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Governing from the Centre: the Influence of the Federal/Central Government on Subnational Governments. The Italian Case

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1. Problems regarding the distribution of powers between the Central and Regional governments following the amendments made to Title V of the Italian Constitution

From the outset, the distribution of legislative powers introduced by Constitutional Law No. 3 of 2001 amending Title V of the Constitution had scant chance of being implemented by the national Parliament.

Little notice was taken of the warning from many quarters not to follow the obsolete "subject matter" criterion for organising the distribution of powers, but to look to the experience of federal States in which the central legislator had originally started out with a rather limited number of enumerated competences to be strictly interpreted, but had then become the legislator with general competence within the system, with powers to act in every sector and with no constitutionally-imposed predefined scope or restrictions on the extension of its legislative powers. In some instances, this has been done on the basis of specific clauses in the Constitution itself, which have been used in a manner that the Constituent Assembly could certainly never have foreseen; on other occasions, it has been due to the creativity of the Supreme/Constitutional Courts which, consistently with legal theories, have attributed the character of "constitutional rules" to metaconstitutional canons, where this has been considered necessary to rationalise the system[1].

In the case of Italy, in particular, it became immediately evident that all the powers that had been vested exclusively in the central government by article 117(2) and (3) n.f.

[1] The reader is referred to S. Mangiameli, Riforma federale, luoghi comuni e realtà costituzionale, in Quale dei tanti federalismi, edited by A. Pace, Padova 1997, 307 ss.

Const., were extremely limited in scope, even in comparison with the powers of federal States in the oldest federal tradition. Indeed, it was said that it was not credible for the distribution of competences to be able to weaken the central government to such an extent[2] that this would make it necessary to channel most of the financial resources to the regions to the point of undermining the role of central government as the guarantor of national unity, and of compromising the protection of national interests at the supranational and international levels.

Scepticism was also caused by the substance of the subject matters falling within the scope of the central legislator's competence. Federations have historically come into being as a result of the devolution of powers by their member states which, until their functions were devolved, had been States *pleno iure*, endowed with full sovereign powers, and as a rule the powers devolved were over matters which generally lay on the external side of sovereignty (Foreign Affairs-Defence) and the governance of the economy and the market. Conversely, matters such as civil and criminal law, justice, the police and demographic services (including, originally, citizenship) were generally left fully within the jurisdiction of the member states themselves.

When Italy amended the Constitution, rather than follow this historical precedent, it did the exact opposite: central government retained its powers over *civil and criminal law and the justice system*, *public order* and *security*, as well as the *civil registry*, while the regional governments, in addition to the considerable so-called "residual" legislative powers vested in them under article 117 (4) Const. "in all subject matters that are not expressly covered by State legislation", were also vested with concurring powers, *inter alia*, over such matters as *foreign trade*, *job protection and safety*, the professions, scientific and technological research, including *support for innovation in productive sectors*, *health protection, nutrition, sport and civil ports and airports, large-scale transport and navigation networks*, *communications* and even *the production, transport* and *national* (sic!) *distribution of energy*. Consequently, despite the decision to adopt the enumeration technique for the central legislator, according to federal theory Italy's constitutional system cannot possibly be likened to a traditional federal system.

Federalism, from the interstate commerce clause in the Unites States' 1787 Constitution to the German *Zollverein* of 1833, and up until the experience of the European Union, beginning with the Common Market established under the 1957 Treaty of Rome, has been fuelled by the need to expand and unify markets, vesting wide-ranging powers of intervention in the central (or rather, the federal) authorities. In 2001, while a process of European integration was at its height, against the background of an irrepressible internationalisation of the economy and finance, the Italian Republic voted

[2] S. Mangiameli, Il riparto delle competenze normative nella riforma regionale, in La riforma del regionalismo italiano, Torino 2002, 119.

through a constitutional reform, which – in the best case scenario – will tend to lead to a fragmentation of economic policy[3].

2. Intervention by the Constitutional Court to make the distribution of competences more flexible, and the co-operative principle: the appeal to subsidiarity

This is the key issue in the systematic interpretation of the new distribution of competences initiated by the Constitutional Court in Judgment no. 282 of 2002. This decision appears to have been driven by the aim of taking seriously the reversal of the enumeration technique. The Court specified that the new wording of article 117 requires the central government to prove the specific right on which to base the exercise of its lawmaking powers. Whereas under the previous system the assumption had been that central government had general powers, following the 2001 reform it became a legislator with very specific competences[4].

But this construction was immediately to prove inadequate for the reasons stated above, and in its judgment No. 303 of 2003, the Constitutional Court completely reversed the approach based on a systematic interpretation in relation to a law on major national infrastructure projects.

The starting point for the Court's reasoning would appear to be its assessment of reversing the enumeration of powers, but there was an immediate change of perspective from the *natural* constitutional interpretation. For the State was acknowledged also having jurisdiction in areas falling within the scope of the regional legislators, justified by the need to pursue unitary requirements derogating from the system of the constitutional distribution of lawmaking powers[5].

From then on the Constitutional Court's judgment – for obvious reasons – has been creating a different constitutional system from the one resolved by the Parliament when it amended the Constitution[6], and it is therefore producing a different breakdown of competences.

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[3] Both judgments examined here, considering also the work of the judge who drafted them, clearly perceived this inconsistency and tried to remedy it in some way.

[4] Cf. Constitutional Court, judgment No. 282 of 2002, point 3 in the Points in law (Considerato in diritto). Similarly, see judgment No. 1 of 2004, in which the Court ruled that "the State's legislative power only exists where the Constitution provides specific legitimation".

[5] Cf. Constitutional Court, judgment No. 303, of 2003, point 2.1 in the Considerato in diritto.

[6] Even though the Constitutional Court cannot admit it, and tries to attach meanings to certain terms used in the Constitution which would be difficult using the traditional tools (logical-textual, teleological and systematic reasoning) for interpretation. For example, the Court says that the: "*Our constitutional system also has devices giving greater flexibility to a plan which, in spheres in which different powers and functions coexist and are interwoven, might, considering the wide range of complexity of powers and competences, run the risk of thwarting the demands for unification present in the widest range of different life environments which, in terms of legal principles, are supported in the proclamation of the unity and indivisibility of the Republic*" (point 2.1 of the *Considerato in diritto*).

All the commentators on this point are in agreement, and have already emphasised the core issues raised by this different constitutional interpretation produced by the Court, which is normally referred to as "the appeal to subsidiarity". There is a mechanism which makes it possible to derogate from the distribution of powers provided by article 117 of the Constitution, to enable central government to take over and regulate, by Act of Parliament, the exercise of administrative functions even in respect of legislative matters attributed to the concurrent or residual legislative powers vested in the Regions, by virtue of the principle of subsidiarity, within the meaning of article 118(1) Const., whenever central government deems it necessary for the purpose of guaranteeing the unitary (supra-regional/national) exercise of those powers.

It is to this reversed interpretation that the principle of legality would apply with what appears to be a syllogistic reasoning, according to which the functions vested by way of subsidiarity must be organised and regulated by an Act of Parliament, since they cannot be governed in different ways by different Regional laws, which would be inconsistent with the elementary need to guarantee the sound operation of government.

It is at this point that the creative nature of the judgment is enhanced: by establishing the reversed relationship between the administration and the law, the judgment provides that *the principle of subsidiarity and the principle of proportionality coexist with the normal distribution of legislative powers enshrined in Title V*, with the result that there has been a shift away from the flexibility required for the distribution of competences[7] to a completely uncertain division of powers in which – as might have been expected – the decisive role of attributing legislative competences and powers inevitably falls to the Constitutional Court.

This is a matter which was well known during the initial period of Italian regionalisation which revolved around the – excessively discretionary – powers of the Constitutional Court when it ruled on the existence, or otherwise, of "national interests", whose controversial nature gave rise to the comment that this useful term, derived from the scholarship of Santi Romano, had been *punished* by being deleted from the Constitution[8].

It was precisely for this reason that, in its judgment no. 303, the Court hastened to throw cold water on a possible outbreak of fire: this has resulted, on the one hand, in the establishment of a so-called "procedural and consensual" interpretation of the principles of proportionality and subsidiarity, according to which mere reference to these principles in

[7] In its judgment the Court ruled that: "*alongside the original static dimension, which becomes evident in the potential attribution of most administrative functions to the municipalities, there is now a dynamic vocation to practise subsidiarity, such that it no longer operates as a ratio lying at the basis of a predetermined and established order of powers, but as a factor of that order's flexibility in order to meet the requirements of unitary action*" (point 2.2. of the *Considerato in diritto*).

[8] Following the revision of Title V, it placed great emphasis on the issue of "the national interests" A. Barbera, *Chi è il custode dell'interesse nazionale?*, in *Quad. cost.*, 2001, 345; on this point see also R. Bin, *L'interesse nazionale dopo la riforma: continuità dei problemi, discontinuità della giurisprudenza costituzionale*, in *Le Regioni*, 4, 2001, 1213; R. Tosi, *A proposito dell'interesse nazionale*, in *Quad. cost.*, 1, 2002, 86; Q. Camerlengo, *L'ineluttabile destino di un concetto evanescente: l'interesse nazionale e la riforma costituzionale*, in AA.VV., *Problemi del federalismo*, Milano, 2001, 327.

itself would not be sufficient to justify any derogation from the distribution of competences[9] while, on the other hand, the judgment regarding the "appeal to subsidiarity" appeared to be clearly restricted as did a strict scrutiny of constitutionality. This has introduced the issue of the principles of proportionality, reasonableness and loyal cooperation as the yardsticks by which to assess central government's legislative intervention (cf. judgment no. 303, *cit.*, point 2.2 of the *Considerato in diritto*).

Reasons for, and portions of central government intervention to safeguard unitary (but no longer national) interests have not had – as might have been foreseen – any real significance; indeed, as in the case of the national interest, this was a *de facto* opinion whose true logic resides more in the judge's common sense than in the logic of law or legal arguments.

The Constitution had made provision for cases in which central government was empowered to derogate from the breakdown of competences, and also for instruments whereby this derogation of powers had to be effected. For *"in order to drive economic development, cohesion and social solidarity, to remove economic and social inequalities, to encourage the effective enjoyment of personal rights, or to make provision for the normal exercise of their functions for different ends"*, central government may allocate *"supplemental resources"* and implement *"special measures"* for the benefit of specific municipalities, provinces, metropolitan cities or regions. However, this provision, which echoes the federal power to make grants-in-aid, had the drawback of being costly and of excessively restricting central government powers by admitting derogation to the constitutional distribution of competences according solely to the "the payer has the powers" principle. This is why the Constitutional Court rejected an interpretation based on the provisions of the Constitution.

Conversely, the principle on which the Constitutional Court in the end focused so strongly was "loyal cooperation", hinging essentially on the possibility for the Standing Conference of the State and Regions (or perhaps even in a unified forum with Municipalities and Provinces) to issue an administrative measure[10]. The expansion of the "Conference" model – following Judgment no. 303 – appeared to be inevitable, at least

[9] Since this would also show "that they cannot undertake a function which the national interest once had, reference to which is no longer sufficient to justify the exercise by central government of the function which is not vested in it under article 117 of the Constitution. In the new Title V the equation elementary national interest=central government competence, which in previous legislative practice underpinned the erosion of the administrative and parallel legislative functions of the regional governments, has now lost any deontological value because the national interest is no longer a constraint of legitimacy or substance on regional legislative powers" (p.to 2.2 of the Considerato in diritto).

[10] For a fuller account, the reader is referred to our Il principio cooperativo nell'esperienza italiana (del primo e del secondo regionalismo), in TDS 3/2005, 419 ff, and 1/2007, 57 ff respectively. See also the thorough analysis on the effectiveness of the Conferences system by R. Carpino in Evoluzione del sistema della Conferenze, in Le istituzioni del federalismo 2006, 13 ff..

until a series of judgments were handed down last year, evidencing a certain degree of rethinking on the part of the Constitutional Court[11].

It should be emphasised that the co-operative circuit hinging on the Conferences system to compensate the Regions for their loss of legislative powers over matters that certainly fall within their sphere of competence under the Constitutional distribution of powers, was only adopted as an extreme remedy to compensate for the inadequacy of the constitutional amendments to create parliamentary representation for the Regions (and local authorities).

In a judgment handed down shortly after judgment No. 303 in 2003 the Constitutional Court reiterated its position that the national parliament was required, as a condition for the constitutional legitimacy of any legislation it enacted, to comply with the principle of loyal cooperation, by providing adequate instruments for participation, mainly in the form of the agreement with the Regional governments initialled at the Standing Conference of the State and Regions, even in the continuing absence of any changes to the parliamentary institutions and, in more general terms, of legislative procedures, even solely within the limits provided by article 11 of Constitutional Law No. 3 of 18 October, 2001 (amendments to Title V of the second part of the Constitution)[12].

This ruling is relevant on several counts. Firstly, it clearly shows that the Constitutional Court is fully aware of the mechanisms governing federal systems, in which any change in the order of competences can only be justified if there are adequate compensatory mechanisms in terms of the functions that are actually devolved by the central legislator to the Regions. In the case of the assumption of lawmaking powers by the central government, only permitting the Regional governments to participate in Central government legislation can adequately compensate the Regions for this interference with their powers.

Secondly, cooperation in terms of the administrative function is a temporary adjustment measure dictated by the need to guarantee the constitutional functionality of the distribution of powers, although at the same time it quite evidently demonstrates the maximum limit on the Court's constitutional creativity, beyond which it additional intervention by the legislator would be necessary to amend the Constitution, either to adjust the provisions regarding the material distribution of powers to meet the actual requirements of the State in its present historical phase, or to introduce coordinated

[11] This is a reference to judgment no. 401 of 2007 on a number of the provisions of the "Contracts Code", in which the Court rejected the idea that in relation to the exercise of exclusive crosscutting central government competence in the matter of "competition protection" (art. 117(2), Const.), especially in the matter of public contracts/tenders, the Regions had necessarily to be involved without this having the effect of creating a case of "strict interference with material areas falling within the competence of the Regions" (points 6.7, 7.1 and 7.3 of the Considerato in diritto). The statements made there were subsequently taken up, as far as our argument here is concerned, in the later judgment issued the same year, no. 431.

[12] Constitutional Court, judgment no. 6 of 2004, point 7 of the Considerato in diritto.

procedures that are able to give the distribution of powers a degree of flexibility consistent with the functions involved.

However, the regional system took a different course, both because of the failure to implement article 11 of Constitutional Law No. 3 of 2001 (which was the first important attempt to link the Central and the Regional governments' legislative systems), and because of difficulties of reforming the Senate to make it a Chamber of the Regions and the local authorities. The Italian co-operative model was therefore established on a skewed basis, since – as leading legal writers have pointed out – in order to remain coherent, "when cooperation is invoked to justify exceptions to the distribution of legislative powers, it must precede, and not follow, intervention by the central legislator"[13].

3. Ctd: the protection of competition

Judgment No. 303 of 2003 brought infrastructure of national importance within the sphere of competence of the central government (and immediately afterwards, Judgment No. 6 of 2004 did the same for production, transport and the national distribution of energy). Judgment No. 14 of 2004 unified the whole scheme of the distribution of powers characterised by fragmented instead in the economy. This was done by introducing the consideration of "the protection of competition".

In this ruling, the Constitutional Court placed a particular interpretation on the role of central government with respect to market support policies, making it possible to place a wholly different construction on it to the one enshrined in the Constitution. For even though the Court based its reasoning on an alternative solution regarding the actual scope of central government competence over the economy (that is to say, whether central government (still) operated using instruments for direct intervention or only through the power to promote and support activities undertaken by the Regional governments and the local authorities), it eventually ruled that central government had exclusive competence in respect of both: direct action, as well as support for the economic policy measures adopted by the Regions and the local authorities[14].

By so doing, the Court dispensed with the natural interpretation of the Constitution and contrasted it with the constitutional essence of the role of the central government in respect of the market, encompassed in the expression "the protection of competition". Its reasoning was therefore built on a dimension which, while consistent with the dogmatics of constitutional law, was actually outside the formal Constitution making it possible to

[13] A. D'Atena, Le aperture dinamiche del riparto delle competenze, tra punti fermi e nodi non sciolti, in Le Regioni, 2008, 815.

[14] Point 3 in the Considerato in diritto. This is an evident reference to the instruments provided by article 119 (5) Const., as the only provision (together with article 120 (2) Const., in respect of which see the Constitutional Court's regarding its *extraordinary character*, judgment No. 43 of 2004) according to which it is only possible to derogate from the Constitutional distribution of (legislative and/or administrative) competences as an exception.

establish a new series of constitutional prescriptions (if it can be described as such), different from the one found in the provisions adopted by the legislator in the course of amending the Constitution.

For in order to to answer the question raised, it would appear to be sufficient for the constitutional court "to set public intervention (in the economy) in a wider systematic context", sites that the public intervention measures "are classified in Community law as 'State aids'. They therefore involve relations with the European Union and affect competition which is governed, in the current phase of supranational intervention, on two tiers: the Community and the State levels".

The Court, using European legislation to promote a competitive market, expresses its conviction that the rules of competition are linked to an idea of economic-social development which gives state institutions tasks of active intervention in the market in addition to the power to impose penalties for violations of competition law.

With its dynamic interpretation, the notion of competition is used by the Constitutional Court to address the central government legislator with the role of guarantor of the unitary national market and a unified public economic policy by adopting State measures to reduce imbalances, to foster conditions for the adequate development of the market or to introduce competitive systems.

It has not been so much the meaning attributed to "protection of competition", which has caused so much debate among commentators on judgment No. 14, and its consistency with the notion of competition and Community law, that has been the subject of discussion, as the role assigned to this competence in the national system of public intervention in the economy.

In constitutional terms, then, what is important is the relationship that exists between this and the other matters enumerated in paragraph (3) of art. 117, or the matters falling within the exclusive competence of the Regions (such as agriculture) in paragraph (4) of art. 117. As far as these are concerned, whether they are actually enumerated, whether they are inferred from the clause dealing with residual powers, the Constitutional Court judgment No. 14 no longer poses the problem of limiting respective spheres of competence, but of measuring the reduction in the scope of the subject matter falling under "the protection of competition". In fact, as the Constitutional Court has ruled, this competence is undeniably teleological in character, whose capacity to expand cannot be determined *a priori*.

All this ultimately affects the system of the distribution of competences between central government and the Regional governments, to the resultant detriment of regional powers in the matter of economic development. In addition to this, the Court also noted the need to draft criteria for governing the exercise of central government cost-cutting competence, in order to restricted extension and to delimit the respective spheres of competence (point 4 of the *Considerato in diritto*).

This once again raises the issue of the principle of unification (falling to central government), according to which the constitutional essence of the State lies in its capacity to effect *reductio ad unitatem*, which, in the case of the market means specifically the guarantee to maintain national economic unity, which is therefore included in the subject matter "protection of competition".

It is certainly not consistent with the wording of the Title V to say that "the intention of the constitutional legislator in 2001 was to unify under the central government the economic policy instruments of relevance to the development of the country as a whole". On the contrary, the spirit driving amendment to the Constitution was the exact opposite. A very small number of economic matters fall within the competence of Central government in comparison with the large number of economic matters provided by article 117(3), and Title V mentions economic unity, not to address the distribution of competences and powers, but to provide a particular means of replacement to be brought into play only in the event of very serious economic crises[15].

The principle that "state intervention" in the economy can always be justified on the grounds of its "macroeconomic importance" regardless of the subject matter to which it refers[16] is therefore due to the constitutional creativity of the Constitutional Court.

Conversely, intervention regarding regional production fall within the "concurrent or residual legislative competence of the Regions" which the Court did not hesitate to define as "localistic or microsectoral in character, and hence not to be deemed macroeconomic".

This judgment refers to a model of unified federalism. Under this the economy must be governed, in contemporary States, even of a federal nature, by unitary logic in respect of which the contribution of the Member States, the Länder, the Regions and the Autonomous Communities are considered to work together and on rare occasions to be act odds.

There is no doubt that the Constitutional Court's ruling appears to contradict the historical reality of the revision of the Constitution, which is designed to broaden the legislative powers of the Regions. But, as previously occurred with judgment No. 303, the compelling need being pursued was an essential part of the rationale for the governance of the economy by central government and the Constitutional Court merely provided a possible justification for it in the light of the new wording of the Constitution. The

[15] In that judgment no. 43 of 2004, the Court reiterated the fact that "the terms 'juridical unity' and 'economic unity', whatever they might mean (which it is not necessary to examine here), are evidently references to interests falling "naturally" to Central government, which has the responsibility of last resort for maintaining the unity and indivisibility of the Republic guaranteed by article 5 of the Constitution.".

[16] Judgment No. 14 states that, "it is only within this framework that the central government retains the right to adopt both specific measures of substantial magnitude, and State aids systems permitted by EU law (including the de minimis aids), provided that they are in every instance able to affect the general economic equilibrium, with regard to their accessibility to all the players concerned and to their overall impact" adding that these would be "instruments which, in the last resort, are of a unitary nature, such that some are interpreted by applying the others, and all are designed to balance the volume of financial resources in the economic circuit" (point 4 of the *Considerato in diritto*).

Constitutional Court now laid down restrictions on possible intervention in the market by central government ("it does not fall within the remit of this court to appraise the economic soundness of the legislator's decisions, namely, to establish whether intervention has such important effects on the economy as to transcend the regional sphere"), but merely provided grounds based on the principle of reasonableness and proportionality[17]. These were therefore the principles it used as the basis for gauging compliance by central government legislative measures with the formal division of competencies, considering that "the protection of competition" does not define "spheres that can be objectively delimited", but if it would interfere "with the many competences vested in the Regions". It reached the conclusion that "if it can be shown that the instrument used is consistent with the purpose of activating the factors which establish general economic equilibrium, the legislative competence of central government provided by article 117(2) (e), cannot be denied".

4. Ctd.: Crosscutting competences and the waiver of the prevalence principle

The third case in which the Constitutional Court flexibly construed the division of legislative competences, with reference to the principle of loyal cooperation, had to do with the normative spheres which central government acts upon through the exercise of its so-called "crosscutting" or "transversal" legislative competences.

This expression refers to the particular character of certain central government competences, and refers to a dynamic, rather than a static, division of legislative powers between the central the regional governments; more specifically, this refers to provisions under which central government competence is not identified objectively, but functionally, and in terms of the purpose pursued, as in the case of "safeguarding the environment", for example, pursuant to article 117(2)(s) Const.

From a different point of view there is also a central government competence to "establish the essential levels of services regarding civil and social rights which must be guaranteed throughout the national territory", pursuant to article 117(2)(m) Const.: in this case, the competence is not identified in terms of purpose and yet it empowers the central government to act "transversely" and hence to intervene in legislative areas which fall to the concurrent or residual competence of the regional governments.

In these cases it is obvious what the Constitutional Court intended to do: acknowledge the central government's right to intervene, as the condition for pursuing unitary interests on a national scale.

This reveals the contradiction in judgments that have laid down, as a condition of constitutional legitimacy of central government legislation, the provision for "collaborative

[17] According to the court, these decisions cannot "evade the test of constitutionality to see whether the bases underlying them are not manifestly irrational and whether the instruments for intervention have been provided in a manner that is reasonable and proportional in terms of the objectives they are expected to attain" (ppoint 4.1 of the *Considerato in diritto*).

modules", and in particular, the need for agreement when implementing it[18]. As has been correctly pointed out, "if these matters constitute the condition for pursuing the national interest, problems arise when claiming that their implementation is conditional upon agreements to be concluded by parties pursuing their own (concrete) interests, which are unwilling to be channelled – under an agreement – into a decision which is of necessity unitary in nature"[19].

In these cases, the central government exercises the competence which is "proper" or "exclusive" to it, albeit *sui generis*. Furthermore, the inevitable interference which the exercise of crosscutting powers produces in areas falling within the scope of regional legislation does not, in itself, constitute a basis that authorises the Regions whose exercise of legislative competence is conditioned thereby, to become involved in the face of adopting administrative measures.

In reality, it is clear that the application of the principle of loyal cooperation is a complete anomaly in cases where there is interference in or inter-linkage between the constitutional powers vested in different tiers of government, determined by the phenomenon of the "connection" between areas falling within the legislative competence of central government and regional government.

In this case, where there is a superimposition or contiguity in the powers of the various authorities involved, even without the clause on "implicit powers", it would be necessary, as the Constitutional Court has itself said, to apply frequently the "prevalence principle" to attribute and divide the legislative and administrative competences[20]. However, the Constitutional Court has often said that it is impossible to reach a acceptable interpretation based on the Constitution which, because of the mutual interrelationships, defines the two distinct material areas falling within the scope of the central and the regional governments. Therefore, it is precisely here, that the Constitutional Court eventually identified the area of priority for the application of the principle of loyal cooperation between central and regional governments. This gives prevalence to central government legislation while requiring agreement to be reached with the regions so that the central government can perform administrative functions[21].

In this context of enhanced central government powers and the loss of meaning of the regional enumeration system (at least in respect of the matters referred to in article 117(3), Const.), the reference made by the Constitutional Court to the need to adopt

[18] Constitutional court judgment no. 134 of 2006, point 9 of the Considerato in diritto.

[19] L. VIOLINI, La negoziazione istituzionale nell'attuazione della Costituzione: livelli essenziali e scelte di sussidiarietà a raffronto, in Itinerari di sviluppo del regionalismo italiano, a cura di L. Violini, Milano 2005, part. 206.

[20] Constitutional Court judgment No. 384 of 2005: by subject matter which, although interfering, were "mainly relative to matters falling within the scope of central government", "in principle, the failure of the Conference to issue an opinion does not entail unconstitutionality".

[21] In this connection see S. BARTOLE, Collaborazione e sussidiarietà nel nuovo ordine regionale, in Le Regioni, 2-3/2004, 578 ff.

instruments for concerted action has helped compensate the regions for the losses sustained in terms of legislative powers.

Both these elements – recourse to the criterion of loyal cooperation in the case of concurrent competences, and its compensatory character – are in contrast to the innovations introduced by the amendments made to the Constitution. In particular, one has to consider the rationale of the new division of legislative powers, where the regional laws should have been given the focal position, in respect of the specific powers of the central government legislator. It is in this context that the overlapping of subject matters ought to have been resolved by establishing a clear separation between them ("aut...aut"), by applying the prevalence criterion[22].

However, considering the "complexity of the social domain to be regulated" the Constitutional Court saw the "interweaving of central government and regional competences" and considering that it could not envisage "the certain prevalence of one corpus rules over another, making the related legislative competence dominant", it refused to pronounce on the prevalence issue and judged the legitimacy of central government provisions not by ascertaining whether the central government was empowered to enact legislation, but whether the central government law provided "adequate instruments for regional involvement" and whether the central government organs complied with them. In essence, the Court applied the criterion of loyal cooperation, which "requires central government laws to provide adequate instruments for the involvement of the regions, in order to safeguard their competences"[23].

The Court does not therefore appear to consider linkage as a interpretative and systematic issue, to be resolved on the basis of positive constitutional law in order to avoid duplication of competences and legislation, or procedures to determine the instruments for implementing legislative provisions, complicated by multiple coordination actions. What it seems to do, however, is to make a policy choice in the opposite direction, giving pride of place in the system to elements of agreement and coordination, and in practice incorporating collaborative modules with no constitutional basis. By so doing, the Constitutional Court appears to be unaware of the inefficiency, in addition to the increasing public expenditure, which leads to widespread and permanent coordination between different tiers of government[24].

[22] In this regard, the reader is referred to S. MANGIAMELI, La connessione, il principio di strumentalità, la Gesichtspunkttheorie e l'enumerazione regionale, in Le Regioni n. 6, 1991, 1757 ff.; ID., Le materie di competenza regionale, Milano, 1992, 190 ff.

[23] See, *ex plurimis*, Constitutional Court judgment no. 308 of 2003, nos. 50, 219 and 231, all from 2005, no. 133 of 2006 and nos. 24, 58, 81 and 162, all from 2007.

[24] See also Constitutional Court judgment No. 63 of 2006 on prohibiting smoking in places open to the public in which the Court ruled that "on the ban on smoking in places open to the public the interweaving of legislative and administrative central and regional competences makes it difficult to resolve matter in terms of sharp division". Then there was judgment No. 213 of 2006 which evidently shows the Court does not examine the provisions being challenged one by one, to delimit the scope of the competencies by reference to the Constitution and to see which competences are specifically vested in central government of relevance to the law being challenged.

Constitutional Court case-law has thus not made a contribution to clarifying the scope of the respective competences, and the linkage established between concurrent competence and loyal cooperation emerges as a serious weakness and precariousness of regional legislative autonomy, and of the efficiency, effectiveness and cost-effectiveness of the whole system of both legislative and administrative functions.

5. The need to supersede problems deriving from loyal cooperation and possible solutions: the Federal Senate and fiscal federalism

The chasm into which Constitutional Court case-law has tumbled with the appeal to subsidiarity and the principle of loyal cooperation, was profound. For by arguing on the basis of "the presence of a system entailing the process in which concertation and horizontal coordination have their due importance, that is to say establishing agreements, which must be conducted on the basis of the principle of loyal cooperation" (Judgment No. 303 of 2003), the regions have lost some of their responsibilities as has clearly emerged from legal disputes over such important issues as energy, foreign trade, infrastructure, the production of public goods, etc.

This has given rise to considerable concern within the Constitutional Court, that the remedy is nothing short of overruling its own case-law on the principle of loyal cooperation. Its references to the principle of efficient administration within the meaning of article 97 Const. are widely known, even in the case of a "strong" agreement, as an essential requirement with which all administrative systems must comply. The same is for a less rigorous interpretation of this principle in order to safeguard the central government normative acts.

In particular, the Court has had to emphasise – not without contradicting itself – the non-constitutional nature of the principle of cooperation and that it is central government that is responsible for its organisation (Judgment No. 401 of 2007), and a hierarchical interpretation of the matters falling within the scope of central government with respect to regional matters, with a power of attraction of the environment, for example, then the regional powers, such as local governance. In this way, the environment has moved from being a subject matter/value (Judgment No. 407 of 2003), as a source of the necessary cooperation between the central government and the regions, to become the exclusive preserve of central government (Judgment No. 325 of 2010) and, ultimately, prevailing over regional competences (judgment No. 33 of 2011).

Conversely, after affirming the existence of an undemonstrated interlinkage of central and regional government competences, it has not formed an assessment based on prevalence, even though it did refer to it (point 7.2. of the *Considerato in diritto*), but it considers that the "complexity" of the financial intervention offered by the central government in the legislation being challenged justifies, in itself, the call to subsidiarity, requiring an agreement on the measure implementing it.

The Constitutional Court has often urged the national Parliament to remedy the situation that has arisen in relations between central government and regional governments (and the local authorities), primarily by referring to involving representatives of the Regions and the local authorities in the national Parliament, as provided by article 11 of Constitutional Law No. 3 of 2001, emphasising the need for a root and branch reform of Italian bicameralism and the institution of a Federal Senate.

The Federal Senate would appear to be a means of rationalising the whole system of relations between central government, regional governments and the local authorities, as has emerged following the constitutional reform of 2001; and it is in this context that its role as a Chamber representing the regions, regardless of the value one might wish to be attributed to it (guarantee or compensation), forms part of the sphere of the institutional reforms which would uphold the principle of the indivisibility and political unity of the Republic (art. 5 Const.) and could, at the same time, give a federal character to the other constitutional organs of the Republic (participating in the election of the President of the Republic and the judges of the Constitutional Court). Moreover, by guaranteeing the effective representation of the Regions and the local authorities[25], the Federal Senate would also enable them to play a part in central government legislation in a clear and unambiguous manner, involving the regional Councils, which are vested with regional legislative powers, in any derogations from the division of powers through the so-called "call to subsidiarity".

The Constitutional Court is also resolved to request the legislator to introduce fiscal federalism, in, for example, Judgment No. 370 of 2003, in which the Court ruled that "the implementation of article 119 of the Constitution is a matter of urgency in order to put into practice the provisions of the new Title V of the Constitution. Otherwise there would be a contradiction with the different division of competences in the new constitutional rules". The Court also emphasised that "the continuation or indeed the institution of forms of financing for the Regions and the local authorities in contradiction to article 119 of the Constitution would open the way to risking jeopardising the functionality of, or even blocking, whole sectors".

In various seminars held recently, the constitutional judges themselves, with a certain frankness, have openly voiced the Constitutional Court's unease, and the need to rethink the issue of cooperation procedures.

The need for restyling Title V and its implementation are widely known. Law No. 42 of 2009 on fiscal federalism is based on a provisional identification of the fundamental functions of municipalities and provinces and on a very uncertain definition of the regional administrative functions.

[25] V. A. D'Atena, *Un Senato "federale". A proposito di una recente proposta parlamentare*, in *Rass. parl.*, 1/2008.

The Constitutional Bill on the Federal Senate is still before Parliament and even though it is supported by all the political parties, it has not yet been placed on the agenda for debate.