



SANT'ANNA LEGAL STUDIES

STALS RESEARCH PAPER 2/2011

Giuseppe Martinico

The impact of “regional blindness” on the Italian Regional State

Sant'Anna School of Advanced Studies

Department of Law

<http://stals.sssup.it>

ISSN: 1974-5656

The impact of “regional blindness” on the Italian Regional State

Giuseppe Martinico*

Abstract

To what extent do Italian courts adapt the national legal instruments (principles, rules and legal techniques) regarding state structure to the requirements of EU law? This paper aims to give an answer to this question by providing an overview of the most emblematic cases of “re-adaptations” operated by the Italian courts in order to ensure the respect of the structural principles of EU law. In doing so, I will distinguish two kinds of principles/rules (i.e. normative enunciations) and instruments/techniques (here understood as operative emanations of the normative enunciations) originally conceived for other goals and in a second moment used by the Italian Courts in order to comply with the EU law requirements.

The first group is composed of those principles/rules and techniques expressly conceived for governing the relationship between Regions and State, provided with a more substantive (i.e. non-procedural) nature and reshaped over the years by the Italian Constitutional Court.

The second group is composed of principles/rules and techniques characterizing the proceedings before the Italian Constitutional Court (which also serves as final arbiter in the conflicts between Regions and State) that are provided with a genuine procedural nature and that have been used, over the years, by the Italian Constitutional Court in order to guarantee first of all the supremacy of the constitution and, episodically, the primacy of EU law. These principles and techniques do not concern exclusively the relationship between State and Regions but they can, of course, be used in order to guarantee the respect of EU law even in cases involving regional legislation.

Keeping this mind I have structured this contribution as follows:

First, I will explain the reasons why research like this is “difficult”, while secondly I will move to the analysis of the two groups of legal instruments mentioned above. Some final remarks will be presented at the end of the paper.

Key-words

Europeanization- Italy- Regions- Italian Constitutional Court- regional blindness

*García Pelayo Fellow, Centro de Estudios Políticos y Constitucionales, Madrid; Max Weber Fellow, European University Institute, Florence (2010-2011). Researcher at the Centre for Studies on Federalism, Turin; Adjunct Professor, Scuola Superiore Sant'Anna, Pisa. I would like to thank Giacomo Delledonne, Filippo Fontanelli and Marco Mazzarella for their comments and suggestions. The usual disclaimers apply.

The impact of “regional blindness” on the Italian Regional State

Giuseppe Martinico

Overview of the research

To what extent do Italian courts adapt the national legal instruments (principles, rules and legal techniques) regarding state structure to the requirements of EU law? This paper aims to give an answer to this question by providing an overview of the most emblematic cases of “re-adaptations” operated by the Italian courts in order to ensure the respect of the structural principles of EU law. In doing so, I will distinguish two kinds of principles/rules (i.e. normative enunciations) and instruments/techniques (here understood as operative emanations of the normative enunciations) originally conceived for other goals and in a second moment used by the Italian Courts in order to comply with the EU law requirements.

The first group is composed of those principles/rules and techniques expressly conceived for governing the relationship between Regions and State, provided with a more substantive (i.e. non-procedural) nature and reshaped over the years by the Italian Constitutional Court.

The second group is composed of principles/rules and techniques characterizing the proceedings before the Italian Constitutional Court (which also serves as final arbiter in the conflicts between Regions and State) that are provided with a genuine procedural nature and that have been used, over the years, by the Italian Constitutional Court in order to guarantee first of all the supremacy of the constitution and, episodically, the primacy of EU law. These principles and techniques do not concern exclusively the relationship between State and Regions but they can, of course, be used in order to guarantee the respect of EU law even in cases involving regional legislation.

Keeping this mind I have structured this contribution as follows:

First, I will explain the reasons why research like this is “difficult”, while secondly I will move to the analysis of the two groups of legal instruments mentioned above. Some final remarks will be presented at the end of the paper. Generally speaking, my main idea is that EU law has had a certain impact on the relationship between State and Regions in Italy, especially looking at the seasons of the principle of competence, that has been understood more and more as referring to the idea of “legislative preference” rather than as to the existence of a “legislative reserved domain”¹. Other evidence of the impact of EU law can be found in the progressive adaptation of instruments born in the administrative law domain (and conceived in order to solve problems connected to the

¹ L.Paladin, *Le fonti del diritto italiano*, Il Mulino, Bologna, 2000, 93 ff.

pathology of administrative acts) to the sphere of application of legislative measures. This can be explained looking at the fungibility between administrative and legislative acts in the logic of national implementation of EU law measures, which is a *leit motiv* of the ECJ's case law and which can be traced back to the original absence of a hierarchy of legal sources in the EC/EU law context².

A preliminary *caveat* should be made before proceeding with the analysis of the instruments and techniques reinvented by the Italian Courts for favouring the respect of the principles of EU law. One should keep in mind the strongly dogmatic nature of the Italian legal system: while the ECJ has been inspired by a strong pragmatism, which gave its case law a certain flexibility, the Italian Constitutional Court is the guardian of a set of principles imbued with the dogmatic flavour of its legal tradition, very refined from a theoretical point of view but also resistant to being reshaped. Bearing this in mind, one can appreciate the efforts made by both courts in their attempt to carry out a sort of convergence, renouncing, at least partly, their original positions (dualism as for the Italian Constitutional Court and monism for the ECJ).

This premise makes clear the focus of the paper. Given the unitary system of courts existing in Italy, and given the particular role of arbiter of conflicts between State and Regions that has to be attributed to the Italian Constitutional Court, I am going to focus on its case law when developing my reasoning in these pages. This also explains the attention paid to the structure of the constitutional *principaliter* proceedings in the second part of the work, *principaliter* proceedings being the arena of the legislative conflicts occurring between State and Regions. Obviously, this does not mean that “common” courts (i.e. ordinary and administrative courts) have not readapted legal concepts under pressure from EU law, an example is given by the administrative courts, as pointed out by the domestic literature.³

Research like this presents itself as very problematic for at least two reasons: the well known principle of “territorial blindness” of the EU, and the less studied “procedural impermeability” that characterizes the case law of the Italian Constitutional Court.

Territorial blindness refers to the fact that, traditionally, from a “formalistic” point of view, the Regions have been neglected in the EU law context. To express such a situation, German constitutional lawyers use the formula “*Landesblindheit*”⁴ (legal blindness towards the territorial subnational entities or simply territorial blindness). This was confirmed in the Treaties (specifically

²G.Gaja, entry: “Fonti comunitarie”, *Digesto delle Discipline Pubblicistiche*, VI, UTET, Torino, 1991, 436 ff.

³F. Cortese, “ECJ and Administrative Courts in EU Member States: Towards a Common Judicial Reasoning?” in F. Fontanelli, G. Martinico and P. Carozza (eds), *Shaping Rule of Law through Dialogue. International and Supranational Experiences*, Groningen: Europa Law Publishing, 2010, 257-271; M. Gnes, “Giudice amministrativo e diritto comunitario” 1999 *Riv. trim. dir. pubbl.*, 331 ff; N. Pignatelli, “L'illegittimità comunitaria dell'atto amministrativo”, *Giur. cost.*, 2008, 3635 ff.

⁴H.P. Ipsen, “Als Bundesstaat in der Gemeinschaft”, E. von Caemmerer-H.J. Schlochauer- E. Steindorff (eds), *Probleme des europäischen Rechts: Festschrift für Walter Hallstein*, 1966, Bonn, 248.

in the former Article 10 ECT), where it can be seen that the subjects of the Community legal order are the states, as holders of the duty to collaborate with each other, which is instrumental for guaranteeing the effectiveness of the supranational law. It could well be argued that this “regional neglect” constitutes just one “element” of the democratic deficit of the EU.

Starting from a “broad” concept of the democratic gap⁵ (i.e. focused not only on the question of the EU Parliament’s powers) we can in fact conceive the absence of a strong legal *status* for the Regions as one of the most important “constitutional wounds” of the EU, even after the coming into force of the Lisbon Treaty. There are a number of reasons for that: the internationalist origin of the European enterprise, the heterogeneity, in terms of composition, of the Committee of Regions, and the lack of specific remedies for them in order to challenge possible violations of their prerogative. Despite their unclear status under EU law, Regions play a fundamental role in the implementation of the multilevel policies as the example of the cohesion policies demonstrate.

Procedural impermeability refers to the general reluctance of the Italian Constitutional Court to be involved in interpretative questions that, directly or indirectly, may have to do with EU law. As we will see in the second part of this paper, the origin of this doctrine can be traced back to the post-*Granital*⁶ scenario, when the Italian Constitutional Court decided to entrust the common judges with the role of natural guardians of the *Simmenthal* doctrine.⁷

I The substantive principles concerning the relationship between State and Regions

The principle of competence

According to the principle of conferral of competences,⁸ the State and the Regions can only act within the limits of the competences conferred on them by the Constitution to attain the objectives

⁵ R. Bellamy, “Still in Deficit: Rights, Regulation and Democracy in the EU”, *European Law Journal*, 2006, 725-742; B.Crum, “Tailoring Representative Democracy to the European Union: Does the European Constitution Reduce the Democratic Deficit?”, *European Law Journal*, 2005, 452-467; A. Follesdal- S. Hix, “Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik”, *Journal of Common Market Studies*, 2006, 533-562; G. Majone, “Europe’s ‘Democratic Deficit’: The Questions of Standards”, *European Law Journal*, 1998, 5-28; A. Moravcsik, “In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union”, *Journal of Common Market Studies*, 2002, 603-24; J.H.H. Weiler, “Bread and Circus: The State of European Union”, *Columbia Journal of European Law*, 1998, 223-24.

⁶ Corte Costituzionale, sentenza n. 170/1984. *Granital*: 1984 CMLRev 756. About this see: M. Cartabia, *Principi inviolabili e integrazione europea*, Giuffrè, Milan 1995.

⁷ ECJ Case C-106/77 *Simmenthal* [1977] ECR I-62.

⁸ On the principle of competence in the Italian legal system, see: G. Zanobini, “Gerarchia e parità tra le fonti”, in *Studi in onore di S. Romano*, vol. I, Padua, 1939, 303; V. Crisafulli, “Gerarchia e competenza nel sistema costituzionale delle fonti”, in *Rivista Trimestrale Diritto Pubblico*, 1960, 775 ff; V. Crisafulli, *Lezioni di diritto costituzionale*, II, 1, *L’ordinamento costituzionale italiano (le fonti normative)*, Padua, 1993, 234 ff; A. Moscarini, *Competenza e sussidiarietà nel sistema delle fonti*, Cedam, Padua, 2003; L. Paladin, *Le fonti del diritto italiano*, Il Mulino, Bologna, 2000, 93 ff

set out in the fundamental charter. In Italian constitutional law, there are three typologies of competences.⁹ The first are competences exclusive to the State, which are listed in Article 117, paragraph 2, of the Constitution. The second are shared (or concurring) competences where State and Regions co-legislate, a “portion” of the matter being acknowledged to each. It is up to the State to give the fundamental principles of the legislative regime by means of legislation known as “framework law” (c.d. “legge-quadro”), and it is up to the Region to fill in (“complete”) the framework by giving the detailed provisions, which should be consistent with the fundamental principles laid down by the State act. As is evident, this model of “shared competence” differs from the German pattern of *konkurrierende Gesetzgebung*.¹⁰ In Germany, when the State and its *Länder* share a competence, the *Land* “shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law” (Art. 72 Const, *Grundgesetz*). According to the Italian model, instead, the activities of the two actors are conceived of as “complementary”. Thirdly, still according to Article 117 of the Constitution,¹¹ the Regions have

⁹ A. D’Atena, “Materie legislative e tipologia delle competenze”, *Quaderni Costituzionali*, 2003, 15-24.

¹⁰ On this distinction, see A. Anzon, “La delimitazione delle competenze dell’Unione Europea”, http://www.associazionedeicostituzionalisti.it/materiali/anticipazioni/competenze_ue/index.html.

¹¹ Art. 117 provides:

“Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.

The State has exclusive legislative powers in the following matters:

(a) foreign policy and international relations of the State; relations between the State and the European Union; right of asylum and legal status of non-EU citizens;

(b) immigration;

(c) relations between the Republic and religious denominations;

(d) defence and armed forces; State security; armaments, ammunition and explosives;

(e) the currency, savings protection and financial markets; competition protection; foreign exchange system; state taxation and accounting systems; equalisation of financial resources;

(f) state bodies and relevant electoral laws; state referenda; elections to the European Parliament;

(g) legal and administrative organisation of the State and of national public agencies;

(h) public order and security, with the exception of local administrative police;

(i) citizenship, civil status and register offices;

(l) jurisdiction and procedural law; civil and criminal law; administrative judicial system;

(m) determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory;

(n) general provisions on education;

(o) social security;

(p) electoral legislation, governing bodies and fundamental functions of the municipalities, provinces and metropolitan cities;

(q) customs, protection of national borders and international prophylaxis;

(r) weights and measures; standard time; statistical and computerised coordination of data of state, regional and local administrations; works of the intellect;

(s) protection of the environment, the ecosystem and cultural heritage.

Concurring legislation applies to the following subject matters: international and EU relations of the Regions; foreign trade; job protection and safety; education, subject to the autonomy of educational institutions and with the exception of vocational education and training; professions; scientific and technological research and innovation support for productive sectors; health protection; nutrition; sports; disaster relief; land-use planning; civil ports and airports; large transport and navigation networks; communications; national production, transport and distribution of energy; complementary and supplementary social security; harmonisation of public accounts and co-ordination of public finance and taxation system; enhancement of cultural and environmental properties, including the promotion and organisation of cultural activities; savings banks, rural banks, regional credit institutions; regional land and

legislative powers in all subject matters that are not expressly covered by State legislation (i.e., not included in the list of express powers laid down in the same Article 117), and these competences should be understood as “exclusive” to the Regions. Following the constitutional reform of 2001, the Regions have been invested with a great amount of competence. At least, so it seems on paper looking at the Constitution. The transformation of the Regions into “residual legislators” represents the most important novelty in the constitutional reform of 2001, which has (potentially) contributed to a sort of Copernican revolution. However when looking at the real situation, both some judgments of the Italian Constitutional Court and the presence of “transversal matters” (matters that are not real matters¹² but rather clauses allowing the State to intervene in different ambits, for example, the so-called legislation on the “*determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory*”, which can evidently serve as a Trojan horse for the centralization of competences) a very different picture seems to emerge.

Having recalled the different types of competences, looking at the history of the Italian Regions in relation to Europe one can immediately realize how European commitments have reshaped the original distribution of competences.¹³ Many instances of this can be found in the case law of the Constitutional Court as we will see in the next sections of this paper. The engine of this process has been the territorial blindness mentioned above. Since the State is the only entity

agricultural credit institutions. In the subject matters covered by concurring legislation legislative powers are vested in the Regions, except for the determination of the fundamental principles, which are laid down in State legislation.

The Regions have legislative powers in all subject matters that are not expressly covered by State legislation.

The Regions and the autonomous provinces of Trent and Bolzano take part in preparatory decision-making process of EU legislative acts in the areas that fall within their responsibilities. They are also responsible for the implementation of international agreements and EU measures, subject to the rules set out in State law which regulate the exercise of subsidiary powers by the State in the case of non-performance by the Regions and autonomous provinces.

Regulatory powers shall be vested in the State with respect to the subject matters of exclusive legislation, subject to any delegations of such powers to the Regions. Regulatory powers shall be vested in the Regions in all other subject matters. Municipalities, provinces and metropolitan cities have regulatory powers as to the organisation and implementation of the functions attributed to them. Regional laws shall remove any hindrances to the full equality of men and women in social, cultural and economic life and promote equal access to elected offices for men and women.

Agreements between a Region and other Regions that aim at improving the performance of regional functions and that may also envisage the establishment of joint bodies shall be ratified by regional law.

In the areas falling within their responsibilities, Regions may enter into agreements with foreign States and local authorities of other States in the cases and according to the forms laid down by State legislation”.

¹² F. Benelli, *La «smaterializzazione delle materie». Problemi teorici ed applicativi del nuovo Titolo V della Costituzione*, Giuffrè, Milan, 2007; F. Benelli, “L’Ambiente tra ‘smaterializzazione’ della materia e sussidiarietà legislativa”, www.forumcostituzionale.it/site/index3.php?option=content...; R. Bin, “Materie e interessi: tecniche di individuazione delle competenze dopo la riforma del Titolo V”, paper presented at the workshop organized by the IDAIC – Siena, 25-26 November 2005, 5; P. Carrozza, “Le ‘materie’: uso delle tecniche di enumerazione materiale delle competenze e modelli di riferimento del ‘regionalismo di esecuzione’ previsto dal nuovo Titolo V della Costituzione”, in G.F. Ferrari and G. Parodi (eds.), *La revisione costituzionale del titolo V tra nuovo regionalismo e federalismo. Problemi applicativi e linee evolutive*, Cedam, Padua, 2003, 69-124.

¹³ T. Groppi, “L’incidenza del diritto comunitario sui rapporti Stato-regioni in Italia dopo la riforma del Titolo V”, http://www.unisi.it/ricerca/dip/dir_eco/grop.htm; M.P. Chiti, “Regioni e integrazione europea”, in *Reg. gov. loc.*, 1994, 547 ff.; A.D’Atena, “Il doppio intreccio federale: le regioni nell’Unione europea”, *Le Regioni*, 1998, 1401 ff. Recently P.Zuddas, *L’influenza del diritto dell’Unione europea sul riparto di competenze legislative fra Stato e Regioni*, Padua, Cedam, 2010.

responsible in case of non-compliance with the requirements of EU law, in many cases the European Court of Justice (ECJ)¹⁴ has been shown not to care about the domestic separation of competences when dealing with cases of non-compliance. This in turn has pushed the Italian actors to force the original distribution of competences in order to avoid sanctions stemming from belonging to the EU.¹⁵

Just to be clear, the Italian Constitutional Court, as we will see, has been always open to the reshaping of the list of competences listed in the different versions of Article 117. We could say that the European mandate has only increased such a predisposition, giving another reason to the Italian Constitutional Court to centralize competences in favour of the State¹⁶

When looking at the role of the Regions in the implementation phase, one should distinguish between administrative and legislative activities. As for the administrative side of the implementation, it has been acknowledged that Regions have the power to implement (here implementation should be distinguished from transposition, of course) regulations (Art. 6 D.P.R. no. 616/1977). There is recognition of a general function of address and coordination for the administrative functions performed by the Regions¹⁷ which can be exercised when the requirements

¹⁴ See cases 169/82, *Commission v Italy* [1984] ECR 1603 ff. and 168/85, *Commission v Italy* [1986] ECR 2945. On this, see Groppi, “L’incidenza”; G. Guzzetta, *Costituzione e regolamenti comunitari*, Milan, 1994, 171 ff.; M. Cartabia and V. Onida, “Le regioni e la Comunità europea”, in M.P. Chiti and G. Greco (eds.), *Trattato di diritto amministrativo*, Giuffrè, Milan, 1997, 605 ff.

¹⁵ “Regions’ activities – or lack of activities – in their areas of competence have sometimes left Italy temporarily out of compliance with EU rules. This is a problem for the national government, as it cannot then plead the existence of provisions, practices or circumstances in its internal legal system in order to justify a failure to comply with EU obligations and time limits (Case C-33/90, Case C-388/01). Indeed, infringement procedures against Italy have been initiated several times over the last decade in fields of regional or concurrent competence; that is, in policy areas where the fulfilment of European obligations requires legislative or administrative acts by the regions. This has been particularly troublesome in environmental matters (e.g., cases C-225/96, C-87/02C-466/99, C-248/02, C-139/04), but has also affected trade fairs, markets and exhibitions (Case C-439/99). The Eur-infra database (<http://eurinfra.politichecomunitarie.it/ElencoAreaLibera.aspx>), concerning pending cases at the European Court of Justice, supports this conclusion. Indeed, in at least six cases out of 40 concerning environmental policies, non-compliance was provoked by regional activity. Conflicts between regioni and stato on environmental issues often end up before the Corte Costituzionale. In order to prevent non-compliance with EU obligations, the stato has been vested with the power to execute by substitution in lieu of the regione (Articles 117.5 and 120 Const., Law No. 11/2005). In some cases, the stato is even given the authority to act in a preventive way (for instance, under the Constitutional Court’s guidelines (Judgment No. 272/2005), the stato could legitimately adopt an urgency instrument in order to implement EU obligations (such as the milk quota), without involving the Conferenza Stato-Regioni. National acts aimed at avoiding non-compliance are temporary measures, and can be substituted for by properly adopted regional acts” P. Bilancia-F. Palermo-O. Porchia, “The European Fitness of Italian Regions”, *Perspectives on Federalism*, Vol. 2, issue 2, 2010, E-122-174, E-167, http://www.on-federalism.eu/attachments/063_download.pdf.

¹⁶ Groppi, “L’incidenza”.

¹⁷ On this function see: L. Paladin, “Sulle funzioni statali di indirizzo e di coordinamento nelle materie di competenza regionale”, in *Giur. Cost.*, 1971, I, 189 ff.; F. Bassanini, “Indirizzo e coordinamento delle attività regionali”, in D. Serrani (ed.), *La via italiana alle regioni*, Giuffè, Milano, 1972, 43 ff.; L. Carlassare, “I problemi dell’indirizzo e coordinamento: le soluzioni giurisprudenziali”, *Le Regioni*, 1985, 29 ff.; G. Falcon, “Spunti per una nozione della funzione di indirizzo e coordinamento come vincolo di scopo”, *Le Regioni*, 1989, 1184 ff.

of EU law involve the necessity of unitary interest over the whole of the national territory (Art. 9, law no. 86/1989¹⁸).

As for the legislative implementation, the issue is much more complicated. Originally the State responsibility in cases of non-compliance (D.P.R. no. 4/1972) convinced it to centralize the competences on State organs, with the consequent alteration of the regional competences. Later (Art. 6 D.P.R. no. 616/1977) the Regions were granted the power to implement EC directives with regional law, but before doing so they had to wait for a State law for the reception of such directives, including the fundamental principles of the matter plus some derogable provisions. We will see this point in the next section when dealing with the issue of *cedevolezza* and the more recent evolutions of the Italian legislation which acknowledge the possibility that the Regions could implement EC directives directly, although with more than one *caveat*.

How did the Italian Constitutional Court react to this shift of competences that occurred in name of EC law commitments? First, the Italian Constitutional Court seemed to admit the possibility that EC law requirements could *de facto* lead to a particular form of shift in the original distribution of competences in the name of the State responsibility for compliance with EC law requirements.¹⁹ In *sentenza* no. 224/1994²⁰ the Italian Constitutional Court pointed out how the regional competences are subject to limits introduced by EC law, saying that sometimes EC law can render the conditions and prerequisites of the regional competence inoperative. In *sentenza* no. 399/87²¹ the Italian Constitutional Court said that Community bodies are not required to respect domestic law fully, even that concerning the distribution of competences between State and Regions (at the same time the Italian Constitutional Court stressed the necessity to respect fundamental principles of the Italian constitutional system- the so-called “counter-limits”²²). In that case, within the frame of the Integrated Mediterranean Programmes, EC legislation has given the Regions functions that differ in part from those included in the catalogue of competences in the national Constitution.

¹⁸ Law 86/89 (“Legge La Pergola”) set up a complex mechanism aimed at ensuring the implementation of EU law and introduced an annual Community law (“legge comunitaria”). “Legge La Pergola” has been replaced by law n. 11/2005 (“Legge Buttiglione”).

¹⁹ See *sentenza* no. 382/1993 and *sentenza* no. 632/1988. Groppi, “L’incidenza”; P. Caretti and G. Strozzi, “Luci ed ombre nella più recente giurisprudenza costituzionale in materia di adempimento agli obblighi comunitari”, in *Le regioni*, 1988, 196 ff. For a *prima facie* opposite conclusion, see *sentenza* no. 124/1990.

²⁰ Corte Costituzionale, *sentenza* no. 224/1994, www.cortecostituzionale.it.

²¹ Corte Costituzionale, *sentenza* no. 399/87, www.cortecostituzionale.it.

²² On the counter-limits doctrine, see M. Cartabia, “The Italian Constitutional Court and the Relationship between the Italian Legal System and the European Union”, in A. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence*, Hart, Oxford, 1997, 133-146; P. Ruggeri Laderchi, “Report on Italy”, *ibid.*, 147-170. The formula “controlimiti” was used for the first time by P. Barile, “Ancora su diritto comunitario e diritto interno”, in *Studi per il XX anniversario dell’Assemblea costituente*, VI, Firenze, 1969, 49 and ff.

The leading case in this matter is *sentenza* no. 126/1996,²³ where the Italian Constitutional Court pointed out how the implementation of EC norms in the Member States has to take into account their structure (centralized, decentralized, federal). However, in the name of the principle of State responsibility for the implementation of EC law, the Italian Constitutional Court distinguished between a competence of first instance accorded to the Regions in the ambits of their competence and a competence of second instance accorded to the State. Such a competence of second instance permits the intervention of the State but may not create seizure of the competences, rather it justifies supplementary substitutive interventions aimed at defending the State itself from the risk of non-compliance due to regional omissions or actions.²⁴ This scheme explains why it is also recognized that the State might challenge the constitutionality of regional laws that contrast with EC law obligations, this being an exception to the general rule of procedural impermeability (see *infra*).

Sentenza no. 126/1996 represented the outcome of a long jurisprudential journey, whereby the Italian Court specified, once again, the possibility of an alteration of the normal distribution of competences in the name of unitary reasons connected with the compliance with EC/EU requirements (see, *ex plurimis*, *sentenza* no. 382/1993 and no. 389/1995²⁵). At the same time it showed how these alterations should be conceived as the exception and not as the rule, trying to “normalize” the otherwise devastating impact of EC law on the national system. In order to balance the constitutional supremacy (the respect of the constitutional distribution of competences) and the primacy of EC law, the Italian system has been forced to adopt or to invent cooperative instruments that can push State and Regions towards specific agreements in this regard. On the other hand, it has forced the Italian Constitutional Court to declare the unconstitutionality of some State laws adopted without respecting these cooperative procedures:²⁶

²³ Corte Costituzionale, *sentenza* no. 126/1996, www.cortecostituzionale.it.

²⁴ “L’attuazione negli Stati membri delle norme comunitarie deve tenere conto della struttura (accentrata, decentrata, federale) di ciascuno di essi, cosicché l’Italia è abilitata, oltre che tenuta dal suo stesso diritto costituzionale, a rispettare il suo fondamentale impianto regionale. Pertanto, ove l’attuazione o l’esecuzione di una norma comunitaria metta in questione una competenza legislativa o amministrativa spettante a un soggetto titolare di autonomia costituzionale, non si può dubitare che...normalmente ad esso spetti agire in attuazione o in esecuzione, naturalmente nell’ambito dei consueti rapporti con lo Stato e dei limiti costituzionalmente previsti nelle diverse materie di competenza regionale..Tuttavia, poiché dell’attuazione del diritto comunitario nell’ordinamento interno, di fronte alla Comunità europea, è responsabile integralmente e unitariamente lo Stato..., a questo – ferma restando, secondo quanto appena detto, la competenza in ‘prima istanza’ delle regioni e delle province autonome – spetta una competenza, dal punto di vista logico, di ‘seconda istanza’, volta a consentire a esso di non trovarsi impotente di fronte a violazioni del diritto comunitario determinate da attività positive o omissive dei soggetti dotati di autonomia costituzionale. Gli strumenti consistono non in avocazioni di competenze a favore dello Stato, ma in interventi repressivi o sostitutivi e suppletivi – questi ultimi anche preventivi, ma cedevoli di fronte all’attivazione dei poteri regionali e provinciali normalmente competenti – rispetto a violazioni o carenze nell’attuazione o nell’esecuzione delle norme comunitarie da parte delle regioni” (*sentenza* no. 126/1996). On this, see Groppi, “L’incidenza cit”.

²⁵ Both available at www.cortecostituzionale.it.

²⁶ *Sentenza* no. 203/2003 and *sentenza* no. 68/2008, both available at www.cortecostituzionale.it.

“The process of European integration has generally affected the traditionally uncooperative relationship between stato and regioni in a positive way. However, a relatively high number of conflicts remain, especially when compared to other European countries. The main conflict-prevention mechanism is the Conferenza stato-regioni, which brings national and regional governments together to draft general policy guidelines or for specific purposes (by means of specialized sub-conferences on varying subjects). The most relevant conflict-resolution mechanism in the case of tension between the central government and the regioni is still provided by the Corte Costituzionale; many cases heard here indeed regard EU affairs. Overall, the court has safeguarded regional prerogatives against stato interference, in part by ruling that it is unconstitutional for the stato to use its coordination role in EU affairs to take competences away from the regioni (Judgment No. 203/2003), at least without the regioni’s consent (Judgment No. 68/2008)”²⁷.

The substitutive powers and *cedevolezza*

Italy has a long tradition of municipal history. The origins of Italian municipalities can be traced back to the Middle Ages (although, of course those “comuni” cannot be compared in terms of functions and role to the current municipalities), as a symptom of urban revolt against the feudal system.²⁸ More recently, further evidence of the long municipal tradition in Italy is that the National Association of Italian Municipalities was set up as early as 1901. Of course the history of Italian municipalities encountered different phases, for instance, their autonomy was largely affected by the fascist centralism, when the National Association of Italian Municipalities was dissolved. In 1946 it was reconstituted and today municipalities represent the basic administrative division in Italy, as provided by Article 118 of the Constitution.

Why am I insisting on Italian *comuni* if this piece is supposed to focus on Regions? Quite simply, because some of the instruments used in the Italian constitutional system in order to coordinate the unitary principle expressed in Article 5 of the Constitution with regional autonomy find their origin in the legislation concerning municipal autonomy. The best example of this is the substitutive power (or replacement power, sometimes also called subsidiary power, *potere sostitutivo*). Until 2001 there was no express mention in the Italian Constitution of EC/EU law obligations and, as is well known, the Italian Constitutional Court used Article 11 of the Constitution in order to find a constitutional basis for explaining the primacy of European law.²⁹

In 2001 a new express mention of EU law obligations was codified in Article 117 of the Constitution, providing: “*Legislative power belongs to the State and the regions in accordance with the Constitution and within the limits set by European Union law and international obligations*”. In

²⁷ P.Bilancia- F.Palermo–O.Porchia, “The European fitness cit”, E-166.

²⁸ See, for instance, M. Ascheri, *La città-Stato*, Il Mulino, 2008.

²⁹ M.Cartabia, “The Italian Constitutional Court and cit”.

the next section we will see that this provision provoked interesting innovations in the Italian Constitutional Court's case law. Soon after the reform, the interpretation of this provision created a division among scholars.³⁰ According to some, Article 117, paragraph 1, would simply codify the pre-existing situation: it would grant a sort of *a posteriori* assent to European primacy³¹ as it was developed by the ECJ and accepted across the European Community. Other scholars, on the other hand, emphasized the importance of the constitutional *status* given to European primacy, and asserted that Article 117 paved the way for the acceptance of the Italian monist thesis.³² However, looking at the wording of Article 117 one can immediately realize how the limitations imposed by EU law obligations apply to both the regional and state legislators, in light of the new distribution of competences carried out by the constitutional reform of 2001.³³

This express reference to EU law obligations explains the rationale of the substitutive power, which was expressly codified in the Constitution in 2001:

*“...The Government can act for bodies of the regions, metropolitan cities, provinces and municipalities if the latter fail to comply with international rules and treaties or EU legislation, or in the case of grave danger for public safety and security, or whenever such action is necessary to preserve legal or economic unity and in particular to guarantee the basic level of benefits relating to civil and social entitlements, regardless of the geographic borders of local authorities. The law shall lay down the procedures to ensure that subsidiary powers are exercised in compliance with the principles of subsidiarity and loyal co-operation”*³⁴

On closer examination, it is possible to find another express reference to the notion of substitutive power in Article 117, par. 5 of the Italian Constitution:

“The Regions and the autonomous provinces of Trent and Bolzano take part in preparatory decision-making process of EU legislative acts in the areas that fall within their responsibilities. They are also responsible for the implementation of international agreements and EU measures, subject to the rules set out in State law which regulate the exercise of subsidiary powers by the State in the case of non-performance by the Regions and autonomous provinces”.

³⁰ For an overview, see R. Chieppa, “Nuove prospettive per il controllo di compatibilità comunitaria da parte della Corte costituzionale”, in *Il Diritto dell'Unione Europea*, 3/2007, 493-511, 499 ff; A. Ruggeri, “Riforma del titolo V e giudizi di “comunitarietà” delle leggi”, 2007, <http://www.associazionedeicostituzionalisti.it/dottrina/ordinamentieuropei/ruggeri.html>.

³¹ C. Pinelli, “I limiti generali alla potestà legislativa statale e regionale e i rapporti con l'ordinamento comunitario”, in *Foro italiano*, V, 2001, 194 ff.

³² F. Paterniti, “La riforma dell'art. 117, 1° co. della Costituzione e le nuove prospettive dei rapporti tra ordinamento giuridico nazionale e Unione Europea”, in *Giur. Cost.*, no. 2/2004, 2101 ff; A. Pajno, “Il rispetto dei vincoli derivanti dall'ordinamento comunitario come limite alla potestà legislativa nel nuovo Titolo V della Costituzione”, in *Le Istituzioni del federalismo*, 2003, 814-842.

³³ For a brief overview of Italian regionalism in English, see: M. Keating- A. Wilson, “Federalism and Decentralisation in Italy”, http://www.psa.ac.uk/journals/pdf/5/2010/930_598.pdf.

³⁴ Article 120.

There has been a huge debate in Italy about the relationship between these two forms of subsidiary powers. They are both forms of substitutive powers, according to scholars, but it is not clear how these two provisions should be coordinated. According to some authors, Article 120 of the Constitution would provide the *genus* of substitutive powers existing in the constitutional system, while Article 117 would refer to one *species* of the *genus*; it would be a mere specification of Article 120. According to other scholars³⁵, instead, Article 120 would refer to a form of administrative substitution (this would explain why the provision refers to the government), while Article 117 – devoted to the redistribution of legislative competences – would refer to a form of legislative substitution (and this would explain why it mentions the State rather than the government).

As noted above, this is the first constitutionalization of such an instrument, although traces of this power can be found in the legislative regime regarding the municipalities (namely Art. 193 *Testo Unico* 1898; Art.169 and 174 *Testo Unico* 1889; Art. 210 *Testo Unico* 1908; Art. 216 *Testo Unico* 1915³⁶) and confirms how such a power can be traced back to the instruments of control over the activity of municipalities.³⁷

Looking at the Republican era, which started with the coming into force of the new Italian Constitution (1948), another codification of the substitutive power – with express regard to the Italian Regions – can be found in some provisions included in the fundamental charters (“*Statuti*”) of the Special Regions³⁸ and by the measures of implementation of such special statutes (see Art. 50 of

³⁵ For an overview of the debate, see: C.Mainardis, *Poteri sostitutivi statali e autonomia amministrativa regionale*, Giuffrè, Milan, 2007; C. Mainardis, “I poteri sostitutivi statali: una riforma costituzionale con (poche) luci e (molte) ombre”, *Le Regioni*, 2001, 1369 ff.; E.C. Raffiotta, *Gli interventi sostitutivi nei confronti degli enti territoriali*, PhD thesis, University of Bologna, 2008, available at <http://amsdottorato.cib.unibo.it/748/>, 66 ff. L. Buffoni, *La metamorfosi della funzione di controllo nella Repubblica delle Autonomie. Saggio critico sull'art. 120, comma II, della Costituzione*, Torino, Giappichelli, 2007

³⁶ See Raffiotta, *Gli interventi sostitutivi*, 13 ff.

³⁷ On the relationship between the activity of control and the substitutive power, see: F.G. Scoca, “Potere sostitutivo e attività amministrativa di controllo”, in AA.VV. *Aspetti e problemi dell'esercizio del potere di sostituzione nei confronti dell'amministrazione locale*, Giuffrè, Milan, 1982, 17 ff; A. de Michele, “Il potere sostitutivo dello Stato e delle Regioni nel Titolo V, Parte II, della Costituzione, nella legislazione attuativa e nella giurisprudenza”, PhD thesis, University of Bologna, 2007, <http://amsdottorato.cib.unibo.it/122/>.

³⁸ In Italy there are two “kinds” of Regions. Fifteen ordinary Regions and five special Regions are listed in Art. 116 of the Constitution: “*Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige/Südtirol and Valle d'Aosta/Vallée d'Aoste have special forms and conditions of autonomy pursuant to the special statutes adopted by constitutional law. The Trentino-Alto Adige/Südtirol Region is composed of the autonomous provinces of Trent and Bolzano. Additional special forms and conditions of autonomy, related to the areas specified in art. 117, paragraph three and paragraph two, letter l) - limited to the organisational requirements of the Justice of the Peace - and letters n) and s), may be attributed to other Regions by State Law, upon the initiative of the Region concerned, after consultation with the local authorities, in compliance with the principles set forth in art. 119. Said Law is approved by both Houses of Parliament with the absolute majority of their members, on the basis of an agreement between the State and the Region concerned*”. Currently in Italy there a debate about the real “specialty” of these five Regions after the new powers given to the ordinary regions by the constitutional reform of 2001 which gave ordinary regions “*exclusive legislative power with respect to any matters not expressly reserved to state law*”. Important differences between ordinary and special

the *Statuto* of Sardinia and Art. 33 D.P.R. no. 480/1975 concerning Sardinia and Art. 39 of law no. 196/1978; Art. 2, p. 3, D.P.R. no. 182/1982). Just to be clear, all these provisions provide forms of “administrative” substitutive powers or forms of substitution that can be traced back to the relationship between administrations. This is evident especially in view of their municipal origin, while the form of substitutive power governed by Articles 117 and 120 of the Italian Constitution seems to refer to forms of “legislative” substitutive interventions as well but recently the Italian Constitutional Court expressed a different orientation making the picture more complicate³⁹. This is confirmed by Article 8 of law no. 131/2003⁴⁰ (the *legge La Loggia*) which implemented Article 120 by specifying the conditions and the procedure to be followed in case of exercise of the substitutive power.⁴¹

As for the procedure to be followed, both laws provide similar procedures.⁴² The president of the Council of Ministers or the Minister for Community Policy gives a term to comply, and can also ask for the submission of the question to the permanent Conference on relations between the State, the Regions and the Autonomous Provinces of Trento and Bolzano/Bozen in order to arrange the necessary initiatives to be taken. In case of inertia of the interested territorial actors, the president of the Council of Ministers or the Minister for the Community Policies may propose to the Council of Ministers the initiatives to be taken for the exercise of the substitutive power (Art. 10, par. 3, law no. 11/2005; similarly Art. 8 of law no. 131/2003).

Returning to the substantive dimension of the substitutive power, it should be said that, even in the pre-2001 legal scenario – and despite the absence of a constitutional basis – there was room for forms of legislative substitution in spite of the wording of Article 11 of law no. 86/89 which expressly provided the substitutive power of the government in case of the *administrative* inactivity of Regions and Autonomous Provinces (Bolzano/Bozen and Trento). This original provision should

Regions are given by the nature of their fundamental charter (*Statuto*)- because ordinary Regions have fundamental charters approved by their Regional Councils- and by the issue of the financial autonomy, issue connected to the current reform in the field of fiscal federalism. On the Italian reform concerning fiscal federalism, in English, see F. Scuto, “The Italian Parliament Paves the Way to Fiscal Federalism”, *Perspectives on Federalism*, Vol. 2, issue 1, 2010, E-67-88.

³⁹ *Contra*, recently, the Italian Constitutional Court: *sentenza* 361/2010, www.cortecostituzionale.it

⁴⁰ On this, see G. Scaccia, “Il potere di sostituzione in via normativa nella legge n. 131 del 2003. Prime note”, available at www.associazionedeicostituzionalisti.it.

⁴¹ As for the subsidiary intervention mentioned by Art. 117, the implementing measure is represented by law no. 11/2005 (*legge Buttiglione*), available at <http://www.camera.it/parlam/leggi/050111.htm>.

⁴² Art. 10, par. 3, law no. 11/2005: “*Nei casi di cui al comma 1, qualora gli obblighi di adeguamento ai vincoli derivanti dall’ordinamento comunitario riguardino materie di competenza legislativa o amministrativa delle regioni e delle province autonome, il Presidente del Consiglio dei ministri o il Ministro per le politiche comunitarie informa gli enti interessati assegnando un termine per provvedere e, ove necessario, chiede che la questione venga sottoposta all’esame della Conferenza permanente per i rapporti tra lo Stato, le regioni e le province autonome di Trento e di Bolzano per concordare le iniziative da assumere. In caso di mancato tempestivo adeguamento da parte dei suddetti enti, il Presidente del Consiglio dei ministri o il Ministro per le politiche comunitarie propone al Consiglio dei ministri le opportune iniziative ai fini dell’esercizio dei poteri sostitutivi di cui agli articoli 117, quinto comma, e 120, secondo comma, della Costituzione, secondo quanto previsto dagli articoli 11, comma 8, 13, comma 2, e 16, comma 3, della presente legge e dalle altre disposizioni legislative in materia.*”.

be read together with the original wording of Article 6 of law no. 86/89, which did not provide at that time the possibility for the Regions to implement European directives in a direct manner (this power was granted only to the special Regions within the matter of their exclusive competences). In fact, under Article 6 of D.P.R. no. 616/1977, Regions were allowed to implement EC directives only after the entry into force of a State act containing the fundamental principles that should be followed by the regional legislator. At the same time Article 6 provided for this State act the possibility to give some detailed provisions that would have been waived by the forthcoming regional legislation. These norms were considered necessary to guarantee the compliance of the Italian State in case of legislative inertia by the regional legislator, and their legitimacy was supported by the Italian Constitutional Court.⁴³

Later, the Regions were granted the power to implement European legislation directly without waiting for the State act of reception of the directive in the national system (law nos. 183/1987 and 86/1989). However, the Regions were asked to wait for the approval of the first national (annual) Community Act following the notification of the directive before implementing it. This mechanism again resulted in frustrating the power of direct implementation of the Italian Regions.

Finally, thanks to the novelties that came into force with law no. 128/98, the ordinary Regions have been empowered to implement European directives directly. This partly explains why the letter of Article 11 of law no. 86/89 refers only to cases of administrative inactivity.⁴⁴ This reading, in a way, has been supported by the Italian Constitutional Court as well, in its decision no. 425/99.⁴⁵

There is another element that makes this kind of substitutive power in case of non-compliance with the European requirements particular: from the theoretical point of view, the idea of substitution seems to imply the adoption of the substitutive instrument subsequent to inactivity by the Region. However, on closer examination, before the coming into force of law no. 128/98, Article 9 of law no. 86/89 referred to a form of “preventive substitution”, since it provided for State intervention initially, with a national act composed of two kinds of provisions. A first group of provisions gave the fundamental principles that could not be waived by the regional legislation and a second group of specific provisions (“disposizioni di dettaglio”) from which Regions could deviate by means of their regional laws. According to this scheme, even in the case of regional

⁴³ Corte Costituzionale, *sentenza* 182/87, www.cortecostituzionale.it.

⁴⁴ On this story, see: G.U. Rescigno, “Attuazione regionale delle direttive comunitarie e potere sostitutivo dello Stato”, *Le Regioni*, 2002, 735 and Groppi, “L’incidenza”.

⁴⁵ Corte Costituzionale, *sentenza* 425/99, www.cortecostituzionale.it.

inactivity, the requirements of EC law would have been satisfied thanks to the detailed provisions included in the national law.

On the contrary, if the Regions had approved a regional law, these national detailed provisions would have “ceded”, giving up their intrusion in that portion of the shared competence belonging to the regional legislator, and the hand of the State legislator would “draw back”, leaving room for the new regional regime. This mechanism is called in Italy *cedevolezza*⁴⁶ (from the Italian “cedere”, “to cede”) and has represented a *fil conducteur* of Italian regionalism since 1970, the year of the effective birth of the ordinary regions. This mechanism works in the field of shared competences and it can be seen as a technique devised by the Italian State legislator (and supported by the Italian Constitutional Court over the years) in order to avoid the danger of legislative gaps. In order to challenge any possible *horror vacui*, the State legislator has been granted the power to make “temporary” detailed provisions that represent an intrusion in the legislative competences of the Regions. These have been upheld by the Italian Constitutional Court⁴⁷ because of their “temporary” and “supplementary” nature, since they are supposed to “disappear” magically once the Regions exercise their portion of legislative competence. In case of regional inactivity, as said above, the *horror vacui* is avoided thanks to the presence of a (State) regulation. As we saw, in the Italian context, by “shared competences” one refers to the sphere of competence that has to be completed or filled in by coordination between two legislative actors that participate, according a hypothetical division of labour, in the exercise of the legislative power.

This “division of labour” refers to the fact that the State act intervening in a matter characterized by shared competences was supposed to give, primarily, the “fundamental principles” (“*principi fondamentali*”) that should then be followed by the Regional legislator, which should in turn build on these principles by passing detailed legislation. According to this scheme, it is possible to distinguish the idea of shared competences applied in Italy from that experienced in other contexts, like Germany, for instance.

One could connect the emergence of *cedevolezza* to the necessity of guaranteeing legislative continuity in intra-temporal relationships. Since the birth of the Italian (ordinary) Regions implied the transfer of competences, this meant that previously the matters within the new regional jurisdiction were already subject to State legislation. Considering these previous State acts as automatically invalid would have led to the risk of legislative gaps pending the passing of new regional acts. As we can see, according to this logic, *cedevolezza* is justified on the basis of the

⁴⁶ On *cedevolezza*, see: M. Motroni, *Le norme cedevoli nel rapporto tra fonti statali e fonti regionali*, PhD thesis, University of Ferrara, 2010, http://eprints.unife.it/323/1/TESI_DEFINITIVA.pdf.

⁴⁷ Corte Costituzionale, *sentenza* no. 214/1985, www.cortecostituzionale.it. Compare this judgment with *sentenza* no. 40/1972, available at www.cortecostituzionale.it. See also decisions in cases no. 192/ 1987 and no. 729/1988, www.cortecostituzionale.it. For a complete overview in Italian see: Motroni, *Le norme cedevoli*, 63-94.

entry into force of a new constitutional parameter and the necessity of guaranteeing stability in a period of transition.⁴⁸ The Constitutional Court followed the same logic soon after the constitutional reform of 2001 which, as we know, changed the distribution of competences between the ordinary Regions and the State. However, what is evident once we know the evolution of the Italian regional system is the use of *cedevolezza* even from the start of the functioning of the Regional legislatures as the rule to be followed in all the cases of legislation that involve shared competences, a practice upheld by the Italian Constitutional Court in 1985.⁴⁹

The adoption of the technique of *cedevolezza* confirms the rise of a new kind of way of conceiving of the principle of “competence” as “legislative” preference rather than as “a legislative reserved domain”.⁵⁰ According to this scheme, the Italian Constitution, when granting a portion of shared competence to the regional legislator, expressed a preference for this actor but, in order to guarantee the continuity of the legal order, admits the possibility of a temporary and derogable State legislative supply. More pragmatically, *cedevolezza* has permitted an evident centralization and a *de facto* alteration of the distribution of competences over the years, since it has been used frequently in combination with the recall of “unitary principles”, finally favouring the centralization of the competences.⁵¹ Even after the coming into force of the new Title V of the Italian Constitution, *cedevolezza* seems to be still alive, despite what the Italian Constitutional Court has seemed to suggest in occasional decisions, like one given in 2002.⁵²

Returning to the specific field of the implementation of EU law measures, one could wonder whether the new Article 117 of the Constitution, which expressly codifies the regional competence to comply with EU law requirements, can represent the end of the technique of *cedevolezza* in this specific ambit. Despite the many doubts raised by scholars,⁵³ this particular kind of *cedevolezza* has to be understood as confirmed in this ambit by the different Community acts – “leggi comunitarie” – which have come into force since the constitutional reform.⁵⁴ According to this trend, the State legislator is allowed to adopt detailed provisions whose coming into force is delayed pending the deadline provided for the implementation of the directive in case of regional inertia.⁵⁵

⁴⁸ M.Motroni, *Le norme cedevoli cit.*, 63-94.

⁴⁹ “*La legge dello Stato [non] deve essere necessariamente limitata a disposizioni di principio, essendo invece consentito l’inserimento anche di norme puntuali di dettaglio, le quali sono efficaci soltanto per il tempo in cui la Regione non abbia provveduto ad adeguare la normativa di sua competenza ai nuovi principi dettati dal Parlamento*”, Corte Costituzionale, no. 214/85.

⁵⁰ L. Carlassare, “La ‘preferenza’ come regola dei rapporti tra fonti statali e regionali nella potestà legislativa ripartita”, *Le Regioni*, 1986, 236 ff.

⁵¹ Among others, A. D’Atena, *Le Regioni dopo il big-bang. Il viaggio continua*, Milano, 2005, 76 ff.

⁵² Case 282/2002, www.cortecostituzionale.it.

⁵³ Motroni, *Le norme cedevoli*, 95 ff.

⁵⁴ Laws no. 39/2002, no. 39, 14/2003 and 306/2003, for instance.

⁵⁵ On this, see G.U.Rescigno, “Attuazione regionale delle direttive”.

Something similar is confirmed in law no. 11/2005, which also provides the State with the possibility to perform the substitutive power by a regulation (“regolamento”, which is a secondary source) even in matters covered by regional legislation (see Art. 11, par. 8, of this law).⁵⁶ This applies even in matters of exclusive regional competence, and despite the fact that Article 117 of the Constitution provides: “*Regulatory powers shall be vested in the State [only?] with respect to the subject matters of exclusive legislation*”. In conclusion, despite the change of the letter of the Constitution, the case law of the Italian Constitutional Court and also the Parliament have confirmed many of the principles and practices characteristic of the previous climate of Italian regionalism.

Before moving to the next section it is interesting to point out how the Italian Constitutional Court recently acknowledged the bilateral nature of *cedevolezza* by recognizing the validity of the legislation of the Friuli-Venezia Giulia Region. These norms included some derogable and supplementary fundamental principles introduced to prevent the possibility that the absence of a relevant State act would result in a situation of regional non-implementation. By regional law no. 11/2005, Friuli-Venezia Giulia implemented directive 2001/42/CE without waiting for the national legislation including the fundamental principles of the matter. Since the matter touched many transversal ambits the regional legislator decided to pass regional legislation of principle, which had to be understood as derogable once the State legislation of principle was ready.⁵⁷ The Italian Constitutional Court rescued this provision in its *sentenza* no. 398/96.⁵⁸

To conclude this section devoted to the mechanism used by the Italian State in order to deal with the risk of non-compliance due to regional inertia, one should recall that since the State now can ask the Regions for the reimbursement of any costs connected with their non-compliance with the requirements of EU law.⁵⁹

The principle of subsidiarity

⁵⁶ According to some authors, it is possible to find a basis for this practice in the case law of the Constitutional Court, see the judgment in no. 425/99, www.cortecostituzionale.it. See: M.Motroni, *Le norme cedevoli*, 132.

⁵⁷ Art. 12 of regional law no. 11/2005: “*1. Le disposizioni contenute nel presente capo e nei regolamenti attuativi sono adeguate agli eventuali principi generali successivamente individuati dallo Stato nelle proprie materie di competenza esclusiva e concorrente di cui all’articolo 117, commi 2 e 3, della Costituzione, con riferimento alla direttiva 2001/42/CE. 2. Gli atti normativi statali di cui al comma 1 si applicano, in luogo delle disposizioni regionali in contrasto, sino alla data di entrata in vigore della normativa regionale di adeguamento*”.

⁵⁸ Corte Costituzionale *sentenza* no. 398/2006, www.cortecostituzionale.it. S. Tripodi, “L’attuazione regionale delle direttive comunitarie e le clausole di cedevolezza. Nota a Corte cost., sent. n. 398/2006”, in www.federalismi.it, and M.Motroni, *Le norme cedevoli* cit, 134-137.

⁵⁹ Art. 16- bis law no. 11/2005. On this see: P.Bilancia-F.Palermo-O.Porchia, “The European fitness cit”, E-167.

Subsidiarity could be conceived of as an example of a principle that was originally alien to the Italian Constitution which was introduced under the pressure applied by the EU level.

As defined in the *Oxford English Dictionary*, subsidiarity implies the concept “that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level”.⁶⁰ This implies both a constitutional preference for the exercise of a competence by the periphery and a “constitutional restraint on the exercise of those competences”⁶¹ for the centre.

The subsidiarity principle, due to its physiology, requires a system of competences at least tending towards a repartition, and at the same time presupposes an “integrated” system like, for example, a federal system of a cooperative type. As a matter of fact, the principle, as provided in the old Article 5 of the ECT, refers to a relationship between two institutional actors (a lower actor, the periphery, and a higher actor, the centre) sharing the same power and whose exercise is preferentially given, at first instance, to the actor closer to the citizens (i.e., the local level). Scholars usually label this first instance as the negative side of subsidiarity, since it implies the duty of non-intervention by the centre. At the same time, this principle allows the possibility to substitute the chosen local actor if the same power can be exercised in a better or more efficient way by the higher level. This way subsidiarity works as an elevator with regard to certain fungible acts that can be exercised in abstract by two institutional subjects and the substitution can be caused by the objective impossibility of the preferred actor carrying out the requested action.

Another important fact is that such impossibility of carrying out the functions has to be temporary this way there will be no obstacles to the restitution of the power. In this respect, it has been pointed out that the subsidiarity principle actually works as a criterion for shifting, although not in a definitive way, the level that is supposed to intervene⁶² and, because of its constitutional relevance, it works as an element of flexibility in the system.⁶³ This would explain why, within the EC context, subsidiarity has operated as a “method of policy centralisation”⁶⁴ rather than as a factor of valorization of the de-centred realities in the absence of a formal catalogue of competences. subsidiarity and competence are not, nevertheless, in a relationship of identity: in fact, it has been said that the principle of subsidiarity is not intended so much for the *a priori* formal allocation of

⁶⁰ *Oxford English Dictionary*, entry “Subsidiary” and “Subsidiarity”.

⁶¹ R. Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law*, Oxford University Press, Oxford, 2009, 246.

⁶² I. Massa Pinto, *Il principio di sussidiarietà. Profili storici e costituzionali*, Jovene, Naples, 2003, 82.

⁶³ R. Bin, “I decreti di attuazione della «legge Bassanini» e la ‘sussidiarietà verticale’”, in A. Rinella, L. Coen and R. Scarciglia (eds), *Sussidiarietà e ordinamenti costituzionali*, Cedam, Padua, 1999, 169 ff.

⁶⁴ G. Davies, “Subsidiarity as a Method of Policy Centralisation”, Hebrew University International Law Research Paper No. 11-06, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921454.

competences, but rather for the *a posteriori* legitimation of the exercise of competences beyond those formally attributed.⁶⁵

Having recalled the theoretical notion of subsidiarity and mentioned its uncertain nature in EU law, it is useful to see how the Italian Constitution has codified it. The principle of subsidiarity is dealt with by Article 118 of the Constitution both in its vertical and horizontal meaning:

“Administrative functions are attributed to the Municipalities, unless they are attributed to the provinces, metropolitan cities and regions or to the State, pursuant to the principles of subsidiarity, differentiation and proportionality, to ensure their uniform implementation.

Municipalities, provinces and metropolitan cities carry out administrative functions of their own as well as the functions assigned to them by State or by regional legislation, according to their respective competences. State legislation shall provide for co-ordinated action between the State and the Regions in the subject matters as per Article 117, paragraph two, letters b) and h), and also provide for agreements and co-ordinated action in the field of cultural heritage preservation.

The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity”

The principle of subsidiarity is also recalled at Article 120 of the Constitution, as we saw, and it is understood there as a limit to the indiscriminate use of the substitutive power of the government.

In *sentenza* no. 303/2003 the Italian Constitutional Court reshaped the distribution of competences codified in the Constitution by using the subsidiarity principle as a Trojan horse. The Court stated that the national legislator is allowed to take away the exercise of administrative functions in matters belonging to the regional concurring legislative power when a uniform exercise of these administrative functions is required. It is evident that the Italian Constitutional Court has expanded the original ambit of application of the subsidiarity principle by inventing a mechanism which was associated to the idea of “national interest”⁶⁶ present in the wording of the old Title V of the Constitution but which disappeared after the 2001 reform. According to many authors, however, it is still present as an unwritten limit to the Regions’ powers:⁶⁷

“While the principle of subsidiarity is used to allocate administrative functions, it is also used to introduce an element of flexibility into the constitutional distribution of legislative power. Under the

⁶⁵ Massa Pinto, *Il principio di sussidiarietà*, 81.

⁶⁶ On the national interest (“interesse nazionale”) see: A. Barbera, *Regioni e interesse nazionale*, Giuffrè, Milan, 1973.

⁶⁷ For an account of this debate, see R. Bin, “L’interesse nazionale dopo la riforma: continuità dei problemi, discontinuità della giurisprudenza costituzionale”, <http://www.robertobin.it/ARTICOLI/interessi%20nazionali.htm>; A. Barbera, “Chi è il custode dell’interesse nazionale?”, *Quad. cost.* 2001, 345 ff.

principle of legality (a pillar of the rule of law), functions that are exercised at the national level according to the principle of subsidiarity must be organized and regulated by national law. In this way, one may derogate from the allocation of legislative competences contained in article 117 of the Constitution”⁶⁸.

It seems useful to recall the solutions suggested by the Italian Constitutional Court for the relationship between subsidiarity and loyal cooperation: the former requires a “loyal cooperation” (“*leale collaborazione*”) between the territorial actors, concerted practices and bodies and, finally, a system of agreements between the institutional actors. When deciding case no. 303/2003⁶⁹, the Italian Constitutional Court adopted “*a procedural and consensual approach to the principles of subsidiarity and adequacy, and it denied that such principles can operate as mere verbal formulas capable of modifying, to the advantage of national law, the allocation of legislative powers established by the Constitution*”.⁷⁰

In doing so, the Italian Constitutional Court fixed a set of conditions under which a derogation to the allocation of competences designed by the Constitution could be possible: the derogation should be “*proportionate to the public interest that justifies the exercise of regional functions by the state, it must not be unreasonable in light of strict constitutional scrutiny, and, finally, the derogation should be the result of an agreement with the region*”⁷¹.

This episode tells us at least two things. First, it confirms the centrality of the Constitutional Court in the destiny of Italian regionalism. Secondly, it makes the task of tracing the constitutionalized idea of subsidiarity back to the EC (or German) model more complicated. While the ECJ normally avoids engaging in debates concerning subsidiarity, the Italian Constitutional Court used subsidiarity to reshape Italian regionalism. Of course, looking at the results achieved by the two courts with their respective behaviours, they are analogous: in both cases, despite its original meaning and goal (favouring the decentralized exercise of “constitutional” functions), subsidiarity worked as a factor of centralization. However, the paths followed in these two cases seem to be different.

⁶⁸ T. Groppi and N. Scattone, “Italy: The Subsidiarity Principle”, *International Journal of Constitutional Law*, 2006, 4 (1): 131-137, 134.

⁶⁹ Corte Costituzionale, *sentenza* no. 303/2003, available at www.cortecostituzionale.it.

⁷⁰ T. Groppi-N. Scattone, “Italy: The Subsidiarity Principle”, 135. See also A. Morrone, “La Corte costituzionale riscrive il Titolo V?”, available at <http://www.forumcostituzionale.it>.

⁷¹ *Ibid.*

II. The adaptation of some procedural principles/norms and techniques characterizing the proceedings before the Italian Constitutional Court: procedural impermeability and disapplication.

As we know, at the beginning of this “love affair”, the two Courts started from opposing positions of monism (ECJ) and dualism (Italian Constitutional Court). During the following years, this purity was replaced and the Constitutional Court began to talk about two “*autonomous and separated, although coordinated*” systems (see case no. 170/1984); at the same time the ECJ demonstrated its appreciation of the efforts of these national actors by assuming, at times, a benign and tolerant attitude. Some scholars have defined such a situation of partial convergence by using the formula “*(limited) flexibilization of supremacies*”.⁷² Despite this convergence, the tension between these two actors has not disappeared due to the progressive expansion of the ECJ’s activity in national fields. The first characteristic of the jurisdictional dialogue described is the “mutability” of the starting position of the Constitutional justices: it is possible in fact to observe a strong evolution in the Italian Constitutional Court case law. In case no. 14/1964,⁷³ for example, the Italian Court interpreted the relationship between national and EC acts in the light of chronological criteria (on the basis of the fact that the enabling act of ratification of the Treaties was an ordinary legislative act); later, in case no. 183/1973⁷⁴ the Court changed its position, saying that the constitutional basis of EC law primacy can be found in Article 11 of the Italian Constitution. This provision was conceived with Italy’s participation in the UN or other limited-power organizations in mind, but not for the EU. The latter in fact imposes limitations of sovereignty for goals that go beyond “*peace and justice between nations*”; the Italian Constitutional Court was forced to “manipulate” the original meaning of Article 11 in order to allow such limitations.⁷⁵ The Italian Court had entrusted the respect for primacy to itself (as a control of indirect violation of Article 11 for those national provisions challenging EC law) but the consistency of EC law with the Italian Constitution could not be controlled by the Italian Constitutional Court because the latter could only rule on the validity of Italian laws. In fact in 1984⁷⁶ the Italian Court again changed its view on this matter

⁷²V.Ferreres Comella, 2005, “La Constitución española ante la clausola de primacia del Derecho de la Unión europea. Un comentario a la Declaración 1/2004 del Tribunal Constitucional 1/2004”, in A. Lopez Castillo-A. Saiz Arnaiz - V. Ferreres Comella, *Constitución española y constitución europea*, CEPC, Madrid, 2005, 77-100, 80-89.

⁷³ Corte Costituzionale, sentenza n. 14/1964, in www.cortecostituzionale.it.

⁷⁴ Corte Costituzionale, sentenza n. 183/1973, in www.cortecostituzionale.it.

⁷⁵ After 2001 (revision of the Fifth Title of the Italian Constitution) an explicit reference to the EC legal order is contained in Art. 117.

⁷⁶ Corte Costituzionale, sentenza n. 170/1984. Granital : 1984 CMLRev 756.

under pressure from the *Simmenthal* judgment given by the ECJ and decided to entrust such control to the national ordinary judges.

Even after the *Granital* judgment the contrasts between the Courts did not subside. First of all, the ECJ has progressively obtained the trust of the ordinary judges, whose role is fundamental in the activity of the Constitutional Courts. A clear result of such an influence is the degeneration of the relationship between ordinary judges and Constitutional Courts: when the ordinary judges seek clarification in the reading of the relationship between the EC law and the national constitutions, they do not refer to their Constitutional Court but rather to the ECJ. This is the outcome of the self-exile of the Constitutional Court, which rarely declares admissible questions concerning the relationship between legal orders. For example, in 2002, the Italian Constitutional Court ruled in just ten cases (out of 500 in total) relating to the EC legal order.⁷⁷

This can be described as “impermeability” between the activity of the Italian Constitutional Court and the application of EU law. The general rule followed by the Italian (and also the Spanish) Constitutional Court is that of the “impermeability” between questions of constitutionality and questions regarding the relationship between EC/EU law and national law which are defined (expressly in Spain) as mere questions of “legality”. Generally speaking, we can say that the Constitutional Court accepted the primacy of EC law over national law but entrusted its guarantee (the “*Simmenthal* mandate”) to the national common judges. The normal solution for the conflict between EC law (if provided with direct effect) and national law is that of non-application (“non applicazione”).

In the Italian context, the Constitutional Court accepted the fact that the guarantee of the EC law’s primacy was entrusted to national judges with an important specification: technically, the judge cannot “disapply” the national law contrasting with an EC act but he must “not apply” the national rule contrasting with directly applicable EC law (a regulation, in the earlier case law, but then also self-executing directives and interpretive rulings concerning directly effective and directly applicable norms, see cases no. 113/1985 and 389/1989⁷⁸). Disapplication, in the Constitutional Court’s reasoning, is a figure of invalidity which would presume a hierarchical relationship between supranational and national legal orders.⁷⁹ However, it is clear that in spite of these theoretical distinctions, the origin of “non-application” can be traced back to the technique of “disapplication”, a technique born and raised in the field of administrative law, connected to the distinction between

⁷⁷M. Cartabia- A.Celotto, La giustizia costituzionale in Italia dopo la Carta di Nizza, *Giur. Cost.*, 2002, 4477 ff.

⁷⁸ Both available at www.cortecostituzionale.it

⁷⁹ It would imply, in the *Corte Costituzionale*’s view, the subordination of the Constitutional Court to the ECJ (the hierarchy between orders which conducts to the hierarchy of Courts) while non-application is a figure of inefficacy, limited to the specific case before the national judge. But this distinction seems to be abandoned by the Italian *Corte Costituzionale* in its judgment in cases 102/2008 and 103/2008, where the *Corte* used the word “disapplicazione”.

ordinary (i.e. “non-administrative”) and administrative justice⁸⁰ and which is based on Articles 4 and 5 of Law no. 2248/1865, Annex E, which empowers the ordinary (i.e. non administrative) judge to set aside (disapply) an administrative act without annulling it (since the ordinary judge is not allowed to declare the invalidity of an administrative act because of the division of labour existing between ordinary and administrative judges in Italy). Such a decision limits its effects to the economy of the case pending before the judge, it thus has a mere *inter partes* effect. Thanks to the disapplication the ordinary judge was given the opportunity to “bypass” the invalidity of an administrative act without infringing the rules governing its mandate. A confirmation of the common nature of these two phenomena can be found in the recent change of the terminology employed by the Italian Constitutional Court in the decisions in cases 102/2008 and 103/2008⁸¹ where the Court used the word “disapplication” instead of “non-application”.

The progressive abandonment of the impermeability doctrine: the extension of the “interposition technique”

If impermeability between national law and EC law is the general rule, it is possible to find some exceptions in *principaliter* proceedings, the arena of the legislative conflicts involving State and Regions. According to the Italian Constitution, the constitutional review of legislation can be triggered and pursued in two different ways: indirect (or *incidenter*) proceedings and direct (or *principaliter*) proceedings.

In *incidenter* proceedings an *a quo* judge (either ordinary or administrative) can raise the question of constitutionality (i.e. of consistency between the Italian law and the Constitution) before the Constitutional Court during a trial. The Constitutional Court can regard the question as admissible only if it is “relevant” (i.e. significant for the solution of the case) and not manifestly groundless. On the contrary, direct proceedings are regulated under by Article 127 of the Italian Constitution:

⁸⁰ This distinction is also confirmed in Articles 102 and 103 of the Italian Constitution.

Art. 102: “Judicial proceedings are exercised by ordinary magistrates empowered and regulated by the provisions concerning the Judiciary. Extraordinary or special judges may not be established. Only specialised sections for specific matters within the ordinary judicial bodies may be established, and these sections may include the participation of qualified citizens who are not members of the Judiciary.

The law regulates the cases and forms of the direct participation of the people in the administration of justice.”

Art. 103: “The Council of State and the other bodies of judicial administration have jurisdiction over the protection of legitimate rights before the public administration and, in particular matters laid out by law, also of subjective rights. The Court of Accounts has jurisdiction in matters of public accounts and in other matters laid out by law.

Military tribunals in times of war have the jurisdiction established by law. In times of peace they have jurisdiction only for military crimes committed by members of the armed forces.”

⁸¹On these decisions see F. Fontanelli- G. Martinico, “Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice”, *European Law Journal*, 2010, 345-364.

“(1) Whenever the government regards a regional law as exceeding the powers of the region, it may raise the question of its constitutionality before the Constitutional Court within sixty days of the publication of the law.

(2) Whenever a region regards a state law, another act of the state having the force of law, or a law of another region, as infringing on its own sphere of powers, it may raise the question of its constitutionality before the Constitutional Court within sixty days of the publication of the said law or act”.

According to the scheme provided therein, in case of a constitutional controversy arising between the Regions and the State, the government can appeal directly against a regional law, and a Region can appeal directly against a national law, or a law enacted by another Region. In such cases, constitutional proceedings are conceived to resolve disputes between the State and the Regions concerning the limits of their respective powers. A huge difference exists between the Regions and State: whilst the former can raise the constitutional question only when their sphere of competence is infringed by a State act, the State can raise the constitutional question on a regional norm grounded on any kind of constitutional “defect”.

Principaliter proceedings thus represent one of the exceptions to the diffuse review of consistency between internal and EC law (i.e. the power that ordinary or administrative judges have to monitor the consistency between domestic and EC law); the Italian Constitutional Court had already agreed to rule on the issue of contrasts between national and EC law within this type of proceeding. According to the decisions in cases no. 384/1994 and no. 94/1995,⁸² indeed, a centralized decision could be envisaged when a question of consistency between national and EC law was raised before the Constitutional Court via direct proceedings (both by the Regions and by the State). Particularly, in case no. 384/1994 the Italian Constitutional Court acknowledged that, due to the particular dynamics of direct proceedings (where the role of the ordinary judge – who normally guarantees the respect of EC law – is irrelevant, its refusal to rule on such questions would have implied a dangerous gap in the protection of rights, and a breach of the legal certainty principle). Therefore, it can be said that, due to the unique features of direct proceedings, the residual possibility to involve the Constitutional Court is justified only because the ordinary judge, who is the natural guardian of the primacy of EC law at the domestic level, is totally missing from the scene.

In direct (*principaliter*) proceedings, EC norms are interposed norms [*norme interposte*] that can integrate the parameter for the control of consistency of the regional legislation with Article 117, par. 1, of the Constitution” (see sentenze no. 129/2006; no. 406/2005; no. 166 and no. 7/2004) or, better, they make the parameter of Art. 117, par. 1, actually efficient,⁸³ [and this can give rise to a declaration of constitutional illegitimacy of the regional norms judged incompatible with EC

⁸² Both available at www.cortecostituzionale.it.

⁸³ This passage is borrowed from *sentenza* No. 348/2007.

law.⁸⁴ Moreover, since no form of appeal against its decisions is foreseen (Article 137 of the Constitution), the Constitutional Court could not avoid raising the preliminary ruling without infringing on the general interest of the uniform application of EC law. After the 2001 reform, two occasions arose for testing the new Article 11: judgment no. 406/2005, where the Constitutional Court accepted a State claim against a regional law where Article 117, par 1, was the only parameter of constitutionality invoked, and in case no. 129/2006.⁸⁵ In both cases, the Italian *Consulta* decided to appoint Article 117, paragraph 1, of the Italian Constitution as the only parameter upon which to decide the question, and refrained from using the other constitutional standard of review invoked by the plaintiff. In fact, the *Consulta* declared the regional laws challenged in this case unconstitutional for the first time, after many “failed attempts”⁸⁶ (see cases no. 65, 150, 161, 304, 355, 393, 428, 434, 469 of 2005⁸⁷).

Another exception is given by the possible conflict between national law and non-directly effective EU law: in this case the Constitutional Court is the only guardian of the primacy of the supranational system (see the sentenza 28/2010⁸⁸). As we saw, in order to “open” the door to the possibility to centralize the solution of the conflict between national and supranational law, the Italian Constitutional Court expanded the notion of “interposed norm” or “interposed standard”. The idea of the interposed norm was conceived by Carlo Lavagna⁸⁹, an Italian scholar, in the fifties. Normally, the criteria for constitutional review may be found in the provisions of the Constitution, in the constitutional legislation or in those sources considered equivalent, such as the generally recognized principles of international law. In some cases the Court can decide to broaden its spectrum by assuming as criteria for constitutional review norms that are, from a formal point of view, provided with an inferior status. This happens, for instance, when a constitutional provision refers to these norms. This way “*a violation of an ‘interposed norm’ is tantamount to a violation of the authorizing norm itself*”.⁹⁰ The most famous example is given by the legislation enabling/authorizing delegated legislation pursuant to Article 76 of the Italian Constitution⁹¹.

Over the years, and especially after the constitutional reform of 2001, the Italian Constitutional Court extended this concept in order to deal with a possible violation of EU law

⁸⁴ ICC ordinanza No. 103/2008.

⁸⁵ ICC, judgement No. 129/2006, www.cortecostituzionale.it.

⁸⁶ In these terms, see R.Calvano, ‘La Corte costituzionale ‘fa i conti’ per la prima volta con il nuovo art. 117 comma 1 Cost.’, (2005) *Giurisprudenza Costituzionale*, 2005, 4417 ff.

⁸⁷ See www.cortecostituzionale.it.

⁸⁸ See www.cortecostituzionale.it.

⁸⁹ C. Lavagna, *Problemi di giustizia costituzionale sotto il profilo della non manifesta infondatezza*, Milan, 1957, 28 ff.

⁹⁰ A. Pizzorusso- V. Vigoriti-G.L. Certomà, “The Constitutional Review of Legislation in Italy” *Temple Law Quarterly*, 1983,593 ff, 511.

⁹¹ Article 76: “*The exercise of the legislative function may not be delegated to the Government unless principles and criteria have been established and then only for a limited time and for specified purposes*”.

representing an indirect violation of Article 117 of the Italian Constitution.⁹² This *revirement* can be connected to the increasing openness shown by the Italian Constitutional Court towards other forms of extra-national law like the European Convention of Human Rights (ECHR). In Order No. 103/2008, the Constitutional Court recalled the twin cases no. 348 and 349/2007, wherein some national provisions⁹³ were declared unconstitutional for being in conflict with the international obligations stated in the ECHR, Protocol 1, Article 1. These decisions are very innovative “*because not only has the Italian Constitutional Court clarified, by using Art. 117, paragraph 1, the European Convention’s actual efficacy in the domestic legal system, but it has also interpreted international obligations as an interposed standard of review, on the basis of which the constitutionality of domestic law must be assessed*”.⁹⁴

However, it is interesting to note that, in the above mentioned decisions, the Italian Constitutional Court delivered lengthy reasons in order to underline the difference between EU law (at that time EC law) and the law of the ECHR, based on the difference of their effects on domestic law, whereas in Order no. 103/2008 the Court refers to this precedent only with a view to supporting its findings on EC law. In other words, the Italian Constitutional Court is more interested in using the similarities between EC and conventional (international) law than in drawing attention to those passages of judgments no. 348 and 349/2007 where the Court itself had provided a careful distinction between them.

Final remarks

Some authors⁹⁵ have described EU integration as one of the most important factors that led to the Italian constitutional reform of 2001. This is true, and by itself it gives an exhaustive answer to the research question formulated at the beginning of this paper: all the institutional actors, including the judges, have adapted old mechanisms or existing principles or, alternatively, amended the Constitution in order to guarantee the effectiveness of EU law. As we saw, the Italian Constitutional Court has played a fundamental role both in the history of Italian regionalism and, more particularly, in the European path of Regions, sometimes supporting the centralization of competences other times preserving the regional sphere of autonomy.

⁹² A similar treatment is now granted to the ECHR, see F. Biondi Dal Monte- F. Fontanelli, “The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System”, *German Law Journal*, 2008, 889.

⁹³ Namely, the provisions ruling the quantification of compensation amounts due for public purposes expropriation and for unlawful expropriation.

⁹⁴ See Biondi F. Dal Monte- F. Fontanelli, “The Decisions cit”, 889 ff.

⁹⁵ P. Bilancia- F. Palermo- O. Porchia, “The European fitness cit”, E-144.

The current phase seems to be characterized by a rediscovery of the importance of cooperative instruments and by the procedural principles of subsidiarity and loyal cooperation that, in theory at least, should represent a sort of shield against the (temporary) alteration of the list of competences. The importance of the Italian Constitutional Court in this process explains the attention paid in the second part of this paper to the technicalities of the constitutional proceedings. However, as we can see by looking at the principles of competence and subsidiarity, the Italian Constitutional Court has demonstrated its openness to broad interpretation of the fundamental charter thus making our Constitution more flexible. This factor should be taken into account. My final impression is that of a (still) quite unstable picture where external (i.e., international or European) factors can have a decisive importance in changing, from time to time, the outcome of the never-ending balancing act between the competing interests of the State and the Regions.