Handle with Care!
The Regional Charters and Italian Constitutionalism's 'Grey Zone'*

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Founding principles and rights in new *Statuti* (fundamental regional charters) – Expression of sub-national constitutionalism? – Constitutional court: *Statuti* not regional constitutions – Provisions on founding principles and rights 'cultural statements' lacking any legal effect – Tertium Genus in addition to 'prescriptive' and 'programmatic' norms? – Various scenarios for potential legal conflicts between the national Constitution and the 'cultural statements'

Introduction

Our paper is focused on the legal 'grey' zone between constitutionality and unconstitutionality which was created by the Italian *Corte costituzionale*, Constitutional Court, in some recent judgments. Three cases in particular (Judgments 372-378-379/2004[1]), regarding the legal effect of some regional provisions on rights and fundamental principles, were ambiguously dealt with by the *Corte costituzionale*. These provisions were included by the regional legislatures in their new Regional Charters (*Statuti regionali*) adopted after the Italian constitutional reform of 1999. This reform resulted in the amendment of Article 123 of the Italian Constitution, according to which the regional *Statuti* are required to be 'in harmony with the (national) Constitution', instead of 'in harmony with the Constitution and with the

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[1] Available on <www.cortecostituzionale.it>.

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laws of the Republic' as was the Constitution's previous text. Against this new background, several regional legislatures understood this as an opportunity to adopt 'regional constitutions'. In Judgments 372, 378 and 379/2004, the *Corte costituzionale* ambiguously refused the Regions' (Tuscany, Umbria and Emilia-Romagna) interpretation of Article 123 of the Constitution, holding that the *Statuti*'s regional statements concerning fundamental rights and principles could not be seen as binding (constitutional or legislative) norms for two reasons.

First, according to the *Corte costituzionale*'s case-law, the regional *Statuti* could not be seen as regional 'constitutional' charters. This view was implicit in Judgments 196/2003 and 106/2002.[2] Secondly, the articles concerning rights and principles contained in the regional charters are neither laws, nor legal 'norms', but *cultural statement*s (378/2004) since they only express regional cultural and historical values. At the same time – this being its contradiction – the *Corte costituzionale* did not declare these articles unconstitutional, thus *keeping them alive*.

Here rests the paradox of the *Corte costituzionale*'s judgments: the Court, while rescuing the regional proclamations of rights from the danger of unconstitutionality, at the same time created a 'grey' zone within the legislation.

Currently, in fact, both the true nature of such *statements* and their legal value are unclear. In this paper we attempt to deal with issues such as the nature, the consequences and the possible implementation of the aforementioned cultural statements by linking the judgments to the *Corte costituzionale*'s earlier case-law (first of all Judgment 1/1956,[3] which was about the distinction between 'prescriptive' and 'programmatic' constitutional norms, and Judgment 40/1972[4]).

Regional *Statuti* after the 1999 constitutional reform: a brief overview

In 1999, the Italian Parliament approved a law containing constitutional amendments concerning, among other issues, fundamental regional charters (*Statuti*). *Statuti* are regional laws that regulate 'the form of government and basic principles for the organisation of the Region and the conduct of its business' (Italian Constitution, Article 123, § 1). They are approved by the regional legislatures (*Consigli regionali*) through a special procedure.

Those constitutional amendments required the *Statuti* to be 'in compliance with the Constitution' (Italian Constitution, Article 123, § 1). That was seen as a major change compared to the previous text of Article 123, which, as we mentioned, required the *Statuti* to comply not only with the Constitution, but also with 'the

[2] Both rulings are available at <www.cortecostituzionale.it>.

[3] Corte Costituzionale italiana, sentenza 1/1956, <www.cortecostituzionale.it>.

[4] Corte Costituzionale italiana, sentenza 40/1972, <www.cortecostituzionale.it>.

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laws of the Republic' – and 'Republic' was then interpreted as 'State'. Moreover, the revised constitutional norms provided a wider scope for the *Statuti*, since the 'form of government', the 'basic principles of the organisation' and the 'conduct of the [regional] business' were understood as more wide-ranging than the 'internal organisation of the Region', as cautiously allowed by the Constitution's original text before 1999. Such modifications seemed to pave the way for a greater differentiation between the Regions.[5] The tool to achieve this goal was supposed to be that sort of sub-national constitutionalism which the new constitutional provisions aimed at. Regional legislatures thus began to prepare the new *Statuti*. So far eleven out of fifteen ordinary Regions have passed their new *Statuto*.[6]

This trend seemed to be borne out and strengthened by another constitutional revision passed in 2001, which prepared Italy for the transition to a quasi-federal (or federal) State.[7] Legislators and enthusiastic commentators saw the *Statuti* as a kind of regional constitution which defines the identity of each Region in a State which is becoming more and more complex and plural. That is why all of the eleven *Statuti* which have come into force contain provisions – sometimes included in a preamble – in which the founding principles of each Region and the fundamental rights of its inhabitants are catalogued.

The following provisions from Latium's *Statuto* are a good example of such a legislative policy:[8]

> The Region shall promote national unity as well as European integration […] as fundamental values of its identity…
> The Region shall contribute to promote [*valorizzare*] Rome, capital of the Republic and symbol of Italian unity, the centre of Catholicism and religious dialogue, a meeting place for different cultures and a universal historical and cultural heritage.
> ...
> The Region recognises the principles derived from the Universal Declaration of Human Rights.[9]

[5] F. Pizzetti, 'La ricerca del giusto equilibrio tra uniformità e differenza: il problematico rapporto tra il progetto originario della Costituzione del 1948 e il progetto ispiratore della riforma costituzionale del 2001', in *Le Regioni* (2003) p. 555 et seq.

[6] *See* <http://www.associazionedeicostituzionalisti.it/dossier/statuti_regionali/aggiornamento_200611.html>.

[7] The choice of terms is quite secondary (*see* G. Bognetti, '*Federalismo*', in *Digesto delle discipline pubblicistiche*, V (UTET, 1991) p. 273 et seq.). The most important point in the 2001 revision was the end of a central state-centred conception of the Republic.

[8] On this point *see* E. Rossi, 'Principi e diritti nei nuovi Statuti regionali', in *Riv.dir.cost.* (2005) p. 51-96.

[9] *See* Arts. 3(1), 5(1) and 6(1), Statuto della Regione Lazio, <http://www.associazionedeicostituzionalisti.it/dossier/statuti_regionali/nuovo_statuto_lazio.pdf>.

As we can see, these propositions concern subjects – such as the relation between the State and the Roman Catholic Church – which are not at all specified by the Constitution as business of the Regions.[10]

Actually, as the Constitutional Court recalled in 2004, this situation was not entirely new to Italy. In the 1970s in fact, soon after the first regional implementation, many Regions gave themselves regional charters marked by a strong axiological content. Some scholars were ironic about that phenomenon and they judged harshly attempts at micro-constitutionalisation at regional level.[11]

According to the scholars and to the '*Legge Scelba*' (Law no. 62/1953, devoted to the establishment and functioning of the regional bodies), the regional *Statuti* should deal only with the Regions' internal organisation, to the exclusion of any other issue.

These arguments were founded on a very restrictive interpretation of '*internal organisation*' in the previous version of Article 123 of the Italian Constitution.[12] Any provisions on fundamental principles and legal values were considered to conflict with the letter of Article 117 of the Constitution (old version),[13] or, better, as being *ultra vires*.

Even those scholars[14] who had accepted a less restrictive reading of the notion of internal organisation did not conceive of the possibility of any programmatic regional norms, because these were prevented by the State framework-laws, which are national laws providing the regional legislature with fundamental principles on concurrent competences. Because of the existence of such fundamental principles (given by the national framework laws) the presence of programmatic principles in the *Statuti* was conceived as a useless pleonasm, and hence superfluous.

There was no explicit judgment of the *Corte costituzionale* in those years, and in the very few cases in which it had the chance to deal with the issue, it seemed to agree with the existence of such norms in the *Statuti*.

[10] Art. 117(1), sub *c* of the Italian Constitution.

[11] T. Martines, 'Prime osservazioni sugli statuti delle Regioni di diritto comune', in T. Martines, *Opere*, vol. III, p. 563 et seq. at p. 567.

[12] Art. 123(1), Italian Constitution (before 2001): 'Every Region shall have a *statuto* which lays down norms concerning its internal organisation in harmony with the Constitution and the laws of the Republic. The *statuto* shall regulate the exercise of initiative and of *referendum* on regional laws and regional administrative decisions, and the publication of regional laws and regulations'. *See also* A. D'Atena, 'Forma e contenuto degli Statuti ordinari', in *Diritto e società* (1984), p. 221 et seq., p. 242; F. Sorrentino, Lo statuto regionale nel sistema delle fonti, in *Giurisprudenza costituzionale* (1971), p. 424 et seq., p. 449.

[13] Art. 117(1), Italian Constitution (before 2001): 'Within the limits of the fundamental principles established by State law, Regions shall legislate in regard to the following subject matters, provided that such legislation does not conflict with the interest of the Nation or of other Regions…'

[14] G. Balladore Pallieri, *Diritto cosituzionale* (1965), p. 358.

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In the constitutional case-law of the 1980s, an interesting distinction was made by the *Corte costituzionale* between the legal effect of regional programmatic norms in the field of the national legislative competence and in the ambit of regional competence. In the former case, the effect of the programmatic norms was limited to the proclamation of values which were not binding for the activity of the Region (Judgment 829/1988).[15]

In Judgment 10/1980, instead, the *Corte costituzionale* admitted that the *Statuti*'s programmatic statements could work as fundamental norms for the concurrent regional legislative competence in case of a lack of national framework legislation, thus conceiving of a sort of filling up of an empty space left in the national framework legislation by the *Statuti*'s programmatic principles.

In later judgments, the *Corte costituzionale* drew on principles of the Constitution on the basis of which the *Statuto* should govern the regional activity – not only with regard to the internal organisation but also with regard to the activity of the legislative competences.[16] In other words, the *Statuti* should work as organisational norms rather than as a fundamental charter governing all regional (administrative and legislative) activities. On the other hand, the Constitutional Court pointed out that the regional programmatic provisions ought not to conflict with the framework laws containing fundamental principles for the regional legislature.[17] In those rulings (e.g., 40/1972[18]), however, the Court did not explicitly deny any legal effect for the *Statuti*, which it did in 2004.

Statuti are subject to judicial review by the *Corte costituzionale*. This procedure is preventive but optional, in as much as it takes place on issues raised by the central Government. It was in this context that the *Corte costituzionale* dealt with the issues under discussion in three difficult cases in 2004.

The Italian Constitutional Court is given the floor: judgments 372/2004, 378/2004 and 379/2004 [and 365/2007]

The practice briefly presented above was first questioned before the *Corte costituzionale* regarding Tuscany's, Emilia-Romagna's, and Umbria's *Statuti*. More particularly, some provisions in those Charters contained recognition of domestic partnerships. The central Government claimed that such a recognition clashed

[15] Corte Costituzionale italiana, *sentenza* no. 829/1988, <www.cortecostituzionale.it>.

[16] Corte Costituzionale italiana, *sentenze* no. 48/1983, 99/1986, 567/1988, 993/1988, 88/1989, in <www.cortecostituzionale.it>.

[17] Corte Costituzionale italiana, *sentenza* no. 171/1999 according to the opinion of M. Rosini, 'Le norme programmatiche nei nuovi statuti', in M. Carli-G. Carpani-A. Siniscalchi (eds.), *I nuovi statuti delle regioni ordinarie* (Bologna, Il Mulino), p. 31 et seq., p. 35.

[18] Corte Costituzionale italiana, sentenza no. 40/1972, <www.cortecostituzionale.it>.

with the constitutional value of the family based on marriage (Constitution Article 29[19]): for example, under their regional charters the legislatures of the abovementioned Regions would have been allowed to take into account, as far as housing policies were concerned, not only married couples but also (gender-neutral) unmarried ones. Moreover, since regional legislatures were previously not supposed to rule on such issues under the heading of either 'form of government', 'organisation', or '[regional] business', statements on these subjects were not at all within their competence. Thus, a seemingly abstract dispute on regional law could turn out to have repercussions on such a controversial subject as family law. These cases could be regarded as the expression of a conflict between a conservative central Government and three centre-left regional administrations, with important political implications.

In the judgments 372/2004,[20] 378/2004[21] and 379/2004,[22] the *Corte costituzionale* decided, so to speak, not to decide. It did not declare the provisions in the *Statuti* unlawful, but it greatly diminished their meaning, thus avoiding taking sides in the discussion on the recognition of domestic partnerships. The Court theorised the existence of a new kind of provision that could be contained in a piece of legislation.[23] It defined them as 'an expression of the various political convictions in the regional community'. Their function is to express those convictions at the regionally highest legal level. However, since their significance does not affect the legal system – they just make clear the dominant feelings in a given Region – they have no legal force, their function being properly (and only) 'political' and 'cultural'.[24] The *Corte costituzionale* undertakes to distinguish these cultural statements from 'programmatic norms', a doctrinal category which enjoyed great popularity between the coming into force of the Constitution, in 1948, and the beginning of the *Corte*'s activity, in 1956.

In its Judgments of 2004 the *Corte costituzionale* said that, since the *Statuti* are not regional constitutions, their provisions could not be considered as programmatic norms. Whereas the Constitution of 1948 is the highest source of law in the Ital-

[19] 'The Republic recognises the rights of the family as a natural society founded on marriage'.

[20] Italian Constitutional Court, *sentenza* n. 372/2004 (*Government* v. *Tuscany*), <http://www.cortecostituzionale.it>.

[21] Italian Constitutional Court, *sentenza* n. 378/2004 (*Government* v. *Umbria*), <http://www.cortecostituzionale.it>.

[22] Italian Constitutional Court, *sentenza* n. 379/2004 (*Government* v. *Emilia-Romagna*), <http://www.cortecostituzionale.it>.

[23] We say 'new' since it had never appeared before in any judgments of the *Corte costituzionale*.

[24] Italian Constitutional Court, *sentenza* n. 372/2004, para. 2: '[..] alle enunciazioni in esame, anche se materialmente inserite in un atto-fonte, non può essere riconosciuta alcuna efficacia giuridica, collocandosi esse precipuamente sul piano dei convincimenti espressivi delle diverse sensibilità politiche presenti nella comunità regionale al momento dell'approvazione dello statuto [...]'.

ian legal system – not only in hierarchical but also in interpretive terms – the *Statuti* are sub-constitutional sources whose scope is determined by the Constitution itself. Their non-prescriptive norms are neither able to set programmes for the legislature nor to influence interpretation. If regional legislatures were to implement them, they would violate the Constitution: as the *Corte costituzionale* stated, since these provisions of regional charters have 'no legal effect', 'a regional law pretending to implement them would be illegitimate'.[25]

Nevertheless, not all provisions concerning rights and principles may be regarded as merely cultural statements In a more recent judgment, 365/2007,[26] the *Corte costituzionale* dealt with a regional ordinary law of Sardinia which was due to set up a regional assembly entrusted with writing a draft for the new *Statuto* (*Consulta per il nuovo statuto di autonomia e sovranità del popolo sardo*). According to that law, this *Consulta* had to take into account:

> the principles and characters of regional identity ... autonomy and sovereignty; ... to promote the rights of Sardinian citizens with regard to the specific traits of the island ... to define autonomy and regional sovereignty.

The Italian Government questioned the constitutionality of that law before the *Corte costituzionale* under Article 127 of the Constitution.[27] In its view, these provisions would clash both with the principle of equality and with the constitutional definition of the Republic as '*one and indivisible*' (Constitution, Article 5). Faced with such strong arguments, the Sardinian defence claimed that the legislation in question could be interpreted as a collection of merely political statements, thus making it 'basically harmless' and not illegitimate. The *Corte costituzionale* firmly rejected the analogy, since the law on which it rendered its judgment was aimed at setting up a procedure to revise the regional *Statuto* – that was not the same as being inserted among the general principles in a regional charter.

Perhaps Judgment 106/2002 is even more interesting. It declared the constitutional unlawfulness of a regional law of Liguria which changed the regional legislature's name from *Consiglio regionale* – as the Constitution provides – into *Parlamento* (Parliament of Liguria). The Court paid great attention to this seemingly trivial question of name, and held that the 'peculiar expressive force' of the word 'Parliament' prevented it from being given to legislative assemblies other than the national one.

[25] Italian Constitutional Court, *sentenza* n. 365/2007 (*Government* v. *Sardinia*), <http://www.cortecostituzionale.it>.

[26] Italian Constitutional Court, *sentenza* n. 365/2007, cit.

[27] Art. 127, Italian Constitution: 'The Government may question the constitutional legitimacy of a regional law before the Constitutional Court within sixty days from its publication, when it deems that the regional law exceeds the competence of the Region'.

'Prescriptive' and 'programmatic' norms: are we dealing with a legal tertium genus?

These rulings cannot easily be considered consistent with the *Corte costituzionale*'s other historic judgments. We briefly recall here two or three leading cases that have been strongly contradicted by the *Corte costituzionale*.

First, we recall the very famous case of the *Corte costituzionale's* first judgment of 1956, in which it clarified the distinction between so-called programmatic and prescriptive norms.

Soon after the entry into force of the Italian Constitutional Charter, the literature distinguished between immediately applicable norms and norms that required implementation by ordinary legislation. As legal scholarship pointed out, this distinction does not fully coincide with the distinction between prescriptive and programmatic norms, because 'some of the prescriptive norms in the Italian Constitution, however, are not effective today and some of the programmatic norms are effective regardless of parliamentary inactivity'.[28] In the literature[29] a better definition has been given: the programmatic norms would be an expression of the revolutionary character of the Italian Constitution which, following the Jacobin ideal, does not limit itself to codifying the equilibrium of social forces which predated the Constitution itself.[30] On the contrary, the Italian Constitution – as in general all revolutionary constitutions – attempts to guide the social forces towards an ideal pattern (described by the combination of Articles 2 and 3 of the Italian Constitution).[31]

A huge part of this legal category would consist of the provisions regarding fundamental rights such as Article 21 on the freedom of speech and expression.

[28] J.C. Adams-P. Barile, 'The Implementation of the Italian Constitution', *The American Political Science Review*, Vol. 47, No. 1 (Mar., 1953), p. 61-83.

[29] *See* for example P. Calamandrei, 'La Costituzione e le leggi per attuarla', in Aa.Vv., *Dieci anni dopo* (Bari, Laterza 1955), p. 215.

[30] *See* for example L.F.M. Besselink, 'The Notion and Nature of the European Constitution after the Reform Treaty', <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086189>, 4: 'revolutionary constitutions tend to have a blueprint character. They provide a grand design, wishing to invent a political future which is different from the past. The constitution is to be truly constitutive, creating, steering and modifying political events, in short: changing the course of political history. Engineering the experiment of the future is the key to constitution making'.

[31] Art. 2: 'The republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity'; Art. 3: '(1) All citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions. (2) It is the duty of the republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country'.

The notion of the 'revolutionary constitution' was used by the Italian scholars of politics to describe this type of constitution, while that of the 'achievement constitution' was used by the jurists to describe its opposite; the latter formula refers to:

> the periodical constitutional reform typical of socialist countries owing to the Marxist doctrine according to which a constitutional reform is the in time necessary and progressive adjustment of the formal constitution to the achievements reached in the social order.[32]

Relying on the presumed differing structure of the constitutional norms, the scholars were divided on this point to the extent that in the 1950s two scholarly positions challenged each other in the main national legal journals ('*Rivista Trimestrale di diritto pubblico*' and '*Rassegna di diritto pubblico*'):[33] a first group of authors insisted on the inefficacy of such programmatic provisions while a second group – captained by one of the most eminent Italian constitutional law scholars, Vezio Crisafulli[34] – summed up the prescriptive effects of the so-called programmatic norms in three points. These were: the possibility of these provisions guiding the interpretation of the 'ordinary' laws (although these were pre-existent in some cases); the possibility of such constitutional provisions being parameters for the review of constitutionality, aimed at striking down those provisions which are in conflict with the Constitution; and finally, these constitutional provisions very often establish an obligation for the law-makers, though admittedly it is very difficult to punish the legislator's inactivity.

The *Corte costituzionale* did not miss the opportunity to clarify the framework by its first and historical ruling (1/1956[35]) in which the Court recognised the impossibility of distinguishing between programmatic and prescriptive provisions with regard to their capacity to be a parameter for the review of ordinary laws. On the basis of this decision, the Italian Constitutional Court began to declare the unconstitutionality of several ordinary laws:

> the well-known distinction between prescriptive and programmatic norms [...] is not conclusive in judgments before the *Corte costituzionale*, since the constitutional

[32] P. Carrozza, 'Constitutionalism's Post-Modern Opening', in N. Walker, M. Loughlin (eds.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form* (Oxford University Press, 2007) p. 169-187, p. 176. In other words, these types of achievement-constitutions could not manage or tackle the problem of social coexistence; on the contrary, suffering from the dynamics of the market, they could only reflect an image of the reality.

[33] On this debate *see* F. Lanchester, *Pensare lo Stato. I giuspubblicisti nell'Italia unitaria* (Bari-Roma, Laterza 2004) p. 156-165.

[34] V. Crisafulli, *La Costituzione e le sue disposizioni di principio* (Milano, 1952) p. 99 et seq.

[35] Corte costituzionale italiana, no. sentenza 1/1956, su <www.cortecostituzionale.it>.

> illegitimacy of a law may derive, in some cases, even from its irreconcilability with norms known as programmatic. Furthermore, this category usually encompasses different constitutional norms: some of them merely draw up generic programs ... [other ones set programs] which directly bind the legislature, influence the interpretation of previous legislation and the ongoing effect of parts of it; in the end, there are norms which lay down fundamental principles, which also affect the whole legislation.[36]

Although their content is very vague, ambiguous and characterised by a high level of rhetoric, programmatic norms can be applied to legal disputes by the judges; that was said to be the core of the Republican revolution and the essence of the Constitution's 'defrosting' process, i.e., the first attempt to take the constitutional principles seriously after the early 1950s, when a legalistic legal culture still prevailed.[37]

In its 2004 judgments, the *Corte costituzionale* returned to the old-fashioned way of (formally) construing legislative statements, and characterised comparable provisions in *Statuti* as having only cultural value. This was based both on their content and their structure. They are comparable in as much as they have the same structure as the constitutional programmatic national provisions. As, according to the *Corte costituzionale* they do not, in fact, clash with our fundamental Charter's main core, they are consistent with the Constitution, which is confirmed in the solution conceived by the Italian Constitutional Court: these regional cultural statements are not unconstitutional, they just lack any legal effect.

As Caretti[38] pointed out, the reason for this decision rests on the strong link between the Constitution and the fundamental rights, the latter being under the Constitution's jurisdiction which admits of no exceptions. In other words, only the Constitution can contain provisions on fundamental rights.

According to the *Corte costituzionale*'s case-law, therefore, these regional *Statuti* cannot be seen as regional 'constitutional' charters. As we saw above, this concept was clearly expressed in the judgments of 29 November 2004 (372, 378 and 379/2004), where the *Corte costituzionale* said the *Statuti* were not

> constitutional charters but only regional sources of reserved and specialised jurisdiction, that is charters of autonomy that are 'required to be in harmony with the

[36] *Ibid.*

[37] By the formula 'constitutional freezing' the scholars mean the non-enforcement of constitutional provisions. *See* E. Cheli, *Costituzione e sviluppo delle istituzioni in Italia* (Bologna, Il Mulino 1978), *see* especially p. 169 et seq.

[38] P. Caretti, 'La disciplina dei diritti fondamentali è materia riservata alla Costituzione', in <www.forumcostituzionale.it>.

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rules and principles which are all derived from the Constitution' (Judgment no. 196/2003).[39]

Statements concerning rights and principles contained in the regional charters, therefore, are neither legislation, nor other 'norms', but *cultural statement*s because they only express the Region's cultural and historical values. At the same time – this being its contradiction – the *Corte costituzionale* did not declare these principles unconstitutional, and so *kept them* '*alive*'.

This distinction opens the legal way to another group of provisions (unknown so far to the jurists) representing a sort of *tertium genus*; the regional fundamental principles, in fact, are neither programmatic norms nor prescriptive norms, they are neither *contra constitutionem* nor constitutional *secundum constitutionem*; they are, in a few words, '*constitutionally tolerated*'[40] provisions.

Nevertheless it is interesting to underline the appearance of a sub-national attempt to codify values which are perceived as controversial by the State (at a super-ordinary, i.e., more than legislative, level). This is probably the consequence of a clear process: the progressive ascent of a cultural issue at regional level (the success of the '*Lega Nord*'[41] in the 2008 political elections in Italy could represent a good example of that); a similar trend is developing in Spain, where in the *Estatutos de Autonomia*[42] sociologists have traced such phenomena back to the so-called '*glocalisation*'.[43]

However, the consequences of these judgments are evident: on the one hand there is a strong invitation for regional Charters to 'lower their voice' (that cannot equal the Constitution's); at the same time there is the risk of postponing the constitutional conflict between the regional laws (which could use those cultural statements as a reference) and the national Constitution itself. This point will be analysed further on in this paper.

The commentator has to deal with a problem created by the distinction made by the *Corte costituzionale*, which has placed the regional norms in a sort of limbo

[39] Judgment 372/2004, *considerato in diritto*, section 2.

[40] For a different meaning of *constitutional tolerance*, *see* J.H.H. Weiler, 'European Democracy and the Principle of Constitutional Tolerance: The Soul of Europe', in F. Cerutti-E. Rudolph (eds.), *A soul for Europe* (Leuven–Sterling, Peeters 2001), Vol. 1, p. 33-54 at p. 53.

[41] On the rise of Lega Nord *see* I. Diamanti, *La Lega. Geografia, storia e sociologia di un nuovo soggetto politico* (Roma, Donzelli 1995).

[42] *See*, e.g., J.M. Castellà Andreu, *La funcìon constitucional del Estatuto de Autonomía de Cataluña* (Barcelona, Institut d'Estudies Autonomics 2004), p. 149 et seq.; I. Ruggiu, 'Testi giuridici e identità. Il caso dei nuovi Statuti spagnoli', in *Le Istituzioni del federalismo* (2007), p. 133 et seq.

[43] On the relationship between global and local dimension *see* R. Robertson, 'Glocalization: Time-Space and Homogeneity-Heterogeneity', in M. Featherstone-S. Lash-R. Robertson (eds.), *Global Modernities* (London, Sage 1995), p. 25-44.

(neither immediately prescriptive nor programmatic) because of their belonging to a regional charter that cannot be defined as constitutional.

As we saw above, in fact, the hidden premise of the reasoning of the *Corte costituzionale* is that the fundamental rights' area can be governed only by (real) constitutional sources.

Subnational constitutionalism without (subnational) constitutions? – Regional autonomy's unmarked boundaries

Judgments such as those under discussion can be given several readings: here we would like to suggest a possible one. First of all, it can be said that we are dealing with clear examples of 'un-constitutional constitutionalism': a sort of constitutionalism embedded in charters lacking (at least formally) in constitutional *status*. We will briefly contextualise the above *regional odyssey* and try to give content to what we shall call a 'complex'.[44] From the definition of complexity we move to its application to the Italian regional case.

Our premise is that the Italian legal order is a multilevel complex: the national, regional and municipal level are conceived as three levels of governance and law-making.

Unlike the multilevel structure of the European Union[45] the relation between the national and regional level (or sub-national level) is usually neglected on the grounds of a presumed homogeneity.

On the contrary, looking at the constitutional variety at the regional level (not only in federal contexts), one factor which contributes to the system's complexity can be identified. This is the mutual 'embracement' of levels, which makes the territorial actors' legislative *domains* difficult to distinguish. This makes the attempt to define legal orders as *self-contained regimes* very difficult. Understanding all levels as one integrated and complex whole represents one of the most fascinating challenges for constitutional lawyers.

[44] E. Morin, *Introduction à la pensée complexe* (ESF, 1990), p. 10. About law and complexity *see* F. Ost, M. van de Kerchove, *Constructing the complexity of the law: towards a dialectic theory*, <http://www.dhdi.free.fr/recherches/theoriedroit/articles/ostvdkcomplex.htm> and M. Delmas Marty, *Le pluralisme ordonné* (Paris, 2006); *see also* M. Doat-J. Le Goff-P. Pedrot (dir.), *Droit et complexité* (Rennes, 2007); G. Martinico, 'Complexity and Cultural sources of Law in the EU context: from the multilevel constitutionalism to the constitutional synallagma', *German Law Journal* (2007), 3/ 2007, p. 205-230.

[45] *See* I. Pernice, 'The European Union is a divided power system in which each level of government – regional (or Länder), national (State) and supranational (European) – reflects one of two or more political identities'. I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making-Revisited?', *CMLR* (1999) p. 703-750, p. 707. I. Pernice, 'Multilevel constitutionalism in the European Union' (Working Paper, 5/02, 4), <http://www.rewi.hu-berlin.de/WHI/papers/whipapers502/constitutionalism.pdf>.

As a consequence of the lack of a precise distinction within the *domain* of law-making, it is sometimes impossible to resolve the antinomies (collision or conflict of norms) between different legal levels on grounds of the precedence of a legal order (e.g., the national) over another legal order (e.g., the regional).

The Italian system of regional *Statuti* forms a clear example of a complex multilevel system in which antinomies may arise which can be resolved only on a case-by-case basis and not by an unequivocal solution offered by the existence of a precise rule for collision norms, such as a clear and undisputed supremacy clause. The main risk of the Constitutional Court's judgments is to create complex antinomies which are both 'non-reducible' and 'unpredictable'.[46]

The antinomies can exist in the meanings we have outlined: the fundamental principles that have been rescued by the Italian Constitutional Court as 'cultural statements' could form the basis for regional legislation (this is the ordinary regional legislation which has unmistakably binding effect) which could be in conflict with the Constitution. The fundamental principles of the *Statuti* could represent a sort of latent and hidden element, apparently inoffensive, which can be made binding by the ordinary regional legislature. In this sense, they could represent elements that are not identifiable as legal and binding by the observer of the starting condition, but which could become legal and binding due to the regional legislature's voluntary implementation of the cultural principle in binding regional legislation.

Ostensibly, the conflict will involve only the implementing laws and the Constitution, but in reality the implementing laws will embody the already existing principle contained in the regional cultural statement. This reveals how absurd the *Corte costituzionale's* strategy is. The fact that the regional *Statuto* contains a similar provision to the regional legislation implementing it, implies the possible reappearance of the conflict between the regional implementing law and the Constitution, which had seemed earlier to have disappeared by considering the *Statuto*'s provision a merely 'cultural' statement and not legally binding. Similar antinomies, whose solution is not predictable simply by looking at the starting circumstances of the legal system, are conflicts that concern certain 'materials' (i.e., documents lacking binding legal effect, but enjoying a wide social consensus, or 'soft law') which are drawn by keen law-makers from the grey zones of the law, and which consequently acquire a sort of influence on the legal order (this effect is due to the

[46] In the natural sciences *non-reducibility* refers to a situation in which the result of the relationship among diversities does not present itself as a mere sum of the latter but it is something different. *Unpredictability* means that it is difficult to foretell or foresee its evolution by looking at the starting position. In a deterministic system it is always possible to predict the final state if the initial state is known. In a complex adaptive system it is not possible to predict the final evolution state even if we know the initial state of the components.

effort of the legislature, who translates this influence into a legislative text). This is precisely the case of regional cultural statements, which an external observer cannot perceive as a specimen of legal material, especially if he or she has in mind the *Corte costituzionale's* doctrine (whereby the regional cultural statements cannot attain the status of norms).

Cases of complex antinomies

Several possible cases of complex antinomies can be identified with regard to the regional legal order. According to many new Regional *Statuti* a new body of control (usually named *Consulta Statutaria* or *Commissione di garanzia statutaria* in the language used in the *Statuti*) will be charged with the specific task of giving its advice on possible conflicts between regional laws and the *Statuti*.[47] The opinions of such bodies create the obligation for the Regional Legislative Assembly (*Consiglio regionale*) to review the regional law, which can then be adopted a second time.

Nothing prevents the consultative bodies from looking at the fundamental principles of the *Statuti* when reviewing the regional laws' consistency with the *Statuti*. This possibility of reviewing the regional laws and of expressing negative advice on them in the light of '*cultural statements*' could signal the latent legal effects of the *Statuti* general provisions; and could also embody an example of real – although indirect – conflict between the Constitution and the fundamental regional provisions, as they cause a potential obstacle for the legislative function entrusted to the Regional Assemblies by the national Constitution.

Moreover, if the President of a Region were to decide to promulgate a regional law without the Regional Assembly's review – and despite the negative advice of the *Commissione di garanzia statutaria* – we should be faced with a clear invalidity of the regional law due to its conflict with the *Statuto* itself, which guarantees the role of the *Commissione Statutaria* and rules on the legislative procedure. Paradoxically, in this case the promulgated regional law would be unconstitutional, because of the violation of the *Statuto* to which the Constitution attributes the highest position in the regional legal system (Article 123 Constitution).

Other cases of conflict between the Constitution and the *Statuti* can be thought of. As we saw, Tuscany's regional *Statuto* contains a provision devoted to the acknowledgement of forms of cohabitation which are different from those of families founded on marriage, the basis of the natural family according to Article 29 of the Italian Constitution.[48] This provision represents one of the first

[47] *See* for example Art. 57 Statuto of Tuscany and Art. 69 of Statuto of Emilia-Romagna.

[48] Art. 29: 'The family is recognized by the republic as a natural association founded on marriage. Marriage entails moral and legal equality of the spouses within legally defined limits to protect the unity of the family'.

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acknowledgements of the necessity to give a legal and official status to the '*other forms of cohabitation*' (currently, there is no specific legal regime for the cohabitants' rights and duties).

Some regions, like Puglia, recently decided to extend to these forms of cohabitation the same legal treatment as provided for families founded on marriage with regard to the right of enjoying social services (regional law of Puglia no. 19/2006 c.d. '*Disciplina del sistema integrato dei servizi sociali per la dignità e il benessere delle donne e degli uomini di Puglia*'[49]).

If Tuscany were to enact a similar regional law referring to Article 4 of its *Statuto*, would this law be unconstitutional? Probably not, because the Constitution contains no provisions on extra-marital cohabitation, but can we draw the same conclusion with regard to a regional law which extends the right to vote to the immigrants according to Article 3 of Tuscany's *Statuto*? This case seems more questionable and more of a problem because Article 48 of the Constitution accords the right to vote only to Italian nationals.[50]

A similar debate took place at the local level when some municipal *Statuti* had given third-country nationals the right to vote in local elections. The *Consiglio di Stato*[51] – which gave an advisory opinion according to the procedure described in the Article 138[52] of the 'Code of municipalities' ('*Testo Unico degli enti locali*') – decided to deny the possibility to extend such a right to vote.[53]

This episode shows the possibility for such a conflict also within regions and confirms the risk of latent antinomies between the *Statuti*'s fundamental principles and the Constitution.

[49] *See* the text here: <http://www.issirfa.cnr.it/download/File/NAPOLITANO_PUGLIA/Puglia%20L%2019_06%20PDF.pdf?PHPSESSID=b4e62468a96940ae6ae687d571bbb063>.

[50] (1) All citizens, men or women, who have attained their majority are entitled to vote. (2) Voting is personal, equal, free, and secret. Its exercise is a civic duty. (3) The law defines the conditions under which the citizens residing abroad effectively exercise their electoral right. To this end, a constituency of Italians abroad is established for the election of the Chambers, to which a fixed number of seats is assigned by constitutional law in accordance with criteria determined by law. (4) The right to vote may not be limited except for incapacity, as a consequence of an irrevocable criminal sentence, or in cases of moral unworthiness established by law.

[51] Consiglio di Stato, sez. I , parere del 16 marzo 2005 n. 9771/04, <http://www.giustizia-amministrativa.it/>. On this *see* R. Finocchi Ghersi, 'Immigrati e diritto di voto nell'attività consultiva del Consiglio di Stato', <http://www.astrid-online.it/rassegna/Rassegna-21/15-05-2006/FINOCCHI-GHERSI-Diritto-di-voto-stra.pdf>.

[52] Art. 138 of D.lgs. 267/2000 is devoted to the power of extraordinary annulment by the Government with regard to the local acts which could represent a danger for the unity of the legal order.

[53] The *Consiglio di Stato* recalled Art. 117(2) of the Constitution, under which the national legislator has "an exclusive legislative power" in "the electoral legislation ... of municipalities, provinces and metropolitan cities".

Real and virtual conflicts

That said, the question arises what would be a possible criterion by means of which to distinguish the compatible regional principles from the incompatible ones? When is there a real conflict between provisions on regional principles and the Constitution? In other words, when is there a real antinomy between the Constitution on the one hand and the Regional *Statuti* and regional legislation based thereon on the other, when both are applicable simultaneously?

The scholars of jurisprudence and of general theory of law[54] usually distinguish between virtual and real antinomies: the former can be resolved through interpretation while the latter represent a real example of irreconcilable normative conflicts. Although probably many cases of conflict between the regional cultural statements of the *Statuti* and the Constitution only embody virtual antinomies, some exceptions could exist.

The Italian Constitution does not provide an exhaustive list of fundamental rights. In this sense, it was said that the general clause of protection of fundamental rights that is contained in Article 2 Constitution is to be considered an 'open' norm.[55] This reading of Article 2 has allowed the Constitutional Court to recognise and guarantee the so-called new rights (the right to know, the right of privacy, environmental rights) and to keep the Constitution up-to-date with respect to the need to protect the 'person' (*principio personalista*).

This process of constitutional updating was due to the pressure coming from the international law of human rights, which forced the Italian Constitutional Court to deal with issues not considered in 1948, i.e., when the Italian Constitution came into force. Looking at the question from this perspective, it seems that no problem of real inconsistency could ever exist for those regional principles which repeat what forms part of the Italian Constitution or the case-law of the Italian Constitutional Court. On the contrary, more problems exist for those regional principles (cultural *statements*, as the Constitutional Court classified them) which do not do so. In our opinion, in this case the interpreter should try to find the possible origin of these regional 'cultural statements' at the supranational legal level (European Convention of Human Rights, EC and EU Treaties, European Court of Justice's case-law[56]).

[54] On the antinomies *see* for example N. Bobbio, *Teoria generale del diritto* (Giappichelli, 1993) p. 213 et seq., at p. 218; R. Guastini, *Le fonti del diritto e l'interpretazione* (Milano, Giuffrè 1993), p. 409 et seq.

[55] Art. 2 Constitution: 'The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed'.

[56] Where there is no supranational or international model for a regional charter statement, it would indeed be inconsistent with the Constitution. In this case, there is no way to 'rescue' the regional provision. A good example would be a regional statement which guarantees a very broad

If the interpreter is able to identify the 'pattern' of the regional 'cultural statement' at this supranational level, he will attempt to interpret the regional law in the light of the supranational norm, trying to find there a consistency between the regional statement and the Constitution.

On the contrary, if the interpreter were not to be able to find such a supranational or international pattern, it could be necessary to raise a question of constitutionality before the *Corte costituzionale*, which might conclude that the regional instrument was unconstitutional. The very fact that the *Statuti* refer to provisions of international conventions to which Italy is a party, gives the norms of the *Statuti* a presumption of constitutionality, because of the existence of Article 117(1) of the Constitution, which reads: 'Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European Union law and international obligations.' So both the national legislature and the regional legislatures have to respect international and EU obligations.

This provision does not distinguish between directly or indirectly applicable norms of international law, it just recalls the international obligations contracted by Italy as being a limit for the regional and national legislature. Thus, the international norms become an interposed standard of review, on the basis of which the constitutionality of domestic law (both regional and national) must be assessed. This seems to us a possible criterion by means of which we can distinguish between real and virtual antinomies.

The 'tragedy' of multilevel constitutionalism lies in its descriptive character: multilevel constitutionalism is a descriptive formula which does not say which level will prevail on the others and why. It comes with the price of not having an unambiguous supremacy clause for the rights that cannot be classified as competences of one level or another. And this explains why, for example, there is a multi-level protection of the freedom of assembly.

Against this background and because of the absence of an unambiguous collision norm, the role of the courts appears as fundamental. Moreover, the technique of consistent interpretation in the light of the Constitution becomes crucial in solving the possible antinomies between levels by looking at them on a case-by-case base. To be more precise, they need to be interpreted in the light of the Constitution, which in turn recalls the international legal sources in Articles 10,

acknowledgement of cultural identities and practices of some ethnic minorities. As a matter of fact, it could pave the way for the admission of practices contrasting with the dignity of the woman or with the integrity of the body. It is to be recalled that, according to Art. 32 of the Constitution, health is conceived both as an individual right and a public interest. Regional legislation which would protect a similar right to practices violating the dignity of women should be considered unconstitutional. The case of infibulation (and other forms of female genital mutilation) is partially different because it is considered as a crime according to Law No. 7 of 2006 and it is banned by several international documents.

11[57] and 117(1). In addition, an interpretation consistent with international law (and case-law) is required of the ordinary court, see decisions no. 348 and 349/2007 of the Constitutional Court.

The proposed method takes into account that there are several provisions (at regional, international, national and supranational level) for certain rights. At the same time, the judge has to attribute superiority to the national Constitution, which represents the reference mark for ruling: one has to deal with constitutional variety starting from the necessity to abide by the Constitution.

Conclusion

In conclusion we argue that the Italian Constitutional Court has only postponed the constitutional conflicts that might arise between the regional cultural statements which embody the *Statuti* and the Constitution.

The existence of complex antinomies implies the presence of possible effects of regional cultural provisions and reveals the ambiguity of the strategy chosen by the *Corte costituzionale*. These cultural provisions are able to produce some legal effects despite what the *Corte costituzionale* stated in 372-378 and 379/2004. An important distinction can be made between efficacy and validity of the regional norms referring to the regional cultural statements. Such a norm will be effective until the declaration of invalidity by the *Corte costituzionale* if it is in conflict with the Constitution. Only after such a declaration it will be deemed invalid and ineffective.

At the same time it is difficult to conceive of seriously dangerous antinomies between these two groups of provisions, because the Regional Charters' fundamental principles usually codify values and principles which already exist at national, supranational and international level.

However, it is important to stress the existence of fundamental principles in Regional Charters because it could produce asymmetries in the guarantees of rights, providing the ground for differentiated policies, which in turn could discriminate between Italian citizens because of their belonging to a specific region rather than another. This system could jeopardise the unity of the Republic which should be ensured by Articles 5, 117 and 120 of the Constitution.

One could say that it is in the essence of decentralisation or regionalisation (like federalisation) that rights in one region are not identical from those in another region. This is not completely true, because also in federal systems there are

[57] Art. 10: The Italian legal system conforms to the generally recognised principles of international law. […] Art. 11: […] Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends.

clauses regarding the existence of a common minimum standard in the protection of rights. This is precisely the Italian case, as Article 117 of the Constitution provides for 'the determination of the basic standards of welfare related to those civil and social rights that must be guaranteed in the entire national territory.'[58] The risk we refer to lies in the possibility that these asymmetries lead to discrimination, stemming from violation of the basic standard. For example, the legislation of the Puglia Region could possibly create discrimination between the cohabitants who live in Puglia and benefit from the regional legislation and those who belong to other Regions and are not able to enjoy the same treatment.

From this we could perhaps conclude that the non-overlapping zone between regional *Statuti* and the Constitution can be traced back to the usual tensions existing in real federal systems and which have been grouped by the formula 'experimental federalism':[59] a sort of a process of mutual learning between levels of government which permits an improvement in the guarantees of constitutional rights.[60]

[58] *See also* Arts. 123 (the necessity of the harmony of the Constitution) and 5 (the need for unity of the Republic) of the Italian Constitution that confirm the need for a homogeneity in the regional system.

[59] M.R. Poirer, 'Same Sex Marriage, Identity Processes, and the Kulturkampf: Why Federalism is Not the Main Event', <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1118320>.

[60] Partially concurring with this conclusion, A.Vespaziani, 'Principi e valori negli statuti regionali: much ado about nothing?' <http://www.associazionedeicostituzionalisti.it/dibattiti/riforma/vespaziani.html>.

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