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Regionalism in the Italian constitutional System[*]

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1. *Foreword*

The aim of this essay is to briefly deal with the history of the relationship between State and Regions in Italian regionalism. I will pay special attention to what has happened to the category of regions usually called "Regioni Speciali".

In section 2 I will study the birth of Italian regionalism. I will examine the "special treatment" of the Regione siciliana before the Constitution came into force, starting in 1946; the approval of the Italian Constitution in 1947, and the "ordinary model" of regionalism held in this charter; finally, the "constitutional statutes" – approved by the same Constituent Assembly in 1948 – regulating the constitutional position of the regions mentioned in art. 116 Cost.

Section 3 describes the most important features of the "ordinary model", as they appeared in the *constitutional text*. In fact, constitutional interpretation – especially by the constitutional Court – has reshaped the relationship between State and Regions. The path followed by the Court, indeed, was far from the expectation one may have had when reading the Constitution.

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The relationship between State and Regions in the *living Constitution* is the topic of Section 4, where I try to describe the features of the model, as shaped by the decision of the constitutional judges. I will attempt, therefore, to offer a point of view about the *reasons* that form the basis of such a model. The thesis suggested in this essay holds that the main reason lies in some assumptions in the field of constitutional theory, especially those concerning the validity of the Constitution and the idea of the People. The consequence of this assumption in the organizations of the relationship between State and Regions is the ontological superiority of the first over the second. The key term I will use to explain this "way of life" in the experience of Italian regionalism is "*interesse nazionale*" (national interest).

Section 5 studies the "life" of the "Regioni speciali". This kind of Regions never enjoyed the special treatment one could derive from the constitutional text.

It is well-known that in 2001 the Italian Parliament approved the most important constitutional reform since 1948. The "*legge costituzionale*" n. 3/2001 – whose title is *Modifiche al titolo V della parte seconda della Costituzione* – changed many articles in the part of the Italian Constitution dedicated to the relationship between the central State and other autonomous territorial organizations: Regions, of course, followed by "comuni" (city councils); "province" (provinces) and "città metropolitane" (metropolitan areas).

In section 5 I will attempt to offer a comprehensive reading of the shape that constitutional reform gave to the Italian system. The main idea is that the l. cost. 2/2001 determined the fall of the State's superiority. The key-words I will use to explain this point of view are "*pluralismo istituzionale paritario*" (that we can translate as "equal institutional pluralism") and "*sussidiarietà*" (subsidiarity). Of course, subsidiarity is a well-known concept in political and legal studies. My aim is not to focus on this principle, but to explain the Italian path towards subsidiarity, drawn by the constitutional reform and the decisions of the Constitutional Court, and, before these, by the legislative reforms of the 1990s.

The thesis I will try to draw is that this principle expresses a profound changeover in the way of thinking of the problem of validity and the very idea of People.

2. *The Birth of Italian Regionalism: "Regioni speciali" and the Constitution*

The first experience of regionalism in Italy can be found in Sicily. In 1946 – before the Constituent Assembly began working – Sicily received special statutory treatment. The *Statuto*, approved by the Government and issued as

a *Regio decreto legislativo* n. 455, 1946, gave the Region considerable power: legislative powers, fiscal autonomy – especially the right to hold the fiscal proceeds obtained in Sicily – special powers to the President to preserve law and order, and, generally speaking, a separation system between regional and general order, are the main features of Sicilian pre-constitutional autonomy. It is important to point out: *i*) that the Sicilian experience was radically new in the Italian legal order; *ii*) that the reason for this strong autonomy was probably linked to the political pressure for independence, also supported by the MIS (*Movimento per l'indipendenza siciliana*); *iii*) that the main claim was of an economic nature, because the Italian State was held responsible for the state of poverty and backwardness of the Region; *iv*) that the model of relationship between the State and the *Regione siciliana* held in the *Statuto* was very far from the constitutional model: this is the reason for the provision of its coordination to the oncoming Constitution; *v*) that this coordination has not yet been achieved.

As we know, the Italian Constitution was approved on December 22, 1947. The regionalism provided for in the Charter was based on 14 "ordinary Regions"[1], whose system was disciplined in the Constitution itself. Next to these Regions, art. 116 provided for the creation of five "special Regions": Friuli-Venezia Giulia, Sardegna, Sicilia, Trentino-Alto Adige and Valle d'Aosta. The law regulating the relationship between special Regions and State is not in the Constitution, but in the respective *Statuti* approved in the shape of *legge costituzionale* by the Constituent Assembly itself. The Sicilian *Statuto* was instead merely confirmed, without due coordination.

3. *The Relationship between State and Regions, in the constitutional Text*

As I pointed out in the first section, the interpretation of the constitutional rules concerning the constitutional position of the Regions, and the system of their relationship with the State supported by the constitutional Court was very far from an "intuitive understanding" of the text. In this section I shall briefly show the most important characteristics of the "intuitive understanding" of the constitutional text. In the following section, I will try to describe the opera of the *Palazzo della Consulta* in reshaping the relationship between State and Regions.

[1] Nowadays in Italy there are 15 ordinary Regions, because in 1963 *Abruzzi e Molise* split into 2 different Regions. See art. 131 Cost. and *Legge costituzionale* n. 3/1963 (*Modificazione agli artt. 131 e 57 della Costituzione e istituzione della Regione «Molise»*).

One can set (solely) the qualifying features of the model according to an "intuitive understanding", in the following list:

a) Regions had legislative power, but only in enumerated fields, while the State's legislative power was general and not limited to certain fields; furthermore, in those fields, regional statutes had to follow the "fundamental principles" (*principi fondamentali*) set by State's statutes; in a few fields – indicated in the art. 117 Cost. – the State, furthermore, had the possibility to identify the *national interest* and reshape – in accordance with that qualification, and therefore solely in this case – the allocation of legislative power;

b) the government could appeal to the Constitutional Court, if it believed that the statute of a Region contrasted with the Constitution[2]; the government, furthermore, could appeal regional statutes to the Parliament when it considered them, *in all fields*, in contrast with *national interest*: unlike the Court's judgment the latter was, obviously, a *political* judgment;

c) administrative power was divided on the basis of the rule usually called "*principio del parallelismo*" (parallelism principle): the Regions could exercise powers in administration only in the same fields that they could regulate;

d) the regions were also autonomous in fiscal and economic affairs, but only in the spaces set by the State's statutes;

e) beyond the judicial review of legislation, there were many controls on regional powers;

f) finally, the text approved in the Constituent Assembly recognized the autonomy of *comuni* and *province*, however assigning them a less guaranteed role than that of the Region: the State's statute, indeed, could mold their position.

4. *The Relationship between State and Regions in the Living Constitution. The Scholars and the Court*

Up to now, we have focused on the constitutional text. But what about the *living Constitution*? In this Section 1 demonstrate how the Constitutional Court of the *Palazzo della Consulta* interpreted constitutional rules regulating the relationship between various level of government and their constitutional powers.

First of all, it is necessary to stress the importance of the general clause mentioned above: the national interest (*interesse nazionale*). According to the case law of the Court, this clause did not represent a

[2] Instead, Regions could only appeal a statute of the State in case of invasion of their sphere of competence.

legal limit for regional legislation except for the few fields in which it was expressly mentioned in art. 117 Cost. The Court, instead, interpreted the *interesse nazionale* as a general legal limit to regional legislation. Scholars criticized this assumption[3], but in a few years it became a solid pillar of the reconstruction built by the judges of *Palazzo della Consulta*.

At the same time, I should mention that the instrument provided to enforce the limit of *interesse nazionale* – the political instrument, devolved to the national Parliament – was never used between 1948 and 2001, when constitutional reform erased the rules from the Constitution.

So, the real "thorny point" in the relationship between State and Regions in the Italian constitutional experience, is the legal *status* in the system of the general clause just mentioned. The Court's theory about this relationship can be exposed as a theory concerning the *interesse nazionale*.

Regarding this controversial issue, the judges of *Palazzo della Consulta* disagreed strongly with the scholars. They refused all the doctrinal proposals. Here, it suffices to mention two or three opinions on this regard.

Let's start with Costantino Mortati.

According to his theory, legal control was only possible in those fields in which the Constitution explicitly mentioned that clause in the division of legislative powers[4].

In the remaining fields, no legal monitoring was allowed. The government could only invoke parliamentary decisions. Such decisions, in Mortati's theory, were completely free of legal limits. It was a pure political pronouncement[5].

Scholars like Temistocle Martines[6] and Augusto Barbera[7] proposed a different theory, similar, on the one hand, to Mortati's, but different, on

[3] See A. D'ATENA, *L'autonomia legislativa delle Regioni*, Roma, Bulzoni, 1974, 121 ss.; S. BARTOLE, *La c.d. competenza frazionaria come alternativa alla «espropriazione» delle materie*, in *Giur. cost.*, 1966, 899 ss.; V. CRISAFULLI, *Le Regioni davanti alla Corte costituzionale*, in *Rivista trimestrale di diritto pubblico*, 1963, 537 ss.; A. ANZON, *Esigenze unitarie e competenza regionale*, in *Giur. cost.*, 1967, 1551 ss.; C. MORTATI, *Legislazione regionale esclusiva e interesse nazionale*, cit., 1004 ss.; ID., *I limiti della legge regionale*, in ID., *Problemi di diritto pubblico nell'attuale esperienza costituzionale repubblicana*, III, Milano, Giuffrè, 1972, 549 ss.; ID., *L'interesse nazionale come limite alla legislazione regionale esclusiva*, in *Scritti Crosa*, Milano, Giuffrè, 1960, II, 1296-1297; F. PIZZETTI, *Il sistema costituzionale delle autonomie locali*, Milano, Giuffrè, 1979, 376 ss.

[4] His theory about *interesse nazionale* was built on the ground of the idea that legal control on the respect of this vague und undefined clause was only possible in the cases in which the text of the Constitution opened the doors of the division of legislative powers to the State's evaluation, mentioning expressly the *interesse nazionale* or other similar concepts.

[5] See C. MORTATI, *I limiti della legge regionale*, in ID., *Problemi di diritto pubblico*, cit., 549 ss.

[6] See T. MARTINES, *L'interesse nazionale come limite alle leggi regionali*, in ID., *Opere*, II, *Fonti del diritto e giustizia costituzionale*, Milano, Giuffrè, 2000, 375 ss.

the other. Both Martines and Barbera – like Mortati – maintained that the choice of the Court of reading the clause as a general legal limit was wrong, but held that the national Parliament not completely free in its political decision. *Their goal was to take away the decision of cancelling a regional statute from the dominion of the majority.* They did not consider parliamentary majority capable of cancelling a regional statute.

The problem is that both Martines and Barbera did not develop a really useful theory nor did their theory fit with the Constitution as a whole, because some of the concepts used in their studies were too vague, and because of the difficulty of coordinating the theory with some important assumptions in the field of constitutional theory.

From a certain point of view, Livio Paladin was the scholar that reached the most radical position as opposed to Mortati's. Indeed, he thought that the Court was right in "transforming" the *political* limit of *interesse nazionale* into a general legal limit. Moreover, he believed that the Court should check the choice of the State in reshaping the field of his legislative power as the field of its regional legislative power, using a well-defined and rigorous criterion: Livio Paladin faced the hard challenge to find the way to transform the clause of *interesse nazionale* into something certain and that could be used in legal judgment. In other words, the question was how to interpret the problem concerning the possible existence of national interest in a particular field of human experiences as a *legal question* and not as a merely *political question*. He therefore considered the clause as equivalent to the interest that can be inferred from the law still in force. As a result, he interpreted the *interesse nazionale* as something very close to the general principles of law.

Finally, let us consider Manlio Mazziotti di Celso. He is important in our essay because he proposed a theory which, from a certain point of view, was closer to that of the Court. He suggested that norms, mentioned above and referring to national interest, should be interpreted as expressing a general rule. This opinion was founded on the fundamental principle of "political unity" (*unità politica*). The need to maintain political unity was the basis – according to Mazziotti – of the superiority of the State on the Regions, and allowed the former to adapt the division of legislative powers to its political choices. In this way, national interest became a legal limit to regional statutes, but – unlike Paladin's proposal – without any criterion for the Court to judge the State's choice. The State was completely free to reshape constitutional rules.

The judges of *Palazzo della Consulta* did not follow the scholar's suggestion. *Maybe Mazziotti's proposal was closer to the path chosen by the*

[7] See A. BARBERA, *Regioni e interesse nazionale*, Milano, Giuffrè, 1973.

Court. In a cornerstone of their case law, the judges established that the Regions had to be considered as institution expressing interests of a merely regional level; the consequences of this point are the following:

> «è d'uopo ritenere che l'ordinamento costituzionale, come impone che siffatti interessi si soggettivizzino nelle Regioni (…), così esige, nel quadro di una razionale individuazione delle due sfere di competenza, che allo Stato faccia capo la cura di interessi unitari, tali in quanto non suscettibili di frazionamento territoriale»[8].

From these preliminary remarks, the Court draws the conclusion:

> «non si può affermare (…) che per la definizione delle materie elencate nell'art. 117 Cost. sia sempre sufficiente il ricorso a criteri puramente formali e nominalistici».

Therefore,

> «anche se nel testo costituzionale solo per alcune di esse viene espressamente indicato il presupposto di un sottostante interesse di dimensione regionale, per tutte vale la considerazione che, pur nell'ambito di una stessa espressione linguistica, non è esclusa la possibilità di identificare materie sostanzialmente diverse secondo la diversità degli interessi, regionali o sovraregionali, desumibile dall'esperienza sociale e giuridica»[9].

One can say that the Court endorsed a similar theory to the one previously mentioned. A general principle guides the interpretation of constitutional norms mentioning the "*interesse nazionale*" in drawing the spheres of legislation, and the conclusion is to enlarge the area governed by these rules, transforming the national interest into a general legal limit.

Anyhow, the most important difference between the way of reasoning of the Court and that of Mazziotti is the following: *the judges of Palazzo della Consulta founded a criterion to judge the choice of the State*.

This criterion, nevertheless, does not consist in a well-fixed (and determinate) standard. The Court, on the other hand, used a fluid criterion usually called "*ragionevolezza*" (reasonableness), that scholars often considered something in-between law and politics[10].

[8] *Considerato in diritto*, § 3.

[9] *Considerato in diritto*, § 3.

[10] P. MEROLA CHIERCHIA, *L'interpretazione sistematica della Costituzione*, Padova, Cedam, 1978, 87 ss.

All in all, through the above-mentioned interpretation the Court unequivocally set the State's superiority over the Regions.

This assumption was completed by the extension of this way of thinking into the field of administrative power – on the grounds of the "parallelism" principle, mentioned above – and through the re-interpretation of the fundamental principles set by state legislation as a limit for regional statutes.

With regard to the former issue, it suffices to recall that the interpretation of national interest endorsed by the Court gave the state legislation the basis for "catching" those parts of administrative activities that, *reasonably*, coincided with a national interest.

As to the latter, on the other hand, the Court considered state legislation not only able to set fundamental principles within the spheres the Constitution gave to regional legislation, but also able to establish the entire regulation of the matter, while waiting for the regional one.

Finally, I have to mention the "fiscal question": regional finance depended almost totally on the state budget. Fiscal autonomy was only a promise, albeit a constitutional promise.

5. *Constitutional Law of the* Regioni Speciali

We will now take a look at the *Regioni speciali.*

First of all, I have to point out that for several years, the "special" Regions were the only ones operating in Italy. The ordinary model began in 1970. In the opinion of constitutional scholars, the delay depended on the interests of the most important national parties, especially the *Democrazia Cristiana*. This party, in fact, was probably afraid of diminishing its power because of the creation of other levels of government.

Consequently, the general assumptions mentioned above were set initially, toward *Regioni Speciali,* and – during the '70s – extended to the ordinary model.

Secondly, the Court – despite a very common different opinion – reduced the differences between special and ordinary Regions.

Finally, during the '70s there were two huge administrative devolutions toward ordinary Regions: the *Regioni speciali*, nevertheless, had to "run after" the ordinary model, because the devolution to this kind of regions needs to follow a specific path. A specific path for obtaining regional consensus, but in practice slower than the ordinary one. So, this kind of Regions – created to guarantee to their inhabitants more autonomy than the others – became an obstacle in the path of self-government.

6. *Why this particular History?*

The problem I am supposed to face in this section is the origin of the path followed by the living Constitution, as described in the Section above. It would be easy to avoid this controversial issue cross-referring to other and more appropriate situations. And perhaps it would be wiser.

However, I will try to make some considerations.

First of all, in my opinion, it is important not to read the development of the Italian constitutional system merely as a "mistake chain" of the Court. It is obviously possible to disagree with the statements of *Palazzo della Consulta*. But it is useful for constitutional studies to make an effort to understand the profound reasons of the Court's decisions before the constitutional reform in 2001.

As I said at the beginning of this essay, I believe that a reason for the development of the living Constitution could be found in the way of thinking about a number of important ideas of constitutional theory. In particular, the concept of the People, and the grounds for constitutional validity. I will try to put forward some considerations about these two questions: how were we used to thinking of the People in Italy during the second part of the last century? Why was Italian Constitution considered as "valid"? These questions are, moreover, linked one to the other.

As to the former question, it is useful to compare the Italian (and European) idea of People to the American one. To do so, we can quote a very famous scholar, Daniel J. Elazar.

> «The real meaning of the American federal solution was to provide a way to circumvent the problem of exclusive state sovereignty–in other words, to provide a modern alternative for organizing the polity on an even more democratic basis than that of the Jacobin state. Rather than accepting the sixteenth-century European view of the sovereign state, Americans understood sovereignty to be vested in the people. The various units of government–federal, state, or local–could exercise only delegated powers. Thus it was possible for the sovereign people to delegate powers to the general and constituent governments without normally running into the problem of which possesses sovereignty except in matters of international relations or the like. In matters of internal or domestic governance it was possible to avoid the issue except when political capital could be made out of it. Different governments are purposely designed to serve arenas of a different sizes, but since size is not an a priori determinant of importance, they relate to one another as equal with regard to the powers delegated to each, respectively»[11].

[11] D.J. ELAZAR, *Exploring federalism*, Alabama, The University of Alabama Press, 1987, 41.

In Elazar's passage, there is a misunderstanding that is easy to find for a European reader. The issue we are talking about is different from the dispute concerning the "research" for the "holder of sovereignty" in the non-federal state. It is well-known, indeed, that theory of state sovereignty was useful for obtaining a balancing point between two different origins of political power: the King, on the one hand, and the People, on the other.

The arguments above allow us to point out a second – and for us more important – misunderstanding, about the very idea of People. In the European tradition, the People is a "unitary person" contending the sovereign power to other "unitary persons": the King, at the beginning, and the State later. The People, in this way of thinking, is not the mere *sum of individuals*. It is something more and different. It is an abstract being that gets its unity through the virtue of political representation. From this point of view, the question answered by Elazar could be reformulated: whose is the sovereignty? Is it of the People's federation, or does it belongs to the People of the member States?

Daniel J. Elazar, from his point of view, can successfully answer the question because he starts from a different idea of People: the – typically American – idea implied by the well-known *incipit* of American Constitution: *We, the People*. Elazar's People, indeed, *does not* transcend individuals. *It is their sum*. So, neither the Federation, nor the member States, are sovereign bodies, but only the sum of citizens is, and it delegates the power in part to the former, in part to the latter.

It can be useful to quote also a passage by Ronald Dworkin. He proposes a theory that distinguishes two conceptions of democracy, interpreting in a different way the premise of "government by the People". The first one is a «statistical one»: it holds that «in a democracy political decisions are made in accordance with the votes or wishes of some function – a majority or plurality – of individual citizen». The latter is «the communal reading»: it holds that «in a democracy political decisions are taken by a distinct entity – the people as such – rather by any set of individuals one by one»[12].

In Italy, traditionally, the way of thinking about these theoretical points is quite different from Elazar's. It is closer to the "communal reading" of democracy[13]. A People – as in the continental tradition – is thought as a

[12] R. DWORKIN, *The moral reading of the American Constitution*, Oxford, Oxford University Press, 1998, 20, quoting especially Rousseau's democratic theory.

[13] But not to the Dworkin's version of "communal reading". The famous scholar, indeed, proposes a "communal reading" of democracy "morally oriented", and – we can say – "rightly based". In his theory, to think of People as a whole, individuals have to be "moral members" of the community. And «the democratic conditions are the conditions of moral membership in a political community». Therefore, there are two kinds of conditions of moral membership: first of all, "structural conditions", that «describe the character the community as a whole must have if it is to

unitary being. And it is on its shoulder that the validity of the Constitution lies.

This way of thinking represents the common ground of various Italian constitutional theories. When – in Italy – constitutional theory faced the issue of pluralism, it tried to overcome the formal unity of the concept of People. Through the recall of sociologic elitist theories, Costantino Mortati, in a cornerstone of Italian studies, proposed the theory of "*costituzione materiale*": that is both the ruling party and its fundamental aim. The *costituzione materiale* was the basis of constitutional validity.

This famous theory did not fit, however, with the pluralism in Italian society and in the same constitutional text. So, it was common to represent the Constitution as a peace treaty, where every part gave something to the others[14]. The text adopted many principles and values, even if – as is well-known – often one contrasting the other. Each party had "their" principle written in the constitutional text: both the *Democrazia Cristiana* and the *Partito Comunista.*

In this situation, Mortati's theory could not successfully explain the path of constitutional validity. There was not a single party pursuing a single end, nor a system of parties pursuing a single end. There were *many parties each one pursuing its own end*. Therefore, constitutional validity followed a quite different path. The grounds of validity were the ruling parties, as in the Mortati's proposal, but not gathered around a single aim: each pursuing its own aim, trying to make an agreement with the other in the day-by-day political life. The founding parties continued in *Parlamento* the agreement get in Constituent Assembly, thus holding together constitutional validity. The Constitutional Court, in this situation, had the task to collaborate and to oversee, using the above-mentioned hybrid criterion of *ragionevolezza*, in-between law and politics[15].

One can read the problem of the relationship between State and Regions using this view. Constitutional validity was built on a being that founded its unity through national political parties. It was not the whole People, obviously: it was *the ruling part of the People*, as far as the political parties were able to find an agreement in everyday life.

count as a genuine political community»; secondly, "relational conditions", that «describe how an individual must be treated by a genuine political community in order he or she be a moral member of that community». All quotations are taken from R. DWORKIN, *The moral reading*, 24.

[14] Costantino Mortati himself suggested this comparison: see C. MORTATI, *La costituente*, Roma, Darsena, 1946.

[15] See F. MODUGNO, *Corte costituzionale e potere legislativo*, in P. BARILE, E. CHELI, S. GRASSI (ed.), *Corte costituzionale e sviluppo della forma di governo in Italia*, Bologna, il Mulino, 1982, 22 ss.; O. CHESSA, *Corte costituzionale e trasformazioni della democrazia pluralista*, in V. TONDI DELLA MURA, M. CARDUCCI, R.G. RODIO (ed.), *Corte costituzionale e processi di decisione politica*, Torino, Giappichelli, 2005 17 ss.

So, political choices at the state level were incomparably more important than political choices at the regional level. The former were the expression of the unitary being carrying on its shoulder the validity of the Constitution. The state supremacy toward Regions descends from this premise. This supremacy, however, was not without limits. The supremacy was well-exercised only if it was coherent with the polytheism of constitutional values, checked through the criterion of *ragionevolezza*.

The paradigm of national interest – as reshaped by the Court – could be read in this context. The State founded its supremacy on the same grounds as constitutional validity. In this way it could reshape the spheres of legislative power. But the State was only "representing" the entity carrying the validity of Constitution, that is the ruling part of the People composed by many political parties agreeing with each other. Therefore, the choice to qualify something as a good of *national interest* was able to reshape the legal limit of regional legislation, but it need to be checked through the criterion of *ragionevolezza*.

7. *The Constitutional Reform*

The Italian Parliament at the end of the XIII *Legislatura* approved the *Legge costituzionale* n. 3/2001 (*Modifiche al titolo V della parte seconda della Costituzione*), that modified several articles of the part of the Constitution devoted to the relationship between State and Regions.

As is well-known, these are the most important changes in constitutional text:

i) first of all, the way of defining the sphere of legislative powers has been changed: now Regions have general legislative power, while the State has legislative power solely in enumerated fields;
ii) secondly – but probably more importantly – the *interesse nazionale* disappeared as the general clause governing the relationship between different levels of government: and the Constitutional Court, in a pillar of the "new deal" of constitutional case-law, stated that «*nel nuovo Titolo V l'equazione elementare interesse nazionale = competenza statale, che nella prassi legislativa previgente sorreggeva l'erosione delle funzioni amministrative e delle parallele funzioni legislative delle Regioni, è divenuta priva di ogni valore deontico, giacché l'interesse nazionale non costituisce più un limite, né di legittimità, né di merito, alla competenza legislativa regionale*»[16];

[16] *Considerato in diritto*, § 2.2.

iii) as for administrative powers, together with national interest, the parallelism principle was also erased: now the criterion for the division of administrative powers is the well-known, widely-studied but yet obscure, principle of subsidarity;
iv) the constitutional reform also increased regional fiscal autonomy, but this is the sole field that the Court has considered still quiescent: we are still waiting for a legislative reform to enact the constitutional provisions;
v) *last but not least*, the reform gave the same *status* both to the Regions and to the other levels of government (City councils, Province and Metropolitan areas).

8. *"Equal Institutional Pluralism": The Fall of State Supremacy*

It is hard to summarize the effects of the reform in the Italian constitutional system. It is also necessary to remember that scholars do not agree about these effects. Therefore, the following observations – although probably endorsed by other scholars – are quite different from the conclusion one could find in other essays.

First of all, it is necessary to underline the importance of the defeat of national interest. Following this change, it is possible to argue that the political choices of the State are now not "more important" than regional political choice. This changeover is expressed by the decision of the Court quoted in Section 7, but it can be read also in the new text of art. 114. Before the constitutional reform this article read:

> «La Repubblica si riparte in Regioni, Provincie e Comuni».

The new provision, instead, is the following:

> «La Repubblica è costituita dai Comuni, dalle Province, dalle Città metropolitane, dalle Regioni e dallo Stato».

In another important decision, the Constitutional Judges stated that in the new art 114:

> «gli enti territoriali autonomi sono collocati al fianco dello Stato come elementi costitutivi della Repubblica quasi a svelarne, in una formulazione sintetica, la comune derivazione dal principio democratico e dalla sovranità popolare»[17].

[17] *Considerato in diritto*, § 3. See O. CHESSA, *La resurrezione della sovranità statale nella sentenza n. 365 del 2007*, in *Le Regioni*, 2007.

Therefore, the State is not the "strongest" public body. It is only "larger", not "stronger" than the Regions. And art. 114 also places Provinces, Metropolitan Areas and City councils next to State and Regions. All these bodies, like Regions, now are «*collocati al fianco dello Stato come elementi costitutivi della Repubblica*», and all these bodies are founded on democratic principle and on the sovereignty of the People.

A well-known and widely-used expression calls this new system "equal institutional pluralism" (*pluralismo istituzionale paritario*), to mean that the State, the Regions, the Provinces, the Metropolitan Areas and the City Councils are different in functions, but equal in their *constitutional status*. None of them has the right to impose its political choice on the others. They can only – and have to – exercise the tasks given by the Constitution and by the legislation on the basis of the Constitution. These tasks can be (and usually are) very different in weight and importance: "equal institutional pluralism" does not deny functional differentiation. It denies only the "major strength" of one of them.

But we can go further.

As I tried to show above, before 2001 the supremacy of the State was founded on the basis of the sovereignty of the People, considered as a whole, as a unitary being. In the new constitutional law each level of government has the same "constitutional status", but the smallest level of government has a "preferred position". This preferred position is clear in the subsidiarity principle. But it can be read in the rule that gives to the State legislative power only in certain fields. The preferred position – as to the legislative power – is the regional one, nowadays. As for administrative power, on the basis of subsidiarity the preferred position is the position of the City councils, over the Provinces; the position of the Provinces, over the Regions, and so on.

9. *Constitutional Reform and the "Regioni speciali": Some Problematic Aspects*

Up to now, I have talked about the evolution of the "ordinary model". Now it is necessary to focus on the *Regioni speciali*.

The constitutional reform concerns the *Regioni speciali* only through art. 10 of the *legge costituzionale* 3/2001. Indeed, in order to avoid the "overtaking" of the *Regioni speciali* by the ordinary Regions as regards their autonomy, the mentioned rules contain the provisions that the new constitutional law concerns the Regioni speciali (as well as the *Regioni ordinarie*) solely in those parts that are more "favorable" for this kind of Regions in comparison to the old *Statuti*.

The "intuitive reading" of this rule suggests that the general law of each *Regione speciale* is still its old *Statuto*, except for some particular aspects.

The case law of the constitutional Court has followed the above "intuitive reading". The judges of Palazzo della Consulta have tried to find the "new" fields of legislative competence given to the *Regioni speciali* by the constitutional reform. These new spheres of regional legislation, however, have been put by the Court in the context of the old *Statuti*, which is very similar to the old, ordinary model.

The problem is that not all the provisions of the *legge costituzionale* 3/2001 have the same impact on the constitutional law of the *Regioni speciali*. That assumption is self-evident if one considers the above-mentioned provision of art. 114. "Equal institutional pluralism" – with regard to the relationship between State and Regions – is itself a rule more "favorable" to the *Regioni speciali*. But it is such a general rule that it is able to influence the entire constitutional law of this kind of Regions.

Therefore, I do not agree with constitutional case law. In my opinion, constitutional reform is now the general constitutional law regulating the Regioni speciali.

As for legislative power, for example, it is easy to understand that the fall of state supremacy makes the State unable to reshape the field of its legislation and the field of regional legislation. The general clause of national interest is "swept away" by equal institutional pluralism, not only in the new sphere of legislative competence, but, more generally, in the whole system of relationship between State and Regions.

Against this view of the relationship between State and Regions in the new constitutional system, a scholar recently remarked that "to have a competence is always more favorable than not to have a competence": in the old sphere of competences, therefore, if the new constitutional law does not give legislative power to the ordinary Regions, the old competence survives with its old limits, including national interest[18].

I do not agree with this theory. Holding a competence – albeit limited, as before, by the clause of *interesse nazionale* – is obviously more favorable than not to hold that competence. It is a truism. However, in order to find the constitutional law of the *Regioni speciali* as determined by art. 10 of the constitutional reform, it is logically necessary to apply, first of all, the provision of the same art. 10 to the general rule of equal institutional pluralism. Therefore, one has to ask oneself: is the equal

[18] See S. PARISI, *Il "posto" delle fonti locali nel sistema*, in O. CHESSA, P. PINNA (ed.), *La riforma della Regione: dalla legge statutaria al nuovo statuto speciale*, Torino, Giappichelli, 2008, section III.2.

relationship between State and Regions held in art. 114 more favorable to the *Regioni speciali* than the old system? This is a rhetorical question. The answer is obviously positive. Therefore, the State has lost its supremacy not only towards ordinary Regions, but also towards the *Regioni speciali*, in every field. It depends on the status of political representation. After the reform, regional political representation is not less endorsed by democratic principle than state representation.

There is another problematic aspect of the constitutional law of the *Regioni speciali*, highly debated by scholars: the constitutional position of public bodies *inside* the *Regioni speciali*. The question one has to answer is: are the City Councils, the metropolitan areas, and the Provinces of the *Regioni speciali* ruled by the same constitutional law of the other City Councils, metropolitan areas and Provinces? The case law of constitutional Court answered this question negatively. Art. 10 of the constitutional reform mentioned above states that the new constitutional law has to be applied – if more favorable – to *Regions*, not to these other political bodies[19].

There are, nevertheless, many reasons for disagreeing with this interpretation. They involve many theoretical matters. So, in the following Section I will only indicate them.

10. *Trying to reach a Conclusion: Democracy and Regionalism, in Italy*

Before the *legge costituzionale* 3/2001 – as I tried to show in Section 6 – the sovereignty of the People founded the state supremacy.

In the words of the Constitutional Court quoted in Section 8, one can read a real changeover concerning the connection between People's sovereignty, democracy and the relationship between the State and the Regions.

The judges of *Palazzo della Consulta* stated:

> «gli enti territoriali autonomi sono collocati al fianco dello Stato come elementi costitutivi della Repubblica quasi a svelarne, in una formulazione sintetica, la comune derivazione dal principio democratico e dalla sovranità popolare»[20].

In this interpretation of the Italian constitutional system, the sovereignty of the People founds the powers of the State and the powers of the other political bodies at the same time. This assumption is so similar to

[19] See Corte costituzionale, n. 370/2006.

[20] *Considerato in diritto*, § 3.

the Elazar's proposal – mentioned above, in Section 6 – to demand a further investigation of its implications.

The Regions, indeed, can be put at the state level in their relationship toward the People's sovereignty only if one thinks of the People – using a "dworkinian" language – from a "statistical" viewpoint rather than in a "communal" way. If People is a unitary entity, it can fully express itself only at the state level. In this way of thinking, the Regions are forced to be subordinate with respect to the State. And – at the same time – this way of thinking does not fit with "parity" between State, Regions and the other public bodies mentioned above.

Therefore, in my opinion, from this premise, one can infer that this profound changeover concerns, first of all, the way of thinking of the People and the very concept of democracy.

After the fall of the old party system in Italy, the paradigm described in Section 4 is no longer able to explain the validity of the Constitution.

Firstly, the old parties do not exist anymore. Hence, the validity of the Constitution cannot lie on the grounds of those parties

Secondly, there is no replacement in this role. The present party system is not able to offer a synthesis of the pluralism, not even through an agreement between the ruling parties. The reason lies probably in the deep changeover of the pluralism itself. There are no collective identities in which one can recognize oneself, as happened in the past. Every man or woman nowadays, expresses his or her special identity, the result of the special path of his or her own life. This is the "*crisi del rappresentato*"[21], that makes political representation unable to give unity to the People.

We cannot consider the People as a unitary and abstract entity. The grounds of constitutional validity have to be found elsewhere. It has to be found in a theory capable of keeping together the manifold individual identities that characterize the atomized pluralism of the present constitutional situation. A theory based on the fundamental rights of individuals.

This is the real changeover of Italian Constitutional Law. And this changeover also explains the way of thinking of democracy implied by the new relationship between State and Regions. Moreover, the indicated path also suggests the reason of the "preferred positions" mentioned above.

Why does the "smaller" level of government have the preferred position with respect to the "larger" level of government? Why does the Italian Constitution give general legislative power to the Region, and to the

[21] See M. LUCIANI, *Il paradigma della rappresentanza di fronte alla crisi del rappresentato*, in N. ZANON, F. BIONDI (ed.), *Percorsi e vicende attuali della rappresentanza e della responsabilità politica*, Milano, Giuffrè, 2001, 109 ss.

State only a limited legislative power? Why does art. 118 hold the principle of subsidiarity with respect to administrative power?

These questions are very difficult to answer if one moves from the European traditional "communal interpretation" of democracy. If one moves from a "statistic interpretation" of democracy, on the other hand, one can easily see that the weight of each person in public democratic choices is greater in a smaller community. The smaller the community, the bigger the approximation to the ideal of self-government.

This theory explains the fall of the supremacy of the State, the deletion of the general clause of "national interest", but also the application of the pillars of the constitutional reform also to the *Regione speciali*. Equality requires that the possibility of self-government for the citizens of the *Regioni speciali* is the same as for all the other Italians. To reach this aim, I suggest the following path:

i) first of all, one has to interpret the term "*Regione*" – in the art. 10 of the *legge costituzionale* 3/2001 – as referred to the whole regional legal order, unlike the case law of the Constitutional Court, that reads this term as referred to the politic body called "*Regione*";
ii) secondly, we have to tear the veil of the political bodies, and to refer the "autonomy" mentioned in the art. 10 of the *legge costituzionale* 3/2001 to the individuals that take political choices through those bodies.

Therefore, we can draw this conclusion: one has to apply the constitutional reform if it gives the citizens of *Regioni speciali* more possibilities of self-governing than the old *Statuti speciali*. The general principle stated in art. 114 and its applications both in the legislative field and in the administrative field give more possibilities of self-governing than the old *Statuti speciali*. So we have to apply them to the *Regioni speciali*.