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KINDREDSHIP, SUBSIDIARITY
AND GRASSROOTS MOVEMENTS:
CATALYSTS FOR EFFECTIVE LEGAL CHANGE

ABSTRACT. The article introduces and analyzes “kindredship” – a more inclusive term to identify what has been called “fraternity” throughout modern history – as a necessary ingredient, along with subsidiarity and grassroots movements, to address a range of emergencies, injustices and challenges that threaten democracy, the rule of law, and our very survival as a species. Increasingly, active citizens bring a broad array of problems to the attention of legal institutions at the local, national and global levels. Through multi-stranded synergies, our human-to-human links congeal into mass movements that spur environmental, social justice and human-rights activists to appeal to governments to make institutional changes. In Italy, the constitutional principle of subsidiarity, mirroring that of European law, requires the government to support citizens’ efforts when they promote general interests. Such interests thus gain legitimacy and citizens’ efforts foster reciprocal trust among themselves and with institutional allies, fortifying the democratic values that are essential to our social contract. Without this strengthened interdependence among all stakeholders, the plethora of existing legal norms at every level will remain unable to provide remedies for a vast range of inequities and brewing crises. The article explores comparative-law aspects of how the combined effects of kindredship, subsidiarity and grassroots movements fortify the rule of law. Civic engagement, based on our common humanity and built in the spirit of kindredship, is a key to overcoming the challenges that legal institutions face to defend and bolster democracy, whose inherent fragility requires constant diligence.

CONTENT. 1. Introduction – 2. Kindredship (Fraternity in the 21st Century) – 3. Subsidiarity – 4. Grassroots Movements – 5. Conclusion

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1. Introduction

Faced with a myriad of emergencies, social injustices and other legal challenges across the globe, active-citizen groups are increasingly organizing themselves, forming grassroots movements rooted in solidarity and based on our shared humanity to seek solutions. In Italy, citizens rely on the principle of subsidiarity, residing in Article 118, 4th paragraph, of the Italian Constitution, which mandates that the public administration support their efforts when they relate to the general interest.¹ Such principle lends legitimacy to citizens' actions, forming synergies – both among individuals and between them and the government – that can foster reciprocal trust and purposeful communication, thereby strengthening the democratic values underlying our social contract. Despite the wide range of legal norms that seek to address and regulate an increasingly complex panorama of inequities and neglected problems, this fortified interdependence among all stakeholders is necessary because “today’s challenges intertwine stories of individuals and populations, with which the law seems to be affected by a profound crisis and by a lack of effectiveness.”² Legislative, executive, judicial and administrative institutions are unable to provide successful governance on their own through top-down approaches: civic engagement must fill the gap to spread democratic values and create mechanisms that make them workable and further the rule of law.³

¹ “The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity.”

² A. COSSEDDU, “Introduction,” in *Journeying along the Path of Fraternity: A Comparative Law Approach*, ed. A. Cosseddu, publication pending, pp. XV-XXV, at p. XVI. Formerly published in Italian as “Introduzione,” in *I sentieri del giurista sulle tracce della fraternità: Ordinamenti a confronto*, ed. A. Cosseddu, G. Giappichelli Editore 2016 Torino, pp. XV-XXV, at p. XVI.

³ Civic participation is included as one of four key indicators – or sub-factors – comprising the Rule of Law, specifically those constituting the World Justice Project’s Factor 3, “Open Government,” as shown in its “*Rule of Law Index*® 2020.” The *Index*® “measures the effectiveness of civic participation mechanisms, including the protection of the freedoms of opinion and expression, assembly and association, and the right to petition the government. It also measures whether people can voice concerns to various government officers, and whether government officials provide sufficient information and notice about decisions affecting the community.” *Id.* at p. 15. The other indicators comprising “Open Government” are: “Publicized laws and government data,” “Right to information” and “Complaint mechanisms.” *Ibid.*

People around the world are taking action to draw attention to and reverse trends of persistent injustices, corruption, a weakened rule of law and declining livability in our cities. They solicit governmental policies and actions to address the damage inflicted over many decades to our planet's ecosystems and other threats to society and humanity as a whole. Social and economic disruption caused by the Covid 19 epidemic has heightened awareness of our global connectedness, uniting the entire human species in a common cause for the first time in its history. Simultaneously, worldwide uprisings demanding social justice in the wake of George Floyd's murder in the US have reinforced the conviction that citizens and institutions must work together in new and innovative ways to reinvent the social contract, one in which mutual respect and responsibility are reciprocated not only among individuals but also by the legal institutions governing us.

This article will focus on these three elements: fraternity (or kindredship), subsidiarity and grassroots movements, and the ways they can combine to effect positive change by harnessing public opinion and revitalizing democratic processes through a renovated legal paradigm. It will explore the positive synergies created through this triad to stimulate all three branches of government – legislative, executive and judicial – and increased citizen engagement. It will analyze the relevant legal bases and theoretical frameworks, in a comparative perspective, and provide concrete examples of how the interaction among these three features have played out and continue to do so in Italy and elsewhere.

2. Kindredship (Fraternity in the 21st Century)

The concept of “fraternity” has seen increasing interest from legal scholars, historians, sociologists and even the Catholic Church⁴ in recent years, identifying this

⁴ Pope Frances, head of the Catholic Church, and Sheikh Ahmed el-Tayeb, Grand Imam of Al-Azharin Abu Dhabi, United Arab Emirates, made a joint statement entitled “Document on Human Fraternity for World Peace and Living Together” on 4 February 2019. In it, they “declare the adoption of a culture of dialogue as the path; mutual cooperation as the code of conduct; reciprocal understanding as the method and standard.” They urge world leaders “to work strenuously to spread the culture of tolerance and of living together in peace; to intervene at the earliest opportunity to stop the shedding of innocent blood and bring an end to wars, conflicts, environmental decay and the moral and cultural decline that the world is presently experiencing” and “to rediscover the values of peace, justice,

“forgotten principle” as a possible solution to the challenges that have been heightened and made more evident by globalization, and as a potential tool to help deliver justice, legality and the rule of law.⁵ Pope Francis’s recent Encyclical Letter traces the history of the law of fraternity in biblical terms, from the Old Testament where “the imperative to love and care for others appears to have been limited to relationships of the same nation⁶” to its expansion to foreigners in the New Testament, with a call for “embracing everyone on the basis of our shared humanity.⁷ The encyclical letter recalls the story of the good Samaritan, in which a lawyer asks Jesus, “What is written in the law?” and “Who is my neighbor?” Christian teachings are founded on the Samaritan’s merciful actions towards the dying man in the story, and leave “no room for an appeal to determinism or fatalism as a justification for our own indifference.”⁸ Rather, Christian doctrine encourages the faithful to “create a different culture, in which we resolve our conflicts and care for one another.”⁹ These teachings contrast starkly with the restrictions placed on them in English tort law when Lord Atkin poses the same question: “Who is my neighbor?” In the landmark case that determined the limits on the duty of care, Lord Atkin defines the scope of such duty to those “persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”¹⁰ Clearly, fraternity can be broadly or narrowly defined, depending on the underlying context and the purposes the writer aims to achieve.

Legal philosopher Eligio Resta has described fraternity as “awareness of the duty to have to take distance from the logic of hostility and to share common spaces with

goodness, beauty, human fraternity and coexistence in order to confirm the importance of these values as anchors of salvation for all, and to promote them everywhere.” See <<https://bit.ly/2BsZmr2>>, accessed 20/6/2020.

⁵ COSSEDDU, “Introduction,” XXII and XXIII, cited *supra*, note 2.

⁶ The Holy See, Encyclical Letter *Fratelli tutti* of the Holy Father Francis on Fraternity and Social Relationship, 3.10.2020, paragraph 59, <http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.pdf>.

⁷ *Id.*, paragraphs 60, 61.

⁸ *Id.*, paragraphs 56, 57.

⁹ *Ibid.*

¹⁰ *Donoghue v Stevenson*, 1932 SC (HL) 31 (UKHL 26 May 1932).

every other individual, with his or her life, story and dignity.”¹¹ In a recent book, Cosseddu *et al* focus on the principle of fraternity and its potential to contribute to solving a vast range of legal problems, including issues in criminal, tort, comparative, international and environmental law, and factoring in the legal systems of Italy, France, Spain, Portugal, Brazil, Canada, the US, the UK and other countries.¹² The broad stroke that the principle of fraternity brushes across this vast panorama reflects its historic presence in the legal-rights triad established in the French Revolution – alongside liberty and equality.¹³ More recently, the inclusion of fraternity in Article 1 of the Universal Declaration of Human Rights underlines its relevance through modern times: “All human beings are born free and equal in dignity and rights [...] and should act towards one another in a spirit of brotherhood.” Critical moments in history have often evoked a legal principle based on “brotherly” relationships and mutual respect.

Before proceeding, however, any contemporary discussion on the principle of fraternity must involve an *a priori* inquiry as to how we might express and include within that term the idea of its true universality, i.e., that it necessarily also includes “sisterhood” and relationships with those identifying with non-binary genders.¹⁴ We can observe that even though the Universal Declaration of Human Rights refers explicitly to “all human beings,” it still uses the term “brotherhood” to express the duty to treat everyone equally, reflecting those familial-type ties that ultimately link all of humanity. If we consider different terms that might successfully encompass this inclusivity, the term “siblinghood” might seem a plausible candidate on the semantic level, but in legal literature it generally connotes relationships within the ambit of family law, specifically relating to questions of adoption, parental responsibility, and so on.¹⁵

¹¹ See E. RESTA, *Il diritto fraterno*, (new ed.), Laterza, Roma-Bari, 2005, p. VII; for a comprehensive view of the author’s conception, see p. 131 et seq.

¹² COSSEDDU, *Journeying along the Path of Fraternity*, cited *supra*, note 2.

¹³ A.M. Baggio (editor), *Il principio dimenticato. La fraternità nella riflessione politologica contemporanea*, Città Nuova, Roma, 2007; Id. (editor), *Caino e i suoi fratelli. Il fondamento relazionale nella politica e nel diritto*, Città Nuova, Roma, 2012.

¹⁴ See R. MORGAN, *Sisterhood is Global*, NY, 2016, Digital edition.

¹⁵ D. MONK AND J. MACVARISH, (2018) *Siblings, Contact and the Law: An Overlooked Relationship*, London: Birkbeck.

These considerations could render use the term “siblinghood” as a substitute for “fraternity” confusing, as related to the general topic but far from our intended meaning in the context of this article and in legal writings generally. Another word, “kindredship,” bears no such competing legal connotations, as far as this author has been able to detect. Defined generally as “the quality or state of being of the same kindred or family,”¹⁶ or “the state or quality of being related,”¹⁷ the term “kindredship” expresses the concept of belonging to the human family but is unburdened by any ambiguity or misleading meanings within legal contexts. Thus, “kindredship” constitutes a plausible alternative for “fraternity” when referring to the links that tie all of humanity together in a familial bond, thus imposing a requirement of mutual respect and equality in furtherance of personal dignity and human rights. Of course, the word “fraternity,” as used in this article, does denote a concept deeply rooted in history, where gender issues – including countless inequitable and exclusionary aspects – played significant roles, albeit largely unexpressed at the time the relevant historic events were occurring. We shall therefore proceed by using the term “fraternity” where the historic context or citations in the literature demand its use, but we will also employ “kindredship” to denote more accurately the relevant meaning intended herein, i.e., the principle that links our common humanity and the consequent appropriateness for solidarity among all human beings.

The concept of fraternity, as traditionally used to express our common humanity, is readily linked to reciprocity, which is the essence of legal relations, where rights and duties are placed in correlative terms.¹⁸ Norberto Bobbio summarized the most important obligations of citizens as follows: “The duty to respect others. Overcoming personal egoism. Accepting the other.”¹⁹ Reciprocal respect and acceptance

¹⁶ <Lexico.com/definition/kindredship>.

¹⁷ <Merriam-webster.com/dictionary/kindredship>.

¹⁸ A. COSSEDDU, “Rethinking Legality in Contemporary Legal ‘Space’: A ‘Bridge’ between Theory and Practice,” pp. 21-98, at pp. 32-33 in *Journeying along the Path of Fraternity: A Comparative Law Approach*, ed. A. Cosseddu, publication pending. Formerly published in Italian as “Ripensare la legalità nello ‘spazio’ giuridico contemporaneo: Un ‘ponte’ fra teoria e prassi,” pp. 21-94 at pp. 31-32 in *I sentieri del giurista sulle tracce della fraternità: Ordinamenti a confronto*, ed. A. Cosseddu, G. Giappichelli Editore 2016 Torino.

¹⁹ N. BOBBIO-M. VIROLI, *Dialogo intorno alla repubblica*, Laterza, Roma-Bari, 2001, pp. 41.

among individuals are inherent to fraternity – or kindredship, to use our proposed nomenclature – and extend horizontally among the citizenry to create a field (hence the term grassroots) across which to communicate, engaging and empowering them. It has been argued that fraternity is also rooted in Italian constitutional law, comprised within the “principle of horizontal solidarity,”²⁰ originating in Articles 2 and 3,²¹ and that it therefore includes the concept of “equal social dignity.”

Italian legal scholars debate the issue of fraternity’s constitutional relevance, intended as a way to integrate social pluralism into policy and invoked as a principle that reciprocally unites humankind by requiring collaboration manifested as benevolent behavior aimed at setting limits on majority rule.²² Its relation to liberty and equality as proclaimed in the French Revolution has morphed, according to Massa Pinto, into the oxymoron “conflictual fraternity,” to describe what she deems to be its limiting function, or its mandate to behave “as if we were brothers,” as the only possible way to install liberty and equality – which derive from fraternity – into reality.²³ She conceives “conflictual fraternity” as a limiting concept because it indicates the “continuous necessity of the external imposition of a duty to approach the Other, as irreducibly different, an enemy, in the awareness that this will be the only way to allow a co-existence in the present epoch.”²⁴ She also submits that the legal principle of fraternity

²⁰ F. PIZZOLATO, *Appunti sul principio di fraternità nell’ordinamento giuridico italiano*, in *Riv. int. dir. uomo*, 2001, pp. 753 et seq. and 799 et seq.

²¹ Article 2: “The Republic shall recognise and protect the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.”

Article 3: “All citizens shall have equal social dignity and shall be equal before the law, without distinction of gender, race, language, religion, political opinion, personal and social conditions. It shall be the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.”

²² I. MASSA PINTO, *Costituzione e fraternità. Una teoria della fraternità conflittuale: “come se” fossimo fratelli*, Jovene, Napoli, 2011.

²³ Id. Emphasis in original.

²⁴ Id. at p. 194 et seq. She considers subsidiarity and fraternity from a viewpoint that is critical of formalism, arguing that neither of them prescribes material content: “they are both indeterminate, to interpret, develop and implement. Subsidiarity and fraternity could be considered, in extreme synthesis, as meta-principles that expect to create order

is used by courts when they balance rights – through a “judgment of reasonableness” – adapting Rawls’s Difference Principle.²⁵

More recently, Adriana Cosseddu has asserted that fraternity should be considered in a perspective where law comprises co-responsibility within a net that constitutes a relational foundation, including “the family, the community and with it, its worlds (business, school, and so on).”²⁶ Thus considered, fraternity is “able to grant an ‘equal dignity’ with respect to diversities, and the opening to every other, no longer perceived as an antagonist, for the common humanity. This is a ‘path’ to make true prevention of conflict possible.”²⁷

In analyzing the Italian constitution’s provisions regarding relational autonomy and responsibility found in Article 5,²⁸ Gregorio Arena notes several aspects that are also relevant to kindredship, as it relates to the network of subjects and institutions

in the legal system, but according to modalities that are *different* with respect to those that are considered as belonging to traditional legal science, i.e., those deemed formalistic.” Ilenia Massa Pinto, “*Sussidiarietà e fraternità alla prova: due declinazioni sintomatiche della critica antiformalistica*,” Associazione Italiana dei costituzionalisti, Rivista n. 4/2011, p. 4.

²⁵ I. MASSA PINTO, *Sussidiarietà e fraternità alla prova*, p. 9. Rawls stated that “[t]he difference principle ... provides an interpretation of the principle of fraternity. In comparison with liberty and equality, the idea of fraternity has had a lesser place in democratic theory.” John Rawls, *A Theory of Justice*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, revised edition of the 1971 original, 6th printing, 2003, p. 90. For Rawls, “fraternity does imply [...] a sense of civic friendship and social solidarity, but so understood, it expresses no definite requirement. We have yet to find a principle of justice that matches the underlying idea. The difference principle, however, does seem to correspond to a natural meaning of fraternity: namely, to the idea of not wanting to have greater advantages unless this is to the benefit of others who are less well off.” Ibid. He concludes that “other aspects of fraternity should not be forgotten, but the difference principle expresses its fundamental meaning from the stand point of social justice.” Id. at 91.

²⁶ A. COSSEDDU, “Rethinking Legality in Contemporary Legal ‘Space’: A Bridge between Theory and Practice,” pp. 21-98, at p. 92 in *Journeying along the Path of Fraternity: A Comparative Law Approach*, ed. A. Cosseddu, pending publication. Formerly published in Italian as “Ripensare la legalità nello ‘spazio’ giuridico contemporaneo: Un ‘ponte’ fra teoria e prassi,” 21-94, at p. 88 in *I sentieri del giurista sulle tracce della fraternità: Ordinamenti a confronto*, ed. A. Cosseddu, G. Giappichelli Editore 2016 Torino.

²⁷ Ibid.

²⁸ Italian Constitution, Article 5. “The Republic is one and indivisible. It recognises and promotes local autonomies, and implements the fullest measure of administrative decentralisation in those services which depend on the State. The Republic adapts the principles and methods of its legislation to the requirements of autonomy and decentralisation.”

involved in Italy's decentralized administration. "Being dynamic and multidirectional, the relationships that are established on the basis of the relational concept of autonomy bring advantage to all the subjects that participate in them, because even if in a quantitatively and qualitatively different measure, all the subjects that form the nodes of the network of relationships are to be considered as bearers of resources, each according to its own capacities and possibilities; and since the relationships within the model of shared administration are founded on relational autonomy, this explains how it is possible that within this model general interest and individual interest tend to coincide: In fact, it is thanks to relational autonomy that each person receives and gives something to others, in an exchange that allows you to meet your own needs by being open to others."²⁹ Thus, fraternity, or kindredship, works as a building block to create symbiotic relationships within the governing structure at every level of the public administration.

From a historic point of view, both grassroots movements and fraternity – manifested as kindredship, or solidarity among citizens – were present in both the American and French Revolutions, whose common goals were rooted in the aspiration to develop fundamental rights through democracy.³⁰ In effect, such Revolutions are the ultimate expression of subsidiarity, since citizens triggered them as the result of activities carried out in their daily lives, which initiated a wider process of change that reestablished the very governance of these citizens' countries, creating democratic constitutional models based on popular sovereignty.³¹

²⁹ G. ARENA, "Introduzione all'amministrazione condivisa" in *Studi parlamentari e di politica costituzionale*, 1997, 117-118. 29-65 p. 47.

³⁰ See F. BRUNO, "The Principle of *Fraternité*: From the French Constitutions of the Revolutionary Period to the Constitution of the Fifth Republic," pp. 1-21 in *Journeying along the Path of Fraternity: A Comparative Law Approach*, ed. A. Cosseddu, publication pending. Formerly published in Italian, as Il principio di *fraternité*: dalle costituzioni francesi del periodo rivoluzionario alla costituzione della V Repubblica in *I sentieri del giurista sulle tracce della fraternità: Ordinamenti a confronto*, ed. A. Cosseddu, G. Giappichelli Editore 2016 Torino, pp. 1-20. "The *fraternité* present in the French constitutional texts – from those of the revolution to that of the Fifth Republic – is found in other constitutions, above all in the countries of the francophone area, from Haiti to Equatorial Guinea, from Algeria to Benin, to Cameroon." Id. at p. 2 in both editions.

³¹ For the ties between the American and French Revolutions, see R. SPITZMILLER, "I modelli esteri e lo stato delle relazioni internazionali," in *Studi per il Bicentenario della Rivoluzione Francese*, Vol. I, "Gli Stati Generali di Francia:

Even where fraternity is not recognized as an enforceable legal principle, it works as an aspirational building block to sustain and promotes the development of self-determination and democratic ideals while strengthening the social contract and the rule of law. The failure to respect the basic tenets of kindredship whereby all members of society retain their human rights and dignity has led to a breakdown of social norms, increased violence and the destruction of our environment. It has been observed: “When a society – whether local, national or global – is willing to leave a part of itself on the fringes, no political programmes or resources spent on law enforcement or surveillance systems can indefinitely guarantee tranquility.”³² Recent social unrest in the US and the insurrection at the Capitol highlight democracy’s inherent vulnerability, exacerbated by the most blatant refutation of kindredship: slavery, inequality embedded in the US Constitution itself in the Three-fifths Compromise and perpetuated by centuries of social injustice.

3. Subsidiarity

The term “subsidiarity” expresses one of the key principles of European law, as established in 1992 in the Treaty of Maastricht and currently formulated under the Treaty on European Union, which entered into force in 2009. In both the European Union and in Italy, this principle distributes and allocates administrative resources and functions within and between hierarchical governmental frameworks. At the European level, it regulates and limits EU authorities from acting when national or even local

L’iniziativa Legislativa,” Presidenza del Consiglio dei Ministri, Scuola Superiore della Pubblica Amministrazione, 1989, Rome, at pages 34-35. The connections between the French and US revolutions are personified by the participation in both by Thomas Paine, author of *Common Sense*, (1775-1776) – the book that sparked the American Revolution – and a sort of 18th Century grassroots blogger. More than two decades later, he wrote to President Washington, “A share in two revolutions is living to some purpose.” T. PAINE, *Rights of Man*, ed. Henry Collins, Middlesex, 1979, p. 9. In a gesture that exemplifies the tangible passage from words – aimed in a “common sense” way to common people for the common good – to widespread civic action and then to sweeping and lasting international legal change, he subsequently delivered George Washington with the keys to the Bastille, writing him: “That the principles of America opened the Bastille is not to be doubted, and therefore the Key comes to the right place.” To George Washington from Thomas Paine, 1 May 1790,” Founders Online, National Archives, <<https://founders.archives.gov/documents/Washington/05-05-02-0238>>.

³² Apostolic Exhortation *Evangelii Gaudium* (24 November 2013), 59; AAS 105 (2013), 1044.

governments could do so more effectively, requiring that decisions be taken as closely as possible to the citizens.³³ At the EU level, subsidiarity thus regulates concurrent powers, through a flexible mechanism that evaluates and compares national interests against local ones, through a weighing process similar to those employed through the Supremacy Clause in the United States and *konkurrierende Gesetzgebung* in Germany.³⁴

In Italy, as noted above, active citizens who organize themselves through associations or grassroots movements rely on the constitutional principle of horizontal subsidiarity³⁵ to gain the public administration's support to carry out initiatives aimed at the collective good. Subsidiarity was established fairly recently in Italy, in 2001, when the Italian Parliament approved and a referendum confirmed revisions to Title V, Italian Constitution, inserting the principle of subsidiarity in paragraph 4 of Article 118.

The activities generated in connection with horizontal subsidiarity aim toward a broad range of objectives, but often seek to defend a public – or common – good.³⁶

³³ See “The Principle of Subsidiarity, European Parliament,” available at: <<https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity>>. Accessed 4 April 2020. In some instances, instead, action at the EU level is indeed warranted. The Court of Justice of the European Union so held, e.g., in case C-547/14, where Philip Morris et al challenged the EU's authority as exercised by Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014, regulating the manufacture, presentation and sale of tobacco. The CJEU upheld the EU's Tobacco Products Directive, holding that “the Commission's proposal for a directive and its impact assessment include sufficient information showing clearly and unequivocally the advantages of taking action at EU level rather than at Member State level. Case C-547/14, paragraph 226.

³⁴ See R. SPITZMILLER, “A Comparative-Law perspective on Street Law in Italy: Drawing best practices from Common-Law traditions to boost Civic Engagement in a Civil-Law Context” in *Street Law and Public Legal Education: A collection of best practices from around the world in honour of Ed O'Brien*, D. McQuoid-Mason (ed.) pp. 221-236, Juta, Cape Town, (2019). See also T. GROPPi and N. SCATTONE, *Italy: The Subsidiarity Principle* (2006) 4(1) Int J Const L 131-137, available at <<https://doi.org/10.1093/icon/moi056>> (accessed on 5 September 2020).

³⁵ Article 118, paragraph 4, Italian Constitution. See note 1, *supra*.

³⁶ In Italy, legal scholars such as Gregorio Arena have defined common goods as those for which a community has assumed responsibility by providing for their care, reuse and regeneration. “The process that leads to the creation of a community for a public good begins when a group of inhabitants of a neighborhood or village propose to the municipal administration to make a pact for the care of a public good, material or immaterial. This process of community creation obviously develops even when there is no pact and a group of citizens spontaneously begin to take care of a public good, but this does not produce the transformation of the good into a common good.” G. ARENA, *I custodi della bellezza: Prendersi cura dei beni comuni. Un patto fra cittadini e istituzioni per far ripartire l'Italia*. Rome (2020) p. 101. In this way, public goods become common goods, and their enrichment can enrich everyone, not just their owner. See G. ARENA, *I beni comuni* (ed.) *Nota allegata al Bando per progetti emblematici*

For example, individual citizens and groups of them (active citizens), by spontaneous initiative and often acting based on a sense of kindredship³⁷ can propose interventions of care or regeneration of public spaces. These might include green areas, squares, streets, sidewalks and other public spaces, public property or subject to public use that might be in partial disuse or dilapidation.³⁸

Under the Italian constitutional principle of horizontal subsidiarity, increased interaction and productive synergies are developing between institutions and grassroots movements such as Retake Roma, to be discussed further,³⁹ below. Horizontal subsidiarity allows decisions and actions “relating to the public interest” to be taken directly by citizens, on their own and in varying degrees of collaboration with public bodies. Heightened citizen engagement is occurring especially in the field of urban security, where residents are directly affected at the most personal and familial levels by the governance of their local surroundings. An example of this collaboration is Italy’s Chamber of Deputies’ invitation to Retake Roma representatives to present observations⁴⁰ relevant to the drafting of the Legislative Decree on Security.⁴¹ The national lawmakers drew upon Retake’s suggestions to incorporate them into the

provinciali, 2018.

³⁷ As noted above, defined as “the quality or state of being of the same kindred or family,” or “the state or quality of being related.”

³⁸ P. BIONDINI, “*Beni pubblici e beni comuni: città, spazi pubblici e beni urbani a fruizione collettiva*,” Labsus, Laboratorio per la sussidiarietà, 18 December 2017. Available at: <<https://www.labsus.org/2017/12/i-beni-pubblici-urbani-nella-prospettiva-dei-beni-comuni/>>. Accessed 20.3.2020.

³⁹ <<https://www.retakeroma.org/>>. Retake is a volunteer association that empowers citizens to take care of common goods all across the Italian peninsula. Retake Roma is a non-profit, non-governmental, non-partisan organization founded in 2010 and currently comprised of some 80 self-organizing neighborhood groups in Rome alone. Aimed at bolstering civic pride, personal responsibility and empowerment, it organizes educational and hands-on clean-up events that engage citizens in the democratic process of caring for and defending common goods from degradation. The volunteers seek to raise awareness about the need to increase and improve normal maintenance operations by city administrations; they educate citizens about their duty to respect the public places by influencing public opinion through first-hand engagement, social media amplification, endorsements and testimonials from key opinion leaders; they gain support and action from public authorities and the private sector.

⁴⁰ <<http://documenti.camera.it/leg17/resoconti/commissioni/stenografici/html/74/audiz2/audizione/2017/10/03/stenografico.0023.html>>.

⁴¹ <<https://www.retakeroma.org/2017/03/07/dl-sicurezza-le-proposte-di-retake-a-montecitorio/>>.

Security Decree of 2017.⁴² Thanks to Retake Roma's proposals, school and university grounds – on a national level – now fall within the areas eligible for pacts for urban security and all the touristic and cultural points of interest, regardless of the number of tourists that visit them, and will also be protected in this law.⁴³ The Italian Security Decree addresses, *inter alia*, the types of measures that could allow abandoned urban areas to be converted into vibrant common goods. To reach the objectives set out in the decree, the legislature has provided for the possibility of pacts for urban security between territorial networks of volunteers – a characteristic manifestation of civic engagement, and of grassroots movements.

Retake has been contributing its philosophy and methodology of active citizenship through Italian educational institutions through its *Retake Schools* program since its founding, often partnering with other civic and legal organizations. One such organization is Labsus, or the *Laboratorio per la sussidiarietà*,⁴⁴ a think-tank of legal scholars supporting the implementation of the principle of subsidiarity, where volunteers – active citizens – elaborate ideas, collect a vast array of experiences and materials and report on relevant initiatives throughout Italy, including Retake Roma.⁴⁵

As noted above, and as provided for in the Italian Security Decree, such initiatives may involve the implementation of “collaborative pacts” between governmental bodies and active citizens for the shared administration of public – or common – goods. Italy's first collaborative pact was formed with Labsus, in Bologna, in 2014.⁴⁶ Labsus defines a collaborative pact as the “technical-legal instrument that allows living the constitutional principle of subsidiarity in everyday life, [by] exercising

⁴² <http://www.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0049720.pdf>.

⁴³ <<https://www.andreamazziotti.eu/decreto-sicurezza-migliorato-grazie-alle-proposte-dei-retakers-retake/>>.

⁴⁴ <<https://www.labsus.org/>>. Accessed 4 April 2020.

⁴⁵ “Retake Roma... dal degrado: Il movimento è riuscito nell'intento di riqualificare importanti spazi urbani” L. ZONFRILLI, 13 October 2013, *Laboratorio per la sussidiarietà*. See: <<http://www.labsus.org/2013/10/retake-roma-dal-degrado/>>. Accessed 4 April 2020.

⁴⁶ See “Il 22 febbraio a Bologna presentato il primo regolamento sull'amministrazione condivisa,” at: <www.labsus.org/2014/02/segna-agenda-il-22-febbraio-bologna-sara-presentato-il-primo-regolamento-amministrazione-condivisa/>. Accessed 27.6.2020.

a new form of responsible and solidary liberty [that renders citizens] sovereign.”⁴⁷ Collaborative pacts are sources of public law that establish the rules to govern the collaboration between citizens and governmental entities in the pursuit of the general interests.⁴⁸ In Italy, as of 30 June 2019, over 1000 collaborative pacts had been signed in 199 cities in 14 regions.⁴⁹ In Rome, the first collaborative pact ever concluded was signed between Retake Roma and the Appia Antica Regional Park Entity on Saturday, June 6, 2020 at the Aqueduct Park, for the shared administration of the park’s care and for the promotion of the cultural heritage it contains throughout the territory. The development of democratic processes inherent to these collaborative pacts represents an enormous shift in the paradigm that has characterized the governance of public goods, by converting them to common goods. Such shift reallocates the focus of the democratic process, placing it within the grasp of individual citizens and small clusters of them, who can then consolidate and form grassroots movements to increase their effectiveness to positively influence governance, thanks also to the synergies made possible by kindredship and subsidiarity.

Recent Italian jurisprudence confirms the virtual cycle created by these three principles. In June 2020, the Italian Constitutional Court, in judgment no. 131 of 2020, decided a landmark case in which it upheld co-planning between the public administration and third sector entities. The controversy involved a challenge of a law of the Umbria region that seemed to expand the number of subjects to be qualified as entities operating within the third sector (hereinafter ETS), claiming such expansion encroached on the exclusive competence of the state to determine rules of the civil order.⁵⁰ The Constitutional Court rejected this claim, and the judgment included broader reflections with considerable significance. The Court held that Art. 55, which opens Title VII of the ETS Code, regulating the relationship between ETS and public administrations, is one of the most significant implementations of the principle of

⁴⁷ *Labsus Rapporto 2019 sull’Amministrazione condivisa dei beni comuni*, G. Arena, p. 7.

⁴⁸ *Ibid.*

⁴⁹ *Id.* Pp. 9-10

⁵⁰ Judgment 26 June 2020 no. 131, paragraph 1.1.

horizontal subsidiarity, enhanced by art. 118, paragraph 4, Italian Constitution.⁵¹ The Court underlined that horizontal subsidiarity was meant to displace “the idea that only the actions of the public system is intrinsically suitable for carrying out activities of general interest”, recognizing the “autonomous initiatives of citizens” as “expressions of solidaristic society.” The Court noted that ETSs are particularly suitable to perform collaborative functions because, according to the ETS Code, they pursue the common good, perform activities of general interest without lucrative purposes and are subject to strict controls. ETSs are also repositories of valuable information, organizational and logistical capacity that are very useful to public administrations, both because they permit cost savings and because they are able to increase the quality of services rendered.⁵² This judgment by the Italian Constitutional Court confirms the importance of the principle of subsidiarity in defining active citizens’ essential role vis-à-vis governance.

4. Grassroots Movements

As noted above, grassroots movements are direct manifestations of kindredship: they begin spontaneously, from the simple relationships that exist among a few persons. Citizens carrying out small clusters of activities solicit collaboration from other people who can eventually become strong enough and empowered to demand legal action from the government, by expressing both proposals and protests in numbers that the public administration cannot ignore. These active citizens are thus united through a common goal, as a result of their recognition of their kindredship. They support each other in kindred-like rapports and guide themselves upward from the ground up – from their broad-based “grassroots level” – ascending along what is often a difficult, zigzag climb through hierarchical governmental systems. They encounter and must overcome cultural and bureaucratic barricades along the way, and break through jealously held territories. They aim to achieve tangible results and legal actions that translate into social improvement for the collective good. To do so, grassroots movements rely on the

⁵¹ Id., paragraph 4.

⁵² Ibid.

principle of subsidiarity to build on the necessarily horizontal foundation of kindredship, enlarging and buttressing it with verticality as they proceed. Then, ideally, they fortify citizens' empowerment by gaining support and authority from the top, the public administration, as mandated by the rule of law.

Returning to the topic of the increasing relevance of women and non-binary individuals in the formation of grassroots movements – and hence the need to use the word “kindredship” instead of “fraternity” – we can indicate a few examples that have achieved important milestones in legal reform. The women's – rights and LGBTQ – rights movements are exemplary. In *Sisterhood is Global* – a book with a range of views from around the world addressing issues facing women, including legal questions such as marriage; divorce; polygamy; contraception; abortion; maternity leave; child raising; physical abuse, including assault, battery and rape; sexual harassment, etc. – the author boldly asserts, “Although evangelical Christians, Islamists, the Vatican, and the ultra-Orthodox regularly unite in a misogynistic brotherhood to prevent women from gaining and keeping the basic human right of reproductive freedom, *they are losing*. [...] *This is directly traceable to the influence of the global women's movement*.”⁵³ Similarly, the #MeToo movement exemplifies the growing importance of legal issues relating to gender in recent years, delivering more emphasis to the critical need for civil remedies and criminal penalties for harm caused through sexual assault. This movement has “shaken the foundations of some of the dominant structures that for so long have been keeping a stronghold over the way that powerful institutions and individuals have been dealing with instances of sexual abuse.”⁵⁴

A wide spectrum of other legal issues involving threatened or violated civil rights – including LGBTQ rights, reproductive rights, immigration, criminal justice, prisoners' rights, disability rights, racial justice and many more – have been identified by individuals who have then formed grassroots movements to seek redress for damages or reform through the courts and legislatures. The Civil Rights Movement itself was

⁵³ R. MORGAN, *Sisterhood is Global*, Preface, NY, 2016, Digital edition. Emphasis in original.

⁵⁴ F. GHADERY, “#Metoo – has the ‘sisterhood’ finally become global or just another product of neoliberal feminism?” *Transnational Legal Theory*, 10:2, 252-274, DOI: 10.1080/20414005.2019.1630169, (2019).

spurred on by many individuals along the way, who contributed to the growth of the movement, and which has recently culminated in the Black Lives Matter movement, still protesting and bringing legal actions to achieve and equal opportunity. In the United States, the American Civil Liberties Union, a non-profit and non-partisan “public interest law firm with a 50-state network of staffed, autonomous affiliate offices”⁵⁵ has been waging legal battles for individuals and civic movements for 100 years.⁵⁶ It is one of the primary legal arms available to aggrieved persons or groups in the US, working through “the courts, legislatures and communities to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States.”⁵⁷ Such initiatives are often pursued thanks to activities that were sparked by kindredship, and their success in courts ultimately further advances such principle. As the operative legal body that solicits the government for remedies and reform, the ACLU relies on a wide range of principles

⁵⁵ <<https://www.aclu.org/guardians-freedom>>. Accessed 29.6.2020.

⁵⁶ A complete analysis of relevant cases where the ACLU has fought to defend the causes initiated by citizens and supported by grassroots movements is far beyond the scope of this article, but a few historic cases can be noted here, to show the long standing influence this organization has had in expanding civil rights. These cases were also instrumental in swaying public opinion and drawing attention to wrongs being committed against individuals or groups by the government. See also <<https://www.aclu.org/guardians-freedom>>.

Gitlow v. New York, 268 U.S. 652 (1925). This landmark US constitutional law case held that the 14th Amendment “incorporates” the First Amendment’s free speech clause and thus applies to the states as well as to the federal government.

Powell v. Alabama, 287 U.S. 45 (1932) The Court held for the first time that constitutional standards applied to state criminal proceedings. Convictions of eight African Americans wrongfully accused of raping two white women were reversed due to the poor performance of their lawyers, which deprived them of their 6th Amendment right to effective counsel.

Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939). The Court found the repressive actions of an anti-union mayor to be a violation of freedom of assembly, holding that such right applies to public forums, such as streets and parks.

Smith v. Allwright, 321 U.S. 649 (1944). The Court overturned a Texas law that authorized parties to establish white primaries, holding that it abridged the Fifteenth Amendment right to vote, as well as the Fourteenth Amendment right to equal protection under the law.

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). This case forbade state laws establishing racial segregation in public schools, even if the segregated schools are equal in quality, partially overruling *Plessy v. Ferguson*.

Romer v. Evans, 517 U.S. 620 (1996). This case held that a Colorado state constitutional amendment preventing protected status based upon homosexuality or bisexuality violated the Equal Protection Clause.

⁵⁷ <https://www.aclu.org/faqs#1_1>. Accessed 29.6.2020.

related to subsidiarity, though not specifically identified as such, present in US law. As noted above, such principles and laws create a regime similar in function to those premised on subsidiarity in the EU: they regulate concurrent powers by weighing and distinguishing national and local interests with the aim to distribute power in the most appropriate and effective way.

The US Constitution provides in the Supremacy Clause that it and other federal laws and treaties made pursuant to them are the “supreme law of the land.”⁵⁸ It thus establishes a hierarchy whereby any state laws that contravene these federal laws are preempted.⁵⁹ In turn, however, the 10th Amendment provides for “Reserved Powers,” and was “intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people.”⁶⁰ Powers that are shared by both the state and federal governments are called “concurrent powers.” This presentation of the disbursement of powers in the US federal system is necessarily very simplified, but serves to underline the roughly pyramid structure within which legal actions flow, and within which citizens, grassroots movements and organizations such as the ACLU operate.

At the legal system’s base, a broad field expands across all 50 states, each endowed with its own pyramid structure, beginning with a myriad of local governments and ascending up through larger, county or otherwise denominated regional bodies, to a summit at the statewide level. The federal legal apparatus operates across this same entire territory, superimposed over this expansive plain. Both state and federal governmental bodies therefore interact directly with citizens, and varying levels, depending on the nature of the matter being addressed. And though several limiting doctrines such as “standing to sue” and “exhaustion of remedies” serve to restrict direct access to remedies through the courts, the system does provide a modicum of success to persistent – and perhaps lucky – plaintiffs.

⁵⁸ US Constitution, Article VI, Clause 2. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme law of the land; and the Judges in every State to the Contrary notwithstanding.”

⁵⁹ *Altria Group v. Good*, 555 U.S. 70 (2008).

⁶⁰ *United States v. Darby*, 312 U.S. 100, 124 (1941).

The very Preamble of the US Constitution speaks most clearly and certainly most eloquently to spur Americans on in their quest of empowerment: “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and to our Posterity, do ordain and establish this Constitution of the United States of America.” The principle of subsidiarity had been conceived in the citizens’ demands that led to the American Revolution in 1776. It was instilled in the social contract and thus became an inherent part of American legal culture through the Supreme Law of the Land in 1787. American democracy has evolved over the last 233 years, and the power of subsidiarity and the strength of the social contract it sustains have certainly ebbed and flowed. Especially in these current turbulent times, the need for kindredship to spark grassroots movements and urge effective management and change in the public administration to foster improvements for the common good seems to be at a peak.

In today’s democracies, citizen participation often evolves from an individual level into a focused association or a grassroots movement that can lead to significant legal changes. A common vision seems to emerge: “a world in which a universal commitment to the health and well-being of the earth and all its peoples, fueled by successful global movements for economic and climate justice, has transformed production practices, consumption patterns, and economic and social relations to ones based on sustainability, equity, and the rights to land, food, and water.”⁶¹ Faced with the need for a shift in societal responsibility and organization, citizens form groups that often develop into grassroots movements, enabling them to have a larger voice and contribute to the care of common goods. As discussed above, one such movement is Retake Roma,⁶² which reinterprets the role of citizens from passive by-standers and converts them into active protagonists by allowing them to “retake” their cities, collaborating with and stimulating the institutions to do their work better. This process

⁶¹ <<https://grassrootsonline.org/who-we-are/>>. Grassroots International was founded in 1983 and has “expanded over the years and decades to support movements for political independence and human rights in South Africa, the Philippines, Palestine, Haiti and elsewhere with material aid and grants [using a] model of long-term partnership and direct advocacy [that] poses a powerful alternative based on movement building for systems change.”

⁶² <<https://www.retakeroma.org>>.

is the essence of subsidiarity. As active citizens, Retakers pursue self-interest and a sense of kindredship to fulfill the needs of their communities by taking care of common goods, creating scenarios where everyone benefits. Moreover, Retake's "approach, aimed at qualifying itself as a relevant subject in the public-private-non-profit partnerships, (PPPnPs) – which has become one of the main forms of organized interventions in local politics – seems to supersede the vision through which every issue of urban politics is resolved exclusively with institutional relationships where the city administration is [merely] called upon to carry out its own functions."⁶³ Retake is emblematic of those grassroots movements born of kindredship and nourished by empowerment attained through active citizenship that lies at the heart of subsidiarity.

5. Conclusion

We have seen how the principles of kindredship and subsidiarity can enable grassroots movements to bring about effective legal change. Fueled by the force of active citizenship that democratic society encourages through the social contract and fully supporting the rule of law, these three elements serve as catalysts to one another to engender important virtuous cycles. Such cycles are interdependent, each of them reinforcing the other; none of them could be as effective in accomplishing sweeping legal reform without the presence of the other two. They are essential in fostering democratic activity aimed at improving the quality of life for the common good and achieving social justice in the Rawlsian sense. In Italy, across Europe and in the United States, these virtuous cycles are working to improve our legal systems, furnishing them with more equitable, functional and sustainable mechanisms to support democratic values and the authority and influence of legal rules.

⁶³ M.C. ANTONUCCI & A. FIORENZA, *Democrazia dal basso: Cittadini organizzati a Roma e nel Lazio*, (2016) 87.
