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The principle of fair cooperation in the Italian legal order and the intergovernmental relations between State and Regions

1. Introduction

In the Italian system and, in particular, within the framework of relations between the State and the Regions, the intergovernmental method (Whright 1988) is underpinned by the principle of fair cooperation (on this principle see Mangiameli 2008; Agosta 2008; Merloni 2002; Sola 2009; Mancini 2013) among the levels of government through the Conference system.

The term "conference system" refers to three intergovernmental mixed bodies, consisting of representatives of the State and of Local Governments: the Standing Conference for relations between the State, the Regions and the Autonomous Provinces (hereinafter the State-Regions Conference); the State-Cities and Local Governments Conference; the Unified Conference.

In this context, the State-Regions Conference plays a central role; therefore this paper explains above all its functioning.

We have to point out that the principle of sincere cooperation is not at all envisaged in the Constitution and has developed from the evolution of Italian regionalism, that went through different phases.

The whole issue of intergovernmental relations and the principle of sincere cooperation in Italy came arose from practice and was coded initially only in a decree of the President of the Council of Ministers (DPCM 12 October 1983), following a parliamentary fact-finding survey that had emphasized the need to find a "seat for a permanent relationship with the central organs of the State and for the participation of the Regions in the development of the general policy of the State".

Only at a later date was the Conference system regulated by an act, namely the act that regulates Government activities and the Presidency of the Council of Ministers (Article 12 of Act no 400 of 23 August 1988). All this demonstrates that intergovernmental relations in the Italian regional and local government system were prompted by the State and not by the Regions or local governments. Indeed, the Government of the time considered it important to involve the regions "in the framing of general policies liable to have an impact on matters of regional competence, excluding foreign policy and policies on defence, national security and justice".

A conspicuous constitutional case law came to add to this original governmental foundation. Indeed, the Constitutional Court, that over time had simply declared in some judgments that relationships between the State and the Regions should be based on cooperation and not conflict, starting from 1984 (judgment no 219), exercised a strong influence on the relations between the State and the Regions with reference to the constitutional division of competences, well beyond the provisions of the Constitution, allowing a flexible interpretation of the list of regional matters, through the new principle of sincere cooperation.

In this way the Court *de facto* stated that the State-Regions relationships could not be contained within the two-tier model of regionalism but within the cooperative model of regionalism.

One might say that this is due partially to the typical role of the constitutional judge in federal/regional systems (Kelsen 1981[1]) and partly to the specific substitute role taken on by the Constitutional Court in a constitutional system deriving from a tradition of statehood based on hierarchical relationships and that in the beginning knew nothing about the weight of intergovernmental relations typical of a multilevel system.

After a concise description of the evolution of the principle of fair cooperation in the first and second period of regional development (1970-2001 / 2001-2016), this paper gives an overview of the functioning of fair cooperation, as the rule underlying the (administrative) relations between the different tiers of government embodied in the Conference system, and it also intends to illustrate the further evolution driven by the Constitutional Court and by Parliament – at least starting from judgment no 251 of 2016 – by extending the intergovernmental method to the legislation.

2. Intergovernamental management in the different stages of Italian regionalism

2.1. The first phase of Italian regionalism and the birth of the principle of fair cooperation

The choice of the form of regional state in the Constituent Assembly brought to two results.

The first (principle) was that of the formulation of Article 5 of the Constitution (Esposito 1954; Berti 1982), whose meaning is undoubtedly that of rejecting both the federal model but above all the idea of a centralized state, since regionalism was considered (by Perassi, Mortati

and Tosato) to be the instrument for a renewal of the State and better implementation of the democratic principle.

Once it had been decided to create the Regions and that they would have legislative power, the second idea was the adoption of a division of competences based on concurrent competence only, "within the limits of the fundamental principles established by the laws of the State" (Article 117 Const., old wording). In this case, the rationale that prevailed, also with regard to the special regions, was reductive because the regions would have legislative power only over the subjects on the list and within the boundaries of the fundamental principles envisaged by the laws of the State. However, the restraints on the legislative function was counterbalanced by the plan to renew the administration by implementing a broader administrative decentralization of the services depending on the State.

In any case, the first phase of Italian regionalism, founded only on concurrent competence (at least for the ordinary Regions) and on parallel administrative functions, proved to be the perfect place for the birth and development of intergovernmental relations thanks also to the peculiar evolution of fair cooperation in federal/regional States.

In particular, the literature (Mangiameli 2005, 421) reminds us that "the evolution of the principle of cooperation is to be linked to the original prospect, according to which the distribution of State powers among different territorial levels and linked by the federal pact was considered to be a 'vertical' completion of the principle of the separation of powers. The federal model characterized by the 'two-tier' principle derives from this approach: on the basis of the constitutional division of powers, each level has its sphere of attribution within which it would exercise its public functions (...). With the progressive unification of the federal orders the sharp distinction between the work of the Member States and the work of the Federations was lost and special forms of an intertwined and joint (but coordinated) exercise of public functions came about that have been called 'cooperative federalism'" (Mangiameli 2005; see also Kincaid 1996).

Therefore, while in the federations the evolution towards the cooperative model is linked to a progressive unification process, in the Italian regional system, once the original regional design, laid down in the 1948 Constitution, was set aside, the terms of the unity-diversity relation proved to be undoubtedly skewed in favour of the former, and hence the cooperative component found room to reorganize the exercise of public functions, and, in this context, intergovernmental relations became progressively a pivotal entity.

Indeed, the simultaneous competence of both levels of government on the same matters that came about – also forged by the constitutional case law of the time that facilitated the overlapping of subject-matters – was bound to determine tangled competences that required a solution based on fair cooperation rather than the search for a rigid separation of powers, decided ultimately in court.

Therefore, even though there were virtually no forums for coordinating the actions of the State and of the Regions, and even though there was no explicit mention of this principle in

the Constitution (Mangiameli 2005, 440 ff.), constitutional case law deemed that the principle of sincere cooperation was inherent in the constitutional system.

In particular, right from its earliest judgments, and hence when there were only the Regions with a special statute, this aspect emerged for the Court at first as a "general sense of duty, inherent in administrative actions, of not losing sight of secondary interests present in the cases and attributed to the (primary) care of the other entity" (Mangiameli 2005, 447), according to one of the possible connotations of the concept of intergovernmental management.

From this standpoint, at only one year from its establishment, with respect to the relationship between full competence of the Sardinian Region in fishing matters and State competence over the seas as public property, the Court pointed out that "it is obvious that there is a need for close cooperation between the State that regulates the lagoon waters, and the Sardinian Region that regulates fishing activities" (judgment no 49 of 1958).

This and other embryonic case law statements of the principle of sincere cooperation with reference to local governments did not prompt any interest in Italian literature for a long time since the first significant contribution was made by Bartole 1971.

It was pointed out that "the constitutional regulations imply that both the State and the Regions should jointly take care public interests through forms of mutual integration thus rejecting any solution based on separate tracks" (Bartole 1971, 145), since it can be stated from this standpoint that "there is a constitutional principle for cooperation between the State and the Regions" (Bartole 1971, 145).

However, the analysis of the cooperative mechanisms contained in the special statutes concluded that the State has a predominant role and this approach paved the way to the subsequent reflections on the role of fair cooperation and on the relevant constitutional case law, attributing to the State a coercive element that clearly emerged recently in intergovernmental relations during the economic crisis (Mangiameli 2013a and 2013b).

Starting from the 1980s, that is when the principle of sincere cooperation was fully formulated, there was an increase in the judgments in which recourse to this principle was functional to offsetting the erosion of regional competences by the State "disguised as cooperation" (Bartole 2003); a forerunner had been a judgment that expressed the hope that "the relations between State and Regions may follow the model of cooperation and integration in the sign of the great unitary interests of the Nation rather than a jealous, meticulous and formalistic defence of positions" (judgment no 219 of 1984).

Hence the remark that "in many judgments the principle of sincere cooperation was not referred to the Constitution, but was presented as a self-evident principle of constitutional standing" (Mangiameli 2005, 466).

It is understood that, at least in this phase, beyond the discussion on principles, the actual implementation of agreement mechanisms – first and foremost the understandings – was mainly, nay exclusively, entrusted to State legislation. These regulatory fragments were considered by the Court to be "particularly prescriptive when the State law diverged from the constitutional system, as in the case of the division of competences that is provided for in the

Constitution" (Mangiameli 2005, 485; from this point of view, see judgment no 366 of 1992, para. 4 of *Considerato in diritto*).

Nevertheless, in this stage, the case law of the Court is more of a "case study than a systematic reading of the legal order, even though in case law there are some indications and directives that the legislator did comply with" (Mangiameli 2005, 492). Indeed, "the first element that appears to emerge from the Italian experience is that there was cooperation in the shaping of the legislation, in that several sectors forms of cooperation between the State and the Regions were progressively introduced in order to meet the various needs of participation. There are sufficient grounds to deem that within the legal order, a real 'general principle' of sincere cooperation has emerged that is to be disciplined by the State law and as such is capable of delimiting the exercise of (regional) competences".

With the establishment of the State-Regions Conference, that – as pointed out – occurred with a D.P.C.M. of 1983, the intergovernmental relationships were reorganized within the Conference, and the literature that dealt with the study of the evolution of the activities of the Conference (Carpani 2006, 23) found that, in the first phase (up to 1988), the Conference came together rarely and that this "paucity of meetings" (Capotosti 1987) and the fact of limiting its activities to merely identifying the sectors where friction was greatest and to finding possible instruments for settling the issues of greatest interest, without carrying out in practice its coordinating function" (Capotosti 1987), were "consequences that were probably consistent with the experimental and semi-spontaneous nature of a body that was essentially instrumental to the exercise of the tasks of the Executive" (Carpani 2006, 23).

Article 12 of Act no 400 of 23 August 1988 regulated the Conference in terms of both its structure and its operations.

As to its composition, it was established (and this has not changed) that the Conference should be a collegiate body which includes the President of the Council of Ministers (or, with delegation, the Minister for Regional Affairs), as presiding official, and the Presidents of the Regions and of the Autonomous Provinces.

The dates and agendas were decided by the President of the Council at his full discretion even though as early as the following year, with the so-called La Pergola Act (no 86/1989), alongside the ordinary meetings two *ad hoc* Community sessions were established that could be convened also upon request by the Regions.

During this phase (after 1988), the most important function of the Conference was that of being an advisory body which, in pursuance of the combined provisions of Article 12 (1) and (5) of Act no 400 of 1988, provided advice on: the regulatory activity that directly involved the Regions and with the objectives laid down in the national economic plan and in the financial and budget policy; on the general criteria for the exercise of state policy and coordination functions regarding the relations between the State, the Regions, the Autonomous Provinces and the infraregional bodies; on the general policies on the elaboration and implementation of Community acts concerning the competences of the Regions; and on the other issues on which

the President of the Council of Ministers deemed it desirable to receive the opinion of the Conference.

There still was no precise list of cases in which the President of the Council of Ministers was obliged to consult the Conference, but this was provided for in Legislative Decree no 418 of 1989, thus in practice depriving the President of the Council of the discretion of deciding when to involve the Conference.

The almost exclusively advisory nature of the Conference was gradually abandoned also in response to the "request of the Regions to receive recognition of being on a par with Government not only formally but also in substantial terms (at least for the decisions regarding matters where they shared concurrent powers)" (Carpani 2006, 55).

More specifically, in the 1990s, the State legislator envisaged forms of understandings – and hence co-decision acts – between the State and the Regions: suffice it to recall the understanding on the National Health Plan, envisaged in the reform of the national health service of 1992 (Article 1 (1) of Legislative Decree no 502 of 1992 and Legislative Decree no 517 of 1993).

A further significant change in the Conference system occurred with Leg. Decree no 281 of 1997 that envisages a more complex model of intergovernmental relations, due to the circumstance that an intermediate stage was starting in Italian regionalism, the so-called federalism with unvaried constitution (Act no 59 of 1997 and Leg. Decree no 112 of 1998), where, even without amending the Constitution there was a transformation of the legislative competences and principles of attribution of administrative functions that increased quantitatively and were significant from a qualitative standpoint. In this area, the link between Conferences and intergovernnental relations were not merely of a consultative nature but were basically centred on the instruments of understandings and agreements. Also the organizational structure of intergovernmental relations became more stable and a permanent apparatus providing technical support was set up. In addition, the way in which the conferences operated, stopped being occasional and became stable with a formal calendar and an agenda and with minutes that were drawn up and kept by the official responsible for the organizational aspects of the Conference.

2.2. The "second stage" in Italian regionalism and the further evolution of the principle of fair cooperation within the framework of the distribution of powers

The 2001 constitutional reform led to the formal overturning of the principle of the list of matters and to the adoption of a division of competences in line with the federal tradition (D'Atena 2010; Di Salvatore 2008). While, indeed, the original formulation of Article 117 Const, listed the competences of the Regions, leaving general powers to the State, now, general powers were conferred on the Regions while the State was given competence on listed matters; but, between listed competences and residual competence, there is – once again a typical Italian element – concurrent competence.

The federalist design that accompanied the reform of the 2001 division of competences was not the only one at work. A design of horizontal interrelationship (network) was introduced – thanks to the reformulation of Article 114 Const. (according to the previous wording, "The Republic is divided in Regions, Provinces and Municipalities", while, according to the new wording, "The Republic is composed of the Municipalities, the Provinces, the Metropolitan Cities, the Regions and the State") – based on the idea of equal dignity between the State, the Regions and local governments. On the whole, therefore, the reform was expected to expand regional powers, at least according to the letter of the revised Constitution, but at the same time there was to be also an increase in horizontal relations with regard to the exercise of administrative functions where the relations are between State and Regions, between State and Local Governments, and between Regions and Local Governments.

A shortcoming in the constitutional reform however was the persistent absence of more specific legislative connections between the State and the Regions since, at the time the so-called Senate of the Regions – namely a Chamber of representation of local bodies - was not established.

While waiting for this institutional development, an exclusively mild legislative connection was envisaged in Article 11 of Constitutional Law no 3 of 2001 providing for the so-called "*bicameralina*" (Mangiameli 2011) according to which, while waiting for the reform of Parliament to occur, a bicameral Commission for regional affairs (mentioned in Article 126 Const.) was envisaged with the "participation of representatives of the Regions, Autonomous Provinces and Local Governments", providing them with some form of participation in the legislative process.

In particular, it was envisaged that the Regions could participate in the state legislation procedures when dealing with the fundamental principles of matters of concurrent competence between State and Regions within the meaning of Article 117 (3) Const., and with the financial autonomy of the Regions and Local Governments, as per Article 119 Const.

This body was expected to operate instead of the so-called Chamber of the Regions but it had a practical limit right from its inception (its restricted scope), besides the fact that the establishment of the *'bicameralina'* was subject to a reform of Parliamentary rules that never came about, but in which there now seems to be renewed interest.

"The elements useful for establishing a systematic setting capable of welcoming and strengthening the principle of sincere cooperation, mentioned only in Article 120 (2) Const., with regard to the law that defines the procedures on the exercise of substitute powers" (Mangiameli 2007, 63) seems to be missing from the 2001 Constitutional reform.

From this standpoint, it can be pointed out that the 2001 reform – aside from the failure to set up an exponential Chamber of local bodies – was based on the development of existing intergovernmental relations, thanks to the provisions made in significant ordinary State laws for intergovernmental relations: on the one hand, the mentioned 1997 legislative reform of the conferences; on the other, Act no 131 of 2003 implementing the new Title V of the Constitution that regulated new and specific forms of cooperation between State and Regions

with further mechanisms for horizontal connections regarding the implementation of public policies.

More specifically, Article 8 (6) of Act no 131 of 2003 lays down that "the Government can promote understandings at the State-Regions Conference or at the level of a unified Conference aimed at encouraging the harmonization of their respective legislations or achievement of unity in positions or the attainment of common objectives". In some cases, as occurred for the Health Agreements, not only were coercive mechanisms excluded – used by the Central Government to overcome regional dissent – but furthermore the formulation of these understandings and the work method adopted by the Conference were based on consent and hence the ensuing acts were "co-decided" by the two levels of government. This practice also influenced the rest of the conference activities with only a very few cases where the failure to reach an understanding was replaced by a resolution by the Council of Ministers.

In such a context, it can be stated that intergovernmental relations take contrasting paths: on the one hand the Conferences, in exercising administrative competences, have produced positive results that have led to a collaborative development of such relations and has increased the value of intergovernmental relations especially in the production of some public policies (health, social security). But on the other, with reference to the cooperation offered by the Regions within the Conference on legislation, the principle of sincere cooperation has taken on a coercive bias, based on the orientation of constitutional case law that has justified an extensive decline in regional competences without constitutional backing.

In particular, when the Constitutional Court implemented a series of case law instruments that encouraged the reinstatement of the centralization of competences and with which it substantially "redrafted" Title V of the Constitution, the principle of sincere cooperation was invoked to disparage the order of competences.

These instruments involved the so-called cross-cutting subject-matters (for instance, protection of environment and market competition) (D'Atena 2003, 15 ff.; Scaccia 2004), the interpretation given of the limit of the fundamental principles set by state law in the area of concurrent competences between State and Regions (Crisafulli 1960; Paladin 1971; Mangiameli 1992; Mangiameli 2002; Paoletti 2001; Benelli 2006; Corvaja 2011; Colasante 2017), with special reference to the principles of coordination of public finance, especially during the years of economic crisis (for instance, see judgement no 198 of 2012; Mangiameli 2013c; Maccarone 2012), the so-called "appeal to subsidiarity" ("*attrazione in sussidiarietà*") whereby the State steps in to legislate on a matter of competence of the Regions, and the criterion of the prevalence (Benelli-Bin 2009; Colasante 2012) of the subject-matter as standard for solving conflicts of competence in the case of legislation on matters of concern for the different levels of government.

It was precisely with the two latter instruments (and a specific "disparaging" idea of the principle of sincere cooperation), that intergovernmental relations were reinterpreted in favour of centralization.

In these cases, the relations within the conferences are heavily conditioned politically by the State that does not implement *ex ante* the principle of sincere cooperation, i.e. before exercising the legislative function it claims, but *ex post*, in that, according to constitutional case law, the centralization of competences is subject to cooperative mechanisms in the exercise of the administrative functions envisaged by law and always conditioned by the possibility of a unilateral legislative intervention by Central Government.

3. The Conference system and the principle of sincere cooperation for legislative competences

Intergovernmental relations in the exercise of legislative powers occur in a context that is somewhat different from that examined above where the equal standing of relations within the conference could not be questioned.

Indeed, the procedure of the understandings is heavily affected not only by the fact that the Regions and the Local Governments are stripped of their legislative competence by the State, but they are also compelled to do what is envisaged by the law at the administrative level, even if they would do otherwise.

This was conceived by the constitutional judge, after the so-called "*chiamata in sussidiarietà* " whereby the State steps in to legislate on a matter of competence of the Regions justified by the fact that the relevant administrative functions have a national and not a regional dimension.

When the State legislator makes laws in subsidiarity, the Court states: "this requires that the principles of subsidiarity and adequacy be given a procedural value, since the need for a State law whereby the State takes on not only the administrative function but also the legislative function, can pass the test of constitutional legitimacy only if there are rules envisaging a procedure which attaches due importance to concertation and horizontal coodination activities, namely the understandings, that must be carried out on the basis of the principle of sincerity" (judgment no 303 of 2003, point 2.2. of the *Considerato in diritto*).

Indeed, after the 2001 constitutional reform, in order to respond to the new needs of coordination, constitutional case law used the principle of fair cooperation as a precondition for establishing the legitimacy of the State's legislative interventions in regional matters.

Depending on the cases, the Court modulated the strength of the understanding, taking into account the need to avoid stalemates in the procedure for adopting the act, also because often the matters involved strategic sectors such as the production and distribution of energy.

In some cases of State interventions on matters of regional competence the Court ruled that the constitutional legitimacy of State intervention was subject to the prior achievement of an understanding with the Regions thus justifying the State's intervention and at the same time guaranteeing that the Regions exercise the functions attributed to them by the Constitution (Const. Court no 303/2003, no 6/2004).

In other cases the Court specified that envisaging an understanding required to ensure compliance with the principle of sincere cooperation implies that there should be "suitable

procedures enabling reiterated negotiations aimed at overcoming disagreements", thus making it possible to work out agreements that iron out any disagreement: according to this line of reasoning of of case law (including Const. Court no 121/2010, no 33/2011), only after the negative outcome of adequate procedures aimed at encouraging agreements can a unilateral decision by the Government be deemed to be reasonable and not undermine the spirit of sincere cooperation between the State and the Regions (It is worth pointing out that the expiration of a deadline is not enough to let the Government decide alone; see judgment no 39 of 2013, on which see Cogo 2013).

Ultimately a distinction has been made between "weak" and "strong" understandings depending on the different degree of importance of the disagreement by one or more of the bodies involved which in some cases is configured as surmountable (weak understandings) in others as not surmountable (strong understandings).

4. "Weak" and "strong" understandings and the distinction between understandings and opinions

In the previous case law on the principle of fair cooperation the Court had already made a distinction between "strong" and "weak" understandings, providing regulations as a formula of intergovernmental relationships and as a cooperative instrument *par excellence* and typical expression of the joint exercise of functions by the State and the Regions (judgment no 366 of 1992).

As early as judgment no 747 of 1988, the constitutional judge had stated that *understandings* "constitute a participation in determining the contents of an act: in other terms, the body or organ that is to express its consent in order for there to be an understanding, holds the power of co-determination and hence truly participates in exercising a given competence", and hence "non-compliance entails (-ed) the annulment of the faulty procedure" (Marpillero 1989).

To this we may add the distinction between "*equal cooperation or level playing field* between State and Regions (and Autonomous Provinces), and unequal cooperation with the acknowledgement that in case of a level playing field both the *activation* and the *outcomes* always require "*a free and unfettered decision by the individual parties*" (judgment no 242 of 1989).

From this standpoint, the adoption of understandings could not be replaced by other forms of cooperation or by acts that, even being the expression of cooperation, would reduce the role of the agreement to a mere proposal.

Consequently, for the constitutional judge, "the understanding (...) is *a typical form of joint coordination*, in that it entails that the participants are on the same level in relation to the decision to be adopted, and such decision must be the outcome of an agreement and hence of a direct negotiation between the body that is legally competent to make the decision and the body that wishes to concur in making that decision" (judgment no 337 of 1989).

This is what is meant by "strong understanding", where the legislation obliges the parties to reach an agreement through repeated negotiations that enable the Regions to act with full

powers and not find themselves stripped of their powers by an act to which they did not contribute.

In spite of the declarations of principle, in actual fact, the line of reasoning of the constitutional judge embodies a coercive and unilateral vision of the cooperative model (Ramajoli 1992), not only because it should always be the state law that envisages cooperation but also because, where there are deemed to be prevailing "national interests" and the need to apply "uniform criteria across the national territory", the understanding cannot be "strong" and hence it becomes "weak". And more specifically the understanding is "weak" because failure to achieve it does not constitute an insurmountable obstacle to the conclusion of the procedure.

Coordination is not conceived as being equal for the parties involved because the higher body has control and restraining powers that inevitably exclude the joint determination of the act, to the advantage of the supremacy of the State (Manfredi 1993).

In spite of this, the case law of the Constitutional Court confirms the distinction between "opinion" and "weak understanding", thus contradicting the hypotheses of those who deem that there is no real difference between the two forms of cooperation, in that, in practice the efficacy of the regulatory provision of an opinion is not all that different from a provision that envisages a weak understanding (In the same sense, judgment no 6 of 1993). The Constitutional Court clarifies the issue by stating that the understanding, even if weak, is not like an opinion in that it determines the obligation to carry out "a negotiation that, thanks to its flexibility and to its being bilateral, goes beyond the *rigid method of the non-coordinated sequence of unilateral acts* (the outline of the plan is to be sent out by the Minister, opinion or silence, or proposal by the Provinces) and so it can more easily reflect the needs of the local governments and a better informed and sensitive evaluation by the Minister" (judgment no 21 of 1991).

To this we add that in judgment no 116 of 1994, the Court specified that if the legislation envisages "a substitute mechanism in case an understanding is not reached", the behaviours of the State and of the Region will not be the same as in the case of an (unfavourable) opinion. It is also true that where the opinion is overlooked, the body taking action must provide a motivation, but apart from the obligation to provide a motivation (at presenting reasons of national interest that have determined the Government to decide unilaterally with regard to the arguments presented by the Region explaining its refusal to express its agreement), where an agreement is not reached, the body that intends to proceed will have to demonstrate, in compliance with the principle of sincere cooperation, that "the discussions aimed at reaching an understanding" were "characterized by fairness and openness of the parties towards each other's position" (judgment no 116 of 1994).

In other words, as pointed out on another occasion (judgment no 444 of 1994), the features that characterize the 'understanding' regime, no matter how 'weak' in that "failure to achieve an understanding may not be an insurmountable obstacle to the conclusion of the procedure", is that at least "the State authority take action to promote the necessary cooperation of the regional body, through a request, and hence, a contact that .... skirts around the rigid method of the uncoordinated sequence of unilateral acts by either body" and that since the

understanding is "a typical form of joint coordination, in that it entails that the parties are on the same level with regard to the decision to be adopted", the latter "must be the result of an agreement and hence of a direct negotiation between the entity that is legally entitled to making the decision and the entity concurring to make that decision" (judgment no 444 of 1994).

According to the Court, these provisions would be capable of ensuring also that the Government does not use "the power to act unilaterally to deprive of its meaning the requirement to find an understanding, or that it does not comply with the need to actually explore all possibilities of finding and agreement" in that this would be a "fact, the outcome of a constitutional pathology, subject to control and remedy if one takes into account the fact that the principle of sincere cooperation must in any case underlie the mutual relationships between State and Regions even if this is not explicitly stated in the law" (judgment no 408 of 1998).

The data (taken from www.statoregioni.it) referring to the activities carried out by the State-Regions Conference – summarized in Tables 1 and 2 – confirm that in practice, they are assigned the task of ensuring, at the institutional level, negotiation among and coordination of the different levels of government. An analysis of these data gives an indication of the efficacy of this model that has been tested out in practice.

Table 1: *Activities of the State-Regions Conference following the reform of Title V of the Constitution*

Year	Number of sessions	Number of acts adopted
2001	18	244
2002	23	230
2003	22	306
2004	14	279
2005	17	223
2006	18	325
2007	21	290
2008	16	267
2009	17	271
2010	12	247
2011	16	250
2012	19	263
2013	19	192
2014	12	196
2015	22	239

Table 2. *Act adopted by type*

Year	Opinions	Understandings	Agreements	Other acts adopted	Designations	Total
2001	123	52	25	21	23	244
2002	105	54	37	21	13	230
2003	165	54	28	18	41	306
2004	128	59	30	17	45	279
2005	108	45	20	21	29	223
2006	127	84	25	22	67	325
2007	98	88	32	22	50	290
2008	90	97	21	14	45	267
2009	81	82	29	15	64	271
2010	78	96	29	5	39	247
2011	57	93	26	12	62	250
2012	73	85	35	14	58	265
2013	46	68	27	16	35	192
2014	50	77	20	14	35	196
2015	65	91	31	17	35	239

With reference to the reported data, there is clearly a progressive reduction in opinons and a progressive increase in understandings and this trend confirms the strengthening of the co-decision function versus the consultative function, as well as an extensive practice of intergovernmental relations in the sphere of Italian regionalism.

5. Final remarks

The State-Regions Conference is a technical-political forum where representation is provided by the Executive bodies and their administrations so that the dialogue that is held, on the side of the Regions, is hinged on the administrative aspects and, specifically it takes place between the regional government and the public servants. The Regional Councils, that express representation and that are the holders of regional legislative power and participate also in intergovernmental relations of the vertical type with the European Union, are excluded from this system of intergovernmental relations. Now if it were only a matter of agreements on administrative functions, without implications for legislative powers, this could be acceptable; but where the conferences are asked to give an evaluation of legislative acts, taken on by the State on a subsidiary basis, they are certainly not the suitable place to do this.

Hence, by way of conclusion, it can be stated that it was rightly pointed out that "this is a shortcoming in the system as a whole: the Conference is not a federal Chamber and it is not

an adequate constitutional forum for negotiating the contents of regulatory acts in an institutional manner; indeed, given its composition, the Conference deprives the legitimate holders of regulatory powers of their right to made decisions and evaluations on the laws being shaped" (Mangiameli 2007, 86).

Even though we do not want to underestimate the contribution that this experience has given to regional participation (also legislative and, above all, in the cases of legislative decrees), in light of the observations just made, it seems necessary to reflect on the need to find other channels intergovernmental relations on legislation.

In fact, the implementation of the principle of fair cooperation and its possible evolutions in the Italian system as a rule of the interovernmental method must take into account a series of elements of the system.

As pointed out, intergovernmental relations follow two paths: the principle of fair cooperation has played a significant balancing role in the exercise of administrative functions, after various events that accompanied its constitutional recognition and its various forms that evolved into the conference system. Its nature was not always symmetrical when it was used to diverge from the division of legislative competences, leading to the statement that there is a tendency towards a form of "coercive regionalism" that enables the State to make laws on matters that are of competence of the Regions and of making administrative interventions almost always facilitated in this by an understanding with the Regions.

In particular, cooperation, according to consolidated case law, does not have any *ex ante* application in the exercise of the legislative function, but only an *ex post* application in administrative law implementing State regulatory provisions that have invaded the field attributed to the Regions by the Constitution.

This dichotomy of intergovernmental relations is, on the one hand, the expression of a symmetrical position of the constitutive bodies of the Republic, according to the expression of Article 114 Const.; and on the other, instead, being the symptom of a sharply skewed and by tendency hierarchical condition between the State, the Regions and Local Governments, it has contributed to determining (alongside above all a permanent taxation centralism) dysfunctional forms in Italian regionalism especially in terms of the accountability of the different levels of government that can be easily identified in the case of symmetrical intergovernmental relations while they are less important in the case of skewed relationships.

After the failed attempts at establishing a Chamber of the Regions, the current debate is trying to solve the *ex ante* participation in the legislative function (or at least the issue concerning the provision of fundamental principles for matters of concurrent competence between State and Regions and the issues concerning financial autonomy) through the participation of the Regions and Local Governments in the legislative procedure in accordance with the forms and ways envisaged in Article 11 of Const. Law no 3/2001.

The possibility envisaged by this provision has not yet been implemented, but it is being looked at with renewed interest because it appears to be the way for solving the intermingling

of the two forms of intergovernmental relations in the only concertation system that exists in the Italian legal order.

In this way, indeed, a solution would be found for the absence of legislative coordination between State and Regions, and it would be possible to reform the conferences to enhance their functionality in implementing public policies that affect both the State administration and the Regional administration.

Furthermore, there appears to be a need for legislative coordination of State and Regional functions also in the area of constitutional case law where the recent judgment no 251 of 2016 on the Madia reform for the reorganization of the Public Administration, extends the principle of understandings to legislative acts. Indeed, the judgment extends the principle of sincere cooperation and the forum where it is implemented – the Conference system – also to the legislative function or, at least, to those special cases (legislative decrees) where the exercise of the legislative function is conferred on the central executive power, that would therefore have to coordinate its action with the regional executives.

In conclusion, therefore, once again, not only a part of the literature but also the constitutional judge emphasized the need to solve the asymmetry that existing in the area of intergovernmental relations.

In this connection it has been pointed out also at the political level that "the implementation of the constitutional provision on the adoption of a Committee for regional matters could (...) be the opportunity for a comprehensive reflection on the current forms of coordination between State and Local Governments with a view to rationalizing the 'conference system' that has never adjusted to the reform of Title V" (D'Alia 2017).

Indeed, as pointed out in the fact finding survey, "one of the main problems of the current intergovernmental Conferences is the heterogeneity of the actions taken and of the ensuing difficulty of focusing on qualifying activities, that are those related to the direct relationship between national Government and the executive bodies of the local governments. *With the adoption of the Committee, the latter could take on the activities carried out by the Conferences in the legislative procedure, thus also avoiding duplications*" (D'Alia 2017).

In this way, there would be a coherent system where the Conferences would be the forum for intergovernmental relations at the administrative level, while the "bicameralina" would be the forum for coordinating intergovernmental relations on legislation.

6. References

Agosta, S. (2008). *La leale collaborazione tra Stato e Regioni*. Milano: Giuffré

Bartole, S. (1971). Supremazia e collaborazione nei rapporti tra Stato e Regione. *Rivista Trimestrale di Diritto Pubblico*, 84 ff.

Bartole, S. (2003). Principio di collaborazione e proporzionalità degli interventi statali in ambiti regionali. *Giurisprudenza costituzionale*, 259 ff.

Benelli, F. (2006). *La "smaterializzazione" delle materie*. Milano: Giuffré.

Benelli, F., & Bin, R. (2009). Prevalenza e "rimaterializzazione delle materie": scacco matto alle Regioni. *Le Regioni*, 1185-1211

Berti, G. (1982). Commento all'art. 5. In G. Branca (Ed.), *Commentario della Costituzione* (p. 277 ff.). Bologna-Roma: Zanichelli.

Capotosti, P.A. (1987). La Conferenze Stato-regioni fra garantismo e cogestione. *Le Regioni*, n. 3, 351 ff.

Carpani, G. *La Conferenza Stato-regioni – Competenze e modalità di funzionamento dall'istituzione ad oggi*, Il Mulino, Bologna 2006.

Cogo, G. (2013). Leale collaborazione tra Stato e Regioni: "intese in senso forte" ed "intese in senso debole" ancora al vaglio della Corte costituzionale. *Rivista Amministrativa,* 149 ff.

Colasante P. (2012). Il criterio della prevalenza della materia nella giurisprudenza costituzionale, in S. Mangiameli (Ed.), *Il regionalismo italiano dall'Unità alla Costituzione e alla sua riforma – Volume II* (p. 189-204). Milano: Giuffré

Colasante P. (2017). Concurrent Powers in Italy: the New State-centred Approach and Prospects for Reform, in N. Steytler (Ed.), *Concurrent Powers in Federal Systems – Meaning, Making, Managing* (p. 92-114). Leiden Boston: Brill Nijhoff.

Corvaja, F. (2011). La potestà concorrente, tra conferme e novità. *Le Regioni*, 287 ff.

Crisafulli, V. (1960). Gerarchia e competenza nel sistema costituzionale delle fonti. *Rivista Trimestrale di Diritto Pubblico,* 775 ff.

D'Alia, G. (2017). Sulle forme di raccordo tra lo Stato e le Autonomie territoriali e sull'attuazione degli Statuti speciali, *www.issirfa.cnr.it*

D'Atena, A. (2003). Materie legislative e tipologia delle competenze. *Quaderni costituzionali,* 15 ff.

D'Atena, A. (2017). *Diritto regionale*. Torino: Giappichelli

Di Salvatore, E. (2008). Federalismo, in S. Mangiameli (Ed.), *Dizionario costituzionale – Dizionario sistematico* (p. 20 ff.). Milano: Il Sole 24 ore

Esposito, C. (1954). Autonomie locali e decentramento amministrativo nell'art. 5 della Costituzione, in C. Esposito, *La Costituzione italiana. Saggi* (p. 67 ff.). Padova: Cedam

Kelsen, H. (1981). La garanzia giurisdizionale della Costituzione (la giustizia costituzionale), in H. Kelsen, *La giustizia costituzionale* (It. translation edited by Carmelo Geraci) (p. 145 ff.). Milano: Giuffré.

Kincaid, J. (1996). From dual to Coercive Federalism in American Intergovernmental Relations, in Deil S. Wright (Ed.), *Globalization and Decentralization: Institutional Contexts, Policy Issues and Intergovernmental Relation in Japan and the United States* (p. 21 ff.). Washington D.C.: Georgetown University Press

Maccarone, L. (2012). Sui costi della politica la Corte costituzionale marca la distinzione tra Regioni ordinarie e Regioni speciali. Riflessioni a margine di Corte cost. 20 luglio 2012, n. 98. *Federalismi.it*

Mancini, M. (2013). La resistibile ascesa, l'inesorabile declino e l'auspicabile rilancio del principio di leale collaborazione. *Le Regioni*, 947 ff.

Manfredi, G. (1993). "Intese in senso debole" e leale collaborazione a senso unico. *Le Regioni*, 1419 ff.

Mangiameli, S. (1992). *Le materie di competenza regionale*. Milano: Giuffré

Mangiameli, S. (2002). Il riparto delle competenze normative nella riforma costituzionale, in S. Mangiameli, *La riforma del regionalismo italiano* (p. 107 ff.). Torino: Giappichelli

Mangiameli, S. (2005). Il principio cooperativo nell'esperienza italiana (del primo e del secondo regionalismo). *Teoria del diritto e dello stato*, 419 ff.

Mangiameli, S. (2007). Il principio cooperativo nell'esperienza italiana (del primo e del secondo regionalismo). *Teoria del diritto e dello stato*, 57 ff.

Mangiameli, S. (2008). Il principio cooperativo nell'esperienza italiana del primo e del secondo regionalismo. Roma: Aracne

Mangiameli, S. (2011). Vicende connesse all'attuazione dell'art. 11, legge cost. n. 3 del 2001, in S. Mangiameli, *Letture sul regionalismo italiano* (p. 69 ff.). Torino: Giappichelli

Mangiameli, S. (2013a). Crisi economica e distribuzione territoriale del potere politico – Relazione al XXVIII convegno annuale dell'AIC. *Rivista AIC* (*www.rivistaaic.it*)

Mangiameli, S. (2013b). *Le Regioni tra crisi globale e neocentralismo*. Milano: Giuffrè

Mangiameli, S. (2013c). La composizione dei Consigli regionali nelle mani del Governo. *Giurisprudenza costituzionale*, 2869 ff.

Marpillero, M. (1989). Una prima decisione della Corte sull'obbligo di intesa nella mobilità del personale. *Le Regioni*, 1226 ff.

Merloni, F. (2002). La leale collaborazione nella Repubblica delle Autonomie. *Diritto pubblico,* 827 ff.

Paladin, L. (1971). Problemi legislativi e interpretativi nella definizione delle materie di competenza regionale. *Foro Amministrativo*, III, 3 ff.

Paoletti, A. (2006). *Leggi-cornice e Regioni. Crisi di un modello*. Milano: Giuffré.

Ramajoli, M. (1992). Autonomie locali e "governo dell'etere". *Le Regioni*, 103 ff.

Scaccia, G. (2004). Le competenze legislative sussidiarie e trasversali. *Diritto Pubblico,* 461 ff.

Sola, G. (2009). La rilevanza costituzionale del principio di leale collaborazione. *Quaderni Regionali,* 553 ff.

Wright, D.S. (1988). *Understanding intergovernmental relations*. Belmont: Brooks/Cole