact on the legal framework for the third sector in Italy.

Section 2 : France

1. The origins

Since the beginning of the 11th century, due to the development of cities in the western world, the was an increasingly need for associations to arose. The growth of crafts in local centres created the need to share knowledge and techniques between masters of the same trade. Around the 12th century the first communities of trades were born, the guilds as real mandatory associations under public law, endowed with legal personality, social and technical regulatory power and disciplinary power. From the Middle Ages until the Revolution of 1789, these organisations characterised the social and entrepreneurial fabric of *Ancien Régime* society. Communities considered to be of public interest communities considered to be of public interest (other than *sociétés*, associations of persons with profit motive) therefore had a statute published as a *Lettres Patentes*, i.e. a legislative act through which the King made a right, a privilege or, indeed, a statute, public and opposable to all. The communities that did not enjoy the King's approval acted clandestinely, coming into opposition to the privileged associative experiences. From the 12th century onwards, communities of trades and manufactures became corporations directly subject to the control of the Crown, no longer functioning democratically but oligarchically. Contrary to the of technological and social innovation, the guilds retarded the natural evolution of society and labour. The religious, too, grouped themselves into congregations controlled directly by the monarchical power. The need to be independent meant that they had to act clandestinely.

2. From the Enlightenment to the French Revolution

2.2.1. *Loi Le Chapelier*: *l'interdiction des corporations*

The privileged corporations were the object of strong criticism in the Age of Enlightenment. For defenders of economic freedom, such as Turgot, the privileges of merchant communities considerably slowed down economic activities and the process of technological innovation. Proponents of individual freedoms believed that the corporate system enforced excessive burdens on artisans by limiting their professional life and invading private and family life. The French Revolution gave way to the Enlightenment thought to become reality and through the law of 21 August 1790 freedom of association was introduced for the first time. The text regulated the right to associate peacefully and without weapons and to create free societies, in compliance with the laws valid for all citizens (it should be noted that the text is close to that of the wording of the 1901 law: freedom of association in compliance of public order). However, the law placed limits on this freedom, i.e. the obligation to set up associations for the sole purpose of public utility (the numerous "clubs" formed under the Revolution): the law of the Republic No. 19 of 22 July 1790 forbade associations considered potentially seditious (most associations of free citizens), while the "d'Allarde" decree of 2 and 17 March 1791 definitively abolished the guilds. A few months later the experience of free association definitely ceased to exist with the law "Le Chapelier" of 14 June 1791: the law, in the name of the free practice of commerce and industry, put an end to all types of professional associations. Religious congregations and brotherhoods suffered the same fate, abolished with the law of 18 August 1792. However, to understand the aim of this law, it is important to go into a deeper explanation. First, this law is seen as a promoter of economical liberalism[13]. It put an end to the working corporation and to the working communities which previously benefited from a collective monopoly, regulated the work, the production and the marketing of goods and services.

This law can also be perceived as a continuity to the enlightened philosophy which inspired the Declaration of the Rights of Man and of the Citizen of 1789. The last one in art. 3 affirme : "le principe de toute Souveraineté reside essentiellement dans la Nation. Nul corps, nul individue peut exercer d'autorité qui n'en émane expressément ». At the time, the revolutionary perceived the Republic as one and as indivisible, citizens are not allowed to divide the nation trough with intermediate entities. According to this model, the state oversees the assistance for destitute, invalid, and elderly. Thanks to the

French revolution, the management and the insurance of social services become a state matter. In this new vision, the state do not limit itself to a regulatory and manager of intermediate entities but it is also seen as the provider et the unifying of social services[14].

Overall, we can remark two fundamental goals of the law. Firstly, it interrupts the société d'ordres of the Ancient Regime, secondly it is willing to put an end to the popular movements. This new legislation is inspired by the fear of working associations. It is aimed at ending all kind of revolt and strikes[15].

The only associations left still alive, namely the political ones, were definitively prohibited by the law of 7 Thermidor year V (1797). Even in experiences liberals following the Restoration no constitutional text affirmed and defended the right to join, but over time the various regimes created ad hoc measures to close all possibility of meeting and association in defines of state security. For all the nineteenth century distrust in the power of associations continued, even in comparisons of mutual aid and assistance societies. Napoleon himself considered associations dangerous for the stability of the regime and in the drafting of the Penal Code of 1810, in art. 291, introduced the ban on the formation of any association without authorization preventive government that responded to the "conditions that will please the public authority to impose". Despite the prohibition imposed by the Code, the workers' associations, the political clubs and the secret societies grew in great numbers and gave birth to that underground debate in the intellectual centres inspired by the new American values but immediately repressed by the measure of 10 April 1834.

During the July Monarchy (1830-1848), benefit society both of philanthropic nature and working nature decided to organise themselves to fight against the impoverishment. The state even recognising the usefulness never recognised them[16]. They will be, however, tolerated until the February revolution of 1848 when the II Republic recognised full affirmation of the rights of meeting and association and give to those entities a juridical and economical status (law 15 July 1850). These freedoms, if well circumscribed and limited, for the first time they become part of a constitutional process and their recognition indicates certainly a high level of democratic development of the system of the Second Republic. The legislative decree of 28 July 1848 had already anticipated the Constitution in authorizing meetings of clubs and workers' associations through a simple declaration and the obligation to make all sessions public.

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[13] Parrot, 1974
[14] Rosanallon 1990
[15] **Nourrison**, *histoitr de la liberté d'association en France depuis 1789*, paper

Unlike Article 8 of the Constitution, the decree limited participation in club sessions to adult men only. However, even if within a republican and liberal context, only a year later, through the law of June 19, 1849, the coming together and the creation of associations came of again prohibited, in the name of state security.

2.2.2. Napoleon III and the socialist movements

The authorization system was restored under the Bonapartist regime of Napoleon III in France in the mid-1800s. This period was marked by the progressive imposition of the bourgeois class and the embryonic development of the first workerist phenomena. The political class was forced to listen to the demands of citizens, especially due to the frequent strikes called between 1862-1864. The authoritarian regime established by Napoleon transformed into a more parliamentary regime, and the first steps towards lightening the bans on freedom of association came from Parliament procedures.

The "Loi Ollivier" of May 25, 1864, abolished the "délit de coalition" and repealed the "Le Chapelier" law of 1791, which had banned strikes. This law aimed to create a link between the working class and the regime and was a decisive step in the rise of trade unionism, which was definitively regulated by the "Loi Waldeck-Rousseau". There were numerous measures in defense of freedom of association, such as the law of 24 July 1867, which recognized workers' cooperatives, and the law of June 6, 1868, which distinguished for the first time the right of association from that of assembly. The latter recognized the possibility of meeting without prior authorization request.

Other laws allowed for the creation of associations whose purpose was that of higher education, such as the "Loi Laboulaye", and the establishment of free trade unions and professional associations mutual aid, authorized by the law of March 22, 1884. These measures were aimed at protecting and promoting the right of association and freedom of assembly, which were considered fundamental rights in the development of a democratic society.

During all the XIX century, these initiatives will be considered as suspicious. However, this perception will change thanks to two main currents of thought[17].

The first movement which cannot considered ad homogenous is the socialist one. In fact, there is a clear division between the Marxist which are against the development of the non-profit sector, considered incompatible with the class struggle. On the other hand, the utopian socialists are willing to incentive the sector since it allows the

[16] Pierre Rosanvallon, 1990
[17] Chavellier, 1986

formation of new groups of workers[18]. A lot of republicans also become promoter of associative behaviours: the former president of the council Pierre Waldeck-Rousseau and Léon Bourgeois[19].

The second current of thought belong to the Christian Social. It is composed by conservative personalities such as Frédéric La Play and some more progressive personalities such as Charles Gide[20].

Differently form the previous one, the Christian Socialist are less radical, they are mainly inspired by the traditional philanthropic nature of the Catholic Church. They goal is not to transform the social structure; indeed, they are willing to create a more faire society. This groups were composed by personalities who aim at reducing the inequalities introduced by the industrial revolution by promoting a model in which the philanthropic tradition is placed at the same level as the moral and social control[21]. This gave space to some experiments such as the one of Saint-Gobin which at the begging of the XVIII century implemented a system of health care for the workers[22].

In the 1880s these two currents of thought, which were initially clearly distant one form the other, started to converge in the importance of an intermediate group whiten the republic.

1. **The freedom of association, a principle guaranteed by the Constitution…**

The twentieth century arrived in France under a bad sign: the Dreyfus affair was the major political and social conflict of the Third Republic. Prime Minister Waldeck-Rousseau, jurist and moderate republican, considered the facts of the "J'accuse!" a scandal juridical questioning of the principles of law. Political scandals targeted sovereignty nationality and the freedom enjoyed by religious congregations – which in the absence of one legislation had developed numerically – it clashed with the hegemony of civil society. For Waldeck-Rousseau, therefore, it was necessary to put an end to this kind of state within the state, to that religious world also held responsible for the arrest, conviction and deportation by Captain Dreyfus. In 1899 the Prime Minister deposited the bill in Parliament which aimed at destroying the power of the congregations, to bring them into subjection to the republican law. Voted on July 1, 1901, the law consecrates the right of all citizens to join without needing the prior

[18] Draperi, 2012
[19] Spriz, 2005
[20] **Defournry & Nyssens**, *Mapping and Testing Social Enterprise Models Across the World: Evidence from the "International Comparative Social Enterprise Models (ICSEM) Project*, 2018
[21] Rosanvallon, 1990
[22] Ibidem

authorization of the public authority. Francis Clementi considers this law the key text of the time.

The action of associating comes out of the domain of public law to constitute itself as private law phenomenon. The political authority no longer has influence over the formation of associations, but the only limits placed on free association are those concerning the end prosecuted by the association, i.e. that this is not illegal, contrary to the law and to good morals and which does not aim at the integrity of the national territory and the cohesion of the Republic. The law is divided into three titles: the first two concern associations in general, the third the religious congregations. For associations, the new law appears to be somewhat liberal: in the absence of the prior authorization required by article 291 of the Criminal Code, each The association can be legally recognized by submitting its headquarters to the prefecture company, the title and object of the association, names, professions and domicile of the members. To unlike all other associative realities, religious congregations cannot be formed without an authorization given by a law from Parliament. The Waldeck-Rousseau law has uninterruptedly regulated the discipline of freedom of association until today, except for a short period of time, namely that of the German occupation e of the establishment of the Vichy regime. In the framework of the "National Revolution" of inspired by Nazism, the government embarked on a corporatist policy: social organizations and professional were directly subjected to the protection of the State and provided for compulsory membership. The liberation definitively cancelled the measures adopted by the Nazi regime and reintroduced the discipline of the law of 1901. The experience of the occupation has however contributed in France to bring a connotation derogatory of the term "corporatism" and consequently the general weakness of the bodies intermediaries that fail to build an efficient social dialogue.

As already mentioned above, the French case in terms of freedom of association represents a particularity. In fact, this freedom was only constitutionalized in 1971 through the decision of the Constitutional Council which gave it the status of *Principe fondamental reconnu par les lois de la République*. This decision represents a turning point in the very functions of the Constitutional Council: having conferred constitutional character on the fundamental freedoms, the Council becomes the institutional subject guarantor and defender of rights and freedoms. The decision also confers constitutional value on the preamble of the 1958 Charter, thus placing it in the hierarchy of norms, at the same level as constitutional articles. In public law French is the so-called *Bloc de constitutionnalité,* i.e. the set of rules of constitutional value, of which - through the decision on freedom of association - they enter the preambles of the Constitutions of

1948 and 1956 and all the "Principes foundations". Net consequence of the legal upheaval brought about by this decision is the evolution of the Council's functions: it is no longer the regulator of powers executive and legislative, but defender of the fundamental rights of citizens. There is no definition in the French legal system of the concept of freedom to association. The regulation of this freedom is attributed to various sources of the national and international legal system. Notably the Constitution of the Fifth Republic does not provide for an explicit provision on the subject, but it refers directly in its preamble to two others fundamental texts, namely the Declaration of 1789 and the Preamble of the Constitution of 1946. The decision of the *Conseil Constitutionnel* in the case of *Liberté d'association*, as stated in sentence n° 71-44 DC on July 16th, 1971, governs the application of this freedom. To fully understand the legal framework of this right, it is essential to also examine its historical evolution.

A recent fundament, despite this, however, also in France, as happened in Italy with the reform of Title V, the constitutional legislator felt the need to intervene in the matter of territorial organization, to innovate and shed light in relation to various areas of local interest. In particular, constitutional law was adopted by Congress on March 17, 2003. Its main objective was to establish the constitutional foundations of a unitary and decentralized republic. In this way, it favoured the development of a local democracy at the service of citizens, respecting the unity and indivisibility of the Republic. Before examining the main innovations introduced by the constitutional reform on the subject of local communities, it is necessary to underline how innovations contribute to give a clearer idea of the place that the same collectivises occupy in the apparatus of the French Republic for the division of powers between them and the State, of the nature, of the extent and guarantees of autonomy as well as of the organization of the administrative apparatus and of the local institutional configuration. The six main innovations introduced by the constitutional reform in local matters that is important to analyse are: subsidiarity, experimentation, territorial communities considered "leader", financial autonomy, local referendum, right of petition.

CHAPTER 2 : AN OVERVIEW OF THE FRENCH AND ITALIAN ADMINISTRATIONS : THE PERSPECTIVE OF THE PRINCIPLE OF HORIZONTAL SUBSIDIARITY

Section 1 : Principle of subsidiarity

The roots of the subsidiarity principles can be found in the ecclesiastic tradition which supported the role of privates and smaller communities within the society to maintain order[23]. Generally, the principle of subsidiarity regulates the relationship between the different levels of territorial power. More specifically, the principle is aimed at guarantee that public functions are elaborated as closer as possible to citizens and at the same time it requires that lower territorial level ask the intervention of the higher ones only when the previous is not able to comply with its functions.

In the administrative field the principle of subsidiarity can be expressed vertically and/or horizontally. Vertical subsidiarity consists in the distribution of administrative powers between different level of territorial government, and it also express the modalities of intervention of upper and lower territorial entities. In other words, the higher bodies intervene only if the exercise of the functions by the lower body is inadequate for the achievement of the objectives. Horizontal subsidiarity can be interpreted in the relationship between authority and freedom, and it assumes that the care of collective needs and activities of general interests are directly provided by private citizens (both as individuals and as social groups). In this scenario, public authorities intervene to program, coordinate, and possibly manage activities.

Furthermore, since its first application, the principle of horizontal subsidiarity, seems to impose a new paradigm in the relationship between the administration and the citizens. More specifically, the administration favour and privilege citizens private initiative in the execution of activities of general interest. It results in the possibility for private entities to act without previous authorisation from the public administration. In other words, the paradigm that was initially founded on the transfer of resources from the public to the private sector, it is now based on the share private and public resources to pursuit of general interest. Thus, the model of shared administration replaces the traditional model, which was no longer able to respond to the increasing complexity of social dynamics.

[23] Encyclical for Quadragesimo anno Rerum Novarum, 1931; Encyclical Mater et Magistra, 1961

Then, it is interested to focus on how horizontal subsidiarity is not explicitly recognized as a legal principle in either Italy or France, but in practice, Italy has developed a more decentralized system with greater regional autonomy, while France has a more centralized system with a stronger role for deconcentrated services.

1. General principle

1.1.1. Italy

The principle of subsidiarity is quite recent in the Italian constitutional system. As we have seen in the previous chapter, it was introduced just in 2001 with the reform of *Titolo V*. In this sense, the constitutional reform led to the idea that administrative functions are attributed to the *Comuni* unless they require a unitary action[24], in this case they are exercised by one of this territorial organization: the *Province*, *Città Metropolitane*, *Regioni* and *State*[25]. In fact, Municipalities since are the closer to the citizens, they can better represent collective needs. In this sense, differently from other constitutional experiences, in Italy the principle of subsidiarity was not initially consider as a basic pilar of the system. Actually, given the local and regional disparities in infrastructure, the Italian constitution was considered by many scholars as incompatible with this principle. Even more debated was the modern draft of art. 118, subparagraph 4, of the constitution which recognised the principle of horizontal subsidiarity. The Branca-Pizzorusso's commentary on this article focuses on three main points: Firstly, the legislative competence of the regions is limited by the principle of subsidiarity, which provides that the regions can intervene only in sectors where the intervention of the State is not necessary or is insufficient. This principle aims to ensure a balanced distribution of powers between the central State and the regions, and to prevent conflicts of competence. Secondly, the legislative competence of the regions is not unlimited, but is subject to constitutional limits and general principles of law. In particular, the regions cannot violate the fundamental rights guaranteed by the Constitution, nor can they adopt laws contrary to Italy's international obligations. Finally, the regions have a concurrent legislative competence with the central State in some specific matters, such as health and education. In these cases, the Constitution provides that the legislative competence of the regions is exercised in compliance with the fundamental principles established by the laws of the State.

[24] Con. L. 12/2004
[25] Art. 118 of the Italian Constitution

This new formulation introduced the relationship between the State (public powers) and social groups[26], which is now guaranteed based on the principle of horizontal subsidiarity. This last one expresses the criterion for the division of responsibilities between local and private authorities, and collective entities, operating as a limit to the exercise of local responsibilities by public authorities: the exercise of activities of general interest is the responsibility of private individuals while local authority has a subsidiary role of coordination, control, and promotion. Following this interpretation, public authorities can intervene, for the performance of activities of general interest, only when individuals or associations, are unable to carry them out.

The decision of March 20, 2000, No. 1493 of the Italian Constitutional Court recognized societal citizenship as a fundamental principle of the Italian constitutional system, emphasizing the importance of active citizen participation in the social and economic life of the country.

As well, Opinion 2691/02 of the Italian Council of State also reaffirmed that societal citizenship represents a fundamental principle of the constitutional system and stressed the importance of citizen participation in the management of public affairs and institutions, as well as the promotion of citizen participation in social and economic life. Essentially, both decisions recognize societal citizenship as a key principle for the functioning of democracy and social justice.

In 2003, the Italian Council of State decided to go farther, and it issued the sociological concept[27] of "*cittadinanza socetaria*" according to which the democratic practices should be rethought, introducing the recognition of basic systems which are able to manage social interests. Moreover, the development of relationships and means to achieve a fair and appropriate goal are given by the ability of social organization to interpret and manage the needs of the community. Nevertheless, it is important to keep in mind the risk coming from the attribution of such role to social entities. In fact, the latter could bypass and dismiss the authority of the citizens. The risk would then be the loss of the political and legal capacity of the individual, because of a vague and imprecise delegation to intermediary bodies whose legitimation, representation and responsibility are not fully defined by the public authorities.

It is however obvious that despite the intensification of horizontal relationship the legislator had to limit the individual power. As a matter of fact, privates cannot be attribution of decision-making power regarding fundamental principles of social management. In this regard, the legislator affirmed that the freedom of individuals can never be limited by the one

[26] Art. 2 of the Italian Constitution

of social formation. “Subsidiarity is not a delegation, but an assumption of responsibility, first of all personal, and then collective”[28] The constitutional case law has also clarified that the principle of horizontal subsidiarity implies respect for the competences attributed by the Constitution to the different levels of government and cooperation among them, in order to guarantee the effectiveness and efficiency of public policies. For example, the regulation of the third sector can also be found in regional legislation, which demonstrates the link between horizontal and vertical subsidiarity in the Italian context.

1.1.2. France

Differently from the Italian case, in France there is no definition of the subsidiarity principle within the constitution. However, it would not be fair to say that the constitution of 1958 completely excludes the principle. Subsidiarity exists within the French institutions because it regulates the framework of the unitary state and limits of infra-state organizations. This definition of subsidiarity is nevertheless the right expression because it uses the same type of reasoning and principle of division of powers of federal constitutional law. There is, however, a difference in the degree of application of the principle which lead to the existence of a Subsidiarity principle “à la française”[29].

As we have briefly discussed, the French constitution of 1958 has no direct reference to the principle of subsidiarity since it is not based on any principle of allocation of competences. Indeed, it affirms the unitary nature of the French republic[30]. In this sense, only State authority have the normative power. It means that only the State authorities hold the initial normative power[31], while infra-state authorities cannot define their own competence and they cannot put in question the authority of State. Thus, Sovereignty cannot be divided as well as its reflection at local and institutional level. As a result, there is a clear limitation of any kind of decentralization and repartition of competences.

Given these premises, the analysis can now be shifted to a more pragmatic level. In fact, thanks to some articles of the Constitution in analysis, it is possible to better understand the processes and the limits of decentralisation of competences in France.

While the principle of subsidiarity is not explicitly mentioned in Article 1, it is consistent with these principles in that it emphasizes the importance of decision-making at the most appropriate level of governance, with the aim of promoting democratic accountability and efficiency in decision-making.

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[27] **DONATI**, *La cittadinanza societaria*, Laterza, Roma-Bari, 1993-2000,
[28] **DONATI**, *La sussidiarietà orizzontale da principio a modello: dinamiche, limiti e ruolo della concorrenza*, paper
[29] Art. 72 of the French Constitution with Amendments through 2008
[30] Art. 1st of the French Constitution with Amendments through 2008

Article 34 of the French Constitution is particularly relevant for the principle of subsidiarity, as it establishes the principle of the general organization of public authorities and the legal regime of public institutions. This means that the law determines the principles of the organization of public authorities, including the distribution of powers between the central government and local authorities. In practice, this means that decision-making is decentralized, with local authorities given significant autonomy in decision-making.

Art. 72-74 of the Constitution can be perceived as the representative illustration of a lack of subsidiarity in the French system. They establish a principle of free administration of local authorities which is perceived as the possibility of self-administration through the exercise of regulatory power alone, within the areas of competence and according to the limits set by the law, with this last one we refer to the national legislature that sets the "powers" of the communities. In fact, only the law, is the expression of national sovereignty and guarantor of national indivisibility but it also defines the extent of this competences. More specifically, art. 72 can be perceived as embryonic version of the principle of subsidiarity. In fact, it affirms that « *Les collectivités territoriales ont vocation à prendre les décisions pour l'ensemble des compétences qui peuvent le mieux être mises en oeuvre à leur échelon*. ». Although the scope of the principle is strongly attenuated by the grammatical choice,"ont la vocation", it ultimately assigns the application of the principle to the legislator which opted for a transfer of powers by attribution and not by principle. It has also inserted a "general competence clause" in the CGCT[32], which could have opened the path to a recognition of principle competences where not otherwise provided. However, such a clause was never very effective for departments and regions. As a matter of fact, it was then repealed for these latter and maintained only for municipalities.

Moreover, the French Constitutional Council was always clear on this topic, in particular with judgment n.82-137 DC of 1982 the court affirmed that the principle of legality requires both the respect for attributions and the indivisibility of the Republic including the integrity of the territory. In this sense, it is not possible to find subsidiarity as a constitutional principle. Still, we can focus on the administrative organization of the state shifting the debate from the decentralization to the devolution of powers. We should move than to the analysis legislative and regulatory texts which are nevertheless the expression of a unitary organization of the state. More specifically, law n. 92-125 of 1992 regards the territorial administration of the Republic and the decree n. 92-604 of 1992 regards the *charte de la déconcentration.*

Art. 2 of the law of 6 February of 1992 is particularly clear on the distribution of missions between central administrations and the decentralized entities. They are organized

[31] **BOURDON**, *V° Indivisibilité, Dictionnaire constitutionnel*, paper, 1992.

according to the principles laid down by this law. The central administration entrusts just two categories of missions: those which are considered to be of national nature and/or those whose execution by virtue of law cannot be delegated to a territorial level. We are here in the presence of a particular application of administrative subsidiarity (and not of the very principle of subsidiarity) but it is still interesting insofar as it is situated in the constitutional framework of the unitary state. M. Lemoyne de Forges[33] has shown, that the administration of the State, even deconcentrated, cannot pursue "its own objectives" and can only be a level of faithful execution of the unitary state defining a national policy. Devolution[34] is therefore not, in this case, the expression of the principle of subsidiarity as a principle of constitutional law.

2. Comparative analysis

As we have briefly discussed, the France and the Italian system have two different approaches to horizontal subsidiarity. First of all, in Italy after 2001, horizontal subsidiarity is affirmed by the last paragraph of art. 118 of the constitution. Contrary, in France the principle is not affirmed in any legal text, it seems almost inconceivable in a centralized state. In fact, even though it conceives the intervention of private entities in the management of activities of general interests, it is clearly reluctant to the idea of having to “prioritize” their initiatives. Still, we can affirm that a “shared administration” model seems to exist in the French legal system, and it is justified by the most recent administrative case law[35].

The comparison between the French and the Italian system is than useful to better understand the notion of horizontal subsidiarity and the relationship between the administration and the citizens. More specifically, in the Italian case we should ask ourselves whether the constitutional consecration of horizontal subsidiarity is not reduced to a simple affirmation of the principle of devolution. While, for France, it is necessary to assess whether the hypothesis of the implicit reception of the principle in the legal system is indeed verified.

1.2.1. The subject of horizontal subsidiarity

Starting from the Italian system, the first element to highlight it is the term used to define the subject of horizontal subsidiarity in art. 118 of the constitution, Citizens. The

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[32] Code général des collectivités territoriales

[33] **LEMOYNE DE FORGES**, *Subsidiarité et fonctionnement de l'État », Colloque des juristes catholiques consacré à la subsidiarité*, 1993

[34] Décret n° 92-604 du 1er juillet 1992

[35] CE, avis, 18 mai 2004, *Cinémathèque française*, *EDCE* 2005, p. 185 ; CE, 6 avr. 2007, *Cne Aix-en-Provence*, n° 284736, Juris-Data n° 2007-071735.

use can be easily explained by the willing of the constituents to consider the national community as the one in charge of activities of general interests. Moreover, the art. does not refer to the traditional concept of "political citizenship"[36] but it refers to a new and larger perception of "administrative citizenship", composed by all those who get in contact with the national administration.

The principle of subsidiarity can be exercised by citizens on the own (individually) or as a group of people (associates). However, concretely the doctrine recognised that the action of single citizens has not a significant or effective impact which led to incentive the group activities, still recognising the central role o the individual. In fact, collective interest necessary require the organization that can be provided and guaranteed just by a plurality of individuals. Moreover, subsidiarity principle was specifically designed to favour the growth and the affirmation of the non-profit sector[37]. In this sense, in 2003, the Italian council of state specified that art. 118 valorise solidaristic and voluntary actions[38]. Thus, horizontal subsidiarity "is expressed by other than profit entities.

Since the activity must be carried out independently and on the initiative of private individuals, the notion of "citizens" does not include private individual to whom the public authority outsources a public service, through contractual or unilateral investiture. It also excludes collective organizations which for structural and functional reasons, are comparable to public institutions.

Shifting now in the analysis of the French system, only in 2007, the Council of State defined for the first time a model of shared administrative management which assumes two main principles: the autonomous initiative of individuals and the autonomous exercise of such initiatives. Additionally, to the previous principles, the Council of State also affirmed that private management should regards only activities of general interest, and it should be exercise under private responsibility without any public intervention in the definition of the content. We can that affirm that French judges joined the conception of "autonomous citizen initiative" affirmed by the Italian constitution and which recognized the important role of the individual in organizing and implement activities.

As it was for the Italian case, when the Council of State refers to private it obviously expresses a preference for social formation which are considered capable of detecting

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[36] **Perlo**, *Le principe de subsidiarité horizontal : un renouvellement de la relation entre l'administration et les citoyens. Etudes comparée franco-italienne*, paper

[37] **Pizzolato**, *Il principio di sussidiarietà*, in GROPPI and OLIVETTI, La Repubblica delle autonomie, Turin, Giappichelli, 2003,

[38] Cons. Stato, avis, 25 août 2003, n° 1440, *cit*

the needs of citizens and which can develop effective solutions especially in the cultural and social fields. Because of this definition, non-profit entities are considered, in France, as allies of the Administration[39]. Nevertheless, the terms of the covenant changed with the introduction of the shared administration as described by the Council of State in 2007.

For this reason, it is now suitable to individualise all those private entities which cannot collaborate with the public administration. First of all, "associations transparentes"[40] do not fit into this model of management, since neither the condition of autonomy nor that of private initiative are satisfied. Likewise, private entities which comply with one of these situations: have received a delegation from a public service, have carry out public services following a contract or a government procurement or that have been invested unilaterally on the management of public services, are excluded from the shared administration.

For profit entities also do not fall in the category of private entities described by the Council of State in 2007. In France such as in Italy, the administrative share model resulting from the subsidiarity principle involves just those private individuals belonging to the no-profit sector and which are driven by the values of solidarity, sharing and cultural promotion.

It is necessary to specify that the present model of management, described by the Council of State in 2007 was rarely perceived and encouraged. The only case in which *administration partagée* have successfully worked is with the Cinémathèque française. In 2004, the Council of State has indeed considered the mission of this association as a general interest but that this dose not imply a delegation of power. Therefore, the Cinémathèque receives significant public grants while maintaining considerable autonomy in the determination and organization of activity.

The second interpretation of shared administration concern the single individual. He does not act in his own name, but pursues public interest, "at its expense and risk"[41], and independently of the local community. The conditions set by the shared administration therefore seem to be fulfilled: it is indeed the autonomous initiative from a private sector in the general and local interest. It includes individuals serving on the legislative bodies of the local authorities as well as a plurality of associations.

The autonomous initiative is however limited by multiple constraints. In fact, to exercise his legal action it has to submit a request to the administrative court, who will grant

[39] **De laubadere**, *Les associations et la vie administrative*, AJDA, 1980,
[40] **Dreyfus**, *Commune de Boulogne-Billancourt*, CE, 21 mars 2007, *AJDA* 2007. 915,

conditions. It is therefore an exceptional procedure which exists, and it is used to strengthen the natural bond of solidarity[42] among citizens of collectivist to which they belong and for this it can return to the paradigm of "shared administration".

1.2.2. The goals of horizontal subsidiarity

Horizontal subsidiarity concerns non-profit entities which by definition are concerned by all those activities belonging to the field of general interests. Moreover, it imposes the administration to recognise the autonomous initiative of citizens.

1.2.2.1. Activities of general interests

In the French and Italian context, the notion of general interests is on one hand linked to the national and local political authorities while on the other hand, it is link to the administrative and judicial authorities. According to the Italian and French perspective, the delimitation of social needs, the interest of individual and collectively, can be considered as a political matter. However, general interests should not necessarily be conceived as something opposed to private interests. Consequently, private cannot determine autonomously the activities of general interest. Still, these latter, if in compliance with certain condition can acquire the "label"[43] of public service and must be recognised as such by the public authorities.

The innovative element of the horizontal subsidiarity lies in the fact that general interest is no longer the expression of the exclusive will of the public authorities, but it is the result of a concrete and complex process of construction in which several actors, both public and private, intervene. More specifically, privates intervene through autonomous initiatives to determine and develop effective solutions to collective needs. Both art. 118 of the Italian Constitution and the *administration partagée* follows this tendency. So, privates can participate in the determination of the general interest and established the importance of the activities in collaboration with the public. The state does not lose its monopoly in the definition of collective needs but agrees to share skills and resources with the private sector, to respond more effectively.

But what kind of activities of general interest can be exercised by active citizens in Italy and in France? The notion elaborated in art. 118 of the Italian constitution overlap with the Service of General Interest proposed by the European Union Law. Although, the actors of horizontal subsidiarity must also guarantee the free access for all

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[41] Art. L. 2132-5 et L 5211-58 du CGCT.
[42] **Chapus**, *Droit du contentieux*, Paris, Montchrestien, 2006,
[43] **Truchet**, *Nouvelles récentes d'un illustre vieillard, AJDA* 1982. 427.

the service in compliance with the principles of non-discrimination and free movements of persons. We can than consider as activity of general interest "*toutes les prestations de biens et de services qui sont créées dans un esprit de solidarité et qui sont capables de répondre à des besoins d'importance sociale ou économique, qui ne peuvent pas être satisfaits par l'individu seul* »[44].

An analysis on the activities carried out by Italian citizens showed that the principle of horizontal subsidiarity was mainly use for the production and maintenance of common goods, such as effective social freedoms and the guarantee of human rights. The arenas concerned are social, health, culture, education, and environment. Thus, for profit activities are excluded by the principle of horizontal subsidiarity. In fact, even though art. 118 do not distinguish the possible nature of the private initiative, which can be either economical or non, the administrative jurisprudence proclaimed the impossibility to have for profit action in the context of art. 118.

In France the by the case of Cinémathèque française and the related judgment of the Council of State cannot apply to activities of general interest that have an economical nature. The judges have established that it is possible for third parties to manage public services with the only limitation for prior competition. If private persons or entities take the initiative to serve public activity under their responsibilities, the public authorities exercise the right to grant subsidy without any kind of delegation of power and the competition rules are set aside. Private initiatives are therefore "especially welcome in cultural and social matters, those sectors who are namely outside the market.

Finally, in Italy as in France, certain activities of general interests, because of their sovereign nature, are not likely to be devolved to the independent initiatives of private. These include for example national defence, justice, diplomacy, and administrative activities leading to the adoption of unilateral administrative acts.

Section 2 : A decentralized organization

Historically, territorial entities in France and in Italy are characterized by a fragmented and complex organization (tab 1). In Italy, the constitutional reform of 2001, introduced changes in art. 114 establishing a new composition of the Republic. Nowadays, Italy is composed by different entities sharing equal dignity, Comuni, Province, Città Metropolitane and Regioni. In France, art. 72 of the Constitution

[44] **Donati**, *La sussidiarietà orizzontale, op. cit.*

establish the territorial order of the Country which result composed of different territorial communities: Communes, Departments, Regions, the Special-Status communities, and the Overseas Territorial communities.

Level	France		Italie	
	N. entities	% public spending	N. entities	% public spending
Municipal	36.552 municipalities	11%	8.047	7,9%
Supra-municipal	2.145 Public entities 13.402 *syncicats*		415 *Unioni di Comuni* and *Conorzi*	
Intermediate	69 *Departements*	6,2%	110 provinces	1,1%
Regional	22 regions (+ 4 oversees territory)	2,4%	20 Regions	19,3%

Source : Dgcl – *Direction Générale des Collectivités Locales, Les Collectivités Locales en Chiffres 2014, 2014; Associazione Nazionale dei Comuni d'Italia (Anci); Unione delle Province d'Italia (Upi).*

Going more in depth into the analysis of the two systems, we can highlight a similar functional divergence. Regions, in the French context do not hold legislative powerG but they are perceived by the legal framework as programming entities, while exercising some management function in the field of secondary education and professional development. Differently, in Italy the Regions oversee the health care and education. Speaking more generally about the other territorial entities, they exercise administrative functions. Municipalities, in particular, exercise general administrative function unless, if based on the principle of subsidiarity, it is necessary to exercise them in wider dimensions. They mainly deal with urban planning, public work, environment, primary education, cultural service, sport, and safety.

In the intermediate level, the action field is very limited in both the Italian and French legal system. In fact, they are historically in charge of the peripherical organization of the state together with the prefectures and local agencies of the ministries. *Province* and *Departement* are also considered as the local organizational space of economic and political actors. Naturally, the similarities are due to historical reasons which dated the two models at the Napoleonic era. However, modern reforms introduced a substantial difference in the Italian intermediate level, in fact Regions according to individual decisions delegated some fields to the *Province*. Moreover, in the last years, all the Italian administrative reforms

delegated to region the regulation regarding the attribution of their own administrative function to local authorities. In France, based on art. 72 of the Constitution, territorial entities freely administrate themselves. Therefore, there are no hierarchical relations among local governments, *Departements* are not subject to constraints imposed by other entities with whom they maintain relationships based on collaboration or competition between separate and distinct subjects, in this sense they are considerably different from the Italian Provinces, which exist in a multi-level context characterized by a clearer hierarchy between entities.

1. National territorial reforms

2.1.1. France

During the history, French state performed multiple administrative decentralization, especially through emanations of important legal texts. Nevertheless, as for the Italian reform of title V, the legislator felt the need to intervene in the field of territorial organization, with the aim to clarify that of interest of local public entities. In particular, the process was implemented by the constitutional review of 2003.

The main objective was to lay the constitutional foundations for a unitarian and decentralised republic to develop a local democracy at the service of citizens. As a matter of fact, the 6 pillars of the constitutional reforms were: subsidiarity, experimentation, territorial community, economic autonomy, local referendum, and the right to petition.

The most important element of the reform was of course the recognition of the subsidiarity principle following the model used at the European level with the treaty of Maastricht to regulate the central level (European Union) and the territorial one (member states)[45]. This principle in the French context is perceived as the affirmatio of the power of local communities to choose the competences manageable at local level. Still, we cannot consider a fully adherence of the subsidiarity principle by the French constitution. In fact, they do not follow the Italian perception according to which competences have to be exercises at local level within the limits of their compatibilities.

A new element introduced by the reform of 2003 regard the repartition of competences between the state and territorial community. The transfer of competences from the State to local public entities can also be done on experimental basis[46]. French local communities have the power to derogate laws and national regulations, in specific field, to benefit from an experimental state power transfer. The reform in this sense not

[45] Article 3 B of the Treaty on European Union
[46] Art. 72 subparagraph 4 of the French Constitution

only attributed to local community the possibility to have a delegation of power but it also allowed them to exercise those competences based on their needs.

The new constitutional text is also aimed at solving the overlapping of some local competences. The reform, to solve the problem, identify two main norms. The first one affirms that no territorial community may exercise a guardianship on another one. The second rule establish that "when the exercise of a competence requires the common work of several authorities, the law may authorise one of them, or a grouping of them, to organise the modalities of their common actions"[47]

The most substantial contribution of the reform is the one focusing on financial autonomy of local community and the establishment of local finances. The second one, more specifically, establish that any transfer of competence between the state and the local community is related to transfer of resources necessary for the exercise of this ones. This also means that in case of extension of the areas of competence, there is also an extension of resources[48].

In 2003, the law introduced also local referendums. They are referendum at local level which can have both a binding or consultative nature and it is limited to bodies of the local community. They allow the voters of a territorial community, under certain conditions, to decide by their vote whether or not to implement a project concerning a local matter (for example, the creation of a municipal police force or the choice named after the inhabitants...). Differently from the past, it is addressed to territorial communities and not only to municipalities as it was in the past. Finally, the right to petition consist in practice in the possibility for territorial community to ask for the introduction of topic in the agenda of the assembly.

Summarizing, as part of this decentralization process, the French government has delegated significant decision-making authority to its deconcentrated services, including the prefects and other local government officials. These officials are responsible for implementing national policies and regulations at the local level and are often called upon to exercise decision-making authority in areas such as public safety, environmental regulation, and economic development.

The role of deconcentrated services in the French governance system is significant, as they often exercise decision-making authority in competition or collaboration with local authorities. This dynamic interplay between the central government, local authorities, and deconcentrated services can create complex governance arrangements.

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[47] Art. 72 comma 5 Cost. francese

[48] Law 29th of July 2004 « Lois organique relative à l'autonomie financière des collectivitès territoriales »

In the last years, the delegation of competences to deconcentrated services is also reflected in various laws and regulations. For example, Article L. 111-1-1 of the French Code of Local Authorities provides that "the State and local authorities collaborate in the exercise of their respective powers in the interest of the population." Similarly, Article L. 121-1 of the same code provides that "the State and local authorities, each within their respective areas of competence, work together to ensure the best possible development of the territories."

The delegation of competences to deconcentrated services has been a key element of France's governance system, as it allows for a flexible and responsive approach to decision-making. However, it also presents challenges in terms of ensuring democratic accountability and transparency, as decisions are often made by officials who are not directly elected by the public.

Overall, the role of deconcentrated services in France's governance system reflects the country's commitment to decentralization and local autonomy. However, it also presents challenges in terms of ensuring effective governance and democratic accountability and requires ongoing efforts to ensure that decision-making processes are transparent, inclusive, and in line with the principles of subsidiarity.

2.1.2. Italy

The reform of Title V of 2001 is characterized by having recognized and increased the autonomy of local authorities. In particular, Article 114 of the Constitution states that "*The Republic is made up of the Municipalities, the Provinces, the Metropolitan Cities, the Regions and the State*".

In particular, we have to highlight that the Municipality is identified as the preferred body to carry out the functions closest to the citizens and to satisfy the interests of an administrative nature, by virtue of the principle of subsidiarity. From the various constitutional articles, it can be deduced that both at the legislative and administrative level, the competence is considered general and therefore is not limited to specific tasks.

To go into more detail on the regulation of administrative functions, it is necessary to trace the first two paragraphs of art. 118. Administrative functions are attributed to the Municipalities unless, to ensure their unitary exercise, they are conferred to Provinces, Metropolitan Cities, Regions and the State.

In this system, regional legislation should not be underestimated since the law has the task of identifying the objectives and results that the administrative action and therefore also the Municipality must pursue. The Regions assume the task of coordinating the administrative functions in an increasingly decentralized context and characterized by the will of the local authorities to have ever wider scope for action. The

Regions must set the general guidelines, equipping themselves with rapid and adequate structures without neglecting the need to regulate and guide, but also enhance the activities of Municipalities and Provinces

As regards the determination of the essential levels of services concerning civil and social rights, the reference is article 117 lett. m) and it refers to certain prerogatives must guarantee the uniformity throughout the national territory. In this case there is an intertwined relationship between the State, which has the exclusive task of defining it, and the other territorial entities, which must provide for implementation. The State will have to prepare criteria to which the essential level of the service must be complied with, and the various bodies will have to provide the specific service in favour of the user.

The new constitutional discipline is characterized by the presence of some very important innovations that have upset the administration sector.

The first novelty concerns the relationship between administrative functions and legislative competences. With the innovations introduced by the reform of Title V, there was a decisive overcoming of the principle of parallelism of functions which was the principle establishing that competences of administrative functions are automatically attributed to the same entity that exercised the legislative function in the matters that were the subject of it. This fact appears all too evident, considering that while the State and the Regions take care of the legislative functions, the administrative functions are attributed to the Municipalities, which have now become holders of a real and proper residual competence in the administrative sector, analogous to that enjoyed by the Regions in the legislative field. The constitutional legislator seemed to be inspired by the so-called "executive federalism", affirming, in the articulation of administrative power, a preference for the minor body. With this structure, the relationship between the entities has changed from a hierarchy system to a network one.

Judgment no. 303 of 2003 of the Italian Constitutional Court established that the legislative competence on the organization of local authorities belongs to the Regions and not to the State. In this sense, there can be multiple interpretation of the decision. On one hand, Groppi's doctrine, emphasized the important role of the Regions in defining the organization of local authorities, recognizing them greater autonomy compared to the central government. Groppi also highlighted that the judgment confirmed the principle of loyal collaboration between the State and Regions, emphasizing that the Regions cannot exercise their competence autonomously and disregard the authority of the State. On the other hand, Scaccia's doctrine argued that the judgment emphasized the importance of collaboration

between the State and Regions in defining the organization of local authorities, reaffirming the principle of loyal collaboration. Moreover, Scaccia pointed out that the judgment confirmed the importance of the principle of subsidiarity, according to which decisions should be taken at the lowest possible level, in this case by the Regions, as they are closer to citizens and better able to evaluate their needs.

Another important novelty is that relating to the legal technique that has been used. Previously, it was directly the art. 118 to allocate administrative functions on the basis of the aforementioned principle of parallelism and on following list of possible proxies.

It can therefore be said that the division of administrative responsibilities has undergone a partial 'de-constitutionalization' and this is an element of absolute novelty as well as critical. In fact, the choice of the constitutional legislator appears difficult to understand, considering that, not even in federal systems, the choice has been of this type, but it is directly the Constitution that deals with the allocation of administrative functions.

2. The reform of intermediate bodies: similar aims, different outcomes

The territorial organization of the French and Italian Republic is located in the midst of a reform process that has decidedly reversed the tendences compared to the previous decade. It is characterised by a decentralization effort also implemented with constitutional revision based on vertical subsidiarity. Starting form very similar premises, the two reform of intermediate bodies has undertaken parallel path, which have in common the financial determinant. The economic and fiscal crisis lead the Governments to put on the agenda and carries out relevant changes in institutions with a rhetoric of efficiency and rationalization, to limit the fragmentary nature of the functions of local authorities and increase its effectiveness. This choice was driven both by exogenous factors, such as the will to demonstrate to EU partners and institutions their capacity to introduce reforms but also by endogenous factors such as the popular support for the redaction of the costs of the public apparatus.

As far as the process is concerned, a strategy of imposition rather than negotiation or incentive for the aggregation processes of local authorities has been pursued. However, it has not led to favourable outcomes: as we have seen, so far in France all the referendums aimed at merging Departments and Regions in single entities have failed[49].

Regarding the content of the reforms, in 2014 in both countries there were no political conditions for a rapid and painless constitutional revision capable of carrying

out a radical «structural reform»[50] such as the pure and simple abolition of the intermediate level, repeatedly overshadowed by the French socialist government and attempted by the Italian governments. There have not even been real financial reforms.

The Governments, therefore, have wanted to give discontinuity to the territorial organization, but so far, they have only partially succeeded in it. The presence of Metropolises, already envisaged in French legislation since 2010 and in the Italian constitutional system since 2001, has consolidated, the essence of a "functional reform", resulting in a legislative remodulation of the powers of the territorial entities which, for the intermediate level, consisted of a partial (France) or substantial (Italy) reduction.

More specifically, France experienced the so-called *conversion*[51], which introduces in some cases the shift of the status quo, without however, distorting it. These changes are mainly related to the assignment of new tasks to the various territorial entities; the departmental level has, in particular, been affected by the strengthening of regional and metropolitan dimensions, but none of its political and financial resources have been affected. Meanwhile, on the other side of the alps, after the failure of the reforms attempted in the years 2010-2013, we have instead approached a real displacement which challenged the status quo by the reconstruction of the existing provinces, brought by the Delrio law. In fact, law 56/2014, alongside with functional changes, it also introduced an "organizational reform", motivated mainly by the new "link between citizens and local decision-making bodies" (the Presidents and Provincial Councils are now indirectly elected). Contributing to the dissimilarity of the outcomes of the reforms in the two countries it is important to remember that in France the political-institutional context was strongly hostile to change, brought about by the executive and by the Socialist majority alone in the National Assembly. In Italy, on the other hand, the environment has long been very much in favour of rationalising the local government. In detail, three contextual factors eminently political, have proved decisive.

The first is the issue of political costs, which has long been on the Italian political agenda by some successful policy entrepreneurs. The second is the political conjuncture in which Italy has found itself in recent years. Since 2011, in fact, several governments of broad understandings have followed one another with the primary aim of restoring public finances to foster stability. The second is the political conjuncture in which Italy

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[49] **Casula**, *Il vincolo della gestione associata per i piccoli Comuni: caso di politica simbolica?*, in *EyesReg*, 1, 2016,

[50] **Dente, & Kjellberg**, *Local Government Reorganization and the Development of the Welfare State*, Cambridge University Press, **(28 November 2008)**

[51] **Hacker**, *Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, The American Political Science Review

has found itself in recent years. Since 2011, in fact, a number of governments have followed one another of broad understandings with the convergence of forces of various political colours on the primary objective of consolidating public accounts to foster the financial stability of the state and economic recovery. As seen, among the measures undertaken included the downsizing of territorial entities, which, however, was only carried out by the current majority[52].

By contrast, in France, structurally characterised by the clear alternation between two political majorities coalitions, all modifications to the institutional architecture have been the subject of partisan clashes and manoeuvres and, therefore, there has always been a lack of broad consensus for a major reform. Moreover, in the case of the NOTRe[53] Law, the French political forces most hostile to the political and bureaucratic establishment spent themselves in favour of the permanence of the Departments. Finally, the local political class played a different role in the two contexts, it is substantially distinct from the national one, whereas beyond the Alps there is, as is well known, ample overlap between the two, thanks to the accumulation of mandates. In particular, due to its indirect method of election and its composition, including many elected members of local authorities, the French Senate is institutionally deputed to defend local interests, especially of rural areas.

[52] ***Mazzoleni***, *La riforma degli enti territoriali in Francia e Italia: l'eutanasia mancata del livello Intermedio*, regione Emilia-Romagna

[53] The law on the Nouvelle Organisation Territoriale de la République assigns new powers to the regions and redefines the competencies of each local authority.

CHAPTER 3 : THE RELATIONSHIP BETWEEN THE PUBLIC AND THE NON-PROFIT SECTOR

Section 1 : Italy

1. History and general background of the collaboration

Without a doubt, the relationship between the public administration and *Terzo Settore* is a relevant topic for both sides. Nevertheless, it is important to keep in mind that the major activities of non-profit entities should be conducted regardless of any public intervention. In this sense, Private may decide to avoid any kind of public affiliation and relay only on their own strength.

Still, in many other cases the *Enti del terzo settore* and the administration itself may decide to collaborate for the pursuit of activities of general interests. In these cases, the public administration can support the activities carried out or rely on them to organize and menage different services. More generally, we can individualise three kinds of interactions between: support (grants, benefits, use of public spaces), collaboration (project management, planification ecc…) and reliance[54].

This subparagraph will be focused on the third level of interaction between the public administration and the non-profit entities, characterised by difficulties in the provision of services, which given its nature it is legally more complex. It is as well fundamental to have a clear distinction of the two possible prospective of this relation. In the *reticolare*, both private and public subject are placed at the same level. In the second case, the *sostitutivo* model, private subjects provide services on the behalf of public administration[55].

In regard to the first interaction, it has developed as first as licence thanks to which private entities were authorised to offer public services. The public administration was mainly in charge to check the compliance with predefined requirements[56]. This first step was aimed at ensuring the compatibility of those entities to private and public interests. As a consequence, public administration prevents the provision of services which do not attain minimum requirement. However, the time showed that a licence was not enough, and it was necessary to implement further measures. Namely, the legislation introduced,

[54] **Michiara**, *L'affidamento di servizi al Terzo settore, in Non profit*, paper, n.3/2014
[55] **Consorti, Gori & Rossi**, *Diritto del Terzo settore*, II edition, Pandora Campus
[56] Ibidem

especially at regional level, the so-called accreditation. This last was provided additional juridical requirements to obtain a license, in this way public administration was able to certify the quality of services provided. In fact, the final aim of this measure is that to certificate the standards of private activities so that citizens can consciously and freely chose if and where require aid.

It is possible to notice that this first interaction does not involve any kind of choice or selection among private subjects[57]. It is limited to identify for citizens eligible provider of activities belonging to the field of general interests. At the same time, it also involves in the ensure the quality of them. Based on the previous observations, the accreditation is also considered as a requirement to have access to public grants in exchange of services that should be provided by public authorities.

The *sistema reticolare* described in the previous paragraphs can however go even further, and in this case, it mainly consists in the stipulation of a specific agreement between the public administration and accredited entities. This arrangement defines the operating methods and the supervision role of the public administration[58]. On the other hand, the *modello sostitutivo* is based on the principle of affiliation according to which the public administration entrusts privates to supply public services. In this case, Ets have a central role in the replacement of the public administration.

In relation to what stated before it is important to focus on the juridical instrument used to individualize the service provider. In this regard, a first step was taken by the art. 5 of *legge Quadro* n. 328/2000. It imposed to local entities to enable the "subjects operating in the Ts" to fully put into practice the projects they envisage, through specific regulations following the issuing of a governmental act. In fact, the reliance principal relay on multiple legislative sources which in some cases make it difficult to comply with the principle of fair treatment.

In the year 2000, the legislator affirmed the necessity for Ets to plan based on clear criteria. Based on these legal provisions, on May 30th of 2001 the president of the council of ministers adopted a Ministerial Decree (d.p.c.m) reiterating an improvement and the implementation of services provided at regional and municipal level. The decree favoured the involvement of *Ets* not only for their planning and managing capacity but also open the path for a clear involvement of privates in the elaboration of public policies.

[57] **Consorti, Gori & Rossi**, *Diritto del Terzo settore*, II edition, Pandora Campus
[58] Omitted by law n.328/2000, the check is not always operated.

Additionally, to the national legislation it is fundamental to consider European Union Law, in particular, three European directives[59] introduced a differentiation within public procurement that was put in place at national level by the legislative decree n.50 of 2016. More specifically, art. 77 of directive 2014/24/Ue explicit the possibility for member states to envisage public procurement also for certain private entities that in Italian legal order can be assimilated to the Ets[60].

Another crucial step was introduced by law n.117/2017, art. 55 of the Third Sector Code has contributed decisively to a turning point in the relations between public bodies and the Third Sector, no longer considered as counterparties - the Public Administration which pursues the public interest by purchasing services, the Third Sector which competes for offer them at the best market conditions – but allies in identifying ways to ensure rights and respond to citizens' needs.

The reform of the third sector (law 106/2016), recalling the principle of subsidiarity affirmed by art. 118 of the Constitution (see also the ruling of the Constitutional Court 131/2020), has laid the foundations for building this relationship, configuring the complex of Third Sector entities (ETS) as "private entities that promote and carry out activities of general interest" and therefore with a purpose analogous to that of the public administration; and this is stated not with reference to a specific legal form, but to all entities, whatever the way of operating - voluntary and free action, mutuality or production and exchange of goods and services - that characterizes them. Secondly, the Reform has laid the foundations for the definition of the border (the subjects that fall within the perimeter of the Third Sector Code and therefore can be registered in the single register) and the related control system, so as to be able to have certainty about which subjects are identifiable as third sector entities.

2. The involvement of the third sector in the activity of co-programming and co-design

The Cts, in Title VII, regulate the relationships with public administration, more specifically, art. 55 establishes that all public administration must involve the Ts in the programming and designing of activities[61]. It must be noticed that the legislator decides to expand the traditional field of action expected by law 328/2000 and by the d.p.c.m of the 30th of March 2001[62]. This led to two different problems: on one hand it is necessary

[59] Directives: n. 2014/23/Ue, n. 2014/24/Ue, n. 2014/25/Ue
[60] **Consorti, Gori & Rossi**, *Diritto del Terzo settore*, II edition, Pandora Campus
[61] Defined by art. 5 of the Cts
[62] AA. VV., *Il Codice del Terzo settore e l'impresa sociale nell'attuazione della legge delega n.106 del 2016*, Position Paper

to evaluate the compliance with Italian constitutional provisions delegating the competences to public local entities[63]. On the other hand, there is a clear change in the objectives of Ts; if in the beginning it was related to the social services, while now it focuses on all the activities of general interests.

In this respect, public administration should think about the role of liaison officer which is typically affiliated to one person[64]. As the *Agenzia per il Terzo settore* recommended, it would be more advantageous to have a unique general office which depend on those in charge of coordinate the administration.

Going further in the analysis, art. 55 expresses the final aims of co-planning. It consists in the identification of public needs and the correlated interventions and modality of fulfilment. Furthermore, as specified by the decree of the Ministry of Labour and Social Policies of the 30th of March 2021, it is possible to have a general comprehension of the needs and the possible solutions only thanks to a shared path. The decree as a consequence imposes the collaboration between the public administration and Ets which are seen as fundamental actor in the identification of need, the advocacy, and the evaluation of the available resources.

Nevertheless, the affiliation of co-programmer implied some juridical consequences which lead the legislator to entrust Ets for the job of co-designer in specific project aimed fulfilling general needs. In this context, it is important to consider the Anac's resolution which specify the projects and the possible interventions within the co-designing[65].

At practical level, the last year were characterised by multiple difficulties. Firstly, Public administration report a general difficulty to identify partners to involve in the activity of co-programming and co-designing. Secondly, the inadequate formulation of the Cts resulted in a overlap with the norms regulating public contracts. This last one, also involved the legislation of the European Union.

It is also possible to affirm that for the activity of co-programming, art.55 does not consider any form of accreditation of public contests but it recall the respect of law n.241/1990, as well as all the other norms regarding this field. While in regard to the co-designing art. 55 paragraph 4 includes a defined procedure to identify Ets eligible for partnership: "*Ai fini di cui al comma il partenariato avviene anche mediante forme di accreditamento nel rispetto dei principi di trasparenza, imparzialità, partecipazione e*

[63] **Delle donne**, *le ripercussioni sul reparto di competenze fra Stato e Regioni*, Non profit paper, n. 3/2017

[64] **Consorti, Gori & Rossi**, *Diritto del Terzo settore*, II edition, Pandora Campus

[65] "progetti innovativi e sperimentali di servii, interventi e attività complesse da realizzare in termini di partenariato tra amministrazione e privato sociale"

parità di trattamento, previa definizione, da parte della pubblica amministrazione procedente, degli obiettivi generali e specifici dell'intervento, della durata e delle caratteristiche essenziali dello stesso nonché dei criteri e delle modalità per l'individuazione degli enti partner".

Addressing the topic from a practical perspective, there are guidelines that must be followed both for the co-programming and the co-designing of activities. In relation to the first one, it can be initiated both by the administration or by the request of one or more Ets. In is, then, articulated in distinct phases. Firstly, there is the appointment of a responsible for the procedure. It has to publish an *avviso* including all the information and requirements for the participation, including the timing and the modalities of actuation. If by the end of the procedure the public administration and the Ets will have elaborated a shared proposal, this last one will be described in a final document. Otherwise, the final document will provide the different position and proposes formulated during the process. In both cases, the actualization is under the authority of the Public Administration.

The co-design activity has a completely different procedure, the outlines required a comparative attitude. In fact, even though the procedure can start by both public and private side, the administration will have to publish the avviso to identify a partner. If the proposal come from an Ets it can be either accepted or rejected by the public administration. In the first case, an avviso is published to allows other interested Ets to present their own proposals which will be compared to the first one.

As for the sessions of co-design, two different modalities are allowed: the first one, imply the creation of a roundtable of co-designing with all the Ets whose proposal was approved, in the second scenarios all the Ets holding the requirements asked in the aviso are allowed to participate. Finally, the guidelines specify that co-designing should be re-evaluated depending on the changing in needs or to reconsider the final assets.

A drastic change was introduced by art. 55 paragraph 3 of the Cts, according to this one we should see accreditation as a simple licence stating that the applicant complies with general and specific requirements of Ets. The administration is than in charge of providing, to potential beneficiaries, a list of designed operational entities which are tracked, checked and in some cases also sanctioned by the public bodies.

Following the important judgment of the court, it is necessary to point out the innovations produced at the regulatory level and in particular on the regional side. For example, Tuscany region defined an ad hoc procedure for co-programming and co-

designing, the aim was to open the path to the respect of autonomies for local entities and for other regions[66].

3. The conventions between the volunteering organization and the social promotion associations

Art. 56 of the Cts regulate the conventions between the Public Administration and the Ets. However, the legislator already provided some norms on the topic, in fact we can them as typical ways for Ets to concludes agreements with the public administration. Still, the Cts innovate the judicial framework.

The previous mentioned art. established that public administration could conclude conventions with all the Odv and Aps which has been subscribed to the Registro Unico del Terzo Settore (Runts) for at least six months. In the following paragraph, the legislator regulates the financials aspects and the criticise to identify all those entities with whom Public Administration can stipulate conventions.

The first aspect to take in consideration is the limited categories of Ets which are considered eligible for the stipulation of conventions. In fact, the legislator privileged the Odv and Aps which are considered the entities with the major solidaristic connotation[67]. Still, a well-defined analysis takes into consideration on the negative implication revel major issue. More specifically, the legal framework as presented by art. 55 link the possibilities to stipulate convention, and as a consequence the co-designing, just to the entities indicated by art. 5 law n. 381/1991going against its own paragraph 4 which imposes to the Public Administration the involvements of all Ets in the activities of co-designing and co-programming. Furthermore, if we should have to apply the same ratio to art. 56, most entities other than Ods and Aps would not comply.

In the lights of what affirmed by the guidelines of Ministry of Labour and Social Policies, it is possible to distinguish between two types of conventions. More precisely, art. 55 refers to the conventions that can be stipulated with entities different from the one presented in the following article. Art. 56, on the other hand, establishes specific procedure just for the Odv and Aps especially in regard to the expenses incurred. In fact, for this second category it is only possible to provide refunds for the incurred expenses. While, for the other Ets, some grants can be envisaged for the provision of services.

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[66] **Consorti, Gori & Rossi**, *Diritto del Terzo settore*, II edition, Pandora Campus

[67] **Albanese**, *I servici sociali nel Codice del Terzo settore e nel Codice dei contratti pubblici: dal conflitto alla complentarietà*, n.1/2019

In this sense, it is important to say that art. 56 establishes specific criteria for the selection of Aps and Odv which are eligible for conventions. It is important to respect the principles of impartiality, transparency, and equal treatment. The eligible entities must also have such as the professional morality and enough experience to carry out activity. Essentially, the procedure expects the setup of a comparative and selective procedure which respect the general principle coming from the European Union legislation.

It seems obvious that this provision recalls an instrument to entrust public services to Ets and it do not consist in financials supports. Still. it is not forbidden for the public administration to support Ets in different form including the complete autonomy in the management of activities of general interests.

Finally, art. 56 have a provision on the requirements for conventions which were already largely presented in other legislative sources[68]. Among the confirmed requirements for the conventions, there is the protection of human rights and human dignity. While the new introduced requirements mainly linked to the financial relations and the check of reciprocal fulfillments. The provision shows a real concern about the economical dimension. In this sense, it seems that the legislator's primary concern when it comes to conventions is not the utility linked to possible social effect, but the costs to carry out those activities. In fact, if we consider the provision defining the terms for the efficiency there is a clear lack of data regarding the social impact.

Briefly introducing art. 57, it regulates specific convention for medical transport. It establishes that emergency transport can be entrust only to Odv fulfilling specific requirements. However, this creates along the years some judicial problems especially in regard to European Union law. In fact, directives 2014/24/UE, on government procurement, explicitly exclude its application "to certain emergency services where they are performed by non-profit organizations or associations, since the particular nature of those organizations would be difficult to preserve if the service providers had to be chosen in accordance with the procedures set out in this Directive".

Finally, the Cts without any doubt favour the relationships between Ets and public entities. In this regards co-programming, co-designing and partnerships are different expressions of the same relation. Nevertheless, there are still some points which the legislator should be elaborated to guarantee the quality of the services and the legitimacy of public actions.

[68] Law n.266/1991 and n. 381/1991

Section 2 : France

1. The heritage of the straggler governmental-non-profit partnership

France has a long and storied history of collaboration between the government and non-profit organizations, dating back to the establishment of the Third Republic in 1870. This partnership has been instrumental in shaping the social welfare system and the country's broader political landscape. From the early days of the Republic to the present day, this collaboration has been defined by a unique mix of state power and civic engagement that has helped to shape the modern French society.

The heritage of the straggler Government-Non-profit Partnership in France can be traced back to the end of the 19th century, when the French government began to recognize the importance of working with non-profit organizations to provide social welfare services to its citizens. This recognition led to the creation of a number of laws and policies designed to encourage collaboration between the state and the non-profit sector. In fact, the French Civil Code provides for the legal capacity of associations to enter into contracts, own property, and sue and be sued. This means that associations have the same legal rights and obligations as individuals, and can enter into contracts with other parties, such as suppliers or service providers. Associations can also own property, such as buildings or land, and can sue or be sued in court in the same way as individuals.

One of the earliest and most significant pieces of legislation in this regard was the Loi sur les Associations of 1901. This law established the legal framework for the creation and operation of non-profit organizations in France, providing them with legal recognition and the ability to receive tax-exempt status. This legislation laid the foundation for a vibrant and active non-profit sector in France, which has since played a key role in shaping the country's social, cultural, and political landscape. An example is article 10 which establishes the conditions under which associations can receive financial support from the State or local authorities. Associations that wish to receive public funding must comply with certain requirements, such as registering with the prefecture and providing information about their activities and governance structure. Associations must also demonstrate that their activities serve the public interest and contribute to the common good. In addition, associations must use public funding in accordance with the purposes for which it was granted.

Throughout the early part of the 20th century, the partnership between the government and non-profit sector continued to evolve and expand. During the interwar period, for example, the French government worked closely with a variety of non-profit organizations to provide social welfare services to citizens, particularly those who had been affected by the

economic upheaval of the Great Depression. This partnership helped to establish a robust system of social welfare in France, which has become a defining characteristic of the country's modern political landscape. More specifically, Law of July 23, 1987, establishes the legal framework for associations that receive public funding. It requires such associations to comply with certain transparency and accountability measures, such as publishing their annual financial statements and submitting them to the authorities for review. The law also requires associations to provide information about their sources of funding and the remuneration of their leaders and employees. These measures are designed to ensure that public funds are used in a transparent and accountable manner and to prevent abuse.

The post-war period saw further expansion of the partnership between the government and non-profit sector in France. In the aftermath of World War II, the French government worked closely with a range of non-profit organizations to provide aid and support to those who had been affected by the conflict. This collaboration helped to rebuild the country and establish a new era of social and economic prosperity.

In the decades since, the partnership between the government and non-profit sector in France has continued to evolve and expand. Today, non-profit organizations play a key role in shaping public policy and providing social services to citizens across the country. From healthcare and education to social services and environmental protection, non-profit organizations in France are involved in a wide range of activities that have a direct impact on the lives of millions of people.

In conclusion, the heritage of the straggler Government-Non-profit Partnership in France is a rich and complex history that has played a key role in shaping the country's modern political landscape. From the establishment of the Third Republic to the present day, the partnership between the government and non-profit sector has been defined by a unique mix of state power and civic engagement that has helped to create a vibrant and active non-profit sector, and a strong social welfare system. As France continues to face new challenges and opportunities in the years ahead, this partnership will undoubtedly continue to play a key role in shaping the country's future. Overall, the partnership is based on the principles of recognition, autonomy, and cooperation, and seeks to balance the interests of associations and the public good. Associations are recognized as legal entities with the freedom to carry out lawful activities but are also subject to legal requirements and restrictions designed to ensure compliance with the law and public order. The State provides a regulatory framework and financial support for the activities of associations, but also has the power to intervene in cases of illegal or harmful activities.

2. The non-profit role in policy formulation

Non-profit organizations have recently played a leading role in formulating social policy in France. The country's stance was to let existing organizations to limit the costs of funding responsibility. It can therefore be assumed that this field corresponds to the 'partnership type' of the relationship between a country and a non-profit organization as defined by Salamon (1995). But the state always gives politics the final context. A non-profit organization in its role as a provider of social welfare programs. Organizational leaders acquire highly specialized skills that governments and parliaments cannot possess because they are multifaceted. Close cooperation is therefore helpful. As we will see later, this ranges from de facto co-creation of public policy to mere influence.

As mentioned above, in the 1960s, children and adults with disabilities were mainly housed in highly specialized institutions created by their organizations. In the 1970s, after allegations of abuse, the government decided to enact legislation. After two years of discussions with representatives of two major organizations (the French Paralyzed Association for the Physically Handicapped and his UNAPEI for the Intellectually Handicapped), the 1975 law adopted the established regulations regarding facilities for persons with disabilities. After the same consultation, a 2002 law clarified the rights of persons with disabilities in residential and general establishments. Finally, in 2005, his 1975 law was amended in collaboration with the same non-profit organization. Persons with disabilities have been added to the cash allowance that all persons with disabilities receive ("Adult Handicap Quota").

As a centralized country, France has a principle of equality throughout its territory, making it difficult to experiment with public policy on any part of its territory. However, this experimentation is possible through non-profit organizations. The best example is the law that guarantees a minimum income. The formal passage of this law follows years of de facto cooperation between non-profits and organizations. Public authorities, especially employment policy, health and social sectors. The association supported employment policy by implementing vocational training programs, especially for unskilled workers, using large amounts of public funds. Between 1984 and 1987 non-profit organizations involved in poverty planning met with local government officials and public housing administrators to develop more permanent poverty policies in a way that guaranteed a minimum income. In regions such as northeast France, the third sector is working with local governments to provide assistance and income support to the newly unemployed poor. The Wresinski Report, adopted in 1987, was the result of these experiments and laid the foundation for the 1988 Minimum Income for Integration

(RMI) Policy Draft. It called for the poor to join the mainstream and called for "close cooperation between the various partners involved in the fight against poverty."

Recently, we can also observe the emergence of a new “assisted job” to combat youth unemployment. Another example is an organization dealing with immigration issues. evolving in recent years Literacy and adult education programs, school support for immigrant children, sports and leisure clubs, Muslim activities, education and mutual aid for women, legal aid, administrative affairs assistance. Local governments encouraged the establishment of such non-profit organizations with in-kind and financial support when such organizations did not exist, and these educational experiments were recognized by official diplomas.

Non-profits have also influenced public policy through other channels. For example, non-profit leaders such as Bernard Kouchner and Martin Hirsch have become pastors. Based on past experience, these civil society leaders will initiate legislation that favours the non-profit sector, such as the Civil Service Act 2010, which gives some unemployed youth the opportunity to do so. At a non-profit organization or institution, he "volunteered" from 6 months to 2 years, paid half the minimum wage by the state.

There are also regular congressional consultations with stakeholders and experts in the non-profit sector on ways to improve existing and proposed legislation. More recently, non-profits have also worked with government agencies that fund them to develop tools to assess their activities and the public policies that influence them. Finally, on the occasion of his 100th anniversary of the Society Act 1901, a charter of mutual commitments was signed by 14 charitable leaders and his 14 ministers.

3. Key issues in governmental-non-profit cooperation

The partnership between the government and non-profit sector in France has been a defining feature of the country's political landscape for over a century. While this partnership has brought significant benefits to both parties, it has also been subject to a range of challenges and issues that have often complicated cooperation between the two sectors.

One of the most significant issues in government-non-profit cooperation in France is the question of autonomy. Non-profit organizations are generally expected to be independent of government influence and control, but the French government has often been criticized for exerting too much influence over non-profit organizations. Some argue that this can limit the ability of non-profits to pursue their own agendas and can lead to a lack of diversity and innovation in the sector.

Another issue that has been a source of tension between the government and non-profit sector in France is funding. Non-profits often rely on government funding to support their activities, but this can create a dynamic in which non-profits feel beholden to the government for financial support. Some argue that this can compromise the independence and effectiveness of non-profits, as they may be reluctant to criticize government policies or take positions that are contrary to the interests of government funders.

In recent years, the French government has also faced criticism for its management of non-profit organizations. In some cases, the government has been accused of mismanaging funds or failing to provide adequate support to non-profit organizations. This has led to concerns about transparency and accountability in the sector and has raised questions about the ability of the government to effectively manage partnerships with non-profits.

On the other hand, it is also true that, some have evolved into professional organizations and reduced their reliance on volunteers. Financial reliance on public funds can also be a source of inertia, as some non-profit organizations have proven to be as institutionalized and rigid as the public bureaucracy. They may be less able to adapt to new situations, making them less advocates. In fact, the innovative character of non-profit organizations relates to their ability to respond quickly to a changing environment and to provide non-bureaucratic solutions to new social problems. They are so entrenched in our communities that we address them through markets and find ways to deal with them. Non-profits also have the ability to address issues in a holistic manner, in contrast to governments that fragment policy areas such as employment, income, health, social and family status, housing, education and skills. However, innovation is often the hallmark of younger associations, which become more bureaucratic and less innovative once they are able to secure significant public funding.

Finally, there is also the issue of political influence. Non-profits often engage in advocacy and lobbying activities to advance their goals and objectives, but this can create tension with the government when non-profits take positions that are contrary to government policies or interests. In some cases, the government has been accused of trying to stifle dissent or limit the activities of non-profit organizations that are seen as being critical of government policies.

In conclusion, the partnership between the government and non-profit sector in France is a complex and multifaceted relationship that has been shaped by a range of issues and challenges. While there are certainly benefits to cooperation between these two sectors, it is important to be aware of the potential pitfalls and challenges that can

arise. By addressing these issues and working together in a spirit of mutual respect and cooperation, the government and non-profit sector in France can continue to build a strong and vibrant partnership that benefits all citizens of the country.

CONCLUSION

The prolonged economic crisis, worldwide and more significantly in Italy, over the last fifteen years has widened social inequalities and exposed the incapacity of traditional systems and markets to respond to growing needs. At the same time, it has increased the scope of action of the Third Sector and its responsibilities in civil society. It is than imperative to explore and highlight the juridical differences between the two countries that shape the way non-profit organizations operate.

In Italy, the Civil Code governs non-profit organizations and outlines strict regulations that must be followed to ensure transparency and accountability. These regulations include requirements for governance, financial reporting, and annual filings. Non-profit organizations in Italy are eligible for tax-exempt status, although the process for obtaining this status can be complicated and time-consuming. As well, the legislative decree 17/2017 has brought about a series of important innovations in the Italian non-profit sector. One of the main innovations was the introduction of a single legislation that unifies and simplifies the laws governing non-profit organizations. Prior to this code, non-profits were faced with a fragmented set of laws and regulations that were often difficult to follow. The objective of the law was to create a clearer and more coherent regulatory framework, providing a unified guide for the different types of non-profit organizations. This has led to greater transparency, simplifying bureaucratic processes, and promoting the development of the third sector. The code also underlines the fundamental principles that guide the activity of non-profit organizations, such as autonomy, democracy, transparency, social responsibility and impartiality. These principles reflect the importance of promoting ethical values and accountability in the non-profit sector.

On the other hand, the non-profit sector in France is governed by the Loi sur les Associations of 1901 and other relevant legislation. Similar to Italy, non-profit organizations in France must register with the local authorities and adhere to specific regulations regarding governance, transparency, and accountability. These organizations are also eligible for tax-exempt status and have access to government funding and subsidies.

In Italy, the increasing economic impossibility of public resources to address social problems in recent years has led the State to seek to build a new relationship between public, private, and non-profit sectors. Horizontal subsidiarity, which existed well before the State's influence, and which in Italy and the United States formed the basis of the origins of the Third Sector, had a very different fate in the two countries, resulting in two different configurations and realities of the sector. In Italy, since the end of the 1800s, the State has played a decisive role in the evolution of the non-profit sector, attempting over the years to maintain control, in some periods limiting its development by competing with the sector and in others promoting

its growth. While, asserting the existence of the principle of horizontal subsidiarity in France is certainly daring and would not correspond to the reality of the law.

The comparison with Italy shows that both administrative systems are marked by common tendencies and that in France, certain aspects of horizontal subsidiarity find their place. Indeed, in both countries, the relations between the Administration and citizens are transforming. The bipolar paradigm no longer manages to describe the complexity of exchanges between public and private entities and, at the same time that the notion of "administrative citizenship" is asserting itself, a new model of relationship between the Administration and citizens is taking shape. The paradigm of "shared administration", advocating a parity and integrated alliance between citizens and the Administration for the pursuit of the general interest, certainly does not replace the traditional hierarchical relationship, but adds to it, elaborating solutions adapted to new collective requirements. In Italy, this paradigm seems to be beginning to yield positive results, especially with a view to raising citizens' awareness of respect for and defence of common goods and valuing the third sector. In France, the hypothesis elaborated by the jurisprudence of the Council of State, apart from the case of the Cinémathèque française, remains abstract, but it presents all the characteristics of shared administration. Similarly, the procedure allowing a taxpayer to plead on behalf of their territorial community is exceptional, but it encourages the bonds of solidarity between the individual and their community of belonging. These two examples would therefore be a signal of conservation of heritage, indicating that they are compatible with the common market.

The juridical differences between the non-profit sectors in Italy and France reflect the unique political, social, and legal contexts in which these organizations operate. While both countries share a commitment to serving the public good and working collaboratively with the government to achieve their goals, the specifics of their legal frameworks differ. It is crucial to understand and study these differences to appreciate the complexity and nuance of the non-profit sector in each country.

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RIASSUNTO IN LINGUA ITALIANA

Il no-profit rappresenta una risorsa importante per lo sviluppo economico e sociale di molti Paesi dove le organizzazioni del terzo settore svolgono un ruolo fondamentale nella promozione alla partecipazione civica e della solidarietà sociale. Esse sono infatti percepite come gli attori principali nello sviluppo di un sistema complesso di soggetti che imprimono l'aspetto solidaristico a quello economico. In questo senso, l'elaborato si concentra sull'analisi dello sviluppo dei rapporti tra Terzo Settore e Stati, con particolare attenzione alla visione moderna secondo la quale lo Stato è percepito come un ostacolo per il non profit. A tal proposito, la ricerca si limiterà ad un'analisi comparata del contesto italiano e francese, dove nonostante l'affinità culturale e storica esistono notevoli differenze nella struttura e nelle normative.

A livello storico, entrambi i paesi condividono una lunga tradizione di impegno nella società civile, con organizzazioni senza scopo di lucro che svolgono un ruolo significativo nell'affrontare i bisogni sociali e promuovere il benessere pubblico. In Italia, le organizzazioni senza scopo di lucro affondano le loro radici nelle corporazioni e nelle confraternite medievali, istituite per fornire mutuo aiuto e assistenza alla società. Diversamente, in Francia le organizzazioni senza scopo di lucro hanno preso piede durante la Rivoluzione francese come mezzo per i cittadini di organizzarsi indipendentemente dal controllo del governo. Non per caso, nonostante il comune impegno a servire il bene pubblico e a lavorare in collaborazione con gli organi dello stato, risultano presenti differenze significative nella struttura e nei regolamenti che disciplinano le organizzazioni senza scopo di lucro in Italia e in Francia. È stato quindi possibile affermare che i due modelli, non sono altro che il risultato storico dello sviluppo del settore non profit che continua a risentire tutt'oggi dei diversi contesti politici, sociali e legali, i quali ne definiscono la complessità e le sfumature in ciascun paese.

Tra i principali elementi di distintivi che influenzano il terzo settore, troviamo il principio di sussidiarietà orizzontale. Infatti, se nel contesto italiano, esso è stato inscritto nella Costituzione a partire dal 2001, in Francia questo principio non è ancora costituzionalmente riconosciuto. È possibile, tuttavia, rintracciarne la presenza anche nell'ordinamento francese, in particolare in alcune sentenze del *Conseil d'État* e nella regola permanente che consente a un cittadino di perorare al posto della sua comunità locale. In questo senso, il confronto tra i due ordinamenti mostra come il principio di sussidiarietà non fa altro che affermare il ruolo della Pubblica Amministrazione nel sostenere e promuovere le iniziative autonome dei cittadini legate ad attività di interesse

generale. Inoltre, la sua applicazione introduce un nuovo paradigma, i. e. "Amministrazione condivisa" dove i cittadini e la Pubblica Amministrazione sono considerati come soggetti alla pari che uniscono le proprie risorse per soddisfare i bisogni di tutti i consociati.

Altro elemento storicamente legato al principio di sussidiarietà e particolarmente determinante nei rapporti tra Terzo Settore e Amministrazione Pubblica è l'organizzazione degli enti territoriali. In Italia e in Francia, essi sono caratterizzate da un'organizzazione frammentaria e complessa (tab 1). Nella prima, la riforma costituzionale n.3 del 2001, ha introdotto modifiche al Titolo V della Costituzione italiana e all'art.114, dando luogo ad una nuova composizione della Repubblica. Di fatto, l'Italia risulta oggi composta da diversi enti dotati di stessa personalità giuridica: comuni, province, città metropolitane e regioni. D'altro canto, la legislazione francese nell'art. 72 della Costituzione stabilisce l'assetto territoriale del Paese, che risulta composto da diverse comunità territoriali: comuni, dipartimenti, regioni, comunità a statuto speciale e comunità territoriali d'oltremare. Bisogna fare tuttavia attenzione, in quanto nonostante in un primo momento si possa pensare ad un parallelismo nei due modelli di organizzazione territoriale, andando più a fondo nell'analisi è possibile evidenziare una divergenza funzionale tra i due. Le regioni, nel contesto francese, non detengono il potere legislativo, ma sono percepite dal quadro giuridico come enti di programmazione e pianificazione, come ad esempio per la gestione dell'istruzione secondaria e dello sviluppo professionale. Diversamente, in Italia le Regioni hanno potere decisionale in materia di legislazione concorrente e residuale come specificato rispettivamente dall'art. 117 commi 3 e 4. In questo senso, la particolarità introdotta dalla legislazione italiano viene definita dalla legislazione concorrente che trova la sua giustificazione nel principio di sussidiarietà espresso nell'art. 118 co. 1. infatti, il legislatore attribuisce ai Comuni l'esercizio delle funzioni amministrative, a eccezione dei casi in cui esso stesso ritenga necessario l'intervento di uno o più enti locali sovraordinati. Ovvero nei casi in cui il Comune non sia in grado di gestire a pieno la materia a lui attribuita per garantire il massimo benessere della collettività. Citando alcune attribuzioni dei Comuni, essi si occupano principalmente di urbanistica, lavori pubblici, ambiente, istruzione primaria, servizi culturali, sport, sicurezza. Passando invece alle similitudini tra il modello Francese e Italiano, è possibile soffermarsi sugli enti di livello intermedio, il loro campo d'azione è molto limitato sia nell'ordinamento di entrambi i paesi. Essi, infatti, sono storicamente responsabili dell'organizzazione periferica dello Stato insieme alle Prefetture. Non a caso, le Provincia e Dipartimento sono considerati lo spazio organizzativo locale degli attori economici e politici.

È possibile notare come i due modelli condividano somiglianze nel quadro giuridico risultati da processi storici che fanno particolare riferimento all'epoca napoleonica. Tuttavia, le ultime riforme in Italia hanno portato ad un consecutivo distaccamento della disciplina del livello intermedio italiano dal modello napoleonico. In questo senso è possibile notare come, ad oggi, le Regioni deleghino autonomamente alcune materie alle Provincie. In Francia, invece, in base all'art. 72 Cost., gli enti territoriali si auto-amministrano liberamente. I Dipartimenti, quindi, non sono soggetti a vincoli imposti da altri enti territoriali, con i quali intrattengono meri rapporti di collaborazione o concorrenza, in questo senso si differenziano sensibilmente dalle Province italiane, che hanno una struttura multilivello.

Come il lettore avrà potuto immaginare, tali differenze sopraelencate impattano significativamente i possibili rapporti tra Enti del Terzo Settore e gli Organi dello Stato e le specificità dei loro regolamenti. Ad esempio, in Italia, le organizzazioni senza scopo di lucro sono tenute a registrarsi presso le autorità locali e presentare relazioni finanziarie annuali. In Francia, le organizzazioni senza scopo di lucro non sono tenute a registrarsi presso il governo, ma devono depositare i bilanci annuali presso la prefettura. E ancora, in Italia, esiste una forte enfasi sulla "sussidiarietà orizzontale", che fa riferimento al principio secondo il quale soggetti pubblici e soggetti privati collaborino in vista del perseguimento di un interesse comune ad entrambi, l'interesse generale. Differentemente in Francia, le organizzazioni senza scopo di lucro sono soggette a norme rigorose in materia di governance e gestione che rendono difficile il riconoscimento giuridico di una possibile collaborazione.

Ad oggi, rimane quindi la necessità di affrontare le difficoltà che le organizzazioni no-profit sono costrette ad affrontare quotidianamente nei due paesi. Tra queste, spiccano la limitatezza delle risorse finanziarie, gli ostacoli burocratici e una mancanza di fiducia del pubblico in questo settore. Detto ciò, è altresì importante evidenziare come negli ultimi anni sia avvenuto un cambio di tendenza. Nel contesto italiano, alcuni sforzi sono stati fatti per razionalizzare il quadro normativo che disciplina le organizzazioni senza scopo di lucro e per aumentare la consapevolezza pubblica del loro contributo alla società. D'altro canto, in Francia ci sono state diverse iniziative per promuovere l'imprenditoria sociale e per incoraggiare una maggiore collaborazione tra organizzazioni no-profit e agenzie governative.

Nel complesso, l'elaborato presenta una preziosa analisi comparativa della regolamentazione legale dei settori no-profit in Italia e in Francia. L'esame dello sviluppo storico di questi settori, nonché dei loro quadri giuridici e contesti specifici, fornisce importanti spunti sulla complessità e le sfumature del settore no-profit in

ciascun paese. È dunque importante che la discussione sulle sfide che le organizzazioni senza scopo di lucro devono affrontare in entrambi i paesi, nonché gli sforzi compiuti per affrontare queste sfide, rimanga aperta e sia istruttiva per i responsabili politici, i ricercatori e le parti interessate a promuovere un settore senza scopo di lucro vivace ed efficace.