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LEGAL CONFLICTS AND SUBNATIONAL CONSTITUTIONALISM

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Abstract

This paper analyses the increasing use of the concept of subnational identity, understood as a peculiar (to some extent) category that is opposed to the State or federal identity. References to it are included in the second-generation Italian (subnational) fundamental charters (Statuti) and Spanish Estatutos de autonomia. After an overview of the identity clauses contained in the sub-national constitutions, we will move to analyse the first cases of judicial relevance of these clauses when they are invoked before national courts, and test whether and how these subnational identity provisions could be interpreted in a manner consistent with the national constitution.

Keywords

Subnational constitutionalism, constitutional interpretation, regional Statuti, Estatutos de autonomia.

Goals of the Paper

This paper analyses the increasing use of the concept of subnational identity, understood as a peculiar (to some extent) category that is opposed to the State or federal identity. References to it are included in the second-generation Italian (subnational) fundamental charters (*Statuti*) and Spanish *Estatutos de autonomia*.

As a matter of fact, when looking at the Spanish experience it is possible to find many references to the traditions and the inheritance of the ancient *Reinos* established in the territories of the *comunidades autónomas* (CAs) before the unification of Spain, or at least before the latest constituent phase.¹ Moreover, formulas like “nation”,² “nationality”, “historical nationality”, “national identity” or “historical community” are used, and many provisions are devoted to the local idioms.³ Another element characteristic of this phenomenon is the diffuse reference to folklore elements and local personalities, idioms, dances,⁴ “*derechos forales*” (“rights of the *fuero*”)⁵ and traditions,⁶ and all those factors which the literature has subsumed under the catch-all definition of *hechos diferenciales* (“differential or distinguishing facts”).⁷ Two other tools devised by the CAs within this process deserve to be mentioned; new collective rights, and new competences of the CAs that are designed to promote their protection.⁸ In addition, the CAs promote their peculiarity by adopting provisions that emphasise their symbolic features,⁹ such as regional feasts, flags, monuments and anthems.

Likewise, in Italy, the new Preambles to the regional charters include several similar provisions recalling the historical roots of the former duchies or counties previously established in the regions’ boundaries.

The phenomenon of subnational identity constitutionalism is not completely new, since some provisions of the same tenor were already included in the first-generation fundamental charters of the German *Länder* that entered into force before the *Grundgesetz* (1945–1949), encompassing several calls to identity and proclamations of rights.

Those provisions, however, were mainly a reflection of political sub-cultures rooted in the ideologies of twentieth-century political parties. Some examples may be quoted. Article 29(5) of the Social Democratic-leaning Constitution of Land Hesse (1946) prohibited the industrial action of lock-out (*Aussperrung*) as unlawful (*rechtswidrig*), whilst the *Grundgesetz* allows both strike and lock-out. The Constitution of the Free Hanseatic City of Bremen (1947) – another Social Democratic electoral stronghold – did not permit religion as an ordinary subject of teaching (Art. 32), very differently from

¹ See the Preamble of the *Estatuto* of Catalonia:

http://www.pedrojhernando.com/aelpa2007/informacion/eac_es_20061116.pdf.

See also the *Estatuto* of Andalucía: http://www.pedrojhernando.com/aelpa2007/informacion/eac_es_20061116.pdf.

² See the Preamble of the *Estatuto* of Catalonia.

³ Art. 6 of the *Estatuto* of Catalonia, in which both Catalan and Castilian are stated to be the official languages of the CA.

⁴ Art. 68 of the *Estatuto* of Andalucía.

⁵ See Art. 4, c. 4, of the *Estatuto* of the Comunidad Valenciana:

<http://www.pedrojhernando.com/aelpa2007/informacion/ESTATUTOCV.pdf>. In mediaeval and modern Spain, *fueros* were charters granting a special status for a given territory.

⁶ Art. 5 of the *Estatuto* of Catalonia.

⁷ See Art. 3 of the *Estatuto* of the Balears, about the insularity of the region as a peculiar fact of the CA.; (http://www.pedrojhernando.com/aelpa2007/informacion/EstatutAutonomiaIB_cas.pdf).

⁸ See Art. 18 of the *Estatuto* of the Balears.

⁹ See Art. 5 of the *Estatuto* of the Comunidad Valenciana.

Article 7(3) of the *Grundgesetz*. Article 141 of the *Grundgesetz* – the so-called “Bremen Clause” (*Bremer Klausel*) – provides a solution for this potential antinomy: Article 7(3) does not apply in those *Länder* where different norms have force. According to Article 131(2) of the Constitution of the predominantly Roman Catholic *Freistaat* of Bavaria, in turn, “the supreme ends of education are fear of God, respect of religious feelings and human dignity” etc.

We will deal with this issue starting from our research question: Is there a tension between the central constitutional identity and the emergence of a subnational constitutional identity?

Returning to the present, scholars have analysed in detail the mentioned Spanish and Italian provisions, emphasising their ambiguity and their dangers, but they have also stressed their essentially rhetorical nature. Other scholars have pointed out the reasons lying behind the identity rhetoric: the necessity to gain new competences (alongside the recognition of new collective rights, there is the acknowledgement of new competences to protect them) and, as a consequence, the claim for new funds, according to the logic “no money, no competences”.¹⁰ Cultural and local peculiarities are thus, after all, the grounds for claiming additional funding from the central government.

After an overview of the identity clauses contained in the sub-national constitutions, we will move to analyse the first cases of judicial relevance of these clauses when they are invoked before national courts, and test whether and how these subnational identity provisions could be interpreted in a manner consistent with the national constitution, especially when they make reference to the existence of a local “nation” other than the federal-State one.

Subnational Constitutionalism in Europe: Peculiarities and Differences

This paper focuses on examples of subnational constitutionalism¹¹ in Europe, taking into account two different cases of federalising processes: Italy and Spain.¹² We will also devote some remarks to the German case. First, though, we will briefly compare the European situation with the USA as, in our view, the European phenomenon of subnational constitutionalism is particular compared with the American one. In this first part, we will explain this speciality by looking at the specific issue of the fundamental rights issues included subnational constitutions/fundamental charters.

As Ginsburg and Posner pointed out: “Americans understand subconstitutionalism as federalism”,¹³ but the American federalism conceives of two levels of judiciaries and two levels of constitutional interpretations that are not always present in Europe. The necessity to amend the subnational constitution usually depends on the presence of a constitutional interpreter. As the Swiss case shows,

¹⁰ I. Ruggiu, “Testi giuridici e identità. Il caso dei nuovi Statuti spagnoli”, *Le Istituzioni del Federalismo*, 2/2007, 133.

¹¹ “Many nation states have a two-tiered constitutional structure that establishes a superior state and a group of subordinate states that exercise overlapping control of a single population. The superior state (or what we will sometimes call the ‘superstate’) has a constitution (a ‘superconstitution’) and the subordinate states (‘substates’) have their own constitutions (‘subconstitutions’). One can call this constitutional arrangement ‘sub-national constitutionalism’, or, for short, ‘subconstitutionalism’.”: T. Ginsburg and E. Posner, “Subnational Constitutionalism”, 62 *Stanford Law Review*, 2010, 1583-1628, 1584.

¹² P. Häberle has devoted many of his writings to the recent trends of European “subconstitutionalism”. See, e.g., idem, “Neuere Verfassungen und Verfassungsvorhaben in der Schweiz, insbesondere auf kantonaler Ebene”, *Jahrbuch des öffentlichen Rechts*, 1985, 303-424; “Die Verfassungsbewegung in den neuen Bundesländern”, *Jahrbuch des öffentlichen Rechts*, 1993, 69-92; “Die Kunst der kantonalen Verfassunggebung – das Beispiel der Totalrevision in St. Gallen”, *Jahrbuch des öffentlichen Rechts*, 1999, 149-170; “Textstufen in österreichischen Landesverfassungen – ein Vergleich”, *Jahrbuch des öffentlichen Rechts*, 2006, 367-383; “Neueste Schweizer Kantonsverfassungen – eine Einführung mit Dokumentationen”, *Jahrbuch des öffentlichen Rechts*, 2008, 278-477; “Juristische Kultur in Katalonien”, *Jahrbuch des öffentlichen Rechts*, 2008, 503-521; “Konstitutionelles Regionalismus-Recht – die neuen Regionalstatute in Italien. Eine Einführung zur Dokumentation”, *Jahrbuch des öffentlichen Rechts*, 2010, 443-453.

¹³ Ginsburg and Posner, “Subnational constitutionalism”, 1588.

contexts where a real control of constitutionality and a real constitutional interpreter is missing are more exposed to the phenomenon of a semi-permanent process of revision.

In many cases in Europe (Italy is just an example) there are neither constitutional nor ordinary judges at regional level and this of course conditions the application of the subnational clauses connecting rights, for instance, and sometimes prevents constitutional conflicts (that is, conflicts between provisions of the fundamental charters of two constitutional poles) being solved in an interpretive way. Moreover in the US, intrinsic to the State Constitutions is the cession of sovereignty that the federated States accepted, while the subnational fundamental charters in Spain and Italy, for instance, arose with – sometimes at least – the specific purpose of claiming sovereignty rather than simple autonomy, or to challenge in a way the central sovereignty of the super-state.

The existence of a monopoly of constitutional interpretation is thus a crucial aspect when dealing with this issue and in many of the European contexts characterised by the phenomenon of identity constitutionalism the Constitutional Courts have pointed out their peculiar nature, denying any possibility of homologation with the regional bodies endowed by these fundamental charters with para-constitutional powers (see the polemics on the *Consigli di garanzia statutaria* in Italy, for instance¹⁴).

At the same time the necessity to deal with these subnational identities by the Constitutional Courts has forced them to perform a very difficult role as arbiter, suspended between the necessity to preserve the hard core of their constitutional order and that of avoiding sensitive fields of the existence of local authorities in contexts characterised by the existence of strong local identity, if not of secessionist parties. As we will see, such an effort has produced a confusing case law which we will illustrate in these pages.

Defining What Subnational Constitutions Are

According to comparative constitutional scholarship, constitution-making power is one of the main distinctive features of the constituent units of federal systems, whether they are known as states, provinces, cantons, or *Länder*.¹⁵ Indeed, the coexistence of a federal constitution and the constitutions of the constituent units of the federation might be seen as one of the major institutional achievements of contemporary federalism. In Daniel J. Elazar's words:

One way in which modern constitutional systems have handled the problem of the moral basis in civil society has been through the use of federalism. Federalism, more specifically modern federalism or federation, has made it possible for the general constitution to concentrate on frame-of-government issues because the constitutions of the constituent states are available to concentrate on the moral and socioeconomic bases of their respective polities.¹⁶

Thus, federalism was also a way to seek constitutional pluralism even before the enactment of pluralistic, “social” constitutions throughout western Europe in the second half of the twentieth century.

In fact, most of the subnational constitutions were drafted as “complete” documents, providing a frame of government as well as a bill of rights. The apparent “minimalism” of the US federal Constitution, for instance, can be explained – and properly evaluated – if one takes into account that it had to face long-existing, detailed State constitutions. Moreover, as has been argued, “one of the other major factors distinguishing state constitutions from the federal Constitution is that they are often referred to

¹⁴ A. Cardone, “Gli organi di garanzia statutaria tra suggestioni del diritto comparato, ‘paletti’ della Corte costituzionale ed apodittiche ricostruzioni del sistema delle fonti”, in M. Carli, G. Carpani and A. Siniscalchi (eds), *I nuovi statuti delle regioni ordinarie*, Bologna, Il Mulino, 2006, 277 ff.

¹⁵ See J.A. Gardner, “In Search of Sub-National Constitutionalism”, 4 *European Constitutional Law Review*, 2008, 325.

¹⁶ D.J. Elazar, “Foreword: The Moral Compass of State Constitutionalism”, 30 *Rutgers Law Journal*, 1998-1999, 850 f.

as documents of limitation rather than documents granting powers”.¹⁷ Thus, paradoxically, many State constitutions may be seen, at first sight, as closer to the more familiar meaning of “constitution” as a document which provides for some form of guarantee of fundamental rights and separation of powers.¹⁸

Our goal is to use these fundamental assumptions as a starting point in order to gain a more analytical insight into some aspects of European subnational constitutional culture. We will now try to identify the very specific traits of subnational constitutionalism with respect to its national or federal counterparts. First of all, the adjective is perhaps more important than the noun to define the constitutional documents and the culture we are interested in here. “Sub-national” suggests the idea of a relationship, and even if this is not necessarily a hierarchical relationship, the scope and the contents of subnational constitutions are often limited by ad-hoc clauses in federal constitutions.¹⁹

Robert F. Williams’ survey of State constitutions in the USA has shed light on some other marking traits of these legal documents, such as flexibility, policy-oriented provisions, and a weaker system of separation of powers.²⁰ A recent contribution by two comparative constitutional law scholars has tried to explain the specific features of subnational constitutionalism (“subconstitutionalism”) using conceptual tools drawn from the public choice school. In this light, “the problem of constitutional design is to specify the decision criteria for different types of problems so as to minimize the costs of decision-making ... while maximizing consent over issues that affect any individual in the group”.²¹ Basically, constitutions should achieve this goal by means of three devices; separation of powers, a bill of rights, and some special procedure for the amendment of the constitution itself. Thus, the aforementioned characteristics of subnational *constitutionalism* are a consequence of the peculiar nature of the subnational *constitutional space*, where stakes and political risks tend to move towards the federal level. Since the agency costs are supposed to be lower, the phrasing of subnational constitutions tends to be “less constitutional” than the language of federal ones. The point we made at the beginning of this section seems to be contradicted. Even if there should be no quality difference, in principle, between national and subnational constitutions, a differentiating process has (unconsciously) taken place in most federal jurisdictions.

The constitutions of the *Länder* of the Federal Republic of Germany provide a major example of this trend. According to German constitutional scholarship, there have been three “waves” of constitution-making (*Verfassunggebung*) in the *Länder*: the first phase lasted from 1945 to 1949, the second phase lasted from 1949 to 1990, the third and current phase started in 1990.²² For the purposes of this paper, we are first going to analyse phases 1 and 2. Conversely, we will consider phase 3 in the next paragraph, where we analyse recent European developments which partly escape the framework scheme that has been sketched up to now.

Between 1945 and 1949, the breakdown of the Nazi regime caused the dismantling of German national statehood. No federal constitution was to be approved before 1949. Thus, legislators in the *Länder* could write *long, comprehensive* constitutions without having to cope with federal constitutional limitations. Moreover, the *Länder* constitutions of the late 1940s were powerfully inspired by regionally dominant political cultures: the outcomes at the extremes of that trend are the

¹⁷ See R.F. Williams, *The Law of American State Constitutions*, Oxford, Oxford University Press, 2009, 27.

¹⁸ See Article XVI of the French revolutionary *Déclaration des droits de l’homme et du citoyen*.

¹⁹ G. de Vergottini, *Diritto costituzionale comparato*, 6th edn, Padua, Cedam, 2004, 306. Many examples might be recalled: Art. IV Section 4 of the Constitution of the United States, Art. 51(1) of the Swiss Constitution, Art. 28 and 142 of the German Basic Law.

²⁰ Williams, *The Law of American State Constitutions*, 1 ff.

²¹ Ginsburg and Posner, “Subnational Constitutionalism”, 1588.

²² See H. Maurer, *Staatsrecht*, 5th edn, Munich, Beck, 2007, 155 ff.

Roman Catholic-inspired Constitutions of Bavaria²³ and Rhineland-Palatinate,²⁴ and the “social-democratic” Constitutions of Hesse²⁵ and the Free Hanseatic City of Bremen.²⁶ Phase 2 was very different. After the enactment of the federal Basic Law (*Grundgesetz*) in 1949, the constituent power was exercised very cautiously in the *Länder*.²⁷ Bills of rights almost disappeared, while the focus of constituent legislators was almost exclusively on the relations between the cabinet and the legislature, the conduct of administrative business, and the system of legal sources.

What has been argued up to now should be even more correct when it comes to other European legal systems, like Italy or Spain. A distinction is crucial to the self-understanding of decentralised legal systems in the Old Continent. Traditionally, scholars trace a distinction between “federal” (Australia, Canada, Germany, Switzerland, and the USA) and “regional” systems.²⁸ Among the latter, scholars have usually classified Italy, Spain, and the devolved regions within the UK. Whereas the constituent units of federal systems are supposed to have full constitution-making power, Italian regions and Spanish CAs are only entitled – at least formally – to compose charters containing a mere frame of government.²⁹ Even if the distinction between federalism and regionalism is fading among constitutional lawyers,³⁰ its theoretical foundations are not without effect on present-day assumptions concerning many legal aspects of regional autonomy in both Italy and Spain. Moreover, there are no courts specifically entrusted with enforcing these charters. In fact, German *Länder* do have their own constitutional courts, which, however, cannot effectively enforce the provisions concerning rights – with the important exception of Bavaria, where every citizen is entitled to go before the Constitutional Court of the *Land* by means of a popular action (in German, *Popularklage*).³¹

²³ Available at <http://www.verfassungen.de/de/by/bayern46.htm>. According to its Preamble, “Mindful of the physical devastation which the survivors of World War II were led into by a godless state and social order lacking in all conscience or respect for human dignity, firmly intending moreover to secure permanently for future German generations the blessing of Peace, Humanity and Law, and looking back over a thousand years and more of history, the Bavarian people hereby bestows upon itself the following democratic Constitution.” Article 131(2) (Educational Goals), in turn, states that “The paramount educational goals are reverence for God, respect for religious persuasion and the dignity of man” etc.

²⁴ Available at <http://www.verfassungen.de/de/rlp/rlp47-index.htm>. See the Preamble: “Conscious of their responsibility before God, the original source of law and the Creator of every human community ... the people of Rhineland-Palatinate have given themselves this Constitution.”

²⁵ Available at <http://www.verfassungen.de/de/he/hessen46.htm>.

²⁶ According to its Preamble, “... the citizens of this *Land* wish to establish an order of social life in which social justice, humanity and peace are sought, those who are not wealthy are protected against exploitation, and everybody who is willing to work is entitled to a dignified life.”

²⁷ See the original wording of the Constitutions of Schleswig-Holstein, North Rhine-Westphalia, and Lower Saxony, all of which are available at <http://www.verfassungen.de>.

²⁸ See G. Bognetti, entry “Federalismo”, in *Digesto delle discipline pubblicistiche*, vol. V, Turin, Utet, 1991, 273 ff.

²⁹ Art. 123(1) of the Italian Constitution, as amended in 1999: “Each Region shall have a *statuto* which, in compliance with the Constitution, shall lay down the form of government and basic principles for the organisation of the Region and the conduct of its business. The *statuto* shall regulate the right to initiate legislation and promote referenda on the laws and administrative measures of the Region as well as the publication of laws and of regional regulations”. Art. 147 of the Spanish Constitution: “(1) Within the terms of the present Constitution, the *Estatutos* shall be the basic institutional norm of each Autonomous Community and the State shall recognize them and protect them as an integral part of its legal order. (2) The *Estatutos de autonomía* must contain: (a) The name of the Community which best corresponds to its historical identity. (b) The delimitation of its territory. (c) The name, organization, and seat of its own autonomous institutions. (d) The competences assumed within the framework of the Constitution and the bases for the transfer of the corresponding services to them.”

³⁰ See B. Baldi, *Stato e territorio. Federalismo e decentramento nelle democrazie contemporanee*, Rome and Bari, Laterza, 2003.

³¹ See C. Starck, “Verfassungsgerichtsbarkeit der Länder”, in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, 3rd edn, vol. VI, *Bundesstaat*, Heidelberg, Müller, 2008, 317 ff.

When it comes to the *Estatutos de Autonomía* of Spanish CAs or the *Statuti* of Italian regions, therefore, both the constitutional courts and dominant scholarship tend to deny that they are subnational constitutions. There is, however, much political pressure to fill these charters with provisions whose content is typically “constitutional” in the most proper sense. If you consider the whole previous story of subnational constitutionalism, this might appear surprising. The subsequent paragraph is devoted to considering some possible reasons for these recent developments.

The Emergence of Identities. The Italian Case

The classics of contemporary political science have tried to explain the dynamic of Western – mostly European – political systems using four fundamental cleavages, among which the centre-periphery cleavage was supposed to be the least important one.³² Such a cleavage appeared to be rather outmoded, since the strengthening of national states had made it increasingly marginal. Moreover, other factors seemed to go the same way – a centralising effect, for instance, has long been seen as one of the main effects of contemporary political party competition.³³ The last three decades, however, have witnessed the (unforeseeable?) rise of new political parties and movements who have exploited ethno-linguistic claims, resurgent regional identities, local resentment, and so on.³⁴ Thus, the centre-periphery cleavage has moved towards the main stage of political debate. Simultaneously, a great amount of discussion has taken place on the emergence of a new “public arena”³⁵; the so-called “glocal” dimension. A convincing example for this is the regionalisation of many European national States, once strongly centralised, which was prompted by the European Union itself, in order, among other things, to implement its cohesion policies. This regionalising wave can obviously be seen as another epiphany of a typically European, subsidiarity-oriented, efficiency-driven view of federalism.

Once again, the German legal system provides some interesting examples. As for the constitutions of the German *Länder*, a new flourishing of subnational constitutionalism has been observed in the aftermath of reunification. While the “new” *Länder* in the East drafted entirely new constitutions, the *Länder* in the West embarked on an updating of their fundamental charters. The results were surprisingly similar: the freshly drafted constitutions contained very long, detailed bills of rights, which inevitably looked more up-to-date than the *Grundrechte* section of the Basic Law, dating back to 1949 and “protected” by the well known “eternity clause”.³⁶ A few examples might be quoted; rights to civic participation, environmental protection and privacy made their first appearance in German constitutional documents in the 1990s.³⁷ However, Germany is quite a homogeneous country, where localist elements are usually absorbed by the national political debate. Thus, the Bavarian Christian-Social Union has strong co-operation ties with the national Christian-Democratic Union, while the Left Party, whose roots were strongly concentrated in the former Democratic Republic of Germany, has now turned into a national force. The constitutional trends which have been observed after 1990 are more of an attempt at updating a Basic Law dating back to 1949.

³² See S. Rokkan, *Citizens, Elections, Parties*, Oslo, Universitetsforlaget, 1970; A. Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries*, New Haven CT, Yale University Press, 1999.

³³ See K. von Beyme, *Political Parties in Western Democracies*, Aldershot UK, Gower, 1985.

³⁴ See, among others, I. Diamanti, “Localismo”, *Rassegna italiana di sociologia*, 1994, 403 ff.

³⁵ We draw this concept from T.J. Lowi, “American Business, Public Policy, Case-Studies, and Political Theory”, 16 *World Politics*, 1964, 677 ff

³⁶ See Häberle, “Die Verfassungsbewegung in den fünf neuen Bundesländern”, 69 ff.; C. Starck, *Verfassungen. Entstehung, Auslegung, Wirkung und Sicherung*, Tübingen, Mohr Siebeck, 2009.

³⁷ A full account can be found in M. Herdegen, “Strukturen und Institute des Verfassungsrechts der Länder”, in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, 3rd edn, vol. VI, *Bundesstaat*, Heidelberg, Müller, 2008, 271 ff.

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” (Art. 123(1) of the Italian Constitution). They are approved by the regional legislatures through a special procedure. 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 organization 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. The tool to achieve this goal was supposed to be that sort of subnational constitutionalism which the new constitutional provisions aimed at. Regional legislatures thus began to prepare the new *Statuti*. So far twelve out of fifteen ordinary regions have passed their new *Statuto*.³⁸ 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. Both constitutional revisions can be broadly interpreted as a response by national political elites to the rise of a strong regionalist movement, the Northern League, in the north of Italy – attempting to “moderate” demands for greater autonomy, or even secession. 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 twelve *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.³⁹

The following provisions from the *Statuto* of Latium are a good example of such a legislative policy:

The Region shall promote national unity as well as European integration [...] as fundamental values of its identity...

The Region shall contribute to promote Rome, [as the] 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.

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 Italian Constitution as the business of the regions. Actually, as the Italian Constitutional Court (ItCC) 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 which were marked by a strong axiological content. Some scholars were sceptical about that phenomenon and they judged harshly attempts at micro-constitutionalisation at the regional level. 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 internal organisation of the regions, to the exclusion of any other issue.

Statuti are subject to judicial review by the ItCC. This procedure is preventive but optional, in as much as it applies to issues raised by the central government. It was in this context that the ICC dealt with the issues under discussion in three difficult cases in 2004.

The practice briefly presented above was first questioned before the ItCC regarding the *Statuti* of Tuscany, Emilia-Romagna, and Umbria. More particularly, some provisions in those charters contained recognition of certain domestic partnerships. The central government claimed that such a recognition clashed with the constitutional value of the family based on marriage (Art. 29 of the Constitution). For example, under their *Statuti* the legislatures of these regions would have been allowed to take into account, as far as housing policies were concerned, not only married couples but

³⁸ The “new” ordinary *Statuti* are available at <http://www.issirfa.cnr.it/47,46.html>.

³⁹ See G. DelleDonne and G. Martinico, “Handle with Care!”, *European Constitutional Law Review*, 2009, 218 ff.

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 and concrete 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, 378/2004 and 379/2004,⁴⁰ the ItCC 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 propositions that could be contained in a piece of legislation. It defined this 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 that particular region – they have no legal force, their function being properly (and only) “political” and “cultural”. The ItCC 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 ItCC’s activity in 1956.

In its judgments of 2004 the Italian Constitutional Court 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 Italian 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 – in short, *Statuti* are not regional constitutions.⁴¹ If regional legislatures were to implement them, they would violate the Constitution: as the ItCC stated, since these provisions of regional charters have “no legal effect”, “a regional law pretending to implement them would be illegitimate”.⁴²

Nevertheless, not all provisions concerning rights and principles may be regarded as merely cultural statements. In a more recent judgment, 365/2007,⁴³ the ItCC 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 ItCC. 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” (Art. 5 of the Constitution). 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 ICC 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.

Judgments 106/2002 and 170/2010 are perhaps even more interesting. In the former the ItCC declared the constitutional unlawfulness of a regional law of Liguria which changed the regional legislature’s

⁴⁰ All three judgments are available at <http://www.cortecostituzionale.it>.

⁴¹ See R. Tarchi and D. Bessi, “Art. 123”, in R. Bifulco, A. Celotto and M. Olivetti (eds), *Commentario alla Costituzione*, Turin, Utet, 2006, 2451 ff.

⁴² Corte costituzionale, *sentenza* no. 365/2007, available at <http://www.cortecostituzionale.it>.

⁴³ Available at <http://www.cortecostituzionale.it>.

name from *Consiglio regionale* – as the Constitution provides – to *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. In its judgment 170/2010 the Court held that a regional law of Piedmont recognising the minority status of the “Piedmontese language” and the rights of Piedmontese-speaking people was illegitimate, since only the state legislator is entitled to identify a national community and the minority groups within it. Thus, it might be argued that this judgment upheld the traditional view of the “people” as one of the constituent elements of post-Westphalian statehood alongside territory and sovereignty.

The Emergence of Identities: The Case of Spain

Moving to the Spanish case, one can see how what has happened in Italy and Spain is quite different. In Spain, currently, six CAs have approved new *Estatutos*: Comunidad Valenciana (*ley orgánica*, 10 April 2006, n. 1), Catalonia (*ley orgánica*, 19 July 2006, n. 6)⁴⁴, Baleares (*ley orgánica*, 28 February 2007, n. 1)⁴⁵, Andalucía (*ley orgánica*, 19 March 2007, n. 2)⁴⁶, Aragón (*ley orgánica*, 20 April 2007, n. 5), and Castilla y León (*ley orgánica*, 30 November 2007, n. 14). Other CAs, such as Extremadura, are attempting to revise their *Estatutos*.⁴⁷ There were also failed attempts to approve new *Estatutos* in the País Vasco and Castilla-La Mancha.⁴⁸

All the *Estatutos* present important novelties, both substantially and formally: they are longer than in the past; they present a long list of “regional rights” (above all, social ones); they re-write the list of competences of the *Estatutos*; they enlarge the CA’s fiscal and financial autonomy; they contain provisions regarding the power of the judiciary; they revise the discipline governing the cooperative relations with the nation-state and the EU; and they contain some provisions devoted to the issue of identity. All the *Estatutos* (except for the unsuccessful draft *Estatuto* of Castilla-La Mancha, which, on the contrary, presents itself as averse to the identity language⁴⁹) contain provisions on rights and principles. Scholars have begun to reflect on the nature of such provisions, reaching conclusions

⁴⁴ On this *Estatuto*, see R.L. Blanco Valdés, “Lo Statuto catalano: testo e pre-testi”, *Quaderni costituzionali*, 2006, 677 ff.; I. Ruggiu, “Il nuovo Statuto catalano”, *Le Regioni*, 2007, 81 ff.; G. Duranti, “Asimmetria e modernizzazione del federalismo in Europa: il caso della riforma dello Statuto catalano”, *Rassegna parlamentare*, 2008, 249-279; E. Aja, “La riforma dello Statuto catalano del 2006”, *Diritto Pubblico Comparato ed Europeo*, 2007, 1133-1154; M. Carrillo, “Il nuovo statuto di autonomia della Catalogna”, *Giurisprudenza costituzionale*, 2007, 3297-3321; C. Viver Pi-Sunyer, “La riforma dello Statuto della Comunità autonoma di Catalogna: principali novità e problemi di costituzionalità”, *Diritto e società*, 2008, 315-350; G. Poggeschi, “La definitiva approvazione del nuovo Statuto di autonomia della Catalogna. Un passo in avanti verso una maggiore asimmetria dell’Estado autonomico”, *Diritto Pubblico Comparato ed Europeo*, 2006 fasc. 3, 1340-1352; J.A. González Casanova, “Reforma del estatuto de Cataluña y Estado federal”, 241 *Revista de fomento social*, 2006, 57-75.

⁴⁵ On this *Estatuto*, see: J. Oliver Araujo and V.J. Calafell Ferrà, “Las Islas baleares: una comunidad autonoma in fieri”, in M.J. Terol Becerra (ed.), *El Estado autonómico in fieri. La reforma de los Estatutos de Autonomía*, Seville, 2005, 215 ff.

⁴⁶ G. Ruiz and Rico Ruiz, “Una primera diagnosis del documento de bases para la reforma del Estatuto de Andalucía”, in Terol Becerra (ed.), *El Estado autonómico in fieri*, cit., 323 ff.

⁴⁷ For an overview, see <http://www.aelpa.org/observatorio.htm>.

⁴⁸ E. Vírghala Foruria, “La reforma Ibarretxe: un auténtica ruptura estatutaria”, in Terol Becerra (ed.), *El Estado autonómico in fieri*, cit., 401 ff. See the text available at: www.nuevoestatutodeeuskadi.net.

⁴⁹ See the preamble of the draft *Estatuto* of Castilla-La Mancha (available at http://www.congreso.es/public_oficiales/L9/CONG/BOCG/B/B_018-01.PDF): “Our existence as an Autonomous Community is not determined either by the past or our historical peculiarities – but by the Constitution which we the Spanish people gave ourselves in 1978 and by the common project for the future which we the citizens arranged.”

similar to those in the Italian debate.⁵⁰ It is a relatively new question, since the old texts were silent on these points.⁵¹

The phenomenon of re-writing the *Estatutos* has been carried out through two main means: the Preambles and the “self-definition” contained in the *Estatutos*. With regard to the former, they contain many references to the ancient *Reinos* which were established in their territories before Spanish unification, or before the latest constituent phase⁵²; at the same time, many “*derechos forales*”⁵³ and traditions⁵⁴ are recalled, and one of the aims of these *Estatutos* consists in the attempt to give them new life in the current age.⁵⁵ With regard to the latter, formulas like nation⁵⁶, nationality, historical nationality, national identity, and historical community⁵⁷ abound, and many provisions are devoted to linguistic idioms.⁵⁸ As indicated at the beginning of this work, there is another element characteristic of this phenomenon: the diffuse reference to folklore elements or local personalities, images, idioms,

⁵⁰ For a comparison, see: A. Mastromarino and J.M. Castella' Andreu (eds), *Esperienze di regionalismo differenziato*, Milan, Giuffrè, 2009.

⁵¹ R. Maluenda Verdú, “La reforma del Estatut d'autonomia: una necesidad identitaria”, in V. Garrido Mayol (ed.), *Instituciones políticas de la Comunidad Valenciana*, Valencia, 1999, 245 ff.; Ruggiu, “Testi giuridici e identità”. *cit.*, 133 ff; A. Mastromarino, “A margine della proposta per la revisione dello statuto catalano in tema di nazione e nazionalità spagnole”, *Diritto Pubblico Comparato ed Europeo*, 2005, 1577-1584.

⁵² See the *Estatuto* of Catalonia: http://www.pedrojhernando.com/aelpa2007/informacion/eac_es_20061116.pdf. From the Preamble: “The Catalan people have maintained a constant will to self-government over the course of the centuries, embodied in such institutions as the *Generalitat* – created in 1359 by the Cervera *Corts* – and in its own specific legal system, assembled, together with other legal compilations in the *Constitucions i altres drets de Catalunya* (Constitutions and other laws of Catalonia). After 1714, various attempts were made to restore the institutions of self-government. Milestones in this historic route include the *Mancomunitat* of 1914, the recovery of the *Generalitat* with the 1932 Statute, the re-establishment of the *Generalitat* in 1977 and the 1979 Statute, coinciding with the return of democracy, the Constitution of 1978 and the State of Autonomies”. See also the *Estatuto* of Andalusia http://www.pedrojhernando.com/aelpa2007/informacion/eac_es_20061116.pdf: “The first text defining the political will of Andalusia of establishing itself as a self-governing political body was the Andalusian Federal Constitution, drafted in Antequera in 1883. The Andalusian flag and escutcheon were approved by the Assembly of Ronda in 1918”.

⁵³ See Art. 3, c. 4, of the *Estatuto* of Comunidad Valenciana: “Valencia’s own historical civil law shall be applied, independently of where he or she may reside, to whoever holds civil Valencian residence according to the norms of the preliminary title of the Civil Code, which shall equally be applicable to resolve conflicts of law.” (<http://www.pedrojhernando.com/aelpa2007/informacion/ESTATUTO CV.pdf>).

⁵⁴ Art. 5 of the *Estatuto* of Catalonia: “The self-government of Catalonia is also based on the historical rights of the Catalan people, on its secular institutions, and on the Catalan legal tradition”.

⁵⁵ F. Rey Martínez, “Sentido y alcance del concepto de ‘derechos históricos’ en la constitución y en los estatutos de autonomía”, in *La reforma de los Estatutos de autonomía. Revista jurídica de Castilla y León*, 2005, 181 ff.

⁵⁶ See, again, the Preamble of the *Estatuto* of Catalonia.

⁵⁷ On this phenomenon, see: E. Sejas Villadangos, “Estado, soberanía, nación y nacionalidades, demasiados factores para una sola ecuación. Revisión de estas categorías a la luz de las reformas constitucional y estatutarias en España”, in “La reforma de los Estatutos de Autonomía”, special issue of *Revista jurídica de Castilla y León*, Valladolid, 2003, 211 ff.; R. Blanco Valdés, *Nacionalidades históricas y regiones sin historia: a proposito de la obsesión rutinaria*, Madrid, 2005.

⁵⁸ Art. 6 of the *Estatuto* of Catalonia, where both Catalan and Castilian are conceived of as official languages of the CA: “1. Catalonia’s own language is Catalan. As such, Catalan is the language of normal and preferential use in Public Administration bodies and in the public media of Catalonia, and is also the language of normal use for teaching and learning in the education system. 2. Catalan is the official language of Catalonia, together with Castilian, the official language of the Spanish State”. See also the Preamble of the *Estatuto* of Comunidad Valenciana, with regard to the “lengua valenciana” (Valencian language).

dances (*flamenco*),⁵⁹ and to all those elements which the literature has brought under the umbrella of *hechos diferenciales* (“differential or distinguishing facts”).⁶⁰

Two other categories of tools devised by the CAs in this process need to be mentioned; new collective rights are claimed, and new competences for the CAs, conceived as functional to their protection, are requested.⁶¹ Proceeding with analysis of the means used by the CAs to promote their peculiarities, one could point out the provisions devoted to the symbols⁶² of the CAs; regional feasts, flags, monuments, anthems.⁶³

Scholars have profusely analysed such provisions, emphasising their ambiguity, their dangers but, above all, their rhetorical nature. Other scholars have pointed out the reasons behind the language of identity: the necessity to gain new competences⁶⁴ (as we saw, alongside the recognition of new collective rights there is the request of new competences to protect them) and, as a consequence, the claim for new funds, according to the logic “no money, no competences”. Thus, the linguistic⁶⁵, cultural and local peculiarities – whose importance among the Spanish public could hardly be overestimated – are also the grounds to claim additional new funds.⁶⁶

⁵⁹ See Art. 68 of the *Estatuto* of Andalucía: “At the same time, this Autonomous Community holds exclusive competence for the knowledge, preservation, research, formation, promotion and spreading of *flamenco* as a peculiar feature of the Andalusian cultural heritage”.

⁶⁰ As noted above, Art. 3 of the *Estatuto* of the Balearic Islands refers to the insularity of the region as a peculiar fact of the CA: “The *Estatuto* protects the insular nature of the territory of this Autonomous Community as a differential fact which deserves special protection”. (http://www.pedrojherando.com/aelpa2007/informacion/EstatutAutonomiaIB_cas.pdf).

⁶¹ See Art. 18 of the *Estatuto* of the Balearic Islands: “1. Everybody is entitled on an equal footing to approach the culture, protection and defence of individual and collective artistic and technical creativity. Political institutions will protect and defend creativity in the forms determined by ordinary laws.

2. Everybody is entitled to have political institutions promoting his or her cultural integration.

3. The political institutions of the Balearic Islands will watch over the protection and defence of identity, values and interests of the people of the Balearic Islands, the preservation of the cultural diversity of this Autonomous Community, and its historical heritage”.

⁶² See Art. 5 of the *Estatuto* of Comunidad Valenciana.

⁶³ See P. Häberle, *Nationalhymnen als kulturelle Identitätselemente des Verfassungsstaates*, Berlin, Duncker & Humblot, 2007; idem, *Nationalflaggen als bürgerdemokratische Identitätselemente und internationale Erkennungssymbole*, Berlin, Duncker & Humblot, 2008.

⁶⁴ On the system of competences, see: F. Balaguer Callejón (ed.), *Reformas estatutarias y distribución de competencias*, Instituto andaluz de administración pública, Seville, 2007; J. Tornos Mas, “Balance de la distribución de competencias tras la reforma de los Estatutos de Autonomía”, *Informe comunidades autónomas*, 2006, 879-89; M. Paloma Biglino Campos, “Reforma de la Constitución, reforma de los Estatutos de Autonomía y configuración constitucional del Orden de Competencias”, 65 *Revista de las Cortes Generales*, 2005, 7-30; E. Guichot Reina, “El reparto de competencias sobre protección de datos tras los nuevos Estatutos de Autonomía”, 39 *Justicia administrativa: Revista de derecho administrativo*, 2008, 5-18.

⁶⁵ M. Barceló i Serramalera, “Els drets lingüístics com a drets públics estatutaris”, 47 *Revista de llengua i dret*, 2007, 265-286.

⁶⁶ On the financial system in the new *Estatutos*, see A. de la Fuente and M. Guidín, “La financiación autonómica en los nuevos estatutos regionales”, 182 *Hacienda pública española*, 2007, 165-200; E. Emilia Girón Reguera, “La incidencia de la reforma de los Estatutos de Autonomía en la financiación autonómica”, 27(80) *Revista española de derecho constitucional*, 2007, 75-111.

The Relationship between the New *Estatutos* and the Spanish Constitution

Soon after the approval of the first *Estatutos*, scholars were divided over the constitutionality of many new provisions included in those texts.⁶⁷ Suffice it here to recall two directly opposite positions that appeared in the *Revista d'estudis autonòmics i federals*; those by Pedro Cruz Villalón⁶⁸ and Eduard Roig Molés.⁶⁹ In the article by Cruz Villalón, after recalling what he considers the main aspects of the Spanish territorial model, the author identifies those features that have never been challenged since 1978. He then moves on to analyse what he calls the re-foundation period of the new *Estatutos de autonomia*; in his opinion, these new *Estatutos* imply a re-definition of the State by the CAs, especially the draft of the *Estatuto de Catalunya*. A very different position is expressed by Eduard Roig Molés. According to him, the new institutional equilibrium coming from the *Estatuto de Catalunya* should be considered as a fundamental step in the development of Spain's original territorial model, since it would ensure a clearer definition of the distribution of powers and a more transparent system of finance. At the same time, it would imply the solution to new institutional needs (the example given by the author refers to the participation of the CAs in the decision-making processes concerning state-wide issues).

The first opportunity for the *Tribunal Constitucional* (TC) to rule on the constitutionality of the *Estatutos* was given in its *sentencia* no. 247 of 12 January 2007, focused on Article 20 of the *Estatuto* of the Comunidad Valenciana.⁷⁰ There, the TC rescued the contested provision by acknowledging the right to high quality water, as provided for in subnational *Estatutos*. The decision is important since it clarifies that an *Estatuto* is an act that cannot be disposed of by the sole will of the national state or of the CA. It is an act emanating from the wills of both entities.

There are two main positions in the literature in this respect. According to some scholars, this act is the expression of a sort of constituent power (“*una cierta potestad constituyente*”) having a constitutional meaning.⁷¹ According to other scholars, it is a mere “*norma de organización*” of the CA. Moreover, the TC recognised a broad interpretive function to the *Estatuto* with regard to the constitutional provisions devoted to the competences of a CA.

In its *sentencia* no. 247 of 12 January 2007, the TC also specified that the content of the *Estatutos* shall not be limited to what Article 147 c. 2 of the Spanish Constitution recognises, but they are free to add other contents, except provisions in conflict with the Constitution itself: in this sense, Article 147,

⁶⁷ On the relationship between the reforms of the *Estatutos* and that of the Spanish Constitution, see: T. Ramón Fernández Rodríguez, “De la reforma de los Estatutos a la reforma de la Constitución”, 5 *Foro: Revista de ciencias jurídicas y sociales*, 2007, 13-28; M.A. Aparicio Pérez, “La adecuación de la estructura del Estado a la Constitución (reforma constitucional vs. reforma de los estatutos)”, 31 *Revista catalana de dret públic*, 2005, 57-86; Ferret i Jacas, “Estatutos de autonomía: función constitucional y límites materiales”, 31 *Revista catalana de dret públic*, 2005, 87-108.

⁶⁸ P. Cruz Villalón, “La reforma del Estado de las autonomías”, 2 *Revista d'Estudis autonòmics i federals*, 2006, 77 ff.

⁶⁹ E. Roig Molés, “La reforma del Estado de las Autonomías: ¿ruptura o consolidación del modelo constitucional de 1978?”, 3 *Revista d'estudis autonòmics i federals*, 2006, 149-186; see also: J. Pérez Royo, “Consideraciones sobre la reforma de la estructura del Estado”, *Reforma del Estatuto de autonomía para Andalucía*, vol. II, Seville, Parlamento de Andalucía, 2005, 37 ff.

⁷⁰ On this decision, see: M. Iacometti, “La ‘prima volta’ di un nuovo Statuto (quello valenciano) di fronte al Tribunale costituzionale”, *Diritto Pubblico Comparato ed Europeo*, 2008, 702 ff.; see also Francisco M. Caamaño Domínguez, “Sí, pueden: (declaraciones de derechos y Estatutos de Autonomía)”, 79 *Revista española de derecho constitucional*, 2007, 33-46; G. Fernández Farreres, *¿Hacia una nueva doctrina constitucional del Estado Autonomico?*, Madrid, Thomson-Civitas, 2008.

⁷¹ On this debate, see J. Tornos Mas, “La reforma estatutaria: un debate marcado por la posición constitucional de los Estatutos de Autonomía”, 12 *Revista General de Derecho Administrativo*, 2006; J.J. Solozábal Echavarría, “El Estado social como Estado autonómico”, 3 *Teoría y realidad constitucional*, 1999, 61-78; G. Trujillo Fernández, *Lecciones De Derecho Constitucional Autonómico*, Valencia, Tirant Lo Blanch, 2004, 122 ff.

c. 2, provides for the minimal content of the *Estatutos*. Having said this, the TC moves on to deal with the provisions devoted to rights in the *Estatutos*. In this respect, there are two main positions in the literature⁷²: according to Castellà Andreu⁷³ and Ferreres Comella⁷⁴, for example, there is no necessary and *a priori* contrast between the constitutional provisions and the new norms contained in the *Estatutos*. according to other scholars, however, there would be the risk of creating asymmetries in terms of protection of rights, and a reserved jurisdiction for the Constitution in the field of rights should be acknowledged.⁷⁵

Finally, the TC rescued the provisions of Article 17 c. 1, of the *Estatuto* of the Comunidad Valenciana, understanding it as a precept addressed to the legislator and not breaching the competence of the national state in the ambit of water planning. In order to rescue the provision, the TC distinguished between the fundamental rights and freedoms and the *principios rectores*⁷⁶ of social and economic policies, that would be a sort of non-directly-applicable principles, aimed instead at orienting the activity of legislators and giving them goals to be achieved. They do not lack legal nature (in this sense the conclusion reached by the TC differs from that of the ItCC⁷⁷); at the same time, thanks to this distinction, those provisions do not jeopardise the principle of equality contained in the CE.

Alongside this subnational provision embodying *principios rectores*, there might be some clauses devoted to rights that are already included in constitutional provisions: these would not be inconsistent with the CE, but they would be just reproducing a constitutional precept. In case of norms that go beyond the constitutional precepts, it will be necessary to consider their link to the local needs: if they embody local aspirations, they might not be considered as unconstitutional.⁷⁸ The decision of the TC in 2007 was characterised by a deep division among its judges and opened a new phase of incertitude, in the wait for the decision of one of the most controversial *Estatutos*: that of Catalonia.⁷⁹

⁷² For a general overview: G. Cámara Villar, “Reflexiones sobre tres aspectos de la reforma del Estatuto de autonomía para Andalucía: principios, derechos y deberes, y administración de la justicia”, *Reforma del Estatuto de autonomía para Andalucía, cit.*, vol. II, 157 ff; see also P.L. Murillo De La Cueva, “Sobre la reforma del Estatuto de autonomía para Andalucía. Los principios y los derechos”, *Reforma del Estatuto de autonomía para Andalucía, cit.*, vol. II, 85 ff.; A.H. Català i Bas, “La inclusión de una carta de derechos en los Estatutos de Autonomía”, *Revista española de la función consultiva*, n. 4, 2005, 181-204; G. Ruiz and Rico Ruiz, “Derechos sociales y reforma de los estatutos de autonomía: el derecho a la vivienda”, 2 *Nuevas Políticas Públicas: Anuario multidisciplinar para la modernización de las Administraciones Públicas*, 2006, 74-95; R. Canosa Usera, “La declaración de derechos en los nuevos Estatutos de Autonomía”, 20 *Teoría y realidad constitucional*, 2007, 59-115; M. Aparicio Wilhelmi and G. Pisarello, “El reconocimiento de derechos, deberes y principios en los estatutos de autonomía: ¿hacia una comprensión multinivel o en red de la protección de los derechos?”, 42 *El Clip*, 2007, <http://www.gencat.cat/drep/iea/pdfs/c42.pdf>; M. Carrillo López, “Los derechos, un contenido constitucional de los Estatutos de Autonomía”, 80 *Revista española de derecho constitucional*, 2007, 49-73; E. Expósito, “La regulación de los derechos en los nuevos Estatutos de Autonomía”, *Revista d'estudis autonòmics i federals*, 2007, 147-202.

⁷³ J.M. Castellà Andreu, “Lo statuto di autonomia del 2006 come (discutibile) strumento per la realizzazione dell'autogoverno della Catalogna”, in S. Gambino (ed.), *Regionalismi e statuti*, Milan, Giuffrè, 2008, 216 ff.

⁷⁴ V. Ferreres Comella, “Derechos, deberes y principios en el nuevo Estatuto de Autonomía de Cataluña”, in V. Ferreres Comella, M. Paloma Biglino Campos and M. Carrillo López (eds.), *Derechos, deberes y principios en el nuevo Estatuto de Autonomía de Cataluña*, Madrid, CEPC, 2006, 38 ff.

⁷⁵ L.M. Díez-Picazo, “¿Pueden los Estatutos de Autonomía declarar derechos, deberes y principios?”, 78 *Revista Española de Derecho Constitucional*, 2006, 63-75.

⁷⁶ M. A. Aparicio Pérez, J. M. Castellà Andreu and E. Expósito (eds), *Derechos y principios rectores en los estatutos de autonomía*, Barcelona, Atelier, 2008.

⁷⁷ Corte Costituzionale, Judgments 372-378-379/2004, available at www.cortecostituzionale.it.

⁷⁸ Iacometti, “La ‘prima volta’”, *cit.*, 716.

⁷⁹ Against the *Estatuto de Catalunya* many objections were aired: on 31 July 2006, some members of the People’s Party presented a *recurso de inconstitucionalidad* before the Constitutional Court; in 2006, 112 articles and four additional provisions of the *Estatuto de Catalunya* were contested before the TC by the *Defensor del Pueblo*, on the following grounds: the mention of Catalonia as a “nation”, the provisions concerning the language, the competences, the jurisdictional system, the discipline of bilateral relationships. Other claims were presented by the Government of Murcia

What has happened in Catalonia in the last few years is another convincing example of the link between subnational constitutionalism and the increasing power of localism in the public debate. Leaving aside other peculiar exceptions like the Basque Country, Catalonia's linguistic identity – based on the Catalan language – is quite distinct from that of the rest of Spain, where Castilian is spoken. Claims for greater political and, significantly, financial autonomy are strongly linked with the resurgence of Catalan identity.

In 2003 a left-wing autonomist (in Castilian, *nacionalista*) coalition took office in Catalonia. One of its main pledges was the writing of a fully new *Estatuto de autonomía*. The drafting of a new *Estatuto* was seen as instrumental both in giving Catalonia a “real” constitution and “forcing the hand” of the central State in bilateral negotiations on such sensitive issues as financial relations and judicial organisation. Thus, it has been at once a constitution-making process and a policy-oriented forum, much in the tradition of subnational constitutionalism. The *Estatuto* was approved in 2006 after a difficult debate and the search for a compromise between Catalan nationalist parties, on one side, and the State and non-nationalist Catalans, on the other side. After that, the leading force in the parliamentary opposition in Madrid, the *Partido Popular* (PP) immediately questioned the constitutional legitimacy of the new Catalan fundamental charter. The Spanish Constitutional Court finally gave its decision about it at the end of a long-drawn-out deliberation process, on 28 June 2010.⁸⁰

The Court issued a very long judgment, which looks into the legitimacy of the whole *Estatuto*. The whole of its reasoning is ultimately based on a doctrine – contained in judgment no. 76/1983 – concerning the difference between constituent power (*poder constituyente*) – which, by definition, is free – and constitutional powers (*poderes constituidos*), whose scope is determined and encompassed by the Constitution. The TC clarifies that the *Estatutos*, which the Constitution qualifies as “basic institutional norms of the Autonomous Communities” (Article 147(3)), can host additional contents, but they are subordinated to the Constitution and must comply with its provisions. Three points are very interesting for the purposes of this paper.

First, the Preamble of the *Estatuto* contains an ambiguous statement: “In reflection of the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority. The Spanish Constitution, in its second Article, recognises the national reality of Catalonia as a nationality.”. According to a well established doctrine of the TC, the Preambles in the *Estatutos* have no normative value but only an interpretive one. However, “a lack of normative value is no lack of legal value” – therefore, the Court has to deal with these “concepts and categories which ... pretend to give the *Estatuto* foundations and a scope incompatible with its condition of subordination with respect to the Constitution”.⁸¹ As a result of this challenge, the TC stated that the most controversial passages of the Preamble had no interpretive value. Whilst a group is entitled to call itself a nation for the purposes of political or cultural debate, when it comes to legal language there is only one nation in the Kingdom of Spain, the Spanish nation. On the contrary, Catalans are just a “nationality” (Article 2 of the Spanish Constitution and Article 1(2) of the Catalanian

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and that of the Balearic Islands. See R.Tur Ausina, “SPAGNA – Lo Statuto della Comunità di Catalogna e di Valencia impugnati dinanzi al Tribunale costituzionale”, on http://www.unisi.it/dipec/palomar/027_2006.html#spagna1. Another element to be taken into account for understanding the political importance of this decision is given by the request of objection to Professor Pablo Pérez Tremps sitting as a judge, which was accepted by the plenum of the Court on 5 February 2007.

⁸⁰ Constitutional Court of Spain, *sentencia* no. 31/2010, available at:

<http://www.tribunalconstitucional.es/en/jurisprudencia/Pages/Sentencia.aspx?cod=9873>. See J.M. Castellà Andreu, *La sentencia del Tribunal Constitucional 31/2010, sobre el Estatuto de Autonomía de Cataluña y su significado para el futuro del Estado autonómico* (September 2010), available at:

http://www.funciva.org/uploads/ficheros_documentos/1284366523_sentencia_del_tc._josep_maria_castella.pdf.

⁸¹ Spanish Constitutional Court, *sentencia* no. 31/2010, para. 7.

Estatuto).⁸² Since the Spanish legal system is based on the principle of popular sovereignty, the only holder of sovereignty can be the Spanish people at large.

Second, as for the legitimising force of Catalan autonomy, the Preamble says that “Catalonia’s self-government is founded on the Constitution, and also on the historical rights of the Catalan people, which, in the framework of the Constitution, give rise to recognition in this *Estatuto* of the unique position of the *Generalitat*”. Again, interpretations pretending that the Catalonian autonomy has foundations other than the constitutional provisions have to be rebutted. The legal foundations of autonomy are the constitutional provisions concerning the territorial organisation of the Kingdom of Spain. In fact, two CAs, Navarre and the Basque Country, enjoy a privileged financial status due to some historical rights (the so-called *derechos forales*) – these rights, however, are explicitly mentioned (and recognised) in the Constitution (Article 149(1)(8)). As the Court stated:

Only in an improper way could these historical rights be intended to be, even legally, the foundation of Catalonian self-government, because ... they can only explain the fact that *Estatutos* take up some determined competencies in accordance with the Constitution, but they cannot at all explain the foundation of the legal existence of the Autonomous Community of Catalonia and its constitutional entitlement to self-government.⁸³

Third, the *Estatuto* contains a detailed bill of rights. In 2007, the TC had already laid down that the provisions of *Estatuti* concerning rights were not fundamental rights but only directive propositions needing ordinary legislation to be implemented.⁸⁴ In 2010 the Court held again that “To be rigorous, fundamental rights are only those rights which limit every legislature, i.e. the *Cortes Generales* and the legislative assemblies of the Autonomous Communities, in order to guarantee freedom and equality. This function of limit can only be performed by a superior norm which is common to every legislature, i.e. by the Constitution.”⁸⁵ In the TC’s view, this assumption is confirmed by Article 37(4) of the *Estatuto*, according to which:

The rights and principles of this Title shall not imply any alteration to the system for distribution of powers nor the creation of new Titles regarding powers nor the modification of those that already exist. None of the provisions of this Title shall be enacted, applied or interpreted in any way that reduces or restricts the fundamental rights recognised in the Constitution and in international treaties and conventions ratified by Spain.

Therefore, the global meaning of the Catalan bill of rights is greatly diminished.

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 “constitutionalism without constitution”: a sort of constitutionalism embedded in charters but 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”.⁸⁶ From the definition of complexity we move to its application to the Italian and Spanish regional cases.

⁸² Ibid.

⁸³ Ibid., para. 10.

⁸⁴ Spanish Constitutional Court, *sentencia* no. 247/2007, available at: <http://www.tribunalconstitucional.es/en/jurisprudencia/Pages/Sentencia.aspx?cod=9408>.

⁸⁵ Spanish Constitutional Court, *sentencia* no. 31/2010, para. 16.

⁸⁶ E. Morin, *Introduction à la pensée complexe*, Paris, ESF, 1990, 10. About law and complexity see: F. Ost and 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 and P. Pedrot (dir.) *Droit et complexité*, Rennes, 2007; G. Martinico,

Our premise is that all the cases taken into account in this paper represent multilevel complex legal orders: the national, regional and municipal levels are conceived as three levels of governance and lawmaking. Unlike the multilevel structure of the European Union⁸⁷ the relation between the national and regional level (or subnational 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 that contributes to the system's complexity can be identified. This is the mutual "embrace" 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. As a consequence of the lack of a precise distinction within the domain of lawmaking, it is sometimes impossible to resolve the antinomies (collision or conflict of norms) between different legal levels on the grounds of the precedence of a legal order (e.g. the national) over another legal order (e.g. the regional).

The Italian and Spanish systems of regional charters offer clear examples 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 Courts' judgments is to create complex antinomies which are both "non-reducible" and "unpredictable".⁸⁸

The antinomies can exist in the meanings we have outlined: the fundamental principles that have been rescued by the Italian and Spanish Constitutional Courts as "cultural statements" or "directive norms" (or statements that present neither legal binding nor interpretive value as for the statements contained in the preambles) 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/Estatutos* 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 the absurdity of the Italian and Spanish Constitutional Courts' strategy. The fact that the regional *Statuto/Estatuto* 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 (or the statements included in the preambles of *Estatutos*) 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.,

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"Complexity and Cultural Sources of Law in the EU context: From the Multilevel Constitutionalism to the Constitutional Synallagma", *German Law Journal*, 2007, 205-230.

⁸⁷ "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?", *Common Market Law Review*, 1999, 703-750, 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>.

⁸⁸ 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 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.

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 effort of the legislature, which 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 doctrine of the Italian and Spanish Constitutional Courts (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. We are going to look at the Italian case but of course what is said here might be extended to the Spanish side. According to many new Italian 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*.⁸⁹ 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 general provisions of the *Statuti*; 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 of the Constitution).

Other cases of conflict between the Constitution and the *Statuti* can be imagined. 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.⁹⁰ This provision represents one of the first 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*⁹¹).

⁸⁹ See, for example, Art. 57 of the *Statuto* of Tuscany and Art. 69 of the *Statuto* of Emilia-Romagna.

⁹⁰ Article 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.”

⁹¹ See the text here:

http://www.issirfa.cnr.it/download/File/NAPOLITANO_PUGLIA/Puglia%20L%2019_06%20PDF.pdf?PHPSESSID=b4e62468a96940ae6ae687d571bbb063.

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.⁹²

These questions are by no means abstract. As a clerk of the Tuscan regional legislature has recently written, what the ItCC stated in its judgment no. 372/2004 “may be correct as far as the relations between the provisions of the *Statuto* and the constitutional order are concerned. They are part, however, of the regional legal order governed by the *Statuto*, thus influencing regional policies and legislation”.⁹³

A similar debate took place at the local level when some municipal *Statuti* had given extra EU immigrants the right to vote in local elections. The *Consiglio di Stato*⁹⁴ – which gave an advisory opinion according to the procedure described in Article 138⁹⁵ of the Code of Municipalities (*Testo Unico degli enti locali*) – decided to deny the possibility to extend such a right to vote.⁹⁶ This episode shows the possibility for such a conflict within regions also and confirms the risk of latent antinomies between the fundamental principles of the *Statuti* and the Constitution.

Conclusion

In conclusion we argue that the Italian and Spanish Constitutional Courts have merely postponed the constitutional conflicts that might arise between the regional cultural statements which embody the *Statuti/Estatutos* and the national 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 ItCC. These cultural provisions are able to produce some legal effects despite what the ItCC (but the same applies to the Spanish decision about the Catalan *Estatuto* with regard to the statements included in the preambles) stated in cases 372–378 and 379/2004.

⁹² “(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.”

⁹³ A. Chellini, “Lo stato di attuazione del nuovo Statuto regionale della Toscana”, *Osservatorio sulle fonti*, 2/2009 (<http://www.osservatoriosullefonti.it>), 1.

⁹⁴ 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>.

⁹⁵ 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.

⁹⁶ 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”.

An important distinction can be made between the 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 constitutional court 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 fundamental principles of the *Statuti/Estatutos* 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 citizens because of their belonging to one specific region rather than another. This system could jeopardise the unity of the Republic which should be ensured, in Italy for instance, 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 to those in another region. This is not completely true, because in federal systems also there are 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 “(m) the determination of the basic standards of welfare related to those civil and social rights that must be guaranteed in the entire national territory”.⁹⁷ Something similar can be found in the Spanish Constitution as Article 149.1.1 confirms.⁹⁸ The risk to which we refer 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 fundamental charters 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”:⁹⁹ a sort of a process of mutual learning between levels of government which permits an improvement in the guarantees of constitutional rights.¹⁰⁰

⁹⁷ See also Art. 123 (the necessity of the harmony of the Constitution) and Art. 5 (the need for unity of the Republic) of the Italian Constitution, which confirm the need for a homogeneity in the regional system.

⁹⁸ “(1) The State holds exclusive competence over the following matters:

(1) the regulation of the basic conditions which guarantee the equality of all Spaniards in the exercise of their rights and fulfillment of their constitutional duties”.

⁹⁹ 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.

¹⁰⁰ 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>.

