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Articoli e saggi

State intervention, economic constitution, and the so-called "principle of subsidiarity": the Brazilian debate

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1. *Introduction*

«I put the Brazilian economy back on its feet. Now we may advance. I shall not let the Country move backwards» – said Brazil's president Michel Temer on Twitter in early March, 2018. Undoubtedly powerful, the statement is a comment on the perceived government's success in reigniting economic growth after a grave two-year period of recession, still echoing from the leadership of its predecessors. But there is no denying it is also symptomatic of a far more decisive political issue: once again in its recent history, Brazil seems to be facing a moment of reassessment of the functions of the State in promoting social and economic development.

Following a somewhat global trend, concepts such as privatization of state-owned companies, market liberalization, de-investment of state-controlled assets, reinforcement of public-private cooperation and so forth are on the spotlight of Brazilian public agenda. The movement is especially striking in some of the latest economic initiatives launched by the federal government. A new wave of privatization projects is announced, perhaps just as substantial as the one conducted during the 1990's reforms, which covers at least fifty-seven of federal state-owned

companies including its electric sector juggernaut, Eletrobrás[1]. In 2016, the government created the Partnership in Investments Program («Programa de Parcerias de Investimentos» – Law No. 13.334/2016) as an endeavor to heat up paralyzed large infrastructure projects delegated to the private initiative: Among the program's basic ground rules there are «ensuring stability and legal security, with minimal intervention in business and investments» (article 2nd, IV).

Whether these strategies will be successful in reaching their announced endgame – mainly, the reduction of public deficit and the promotion of sustainable growth – is yet to be seen. It comes as no surprise, then, that economists most certainly have much material on which to work. With every new policy come new challenges: on the efficiency of its instruments, on its practical consequences to the overall economy and, ultimately, on its very effectiveness to the development aspirations of our society.

As constitutional lawyers, however, our concerns lie a few steps back. All the current agitation towards the private sector seems to give reason to a prominent line of Brazilian public law theorists in general, and of constitutionalists in particular: those who support a "constitutional principle of subsidiarity" to guide the State's efforts in the economy. In a preliminary definition, as an economic – and constitutional – guideline, the "subsidiarity" ideal holds that individual freedom of initiative is to prevail over State intervention; the free market, over public action, planning and coordination. Only when individuals and the market mechanisms fail to achieve their purposes is the State authorized to legitimately interfere with the economy – preferably to correct market flaws and encourage the private sector; as an absolute exception, to engage directly in economic production. The State should be doing less, and the market, doing more: The State, thus, should remain "subsidiary" in relation to the private sector in a pursuit for development.

This article presents a counter-argument, from a strictly legal standpoint, on this perception. Make no mistake; this is an essay on constitutional law and interpretation, not on economics[2]. Our objective is this: to construe a compe-

[1] Eletrobrás – Centrais Elétricas do Brasil S/A – is a Brazilian federal public-controlled mixed-capital company, currently the largest national operator in the electric sector. A Presidential act enacted on December 2017 sought to include the company in the National Privatization Program (Law No 8.031/90, followed by Law No 9.491/97) in order to begin the studies and the processes for the sale of many of its assets – including its corporate control – to the private sector. By the time this article was written (early 2018), the privatization initiative was being debated in Brazilian Parliament, which may or may not uphold it, and has been cause of great divide among representatives.

[2] Despite the great contemporary appraisal of theoretical approaches such as the "Law and Economics" and the "Economic Analysis of Law" (in many cases, well deserved), this article takes a different methodological path: it holds the premise that the Law is to some degree independent from the economy, and that it has (=should have) autonomy *vis-à-vis* economic considerations of efficiency, maximization of wealth and other similar criteria. On the autonomy of Law in relation to the economy: M. Barbosa, *A recusa de conformação do*

tent reading of the Brazilian constitutional economic system[3] in order to test the claim for a "subsidiary State" entrenched in it. Being essentially legal-oriented, our arguments will be normative and conceptual, not empirical, descriptive ones: it isn't to say whether the Brazilian State actually performs a subsidiary role in the economy – chances are that it still does not –, but rather if the State necessarily must, on constitutional grounds, aspire to restrain itself in all circumstances to some sort of subsidiary routine. And, if not, what ought to be the alternative, if read in its best light, our Constitution may offer.

2. *What is subsidiarity? Some concepts and possible origin*

When it comes to a discourse on a "principle of subsidiarity", be that in any social science, nothing is quite evident – starting with its very origins and meanings. For the purposes of this article, our interest falls upon a "subsidiarity" as a social, political and economic – as well as, subsequently, constitutional – notion. Bearing the risk of some oversimplification, one might say that subsidiarity is a philosophical principle aimed at governing, in a normative and very comprehensive manner, the multiple interactions between the individual, civil society and the State.

According to this principle, in a fair, decent community the individual must be, at first, left to her own devices to achieve her personal goals and realization. This derives from the deeper conviction that every human being is entitled to a special dignity of her own – the idea of "human dignity", an intrinsic, inalienable value in each and every human life – which can only be fully realized by the exercise of her autonomy, demanding respect from other individuals and institutions[4]. By guaranteeing individual freedom of self-determination the principle of

jurídico pelo económico, in *Boletim de Ciências Económicas: homenagem ao Prof. Doutor António José Avelãs Nunes*, vol. LVII, t. I, Coimbra, 2014, 641 ss.

[3] The Constitution is regarded here not only as the legal expression of the fundamental political order, but also as the legal expression of a *fundamental economic order*. On the concepts of an "economic constitution" and of "constitution as the fundamental economic order" – of which a subsidiarity principle of State intervention may or may not be an element: V. Moreira, *Economia e Constituição*, 2ª ed., Coimbra, 1979, 41 ss.; A.C. dos Santos; M.E. Gonçalves; M. Manuel Leitão Marques, *Direito Económico*, 5ª ed., Coimbra, 2010, 30 ss.; M. E. Azevedo. *Temas de Direito da Economia*, 2ª ed., Coimbra, 2017, 53 ss.

[4] Although referring to a discussion on subsidiarity and International Law, the following remarks are applicable to subsidiarity as a philosophical ideal in general: "Its [subsidiarity's] basis is personalistic, rather than contractual or utilitarian. That is, its first foundation is a conviction that each human individual is endowed with an inherent and inalienable worth, or dignity, and thus that the value of the individual human person is ontologically and morally prior to the state and other social groupings. Because of this value, all other forms of society, from the family to the state and the international order, ought ultimately to be at the service of the human person. Their end must be the flourishing of the individual." (P.G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, available at: http://scholarship.law.nd.edu/law_faculty_scholarship, access in 20/02/2018, 42).

subsidiarity, as its partisans present it, would also be reverential to the pluralism of word-views existent in modern, complex societies[5].

From this baseline view on human dignity and pluralism comes a directive of coordination of action among the individual and the multiple social bodies. All social groupings, like the family, the city, the State, international organizations, etc. exist to provide the individual person the help and the support she may require in her quest for self-fulfillment – not to destroy neither to absorb her. Also, lesser associations should *ab initio* be able to freely govern the persons who belong to them, for this would ensure not only that decision centers be closer and more sensible to the interests of those affected (subsidiarity in its vertical sense), but also that the definition of the general interests pursued by institutions be devised with citizen participation (subsidiarity in its horizontal sense)[6]. In turn, larger collective aggregations, such as the State, ought to come into play exclusively to the extent that smaller ones become ineffective or in any way insufficient in achieving their goals – a perception that is in the basis of western federalist thought[7]. And even still, such intervention must be exercised in an enabling, supportive fashion, in order to provide smaller associations the resources they might need to realize their functions of promoting individual flourishment and freedom[8].

In this sense, subsidiarity might be just as ancient and differentiated as western political philosophy itself[9].Yet, interestingly enough, it was by the hands of the Catholic social theory of the nineteenth and twentieth centuries that the term "subsidiarity", as it is nowadays used – in Brazil as well as in Europe –, would

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[5] Cf. J.A. de Oliveira Barraco, *O princípio de subsidiariedade: conceito e revolução*, in *Revista de Direito Administrativo*, Rio de Janeiro, v. 200, abr./jun. 1995, 24.

[6] The distinction between the "horizontal" and "vertical" dimensions of subsidiarity is recurring in Italian legal thought, although still uncommon in Brazil. Most scholars, however, emphasize that both of these dimensions, vertical and horizontal, may only be adequately understood when approached as interconnected parts of a same concept: S. Mangiameli, *Sussidiarietà e servizi di interesse generale: le aporie della privatizzazione*, available at: http://www.issirfa.cnr.it/stelio-mangiameli-sussidiarieta-e-servizi-di-interesse-generale-le-aporie-della-privatizzazione-agosto-2007.html, access in 05/05/2018.

[7] Cf. M. Salema D'Oliveira Martins, *O princípio da subsidiariedade em perspectiva jurídico-política*, Coimbra, 2003, 85.

[8] Cf. P.G. Carozza, *op. cit.*, 43.

[9] Legal and political historians trace the idea of subsidiarity all the way back to Aristotle in classical Greece (for some commentators, his political philosophy endorses the complementary roles of social groupings: family, village and the city) and, after him, to Thomas Aquinas in the Middle Ages (for whom political power exists to ensure the "common good", so that each man may achieve his personal goals on his own). In the early seventeenth century, German lawyer Johannes Althusius conceived a model of secular federalist society which heavily, although not explicitly, depended on subsidiarity (an interconnected set of groups – families, corporations, cities, provinces and, at last, the State – conform what he called a "*consorciatio symbiotica*"). Repercussions of these insights would be felt through most of the eighteenth and nineteenth centuries political thought in the writings of authors as varied as Tocqueville, Hegel, Locke and his economic liberalism, Taine and Proudhon. For a detailed historical analysis on subsidiarity, ranging from classical Greece to Catholic Social thought: M.S. D'Oliveira Martins, *op. cit.*, 39 ss. See also, in Brazilian legal literature: S.F. Torres, *O Princípio da Subsidiariedade no Direito Público Contemporâneo*, Rio de Janeiro, 2001, 23 ss.

appear with more defined contours in the political lexicon. Came the end of the Second Great War and the reestablishment of democracies, the Church chose the Welfare State as its main adversary, due to its excessively disruptive interventions in the economy and the risks of paternalism bore with them. In 1961, Pope John XXIII issued «Mater et Magistra» stating that the primary end of a just and prosperous economic order should lie in individual initiative, being the State limited to essentially facilitating, stimulating, freedom-promoting functions[10] (followed by his «Pacem in Terris» in 1963[11] and the instruction «Libertatis Conscientia» in 1986[12]). At last, «Mater et Magistra» and its criticism on the economic aspects of the Welfare State were then furthered – and, to large extent, made harsher – by Pope John Paul II's 1991 encyclical «Centesimus Annus»[13].

Brief as it may be, this reconstruction serves to display the main philosophical and theoretical cornerstones of the principle of subsidiarity as a sociopolitical ideal: human dignity, a pluralism of conceptions of what is a good life, a limitation of State interventions upon civil society. As an undeniably complex conception, subsidiarity may actually serve as the normative foundation for a plethora of institutional designs, ranging from federalism and the international order to intra-

[10] In Pope John XXIII's own words: «But however extensive and far-reaching the influence of the State on the economy may be, it must never be exerted to the extent of depriving the individual citizen of his freedom of action. It must rather augment his freedom while effectively guaranteeing the protection of his essential personal rights. Among these is a man's right and duty to be primarily responsible for his own upkeep and that of his family. Hence every economic system must permit and facilitate the free development of productive activity. […] Moreover, as history itself testifies with ever-increasing clarity, there can be no such thing as a well-ordered and prosperous society unless individual citizens and the State co-operate in the economy. Both sides must work together in harmony, and their respective efforts must be proportioned to the needs of the common good in the prevailing circumstances and conditions of human life.» Available at: http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_15051961_mater.html, access in 04/03/2018.

[11] On subsidiarity and the organization of the international order. Available at: http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html, access in 04/03/2018.

[12] On subsidiarity and the relationships between the State and lesser social bodies. Available at: http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19860322_freedom-liberation_en.html, access in 04/03/2018.

[13] «In recent years the range of such intervention has vastly expanded, to the point of creating a new type of State, the so-called 'Welfare State'. This has happened in some countries in order to respond better to many needs and demands, by remedying forms of poverty and deprivation unworthy of the human person. However, excesses and abuses, especially in recent years, have provoked very harsh criticisms of the Welfare State, dubbed the 'Social Assistance State'. Malfunctions and defects in the Social Assistance State are the result of an inadequate understanding of the tasks proper to the State. Here again the principle of subsidiarity must be respected: a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.» Available at: http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html, access in 04/03/2018.

State administrative organization and, of course, – which shall be the focus of this article – entire economic systems and the role the State must play in them[14].

3. *Interlude: a few remarks on principles and constitutional interpretation*

Hence, the idea of subsidiarity reaches the legal realm. Its general propositions have exerted deep influence in contemporary Brazilian constitutional-economic theory. By drawing inspiration on more-or-less updated versions of the Catholic social teachings – explicitly or implicitly –, a respectful line of legal scholars have identified in the Brazilian Constitution a general orientation of ever-reduced, subsidiary State economic intervention: a constitutional principle of State subsidiarity[15]. And, when such intervention does occur – since it is prima facie constitutionally authorized under some circumstances (as shall be discussed shortly) – it should be deemed as an exception to individual freedom of autonomy and to the free-market ideal model; thus, it should be interpreted restrictively.

But first, before dwelling into the argument, a succinct methodological de-tour is required. To discuss the idea of subsidiarity as a principle of the constitutional economic order poses a reflection on the concept itself of principles as legal norms. The acknowledgement of principles – and of the principle-oriented character of Constitutional Law – is a defining feature of post-War constitutionalism. Since the enactment of the 1988 Constitution, the debate surrounding principles has gained increasing significance in Brazilian constitutionalism. Brazilian legal literature often remarks that principles «are no longer a secondary source of Law but have risen to the center of the legal system [and] irradiate to the entire legal order, influencing the interpretation and application of legal norms in general and allowing for a moral reading of the Law»[16].

The very notion of principles, however, has multiple meanings. Suffice it to say, there is more than one single theory on the nature of principles as legal norms, which make use of different sets of criteria – not always mutually compatible – in an attempt to identify and differentiate principles from other legal standards (mainly, the rules).

From a generic point of view, principles are norms prescriptive of ends to be achieved, serving as the foundation for the application of the constitutional sys-

[14] Cf. F.C. Duarte, I.C. Nacle, *Subsidiariedade: a evolução do princípio constitucional limitador da interferência estatal*, in *Sequência*, Florianópolis, v. 68, 2014, 93 ss.

[15] Cf. J.V. Santos de Mendonça, *Direito Constitucional Econômico: a intervenção do Estado na economia à luz da razão pública e do pragmatismo*, 2ª ed., Belo Horizonte, 2018, 227.

[16] Cf. L.R. Barroso, *Curso de Direito Constitucional Contemporâneo – Os Conceitos Fundamentais e a Construção do Novo Modelo*, São Paulo, 2009, 203.

tem. As Dworkin states, «[principles] are the doorway through which values enter from the ethical field into the legal world»[17]. The theoretical development on the subject has been absolutely rich and vast: (i) some theories identify principles as legal standards of broader and more abstract language than rules, often close to values; (ii) some differentiate principles from rules based on a formal distinction of their logical structure (rules are, if valid, applicable in an "all-or-nothing" fashion, while principles require a case-by-case weighing of their reasons, and the prevalence of one principle does not make the others invalid); (iii) while other theories provide substantial elements to differ principles from rules (the distinction is a matter of the norms' importance within the legal system)[18]. All of these approaches can be methodologically useful as long as a consistent theoretical and logical trail is observed[19].

Given the abundance of norms enunciated as "principles" in the Brazilian Economic Constitution – and in the Constitution at large –, identifying them all under one general theory is certainly no easy task. Anyhow, a serviceable method of constitutional interpretation may be undertaken via the use of the substantial quality of principles, as stated above: principles are deemed as norms of higher importance than rules, in a similar concept to that provided, mainly, by the works of Karl Larenz[20] and Joseph Esser[21].

Principles, in this sense, are the norms establishing the foundations of the legal system. They offer the legal basis for the enactment of rules or, to put it another way, they conform the ratio underlying legal rules. The difference between principles and rules, according to this approach, resides neither on their respective level of abstraction nor on their logical structure per se, but rather on their quality or importance: the function of normative foundation for legal decision-making. Principles operate as the normative starting point for the solution of a legal problem or case, by offering the guidelines for the interpretation and application of the Law.

Indeed, as shall be made clearer in the next topics, the Constitution provides a great set of norms of higher importance to conform the entire economic

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[17] Cf. R. Dworkin, *Uma questão de princípio*, 2ª ed., São Paulo, 2005. This conception was developed further in Dworkin's later works, especially as a central part of his theory of "Law as integrity": R. Dworkin, *O Império do Direito*, São Paulo, 2007, 271 ss.

[18] For a review of the traditional methods of differentiating between principles and rules, in Brazilian literature: H. Ávila, *Teoria dos Princípios: da definição à aplicação dos princípios jurídicos*, 17ª ed, São Paulo, 2016, 60 ss.

[19] Cf. V.A. da Silva, *Direitos fundamentais: conteúdo essencial, restrições e eficácia*, 2ª ed., São Paulo, 2014, 44 ss.

[20] Cf. K. Larenz, *Metodologia da Ciência do Direito*, 3ª ed, Lisboa,1997.

[21] Cf. M.C. Galuppo. *A contribuição de Esser para a problemática dos princípios jurídicos,* in *Direito, discurso e democracia: o princípio jurídico da igualdade e a autocompreensão do Estado Democrático de Direito*, Belo Horizonte, 1998.

system; and many of them also offer the legal basis for the multiplicity of State actions regarding the economy[22]. For the purposes of the argument presented in this article, then, constitutional principles – including the so-called principle of subsidiarity (for those who endorse it as a constitutional norm) – are identified in accordance to their substantial degree of importance or essentiality within the legal system.

4. *Subsidiarity as a "principle" of the constitutional economic order*

That being said, let us draw our attention back to the matter at hand. In Brazil, the legal controversy surrounding subsidiarity takes different paths when compared to some countries in Europe.

The Italian Constitution, for instance, unlike the Brazilian Constitution, contains a positive principle of subsidiarity in the intra-State, "organizational" sense of the idea (see section 2). After a relatively recent constitutional reform conducted in 2001, it is safe to say that subsidiarity has been heightened to the status of one of the most important principles of the Italian legal system: it expressly regulates the organization and the distribution of competences among the different Republican institutions (communities, provinces, metropolitan cities, regions and the State). Indeed, article 118 of Title V of Part II («Le Regioni, Le Province, I Comuni»), in its post-reform text, contains guidelines on vertical subsidiarity («Le funzioni amministrative sono attribuite ai Comuni salvo che, per assicurarne l'esercizio unitario, siano conferite a Province, Città metropolitane, Regioni e Stato, sulla base dei princìpi di sussidiarietà, differenziazione ed adeguatezza») as well as horizontal subsidiarity («Stato, Regioni, Città metropolitane, Province e Comuni favoriscono l'autonoma iniziativa dei cittadini, singoli e associati, per lo svolgimento di attività di interesse generale, sulla base del principio di sussidiarietà»)[23].

Similarly, in European Union Law, a positive principle of subsidiarity regulates the distribution of competences among the Union and its member-States. As per article 5th, n. 3, of the EU Treaty (Maastricht Treaty of 1992), outside of its exclusive competences – that is, when the exercise of a shared competence is in

[22] Cf. E.B. Moreira. *Os princípios constitucionais da atividade econômica*, in *Revista da Faculdade de Direito da UFPR*, Curitiba, v. 45, 2006, available at: https://revistas.ufpr.br/direito/issue/view/623, access in 05/05/2018.

[23] For a comprehensive analysis of the principle of subsidiarity in the Italian Constitution (after the reform of Title V), see: M Carrer, *Il Principio di Sussidiarietà: dalle Regole Costituzionali all'azione di Governo*, Bergamo, 2010.

question – the Union must only intervene when a specific course of action cannot be adequately conducted by member-States on the regional or local levels[24].

Still, it must be noted that the emphasis of the Italian and European debate on subsidiarity seem to lie on the "organizational aspect" of the principle – especially regarding the actions of Public Administration and the distribution of competences among political entities. This is a substantially distinct matter (although not disconnected by any stretch of the imagination) when compared to the Brazilian debate, focused mainly on the limits and constrains falling upon State interventions in the economy – as shall be made clear in this and the next sections.

The argument in support of the principle of subsidiarity as a constitutional element in Brazil, in an effort to synthesize it, can be best understood in a threefold sequence: (i) it first articulates moral ideas on the relationship between the State and the individual person; (ii) then, it proceeds to turn these broad moral propositions into legal determinations inscribed in the Constitutional text, while also being (iii) the result of institutional reforms conducted during the past decades, on both constitutional and infra-constitutional levels (legislative and administrative).

It goes as follows. State economic intervention is, as a rule, an exception to the freedom of initiative assisting private actors; in this condition, it must be operationalized and interpreted with both eyes on its restrictions. On moral terms, the argument holds that there is an axiological priority of the individual in relation to larger collective institutions, especially the State – a thesis, as we have seen, that was best elaborated by the Catholic Church's social doctrine. This leads to the perception that, in a functioning economic system, private free action and investment are of greater intrinsic value in comparison to the State's forceful, top-to-bottom lunges towards the economy. Hence, our constitutional normative choice would have been for «an order open to failure [of free individual action] rather than a supposedly certain and efficient 'stability' [provided by the State] […]; the order is centered in the activity of persons and groups and not on the activities of the State.»[25]

This way, the argument's bottom line recommendation is sufficiently straightforward: State operation in the economy would only be justified, on exceptional situations, if it were to favor and complement individual freedom of initiative and, ultimately, to correct market failures[26]. The primary end of State

[24] On the principle of subsidiarity in the EU, see: K. Van Kersbergen; B. Verbeek, *The Politics of Subsidiarity in the European Union*, in *Journal of Common Market Studies*, v. 32, 1994, available at: https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-5965.1994.tb00494.x, access in 05/05/2018.

[25] Cf. T.S. Ferraz Junior, *Congelamento de preços – tabelamentos oficiais (parecer)*, available at: http://www.terciosampaioferrazjr.com.br/?q=/publicacoes-cientificas/26, access in 02/03/2018.

[26] Among the examples of typical market failures to be tackled by the subsidiary State model, as the economic literature evinces them, the most relevant are: *(i)* mobility flaws of productive factors; *(ii)* asymmetric information (between firms or between firms and consumers); *(iii)* structural flaws (such as unrestrained con-

economic intervention should be to mimic ideal market conditions under which private initiative and economic autonomy may flourish freely – not to disrupt the market dynamics[27].

So, if it is true that State intervention cannot be entirely proscribed in contemporary economies (a suggestion that would mean an unrealistic attempt at returning to an obsolete laissez-faire system), according to the subsidiarity doctrine the State must intervene, at best, as a last resort, an *ultima ratio*. The State should allow individuals, firms and other groups and associations to solve their problems autonomously and accomplish their economic goals on their own. Only if a specific economic objective could not be achieved satisfactorily by social actors should the force of the State come at hand – to encourage, support and all in all stimulate private initiative, never (or, as an absolute exception) to compete with it or to take its place[28]. The principle of subsidiarity, as presented here, dictates that it would be a grave injustice for the State to substitute private free initiative in reaching economic purposes that private firms and groups may reach by their very own course of action. In other words, as one scholar argues, public intervention serves «only to stimulate private initiative or to fill in the gaps left by it»[29].

Furthermore, there is – so goes the moral aspect of the argument – a "spontaneous order" in society and in the economy to demand constitutional protection against a tendentiously overwhelming power of the State[30]. This is the main reason for the frequent understanding that the State would be authorized to intervene exclusively after the depletion of private potentials in a given economic sector – due to private actors' lack of interest, inefficiency, inability, or any oth-

centration of economic power in one company or conglomerate, or even monopolies); *(iv)* signalization flaws (negative externalities not included in the final prices of products); *(v)* incentive flaws (due to the existence of "collective goods" and the consequent lack of incentives for their economic exploitation); *(vi)* excessive transaction costs (partially created by State institutional designs, legal norms, *etc.*), and so forth. Cf. F. Nusdeo, *Curso de Economia: introdução ao Direito Econômico*, 9ª ed., São Paulo, 2015, 115 ss.

[27] International literature on subsidiarity also commonly associates the market to a space of freedom realization *par excellence*, in a similar fashion as some lines of Brazilian constitutional theory. Commenting *Centesimus Annus*, one author argues that the market would be and expression of "human nature" and its constant pursuit of freedom: "*Centesimus Annus* is important because it provides a defense of the free-market economy based on the nature of the human person. Human beings are free and seek freedom. Wounded by Original Sin, we can both transcend our own self-interests and yet seek our own interests. One of the virtues of the market economy is that it provides room for individual freedom and initiative, making it possible to work for the common good in a manner that does not entail ignoring one's self-interests." (G.R. Beabout, *The Principle of Subsidiarity and Freedom in the Family, Church, Market and Government*, in *Journal of Markets & Morality*, v. 1, 1998, 136).

[28] Cf. F.A. Marques Neto, *Limites à abrangência e à intensidade da regulação estatal*, in *Revista Eletrônica de Direito Administrativo Econômico*, Salvador, v. 4, 2005, 09 ss.

[29] Cf. N. Eizirik, *Monopólio estatal da atividade econômica*, in *Revista de Direito Administrativo*, Rio de Janeiro, v. 194, 1993, 76. See also: G.J. Sampaio, *O princípio da subsidiariedade como critério delimitador de competências na regulação bancária*, São Paulo, 2011, 100 ss.

[30] Cf. D.F. Moreira Neto, *O novo papel do Estado na economia*, in *Revista de Direito Administrativo*, Rio de Janeiro, v. 241, 2005, 12.

er similar standard –, or when the market presents flaws it is unable to correct by the betterment of its own mechanisms. If this "spontaneously-developed order" resultant of social dynamics – an expression of individual freedom and autonomy – operates suitably, there should be no plausible justification for the State to imposingly disturb such balance. The State ought to maintain the spontaneous ordering untouched[31].

On now properly constitutional and legal grounds, the argument suggests that subsidiarity is to be regarded as an "implicit constitutional principle"[32]. In order to prove the claim, scholars usually invoke the reading of a set of constitutional provisions which, when read in isolation, are somewhat reminiscent of many of the philosophical principles spelled out by Catholic Social theory on subsidiarity. Its formal constitutional sources would then lie in the ideal of «human dignity» as a basis of the Brazilian Republic (art. 1st, III, of the Brazilian Constitution); in the «social value of freedom of initiative» (art. 1st, IV), which is also a structural principle of the economic order (art. 170, caput); in the principle of «political pluralism» (art. 1st, V) and, finally, in the supposedly limitative language of the constitutional authorization for State «direct economic performance», to be legitimate strictly when reasons of «relevant collective interests» or «national security» so require it (art. 173, caput). Some commentators even speak of subsidiarity as an authentic «general principle of Law», applicable to all forms of coercive State interpositions – not only economic interventions – on the domains of civil society[33].

In addition to moral and legal arguments, some recent events in Brazilian economic history are perceived to offer even more thrust for a subsidiarity defense by its supporters. It was during the constitutional and State reforms

[31] Acclaimed Brazilian publicist Diogo de Figueiredo Moreira Neto makes the point crystal clear: «[…] if, one the one hand, the principles of the spontaneous economic order of human societies do not even require elucidation, for they are naturally associated to the fundamental concept of human dignity, on the other, all of those [principles] artificially introduced by a construct of reason must be necessarily express in the Constitution. […]" (D.F. Moreira Neto, *op. cit.*, 12 ss.). In a similar sense: «The needs for change are evident, and Society changes on its own, when it deems necessary. The State, in general, impedes transformation, and in many cases it seeks to take it to directions it does not intend to follow. It does not always fall to the State to transform Society, thus it is imperative do desacralize Politics.» (J.A. Barraco, *op. cit.*, 23.); «[The State], this way, intervenes every time private activity or economic power of certain groups jeopardize the common good and the spontaneous order. The function of the State, here, is to order and stimulate the correct exercise of economic rights, seeing that the market be loyal and ensuring greater equality of opportunities – and not of results – as much as possible.» (S.F. Torres, *op. cit.*, 154).

[32] Cf. J.A. Barraco, *op. cit.*, 25.

[33] On the words of an Administrative Law scholar: «It is worth noting that subsidiarity has a character of *general principle of law*. Not only does it limit the action of the State's authority (the use of competencies by public agents) e not only does it limit the application of public law norms imposing submissions, conditions, sacrifices and limitations to private rights. It serves indeed as a restraint on the extent of juridification of social life by the imposition of private law rules.» (F.A. Marques Neto, *op. cit.*, 10).

implemented in the 1990's – and the years that followed – that the idea of subsidiarity really gained traction in Brazilian public and constitutional law. In its original 1988 promulgated text the Constitution was, on the opinion of some of its critics, very much a result of "State-centered" ideological orientations in regards to the functions of the State in conducting economic activity and development[34]. This is so because the 1988 Constitution contained dire restrictions on the participation of foreign capitals in Brazilian economy, while it also institutionalized a formidable series of State monopolies. Many of them took the form of public services – electricity, oil and gas, telecommunications, infrastructure, public transportation, to name a few – which were carried out, up until then, by state-owned companies alone.

In the 1990's, however, – as a part of a larger-scale "State and Administration Reform" project[35] – a sequence of constitutional amendments would allow for the conduction of a process of privatization and liberalization in the economy[36]: amendments No. 6 and No. 7 put an end to some relevant restrictions to foreign capital participation (on the favorable legal treatment to smaller firms and the research and exploration of mineral resources, as well as waterway transports, respectively); amendments No. 5, No. 8 and No. 9, on their turn, softened many important State monopolies, opening up to private competition, via State concessions, public services of local gas distribution, telecommunications, radio transmission, and much of the oil industry.

Moreover, these constitutional reforms were then immediately furthered by a range of privatizing, market-oriented and State-reducing legislative efforts: the privatization of several state-owned companies (most notably in the telecommunications and mining sectors), the creation of a legislative landmark for concession contracts (government contracts which delegate the execution of public services to private actors) and the creation of the very first independent regulatory agencies in recently liberalized economic sectors (telecom, oil and gas, and electricity production). Given this context, if any doubt still remained as to a principle of subsidiarity being present in the original constitutional text, according to its supporters, after the 1990's reforms such doubt is no more: Constitutional amendments (and complementary legislation) would show a clear-cut movement towards the restriction of State economic roles and the increment of private pro-

[34] Cf. DF. Moreira Neto, *op. cit.*, 13.

[35] The movement was certainly not exclusive to Brazil. Different privatization processes were experienced in many countries of Europe and Latin America, most notably after the Washington Consensus of 1989. For a summary of the theoretical guidelines of the 1990's Brazilian "State and Administration" reform, written by one of the main economists responsible for its implementation, see: L.C. Bresser-Pereira, *Reforma do Estado para a Cidadania: a reforma gerencial brasileira na perspectiva internacional*, São Paulo, 1998.

[36] Cf. L.R. Barroso, *Agências reguladoras, Constituição, transformações do Estado e legitimidade democrática*, in *Revista de Direito Administrativo*, Rio de Janeiro, v. 229, 2002, 289 ss.

tagonism[37]. The "spirit of the Constitution", on this account, would contain the idea of a subsidiary State. Institutional reforms would have done nothing more than bring this constitutional spirit to notice[38].

Having settled the general idea, finally, one should be careful to distinguish between two different technical usages of the principle of subsidiarity in Brazilian constitutional dogmatics. In a (i) broad sense, subsidiarity refers to all types of State coercive interventions in the civil society and, especially, in the economic realm, either normative (enactment of rules, public planning, etc.) or material (economic supervision, sanctioning, etc.). So, for instance, restrictive economic legislation in any given sector of commerce or industry, or administrative regulatory activity in general, are both constitutionally bound, in this line of argument, to pay reverence to the guidelines of subsidiarity as per stated above: the prevalence of private autonomy; encouragement of behaviors of private actors by the State; coordination and correction of malfunctions in the market[39].

In a (ii) stricter sense, the principle of subsidiarity refers only to what lawyers usually address as direct State interventions in the economy (non-normative interventions): mainly, the creation of state-owned companies – to either compete with private firms or to operate State legal monopolies – and public participation in privately-owned enterprises[40]. By interpreting Article 173 of the Constitution[41], subsidiarity proponents endorse a preoccupation that is liberal at heart. The restriction of State direct intervention to cases of «relevant collective interests» and/or «national security imperatives» is taken as a protection of

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[37] Cf. D.F. Moreira Neto, *op. cit.,* 13; S.F. Torres, *op. cit.*, 157 ss.

[38] These are one scholar's remarks on the subject: «Since the coming of the 1988 Carta Magna [Brazilian Constitution], this [subsidiarity principle] has been the spirit of the Higher Law after a series of reforms the document suffered during the years. These are constitutional modifications carried out by Derived Constituent Power which could not be considered punctual, sparse or disconnected from one another. On the contrary, these are systematic reforms inspired by a common constitutional spirit: precisely that of conferring greater emphasis to the constitutional political option for the primacy of freedom of initiative, as well as upholding the subsidiarity principle and public action of social and economic orders primarily via regulation.» (M.Z. Travassos, *O Estado subsidiário regulador e de fomento na Constituição da República Federativa do Brasil de 1988*, in *Revista Contribuciones a las Ciencias Sociales*, v. 27, 2015, available at: http://www.eumed.net/rev/cccss/2015/01/subsidiariedade.html, access in 02/03/2018).

[39] In this sense: J.B.L. da Fonseca, *Direito Econômico*, 9ª ed., Rio de Janeiro, 2016, 167 ss; see also: F.A Marques Neto, *op. cit.*, 13 ss.

[40] For an example of this use of the principle of subsidiarity in Brazilian public law, discussing the criteria for the creation of state-owned companies and State participation in private-owned enterprises: A. S. Aragão, *Empresas Estatais: o Regime Jurídico das Empresas Públicas e Sociedades de Economia Mista*, Rio de Janeiro, 2017, 96 ss.; F.M. Guedes, *A Atuação do Estado na Economia como Acionista Minoritário*, São Paulo, 2015, 23 ss.; R.W. Schwind, *O Estado Acionista: empresas estatais e empresas privadas com participação estatal*, São Paulo, 2017, 208 ss.

[41] As per Article 173 of Title VII ("On the Economic and Financial Order") of the Brazilian Constitution: "With the exception of the cases expressly mentioned in this Constitution, *direct economic performance by the State* shall only be permitted when necessary to *national security imperatives* or to *relevant collective interests*, as per defined in legislation."

the economic sphere – a private environment par excellence – against State intrusions. Competition among private and public-owned firms ought to be as restrictive as possible. No more than to supplement an eventual lack of private interest in a given area of concern[42] should the State diverge from its "constitutionally-mandated" absent position in the economy and engage directly in production as an entrepreneur – never to exclude or absorb the private sector[43].

5. *A counter-argument: constitutional commitments and the multiple economic possibilities for the State. Reasons to reject the constitutional status of subsidiarity*

Does this all show our economic Constitution in its best possible light? Is a "principle of subsidiarity" in fact the best interpretation one may construe on the constitutional role of the Brazilian State towards social and economic development? There are good reasons to believe that it is not. Not for nothing, a critical line of lawyers has arisen some blunt counter-arguments against this purported "constitutionalization" of a subsidiary State. Now is the opportunity to take some of these objections further. In our opinion, the constitutional argument against subsidiarity (not philosophical, economic, etc.) involves tackling two basic issues: (i) the constitutional relationship between the economy and the State and (ii) the nature and the definition of the ends to be achieved by State economic action.

First, the point of agreement: there is no denying the Brazilian Constitution establishes a capitalist economic model. The constitutional text speaks largely on private property, on the prevalence of freedom of initiative in the conduction of economic dynamics and, all in all, on "negative" rights of State non-interference with private activities[44] – akin, to some extent, to what subsidiarity doctrine mostly dictates. No legislative or administrative effort intending to do away with the capitalist basic structures of the legal system could be regarded as constitutionally legitimate (e.g., the complete abolishment of private property; the

[42] Cf. E. Britto, *Reflexos jurídicos da atuação do Estado no domínio econômico*, 2ª ed., São Paulo, 2016, 108 ss.

[43] A legal scholar summarizes the topic with the following observation: «Art. 173 of the Constitution […] only enables the State to act directly in the economy in a supplementary fashion, which is, when the Constitution itself makes such exception, demanding the existence of national security imperatives or of relevant collective interests. From this assumption two principles emerge: that of *subsidiarity* under which the State only intervenes directly in the economy on express cases mentioned in the Constitution; and that of *abstention*, according to which the State must not engage in economic activities, excluding or competing with private initiative, except under the afore-mentioned circumstances.» (A. Saddy, *Intervenção direta do Estado na economia: uma análise do caput do art. 173 da Constituição brasileira*, in *Revista de Direito Administrativo*, Rio de Janeiro, v. 269, 2015, 124).

[44] Cf. V. Moreira, *A ordem jurídica do capitalismo*, 4ª ed., Lisboa, 1987, *passin*.

nationalization of entire economic sectors paying no mind to private activity). But the Constitution also contains, all the same, a wide set of social, nationalist, interventionist and promotional norms which may require, to different degrees, the State socioeconomic intervention for their greater realization[45]. These are "positive" rights, for they authorize or even demand, under many circumstances, that the State take positive actions towards social and economic processes, instead of mere State omissions (duties of "non-disturbance").

In spite of the privatizing reforms that took place during the 1990's (or "subsidiary reforms", some would argue), the protection of a private sphere of operation in the economy against arbitrary State intrusions is still but one of our constitutional concerns – there are many others, of equal importance. For example: (i) Article 1st, IV states as a foundation of the Brazilian Republic, right next to freedom of initiative, the social value of labor; (ii) Article 3rd includes the fundamental objectives of the Brazilian Republic, such as «creating a free, just and solidary society» (I), «ensuring national development» (II), «ending poverty and reducing social and regional inequalities» (III) and «promoting the good for all, without prejudice of any kind» (IV); (iii) Article 6th sets forth a long list of fundamental "social rights", such as education, health, nourishment included via Constitutional Amendment No 4/2010), housing (Constitutional Amendment No 26/2000), leisure, transportation (Constitutional Amendment No 90/2015), safety, social security, and others; (iv) Article 170, which structures the economic order, not only repeats the social value of labor, but also declares the order has by primary end «ensuring to all a dignified existence, in conformity with the principles of social justice», based on «national sovereignty» (I), on the «social function of property» (III), on «consumer defense» (V), on «environmental protection» (VI), on «the reduction of regional and social inequalities» (VII), on «the search for full employment» (VIII) and on the «favorable treatment for small firms created under Brazilian laws» (IX).

This vast array of principles – in the legal, normative sense (see section 3) – offers very important grounds for the denial of the constitutional status of subsidiarity. First and foremost, the thesis of a constitutionalized "spontaneous order" in society in contrast with State power must be quickly rejected. As we have seen, subsidiarity holds the elementary belief that the sole economic direction of a political community must be to preserve the "spontaneous social order" – a concept usually to be taken as being the market[46] –, with a limited State intervention to

[45] Cf. J.A. da Silva, *Curso de Direito Constitucional Positivo*, 35ª ed., São Paulo, 2011, 790 ss.; A.R. Tavares, *Direito Constitucional Econômico*, 3ª ed., São Paulo, 2011, 123 ss.

[46] Although, as it happens, some of its proponents will be the first to deny the automatic link between subsidiarity and the free market ideal model. Recently, legal scholars have offered a "softer" approach on the principle of subsidiarity by holding that it is not, in fact, entirely incompatible with some degree of State inter-

regulate, stimulate and complement it. The doctrine surrounding subsidiarity, at least in the way it has been often presented by a majority of Brazilian legal scholars, presupposes a rigid separation between the State and civil society, between public and private spheres[47], in a classical liberal style. Subsidiarity's logic is bottom line binary: on one side, there would be the State, a behemoth of authority and power; on the other, there would be the space of the economy and especially the market, an environment of freedom, autonomy, equality and self-realization for the individuals which inhabit it. Hence the appearance, in subsidiarity discourse, of a "spontaneous order" to demand defense over unmeasured intrusions by a potentially arbitrary and cumbersome State.

Such a natural order, of course, does not exist in contemporary times, and perhaps never has. For some time now, the belief in a "spontaneously occurring" economic system, derived from human nature itself in an abstract, metaphysical sense, has been abandoned. The "private sphere" of the economy simply cannot survive and develop without an intricate and complex range of interactions, conditionings and guarantees provided by the public sphere – in other words, by the State. Even the freer of markets (akin liberal theorization would have it) is, to quote constitutionalist Eros Grau, «an institution which is born due to a series of certain institutional reforms, and operates grounded on legal norms which regulate, limit and conform it»[48]. The economy and the State are two interconnected and interdependent parts of a same reality: no economic system is able to operate properly without its normative institutionalization by the State, nor can a State survive without a well-ordered economy to provide it with a material basis of resources. Or, to call upon the words of an economist, «there can be no production, and even less so distribution, without power: private power and political power are constantly present in the market»[49].

And, if this context was true even in times of liberalism heyday, it is most certainly true in today's complex economic reality; and, particularly, when one considers the nature of the Brazilian Constitution. The State is no longer limited to a night watch, arbiter position in regards to economic dynamics (a mostly pas-

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vention. Besides traditional "negative" subsidiarity – a limitation of State action upon society – there are authors who argue for a *positive dimension* of subsidiarity, according to which subsidiarity might actually *demand* State action under certain circumstances for its full realization. In this sense: F.A. Marques Neto, *op. cit.*, 13; M.S. D'Oliveira Martins, *op. cit.*, 82 ss.

[47] For instance: «Therefore, at first one should comprehend that the principle of subsidiarity holds he existence of the binomial private x public, in which on one side there are equal individuals seeking to ensure their rights and freedoms and on the other there is the power of the State, intervening when necessary – in a subsidiary manner – in social relations.» (F.C. Duarte, I.C. Nacle, *op. cit.*, 100 ss.).

[48] Cf. E.R. Grau, *A ordem econômica na Constituição de 1988 (interpretação e crítica)*, 15ª ed., São Paulo, 2012, 29 ss.

[49] Cf. L.C. Bresser-Pereira. *O caráter cíclico da intervenção estatal*, in *Revista de Economia Política*, São Paulo, 1989, 116.

sive form of interaction with the economy). In its current constitutional design, the State effectively takes up promotional duties to act in the economy with the scope of directing it towards normatively defined ends and objectives: ending poverty, reducing social inequalities, realizing social rights, protecting the environment, to name a few.

In other words, the Constitution's economic system does not suggest an ironclad separation between State and the economy. It expressly imposes that the State be present in the country's economic life. The State, therefore, is deemed as a central institution for the proper functioning of the economic organization, not as outsider which only exceptionally – nay, "subsidiarilly" – invades the system to correct its flaws. In summary, «the State no longer intervenes in the economic system» – an «intervention», after all, presupposes the entry of a stranger in another's space – «[the State] integrates it. [The State] becomes an agent and a regular participant in its decisions.»[50-51]

More still: subsidiarity's defense of the virtues of the market mechanisms, while constitutionally and economically relevant, does not have enough teeth to embed itself as the primary, or even less still, as the sole constitutional concern conferred to the State. The State ought to pursue a much greater variety of economic goals by promoting sectorial as well as global public policies. These policies may be of a more or less interventive character in accordance with democratic deliberation – but are not simply limited to complementing an occasional lack of private interest or to the strict correction of market failures. Thus, there is a powerful democratic counter-argument against subsidiarity.

As we have recently argued, there are actually multiple constitutional principles to offer legitimacy and direction to the State performance upon the economy. As a matter of fact, market mechanisms may be operating just fine – at least in accordance to theoretical standards of perfect competition and information –, and still the State may be required to act in order to pursue democratically-defined public policies, oriented to the promotion of different constitutional principles other than the ones more market-oriented (freedom of initiative, private competition, etc.).

Nothing immediately evident from the constitutional text suggests the State would need to await, in each and every occasion, for the total depletion of pri-

[50] Cf. F. Nusdeo, *op. cit.*, 153.

[51] Portuguese scholar Vital Moreira very much summarizes the counter-argument presented here in a passage worthy of transcription in full: «[…] when one considers that nowadays State participation in not an exception, but rather a permanent condition of balance and economic development; that the role of the State is not passive, but rather that upon it fall tasks of economic and social transformation; when one recognizes that now corporations and social groups are also in position to invest against the freedom of the individual, who is before them much less protected than before the State – if this is so, than *a subsidiarity principle seems to have definitely lost its conditions of existence.*» (V. Moreira, *op. cit.*, 156).

vate potentials – as an absolute lack of interest or capability – and only then take action in the economy. In some cases, this sort of empirical evaluation may not be easily assessable; in many others, it may not even be desirable to delay State responses for this long. Which isn't to say, and this much is true, that stimulating and supporting private activities or addressing market failures shall never be legitimate economic objectives under the State's sight: they most definably might be; and if so, they must be tested in democratic debate. The State, nonetheless, is in no way constitutionally bound to implement these objectives exclusively.

This means that our Constitution, if interpreted in its best light, does not favor one single economic ideology[52] – such as subsidiarity, liberalism, socialism, and the like. Rather, it affirms elements of multiple ideologies. It is filled to the brim with postponing commitments, especially in economic matters. Since the original drafters of the 1988 Constitution – and reformists alike – were unable to reach a solid consensus on what the economic role of the State should have been and to which extent it should be allowed to intervene – in other words, if a more liberal or a more State-oriented model was adequate –, the remaining option was this: to include in the constitutional text different provisions in the form of principles, and thus leave to later legislative efforts the special task of interpreting and implementing the abstract constitutional economic promises[53].

For this reason, a feature that many would argue to be our Constitution's greatest flaw might in fact turn out to be its greatest virtue. It is due to the analytical text of our Constitution, which has a lot to say on different economic subjects in languages of different ideological positions, that the Constitution itself may legitimately support a variety of economic State models. It falls to democratic debate, then, to define the exact extent, the nature and the scope of State intervention by adopting one of the many alternatives possible within the constitutional framework[54].

Such a proposition requires a great dose of modesty on the part of interpreters and, more specifically, on the part of Constitutional Courts in charge of evaluating the constitutionality of economic legislation and other official State acts. It favors democracy over preconceived transcendent propositions – such as subsidiarity or any other all-embracing philosophical doctrine. It aspires to constitutional stability, for it preserves the possibilities of constitutional commitments and leaves ideological argumentation where it belongs: to democratic public debate. Imperfect as it may be, democratic deliberation still remains the main

[52] Cf. G. Bercovici. *O princípio da subsidiariedade e o autoritarismo*, available at: https://www.conjur.com.br/2015-nov-08/estado-economia-principio-subsidiariedade-autoritarismo, access in 01/03/208.

[53] Cf. J.V. Santos de Mendonça, *op. cit.*, 232.

[54] Cf. J.V. Santos de Mendonça, *op. cit.*, 246.

instrument through which a community might attempt to reconcile its multiple legitimate interests into a comprehensive, collective development path.

This same reasoning is applicable to counter-argue subsidiarity in both its broad sense – meaning all types of coercive State activity on society – and its strict sense. Regarding the latter, the "direct State intervention" in the economy is usually the greatest concern of subsidiarity in its economic sense. Article 173 of the Brazilian Constitution does indeed impose relevant restrictions on the creation of State-owned companies and other public enterprises[55]. Such constrains, nevertheless, do not seem to be necessarily as dire and substantial as subsidiarity axioms intend them to be. A more constructive, non-biased interpretation identifies in Article 173 a typical postponing commitment: The Constitution dictates that the creation of State companies is justified whenever «national security imperatives» or «relevant collective interests» so require it – as per defined in legislation[56]. No State-controlled company shall be constitutionally legitimate without democratic deliberation on the reasons for its existence (national security or collective interests). This normative command is not the same as evoking a "subsidiary", supplementary, *ultima ratio*, last resort, exceptional State action[57]. On the

[55] Other Constitutions, especially in Europe after the Second Great War, contain similar provisions on State direct economic intervention – the creation of State-owned companies or the nationalization of private firms. It is interesting to notice that many of them, unlike the "restrictive language" adopted by the Brazilian Constitution of 1988 (as read by many of its commentators), expressly refer to a "public economic sector" coexistent with private initiative. The Portuguese Constitution of 1976 mentions three autonomous spheres of property of production factors: the public sector, the private sector and the «cooperative sector» (Article 80th). Similarly, the Italian Constitution of 1947 refers to both public and private economic property (Article 42nd), all the while proclaiming private freedom of initiative (Article 41st). The most noteworthy example, however, seems to be that of the Spanish Constitution of 1974: the text explicitly and directly calls upon «the recognition of public initiative in economic activity» (Article 128th). Notwithstanding the difference in language, the debate on subsidiarity of State economic action more often than not takes similar paths, in Europe and in Brazil. For a defense of the subsidiarity principle (in its economic expression) in Portugal, see: P. Otero, *Vinculação e Liberdade de Conformação Jurídica do Sector Empresarial do Estado*, Coimbra, 1998, 35 ss.; for the Spanish debate state-of-the-art, see: G.F. Farreres, *Reflexiones sobre el valor jurídico de la doctrina de la subsidiariedad en el derecho administrativo español*, in D.F. Moreira Neto (org.), *Uma avaliação das tendências contemporâneas do direito administrativo: obra em homenagem a Eduardo García de Enterría*, Rio de Janeiro, 2003.

[56] Let us read Article 173 again, but with a different emphasis: «With the exception of the cases expressly mentioned in this Constitution, direct economic performance by the State shall only be permitted when necessary to national security imperatives or to relevant collective interests, *as per defined in legislation*.»

[57] Perhaps part of the reason for this prevailing understanding – that direct State performance can only be constitutionally legitimate if its purposes are to *supplement the failures of private mechanisms* – lies on "interpretative echoes" still coming from the *prior constitutional text*. Indeed, the 1967 Brazilian Constitution, after the Constitutional Amendment No 01/1969 – in essence, an entirely new Constitution imposed by the governing Military Dictatorship – stated that «interventions on the economic domain and the monopolization of certain industry or activity are allowed, via federal law, when necessary under reasons of national security or for *the organization of sectors which cannot be developed with efficacy under competition and freedom of initiative*, with regard to individual rights and guarantees» (Article 163). In spite of the more restrictive language of the constitutional text of 1969 – definitely more restrictive than the current 1988 Constitution – it was during the Military regime that Brazil experienced its period of greatest expansion of the public industrial sector, with the creation of 302 (three-hundred and two) State-owned companies between 1964 and 1985. Most of these com-

contrary, multiple constitutional economic principles can be densified via legislation authorizing the State to perform as an entrepreneur. An exclusively supplementary course of action may, in fact, be considered appropriate after legislative debate; it would, however, be an extreme restriction on legislative efforts – incompatible with the nuances the constitutional language provides – to turn it into an obstinate legal determination. Once again, our Constitution seems to favor democracy over any specific general doctrine.

6. *Constitutional adjudication beyond subsidiarity: lessons from a Brazilian Supreme Court ruling (ADI No 1.923/DF)*

Still, a crucial question remains unanswered: how exactly can the approach suggested here be made to work in the practice of constitutional adjudication? If, on the one hand, the "principle" of subsidiarity (which is not a legal principle at all) is, by its very nature, too restrictive – for any non-subsidiary economic project would be unfairly disregarded as unconstitutional – on the other, the democratic argument, if taken to its extremes, could wind up being too permissive. In any democracy worthy of its name, a constitutional text exists not only to ensure a space of legitimate political pluralism and democratic debate, but also to provide a community with minimal political consensus, undefeatable by majority decision. It is of the essence of a Constitution to impose some restrictions and constraints even to democratically-enacted legislation – and the same applies to laws on the economic role of the State. This is indeed an expression of the most basic challenge posed by judicial review and constitutional adjudication[58].

It is beyond the purposes of this article to come to grips with such a broad theory. Our goal in this final section, much more modest, is to sketch some possible guidelines for constitutional decision-making which may prove deferent to the democratic nature of our constitutional commitments on economic matters, whist all the same offering legitimate constitutional constraints on legislation and other State acts – but without the recourse to the ideological propositions of subsidiarity doctrine.

In this sense, some lessons can be taken from an important Brazilian Supreme Court ruling [Supremo Tribunal Federal, or simply STF]. In ADI

panies served governmental purposes of promoting industrialization (infrastructure, energy, telecom, oil, etc.), and a lack of stricter administrative controls offered the incentives for their unsustainable dissemination. (F.L. da Costa; V.Y Miano, *Estatização e Desestatização no Brasil: o papel das empresas estatais nos ciclos da intervenção governamental no domínio econômico*, in *Revista de Gestión Pública*, v. 2, 2013, 152 ss.).

[58] Cf. J.H. Ely. *Democracia e Desconfiança: uma teoria do controle judicial de constitucionalidade*, São Paulo, 2016, 08 ss.

No 1.923/DF [Ação Direta de Inconstitucionalidade n. 1923/DF][59], the Court was faced with examining the constitutionality of the legislation which created, during the 1990's State and Administration reforms, the institution of "social organizations": private non-profit organizations providers of public services such as education, healthcare, scientific research, technological development, environmental protection and cultural activities (Law No. 9.637/1998). After the fulfillment of certain formal conditions, these organizations would be authorized to take part in public budget, along with other instruments of technical and logistical assistance such as the use of government property and personnel, as a means of financing and encouragement by the State[60].

For a better appreciation of the ruling, a few general words must be said about the Brazilian system of constitutional adjudication and the role STF plays in it[61]. By combining elements of both abstract and concrete forms of judicial review, the constitutional text enables STF with the functions of (i) ruling on «direct constitutional actions», akin a European "Constitutional Court" model, by analyzing the abstract compatibility of legislation and other normative acts vis-à-vis the Constitution (Article 102, I, "a"), and (ii) ruling on specific concrete cases as a last instance of judgment, similar to a North-American "Supreme Court" model, which incidentally involve the discussion of constitutional matters (Article 102, III, "a" and "b"). The «Direct Action of Unconstitutionality» [Ação Direta de Inconstitucionalidade] falls under the first model of constitutional adjudication (abstract review of legislation). There are many actors authorized by the Constitution to file this type of action before the STF: The President; the Federal Senate; the Chamber of Congressmen; state governors; The Federal General-Attorney; the Federal Counsel of the Brazilian Order of Attorneys [Ordem dos Advogados do Brasil]; any political party with representation in Congress; syndicate confederations and any nation-wide class association (Article 103).

The ADI No 1923/DF, examined here, was filed by the Workers Party [Partido dos Trabalhadores] and by the Democratic Working Party [Partido Democrático Trabalhista]. Its main point of questioning lied, precisely, on

[59] The written version of the STF ruling in ADI No 1.923/DF, including the individual votes discussed in this section, is available in full in the official STF website (in the original Portuguese): http://portal.stf.jus.br/processos/detalhe.asp?incidente=1739668, access in 05/05/2018.

[60] Cf. M.S. Zanella Di Pietro, *Parcerias na Administração Pública*. 11ª ed., Rio de Janeiro, 2017, 337 ss. After years of experience, however, many fundamental flaws have been pointed out in the model of social organizations, especially due to a lack of a more general public planning and coordination in regards to their creation. On the topic, see: E. B. Moreira, *Desenvolvimento Econômico, Políticas Públicas e Pessoas Privadas (passado, presente e futuro de uma perene transformação)*, in *Revista da Faculdade de Direito da UFPR,* Curitiba, v. 46, 2007, available at: https://revistas.ufpr.br/direito/article/view/14130, access in 05/05/2018.

[61] Cf. D.W. Arguelhes; L.M. Ribeiro, *Criatura e/ou Criador: transformações do Supremo Tribunal Federal sob a Constituição de 1988*, in *Revista Direito GV*, Rio de Janeiro, v. 12, 2016, 407 ss.; O.V. Vieira, *Supremocracia*, in *Revista Direito GV*, São Paulo, v. 04, 2008, 445 ss.

the new State economic role instated by the legislation. As we have discussed, the 1990's reforms implement a series of constitutional, legislative and administrative measures aspiring to reduce the State to a position of, legal scholars argue, subsidiarity, rearranging on some of its most basic levels the division of tasks between the State and private institutions. And, admittedly, the then newly-founded "social organizations" are a prime illustration of a subsidiarity-guided strategy: Under this governance model, the State supports and encourages private non-profit associations with financial and technical aid in providing public utilities, instead of attempting to offer these services by its lonesome[62]. In the opinion of the ADI's authors, infra-constitutional legislation could not legitimately transfer public services to private actors while restraining State functions in their direct execution, since these services are constitutionally-mandated as a duty to be fulfilled by the State.

Complex as it was, the action gave rise to a rich debate among STF Justices. At the core of the discussion was the topic we just referred to as the basic problem of constitutional adjudication in general, and of constitutional adjudication in economic matters in particular: the never-ending tension between constitutionalism and democracy. Justice Carlos Aires Britto, the first one to vote, ruled in favor of the partial unconstitutionality of Law No 9.637/1998. For him, private participation in the provision of public services, by a constitutional imposition, should only be complementary to that of the State – not the other way around. The administrative model of "social organizations", with its limitation of the State to a strictly encourager and overseer role, would amount to the renouncement of the State constitutional duties on the provision of public services.

Justice Luiz Fux was quick to diverge from this line of thought. By drawing from an opposite argument, he asserted that the Constitution does not itself embed a specific, immutable State model. On the contrary – so the argument proceeded – it is the mission of democratically elected majorities, not of the Constitutional Court, to design in each historical and cultural moment their own projects of State socioeconomic operation. Furthermore, according to Justice Fux, in light of Law No 9.637/1998 the State was not, in fact, avoiding altogether its constitutional duties of providing certain public services to the population; it was framing a different form of service-providing. Instead of the traditional State-oriented direct provision, the legislation opted for a technique based

[62] Brazilian economist Bresser-Pereira, the intellectual patron of most of the reforms, explains the intention behind the creation of "social organizations". According to him, social organizations are a part of a "public non-State" sector, for they are non-profit organizations which provide the population with basic public services (education, healthcare, culture, *etc.*). As such, they would allow for a more efficient provision of basic services as well as for greater social control by society: L.C. Bresser-Pereira, *Reforma do Estado para a Cidadania: a reforma gerencial brasileira na perspectiva internacional*, São Paulo, 1998, 235 ss.

primarily on the encouragement and the regulation of private non-profit institutions by the State, qualified by law as "social organizations".

As one may notice, Justice Fux's opinion fundamentally appeals to democracy. His vote shows a clear concern with the fact that the Constitution, although it burdens the State with active duties of participating in social and economic dynamics, allows for an ample arena of democratic debate as to how, from an operational and administrative standpoint, the State shall comply with its obligations – either through direct provision or the encouragement of private actors, with a vast array of options in between[63].

Justice Marco Aurélio, on his turn, raised some interesting objections to the "democratic argument" put across by Fux. His remarks tilted the discussion to the other side of the scale: his concern was no longer with democracy per se, but with the actual constraints imposed by the Constitution on legislation; in other words, with constitutionalism. This is made visible in the following extract of the vote:

> In a Rule of Law system, the democratic principle is not the only one worthy of deference. Were that the case, the Constitution would be unnecessary. The basic operational rules for the State, from which arise limits on legislative activity, are inserted precisely in the Higher Law. The majority principle may, sometimes, lead to the enactment of legislation contrary to the Law itself, and the number of rulings by this Supreme Court declaring unconstitutionalities, since the promulgation of the 1988 Charter, proves this circumstance. Thus, the Court has the role – not at all simple, one might add – of harmonizing the majority decisions, embedded in legislation passed by the Federal Congress, with the principles and rules of the Federal Constitution.

With these normative considerations in mind, Marco Aurélio's vote proceeded to rule for the unconstitutionality of Law No 9.637/1998. In his view, similar to that of Justice Aires Britto, the Constitution would dictate that public services necessarily must be provided, to some extent, directly by the State. No legislative or administrative project could be considered constitutional, he said, if it were to exclude direct State participation and limit its role to mere external encouragement. To put it bluntly, in the Justice's own words: «The constitutional model for the provision of social public services […] does not go without direct State action […]», to which he continued, «[t]he State cannot simply exempt

[63] In Justice Fux's words: «As a rule, it falls to the *elected representatives* to define which model of intervention, *direct or indirect*, shall be more effective to the fulfillment of the collective goals demanded by the Brazilian society, by establishing a form of action in accordance with the winning political project in the elections. It was based on this, especially during the last century, that direct State intervention prevailed in many social sectors, as a consequence of the ideals of a Social State.» Available at (in the original Portuguese): http://portal.stf.jus.br/processos/detalhe.asp?incidente=1739668, access in 05/05/2018.

itself of the direct execution of [public services] by means of 'partnerships' with the private sector».

After much debate, the law on social organizations was ultimately upheld by STF in 2015, by a majority vote. Justices Aires Britto and Marco Aurélio stood outvoted; Justice Fux's opinion managed to convince the other Court members. Even though it never mentioned the term "subsidiarity", a constructive interpretation of the ruling's ratio decidendi may notice that the Court actually rejected the argument central to subsidiarity proponents: based on Fux's prevailing vote, it ruled that the Constitution itself does not contain a specific State economic model – be that a "subsidiary model" or of any other kind or ideology. Far from it, the Court decided in favor of the Constitution being open the different democratic options in relation to the economic roles of the State:

> The Constitutional Court must not plaster and crystalize a specific pre-conceived State model, and thus prevent that, within the constitutional limits, prevailing political majorities in a pluralist democracy may set in motion their governmental projects, shaping the character and the instruments available to public administration in accordance with the will of the community.[64]

This may seem like a paradox, but a paradox it is not. In order to sustain a legislative-build subsidiary public administration model – in this case, the model of "social organizations" –, the Supreme Court had to accept that our Constitution must not impose any specific state model. As a logical consequence comes that if a State-centric model of direct provision of public services, like the one allegedly existent during the period pre-reforms, is not constitutionally-mandated, neither is a Subsidiary State-model intended exclusively with the preservation of individual freedom and of market mechanisms. Precisely because many of the State objectives towards the economy are expressed in the abstract language of constitutional principles, the definition of the State size, activities and specific instruments for their realization is, to large extent, susceptible to democratic definition and adaptation.

Why did this rationale emerge victorious? What was, after all, the constitutional constraint enforced by the Brazilian Court? It surely was respectful to democratic deliberation by upholding a reasonable legislative choice, as Justice Fux envisaged; but it also did pay reverence to constitutionalism – although in a different, more contained manner when compared to the suggestions made by Justices Aires Britto and Marco Aurélio.

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[64] Available at (in the original Portuguese): http://portal.stf.jus.br/processos/detalhe.asp?incidente=1739668, access in 05/05/2018.

The decisive consideration in determining the constitutionality of the legislation on social organizations seems to be the following: Law No 9.637/1998, contrary to what the defeated votes argued, did not merely exempt the State from attaining its constitutional obligations towards the provision of public services. In reality, the enactment of the law demonstrated a prima facie objective of reinforcing the effectiveness of these services, by selecting an alternative means for their provision: the creation of private social organizations, to be supported and regulated by the State. The Constitutional Court, then, backed up the law not on the grounds that it expressed a supposedly "subsidiary" State model, but for the reason that the State showed a concern with its constitutional economic duties. The concrete advantages and disadvantages of the model were rightfully left to democratic testing and deliberation as a political issue – not as a constitutional determination.

At this final point, a relevant aspect of the argument presented here must be emphasized, as to avoid any misperception. To deny the constitutional status of subsidiarity by no means implies the existence of an opposite constitutional directive – that of a "maximalist State", so to speak. This is not the guideline arising from the ruling commented here; neither is it the normative claim developed in the previous section. By doing so, one would risk to incur the exact same mistake the approach intends to avoid: to shoehorn a pre-determined State model of one's political or philosophical preference – a highly interventive, do-all see-all State model – into the democratically open-ended language of our economic Constitution. Which is to say that one could in fact be a feverous supporter of subsidiarity as a good political ideal, on a variety of reasons (moral, economic, emotional) – or any other State economic project, for that matter – all the while being convinced the Constitution does not mandate, in and of itself, that this principle of limited State intervention be always adopted on the legislative level – and still be completely coherent in one's assertions[65].

Take, for instance, the 1990's State and Administration reform, largely discussed during this article, or even the recent "subsidiary measures" implemented by the Brazilian Federal Government, mentioned in the Introduction. These are all political decisions, expressed via democratic legislation, which to great extent rely on concepts derived from subsidiarity, as a means of implementing specific State economic responsibilities. Their undertaking and effectiveness are matters of ordinary politics, not of constitutional law. It would be utterly insensible to simply label them all "unconstitutional" due to their rearrangements of the role of the State. It would be just as insensible, however, to imagine them as constitutional "impositions", as if no other sound courses of action – subsidiary or not

[65] For the best development, to our knowledge, of this line of argument in Brazilian legal literature, see: J.V. Santos de Mendonça, *op. cit.*, 230 ss.

– could have been legitimately adopted on the infra-constitutional level by political majorities.

At last, perhaps our economic Constitution's best light resides precisely here: in its radical, democratically-inclusive commitments on the relationship between the State and the economy.

7. *Conclusion*

This article presented a counter-argument against a "principle of subsidiarity" as a part of the Brazilian constitutional economic system. Constitutional commitments expressed on the abstract language of multiple principles – some market-oriented, others of social, interventive and nationalist character – provide the main reason to reject the constitutional status of subsidiarity. Being the State a central element of the constitutionally-defined economic order, its more or less interventive activity, especially in regards to its forms and instruments – ranging from the direct provision of public utilities to the many arrangements of interaction with private actors – ought to be defined over democratic deliberation. As such, a subsidiary course of action may or may not be implemented on the legislative and administrative levels – it is not to be taken, though, as an absolute imposition by the Brazilian Constitution.

In this context, constitutional adjudication, more specifically when conducted by the Constitutional Court, should be modest and self-restrained: It should refrain from striking down democratic legislation and other State acts based on particular pre-conceived State models, as if they were inscribed in the constitutional text itself – even a "subsidiary State" model. Its main function, rather, must be that of preserving the spaces of legitimate democratic debate provided by the Constitution. Still, this does not imply that there are no substantial standards to be enforced by courts. Although deferent to democracy, the Constitution imposes, by its multiple principles, a series of duties upon the State to act towards social development and transformation. When examining the constitutionality of laws and other State official acts, then, courts devoted to the effectiveness of the Constitution must analyze if the State is, noticeably, showing a reasonable degree of concern with the practical implementation of its positive responsibilities – be that via subsidiarity-guided strategies or via other economic programs supported by a variety of constitutional principles.

Intervento dello Stato, Costituzione economica e il c.d. "principio di sussidiarietà": il dibattito brasiliano

L'articolo tratta dell'esistenza e dell'applicazione del "principio di sussidiarietà" nella Costituzione brasiliana del 1988, come criterio per il legittimo intervento dello Stato nell'economia. Innanzitutto, si analizzano gli argomenti a favore dell'applicazione di tale principio, che rinviene le sue fonti formali nella Costituzione brasiliana. In secondo luogo, il saggio nega alla sussidiarietà la dignità di principio costituzionale, poiché tende a incorporare uno specifico modello economico di Stato nella Costituzione. Una lettura democraticamente orientata sostiene, invece, che gli obblighi costituzionali possono supportare più modelli economici – che possono essere più o meno orientati allo Stato. Infine, l'articolo offre alcune linee guida di giustizia costituzionale su questioni economiche che vanno oltre la dottrina della sussidiarietà, traendo ispirazione da un'importante sentenza della Corte suprema brasiliana ("ADI n. 1.923/DF").

State intervention, economic constitution, and the so-called "principle of subsidiarity": the Brazilian debate

The article discusses the existence and the application thereof of a "principle of subsidiarity" in the Brazilian Constitution of 1988, as a criterium for the State legitimate intervention in the economy. First, it analyses the arguments in favor of such principle which indicate its formal sources in the Brazilian Constitution. Then, the paper rejects the status of subsidiarity as a constitutional principle, for it tends to embed a specific economic State model in the Constitution. A democratically open reading holds that constitutional commitments may support multiple economic roles for the State – which may be more or less State-oriented. Finally, the article offers some guidelines for constitutional adjudication on economic matters beyond the doctrine of subsidiarity, by drawing inspiration on an important Brazilian Supreme Court ruling ("ADI No 1.923/DF").