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The Autonomous Regional Power of South Tyrol under the Umbrella of the Paris Austro-Italian Agreement

SOMMARIO: 1. Two Premises. – 2. The Particularly Special Conditions of Autonomy Ensured by the Statute of the Trentino-Alto Adige/South Tyrol Region. – 3. The Problems Posed by the Institutional "Trio" in Case the Greater Competences Granted to the Regions Having Ordinary Statutes were Extended to the Regions Having Special Autonomy. – 4. Importance of the International Origin of the Autonomy Granted to the Autonomous Province in the Italian Legal System. – 5. The Cooperation Method

1. Two Premises.

In order to discuss the issue I have been assigned – the impact of the Paris Agreement on Italian Constitutional Law –two premises are in order.

The first premise is that I shall be considering the *direct guarantee* of minorities: i.e. the guarantee of the minority group as such, not *indirect guarantee*, ensured to the group through the guarantees acknowledged to the individuals of which it is composed[1]. I shall dwell on the autonomy granted by the Statute of the Trentino Alto Adige / South Tyrol to the Autonomous Provinces it contemplates (and, in particular, to the Bolzano Province)[2].

The second premise is linked to a specific characteristic of Italian regionalism, namely the fact that in Italy there are two distinct circuits of autonomy: the 15 Regions that have been

[1] For this distinction: ERMACORA, *Südtirol als Rechtsproblem*, in HUTER (edited by), *Südtirol. Eine Frage des europäischen Gewissens*, Wien 1965, 450.

[2] Even though the Gruber-De Gasperi Agreement applies literally to German speaking inhabitants, the Italian regulations refer to it at times also for the autonomy granted to the Trentino-Alto Adige Region and to the Trento Autonomous Province. Significant, in this regard is also Article 2 (2) Leg. Decree no 266 of 16/3/1992 (*Implementation rules of the special Statute for Trentino-Alto Adige regarding the relationships between State, regional and provincial legislative acts and the policy and coordination powers of the State*), which states that the "special autonomy of the Trentino-Alto Adige Region and of the Autonomous Provinces of Trento and Bolzano, founded on a special Statute" is linked "to the agreement concluded in Paris on 5 September 1946, which envisages the exercise of an autonomous legislative and administrative power also for the protection of language minorities". The literature endorses this approach enhancing the tradition of independence that applies also to the Trento province: ANTONINI, *Il regionalismo differenziato*, Milano 2000, 198 et seq..

granted ordinary autonomy (Regions having an ordinary Statute), and the five Regions and two Provinces of Trento and Bolzano that have been acknowledged special autonomy[3].

In order to describe this system, we can recall an image from Animal Farm by George Orwell: "*All animals are equal, but some animals are more equal than others*". In our case, all Regions are different (if such differences, that are the basis of their institutionalization, were not recognized the legislation would have to be unitary, adopted by a single central legislator, as is the case in France), but certain Regions are more different than the others. The special autonomies are based on these differences and they constitute an exception with respect to ordinary autonomy and they are mutually differentiated[4].

2. The Particularly Special Conditions of Autonomy Ensured by the Statute of the Trentino-Alto Adige/South Tyrol Region.

There is no denying that the highest degree of special conditions is found in the Trentino-Alto Adige/South Tyrol Region.

There are two aspects in such special conditions.

The first is represented by the institutional architecture. On the territory of the Trentino Alto Adige/South Tyrol Region there are three distinct entities that are the holders of the autonomy guaranteed by the Constitution: on the one hand the Region, and on the other, the two Autonomous Provinces, which, on an equal standing with all other Regions, are endowed with legislative and administrative powers. Therefore those who speak of three Regions in this connection are not too distant from the truth [5].

The second aspect is the international anchorage of autonomy which draws its origin from the agreement whose 70th anniversary we are celebrating at this point in time: the 1946 Gruber-De Gasperi Paris Agreement[6].

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[3] On the cultural roots of this double circuit of autonomy, refer to D'ATENA, *Between Spain and Germany. The Historical Models of Italian Regionalism*, in *Italian Papers on Federalism, n° 2/2013* and in MANGIAMELI (ed.), *Italian Regionalism: Between Unitary Traditions and Federal Processes*, Springer 2014, 67 *et seq.*.

[4] A list of the "very special conditions" underlying the granting of special autonomy was provided by Article 1 (1) Legisl. Decree no. 545 of 7 September 1945 norm that laid down a special administrative system for Valle d'Aosta which was the embryo of regional autonomy in Italy. This is about the geographic, economic and language conditions existing, jointly or separately, also in other regional realities. A recent list of reasons justifying the special autonomy enjoyed by some regions is contained in a declaration signed by the Presidents of the Regions having special autonomy and of the two Autonomous Provinces, in which it is stated that the special status of these areas derives "from different historic, institutional, territorial (island, exclusively mountainous territory, border region), cultural and language (language minorities) factors" (Aosta Declaration, 2 December 2006).

[5] For example: MOR, *Le autonomie speciali*, in *le Regioni*, 1997, 1036; RIZ, HAPPACHER, *Grundzüge des italienischen Verfassungsrechts unter Berücksichtigung der verfassungsrechtlichen Aspekte der Südtiroler Autonomie*, IV ed., Innsbruck 2013, 372.

[6] Remarks on the origin of the agreement lie outside the scope of this paper but reference can be made to thorough historic studies (as, for instance, the study by TOSCANO, *Storia diplomatica della questione dell'Alto Adige*, Bari 1967) and collections of documents (the most recent being the book edited by BERNARDINI, *L'accordo De*

There is a link between the two aspects. Suffice it to think of the way in which the international events tied to the Italian-Austrian dispute – the "package" that constituted the basis of the solution, the reform of the special Statute and Austria's discharge of any claims – modified the balance among the three entities: the Region and the two Autonomous Provinces [7].

For instance, initially, from the organizational standpoint, the two Autonomous Provinces presented themselves as sub-bodies of the Region. Suffice it to point out that the Provincial Councils were made up of members elected to the Regional Council by the people belonging, respectively, to the two Provinces[8].

It is however widely acknowledged that, in continuity with the process that began with the 1971 reform, Constitutional Law no 2/2001 overturned the relationship among the three bodies. Indeed, the two Provincial Councils no longer derived from the Regional Council but it was the Regional Council that was made up of representatives from the two Provincial Councils[9].

This shift in the centre of gravity of the Autonomous entities also affected the breakdown of their competences. Indeed, while on the basis of the 1948 Statute the primary legislative powers of the Region included 14 subject matters, under the 1972 Statute the subjects of primary competence of the Region dropped to ten while the subjects over which the Provinces had competence rose to 29[10]. And similar remarks can be made for concurrent powers along the vertical axis[11].

Gasperi-Gruber. Una storia internazionale, Trento 2016, containing not only a solid introductory chapter, but also a rich collection of documents). Here I shall not mention some questionable papers - that now belong to the past - that challenge the binding force of the agreement. For the sake of documentation I shall merely recall the rebuttal by HUMMER, *Zum Rechtscharakter des Gruber-De Gasperi-Abkommens 1946. Völkerrechtlicher Vertrag, einseitige Verpflichtungserklärung oder bloßes „gentlemen's agreement"?*, in BENEDIKT (edited by), *Südtirol und der Pariser Vertrag. Geschichte und Perspektiven*, Innsbruck 1988, 137 *et seq.*.

[7] The amount of literature on this issue is immense. To begin with, see: ALCOCK, *Geschichte der Südtiroler Frage: Südtirol seit dem Paket*, Wien 1982; POTOTSCHNIG, *Trentino-Alto Adige*, in *Noviss. D.I*, 1973, 677 *et seq.*; BERTOLISSI, *Regione Trentino-Alto Adige*, in *Encicl. Dir.*, XXXIX, Milano 1988, 414 *et seq.*; BARTOLE, *Regione Trentino-Alto Adige*, in *Encicl.giur. Treccani*, XXVI, Roma 1991; WOODCOCK G., *The new autonomy of Trentino-Alto Adige (the end of the South Tyrol Question)*, in *Il Politico*, 1992; GIOVANETTI, *Trent'anni di 'devolution': l'esperienza del Trentino-Alto Adige*, in *il Mulino*, 2004; DI MICHELE, PALERMO, PALLAVER (edited by), *1992: Fine di un conflitto. Dieci anni dalla chiusura della questione sudtirolese*, Bologna 2003; MARCANTONI, POSTAL, TONIATTI (edited by), *Trent'anni di autonomia*, I. *Riflessioni sull'assetto della Provincia autonoma di Trento dal 1972 al 2002*, Bologna 2005; RIZ, HAPPACHER, *Grundzüge des italienischen Verfassungsrechts*, cit., 321 *et seq.*.

[8] Article 42 of the 1948 Statute.

[9] Article 25 of the new Statute.

[10] See Articles 4 and 11 of the 1978 Statute and Articles 4 and 8 of the new Statute. The expression "primary" legislative competence is technically preferable when speaking about the Regions and Autonomous Provinces having special autonomy, rather than "exclusive competence", an expression that is sometimes used. Indeed, unlike the authentically exclusive competences normally envisaged in federal constitutions, primary legislative competence provided for by the Italian special Statutes comes up against limits that ensure scope of action to the ordinary State legislator: e.g. limits such as the "great reforms", "general principles of the system" and international obligations.

All this obviously had a financial impact: today 90% of the total budget is administered by the Provinces[12].

Finally, we cannot overlook one last very important point. We cannot fail to mention the creator of the constitutional justice system that became established in the European continent: Hans Kelsen[13]. I am referring to the jurisdictional protection of such autonomy before the Constitutional Court.

The old Statute did not grant the Autonomous Provinces the possibility of challenging the legislative acts of the State that undermined their competences. They could only challenge the regional and provincial laws before the Constitutional Court[14]. Only the Region was empowered to challenge State laws[15]. On the basis of the new Statute, instead, the Provinces were given the power to resort to the Constitutional Court to claim interference by State law or by non legislative acts in their competences by asking for, respectively, a judgment on constitutional legitimacy and on the conflict of attribution[16].

The deep meaning of this innovation is quite evident. Indeed, all the guarantees that are typical of the rule of law are fully extended to the Provinces: the principle of legality (represented here by the way the competences are regulated by the Constitution) and the specific jurisdictional protection ensured by the Constitutional Court [17].

The only special Statute that qualifies the legislative competence granted to it as "exclusive" is the Statute of the Region of Sicily (Article 14). However, for the presence of the above mentioned limits, in the literature it is commonly considered that the adjective is used inappropriately. For sake of completeness, at this point, I need to add that as a result of the reform of Title V of the Constitution (Const. Law 3/2001), the Regions having ordinary autonomy are granted a basically exclusive competence (see D'ATENA, *Diritto regionale*, III ed., Torino 2017, 140 s.). As we shall see, also the Regions having special autonomy and the two Autonomous Provinces are entitled to this competence by virtue of the equivalence clause contained in Article 10 of Constitutional Law no 3/2001.

[11] See Articles 5 and 12 of the 1948 Statute and Articles 5 and 9 of the new Statute. As is known, this is a competence that is shared by the central legislator (who lays down the fundamental principles) and the regional or provincial legislator (who sets out the detailed legislation). Therefore it is not similar to the *konkurrierende Gesetzgebung* provided for in Article 72 GG, but to the *Grundsatzgesetgebung* provided for by Article 12 of the Austrian Federal Constitution, or to the *Rahmengesetzgebung* provided for in Article 75 GG (eliminated by the 2006 constitutional reform).

[12] On this see: RIZ, HAPPACHER, *Grundzüge des italienischen Verfassungsrechts*, cit., 372.

[13] KELSEN, *Verfassungs- und Verwaltungsgerichtsbarkeit im Dienste des Bundesstaates, nach der neuen österreichischen Bundesverfassung vom 1. Oktober 1920*, in *Zeit. für Schweiz. Recht*, 1923, 191 et seq..; ID., *La garantie jurisdictionnelle de la Constitution (la justice constitutionnelle)*, in *Rev.dr.publ.*, 1928.

[14] Article 82, paragraph 3, 1948 Statute.

[15] Article 83, 1948 Statute.

[16] Article 98 of the new Statute.

[17] On the rule of law as jurisdictional protection of competences in the relations between central State and sub-State bodies (and on its limits, considering the quality that constitutional legality has in these matters) see: D'ATENA, *Giustizia costituzionale e autonomie regionali. In tema di applicazione del nuovo titolo V*, in PACE (edited by), *Corte costituzionale e processo costituzionale nell'esperienza della Rivista "Giurisprudenza costituzionale" per il cinquantesimo anniversario*, Milano 2006, and also in AA.VV., *Giurisprudenza costituzionale ed evoluzione dell'ordinamento italiano* (Atti dei Convegni Lincei, 235), Roma 2007, and also in D'ATENA, *Tra autonomia e neocentralismo*, cit., 159 et seq..; ID.,

3. The Problems Posed by the Institutional "Trio" in Case the Greater Competences Granted to the Regions Having Ordinary Statutes were Extended to the Regions Having Special Autonomy

The two specificities mentioned above played a crucial role in the institutional dynamics concerning Italian regionalism.

As to the institutional architecture (the trio), the biggest problems arose when at a certain point the competences of the bodies having special autonomy had to be upgraded in order to be on a par with the greater competences acquired by the Regions having ordinary autonomy.

3.1. D.P.R. no 616/1977

The problem came to the fore for the first time in 1977 as a result of the Decree of the President of the Republic no 616 of that year that "completed the legal system governing the regions". This Decree attributed a series of new competences to the Regions which – as I pointed out at the time, sensing a 'heretical' stance[18] – went beyond the list laid down in Article 117 (1) of the Constitution.

The problem derived from the fact that, consistently with the delegation act (Act no 382/1985), by referring exclusively to the Regions with an ordinary Statute, Decree 616 did not apply to the Regions and Provinces with special autonomy[19].

As a consequence, these Regions and Provinces paradoxically found themselves to be worse off. Indeed, while at the beginning they enjoyed broader autonomy than the other Regions with an ordinary Statute, after Decree 616 they were at a disadvantage with regard to devolved matters.

This put them in a position where they had to regain lost ground, trying to catch up with the Regions having ordinary autonomy, especially through the use of special legal sources, namely legislative decrees, provided for by the Statutes[20].

Il riparto delle competenze tra Stato and Regioni ed il ruolo della corte costituzionale, in *Italian Papers on Federalism*, n. 1/2015, and also in ID., *Tra autonomia e neocentralismo*, cit., 175 *et seq.*.

[18] *Il completamento dell'ordinamento regionale. Profili di costituzionalità del decreto 616 del 1977*, in *Dir.soc.*, 1978 (and also in *Scritti in onore di Egidio Tosato*, II, Milano 1982, and in D'ATENA, *Costituzione e Regioni . Studi*, Milano 1991, 333 *et seq.*.).

[19] On this issue refer to D'ATENA, *La parabola delle autonomie speciali*, in AA.VV., *La Sicilia e altre Regioni a Statuto speciale davanti ai problemi delle autonomie differenziate* (Atti del Convegno organizzato a Palermo nei giorni 6-7 maggio 1983 dall'Assemblea Regionale Siciliana), Palermo 1984 (and also in ID., *Costituzione and Regioni*, cit., 381 *et seq.*.).

[20] For an understanding of the implementation laws inspired by d.P.R. 616/1977, that were provided in a comprehensive form for three Regions (Valle d'Aosta, Trentino-Alto Adige and Sardinia) and through separate norms for Sicily: BARONI, *Il rapporto tra Regioni ordinarie e Regioni speciali; la "rincorsa" sul terreno delle funzioni amministrative dopo la riforma del titolo V*, in MANGIAMELI (edited by), *Il regionalismo italiano dall'Unità alla Costituzione*

But while for most of these bodies the operation did not give rise to particularly complex problems, the automatic transposition of the provisions of Decree 616 was not possible for Trentino Alto Adige. It was necessary to establish whether the competence was to be attributed to the Region or to the Autonomous Province.

This *actio finium regundorum* was taken care of by D.P.R. no 52/1987 (partially amended later by Legislative Decree no 275/1996), which provided for – as we read in the title – the "extension of the provisions of D.P.R. 616 of 1997 to the Alto Adige Region and to the Autonomous Provinces of Trento and Bolzano". In attributing the new functions to the Region and to the Autonomous Provinces, this Act made provisions that are commensurate with the increase in provincial competences under the new Autonomy Statute.

3.2. The 2001 Reform of Title V of the Constitution

If I can express myself in a somewhat non-academic manner, I might say that the issue posed by Decree 616/1977 was the 'appetizer', the *Vorspeise*, while the 'main course', the *Hauptgericht*, was the reform of Title V introduced by Constitutional Law no 3 of 2001.

As regards the Autonomous Provinces, this constitutional law represents the recognition of a problem. On the one hand, the 2001 Constitutional Law acknowledges the Autonomous Provinces but, on the other hand, this creates a new order of problems.

The acknowledgement consists in the fact that the two Provinces are mentioned in the Constitution for the very first time: Article 116, paragraph 2, states that the Trentino Alto Adige/South Tyrol Regions consists of the Autonomous Provinces of Trento and Bolzano. In Article 117, paragraph 5, with reference to European and international relations, it acknowledges specific competences to the sub-State entities, mentioning alongside the Regions also the Autonomous Provinces of Trento and Bolzano; Article 10 of Constitutional Law no 3/2001, which, as we shall see, speaks of the equivalence clause (or to the most favourable clause) with reference to the Regions having special autonomy and to the Autonomous Provinces of Trento and Bolzano.

The problem is linked to the increase in powers granted to the Regions having ordinary Statutes that was both quantitative and qualitative: quantitative as a result of the higher number of subject matters attributed to them, but also – and above all – qualitative, as a result of the attribution of residual powers to the regional legislators (thus overturning - consistently with the federal system - the approach based on listed matters).

In order to avoid penalizing the Special Autonomies, this constitutional law envisages the equivalence clause mentioned above, as a result of which the new constitutional rules apply also to the Regions having a special Statute and to the two Autonomous Provinces in the

e alla sua riforma, cit., II, 769 s. For recent comments on the downgrading of special autonomies to the standards of ordinary regions: TEOTONICO, *La specialità e la crisi del regionalismo*, in *Rivista AIC*, 4/2014, 7,

section where it envisages "broader forms of autonomy". This is contained in Article 10 of the constitutional law, and it states: "Up until the respective Statutes are updated, the provisions of this constitutional law shall apply also to the Regions having a special Statute and to the Autonomous Provinces of Trento and Bolzano for the parts that envisage forms of autonomy that are broader than those they already enjoy".[21]

The clause operates on two levels: the prerogatives to be acknowledged to the body having special autonomy and their legislative powers.

As regards the prerogatives, the biggest consequence is the cancelling of the special preventive control on compliance with the Constitution of the legislation produced by the Regions having special autonomy and the two Autonomous Provinces: a control that the Government could exercise before the regional or provincial law was promulgated and published. Since the preventive control envisaged in Article 127 Const., on the laws adopted by the Regions having normal autonomy has been abolished, in pursuance of the equivalence clause, it has been quashed also for the laws produced by the bodies having special autonomy[22].

As regards the competences, the most important effect of the clause is represented by the new matters attributed by the new Title V to the Regions having an ordinary Statute that are now attributed also to the Regions and Autonomous Provinces having a special Statute (in that these had not been envisaged in the special Statutes)[23].

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[21] On the scope of the clause, see in particular: GIANFRANCESCO, *L'Articolo 10 della legge costituzionale n. 3 del 2001 ed i controlli nelle Regioni ad autonomia speciale*, in *Giur. cost.*, 2002; D'ATENA, *Le Regioni speciali ed i "loro" enti locali, dopo la riforma del Titolo V*, (report presented at the Conference on "Local governments in the Regions having a special Statute and Autonomous Provinces", Cagliari 20 March 2003), in *Le autonomie locali nelle Regioni a statuto speciale e nelle province autonome*, n. 20 dei *Quaderni del Formez*, Rome 2004, and also in *Studi in onore di Gianni Ferrara*, vol. II, Torino 2005, and in D'ATENA, *Le Regioni dopo il* Big Bang. *Il viaggio continua*, Milano 2005; DE MARTIN, *La condizione e il ruolo delle autonomie locali nelle Regioni a statuto speciale e nelle Province autonome*, cit.; GALLIANI, *All'interno del Titolo V: le 'ulteriori forme e condizioni particolari di autonomia' di cui all'Article 116.3 Cost. riguardano anche le Regioni a statuto speciale?*, in *Le Regioni*, 2003; RUGGERI, *La legge La Loggia e le Regioni ad autonomia differenziata, tra "riserva di specialità" e clausola di maggior favore*, in *Le Regioni*, 2004; DI LELLO, *Article 10, Statuti speciali e competenza esclusiva dello Stato*, in *Giur. cost.*, 2005; LOPILATO, *Funzioni amministrative, Regioni speciali e clausola di maggior favore: ipotesi casistiche*, in *Nuove autonomie*, 2006; RUGGERI, *La Corte, la "clausola di maggior favore" e il bilanciamento mancato tra autonomia regionale e autonomie locali (a margine della sent. n. 370 del 2006)*, in ID., *"Itinerari" di una ricerca sul sistema delle fonti*, X, Torino 2007.

[22] With reference to the Trentino-Alto Adige/South Tyrol Region and to the two Autonomous Provinces: Const. Court., judgments 408 and 533/2002.

[23] Just to make two examples, consider the power to legislate on communication and energy granted to the Regions and Autonomous Provinces having special autonomy (Const. Court judgments nos 312/2003, 303/2007, Const. Court judgment no 8/2004 and Const. Court judgments nos 383/2005 and 165/2011). It should be added that a further effect is constituted by the *upgrading* of powers with regard to matters already provided for in the Special Statutes. On this point in general, see: D'ATENA, *Diritto regionale*, cit., 269 and also, with reference to the competences of the Autonomous Provinces: HAPPACHER, *Südtirols Autonomie in Europa. Institutionelle Aspekte der Europäischen Integration*, Wien 2012, 101 s.; PETERLINI, *Südtirols Autonomie und die Verfassungsreformen Italiens. Vom Zentralstaat zu föderalen Ansätzen: die Auswirkungen und ungeschriebenen Änderungen im Südtiroler Autonomiestatut*, Wien 2012, 255.

Hence the question as to whether in Trentino Alto Adige these new competences should be attributed to the Autonomous Provinces or to both bodies. The fact that they do not apply only to the Region is confirmed by the specific mention of the Provinces of Trento and Bolzano in Article 10.

The issue arises both for the matters assigned to concurrent competence, as per Article 117, paragraph 3, and for the unnamed matters that come under residual competence acknowledged to the Regions by paragraph 4 of the same Article 117.

In my opinion, the preferred solution is to adopt a connection criterion by matching the new matters to the competences of the body (Region or Autonomous Province) that, in pursuance of the special Statute, is the holder of the competence over connected matters[24]. If there are no connected matters, competence is granted to the Provinces that have now become the centre of gravity of legislative activities.

When the matter was put to the Constitutional Court, the latter had recourse to 'a similar line of reasoning'.

In this connection an interesting decision on radio-television services, was judgment no 312/2003, in which the Constitutional Judge confirmed the expansion of the competence of the Province of Bolzano with regard to the "dissemination of information about cultural and local educational activities, also through "radio television media", as a result of Article 10 of Constitutional Law no 3/2001, taking over concurrent legislative competence with regard to legislation on communication, assigned by paragraph three of Article 117 to the Regions having an ordinary Statute.

The same approach was adopted by Constitutional case law with reference to another matter that comes under the concurrent competences of the Regions having ordinary Statute, namely the matter called the "national production, transportation and distribution of energy", where the Court, in two judgments of 2005 and 2014, recognized the two autonomous Provinces as having an identical concurrent competence as that of the Regions having an ordinary Statute.[25].

4. Importance of the International Origin of the Autonomy Granted to the Autonomous Province in the Italian Legal System

[24] On this: PETERLINI, *Südtirols Autonomie und die Verfassungsreformen Italiens. Vom Zentralstaat zu föderalen Ansätzen: die Auswirkungen und ungeschchriebenen Änderungen im Südtiroler Autonomiestatut*, cit., 246 *et seq.*. A particularly thorough analysis of the complex problems raised by the application of the equality clause to the Bolzano Autonomous Province is made by HAPPACHER, *Südtirols Autonomie in Europa. Institutionelle Aspekte der Europäischen Integration*, cit., 100 *et seq.*.

[25] Const. Court judgments nos 383/2005 and 64/2014.

As stated at the beginning, the autonomy of the Autonomous Province of Bolzano is important not only from the standpoint of Italian domestic law, but also in terms of international law because it is upheld by the 1946 Paris agreement [26].

This is not the right place to examine the problems generated by the interpretation of this agreement and the international disputes that it gave rise to.

What we are interested in here is what has been achieved – the *acquis*, to use the European Union terminology.

The *acquis* in this case comprises three aspects: first of all the fact that provincial autonomy derives from the 1946 Paris Agreement[27]; recognition of Austria's protective function on the implementation of this agreement[28], and finally the recognition that any infringement of the Paris agreement can be brought before the International Court of Justice [29].

In order to be aware of the impact of this *acquis* on the Italian legal system it is worth focusing on the fundamental element of the pre-understanding (of *Vorverständnis*, one might say in German). I am referring to the theoretical model that Italian legal science and case law use when dealing with the relationships between international law and State law.

Well, the model is not Kelsen's monistic theory of law. The author of reference is not Hans Kelsen, but Heinrich Triepel together with Dioniso Anzilotti. Italian constitutionalists and internationalists generally consider International Law and State Law as being distinct and

[26] Among the many contributions to the issue: ERMACORA, *Südtirol als Rechtsproblem in nationaler und internationaler Sicht*, cit. 426 *et seq.*; PIZZORUSSO, *Aspetti dell'efficacia giuridica dell'accordo De Gasperi-Gruber*, in AA.VV., *L'accordo di Parigi. A 30 anni dalla firma dei patti De Gasperi-Gruber. 5 settembre 1946*, Trento, 1976, 139 *et seq.*; ZELLER, *Das Problem der völkerrechtlichen Verankerung des Südtirol-Pakets und die Zuständigkeit des Internationalen Gerichtshofs*, Wien 1989; ANTONINI, *Il regionalismo differenziato*, cit., 209 *et seq.*; HILPOLD, *Die völkerrechtliche Absicherung der Südtirolautonomie*, in MARKO, ORTINO, VOLTMER, WOELK (edited by), *Die Verfassung der Südtiroler Autonomie. Die Sonderrechtsordnung der Autonomen Provinz Bozen/Südtirol*, Baden Baden, 2005, 38 *et seq.*; TICHY, *L'ancoraggio internazionale dell'autonomia altoatesina nel contesto dell'Unione europea dal punto di vista della potenza tutrice: Austria*, in PALERMO, OBWEXER, HAPPACHER (edited by), *I 40 anni del secondo statuto di autonomia. L'autonomia speciale della provincia autonoma di Bolzano nel contesto dell'integrazione europea*, Padova 2014,41 *et seq.*.

[27] On the evolution of the positions taken by Italy on this issue: HAPPACHER, *Südtirols Autonomie in Europa. Institutionelle Aspekte der Europäischen Integration*, cit., 53 *et seq.*.

[28] On this aspect, among the more recent writings, see: OBWEXER, *Die Schutzfunktion Österreichs im Zusammenwirken von Völker, Europa- und Verfassungsrecht*, in GAMPER, PAN (edited by), *Volksgruppen und regionale Selbstverwaltung in Europa*, Wien-Baden Baden, 2008), 163 et seq..; TICHY, *Die völkerrechtliche Verankerung der Südtirol-Autonomie im EU-Kontext aus Sicht der Schutzmacht Österreich*, in HAPPACHER, OBWEXER (edited by), *L'ancoraggio internazionale dell'autonomia altoatesina nel contesto dell'Unione europea dal punto di vista della potenza tutrice: Austria*, cit., 41 *et seq.*.

[29] Very concisely, mention can be made of the fact that Austria and Italy made the declaration provided for in Article 36 (2) of the Statute of the International Court of Justice on 19 May 1971 and on 25 November 2014 respectively. Moreover, on 17 July 1971, they signed the agreement on the amendment to Article 27 *a)* of the European Convention on the peaceful solution to the disputes in the relationships between Italy and Austria, extending the application of the provisions of Heading 1 of the mentioned convention to disputes concerning facts or situations prior to the entry into force of the same convention in the two States.

separate. From this precondition there derives, as a corollary, that a given fact may constitute an international offence but it may be perfectly legitimate from the standpoint of State Law[30].

Constitutional case law on the domestic importance of the Paris Agreement cannot be understood if this theoretical premise is not taken into account.

A classic example in this connection is judgment no 32 of 1960 from which the following quotes are taken: "Since the Paris Agreement has been implemented in Italy, the domestic norms deriving from it have the same value as ordinary laws; as such, they can be amended by an ordinary law or by implementation norms. Of course this does not mean that the State is free to ignore the commitments arising from the Paris Agreement, but it only means that the duty to observe such commitments does not have constitutional importance between the State and the mentioned Region (or Province of Bolzano)". In order to avoid misunderstandings, it is worth noting that this premise, that is impeccably dualistic, does not prevent the judgment from acknowledging that the Paris Agreement has some importance in Italian domestic law. Indeed, the judgment states that "we cannot deny the considerable influence that the Agreement has on the interpretation of some of the fundamental provisions of the Statute, that were surely laid down taking into account also the implementation of the Agreement".

The same theoretical approach is taken by the judgment with which, in 1989, the Constitutional Court came back to this issue: judgment 242, which moreover as emerges from the extensive quote given here, contains a much clearer stance. It states: "on the scene of national autonomy, the Trentino Alto Adige Region and, in particular, the Province of Bolzano [have] very special characteristics that essentially concern the nature and breadth of devolved matters – the structuring of regional and provincial organization and, above all, the value attributed to the protection of the local language minorities and protection of the equality of citizens and of language groups, a value that constitutes the primary point of reference for the body of provisions of the special Statute for Trentino-Alto Adige. There are no doubts that, with regard to these characteristics, the already mentioned 1946 Italian-Austrian agreement, that was transposed into Italian law through an act having the value of an ordinary law, exercises considerable influence since, as is also confirmed by the literature, it is the best interpretation for understanding the special nature of the autonomous system created for Trentino-Alto Adige".

In order to complete the picture, it must be pointed out that, after this decision, the Italian Constitution underwent a major amendment with regard to the relationships between the domestic system and international law. Indeed, as a result of Article 117, paragraph 1, as amended by Constitutional Law 3/2001, all international obligations (including those arising from international agreements implemented through laws) must be respected by the legislative

[30] The principle that applies to these cases is the principle of the relativity of juridical values, regarding which refer to: CRISAFULLI, *Lezioni di diritto costituzionale, I Introduzione al diritto costituzionale italiano*, Padova 1970, 43 s.).

acts of the State[31]. Previously this constraint existed only for the obligations arising from customary rules of international law in accordance with the current interpretation of the wording "generally recognized norms of international law" used by the device for automatic transposition envisaged by Article 10 (1) Const (a formula that is literally taken from Article 4 of the Weimar Constitution[32]).

Therefore today, on the basis of the constitutional law in force, the De Gasperi-Gruber Agreement not only maintains the characteristic of being an essential point of reference for the interpretation of the special Statute (in the form of a constitutional law), but it is also a parameter that all regulatory acts of legislative standing – ordinary laws, legislative decrees, law-decrees, legislative decrees implementing the special Statutes – must comply with. This means that any infringement of the agreement by legislative acts could be brought before the Constitutional Court. This is one of the cases where the Italian Constitutional Court uses the category of interposed norms: norms whose violation automatically constitutes an indirect violation of the Constitution[33]. The line of reasoning here is quite simple: since Article 117, paragraph one, Const. lays down that the laws must comply with international agreements, the infringement of an international agreement is at the same time a violation of Article 117, paragraph one, Const., and it is consequently sanctioned by declaring that the relevant legislative act is constitutionally illegitimate[34].

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[31] Article 117, (1) literally extends the constraint also to regional laws. But, for this part, there is nothing new since, for the sub-State legislators, the constraint of complying with international obligations existed also previously (and was applicable not only to the four special Regions whose Statutes clearly stated the constraint, but also to the Region of Sicily, even though there was no provision for this in its Statute, and to the ordinary Regions, even though the Constitution was silent on this point).

[32] This is the text of Article 4: "Die allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile des deutschen Reichsrechts". It is worth pointing out that there is a significant difference between the Weimar wording and the wording used in Article 10, paragraph one of the Italian Constitution. While the former considers the generally accepted rules of international law as being "integral parts" of State law, the latter envisages that the Italian legal system "should comply" with them. This wording appears to be more adequate to the theoretical hypotheses of Triepel's dualism, as highlighted by its proponent, Tomaso Perassi, (who was not only a member of the Constituent Assembly but also one of its most authoritative Italian experts of that time in international law) in the Constituent Assembly at the meeting of 24 January 1947 of the Commission of 75, who made the following statement: "The German literature itself has pointed out that Article 4 of the Weimar Constitution is imprecise in its wording in that a provision of international law should not enter into the domestic law of a State as it is [...] An internal law is to be created that is correlated to the international law but not identical to it. Indeed, Article 4 of the Weimar Constitution has been defined to be a "permanent transformer" in spite of its formulation".

[33] The category of interposed norms is due to LAVAGNA, *Problemi di giustizia costituzionale sotto il profilo della "manifesta infondatezza"*, Milan 1957. The most thorough discussion on the issue is provided by SICLARI, *Le "norme interposte" nel giudizio di costituzionalità*, Padova 1992.

[34] According to the Constitutional Court, in case of conflict between legislative norms and the norms arising from international agreements, the judge is to interpret the former consistently with the latter (consistent or oriented interpretation) and, if this interpretation is not possible, the judge is to raise the issue of constitutional legitimacy of the legislative norms, stating that there is an indirect infringement of Article 117 (1) Const. (Const. Court, judgment no 349/2007).

5. The Cooperation Method

One of the most effective enforcement instruments envisaged by the Paris agreement is cooperation. Indeed, on the basis of the Agreement, the domestic legal framework – for ensuring the application of the norms on autonomy to be ensured for "the German speaking inhabitants of Bolzano and of the neighbouring bilingual townships of the Trento Province" (Article 1) - needs to be "drafted in consultation also with German speaking elements" (Article 2, (2)).

In later experience, the cooperation method was progressively consolidated with significant examples also at the international level. In this connection it is worth mentioning the initiative of the Italian Foreign Affairs Minister, Lamberto Dini, who, in view of adopting a constitutional law containing amendments to the Statute of the Trentino Alto Adige/ South Tyrol Region addressed his Austrian counterpart, Minister Benita Ferrero Waldner, for concertation, given the international nature of the South-Tyrolese package[35].

From the standpoint of Italian domestic law, the cooperative structure of the relationships among the State, the Regions having special autonomy (all the Regions having special autonomy) and the Autonomous Provinces of Trento and Bolzano wre supposed to be considerably strengthened as a result of the Renzi-Boschi constitutional reform which, in Article 30 paragraph 13, by accommodating a request that had long since been made by the Regions and Provinces with special autonomy, envisaged that the revision of the Statutes was to occur "on the basis of understandings to be reached with the Regions and Provinces with special autonomy themselves [36].

This reform, however, did not enter into force because of the negative vote that emerged from the referendum held on 4 December 2016.

As a result of this circumstance, we are exempt[37] from examining here the issues that would have been raised by the implementation of Article 39 (13). What is to be pointed out is that even if the referendum had had a different outcome, and the new measures were to have been adopted by Italian positive law, the Gruber-De Gasperi Agreement would have preserved its function.

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[35] HILPOLD, *Die völkerrechtliche Absicherung*, cit, 46; OBWEXER, *Die Schutzfunktion*, cit., 176.

[36] The request to introduce a conventional moment in the procedure for the amendment of the special Statutes was significantly made official in the mentioned Aosta Declaration signed by the Presidents of the Regions having special autonomy and the two Autonomous Provinces on 2 December 2006. It may be worth recalling that subordinating the amendments of the special Statutes to the achievement of an understanding between the State and the Region, or Province involved, had already been envisaged in Article 38 of a constitutional reform of the second part of the Constitution, approved with an absolute majority of the members of each Chamber in 2005, but rejected, as occurred with the later Renzi-Boschi reform, by popular vote in the relevant referendum.

[37] For an examination of these issues, refer to D'ATENA, *La specialità regionale tra deroga ed omologazione*, in *Italian Papers on Federalism*, 1-2/2016, and also in ID., *Tra autonomia e neo-centralismo*, cit., 223 *et seq.*. (and the bibliographic references therein).

This is clearly evident in international law. Indeed, while the mentioned Article 39 envisaged a guarantee that would affect only the subjects of Italian domestic law - namely the Regions having special autonomy and the two Autonomous Provinces - the agreement also involves a subject of international law: the Federal Republic of Austria.

We must further consider that one of the problems put on the table by the principle of a prior understanding to be reached for the revision of the special Statutes would have been that of what possible remedies could be adopted if an understanding were not reached. The Renzi-Boschi reform remained silent on this point. However a constitutional law was being examined that envisaged a procedure to be followed if the understanding were not reached[38]. It is self-evident that if this constitutional law were to have been adopted, the previous understanding would no longer be essential.

Therefore, within the Italian legal order, the guarantee ensured by the Paris agreement would have maintained its lasting function.

[38] This is the Bressa draft, produced by an informal task force that included the Regions having special autonomy and the two Autonomous Provinces, on the basis of an agreement achieved on 18 June 2015 between the Undersecretary Gianclaudio Bressa and the Presidents of the mentioned bodies. The draft constitutional law drawn up by the task force envisaged that, if an agreement were not reached, a conciliation mechanism of the German (and European type) would be adopted: assigning to a Joint Committee the formulation of a proposal - agreed upon unanimously - to be put before Parliament for acceptance with an absolute majority. Furthermore, this proposal envisaged that if the convergence Committee did not reach unanimity, the approval of the amendment to the Statute would necessarily require a two-third majority in each Chamber.