

STATE AND REGIONAL LEGISLATION IN ITALY  
IN THE DECADE AFTER THE CONSTITUTIONAL REFORM

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*Abstract*

This paper describes the evolution of the legislative powers in Italy after the constitutional reform of Title V and, in particular, in the decade that followed. Constitutional Law no. 3 of 2001 sought to amend the Constitution so as to provide greater legislative autonomy to the Italian regions; for this reason, it reversed the criteria for the distribution of legislative powers, and provided a residual clause whereby all matters not expressly provided for in Art. 117, par. 2 and 3, should be considered to belong to the full legislative competence of the Regions. In the next ten years the Constitutional Court was called to offer a reading of the new reach of legislative powers. The result is a structure of powers which is quite different from that envisaged by Art. 117 of the Constitution. The study outlines the characteristic features emerging from an analysis of the decisions of the Constitutional Court as to each type of legislative powers (exclusive, concurrent and residual) and the main legislative matters. It also describes the main models and tools used to harmonize the expressed purpose of legislation.

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## 1. Factual assumptions and jurisprudential evolution

### 1.1 Premise. Delineating the extent of the investigation

This study describes how the framework of legislative powers in Italy has evolved due to the constitutional amendment of Title V.

It should be noted right at the start that state and regional legislative powers in Italy are inevitably intertwined with the history of its regions (special statute regions to start with, ordinary regions to follow) and with the slow, continuous evolution of Italian regionalism.

The factors that have determined the rather difficult constitution of a credible regional state since 1948, at various levels (political, legislative, administrative, and financial) are diverse, and have been effective at different times in the constitutional history of the country.

As a matter of fact, the «regional issue» is deeply rooted in the ways in which the unification of Italy (whose 150<sup>th</sup> anniversary was celebrated in 2011) was pursued, achieved and implemented by the liberal state.

In order to fully understand the complex issues the constitutional reform has tried to address, the juridical analysis offered below needs prefacing with a detailed description of the evolution of the Italian regional system spanning the twenty years from the strenuous effort in making up the regions<sup>1</sup> during the constituent assembly, through the laying out of an implicitly ambiguous (especially as far as the legislative power granted to the regions<sup>2</sup> is concerned) Constitutional Charter in 1948, to the delayed provisions relating to the establishment of ordinary regions<sup>3</sup> in the late '60s.

The preface should be complemented with a close juridical analysis of the legislative powers distributed between State and

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<sup>1</sup> Further details on the topic are available in E. Rotelli, *L'avvento della Regione in Italia (1943-1947)* (1967).

<sup>2</sup> For an in-depth study, refer to: V. Crisafulli, *La legge regionale nel sistema delle fonti*, in Riv. trim. dir. pubbl. 262 et seq. (1960); L. Paladin, *Problemi legislativi e interpretativi nella definizione delle materie di competenza regionale*, in 1 Foro amm. 3 et seq. (1971); S. Bartole, *Supremazia e collaborazione nei rapporti tra Stato e Regioni*, in 1 Riv. trim. dir. pubbl. 84 et seq. (1971); A. D'Atena, *Legge regionale (e provinciale)* in *Enc. dir.*, XXIII (1973), 969 et seq.

<sup>3</sup> A detailed analysis of these issues is offered in L. Paladin, *Diritto regionale* (1992); E. Spagna Musso, *Diritto regionale* (1992).

regions in the thirty years from the effective implementation of the ordinary regions to the (third) Constitutional Law of 2001<sup>4</sup>.

However, only a short list of what cannot be discussed here<sup>5</sup> is provided in order to point out that the amendment of Title V has not devised Italian regionalism «from scratch». Many of the developments that followed the amendment can only be explained on the ground of the burden placed by the former institutional evolution onto the state-regions relationship as redesigned by the constitutional reforms in the years between 1999 and 2001. In this article we will discuss what has happened since 2001.

Also in this respect, it should be pointed out that the article will only incidentally discuss the growing role of the impact of EU legislation on state law – partly due to the new wording of Const. Art. 117, par. 1<sup>6</sup> – and its consequences in the relationship between State and regional legislation, as it would deserve a comprehensive analysis that we cannot carry out here<sup>7</sup>.

## **1.2. The amendment to Title V and the new framework of legislative powers**

What Constitutional Law (CL) No. 3 of 2001 deliberately intended to do when it amended the whole Title V of the Constitution (Articles 114 through 133) – along with the previous CL, No. 1 of 1999 – was to redefine the system of relationships

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<sup>4</sup> A detailed analysis of the topic is provided in R. Bin, *Legge regionale*, in A. Barbera, L. Califano (ed.), *Saggi e materiali di diritto regionale* (1997), 59 et seq. Further remarks on the several attempts at amending the constitution are available in C. Fusaro, *La redistribuzione territoriale del potere politico nel dibattito parlamentare dalla Commissione Bozzi alla Commissione D'Alema (1983-1998)*, in S. Gambino (ed.), *Stati nazionali e poteri locali* (1998), 493 et seq.

<sup>5</sup> An in-depth study is offered in S. Calzolaio, *La legge regionale fra materie e competenze* (2008).

<sup>6</sup> See A. Barbera, *Corte costituzionale e giudici di fronte ai "vincoli comunitari": una ridefinizione dei confini?*, in 2 Quad. cost. 335 et seq. (2007); for a broader perspective, see A. Ruggeri, *Rapporti fra fonti europee e fonti nazionali*, in P. Costanzo, L. Mezzetti, A. Ruggeri (ed.), *Lineamenti di diritto costituzionale dell'Unione europea* (2008), 285 et seq.

<sup>7</sup> For further details, see P. Zuddas, *L'influenza del diritto dell'Unione Europea sul riparto di competenze legislative tra Stato e Regioni* (2010).

between State and territorial authorities, specifically between State and regions.

It should be noted, in a comparative perspective, that the underlying reasons that make the relationship between State and Regions rather unstable and in need of continual adjustments also in terms of constitutional norms, are common to almost all decentralized systems<sup>8</sup>.

Space constraints will not allow us to discuss the quantity and quality of the amended provisions at length, but for those aspects which more directly affect the system of legislative powers. However, to provide a brief overview of the Constitutional Reform (or, if you wish, of the overambitious underlying reforming intent), it will suffice to compare the different formulation of Const. Art. 114, par. 1, which reads “*The Republic is divided into Regions, Provinces, Municipalities*” in the Constitution of 1948, with the amended version (in force) suggesting a more emphatic approach: “*The Republic is composed of Municipalities, Provinces, Metropolitan Cities, Regions and the State*”<sup>9</sup>.

Apparently, the former implies a simplistic framework of territorial subdivision of the Republic – this term being used as a synonym for «State». The latter clearly separates the concept of «State» from the concept of «Republic», considering that this is seen as consisting of all territorial authorities, including the State.

In this perspective, all territorial authorities – from municipalities to the state – are claimed to be deliberately brought onto the same level of formal and substantial equality.

The provision that draws our attention most – i.e. Const. Art. 117 – further develops this claim and extends it to the exercise of legislative powers while following the framework introduced by the so-called «Bassanini Law»<sup>10</sup>.

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<sup>8</sup> For further remarks, see A. D’Atena (ed.), *I cantieri del federalismo in Europa* (2008), and P. Bilancia, *Stato federale, unitario, regionale: dalle diverse origini storiche alla confluenza dei modelli*, in *Scritti in memoria di L. Paladin* (2004), 269 et seq. On the evolution and development of Federalism in the U.S., see the recent C. Bologna, *Stato federale e “National interest”. Le istanze unitarie nell’esperienza statunitense* (2010).

<sup>9</sup> Further information on this topic is available in A. Barbera, *Dal “triangolo tedesco” al “pentagono italiano”*, in 1 *Quad. Cost.* 85 et seq. (2002).

<sup>10</sup> Reference is made to Act No. 59 of 1997, adopted with the intent to complete the devolution of administrative powers from State to regions and local authorities (it is, in fact, the 3<sup>rd</sup> body of laws concerning the devolution of

The first paragraph of the provision applies restrictions to the legislation as such (whether state or regional) – which appears to be big news (it notably tended to achieve regulatory equality between state and regional lawmakers) if compared with the past formulation, which placed limits on the regional lawmaker only: “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”<sup>11</sup>.

The subsequent paragraphs contribute to identify the three types of legislative powers that are being exercised, at least formally: *exclusive powers* (i.e. the list of subject matters on which only the state can legislate: Art. 117, par. 2), *concurrent powers* (i.e. the list of subject matters for which – based on the old Art. 117 – the State will enforce the fundamental principles, while the Regions will enforce the implementation rules: Art. 117, par. 3); *residual powers* (which do not refer to any list of subject matters, but are based on the «residual policy», according to which all subject matters that are not enumerated or provided for in the former lists fall within the Regions’ full legislative powers: Art. 117, par. 4).

A formal survey of legislative powers would therefore report the State as only having legislative authority over those subject matters which are expressly related to its exclusive powers, or referring to the fundamental principles in matters under concurrent powers.

The residual policy is called upon in all other subject matters that are not enumerated; over these the Regions acquire

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powers, following the first two in the ‘70s). What is of interest here is that the real novelty introduced by the law consisted in the method for devolving powers, since the traditional criterion of distribution of powers and duties between the state, on one side, and the regions and local authorities, on the other, was subverted: in short, Bassanini Law provided the legal framework by which the state was to maintain its administrative powers over a definite set of enumerated matters while the remaining matters were to be granted to other local authorities through appropriate decrees.

<sup>11</sup> For further details on the analysis of the limitations deriving from the EU system and international obligations, refer to E. Baroncini’s contributions, *La fonte internazionale* and *La fonte dell’Unione europea*, in L. Califano (ed.), *La costruzione giurisprudenziale delle fonti del diritto* (2010).

general jurisdiction, as they are vested with legislative powers<sup>12</sup>: the state and regional legislative roles therefore seem to have been inverted if compared to the past formulation of art. 117. The regional lawmaker is granted general powers, in full or in part, over those subject matters which have not been reserved specifically for the State, as per Art. 117, par. 2 and 3.

The entire system of state and regional legislative powers is consequently found to be based exclusively on the principle of the separation of powers, in accordance with the «legislative matters» assigned (or denied).

### **1.3. The exercise of legislative powers. Introduction to a complex system.**

The exercise of legislative powers is much more complex than it may appear from the short description above.

This complexity stems from a combination of factors, the first of which is represented by the «legislative matter» definition framework adopted in Art. 117.

The first thing that can be noted while going through the lists contained therein is that the enumeration method of the legislative subject matters in the new Art. 117 is not unambiguous: it spans from objective identification (e.g. defense and armed forces: Art. 117, par. 2, letter d) to teleological identification (e.g. environmental protection: letter s).

In the former case, the subject matter implies legislative powers generally referring to a certain subject: e.g. the State is granted legislative authority on matters of «weights and

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<sup>12</sup> The distribution of powers provided for in Art. 117 is to a great extent neither necessarily «fixed» nor immutable. Const. Art. 116, par. 3, specifies that “*other forms of self-government and special conditions of implementation, concerning*” matters of concurrent powers and matters of exclusive state powers (such as the protection of the environment, ecosystem and cultural heritage) “*may be granted*” to “*Regions, by means of state laws, on the initiative of the interested region, after consulting the local authorities, and in compliance with the principles mentioned in Art. 119*”. The law is approved if the “*absolute majority of the members*” in both branches of the Parliament is achieved and a preliminary agreement between the state and the region involved has been reached. More on the topic in A. Morrone, *Il regionalismo differenziato. Commento all’art. 116, comma 3, della Costituzione*, in 1 Fed. Fisc. 139 et seq. (2007).

measures, standard time» (letter r). The Regions will therefore not be allowed to make laws on any of those subjects.

In the latter case, on the contrary, legislative powers are not granted mainly with reference to a certain subject, but especially with reference to a certain scope (which relates to a certain subject).

The state has legislative powers over «protection of cultural heritage»; however, its powers do not always apply to the subject matter («cultural heritage»), because concurring powers also include another subject («promotion and organization of cultural activities»), therefore also the Regions have lawmaking authority on the same subject - within the limits of the implementation rules.

What distinguishes the two powers (the «protection» governed by the state, and the «promotion» concurrently governed by the state as to the fundamental principles and by the regions as to the implementation rules) is not the subject - which is still «cultural heritage» - but the scope defined by the State or regions.

Consequently, the boundary between the relevant powers will be located at the rather uneasy distinction between the relevant scopes that the two authorities share for the same subject.

Not only. To the extent to which the subject matters impose a scope, they tend to cross the border that can be hypothesized for themselves and supersede the established order of the (other) powers as it has been identified according to the objective criterion.

For instance, the Constitutional Court ruled that the subject matter «fishing» falls within the residual powers of the regions (Case No. 213 of 2006), while the state has exclusive powers over the «protection of the environment and ecosystem».

Who will then be granted lawmaking power with respect to sustainability measures for the «fishing effort» applicable to a certain stretch of the sea and to some of the fish species living there?

It is beyond our scope to provide an answer to this question here - the reader may refer to Case No. 81 of 2007 for more detail. What is most important is that we underline that the teleological subject matter naturally tends to «cut across» the objectively identified powers.

In other terms, in the case discussed above, both the state and the region can be said to have powers, virtually: the regulation of the «fishing effort» belongs to the subject matter «fishing», but it also inevitably concerns «ecosystem protection», because the regulation of this peculiar aspect of the subject matter «fishing» involves safeguarding the natural habitat of the fish species<sup>13</sup> – in other words, it involves «ecosystem protection».

We should also add that the classification of legislative matters is not completed by either the objective or teleological criterion as they are particularly wide-ranging: several sub-classes can be found in Art. 117, such as «regulatory subject matters» (e.g., civil and criminal regulation: letter l), «coordination subject matters» (as in Art. 117, par. 2, letter r) and, to some extent, also the «“relating-with” subject matters», which alone raise some difficulties as to the identification of a well-defined, objective, material substance.

We should especially consider those subject matters identifying a coordinating function: isn't this after all an intention to be pursued, a goal to be achieved? To what extent, even if only conceptually, will the power assigned affect a specific sector in which the assignee performs a coordinating function? The impression we get is that this classification embodies some kind of a mixed type lying between the identification by an objective criterion and the identification by a teleological criterion.

The problem becomes more serious if we consider a «coordinating subject matter» of some substance: e.g. «coordinating the public finance and tax system» – which can also be found among concurrent powers.

According to the discussed framework, we should be able to imagine a (state) power «coordinating the fundamental principles of the finance and tax system» and a (regional) power «coordinating the implementation rules of the finance and tax system». As one can easily guess, it is quite problematic even to think of the ways in which a regional law should be made to coordinate the implementation rules of the financial and tax systems.

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<sup>13</sup> For further details on this topic, see B. Caravita, *Diritto dell'ambiente* (2005), 22 et seq.

The examples provided - in their paradoxical nature - contribute to introduce the theme of the role performed by «legislative matters», and their attribution, to qualify state and regional legislative powers, but also to unveil a first limitation inherent in Const. Art. 117.

#### **1.4. Following: a premise ...**

The statements above lead to a first focal point, which is peculiar to the distribution of legislative powers based on the assignment of legislative matters.

On an abstract level, the assignment of a legislative matter to the exclusive or concurrent powers (or, if unenumerated, to the residual powers) is meant to separate the legislative contexts: if the state is granted exclusive powers, these are no longer available to regions; if concurrent powers are granted, the application contexts and modes shall be distinguished between state and regional (along the fundamental principles/implementation rules axis); if the matters have not been enumerated or assigned, they fall within regional powers according to the residual policy.

However, the separation of powers based on the assignment of matters only holds in abstract terms.

In concrete terms, as we have anticipated and will see in detail, even a sheer analysis of the content of legislative subject matters will inevitably produce an unpredictable amount of overlapping between legislative powers: state and regional lawmakers will find themselves to be competing with each other in nearly all contexts in which powers have been conferred based on legislative subject matters.

In other terms, the separation of powers turns out to be the exception, while overlapping powers remains the rule.

Therefore, if the framework of legislative subject matters of Const. Art. 117, seems to be directing lawmakers towards the separation of powers, as a matter of fact, subject matters will only serve to establish a relationship between the contexts of (and modes of regulating) the legislative powers conferred to each lawmaker.

We can also try and assign an abstract, predetermined content to each of the legislative subject matters, but the ensuing framework of legislative powers will be the result of the interplay

between several subject matters (enumerated or unenumerated; pertaining to exclusive, concurrent, residual powers), so that the subject matters are held together in a relationship of reciprocity, which keeps on being gradually modified while becoming more solid as it is defined through legislative action and case law.

In short, what we have is therefore dissociation between the content of legislative matters as it can be conceptualized and the content of legislative powers as it is implemented: this appears to be the common trait of both the old and new Article 117.

To use a metaphor, the abstract framework of the state and regional legislative powers as defined in Const. Art. 117, can be represented as two football teams ready to play their match. Each player corresponds to a legislative subject matter while the players' arrangement on the field is predictive of the moves of those who are going to cross the halfway line and those who are going to remain on their part of the field.

Conversely, the materialized framework of legislative powers (i.e. the space that each lawmaker will actually occupy) corresponds to the actual game dynamics: there will be a team attacking and dominating the match while the other is on the defensive – which perfectly matches what happens with the legislative powers between State and regions in a specific system.

These dynamics produces something inevitable: there will never be a system which does not display a certain separation between «subject matters» (i.e. the constitutional assignment of a certain subject to the abstract legislative power) and «powers» (i.e. the normative space which is actually occupied by the lawmaker as referred to the relevant provision).

In the legal experience, the concept of «legislative matter», however one attempts to anchor it to a solid, objective ground, ends up fading away, getting more confused or, as recently reported – but the conclusion was pretty clear even prior to the constitutional amendment – «dematerializing»<sup>14</sup>: accordingly, subject matters become «pure ideas» and, with their preceptive and defining content, can only preserve their worth as long as they remain in their «noumenon». In the legal phenomenology,

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<sup>14</sup> The topic was developed by F. Benelli, *La "smaterializzazione" delle materie* (2006) and by R. Bin, «*Problemi legislativi e interpretativi nella definizione delle materie di competenza regionale*». *Rileggendo Livio Paladin dopo la riforma del Titolo V*, in *Scritti in memoria di Livio Paladin* (2004).

when they descend into the material world, they «dematerialize», i.e. they switch from being a «mental icon» to becoming a «relational property», which is based not (only) on the abstract content of something called «legislative matter», but (also) on the positions of strength that the (assumed) assignee of that matter holds and can enforce.

If the assignee lacks the strength for enforcing – according to the constitutional provisions – the assigned legislative matter in his/her relationship with the weaker, *per tabulas* non-assignee, the matter will never turn into «power», but will remain suspended in a world that does not belong to us, albeit it is going to be regulated by the hypothetical non-assignee.

Perhaps this is also the reason why the category «limitations of the legislation» defines the «legislative matter» better than the subject matter itself can do: the «limitation» more easily establishes the «relation» of power not only between subject matters, but more appropriately between assignees of those powers that can hypothetically be exercised.

To this purpose, on a conceptual level, the dynamics is explained by referring to the thorough evaluation of the «interest raised» around each legislative power and, especially, around each case of overlapped legislative matters and powers.

In other terms, a general parameter is available – which the Court has actually explicated since its very first decisions on regional subjects<sup>15</sup> – that can help interpret the exercise of regional legislative powers, a parameter which we could define «the regional quality of interests»: the Constitution assigns regions a number of legislative matters, yet the actual powers devolved to the regional legislative authority are those corresponding to the regional dimension of the regulated interests.

Both the statement and the interpretation are absolutely beyond dispute, though not necessarily exhaustive, as they do not account for the fact that a specific interest should be qualified as either state or regional at the outset.

We'd better go back to our metaphor then: in the example provided, the football field on which both teams are going to play is symmetrical, i.e. each team have their own «half of the field» which mirrors the other half; in fact, they are interchangeable (the

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<sup>15</sup> See Constitutional Court, Case No. 7 of 1956.

teams generally exchange their positions between the first and the second half of the match).

A question arises: Does the same apply to the state-regions relationship as to the relevant legislative powers?

On this matter, we immediately discover that the «playing field» is anything but symmetrical and, above all, that the constitutional provisions that define its borders are not primarily those which assign legislative matters in Const. Art. 117.

In other words, the provisions concerning legislative matters are the latest addendum of a certain organizational model, and financial planning, of the state (or “republic”, as it should currently be called) and of a certain model for the protection of basic rights and individual juridical situations in general, which represents the playing field where the competition between state and regional lawmakers takes place.

As a matter of fact, regional lawmakers are denied the possibility to make laws in key sectors of the juridical system (civil and criminal law, civil procedural and criminal procedural law, administrative procedural law, fundamental rights law, to name the most obvious).

As a consequence, regions find themselves in a subordinate condition as regards their capacity to make a difference in the arena of national policies, and struggle to assure the expected degree of financial independence from state decisions.

In short, the lack of a Chamber of the Regions that might affect the approach of the state legislation at its very inception<sup>16</sup>, the lack of implementation – currently only provisional considering that Act No. 42 of 2009 delegated the implementation of the so-called «fiscal federalism» to the government – of the principles of financial independence contained in Const. Art. 119, the removal of entire sectors of the regional juridical system – but for few exceptions – through limitations of the regional legislation (which was practically achieved in the passage from the old to the new Article 117), all of this confines the exercise of regional legislative powers to a limited section of the juridical system (i.e,

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<sup>16</sup> Among the many contributions on this subject, read the persuasive comments by S. Staiano, *Note introduttive*, in M. Scudiero (ed.), *I Le Autonomie al centro* (2007), XVI et seq. Read more in general about the topic in L. Castelli, *Il Senato delle autonomie* (2010).

recalling the football metaphor, the match is only played in the penalty area on the «regional» side of the football field).

In this perspective, the ability to regulate and distribute the actual powers related to legislative matters exemplifies a «precipitate», not a «precondition», of the overall system organization.

This issue is crucial, in our opinion, both to explaining the current situation, and to understanding the role played by the legislative matters in relation to subjects of state and regional interest.

In the latter perspective, the delimitation of the playing ground where the state and regional legislative matters are called to compete (i.e. a certain overall organizational model of the constitutional system) *ex ante* solves the bulk of power conflicts by qualifying the dimension of the state and regional interests. To which we can add that the implied qualification is anything but immutable, as it depends on the interpretation – lately, more cultural than juridical – of two decisive provisions in our Constitutional Chart: Article 3 (the principle of equality in a formal and substantial sense: to what extent can a body of legislation differ from region to region in the context of citizens' equality before the law?) and Article 5 (the principle of unity and indivisibility of the Republic and the principle of devolution: how can these conflicting principles be brought to terms, and what kind of balance can be achieved between the two?).

Once the limits of the basic organizational system are marked in a more or less regional direction – undoubtedly less so in the Italian system – the role of legislative matters is essentially recessive: they can only play their role in conferring powers in the given context. This limiting perspective for the regions will progressively restrict the interpretation of matters concerning regional legislative powers.

For this reason, as we shall see, while the whole nomenclature of the limitations to which regional lawmakers are subjected has practically changed, the amendment to Title V of the Constitution has failed (sofar) to shift the legislative power exercise axis credibly and, more generally, to assure the proper degree of regional (political) independence.

### 1.5. Following: ... and two conclusive viewpoints

After providing a snapshot of the overall system of legislative powers and the role of legislative matters, we should throw some light onto the approach of the two agents of the institutional system who, in the praxis following the constitutional amendment, had to take a stand on its impact.

We will therefore introduce the conclusive viewpoints of both the state lawmaker and the legislative power referee (in line with the football match metaphor), i.e. the Constitutional Court.

As noted elsewhere, such a significant constitutional reform as the amendment of Title V “requires that Parliament should implement an active and coherent institutional policy, mindful of those procedures meant to assure the effective involvement of the Regions, the lack of which would result in a dangerously growing risk of dysfunctionalities and degeneration that could not be compensated by the action of any other constitutional body, in the long run”<sup>17</sup>.

As a matter of fact, throughout the 14<sup>th</sup> legislature – and, for other reasons, even the 15<sup>th</sup> and the current one, the 16<sup>th</sup> – state lawmakers have approached the matter from a totally opposite viewpoint: far from taking the amendment to Title V seriously, they have continued to legislate as if nothing had changed.

This became clearly evident as the state legislators continued, especially in budget laws, to create and regulate funds and functions falling within regional powers, or even to try and get ahead of the newly amended constitution, especially as regards the granting of regulatory powers (otherwise removed from the state concurrent powers: see Art. 117, par. 6), by formulating unprecedented «decrees of a non-regulatory nature».

Another aspect related to the first is the extremely weak (and substantially failed) attempt at implementing a constitutional reform through Law No. 131 of 2003 (the so-called La Loggia law), which was dimidiated by the Constitutional Court<sup>18</sup> itself.

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<sup>17</sup> See U. De Siervo, *Il sistema delle fonti: il riparto della potestà normativa fra Stato e Regioni*, in 6 Le Reg. 1264 (2004).

<sup>18</sup> See Cases Nos. 236, 238, 280 of 2004. In particular, in Case No. 280, the Court had to face a dual proxy for the adoption of legislative measures «only meant to acknowledge the fundamental principles that can be drawn from the laws in force»: the one concerning concurrent powers, the other concerning matters of shared powers (respectively, Art. 1, par. 4 and 5), which we will discuss in the

A third, crucial aspect concerns the failed – at least on an operational level – attempt at carrying into effect the “fiscal federalism” by the relevant High Commission during the 14<sup>th</sup> legislature, which currently (and perhaps decisively) found a remedy in the implementation provisions in matters of «fiscal federalism» through proxy law No. 42 of 2009.

These three concurrent causes have produced an institutional framework in which regions have been granted more legislative powers on paper, while actually nothing has really (and automatically) changed on the level of both the administrative functions and the financial resources and independence (which are still regulated by laws in force prior to the constitutional amendment).

This, in turn, has produced – this is recent history – a very considerable amount of conflicts to be addressed by the Constitutional Court: after Title V of the Constitution was amended, the number of rulings by the Constitutional Court concerning the application of the new powers introduced in 2001 has increased exponentially, especially as regards legislative powers.

In short, it appears that the Constitutional Court has taken on the role of «referee of the legislative powers» and, more generally, of the State-Regions relationship.

To fully understand the distribution of legislative powers in the Italian system, we need to refer to the Constitutional Court’s relentless work of modulating legislative powers.

We’ll introduce this second viewpoint – the constitutional judge’s viewpoint – because, in our opinion, in the short time elapsed since the new constitution has come into force (hardly a decade), the Court has gradually developed and changed its own approach to the amendment of Title V<sup>19</sup>. More specifically, after an

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next pages. In short, the Court reduced the capacity of the former to purely formal acknowledgement of fundamental principles and declared the latter constitutionally illegitimate.

<sup>19</sup> In this regard it should be pointed out that the reform of Title V had been hailed by most of the doctrine – understandably – as an amendment which would have radically changed the relationship between State and regional legislation in such a way as to favor the latter. See, among others, B. Caravita, *La Costituzione dopo la riforma del Titolo V* (2004), 69 et seq.; M. Olivetti, *Le funzioni legislative regionali*, in T. Groppi, M. Olivetti (eds.), *La Repubblica delle autonomie* (2003), 91 et seq. Opponents, conversely, had expressed a more

initial set of decisions which established new scenarios as compared to the former distribution system, the Court took remedial measures, probably on account of the inertial action of the Government-Parliament dyad.

In that sense, as the constitutional case law which followed the amendment to Title V is extremely varied and complex, we deem it useful to offer a quick history of constitutional case law at different time intervals, in spite of the limits that such an operation may have. Considering that the bulk of decisions we refer to is in the order of thousands, it goes without saying that what we'll be able to provide is only a general trend in case law.

In our opinion, the Court's judicial review in the area of regional powers has undergone three stages in the past years.

At a first stage, *between 2002 and 2003*, the Court maintained an attitude of open-mindedness on the innovations introduced with the constitutional amendment (while keeping silent as to the behavior that could be expected of the institutions): Cases Nos. 282 and 407 of 2002, No. 94 of 2003, as we shall see in the next pages, exemplify an attempt to make the most of the regional legislation and its prospects.

The approach that is attributed to the Constitutional Court appears to be even clearer when comparing these earlier decisions with the earliest decisions on regional matters that had been taken immediately after the establishment of the ordinary regions (reference is made to the decisions of 1971-72, which certainly point out, in several respects, the inherent supremacy of the State).

In short, the Court did not initially intend to maintain a suspicious or cautious approach to the amendment of Title V: on the contrary, it openly acknowledged the effects that the reversed division-of-powers policy had in inverting the burden of proof – meant to provide evidence for the ownership of legislative powers

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problematic vision of the relationship between the new provisions of Art. 117, par. 2-4, and the reality ensuing from the relations between State and regional law. See especially the contributions by R. Bin, *L'interesse nazionale dopo la riforma: continuità dei problemi, discontinuità della giurisprudenza costituzionale*; P. Caretti, *L'assetto dei rapporti tra competenza legislativa statale e regionale, alla luce del nuovo Titolo V della Costituzione: aspetti problematici*; R. Tosi, *La legge costituzionale n. 3 del 2001: note sparse in tema di potestà legislativa ed amministrativa*; and G. Falcon, *Modello e "transizione" nel nuovo Titolo V della Parte seconda della Costituzione*, in 6 Le Reg. respectively 1213 et seq.; 1223 et seq.; 1233 et seq.; 1247 et seq. (2001).

- which, after the amendment, was placed on the State (Case No. 282/02).

At the same time, state powers were partially «relieved» of the «protection of the environment and ecosystem» - which seemed to strip the regions of a conspicuous part of their legislative history (probably the most positive part considering the normative space it occupied) - thus limiting the legislative powers of the state to setting minimum standards of protection whenever concurrent conditions occurred (407/02), which in turn introduced an argumentation scheme in the relationship between legislative powers that was generally not unfavorable to the regions.

The state lawmaker's inactiveness - as we have mentioned before - and the lack of legislative implementation expected in the long run - both affecting the modulation of relevant powers and the inherently interrelated "financial relationships" - urge that the Court, besides deciding on critical (and hence political) matters such as budget laws, found instruments to enable the independent and «comprehensive» implementation of the constitutional amendment, since the end of 2003, and throughout 2004.

The historical development of this fairly large body of Court decisions seems to suggest that a genuine choice - made necessary by events, yet meant to preserve the postulated unification (although in some cases with certain precautions) - was implicitly exercised by the Constitutional Court.

The Court decisions made at that time included:

a) Case No. 274 of 2003, by which (on the ground of Case No. 94 of 2003) the Constitutional Court confirmed the asymmetry of the questions raised by State and regions in the contestation of the relevant legislative acts before the Court (based on the evidence of Const. Art. 5 itself);

b) Cases No. 303 of 2003 and No. 6 of 2004 (the so-called «legislative subsidiarity», which will be discussed further on in this paper);

c) Cases No. 370 of 2003 and No. 13 of 2004 (the so-called principle of «institutional continuity», which will be discussed further on in this paper);

d) once more, Case No. 370 of 2003 in which the Court ruled that the residual policy was not to be applied automatically;

e) Case No. 14 of 2004 (in which «competition protection» was interpreted as a dynamic, cross-cutting subject matter that allowed the state to be in charge of economic policy management tools);

f) Cases Nos. 307 and 331 of 2003, concerning «electrosmog» (which at least partially improved the provisions of Case No. 407 of 2002 imposing further restrictions on the regional lawmaker's right to *in-melius* derogation from the state rules for the environmental protection);

g) numerous decisions which acknowledged the lack of implementation of Art. 119 and explained the principles and the resulting limitations that were imposed on the state lawmaker (since the very Case No. 370 of 2003);

h) Case No. 308 of 2003 which, following No. 88 of 2003, seemed to initiate the «season of loyal cooperation», asserting that “*in those cases in which the exercises of powers cannot be clearly defined due to their functional relationship, the principle of «loyal cooperation» will apply*”.

Compared to the former period, a quantum leap in quality seems to have been taken since 2005.

The Court finally realized it had been left «alone» and, after «La Loggia» law (Case No. 280/04) substantially failed to implement the constitutional amendment, it decided to proceed, in the most absolute inactivity of the system, by referring to its own juridical precedents.

Therefore, in a number of subject matters that we are now going to analyze, the deviation from the original model is even more striking: what is achieved is no longer an evolutionary (or creative) interpretation of the Constitutional Chart, but a real «interpretation of the interpretation».

In other words, in the latest years, in many areas and in reference to various legislative matters, the parameter of the Court has no longer been a certain interpretation of the constitutional provisions (legislative matters and principles) in the amended text of Title V - though still somehow at work until 2005 - but it has rested, as the principal issue, on the interpretation of those parameters already given by constitutional judicial review, to

which further developments in the interpretation are added, predominantly based on this body of case law<sup>20</sup>.

Leveraging the described dynamic case law, the Court – as it will be specified below – has in the past three years changed some basic interpretation guidelines as to the configuration of legislative matters of particular importance in the understanding of the relationships between state and regional powers.

This observation is useful to understand the special bond that characterizes the relationship between Government and Parliament, on the one hand, and the Constitutional Court, on the other hand, in the overall configuration of the relationship between state and regional legislation.

In fact, it is no coincidence that the expansion of certain state powers in the constitutional judicial review coincided with the approval of key state "reform" normative acts in those areas (we refer, e.g., to the Public Contracts Code and the Environmental Protection Code – respectively, Legislative Decree No. 163 and n. 152 of 2006 – and even before, the Electronic Communications Code, Legislative Decree No. 259 of 2003).

The complex amending moves necessary to match the model introduced by the constitutional amendment of Title V with the institutional and legislative practice tend to emphasize the symbiotic relationship – in regional matters – between state policies and the Constitutional Court's interpretation of the system of regulatory powers.

In this framework, we are now going to analyze the overall orientation – a detailed analysis on each subject would be impossible due to space constraints – provided by the Constitutional Court as to the system of exclusive, concurrent, and residual legislative powers.

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<sup>20</sup> At this «third stage», the Constitutional Court's decisions would typically reserve a paragraph of the motivations to the organic reconstruction of the juridical precedents about the matter discussed in the interpretation and, based on that, the Court would release its decision.

## 2. Exclusive powers

### 2.1. Introduction. The framework of powers reserved to the state.

We have earlier mentioned the essential features of the subject matters listed in Article 117, as identified according to objective or teleological criteria.

We need now to point out that, as was noted elsewhere, the actual powers reserved to the state do not even formally find completion in the exclusive powers listed in Art. 117, par. 2<sup>21</sup>.

Above all, it should be noted that "teleological matters", when assigned to the exclusive power of the state, tend to be considered as cross-cutting matters.

The development of Constitutional Court case law in response to cross-cutting issues calls for a double-track approach that chronologically illustrates the advances in both environmental protection and competition protection, albeit separately.

The subject matters that have not (as yet) taken on a cross-cutting connotation will follow.

### 2.2. Cross-cutting matters

The Constitutional Court has given full consideration to the «cross-cutting matter» concept in the case law which followed the amendment of Title V, and identified – among the subject matters listed in Art. 117, par. 2 – some issues for possible intervention by the state, which would at first sight, on the paper (i.e. according to Art. 117), appear to be reserved for the regional lawmaker<sup>22</sup>.

We should start by saying that the mere identification of a cross-cutting issue does not necessarily imply that this will expand state powers both quantitatively and qualitatively.

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<sup>21</sup> It was appropriately reminded that "further areas of exclusive state legislation than those listed in Art. 117 par. 2 can be inferred from a number of constitutional provisions (Art. 33, par. 6; Art. 114, par. 3; Art. 116, par. 3; Art. 117, par. 5 and 9; Art. 118, par. 2 and 3; Art. 119, par. 3, 5 and 6; Art. 120, par. 2; Art. 125; Art. 132, par. 2; Art. 133, par. 1)": G. Scaccia, *Legislazione esclusiva statale e potestà legislativa residuale delle Regioni*, in F. Modugno, P. Carnevale (ed.), *Trasformazioni della funzione legislativa, vol. IV – Ancora in tema di rapporti Stato-Regioni dopo la riforma del titolo V della Parte II della Costituzione* (2007), 113 et seq.

<sup>22</sup> V. G. Falcon, *Modello e transizione nel nuovo Titolo V della Parte seconda della Costituzione*, in 6 Le Reg. 1252 et seq. (2001).

As we shall see below – e.g. in the case with the “protection of the environment and ecosystem” – the «cross-cuttingness» has sometimes come into play at a time when state powers were being withdrawn and specific legislative powers were being vested in the regions.

The (basic) matters that have been explicitly identified as cross-cutting among those falling within the State’s exclusive powers include the “*protection of the environment and ecosystem*” (leading case, Case No. 407 of 2002); the “*essential service levels relating to civil and social rights to be guaranteed regardless of the geographical borders of local authorities*” (in this case, the cross-cutting issue was acknowledged by an *obiter dictum* contained in Case No. 282 of 2002, and referred to, inter alia, in Cases Nos. 88 and 370 of 2003); “*competition protection*” (leading case, Case No. 14 of 2004, later confirmed, inter alia, by Case No. 272 of 2004); “*criminal justice system*” (leading case, Case No. 185 of 2004).

Contrary to what might be expected, the Italian constitutional jurisprudence has not developed a unitary concept of «cross-cutting matter». The «cross-cutting» content of these subject matters is treated differently and even takes on independent meaning and scope for each of them.

In an effort to summarize, the Court actually affirmed that “*environmental protection is not to be seen strictly as a subject matter, but rather as a constitutional value which, as such, represents a cross-cutting matter; this gives rise to distinct powers, which may well be vested in the regions, while the decisions about questions demanding uniform treatment over the national territory should remain the concern of the State*” (407/02).

This substantiates the idea that vesting the State with legislative powers over environmental protection will not prevent regional laws from intervening to improve it, provided that the regions are legitimately entitled to do so by provisions in Art. 117, paragraph 3 or 4, and that these interventions fall within the minimum *standards* of protection set by state law.

In other words, the state powers over cross-cutting issues arise, as specified before, from the need to make more room for regional lawmaking; yet, as the value attached to environmental protection would suggest, not only have the *borders* become blurred, but, more importantly, the *contents* have become confused and confusing (to the regional lawmakers’ advantage).

As far as essential service levels (hereinafter «ESL») are concerned, the constitutional judge specified that *“they cannot be strictly considered as a subject matter, but rather as an underlying component encompassing all subject matters, for which the state lawmaker shall be allowed to set the necessary rules in order to ensure full enjoyment of the relevant rights throughout the national territory, thus preventing any limitations or constraints that might be imposed by the regional lawmaker”* (282/02).

What the Court did was not only to identify a cross-cutting matter that touched a variety of matters, as in the case with environmental protection, but more generally it contributed to describe an as yet indefinite and *a priori* indefinable, but potentially all-encompassing “non-matter”.

Accordingly, “competition protection”, the Court added, *“does not show the characteristics of a definite subject matter, but those of a power that can be exercised on many different subjects, (...) hence the inclusion of this state power in Const. Art. 117, par. 2, letter e), which evidences the 2001 state lawmaker’s intention to bring those economic policy tools which (...) are the expression of a unifying power solidly into the State’s responsibility. The state’s intervention is therefore justified by its relevance to macroeconomics”*(14/04). On this basis, it was added that *“the intervention of the state lawmaker is legitimate if contained within the limits of appropriateness and proportionality”* (345/05).

In this case, therefore, cross-cuttingness results from the macroeconomic importance attached to the state intervention, and it is through this criterion that the extent of state power and, conversely, of regional power can be identified. In reality – but we will return on this later – in the most recent case law the Court seems to have expanded the “regulatory” capacity of the matter, thus extending its scope and partly changing its identification criteria.

Lastly, the state powers in matters of “criminal justice system” imply that *“the regions do not have any powers that entitle them to make laws in order to introduce, repeal or modify the penalties prescribed by state laws on the same matter”* (185/04).

The Constitutional Court (implicitly recalling its previous case law) also added that *“the «criminal matter», understood as the set of assets and values to which the greatest protection is afforded, cannot normally be determined in advance; it comes at a time when the state lawmaker sets incriminatory provisions, and this can actually occur*

*in any sector, irrespective of the division of legislative powers between the state and the regions. It is by definition an instrumental power that the State exercises and that can potentially affect the most diverse sectors, even those included in the exclusive, concurrent or residual legislative powers of the regions”.*

In the case at issue, under the guise of a cross-sectoral matter, a general limit that the Constitutional Court had identified since its inception is confirmed, namely the so-called «limit of criminal justice matters»<sup>23</sup>, according to which the power to regulate legal issues in criminal cases is inherently vested in the State. Moreover, by the statement above the Court categorically reaffirms that no allotment of subject matters may affect or limit that power of the State.

We find it relevant to make a final remark, which has partly emerged before: for each cross-sectoral matter that the Court expressly acknowledged, the constitutional justice makes sure that a parameter is identified, a sort of stop-limit, which can help restrict (or at least control by means of interpretation) the expansive exercise to the damage of regional powers.

With regard to environmental protection, this function is initially accomplished – except as discussed in the next paragraph – by the principle of *in-melius* derogation (182/06) and the corresponding reference to the definition of state powers in terms of setting the «minimum standards of protection» (407/02).

With regard to «ESL», the function is accomplished by the principle of loyal cooperation, by a certain interpretation of the provisions ruling such a power and by the clear statement of the Constitutional Court according to which this power cannot be used “*to identify the constitutional basis of the state regulation of whole subject matters*” (respectively, 88/03, 370/03, 285/05)<sup>24</sup>.

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<sup>23</sup> See C. Ruga Riva, *Regioni e diritto penale. Interferenze, casistica, prospettive* (2008).

<sup>24</sup> Of particular relevance is the Court’s latest decision, no. 10 of 2010, that found legitimacy in the state provisions concerning the renowned «*social card*» issued by the state to cope with the most severe poverty situations at a time when the financial and economic crisis was growing more serious: referring to the current situation of crisis and basing its decisions on the state powers in matters of «ESL», the Court affirmed that “*in other words, such an intervention by the state shall have to be considered admissible, should it be necessary to actually ensure the protection of those people who, being in dire straits, claim a fundamental right which, as it is strictly inherent to the protection of the inalienable core of human dignity,*

With regard to competition protection, the function is accomplished (at least initially) by the macroeconomic nature of the intervention as assessed in accordance with principles of adequacy and proportionality (14/04, 345/05).

After all, even in the case with the criminal justice system, the claim that the exercise of state powers in criminal justice matters should *“always be contained within the limits of non-manifest unreasonableness (...) in accordance with the last resort criterion”* means that *“the limitation of regional legislative powers is justified when state law tends to preserve the heritage, values and interests of its entire community, on equal terms”* (185/04).

It is therefore noted that the dynamics of the three major cross-cutting matters (environmental protection, competition protection, ESL) – at this first stage of judicial review – tends to establish a relationship (peculiar to each of them) between state and regional powers, in which there is still theoretically the possibility for the regional lawmaker to intervene in areas teleologically related to such (cross-cutting) matters falling within exclusive state powers.

### **2.3. The new approach to the cross-cutting matters «environmental protection» and «competition protection» (2007/10)**

Starting from a core of decisions in 2007, which were later confirmed, the Constitutional Court changed its approach with regard to the interpretation of the matters «environmental protection» and «competition protection».

As far as «environmental protection» is concerned, the Constitutional Court clearly stated, in contradiction to what was expressed in the mentioned Case No. 407/02, that environmental protection makes a matter of its own which regards a nationally recognized legal concern (the environment), whose discipline is vested exclusively in the state (see Cases No. 387 of 2007, No. 225 of 2009, and No. 104 of 2008 – among others – from which the following quotations are drawn).

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*especially when the peculiar situations mentioned above realize, shall have to be ensured all over the national territory in a homogeneous, appropriate and timely manner, by means of a coherent regulation, appropriate to the scope”.*

It remains true that “next to the environment as a nationally recognized asset, other “legal” assets can coexist which relate to components or aspects of the environment as an asset, concerning different interests that are legally protected”, and that therefore we can talk about “the environment as a «cross-cutting matter», in the sense that different interests converge on the same subject: those related to the preservation of the environment and those related to its uses”.

In such cases, however, “the national legislation on the protection of the environment as a general asset, which is vested exclusively in the State, prevails over that vested in the regions or the autonomous provinces, with regard to their powers which concern the use of the environment and, therefore, other interests”.

We can conclude that “the state legislation on environmental protection «actually operates as a limit to the legislation that the regions and autonomous provinces have laid down on other matters within their powers», except when they adopt higher environmental protection rules in the exercise of powers provided by the Constitution which come into contact with those ruling environmental protection. This is therefore the sense in which the environment can be understood as a «cross-cutting matter» (as repeatedly stated in the case law of this Court; see Case No. 246 of 2006 for all), and it cannot be said, as the regions Veneto and Lombardy would like to say, that «the environmental matter cannot be understood as such in a technical sense». On the contrary, the environment is a legal asset that, pursuant to Const. Art. 117, par. 2, letter s), also serves as a dividing line between matters within exclusive state powers and matters within regional powers”<sup>25</sup>.

As regards “competition protection”, the result is the same but with different arguments.

In short, the Court refers to competition as a means of protecting and promoting competitive assets of the market and in the market, in keeping with the EU notion itself. In this sense, and when the available state provision pursues this goal, it can be implemented in every material sector, appearing as a «cross-cutting matter». The need remains to test the appropriateness and

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<sup>25</sup> With reference to the environmental matter, therefore, the planning of a policy and coordination function can be admitted [partial preemption] and, above all, unlike what seemed to be implied, the administrative functions, as outlined in the Legislative Decree No. 112 of 1998, can be revised in the direction of a centralized exercise of the state legislative power over environmental matters [total preemption] (see Case No. 232/09).

proportionality of the state legislative actions (as argued in Cases Nos. 401, 430, 431, 452/07).

The departure from earlier case law in both matters here deserves particular emphasis not so much because of the emerging argumentative outlines, but rather because of the consequences that they immediately produce.

As it will be clear later when discussing the use of the principle of loyal cooperation in managing the system of legislative powers, the Constitutional Court's approach clearly sets a limit to the regions' claim that they should be involved in the exercise of legislative powers and the ensuing regulatory powers in these matters.

The Court specifies that since both matters concern the exercise of exclusive – albeit cross-sectoral – powers of the State, this will not be bound to consult the regions about the legislative and regulatory acts to be adopted.

In this sense, both matters, at this point, establish a real, new limitation for the regional lawmaker – at least with respect to its extent – and actually it is a particularly pervasive limitation, as it impacts a large portion of regional powers.

In fact – and we refer to practical case law, not to an abstract interpretation of subject matters – environmental protection is typically related to a range of concurrent and residual regional powers, such as health protection, territorial government, fish and game<sup>26</sup>.

Competition protection has no less impact since it usually relates with regional powers in matters of trade, industry and economic activities in general, and with (local) public services, to name just the best known.

In these cases, therefore, to quickly go back to the theoretical perspective, it is now clear that there is no clear-cut separation between state and regional legislation in all these areas, and it will be necessary to verify the order and nature of the state and regional regulation to qualify the subject matter that should encompass the regulatory intervention, so as to legitimize (or de-legitimize) the exercise of the relevant power.

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<sup>26</sup> Refer to <http://www.dirittoregionale.it> for examples of overlapping matters, which are numerous in this sector.

However, the relational model to which this new approach for the mentioned cross-sectoral powers refers is peculiar.

Whenever legislative power is exercised in either cross-cutting matter, the state law acts as a limit to the regional legislation, although this implies invading the regional power (which, after all, is in line with the old national interest model). This means that the space occupied by the State in these matters, even if it affects regional powers, is automatically removed from the regions, which cannot claim involvement even only in terms of loyal cooperation with the legislative power of the State, and will also lose their regulatory powers (which comply with the formal model as in Art. 117, par. 6: they are vested in the State in matters of exclusive powers).

This aspect is particularly important not only because it changes (or reinforces) the invasive outline of these powers of the State. As a matter of fact, the new element introduced by these decisions is the re-introduction of an apparently outdated relational model between state and regional powers.

However, in those cases when state and regional legislative powers overlap, a situation which is effectively depicted with the term «concurrency of powers», the Constitutional Court adopted – and keeps on adopting beyond the context of these matters – a number of decisive criteria which ensured the legitimacy of state legislation while somehow compensating the regional level by providing regional involvement in the implementation of the state legislation (usually through a statement or agreement on measures for implementing the national legislation during the State-Regions Conference).

With reference to the above mentioned cross-cutting matters, however, the relational model is quite the opposite, although the case in point is similar: as it is simple to understand, by definition, if a state power is «cross-sectoral», in operational terms, it implies overlapping powers.

On the contrary: the overlap is realized precisely in the «cross-cutting» part of the matter at issue and usually gives rise to the intertwining of powers (both state cross-sectoral powers and regional powers).

In this case, the plot is easily solved: the power is vested in the State, there is no need for any form of trustful cooperation. The state legislation introduces and acts as a limit on the regional

legislation. The regional lawmaker is stripped of the relevant legislative power.

In that regard, the Court has recently pointed out – as if it wanted to establish a parallelism between limits on the environmental protection matter and limits on the competition protection matter, and also to define its scope – that “*the pursuit of environmental protection by the regional lawmaker can only be accepted if it is a marginal and indirect effect of the guidelines adopted by the region in the exercise of its legitimate powers, provided that it does not clash with the goals set by state regulations for the protection of the environment (Case No. 431 of 2007)*”.

Case No. 431 of 2007 expressed the same concept with regard to competition protection.

One last remark. If we look at the motivational content of the decisions described above, we cannot but notice some (newly introduced) convergence between the interpretive approach of the environmental and competition protection cross-cutting matters on the one hand, and criminal justice system, on the other. In either case, whenever state legislation is materialized in these areas, the limit on the regional lawmaker is confirmed (and extended): it operates in a way not unlike the limit of national interests before the amendment to Title V<sup>27</sup>.

#### **2.4. Potentially cross-cutting matters**

A final mention should be made to two specific matters that could be defined as potentially cross-cutting: «civil regulation»<sup>28</sup> and «heritage protection».

The former, although not classified as a cross-cutting matter, ends up enacting, as the Court put it, the old limit of private law, which, due to its wide scope and difficult predetermination, provides a

“touch of cross-cuttingness” to the matter.

In this sense, the Court stated that “*the state’s legislative power includes aspects that are inherent in relationships of a private nature, for which there is a need for national uniformity; [that] it is not*

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<sup>27</sup> See A. Barbera, *Regioni e interesse nazionale* (1974); and A. Barbera, *Gli interessi nazionali nel nuovo Titolo V*, in E. Rozo Acuña (ed.), *Lo Stato e le Autonomie* (2003), 12 et seq.

<sup>28</sup> See E. Lamarque, *Regioni e ordinamento civile* (2005).

*excluded by the presence of aspects of specialty codes regarding code provisions; [that] it includes the rules governing legal persons under private law; [that] it includes institutions which are characterized by elements of public law, yet having a private law nature” (326/08).*

The latter, «heritage protection», – usually interpreted together with another matter under concurrent powers: «development of cultural and environmental heritage» – was considered by the Court to have a cross-cutting nature, in the same sense and for the same reasons as «environmental protection», i.e. to ensure a strong link between state and regional legislation, given the overlap of powers, which only the reference to Legislative Decree No. 112 of 1998 and, more recently, to Legislative Decree No. 42 of 2004, can partly remedy (9/04 and 232/05).

Also «heritage protection» followed (actually, partly anticipated) the same pattern as previously seen in the case of environmental protection (see Case No. 367/07).

## **2.5. Matters with potentially defined content**

What follows documents a phenomenon opposite to that of the so-called «cross-cutting matters». That is, while the Court interpreted some state-governed matters or areas or sectors in their extensive and cross-cutting nature, in other cases (not seldom, though), it identified the limits and boundaries of state legislative matters. In the case of matters such as «public order and security» (letter h), «statistical coordination of state, regional and local government data» (letter r), and «legal and administrative organization of the state and national public agencies» (letter g), the Court has so far favored a plain reading, which collocates, defines and confines these powers. Furthermore, this line of interpretation is not always resolved in favor of the regional legislative powers, but it is certainly consistent with the overall approach of Art. 117 and shows that, in some cases, the enumerated matters can be filled with contents without having to resort to interpretations that contradict the system of the legislative powers allocated to each matter.

Case No. 17 of 2004 represents a hypothesis of a strict reading of a matter assigned to exclusive state powers, such as the «statistical coordination of state, regional and local government

data». Of relevance here is the fact that a strict interpretation of the matter is aimed at limiting – in a manner favorable to the regions – the extent of the state regulation which, according to the Court, should be understood *“as granting the Minister for Innovation and Technology a power (over the regions) which is limited to a merely technical coordination task”*.

The “coordination” idea, which could have been easily interpreted by the Court as expansive, was on the contrary deprived of its intrusiveness into regional powers and reduced to a *“merely technical coordination”*. Therefore, while on the one hand the contested provision is not declared unconstitutional, on the other hand the Court’s interpretation limits its scope to a degree of compatibility and compliance with the regional powers granted by the Constitution.

A similar attitude is reflected in the interpretation of the matter «legal and administrative organization of the state and national public agencies»: in this hypothesis, a thicker and sometimes wavering case law has explicitly ruled out that it is or can be interpreted as a cross-sectoral power; the Court has also ruled out several times that the generic reference made by state law to «public administrations», in relation to the effects of certain regulatory bodies, could be interpreted as also including non-state agencies (see Cases Nos. 31/05, 270/05, 319/09).

Last but not least, the matter «public order and security, with the exception of local administrative police» represents the first case of a restrictive interpretation of an exclusive state power after the constitutional amendment of 2001. Since Case No. 407 of 2002 the Court has stated that, in order to justify a restrictive interpretation, it suffices to *“note that the specific context of Art. 117, par. 2, letter h) – which almost entirely reproduces Art. 1, par. 3, letter l in Act No. 59 of 1997 – induces a restrictive interpretation of the concept of «public security», because of the textual connection with «public order» and the explicit exclusion of «local administrative police», as well as based on the preparatory work. «Public security», in fact, as this Court would traditionally put it, should be conceived, in opposition to the tasks of regional and local administrative police, as an area reserved to the State on measures related to crime prevention or maintenance of public order (Case No. 290 of 2001)”*.

Incidentally, two distinct meanings are attached to the notion of «public order» by the Supreme Court of Appeal and the

Constitutional Court, as the notion suggested by the Constitutional Court is more restrictive.

In order to complete our analysis, it should be noted that in these matters the relational model (as referred to regional powers) is different from that of cross-cutting matters (environmental protection and competition protection): whenever state powers and regional powers intersect or overlap, the Constitutional Court tends to solve the situation by referring to the concept of «concurrent powers» only – on which we will return – therefore through the prevalence criterion and, if necessary, the principle of loyal cooperation.

## **2.6. State exclusive unenumerated powers: the case of «road traffic»**

A special case is to be reported, in which the Court, without resorting to special tools to take on state powers, directly relates an unenumerated subject matter to its exclusive power: this is the case of «road traffic».

In Case No. 428 of 2004, the Court stated that *“road traffic, even though not expressly mentioned in Const. Art. 117, cannot be placed in the residual area of powers reserved to the ordinary regions in Art. 117, par. 4. In relation to various aspects under which it can be considered, systematic considerations suggest that «road traffic» can be traced back in many ways to exclusive state powers, in accordance with Art. 117, par. 2”*.

The Court here refers to exclusive state powers in matters of «public order and security», «criminal justice system» and «civil regulation», «administrative justice» and «jurisdiction», to assert that «road traffic» is an exclusive power of the State, for systematic reasons, although «unenumerated» (on the same line of reasoning, more recently, is Case No. 9/09).

Therefore, the systematic interpretation of certain sections under state jurisdiction can bring a matter («road traffic» in this case) within the exclusive power of the State, and this too is another relational model. The complex of state powers can lead to the inclusion of a matter within the exclusive powers of the State (supplementing the list in Art. 117, par. 2).

### 3. Concurrent powers

#### 3.1. The framework of concurrent powers. Introduction to the relationship between principle rule and implementation rule. The role of the implementation of Community law

The amendment to Title V of the Constitution did not make it easier to identify the content of the fundamental principles set by the State in matters of concurrent powers, which proves to be perfectly in line with the original regional structure. In Case No. 50 of 2005, the Court stated that *“the concept of «fundamental principle» (...) is not and cannot be of a strict, universal nature, because “subject matters” have different levels of definition that can change over time. It is the lawmaker’s task to make choices as deemed appropriate and adjust each subject matter on the basis of essential normative criteria that the interpreter shall assess impartially without being influenced conclusively by any self-classification”*.

In reality, once more in line with the original regional structure, the Constitutional Court has often allowed implementation rules to be ranked as fundamental principles. In a recent decision that has been repeatedly quoted, the Court has taken up the claims made in the mentioned Case No. 50 of 2005 and specified the role that the implementation of Community law may have in defining the relationship between principle rules and implementation rules: *“in the implementation of Community law the definition of the internal allocation of powers between State and regions in matters of concurrent legislation and, therefore, the very identification of fundamental principles cannot disregard the analysis of the specific content as well as the purpose and needs to be pursued at Community level. In other words, the goals set by EU directives, although they do not affect how the separation of powers is achieved, may in fact require a specific articulation of the relationship between principle rules and implementation rules”* (336/05).

To put it shortly, the implementation of Community law may drag the fundamental principle into establishing implementation rules, as is the case at issue.

More generally, the requirements for the implementation of EU directives – in continuity with Case. No. 126/96 – may entail centralizing implementation powers in the State, notwithstanding the internal framework for the division of legislative power (398/06).

With a view to implementing Community law, the Constitutional Court – in compliance with the law<sup>29</sup> – considers legitimate for the State to adopt pliable implementation rules, even in matters of concurrent and, apparently, residual powers (see Case No. 399/06).

The doubt remains that, beyond the requirements for the implementation of Community law, the state lawmaker may generally adopt implementation rules, even if pliable, on matters of concurrent powers (see, however, Cases Nos. 303/03, 401/07).

### **3.2. Potentially cross-cutting matters. The special case of «linguistic minorities»**

Even concurrent powers include potentially expansive or cross-cutting matters. Among these is undoubtedly «territorial government», a matter which is one of the typical powers of the Region, which has gradually carved out a role for itself between the State and local authorities at a time when «territorial planning» activities were being regulated.

This accounts for the decisions which regulate the specific powers in matters of «territorial government», in particular, «city planning» (303/03), «public housing» (362/03), «public works of the Regions and Local Government» (49/04), and most of the «building amnesty» (196/04) and «land reclamation boards» (282/04).

It is a power that is recurrently invoked in judicial review, as it connects with many matters delegated to the State (environmental protection, cultural heritage preservation). For the sake of example, it is exactly the reference to the territorial government – along with other concurrent powers – that led the Court to suggest that the regions have powers over environmental matters; and it is the same matter that led the Court to «split» cases between criminal and administrative infractions in the so-called «building amnesty case». These examples account for its potential cross-cuttingness.

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<sup>29</sup> Law No. 11 of 2005 (dealing with “*Norme generali sulla partecipazione dell'Italia al processo normativo dell'Unione europea e sulle procedure di esecuzione degli obblighi comunitari*”); referred to in L. Califano, *Stato, Regioni e diritto comunitario nella legge n. 11/2005*, in 4 Quad. cost. 862 (2005).

The same applies to the subject matters «health protection», «education» (for the settlement of the matter: 200/09), «job protection and security».

For example, the responsibility for «nurseries» was equally shared between «education» and «job protection». (370/03, 120/05), and the very fact that «school organization» was assigned to the regional power in matters of «education» originated the need, well perceived by the Court, to develop the principle of the so-called «institutional continuity» (13/04).

Still, the Court broadly ruled out the adoptability by the State of acts of guidance and coordination in relation to matters of concurrent powers, namely in a ruling on «health protection» (329/03).

The Court has identified two types of matters among concurrent powers: «scientific research», whose contents are acknowledgedly imbued in «constitutional value», and the «harmonization of public accounts and coordination of public finance», which embodies a purposive, goal-oriented function which ultimately rests with the State.

In the former case, the Court stated that “*scientific research shall be considered not only a “matter”, but also a constitutionally protected “value” (Const. Art. 9 and 33), and as such capable of getting over a framework of strictly defined powers”* (423/04, 31/05, 365/06, 178/07): in this sense, it legitimizes the potential recourse to the assumption of powers and functions by the State in subsidiarity in accordance with the procedure laid down in Cases No. 303 of 2003 and No. 6 of 2004.

Similarly, with regard to the «harmonization of public accounts and coordination of public finance», the Court believed that “*the «teleological» essence of coordination requires that the central level can not only determine the basic rules governing the matter, but also exercise the specific powers that may be necessary to concretely realize the coordination function – which in itself inevitably exceeds, in part, any possible involvement of sub-state and local levels. (...) Of course, these powers must be configured in a manner appropriate to the existing spheres of autonomy guaranteed by the Constitution, with respect to which coordination can never exceed the limits beyond which it would be transformed into management activities or undue influence on the autonomous bodies”* (376/03).

In another decision, the Court stated that *“the coordination of public finance, referred to in Const. Art. 117, par. 3, is less a subject matter than a function vested in the State, since it extends to the national level, and to public finances as a whole”* (414/04), coming almost naturally to argue that state legislation could also include particular precepts and «implementation» rules (35/05).

The Court has at the same time developed a body of case law that seeks to limit the invasiveness of state legislation – in particular, with respect to the financial autonomy of local authorities – and identified the specific requirements requested of standards of financial coordination to qualify as «principle» rules (169/07): in short, they can demand that the overall spending of local authorities be limited, but they may not «audit» individual sectors in which those authorities need to reduce their costs (very clear in this regard is Case No. 27/2010, on the financing of mountain community services boards, which resulted in a situation of “double legislation” passed in both cases under review by the Constitutional Court).

However, even in this area, the «subsidiarity principle» can always be accepted (376/03).

A final remark must be made on the recent identification of powers vested in the State and the Regions in matters of «protection of linguistic minorities» (Case No. 159/09, from which the following quotes are drawn), which *“generates a model of division of powers between State and regions that does not correspond to the well-known categories applicable to all other matters under Title V of the Constitution, both before and after the constitutional amendment of 2001”*.

On the one hand, *“the state lawmaker appears to be holding the power to identify the protected minority languages, to determine the features of a linguistic minority to be protected, and the institutions that characterize this protection”*; on the other hand, *“the regional lawmaker is responsible for the further implementation of any state law that is necessary”*.

That power seems to resemble the power over matters of «scientific research»: in short, it is the regions’ concern to implement the state legislation in defense of a series of rights and constitutional values (but the limits implied can hardly be marked along the axis of the principle/implementation rule).

### **3.3. Matters with potentially defined content (enumerated and unenumerated)**

Next to these matters which variously contribute to inflate the matters listed in Const. Art. 117, par. 2 and 3, there are some with a more defined content, which do not lend themselves to being interpreted as cross-cutting or constrained in their respective fields because of the impact of state powers.

These include matters of «professions» – in which one of the fundamental principles of State responsibility is also the identification of professionals (see 353/03 and 138/09 among others) – and «promotion and organization of cultural activities» – within which the responsibility of determining «actions in support of public entertainment» is brought (although for reasons of institutional continuity a state provision that regulated the relevant financial fund was then considered legitimate: 255/04). Similar considerations may be invoked for the «sports system regulation»: in Case No. 424 of 2004 the Court – excluding the relevance of other matters – listed under this label those powers relating to the regulation of facilities and sports equipment. The interpretive development of the «ports and airports» matter seems to lead to the same conclusion: the focus is less on identifying the contents of responsibility (which “*is mainly concerned with facilities and their geographical location*”, 51/08), than on finding modes of cooperation between State and regions.

A phenomenon identical to that described for the «road traffic» occurs, under concurrent powers, in two subject matters not listed in Art. 117: «building amnesty» and «land reclamation boards». In both cases – except for criminal law infractions of the building amnesty regulation – the Constitutional Court brings these matters within concurrent regional powers, mainly in the area of «territorial government», thus confirming its typically «expansive» capacity: however, it should be noted that, once again, the fact that a matter is not listed does not prevent it from being assigned to a level of power other than the residual legislative power of the Region.

### **3.4. Matters that can hardly be regulated by regions**

Finally, a few words about some powers that, apparently almost by mistake, have been added to (we’d better say, have

fallen within) concurrent powers. This statement is not motivated by a desire to be controversial, but by the fact that the constitutional judicial review that has dealt with these matters has often made use of interpretive tools to warrant centralization.

The most striking example is provided by «national production, transportation and distribution of energy»: if we looked at Cases No. 6 of 2004, Nos. 336 and 383 of 2005 in particular, we would realize that, with the only exception of those aspects – also very difficult to identify – which connect the mentioned matter to planning and, consequently, to «territorial government», the regional level is not structurally prepared to regulate the sector in question, especially in terms of implementation rules: the Court repeatedly said that technical regulations and, more generally, the guarantee of a uniform set of rules shall be considered the responsibility of the State. The regions, on the legislative front, are left with very little or nothing at all (as evidenced by Case No. 103 of 2006).

In this perspective, it is hardly relevant that state powers are ensured by resorting to the «subsidiarity principle» (Case No. 383 of 2005) or by extending, through interpretation, the scope of the fundamental principles (Cases No. 336 of 2005, No. 129 of 2006).

Much the same can be said of «rules of communication»: Cases No. 336 of 2005, Nos. 103 and 265 in 2006 (although the line of cases actually begins with Cases Nos. 307 and 331 of 2003) made it clear – e.g., with regard to ensuring a unified procedure for authorizing mobile telephony installations – that the regional role, at the administrative implementation stage, is limited to executing national rules (which in turn «execute» the Community law)<sup>30</sup>.

#### **4. Residual powers**

##### **4.1. The problematic nature and workability of the residual policy**

The residual policy has not found «widespread» application in constitutional judicial review.

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<sup>30</sup> Nevertheless, see the latest Case, No. 255 of 2010, in which the Constitutional Court seemed to outline a possible framework for regional intervention.

Already in Case No. 370 of 2003, which formalizes the use of the prevalence criterion, it is stated that the residual policy does not work mechanically and does not operate automatically: “*in general, we also need say that it is impossible to refer a particular subject of legislation to the application area within the residual powers of the Regions under the fourth paragraph of Art. 117, by the mere fact that this subject is not immediately attributable to any of the matters listed in the second and third paragraphs of Const. Art. 117*”.

Apparently, this claim – in so far as it does not correspond to an inevitable consequential logic, by which it is obvious that some legislative regulations are part of the matters listed in art. 117, although they do not reproduce the exact header – seems to debase the major innovation introduced with the new Art. 117: residual policy, and the relevant reversed policy ensuing from the enumeration of state powers<sup>31</sup>.

In other words, such a statement of principle – which is duly reflected in subsequent cases – makes it *ordinary* to refer (national) legislative regulations – which would more likely be ranked under the «unenumerated» matters – to individual titles under the exclusive power of the State or regional concurrent powers, while it makes it *exceptional* to assign them to residual powers (as a result of an interpretive *process* that can go as far as to attributing a matter to the regional residual powers only after unfailingly excluding any link to other «enumerated» matters). It is therefore at the level of the interpretive process that the spirit (and substance) of Art. 117 are fully mitigated.

In this sense, the recent case of «dematerialization» and subsequent «re-materialization» of the responsibility in matters of «public housing» acquires significance: in continuity with previous constitutional judicial review (starting from Case No. 221 of 1975 and in respect of all subsequent decisions), the Court derived the tripartite division of the matter at issue from an old decision, and dismembered the matter – after acknowledging its «cross-cuttingness», obviously not in the “classical” sense – to finally recompose it using existing titles, so that it partly falls within the «essential service levels», partly within the «territorial government», and partly within the residual powers.

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<sup>31</sup> However, it had warned about the uselessness of residual policy in strengthening regional powers, S. Mangiameli, *Riforma federale, luoghi comuni e realtà costituzionale*, in 4 Le Reg. 517 et seq. (1997).

The interesting fact is that the judicial review *process* that the Court chose as the basis for its decision, which was completed before the constitutional amendment, concluded with a reference to Case No. 27 of 1996, which clearly affirmed that the regions had «*plena cognitio*», “*in matters of public housing, both administratively and legislatively (because of the similarity in functions), so that we could consider that a ‘new’ matter under regional powers has taken shape in the development of the judicial system which goes beyond the initial reconstruction made with Case No. 221 of 1975 – public housing in fact – and has achieved its own consistency regardless of its reference to urban planning and public works*” (Case No. 27 of 1996, in the passage drawn from Case No. 94 of 2007).

Now, as the residual policy had been called into action – at least in this case in which the new matter had been “certified” by the Constitutional Court itself – we would have expected full regional knowledgability, to paraphrase the Court. Contrary to all expectations, the Court «materialized» public housing in a new way with the aim of holding back to the state what it would otherwise have lost (as it was no longer to be referred to concurrent powers).

It must therefore be stressed how important continuity of “results” and the protection of national instances are in constitutional jurisprudence, and how heavily vesting the regions with new, truly residual powers is affected by these dynamics.

In essence, also this results in a relational model of powers and, in this perspective, the residual policy turns out to be twice as residual: the residuality introduced in the legal system with Art. 117, par. 4, as interpreted by the Constitutional Court, actually is «second-order residuality».

In order for a residual power to be acknowledged, it is not enough that a matter is not listed in paragraphs 2 and 3 of Art. 117 (i.e. the requirements of Art. 117, par. 4). It must also be ruled out, as a matter of interpretation, that the unenumerated matter can be referred to, and therefore be part of, other enumerated legislative matters.

It can be concluded that the residual matter is what remains after excluding other enumerated powers in the subsumption (as shown in the decision regarding public housing).

#### **4.2. In search of truly residual powers**

However, that has not prevented – given the circumstances – a number of truly residual regional powers from being identified over the past fifty years.

The Court recognized that matters such as agriculture; handicrafts; trade; social assistance and social services; mountain community services boards; education and vocational training (which is the only somehow «enumerated» matter, because it is expressly excluded from concurrent powers in matters of “education, except the autonomy of educational institutions and with the exception of education and vocational training”); regional public employment; regional office regulation; fisheries; local public services and tourism should be considered under regional residual power<sup>32</sup>.

In fact, it should be noted that residual regional powers embody the “Cinderella” of the system of legislative powers: many of the powers recognized as such suffer the impact of cross-cutting matters, of the reference to national interests, of the ever-applicable «subsidiarity principle», the impact of the «prevalence criterion – principle of loyal cooperation – historic-regulatory policy» triptych, the expansion of the fundamental principles as seen before (which may also affect residual powers), and the operation of the principle of institutional continuity (as is the case with handicraft: Case No. 162 of 2005).

All these elements of flexibility, paradoxically, while introducing fuzziness in the scope of the matters listed in Art. 117, in one way or another, end up referring the legislative regulations under review by the Court to one of the numerous tags contained in Art. 117, par. 2 and 3, thus setting a limit to the role of the residual clause.

#### **5. Models and tools to harmonize the system of legislative powers**

At this point, after providing what we hope is a sufficiently articulated, and realistic, description of an objectively complex system, we can now analyze the tools that the Constitutional

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<sup>32</sup> Refer to <http://www.dirittoregionale.it/> for a list of the decisions on each matter.

Court used for the «judicial construction of law»<sup>33</sup>, meant to harmonize the system of legislative powers, i.e. to make it sustainable.

We will therefore go through a set of tools that we have already discussed above and will now be briefly described and explained.

In the last section we will retrace the patterns of relationships between legislative powers endorsed by the Constitutional Court.

### **5.1. Institutional continuity**

The tool we should analyze first is the so-called «institutional continuity». It should be treated first as it clearly shows how difficult it is to confer new powers to the regions in the context of an organizational system of the state – in the broad sense in which it was discussed earlier – which has not yet been adjusted to the new legislative powers that are vested in the regions as per Art. 117.

This inevitably resulted in the previously existing system being perpetuated. The reasons for failing to adjust have already been mentioned, but it is worth resuming them briefly.

First of all, the little or no weight given to Title V by the state lawmaker (particularly in those legislative acts which are fundamental for the life of the State, such as budget laws).

Secondly, the need for implementing a constitutional reform designed to make the functions allocated by the state legislation – in particular by the so-called Bassanini reforms – “readable”, starting from the wording of the amended Articles 117 and 118, and not vice versa, as has been the case so far.

By all appearances, these two aspects are interlinked, and immediately recall a third one: the issue of the financial autonomy of the Regions (particularly) and of the implementation of Article 119 of the Constitution.

In other words, the interaction of three factors (the practice of state law, the lack of legislative as well as financial implementation of constitutional amendments) led to a recurrent situation before the Constitutional Court, in respect of which it has

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<sup>33</sup> See L. Califano (ed.), *La costruzione giurisprudenziale delle fonti del diritto* (2010).

sometimes had to adopt specific remedies involving a significant sacrifice for the legal (financial and administrative) independence of the regions.

The Constitutional Court recognized, for instance, that «school organization» (Case No. 13 of 2004) or «actions in support of public entertainment» (Case No. 255 of 2004) fall under regional responsibility in matters of «education» and «promotion and organization of cultural activities».

However, the Court itself, in the latter decision, took charge of focusing on the specifics of the problem and recognized «effectiveness» to this regional power (although only theoretically); in the case before the Court, in fact, the acknowledged regional power corresponded to a state law establishing the criteria and procedures for funding entertainment activities and the annual distribution rates for the Entertainment Fund, which inevitably had previously been established, regulated and governed centrally. The Constitutional Court said that *“what we have before us is most evidently the unavoidable necessity for the state lawmaker to significantly review the existing laws – which in cases like this can hardly be modified by regional lawmakers – in this area, as in all similar areas which have become a regional matter under the third paragraph of Article 117 of the Constitution but are still characterized by a centralized procedure, in order to meet the evolving constitutional framework”*.

In the case in point, the Constitutional Court added that this was the result of *“the difficulties caused by the missing transitional provisions – in Constitutional Law, No. 3 (...) of October 18, 2001 – designed to govern the transition in those matters where a change of ownership between State and regions had taken place and especially where – as in this case – a changeover is necessary from a legislation regulating centralized procedures to forms of management of the administrative action that are centered on the regions, but where the current legislation cannot be effectively reviewed directly by regional laws alone”*. Thus, it concluded that *“in view of this exceptional situation supplementing Act No. 163 of 1985, while its temporary application can be justified, it is clear that this regulatory system cannot be justified further in the future”*.

Case No. 13 of 2004 provides a similar and even clearer example as it identifies the stakes raised and remedies adopted by

the Court: in this case the effectiveness of regional prerogatives is caught in a sort of «pincer movement».

After acknowledging the state lawmaker's intrusion into regional legislative power, the Court affirmed that *“the immediate repeal of the censored paragraph 3 of Article 22 (...) would lead (...) to effects (...) which are incompatible with the Constitution. Education service delivery is linked to fundamental human rights (...). This results in the obvious need for continuity in the delivery of the education service (...), which is an essential public service”*.

It follows that *“the principle of continuity that this Court has already recognized to be working on the legislative level, (...) must now be expanded to meet the needs of institutional continuity, since – especially in a Constitutional State – the system does not live on rules and regulations only, but also on institutions aimed at guaranteeing fundamental rights. In matters of education, the preservation of this feature is imposed by irreducible constitutional values. The type of decision that this Court is called upon to take is suggested, in short, by the joint need of complying with the division of constitutional powers and assuring continuity of the education service. Article 22, paragraph 3 of Act No. 448 of 2001 shall thus continue to operate until each individual region will be equipped with the regulations and institutional apparatus capable of performing the function needed to distribute teachers among schools within its territory according to the timing and mode necessary to avoid disrupting the service, inconveniencing students and staff, and causing shortages in the operation of the educational institutions.”*

In this way, therefore, the distribution of the administrative functions mandated by the existing legislation in relation to the constitutional review, the lack of implementation of Article 119<sup>34</sup> and the principle of institutional continuity coalesce at the expense of regional autonomy.

As a matter of fact, premising the specific legislative powers vested in the State (unlawfully after the amendment to Title V) in matters that may have an impact on the exercise of fundamental rights, how can the yet existing regional power ever be acknowledged if, in order to effectively exercise it, the Regions

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<sup>34</sup> On this matter, the concept of «suspended financial constitution» is introduced by A. Morrone, *Corte costituzionale e «costituzione finanziaria»*, in A. Pace (ed.), *Corte costituzionale e processo costituzionale nell'esperienza della rivista «Giurisprudenza costituzionale» per il cinquantesimo anniversario* (2006), 624 et seq.

must not only adopt *ad hoc* regulations, but also set up institutions that can handle them, without resorting to additional resources (because of the failing implementation of Article 119)?

Clearly, in these cases the system essentially stalls, as it meets, on the one hand, the regulatory void left by the non-implemented new Article 119 of the Constitution, and the principles determining the adequacy of funds related with the exercise of the powers conferred to each local authority involved, and, on the other hand, the need to ensure continuity in the services that affect citizens' fundamental rights.

These are the reasons behind the decisions – in all but rare instances – that adopt the principle of institutional continuity, by virtue of which, while clearly acknowledging the regional authority and the lack of national authority over rules and regulations imposed by the State, these are kept effective to prevent infringement of fundamental rights<sup>35</sup>.

Incidentally: the question remains open as to the way in which “the region can give proof of being in possession of the administrative apparatus capable of ensuring continuity of service, thus fulfilling the condition precedent imposed by the Court to the exercise of their powers”<sup>36</sup>.

Based on all of the above considerations, the Constitutional Court appears to be powerless when confronted with such cases.

Rather than arguing that, under these circumstances, the constitutional case law concerning the pending implementation of Article 119 of the Constitution is far from being effective and that after all it lets the state lawmaker live a quiet life, it should be noted that both the effects of (any) declarations of unconstitutionality, and the Court's position in the constitutional system suggest that the only agent who can set the conditions that

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<sup>35</sup> It is interesting to note, incidentally, how the Constitutional Court's approach, in these cases, refers to some kind of internal hierarchy of constitutional provisions, according to which the constitutional guarantee of a right (and of the continuity of the administrative structures that will allow that right to be guaranteed) prevails over other constitutional provisions conferring legislative powers.

<sup>36</sup> As noted by L. Violini, *La riforma del regionalismo italiano e gli orientamenti della Corte costituzionale: casi e percorsi interpretativi*, in E. Bindi, M. Perini (ed.), *Federalismo e regionalismo. Teoria e prassi nell'attuale fase storica* (2006), 27.

make it possible to exercise regional powers is the Parliament, not the Constitutional Court through its decisions.

Sometimes the Court has been more explicit: to this regard, reasonable seems the reading of those who pointed out that the Constitutional Court maintains two different attitudes toward the declaration of unconstitutionality of the fixed funds established by the State in matters of regional legislative power.

When people's «rights» are being questioned, the Court tends to keep them alive by referring to the principle of institutional continuity (reference is made to Cases No. 50/08 and No. 10/2010 concerning the well-known «social card», in which the Court stated that *“the need for continuity, already considered by this Court operative on the regulatory and institutional level (Case No. 13 of 2004), may also be invoked in relation to a scheme intended to ensure a fundamental right, as the need to properly protect irrepressible constitutional values requires us to prevent, where possible, interruptions capable of violating it”*).

In other cases, instead – for instance, Cases Nos. 16 and 49 of 2004 – when the problem of financial autonomy purely arose as a conflict of powers between levels of government that would not (immediately) involve fundamental rights, the Court did not hesitate to develop a clear case of censorship of that State practice.

For present purposes, we must conclude that the lack of legislative – but more specifically institutional – implementation of the constitutional amendment implies that, in significant areas currently assigned to the regional legislative authority, and expressly recognized as such by the Constitutional Court, the relevant legislative and regulatory power is stripped from the regions.

## **5.2. The concurrence of powers: the prevalence criterion and the principle of loyal cooperation**

«Concurrence of powers» is a synthetic, but effective proposition (used by the Constitutional Court in Case No. 50/05) that refers to a different hypothesis than the one dealt with above.

Generally speaking, it refers to the frequent cases of "intertwining" of legislative powers taking place within a unified regulatory body, such that it cannot be solved by identifying a

clear boundary between the legislative powers of the State and the Regions.

To resolve these (theoretically) anomalous but (practically) recurrent cases of overlapping powers, the Constitutional Court has identified at least two criteria: the prevalence criterion and the principle of loyal cooperation.

This approach, besides being constantly practiced by the Court, it has also been theorized in Case No. 231 of 2005, as the principal issue: *“the complexity of the social reality to be governed entails that legislative acts cannot often be attributed to a single subject matter as a whole, because they concern non-homogeneous positions covered by quite different matters in terms of legislative powers (matters within the exclusive powers of the State and matters within the residual regional power, matters within the exclusive powers of the State and matters of concurrent powers). In such cases of concurrent powers this Court has applied the prevalence criterion and the principle of loyal cooperation, based on the peculiarities of the intertwining acts (Cases No. 370 of 2003 and No. 50 of 2005). Accordingly, in order to identify the matter(s) which relate to the censored provisions, the historical-systematic context to which they belong must be taken into account”*.

As can be seen, to the two criteria set forth the Court also added the reference to the «historical-systematic context», which actually, in judicial review, could as well be interpreted as «historical-regulatory criterion».

If we look at the operating dynamic of the criteria laid down by the Court, we realize that, ultimately, all three – which also run on very different plans – end up “justifying” the resumption of power by the State.

The historical-regulatory criterion is used by the Court as a solid bridge to current legislation (which ultimately favors the crystallization of the legislation in force until the constitutional reform and even after it, as we have seen in relation to the changed interpretive paradigm of the matters “competition protection” and “environmental protection”).

The prevalence criterion, wisely adopted along with state powers to dictate principles in matters of concurrent powers and used, in any case, to prevent unenumerated matters from “falling” into the category of regional residual responsibility, ends up promoting the total or partial assignment of the interpreted

matters to the state powers (evaluating the *ratio* of the legislative intervention).

The principle of loyal cooperation is the seal of this type of relational model of the legislative powers and seems to lead to the conclusion that, when the region is «stripped» of a power apparently given by the Constitution, it should be allowed to the decision sharing process connected to the implementation of state regulations.

The degree (opinion, weak or strong consent) and level (single region, the State-Regions Conference, Joint Conference) of the regional partaking based on the principle of loyal cooperation is the result of an essentially judicial assessment of the Constitutional Court (at least when legislative predetermination of agreed procedures is missing or considered insufficient).

Glancing through the case history, it seems that the intensity of the cooperation permitted by the Court depends upon some sort of sub-decision about the priority of matters based on the constitutional significance of the interests at stake (of which, however, the reference to legislative matters is usually an expression) or on the status of legislation – occurring particularly when powers concur in establishing or refinancing state funds affecting regional matters, which cannot sometimes not imply – except for complex reform movements – the exercise of State legislative power: if the contested law is more (as compared to other powers, otherwise the prevalence criterion would be applied) to be referred to residual or concurrent powers, then the cooperation will be stronger, while in the opposite case it will be realized in milder, mainly advisory procedures.

For instance, in a recent case (Case No. 51/08) of power concurrence in matters of airport regulation in which the overlap was between «civil regulation», «competition protection» (exclusive state powers) and «airports», «territorial government», «large transportation networks» (concurrent powers), in consideration of “*the existing connections and intertwinings*”, the opinion of the Joint Conference (to be acquired before the CIPE’s – Interministerial Economic Planning Committee’s – decision expected in the contested provisions) was considered sufficient.

In the preceding case (Nr. 50/08, but see also Nr. 168/09), the regions had challenged certain provisions of the Finance Act of 2007 which governed the purpose of use of the Fund for family

policies. The Court recognized that *“the overall and unified purpose which is meant to be achieved through the examined paragraphs is embodied in the provision of social policy interventions”*, thus establishing the reference to regional residual power in matters of «social services».

However, the Constitutional Court also stated that the contested provisions contained *“additional specific purposes”* which could be referred to the exclusive powers of the state.

It concluded, *“taking into account the unitary and indivisible nature of the Fund at issue”*, in favor of the firm application of the principle of loyal cooperation consisting in – given the *“nature of the interests involved”* – the (additional) expectation of the necessary, preliminary consent of the Joint Conference before adoption of the decree concerning the distribution of the ministerial Fund for Family Services.

There is, therefore, a certain connection between the «burdensome» intrusion of the State and the model of loyal cooperation chosen by the Constitutional Court, which reveals a tendency to use «compensatory» consent procedures when concurrence of powers cannot be solved in terms of priority.

It should be noted that the concurrence of powers (with its decisive criteria) is the general model for resolving overlapping state and regional powers, but the Constitutional Court has expressly rejected its application in relation to the cross-cutting matters «environmental protection» and «competition protection» (to which what has already been said applies).

### **5.3. «Subsidiarity principle» (and some details about the ambiguous role of the principle of loyal cooperation)**

The best known – yet not the most widely used – means adopted by the Constitutional Court to harmonize the system of legislative powers is certainly what the Constitutional Court has identified as the «subsidiarity principle»<sup>37</sup>.

Since the celebrated Case No. 303 of 2003, the Court has acknowledged that the division of powers prescribed in Const. Art. 117, can be partly repealed, letting the state resume the

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<sup>37</sup> For further details, see G. Scaccia, *Sussidiarietà istituzionale e poteri statali di unificazione normativa* (2009).

legislative regulation of administrative functions which, although assigned to the responsibility of the regions at the legislative level, the regions are not equipped to manage and regulate.

Therefore, under the principle of legality – which requires a legislative framework of the administrative activity – if the responsibility is “upgraded” because of the principle of subsidiarity (and adequacy) as per Art. 118, par. 1, also the level of legislative responsibility must rise, which means that it will be transferred from the regional level to the state level.

The point is that the Court, feeling the overwhelming scope of the decision, tried to mark its limits by requiring that the right of subsidiarity should be supported by an underlying public interest actually proportionate to the legislative measure adopted, should not be characterized by “*unreasonableness as in a close scrutiny of constitutionality*” and, above all, should be “*object of an agreement with the region concerned*”.

Apart from the criteria of «proportionality» and «reasonableness» (which in the constitutional judicial review of regional interest are likely to be essentially evanescent or easily adaptable according to contingent needs), this partially enigmatic claim of the need for an agreement with the region concerned left open the question on the necessity that the agreement had to be prior or subsequent to the state’s legislative intervention «in subsidiarity». The case law that followed implied that the agreement may be subsequent (Case No. 6 of 2004), but also confirmed that, basically, when the subsidiarity principle is invoked, consent should be “strong”.

In fact, the point falls short of the degree of clarity that would be desirable, both in terms of regional involvement, and in terms of the overall assessment of the better or worse “direction” taken in the subsidiarity practice in relation to the previous limits to regional autonomy<sup>38</sup>.

Looking at the cases from a general point of view, we can observe that the subsidiarity principle plays a partly «subsidiary» role in relation to the «concurrence of powers» resolved with the use of the principle of loyal cooperation (see preceding paragraph), often with similar procedural consequences. If the

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<sup>38</sup> See remarks by A. Ruggeri, *Leggi statali e leggi regionali alla ricerca di una nuova identità*, in 1-2 Quad. reg. 401 et seq. (2007).

Court is not faced with such an intertwining of powers that would fully justify state legislation, after judging the interest underlying the state's legislative intervention, it can still confer power to the state on the base of subsidiarity, while deciding the necessary level of cooperation (as the degree is generally that of a strong consent with respect to acts of implementation of the legislation adopted by the State after application of the subsidiarity principle).

From another perspective, a certain way of understanding the role of «loyal cooperation»<sup>39</sup> helps to factually overcome the division of powers set out in Article 117: the Court stated that *“the principle of loyal cooperation shall regulate all relationships between State and Regions: its flexibility and its adaptability make it particularly suitable to dynamically regulate the relationships at issue, reducing any dualism and avoiding rigidity. However, the vagueness of this parameter, if useful for the reasons stated above, requires constant clarification and factual underpinnings. These can be legislative, administrative or judicial”* (No. 31/06).

In that respect, *“one of the most qualified agents to formulate rules designed to complement the parameter of the loyal cooperation is currently the system consisting of State-Regions Conferences and local authorities”* where *“the dialogue takes place between the two large regulatory systems of the Republic, following which agreed solutions to controversial issues can be identified”*.

The Court continued by underlining that the principle of loyal cooperation *“requires parties to sign – in an institutional setting – an official agreement to abide by their commitment. Realizing the parameter of loyal cooperation through the agreements in the State-Regions Conference is also more consistent with the constitutional system of self-government, since it privileges a horizontal (collegiate) view rather than a vertical (hierarchical) view of mutual relationships”*.

However, the Court, also in order to give account of the non perfectly linear trend of case law on the issue<sup>40</sup>, made it clear on the one hand (Case No. 63/06) that collaborative procedures cannot derogate from the constitutional division of powers (thus

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<sup>39</sup> See the reconstruction provided by da R. Bifulco, *Leale collaborazione (principio di)*, in S. Cassese (ed.), *Dizionario di diritto pubblico* (2006), 3356 et seq.

<sup>40</sup> See A. Carminati, *Dal raccordo politico al vincolo giuridico: l'attività della Conferenza Stato-Regioni secondo il giudice costituzionale*, in 2 Le Reg. 257 et seq. (2009).

strongly limiting the theories - and practices - that are pressing for a substantial contract system of legislative powers), and on the other hand (Case No. 378/05) that collaborative procedures can be overcome when there is a need to respond quickly to essential public interests.

In any case, a number of issues of constitutional legitimacy raised by the regions with regard to the breach of the principle of loyal cooperation were found groundless by the Court (No. 387/07), which affirmed that *“this principle cannot be invoked, as a requirement of constitutional legitimacy, with regard to the exercise of legislative power, since no constitutional basis can be identified for the obligation to adopt collaborative procedures designed to influence that power (ex plurimis, Cases No. 98 of 2007, No. 133 2006, No. 31 of 2005 and No. 196 of 2004)”*<sup>41</sup>.

As mentioned above, frequently, when the Court is faced with budget laws containing provisions regulating funds in matters of regional concern that are likely to extend the scope of matters of state concern or the scope of fundamental principles, or that resort to the concept of «concurrency of powers» or the «subsidiary clause», the result is not a blunt declaration of unconstitutionality, but the so-called «cooperation-additive» decision with which the Court rules that the Regions (normally through the conference system) shall be involved during the implementation of those provisions<sup>42</sup>.

Furthermore, recent rulings by the Constitutional Court on the cross-cutting matters «environmental protection» and «competition protection» (broadly bordering with - or rather, encroaching on - regional responsibilities) clarified that collaborative procedures do not extend to matters of exclusive state concern, even if cross-cutting (unless the state lawmaker provides them spontaneously).

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<sup>41</sup> On the other hand, in Case No. 24 of 2007, the principle of «loyal cooperation» was dilated to the extent that consent to determine the learning profiles of professional apprenticeship was deemed necessary not only between levels of government (even overlapping or concurring in the exercise of the same function or power), but also between a regional council and employers' and trade union organizations.

<sup>42</sup> See R. Cherchi, I. Ruggiu, *«Effettività» e «seguito» della giurisprudenza costituzionale sul principio di leale collaborazione tra Stato e Regioni*, in R. Bin, G. Brunelli, A. Pugiotta, P. Veronesi (ed.), *«Effettività» e «seguito» delle tecniche decisorie della Corte costituzionale* (2006), 365 et seq.

In this regard, it is worth noting that most of the cooperative procedures introduced by the Court or the extensive references to the conference system will end up vesting the State with the power to «coordinate» where it would not have the power to «regulate» in spite of the fact, however, that no similar (obviously non-specular) process is found in favor of the Regions, at least with reference to the cross-sectoral powers that affect, by definition, the cross-cutting matters assigned to them by the Constitution.

In this perspective, the line of case law (well supported in theory) which has greatly expanded the use of additive or substitutive decisions «of collaboration» (with the various possible formulas), while, at the technical-judicial level, it has “used the most invasive tool at disposal”<sup>43</sup>, at the level of the relations between state and regional powers, it seems not to have overplayed its hand, by not using – for understandable reasons, given the structural weaknesses in the implementation of the constitutional amendment from the various and often cited viewpoints – the key tool in its hands: the declaration of unconstitutionality due to the state’s intrusion into regional legislative powers.

#### **5.4. From judicial case law to models of separation and distribution of legislative powers**

In conclusion, it may be useful to summarize the framework for harmonization of the system of state and regional legislative powers that emerge from the analysis conducted so far.

In principle, the Constitutional Court consistently held that the identification of the matter to which a number of legislative and statutory provisions must be ascribed “*should be related to the subject and requirements of the provisions, taking into account their purpose and ignoring marginal aspects and induced effects, so as to properly identify and fully protect their interest (Cases No. 430, No. 169 and No. 165 of 2007)*” (168/09).

1) In this context, we can proceed to analyze, first, the placement of state exclusive powers compared to concurrent or residual regional powers.

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<sup>43</sup> See R. Cherchi, I. Ruggiu, «Effettività» e «seguito», ditto, 381.

Exclusive state powers (in brief, without much accuracy) are of two types: either cross-cutting (and potentially cross-cutting) or with potentially defined content (even though unenumerated).

All can lead to overlapping powers.

With regard to regional powers, the former relate to each of them in a peculiar way (special reference is made to «ESL», «criminal justice system», and «civil regulation»).

On the other hand, important similarities can be pointed out that concern «environmental protection» and «competition protection», as described.

As for the other exclusive legislative powers of the state, instances of overlap (or involvement) are resolved on the basis of three criteria:

a) first, with the criteria typical of the *concurrence of powers*, i.e., as the Constitutional Court has recently stated, by conferring powers as follows: “*in the event that a regulatory provision is at the crossroads of different subject matters, assigned by the Constitution to the legislative powers of both State and Regions, the prevailing field of application must be identified. And if such a field of application cannot be identified, in the absence of criteria contained in the Constitution, the concurrence of powers comes into play and justifies the application of the principle of loyal cooperation (Case No. 50 of 2008), which is anyway expected to permeate the relations between the state and the system of local self-governments*” (No. 168/09).

In reality, both the prevalence criterion and the principle of loyal cooperation – in case law – are closely linked to the historical-regulatory criterion, namely the context of interests as dealt with and settled in the legal system (usually based on State regulation) or the regulatory «context» in which the legislative act is situated.

More realistic is therefore – even with respect to the statement cited at the beginning of the paragraph – the following statement of the Constitutional Court (concerning both the identification of legislative matters, and the resolution of a case of overlapping legislative powers): “*The decision about these issues implies prior identification of the matter to which the legislative act at issue is to be related, having regard to the object and the rules determined by the contested provisions, taking into account their purpose, the objectives it proposes to pursue, the context in which it was adopted, and*

*identifying the interest served*" (excerpt drawn from Case No. 10/2010);

b) through the *principle of institutional continuity*, which recognizes the abstract regulatory power of the regions, but also highlights the inadequacy of the regional apparatus (regulations, facilities and equipment) designed to rule and administer it. In these cases, in particular if the validity of state legislation implies the continuity of the protection of fundamental rights, the state law is not declared unconstitutional;

c) through the «*subsidiary clause*», according to which the regulation of indivisible administrative powers is resumed by the central level. In this case, collaborative procedures between State and regions should normally be provided for in the exercise of these powers.

Both in the context of the «subsidiary clause», and in the context of the concurrence of powers resolved through the principle of loyal cooperation, it was stressed that this principle – which in itself would be geared to enhancing the regional level – ends up in practice as a compensatory measure to make up for the loss of legislative powers that both harmonization models entail for the regional self-government.

In other words, if we look closely at the practical realization of both the «subsidiary clause» and the concurrence of powers (when it is resolved through consent), we note that both these tools have a «side effect» on regional self-government.

While they carve out a role for the region or, more frequently, for their «system of representation» at the central powers, at the same time they significantly reduce the margin of «individual choice» given to each of them (by the Constitution).

In this way, the regions (or rather the regional system) actually manage to reach a level of sharing in decisions concerning the use of resources or the exercise of administrative functions (to manage or co-manage), but each of them immediately loses a good portion of their legislative independence both with respect to the state, and as compared to the possibility of distinguishing their choices from those of other regions – which, as we might guess, is the true essence of regional self-government.

2) Within the domain of concurrent powers it was noted that the concept of fundamental principle is either elusive, or should be declined by each matter, considering that the self-

classification of a state rule as a « fundamental principle» is irrelevant in itself.

The internal implementation of Community law may lead to a unique modulation and, de facto, an extension of the normative scope of the fundamental principles (at the expense of regional powers). The state legislation implementing Community law may contain a pliable implementation rule (which means it can be replaced by rules established by the regional lawmaker).

Within the domain of concurrent powers we have analyzed some matters in which the Court admitted, for various reasons, that the state legislation was not exclusively limited to fundamental principles (scientific research and financial coordination, in particular).

We have also described a number of concurrent matters that we have defined «matters that can hardly be regulated by regions» in the sense that they usually give rise to decisions of the Constitutional Court to ensure a unified, national, regulatory framework in those areas, either because there are unified state regulations, or because unified technical standards are required.

As regards state and regional powers overlapping, what has previously been said applies.

3) Finally, with regard to regional residual powers it was verified that the prevalence criterion ultimately gives rise to what has been called «second-order residuality»: that is, residual powers (Art. 117, par. 4) only attract those matters that cannot be considered part of an enumerated power, based on an assessment of priority.

As was anticipated, and as summarized here, we can easily verify that the system of state and regional legislative powers operates quite differently from what we could theoretically imagine by reading Article 117.

In this area, we cannot but confirm the difficulty, as was the case under the term of the previous Article 117, in having the constitutional text effectively regulate the relationships between state law and regional law. Figuring out the solutions to these issues is not within the scope of this work.