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Regionalism in Italy

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1. The Constituent Assembly chooses Regions

The founding of the Regions was one of the greatest novelties of Italy's republican Constitution of 1947. Overturning a centralist policy dating back to national unification in 1861, this new constitution not only strengthened the pre-existing local authorities (which it specifically recognised) but also enriched their structure by introducing a new territorial unit, namely, the regional one. This it endowed with both legislative and administrative powers.

The chosen organisational formula found a partial precedent in the Spanish constitution of 1931. Some federalist traces of Central European origin may also be detected in its drafting.

The method used to divide competences between the State and the Regions, above all, was of Spanish ancestry. Indeed, unlike the Member States of a federation, the Regions were fashioned as bodies enjoying *specifically listed* competences, rather than a *general* competence. Another sign of the Iberian influence may be detected in the provision for varying degrees of regional autonomy. This was achieved through the distinction between the ordinary Regions (subject to a common legal treatment) and the special Regions (enjoying "special forms and conditions of autonomy pursuant to the

special Charters adopted by constitutional law"). Lastly, the lack of a "Chamber of the Regions" (analogous to the German or Austrian *Bundesrat*, the North American Senate or the Swiss Council of States) may be traced to the same background. The only concession in this direction may be detected in the provision for a Senate of the Republic elected "on a regional basis" (article 57 of the Constitution). Nevertheless, the organ was not endowed with the traits of a body representing the Regions. This may be understood simply by considering that the number of representatives guaranteed to individual sub-state bodies in the second Chambers existing in federal legal orders is either equal (as in the United States of America and Switzerland) or is differentiated in rather contained terms (as in Germany and Austria, for example). In the Italian Senate, on the other hand, the imbalance is very great: at the moment of writing, Valle d'Aosta is guaranteed only one senator whereas Lombardy has been allocated 47.

The constitutional status of the rules governing competences, on the other hand, was ascribable to a federal influence. The rules regarding the Regions with ordinary autonomy were dictated directly by the Constitution (Part II, Title V) whereas those concerning the special Regions were (and are) established by sources enjoying equal status: the special Charters (each enacted, as we have seen, in the form of a constitutional law). Furthermore, the federal model's inspiration can been seen in the "type" of regional legislative power for which the constituent assembly showed a marked preference, namely, the shared (or, according to Italian terminology, "concurrent") competence. Such competence was attributed to the ordinary Regions by article 117(1) of the original version of the Constitution and to the special Regions by their respective Charters. It is a power held in accordance with basic principles established by State laws (framework laws). Such division of powers between State and Regions was, in many ways, similar to that provided for by the European federal constitutions best known to the Constituent Fathers: the Weimar constitution of 1919 and the Austrian constitution of 1920.

That said, it should be added that the system chosen by the Italian Constitution was not simply a mechanical combination of elements borrowed from other experiences. Indeed, immersed in a different constitutional context, such elements assumed new valencies. The shared or "concurrent" legislative competence is a good example of this, covering as it did a far broader area than that reserved to it by the Weimar constitution of 1919 or the Austrian constitution of 1920 (both of which relegated it to a decidedly marginal position). Moreover, as a result of interpretations consolidated over time, it has perceptibly distanced itself from analogous competences in federal systems. In fact, it is now well established that the Regions, when exercising such competence, are not bound solely to comply with the prescribed principles contained in the special framework laws but also, where these are lacking, with unwritten principles that may be inferred from the *corpus* of national legislation.

Furthermore, the way in which the Italian Constitution sought to harmonise the requirements of autonomy with unitary interests referring to the State as the body

representing the whole national community was absolutely original. In particular, although it surrounded regional autonomy with remarkably extensive and pithy protection, the Constitution accorded to the State the function of directing how such autonomy developed and of monitoring the way it was exercised. This it did in terms that were fundamentally unparalleled in the experiences that had provided its historical models.

The result was a particularly complex system of balances that found its emblematic expression in article 5. Enunciating one of the Constitution's most significant principles, this balances autonomist aspirations (condensed into the principle of promoting local authorities) with a solemn affirmation (in the wake of a centralist tradition dating back to the French Constitution of 1791) of the Republic's unity and indivisibility.

The significance that the so-called "limitation of the principles" assumed within the economy of the new model may now be properly perceived. It did not take the form of a "potential" limitation because it already existed (but only if the State legislator exercised the power to adopt framework laws). It was, rather, a "necessary" and "general" limitation affecting every regional legislative power i.e. both the shared competence (bound, as we have seen, to observe the framework legislation or, where such legislation is lacking, unwritten legislative principles) and the full (or primary) competence of the Regions with special autonomy (as well as that of the Provinces of Trent and Bolzano), called to operate in harmony with the general principles underpinning the Italian legal system.

The Constitution's draftsmen probably intended the limitation's modulatory effect to prevent the danger that the new legislative polycentrism might compromise the basic systematic consistency of the Italian legal order as a whole. The particular regime of checks to which the Regions were subjected could also be considered designed to meet the same requirement. In this context, the model of municipal and provincial legislation was borrowed to develop the idea that, in relation to the new bodies, the State should enjoy a "tutelary" role not that dissimilar from the one it traditionally enjoyed *vis à vis* the local authorities. This led to the provision that all regional measures (i.e. the [ordinary] Charters, laws and administrative acts) were to be subject to preventive State control regarding legitimacy and merit.

2. Constitutional Safeguards for the Regions

The element just referred to did not, however, prevent the Constituent Assembly's overall scheme being imbued with a logic that was fundamentally geared towards safeguarding the Regions. This is corroborated by the fact that the division of competences between the State and the Regions was established directly by constitutional sources: title V of the Constitution and the special Regions' Charters (enacted, as we have seen, in the form of a constitutional law).

The "constitutionalisation" of the division of competences was intended to afford the said division protection from the interventions of ordinary State law. The significance of this protection may be appreciated if one considers the different solution chosen contemporaneously for territorial bodies other than the Regions (i.e. the Municipalities and the Provinces). Under article 128 of the Constitution (repealed in 2001, during the reform of title V of the Constitution) these were "autonomous bodies in the context of the principles established by general laws of the Republic" called to *determine their functions.* The Constitution therefore provided that these bodies enjoyed autonomy but did not directly identify the areas covered by such autonomy. It referred their precise determination to ordinary State law.

As regards the Regions, on the other hand, the Constitution did not limit itself to guaranteeing the existence of their autonomy. It also directly identified both the subject-areas in which it could be exercised and the limits placed on it.

The Regional safeguards were further reinforced by the actionability of the constitutional rules dividing competences between the State and the Regions. Indeed, in the wake of a tradition introduced to Europe by the Austrian Constitution of 1920, the Italian Constituent Assembly accorded both the State and the Regions the power to submit acts of the Regions and the State, respectively, for adjudication by the Constitutional Court in cases where such acts were deemed to violate the Constitutional division of competences.

2.1. The "Constitutionalisation" of the Regional Subject-Matters

As regards the areas covered by regional autonomy, the constitutional rules proceeded to a double order of determinations. On the one hand, they stated "with what" the Regions could concern themselves (by identifying the *object* of their competences). On the other, they clarified "how" the Regions should operate (by placing *limits* on such competences and by linking them to those of the State).

As we have seen, the first determination followed the Spanish model and set the Regions' competences out in lists. The Italian Constitution distanced itself from such a model, however, over a matter that was no side-issue. It established that the regional powers were provided for directly by laws of constitutional status, rather than by Charters of Autonomy agreed between the Regions and the State. The function of identifying the object of such powers, in particular, was substituted by lists of subject-matters set out in the Constitution or (as regards the Regions with special autonomy) in the Charters enacted, as stated, in the form of a constitutional law.

Such lists identified the field of action for all Regional competences, legislative and administrative alike. It must be added, however, that the two orders were not provided with separate lists. Indeed, the constitutional regime was shaped by the principle of the *powers' parallelism*, by virtue of which the objects of regional legislation and administration

generally tended to coincide. To this end, both the Constitution and the special Regions' Charters used the referral technique: the laws establishing Regional administrative powers identified their object *per relationem* i.e. by referring to the lists laying down legislative competences. Limiting our attention to the Constitution, it will be recalled that article 117 governed legislative competences, listing the subject-matters covered by regional law-making. Article 118 governed administrative competences, its first paragraph attributing to the Regions "administrative functions in relation to the subject-matters listed in the preceding article".

2.2. The Exclusive Nature of the Regions' Administrative Competences

As stated, the rules laid down by the Constituent Assembly to regulate regional competences also determined "how" the Regions were to exercise them. This they did by fixing limits that the latter were bound to observe. Generally speaking, these limits consisted of complementary State powers.

Such determinations only applied to legislative competences, however, and not to administrative ones. On the basis of article 118(1) of the Constitution then in force, administrative competences were the *exclusive* preserve of the Regions, having as their object subject-matters that were totally removed from the administrative activity of the State. This did not mean, however, that the Regions were the only body entitled to adopt administrative acts in regional subject-areas. Under the Constitution, the exclusivity of the Regions' administrative competence was designed to apply in relation to the State, not the local bodies (such as the Municipalities and Provinces). Such fact could be inferred from the first and third paragraphs of article 118 of the Constitution. Under the first paragraph, the State could (by Act of Parliament) hive off functions "of exclusively local interest" from the regional administrative functions in order to attribute them to the Municipalities, Provinces or other local bodies. Moreover, under the third paragraph, the Region should "normally" have had to exercise its own administrative functions by delegating them to the aforesaid bodies or by using their offices. This was a model that saw the Regions as "bodies exercising an obligatorily indirect administration" (M.S. Giannini) though, as we will see (under section 7 *infra*), it was not the Constitution's exclusive choice. On the basis of such a model, the regional bodies would not have been called to exercise their administrative functions directly (through their own offices) but through the local bodies.

2.3. Regional Legislative Competences and the Concurrency Principle

The constitutional division of legislative competences was considerably more elaborate. Its characterising principle was not *exclusivity* but, rather, *concurrency,* by virtue of which none of the subject-matters of regional competence was withdrawn from the reach of the State's legislative intervention.

As for the nature of such concurrency, it is highly significant that the Italian Constituent Assembly rejected one of federal constitutionalism's most widespread distributive models, namely, the *konkurrierende Gesetzgebung*. Under such model, the State legislator is enabled (of his own initiative) to cover areas assigned to the regional legislators, thereby complementarily reducing (if not actually *expelling*, to borrow an expression from German jurisprudence) the latters' competence. Under the Italian law, however, neither the State nor the Regions could have influenced the division of competences by which they were affected, since this was governed directly by constitutional rules that rigidly established the parameters for concurrence between the two legislative bodies.

The model chosen was that of a *vertical* division of competences. This found its expression in two basic rules set out (as regards the ordinary Regions) in article 117(1) of the Constitution. The first provided that, in relation to the Regions' listed subject-matters, the State should limit itself to establishing the *basic principles,* leaving the remaining rules (i.e. the detailed rules) to the Regions. The second reserved the establishment of such principles to Acts of Parliament.

3. The Model's Crisis

That being said, it must immediately be added that the scheme briefly outlined above was never fully implemented. Indeed, in terms of concrete constitutional experience, a very different system came to be established. This fact, let it be said in passing, contributed to the crisis of regionalism in our country. It was that crisis that fuelled the drive to reform title V of the Constitution.

As a consequence of legislative practice consolidated over time and a body of constitutional case-law that did not make the most of the "autonomist" spirit of the regime laid down by the Constituent Fathers, a good number of the Constitution's corner-stones were demolished, including:

a) the vertical division of legislative competences (centred, as we have seen, on the distinction between basic principles, falling within the State's competence, and the detailed rules, reserved to the Regions);

b) the exclusive nature of the Regions' administrative competences; and

c) the "constitutionalisation" of the subject-matters called to identify the object of both forms of regional competence.

As regards the *vertical division,* it is sufficient to recall that the State did not limit itself to establishing the basic principles governing the subject-matters assigned to the Regions.

Very frequently, it intervened with carefully detailed rules that the Constitutional Court sometimes recognised as binding by affirming their mandatory effect on regional law.

It should be added that the rules that the regional legislators were required to observe were not always exclusively set by Acts of Parliament (as required by the Constitution). Not infrequently, they had their origins in government regulations, if not administrative acts (such as those adopted in exercise of the function of policy-setting and co-ordination invented by the regional finance law of 1970: such law was confirmed by subsequent legislation and consistently endorsed by the Constitutional Court).

Similar considerations apply to the Regions' *administrative competence*. Constructed as an exclusive competence by the Constitution, this was gradually transformed into a concurrent competence as a result of the State being recognised as enjoying both substitutive powers not envisaged by the Constitution and the function of policy-setting and co-ordination just referred to.

Turning, lastly, to the *Regional subject-matters*, the most important point is that they have been freely defined and redefined by ordinary (i.e. not constitutional) State law which has altered their profile at will, arrogating to itself a role that the Constitution had quite explicitly excluded. Indeed, by fixing the list directly and by expressly reserving integrations to constitutional law, article 117 had rendered the list beyond the reach of ordinary legislation.

Drawing on one of Livio Paladin's images, it may be said that, as a result of such a state of affairs, the Regions were reduced to a sort of institutional variable that the State manipulated at its discretion. But that was not all. The regionalisation of the country certainly had not fostered that profound reform of the State that the framers of the Constitution had been proposing. It produced neither a restructuring of the State administrative machinery in the areas of regional competence nor a redefinition of Parliament's law-making activities. The latter, continuing to legislate as though the Regions did not exist, had not been transformed into the place of great national political choices dreamed of by the Constituent Fathers.

4. The Relationship between the Regions and the Political Party System

It is now well established that the fact that the Regions were dropped into an institutional reality dominated by highly centralised national political parties strongly contributed to the constitutional model's crisis. Inserted into such a context, the Regions did not have the power to counter the logic of party-political mediation with that of territorial representation.

In a study that appeared on the eve of the founding of the ordinary Regions, one of the most perceptive French commentators on italian regionalism, Claude Palazzoli, defined this aspect with great lucidity. He emphasised that the destiny of the Regions would be entirely decided by the degree of their emancipation from the national party

system. Were the Regions to have the capacity to change the processes for channelling political consensus, they would be able to create vital relationships with their respective communities and would thus be able to give the system of territorial autonomies an authentically pluralistic imprint. Should they fail to demonstrate such a capacity, on the other hand, the country's regionalism would be a mainly token one (and the regional institutions would consequentially be transformed into tools of the national political parties).

It was the second scenario that undeniably became the historical reality. It is well known, for example, that the actual foundation of the Regions enjoying ordinary autonomy in 1970 (i.e. with a twenty-year delay, in relation to the Constituent Fathers' provisions) was partly influenced by the consideration of the career prospects that it promised party political staff. It is equally well known that the demands of the party system had a determining impact on subsequent events as well: from the so-called completion of the transfer of administrative powers to the Regions under Legislative Decree No. 616/1977 (which, during the years of terrorism, favoured Parliamentary support by the Italian Communist party of governments from which it was excluded) to the regional coalition governments' tendency to homologate those established at a national level and to the consequential domino effect through which the national coalition crisis provoked a chain reaction that overthrew the regional governments which had reproduced its composition (not even the provinces or large municipalities were spared).

Against such a backdrop, it comes as no surprise that the topic of regional reform (which had remained dormant for about twenty years) imposed itself most forcefully at the beginning of the nineties, coinciding with the devastating crisis that shook the party system to its foundations: that party system that had written fifty years of republican history.

The chaos that hit the system left the overall framework in a highly unstable state (twenty years later, it still has not re-stabilised). Furthermore, it provoked the disintegration of many of the pre-existing national political entities, thereby favouring the surfacing of locally anchored political parties. Not by chance, the latter were in the front line in demanding that the preceding centralism be abolished.

It should further be considered that the introduction of direct elections for mayors and provincial and regional presidents contributed to a process of emancipation and revitalisation for the municipalities, provinces and regions that constituted a decided break with the past (as evidenced by, amongst other things, a self-promotion on the part of their management that would have been unthinkable earlier).

It was in this context that the long process that was to lead to the thirteenth Parliament's reform of title V got under way. It was a process that began during the eleventh Parliament with the work of the De Mita/Iotti Bicameral Commission (which formulated a constitutional bill directed at amending the second part of the Constitution) and continued during the subsequent Parliament with the work of a ministerial study committee presided over by the Minister Speroni (which ended, in its turn, with a

constitutional reform bill having the form both of government and of the State as its object).

5. The Thirteenth Parliament's Constitutional Reforms

It was necessary to wait until the thirteenth Parliament for this constitutional reform process to achieve concrete results. During its life, seven constitutional laws were enacted, with profound consequences for the Italian legal order. Of these, the most important is Constitutional Law no. 3/2001 ("Amendments to title V of the Second Part of the Constitution") which was carried on 8th March 2001 and confirmed by way of a referendum on the following 7th October. This constitutional Act completed the reform of regionalism initiated only a little earlier by two constitutional laws: Constitutional Law no. 1/1999 (amending the constitutional rules governing the ordinary Regions' Charters) and Constitutional Law no. 2/2001 (which extended similar rules to the Regions enjoying special autonomy).

The process that ended in these results was a convoluted one. It had its beginning in the enactment of Constitutional Law no. 1 of 1997 which, in view of the reform of the whole of the second part of the Constitution, provided for a special procedure for constitutional amendment. This broke with the normal (or "typical") procedure envisaged by article 138 of the Constitution in two respects: first of all, as regards the preliminary preparatory role reserved to an *ad hoc* Bicameral Commission and, secondly, in its provision that the text deliberated by the two Houses of Parliament through two separate instances of voting should then be submitted to a confirmatory referendum in any event (i.e. independently of a specific initiative and even if carried by a qualified, two-third majority after its second reading).

After proceeding through its first phases (and after the Bicameral Commission – over which Massimo D'Alema was called to preside – had adopted its definitive proposals), the journey thus prefigured came to a halt because the political pact underlying it broke down. Its discontinuation did not lead to the subject of constitutional reform being closed, however. It simply made it necessary to overcome the idea that it should be tackled *uno actu* (i.e. by rewriting half of the Constitution) or by using techniques that departed from the ordinary amendment procedure.

This led to a change in strategy that, in turn, resulted in the enactment of six constitutional laws (along lines traced by article 138). In addition to those mentioned in opening, these included Acts that introduced, respectively, the vote for Italian citizens residing abroad and the integration of article 111 of the Constitution (through provision for the so-called "fair trial").

6. The "Federal" Option

Insofar as it specifically concerns reform of title V of the Constitution, one preliminary point deserves emphasis. This is the intention declared by almost all the political parties to substitute the form of regionalism outlined by the Constituent Assembly in 1947 with a federal one. Use of the term "federalism" provides a significant linguistic clue as to such an intention. Appropriately or inappropriately, this term was commonly employed to indicate not only the reform's goal but also that pursued by the ordinary laws that preceded and prepared for it. According to the vulgate of the time, for example, the achievement of "administrative federalism" or of *"federalismo a Costituzione invariata"* (i.e. "federalism with an unaltered Constitution") would be attributable to the law that, in 1997, began a huge transfer of competences in favour of the Regions, provinces, municipalities and other local bodies (Law no. 59/1997: the so-called "first Bassanini Act").

The significance of this fact can be appreciated simply by remembering that when, during the course of the eleventh Parliament, another Bicameral Commission (the above-mentioned De Mita/Iotti Commission) was occupied in formulating a bill to reform title V of the Constitution, the term "federalism" was strictly banished from political vocabulary. And this, it must be noted, although the proposals approved at the time made use of a technique of clear federal origin, namely, recognition of the Regions' general competence and the State's listed competences.

The symbolic value of the new terminology cannot be missed. It was intended to give expression to the (openly declared) will to break radically with the previous regional framework as this was considered incapable of responding to the demands for self-determination expressed by some of the country's most economically advanced areas. Federalism was therefore recognised as the key to absorbing tensions that were otherwise likely to jeopardize national unity.

7. The Constitutional Model's Limitations

It should be added that reform of title V was also hoped to bring Italian regionalism out of its profound state of crisis. As we have seen (under section 4 *supra*), it was a crisis rooted in political issues but one that was not untouched by the constitutional rules themselves, the latter having proved over time to have some incontestably weak points.

Focussing on the most important aspects, it should first be observed that the Constituent Fathers had not made a clear decision about the role of the Regions. The question "What is the point of the Regions?" (to echo the title of a little volume published in France in the seventies) is not an easy one to answer. To borrow an effective image of Giuliano Amato's, it could be said that the Constitution had shaped the Regions as bodies "without faces". Bodies, that is, without a clearly decipherable role.

This fact may be understood simply by considering the lists of subject-matters that the draftsmen (borrowing, it will be remembered, from the Spanish tradition) used to identify the object of the legislative and administrative competences assigned to them. Set out both in the original article 117 and the corresponding rules of the special Regions' Charters, such lists were born outdated, having been built on the model of a pre-industrial society with a predominantly agricultural economy. This fact condemned the Regions to a marginal role, all in all. Furthermore, owing to the highly fragmented nature of the lists, the Regions were not in a position to give their interventions the degree of organic unity needed. Indeed, the competences that they enjoyed became entwined with State competences, with consequences that can easily be imagined as regards overlapping interventions and accountability.

The organisational uncertainty was further aggravated by the technique the Constitution used to distribute legislative powers between the State and the Regions. As seen, the so-called "vertical" division contained in article 117(1) of the Constitution centred the distribution of competences between the State and regional legislators on the distinction between basic principles (falling within the former's competence) and detailed rules (referred to the latter). Trust was therefore placed in a remarkably vague boundary line.

To all this must be added the lack of a clear decision regarding the relationship between the Regions and the local bodies. Indeed, the constitutional rules oscillated between two models: a functional integration of regional and local government, on the one hand, and their mechanical superimposition, on the other. The first modelled the Region as a body "exercising an obligatorily indirect administration" (as discussed under section 2.2 *supra*). That is to say, the Region was seen as a body called to operate through the mediation of the local bodies rather than directly, through its own administrative machinery. The second saw the Region engaged not only in policy-setting but also in concrete administrative management (and consequently equipped with its own appropriate structures).

To complete the picture, mention must be made of the constitutional rules governing finance. Theses remarkably nebulous rules were laid down by article 119 of the Constitution which identified the different types of regional revenue (the Regions' own taxes, quotas of State taxes and special aids) but did not specify what kind of relationship should exist between them. A very wide discretionary margin was thus left to ordinary State law. This led to the establishment of a system which, particularly during its first thirty years, thwarted any possibility of regional self-determination regarding revenue. A dissociation between revenue and expenditure, amongst other things, was thus created, resulting in a deficit in political responsibility for the latter. Indeed, it is clear that, if only a minimal proportion of the resources used by the Regions comes from taxes that they themselves regulate, regional voters will feel no urge to exercise that control over spending that constitutes one of the most vital elements in representative democracies.

8. Reform

The decision to turn over a new leaf by breaking with the former regionalism contributed to a thematization centred on general models rather than on Italian experience as it matured over time. As we will see, these models did not always have parallels in other countries.

8.1. Two Initial Mistakes: Macro-regions and a Microstate

Such a criticism may be made, above all, of a first model that, albeit outmoded by subsequent debate, was initially taken rather seriously. This was the model based on the so-called "macro-regions", according to which the 20 original Regions should have been replaced (or, at least, flanked) by larger bodies resulting from their territorial amalgamation. Under the most radical hypothesis, there should have been no more than three such bodies.

The assumption underlying this formulation was that the original regional bodies were not capable of reaching the necessary critical mass (in terms of territory and population) for exercising the greater powers that should have devolved to the sub-state bodies under the reform. This assumption was without foundation, however, as is confirmed by the two federal States geographically closest to Italy. Despite their modest demographic and territorial dimensions, Austria and Switzerland are structured in 9 *Länder* and 26 cantons.

That was not all, however. The operation envisaged by such proposals was markedly Jacobin in nature. The advocates of the macro-regions proposed introducing the new bodies out of the blue, entrusting their creation to an arbitrary decision of the constitutional legislator. They would therefore have had recourse to a method open to the risk of creating artificial bodies without any concrete connection to appropriately homogenous social groups held together by their own cultural identity. This was no small risk. Indeed, it is widely acknowledged (one can think, for example, of Peter Häberle's observations on this point) that only those territorial structures enjoying an anthropological-cultural foundation can breathe life into solid, vital forms of federalism and regionalism.

In order to avoid such consequences, the projects to amalgamate the Regions would have had to provide for a different path i.e. a bottom-upwards self-identification by communities. This was, moreover, the path wisely indicated by article 132 of the 1947 Constitution. Following an example in the Spanish regional tradition, this provided for the involvement of the Municipalities and the regional assemblies affected, as well as for the consultation of their inhabitants by way of a referendum.

Another model that the evolving debate fortunately chose to shelve was that which could be termed the "model of the four competences". This was based on the idea that, in a federal system, the central government should see exclusively to four things: defence, justice, foreign policy and currency. Nor could this assumption be considered well founded, however. In actual fact, in none of the truly federalist States does the federation have such slender powers. Switzerland, Germany and Austria, the European states with the most tried and tested federal tradition, provide a significant confirmation of this fact. Indeed, their constitutions include themes such as expropriation, consumer protection, road traffic, cinema promotion, trade in foodstuffs, the banking system, Chambers of commerce, state-controlled prices, administrative procedure, organ transplants, maternity rights, childcare and bankruptcy law amongst the subject-matters attributed to the federation.

The fundamental importance of this issue hardly needs to be stated. Indeed, it is evident that if functions involving unitary, indivisible interests are not reserved to central government, the very possibility of constructing a common citizenship around a sufficiently substantial nucleus of rights risks being compromised (thereby jeopardizing national unity).

8.2. Constitutional Techniques for Dividing the Competences

Reflection on the techniques to be used to distribute competences between central and regional government proved to be more concrete: it was necessary to compare the various solutions offered by comparative law.

In this field, it became clear during the reform process that the real choice was between two models prescribing inverted scenarios: the classical federal model and the Spanish regional one. Under the first, the listed competences lie with the central State and the general competence lies with the sub-state entities (e.g. the *Länder* and the cantons). Under the second, conversely, it is the central State that enjoys general competence, whilst the bodies corresponding to the Italian Regions (the *comunidades autónomas*) have listed competences.

The second model was closest to the one chosen by the Italian Constitution of 1947 (which had taken its inspiration from it: see section 1, *supra*). It differed from it, however, in one essential respect: it did not contemplate the category of Regions enjoying ordinary autonomy. According to this Spanish model, each regional body is endowed with the competences provided for by its respective Charter of Autonomy, such competences not necessarily coinciding with those granted to other Regions.

It was precisely this detail that, in principle, led to an agreed preference for the federal model. Chosen both by the proposals formulated by the Bicameral Commission and by Constitutional Law no. 3 of 2001, such model offers the advantage of allowing a rational reform of the State. Indeed, under the Spanish system, the reorganization of the State's

competences through the devolution of powers to the Regions does not occur in a uniform manner throughout the whole national territory but, rather, in a regionally differentiated fashion. Indeed, it depends on the quality and quantity of the competences that the individual Regions respectively enjoy. On this basis, the State ends up assuming the traits of a body enjoying "left-over" competences, being called to intervene in a complementary manner in the contexts that the individual Charters of Autonomy have not assigned to the Regions' respective territorial competences. This leads to an organisation resembling a leopard's spots, the asymmetry of which is objectively incompatible with the intention to use the Regions to promote an organic reform of the State. That such an organic reform of the State was necessary was not called into question by any of the political parties in Parliament.

It must nevertheless be stated that Constitutional Law no. 3/2001 did not use the model in its most rigorous form. As we shall see (under section 8.13, *infra*), this was because the category of Regions enjoying special autonomy was preserved and because provision was made that the ordinary Regions might also be recognised as enjoying "special forms and conditions of autonomy".

8.3. Subsidiarity

Subsidiarity was another topic that imposed itself forcefully during the debate leading to reform. From the first proposals adopted by D'Alema's Bicameral Commission onwards, there had been the intention to codify this principle in the Constitution by providing that, for the purposes of distributing functions and duties, preference was to be given to the institutional or social level closest to those affected.

In this area, the debt the Constitutional formulation owed to the above-mentioned "first Bassanini Act" (Law no. 59/1997) should be noted, above all. Reaching beyond a formulation that, in Italy, dated back to the beginning of the nineties (and had been used for the law implementing the European Charter on Self-government), this Act did not interpret the principle of subsidiarity in an exclusively *vertical* sense (i.e. with reference to the relations between territorial bodies) but also in a *horizontal* one, using it with reference both to the relations between territorial bodies and non-territorial ones (such as Universities and Chambers of Commerce) and to those between public authorities and civil society. As regards this last profile, the rule directed at promoting "the discharge of duties of social importance by families, associations and communities" (article 4, para. 3, letter *a*) must specifically be noted.

The importance of the innovation is evident. Thanks to it, the full axiological richness of the principle has been recovered at a positive law level. Such principle cannot be considered simply a technique for distributing power between homogenous institutions (i.e. all those territorial bodies that are tied to universal suffrage and the mediation of political parties). Indeed, as revealed by its historical roots (ranging from the Church's

social doctrine to liberal formulations and the federalist tradition), it intends to answer another primary question: how the State's activity is to be contained. The crucial topic of the State/market relationship, amongst other things, falls into this context.

This widening of perspectives also dominated developments in constitutional reform. This is not so surprising. It is true that, in the context of a "federal" type of reform, the topic of State/society relations should, strictly speaking, have been considered an intruder (to be tackled, if at all, during the updating of the basic principles preceding the first part of the Constitution). It is nevertheless worth considering that this interpretation of subsidiarity offered a way of untangling one of greatest knots that the constitutional transition found itself obliged to face, namely, civil society's widespread impatience with an invasive form of statehood that was refractory in recognising any form of pluralism other than party-political pluralism.

It must nevertheless be added that the translation of the subsidiarity theme into a legislative key proved anything but easy. This is evidenced, amongst other things, by the laborious stratification of formulations following one after the other during the course of the reform. The last version (adopted by Constitutional Law no. 3 of 2001) contains two important references to such principle. The first is to the subsidiarity principle in its vertical sense, the latter being used as the criterion for allocating administrative functions between the territorial bodies (article 118(1): see section 8.10 *infra*). The second reference, on the other hand, is to the principle in a horizontal sense, which finds its expression in the rule that (generally speaking) requires territorial bodies to 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" (article 118[4]).

8.4 The State's "Tutelary" Role is Abandoned

It was not only in its express enunciation of the subsidiarity principle, however, that the constitutional reform diverged from the scheme originally outlined by the Italian Constitution. On the contrary, it may be said that not one part of that original scheme was not profoundly affected by the reform, starting with the basic concept that the State enjoyed a tutelary role in relation to the Regions analogous to the role it had had in the past *vis-à-vis* the local authorities (i.e. the Provinces and the Municipalities).

As already stated, such a concept found its emblematic expression in the Constitution's rules on control, by virtue of which there was not a regional measure that was not subject to State control. A control, it must be noted, that was not limited to issues of legitimacy but extended to the merits (and, therefore, to political appropriateness as well). This was so for all a Region's measures, without distinction: its Charter (subject, under article 123, to approval by the National Parliament), its laws (subject, under article 127, to a possible Parliamentary scrutiny on the merits, in addition to the Constitutional

Court's ruling on legitimacy) and its administrative acts (also subject, under article 125, to preventive control regarding legitimacy and merit).

The structural principle shaping the rules dividing legislative competences between the State and the Regions (i.e. the concurrency principle – see section 2.3 *supra*) may also be traced to the same source. As a result, the Regions could not legitimately legislate on any subject-matter by themselves. The laws they enacted were always bound to observe determinations traceable to the State legislator (such as express or implied principles or the basic rules governing the socio-economic reforms contemplated by the special Charters). This fact, be it said in passing, could not fail to be reflected in the quality of regional legislation. The Regions enacted laws of a reduced political valency.

8.5. A U-Turn

Given such a situation and the centralistic trends that had further strengthened the State's position of supremacy (see section 3, *supra*), it is hard to see how the U-turn could have been more radical. This may be appreciated by observing that the reform sanctioned the total elimination of control over regional measures (see section 8.12), inverted the listing of legislative competences (by recognizing the Regions' general competence) and deprived the concurrency principle of the central position it had originally enjoyed.

8.6. An Inversion of the Listing and the Regions' Residual Legislative Competence

Starting with the legislation, the first element for consideration is the inverted listing of competences just mentioned. Using a typically federal technique, the reform recognised the State legislator as enjoying listed competences and the regional legislators a general competence.

In particular, the new article 117 attributed

- exclusive competence to the State in the subject-matters listed under the second paragraph;
- concurrent competence to the State and the Regions in the subject-matters listed under the third paragraph; and
- residual competence to the Regions (article 117[4]), having as its object all the areas not included in the lists in the preceding paragraphs (or, in any event, those not reserved to the State by other constitutional rules: one can think of the last paragraph of article 33, concerning universities and other institutions of higher education, for example).

The innovation's revolutionary nature does not need to be emphasised. It abolished the general presumption in favour of the State legislator's competence. The latter's power was no longer the rule but the exception.

This was not all, however. As regards the objects contemplated by the residual clause, the Regions were recognised as enjoying a basically exclusive competence. What prevents this competence created by article 117(4) being considered wholly exclusive is the "finalistic" nature of some of the State's competences. This with reference to the numerous cases where the Constitution identifies the area in which State legislation is to be enacted by identifying the goals entrusted to it rather than the subject-matters falling within its remit. This occurs, for example, in relation to the State competences concerning protection of competition, protection of the environment and the eco-system and safeguards relating to the basic level of services to be guaranteed unitarily throughout the whole national territory. As will be seen (see section 8.9.2 *infra*), the competences thus defined put the State legislator in a position to penetrate areas contemplated by the residual clause, thereby binding regional legislators, if not actually expropriating their competence.

If one leaves such possible influences to one side, it must be acknowledged that the laws enacted by the Regions in the fields covered by the clause come up against no other "vertical" limitations than those generally applicable to every legislative act (whether regional or of the State). Such limitations are laid down both by the Constitution (which, being rigid, must be observed by all legislative acts without distinction) and by the interposed rules to which it refers. The violation of such rules normally constitutes a violation of the constitutional provisions envisaging them.

8.7. Observance of International and Community Obligations

For the sake of clarity, it should nevertheless be emphasised that the equalisation of regional laws with national ones was not achieved simply by extending to the former the limitations previously laid down for the latter. In fact, the constitutional reform introduced a great novelty which, as we shall see, extended to State laws a limitation formerly only envisaged for regional ones. This was the duty to observe international obligations (article 117[1]). This novelty came as a surprise result of the reworking of a proposition introduced by the bill that, after the Bicameral Commission's failure, re-started the reform process: the Amato draft (so named after the minister responsible for reform at the time). Unlike the constitutional law that resulted from it, however, this draft did not refer observance of international obligations to the State's and the Regions' exercise of legislative power but, rather, to the division of competences between the two legislative bodies.

According to the interpretation that appears preferable, such innovation results in the treaties whose ratification has been authorised by law (pursuant to article 80 of the Constitution) being binding upon the State legislator as well as the regional legislator (only the latter had been bound previously). Where the State or a Region breaches them, annulment by the Constitutional Court will be justified. Which fact, let it be said

incidentally, is by no means undesirable since it prevents the State breaching (legitimately, under its domestic law) duties to which it freely agreed in the international legal order.

Slightly different considerations apply to another limitation created by article 117(1) of the Constitution, namely, observance of the constraints deriving from the European Union's legal system. A limitation of this sort had not previously featured in the text of the Constitution. It should be emphasised however, that its existence had nevertheless been recognised by the Constitutional Court in a steady and well-established flow of case-law. Its mention by article 117 is therefore more of a confirmation than an innovation.

8.8. Concurrent Competence: Continuity with the Past and Innovation

Turning now to the concurrent competence, it should first be stated that although borrowed from the original Constitution of 1947, it does not correspond in every respect to the paradigm the latter established. This for the reason that, being introduced into a new constitutional context, it assumed slightly different characteristics.

An element of continuity with the past may be found in the fact that the exercise of concurrent competence was not subordinated to prior enactment of framework laws. Indeed, it seems irrefutable that, in the areas where the concurrency principle applies, the Regions can also legislate independently of the State legislator's enactment of basic principles. In such a case, however, they do not operate free of all legislative ties. They are to be considered bound, at least during a first application of the reform, to observe the implicit or unwritten principles which can be inferred from the entire national legal system previously in force (as the Constitutional Court held in its judgement no. 282/2002).

Turning now to the innovative elements, two points deserve emphasis. In the first place, it should be noted that the new constitutional rules abolish the old (and highly contested) practice by which the State enacted detailed rules, in subject-areas falling within the Regions' competence, that were either legally binding or applicable as long as the Region did not depart from them (see section 3 *supra*). Article 117(3) and (4) are in conflict with the continuation of such a practice, providing respectively, "In the subject-matters covered by concurring legislation legislative powers are vested in the Regions, except for the determination of the basic principles, which are laid down in State legislation" and that "the Regions have legislative powers in all subject-matters that are not expressly covered by State legislation". They thus present an insurmountable obstacle to the State's claim to be entitled to intervene with provisions on anything other than principles in relation to the subject-matters listed under paragraph 3.

Another practice that the new constitutional rules threw into crisis was the "down-grading" of the guiding principles. This was the practice of requiring the Regions to observe non-legislative parameters established by way of regulations or, more frequently, policy-setting and co-ordination instruments enacted in an administrative form (see section

3 *supra*). Indeed, the admissibility of non-legislative constraints binding the Regions is irrefutably excluded by article 117(6). In admitting the State's regulations only in relation to the subject-matters reserved to the State's exclusive legislation, this paragraph obviously excludes the possibility of State intervention regarding "concurrent competence" subject-matters by way of non-legislative measures (so held the Constitutional Court, for example, with reference to policy-setting and co-ordination instruments in its judgement no. 329/2003) or, consequently, of it binding regional law-making in such a way.

8.9. The Legislative Subject-Matters

As regards the legislative competences' field of action, the Constitutional reform made use of a technique similar to that employed by the Constitution of 1947 and set the subject-matters of competence out in special lists. As already stated, however, since the listing was inverted, such lists no longer identified the object of the Regions' competences but, rather, those of the State. Or, more precisely, they identified the object of the Regions' competences in the sole area of concurrent competence, where they were entwined with complementary State competences. As already seen (under sections 8.6 and 8.8), this competence is shared in such a way that the State legislator is called to lay down principles whilst the regional legislator enacts detailed rules.

The central position that the lists of legislative subject-matters enjoyed in the reform's general architecture cannot be missed. Indeed, it is precisely to the lists that the function of identifying the balance between the requirements of unity and those of autonomy has been entrusted: that balance between indivisible, unitary interests (which require the intervention of the State legislator) and the demands of differentiation (which concern the regional legislators).

8.9.1. ...and Their Interpretation

If the *constitutional* listing of the areas of competence is to preserve its safeguarding function, the issue of the subject-matters needs to be considered not in terms of the Constitution's *implementation* (i.e. by recognising ordinary State law as having the power to define the areas covered by the items listed) but, rather, in terms of its *interpretation*.

As for the criterion to be employed in such an interpretation, the author remains convinced that whenever the constitutional draftsmen feel no need directly to define the concepts they have employed, the latter can reasonably be deemed to have been drawn from the rules in force at the time of their intervention.

It must be emphasised, however, that the protection afforded by the Constitution's rigidity requires these concepts to crystallise (the Austrians would say *petrify*) in their original meaning. In other words, they are to be sheltered from possible *legislative intervention* but not, it should be noted, from *unforeseen actual events*, since it is clearly

impossible to limit the naturally expansive capacity of legislative provisions (or, therefore, to prevent new relationships, situations or facts resulting from socio-economic development or technological evolution being regulated on the basis of legislative concepts that could not have foreseen them).

Such a key obviously cannot be used in cases where the constitutional draftsmen have used formulae with no history i.e. "new" concepts without significant parallels in our legislative tradition. In such cases, interpretation should not be based on references to previous rules (which are incapable of offering diriment elements) but, rather (and echoing article 12(1) of the provisions preceding the Italian Civil Code), on the sense rendered evident by the strict meaning of the words according to the order in which they have been placed. Reference should also be made to the legislative "system" in which the items themselves have been included (and, therefore, to the rest of the constitutional rules and, nowadays, to European law as well).

8.9.2. The "Non-subject Matter" Subject-Matters: "Finalistic" Competences and the "konkurrierende Gesetzgebung"

Taking up a point mentioned earlier (see section 8.6 *supra*), it should now be stressed that the lists set out under Article 117(2) and (3) included some "subject-matters" that are so in name only, identifying as they do not the object of the competence but the goals to be pursued through it. They therefore identify competences that have been constructed to finalistic ends i.e. in relation to their purpose rather than their scope. There are numerous examples of such a technique in the new article 117. Of these, the most significant are provided by article 117(2)*(e)* and *(m)* which refer, respectively, to the protection of competition and the determination of the basic level of benefits relating to civil and social rights to be guaranteed throughout the national territory.

The competences constructed in this manner reveal two peculiarities.

First of all, they appear to be competences without an object, called to define themselves (or, more precisely, their respective scopes) through their very exercise. For this reason, the measures enacted under them can legitimately affect various subject-matters (including those falling under the residual competence clause). For example, it is irrefutable that protection of competition can potentially affect various sectors (such as industry, trade, agriculture and handicraft etc), depending on the political decisions enacted by the State legislator.

The second characteristic of the competences identified in finalistic terms is their flexibility. Save where the constitutional provisions dictate otherwise (e.g. where such competences are subject to the regime of concurrent legislation), the rules providing for them do not rigidly prefigure the terms of the relationship between the State and the regional legislators but entrust its conduct to the former. Such an approach allows the State legislator either to limit himself to establishing basic principles or to push ahead into

the detail (and, in this second case, to expropriate objects assigned to the regional legislator's competence from him). This results in very significant points of contact with the *konkurrierende Gesetzgebung* of Central European federalism which enables the federal legislator to conduct his relationship with sub-State entities in various ways: not only can he enact guidelines but he can also expropriate such entities' competence by occupying areas normally reserved to them.

8.10. Administrative Functions

Turning now to the administrative functions, a profound innovation regarding their relationship with the legislative competences should be noted. The new constitutional text abolishes the principle of parallel functions that had characterised the old one (see section 2.1 *supra*). According to such principle, administrative functions lay with the same body as was called (in the subject-matters forming their object) to exercise the corresponding legislative functions.

The reform, on the other hand, chose the principle of what might be termed "dissociation": administrative functions are generally assigned to bodies other than those enjoying legislative powers over the related subject-matters. In particular, whilst legislation lies with the State and the Regions, administrative functions are usually assigned to the Municipalities. Under the new law, the latter enjoy a general administrative competence similar to the general legislative competence attributed, as we have seen, to the Regions.

This attribution of general administrative competence to the Municipalities constitutes one of the most controversial aspects of the reform. The latter sought to temper the drastic nature of the rule (the mechanical application of which would have absurd consequences) by providing that it can be departed from by way of ordinary (State or regional) law.

In order to quell criticism that the constitutional draftsmen would thus end up emptying the wording on the Municipalities' general competence of all meaning, Constitutional Law no. 3/2001 sought to circumscribe the power accorded the State legislator by orienting his interventions. In fact, article 118(1) of the Constitution provides that withdrawal from the Municipalities of administrative functions otherwise falling within their competence by virtue of the general clause is subject to two conditions: that it has been rendered necessary by the need to "ensure the unitary exercise" of the said functions and that the laws providing for it have been enacted "pursuant to the principles of subsidiarity, differentiation and proportionality".

Immediately after the reform came into force, it was impossible to foresee whether these conditions would actually prove capable of performing the function they had been introduced to perform i.e. guaranteeing the actionability of the aforesaid withdrawal (through the Constitutional Court's rulings on laws reallocating administrative functions). It should be said that the Constitutional Court clearly opted for an affirmative

interpretation in its judgement no. 303/2003: it made maximum use of the enforceable effect of the subsidiarity principle which it interpreted in terms favouring proceduralisation. Thus the risk, feared by some, that the whole law governing administrative functions would be "deconstitutionalised" appears to have been reduced.

8.11. The Constitution's New Finance Rules

The rules governing regional finance were also profoundly innovative. The hardest task facing the constitutional draftsmen here was that of circumscribing the very wide margins article 119 of the 1947 Constitution had left to ordinary State law.

In this area, the explicit condition that local authorities should *set* and *levy* their "own" taxes in the same way as their revenues (article 119[2]) was the constitutional reform's response to the common interpretation of the corresponding concept in the rules it replaced. Under the old system, the rules governing the so-called "own" taxes had never been regional rules but, rather, State ones. They were distinguished from the rules governing tax revenues by the power these same rules accorded the Regions to determine the rates applicable in their territory, albeit within rigorous limits.

Certain rules directed at limiting the State legislator's discretionary powers also fall into this area. These include the provision by which financial equalisation (involving a special fund without allocation constraints) must be anchored to an objective element: the "per-capita taxable capacity" of the territories called to make use of it (article 119[3]). Thus the constitutional reform not only intended to introduce an element of distributive justice but also to render the Regions accountable by penalising those that fail to draw fully on the tax resources that their respective populations are capable of guaranteeing.

There is a fairly widespread view that the rules' very degree of specificity ought to make it correspondingly difficult to advance "evasive" interpretations of the sort developed in relation to the original text.

8.12. State Control over Regional Measures is Abolished

As already stated (see section 8.5 *supra*), another highly innovative element of the 2001 reform concerned the area of control.

In this field, as we have had occasion to note, the reform could not have been more radical. Indeed, it decreed the definitive abolition both of the institution and of the general concept underpinning it. This may be appreciated simply by examining the innovations introduced in this context by Constitutional Laws no. 1/1997 and no. 3/2001. The first eliminated State approval of the Regions' Charters, replacing it with approval by the Region's inhabitants by way of a referendum when the conditions prescribed by article 123(3) of the Constitution are satisfied (see section 8.15 *infra*). The second abolished central government control over regional laws by providing, in line with

the rules commonly found in federal constitutions, that aspects vitiating the legitimacy of such measures are to be asserted exclusively through the courts by way of a subsequent judicial review application made by the State (article 127). The same Constitutional Law no. 3/2001 also did away with the judgement on a law's merits originally entrusted to Parliament (which power had never been exercised, in any event). It further expressly repealed the rules concerning control over both the Regions' and the local authorities' administrative measures.

8.13. The Regions Enjoying Special Autonomy

The novelties of the organisation outlined by the reform were not always quite so radical. The Regions enjoying special autonomy provide a significant example in this respect, posing as they did three far from simple problems for the reform's draftsmen. One problem concerned constitutional architecture and two were of a political nature.

The issue concerning the Constitution's architecture was whether maintaining the special Regions was compatible with the inverted lists of competences. From an academic point of view, it had been emphasised that the inverted listing would have rendered preservation of the special Regions highly incongruous. It would have resulted either in the special autonomy assuming a status inferior to that of ordinary autonomy or in its ultimately being absorbed by the latter.

The requirements of the Constitution's architecture were nevertheless counter-balanced by the interests of the special Regions which were anything but willing to see themselves reduced to normal status, mainly because of the more favourable financial treatment reserved to them. The elimination of their special status would therefore have exacted a probably unacceptably high price in electoral terms. This was the first political problem.

The second political problem was posed by the ordinary Regions. Indeed, it might reasonably have been supposed that these (or some of them) would have expected to be allowed to enjoy the (above all, financial) benefits that special autonomy accorded, should it have been maintained.

Given the complexity of the tangle, it must be acknowledged that the reform's draftsmen did all that was possible in the existing situation. In particular, they:

- kept the special forms and conditions of autonomy (article 116[1] and [2]);
- provided, on a provisional basis (i.e. "until the Charters are updated"), for the application to the Regions enjoying such special autonomy of that part of the new law governing ordinary autonomy that provides for "wider forms of autonomy than those already attributed" (article 10 of Constitutional Law no. 3/2001); and
- permitted the partial extension of special autonomy to individual ordinary Regions (article 116[3]).

This was clearly a solution reminiscent of King Solomon, seeking as it did to reconcile heterogeneous demands that are not easily reconcilable.

In its concrete application, the extension to the special Regions of the wider-ranging competences that the constitutional reform of 2001 accorded the ordinary Regions did not spark any significant debate. Indeed, the Constitutional Court has interpreted the clause providing for it (article 10 of Constitutional Law no. 3/2001) wisely. It has essentially inferred two consequences of its wording, namely:

a) that the special Regions also enjoy legislative competence in relation to subject-matters not contemplated by their respective Charters but, rather, attributed to the ordinary Regions under the reform (such as energy and the law governing communications, for example); and

b) that, in cases where there is coincidence of object (i.e. when the same subject-matter falls both within the special Regions' competence by virtue of their respective Charters and within the ordinary Regions' competence under the constitutional reform), the special Regions do not have to observe the limitations provided for by their Charters if such limitations are not also provided for by the Constitution (such as the limitation requiring observance of the State's major reforms, for example).

The clause (regarding ordinary Regions' access to forms of special autonomy) proved more controversial. So much so that the constitutional reform carried by the fourteenth Parliament's political majority (but rejected by the popular referendum held in June 2006, as we will see) provided for its repeal.

The problems arose from the fact that it permits competences encompassing profiles of incontestably national importance such as education, energy, the professions, health protection etc. to be transferred to the Regions. It is true that the procedure provided for by the last paragraph of article 116 makes such transfer of competences subject to State law, requiring such law to be enacted by an absolute majority as well as on the Region's initiative and in agreement with it. As a consequence, Parliament can refuse to consent to attributions of competence to Regions in contexts it does not consider open to legislative hiving-off. This is nevertheless an outcome tied to contingent political conditions that may or may not arise on each separate occasion. Where "autonomist" parties (or parties characterised by strong local ties) are decisive for the survival of a coalition Government, the risk that the national political majority will be unable effectively to oppose the Regions' requests must not be undervalued.

It must be added that the "additional special forms and conditions of autonomy" that the ordinary Regions may thus obtain can also result in the transfer of financial resources in favour of those Regions that acquire them. This reduces the possibility of adjustments between the country's richest and poorest areas.

8.14. The Second Chamber and State/Region Co-operation

The other almost insoluble problem concerning the Regions already enjoying special autonomy was posed by the reform of the second Chamber. This was not because the Regions' need of a form of representation could be called into question but because the introduction of an authentically "federal" Senate would have involved the abolition of the currently existing Senate, which has always been anything but willing to contribute to its own institutional death.

Facing the political impossibility of solving this problem, Constitutional Law no. 3/2001 had recourse to a substitute. Under article 11(1), it authorised both Houses of Parliament to provide in their standing orders for the participation of Regional and local authority representatives in the proceedings of a pre-existing organ: the bicameral Commission for regional affairs (composed of 20 Deputies and 20 Senators).

Under article 11[2], the constitutional reform further provided, on the one hand, that the thus-formed Commission (commonly known as the *"bicameralina"* or "little Bicameral") had to be consulted whenever Parliament carried a framework law or a law on regional or local finance and, on the other, that if Parliament intended to depart from the Commission's opinion, voting had to take place in a full House and result in an absolute majority (it must not be forgotten that, in Italy, laws may be passed by parliamentary committees).

Here, too, it must be acknowledged that the draftsmen did everything possible to find a solution capable of reconciling different demands. The solution is an ingenious one even if not particularly incisive. In any event, as a result of difficulties arising during the implementation phase, it is, to date, a solution that has seen no follow-up.

That said, it should be stressed that the reform's indifference towards the need for co-operation between central and regional government goes well beyond the issue of the second Chamber. The rules it created on the subject have as their respective objects: 1) the Regions' participation in the preparatory decision-making process for EU legislative acts (article 117[5]); 2) co-ordinated action in the subject-matters of immigration, public order and security (article 118[3]); 3) agreements and co-ordinated action in the field of cultural heritage preservation (article 118[3]) and 4) the founding of the Council of Local Authorities in the Regions (article 123[4]).

The rest is a gaping void. For example, it is significant that, unlike the proposal formulated by the Bicameral Commission, the constitutional reform makes no mention of a mixed body created by previous legislation, namely, the "permanent State/Regions Conference" composed of the President of the Council of Ministers (who presides over it), the Ministers with "as and when" competence for subject-matters and the Presidents of the Regional governments. Despite the Constitution's silence on the matter, this was a body that, together with the "State/Cities Conference" and the "Unified Conference"

introduced by the frequently cited "first Bassanini Act", enjoyed a central role in the system of relationships between the various levels of government.

8.15. The New Constitutional Rules governing the Ordinary Regions' Charters

This concise account of Italian regional reform would be incomplete without a mention of the new rules governing the ordinary Regions' Charters. Introduced by Constitutional Law no. 1/1999, these rules present elements of continuity and discontinuity with those preceding them.

The continuity concerns issues of subject-matter i.e. the object of the Charters. Indeed, the new rules follow models that may properly be termed "regional", since they attribute to the Regions the power to enact *Charters* rather than authentic *Constitutions* (similar to those usually enacted by the Member States in federations). That is to say, they accord a power that, unlike that held by Member States in a federation, does not extend to the rules governing the rights and duties of citizens *vis à vis* sub-state entities but essentially has the Region's organisation as its object. The most important choice that the Constitution refers to the Charters concerns form of government. Under article 122(5), the Charters can choose between preserving the (non-mandatory) rules laid down by the Constitution (providing for the direct election of the President of the Region) or introducing one of various forms of parliamentary government.

The innovative elements, on the other hand, concern issues of form i.e. the procedure for creating Regional Charters. As stated, the reform of 1999 abolished their parliamentary approval. Furthermore, partly following the model article 138 of the Constitution adopted for constitutional Acts, it provided that, in addition to a preventive verification of constitutional legitimacy by way of a Government application (article 123[3]), the Charters must be deliberated twice by the Regional Council and can also be submitted to a confirmatory popular referendum where this is requested by one fifth of the members of the Regional Council or by one fiftieth of the Region's electorate (article 123[3]).

Upon reflection, such innovation is justifiable precisely on the grounds of the continuity referred to above. Indeed, it should be considered that parliamentary approval of the Charters had been borrowed from the Spanish Constitution of 1931. It had been tied to the function reserved to such acts by that Constitution which, like the current one (i.e. the 1978 Spanish Constitution), had also required the Charters to define the subject-matters of regional competence and, therefore, complementarily to reduce the State's competences. Such fact made it perfectly understandable that the State was not to be excluded from the related decision-making process.

It thus may readily be observed that the mechanical use of such a procedural mould for Charters called exclusively to cover regional organisation did not show any great far-sightedness on the part of our Constituent Fathers. Had parliamentary approval been

required for the special Regions' Charters, it would have been different. This was not what the Italian Constitution chose, however, since it provided that such charters are to take the form of constitutional laws of the State.

The preservation of the exclusively organisational character of the ordinary Charters therefore fully justifies the change of course recorded as far as the procedure for their creation is concerned.

9. The Implementation of the Reform

More than ten years after the new title V came into force, significant progress in implementing the new constitutional rules has been made.

As regards the State side of the coin, four Acts in particular must be mentioned:

- Law no. 131/2003 (Provisions for the Implementation of Constitutional Law no. 3 of 18th October 2001),
- Law no. 165/2004 (the framework law on regional elections),
- Law no. 11/2005 (General Rules governing Italy's participation in the European Union's decision-making and the procedures for performing Community obligations) and
- Law no 42/2009 (delegation to the Government for the implementation of fiscal federalism and article 119 of the Constitution).

Turning to the regional side, two kinds of intervention in particular should be noted: the enactment of the new ordinary Regions' Charters and the approval of laws governing regional elections. Charters have been adopted by 13 out of the 15 ordinary Regions (Abruzzo, Apulia, Calabria, Campania, Emilia-Romagna, Latium, Liguria, Lombardy, The Marches, Piedmont, Tuscany, Umbria and Veneto). As for the electoral laws, eleven Regions (both ordinary and special: Abruzzo, Apulia, Basilicata, Calabria, Campania, Friuli-Venezia Giulia, Latium, the Marches, Piedmont, Sicily, Tuscany and Valle d'Aosta) and the two autonomous provinces of Trent and Bolzano have already legislated.

In addition to the Charters of Regions that still have not answered the roll- and the still missing laws governing regional elections, some State legislative rules of primary importance are required before the implementation process may be considered complete. These are some of the new delegated decrees on regional and local finance and the law directed at identifying the "basic functions" of the local authorities i.e. the Municipalities, provinces and Metropolitan cities.

It should be added that the Constitutional Court has been intensely active in its interpretive capacity over the last ten years. Indeed, it has proved to be the major catalyst of the new constitutional rules' implementation, generating a highly creative flow of case-law that, in the context of a constitutional framework abounding in grey areas and uncertainty, frequently resorted to "orthopaedic" interventions (to borrow an image of the author's used elsewhere).

In short, the Constitutional Court's strategy may be condensed into three points.

First of all, the Court recognised the immediate effect of the reform of title V (or, more precisely, as immediate an effect as possible) insofar as the reform had not been subordinated to implementing legislation. On this basis, it rejected the argument that the Regions could not exercise their concurrent legislative competence until the State enacted framework laws.

Furthermore, it made the most of the system's "dynamic" elements (i.e. the "finalistic" competences referred to under section 8.9.2 above and the subsidiarity principle), thereby attenuating the rigid division of competences.

As far as the "finalistic" competences are concerned, the Court has accepted:

- on the one hand, that the State legislator can, when exercising them, also influence areas falling within the residual competence of the Regions (see, for example, the case-law on the protection of competition); and
- on the other, that their attribution to the State does not prevent the Regions from legislating, if they pursue the purposes contemplated by them (see the consistent line of case-law on the protection of the environment and the eco-system).

Turning to the principle of subsidiarity, a fundamental decision in 2003 should be remembered. Referred to above (see section 8.10), judgement no. 303 stated that when the State takes over administrative competences in the name of this principle, it can likewise assume the corresponding legislative competences, in accordance with the principle of legality.

The Constitutional Court's third strategic choice was to entrust the problems it considered itself incapable of solving solely by way of legal interpretation to an unwritten constitutional principle, namely, the principle of loyal co-operation. On this basis, for example, it interpreted the subsidiarity principle in terms favouring proceduralisation, holding that, for the purposes of centralising administrative competences (and, as we have just seen, their corresponding legislative competences), the State must make use of procedures that provide for the Regions' involvement (or agreement, even). Similarly, it has held that the Regions' participation is necessary both for establishing health standards to be applied throughout the national territory (the "basic levels of care") and for exercising competences relating to objects concerning several subject-matters subject to different regimes of competences.

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