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Local self-government, local public entrepreneurship and judicial intervention. The aftermath of global competition among local governments?

Christian Iaione*

Abstract

Local public entrepreneurship is a concept which encompasses a variety of activities carried out by local governments to foster local economic development. The first part of this paper puts forward local public entrepreneurship as a windfall of the right to local self-government. In the second part two cases are presented - one from EU and one from US - where local public entrepreneurship is playing a major role. However, in the EU the ECJ jurisprudence is discouraging local governments to engage in such activities thereby undermining the right to local self-government. By contrast, the US legal system actively encourages a high level of local public entrepreneurship for the production of urban services and infrastructure. The third and conclusive part of the paper addresses the implications of globalization for local development and questions whether normative action to regulate local public entrepreneurship shall be taken at the international law.

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TOCCATA (OR PRELUDE)... : The Hayek-hypothesis. Local governments as competing quasi-commercial corporations¹.

Since its birth the Tiebout model has divided the field of local government scholarship into two main schools of thought, its estimators and its detractors. Here I build on Tiebout's intuition that local governments shall compete with each other. But I analyze this phenomenon from a slightly different perspective.

Tiebout's cutting-edge study² asserted that local governments compete with each other to convey more taxpayers into their jurisdiction by offering packages of local public goods at competitive tax-prices. From this standpoint they act just as private firms which would compete for consumers by offering competitively priced private goods. "Exit" or "full mobility" of citizens is the crucial device that ensures efficiency. Taxpayers can leave inefficient cities/markets for cities/markets that produce preferred public services at a lower tax-price.

Hence, in the Tiebout model local governments are not the dynamic players in the game of interlocal competition. Richard Briffault has underscored that

local governments play a relatively passive part in this market-type mechanism, presenting a variety of revenue and expenditure patterns that are "more or less set". The dynamic element in the public sector marketplace is the individual, or, in Tiebout's terminology, "the consumer-voter." The central mechanism for revealing public service preferences is relocation: "The act of moving or failing to move . . . replaces the usual market test of willingness to buy a good and reveals the consumer-voter's demand for public goods". By settling in a particular locality, "the consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods." People decide on the taxes they want to pay and the type and level of services they want to receive by "shopping around" among the various localities in a given metropolitan area before "purchasing" by moving to the one that best fits their needs. The multiplicity of localities assures a range of choices and increases the likelihood that one locality will approximate the mobile consumer-voter's preferences³.

Surprisingly enough, Friederich Hayek⁴, an ardent exponent of laissez-fairism, maintained an active role for local governments in local economies

¹ Toccata (Italian for *to touch*) is a piece of classical music mainly for organs, composed to emphasize the dexterity of the performer. The form first appeared in the late Renaissance period. It originated in northern Italy. But it was in Germany where it reached its full development, culminating in the work of Johann Sebastian Bach more than a hundred years later. The Baroque toccata increases in intensity and virtuosity from the Renaissance version, reaching heights of extravagance equivalent to those of the architecture of the period. Bach's toccatas are among the most famous examples of the form. His toccatas for organ are often followed by an independent fugue movement. The fugue begins with a theme, known as the subject, stated alone in one voice. A second voice then enters and plays the same theme, beginning on a different degree of the scale. The remaining voices enter one by one, each beginning by stating the same theme (with their first notes alternating between the same two different degrees of the scale). The remainder of the fugue develops the material further using all of the voices and, usually, multiple statements of the theme. This description is an adaptation of the entries "toccata" and "fugue" drawn by Encyclopædia Britannica.

² Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 421-23 (1956).

³ For this reasoning see Richard Briffault, *Our Localism: Part II-Localism and Legal Theory*, 90 COLUM. L. REV. 346, 400 (1990).

⁴ FRIEDERICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY, VOL. 3, THE POLITICAL ORDER OF A FREE PEOPLE*, 146 (THE UNIVERSITY OF CHICAGO PRESS, 1979).

Most service activities now rendered by central government could be devolved to regional or local authorities which would possess the power to raise taxes at a rate they could determine but which they could levy or apportion only according to general rules laid down by central legislature.

I believe the result would be the transformation of local and even regional governments into *quasi-commercial corporations competing for citizens*. They would have to offer a combination of advantages and costs which made life within their territory at least as attractive as elsewhere within the reach of its potential citizens. Assuming their powers to be so limited by law as not to restrict free migration, and that they could not discriminate in taxation, their interest would be wholly to attract those who in their particular condition could make the greatest contribution to the common product.

To re-entrust the management of most service activities of government to smaller units would probably lead to the revival of a communal spirit which has been largely suffocated by centralization. The widely felt inhumanity of the modern society is not so much the result of the impersonal character of the economic process, in which modern man of necessity works largely for aims of which he is ignorant, but of the fact that political centralization has largely deprived him of the chance to have a say in shaping the environment which he knows. The great Society can only be an abstract society – an economic order from which the individual profits by obtaining the means for all his ends, and to which he must make his anonymous contribution. This does not satisfy his emotional, personal needs. To the ordinary individual it is much more important to take part in the direction of his local affairs that are now taken largely out of the hands of men he knows and can learn to trust, and transferred to a remoter bureaucracy which to him is an inhuman machine. And while within the sphere which the individual knows, it can only be beneficial to rouse his interest and induce him to contribute his knowledge and opinion, it can produce only disdain for all politics if he is mostly called upon to express views on matters which do not recognizably concern him.

These might have sounded to many as “prophecies” destined to remain unrealized. All or part of the prophecies seem turning true thanks to globalization of social, economic and legal relationships.

... AND FUGUE: Local public entrepreneurship and local self-government.

At the outset, it is necessary to forge an heuristic tool serving as a guide in the investigation of the Hayek’s hypothesis. The tool I imagined is the concept of local public entrepreneurship⁵. This is the “fugue”⁶ I am referring to and which could turn into either a step ahead or an undue

⁵ I adapt the terminology used in ROBIN PAUL MALLOY, *PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT* (Pennsylvania, 1991) at 10.

⁶ With all due respect for (and distance from) the extraordinary context where this lexicon was drawn from, I interpret the subject of this paper in a similar fashion. Indeed, after the little prelude where I give credits to those authors who have inspired me the most, I state the theme which is precisely the concept of “local public entrepreneurship”. I then try to play the same theme on different upward scales (*i.e.* national, supranational and international). I therefore do not pretend here to create a new original theme. I just enjoy playing with a little twist and some personal touch a theme many others contributed to create.

step out of line in the study of competition among local governments. Whatever the outcome may be, my attempt is to carve out a principled rationale for legislative and judicial interventions on behalf of local governments who regard other interventions of the same kind as excessively burdensome.

Now, ‘entrepreneur’ is «one who undertakes an enterprise; one who owns and manages a business». And ‘enterprise’ is a «commercial or industrial undertaking»⁷. Therefore, ‘local public entrepreneurship’ - as understood for the purpose of the present study - embodies all the commercial or industrial activities local governments engage in directly or support indirectly for the purpose of accomplishing their mission.

And their mission is primarily – although not exclusively - to foster the well-being of their constituency and more notably local economic development⁸. Local governments economic activism is meant to generate and retain business, drawing individuals and firms through expenditures on infrastructure and capital projects, public relations and marketing, and a vast array of other business-oriented initiatives⁹. The objective is to convey more citizens, firms and investments into their jurisdictions and take them away from other similar jurisdictions.

I move along the path enlightened by the Tiebout model¹⁰. That is competition among local governments. For the accomplishment of the aforementioned mission local authorities need to provide goods and services to their actual and potential constituencies. As Baker and Gillette claim «Different localities distinguish themselves by offering different packages of goods and services»¹¹. Local governments differentiate the basket of goods and services they provide to their citizens.

This creates a market of local goods and services. Citizens-consumers choose the city and the basket that maximize their preferences and minimize the tax-price for such goods and services.

Here I look at the same phenomenon although from a slightly different perspective. Tiebout and his successors have implemented a consumer-oriented vision of cities economic entrepreneurship. I embrace here a “business-oriented approach”. That is to say I look at competition among local governments from the side of the “supplier” of local public goods and not from the side of the “buyer”.

But in dealing with the supplier’s business strategies I do not intend to cover the supplier’s pricing policies. In the case at issue this imply that I do not address how the taxing power of local governments can be used to win competition with other jurisdictions. The matter has been extensively eviscerated¹². The fiscal well-being of most cities truly depends on the decisions of taxpayers - private individuals and revenue-raising / employment-generating businesses - to

⁷ The definitions are drawn by the Oxford English Dictionary.

⁸ See, for example, PAUL E. PETERSON, *CITY LIMITS* (Chicago, 1981); Ann O’M. Bowman, *The Visible Hand: Major Issues in City Economic Policy* 7-8 (NLC Working Papers, Nov 1987) (86% of mayors surveyed ranked economic development among their three top priorities; 36% qualified it as the highest priority); ROBIN PAUL MALLOY, *PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT* (Pennsylvania, 1991) (on legal, political, and economic implications of public/private cooperation and urban development and revitalization). In the landmark case *Kelo v. City of New London* (125 S. Ct. 2655 (2005)) the Supreme Court of Connecticut ruled that economic development constitutes a «traditional and long accepted function of government».

⁹ See Clayton P. Gillette, *Kelo and the Local Political Process*, 34 *HOFSTRA L. REV.* 13 (2005).

¹⁰ Charles M. Tiebout, *A Pure Theory of Local Public Expenditures*, 64 *J. POL. ECONOMY*, 416-424 (1956).

¹¹ LYNN A. BAKER – CLAYTON P. GILLETTE, *LOCAL GOVERNMENT LAW 337* (Foundation Press 2004).

¹² See, e.g., WILLIAM E. OATES, *FISCAL FEDERALISM*, (1972).

move to, remain in, expand in or depart from the geographical boundaries of the city¹³. However city taxing powers are constrained by the “cross-cutting pressures to hold taxes low enough to make the city attractive to businesses and affluent residents while keeping taxes high enough to fund essential infrastructure and social welfare programs”¹⁴. Hence at some point cities have to use levers other than the fiscal one to influence those decisions.

From the perspective embraced here, local governments seem to come very close to fulfill the “Hayek hypothesis”. Indeed, to foster economic growth and attractiveness of their territory localities engage in a variety of activities aiming at creating a fertile environment for the birth of new enterprises or conveying more external investment into their jurisdictions. Not only do they act as business operators, but they also choose tools that private firms would choose. As a matter of fact, local governments are increasingly relying on private corporate structures to deliver local public goods. They also sign contracts and/or enter into complex transactions to build partnerships with each other and/or with private parties¹⁵.

I follow this pattern to investigate a more legal-based issue. Provided that localities have to compete with each other, they need to be relatively free to define the content of the basket to fit their constituents preferences. As Briffault maintains

Yet a fundamental premise of the Tiebout hypothesis is that localities possess substantial discretion over local taxing, spending and regulatory decisions. Although this premise usually passes unstated, Tiebout's theory would make no sense without it, since it is this discretion that allows local governments to respond to consumer-voter preferences. Mobile citizens and multiple local governments would have little economic significance if each locality simply executed the decisions of a higher level government or if local decisions were regularly superseded by state or federal action¹⁶.

Thus, as economic entrepreneurs, cities need to hold sufficient discretion to let the entrepreneurial spirit free to design the pro-business and/or business-like strategies. At the same time they also need to be able to decide how they accomplish their mission and therefore what are the best suited instruments to implement such strategies. For instance local governments usually provide directly some local public goods and services. For some of them there is however an alternative to public production. That is called privatization, which takes different forms and in broad terms means private production with (at times) public partnership, regulation or mere oversight. It is however left out of the scope of this essay the ancient debate between laissez-fairism and public intervention. There are two reasons for this choice. First, it is now becoming questionable that local governments share always the exact same nature of other governmental entities which are undoubtedly public¹⁷. Second, in many cases activities falling within the scope of local public entrepreneurship may be provided simultaneously by local governments and private operators because either they correspond to a normal entrepreneurial

¹³ See P. PETERSON, CITY LIMITS, 22-37 (1981) and Richard Briffault, *Our Localism: Part II-Localism and Legal Theory*, 90 COLUM. L. REV. 346, 351 (1990).

¹⁴ See Richard Briffault, cited above.

¹⁵ Gillian E. Metzger, *Privatization as delegation*, 103 COLUM. L. REV. 1367 (2003).

¹⁶ Richard Briffault, *Our Localism: Part II-Localism and Legal Theory*, 90 COLUM. L. REV. 346, 405 (1990).

¹⁷ The public/private distinction is becoming blurry. See Roderick M. Hills, *The constitutional rights of private governments*, 78 N.Y.U. L. REV. 144 ().

activity any economic actor could engage in (*e.g.* debt issue) or they relate to sectors where the public provision (and monopoly) is or could be limited to just a specific part of them¹⁸.

In principle, local public entrepreneurship shall therefore imply localities' freedom to decide the "what" and the "how" of local economic development. Now, in some legal systems such economic freedom seems not to be fully protected and in some cases it is at stake. Then the question addressed here becomes: "who" has to make the choice about the "what" and the "how" of local governments economic activism? The law, the judiciary or local governments themselves? The ultimate question would address the role that globalization may play in this game.

Before we turn to the two case studies that addresses those questions, I need to make clear that the assumption from which I move is that local public entrepreneurship is a windfall of the right to self-government that local governments hold in almost any highly decentralized legal systems. In this regard it might be useful to briefly summarize how local self-government and local public entrepreneurship relate to each other in different legal frameworks. However, considering the nature of this essay, only a hasty treatment is possible. The reader will forgive the quick run through a densely populated area, allowing stops along the way only at few milestones.

I.1 In the Italian legal framework

(A) The role of local governments according to the Italian constitution after the 2001 devolution reform.

Italian constitutional law no. 3 of 18 October 2001 has deeply changed the previous framework of local governments powers¹⁹. This is due to the overall changes made to the Fifth Title of the Constitution setting forth the relationships among the Italian regional and local governments and in particular, to the re-drafting of section 118 of the Constitution.

To begin with, the Constitution today grants today autonomy to all the sub-national levels of government and the entities composing the Italian Republic stand all on an equal footing although with different powers²⁰.

The most relevant innovations enacted with the 2001 reform are the general entitlement of municipalities with "administrative functions" and the provision of the principles of subsidiarity, differentiation and adequacy. These principles shall serve as safeguards to both prerogatives of localities and effective and uniform standards in public goods delivery²¹.

¹⁸ See Clayton P. Gillette, *Opting out of public provision*, 73 DENV. U. L. REV. 1185 (1996).

¹⁹ On this see G. Cartei & V. Ferraro, *Reform of the fifth title of Italian Constitution: a step towards a federal system?*, EUROPEAN PUBLIC LAW, 445 (2002); E. Ferrari, *Planning, building and environmental law after the recent Italian devolution*, EUROPEAN PUBLIC LAW, 357 (2002); G. Cartei, *Devolution and the Constitution: the Italian perspective*, EUROPEAN PUBLIC LAW, 33 (2004).

²⁰ Article 114 of the revised constitutional text states that «the Republic is composed of municipalities, metropolitan cities, provinces, regions and the State». The previous text, instead, stated the «the Republic is divided into regions, provinces and municipalities». Besides, article 114, paragraph 2, has now extended to provinces, metropolitan cities and municipalities the legal status previously granted only to regions by the repealed article 115. Accordingly, they share with regions the same nature of autonomous entities with their own home rules and constitutionally entrenched powers and functions. Indeed, they are «autonomous entities having their own statutes, powers and functions in accordance with the principles laid down in the Constitution».

²¹ Article 118 so provides: «Administrative functions are attributed to the Municipalities, unless they are attributed to the provinces, metropolitan cities and regions or to the State, pursuant to the principles of subsidiarity, differentiation and adequateness, to ensure their uniform implementation.

Article 118 recognizes the principle of subsidiarity in its full meaning as keystone of the right of self-government²². Accordingly, power shall be assigned «to the lowest practicable tier of social organization, public or private»²³.

The principle of subsidiarity implies the principle of adequacy which calls for a flexible and dynamic distribution of powers. Powers shall therefore be assigned on the basis of the local/non-local dimension of the collective interest and of the capability of the specific government level to fulfill such interest. The principle of adequacy requires therefore an extensive degree of interlocal cooperation in order to reach the optimal dimension of delivery of several local services.

Conversely, in my view²⁴, the principle of differentiation lays down the right to self-determination of local authorities in the selection of public responsibilities and services they purport to provide to actual and potential residents. The principle at issue also recognizes the right to choose the organizational means through which localities have decided to supply the selected services or have been charged with the duty to provide by other governmental bodies²⁵.

Municipalities, provinces and metropolitan cities carry out administrative functions of their own as well as the functions assigned to them by State or by regional legislation, according to their respective competences.

State legislation shall provide for co-ordinated action between the State and the Regions in the subject matters as per Article 117, paragraph two, letters b) and h), and also provide for agreements and co-ordinated action in the field of cultural heritage preservation.

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».

²² Paragraph 4 of article 118 recognizes the principle of the so-called “horizontal subsidiarity” pursuant to which all public authorities «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».

²³ Roderick M. Hills, *Is Federalism good for localism?*, 21 J. L. & POLITICS 187 (2005).

²⁴ This view does not correspond to the opinion of the majority of the scholarship. The mainstream reads the principles of differentiation and adequacy as an hendiadys or disregards at all the importance of the principle of differentiation. See for instance T. Groppi, N. Scattoni, *Italy: The Subsidiarity Principle*, 4 INT'L J. CONST. L. 131 (2006); B. Caravita di Toritto, CONSTITUTIONAL REFORM: LOCAL GOVERNMENT AND THE RECENT CHANGES TO INTERGOVERNMENTAL RELATIONS IN ITALY, in THE PLACE AND ROLE OF LOCAL GOVERNMENT IN FEDERAL SYSTEMS (2005), (N. Steyler Ed.); P. Leyland, J. Frosini and C. Bologna, *Regional government reform in Italy: assessing the prospects for devolution*, PUBLIC LAW 242-251 (2002).

²⁵ Indeed, article 117 paragraph 2(p) establishes that the Italian State has exclusive legislative competence in matters of «electoral law, local government and fundamental functions of the municipalities, provinces and metropolitan cities». Correspondingly, there are some services that any local government needs to provide to their constituents to guarantee equal and uniform conditions of citizenship and this calls for a nationwide minimum common denominator in public service delivery. Indeed, the Italian constitution also entrusts the central government with the legislative power to determine «the minimum level of service delivery relating to civil and social rights to be guaranteed throughout the national territory» (article 117 paragraph 2(m)). Also, regions may decide to assign further tasks. Anyhow, central and regional governments shall transfer to local governments the necessary economic resources for this purpose. Yet, beyond these nationwide and regional common denominators each local government has got the power to decide to provide further services and above all it has the power to self-organize the provision of such services. To this extent section 119 establishes that «Municipalities, provinces, metropolitan cities and regions shall have revenue and expenditure autonomy.

Municipalities, provinces, metropolitan cities and regions shall have independent financial resources. They set and levy taxes and collect revenues of their own, in compliance with the Constitution and according to the principles of co-ordination of State finances and the tax system. They share in the tax revenues related to their respective territories.

State legislation shall provide for an equalization fund - with no allocation constraints - for the territories having lower per-capita taxable capacity.

But above all it favors the right of local governments to politically and economically self-differentiate in the pursuit of their mission to foster local development.

In this latter regard, the 2001 reform has indeed strengthened the regulatory powers and organizational autonomy of local authorities. Localities have been vested in with the power to enact regulations «as to the organization and implementation of the functions attributed to them» (art. 117, paragraph 6).

Thus, provisions of national or regional laws extremely rigid or detailed in foreseeing services to be provided and the exercise of local administrative functions. A clear ruling of the Constitutional Court on this issue is still missing. In the meantime State and Regions should have grasped the inner potential of these principles and promoted competition and cooperation among municipalities at local level.

However, after more than five years, little efforts have been carried out to implement the new constitutional principles recognizing local governments' full-fledged status of autonomous entities composing the Italian republic.

(B) Local public entrepreneurship in the Italian legislation on local government.

Legislative Decree no 267 of 8 August 2000, also known as the Local Government Act, is still the legislative body governing the legal status of local governments within the Italian institutional framework. Notwithstanding the constitutional reform, minimal changes have occurred.

With regard to the subject of this essay articles 3, 13, 112 and 113 are of prominent relevance. Articles 3 and 13 set forth the general scope of local governments autonomy which requires taking care of local interests and promoting social and economic development of local communities.

In particular, under section 112 local governments, within their competences, shall provide «public services having as their object the production of goods and activities aiming at fulfilling social ends and to promote the civic and economic development of local communities».

Under section 113(5) of the Local Government Act local public services of economic relevance such as those covering the operation and maintenance of methane gas, electric power, water distribution networks, public transportation networks and sanitation shall be provided alternatively through: a) a limited liability company selected through a competitive tendering procedure; b) a limited liability company held jointly by the local government and a private partner selected through a competitive tendering procedures in compliance with national and EU competition law and in accordance with the the guidelines enacted by the competent regulatory authorities; c) a wholly public-owned limited liability company provided that «the local authority exercises over the person concerned a control which is similar to that which it exercises over its

Revenues raised from the above-mentioned sources shall enable municipalities, provinces, metropolitan cities and regions to fully finance the public functions attributed to them.

The State shall allocate supplementary resources and adopt special measures in favor of specific municipalities, provinces, metropolitan cities and regions to promote economic development along with social cohesion and solidarity, to reduce economic and social imbalances, to foster the exercise of the rights of the person or to achieve goals other than those pursued in the ordinary implementation of their functions.

Municipalities, provinces, metropolitan cities and regions have their own assets, which are allocated to them pursuant to general principles laid down in State legislation. They may resort to indebtedness only as a means of financing investment expenditure. State guarantees on loans contracted for this purpose are not admissible».

own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities».

To sum up, the current Italian legislation seems to leave enough leeway for self-determination in the selection of local public goods and services as much as in the organization of services provision.

I.2 In the European legal framework

Decentralization is a common denominator to several European countries. This explains the attention paid to local governments involvement in the European supranational context and in the ongoing discussion on EU governance reform. The impression is that local self-government is gaining more and more attention and within this framework European countries are promoting local public entrepreneurship.

(A) The role of sub-State bodies in the European Charter of Local Self-Government.

On the European international law level, a primitive political recognition of local actors comes within the Council of Europe in 1961, which gave permanent status to the Conference of Local Authorities of Europe. The Charter of that conference was amended in 1975 to include the region as a political entity. Its working sessions led to the Charter of Local Self-Government²⁶ and the Charter of Regional Self-Government²⁷²⁸.

Article 2 of the Charter of Local Self-Government provides with the Constitutional and legal foundation for local self-government. In accordance with it, «local self-government shall be recognised in domestic legislation, and where practicable in the constitution».

With regard to the extensiveness, the right to local self-government «denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage *a substantial share of public affairs under their own responsibility and in the interests of the local population*» (Article 3, paragraph 1).

As to the content, the constitution or the statute shall prescribe «basic powers and responsibilities of local authorities» (Article 4, paragraph 1). Beyond the basic constitutionally entrenched powers, the Charter recognizes local authorities' right to self-determine and therefore differentiate their activities. Indeed, local authorities shall have «full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority» (Article 4, paragraph 2). Moreover, «Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy» (Article 4, paragraph 3). And even with regards to powers delegated to them by a central or regional authority, «local authorities shall, insofar as possible, be allowed discretion in adapting their exercise to local conditions» (Article 4, paragraph 4).

²⁶ Approved on 15 October 1985, in force since 9 September 1988.

²⁷ Adopted unanimously on 5 June 1997.

²⁸ At least equal attention should go to the Assembly of European Regions, - founded on 15 June 1985, headquarters in Strasbourg -, the purpose of which, under Chapter I, Article 1(3) of its Statute, is «[t]o promote the institutional participation of the Regions in decision making processes and in order to do this increase their active role in the construction of Europe, especially in the work of the Council of Europe, of the Organisation for Security and Cooperation in Europe and of the European Union».

And now we come to the right of self-determining the organizational means to accomplish their means. Indeed, «local authorities shall be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management» (Article 4, paragraph 5). In this regard, it is also relevant the provision contained in article 20 of the Charter according to which local governments shall have the possibility to choose, «in exercising their powers, to co-operate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest». On a more international level, they shall be able «to co-operate with their counterparts in other States».

Besides, the Charter sets forth some principles regarding administrative supervision of local authorities and in particular it establishes that it shall be ensured that «the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect».

The Charter also provides with financial autonomy of local authorities. Pursuant to article 9 local governments shall have «adequate financial resources of their own, of which they may dispose freely within the framework of their powers. Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law. Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate».

Finally, local authorities need to get recognition of «the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation».

(B) The role of sub-State bodies in EU primary law and EU secondary legislation. The role of regional and local governments in EU soft law and policy guidelines.

Initially, local and regional authorities have been completely cut out of the European integration process. The neglect they have suffered derives from the absence of any reference to local actors in the EC Treaties.

On the EC secondary law level, the creation of the Consultative Council of Regional and Local Authorities enacted with Decision 88/487/EEC²⁹ was the outset of local governments involvement in the EU decision-making process. In the preamble to the aforementioned Directive the Commission considers it necessary for those authorities to be more closely co-opted within the formulation and implementation process as regards as EU regional policy, which includes the consideration of other EU policies, and to set up a body to represent decision-making at the sub-State levels which would have only consultative powers³⁰ and would meet only when convened by the Commission itself³¹.

Nevertheless, the emergence of this new body has represented the keystone of decentralization in EU governance. It grew into the Committee of the Regions, established in the Maastricht Treaty³². However, despite the forward steps made in the Treaty of Amsterdam³³ and in the

²⁹ Commission Decision of 24 June 1988 (OJ 1988 L 247, p. 23).

³⁰ Article 2 of Decision 88/487/EEC.

³¹ Article 7(1) of that decision.

³² Articles 198a to 198c of the EC Treaty (now, after amendment, Articles 263 EC to 265 EC).

³³ The achievements in Amsterdam consisted mainly in the ability of the Committee of the Regions to adopt its Rules of Procedure (second paragraph of Article 264 EC); an increase in the number of areas in which consultation is mandatory (for example, Articles 71 EC, 128 EC, 137 EC and 175 EC); the right to issue opinions on its own

Treaty of Nice³⁴, the Committee of the Regions has not been able to enfranchise from being a mere consultative body.

Yet decentralization in European Governance has found a strong ally in the EC Commission. With the issuance of the White Paper on European Governance³⁵, the Commission committed itself to: a) establish «a stronger interaction with regional and local governments and civil society» through «a more systematic dialogue with European and national associations of regional and local government at an early stage of policy shaping»; and b) to bring «more flexibility in the means provided for implementing legislation and programmes with a strong territorial impact» through target-based contracts to be concluded between Member States, territorial authorities designated by them, and the Commission within one or more areas.

From the first point of view, after adopting its report on European Governance³⁶ and its communication on a reinforced culture of consultation and dialogue³⁷ on 11 December 2002, the Commission adopted the Communication on Dialogue with associations of regional and local authorities on the formulation of European Union policy laying down the framework, goals and modalities governing this dialogue with associations of regional and local authorities³⁸.

As to the second point of view, the Commission adopted a communication providing “A framework for target-based tripartite contracts and agreements between the Community, the States and regional and local authorities”³⁹. The contract would entrust the designated sub-national authority in the Member States with the task to undertake the implementation of identified actions in order to realise particular objectives defined in “primary” legislation. The contract should include arrangements for monitoring. The approach concerns regulations or directives in fields where subnational public authorities are responsible for implementation within the national institutional or administrative system.

In recent years the EC Commission has introduced a new governance mechanism that tends to foster the connection between the EU-level and the national and local levels. This new governance approach is called the ‘open method of coordination’ (OMC) and it has been adopted as a general model to be used in a several policy areas⁴⁰.

Finally, decentralization aspirations were in part realized in the Treaty establishing a Constitution for Europe. The Constitution included a number of important achievements for regional and local governments. In summary, these points include:

initiative (fifth paragraph of Article 265 EC); and the right of the European Parliament to seek its opinion (fourth paragraph of Article 265 EC).

³⁴ There were two main amendments introduced by this Treaty: the requirement that members of the Committee must have an electoral mandate in a regional or local authority, their status as members lapsing when that mandate comes to an end; and the restriction of the number of members to 350 (Article 263 EC).

³⁵ COM(2001) 428 final of 25 July 2001.

³⁶ COM(2002) 705 final of 11 December 2002.

³⁷ COM(2002) 704 final of 11 December 2002.

³⁸ COM(2003) 811 final of 19 December 2003.

³⁹ COM (2002) 709 final of 11 December 2002.

⁴⁰ See for instance Communication from the Commission on Modernising Social Protection for the Development of High-Quality, Accessible and Sustainable Health Care and Long-Term Care; Support for the National Strategies using the “Open Method of Coordination”. COM(2004)304 final of 20 April 2004. S. BORRÁS & K. JACOBSSON, *The Open Method of Co-ordination and New Governance Patterns in the EU*, JOURNAL OF EUROPEAN PUBLIC POLICY, Vol. 11, No. 2, pp. 185–208 (2004). S. REGENT, *The Open Method of Coordination: a New Supranational Form of Governance?*, EUROPEAN LAW JOURNAL, Vol. 9 (2), pp. 190–214 S. (2003).

- the explicit recognition of local and regional self-government (Article I-5);
- the extension of the subsidiarity principle to include local and regional government (Article I-11);
- the extension of the concept of cohesion to include *territorial* cohesion, both as an objective of the Union (Article I-3), and as a competence;
- the safeguarding of the Committee's prerogatives (Article III-365(3));
- the subsidiarity/proportionality monitoring system (Protocol on subsidiarity);
- more effective consultation of regional and local governments, and more account to be taken of the financial impact of EU policies on local and regional governments (Protocol on Subsidiarity);
- the new right of the Committee of the Regions to refer subsidiarity issues to the Court of Justice.

The Constitution – by strengthening the principle of multi-level governance – marks an important achievement in overcoming the gap between the EU and our citizens. It makes it easier for citizens to engage with European policies, thus ensuring that EU priorities more adequately reflect their day-to-day concerns.

(C) The case-law of the ECJ on the standing to bring an action of sub-State bodies

To field-test the extension of a their legal status within European Union could be useful to ascertain whether local governments hold the right to stand before the ECJ. Such entitlement could witness in favor of local governments legal recognition within the EU framework. Yet notwithstanding the aforementioned political and legal accomplishment the legal status of sub-national bodies in annulment proceedings before the ECJ is still weak.

According to some scholars, in the absence of an express definition of ‘State’ in the Treaties - especially for the purpose of Article 230 EC - that term should be interpreted as referring to subjects of international law recognized as having the capacity to sign and ratify agreements between States who form an organization having independent power on a territorial basis⁴¹. By contrast, other authors infer from the case-law of the Court of Justice that the term ‘State’ embodies a collection of authorities and tasks⁴². However, this scholarly debate adds little to the interpretation of the second paragraph of article 230 EC Treaty. Indeed it does not provide an answer to the question of the scope of its meaning in that context.

The scarcity of ECJ rulings does not help in this regard and it suggests that the Court has not reached a clear position on this issue.

In two orders⁴³ the ECJ declared the actions for annulment brought by the Région Wallonne⁴⁴ and the Regione Toscana⁴⁵ to be manifestly inadmissible. The wording of both orders is,

⁴¹ M. PEREZ GONZALEZ, LA SUBJETIVIDAD INTERNACIONAL, in INSTITUCIONES DE DERECHO INTERNACIONAL PUBLICO (M. Díez de Velasco Ed.), 219 (2001).

⁴² M. Hecquard-Theron, *La notion d'État en droit communautaire*, in 26(4) REVUE TRIMESTRIELLE DE DROIT EUROPEEN, 693 (1990).

⁴³ It has been objected that there is still no formal judgment to support that case-law, but such procedural rigor seems unconvincing given that pleas of inadmissibility, and in particular manifest inadmissibility, are usually disposed of by way of an order, in accordance with Article 92(1) of the Rules of Procedure of the Court of Justice, and that the same is true of questions referred for a preliminary ruling, ‘where the answer admits of no reasonable doubt’, in accordance with Article 104(3) of those Rules. An approach consistent with the procedure followed by the Court of

however, identical, and reads as follows: «it is clear from the general scheme of the Treaties that the term Member State, for the purposes of the institutional provisions and, in particular, those relating to proceedings before the courts, refers only to government authorities of the Member States of the European Communities and cannot include the governments of regions or of autonomous communities, irrespective of the powers they may have». Express reference is made to both orders in a judgment of the Court of Justice in which, without citing the text itself, the Court confirmed that the second and third paragraphs of Article 230 EC cannot be applied by analogy to the regions⁴⁶.

However, in matters other than direct actions, the ECJ has on many occasions widened the scope of the term ‘State’ to include any body, whatever its legal form, which has been made responsible for providing a public service and has for that purpose special powers beyond those which result from the rules applicable in relations between individuals⁴⁷. The variability of the term ‘State’ in the Court’s case-law is also proved by the use of such term in cases having as object Member States failure to fulfill their obligations under Community law. Kingdom of Spain has been found to be in breach of its obligations in cases where local and regional bodies were instead blamable of the breach (*Santoña marshes*⁴⁸, *Ambient air quality*⁴⁹ and *Magefesa Aid II* cases)⁵⁰. Thus, if a sub-State regional or local authority fails to fulfill its obligations under Community law, the Member State in which that authority is located is held liable.

Similarly, on a path loosening the definition of ‘State’, the ECJ has assimilated the meaning of ‘public authority’ to that of ‘State’ in the application of Article 39(4) EC. The Court held that employment in the public service shall include all offices «which involve direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the State or of other public authorities»⁵¹. The concept of public authorities encompasses State as much as sub-State bodies, in particular local and regional bodies.

Not surprisingly, the Court has followed a variable geometry approach, which adapts the concept of ‘State’ to the field at issue in order to guarantee the effectiveness of Community law and maximize the integration aim underlying the EC Treaty.

However, the ECJ has not extended the loose definition to the provisions relating to the distribution of powers within the Community, as the Court held in the orders in *Région Wallonne* and *Regione Toscana*: «If the contrary were true [if sub-State bodies had standing to bring an

Justice therefore lends weight to the authority of those two orders. However there is a third case regarding Gibraltar for which see the Opinion of Advocate General Lenz in Case C-298/89 *Government of Gibraltar v Council* [1993] ECR I-3605, in particular 3621 et seq.

⁴⁴ Order in Case C-95/97 *Région Wallonne v Commission* [1997] ECR I-1787, paragraph 6.

⁴⁵ Order in Case C-180/97 *Regione Toscana v Commission* [1997] ECR I-5245, paragraph 6.

⁴⁶ Judgment in Case C-452/98 *Nederlandse Antillen v Council* [2001] ECR I-8973, paragraph 50.

⁴⁷ Judgment in Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraphs 17 to 20; in paragraph 19, the Court pointed out that it had previously held that provisions of a directive could be relied on against: the tax authorities (judgment in Case 8/81 *Becker* [1982] ECR 53, paragraphs 23 to 25); local authorities (judgment in Case 103/88 *Fratelli Costanzo* [1989] ECR 1839); constitutionally independent authorities responsible for the maintenance of public order and safety (judgment in Case 222/84 *Johnston* [1986] ECR 1651); and public authorities providing public health services (judgment in Case 152/84 *Marshall* [1986] ECR 723).

⁴⁸ Judgment in Case C-355/90 *Commission v Spain* [1993] ECR I-4221.

⁴⁹ Judgment in Case C-417/99 *Commission v Spain* [2001] ECR I-6015.

⁵⁰ Judgment in Case C-499/99 *Commission v Spain* [2002] ECR I-6031.

⁵¹ Judgment in Case 66/85 *Lawrie Blum* [1986] ECR 2121, paragraph 27.

action of their own right], it would undermine the institutional balance provided for by the Treaties, which govern the conditions under which the Member States, that is to say the States party to the Treaties establishing the Communities and the Accession Treaties, participate in the functioning of the Community institutions. It is not possible for the European Communities to comprise a greater number of Member States than the number of States between which they were established».

Nor has there been a sufficient development of the local authorities EU legal status as to justify a shift in the institutional balance referred to in the orders in *Région Wallonne* and *Regione Toscana*. For this reason the ECJ has again confirmed the previous case-law in the recent *Regione Siciliana* case⁵².

(D) The EU framework for local public entrepreneurship.

Local governments have always been involved indirectly in the implementation of EU structural policies whereas they have been directly responsible of actions enforcing EU sectoral policies. In this latter framework the Commission has recently adopted the communication on “Cohesion Policy and cities: the urban contribution to growth and jobs in the regions”⁵³ which encourages local public entrepreneurship to bear the rise of global competition among local territories.

The Commission acknowledges that European cities attract investment and jobs. The proposals of the Commission for Cohesion Policy suggests cities to use the very many tools at their disposal to strengthen their attractiveness. According to the Commission local governments should intervene in four key sectors: a) transport, accessibility and mobility⁵⁴; b) access to services and amenities⁵⁵; c) the natural and physical environment⁵⁶; d) the cultural sector⁵⁷.

In the Commission’s view, cities should support local economies by providing «a stimulating environment for innovation and businesses to flourish». They need to take steps to further foster this environment. City-level actions have an added value because local governments hold «more information on the specificities of the business environment and are able to carry out smaller scale complex actions tackling multiple interlinked problems». The Commission suggests two types of action local governments can take to promote local economic growth: a) actions for the establishment of new enterprises⁵⁸; b) actions for innovation and the knowledge economy⁵⁹. This

⁵² Judgment in Case C-417/04, *Regione Siciliana v Commission*, [2006] ECR I-3881, paragraph 21. The ECJ ruled that « an action by a local or regional entity cannot be treated in the same way as an action by a Member State, the term Member State within the meaning of the second paragraph of Article 230 EC referring only to government authorities of the Member States. That term cannot include the governments of regions or other local authorities within Member States without undermining the institutional balance provided for by the Treaty (order in Case C-180/97 *Regione Toscana v Commission* [1997] ECR I-5245, paragraphs 6 and 8, and Case C-452/98 *Nederlandse Antillen v Council* [2001] ECR I-8973, paragraph 50) ».

⁵³ COM(2006) 385 final of 13 July 2006.

⁵⁴ Sustainable urban mobility means making the best use of all the transport infrastructure, co-ordination between the various transport modes and the promotion of the least polluting modes.

⁵⁵ «A competitive city needs to invest in modern, efficient and affordable services with easy online access. Key services include healthcare, social services, training and public administration. These services must develop and adapt to current and future demographic changes, especially the aging population».

⁵⁶ «Redevelopment of derelict brownfield sites and renovation of public spaces improves local services and the local area and avoids the use of greenfield sites. Initiatives to make urban areas and city centers attractive places to live».

⁵⁷ «An active cultural policy is a valuable tool for building bridges between communities and fostering the integration of immigrants and other newcomers to the city».

⁵⁸ To promote business initiatives at the local level, local governments are required to improve their economic infrastructure. This includes transport and accessibility to be integrated with regeneration and renewal of buildings,

actions might induce local governments to step into the economic arena and sometimes enter into partnerships with private actors or other public entities.

In terms of governance the Commission suggests to strengthen «flexible co-operation between the different territorial levels». According to the Commission «Cities must find forms of governance which respect the institutional organization of each Member State and which are able to manage all aspects of urban development». The Commission sets forth some interesting guidelines. First, partnerships should be developed «between cities, regions and the state, within the framework of an integrated and coherent approach to urban development». Also, European cities need address the challenge of global competition and therefore elaborate «strategies coordinated at the level of agglomerations or urban networks in order to achieve critical mass». Particularly, the handling of the urban-rural interaction requires «co-ordination between urban authorities (both central and suburban) on the one hand and rural and regional authorities on the other. Both because urban areas provide a service to the wider region in terms of employment, public services, public spaces, social centres, sport and cultural facilities; and because in a similar way, rural areas provide services to wider society through the provision of rural amenities, recreational opportunities and environmental goods as reservoirs of natural resources and highly valued landscapes».

As to the approach local governments should take in addressing the issue of urban economic growth, the Commission underscores that «urban development is a complex and long term process». Cities should therefore maximize all the key factors for this development by adopting a long term integrated perspective. For this purpose, cities should elaborate a «long term, consistent plan for all the different factors promoting sustainable growth and jobs in urban areas. Actions in one field must be consistent with those in another. Notably, economic measures must be sustainable in social and environmental terms. Monitoring and evaluation systems should be in place to verify results on the round». Also, localities should drag the key partners – citizens and civil society, the private sector, the community and NGOs, as well as local, regional and national government – in the planning, implementation and evaluation of urban development.

As to financing, beyond EU structural funds, urban development may be supported through private resources. Private financing is useful and often necessary to complement public resources. A clear legal framework must underpin the setting up of public-private partnerships. The private sector brings not just money but complementary skills and competences. An

business parks and incubators, commercial centers. This requires also providing advice and support services to business, including social enterprises as much as assistance in the adoption and efficient use of new technologies, science parks, ICT communication centres and incubators. It also includes support and coaching in the areas of management, marketing, technical support, recruitment, and other professional and commercial services. Also, local governments shall contribute to build networks of cooperation between local partners including business, trade unions, universities, NGOs, training institutes and the local community. This support networks could help creating new mechanisms for sharing knowledge and experience. The financial aspects is, of course, relevant. In particular, «partnerships between local authorities, funders, service providers and SMEs facilitate the bringing together of financial and non-financial instruments, to meet local needs. Packages may consist of grants; micro credit schemes; guarantee funds for sharing high risks; mezzanine funds, advice and training. Cities can be important initiators in this field in coordination with regional and national financial initiatives».

⁵⁹ Cities should attract and retain knowledge workers and, more generally, an important share of tertiary educated residents. A key input to choice is the attractiveness of a city in terms of transport, services, environment and culture. Cities can stimulate and co-ordinate partnerships and clusters of excellence with universities and other institutions of higher education, creating business incubators, joint ventures and science parks.

effective public-private partnership requires both a strategic and long term vision and technical and management competences on the part of local authorities.

Local public entrepreneurship is also recognized in the EC Commission soft law which deals with services of general economic interest. The Commission seems to leave a wide discretion in terms of what and how local governments shall provide to their constituents.

In principle, «Member States have a wide margin to decide how to organise services of general interest. In the absence of Community harmonisation, the relevant public authorities in the Member States are in principle free to decide whether to provide a service of general interest themselves or whether to entrust its provision to another (public or private) entity. However, providers of services of general economic interest, including in-house service providers, are undertakings and therefore subject to the competition rules of the Treaty. In practice, Member States increasingly use public-private schemes, including design-build-finance-operate contracts, concessions and the creation of mixed-economy companies to ensure the delivery of infrastructure projects or services of general interest»⁶⁰.

Also, the Green Paper on Public-Private partnerships launched a debate on the application of Community law on public contracts and concessions to the PPP phenomenon. Yet the Commission clarified that this debate «takes place downstream of the economic and organizational choice made by a local or national authority, and can in no way be perceived as attempting to make a value judgment regarding the decision to externalize the management of public services or not; this decision remains squarely within the competence of public authorities. Indeed, Community law on public contracts and concessions is neutral as regards the choice exercised by Member States to provide a public service themselves or to entrust it to a third party»⁶¹.

Last, the provisions of Directive 2006/123/EC concerning the freedom of establishment and the free movement of services should apply only to the extent that the activities in question are open to competition, so that they do not oblige Member States either to liberalise services of general economic interest or to privatise public entities which provide such services or to abolish existing monopolies for other activities or certain distribution services (eighth whereas clause). Thus, Directive 2006/123/EC «does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services» (Article 1, paragraph 2).

The position of the EC Commission heavily relies on the principles consecrated in the EU primary law. Indeed, article 295 of the EC Treaty establishes the principle of neutrality as to public or private ownership⁶². In addition, article 86 states that public undertakings or undertakings to which Member States grant special or exclusive rights, if entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, are subject to the rules contained in the EC Treaty, in particular to the rules on competition, only «in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them». Also article 16 of the EC Treaty is relevant «Without prejudice to Articles 73, 86 and 87, and given the place occupied by services

⁶⁰ See the White Paper on services of general interest COM (2004) 374 final of 12 May 2004.

⁶¹ See COM(2004) 327 final of 30 April 2004, paragraph 17.

⁶² «This Treaty law shall in no way prejudice the rules in Member States governing the system of property ownership».

of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfill their missions».

I.3 In the US legal framework (and doctrine)

In defining the right to local self-government within the US legal framework one cannot start without integrating this discussion into the broader framework of American federalism. I need to briefly recall here the characteristics of US federalist institutional design.

In doing so I will stick to Roderick Hills characterization of American federalism⁶³. According to Hills,

“federalism” is the body of legal rules protecting the power of “regional”, subnational governments.

Hills suggests also that “regional” governments have ‘tree defining characteristics’ because they

(1) possess the general power to collect taxes and expend revenue, subject to relatively narrow exceptions in national law; (2) possess general regulatory power to govern territory containing several local governments that they have their own broad taxing and regulatory powers; and (3) define those local governmental powers through the regional government’s laws. Local governments are the atom of the system, for their laws do not define or control the powers of any “general purpose” governments smaller than themselves, although their territory may encompass other, smaller local governments, as counties’ territory (for instance) encompasses municipalities.

Hence the right of local self-government is not entrenched in the US federal constitution. Yet it is a principle that neither State constitutions nor State courts would deny. Why is that? If it is not consecrated in a federal constitutional provision what is the legal foundation of local self-government and what prevents States from abolishing local governments and frustrating local communities aspirations to get a share of public government in the US federal democracy?

As to the foundations of the right of local self-government Hills recalls Abraham Lincoln’s speech on the Kansas-Nebraska Act:

I trust I understand, and truly estimate the right of self-government. My faith in the proposition that each man should do precisely as he pleases with all which is exclusively its own, lies at the foundation of the sense of justice there is in me. I extend the principles to communities of men, as well as to individuals. I so extend it, because it is politically wise as well as naturally just: politically wise, in saving us from broils about matters which do not concern us⁶⁴.

This allows Hills to lay down a parallelism between individual and collective right to self-government to conclude that:

Decentralization is the backbone of self-government, both individual and collective. [...] Thus, collective self-government is simply the natural extension

⁶³ Hills, cited above.

⁶⁴ ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1832-1858, at 327 (Don E. Fehrenbacher ed., 1989).

of the concept of individual rights. [...] In short, there is no difference in principle between the consideration that justify collective individual self-government [...] decentralization serves the goal of self-government, whether the self doing the governing is an individual, the members of a private organization, or the population of a local jurisdiction.

Aside from Hills' suggestive and agreeable parallelism which could eventually lead to construe the right to local self government as an "'inherent' right of group association"⁶⁵, the American legal scholarship seems profoundly divided on the actual legal status of local governments within the US institutional framework. For some scholars, according to the legal framework in force the city shall be perceived as a "powerless creature of the State"⁶⁶. Others object that this view obliterates the empirical evidence which depicts the city as "a complex local polity, entitled to self-governance and capable of supporting a local political system" and ultimately "a state in microcosm"⁶⁷.

According to Richard Briffault⁶⁸, the difference between the two theses can be understood in light of the coexistence of Dillon's Rule⁶⁹ and home rule⁷⁰ which reflects

this tension between two views of the city: a complex local polity, entitled to self-governance and capable of supporting a local political system; and an administrative arm of the state, and as such both a potential threat to individual liberty and a hierarchically subordinate institution subject to state control. These developments concurrently justified and constrained local autonomy.

⁶⁵ Roderick M. Hills, *Romancing the town: why we still need a democratic defense of city power*, 113 HARV. L. REV. 2009 (2000).

⁶⁶ Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980). see also Gerald E. Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553 (1987) and Frug, *Property and Power: Hartog on the Legal History of New York City*, 1984 AM. B. FOUND. RES. J. 673, 687-90.

⁶⁷ Richard Briffault, *Our Localism: Part II-Localism and Legal Theory*, 90 COLUM. L. REV. 346, 391-435 (1990).

⁶⁸ Id. at 392-393.

⁶⁹ The reader of this paper who is not familiar with US local government law may appreciate a little definition of these two concepts. The others will forgive any shortcomings in the definition I am providing. In his *Treatise on Municipal Corporations* (1872), John Forrest Dillon explained that while the powers of states except for express restrictions under the state or federal constitution, municipalities only have the powers that are expressly granted to them. Thus the "Dillon's Rule" states that municipal governments only have the powers that are expressly granted to them by the state legislature, those that are necessarily implied from that grant of power, and those that are essential and indispensable to the municipality's existence and functioning. Any ambiguities in the legislative grant of power should be resolved against the municipality so that its powers are narrowly construed. However, when the state has not specifically directed the method by which the municipality may implement its granted power, the municipality has the discretion to choose the method so long as its choice is reasonable.

⁷⁰ Clayton P. Gillette & Paul B. Stephan III, *Constitutional Limitations on Privatization*, 46 AM. J. COMP. L. 481, 501 (1998) (Under governing principles of law, political subdivisions of a state cannot engage in any activity unless they have received explicit authority from the state legislature. The only exception to this rule exists where a locality has received "home rule" power either in the state constitution or from the state legislature. A locality that possesses "home rule" may initiate legislative programs without prior approval from the legislature. It seems relatively clear that the decision to contract with private firms for the provision of a particular good or service would be subject to this rule of plenary state power. Thus, a locality that desired to privatize one or more of its functions would presumably have to receive explicit authority to do so or would have to possess "home rule" power. The scope of "home rule" is itself somewhat ambiguous, though courts are likely to include within that category any activity that has minimal effects outside the jurisdiction. A home rule locality might be able, for instance, to contract out for street paving services, while a non-home rule locality might be able to do so only if it had explicit authority from the legislature). On this see also Clayton P. Gillette, *Opting out of public provision*, 73 DENV. U. L. REV. 1185 (1996).

Nowadays there is still discussion about the proper scope of local autonomy and the legal discourse sees two scholarly factions.

The two arguments emphasize different fundamental values: participation in public life in the one and efficiency in the provision of public sector goods and services in the other. Similarly, the theories rely on contrasting metaphors for the central mechanism of local public life: "voice" in the one case and "exit" in the other⁷¹. Yet the two tales told by political and economic theorists share a common commitment to localism⁷².

The two separate traditions although relying on distinctive premises converge on the general contention that local autonomy is the superior value that should be protected and enhanced. Most notably there is a further common denominator that ties together the political and economic schools of thought. That is precisely local public entrepreneurship.

Frug, who is the most prominent among the participation theorists, suggested that local governments power should be enhanced and they should be allowed to operate banks, insurance companies and other financial institutions, provide housing, create food cooperatives and run profit-making businesses⁷³. In Frug's view, municipal economic activism would transform local political life and provide a basis for empowering workers, the poor and consumers. Indeed, he contends that a municipal bank or insurance company "might make different judgments about the relative value it places on the profit margin, the kinds of loans it deems socially useful, and the kinds of consumer protection it seeks to provide" than would private lenders⁷⁴. Municipal ownership of housing "could prevent gentrification of these units, and encourage democratic control over the operation of multiple-family housing"⁷⁵. In other terms, city-owned enterprises could provide socially-oriented products⁷⁶.

Commenting Frug's argument about city's powerlessness, Ellickson⁷⁷ one of the most prominent legal scholars of local government who follows the economic perspective has underscored the relatively broad power of local governments to participate in business activities

First, during the twentieth century, state grants of power to cities have become more and more generous. Dillon's Rule, which required courts to construe strictly all state statutory delegations of power to cities, was widely accepted in 1910. Today it is a dead letter in many states. More significantly, over the past few decades more and more states have conferred broad home-rule powers on certain of their cities. The home-rule movement has not only given cities new powers, but has also created in them an (admittedly limited) right to resist state interference in their "local" or "municipal" affairs.

Second, state courts have considerably altered their interpretation of the constitutional and statutory texts that they once invoked to limit city business activities. In most states the key limitations have been state constitutional provisions that forbid cities from spending tax and bond revenues for other than "public purposes." These constitutional

⁷¹ Briffault is here expressly referring to A. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

⁷² Richard Briffault, cited above, at 393-394

⁷³ See Gerald E. Frug, *City as Legal Concept*, cited above, at 1150; Gerald E. Frug, *Property and Power*, cited above, at 687-91.

⁷⁴ *Id.*, *City as Legal Concept*, cited above, at 1150.

⁷⁵ *Id.*, *Property and Power*, cited above 59, at 688.

⁷⁶ *Id.* at 688-89.

⁷⁷ Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982) at 1568-73.

doctrines continue to have some bite in most states, but less and less bite as the years pass. Cities now rarely lose lawsuits that challenge their power to engage in business activities that deviate from the public-utility paradigm. Frug's "powerless" local governments currently develop housing complexes, retail stores, office buildings, sports stadiums, and redevelopment projects. They rent tools; own and operate distant vacation resorts; sell at retail products such as gasoline, liquor, light bulbs, and sportswear; and lend money to homebuyers and business enterprises. In Arizona, a state more rugged in its individualism than most, a constitutional provision explicitly authorizes all cities "to engage in industrial pursuits." Current mainstream economic theory, which would limit the role of government to instances of market failure, seems today to have little more constitutional relevance in most states than Herbert Spencer's social statics.

. . . the Supreme Court repeatedly held that the due process clause did not prevent states and cities from entering into businesses commonly carried out by private enterprise. Perhaps the broadest holding came in 1920, when the Court in *Green v. Frazier* unanimously sustained the constitutionality of a North Dakota statute that authorized the establishment of state banks, state mills and grain elevators, state homebuilding agencies, and other state enterprises.

The US experience of local public entrepreneurship includes a wide variety of public policies as well as legal and financing techniques available to local governments to nurture and trigger economic development. Notably, US local governments' business-oriented activism encompasses exercise of eminent domain for land acquisitions, public-private partnerships for urban renewal projects, issuance of debt and securities (*e.g.* industrial development bonds) and municipalization (as well as re-municipalization of previously privatized) local services⁷⁸. On a more corporate level, local public entrepreneurship has entailed the establishment of private-law-based structures or special-purpose public authorities⁷⁹ and special assessment districts⁸⁰ to finance improvements in urban renewal or in local public services and to carry out development projects.

II. Two "case-law studies".

In this section two case studies are presented which takes inspiration from two important case-law brought before respectively the European Court of Justice and the Supreme Court of Connecticut. In both cases courts were asked to express their judgment upon cases where economic entrepreneurship of local governments was under scrutiny. From the EU standpoint, cities are incorporating entirely or partially city-owned companies for the delivery of local public services or for urban renewal projects. As to the US legal framework, I will cursorily recall the landmark decision in *Kelo v. City of New London* in which the Supreme Court of Connecticut upheld a municipality's right to condemn private land for economic development purposes.

In both cases local public entrepreneurship is playing a major role fostering local governments innovation and enhancing communities well-being. However, in the EU the ECJ jurisprudence is

⁷⁸ Shelley Ross Saxer, *Eminent domain, municipalization, and the dormant commerce clause*, 38 U.C. DAVIS L. REV. 1505 (2005); *Id.*, *Government power unleashed: using eminent domain to acquire a public utility or other ongoing enterprise*, 38 IND. L. REV. 55 (2005).

⁷⁹ Jonathan Rosenbloom, *Can a private corporate analysis of public authority administration lead to democracy?*, 50 N.Y.L. Sch. L. Rev. 851 (2006).

⁸⁰ Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365 (1999).

discouraging local governments to engage in such activities thereby undermining the right to local self-government. Conversely, the US legal system actively encourages a high level of local public entrepreneurship for the production of urban services and infrastructure.

II.1 The EU debate on "in-house operations".

In recent years the European Court of Justice has been developing a very large jurisprudence on the so-called "in-house operations". Under the "in-house" umbrella public contracts are awarded by public authorities to entities having distinct legal personality although partially or wholly owned by the contracting authority itself⁸¹. The Court's findings, together with the analysis provided by the Advocate Generals, have represented a moment of confrontation on local public entrepreneurship.

(A) *The Teckal criteria and the substantive scope of the in-house exemption.*

The very first opportunity the Court had to deal with in-house operations was the *Arnhem* case⁸². The issue brought before the ECJ was whether the award of a public service contract to a public limited liability company jointly incorporated by two Dutch municipalities was subject to the EC public procurement rules. In his opinion advocate general La Pergola contended that the setting up of this company was a measure of administrative reorganization and the awards of the public responsibilities were to be construed as an "inter-department delegation" escaping the scope of the (old) Public Service Contracts Directive⁸³. The ECJ did not address the issue⁸⁴.

In the subsequent *Ri.San.* case⁸⁵, which concerned the award of a public service contract to an Italian company, whose capital was split by 51% of the contracting authority itself and 49% of a central government undertaking, the advocate general Siegert Alber analyzed thoroughly the nature of "in-house" operations. His cutting-edge opinion maintained that the "influence" a

⁸¹ As advocate-general J. Kokott explains in her opinion delivered on 1 March 2005 in case C-458/03, "*In-house operations stricto sensu* are transactions in which a body governed by public law awards a contract to one of its departments which does not have its own legal personality. *Largo sensu*, however, in-house operations may also include certain situations in which contracting authorities conclude contracts with companies controlled by them which do have their own legal personality. Whereas in-house operations *stricto sensu* are by definition irrelevant for the purposes of procurement law, since they involve transactions wholly internal to the administration, in-house operations *largo sensu* (sometimes called 'quasi-in-house operations') frequently raise the difficult question whether or not there is a requirement to put them out to tender". That was the issue with which the Court was mainly concerned in this case-law. In particular, there are three different in-house or quasi-in-house scenarios: awards to wholly owned companies, owned 100% by the contracting authority or entities which may be equated with that authority; awards to joint public companies whose shares are held by a number of contracting authorities; and awards to semi-public companies, in which genuinely private parties hold a majority or minority stake.

⁸² Case C-360/96, *Gemeente Arnhem v BFI Holding BV* [1998] E.C.R. I-6821; R. Williams, *The 'Arnhem' Case: Definition of 'Body Governed by Public Law'* 8 P.P.L.R. CS5 (1999); E. Papangeli, *The Application of the EU'S Works, Supplies and Services Directives to Commercial Entities* 9 P.P.L.R. 209 (2000).

⁸³ Opinion of A.G. La Pergola presented on February 19, 1998, at [36] et seq.; R. Williams, *The Scope of the EC Public Procurement Directives: an Analysis of the Arnhem Decision*, 7 P.P.L.R. 49 (1998).

⁸⁴ The ECJ canvassed instead the corporate structure of the company to establish whether it constituted a "body governed by public law" (*i.e.* having legal personality, subject to public control and established for meeting needs in the general interest, not having an industrial or commercial character), falling therefore within the scope of the "in house" explicit exemption set forth in article 6 of the old Public Service Contracts Directive.

⁸⁵ Case C-108/98, *RI.SAN Srl v Commune Ischia* [1999] E.C.R. I-5219.

contracting authority exercises over another entity should have been the decisive criterion to determine the "in-house" nature of the relationship⁸⁶.

It was in the landmark *Teckal* decision⁸⁷ that the ECJ forged the hermeneutic method that will then be adopted in all the subsequent cases to evaluate in-house operations. This case concerned the direct award to an interlocal (45 municipalities) consortium of a contract for the operation of the heating systems for several municipal buildings, including the contracting authority. The key issue in this case was whether the granting of a public service to an entity, in which the contracting authority is itself a member, is subject to the detailed EC rules on public procurement. The ECJ carved out the basic elements of an in-house operation and it extended it to relations between contracting authority and entities having a distinct legal personality when certain conditions are met. Most notably, an in-house relation exists provided that: "the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities"⁸⁸.

Thus, the substantive subordination to the contracting authority of a public-controlled legal entity in decision-making and operating processes does not trigger the applicability of EC legislation on public procurement. As to the scope of the in house derogation, with the *Teckal* decision the ECJ generalized the principle explicitly foreseen only in article 6 of the public service contracts directive and extended the application of the in-house rule to public contracts other than public services⁸⁹.

As to the substantive scope, after *Teckal* Court's case-law has broaden the scope of the in house derogation to contracts of public supply and infrastructure works⁹⁰, as well as to concession agreements⁹¹ granted by the public authority⁹², where the local government acting as contracting

⁸⁶ Opinion of A.G. Siegert Alber presented on March 18, 1999, at [52] et seq. On the basis of functional considerations he concluded that even without knowing all the organizational details of the entity in question, the latter formed part of the Italian State by the mere fact that the state owned 100% of its shares.

⁸⁷ Case C-107/98, *Teckal Srl v Comune di Viano*, [1999] E.C.R. I-8121.

⁸⁸ *ibid.*, at [50].

⁸⁹ The contract at issue concerned both the provision of services and the supply of goods. However, as the value of the latter was greater than the value of former the ECJ ruled on the basis of the old Public Supplies Contracts Directive.

⁹⁰ See case C-107/98, *Teckal* cited above; case C-26/03, *Stadt Halle* [2005] E.C.R. I-1; case C-29/04, *Modling* [2005] E.C.R. I-9705, case C-340/04, *Carbotermo* [2006] E.C.R. 0000.

⁹¹ Under Article 1(4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), "service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment'. A similar definition is drawn for public works concessions.

⁹² See case C-231/03, *Coname* [2005] E.C.R. I-7287; case C-458/03, *Parking Brixen* [2005] E.C.R. I-8612, case C-410/04, *ANAV* [2006] E.C.R. 0000. Notwithstanding the fact that public services or works concession contracts are, as Community law stands at present, excluded from the scope of Directives on public procurement, public authorities concluding them are, nevertheless, bound to comply with the fundamental rules of the EC Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular. See, to that effect, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60, and Case C-231/03 *Coname* [2005] ECR I-0000, paragraph 16. The prohibition on any discrimination on grounds of nationality is set out in Article 12 EC. The provisions of the Treaty which are more specifically applicable to public service concessions include, in particular, Article 43 EC, the first paragraph of which states that restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are to be prohibited, and Article 49 EC, the first paragraph of which provides that restrictions on freedom to provide services within the Community are to be

authority exercises an oversight over the awardee company substantially equivalent to that exercised on its own internal services and the latter dedicates the majority part of its activities to the authority or authorities that control it⁹³.

More recently, the Court has gone much further in the application of the EC public procurement regime to local authorities entrepreneurship. Yet the ECJ has asked for the fulfillment of the *Teckal* test also in cases where procurement law purpose to ensure a transparent and non-discriminatory selection of private contractors could have no foundation.

In *Commission v. Spain*⁹⁴ the Court upheld the need to apply the *Teckal* test also to mere inter-administrative cooperation agreements which occur between two or more public legal entities in order to determine whether the contract in question falls under the scope of the Public Procurement Directives or under the "in-house" exemption.

In *Commission v. France*⁹⁵ and moreover in the very recent *Auroux* case⁹⁶ the ECJ has submitted to the *Teckal* test also urban renewal projects. Most notably the latter case had as its object an agreement for the redevelopment of a brownfield area and the construction of a leisure center in the French city of Roanne that the Municipal Council of the municipality of Roanne had authorized its mayor to sign with a semi-public company owned by the Region of Loire. The project at issue constituted a public works contract according to ECJ⁹⁷. The Court stated that it is

prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. According to the Court's case-law, Articles 43 EC and 49 EC are specific expressions of the principle of equal treatment (see Case C-3/88 *Commission v Italy* [1989] ECR 4035, paragraph 8). The prohibition on discrimination on grounds of nationality is also a specific expression of the general principle of equal treatment (see Case 810/79 *Überschär* [1980] ECR 2747, paragraph 16). In its case-law relating to the Community directives on public procurement, the Court has stated that the principle of equal treatment of tenderers is intended to afford equality of opportunity to all tenderers when formulating their tenders, regardless of their nationality (see, to that effect, Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, paragraphs 33 and 54). As a result, the principle of equal treatment of tenderers is to be applied to public service concessions even in the absence of discrimination on grounds of nationality. The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with. That obligation of transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed (see, to that effect, *Telaustria and Telefonadress*, cited above, paragraphs 61 and 62).

⁹³ In the *Stadt Halle* case the Court upheld again that "A public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. In such a case, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority. There is therefore no need to apply the Community rules in the field of public procurement".

⁹⁴ Case C-84/03, *Commission v Spain* [2005] E.C.R. I-139; M. Dischendorfer, *Issues under the EC Procurement Directives: A Note on Case C-84/03, Commission v Spain*, 14 P.P.L.R. NA78 (2005).

⁹⁵ Case C-264/03 *Commission v France* [2005] ECR I-8831.

⁹⁶ Judgment of the Court of Justice in Case C-220/05 of 8 January 2007 not yet published.

⁹⁷ In 2002, the French municipality of Roanne decided, as an urban development measure, to construct a leisure center in the area close to the railway station, including a multiplex cinema, commercial premises, a public car park, access roads and public spaces. The construction of other commercial premises and a hotel were envisaged subsequently. In order to implement this project, the municipality of Roanne awarded a semi-public development company (the Société d'équipement du département de la Loire), to acquire land, obtain funding, carry out studies, organize an engineering competition, undertake construction works, coordinate the project and keep the municipality informed. The administrative Tribunal of Lyon asked the ECJ to establish whether the award of the contract to the regional company constituted an award of a public works contract subject to a call for competition in accordance

apparent from the agreement that the construction of the leisure center is intended to house commercial and service activities designed to regenerate an area in the town, so that it must be regarded as fulfilling an “*economic function*”. Thus, it must be regarded as an ordinary public works contract.

The *Teckal* criteria need to be met cumulatively. However their practical application in specific cases has proved them to be blurry. Considering that their fulfillment deactivates the EC public procurement legislation and principles, the Court is interpreting them very strictly leaving the burden of proof to the person seeking to rely on the exceptional circumstances that justify such derogation⁹⁸. Now, if interpreted too narrowly, it is most unlikely that such criteria could ever be met⁹⁹. As a matter of fact, what is happening now is that an unrestrained formalism in the construal of the *Teckal* criteria is putting at stake local entrepreneurial and innovation spirit as well as the seek for new forms of interlocal cooperation.

(B) *The aftermath of Teckal on local public entrepreneurship*

In recent decisions the ECJ has tried to put in context the *Teckal* criteria.

First, in an economic relationship between two entities having distinct legal personality it is hard to prove that one (*i.e.* the contracting authority) exercises a control over the other (*i.e.* the contractor) resembling the control the former exercises over its own departments. Unless adapted to the factual context and applied in a not too formalistic way the “similar control” criterion risks to narrow the scope of in-house operations and to turn them into a barely realistic tool. This is what the ECJ did.

In *Stadt Halle* the ECJ held that the award of public responsibilities to public-private companies does not fall within the scope an in-house operation and therefore is subject to the EC public procurement rules. This contention is now affecting local public-private partnerships¹⁰⁰, which are often entrusted with major and long-term projects by local municipalities for the provision of

with EC directives concerning the coordination of procedures for the award of public works contracts. As regards the question whether the development agreement constitutes a public works contract, the Court recalls, first of all, that the directive concerning the coordination of procedures for the award of public works contracts defines a public works contract as any written contract, concluded for pecuniary interest between a contractor and a contracting authority (State, local authority, body governed by public law) whose purpose is, in particular, the design and/or execution of works, or a work corresponding to the requirements specified by the contracting authority.

The Court notes that SEDL, a contractor within the meaning of the directive, was engaged by the municipality on the basis of an agreement concluded in writing. It observes that, although the agreement to engage SEDL contains an element which provides for the supply of services, that is to say the administration and organisation of the works, its main purpose consists in the construction of a leisure center, that is to say a work within the meaning of the directive. The Court states that it is irrelevant, in that regard, that SEDL does not execute the works itself and that it has them carried out by subcontractors. The Court states that it is apparent from the agreement that the construction of the leisure centre is intended to house commercial and service activities designed to regenerate an area in the town, so that it must be regarded as fulfilling an “*economic function*”. In those circumstances, the Court holds that the agreement must be classified as a public works contract within the meaning of the directive.

⁹⁸Case C-26/03, *Stadt Halle*, at [46]; Case C- 458/03, *Parking Brixen*, at [63]; Case C-410/04, *ANAV*, at [26].

⁹⁹ For instance, in his opinion delivered on July 1, 1999 in the *Teckal* case advocate general Cosmas found that the “control criterion” was almost unlikely to be met in a case where 45 municipalities owned the entity in question and the contracting authority in the specific case at issue had only 0.9 per cent stake of the entity's share capital.

¹⁰⁰ As public-private partnerships are not regulated, nor defined at European level, before the *Stadt Halle* judgment it was not clear whether the assignment of public tasks to such entities in the form of public contract or concession, fell within the scope of the Public Procurement Directives.

services of general interest¹⁰¹. After *Stadt Halle*, contracting authorities now obliged to apply Public Procurement Directives supposedly twice (once for the choice of the private shareholder and then for the choice of the contractor) may be withheld from using this form of co-operation¹⁰².

In *Parking Brixen* and *Mödling* cases ECJ made instead clear that the award of concessions or contracts even to wholly owned subsidiaries of the contracting authorities may be subject to public procurement regime. This leaves little space for optimism as to the survival of in-house operations in the future. *Mödling* and *Anav* specified then that the two Teckal criteria are met on a permanent basis.

In *Carbotermo* the ECJ specified the second *Teckal* criterion and interpreted the term "essential part of activities"¹⁰³. In the Court's view, this criterion is met only if the activities of the entity concerned are devoted principally to the contracting authority and any other activities are only of marginal significance. Then it is up to the national judge to carry out qualitative and quantitative analysis on factual basis. This assessment shall concern any activities carried out under a contract awarded by the contracting authority, regardless of who is the beneficiary (the contracting authority or the user of the services), who pays the contractor (the contracting authority or third users in case of concessions) and in which territory the services are provided.

Such an extensive interference in the self-government of many municipalities and, in particular, in their organisational discretion¹⁰⁴ is – even from the point of view of the market-opening aims of procurement law – extremely disproportionate. In *Parking Brixen* advocate general J. Kokott noted that:

After all, the purpose of procurement law is to ensure that contractors are selected in a transparent and non-discriminatory manner in all cases where a public body has decided to use third parties to perform certain tasks. However, the spirit and purpose of procurement law is not also to bring about, ‘*through the back door*’, the privatisation of those public tasks which the public body would like to continue to perform by using its own resources. This would require specific liberalisation measures on the part of the legislature.

In any event, through its use of the phrase ‘control *similar* to that which’, the judgment in *Teckal* indicates that the possibilities open to an authority for exerting influence over its

¹⁰¹ For instance transport, public health and waste management.

¹⁰² See Commission Communication on public-private partnerships and Community law on public procurement and concessions, COM (2005) 569 final, of November 15, 2005, 8. Anyhow, the European Commission is planning to publish a specific interpretative Communication in order to clarify limits of applicability of the public procurement rules to undertakings held jointly by the public and the private sector. This initiative, although of soft law type, shall provide reliable guidance for the selection of private partners participating in public-private partnerships and contribute, in general, to the better understanding of the Court's relevant case law. See S. Arrowsmith, *Public-Private Partnerships and the European Procurement Rules: EU Policies in Conflict?* 37 C.M.L.Rev. 710 (2000); L. Hausmann, J. Denecke, *Changes to German Public Procurement Legislation by the PPP Acceleration Act* 14 P.P.L.R. NA195 (2005).

¹⁰³ *ibid.*, at [63]-[68].

¹⁰⁴ As we have seen such right is enshrined in the European Charter of Local Self-Government of 15 October 1985 (ETS No 122). Indeed, article 6(1) of the Charter provides that local authorities must ‘be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management’. Moreover, the importance of local self-government is emphasized by the express reference to it in Article I-5(1) of the Treaty establishing a Constitution for Europe (signed in Rome on 29 October 2004, OJ 2004 C 310, p. 1).

own departments and over public undertakings do not have to be identical. What matters in deciding whether an undertaking is akin to an administrative department or to other market operators is not whether, *from a formal point of view*, the public body has the same possibilities *in law* as it does in relation to its own departments, for example the right to give instructions in a particular case. What matters is rather whether, *in practice*, the contracting authority is able to attain its public-interest objectives in full at all times. It is only where an undertaking has been made independent (autonomous) to such an extent that the contracting authority is no longer able to pursue its interests in full within the undertaking that the contracting authority can no longer be said to exercise a control similar to that which it exercises over its own departments.

Thus, if account were taken only of the – usually relatively extensive – fields of activity in which a public or private limited company is permitted to operate from a purely legal point of view (that is by law or under the company’s statutes), it would be practically impossible for such undertakings to fulfill the second *Teckal* criterion. In those circumstances, contracting authorities would always be required to comply with the procurement rules before concluding contracts with their subsidiaries, in so far as those subsidiaries are organised as public or private limited companies. This would make the choice of public or private limited company as a form of organisation appreciably less attractive. Such extensive interference in the organisational sovereignty of the Member States and, in particular, the self-government of many municipalities is not necessary for the purposes of the market-opening function of public procurement law.

The foregoing shows that the ECJ case-law on in-house operations deserves careful re-reading or, even better, complete re-thinking for its implications on local governments rights of self-government. The seminal *Teckal* decision first forged the in-house derogation to withhold the application of Community law on public services to relations between a local authority and its formally separate although substantially dependent corporate structures. It was intended to preserve local governments sphere of self-government being it in the form of self-organization or self-provision. Subsequently, the ECJ expanded the in-house derogation applying it also to all the other typologies of public contracts¹⁰⁵. The generalization of the category triggered a self-restraint interpretative attitude of the ECJ. In some cases such attitude has led the Court to reach conclusions deeply weakening local governments entrepreneurial discretion as well as interlocal cooperation. The point I want to make here is that the inquiry on the proper relationships between local governments and local economies is hardly suitable for judicial appraisal because it interferes with highly political decisions. The US case study will help understanding this point.

II.2 The US debate on the “public use” issue.

For the reasons stated above in the US local public entrepreneurship is much more developed and local governments are way more conscious of their intrinsic entrepreneurial nature. US local governments business-oriented strategies involve a wide variety of public policies as well as legal and financing techniques available to local governments to nurture and trigger economic development.

Notably, US local governments’ business-like activism encompasses exercise of eminent domain for land acquisitions, public-private partnerships for urban renewal projects, issuance of debt and

¹⁰⁵ For which the Community procurement regime does not provide an "in-house" provision similar to the one foreseen for in the EC Directive concerning the coordination of public service contracts awarding procedure.

securities (e.g. industrial development bonds) and municipalization (as well as re-municipalization of previously privatized) local services¹⁰⁶. From a corporate point of view, local public entrepreneurship may entail the establishment of private-law-based structures or special-purpose public authorities¹⁰⁷ and special assessment districts¹⁰⁸ to finance improvements in urban renewal or in local public services and to carry out development projects.

For the purpose of this essay I will briefly focus my attention on the use of eminent domain to assemble land for economic development. The reason why I devoted this section to the analysis of this specific instrument of local economic development is that it better enlightens the different attitude of the judiciary toward the political economy of local governments. A recent ruling of the Supreme Court of Connecticut has recently endorsed a municipality's right to condemn private land for economic development purposes.

Those who are strangers in the land of land use law might find useful to receive some basic information on the whereabouts of the power of eminent domain. I find no better words than those of professor Gillette¹⁰⁹

The eminent domain power is necessary to cure what is itself a political problem--the capacity of individual private property holders to frustrate majority will by refusing to sell privately held land for public purposes. In theory, publicly interested officials will use the condemnation power only to solve what is called the "land assembly" problem and only to do so where the result is to confer net benefits on their constituents, that is, only to make residents as a whole better off, even though some of those residents will lose private property that they might have preferred to retain.

Of course, the grant of such power raises the risk that local officials will exploit it and will condemn private property even where insufficient public benefits result. The underlying assumption of constitutional doctrine that permits takings only for a public use and then only with governmental payment of just compensation is that these twin requirements will deter officials from exercising their condemnation power where public costs would exceed public benefits. But given the vagaries of both those requirements, the doctrinal safeguards may simply reflect a calculation that systemic abuse will create a political backlash, so that fear of electoral redress is the most compelling constraint on local officials.

Now, in many economic development programs in which local governments decide to play a role the power to acquire land through the exercise of eminent domain is crucial. Practically every state has adopted legislation on land assembly through eminent domain. Such legislation authorizes the use of eminent domain mainly in urban renewal projects which have economic redevelopment as their primary objective. Some states have also enacted new legislation that regardless of urban renewal aims authorizes still the use of eminent domain for economic development. The use of eminent domain for economic development has sometimes been used to

¹⁰⁶ Shelley Ross Saxer, *Eminent domain, municipalization, and the dormant commerce clause*, 38 U.C. DAVIS L. REV. 1505 (2005); Id., *Government power unleashed: using eminent domain to acquire a public utility or other ongoing enterprise*, 38 IND. L. REV. 55 (2005).

¹⁰⁷ Jonathan Rosenbloom, *Can a private corporate analysis of public authority administration lead to democracy?*, 50 N.Y.L. SCH. L. REV. 851 (2006).

¹⁰⁸ Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365 (1999).

¹⁰⁹ See Clayton P. Gillette, *Kelo and the Local Political Process*, 34 HOFSTRA L. REV. 13 (2005) at 15-16.

convey the land the governmental agent acquires to a private entity, which carries out the development project.

A question of constitutionality of such a use of the eminent domain power arises. All states have constitutional limitations on the use of the eminent domain power. Eminent domain may indeed be used only for a "public use"¹¹⁰ and upon payment of just compensation. US courts construe very broadly the notion of "public use" to include also "economic development"¹¹¹. This has been told to reflect the "deference to legislative judgments about the proper use of public expenditures and the proper interaction between government and business"¹¹².

In the recent *Kelo v. City of New London* case the Supreme Court of Connecticut has basically recited the conditions under which the judiciary shall refrain from interfering with local political economy decision-making by rejecting any "monolithic metric for economic development"¹¹³.

As Gillette underscores, in the *Kelo* case the Court's attitude was that the judiciary should defer to the assessment that emerges from political deliberations where the locality proceeds pursuant to a "carefully considered" decision¹¹⁴. In other terms, the Court shall limit its consideration to track down any "indicia of apparent political process failure that courts could detect and correct better than the political process itself"¹¹⁵. In the process utilized in *Kelo*, for instance, the Court noted that nothing indicated that the City's development plan was adopted "to benefit a particular class of identifiable individuals"¹¹⁶.

Thus, judicial investigation on interactions between local government and economic development activities shall be restrained to some circumstances. *Kelo* establishes "the need to articulate those conditions under which judicial intervention is warranted"¹¹⁷. In Gillette's view, the language employed in *Kelo* to justify the judiciary deference to local decisions confirms this impression: "The takings before us . . . would be executed pursuant to a 'carefully considered' economic plan"¹¹⁸; "[t]he disposition of this case . . . turns on the question [of] whether the City's development plan serves a 'public purpose'"¹¹⁹; "[t]he City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community"¹²⁰; "[g]iven the comprehensive character of the plan, the thorough deliberation that preceded its adoption,"¹²¹ the plan as a whole shall be reviewed to find it satisfies the public purpose requirement.

¹¹⁰ In some states the limitation is more blurry and courts allow the use of eminent domain for a "public purpose".

¹¹¹ "Promoting economic development is a traditional and long accepted function of government". See 125 S. Ct. 2655 (2005).

¹¹² See Clayton P. Gillette, *Kelo and the Local Political Process*, cited above, at 17.

¹¹³ *Id.* at 17. In particular the Court did not restate the so-called blight requirement. In origins state statutes approved the use of eminent domain in urban renewal projects, provide that the land to be acquired through the exercise of the eminent domain was located in an area that had been designated as "blighted." Blight can take many forms. The type of area that conventionally has been called "blighted" is an area that contains substandard housing or nonresidential buildings. All state courts have upheld the acquisition of blighted areas under the eminent domain power as a sufficient basis to prove public use or public purpose of the redevelopment of the cleared land by a private entity.

¹¹⁴ 125 S. Ct. at 2661.

¹¹⁵ Clayton P. Gillette, cited above, at 18.

¹¹⁶ 125 S. Ct. at 2661-2662.

¹¹⁷ Clayton P. Gillette, cited above, at 18

¹¹⁸ 125 S. Ct. at 2661.

¹¹⁹ *Id.* at 2263.

¹²⁰ *Id.* at 2665.

¹²¹ *Id.*

Let's now turn to the lesson that Europeans judges can learn from Kelo and the foregoing American jurisprudence on the interactions between local economies and local governments:

The historical relationship between local government and business . . . has shifted significantly over America's 230-year history . . . But this very flexibility in defining the proper relationship between local government and the local economy is what makes the inquiry uniquely unsuitable for judicial investigation. Courts are pretty good at applying principles of law that have staying power over time. Where the principle is one of political will, however, courts do best by deferring to the political institutions that can best gauge the political sentiment of the time -- assuming, of course, that the political bodies can be trusted to interpret and apply that sentiment properly"¹²².

Gillette's claim is that

the capacity of the judiciary to make inquiries into the process, to reverse engineer the political decision to determine whether it was tainted or whether the same decision would have been reached on objective grounds, is minimal. Thus, perhaps the best that a court can do is to define the conditions under which the probability of abuse is minimal and defer to the political process when those criteria are satisfied¹²³.

What about the lesson for the European legislatures? Gillette recalls that some state legislations enacted post-Kelo introduced "procedural safeguards, such as hearing requirements, to the condemnation process". Gillette holds that "openness and opportunity for collective action will generate more publicly-interested decisions and reduce the risk of abuses"¹²⁴. After all, Kelo is nothing new under the sky of US local government law and Gillette properly underscores that "Kelo is a very conservative opinion". It fits indeed within the American jurisprudential "tradition of counteracting the need for flexibility in urban planning with political process protections"¹²⁵. And it would have been the same if business and government had interacted in a public policy field other than urban renewal.

My question is then: why should it not be the same for Europe? Local public entrepreneurship needs flexibility and such flexibility shall be counterbalanced only by democratic participation mechanisms and not by some unrealistic requirements spilled out of the minds of some "Berlin's judge"¹²⁶.

III. The influence of globalization on local public entrepreneurship.

¹²² Clayton P. Gillette, cited above, at 19.

¹²³ Clayton P. Gillette, cited above, at 20.

¹²⁴ *Id.*

¹²⁵ Clayton P. Gillette, cited above, at 18.

¹²⁶ The expression refers to the legend of Frederick the Great of Prussia and the Potsdam miller. The King wanted to redevelop his palace in Potsdam, a small village near Berlin, by adding an adjoining real estate owned by a miller and upon which stood a windmill, used for grinding corn, and had his aides asking the miller to sell the property. The miller said he did not wish to sell. After several unsuccessful attempts of his aides, Frederick himself went to the miller, who again declined to sell. Frederick told him that if he did not sell his real estate to him he would take it anyways. The miller replied, "No, sire, you will not take it; we have laws in Prussia ... There will be a judge in Berlin enforcing the laws". The King acknowledged the supremacy of the laws of Prussia and decided to desist from his intentions to use authoritarian powers. After some years the King obtained the property by purchase. It was added to the palace grounds with the small windmill standing; and by royal order it is kept and preserved at this day in complete repair, as a monument dedicated to justice and the supremacy of the laws of Prussia. I believe this story tells us also that sometimes there is no need for judicial intervention if the law recognizes citizens' rights and public authorities enforce them.

There is a further reason why legislatures should recognize, protect and provide democratic counterbalances to local public entrepreneurship as well judges should adopt a more deferent approach.

The foregoing discourse aimed at demonstrating that cities shall be allowed to engage in business-like activities or make strategic decisions likewise business-minded players. In particular, they should be able to step into the economic arena or back-up private projects if this fosters their economic attractiveness. The reason is that they compete with each other to gain new investors, “customers” and lenders. The overall aim is to improve the competitiveness and well-being of their jurisdictions by either providing new/better public services and infrastructure as well as by increasing their tax-base or debt leverage.

Now globalization of economy requires local governments to take on an even more difficult challenge. The rise to global competition. Domestic legislature and judiciary should take this phenomenon into account. World economy’s globalization and its key features - mobility of capital, world scale division of labor, advances in communications technology, mobility of people through reductions in travel time or large-scale migrations – are giving cities a primary role in global governance favoring the creation of horizontal networks which fosters interlocal cooperation¹²⁷ as well as their involvement in the implementation of international organizations programs that are waning national (institutions and legislation) influence over cities¹²⁸. In their new global standing cities are starting to become object of international organizations policies promoting new forms of urban governance¹²⁹ or formulating development strategies¹³⁰ as well as international trade and investment agreements¹³¹ and arbitral decisions¹³².

¹²⁷ See for instance the World Organization of United Cities, a group that advocates democratic local self-government, and Local Governments and the Cities Alliance, launched in 1999 by the World Bank and the United Nations Human Settlements Programme (UN-Habitat). On the emergence of sub-national networks see ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

¹²⁸ John Friedmann, *The World Cities Hypothesis*, in *WORLD CITIES IN A WORLD SYSTEM* 317 (Paul Knox & Peter Taylor eds., 1995).

¹²⁹ See *THE GLOBAL CAMPAIGN ON URBAN GOVERNANCE, CONCEPT PAPER* (2d ed. 2002), <http://www.unhabitat.org>; United Nations Human Settlement Programme, *International Legal Instruments Addressing Good Governance 5* (2002), <http://www.unhabitat.org>; UN-HABITAT, *The Global Campaign on Urban Governance-Legislative Reform*, <http://www.unhabitat.org>; UN-HABITAT, *The Global Campaign on Urban Governance-Campaign Overview*, <http://www.unhabitat.org>. See generally NEIL BRENNER, *NEW STATE SPACES: URBAN GOVERNANCE AND THE RESCALING OF STATEHOOD* (2004); CITY MATTERS: *COMPETITIVENESS, COHESION AND URBAN GOVERNANCE* (Martin Boddy & Michael Parkinson eds., 2004); *CITIES TRANSFORMED: DEMOGRAPHIC CHANGE AND ITS IMPLICATIONS IN THE DEVELOPING WORLD* (Panel on Urban Population Dynamics, M.R. Montgomery, R. Stren, B. Cohen & H.E. Reeds eds., 2003).

¹³⁰ *THE WORLD BANK, CITIES IN TRANSITION 20* (2000), <http://www.worldbank.org>; The World Bank, *Comprehensive Development Framework*, <http://web.worldbank.org>; Monterrey Consensus, *Confronting the Challenges of Financing for Development: A Global Response 3*, <http://www.un.org>. More generally for World Bank’s projects, see The World Bank, *Urban Development-Projects & Policies*, <http://www.worldbank.org/urban>, section on “Projects & Policies”.

¹³¹ See on this subject Ellen Gould, *International Trade Agreements: Recent Developments of Interest to Local Governments* (August 2004) <http://www.civicnet.bc.ca>; H. V. SAVITCH & PAUL KANTOR, *CITIES IN THE INTERNATIONAL MARKETPLACE* (2004); Ward Ferdinandusse, *Out of the Black-Box? The International Obligations of State Organs*, 29 *BROOK. J. INT’L L.* 45, 66-71 (2003); Saskia Sassen, *Introduction to GLOBAL NETWORKS: LINKED CITIES* (Saskia Sassen ed., 2002).

¹³² Vicki Been & Joel Beauvais, *The Global Fifth Amendment? NAFTA’s Investment Protections and the Misguided Quest for an International “Regulatory Takings” Doctrine*, 78 *N.Y.U. L. REV.* 30, 59-86 (2003).

There has also been an attempt to codify the right to self-government in international law at the global level¹³³. The World Charter of Local Self-government is to date a discussion draft produced by UN-Habitat and international organizations of city governments that has not been presented to the United Nations General Assembly yet. Nevertheless the draft tells us where international legal thinking relating local government stands today¹³⁴. However, many aspects of the World Charter resonate the European Charter of Local Self-Government, which was enacted within the Council of Europe in 1985 and is in force since 1993.

Yet, at the global level much more emphasis is on cities role as international economic actors. Indeed they "function in four new ways: first, as concentrated command points in the organization of the world economy; second, as key locations for finance and specialized service firms, which have replaced manufacturing as the leading economic sectors; third, as sites of production, including the production of innovations in these leading industries; and fourth, as markets for the products and innovations produced."¹³⁵

The "world cities" image emerging from the international framework acknowledges the importance of local public entrepreneurship and partially resembles that of Martinotti's third-generation cities¹³⁶. That is to say cities whose goal is to attract worldwide investments. But at the same time it stresses the importance of democratic participation and poverty reduction policies. Let's have a look at some of the sources.

The World Bank Cities in Transition report maintains that "Urbanization, when well managed, facilitates sustained economic growth and thereby promotes broad social welfare gains."¹³⁷ The World Bank put much emphasis on the need for cities to become "livable, competitive, and bankable."¹³⁸ This requires the cities to eliminate burdensome regulation and transactions costs, facilitate public-private partnerships, and promote best practices. The goal, as the Bank emphasizes, is to improve the lives of the poor in the world's cities¹³⁹.

¹³³ World Charter of Local Self Government 4(4). See United Nations Centre for Human Settlements (Habitat) World Associations of Cities and Local Authorities Coordination, Towards a World Charter of Local Self Government, <http://www.gdrc.org/u-gov/charter.html>

¹³⁴ The draft recognizes and requires protection in domestic legislation for) the principle of local self-government (Article 2). As to the meaning of local self-government, the draft includes therein «the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population» (Article 3). On the financial autonomy level, local authorities shall hold «adequate financial resources of their own, of which they may dispose freely within the framework of their powers» (Article 9(1)).

¹³⁵ SASKIA SASSEN, *THE GLOBAL CITY* (1999) at 3-4.

¹³⁶ Guido Martinotti, *A City for Whom? Transients and Public Life in the Second-Generation Metropolis*, in ROBERT BEAURAGARD & SOPHIE BODY-GENDROT, *THE URBAN MOVEMENT: COSMOPOLITAN ESSAYS ON THE LATE-20TH-CENTURY CITY* 160-65 (1999). Martinotti elaborated three conceptions of cities. "First generation" cities served their own residents and focused on providing municipal services to these residents. "Second generation" emphasized cities' relationship with nonresident users, such as tourists and commuters, and focused on attracting these outsiders by building convention centers, sports stadiums, theme parks, and the like. "Third generation" cities' main goal is attracting worldwide business and has focused on making the city attractive to business executives.

¹³⁷ *CITIES IN TRANSITION*, cited above, at 2

¹³⁸ *Id.* at 8-12.

¹³⁹ *Id.* at 1.

Cities Alliance's 2004 Annual Report¹⁴⁰ follows the World Bank's Cities in Transition approach¹⁴¹. Cities Alliance holds that "cities and towns are essentially markets,"¹⁴² and it is essential to unleash "the potential of cities" by modernizing their economies with city-supported infrastructure and private investments¹⁴³. "The most fundamental requirements for a productive urban economy include available and affordable land for firms and for housing and transport networks that promote the mobility of both goods and workers."¹⁴⁴

UN-Habitat adopts a similar strategic vision. UN-Habitat fosters initiatives "to promote pro-poor urban governance"¹⁴⁵ and depicts "the city as an organizing agent for national development."¹⁴⁶ In its Global Campaign on Urban Governance, UN-Habitat emphasized governance rather than government and the strategic value of public-private partnerships and democratic participation making "stakeholders" consensus a key feature of any local decision making.

Finally, The Founding Declaration of United Cities and Local Governments blends the defense of local democracy with the enhancement of cities' "strategic role in economic development."¹⁴⁷

5. Concluding remarks

Local governments are political as well as economic entities. They also represent a form of human organization which shares both governmental and associative nature consequently featuring characteristics of a public as well as civic society entity. Local governments should therefore be granted both political liberty (the right to local self-government) and economic liberty (the right to self-provide public local goods and/or engage in economic activities for the sake of the local development)¹⁴⁸.

Open questions remain. Where do we draw the line? Local government could "steal" space to private firms and the market. Also, how can local government entrepreneurial activities be audited to make local governments more responsive or democratically accountable in the operation of such activities?

¹⁴⁰ The Cities Alliance is the World Bank and UN-Habitat co-chaired organization focused on poverty reduction and on creating "cities without slums." [http:// www.citiesalliance.org](http://www.citiesalliance.org).

¹⁴¹ THE CITIES ALLIANCE, 2004 ANNUAL REPORT, available at <http:// www.citiesalliance.org>.

¹⁴² Id. at 4.

¹⁴³ Id. at 3.

¹⁴⁴ Id. at 7.

¹⁴⁵ UN-HABITAT, THE UN-HABITAT STRATEGIC VISION 5 (2003), <http:// www.unchs.org>, at 10.

¹⁴⁶ Id. at 2

¹⁴⁷ UNITED CITIES AND LOCAL GOVERNMENT, FOUNDING CONGRESS FINAL DECLARATION § 11, <http://www.dsf-fsn.org>, at § 21.

¹⁴⁸ This argument is some how similar to what Adam Smith used to sustain in its THEORY OF MORAL SENTIMENTS (1759) when advocating for the idea of the market's invisible hand. He argued that economic "liberism" (i.e. *laissez-faire* capitalism) shall not come without political "liberalism" and viceversa if we want individuals to fully develop their personalities. In other terms economic liberty is a key tool for political liberty. On this see also J. RAWLS, POLITICAL LIBERALISM (1993) and R.A. DAHL, ECONOMIC DEMOCRACY, (1980) and MILTON FRIEDMAN & ROSE D. FRIEDMAN, FREE TO CHOOSE , pp. 2-3 (1980):

Economic freedom is an essential requisite for political freedom. By enabling people to cooperate with one another without coercion or central direction, it reduces the area over which political power is exercised. In addition, by dispersing power, the free market provides an offset to whatever concentration of political power may arise. The combination of economic and political power in the same hands is a sure recipe for tyranny.

For the purpose of this paper the tyranny from which local governments need to be freed is that of national and regional governments who sometimes hinder the innovation and entrepreneurial spirit of autonomous local governments.

Briffault is right when he warns that the widespread use of local government structures and policies to facilitate the implementation of pro-business policies risks to turn local governments into “devices for using the coercive power of the public authority for private economic ends” circumventing direct democratic control¹⁴⁹. To avoid abuses the legislature does not have to deny and frustrate local governments autonomy though. It is however crucial to implement democratic counterbalances. The response may not be left only to the intervention of the judiciary.

Finally, globalization is completely changing the characteristics of competition among local governments. Competition is today taking place in the international marketplace. The rise to the global challenge requires full development of the cities entrepreneurial spirit. Local public entrepreneurship will foster also interlocal cooperation otherwise local governments will not be able to face global competition. The emerging global networks of cities seem to testify that. Yet they need to reach the optimal scale of economic power and industrial organization. However, this phenomena need to be recognized, nourished and regulated at the global level. The arguments set forth in this paper put forward an international codification and regulation of the right to local self government with all its implications including the right to economic entrepreneurship¹⁵⁰.

¹⁴⁹ R. Briffault, *Who rules at home?: one person/ one vote and local governments*, 60 U. Chi. L. Rev. 339, at

¹⁵⁰ The draft of the World’s Charter of Local Self-government goes in this direction.