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The Principle of Subsidiarity in the Spinelli Project. A Federal Reform Draft in Disguise

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> Des États voisins sont naturellement ennemis les uns des autres, à moins que leur foiblesse commune ne les force à se liguer pour former une République fédérative, et que leur Constitution […], ne prévienne les différens qu'occasionne le voisinage, et n'étouffe cette jalousie secrette qui porte tous les États à s'accroître au préjudice de leurs voisins. (Abbé de Mably, *Des Principes des Négociations*, 1757).
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> Nothing is more certain than the indispensable necessity of government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights in order to vest it with requisite powers. It is well worthy of consideration therefore, whether it would conduce more to the interest of the people of America that they should, to all general purposes, be one nation, under one federal government, or that they should divide themselves into separate confederacies, and give to the head of each the same kind of powers which they are advised to place in one national government.
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> John Jay, *The Federalist Papers*, No. 2, 1787

1. A Technical-Political Expedient: Subsidiarity from the Vedel Report to the Tindemans Report Through the 1975 Commission Report

The 1979 European Parliament (EP) elections by direct universal suffrage put the issue of the prerogatives of the new assembly and the competences of the European Community (EC) at the heart of the debate on the future of integration, with the return of the issue of the EC budget and its approval, Altiero Spinelli's first battle as an MEP (see Graglia 2008: 583-614; Spinelli 1989: 227-245). After losing the debate with the Council on this issue and forming the Crocodile Club in the meantime, Spinelli worked to implement his constituent strategy by promoting the creation of the CIPE (the EP's Committee on Institutional Affairs), thus laying the foundations to reform the Treaties[1]. In this process, the method used to attribute competence to the future European Union

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[1] On 9 July 1980, the Crocodile Club was founded in Strasbourg and was composed of nine members of the European Parliament: Karl von Wogau and Hans August Lücker of the German CDU, the British Conservative Stanley Johnson, the Christian Democrat Paola Gaiotti De Biase, the Liberal Bruno Visentin, Richard Balfe and Bryan Key from the British Labour party, the Communist Silvio Leonardi and Altiero Spinelli (independent). See Dastoli, Pierucci 1984. For the years in question, see also Spinelli 1992.

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(EU) characterized part of the parliamentary debates, fostering a constituent awareness and a supranational perspective within the EP. These features, specific to the Draft Treaty on the European Union (DTEU), also known as the Spinelli Project, emerged from the use and interpretation of the principle of subsidiarity[2].

The principle of subsidiarity was not new to Spinelli, nor was it unknown in the history of the European integration process[3]. It was an idea that had been around for a while, originating in liberal and Christian social political thought, and had always been linked to the theory and practice of the federal state, to the point that American federalism scholar Jenna Bedner easily defines this principle as "the soul of federalism (Bednar 2014: 231)."

At the beginning of the European integration process, the founding fathers, inspired by Christian thought, employed the principle of subsidiarity as an antidote to political centralism and totalitarianism, considering it "a criterion for the legitimacy of power that was not the legitimacy of man or time but that corresponded to the existence of permanent truths (Melchionni 2013: 170)." These truths, constituting every individual and society, would necessarily lead to democracy in communities and peoples bound by shared values[4]. However, in addition to the axiological nature of subsidiarity, there was a pragmatic implication to its political use which Spinelli referred to and proposed in his Project as a principle governing the attribution of competence in the EU[5].

In the early 1970's, while serving as the European Commissioner for Industrial and Technological Policy, Spinelli had already begun exploring the possibility of enforcing this principle by leveraging Art. 235 of the Treaty establishing the European Economic Community (EEC). At that time, the aim was to transfer competences in his sector to the EC, thereby advancing the integration progress in areas related or connected to industrial policy, such as social, regional and environmental areas (see Giordano 2023).

[2] On the Spinelli Project, in addition to the references already cited, see also Cangelosi 1987; Pistone 2014; Dastoli 2014; Yıldırım 2014; Ponzano 2009; Giordano 2020.

[3] In the Treaty of Paris establishing the European Coil and Steel Community, Art. 5 contained a clear, implicit reference to the principle of subsidiarity. According to the Article, the Community would fulfil its task under the conditions laid down in the Treaty, with limited interventions in areas where Member States were unable to act. Furthermore, the provision referred to "implicit powers," a concept subsequently reiterated in Art. 235 of the EEC Treaty, which expressed the need for Community action to prevail "over the need to bridge the gap between the objectives and the powers conferred to achieve them." In addition, action thus undertaken should be linked "to an objective set by the Treaty based on a functional link", in compliance with a measure of proportionality "in relation to the objective to be achieved" (Tolomeo 2014: 21). Finally, Articles 100 and 189 of the EEC Treaty also contributed to consolidating this approach, promoting the gradual approximation of national laws to the extent necessary to the functioning of the common market, to be implemented by means of directives. On the origin of the principle of subsidiarity in European integration, see Giordano 2020. At the legal level, see De Pasquale 2000 and Bilancia, D'Amico 2009: 99-115.

[4] More generally, on this concept, see Savarese 2018; Donati 2011; Cotturri 2002. In particular, on the restrictive nature of state centralism by subsidiarity, from a historical perspective, see Malandrino 2001.

[5] Heinrich von Brentano, President of the Constitutional Committee of the Ad Hoc Assembly, which drafted the statute of a European Political Community in 1953, already expressed this idea when suggesting that "chacun des États membres [de la Communauté] et d'Europe, devront admettre, dans une telle cohabitation, le principe de subsidiarité. C'est-a-dire qu'ils ne remettront problèmes dont l'organe inférieur n'arrive pas à venir à bout avec ses seuls moyens. Nous pensons qu'un tel État, et une telle Europe, seront seuls en mesure d'assurer la coexistence pacifique d'hommes libres, de familles libres, de groupes ethniques libres et de peuples libres" (Brentano 1965 : 176). See also Ingravalle 2006. For a legal interpretation, see Marrone 2007.

In 1971, he suggested that the European Commission appoint a group of independent figures, mainly lawyers, to study all the issues related to the increase in the powers of the Assembly. By doing so, he aimed to raise the question of the democracy and efficiency of the EEC, hence the competences to be attributed to it. The final report, presented on 25 March 1972 by French constitutionalist Georges Vedel, head of the group of experts, addressed the objectives of reducing the democratic deficit and making EC action more effective. Therefore, the Vedel Report provided for the extensive use of Art. 235 — considered almost a para-constitutional article — to gradually extend the EC's powers (see European Parliament 1972; Neri Gualdesi 2018a).

Although Spinelli expressed some criticism of the document in progress, he stressed the power that — by virtue of its implicit powers — it could exercise under the existing Treaties to extend the Community sphere of action[6]. In a note drafted on 20 March 1972, in preparation for the Commission's proposal for the Paris Summit, Spinelli proposed broadening the spectrum of EC policy, including policies that were only partially or entirely uncovered, such as industrial, technological, regional, social and environmental policies. His suggestions were based on the idea of maximizing EC benefits. According to a logic of scale and at an international competition level, joint management of certain policies would be more useful and consistent than simple cooperation. Spinelli argued that,

> [certainement] doivent etre débattues, définies et acceptées ou repoussées en se fondant sur leur utilité ou superfluité pour la communauté: Si el les sont acceptées [cependant], leur application se fondera, selon le cas, sur les articles dea traités qui les autorisent, sur une application non restrictive de l'art. 235 qui permet la création d'instruments nouveaux, et sur l'art. 236 qui pennet la révision des traités. (Fondo Altiero Spinelli 1972: 2).

The Vedel Report was not followed up, except for the adoption at the Paris Summit of the recommendation to make the widest possible use of all the Treaty's provisions, including Art. 235, in the areas of environmental, regional, social and industrial policy. In any case, the principle of subsidiarity, under the guise of Art. 235, had by then made its way into the European political debate, influencing the drafting of documents and proposals aimed at changing the EC's political and institutional structure. This was the case, for example, with the Tindemans Report, which the Belgian Prime Minister was asked to prepare after the 1974 Paris Summit. As is well known, Tindemans was tasked by the heads of state and government of the EEC Member Countries with studying proposals for closer integration with a view to establishing the EU. Although it was considered too ambitious, the Tindemans Report, presented in December 1975, only made marginal and indirect reference to the principle of subsidiarity, while remaining vague about the allocation of powers[7].

[6] On Spinelli's critical observations, see Graglia 2008: 527-539.

[7] The document, which was divided into five sections, addressed the following topics: a common vision of Europe, Europe in the world, European economic and social policies, a common vision of Europe, a citizen's Europe, strengthening the institutions. In his report, Tindemans stressed the importance of taking concrete

According to the Belgian politician, the EC was "unbalanced: in some fields it [had] been given far-reaching powers, in others nothing, or practically nothing [had] been done (Report Tindemans 1976: 11)." In assessing the objectives that the Union should set itself, Tindemans spoke of the extension of powers in these terms: political choices must be carefully assessed, "They [will not occur] without a transfer of competences to common institutions. They [will not occur] without a transfer of resources from prosperous to less prosperous regions. They [will not occur] without constraints, freely accepted certainly, but then enforced unreservedly (*ibid*.: 14)." It was necessary "that the institutions of the Union [be able to] discuss all problems if they [were] relevant to European interests and consequently [came] within the ambit of the Union (*ibid*.: 15)." This implied that "within the fields covered by the European Union — although the Council had the final say —, the European states [would] always present a united front, otherwise, the term would be meaningless;" also because "the coordination of policies, which [was] precious during a transitional period, [had to] […] gradually make way for common policies (*ibid*.);" also because "the will to establish a genuine European Union" had to correspond to a similar will to "solve the real problems of the day at European level (*ibid*.: 5)."

In other words, the allocation of competences between Member States and the new EU would occur as a result of a will to move beyond mere cooperation and achieve political synthesis, dictated by the inability of States to act alone based on matters exceeding their own capabilities: i.e. "in view of the limited powers of national structures (Ippolito 2007: 6)." So, in the Report, the principle of subsidiarity remained passive in the background, evoked solely for functional needs and lacking any implementing mechanisms.

Instead, the June 1975 Report of the Commission on the EU, also advocated at the Paris Summit, was very different, and Spinelli's contribution was clearly discernible (European Commission 1975a; European Commission 1975b)[8]. In fact, the Report strongly stressed the need for the Union to possess centralized decision-making in the monetary field and also proposed a distribution of competences that would give precedence to the federal principle of the subsidiary allocation of initiative. Furthermore, it stressed the urgent need to enhance the role of the EP and

action to bring citizens closer to the European institutions, thus introducing a perspective of subsidiarity that would be taken up and, finally, officially included in the declarations preceding the common provisions (Title I) of the Maastricht Treaty in the well-known formula: "Resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen, in accordance with the principle of subsidiarity." These actions concerned the protection of fundamental rights, consumer protection, environmental protection, the establishment of the free movement of persons, education and information policy. From an institutional point of view, the Report contained proposals aimed at making the existing system more efficient by giving the EP greater powers, such as the legislative initiative, and the European Council the power to systematically designate the bodies responsible for implementing its decisions. In fact, the Report aimed at strengthening the EC institutions and political cooperation in order to gradually fulfil the identity, political and security ambitions of the future EU. See Neri Gualdesi 2018b; see also Willame 1977, in which some bibliographical references to documents and comments contemporary to the Report can be found.

[8] Hereinafter the Report of European Commission 1975b will be the reference document.

democratize the building of the Community (see European Commission 1975b: 16-17)[9]. Spinelli was the one who urged the Commission to get involved in the preparation of the Tindemans Report while drawing up its own document, attempting to introduce innovations in view of the desired reforms[10]. The first aspect that was immediately criticized was the predominance of the intergovernmental approach, deemed insufficient to deepen integration in those areas now considered crucial to the functioning of the Union. The European executive thus proved that it had implemented Spinelli's spirit, as Piero Graglia explains, especially when it called for "a far-reaching institutional reform to be implemented with the creation of a new institutional system centered on a European government (*ibid*.: 553)[11]", subject to, the Report specifies, "adequate parliamentary control (European Commission 1975b: 8)," with effective powers in some fields of competence and ready to take on others according to specific common needs. According to this document, the EU was "one aspect of the more general historical global process" that would lead to a "redistribution of decision-making powers throughout society enabling both the efficiency of public administration to be raised and the involvement of the citizen to be intensified (*ibid*.: 3)." In this respect, the principle of subsidiarity was made explicit, gaining particular political weight and being henceforth included among the Community reform instruments in relation to the division of competences. The document upheld "the principle of legal unity," the same principle that characterized the Communities, then "it [was] implicit that the Union institutions would exercise their powers in all fields within their competence in relation to all the Member States (*ibid*.)." According to the Commission, the division of competences between the Union and Member States should take into account the evolving nature of European integration, which provided for different forms of integration. This condition suggested that two formula could coexist to justify Community action in light of the

[9] On the drafting of the report, see also: 1) *Draft Report of the Commission*; 2) *Draft letter accompanying the Report*; 3) *Minutes of the 8 and 20 June 1975 meeting of internal Working Group on European Union*; 4) *Comments and proposed amendments submitted by members of the Commission;* 5) *Notes from the Legal Service on "Protection of Human Righst" and "Potential Powers"*; 6) *Minutes of the meeting of members of the Commission on 11 and 12 October 1973 in Duivenvoorde*", in "SEC(1975)2000 - OJ 345 - Point 16 Projet de lettre d'accompagnement du Rapport sur l'UE", Vol. 1975/9011, cart. Secrétariat général (1967), Activités du Greffe, Documents cotés, Documents SEC, 1975, in Historical Archives of the European Union.

[10] In December 1972, following the Paris Summit and shortly after the presentation of the Vedel Report, Spinelli again proposed setting up a study group within the Commission to draft a new reform plan: "since the Commission will have to prepare institutional proposals for May 1973, adjustments between the Council, Parliament and Commission during the same year, and a report on European Union for 1975, I could ask to do it, assisted by a task force" (Spinelli 1992: 366). On 12 March 1974, in a speech given at Bonn University on the occasion of the Shuman Prize award ceremony, Spinelli pressed the Commission once again, denouncing its inaction and inability to play a political role capable of initiating the reform of the Community system (see Graglia 2008: 549). Spinelli succeded in encouraging the Commission to adopt a truly reformist stance only in late 1974, as Piero Graglia explains: "This time Spinelli's pressure on his fellow Commissioners had […] some effect, at least according to the speech Ortoli gave to his colleagues during the Commission meeting on 9 January 1975, proclaiming a willingness to commit the Commission to political action in order to denounce, through the report on the European Union, the use of the intergovernmental method for to build the future union (*ibid*.: 552)".

[11] The Report was not obviously and completely in line with Spinelli's proposals and original strategy, see Spinelli 1971.

general interests and common objectives to be achieved. On the one hand, "the competence of the Union" was proposed, "which [meant] the areas in which it [could] act," and on the other, "the powers of the Union, meaning the way and means it [could] act (*ibid*.: 4)." The nature and scope of its powers could vary according to the issue, with the possibility of evolving over time if needed. Furthermore, it was reiterated that "any power-transfer process at European level [could not] and [should not] be allowed to impede the attainment of a greater degree of decentralization (*ibid*.: 3)." In other words, it suggested a model inspired by federalism and characterized by the flexibility of the principle of subsidiarity. To dispel any doubts over fears of excessive centralization, par. 12 of the document stressed that "No more than the existing Communities [did] so, European Union [was] not to give birth to a centralizing super-state. On the contrary, "Consequently and in accordance with the *principe de subsidiarité*, the Union [would] be given responsibility only for those matters which the Member States [were] no longer capable of dealing with efficiently (*ibid*.: 4)." If a decision was made to give "the Union competence in areas not specified in the Act of Constitution, the Act [should] be amended by a procedure probably entailing ratification by all the Member States (*ibid*.)".

The principle of subsidiarity was thus adopted as a partly technical and partly political criterion regarding the division of competences, which could be exclusive, concurrent or potential. The same competences that would later be found in the DTEU were anticipated here. It was obvious that in assigning the Union's competence "the *principe de subsidiarité* [was] restricted by the fact that the Union [should] be given extensive enough competency for its cohesion [and effectiveness] to be ensured (*ibid*.: 5)."

This limit achieved its purpose, because it required the establishment of minimum guarantees to maintain the standards of effectiveness of the Community policies, gradually calling for the integration of others. However, it also implied a political process whereby increasingly important fields of competence were devolved from the Member States to the Community. However, the Report assured that "between the exclusive competence of the Union and the Member States [there was] bound to be an extensive border area in which both Union and States [could] have competence (*ibid*.)," possibly becoming concurrent.

In fact, the EU would intervene "only when it felt the need" or could "enact outline legislation to cover the whole field specifying the area reserved respectively for the Union itself and for the Member States," which would remain "free to act on all aspects on which the Union had not taken action (*ibid*.)." In addition, with regard to the exercise of powers (paragraphs 20 and 21), a more legal-administrative and less political use of the principle of subsidiarity was suggested, since what prevailed was not a "criteria to attribute competences to one centre of power or another," but rather a "criterion for the exercise of powers [shared] by several centres of power." Francesco Ingravalle points out that, in the former case, "the principle [had] a political nature, while in the latter it [had] a more legal nature (Ingravalle 2006: 7)."

Finally, the Report remained open to any changes in the institutional balances or transfers of competences regarding relations between the Community and intergovernmental levels: there might be "areas which [fell within] the general competence of the Union where the Union [could] not or [need] not yet be given powers of its own (European Commission 1975b: 10)." This envisaged the possibility of "[intergovernmental] cooperation within the Union" to promote "agreement on certain basic options" and "in [the most] appropriate fields," with a view to leading "at a later stage to the Union been given powers of its own (*ibid*.)" in areas of common interest.

On the other hand, there might be "areas where it would not be considered necessary to give the Union its own powers but to establish organized forms of cooperation subsidiary to the exercise of the Union's own powers (*ibid*.)." Basically, cooperation was linked to integration and, depending on the situation, some of its matters could be gradually transferred to the Community level. The Report stressed that "the nature and scope of these powers [had to] therefore be broad enough to give the Union the dynamism it [needed] (*ibid*.)."

The Commission had envisaged all this for the future European Union to remain "dynamic in character" and "flexible in structure, so that it [could] adapt to political reality and to the requirements of a changing society (*ibid*.: 5)." In addition to a "constitutional" conception of the principle of subsidiarity, the 1975 Report also contained numerous, important recommendations that would later be taken up during the preparation of the DTEU. Later in the 1980s, this document would provide the EP with a theoretical basis to employ subsidiarity in designing the institutional reforms.

2. The Spinelli Project, Subsidiarity and the Federal Nature of the Union

With the Report being set aside following the European Council's decision to hold the first direct European elections and his time on the European Commission now considered over, Spinelli resigned as Commissioner in May 1976. After a period of withdrawal and personal difficulties[12], he decided to continue his political and Europeanist activities within the institution he considered to be a true centre of Community reform: the European Parliament.

Here, Spinelli resumed the constitutional path he had previously pursued with far greater consistency, convinced that after electing the Assembly, it would take the lead in the reform process towards a European federation. With its democratic legitimacy, the EP would in fact obtain the political authority needed to wrest the initiative from governments and gain recognition of its constitutional role. All Spinelli's efforts were geared towards this goal, drawing on his previous experiences, including the 1975 Report (see Graglia 2008: 583; Morelli 2010: 172).

[12] On 1 December 1975, Ursula Hirschmann suffered a cerebral hemorrhage, which led Spinelli to temporarily withdraw from politics, taking "a few months' leave," as he himself wrote in a letter to Giuseppe Lovato (Graglia 2008: 554).

In this Report, the Commission noted that "the States [were] no longer able to cope individually with problems and economic interpenetration [neutralized] the efforts of the various individual countries (European Commission 1975b: 2)," thus suggesting that the principle of subsidiarity be introduced into the Community system in order to more effectively allocate the political and operational competences of the future EU. Under the DTEU, the EP, strengthened by the popular vote, took "constitutional" action and drew up the most significant plan for redefining the EC's political and institutional architecture since its inception. In a speech delivered on 21 May 1980 at the Strasbourg Chamber, Spinelli clearly spurred his colleagues on regarding the goal he had set for himself since his election:

> We should […] ask ourselves why the Community seemed paralyzed and, on one or another issue, is becoming increasingly incapable of taking decisions. It is often said that there is a lack of political will, but that is not true. The political will to be together does exist in the Community, as demonstrated both by the fact that this Assembly has been elected, continues to meet and is capable of doing things together; and by the fact that, despite all their failures, the representatives of our governments continue to seek common solutions to the most serious problems. […] The fact is that we must say that what is lacking today are appropriate institutional instruments that allow needs, feelings, common aspirations to become common political will and action. (Fondo Altiero Spinelli 1980)[13].

The DTEU, whose drafting did not begin until January 1982 within the CIPE[14],

[13] After taking office in the EP, Spinelli began working to highlight all the contradictions inherent in the Community system, starting from the evident anomaly of a Parliament elected by universal suffrage but with almost exclusively advisory functions. In December 1979, an institutional crisis arose over the EP's decision to reject the Community budget. Spinelli, who was appointed vice-president of the Budgets Committee, leveraged this contradiction and led the Assembly into a confrontation with the Council: "We must not be fooled," Spinelli explained to his colleagues in the Chamber, "by those who say that we must save money, because this will cause our States to spend more and make the necessary policies impossible. At every turn, we come up against the need for common policies and every time we say: Unfortunately, we are not prepared. This is a good opportunity to say: The Parliament states that it is possible to move in this direction (Spinelli 1987: 180)." This process ended in May 1980 with the EP being defeated; however, Spinelli succeeded, as Graglia explains, in preparing "the Assembly of MEPs to respond positively" to his call for "action on the very causes of the impotence of the Parliament and the shortcomings of the Community policies implemented so far (Graglia 2008: 599-600)." This was an opportunity to push the Parliament to become more aware of its role and an active promoter of reforms. "With the current institutions and their current procedures and competences (Spinelli 1987: 214)." Spinelli wrote, "the Community is doomed to move from one crisis to another […], at a time when not only the economy but also the Community's foreign policy need to develop continuously, fully and with broad popular consent (*ibid*.)." The Parliament could no longer simply "deplore the inefficiency of the institutions" and "issue opinions (*ibid*.)." Instead, it had to "launch a major and intense debate on the Community's institutional crisis and "appoint an *ad hoc* working group [to draft] the institutional reforms needed (*ibid*.)." On 25 June 1980, in an open letter to the MEPs, Spinelli called for action and consistency from his colleagues whose groups or parts of groups were positive towards European democratic unification in order to discuss and vote on this project, "shaping it as a draft treaty that [would amend] and [supplement] the current ones," and then formally proposing "its adoption to the Community's national governments and parliaments (*ibid*.)".

[14] On 9 July 1980, Spinelli and eight other MEPs formed the *Crocodile Club* in Strasbourg. This group aimed to establish a link with public opinion to keep it informed of the Assembly's initiatives and to use the parliamentary method to pursue the goal of reforming the Treaties by setting up a parliamentary intergroup and an *ad hoc* committee. On 9 July 1981 the CIPE was established, removing the misgivings of members of the PP and some Socialists. It was responsible for drafting amendments to the existing Treaties and started its revision work in

aimed to equip the EP with the suitable instruments, including the principle of subsidiarity, to turn the Community into a true Union, just as Spinelli had advocated in his previous speech (Dastoli, Pierucci 1984: 46-48).

The Treaty provided for wide-ranging reforms and proposed a system to rebalance the political guidelines that had thus far governed the European integration process: intergovernmental cooperation and the so-called "Community method." It put the institutions in order and synthesized the two trends, trying to preserve as much flexibility as possible and ensure the best adaptation opportunities for the Union, enabling it to address global challenges on the basis of institutional consistency and political effectiveness while respecting the principle of democracy.

Therefore, it was implied — and partially concealed — that a gradual transfer of powers from the States to the Union would occur and guide the new European economic and political reality towards forms of supranational statehood. In this way, as Mauro Ferri declared, "the entire heritage of the Community's achievements" would be fully confirmed and "an extension of the Union's competences, both in the actual political sphere and in the economic and social spheres, in all areas such as industry, energy, transport and research where […], due to the limits imposed by the existing Treaties, it [had] never been able to initiate common policies" would be envisaged (*ibid*.: 10). This was possible thanks to the principle of subsidiarity, whose functions were laid out in the 1975 Report. It would then facilitate the transition from an intergovernmental or confederal Union to a supranational or federal Union, with an initial phase where the two practices "coexisted," the scope of which had been specified in the document through the allocation of powers on a subsidiary basis and "cooperation" and "common action" as methods of action.

However, the issue of which approach to adopt was still delicate, especially because how close the principle was to federalism. Subsidiarity was versatile but ambiguous. On the one hand, it showed clear "federalizing" potential, the main fear of the guardians of national sovereignty. On the other, it was capable of disguising this potential by mitigating or restraining the scope of devolution to the Union. For this reason, in order to prevent the debate from foundering on dogmatic and controversial terms such as federalism and confederalism, with the risk of positions becoming entrenched, a decision was made to abandon this initially drafted line and propose a "more pragmatic approach (*ibid*.: 49)."

With this spirit, adopted by the CIPE and the EP, the decision was made to adopt the less divisive principle of subsidiarity as the criterion governing the allocation of competences. During the parliamentary debates, Ferri put forward a motion for a resolution summarizing the underlying principles of the Treaty and indicating the method to be followed. According to this document, which was approved on 6 July 1982, the Union, based on the Community's existing institutions, should operate

January 1982. The parliamentary body was chaired by Socialist Mauro Ferri, assisted by three vicepresidents, Dutch Jouke Jonker (EPP) and Hans Nord (L), and Italian Marco Pannella (Ind.) (Dastoli, Pierucci 1984: 37 and ff). The activity of the *Crocodile Club* was documented by *Crocodile*, a bulletin printed in eleven issues by Spinelli, collected in Pistone 2008.

according to certain fundamental criteria, such as the separation of powers, legitimacy, democratic accountability, Member States participation and the Community's improved decision-making and functioning. However, the cornerstone was the principle of subsidiarity.

In fact, after explaining that the proposal was based on "general ideas that were sufficiently clear to guide the Commission's future work," the chairman of the CIPE presented what he viewed as "one of the cornerstones of the proposal itself," a concept that would "dispel any remaining doubts and hesitations among those who [feared] that [we intended] to push too far ahead on the EU path." Ferri was indeed referring to "the principle of subsidiarity, understood as a fundamental principle according to which, [it was] stated very clearly, the European Union [should] only carry out those tasks which [could] be undertaken more effectively in common than by the Member States separately (European Parliament 1982: 89)." Therefore, the idea of the distribution of competences and the need to act jointly remained unchanged, if circumstances so require or dictate, but the type of common or cooperative action was not specified. This is the ambiguity inherent in the principle, which the drafters of the DTEU skillfully exploited.

From the outset of the CIPE's work, the logic of subsidiarity prevailed, whereby the EU could pursue common policies to achieve greater effectiveness, bringing national wills together in closer cooperation or common action. However, the problem of curbing national self-interest was still far from being overcome, especially where it was concentrated, opposed and expressed through unanimity, thus paralyzing the Community.

In his May 1982 *Lettera ai membri del Parlamento europeo*, Spinelli addressed a series of issues. He argued that based on "a widespread feeling of a shared destiny" among the peoples of Europe, members of the Commission, the Parliament and the Court were "able to pursue and carry out acts based on a common will (Spinelli 1982a: 3)." These persons, representing the European political and ruling class, "[did]not forget the needs of their homelands, but rather learn[ed] to identify and respond to them within the framework of the broader needs of Europe"; in other words, they learned how "to have a constructive, common political will (*ibid*.: 4)."

On the contrary, in the Council, where the defence of national interests limited political vision and caused positions to become entrenched, "this will [was] very often lacking," and when it materialized, it implied "a low degree of European solidarity: it often [led] to the degradation of this solidarity (*ibid*.: 3)." What Spinelli stressed was a more European perception of problems, which on a logic of scale calling for a subsidiary transfer of powers, recognized that genuine Community bodies should be responsible for pursuing and implementing that solidarity, an objective that the Council had often disregarded.

The common EU institutions were the only ones capable of seeing economic problems for what they really were and agree on the need for joint efforts, since the challenges went far beyond the individual Member States' actual capacity for intervention. Work needed to be done to give the Community the right competences

to face these challenges and instruments capable of arriving at solutions and generating common action. To achieve this goal, increased political capacities and the democratic reform of the Community's institutions were essential to overcome "the absurdity" enshrined in the Treaties. On the one hand, the Treaties called for "the gradual establishment of common policies" but, on the other, entrusted "the decision-making power to a body [the Council] capable only of seeking a precarious cooperation on policies that remain[ed] national (*ibid*.: 6)."

Therefore, the reform of the Treaties aimed to put an end to this political paradox because, as Spinelli explained, the time had come for

> A group of States to decide that certain national policies [should] be pooled to create a common policy. In this case, these States [would have to] relinquish their power to take certain decisions, i.e. cede some of their sovereignty and transfer it to an appropriate common set of political bodies. If these common bodies [were] democratic, citizens [would regain], as Community citizens, what they [had] lost as citizens of their countries; but the Member State [would] reduce its sovereignty. Since it [would] no longer decide on certain matters, it [could] not oppose a decision, but it [should] accept it if it remained in the minority (*ibid*.: 5-6).

Therefore, in the wake of this European parliamentary term, the Treaties needed to be reformed to equip the Union with a structure capable of setting a true European course, summarizing the interests of the various political and institutional actors involved and entrusting the competent bodies and appropriate levels with the task of putting into practice this European will using the Community method or the cooperative approach. In addition, instruments needed to be devised that were capable of steering the Union, not too quickly, away from intergovernmental consultation, which was often difficult and ineffective, to more consistent and effective Community action. The implicit and explicit use of subsidiarity — granted to the Union in the DTEU — provided the opportunity to modulate this pace, making use of both the more direct attribution of competences[15] and the method of action to be followed in relation to the objectives to be achieved[16].

3. The Three Options for Subsidiarity in the DTEU: Implicit, Explicit and Potential

According to Spinelli, appointed as rapporteur-coordinator of the CIPE, the reform of the Council and its powers, and therefore the relationship between the intergovernmental system and the Community system, remained "the cornerstone of institutional reform (Spinelli 1982a: 7)." In January 1982, during its first meeting, the CIPE established a timetable for its work and entrusted six rapporteurs[17] with the task

[15] On competences, see Dastoli, Pierucci 1984: 73-74.

[16] On methods of action, *ibid*.: 72-73.

[17] In order of policy areas, they were the French socialist Jacques Moreau, the German EPP member Gero Pfennig, the British conservative Derek Prag, the Gaullist Michel Junot — later replaced by the German socialist Hans-Joachim Seeler —, the Dutch liberal Karel De Gucht and the Italian Christian Democrat Zecchino (see Spinelli 1984b: 4). On the work of the group, see Dastoli, Pierucci 1984: 54-61.

of studying and providing their rapporteur-coordinator with some "reports" on "the competences of the Union in the field of economic policy, internal and external policy, […] social policy, […] political cooperation, security and development aid" as well as on the Union's finances, law and institutions (Spinelli 1982c: 7).

Once collected, the reports would be submitted to the EP for approval, voted on and then go on to form the political basis on which legal experts would draft the Treaty. According to Spinelli, if the CIPE wanted "to open the prospect of resuming the Community's path towards a true political union," it would have to "address the issue of expanding the tasks and competences of the Union and transforming the Commission of the Communities into a true executive and the Parliament into a true legislative assembly (Spinelli 1982a: 6)." These were issues that could not be avoided.

Therefore, the CIPE invited Spinelli to prepare a draft of the preliminary guidelines outlining the work to be carried out and the objectives to be pursued[18]. In this first draft, the principle of subsidiarity, considered "the essence of the Union," was explicitly identified as the criterion governing its competences (Spinelli 1982b), which, depending on the situation, could be *exclusive*[19] (conferred in accordance with the previous Treaties or added for political reasons), *concurrent*[20] (to ensure effective common action on "tasks" considered "essential to the life of the Union") or *potential* (for policies that still remained within the scope of intergovernmental cooperation and could potentially and gradually fall within the scope of common policies) (Spinelli 1982d: 9)[21]. The definition of competences was set out in Art. 12 of the Treaty. As above-mentioned, they could be exclusive, i.e. attributed to the Union by virtue of a specific political choice, wherein the supranational entity was considered the most suitable actor to achieve the best results in certain areas or which attributed to it, under the previous Treaties, specific policies that were already communitized, such as the free movement of persons, goods, capital or commercial policy. In these areas, Member States could not intervene or legislate. Then there were the concurrent

[18] The guidelines that were to characterize the reform were included in the resolution approved by the EP on 6 July 1982. See Spinelli, De Gucht, Pfennig, Prag, Seeler, Zecchino 1984.

[19] They were later defined in Art. 12.1.

[20] Art. 12.2 of the Treaty stated that, with regard to concurrent competences, "the Union shall only act to carry out tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers." It also specified that "a law which initiates or extends common action in a field where action has not been taken hitherto by the Union or by the Communities must be adopted in accordance with the procedure of organic laws," i.e. through a more complicated procedure than the regular one, which entailed greater involvement of Member States.

[21] Beyond the specific nature of competences, Spinelli gave an even broader meaning to subsidiarity, understanding it as the principle governing the "fluid" distribution of political and operational competences as well as tasks, "the content and scope of which," Spinelli wrote, "may vary according to the evolution of the Union (Spinelli 1982d: 9)." The latter, he added, "must have the appropriate powers to ensure consistency, convergence and cooperation among Member States' policies — and to take its own initiatives (whenever the principle of subsidiarity so requires)," in the areas provided for in the previous Treaties and in "general and […] sectoral economic policy," in monetary policy, social policy, cooperation with the Third World and in "the gradual shaping of a genuine common European policy in the area of international relations and security (*ibid*.)." All these competences, Spinelli concluded, "must be established in a variable way depending on the fields and possible stages," but they must be "sufficiently clear" so that the Union "can exercise them effectively" and must "take into account the inevitable prospect and evolution of the Union's tasks (*ibid*.: 9-10)".

competences, which offered a wide margin of discretion in terms of the actors involved in the political and regulatory process. In general, Member States' legislation could intervene until the Union legislated, i.e. outside the scope of its intervention. Conversely, the Union would not exceed the limits imposed by the Treaties, leaving the States with absolute autonomy. However, the former could intervene in various forms and at different rates where there was a clear lack or manifest insufficiency of state power. Concurrent competences brought the Union into the sphere of federal systems, even though it did not intend "to be a super-state" but rather only an effective system with a capacity for intervention appropriate to its ambitions and size (Dastoli, Pierucci 1984: 53).

This type of competence was only accepted and incorporated by the CIPE into the DTEU after a long internal debate, as there were fears that the unscrupulous use of the subsidiary logic might lead the Union to excessive centralization, gradually depriving Member States of their powers. To overcome this problem and ensure that some of these competences were attributed to the Union, a decision needed to be made involving the institutions representing the interests of its two political bodies: the Parliament for its citizens and the Council for its Member States, i.e. an organic law. In this way, Graglia explains, the Union "would have a strong and irreversible impact on the reality of Member States not only in terms of the economy and single market but also specifically regarding social, environmental, labour, rights protection, health, education, transport, television and radio broadcasting policies (Graglia 2008: 602)."

Finally, the Treaty provided for so-called "potential competences," which were not specified, albeit present in the 1975 Report, because they called for federalizing actions in areas considered strategic to the national interest. According to the subsidiarity underlying the DTEU logic, tasks needed to be carried out by the institutions and in the ways that best pursued the common interests of the Union. By virtue of this logic, the whole Treaty was permeated by potential competences, making it flexible in terms of the distribution of tasks, allocation of power and operating procedures. What characterized the Draft Treaty was precisely "the fluidity and internal dynamics among the different spheres of competence and action of the Union," specifically, in the same way as "the transition from state competence to Community competence [was] organized," i.e. on a competitive basis through organic laws, the Treaty "provided for the transition from the cooperation method to common action (Angelino 2003: 161)," which could transfer certain matters from the intergovernmental to Community level.

Potential competences were carefully included because it was believed that rapid progress towards complete economic integration and international pressure would provide impetus to the federalization of foreign, security and defence policy. According to the Draft Treaty, those areas would fall under the potential competences of the Union, even though they were initially intended to remain under the full control of the Member States. At most, the latter could strengthen their cooperation. Nevertheless, Sergio Pistone explains, the letter of the Treaty included "a mechanism

to transfer potential competences to the area of the exclusive or concurrent competences of the Union without needing new treaties (with unanimous consent and ratification) and simply on the basis of a unanimous decision by the European Council (see Pistone 2014: 50). In other words, the latent competences, which were not clearly set out in the Treaty, could also be activated, if necessary, with the unanimous agreement of the States.

In addition to the specific competences, the confederal or potentially federal nature of the EU can also be found in its methods of action. In this case, the scope of its intervention was determined by the method used to achieve the political initiative, which could be either the Community method using common action or the intergovernmental method, if carried out using cooperation. Common actions were "all normative, administrative, financial and judicial acts, […], and the programmes and recommendations issued by the Union itself, originating in its institutions and addressed to those institutions, or to States, or to individuals" (Art. 10.2); while cooperation consisted of "all the commitments which the Member States [would] undertake within the European Council" (Art. 10.3). Their limits were set and defined by the Treaty, but Article 11.1 provided that, under certain conditions, "some matters" could be "transferred from cooperation to common action" — which was irreversible (Art. 11.2) –, bringing "those matters within the exclusive or concurrent competence of the Union"[22]. Finally, all areas of cooperation could be transferred, again by the unanimous decision of the European Council, to common action and "be the subject of concurrent or exclusive competence of the Union"; as Pier Virgilio Dastoli and Andrea Pierucci explain, this was "an implicit case of so-called potential competences (Dastoli, Pierucci 1984: 91).

In the more sensitive area of international relations, the transfer from one method to another was also envisaged in order to achieve the objectives listed in Art. 9 of the Treaty more effectively[23]. In this regard, the Union could "act either by common action or by cooperation" (Art. 63.2). The Treaty, for example, provided that the Council could "extend the field of cooperation, in particular as regards armaments, sales of arms […], defence policy and disarmament" (Art. 68.1). It also specified that "under the conditions laid down in Article 11 […], the European Council [could] decide to transfer a particular field of cooperation to common action in external policy" (Art. 68.2), obviously to achieve a specific macro-European objective.

This mechanism would provide the Union with more consistency and effectiveness, enabling it, according to Pistone, to make that "qualitative leap" towards becoming "a fully democratic, federal Europe that is really capable of acting on the international stage (Pistone 2014: 51)." Finally, it should not be underestimated that,

[22] This could occur, for example, in the field of industrial cooperation (Art. 54.1), where, if "common interest" justified it, the European Council could decide "to convert those forms of cooperation into a common action of the Union." These transfers could also be temporary, i.e. for the period required to solve the problem, as indicated, for example, in Art. 68.4.

[23] This Article contained all the Union's objectives, such as "a human and harmonious development of society," "the economic development of its peoples," "security, peace, cooperation, détente, disarmament and free movement of persons and ideas" and "the harmonious and equitable development of all the peoples of the world."

whether it acted using cooperation or common action, the commitments undertaken would be "implemented by the Member States or by the institutions of the Union" (Art. 10) within a single legal and political framework, i.e. within the scope in which the Treaty placed that initiative, with a view to achieving a more consistent and effective Union. The inclusion of cooperation within the single legal framework ensured that "the legal guarantees provided for in the Treaty [applied] also to it" (Art. 67) (see Dastoli, Pierucci 1984: 73).

It is worth remembering that, thanks to the cautious introduction of the principle of subsidiarity, which was only explicitly mentioned in the Preamble[24], the DTEU envisaged a political-institutional structure that, although it made use of a system of connected vessels, it clearly distinguished Community policies and action from intergovernmental policies and action. The former could appropriately and gradually take over the areas reserved for the latter, whereas the latter, although guaranteed, had a limited scope of action, as they could not interfere with the former. It was like a system of canals and locks, where portions of national sovereignty could be drained from the reservoirs of intergovernmental cooperation into the wider pool of the Union's policies, directing in a harmonious and controlled manner the course of devolving only those competences required to "revive the democratic unification of Europe, of which the European Communities, the European Monetary System and European political cooperation [represented] the first achievements." In Spinelli's words,

> Our project acknowledg[ed] the existence of a sphere of problems that [would be] addressed by the European Council using the cooperation method. However, on the one hand, it prohibit[ed] the intergovernmental method from encroaching on the scope of common action and, on the other, [opened] the door that [made] it possible to move from cooperation to common action (Spinelli 1987: 336).

[24] Where it was stated: "Intending to entrust common institutions, in accordance with the principle of subsidiarity, only with those powers required to successfully complete the tasks they may carry out more satisfactorily than the States acting independently."

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