Essays

Subsidiarity and the New Frontiers of Freedom of Contract

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Abstract

The principle of subsidiarity is a suitable basis for legitimating a ruling that contracts concluded in place of public acts are binding. In this way, freedom of contract extends to new forms, namely: 'contracts substitutive of administrative measures'; 'contracts as an alternative to judicial settlements'; and 'contracts as sources of legal rules'. This extension of the freedom of contract runs counter to theories predicting the 'death of contract' and the 'fall of freedom of contract'. This paper aims to reconstruct the systematic framework of these legal reasonings.

I. Introduction

This paper develops the argument that contracts can pursue public interests in terms of the principle of subsidiarity in five conceptual steps.

First step: I establish the fundamental theorem of assessment according to subsidiarity.

Second step: the paper identifies the decisions that can potentially change the system concerning the sources of legal rules.

Third step: I pinpoint the decisions that can potentially increase the area of freedom of contract.

Fourth step: I will refute the doctrine that contracts cannot pursue public interests.

Final step: the paper will explain why judicial decisions inferred from the principle of subsidiarity are compatible with the higher value of legal certainty.

Conclusion: I will tie up the results of the analysis by claiming that these decision-making techniques imply that the distinction between 'private law' and 'public law' can be considered superseded.

II. The Historical Evolution of the Subsidiarity Principle

Subsidiarity is a very deceptive category. Metaphorically, the expression

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'principle of subsidiarity' evokes the idea of supporting,[1] which misleadingly reflects a natural inclination for self-restraint.

This moderate characterisation is not accidental. Historically, horizontal subsidiarity could first be found in some political statements by the Catholic Church, especially the Encyclical *Rerum Novarum* of Pope Leo XIII (15 May 1891).[2] In this document, the Catholic Church declared its intention to provide fundamental public services. In the period between the unification of Italy and the Lateran Pact, ecclesiastical institutions felt the need to use a reassuring tone as if to say, 'We wish to provide essential public services, but we don't want to replace the State'. In this context, subsidiarity is a manifesto of political action rather than a technique of legal assessment.

The subsidiarity principle became a decision-making tool in European Union law (initially, Art 3B EC Treaty, then Art 5 EC Treaty, and now Art 5 EU Treaty).[3]

III. The Logical Sequence of Assessment According to Subsidiarity

The EU-law principle of subsidiarity is not only concerned with 'vertical' subsidiarity. More broadly, it establishes the fundamental theorem that must work in any application of the principle of subsidiarity both vertically and horizontally.

This precept can lead to a preliminary ruling concerning the validity/suitability of a public act carried out by a subject typically considered incompetent or inadequate to fulfil public interests. Consequently, a court will order the enforceability of the envisaged actions, or in any case, what is pursued by the act in question. The term 'vertical' subsidiarity is used if the otherwise incompetent subject is a public institution. 'Horizontal' subsidiarity regards acts originating

[1] Cf R. Carleo, 'La sussidiarietà nel linguaggio dei giuristi', in M. Nuzzo ed, *Il principio di sussidiarietà nel diritto privato* (Torino: Giappichelli, 2014), 3.

[2] For a thorough discussion, C. Martinez-Sicluna Y Sepúlveda, 'Il principio di sussidiarietà ed il suo fondamento classico', in G.P. Calabrò and P.B. Helzel eds, *La nozione di sussidiarietà tra teoria e prassi* (Napoli: Edizioni Scientifiche Italiane, 2009), 19 et seq; M. Ayuso, 'L'ambigua sussidiarietà', in G.P. Calabrò and P.B. Helzel eds, *La nozione di sussidiarietà tra teoria e prassi*, 35 et seq.

[3] Art 5 TEU: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'. For an analysis: P. Caretti, 'Il principio di sussidiarietà e i suoi riflessi sul piano dell'ordinamento comunitario e dell'ordinamento nazionale' *Quaderni costituzionali*, 3 et seq, especially 10 (1993); G. Strozzi, 'Il ruolo del principio di sussidiarietà nel sistema dell'Unione europea' *Rivista italiana di diritto pubblico comunitario*, 1-2 (1993), 59 et seq, especially, 69; P. Vipiana, *Il principio di sussidiarietà "verticale"* (Milano: Giuffrè, 2002), 45 et seq; P. Femia, 'Sussidiarietà e princípi nel diritto contrattuale europeo', in P. Perlingieri and F. Casucci eds, *Fonti e tecniche legislative per un diritto contrattuale europeo* (Napoli: Edizioni Scientifiche Italiane, 2004), 143 et seq; F. Ippolito, *Fondamento, attuazione e controllo del principio di sussidiarietà nel diritto della Comunità e dell'Unione Europea* (Milano: Giuffrè, 2007), 163 et seq.

from a non-institutional subject. The condition for invoking the principle of subsidiarity is to prove that these judicial solutions fulfil a public policy goal in the best way.

Through this possible legal reasoning, the principle of subsidiarity may have a substantial impact on the system of the sources and the self-regulatory acts of civil law. Instead, case law demonstrates an ambivalent attitude towards the use of these decision-making techniques.

Some decisions, however, seem to make powerful creative use of the subsidiarity principle. In the field of 'vertical' subsidiarity, the solution of '*chiamata in sussidiarietà*' is emblematic. This technique is used to obtain a preliminary ruling on the validity of a statutory law of the State establishing the claims that can be brought before a court relating to a matter reserved to regional legislation. The Italian Constitutional Court conceived this 'monumental' work of interpretation,[4] and decisions of this weight have profoundly changed the system of the distribution of legislative powers between the State and Regions.[5]

The concept of 'horizontal' subsidiarity was used in decisions concerning banks[6] and the Third Sector Code/decreto legislativo 3 July 2017 no 117.[7] From this was derived the premise that banking foundations and non-profit associations are private parties.[8] The combination of 'horizontal' and 'vertical' subsidiarity has given rise to preliminary rulings on the ability of central statutory law to establish limits and controls on the activities of these subjects.

In case law, on the other hand, many 'missed opportunities' can arise. Indeed, there have been no instances of this approach in such decisions, even though recourse to the principle of subsidiarity would be particularly suitable.

First, we must consider the legal reasoning concerning the question of the legitimacy of regional private law.[9] Subsidiarity can be invoked to justify a decision that a regional statutory law establishing enforceable claims in intersubjective

[4] The leading cases are Corte costituzionale 1 October 2003 no 303, *Il Foro Italiano*, I, 1004 (2004); Corte costituzionale 13 January 2004 no 6, *Giurisprudenza costituzionale*, 104 (2004).

[5] See: R. Ferrara, 'Unità dell'ordinamento giuridico e principio di sussidiarietà: il punto di vista della Corte costituzionale' *Il Foro Italiano*, I, 1018 (2004); S. Gambino, 'Repubblica delle autonomie e sussidiarietà', in G.P. Calabrò and P.B. Helzel eds, n 2 above, 160 et seq; R. Rolli, 'Il principio di sussidiarietà nel diritto pubblico', in G.P. Calabrò and P.B. Helzel eds, n 2 above, 202 et seq Especially S. Papa, *La sussidiarietà alla prova: i poteri sostitutivi nel nuovo ordinamento costituzionale* (Milano: Giuffrè, 2008), 141, observes how these jurisprudential guidelines have changed the system of division of legislative powers between State and Regions.

[6] Corte costituzionale 29 October 2003 no 300 and no 301, *Il Foro Italiano*, I, 1324-1326 (2006). In the same matter more recently, Corte costituzionale 21 December 2016 no 287, *Banca, borsa titoli di credito*, II, 167 (2017).

[7] Corte costituzionale 12 October 2018 no 185, *Giurisprudenza costituzionale*, 2051 (2018).

[8] For an analysis of these decisions: D. De Felice, *Principio di sussidiarietà ed autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2008), 152 et seq.

[9] On the legal framework in place before the reform of "*Titolo V*" of the Italian Constitution, S. Giova, *"Ordinamento civile" e diritto privato regionale* (Napoli: Edizioni Scientifiche Italiane, 2008) 39, 61.

relationships is valid despite the State having exclusive competence concerning the '*ordinamento civile*' (Art 117, para 2, let *l)*, of the Italian Constitution).[10] The Italian Constitutional Court has adopted these innovative solutions – grounded, however, in technical reasons other than the subsidiarity principle.[11]

Second, it is worth examining certain decisions in the domain of private international law[12] concerning the application of a foreign statute law contrary to the connecting factors provided for in Italian statute law.[13] Transnational Courts have taken such decisions without referring to the principle of subsidiarity.

Third, certain potential decisions involving the application of provisions of the *lex mercatoria* not complying with the rules of Italian statute law must also be considered.[14] Specifically, the principle of subsidiarity might motivate a ruling that the unilateral promises in use in international business practices but not provided for by statute law are binding notwithstanding Art 1987 of the Italian Civil Code.[15] What is actually used to reach these solutions, instead of the principle of subsidiarity, is the artifice that international arbitration awards are unappealable, as authoritatively proposed by Francesco Galgano.[16]

[10] The counter-argument that the State alone is competent with regard to '*ordinamento civile*' has been used by the Italian Constitutional Court: Corte costituzionale 24 October 2016 no 228, *Il Foro Italiano*, I, 3701 (2016); Corte costituzionale 16 January 2013 no 6, *Corriere giuridico*, 1057 (2013); Corte costituzionale 11 March 2011 no 77, *Il Foro Italiano*, I, 1294 (2011). In opposition to this jurisprudential orientation the theory was elaborated that there is a *genus ad speciem* relation between '*diritto privato'* and '*ordinamento civile*': G. Alpa, 'L'ordinamento civile nella recente giurisprudenza costituzionale' *I Contratti*, 186 (2004); F. Ghera, 'Ordinamento civile e autonomia regionale: alla ricerca di un punto di equilibrio' *Giurisprudenza costituzionale*, 1182 (2011); A.M. Benedetti, 'Proprietà e diritto privato regionale (a proposito di Corte cost. n. 228/2016)' *Diritto civile contemporaneo*, 3 February 2017.

[11] For example, see Corte costituzionale 24 February 2017 no 41, *Il Foro Italiano*, I, 2566 (2017).

[12] These decisions reflect the transition from the Savigny's formalistic conception of private international law (F.C. von Savigny, *Sistema del diritto romano attuale*, VIII, trans. V. Scialoja, (Torino: UTET, 1898), 27 et seq) to a functionalistic theory. From this angle, G. Carella, 'Specificità del metodo conflittuale e materializzazione del diritto internazionale privato. Atti della Società Italiana degli Studiosi del Diritto Civile', in *Il diritto civile oggi. Compiti scientifici e didattici del civilista* (Napoli: Edizioni Scientifiche Italiane, 2006), 59 et seq, uses the expression 'materializzazione del diritto internazionale privato'.

[13] European Court of Justice, Grand Chamber, Case C-353/06, *Grunkin-Paul* v *Standesamt Niebüll*, Judgement of 14 October 2008, available at www.curia.europa.eu; European Court of Justice, Case C-148/02 *Garcia Avello* v *Gov. Belgio*, 2 October 2003, available at www.eur-lex.europa.eu. Regarding the execution in Italy, Tribunale di Bologna 9 June 2004, *Diritto di Famiglia*, 441 (2004). For a thorough analysis, F. Maisto, *Personalismo e solidarismo familiare nel diritto internazionale privato* (Napoli: Edizioni Scientifiche Italiane, 2011), 92. On this issue see also Corte costituzionale 21 December 2016 no 286, *Il Foro Italiano*, I, 1 (2017).

[14] On this theory, F. Maisto, 'Promesse unilaterali', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2014), 66 et seq. For an extension from *lex mercatoria* to *lex electronica/informatica/digitalis*, P. Laghi, *Cyberspazio e sussidiarietà* (Napoli: Edizioni Scientifiche Italiane, 2015), 117. The same solution is proposed on the basis of different arguments by F. Bravo, 'Ubi societas ibi ius e fonti del diritto nell'età della globalizzazione' *Contratto e impresa*, 1345 and 1386 (2016).

[15] See F. Maisto, n 14 above, 63 et seq.

[16] See F. Galgano, 'Globalizzazione dell'economia e universalità del diritto' *Politica del*

IV. The Role of the Principle of Subsidiarity in Expanding Freedom of Contract

Certain potential decisions explain the role of the principle of subsidiarity in expanding freedom of contract.

Freedom of contract has a specific meaning in the sense of the principle of contractual autonomy of the parties.[17] This argument is used to justify, with regard to a contract, the decision to enforce the execution of the actions intended by the interested parties in the absence of a specific statutory provision.[18] In constitutional terms, the principle of freedom of contract can justify a preliminary ruling on the invalidity of a statutory provision establishing limits on the enforceability of contracts relating to some intersubjective relationships.[19] In the light of the *Drittwirkung* of fundamental principles, this technical ground justifies the decision that the benefits agreed by the concerned parties can be claimed even in the event of a contrary provision in statutory law.[20]

Horizontal subsidiarity could be the legitimating factor for decisions concerning the enforceability of the benefit provided for in an agreement on assets subject to the domain of public administration, a solution compliant with the conception of contracts substituting administrative measures.[21] These words are not merely descriptive, however. According to the logic of subsidiarity, these agreements are contracts. Subsidiarity principle legitimises acts that the otherwise incompetent subject ordinarily performs in matters within its competence; hence, as private parties ordinarily use contracts, the agreements legitimised by horizontal subsidiarity are contracts. This reconstruction corresponds to the concept that an EU directive or a national statute law do not change their nature when legitimised by vertical subsidiarity. Therefore, the principle of horizontal subsidiarity makes an evolutionary interpretation of Art 11, legge 7 August 1990 no 241 on '*convenzioni urbanistiche*', appropriate.[22] The same operation also applies to other, more specific,

diritto, 190 (2009). Galgano's theory is ultimately followed also by F. Sbordone, *Contratti internazionali e lex mercatoria* (Napoli: Edizioni Scientifiche Italiane, 2008), 114.

[17] About the polysemy of the category, H. Dagan and M. Heller, 'Freedom of Contracts' *Columbia Law & Economics Working Paper 458*, 2 (2013). They write: 'Freedom of contracts is the sum of two components, which together constitute contractual autonomy: the familiar freedom to bargain for terms within a contract, and the long-neglected freedom to choose from among contract types'.

[18] Following the classic exposition delivered by Sir George Jessel MR, when contracts 'entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice' (A. Chrenkoff, 'Freedom of Contract: a New Look at the History and Future of the Idea' 21 *Australian Journal of Legal Philosophy*, 36 (1996).

[19] D.E. Bernstein, 'Freedom of contract' *George Mason University Law and Economics Research Paper Series*, 08-51.

[20] Below, note 43.

[21] On the category of 'contracts substitutive of administrative measures', F. Maisto, *L'autonomia contrattuale nel prisma della sussidiarietà orizzontale* (Napoli: Edizioni Scientifiche Italiane, 2016), 128.

[22] This is a new interpretation of the Art 11, legge 7 August 1990 no 241, that conflicts with

statutory provisions such as Art 306-*bis* of the '*Codice dell'ambiente*', concerning environmental settlement arrangement.[23] This interpretation allows the use of the rules established for contracts relating to pre-contractual liability, personal incapacity, and vices of will, as well as damages for breach of contract, etc.

Horizontal subsidiarity can justify a ruling that certain alternative dispute resolution agreements are binding. Such an assessment is based on the precept that contracts other than judicial settlements are allowed.[24] This category has a broad field of application. Principally, it might justify recourse to the rule of contractual autonomy. Indirectly, it could justify considering that the statutory provisions establishing limits to arbitration (for example, decreto legislativo 12 April 2006 no 163, Art 241, para 1) and other forms of alternative dispute resolution are incompatible with the Italian Constitution.

Above all, the principle of horizontal subsidiarity could be used to justify the decision to enforce agreements regarding planned actions usually reserved by law. This decision supports the theory of the validity of contracts as sources of legal rules.[25] Mostly, these agreements envisage actions binding on the third parties; for example, condominium regulations; association bylaws; general contractual terms and conditions;[26] collective labour agreements;[27] bylaws of sports federations;[28]

the reconstruction offered by administrative law scholars: G. Greco, 'Il regime degli accordi pubblicistici' *Autorità e consenso nell'attività amministrativa* (Giuffrè: Milano, 2002), 161; G. Greco ed, *Accordi amministrativi tra provvedimento e contratto*, (Torino: Giappichelli, 2003), 86; F.G. Scoca, 'Autorità e consenso' *Diritto processuale amministrativo*, 436 (2002); V. Cerulli Irelli, 'Note critiche in tema di attività amministrativa secondo moduli negoziali' *Diritto Amministrativo,* 224 (2003); G.D. Falcon, *Le convenzioni pubblicistiche. Ammissibilità e caratteri* (Milano: Giuffè, 1984), 205.

[23] For the contractual nature of this agreement, M. Meli, 'La nuova disciplina delle transazioni nelle procedure di bonifica e di riparazione del danno ambientale concernente i siti di interesse nazionale' *Nuove leggi civili commentate*, 456, 480 (2016). *Contra*, U. Salanitro, 'Dal "contratto" all'"accordo": la riforma della "transazione" ambientale' *Giustizia civile*, 411, 421 (2017).

[24] On the category of 'contracts alternative to judicial settlements', F. Maisto, n 21 above, 129.

[25] On the category of 'contracts as sources of legal rules', F. Maisto n 21 above, 130. See also: N. Lipari, 'La formazione negoziale del diritto' *Rivista di diritto civile*, I, 307 (1987); N. Lipari ed, *Le fonti del diritto* (Milano: Giuffrè, 2008), 166; G. Alpa, *Il contratto in generale* (Milano: Giuffrè, 2014), 293. Skepticism is expressed by E. del Prato, 'Principio di sussidiarietà sociale e diritto privato' *Giustizia civile*, 387 (2014). At the other extreme, for R. Di Raimo, *Autonomia privata e dinamiche del consenso* (Napoli: Edizioni Scientifiche Italiane, 2003), 105 and 108, in accordance with the principle of subsidiarity, all contracts are sources of law.

[26] See also M. Orlandi, 'Le condizioni generali di contratto come fonte secondaria?', in F. Macario and M.N. Miletti eds, *Tradizione civilistica e complessità del sistema. Valutazioni storiche e prospettive della parte generale del contratto* (Milano: Giuffrè, 2006), 347 et seq.

[27] See N. Lipari, *Le fonti del diritto* (Milano: Giuffrè, 2008) 171; M. Cerioni, 'Prime riflessioni sulle fonti dell'autonomia privata' *Annali della Facoltà giuridica di Camerino* (Napoli: Edizioni Scientifiche Italiane, 2012), 147.

[28] See M. Cimmino, 'Sussidiarietà orizzontale e ordinamento sportivo', in M. Nuzzo ed, n 1 above, 225 et seq.; G. Santorelli, *Sussidiarietà e regole di validità dei contratti sportivi*, in M. Nuzzo, n 1 above, 235 et seq. For a different opinion, M.P. Pignalosa, 'Ordinamento sportivo e fonti private' *Jus Civile*, 6, 665 et seq (2017).

and professional ethical codes.[29] The category also contemplates agreements organising events regarding the relationships between the parties; for example, agreement on the choice of applicable law (*lex voluntatis*) under the Rome Convention of 1980.[30]

This interpretation differs from the one proposed by a famous scholar of Italian private law, Mario Nuzzo.[31] Nuzzo considers it correct to use subsidiarity to justify the decision that agreements in place of public acts are binding. However, he does not consider these agreements to be contracts. He argues that contracts are incompatible with the pursuit of public interests, a proposition that is deeply rooted in Italian legal tradition,[32] but such an argument must be disproved. From this perspective, an opposite view arises from an analysis of the role of the contract in allocating resources according to the Italian Constitution.

In ancient civilisations, agreements (more specifically, barter) were simply a way of appropriation that avoided violence.[33] In modern civilisations, contracts play a fundamental role in the organisation of civil coexistence. The traditional ethical foundations – ie, *pacta sunt servanda*[34], *solus consensus obligat*[35], *qui dit contractuel dit juste*[36] – differ from the constitutional model of intersubjective relationships. They can only annul immoral agreements: for example, when a thief offers to sell the stolen property back to the victim of the crime. They do not explain the actual reason why contracts are generally binding in modern society. In a free market system, someone enters into a sale-and-purchase contract because he needs something of value from someone else, who, under the law, has a surplus. From a general perspective, the enforceability of contracts depends on a political choice regarding resource allocation. Such considerations lead to an appreciation of the compliance of freedom of contract with the liberal allocative system reflected in

[29] See A. Bellelli, 'Il problema della giuridicità delle regole deontologiche delle professioni', in M. Nuzzo, n 1 above, 79 et seq; E. del Prato, 'Regole deontologiche delle professioni e principio di sussidiarietà', in M. Nuzzo, n 1 above, 91 et seq.

[30] See F. Sbordone, *La "scelta" della legge applicabile al contratto* (Napoli: Edizioni Scientifiche Italiane, 2003), 184.

[31] M. Nuzzo, n 1 above, XVI, and R. Carleo, 'La sussidiarietà nel linguaggio dei giuristi', in M. Nuzzo eds, n 1 above, 9.

[32] For example, see L. Cariota-Ferrara, *Il negozio giuridico nel diritto privato italiano* (Napoli: Morano, 1948), 281.

[33] For E. Betti, *Teoria generale del negozio giuridico* (Napoli: Edizioni Scientifiche Italiane, 1994), 45, n 4 (based on Herodotus, *Ἱστορία*, IV, 196), there is no difference between the practice of ancient barter and the modern bilateral contract.

[34] 'Pacta et promissa semperne servanda sint, quæ nec vi nec dolo malo, ut prætores solent, facta sint' (Cicero, De officiis, 3, 92, 24).

[35] G. Astuti, 'Contratto (diritto intermedio)' *Enciclopedia del diritto* (Milano: Giuffrè, 1961), IX, 779, refers to S. Pufendorf (*De jure naturæ et gentium*, III, 5-6, v. 2) and H. Grotius (*De jure belli ac pacis*, II, 11-12).

[36] See A. Fouilée, *La science sociale contemporaine* (Paris: Hachette, 1885), 410; J.F. Spitz, '"Qui dit contractuel dit juste": qualques remarques sur une formule d'Alfred Fouilée' *Revue Trimestrielle de droit civil*, 281 et seq (2007).

the combined provisions of Art 3 and Art 23 of the Italian Constitution.[37] This assessment also affects the ability of contracts to maximise the interests of the parties according to the theory that each person must be considered the best judge of his own interests[38] and to the provisions of Arts 41 and 42 of the Italian Constitution.[39] Lastly, bilateral contracts must be considered able to produce marginal utilities according to bargain theory.[40] Essentially, in compliance with constitutional principles, the reason contracts are binding is not rooted in the sense of honour of individuals but in their role in pursuing public policy goals.[41]

The above analysis disproves the argument that contracts are incompatible with the pursuit of public interests. At this point, there is no reason why agreements in place of public acts should not be deemed contracts. Furthermore, the logic of subsidiarity implies that such agreements are indeed contracts.[42]

The notion that these agreements are contracts can be applied in terms of the following legal reasoning. As contracts, they fall under Art 1372, para 2, of the Italian Civil Code (corresponding to the doctrine of privity of contract). For this reason, it is not correct to use the argument that the events planned by the agreements are binding for third parties because these acts are beyond the scope of Art 1372, para 2, of the Italian Civil Code. Instead, a decision-making operation of this kind is a derogation from the aforementioned legal provision. Therefore, the principle of subsidiarity can legitimise the decision that contracts as sources of legal rules are enforceable even though there is a statutory provision to the contrary. Of course, there must be the need to realise a higher interest of the community in the best way possible. The said balancing of interests concerns the following hypotheses: a collective labour agreement establishing standards that are higher than the standard protection of gender equality; a sports law agreement that

[37] See F. Maisto, n 21 above, 119. On the relation between freedom of contract and the principle of equality: F. Galgano, 'Teorie e ideologie del negozio giuridico', in C. Salvi ed, *Categorie giuridiche e rapporti sociali* (Milano: Giuffrè, 1978), 67; C. Donisi, *Il problema dei negozi giuridici unilaterali* (Napoli: Jovene, 1972), 28.

[38] See G. Osti, 'Contratto' *Novissimo digesto italiano* (Torino: UTET, 1959), IV, 478; R. Di Raimo, n 25 above, 12; F. Di Ciommo, *Efficienza allocativa e teoria giuridica del contratto* (Torino: Giappichelli, 2011), 4, 16.

[39] See L. Mengoni, 'Autonomia privata e Costituzione' *Banca, borsa titoli di credito*, I, 2 (1997); A. Gambaro, 'Freedom of Contract and Constitutional Law in Italy, in A.M. Rabello and P. Sarcevic eds, *Freedom of Contract and Constitutional Law* (Jerusalem: Sacher Institute for Legislative Research and Comparative Law, 1998), 169 et seq.

[40] See R. Sacco, 'Contratto, autonomia, mercato', in R. Sacco and G. De Nova, 'Il contratto', in R. Sacco ed, *Trattato di diritto civile* (Torino: UTET, 2004), 17. On the origin of the '*bargain theory*', O.W. Holmes, *The common law* (Boston: Little, Brown & Co, 1881), 230.

[41] See P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), IV, 30 and 45; and before, Id, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), 396; Id, 'La sussidiarietà nel diritto privato' *Rassegna di diritto civile*, 688 (2016); Id, '«Controllo» e «conformazione» degli atti di autonomia negoziale' *Rassegna di diritto civile*, 208 (2017).

[42] See P. Perlingieri, *Il diritto civile* n 41 above, 29.

allows professional competitions to take place notwithstanding a general statutory prohibition (for example, '*Protocolli FIGC per allenamenti e partite delle squadre di calcio professionistiche durante l'emergenza Covid-19*') or a code of ethics for journalists establishing a wider range of restrictions in order to protect privacy.

V. Compliance of the Direct Application of the Principle of Subsidiarity with a Legal Methodology Bound by Values

In sum, subsidiarity can legitimate a decision that contracts concluded in place of public acts are binding. Such 'demiurgic' rulings entail the direct application (*Drittwirkung*) of the principle of subsidiarity.[43] From the perspective of legal theory, the system of the hierarchy of statutory law provisions has transformed into a hierarchy of values. There are many technical objections, but there is one critical substantive issue. The need for cultural support for law[44] makes the reluctance of courts to adopt these decision-making techniques suspect. However, the orientation in this sense in the case law does not depend on the fear of losing the benefit of legal certainty.[45] In fact, courts still adopt these solutions, bringing forward arguments that diverge from subsidiarity when those are needed in order to pursue fundamental public policy goals.

From a broader perspective, the opposite theory that directly applying the principles promotes legal certainty is – counterintuitively – correct.

Traditionally, the axiological decision-making method is criticised on two grounds: the unpredictability of rulings and the lack of ideological neutrality of rulings, so the formalistic decision-making method is preferred. Nevertheless, such conceptual constructs must be historicised.

According to this line of thought, the above-mentioned public policy goals have no weight in the formalistic theory of *Begriffsjurisprudenz*. The base of this dogmatic architecture (*Begriffspyramide*) is the 'struggle for existence'[46] between legal concepts.[47] The conceptual pyramid of legal subjectivity is particularly significant. In the beginning, only the *Quirites patres familias* were considered

[43] The core of direct application of principles is to establish the enforceability of events incompatible with a specific statutory provision which however remains in force. On this definition, see G. D'Amico, 'Appunti per una dogmatica dei princìpi', in G. D'Amico and S. Pagliantini eds, *L'armonizzazione degli ordinamenti dell'Unione europea tra principi e regole. Studi* (Torino: Giappichelli, 2018), 18.

[44] See A. Falzea, 'Dogmatica giuridica e diritto civile' *Rivista di diritto civile*, I, 773 et seq (1990); Id, *Introduzione alle scienze giuridiche* (Milano: Giuffrè, 2008), 395.

[45] From a different perspective, R. Carleo, n 1 above, 13.

[46] The expression is the title of the third chapter of C. Darwin, *On The Origin of Species* (London: John Murray, 1859). In this book, Darwin also uses the words 'struggle for life'.

[47] On legal Darwinism in Italy: P. Cogliolo, *La teoria dell'evoluzione nel diritto privato. Prelezione al corso di Diritto romano letta il 21 novembre 1881* (Camerino: Savini, 1882); G.P. Chironi, *Il darwinismo nel diritto. Discorso pronunciato per la commemorazione di C. Darwin tenuta nella R. Università di Siena il 21 maggio 1882* (Siena: Lazzeri, 1882).

holders of individual rights; gradually, women, minors, foreigners, and slaves were also exceptionally granted individual rights; then, under the influence of Christianity, all human beings were considered to be holders of fundamental rights; in this way, the struggle between the above concepts established the legal capacity of natural persons. In later times,[48] the dogma of the exclusive subjectivity of human beings conflicted with the need to assign individual rights to exponential organisations of human interests, and this conflict spawned the category of the legal person; subsequently, the distinction between an organisation with personality and an organisation without personality brought about the concept of the legal subjectivity of collective entities.[49] At this point, the pyramid had a new step: the paradigm of legal subjectivity in a broad sense. It is easy to notice that the 'struggle for existence' between legal categories precludes both the predictability and neutrality of rulings because courts are legitimised to apply the solution obtained from the 'original' concept or the 'antagonistic' concept according to the preferred balance of powers.

The predictability and neutrality of decisions were actually pursued in the formalistic method of subsumption proposed by the 'pure theory of law' (*Reine Rechtslehre*)[50] and the 'construct of *Tatbestand*'.[51] This system worked when statutory law held a position of primacy. At that time, the only problem was that the ideal of Justice was compromised by the inadequacy of statutory provisions for borderline cases or changes in the socio-economic context ('*summum jus summa injuria*' and '*dura lex sed lex*').[52]

Currently, the 'multilevel' character of sources of law often prevents subsumption from providing predictable rulings. An emblematic case is that of unpaid fees due to an agent who is not enrolled in the register: under Italian statutory law, he would have no right to a claim (Art 4, Law no 204, 9 May 1985 and Art 1418, para 1, of Italian Civil Code); according to the EU statutory provisions he is entitled to claim the entire commission.[53] The formalistic method was unable to provide a predictable ruling because subsumption was possible under both legal provisions. To complicate the issue, an Authority could establish the right to a partial commission.

Above all, the formalistic decision-making method adapted to the need to prevent the injustice of rulings. In borderline cases, decisions incompatible with

[48] F. Galgano, *Lex Mercatoria* (Bologna: il Mulino, 1993), 76, refers to the establishment of the British East India Company on 31 December 1600.

[49] On the subjectivity of algorithms, G. Teubner, *Soggetti giuridici digitali? Sullo status privatistico degli agenti software autonomi* translated by P. Femia (Napoli: Edizioni Scientifiche Italiane, 2019), 109.

[50] H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (Leipzig/Wien: Franz Deuticke, 1934).

[51] See E. Betti, n 33 above, 8, n 2.

[52] From a different perspective, F. Ricci, 'Potere "normativo" dei privati, clausole generali, e disciplina dei contratti', in M. Nuzzo eds, n 1 above, 602.

[53] Case I-02191 *Bellone* v *Yokohama s.p.a.,* Judgement of 30 April 1988, available at eur-lex.europa.eu, which refers to CEE directive 18 February 1986 no 653, before transposition.

the traditional legal categories are justified using the sophistical argument that 'the exception proves the rule'.[54] In this way, however, the unpredictability and discretionary nature of rulings increase.

In epistemological discussions,[55] new considerations preferring the axiological method of decision-making method are gaining ground, being better able to combine the justice of court decisions with predictability and impartiality. At the present, courts cannot provide standardised decisions allowing to achieve the result of their absolute predictability. Instead, they can make rulings in compliance with a system of politically approved values achieving the goal of their relative predictability.[56] From this perspective, the analysis of interests makes it possible to identify arbitrary decisions. Thus, judicial discretion is controlled, and the unpredictability of rulings is limited. In this sense, the direct application of principles is compatible with the higher value of legal certainty.

The above considerations confirm that case law reflects the axiological decision-making method more than the formalistic one.[57]

In conclusion, the fact that courts are reluctant to adopt the principle of subsidiarity is not a cultural aversion to the method of direct application of principles (*Drittwirkung*). This trend depends, rather, on the 'original sin' of subsidiarity:[58] the misrepresentation that this principle has a natural inclination to self-restraint persuaded the courts not to use its full potential.

VI. Concluding Remarks: Subsidiarity as a Revolving Door Between Private Law and Public Law

The precept 'according to the principle of subsidiarity' can be used to justify the enforceability of contracts in place of public acts. From this perspective, freedom of contract extends to new forms, namely: 'contracts substituting administrative measures'; 'contracts alternative to judicial dispute resolution'; and 'contracts as a source of legal rules'.

[54] From the criminal and public law standpoints: G. Fornasari, 'Antinomie giuridiche, norme di civiltà e l'ideologia dell'eccezione', in S. Bonini, L. Busatta and I. Marchi eds, *L'eccezione nel diritto* (Napoli: Editoriale Scientifica, 2015), 417; C. Casonato, 'Eccezione e regola: definizioni, fisiologie e patologie, responsabilità', in S. Bonini, L. Busatta e I. Marchi eds, *L'eccezione nel diritto* (Napoli: Editoriale Scientifica, 2015), 423. From a perspective of general theory, C. Nitsch, 'La regola e l'eccezione. Su defettibilità, ambiguità e vaghezza delle norme giuridiche', R. Brighi and S. Zullo eds, *Filosofia del diritto e nuove tecnologie. Prospettive di ricerca tra teoria e pratica* (Aprilia (LT): Aracne, 2015), 341 et seq.

[55] The discussion was prompted by the acute intellectual provocations of: N. Irti, 'Calcolabilità weberiana e crisi della fattispecie' *Rivista di diritto civile*, I, 987 et seq (2014); Id, 'La crisi della fattispecie' *Rivista di diritto processuale*, 36 et seq (2014); C. Castronovo, *Eclissi del diritto civile* (Milano: Giuffrè, 2015).

[56] See N. Lipari, 'I civilisti e la certezza del diritto' *Ars interpretandi*, 2, 55 (2015).

[57] See P. Perlingieri, n 41 above, 78, 249.

[58] *Retro* para 2.

This expansion of freedom of contract is opposed to the learned metaphors of the 'death of contract'[59] and the 'fall of freedom of contract'.[60] The reason contracts are binding is not the simple need to protect individual reliance. Thus, freedom of contract is not a mere reflection of tort law.[61] Such an argument cannot be used to motivate a ruling establishing the exclusion of the liability for breach of contracts when agreements pursue public interests.

The concept that contracts can fulfil public interests is a fragment of a more general theory. It focuses on the idea that public functions can be implemented by intersubjective cooperation in the place of public acts. At the same time, subsidiarity also legitimises the adoption of administrative measures to protect individual interests (for example, administrative sanctions against unfair commercial practices or anti-competitive behaviour).[62] The metaphor encapsulates very well the theory that subsidiarity is a 'revolving door' between private law and public law.[63]

The aim to fulfil public interests can be considered a specificity of legal realism in Italian civil law. Nevertheless, this legal methodology helps bring the civil and common law ever closer.[64]

[59] G. Gilmore, *The Death of Contract* (*Columbus:* Ohio State University Press, 1974).

[60] P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979).

[61] See: C. Amato, *Affidamento e responsabilità* (Milano: Giuffrè, 2012), 26; L. Moccia, 'Promessa e contratto (spunti storico-comparativi)' *Rivista di diritto civile*, I, 845 et seq (1994).

[62] See A. Jannarelli, 'I "principi" nel diritto privato tra dogmatica, storia e postmoderno' *Roma e America. Diritto romano comune*, 34, 178,186 (2013); E. del Prato, n 25 above.

[63] The reasons for moving beyond the 'private law/public law' distinction are examined amply in P. Perlingieri, n 9 above, 138; C. Mazzú, *La logica inclusiva dell'interesse legittimo nel rapporto tra autonomia e sussidiarietà* (Torino: Giappichelli, 2014), 16. Differently, C. Cicero, *Diritto civile e interesse pubblico* (Napoli: Edizioni Scientifiche Italiane, 2019), 184, proposes a *tertium genus*, namely the '*diritto privato della pubblica amministrazione*'.

[64] On the role of the method of legal realism in the US, see G. Tarello, *Il realismo giuridico americano* (Milano: Giuffrè, 1962).