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ANTONIO D'ATENA

National unity between supranational integration and regional governments

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1. Two background facts

The subject of this paper refers to a recent stage of our constitutional experience. Indeed, a discussion on the relationships between national unity, regional governments and supranational integration posits the simultaneous existence of institutional bodies that are the expression of these three concepts: the State, the Regions and supranational institutions.

Such condition of simultaneous existence occurred only after 1970 which was the year when the Regions with an ordinary statute were actually established, or echoing the words used in a beautiful decision written by Vezio Cirsafulli[1], it was the year when the Regions went from being "virtual bodies" to the condition of "concrete bodies", namely bodies capable of concretely interacting with the other institutional levels.

It would be incorrect to suggest the earlier date, 1957, the year when the Rome Treaties were signed. Indeed, while it is true that in Italy at that time there were territorial bodies of the regional type, namely four of the five Regions having special autonomy[2], it is likewise a fact that these Special Regions were victims of the delay in implementing the Ordinary Regions. The four Special Regions had started to operate in a hostile institutional environment since, in spite of the regionalization envisaged in the new Constitutional Charter, the legal order in the Country had maintained the characteristics of a centralized

[1] Const. Court Judgment no 39/1971.

[2] For Friuli-Venezia Giulia this was to happen in 1963.

French-like unitary State. Therefore the Special Regions had been perceived to be authentic constitutional heresies. And they had been treated accordingly. This emerges clearly from the case law of the Constitutional Court on the autonomy of the Region of Sicily[3].

The second background fact is that the system of relationships between the three bodies is permeated with the most conspicuous tensions that contemporary constitutionalism has ever experienced. Indeed, it represents the most critical point of the multilevel system consisting of Europe (today the EU), the Member States having a federal or regional structure, and the sub-State entities present within the latter.

I would like to clarify immediately that, here, I am not going to consider *ex professo* the tension between unity and integration, and I am not going to deal with it directly because if I were to do so in a manner that would be barely sufficient, I would have to give an overview of the whole system of European institutional law whose bodies and procedures are built on this tension. I shall only indirectly mention some of these elements when I will be discussing the other two aspects: unity versus autonomy (regional and local government), on the one hand, and integration versus autonomy (regional and local government) on the other.

2. The formulation of Article 5 of the Italian Constitution

As regards unity versus autonomy, the compelling starting point is Article 5 of the Italian Constitution where the two terms of the relationship - national unity and local governments (including in this context also regional governments) - are dealt with side by side and balanced. Indeed, as is well-known, it is Article 5 that expresses the solemn statement: "the Republic, one and indivisible, recognizes and promotes local autonomies".

A statement, I would add in passing, that does not deserve the criticisms it has received. I am referring to the stinging opinion by Denis de Rougemont – eminent Swiss representative of the European Federalist Movement, and among other things, supporter of the Europe-of-Regions model (based, however, on a functional idea of regionalism)[4] – who stated that only Italy's talent for compromise could devise the wording of the mentioned Article 5 that reconciles the devil with holy water: the federalism of the Girondists and the unitarism of the Jacobins[5].

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[3] On this point refer to D'ATENA, *Dalla "costituzionalizzazione" alla "dissoluzione" dello Statuto siciliano. (Riflessioni sull'elaborazione giurisprudenziale del primo ventennio)*, in Istituto Gramsci siciliano - Sezione giuridica (edited by), *Lo Statuto siciliano dopo 40 anni*, Padova, 1990 (and also in *Giur.cost.*, 1990 and in D'ATENA, *Costituzione e Regioni. Studi*, Milano 1991)

[4] *La région n'est pas un mini Etat-Nation*, in *Bulletin du Centre Européen de la Culture* (Genève) 1969; *L'Un et le Divers*, Neuchâtel 1970; *Lettre ouverte aux Européens*, Paris 1970; *L'avenir est notre affaire*, Paris 1977; *Ecologie, régions, Europe fédérée: même avenir*, in *Cadmos* (Genève), 5/1979, 5 ss.

[5] DE ROUGEMONT, *Die Devise des Regionalismus: keine Freiheit ohne Verantwortung*, in *Festschrift Gasser*, Berlin 1983, 527.

This is a smart but ungenerous opinion. It does not consider that this wording reflects an existing tension. All legal orders of the federal and regional type grapple with the fundamental issue of maintaining a balance between these two values and between the forces that uphold them. Both the procedures and the rules that preside over the distribution of powers are built on the dialectic tension between these two entities[6]. The perspective suggested by Article 5 Const., offers a formidable interpretation that could be adopted by all the Constitutions of States that experience forms of territory-based decentralization[7]. Indeed the wording of Article 5 has set an example and it has inspired both the Portuguese Constitution of 1976[8], that contains echoes of it in two provisions, and the Spanish Constitution of 1978[9].

3. Article 5 in the debate in the Constituent Assembly

The members of the Constituent Assembly were perfectly aware of the tension between unity and autonomy. And many of them feared that the Regions might endanger national unity. Furthermore, statements foreboding disquieting prospects like those pronounced by Hon. Andrea Finocchiaro Aprile, namely that Sicilian autonomy was the first step towards the independence of Sicily, were not at all reassuring[10].

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[6] This is an undisputable fact as confirmed by the classical works by TRIEPEL, *Unitarismus und Föderalismus im Deutschen Reiche. Eine staatsrechtliche und politische Studie*, Tübingen 1907, and by FLEINER, *Unitarismus und Föderalismus in der Schweiz und in den Vereinigten Staaten von Amerika*, Jena 1931.

[7] On this issue: D'ATENA, *Il principio unitario nel sistema dei rapporti tra Stato e Regioni*, in ROLLA (edited by), *La definizione del principio unitario negli ordinamenti decentrati* (Proceedings of the Conference of the Association of Comparative and European Public Law, Pontignano, 10-11.5.2002), Torino 2003 (and also, with integrations, in *Scritti in memoria di Livio Paladin*, Napoli 2004, and in D'ATENA, *Le Regioni dopo il* Big Bang. *Il viaggio continua*, Milano 2005); ID., *Le autonomie sub-statali e le loro garanzie istituzionali*, in ROLLA (edited by), *La difesa delle autonomie locali*, Milano 2005, nonché in *Rass.parl.* n. 3/2005 and in D'ATENA, *Le Regioni dopo il* Big Bang, cit.

[8] Which, having declared the principle of unity and indivisibility of sovereignty (Art. 3, (1): "A soberania, una e indivisível, reside no povo, que a exerce segundo as formas previstas na Constituição."), clarifies that, in its organization and functioning, the "unitary" State respects the autonomy of the island, the principles of subsidiarity, of autonomy of the local autarchies and of the democratic decentralization of the Public Administration (Art. 6, (1): "O Estado é unitário e respeita na sua organização e funcionamento o regime autonómico insular e os princípios da subsidiariedade, da autonomia das autarquias locais e da descentralização democrática da Administração Pública").

[9] Art. 2: "The Constitution is based on the *indissoluble unity of the Spanish nation*, the homeland of all Spanish people, and recognizes and guarantees the *right to autonomy of the nationalities and regions* that are part of it as well as the solidarity among such entities" ("La Constitución se fundamenta en la indisoluble unidad de la Nación española, patria común e indivisible de todos los españoles, y reconoce y garantiza el derecho a la autonomía de las nacionalidades y regiones que la integran y la solidaridad entre todas ellas").

[10] Significant in this connection is the concern expressed by Hon. Umberto Nobile at the session of 15 November 1946 of the second Sub-Committee of the Commission for the Constitution: "Nobile reconfirms his dislike for any solution to the problem of regional autonomy that may, in the slightest way, undermine not only political unity but also the economic unity of the State. It is absurd in the modern world to speak about regional governments. In France, even though there are advocates of regional autonomy, there is no mention of an autonomous regional order in the new Constitution. Hon. Finocchiaro-Aprile has openly declared that in his

Hence above all among the ranks of the left the attitude was strongly on the defensive as can be inferred from the following short list of statements.

Pietro Nenni[11]: "[...] Let us examine the Constitution from the standpoint of the unitary State. Article 106 of the draft states that the Italian Republic is one and indivisible, that it promotes local governments and implements extensive administrative decentralization. This article is certainly in perfect harmony with the one that I have called the embodiment of the spirit of June 2nd. I would not say the same thing however about the version of regional federalism that was the result of the *makeshift deliberations* of the Commission that was studying the implementation of the principle of administrative decentralization".

Palmiro Togliatti[12], making reference to what was to become Art. 114: "[...] In the articles on the regional system there is one such mistake. While the Sub-Committee had quite rightly proposed: 'The territory of the Republic is divided, etc...'; the revised text states: "The Republic is divided into Regions and Municipalities'. This wording is not consistent with the statement that the Republic is indivisible".

Renzo Laconi, in his typical straightforward manner: "We think that the issue is not that of bringing the people closer to the bodies of democratic life and of submitting certain branches and sectors of the Country's life to the control of the people; we think that there is more to this, that we are headed for the fragmentation of legislative power, disruption of the organic unity of our Country. There are no doubts that if this part of the project were approved we would once again have a plethora of small states in Italy, each exercising its own legislative powers, each implementing its reform on its territory, different from reforms of the neighbouring or distant Regions. I believe that in this way we would be creating within the Italian democratic body a series of air-tight compartments that would merely serve the purpose of stopping, delaying or slowing down as much as possible the movement of ideas and progress, the circulation of laws in our Country, and would hinder any decisive and consequential action taken by the democratic State" [13]

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opinion Sicilian autonomy is a first step towards the independence of Sicily. This is proof of the fact that the problem of the regions in Italy cannot but raise serious concern, whatever the solution that is intended to be adopted. He is unable to accept the regionalistic movement, perhaps because he is not attached to any specific Region of Italy and feels he is only Italian; or perhaps because he is also convinced that as a consequence of the mechanical revolution, all human communities should tend towards unification. In any case he is unable to understand that there may be some people who want to disunite our Country, whose unity cost so much sacrifice. The only need he seems to be willing to accept is that of granting some convenient autonomy to the multilanguage border zones, for which autonomy may also be imposed by international agreements, as is occurring for Alto Adige, or by considerations of international convenience. Indeed, in such cases special statutes would be granted for the protection of ethnic minorities".

[11] At the session of the *plenum* of 10th March 1947.

[12] At the afternoon session of the *plenum* of 11th March 1947.

[13] These words were pronounced on 5th March 1947, during the general discussion on the project for the Constitution of the Republic of Italy.

In concluding on this point it is worthwhile recalling the concerns expressed on 27 June 1947 by Hon. Tommaso Tonello: "Those who are acquainted with the Italian soul knows that it varies from Region to Region; they know that we Italians are still predisposed to reviving ancient disagreements. In my opinion, we have not yet shaped a national spirit that is deep enough to enable us to peacefully create a regional level of government. The biggest danger that I see, Honourable colleagues is this: that, instead of cementing the bonds of the Italian family, the Regions may weaken them and create a number of contrasts between Regions or between the various localities of the same Region and hence instead of promoting an action of union and national pacification we would be accomplishing a work of disintegration and disruption also in the parties".

As can be noticed, the climate was one of red alert. An atmosphere in which the declaration of the principle of unity and indivisibility of the Republic was felt to be a sort of reassurance of the unity of the system. This is borne out by the battle waged to remove the corresponding provision from Part II of the Constitution, and placing it in the opening paragraph on fundamental principles, and even in article one, according to the hopes expressed, for instance, by Hon. Francesco Saverio Nitti: "[...] I would like to express a timid desire, namely that in the first line of our Constitution, where it says: "Italy is a democratic Republic', one might add 'and indivisible'. The word is taken from the French Constitution. You will not find it strange that at this time when there are so many thrusts towards division, this word should be solemnly consecrated" [14].

Hence the amendment proposed by Hon. Ruggiero Carlo, Carboni, Preti, Cartia and Paris: "Paragraph one [of Art. 1], add the words *one and indivisible*[15] to the word *democratic*" [16]. An amendment that was not put to the votes because the proponents withdrew it, also because of another amendment proposed by Tomaso Perassi: "Shift Art. 106 that lays down the principles of local autonomy and decentralization to the section on general provisions (and hence) immediately after Article 6" [17].

As is well known, apart from the number of the article, this is the solution that was finally adopted in the text of the Constitution. A solution that was not deliberated on by the Assembly, but was due to the work of the *Committee of 18*, that revised the Constitution not

[14] These words were pronounced on 18th March 1947, during the afternoon session, of the *plenum* of the Constituent Assembly.

[15] Session of the Assembly of 22nd March 1947.

[16] Seduta dell'Assemblea del 22 March 1947.

[17] The proposal was presented by Hon. Perassi at the session of 24th March 1947: "According to an inspired expression by the President of the Commission, these general provisions are intended to fully define all the connotations of the Republic. Some of these aspects are indicated in Articles 1, 2 and 3 that we are examining here. But there is another aspect that concerns the way of being of the Republic in how it is articulated. My proposal, at this point in time, aims at making a reservation for a 'seat', so to speak; that is to say when we examine Article 106, that lays down the principles of autonomy and decentralization, in my opinion it will be worthwhile moving that article, once it is approved, to the section entitled "General Provisions" since it defines one of the features of the Republic."

only for exclusively stylistic and formal purposes but also, as in this case, for substantial aspects[18]. In order to measure the scope of the positioning of the declaration among the fundamental principles, suffice it to point out that not only did it actually protect it from any constitutional revision (thus strengthening also the scope of the text represented by the adjective "indivisible" [19]) but it also shielded it from being affected by the major constitutional reforms that occurred in the following thirty years (and what is even more important from a practical viewpoint, it was shielded from being involved in the only reform that was actually completed, the process that ended with constitutional laws no 1/1999 and 3/2001).

4. The elements in favour of unity in the original constitutional provisions: the principle of concurrence and the control mechanism.

Needless to say that the problem of balancing the reasons in support of unity and those in support of autonomy could not be entrusted exclusively to the solemn statement of Article 5. Rather, a specific discipline was required that – as is well known – our Constituent Fathers placed almost entirely in Title V, Part II, of the Constitution.

There is no need for a particularly thorough examination to perceive the thematic consistency between this discipline and the principle that it develops. Indeed, it entirely arises from the dialectics between the two camps that it produced.

Let us begin with unity. It may be noted that two fundamental devices were introduced to ensure unity: the principle of concurrence and the control mechanism.

The concurrence principle was comprehensively applied to legislative powers. Thanks to this principle, there was no subject over which the Regions authentically had exclusive powers because State principles virtually involved all fields: expressed principles (in the case of concurrent powers on a vertical division), general unwritten principles, for primary or full powers of the Regions having special autonomy and the two Provinces of Trento and Bolzano. The unsurmountable boundary was confirmed by the interpretation made immediately of concurrent powers in the strict sense. Namely the recognition that, in the absence of a framework law, the Regions were not exempt from the duty to comply with that boundary, but were bound to make laws consistently with non written principles, inferred, through induction, from the body of national laws. This solution was certainly not a given, as confirmed by the case of Germany whose fundamental law, up until 2006, envisaged a similar power: *Rahmengesetzgebung*, that however envisaged that the boundary between principles was

[18] For a full discussion of the most significant changes made to the constitutional text by the co-ordination committee: FALZONE, GROSSI, *Assemblea costituente italiana*, in *Encicl, dir.*, III, Milano 1958, 380 *et seq.*

[19] For a very sharp view on this ESPOSITO, *Autonomie locali e decentramento amministrativo nell'articolo 5 della Costituzione*, in ID, *La Costituzione italiana. Saggi*, Padova 1954 (and also, albeit with a slightly different title, in *Riv. dir. pubbl.*, 1948).

not ubiquitous, and was applied only if – and only because - the federal legislator had made use of his power to adopt the framework law[20].

The rationale of the Italian solution is absolutely transparent. The obligation to comply with State principles of various types – written, unwritten, fundamental, general – was aimed at avoiding the danger that multiple law-making bodies, as introduced by the Constitution, might undermine the systematic comprehensive nature of national positive law. This was Hon. Laconi's nightmare: "a mass of small states, each exercising its own legislative power, each capable of implementing in its own territory reforms that would be different from those of neighbouring or distant Regions ...."

As stated earlier, the second means for ensuring unity was the control mechanism. Restricting our comments here to the oversight exercised on acts, it is recalled that no Regional act was exempt from State control. Controls were envisaged on statutes, laws and administrative acts. These controls were rigidly aimed at ensuring unity. First of all because they were preventive controls and so they actually intercepted any act before it was adopted and hence before it became part of the legal order, secondly because they also considered the merits of the acts, thirdly because, except for administrative merit[21], they would stop the process if the act was found to be inconsistent.

Given these aspects, the institute was specifically Italian and it gave rise to the role of the State as guardian, a guardianship role similar to the role shaped by tradition in our municipal and provincial legislation[22].

5. The devices in defence of local regional government in the original legislation and how they were encroached upon in practice

This was not, however, the exclusive feature of the constitution designed by our Constituent Fathers. The devices in defence of unity were robustly balanced by the devices in defence of autonomy that were based on a markedly libertarian logic.

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[20] This was confirmed by the fact that the power to adopt a model law (*Rahmengesetz*) was not a power granted *unconditionally* to the *Bund*, but was subject to the implementation clause (initially *Bedürfnisklausel* and now *Erforderlichkeitsklausel*) envisaged for the *konkurrierende Gesetzgebung* by Article. 72, (2), GG.

[21] Based on Article 125, (2), control over the merits of administrative acts would not occur through cancellation (as instead was envisaged by Article 127 in the case of laws) or through non-approval (as is the case of ordinary regional statues, ex Article 123, u.c.), but simply through a request for review submitted by the Regional Council. On this issue: SCUDIERO, *I controlli sulle Regioni, sulle Province e sui Comuni nell'ordinamento costituzionale italiano* Napoli 1963; TORRIGIANI, *Controlli amministrativi statali e regionali*, Milano 1972.; BENVENUTI, *I controlli amministrativi dello Stato sulla Regione*, in *Riv. trim. dir. pubbl.*, 1972; SANDULLI, A.M., *I controlli sugli enti territoriali nella Costituzione*, *ibidem*; VANDELLI, *Il controllo sull'amministrazione della Regione Emilia-Romagna: problemi ed orientamenti*, in *Le Regioni*, 1974; ID., *L'esperienza dei controlli sull'amministrazione regionale*, in ZANONE (edited by), *Potere statale e riforma regionale*, Bologna s.d. (but 1976); ID., *I controlli sull'amministrazione regionale*, in BARTOLE, VANDELLI (edited by), *Le Regioni nella giurisprudenza*, Bologna, 1981.

[22] For the choice of words and the underlying evaluation the reader is referred to D'ATENA, *Diritto regionale*, II edizione, Torino 2013, 62.

Leaving aside the details it is safe to say that the main guarantees of autonomy were on the one hand the establishment in the Constitution of the division of powers aimed at removing this sphere from ordinary State law[23],, on the other, the Regions were given instruments to challenge the State when it passed laws that strayed from its scope of powers.[24]

This approach, that was certainly not skewed in favour of autonomy, was interpreted in practice – in law-making and in the case law of the Constitutional Court – as being in favour of central power and hence its protective component was demolished.

Here I shall merely recall some titles: deconstitutionalization of listed matters (the legislator defined and redefined the matters, modifying their content, even quite radically[25]);

Stripping the fundamental principles of their force of law (in spite of the State's legal reserve "riserva di legge" under Article 117, (1) – under which the fundamental principles were to be established through a legislative act – case law accepted that any restraint on regional laws could be placed also through a regulation, or even, through a high-level administrative act adopted in the exercise of guidance and co-ordination functions[26]); detailed State rules on subjects over which the Regions had power (State legislation did not restrict itself to laying down principles; to the contrary, quite often it would even provide detailed regulations, and for instance as in the case of the model law on truffles, it would even go as far as determining the specifics of the instrument to be used to dig the tubers from the ground: small spade [or *vanghella*][27]).

Apart from the episodes that have just been recalled – whose ability to erode the protective component of the Constitutional rules is evident – we cannot overlook mentioning the authentic *deus ex machina* of the phenomenon: national interest[28]. As a result of the transposition of merit into legitimacy, national interest (that had been set by the Constitution as limit of merit where violation would have to be ascertained by Parliament) ended up being – in Giuseppe Ferrari's words – a magic word, that nationalized what was not national[29].

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[23] Especially Articles 117 (1), 118 and 123 Const.. Unlike Article 128 (now repealed on the autonomy of local government, these provisions were not limited to the general recognition of the autonomy of the Regions, but they laid down the scope, limits and modalities for exercising the regional powers they provided for.

[24] The role of the Constitutional Court was of paramount importance for the judgments being issued and for the decisions on iujntersubjective conflicts.

[25] On this issue, see in particular MANGIAMELI, *Le materie di competenza regionale*, Milano 1992.

[26] D'ATENA, *Regione (in generale)*, in *Encicl dir.*, XXXIX, Milano 1988; ID., *La crisi della legge regionale*, in ID., *Costituzione e Regioni. Studi*, Milano 1991, 232; ID., *La vicenda del regionalismo italiano ed i problemi della transizione al federalismo*, in D'ATENA (edited by), *Federalismo e regionalismo in Europa*, Milano 1994, 219 ss.; PAOLETTI, *Leggi-cornice e Regioni. Crisi di un modello*, Milano 2001, 149 ss.

[27] For this instance: PAOLETTI, *Leggi-cornice e Regioni. Crisi di un modello*, cit., 116, thanks to which– 111 ss. – a full census was carried out on this phenomenon.

[28] Spec.: BARBERA, *Regioni e interesse nazionale*, Milano 1973.

[29] FERRARI, *Il capoluogo regionale. Autonomie regionali e sovranità articolata*, Milano 1970, 88.

Hence Livio Paladin's desolate conclusion who highlighted that, as a result of this drift, the Region was reduced to an institutional variable that the State handled at its discretion[30].

Leaving aside the details, it is worth recalling that among the main causes that prevented regionalism from taking off in our Country was the tension between the logic underlying the regional reform and the logic underlying the party system. Indeed, while regionalization pursued the goal of shifting towards the periphery shares of political power, the parties maintained a strongly centralized structure. Some pages written by Claude Palazzoli on this issue are absolutely enlightening. He pointed out that, if the Regions did not succeed in eroding the channels conveying political consent, they would be turned into mere facades, in the hands of the national parties, instruments to be used in games based on an exclusively national logic[31]. In order to limit our attention to a single element, it may be recalled that, where there were sufficient numbers, regional government coalitions were filiations of the national coalition, decided in Rome and invested with a relentless domino effect during the Government crises that came in succession at the national level.

This aspect is crucial because it was the new party system that created conditions conducive to the radical reform of title V of the Constitution in the late 1990s and beginning of the new millennium. Indeed, in those years an absolutely special alignment of the stars occurred that disrupted the pre-existing balance. I am referring to the alignment of three circumstances each of which in itself would have been sufficient to modify the picture, but combined together they produced a true earthquake: the fall of the Berlin wall, the adoption of the majority system as a result of the referendum and '*tangentopoli*' (bribesville). Thanks to these events, the '*conventio ad excludendum*' that had deprived our system of the corrective factor of alternation was overthrown, the parties that had been protagonists on the Republican stage for the first fifty years broke down and disappeared, the parties that did survive the quake were deeply transformed, and new political forces were born, some of which – such as the leagues, initially in the plural - chose "federalism" as their banner.

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[30] PALADIN, *Relazione introduttiva*, in AA.VV., *Le Regioni nella realtà sociale* (Proceedings of the Rome Conference, 21-22.1.1985), in Suppl. n. 7/1985 del *Bollettino di legislazione e documentazione regionale*, vol. II, 18

[31] PALAZZOLI, *Partis politiques et Régions autonomes*, in MARANINI (edited by), *La Regione e il governo locale*, I, Milano 1965. On this issue see also anche: RODOTÀ, *Regioni e forze politiche*, in AA.VV., *Dalla parte delle Regioni*, Milano 1975, 297 s.; AMATO, CASSESE, CHELI, RODOTÀ, SERRANI, *Materiali per una discussione sullo stato dell'attuazione delle Regioni*, *ibidem*; ROTELLI, *Le Regioni dalla partecipazione al partito*, in *La non riforma*, Roma s.d. (ma 1981); PASQUINO, *Organizzazione dei partiti*, in AA.VV., *La regionalizzazione*, Milano 1983; BARTOLE, *Il caso italiano*, in *Le Regioni*, 1984; MENY, *La posizione delle Regioni nello sviluppo e nella trasformazione dello Stato: un'analisi comparata delle politiche di regionalizzazione in Francia, Italia e Spagna*, *ibidem*; WRIGHT, *Regioni e regionalizzazione in Francia, Italia e Spagna*, *ibidem*; MARTINES, *Legislazione regionale e riforme istituzionali*, in *Quad. reg.*, 1984; BARBERA, *1970-1985: come superare le insufficienze del decentramento*, in *Dem. dir.*, 1985; MERLONI, *Perché è in crisi il regionalismo*, in *Dem. dir.*, 1985; D'ATENA, *Regione (in generale)*, cit.; CACIAGLI, CAZZOLA, ILARDI, MARTINES, PRIULLA, SCARROCCHIA, *Autonomia regionale e sistema dei partiti*, I *I partiti di fronte alle Regioni*, Milano 1988; D'ALBERGO, FEDELE, ILARDI, SCARDOCCHIA, TASSARA, *Autonomia regionale e sistema dei partiti*, II *Classe politica e modelli di organizzazione*, Milano 1988; FEDELE, *Autonomia regionale e sistema dei partiti*, III *Le forme politiche del regionalismo*, Milano 1988.

6. The reform of Title 5 of the Constitution

We owe the constitutional reform to this change in climate[32]. In the dialectical relationship between unitary principle and autonomy-oriented principle, the reform shifted the centre of gravity towards the latter, thus burying the protective role of the State[33].

[32] On the reform process, that was carried out during the 13th parliament: MARIUCCI, *La riforma federale. Vademecum per la commissione bicamerale e il parlamento "costituente"*, Rimini 1997; TERESI, *La strategia delle riforme. La tormentata revisione della Costituzione della Repubblica. Materiali di studio*, VI ed., Torino 1998; COSTANZO, FERRARI, FLORIDIA, ROMBOLI, SICARDI, *La Commissione bicamerale per le riforme costituzionali. I progetti, i lavori, i testi approvati*, Padova 1998; PANUNZIO (edited by), *I costituzionalisti e le riforme*, Milano 1998; AZZARITI, VOLPI (edited by), *La riforma interrotta. Riflessioni sul progetto di revisione costituzionale della Commissione Bicamerale*, Perugia 1999; D'ATENA, *L'Italia verso il "federalismo". Taccuini di viaggio*, Milano 2001; FERRARA, A. (edited by), *Verso una fase costituente delle Regioni? Problemi di interpretazione della legge costituzionale 22 novembre 1999, n. 1*, Milano 2001; FERRARA A. (edited by), *Le autonomie territoriali nella riforma costituzionale*, Milano 2001. *Adde*, for some cases: CIOLLI, DOMENICHELLI (edited by), *Le ragioni del federalismo*, Roma 1997.

[33] The literature that has been produced on the new Title V is impressive. Among the contributions of a general nature, mention can be made of: BERTI, DE MARTIN (edited by), *Le autonomie territoriali: dalla riforma amministrativa alla riforma costituzionale*, Milano 2001; FERRARA A., SCIUMBATA (edited by), *La riforma dell'ordinamento regionale. Le modifiche al titolo V della parte seconda della Costituzione*, Proceedings of the Seminar held in Rome on the 29th of September 2000, Milano 2001; GROPPI, OLIVETTI (edited by), *La Repubblica delle autonomie. Regioni ed enti locali nel nuovo titolo V*, II ed., Torino 2003; CALVIERI, *Stato regionale in trasformazione: il modello autonomistico italiano*, Torino 2002; ROMBOLI, *Le modifiche al titolo V della parte seconda della Costituzione. Premessa*, in *Foro it.*, 2001; AA.VV., *Il nuovo Titolo V della Parte II della Costituzione* (Proceedings of the Conference on "The new Title V of Part II of the Constitution – Initial problems in its implementation", organized by the Italian Association of Constitutional scholars, Bologna 14 January 2002) Milano 2002; D'ATENA, *Il nuovo ordinamento federale*, in Treccani. Il libro dell'anno 2001, Roma 2002; ID., *Die Verfassungsreform des italienischen Regionalismus*, in *Jahrbuch des öffentlichen Rechts*, N.F. 51 (2003); ID., *El advenimiento del semifederalismo a la italiana*, in FERNANDEZ SEGADO (edited by), *The Spanish Constitution in the European Constitutional Context – La Constitución Española en el Contexto Constitucional Europeo*, Madrid 2003; MANGIAMELI, *La riforma del regionalismo italiano*, Torino 2002; ANZON, *I poteri delle Regioni dopo la riforma costituzionale. Il nuovo regime e il modello originario a confronto* Torino 2002; ID., *I poteri delle Regioni nella transizione dal modello originario al nuovo assetto costituzionale*, Torino 2003; PIZZETTI, *Il nuovo ordinamento italiano fra riforme amministrative e riforme costituzionali*, Torino 2002; CARAVITA DI TORITTO, *La Costituzione dopo la riforma del titolo V. Stato, regioni e autonomie fra Repubblica e Unione Europea*, Torino 2002; ID., *Il Titolo V della Costituzione*, in *federalismi.it*; TARANTINI (edited by), *Il federalismo a costituzione variata*, Torino 2002; MANCINI, (edited by), Il *nuovo titolo V, parte II della Costituzione*, Milano 2002; BOTTARI (edited by), *La riforma del titolo V*, Rimini 2003; CARETTI, *Stato, Regioni ed enti locali tra innovazione e continuità. Scritti sulla riforma del Titolo V della Costituzione*, Torino 2003; GAMBINO (edited by), *Il "nuovo" ordinamento regionale. Competenze e diritti*, Milano 2003; VOLPE G. (edited by), *Alla ricerca dell'Italia federale*, Pisa 2003; AA.VV., *Proceedings of the Conference su "Corte costituzionale e regioni due anni dopo la riforma"* Firenze 30 gennaio 2004, in *Le Regioni*, 2004; MODUGNO, CARNEVALE (edited by), *Nuovi rapporti stato-regione dopo la legge costituzionale n. 3 del 2001*, Milano 2003; CARETTI, *Stato, regioni, enti locali tra innovazione e continuità. Scritti sulla riforma del Titolo V della Costituzione*, cit.; FERRARI, PARODI (edited by), *La revisione costituzionale*

In particular we owe the suppression of State control over Regional acts to the reform and also the boundaries delimiting the principle of concurrency, that could now be invoked only for concurrent powers in the strict sense and, above all, we owe the reform the overturning of the listing of legislative powers thanks to which it is no longer the regional legislator but the State legislator that invokes concurrent powers to substantiate its interventions.

While these innovations strengthened the autonomy-oriented component of the system, the reform contains interesting news also with regard to the devices in favour of unity. I am referring to three new elements: giving substitutive powers a constitutional status, thus filling a gap in the previous discipline (for which attempts had been illicitly made to find remedy through ordinary legislation[34]), and attributing to the State a large number of purpose-oriented or transverse powers (*competenze finalistiche*) that puts the State in the condition of evading from the otherwise suffocating cage of listed matters[35]; and finally the principle of subsidiarity, which undeniably protects the levels of power closest to those affected (and hence the local governments), but operates as a two-faced Janus, in that this gives the State a means for attracting powers that would otherwise lie with other bodies [36].

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del nuovo titolo V tra nuovo regionalismo e federalismo, Padova 2003; DE MARTIN, *Primi elementi di lettura della riforma del Titolo V della Costituzione*, in *Amministrazione in cammino*; CHIAPPETTI, *Il rebus del federalismo all'italiana*, Torino 2004; ROLLA, *Incertezze relative al modello di regionalismo introdotto dalla legge costituzionale 3/2001*, in *Quad. reg.*, 2004; CERULLI IRELLI, PINELLI (edited by), *Verso il federalismo. Normazione e amministrazione nella riforma del titolo V della costituzione*, Bologna 2004; D'ATENA, *Le Regioni dopo il* Big Bang. *Il viaggio continua*, Milano 2005; PIERGIGLI (edited by), *Federalismo e devolution*, Milano 2005; D'ATENA (edited by), *Regionalismo in bilico. Tra attuazione e riforma della riforma*, Milano 2005; VIOLINI (edited by), *Itinerari di sviluppo del regionalismo italiano*. Primo incontro di Studio "Gianfranco Mor" sul diritto regionale, Milano 2005; GROPPI, PETRILLO P.L. (edited by), *Cittadini, Governo, Autonomie. Quali riforme per la Costituzione?*, Milano 2005; PIZZETTI, POGGI, *Il sistema "instabile" delle autonomie locali*, Torino 2007; MANGIAMELI, *I processi di riforma* in itinere. *Considerazioni sul riflusso della riforma federale in Italia*, in GASPARI, PIRAINO A. (edited by), *Il "gioco" della cooperazione*, Roma 2007; DI GIOVINE, MASTROMARINO (edited by). *Il regionalismo italiano in cerca di riforme*, Milano 2008; MANGIAMELI, *Il profilo dell'istituto regionale a sette anni dalla revisione costituzionale*, in D'ATENA (edited by), *I cantieri del federalismo in Europa*, Milano 2008; MANGIAMELI, *Letture sul regionalismo italiano. Il titolo V tra attuazione e riforma della riforma*, Torino 2011; VANDELLI (edited by), *Il governo delle Regioni: sistemi politici, amministrazioni, autonomie speciali*, Bologna 2013.

[34] This approach, inaugurated by Article 6 D.P.R. no 616/1997, on compliance with Community obligations, had raised vivid criticism in the literature. For all: D'ATENA, *Le Regioni italiane e la Comunità economica europea*, Milano 1981.

[35] Indeed, by exercising these powers, the State can intervene in subjects over which the Regions have powers not only to set general principles but also to lay down detailed regulations, thus compressing or even divesting the Regions of their legislative power. For this reason some scholars liken it to the *konkurrierende Gesetzgebung*: D'ATENA, *Materie legislative e tipologia delle competenze*, cit.; ID., *Il principio unitario nel sistema dei rapporti tra Stato e Regioni*, in ROLLA (edited by), *La definizione del principio unitario negli ordinamenti decentrati*, Torino 2003 (and also, with integrations, in *Scritti in memoria di Livio Paladin*, Napoli 2004, and in D'ATENA, *Le Regioni dopo* il Big Bang. *Il viaggio continua*, cit.); a similar stance had already been taken by FERRARA A., *La "materia ambiente" nel testo della riforma del titolo V* (30 maggio 2001), in *federalismi.it*; *contra*: ANZON, *Il difficile avvio della giurisprudenza costituzionale sul nuovo titolo V della Costituzione*, in *Giur. cost.*, 2003.

[36] On the mechanisms for making the breakdown of powers flexible, see, for a general discussion of the issue: D'ATENA. *Il riparto delle competenze legislative: una complessità da governare*, in DI GIOVINE, MASTROMARINO (edited by), *Il regionalismo italiano in cerca di riforme*, Milano 2008, nonché in AA.VV., *Scritti in onore di Michele Scudiero*,

7. Integration versus autonomy: the original "provincialization" of sub-state entities

Moving on to consider the relationships between regional governments and the European integration process, in the late 1960s on the eve of the concrete establishment of the Regions having an ordinary status, there were criticisms on the desirability of a late implementation of regionalization as laid down in the Constitution. Indeed, it was pointed out after twenty years from the entry into force of the Charter, that the regionalist design approved by the Constituent Assembly had become somewhat obsolete because of the institutional novelties that had occurred in the meantime. First and foremost the European integration process[37]. It is self-evident that supranational integration and regionalization are difficult to reconcile, being the expression of opposite institutional rationales. While the former is based on a supranational and centralizing logic, the latter is driven by the idea of decentralization of powers; whereas the former entails the transfer of portions of political powers from the National States to an institutional body that encompassing them transcends them, the latter bases the shift of powers not upwards but downwards to the benefit of infranational bodies[38].

The encounter of these two dynamics caused a sort of short circuit whose victims were above all the sub-State bodies present in Europe at the time: the German *Länder* and the four Italian Regions with a special statute (the only ones that existed at the time, and then joined by the Region of Friuli-Venezia Giulia in 1963). and it is not by chance that, at this point in time the German legal scholars are crying out against the *Provinzialisierung*, the provincialization, of the *Länder*, whose constitutional prerogatives were strongly penalized by Germany's becoming a member of the European Community[39].

Such penalization involves three levels[40].

The first concerns the constitutional function recognized to the *Länder* and to the Regions by their respective national constitutions[41]. Think of the powers of the German *Bundesrat* in

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Napoli 2008, and in D'ATENA (edited by), *I cantieri del federalismo in Europa*, Milano 2008. Per quanto specificamente attiene al principio di sussidiarietà, v., in particolare, per i profili che qui interessano: D'ATENA, *Costituzione e principio di sussidiarietà*, in *Quaderni costituzionali*, 2001; ID., *Dimensioni e problemi della sussidiarietà*, in DE MARTIN (edited by), *Sussidiarietà e democrazia. Esperienze a confronto e prospettive*, Padova 2009; MOSCARINI, A. *Competenza e sussidiarietà nel sistema delle fonti*, Padova 2003, SCACCIA, *Sussidiarietà istituzionale e poteri statali di unificazione normativa*, Napoli 2009.

[37] Doubts in this sense had been expressed above all by Vezio Crisafulli, who also pointed out the tension between regionalization and the early drafts of the national economic programme. With specific reference to this latter aspect: CRISAFULLI, *Vicende della "questione" regionale*, in *Le Regioni*, 1982, 502.

[38] On this issue: MASSART-PIERARD, *La dialectique européanisation-régionalisation*, in AA.VV. *L'Europe et ses Régions*, Liège-La Haye 1975.

[39] BIRKE, *Die deutschen Bundesländer in den Europäischen Gemeinschaften*, Berlin 1973.

[40] D'ATENA, *Il doppio intreccio federale: le Regioni nell'Unione Europea*, cit.

[41] CRISAFULLI, *Le funzioni "costituzionali" delle Regioni*, in *Corriere amm.*, 1949, cui *adde*: D'ORAZIO, *Contributo allo studio delle funzioni costituzionali delle Regioni*, in *Riv. trim. dir. pubbl.*, 1972; RESCIGNO F., *Le "funzioni costituzionali" delle Regioni fra previsione ed attuazione*, Torino 2001.

the federal legislative system or the State legislative initiative of Italian Regions. Such powers, indeed, could not be exercised against the decision-making processes taking place in the supranational forum.

The second aspect was jurisdictional protection. It is evident that where decisions were made by Rome or Bonn, the Regions and the *Länder* could address the Constitutional Court and to the German Federal Constitutional Tribunal (the *Bundesverfassungsgericht*) respectively to complain for alleged encroachment on their powers; but now, faced with the decisions adopted by Brussels, they were (and are) deprived of any means of jurisdictional protection. Indeed, they do not appear among the privileged applicants indicated in Article 173 (1) of the Treaty (now Article 19 (3) TEU and Article 263 (2) TFEU).

Finally we cannot forget, and here we come to the third aspect, that the Treaties establishing the European Community (especially the EEC Treaty) had attributed to the European Community many powers over subjects over matters that the German Basic Law and the Italian Constitution attributed to their respective sub-State units. Let us recall, for instance, the powers over agriculture[42]. As a consequence, these bodies were actually dispossessed of their powers to the benefit of the Community order.

As regards the Italian Regions, an additional loss came to add to this power that had been taken away from them. Indeed, both the national legislator and the Constitutional Court deemed that, for the matters over which the Regions had competence, the power of implementing Community directives and the power of enforcing Community regulations did not belong to the Regions but to the State[43]. This conclusion was based on a gap in the Italian Constitution, which did not endow the State with substitutive powers. As consequence, it was deemed that if the Regions did not execute and implement the derived Community law the State would find itself in the uncomfortable condition of being accountable to Europe, and of not having the legal instruments to remove the illicit conduct. To use an expression that we find in a famous judgment of the Constitutional Court, the State would be "disarmed"[44]. Hence the conclusion according to which derived Community law must always be implemented by the State, even – pray mark this - for matters attributed to the Regions by the Constitution[45].

In order to complete the picture, it must be added that the provincialization of the *Länder* and of the Regions was burdened by an 'eye disease' that affected the European Communities, namely "*regional blindness*" (*Landesblindheit*), to use a famous metaphor by Hans

[42] On these powers and on the impressive European regulatory production on agricultural matters, see GILSDORF, in GRABITZ (edited by), *Kommentar zur EWG-Vertrag*, München 1986, *sub* Art. 43, II, n. 4.

[43] The Judgment that took the lead in this sense is Judgment no 142/1972 (rapporteur Costantino Mortati).

[44] Const. Court Judgment no 182/1976.

[45] The situation described in the text is what actually happened in practice. It must further be pointed out that it was harshly criticized in the literature (e.g..: D'ATENA, *Le Regioni italiane e la Comunità economica europea*, cit.).

Peter Ipsen[46]. Indeed, the Community could only "see" the States; it did not see the institutional articulations that existed within the States. This means that it built its organization and decision-making processes rigorously and esclusively taking into account the State.

As a consequence of this 'eye condition', the losses experienced by the Regions in terms of powers and guarantees were not at all offset by their (direct or indirect) participation in the Community decision-making processes: that is to say there were no *political safeguards* – to use the US terminology[47] – enjoyed instead by the States.

This clearly explains why the sub-State bodies present in Europe (and above all the German *Länder* did all they) could to emancipate themselves from their original provincialization.

8. Europe's turning point on its journey from Maastricht to Lisbon, the way the Italian Constitution overcame the "*Community blindness*" and the role of the Regions in the ascending and descending phases

The growing number of Member States having a federal and regional structure in Europe[48], and in Italy the opening up to "federalism" (rigorously in inverted commas)[49], have had the consequence that in both legal orders measures were taken to give an answer to the mentioned need for emancipation.

In the European legal order, after a preparation that took place entirely without any changes to the Treaties[50], the fundamental shift came about with the Maastricht Treaty, to

[46] IPSEN, *Als Bundesstaat in der Gemeinschaft*, in AA.VV., *Probleme des Europäischen Rechts- Festschrift für Walter Hallstein zu seinem 65. Geburtstag*, Frankfurt A.M. 1966, 248 ss. Sul progressivo superamento di tale patologia oculistica: WUERMELING J., *Das Ende der "Länderblindheit": Der Ausschuß der Regionen nach dem neuen EG-Vertrag*, in *EuR*, 1993; D'ATENA, *Il doppio intreccio federale: le Regioni nell'Unione europea*, in *Le Regioni*, 1998; DOMENICHELLI., *Le Regioni nel dibattito sull'avvenire dell'Unione: dalla Dichiarazione di Nizza alla Convenzione europea*, in D'ATENA (edited by), *L'Europa delle autonomie. Le Regioni e l'Unione Europea*.

[47] WECHSLER, The political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, in Columbia L.R., 54, n. 4 (April 1954), and also, for more recent comments on the theory: MARGARIAN, Toward Political Safeguards of Self-Determination, in Villanova Law Review, 46, n. 5 (2001).

[48] Reference is being made to the regionalization of the whole of Italy that occurred in 1970, to the regionalization of Belgium, that took place during that same decade, to the accession to the European Community of two States that in the meantime had set up regional governments: Portugal and Spain. As is well-known the process continued also in the ensuing years with the transition of Belgium to the federal form of government (1993), the accession to the Community of another federal State with a longstanding tradition, Austria (1st January 1995), and the creation of regional governments with legislative powers also in the United Kingdom: Wales, Scotland and Northern Ireland (1998).

[49] For a discussion of such measures and of the process that ensued: D'ATENA, *L'Italia verso il "federalismo". Taccuini di viaggio*, Milano 2001.

[50] This preparation was marked by: *a)* the *Joint Statement*, by the Council, Commission and Parliament on 19 June 1984, which reads as follows: "The three institutions recognize the importance of a more effective relationship between the Commission of the European Communities and the regional or, where appropriate, local governments, with due regard for the internal jusridiction of the Member States and the provisions of Community

which we owe three important novelties: the opening up of the Council to Regional Ministers[51], the establishment of the Committee of Regions[52] and the introduction of the principle of subsidiarity[53]. This original structure was subsequently strengthened by the Amsterdam and Nice Treaties.

The former introduced the protocol on subsidiarity, that preceded the one that was attached to the Lisbon Treaty, while the Amsterdam and Nice Treaties strengthened the Committee of Regions, to which – as is well known – the Lisbon Treaty subsequently acknowledged the power to address the Court of Justice for violations of the subsidiarity principle[54]. And finally we cannot overlook the fact that one of the changes made by this latter Treaty to the mentioned protocol is the fact of envisaging that in the course of the procedure for the drafting of the Union's acts, opinions can be expressed also by the regional parliaments[55].

At the symbolic level it must finally be pointed out that the change made to Article 5 of the Lisbon Treaty (now EUT) specifies that the insufficiency that ensures the Union's power

law. This will enable the interests of the regions to be taken more fully into account when regional development programmes and intervention programmes are being drawn up"; *b*) the establishment, in 1988, of the *Consultative Council of Regional and Local Authorities* (Commission decision no 487 of 24 June 1988), consisting of 42 members, holding elected office at regional or local level, grouped into two sections, to voice the interests of the Regions and the interests of the local authorities; *c*) resolution of the European Parliament on the regional policy of the Community and on the role of the Regions, of 18 November 1988: the *Community Charter for Regionalization*. (*GUCE*, 19.12.1988, n. 329), which raised to the level of institution regional bodies by the Member States)or, in any case, the conservation of bodies of this type) (Article 2), but it also set the essential coordinates of such bodies namely: legal personality (Article 3 (3)), being endowed with legislative power (Article 11), existence of directly elected representative assemblies and governments wth democratic legitimation (Articles 6, 7 and 9).

[51] This occurred by removing the reference to national Government from Article 146 TCE. On this point: Cfr. CEREXHE, *Les Communautés et les Régions dans l'ordre juridique international et dans l'ordre juridique européen*, in MIRANDA (edited by), *Perspectivas constitucionais: nos 20 anos da Constituição de 1976*, vol I, Coimbra 1996, 784 s., who recalled the initiative taken on this issue by Belgium after its regionalization.

[52] Article 198A EEC Treaty. On how it came about, cfr.: TIZZANO, *La partecipazione delle Regioni al processo d'integrazione comunitaria: problemi antichi e nuove prospettive*, in *Le Regioni*, 1992, 611 ss.; HOFFSCHULTE, *Kommunale und regionale Selbstverwaltung im Europa der Regionen – Zur Rolle der vierten Ebene in der Europäischen Union*, in KNEMEYER (edited by), *Europa der Regionen - Europa der Kommunen: wissenschaftliche und politische Bestandsaufnahme und Perspektive,* Baden Baden, 1994, 142.

[53] Articles 3B and A, (2). On this issue refer to D'ATENA, *Il principio di sussidiarietà nella Costituzione italiana*, in *Riv.dir.pubbl.com*., 1997, 603 ss. As is well-known, the discipline introduced on this issue by the Maastricht Treaty was partially anticipated by the European Single Act where it refers to environmental protection (see Article 130R, (4), EEC Treaty). On this point, among others: GEIGER, R., *Die Stellung der Bundesländer im europäischen Gemeineschaftsrecht und ihre Rechtschutzmöglichkeiten gegen Rechtsakte der Gemeinschaft*, in KREMER (edited by), *Die Landesparlamente im Spannungsfeld zwischen europäischer Integration und europäischem Regionalismus*, München, 1988, 62 s.; ERASMY, SÜLLWALD, *Zur Justitiabilität des Subsidiaritätsprinzips*, in *Arbeitgeber*, 1994, 127.

[54] Article 8, (2), of the Protocol (2) on the application of the principles of subsidiarity and proportionality.

[55] Article 6 Protocol. On the issue, for all: DE PASQUALE, *L'esercizio di competenze dell'Unione europea e il principio di sussidiarietà*, in *Studi in memoria di Luigi Sico*, Napoli 2011. In generale, sulle prospettive dischiuse alle Regioni: PATERNITI, *Legislatori regionali e legislazione europea. Le prospettive delle Regioni italiane nella fase ascendente di formazione del diritto dell'UE dopo il Trattato di Lisbona*, Torino 2012.

to act under the subsidiarity principle is to be verified by taking into account also the regional and the local levels. I am speaking of a symbolic innovation, since it is not reasonable to doubt that, even in the past, the Union would never act where circumstances warranted action by the central levels of government of the Member States, or by the Regional and local bodies operating within the State[56].

One last note: the case law of the Court of Justice, that initially did not seem to particularly appreciate the principle of subsidiarity subsequently gave evidence that it was taking it seriously. I am referring in particular to the judgment of 8th June 2010, in C. 58/'08, the Vodafone case, and to the judgment of 12th May 2011 in C-176/09, on the matter of airport rights.

It is true that neither decision acknowledges in the specific cases that the principle was violated. However they, and even more so the conclusion of the general lawyers Poiares Maduro and Mengozzi), reflect serious efforts to search for criteria enabling it to be applied.

As regards the national aspect, it must be pointed out that with the reform of Title V of the Italian Constitution, an embarrassing situation was overcome. I am referring to the circumstance (that need not be recalled here) in which the Italian Constitution, unlike the Constitutions of the other Member States, did no contain any mention of the process of European integration[57]. Paraphrasing Ipsen's words, it was "*Communitarily blind*".

As is well-known, however, with the reform of Title V, the situation changed radically. Indeed, even though during the reform process the idea of introducing into the Constitution a comprehensive body of rules on the phenomenon (through *Europaartikeln* similar to those that are found in the German fundamental law[58] and in the Austrian constitution[59]) was set aside, the new Title V does include mention of the European legal system that were unthinkable in the past, hence setting aside the original *blindness*. With regard to written law, of central importance is the principle that had already been brought to the fore in the case law of the Constitutional Court, namely "compliance with the constraints deriving from the Community legal Order" that Article 117 (1) states with reference to State and Regional legislation.

What is to be added here is that most of the "European" regulations introduced by the reform of Title V concerns the position of the Regions vis-à-vis the Union's policies.

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[56] For this observation, formulated with reference to the similar provision contained in the Rome Treaty of 2004 (stopped – as everyone knows – because of the "no" expressed in the referendum by France and Holland): D'ATENA, *Modelli federali e sussidiarietà nel riparto delle competenze normative tra l'Unione europea e gli Stati membri*, in *Il dir. dell'U.E.*, 1/2005 (also, *Costituzionalismo multilivello e dinamiche istituzionali*, Torino, 2007).

[57] On this aspect and on its causes (and also on the winding solution found to solve the problem): D'ATENA, *Le Regioni e l'Europa*, Report presented at the 8th National Conference on regional studies, sponsored y the Regional Council of Liguria (Genova 25-26.1.2002), in AA.VV., *Le Regioni tra riforma amministrativa e revisione costituzionale*, Rimini 2002 (nonché in *Quaderni regionali*, n. 2/2002 ed in D'ATENA, *Le Regioni dopo il* Big Bang, cit.)

[58] Art. 23 GG.

[59] Artt. 23a, 23b, 23c, 23d, 23e, 23f, 23g, 23h, 23i, 23j, 23k Cost. Fed.

The new discipline does not restrict itself to expressly imposing on the regional legislator – as was noticed earlier – the duty to comply with European acts (and of course with State acts). It acknowledges that the Regions have a role in the bottom-up and top-down Community decision-making processes, attributing to them[60], for the subjects over which they have competence, the power to participate "in the decisions designed to form the Community regulatory acts", and the power to carry out the regulatory adn administrative activities downstream from them (respectively evoked by the twofold reference to the *implementation* and *execution* of the acts of the European Union) [61]. Powers, we might add, that are offset, in the name of the value of unity, by the most welcome provision of substitute powers for the State, for cases of "non fulfilment" or "failed compliance" by the Regional bodies of their obligations deriving from the European order[62].

9. Two parallel evolutions: from the competence on competence (and from the hegemony of national interest) to the procedural interpretation of the principle of subsidiarity.

If one tries to capture the overall meaning of the processes outlined above, it may be noted that the tensions among the three elements remain (and it could not be otherwise). What differs are the techniques used to govern them.

Initially the techniques used for this purpose were unquestionably pro-centre in both orders: the domestic and European legal orders. They found expression in recognizing that the centre (namely the State and the Community) had a sort of competence on competence.

In the State order, the *deus ex machina* was national interest. In the name of national interest matters were subject to legislative redefinition, Regional powers were eroded on grounds of setting fundamental principles, the vertical breakdown of legislative powers was overidden enabling the State to adopt detailed compulsory regulations. And more in general, national interest was invoked to justify State interference in areas over which the Regions had competence.

In the Community system the channels were different but the results the same.

For instance the Community's prerogative to choose whether to issue a directive or a regulation put it in a condition to unilaterally modulate the relationship between its powers and those of the States[63]. Indeed it is evident that if the supranational legislation intervenes with a directive, it leaves room of manoeuvre for the domestic legislator (State or Regional), whereas if its act is a regulation the only residual space left is administrative execution. Think of the special-purpose powers envisaged by the treaties (and above all by the EEC Treaty), by

[60] And obviously also the two Autonomous Provinces of Trento and Bolzano

[61] Article 117, (5).

[62] Respectively provided for in Article 117, (5), and Article 120, (2).

[63] See articles 43.2.III; 49.1; 87.1 EC Treaty (original wording).

virtue of which the European institutional level could adopt all measures *necessary, desirable or useful*, to achieve the goals of the treaty (hence it being legitimated to define the scope of its power by exercising that power). And finally think of the many teleological statements found in the corpus and in the preamble of the Treaty, setting such goals as the elimination of barriers that divide Europe, the defence of peace and freedom, ironing out the regional imbalances, improving life-style, and equating living and working conditions. Indeed thanks to the special-purpose powers mentioned above and thanks to what was at times called the power to make minor revisions of the Treaty, as per Article 235[64], such statements make sure that not many sectors of public actions would lie outside the scope of power of the Community.

Hence the remarkable amount of *acquis communautaire* that was produced up to the Maastricht Treaty.

In we compare this state of affairs with the current situation, it is evident that, at both national and European levels, there has been an increase in the devices that protect the periphery (namely Member States and sub-state bodies operating within the States). And also that the techniques used for this purpose have many points in contact.

In particular, reference is being made to the extensive use of the principle of subisidarity, of being able to have recourse to justice and proceduralization of actions, with the involvement of the periphery in the decision-making processes that occur at the central level (suffice it to recall the address inaugurated by Judgment 303/2003 of our Constitutional Court and the Protocol on the application of the subsidiarity and proportionality principles, further strengthened by the Lisbon Treaty) [65].

If we were to summarize in a nutshell the overall meaning of this process, we might say, echoing the title of a pioneering study by Sergio Bartole[66], that at the level of constitutional and pact-based disciplines, in the relationship involving units, autonomies and supranational integrations, the logic of supremacy is no longer the exclusive logic because it is supported (and to some respects replaced) by the philosophy of co-operation.

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[64] Regarding the historical importance of this rule, see, for references and summary general remarks: CARUSO, *Considerazioni generali su unificazione e uniformizzazione delle legislazioni statali in diritto comunitario*, in PICONE (edited by), *Diritto internazionale privato e diritto comunitario*, Padova 2004, 7 s

[65] D'ATENA, *Modelli federali e sussidiarietà nel riparto delle competenze normative tra l'Unione europea e gli Stati membri,* in *Dir. U.E.*, 2005 (with reference to the Rome Treaty of 2004, that as said earlier never entered into force, but that is of interest for many of the aspects dealt with here). As regards the progressive use of proceedings in the European legal system: ID., *Sussidiarietà e sovranità*, in AA.VV, *La costituzione europea* (Annuario 1999 dell'Associazione italiana dei costituzionalisti – AIC), Padova 2000, nonché ID., *In tema di presidi procedimentali del principio di sussidiarietà*, in AA.VV. *Sovranazionalità europea: posizioni soggettive e normazione*, n. 7 dei Quaderni del Consiglio di Stato, Torino 2000.

[66] BARTOLE, *Supremazia e collaborazione nei rapporti tra Stato e Regioni*, in *Riv.trim.dir.pubbl.*, 1971