SUBSIDIARITY AS THORETICAL APPROACH FOR THE EUROPEAN EXPERIENCE

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DRAFT – NOT TO BE QUOTED

1. Italy was built up as unitary State in 1861, after the collapse of the Kingdom of Two Sicilies under the pressure of the "Mille" of Giuseppe Garibaldi and the annexing of the South of Italy to the Kingdom of Piedmont. 1866 territories of the State of the Catholic Church were annexed to the new proclaimed Kingdom of Italy; and finally Rome entered in the Kingdom in 1870, realizing the definitive unification of the Italian Nation within a unitary State.
   In the last thirty years of the XIX century Italy took actively part to the politics of European States of colonization of Africa. With the First World War unification of Italy was finally completed, with the annexing of the last territories (Trent and Trieste) under the control of Austro-Hungarian Empire. After the War Italy was not able to conciliate the unavoidable expansion of political and social rights with the democracy and experimented twenty years of authoritarian regime, participating finally to the Second World War together with the Nazi Germany, the two European countries which reached only in the late nineteen century the national unity.

2. Italy and Germany were defeated in the Second World War. But the war, that brought destruction and millions of death in Europe, represented the final

arrival point of the tercentenary experience of European Nation States. Nation State cannot be per se damned and banned; it represented an experience of institutional modernization and democratization, it was the political structure in which were possible a new radical form of involvement of masses into the public organization, the distribution of resources and finally the building up of a welfare model; but, with the Second World War, this experience reached its conclusion, not only for the defeated countries.

Also the European winners (i.e., France and United Kingdom) should progressively accept, on the one side, new model of coordination at European level (1957 for France, 1973 for United Kingdom), on the other side, the end (1961) of colonialism, worldwide consequence of the European nationalisms.

In the sixty years following the end of the war, Europe finally experienced some new important phenomena. European countries could see the definitive enlargement of democracy and of political and social rights to all citizens (1981-1986 entered Europe the three countries in which authoritarian fascist regimes remained - or was established - also after the Second World War); the progressive construction of a European common house; the acknowledgment of local and social autonomies, acquiring important areas of self-determination facing the different Nation States. And as we noticed, colonialism - between lights and shadows – was at its conclusion, already in the first fifteen years after the Second World War. Before the "short century" ended, also the other European totalitarian experience, that of communist regimes, reached to the end. And finally, at the beginning of our millennium ten European countries (plus Cyprus and Malta), before under the communist and Russian control, entered a common Europe.

Someway, Europe – after the big break down following to the French revolution – reunified.

Nowadays, twenty-seven European countries share common disciplines on the most important areas of economic and social life; share a common chart of freedom rights; participate to the experience of the construction of common constitutional principles, through the activities of the European institutions (although if they are unsatisfying under a democratic point of view). They reached this result in sixty years of continuous peace on the European territories: a durable period without wars and fighting which is not usual in the European history.

In the same time in which they were devolving powers towards up – and it is someway wondering - these European countries are developing the road of inner territorial autonomies. Of course, in a different way according the size and the history of each country. The broadest and most populated countries develop experience of (inner)federal or regional autonomy. This is the way of the six big (according to territory and inhabitants) countries: Germany is, according to its Constitution, a federal State; Spain acknowledges a large constitutional autonomy to its autonomous communities; Italian regions were foreseen in the constitution of 1948 and could add recently important political, legislative and administrative powers; United Kingdom is experimenting asymmetric regionalism; France and Poland have modified their traditional administrative organization with the introduction of Regions with political and administrative powers. To the six "big" must be added two "smaller" countries, "federal" for historical (Austria) or ethnic-linguistic (Belgium) reasons. In most of the other countries is often the small dimension of territories that do not permit viable regional autonomies (e.g. Luxembourg, Cyprus, Malta, Estonia, Latvia, Lithuania, Slovenia); in any case, they are sometimes developing experience of regional administration, as intermediate level between State and local authorities (Portugal, Sweden, Finland, Greece, Romania) or there are strong experiences of municipal autonomy (Netherlands, Denmark). In any case, more the three hundred sixty millions of people over for hundred eighty (that is, three quarter of total inhabitants) live in countries with a inner federal or regional structure.
I know that the apologists of a pure theory of federalism would totally disagree with the idea that German Leander are comparable with French or Polish Regions, but if we go to the real functioning of the institutional system, the analogies among the European territorial autonomies are deeper as the differences (and as the experience of the International Association of Centers for Federal Studies shows that there are stronger differences between European and American federalism as among the European experiences, be they abstractly federal or regional).

3. Under the pressure of the devolution of powers to Brussels and of the distribution of competences to the local and social autonomies inside the State, the European Nation States seem to lose their meaning, appear as disarticulate entities, always on the road to be dissolved: in the time of

"glocal", some people think, there be no more reasons for searching historical, ethnic, cultural, religious, linguistic homogeneity as a basis for the construction of viable administrative institutions, whatever may lawyer and Courts argue in favor of the ancient idea of the Nation State (see, for instance, the decision of the Italian Constitutional Court n. 365 of 2007, or the recent Lissabon-Urteil of the German Bundesverfassungsgericht).

In the European experience it is difficult to organize theoretically the three phenomena: the States lose their powers, seem to disarticulate, but do not dissolve; a new supranational organization appears and grows, but remains largely unsatisfying to traditional democratic (State-based) criteria; territorial and social autonomies (re)appear on the scene (they traditionally existed in Europe before the French revolution), imposing a new model of political and social organization.

Up to now we thought that the key to explain this new situation was the adoption of the theoretical model of the federalism. But if we apply this model, we rapidly understand that it is no more able to give a coherent answer to the institutional reorganization experimented in Europe: maintenance of the States, devolution of powers towards up and towards bottom. Finally we need to recognize that the theoretical approach for a better comprehension of the new situation is no more that of federalism, that was in some way an answer to the first failure of Nation State (see the process of State building of the United States of America or of the federal states in Canada, in Mexico, in South America, in India or in Australia). The correct approach may more be found in a modernization of the ancient theory of subsidiarity: in fact, only subsidiarity may explain both the devolution towards up and the devolution towards the bottom. And the model of subsidiarity explains also the role of municipal and local autonomies: the traditional federal States (USA, Canada, Australia) do not foresee a constitutional guarantee for local authorities in the Federal Constitutions, being local autonomies matter of State Constitutions, whereas the European federalism and regionalism (and some recent federal south-american or African Constitution) offers a constitutional guarantee also to the sub-regional autonomies.

4. In the global competition Europe cannot resist without presenting itself as an unitary body. The dimension of the European states (also of the four bigger!)

is anyway too small, as size and inhabitants, to compete in a world in which the player are now (and will be in the future) USA, Russia, China, India, Brazil, Africa as a whole, Asian South-East. In the next fifty years Europe will continue to have a role only if it will speak with an unitary voice. How to compete in the global market, how to build up viable monetary and economic politics, how to manage the pressure of billion of persons at the southern and eastern boundaries, how to manage the continuous risks of war and of terrorism, are things that must be faced at European level, and no more at national level, be also that of Germany, France or United Kingdom!

On the other side, the amount of decisions that must be taken by the public institutions is so big, their impact is so broad, that these decisions cannot remain at a central national level, cannot be efficiently managed by a centralized administrative structure: they must be devolved at lower institutions or at the autonomous social and local organizations, where they can be managed easier and probably at a lower cost.

5. Subsidiarity implies a decision on the coherent allocation of functions: it must be decided what is the right level where a (public or collective) function can be properly organized, and related service can be given. Subsidiarity means not only which level of the hierarchical public structure should manage the function, but also if a function (of collective interest) should remain managed by the public institution, or if it can more properly organized by a social organization. Decisions on the allocation of functions are followed by the related and consequent decisions on the allocation of resources and of personnel.

   Subsidiarity is a continuous challenge, asking for a permanent check of the adopted solution.

   It cannot be denied that the decision about devolution, the way to reach it, the quality and quantity of functions to be devolved, the control about devolved functions, is not a technical decision, but – as it clear appears – is a highly political decision. In complex societies, the hierarchical approach does not explain their functioning: so we cannot search for a social or institutional place from where decisions go down, conforming the whole structure. We have to organize our thought differently. We still need a point of decision, but this point is not necessarily at the summit of the institutional structure.

Paraphrasing Carl Schmitt, sovereign is no more who decides on status of emergency, but who decides on the distribution of functions.

As far as European experience is concerned, the point is: who decides how public functions are organized and at which level they must be managed? This is in fact the new role of European Nation States, in which they still remain crucial. They are no more the "Herren der Vertraege", the lords of the treaties; or, better, they may still remain the "Herren der Vetraege"; but in the sense that they are the point in which the distribution of competences, towards the up and towards the bottom of the institutional structure, is decided: in same way, one could say that the Nation States, once they have loosen their place of sovereign subjects, towards outside and towards inside, find a new institutional and political meaning in being the pivots of the subsidiarity. Paradoxically, they remain sovereign in the decision about the amount of sovereignty to be given away.

Also if some country tries to dissimulate it, this is now the real situation of the twenty-seven States composing European Union. Through the Treaties and through the activity of the European Council (real engine of the Union), the States participate at the decision on the devolvement of functions towards up. Whereas they are relatively free in decisions about devolution towards lower institutions and towards social organization: but in fact they take such decisions.

6. Italy also is clearly involved in this process; as our French or German or British friends, we try to dissimulate the real European situation, but here we are! It is not my role to discuss the relation between Italy and the European Union; I just discuss what is happening in Italy after the constitutional reforms of 1999 and 2001.

   In 1999 and 2001 three important constitutional laws [namely constitutional law no.1, 22 November 1999, constitutional law no. 2, 31 January 2001, constitutional law no. 3, 18 October 2001] were approved by the Italian Parliament, radically altering Title V, Part II of the Constitution, concerning Regions, Provinces and Municipalities, and the special Statutes of the five Regions with particular forms of autonomy. Constitutional law 1/1999 introduced the direct election of the Presidents of the Region and gave the Italian Regions the power to approve autonomously their own Statutes, within the frame of the Italian Constitution. Under constitutional law no. 2, 31

January 2001, the five Regions with special status were able to organize their own forms of government, in keeping with the innovations regarding forms of government and statutory autonomy introduced for the other regions under constitutional law 1/1999. Constitutional law no. 3, 18 October 2001 modified many other articles of the Title V of the Constitution. One of the main changes introduced by this last reform was the prevision of Municipalities, Provinces, Metropolitan Cities, Regions and State (the central government) as components of the Republic with equal "dignity", rejecting the notion of an absolute identity between State and Republic.

An important decision of the Italian Constitutional Court (decision 106/2002) clearly stated that, according to Article 1 of the Constitution, the only sovereign subject existing is "the people", and not the State. Local and regional institutions derive their legitimacy from the people in the same way as the national Parliament and Government.

Constitutional law 3/2001 introduced a new division of legislative powers between the central State and the Regions, overturning the criteria that had been applied previously. Until then, the Regions detained certain competences only in regard to those subject matters expressly listed in the Constitution. The reformed text, after having listed a series of subject matters reserved to the exclusive legislation of the central State, indicates a list of subject matters of concurrent legislative powers. In any other subject matter not expressly attributed to the State legislation the legislative powers belong to the Regions. In addition to their guaranteed powers, all the Regions may request special "conditions of autonomy" with regard to the concurrent legislative powers (i.e. health, professions, employment, infrastructure, education, etc.) and with regard to three subject matters in which the central State has exclusive legislative powers (organization of the basic level of justice, environment and guidelines on education).

Constitutional law 1/1999 established that the Presidents of Regions were to be directly elected by popular vote. Previously, the Presidents were elected by the Regional Councils. The constitutional reform also established that the regional Statutes were acts of regional autonomy, approved by the Councils, and that they do not need to be approved by the central government. In the case of a violations of the Constitution, regional laws and statutes can be contested by the central government before the Constitutional Court. The reform also established that a referendum, against the statute, could be

triggered by 1/50 of the regional electors or by 1/5 of the regional deputies. The reform also provided that, in the near future, a council of Local Autonomies, as a connecting body between the Regions and the Local Authorities, should have been created.

Ever since the Constitutional law 3/2001 came into force, the new text of the Constitution has been strongly criticized by both the scholarship and the political actors; the text appeared, in fact, to be incoherent and very difficult to be enforced. In relation with the object of this report and with the theme here discussed, the criticisms essentially touched three aspects: 1) the difficult interpretation of the subject matters in relation to the subdivision of competences between the (central) State and the Regions; 2) the rigid character of this subdivision; 3) the absence of any constitutional provision permitting (central) State legislation to prevail on regional legislation.

7. In the lack of a legislative intervention by the central Government, all these problematic aspects have been discussed, and often solved, by the Constitutional Court, confirming the indispensable role of Supreme/Constitutional jurisdiction in the construction of federal models.

   I would like to begin by painting a picture of the problems that have occurred as a consequence of the distribution of competences between the (central) State and the Regions according to a series of subject matters, listed in the Constitution.

   All federal experiences, from a theoretical and practical point of view, are based on the creation of lists – written in the Constitution – which distribute competences at a central and regional level. Although this technique can seem rough, no better solution has been thought of. Even the text of the European Treaties provides a list of subject matters of exclusive competence of the Union and a list of subject matters of concurrent competence. This way of proceeding is rough, because the contents of each subject matter listed cannot be immediately clear. In order to obtain a specification of the areas covered by a subject matter, a difficult work of interpretation is needed and, to do so, a plurality of criteria may be used (literal, historical subjective, teleological, logical systematic, historical prescriptive). Moreover, the difficulty of a legislative intervention which respects the division of competences is due to the fact that areas of legislative regulation do not and

cannot correspond exactly with the subject matters so as defined by the Constitution.

The reformed text of the Italian Constitution appears very problematic. There is, in fact, an overturn of the residual clause in favour of the Regions. Many terms, not present in the previous text, appear to be incoherent and, sometimes, simply wrong.

Furthermore, the (central) State and the Regions have not implemented institutional remedies in order to cooperate in the definition of the area covered by the single subject matters. From 2003 onwards, the Constitutional Court has been forced – so as to avoid a total paralysis of the political system – to intervene in defining the area covered by each subject matter. This has not been an easy task. On this point I can give a few examples.

The reformed Constitution does not mention "lavori pubblici" (public works) as a subject matter; following the logic of article 117, the Regions tried to argue that the subject matter "lavori pubblici" was to be considered within the category of residual competences, therefore under the competence of the Regions. This position appeared to be paradoxical, to say the least. Such an interpretation would have meant a complete absence of common national rules in the area of public works. In the absence of an agreement between the (central) State and the Regions, the Constitutional Court established that "lavori pubblici" was not to be considered a subject matter in the true sense and that the regulation of "lavori pubblici" should, therefore, follow the material areas of competence of the (central) State and the Regions. This meant that some public works (e.g. construction of defence buildings or justice buildings) were to fall under the competence of the (central) State, whereas other public works (e.g. public works in the agricultural sector) were to fall under the competence of the Regions (decision 303/2003).

The Constitution includes the subject matter "governo del territorio" (land-use planning) in the category of concurrent competences, modifying the wording of the previous text which talked about "urbanistica" (town planning). This lead to the need of establishing whether "urbanistica" and the related area of "edilizia" (building activity) were to be considered in the category of residual competences, "governo del territorio" being something different. The Constitutional Court established that the expression "governo del territorio" was to be intended in a very broad sense, being inclusive of both "urbanistica" and "edilizia" (decision 303/2003).

In the list of subject matters of concurrent legislation, there is also a mention for "national production, transport and distribution of energy". If a strict interpretation of the text was to be followed, other areas related to the field of energy (i.e. storage) would have to be considered in the category of residual competences. Here again the Constitutional Court determined that the text of the Constitution should be understood in a broad sense, referring to a comprehensive governance of the energy sector, to be considered an area of concurrent legislation (decision 6/2004).

The new text of art. 117 makes no mention of "spettacolo" (show business, entertainment), neither in the list of State legislation nor in the list of concurrent legislation. This omission arose a strong debate, with big disappointment of the many people involved in the field, which feared that the discussion could paralyse public funding of their activities. The question was to know whether "spettacolo" was to be considered a subject matter of residual competence of the Regions, a subject matter of concurrent legislation or a subject matter of exclusive legislation of the State. In the opinion of the Regions, taking account of the residual clause, "spettacolo" was to be considered an area of regional legislation. Differently, according to the central State, "spettacolo" was to be considered within the area of "tutela dei beni culturali" (protection of cultural heritage), listed as a subject matter of exclusive central State legislation. Others, in an intermediate position, argued that "spettacolo" fell within the area of "promozione e organizzazione di attività culturali" (promotion and organization of cultural activities), listed as a subject matter of concurrent legislation. After three years of administrative paralysis, the Constitutional Court decided – *in medio stat virtus!* – that "spettacolo" was to be considered a subject matter of concurrent legislation falling within "promozione e organizzazione di attività culturali" (promotion and organization of cultural activities" (decision 255/2004).

I could go on with many other examples, but I think that it is sufficient to glance through the subject matters listed in art. 117 to understand that each of these areas – in the lack of any institutional and political coordination – needs a continuous interpretation by constitutional jurisdiction.

8. In the subject matters covered by concurrent legislation, legislative powers are vested in the Regions, except for the determination of the fundamental principles, which are laid down in State legislation. In the Italian Constitution

the expression "concurrent legislation" is used to indicate the subdivision between State and Regions, according to which the framework legislation is a competence of the State and the detail regulation is a competence of the Regions; it is quite different from the meaning of "concurrent legislation" in the German Constitution, which is used to indicate the possibility for the federation to legislate, if and to the extent that, the creation of equal living conditions throughout the country or the maintenance of legal and economic unity makes federal legislation necessary in the national interest.

Without entering the theoretical discussion on "what fundamental principles are" – I would need to have more time and more space, but maybe also different capacities– I would like to focus on three, to my mind, essential questions:

a. do principles always have to have the same structure or can they be organized in various ways, according to the different subject matters?
b. Is the non self-executing character a prerequisite of principles or can they, in some cases, regulate situations directly?
c. What is the consequence if the establishing of new principles by the State is not followed by a concrete and detailed regulation by the Regions?

Neither the Constitution nor Act 131/2003 offer solutions to these points.

So the Constitutional Court was challenged to give an answer to these three questions; the attempt was carried out not without hesitation.

After a series of ambiguous decisions, the Court clearly stated the intensity of a principle can vary, according to the subject matter involved and to the aims pursued by the State legislation (decision 50/2005).

In other decisions, following the same logic, the Constitutional Court stated that principles, if expressed in a precise and punctual manner, can directly regulate behaviors and situations (decisions 214/1985; 196/2004; 336/2005). The idea that principles cannot be self-executing was so rejected by the Court.

On the last point, the position of the Court remains uncertain. The foregoing orientation (decision 214/1985), according to which the State legislation can set both principles and rules, the rules being destined to be replaced by regional rules – as a result of the so-called principle of "cedevolezza" (pliability) – has not clearly been confirmed. In my opinion, having regard to the broadness of the areas of concurrent legislation, there is no other solution

than to confirm this orientation, but we are still waiting for a clear decision of the Court.

In any case the principle of "cedevolezza" has been accepted in relation to the implementation of European Community directives in the area of residual powers of the Regions. Once a year the Italian Parliament passes a Bill with regard to the implementation of EC law: in this Act, the Government is called to approve measures having force of law in a series of subject matters, which can also be areas of residual regional power. It is, however, clearly stated that, in regard to the areas of residual regional power, any State legislation will remain in force only during the period of absence of the regional legislation. The possibility of being substituted by an incoming regional law must be explicitly mentioned by the State legislation. To give an example of the uncertain attitude of the Constitutional Court on this point, in a peculiar decision the Constitutional judges declared a national law to be null and void, on the grounds of it touching an area of regional competence, and called for the Regions to lay down their own legislation, within a certain period of time (decision 196/2004). In the event of the Regions failing to do so, the Court paradoxically affirmed that the national regulation – although declared null and void – was to come back into force, in order to fill in the gap in the law thus created. Following this decision, which is not yet confirmed, areas of concurrent legislation cannot remain without a concrete regulation; if the Regions don't set their own regulation, the State is called to intervene. This last decision seems to be expression of the principle of "intervento sostitutivo" (substitutive intervention) provided by art. 120, par. 2 of the Constitution.

Although the two principles may seem similar, "substitutive intervention" differs from "pliability": according to the principle of pliability the (central) State may provide legislation preventively and, subsequently, the Regions may replace the State legislation with their own rules, whereas according to the principle of substitutive intervention the State may intervene only ex post as a result of a regional omission.

Many of the problems that have risen since the enter into force of the constitutional reform in 2003, are a result of the naïve idea according to which the distribution of legislative powers between the central State and the Regions could prescind from any reference to the territorial *niveau* of interest. Following this idea, the reference to "interesse nazionale" (national interest),

present in the previous version of the Constitution as a prevalence instrument for State legislation, was cancelled. Moreover, the placing of the subject matter "*national* production, transport and distribution of energy" within the list of concurrent powers is also a result of this orientation.

In fact, the reformed text does not make any explicit reference to the prevalence of State legislation on regional legislation. There is no definite supremacy clause, on the model of the German *Bundesrecht bricht Landesrecht* (federal law prevails on regional law).

In the light of this, the Court, interpreting the Constitution (someone said "amending the Constitution") was forced to contrive ways of rendering the relation between national and regional legislation more flexible.

9. Ever since its first decisions, the Constitutional Court indicated that some of the areas listed in the category of exclusive legislation of the central State were not to be considered simple "subject matters", but "materie trasversali" (cross-subject matters), being expression of constitutional values or public duties (decision 282/2002 e 407/2002).

   Using the expression "materia trasversale", the Court wanted to point out the possibility for the State to cross areas of concurrent or residual regional legislation, while exerting its own competences. For example, "tutela dell'ambiente" (protection of the environment) is an exclusive competence of the State, whereas other matters like "tutela della salute" (protection of health), "governo del territorio" (land-use planning) and agriculture are concurrent competences or residual powers of the Regions. The fact that the legislation of the State in the area of environment may cross the other areas mentioned above appears to be quite obvious. The Court used this argument, not only in regard to the protection of environment but also with reference to "tutela della concorrenza" (competition protection) (decision 14/2004) or to "ricerca scientifica" (scientific research) (decision 423/2004).

   Following the logic of this principle, one of the areas listed among the exclusive powers of the State is susceptible of crossing every single subject matter falling under the competence of the Regions, that is to say: "determinazione dei livelli essenziali delle prestazioni concernenti i diritti civili e sociali che devono essere garantiti su tutto il territorio nazionale" (determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory).

The concrete working of this principle laid down by the Court can cause important problems to regional legislative competence, reducing the broadness of the subject matters falling within the residual competence and calling State and Regions for cooperation. To give an example, "agriculture" is without a doubt a subject matter falling within the area of residual regional competence. However, it can be crossed by the regulation laid down by the State with regard to other areas like, for instance, protection of environment, health protection, land-use planning, nutrition, competition protection, etc. (sentt. 14/2004 e 134/2005).

10. In regard to the relation between State legislation and regional legislation, the Constitutional Court has also taken some important decisions concerning the principle of subsidiarity. This principle is expressed in article 118 relating to the distribution of administrative functions between the institutional levels of the Republic (Municipalities, Provinces, Metropolitan Cities, Regions and State) and to the promotion of autonomous activities of citizens, both as individuals and as associations.

    In some recent decisions, the Constitutional Court stated that the principle of subsidiarity works not only top-down, but also bottom-up, not only in regard to the administrative functions, but also in regard to the legislative powers. As a consequence of this, the State is entitled to draw on its own legislative power the regulation of areas of concurrent and residual legislation on two conditions:

    a. there is a need of a unitary regulation in the area;

    b. the central State and the Region/Regions concerned find an agreement on the question.

    This idea has been explicitly used in order to legitimate the existence of measures of State legislation in the area of strategic public works (decision 303/2003), energy (decision 6/2004) and telecommunications (decision 336/2005).

11. As the other "big" European countries, Italy is experimenting devolution of functions towards the bottom. It is a model directed to a better functioning of public institutions and, in the given situation of the European democracies, to

reduce costs of public apparatus. Federalism, regionalism, subsidiarity cannot be only easy propaganda for the time to time coming elections.
Nowadays, Italy is facing four major problems in implementing a viable inner subsidiary organization:

a. Build up an efficient system of relationship between State, Regions and local autonomies, able to better define the distribution of powers, functions, duties and resources. There are two major paths to be followed. On the one side, it can be useful to rebuild the Italian Upper House, so to make it as representative Chamber of autonomies: but it is easy to say, very difficult to practice. The Senate is not happy to be the turkey of the Thanksgiving Day; and in any case, how to modify it? Making the new Senate representative of the Regions or also of the local autonomies? With the same number of members for all the Regions, or differentiating it according to the size of the Regions? With a direct election or through an indirect election? On the other side, Italy needs a viable administrative structure to which can be given the role to find a coordination, a common way of operating, to research consensus among the player. We have the traditional structure on Conferences, but we need to rewrite rules and procedures, coordinating them to the new constitutional frame and to the broad elaboration of the Constitutional Court.
b. We also need to rewrite and correct the article about distribution of legislative competences between State and Regions; I recognize the lack of art. 117, but I think that the technique of organizing distribution of legislative competences through a list of subject matters will always have problem of interpretation. So, more than a correction of article 117, we need the introduction of a moderate and temperate rule of prevalence of State law on the regional laws and of procedure of common interpretation of the meaning of the list of subject matters: we need more interinstitutional cooperation and less intervention of Courts.
c. If subsidiarity implies coherent allocation of functions, asymmetric organization is unavoidable: in the same way as it happens at European level, in which some State may opt out regarding the adoption of some area of common rules, at inner national level some Regions may decide to implement some more or some less functions; of course, it must be decided together with the pivot of subsidiarity, to which is given the final

political responsibility of the better allocation of functions. Italian Constitution foresees this possibility, but it was not yet practiced.

d. Allocation and re-allocation of functions implies that financial resources are available for this task. Therefore the real and definitive challenge Italy is now facing is that of fiscal federalism: we have to implement the article 119 of the Constitution and the recent law n. 42 of 2009. This law needs an impressive number of governmental decree, to be approved through a difficult procedure: we are in the middle of the road. And the result of the Italian way to a viable administrative organization inspired to the principle of subsidiarity could be seen and appreciated at the end of this path.

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