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CONTEMPORARY DYNAMICS OF SUB-NATIONAL GOVERNMENTS AND COURTS: A CHALLENGING SHARED PATH

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Contemporary dynamics of sub-national governments and Courts: a challenging shared path.

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ABSTRACT: *There is a very close tie which binds the sub-national governments dynamics and the constitutional justice's system, which is evident by Court's role in deciding on the distribution of power issues between the central and the local governments. But, nowadays, the connection throught those two areas is no longer just a problem of separation of responsabilities of the State and the sub-national bodies: to date, this bond reveals a new intimate relationship among the government and the citizens. The analysis of these up-to-date issues can be no longer carried on according to the traditional cathegories of public law: it needs to follow new outlines, which are directly offered by the factual experiences, even in a comparative perspective.*

This paper aims to introduce and to compare those novel tools, which should be applied to study the phenomenon of sub-national governaments and its effects on the constitutional justice system: starting from the constitutional framework, it has to be considered the differentiation trend of the subnational governments, the innovative decisions of the Supreme or Constitutional Courts about that arrangement and the role of territorial referenda. In that view, the Italian and the British legal systems offer several cues to prove this institutional change put into act and to operate a wider review on the new paradigms of constitutional law based on the recognition of the principles of differentation and pluralism.

Key words: subnational governments - constitutional justice systems - devolution -regionalism -referenda

1. *A brief methodological introduction.*

In approaching a comparative constitutional analysis, it is important to clear up the terminology adopted, because the translation of certain legal terms could be different, according to the legal system in which they are goint to be applied[1]. In fact, from the Italian doctrinal perspective, the concept of "*forma di Stato*"[2] describes the principles and the rules related to the relationship between the State and the citizens, on one hand; and the distributions of legislative (and administrative) powers between the central and the sub-national governments, on the other hand.

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[1] A. HARDING, P. LEYLAND, *Comparative Law in Constitutional Contexts*, in http://www.lumsa.it , 331: "In approaching comparative constitutional analysis, while stopping well short of developing or advocating a particular methodology, it is possible to identify certain questions which nearly always need answering. For instance, it is interesting here to speculate whether there is a universal language of constitutional terminology, allowing for common assumptions to do with constitutional features. Even here, we must maintain a degree of caution in how terms are used and what their implications might be. We have just noted that typologies are often useful. However, at all times it is crucial to deal with issues of terminology, ensuring that words have been correctly understood and avoiding simplistic translations which might lead to misunderstandings. In this regard it is necessary to remember that general and legal expressions, in any language, are often very, or just subtly, different, and that we should look for actual, as opposed to linguistic, equivalents".

[2] "*Con l'espressione forma di stato si intende il rapporto che corre tra le autorità dotate di potestà di imperio e la società civile, nonché l'insieme dei principi e dei valori a cui lo Stato ispira la sua azione",* R. BIN, G. PITRUZZELLA, *Diritto costituzionale*, Giappichelli, Torino, 2012, 33; see also L. PEGORARO, A. RINELLA, *Sistemi giuridici comparati*, Giappichelli, Torino, 2017, 50.

This last concept is named by the Italian scholars "*tipo di Stato*"[3]. Instead, according to the British standpoint, the two concepts aforementioned are included in the general term "*Constitution*", which expresses both the State-citizens relationship and the territorial distribution of powers[4]. Moreover, the "type of State" also constitutes the communication channel among those aspects and the "form of government", which – according to Italian doctrine – represents the distribution of powers (legislative, executive and judiciary) in a modern State[5]. Even in that case, the British doctrinal perspective conceives the "form of government" as the frame of institutions arranged by the Constitution[6].

However, the paper would aim to make an overall and comprehensive approach, based on the factual comparative method[7] rather than the traditional classifications, which remain on the background[8]. The method adopted takes into account the pragmatic dimentions of the constitutional issues and the research on the so called "formants"[9]: in our case, the formants will be represented by some decisions of the Italian Constitutional Court and the United Kingdom Supreme Court, which have encorauged some insights regarding a renew relations between "apex" Courts and the dynamics of sub-national governments.

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[3] M. VOLPI, *La classificazione delle forme di Stato*, in VV.AA., *Diritto pubblico comparato*, Giappicchelli, Torino, 2004., 207-208: according to him, the "*type of State*" is constituted by "*l'insieme delle regole che disciplinano i rapporti tra lo Stato centrale e gli enti autonomi territoriali operanti al suo interno*"; A. VIGNUDELLI, *Diritto Costituzionale*, Tomo I, Giappichelli, Torino, 2004, 148; see also M. BURGESS, *Federalism and political territorialità: the character and significante of constituent units in the new federal models*, in VV.AA., *Federalism, regionalism and territory, Istituto di Studi sui Sistemi regionali federali e sulle autonomie*, Proceedings of the Conference, Rome, 19-20-21 September 2012, 197: "In the case of federal states the relationship between territory and politics is especially striking for the simple reason that federations are a particular type of State: they are built upon what we commonly refer to as constituent units which are 'territorially bounded communities' entrenched in a written constitution".

[4] A State's Constitution "also regulates relations between the State and the individuals", A. RILEY, P. SOURS, *Common Law Legal English and Grammar*, Hart Publishing, Oxford, 2014, 72. The term "Constitution" includes two constitutional axes: the first is the *State vs the Citizen* and the second is the *Centre vs the Locality*, see R. HOLME OF CHELTENHAM, *The changing British Constitution, Checks and Balances*, Acts of the Conference of Comparative Public and European Law Association, University of Bari, 29-30 May 2003, 568.

[5] See R. BIN, G. PITRUZZELLA, *Diritto costituzionale*, q., 33: "*per forma di governo si intendono i modi in cui il potere è distribuito tra gli organi principali di uno Stato-apparato e l'insieme dei rapporti che intercorrono fra essi*" and G. FALCON, *Lineamenti di diritto pubblico*, Cedam, Padova, 2011, 126, according to him the "form of government" ("forma di governo"): *"si basa sul modo in cui i massimi poteri statali – in particolare il potere legislativo e il potere esecutivo – sono distribuiti tra gli organi di vertice dello Stato*". For a critical position see M. VOLPI, *Il metodo nello studio e nella classificazione delle forme di governo*, in *Diritto comparato pubblico ed europeo*, no. 1/2015, 131: "*il termine 'forma di governo' è stato coniato dai giuristi italiani e si è distaccato a fatica da quello di forma di Stato, in quanto nelle classificazioni, operate a partire dall'antichità fino all'avvento dello Stato moderno, la seconda nozione si risolveva sostanzialmente nella prima a causa della identificazione che veniva operata fra Stato e Governo*".

[6] See G. TIEGHI, *Fiscalità e diritti nello Stato costituzionale contemporaneo*, Jovene, Napoli, 2012, 30-31.

[7] R. SCARCIGLIA, *Diritto globale e metodologia comparativa: verso un approccio verticale?*, in *Diritto pubblico comparato ed europeo*, October-December, 2015, from 5: "*Allo sguardo del comparatista appare abbastanza evidente come il confronto orizzontale fra regole, istituzioni e procedure, appartenenti allo stesso livello ordinamentale, non sia più soddisfacente, ove sui fenomeni giuridici e le soluzioni oggetto di analisi incidano fattori provenienti da attori globali, (…).Peraltro, si può qui osservare che, se i presupposti con cui un tempo si affrontava, ad esempio, lo studio di istituti classici del diritto costituzionale – come sono, appunto, le fonti del diritto – appaiono inadeguati a interpretare questioni costituzionali che nascono al di fuori di uno Stato sovrano e che con esso possono scontrarsi, occorre rendere maggiormente dinamici e variegati gli strumenti di analisi utilizzati dal ricercatore*". See A. HARDING, P. LEYLAND, *Comparative Law in Constitutional Contexts*, q., 331; G. TIEGHI, *Fiscalità e diritti nello Stato costituzionale contemporaneo*, q., 72.

[88] D. CASTELLANO, *Livio Paladin e il problema della scienza giuridica* in VV.AA., *Riforme opinioni a confronto*, Jovene, Napoli, 2015, 25: "*La convenzionalità della scienza giuridica, coerentemente postulata dal positivismo giuridico e in particolare della geometria legale, costringe, infatti, a far ricorso ai principi generali dell'ordinamento che, però, non sono propriamente tali. Il principio, infatti, consente (deve consentire) di "leggere" l'esperienza, tutta l'esperienza, in maniera non contradditoria*".

[9] "*L'espressione 'formanti' è stata proposta da R. Sacco per indicare diversi insiemi di regole e proposizioni che, nell'ambito di un ordinamento, contribuiscono a generare l'ordine giuridico del gruppo in un determinato luogo e in un determinato tempo*": L. PEGORARO, A. RINELLA, *Sistemi giuridici comparati*, q., 11-15.

2. *Apex Courts and sub-national governments: an istitutional relationship to look into beyond the traditional classifications.*

According to the constitutional traditional categories, the Supreme Courts and the Constituonal Courts are two different types of judges. The first is defined as the highest court within a given legal order, that generally hears civil, criminal and – possibly – administrative cases; the second, instead, is a specialised judge, situated outside the common structure of the judicial brand, with the power to examine legislative (or even executive) acts and to nullify them, if they violates the provisions of the Constitution, according to the judicial review of legislation[10].

Thus, there are two patterns of constitutional adjudication, following the classical definitions: the American and the European model. The prerogative of the American model is the fact that the Supreme Courts are also entrusted, together with every judge, in the judiciary system[11], with the role of reviewing the compliance of ordinary legislation with the Constitution[12]. Otherwise, the European model, according to the Kelsen idea[13], is characterised by the existance of a centralized judicial body in charge of a review of the ordinary laws and it is widespread in the civil law countries [14].

This classification seems to describe clearly the public-law landscape about the mismath Constitutional/Supreme Court; but, both the two quoted parameters do not take into consideration the first – historically speaking[15] – power conferred to a Constitutional Court, that is to govern the relationship between the central government and the local ones, according to the constitutional order provided. Infact, a Constitutional Court has necessarily the task to ensure the observance of the constitutional attributions between the central government and the sub-national bodies, as provided in the Constitution: that "legal" operation constitutes a special control of the legislation based on the subnational constitutional autonomy[16] and depends – among other things – on the pragmatic features of the so called *type of State* taken into consideration[17]. By adopting these classical definitions, this power, related to the *center-periphery* balance[18], can not be attributed to a "*simple*" Supreme Court, because it has the role of judging – in the highest instance – only the civil,

[10] For the traditional classification see: L. GARLICKI, in *Constitutional courts vs supreme court*, in *International Journal of Constitutional Law*, Volume 5, Issue no. 1, 1 January 2007, 44 – 68.

[11] It is not a *proper and reserved* role of the Supreme Courts, because it is also assigned to all the Courts in the country: it is the model of the diffuse constitutional review.

[12] The judicial review of legislation is conferred by U.S. Constitution to the Supreme Court, but it was affirmed in the famous *Marbury vs Madison* case in the 1803, because it was considered the natural consequence of the Constitution's supremacy clause. With the regard to the American constitutional justice system see: W.M. WIECEK, *The Supreme Court in American life*, Johns Hopkins U.P., Baltimore, 1988; H.H. WELLINGTON, *Interpreting the Constitution, the Supreme Court and the Process of Adjudication*, Yale U.P., New Haven, 1991.

[13] H. KELSEN, *Wer soll der Hüter der Verfassung sein?* In *Die Justiz*, 1930-1931, Heft 11-12, Bd. VI, from 576, trad. it. *Chi deve essere il custode della Costituzione?*, in H. KELSEN, *La giustizia costituzionale* (a cura di C. Geraci), Giuffrè, Milano, 1981, from 229.

[14] M. CAPPELLETTI, *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato*, Giuffrè, Milano, 1971; M. CAPPELLETTI, *Judicial review in a comparative perspective*, in *California Law Review*, no. 58, 1970, 58.

[15] The reference is to the American experience: during the Philadelphia's Congress the colonies' representatives decided to adopt the federal system, instead of the confederate one: the Constitution was considered as the "*supreme law of the land*", the highest source of law regulating all the member States and their relationships with the central Government. It soon became clear that the United States needed a national Court which would rule on the issues concerning the constitutional powers of the central Government and the Member States according to the constitutional provisions. But also the Austrian *Verfassungsgerichtsbarkeit* was born with the same task, see L. PEGORARO, A. RINELLA, *Sistemi constituzionali comparati*, q., 598-599.

[16] To analyse this perspective from the Austrian, Spanish and Oklahoma's point of view, see A. GAMPER, *Constitutional Court, Constitutional Interpretation and Subnational Constitutionalism*, in *Perspective on Federalism*, Vol. 6, issue no. 2, 2014.

[17] L. PEGORARO, A. RINELLA, *Sistemi giuridici comparati*, q., 598-603.

[18] See R. HOLME OF CHELTENHAM, *The changing British Constitution, Checks and Balances*, q.

administrative and criminal case: according to the traditional criteria, that kind of adjudication has to be practised only by the Constitutional Court in a proper sense. Nevertheless, there are some tangible examples which show that the roles and the prerogatives just illustrated can not be considered absolute: indeed, the United Kingdom Supreme Court, that is not considered as "constitutional", neither according to the American model, has the task of solving allocation issues between the *center* and the *periphery*. This is only an example to prove that the classical outlines of the comparative public law are no longer sufficient to understand the current condition of sub-national governments[19]: it is necessary to change the elements of the analysis, choosing a different perspective and taking into account other constitutional parameters, regarding directly the pragmatical institutional experiences[20].

This kind of operation needs to be carried out also for the classifications of the several types of State: as just said, federal State and regional State are two categories that does not describe anymore the complexity of the institutional framework[21]. The legal systems, infact, provide for new territorial solutions, which have mixed elements of the two classical models and – also – other original aspects. For example, observing the territorial experiences, one of the new elements to take into account is the differentiation's trend of the sub-national governments. That principle seems to characterise the contemporary not-federal States (like Italy and the United Kingdom): giving legislative, administrative and financial autonomy to those bodies, the central government not only accepts different solutions adopted by the sub-national governments in their legislative competence matters, but also different autonomy's degree among the sub-national bodies[22].

Getting into these things, the scholar has to adopt a comprehensive perspective, taking into account the new evidence resulted, that links the variuos issues: to carry on this process is necessary to consider the whole constitutional context in which the subnational governments are collocated and, in particular, its degree of flexibility. Moreover, it is also necessary to look at the renewed activities of the "apex" Courts. Thus, the comparative method is very useful to explore those new parameters, trying to find a joint legal foundation between different territorial experiences, that could – at first sight – not seem easily comparable: in particular, this paper would take into account Italy and the United Kingdom in order to prove effectively that new relationships among the contemporary dynamics of the subnational governments' and the "apex" Courts.

3. *The relevance of the constitutional framework: brief remarks on the Italian context.*

[19] L. PEGORARO, *Giustizia costituzionale comparata. Dai modelli ai sistemi*, Giappichelli, Torino, 2015, 201.

[20] It essential to give up the classical basis, in order to start from the straight observation of what could be considered as constitutional, in a substantive approach. About that: M. BERTOLISSI, *Autonomia e responsabilità sono un punto di vista*, Jovene, Napoli, 2015, 73: "*L'ottica prescelta dalla dottrina e dalla giurisprudenza costituzionale in tema di autonomie ha scontato gli effetti velenosi prodotti da un armamentario concettuale datato, improntato al più risalente e acritico formalismo, riflesso di analisi letterali e sistematiche dominate da un combinato disposto oltretutto limitato*"; M. CAPPELLETTI, *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato*, q., 8.: "*al di là di generiche formule prive di contenuti, anche i 'valori' cambiano, dunque anche 'la Legge' cambia e dev'essere volta per volta faticosamente, responsabilmente ricercata, ricreata dall'uomo*.

[21] "*La scelta che si impone, scelta coraggiosa ma necessaria, è discendere da quel piedistallo falsante e adottare come nuovo angolo d'osservazione non più la maestà dei poteri sovrani bensì la realtà plurale, composita, complessa della società dal basso, da un osservatorio più ravvicinato, si può raggiungere una visione complessiva e oggettiva del fenomeno giuridico, che prima ancora di essere caratterizzato dalla statualità, si connota per una intima socialità, prima ancora di esprimere lo Stato, esprime quel complesso assai ampio di valori e di interessi rappresentato dalla società civile come fatto globale*": P. GROSSI, *Santi Romano: un messaggio da ripensare nella odierna crisi delle fonti*, in *Diritto e Procedura civile*, giugno 2006, 383-384.

[22] Those special conditions could be established directly by the Constitution, as result of historical processes and political issues, or provided in the Constitution as a viable "options".

The Italian Constitution is the fundamental law of the whole legal system and provides the basis of legitimacy for all sources of law and the activities by the public authority[23]. It is written and "rigid", which means that laws amending the Constitution have to pass a deep-seated and hardened legislative process[24]. That is the result of the Constituent Assembly's fundamental choice in attributing a "*supralegislative*" force to the Constitution, so that the ordinary laws could not amend it or derogate from it: the Italian Constitutional Court was created in order to safeguard and guarantee the compliance with the Constitution. Infact, the Italian Constitutional Court is one of the earliest example of the European model of constitutional review of legislation, arising out of the convergence between the abstract Kelsenian model and the concrete US system: it is not part of the ordinary judicial branch and its jurisdiction concerns only constitutional issues[25].

With regard to the concept of "type of State", Italy is a regional State, comprehending 16 regions having legislative, administrative and financial ordinary autonomy[26] and 5 regions (*Val d'Aosta, Trentino Alto Adige, Friuli Venezia Giulia, Sicilia and Sardegna*) having a special (and graeter) autonomy. The raeasons that explain this autonomous status are multifacted, involving political, international, historical and cultural issues; the allocation of the powers for the "special" regions is established in their statutes, that are constitutional laws. The Italian regional model created in 1948 was considerably reshaped in the 1999-2001 through a constitutional reform which tried to strengthened the legislative and administrative power of the ordinary regions, leaving untouched the prerogatives of the special ones.

The partition of legislative power between the State and the ordinary Regions is written in the Constitution. The matters ascribe to the State are enlisted in the Constitution, while those reserved for the Regions are residual[27]: according to the classical doctrine[28], this was considered a key feature of a federal State, but the Italian case, albeit with its peculiarities, is undoubtedly closer to regional model than to the federal one.

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[23] The Italian Constitution provides a "constitutional democracy": the sovereignty belongs to the people "*which exercises it in the forms and within the limits of the Constitution*" (article 1, Const.). For a general overview of the Italian constitutional system, see A. PISANESCHI, *Diritto Costituzionale*, Giappichelli, Torino, 2017; R. BIN, G. PITRUZZELLA, *Diritto costituzionale*, q.

[24] "Laws amending the Constitution and other constitutional laws must be adopted by each House after two successive debates at intervals of not less than three months, and must be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum cannot be promulgated if not approved by a majority of valid votes. A referendum is not to be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members": T. GROPPI, *The Italian Constitutional Court: towards a "multilevel system" of constitutional review?*, in *Journal of Comparative Law*, no. 2, 2008, 100.

[25] M. CARTABIA, *Of bridges and walls: the "Italian Style" of constitutional adjudication*, in Italian Journal of Public Law, Vol. 1, 2016, 4.

[26] L. PALADIN, *Diritto regionale*, Cedam, Padova, 2000, 38 - 39, about the Italian ordinary regions: "*gli organi fondamentali delle Regioni (...) sono tutti costituiti – direttamente o indirettamente – dai rispettivi corpi elettorali; e ne rappresentano tutti le complessive esigenze, non individuandosi in ragione di uno specifico scopo bensì perseguendo, nell'ambito delle loro competenze, qualunque finalità interessante le popolazioni locali. A questa stregua, si suole affermare in dottrina che (...) le Regioni dispongono di autonomia politica, consistente nella potestà di promuovere un proprio indirizzo, relativamente libero dalle impostazioni statali*". See also A. D'ATENA, *Regionalism in Italy*, in Italian papers on Federalism, no. 1/2013.

[27] Art. 117, Const., contains two lists of matters: the first contains the State esclusive competence's matters (sec. 2) and the second enlists the matters of concurrent legislative power between the State and the Regions (sec. 3): such legislative power is vested in the Regions, except for the determination of the fundamental principles, which are laid down by the State. The third section, instead, establishes a general residuality clause for the benefit of the Regions. See G. F. FERRARIO, *Federalismo, regionalismo e decentramento del potere in una prospettiva comparata*, in *Le Regioni*, no. 4/2006, 590: "Lo studio sia diacronico che sincronico della modellistica comparata dello Stato dimostra, comunque, che i poli estremi rappresentati dalla forma minima della deconcentrazione burocratica mediante delega amministrativa e dalla forma massima del legame confederativo tra enti statuali sovrani sono a frequentazione rarefatta, mentre affollate sono le posizioni mediane occupate dalle variegate forme di federalismo e regionalismo".

[28] M. VOLPI, *La distribuzione territoriale dei poteri: tipi di Stato e Unione Europea*, q., 361; R. BIN e G. PITRUZZELLA, *Diritto costituzionale*, q., 95-96; G. FALCON, *Lineamenti di diritto pubblico*, q., 125.

This brief report of Italian regional reform would be incomplete without mentioning the new rules – introduced by the Constitutional Law no. 1/1999 – that attribute to the Regions the power to enact their Statutes. Indeed, the regional ordinary statutes can now establish the regional form of government[29] and the fundamental principle steering the regional organization; in particular, the Statutes regulate the exercise of holding referendum on regional laws[30].

Moreover, the Constitutional Law no. 3/2001 provided also for the introduction of the so-called "*regionalismo differenziato*"[31]. The new article 116(3) allows ordinary regions to ask for having particular forms and condition of autonomy in specific subject matters, adopting a complex procedure involving both the State and the local authories. That constitutional provision was introduced also in order to fill this inequality's gap[32] between the powers of the ordinary regions and those of the special ones. Infact, for 16 years there were no application of that provision, because several regional initiatives to get greater competences have been stopped by the central government[33]; but now two ordinary regions (Veneto and Lombardia) are trying to apply for the art. 116(3), after the consultative referenda held in their own territories on the 22th October 2017, which have been pointed out, expecially in Veneto, the common feeling of the inhabitants to obtain greater form of autonomy[34]. In a certain way, with the reform of the article 116(3), the Italian legal system has accepted a certain degree of differentiation even in the context of ordinary regions.

In that framework, the Italian Constitutional Court has the power to adjudicate on the constitutionality of the national and regional law, according to the separation of powers provided by the art. 117 and to resolve the jurisdictional conflicts between the State and the Regions, concerning administrative acts or behaviours: this aspect represents the typical confict-solving role of a proper Constitutional Court[35]. A second element, strictly connected to the first, is given by the power

[29] According to article 122(5), the Statutes can choose between preserving the (non-mandatory) rules laid down by the Constitution (providing for the direct election of the President of the Region) or introducing one of various forms of parliamentary government.

[30] On that point, see M. LUCIANI, *I referendum regionali (a proposito della giurisprudenza costituzionale dell'ultimo lustro)*, in *Le Regioni*, no. 6, 2002.

[31] On the differential regionalism: F. CORTESE, *La nuova stagione del regionalismo differenziato: questioni e prospettive, tra regola ed eccezione*, in *Le Regioni*, no. 4, 2017; M. CECCHETTI, *Attualità e prospettive della «specialità» regionale alla luce del «regionalismo differenziato» come principio di sistema*, in Federalismi.it, 3 dicembre 2008; A. MORRONE, *Il regionalismo differenziato. Commento all'art. 116, comma 3, della Costituzione*, in *Federalismo fiscale*, 2007, from 139 ; F. PALERMO, *Il regionalismo differenziato*, in VV.AA., *La Repubblica delle autonomie. Regioni ed enti locali nel nuovo Titolo V*, Torino 2003, from 55; T.E. FROSINI, *La differenziazione regionale nel regionalismo differenziato*, in *Rivista giuridica del Mezzogiorno*, 2002, from 599; N. ZANON, *Per un regionalismo differenziato: linee di sviluppo a Costituzione invariata e prospettive alla luce della revisione del Titolo V*, in VV.AA., *Problemi del federalismo*, Milano 2001, from 51 and ; e L. ANTONINI, *Verso un regionalismo a due velocità o verso un circolo virtuoso dell'autonomia?*, *ibid.*, from 159.

[32] The privileged condition of the "*special*" *regions*, guaranteed by the Constitution, has been created a substantial inequality with regard to other ordinary Regions, because two main reasons: the ordinary Regions could not apply to the same degree of autonomy (except through a constitutional reform) and the Italian Constitutional Court has a very centralist trend in resolving the constitutional cases concerning the autonomy of the ordinary Regions: retrieved in V. TEOTONICO, *La specialità e la crisi del regionalismo*, in Rivista AIC, no. 4/2014, 1: "*Benché la specialità regionale sia spesso considerata, in letteratura, un caposaldo dell'architettura repubblicana, tale sua presunta fondamentalità non ha mai dato luogo, in politica, a un'autentica rivalutazione del suo significato, né a una sua adeguata ricollocazione nel mutato contesto generale (...) Così, la specialità ha perso il suo iniziale valore paradigmatico ed è andata avanti "per forza d'inerzia*".

[33] See E. ARBAN, *The referenda for more autonomy in Veneto and Lombardia: constitutional and comparative perspectives*, in Perspective on Federalism, Vol. 10, issue no. 1, 2018 and L. MICHIELOTTI, *A dieci anni dalla costituzionalizzazione del regionalismo asimmetrico: una mano sul freno a leva oppure un piede sull'acceleratore per l'art. 116, terzo comma, Cost.?*, in *Le Regioni*, no. 1-2, 2012, from 101.

[34] Following the action of Veneto and Lombardia, also Emilia Romagna is nowadays trying to apply for the art. 116(3).

[35] As I said, this is – hystorically speaking – the first task attributed to a constitutional Court in a formal sense. "*In qualche misura la previsione di un conflitto di attribuzione tra Stato e Regioni completa il quadro relativo ai rapporti tra centro e periferia. Se nel giudizio in via principale oggetto di giudizio sono le leggi, statali o regionali, ai sensi dell'art. 127 Cost., in sede di conflitto oggetto di giudizio sono eventuali lesioni di competenza derivamenti, in linea di*

attribuited to each region of directly applying to the Court to challenge the constitutionality of a State law[36]: this is the main tool for guaranteeing the autonomy of the subnatiotional bodies.

However, this report only describes the situation that appears on paper. However, the current condition of relations between the Italian central government and Regions is different and it is determined by two other factors: the centralist tendency of the Italian government and the ItCC's support in doing so[37]. In fact, even if there is not a "*supremacy*" clause, the Italian government has extended the titles of its exclusive or shared competence[38], legislating on matters in which the Regions could do it, in order to compress the autonomy'sphere of the ordinary ones. These issues represent the revival of the "national interest"[39], that was a constitutional parameter formally abolished by the 2001 constitutional reform, which aimed to to strengthen the position of the ordinary Regions. But in these cases, the last word always belong to the ItCC, which has continued to interpret the Constitution from a fit perspective to the formal uniformity[40], without considering the value of pluralism and the autonomy stated in the article no. 5 of the Italian Constitution[41] and adopting – in its review – an orientation rather favourable towards the State. Therefore, the Italian Constitutional Court itself has redesigned the legislative competence between State and the Regions, in favour of the first one, being directly responsible for balancing powers between the "center" and the "periphery". This approach probably dates back to an historical Italian skeptical tendency towards the peripheral management of the resources and the differentiation of specific

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principio, da atti diversi dalla legge": S. BARTOLE, R. BIN, *Commentario breve alla Costituzione*, Cedam, Padova, 2008, II ed., 1175 and T. GROPPI, *La garanzia dell'autonomia costituzionale degli enti locali: un'analisi comparata*, in *Le Regioni*, no. 5/1998, 1035: "*Se la posizione di autonomia della quale godono le collettività locali è tale da imporsi a tutti i soggetti dell'ordinamento, e anche al legislatore che è chiamato a concretizzarla, appare indispensabile, affinché essa non rimanga una mera 'romantica dichiarazione' che esistano strumenti concreti per la sua difesa. E, in effetti, accanto alla tendenza alla valorizzazione dell'autonomia costituzionale delle comunità territoriali se ne colloca un'altra, quella a riconoscere loro forme di ricorso diretto agli organi di giustizia costituzionale*".

[36] "*Se la posizione di autonomia della quale godono le collettività locali è tale da imporsi a tutti i soggetti dell'ordinamento, e anche al legislatore che è chiamato a concretizzarla, appare indispensabile, affinché essa non rimanga una mera 'romantica dichiarazione' che esistano strumenti concreti per la sua difesa. E, in effetti, accanto alla tendenza alla valorizzazione dell'autonomia costituzionale delle comunità territoriali se ne colloca un'altra, quella a riconoscere loro forme di ricorso diretto agli organi di giustizia costituzionale*", T. GROPPI, *La garanzia dell'autonomia costituzionale degli enti locali: un'analisi comparata*, q., 1035.

[37] M. BERTOLISSI, *Autonomia e responsabilità sono un punto di vista,* q., 314; P. CARETTI, *L'assetto dei rapporti tra competenza legislativa statale e regionale, alla luce del nuovo Titolo V della Costituzione: aspetti problematici*, in *Le Regioni*, no. 6/2001; S. MANGIAMELI, *Giurisprudenza costituzionale creativa e costituzione vivente. A proposito delle sentenze n. 303 del 2003 e n. 14 del 2004*, in *Le Regioni*, no. 4-5/2008; F. MANGANIELLO, *L'interesse nazionale scompare nel testo... ma resta nel contesto. Una rassegna dei problemi*, in *Le Regioni*, no. 1-2/2012; R. TONIATTI, *L'autonomia regionale ponderata: aspettative ed incognite di un incremento delle asimmetrie quale possibile premessa per una nuova stagione costituzionale del regionalismo italiano*, in *Le Regioni*, no. 4/2017, 638.

[38] The matters with which the State intervenes are: "protection of competition"; "determination of the basic level of benefits relating to civil and social rights that must to guaranteed throughout the national territory"; "coordination of public finance"; etc.

[39] M. CAMMELLI, *Regioni e regionalismo, la doppia impasse*, in *Le Regioni*, no. 4/2012, 691: "*Particolarmente significativo il caso del «catalogo» delle materie ex art. 117 Cost., dove i dati presi a riferimento erano già stati superati dalla grande trasformazione italiana degli anni '60. Al di là degli elementi di contenuto (v. caccia o pesca) o della concezione sottesa (beneficienza pubblica) le materie erano assunte come «territori», cioè definibili se non definite in modo statico, con confini chiari e comunque da riferire a titolarità soggettive esclusive e riconoscibili*"; S. BARTOLE, *Interesse nazionale, supremazia dello Stato e dottrina giuridica*, in *Le Regioni*, no. 2-3/2001, 565-566.

[40] M. BERTOLISSI, *Autonomia e responsabilità sono punti di vista*, q., 322: "*Comunque sia, credevo valesse la pena di interrompere riflessioni basate su paure ataviche per costruire l'unità sul piano reale: fatto di prestazioni e servizi equivalenti, di eguale dignità nell'istruzione, nella sanità, nei trasporti (...), essendo consapevole della circostanza che l'unità non è data da uniformità formali*".

[41] Italian Const., art. no. 5, "The Republic, one and indivisible, recognises and promotes local autonomies, and implements the fullest measure of administrative decentralisation in those services which depend on the State.

The Republic accords the principles and methods of its legislation to the requirements of autonomy and decentralisation."

interests. However, these two factual elements has to be considered essential to truly describe the Italian regionalism's framework[42].

Moreover, althought the distribution of the legislative matters could appear clear, there is an objective difficulty to subsume in which predefined pattern all the concrete legislative acts should have been inserted[43]: as imaged, the numbers of competence conflicts between the State and the Regions is very impressive[44].

The Italian ordinary regionalism appears very weak and not able to get out from this stalemate: but, in 2015, there was an important decision of the Italian Constitutional Court (no. 118/2015), which constitutes – albeit somewhat hesitant – a partial overuling of the constitutional case-law trend in favour of the regional autonomy, with regard to the application of the article 116(3) and the role of regional advisory referendum.

4. *The relevance of the constitutional framework: brief remarks on the British context.*

The United Kingdom does not have a written Constitution: the UK Constitution is made up of different legal sources layered over the time, such as statutes having constitutional value, constitutional conventions and pivotal common law's judgments, which form the fundamental principles of British legal system, regulating the relationships between the political powers and ensuring the human rights[45]: UK Constitution has a higher degree of flexibility than the Italian Constitution[46], even if it is strongly rooted in the British tradition.

A part from the unwritten Constitution, the British constitutional context differs from most European countries in other two aspects: the absence of the classic idea of State[47] and the principle of parliamentary sovereignty. This principle means that Westminster Parliament can enact any law, without any limit[48], so that its Acts are supreme in the hierarchy[49]: the immediate consequence is

[42] "*Si tratta di una costante del Titolo V della Parte Seconda della Costituzione, visto che, come è noto, specialmente dopo la riforma del 2001, il diritto vivente delle relazioni tra Stato, Regioni e altre autonomie territoriali risulta ben lontano da ciò che si potrebbe desumere da una semplice lettura della lettera della Costituzione stessa e da ciò che ci si poteva (o ci si auspicava di) attendere all'indomani della sua revisione*": F. CORTESE, *La nuova stagione del regionalismo differenziato: questioni e prospettive, tra regola ed eccezione*, in *Le Regioni*, no. 4/2017, 690.

[43] M. BENVENUTI, *The Constitutional Distribution of Legislative Powers in Italy: recent judgments of the Constitutional Court*, in *Italian Journal of Public Law*, Issue no. 2, 2015, 392.

[44] In the 2017, 114 questions of constitutionality were submitted by "direct review".

[45] *Statutes* are laws passed by Parliament and they are generally the highest form of law. *Conventions* are unwritten practices, which have consolidated during the time and regulate the business of governing. The term *"common law"* means, instead, the law developed by the courts and judges through practical cases. The research, due to comprehend what the British Constitution is made of, has to encompass all of them, and more besides, including local government's legislation. See P. PERNTHALER, *The English Roots of European and Global Constitutionalism*, Acts of the Conference of Comparative Public and European Law Association, University of Bari, 29-30 May 2003, 527: "A noteworthy feature of English constitutional law is that (…) namely to ensure liberty and to allocate political power within a representative system based on binding legal instruments and mechanism of control".

[46] "The constitution of the United Kingdom is unwritten/uncodified, in the sense that it is not contained in any single document, (…) it is relatively flexible, in the sense that any aspect can be changed by way of ordinary legislation and certain aspects can be modified by convention", P. LEYLAND, *The Constitution of the United Kingdom*, Hart Publishing, Oxford, 2012, 2.

[47] G. W. JONES, *The multi-dimensional Constitution in the United Kingdom: centralisation and decentralisation*, Acts of the Conference of Comparative Public and European Law Association, University of Bari, 29-30 May 2003, 394.

[48] The reference is to the Albert Dicey's thought in his "*Introduction to the study of the Law of the Constitution*". However, the Charter of Fundamental Rights of the European Union and the EU legislation has affected that secular principle, directly conditioning the Parliament's legislative activity.

[49] This arrangement, derived directly from the *Bill of Rights 1689*, has given to the Parliament the fundamental role of protecting the human rights; see P. LEYLAND, *Civil Liberties and Human Rights: the Parliamentary Legacy Re-examined*, in Acts of the Conference of Comparative Public and European Law Association, University of Bari, 29-30 May 2003, 107.

that no institution – any Courts – has the capacity to declare that a statute is beyond the power of Parliament[50]. The EU legislation and the European Convention of Human Rights have effect in the UK thanks to the European Communities Act 1972 and the Human Rights Act 1999[51]. The principle of parliamentary sovereignty needs to be considered according to the operation of the *rule of law*, which assures that all public powers act lawfully, in order to protect citizens' rights and freedom[52]. According to that principle, the UK Parliament is – at the same time – a legislative and a constitutional organ[53], depending on the matter of the statute law entered into force. For that reason, the UK does not have a constitutional Court: the power of reviewing a law is entitled the same Parliament; any constitutional justice system is – apparently – contemplated in the United Kingdom.

With regard to sub-national governments, the United Kingdom has been considered a unitary State until the 1998, when the *devolution* broke into its constitutional context. The U.K. *devolution* is a complex phenomenon one of a kind: speaking generally, it could be defined as the transfer of powers from the central Parliament and the ministers to a subordinate elected body[54]: starting from 1998 Scotland, Wales and Northern Ireland have reached different "*degrees*" of autonomy from the central power – which is represented by Westminster Parliament and U.K. government – by a process of transferring legislative and administrative powers to them[55]. Northern Ireland chose the devolution form since the partition of Ireland in 1922: only in this case, devolution was a key part of an agreement, the well known as "*Good Friday Agreement*" or "*Belfast Agreement*", which was supported by voters in a referendum in May 1998. Scotland and Wales did have another kind of political path: as a result of the political pressure, particularly in Scotland[56], in September 1997 the Labour Party held two referendums[57] (one in Scotland and the other one in Wales) on whether to

[50] In Italy, where the Constitution contains fundamental rights and principles, the parliamentary activity is screened by the Constitutional Court. On the other hand, about *parliamentary sovereignty* see: N.W. BARBER, *The afterlife of Parliamentary sovereignty*, in *International Journal of Constitutional law*, Vol. 9, Issue no. 1, 2011, 145: "Once the Court - or anyone else operating within the legal order - has concluded that a document is a statute, it is obliged to treat that document as legally binding, unless it has been repealed by later legislation"; D. JENKINS, *Common law declaration of inconstitutionality*, in *International Journal of Constitutional law*, April 2009, 193: "Parliamentary sovereignty, nevertheless, ensures that the democratically elected legislature retains the final word over the unelected judiciary".

[51] That question is very prominent after Brexit and the Miller case, see: G. CARAVALE, *Sovranità parlamentare vs sovranità popolare: nel Regno Unito si discute "The constitutional case of the century"*, in *Nomos*, no. 3/2016; F. SGRÒ, *Il caso "Brexit": qualche considerazione sulla sovranità parlamentare e sul sistema delle fonti nell'ordinamento costituzionale britannico dopo la sentenza della Supreme Court of the United Kingdom*, in *Federalismi.it*, no. 5/2017.

[52] If this institutional mechanism based on the rule of law does not work, the courts are called to intervene and to ensure the individual rights: see M. LOUGHLIN, *Public Law and Political Theory*, Oxford, Clarendon Press, 1992, 141.

[53] C. CHIMENTI, *Noi e gli altri. Compendio di diritto costituzionale italiano e di elementi comparativi, Sintesi di ordinamenti stranieri* (vol. II), *Gran Bretagna, Stati Uniti, Germania* (par. I), Torino, 2001, from 36.

[54] V. BOGDANOR, *The new British constitution*, Hart Publishing, Oxford and Portland – Oregon, 2009, 89.

[55] "More precisely, devolution may be defined as involving three elements: the transfer to a subordinate elected body, on a geographical basis, of functions at present exercised by ministers and Parliament"; P. LEYLAND, *The multifaceted constitutional dynamics of U.K. devolution*, in *International Journal of Constitutional Law*, Vol. 9, Issue no. 1, 2011, 253.

[56] In particular, for Scottish devolution, see: I. RUGGIU, *Le politiche della devolution scozzese: unus rex unus grex unalex?*, in *Le Regioni*, no. 6/2004, 1270: "*La necessità di avere un proprio organo legislativo era particolarmente avvertita anche per soddisfare un'altra esigenza di differenziazione. La Scozia si trovava, infatti, dall'Act of Union 1707 di fronte al seguente paradosso: aveva conservato, accanto alla propria religione, incarnata dalla presbiteriana Church of Scotland, un autonomo legal system. Con tale espressione si fa riferimento alle norme civili e penali, tanto di diritto sostanziale che processuale. Ebbene, tale fondamentale settore dell'ordinamento era andato nel corso dei secoli ossificandosi e sviluppandosi in modo del tutto disorganico*"; V. BOGDADOR, *Devolution in the U.K.*, Oxford Universitary Press, Oxford, 1999; and A. TORRE, *Il territorial government in Gran Bretagna*, Cacucci, Bari, 1991, 91.

[57] The fact of using referenda, to ratify an Act of Parliament about devolution, is not irrelevant from a constitutional and comparative point of view: in the 1979, during the first attempt to introduce sub-national governments, a referendum was used in Scotland, and the same thing happened in the 2014 when the Scottish government held a referendum on the Scottish independence."Referendums are not regular feature of the British Constitution. There are no basic rules to determine when a referendum should be held, as in some written constitutions. Instead, the Government may decide to hold a referendum if it considers it is politically convenient to reach a decision only on the basis of

create two devolved legislatures: the majority of voters chose to establish a Scottish Parliament and a National Assembly for Wales[58]. Just after the referenda, devolution of power was immediately introduced by Westminster, without an overall reform: the *Scotland Act 1998*, the *Government of Wales Act 1998* and the *Northern Ireland Act 1998* are the statutes, which govern the renewed relationships between the devolved public body and the central State[59]. Following the criteria indicated, the devolution phenomenon represents the most important legal issue related to the question of the *Centre versus the Locality* in the UK: it had (and still has) a significant impact on the constitutional dynamics of the United Kingdom. The principle of differentiation is easily recognisable also in the UK devolution phenomenon and constitutes one of the peculiar features of devolution[60]: devolution legislation and administration have not set up the same structure of government in Scotland, Wales and Northern Ireland, creating an asymmetric structure: under the devolution legislation of 1990s, the three sub-nations have three different constitutional arrangments[61]. England was completely omitted from any devolution process (it's the so-called *West Lothian Question*[62]), creating an unaspected inequality's situation[63]. On the other hand, Scotland has the strongest form of devolution, considering the width of its legislative and administrative powers. The devolution reform has confirmed the British cultural and administrative tradition of approaching constitutional changes in a piecemeal rather than a comprehensive manner[64]: the "*ad hoc model*" implies that the central government could assess the impact of devolution over a period of time and – then – decide to change its approach, capping the previous development's manner and trying a new process. However, the British legislation allows sovereignty to be taken back by Westminster, because – not having a written Constitution – it is not clear if this territorial arrangement is destined to last[65].

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popular support: for example the referendum held in May 2011 on electoral reform": A. RILEY, P. SOURCES, *Common law, legal English and grammar, a contextual approach*, Hart Publishing, Oxford, 2014, 89.

[58] For a devolution's brief summary see: *The Union and devolution*, House of Lords, Select Committee on the Constitution, 10th Report of Session 2015–16, 25 May 2016; *Devolution of powers to Scotland, Wales and Northern Ireland*, in www.gov.uk/, 18 February 2013.

[59] They contain the rules regarding the new arrangement of the competences between the devolved institutions and the central powers, comprehending legal provisions about the legislative, the administrative and the financial powers.

[60] The asymmetry represents the immediate consequence of British devolution's pragmatical approach. The way in which devolution has been developed testifies another significant characteristic: the "*incremental*" or *ad hoc* nature, P. HOGWOOD, *The Asymmetric Institution and Politics of Devolution*, q., 410.

[61] This could be assimilated to the phenomenon of "*differentiated regionalism*", which is partially present also in Italy: the so-called "*special statute regions*".

[62] On the West Lothian Question: P. LEYLAND, *The multifaceted constitutional dynamics devolution of U.K.*, in *International Journal of Constitutional law*, q., 265: "We next turn to England, by far the most populous part of the United Kingdom, which was entirely omitted from the devolution equation in the sense that no equivalent nationwide layer of regional or devolved government was proposed to coincide with devolution elsewhere"; A. TORRE, *Scozia: devolution, quasi-federalismo, indipendenza*?, in *Le Istituzioni del Federalismo*, no. 1/2013, 168: "*La West Lothian, in sintesi, determina un'evidente situazione di sopravvalutazione politica della rappresentanza della Scozia devoluta in seno al Parlamento del Regno Unito, creando un'antinomia che invero consegue all'intera riforma devolutiva così come applicata a tutte le aree substatali del Regno Unito, ma che con più diretta attinenza al caso della Scozia produce un considerevole impatto sull'attività del Legislativo britannico e un macroscopico squilibrio politico all'interno della Camera dei Comuni*"; see also P. LEYLAND, *La multi-layered Constitution e il tentative di devolution nelle regioni inglesi*, in *Le Regioni*, no. 1/2006, 22 and I. RUGGIU, *Aspetti recenti della devolution nel Regno Unito: uno Stato territoriale "a metà" tra occasionalismo riformista, asimmetria e pax partitica*, in *Le Regioni*, no. 6/2005, 1161.

[63] For that reason in the 2015 various procedural changes ("*English votes for English laws*") were introduced in the House of Commons in order to do that the legislation which affects only England requires the support of a majority of MPs representing English constituencies.

[64] S. BULMER, M. BURCH, *Europeanisation, Change and Devolution in the UK*, UACES Conference, Central European University, 6-8 April 2000.

[65] "*The UK Parliament will of course remain sovereign, but the essence of devolution is that for the better government of our country, certain powers are passed on to an elected Scottish Parliament*", G. ROBERTSON, June 1996, quoted in M. KEATING, *Remeking the Union. Devolution and British Politics in the 1990s*, London-Portland, Frank Cass, 1998.

In the 2005 the *Constitutional Reform Act* introduced, among the other things, the United Kingdom Supreme Court (UKSC), that came into force in the 2009. The UKSC is the final court of appeal in the UK for civil cases, and for criminal cases from England, Wales and Northern Ireland and it has taken over jurisdiction about the so called "*devolution issues*" from the Judicial Committee of the Privy Council, having the power to resolve the devolution conflicts between the central power and the devolved legislature according to the different competences attribuited in the Scotland, Wales and Northern Ireland Act[66]. It was thought to be a general high court, interpreting national statutes and to make a clear separation between the judiciary and the legislature[67]. The UKSC is itself subject to the principle of parliamentary sovereignty, which means that its power of control the statutes' lawfulness is fairly limited[68]: it practises a weak form of judicial review of legislation, declaring the mere incompatibility of the legislation with the *Human Rights Act*[69].

The change taking place about the role of the sub-national governments has also brought to new kinds of decisions delivered by the apex Courts, which regard not only the division of power issues between the sub-national bodies and the central governments, but also the wider constitutional dynamics involved. Considering the UK constitutional system, Axa (2011) and Agnew (2017) cases are fundamental for the purpose of this paper; on the other hand, as anticipated, the ruling no. 118/2015 of the ItCC has opened a new path towards the greater autonomy of the Italian ordinary regions and the role of territorial referenda.

5. *Decision no. 118/2015: a new role of the Italian Constitutional Court about the sub-national dynamics?*

Veneto is an Italian ordinary region, bordering two special regions (Trentino-Alto Adige e Friuli-Venezia Giulia). In Veneto, at the beginning of the 1990s, new regional movements for autonomy began to appear, progressively acquiring an important position in the institutional scenario. During that period, different political parties proposed several attempts to lauch a popolar consultation asking to the regional population if they would have got greater autonomy in Veneto. In all these cases, the italian Prime Minister challenged the regional laws, which was all annulled by the Constitutional Court[70].

Firstly, in the judgment no. 470/1992, although the Court admitted that the referendum initiatives and the regional legislation may also regard the constitutional matter of the territorial communities, it affirmed that a regional consultative referendum could not exercise any form of influence or orientation in relation to the subsequent stages of the legislative law-making process, because of "*the risk of adversely affecting the constitutional and political order of the State*"[71]. The perspective

[66] Each of three statutes enables the Supreme Court to rule whether the primary legislation, made by each of the devolved legislatures, is outside their fields of competence. The devolution statutes provide for a special procedure for the devolution issues raised in litigation, including mechanisms of referring (by courts or law officers) or appealing (by parties) to the Supreme Court. There are two main types of devolution issues cases: in fact, the legality of the acts of devolved institutions, embodying both the legislative both the executive branch, can be challenged for acting 1) beyond the boundaries of the subject-matter of competences by the devolution acts 2) in a way which is incompatible with Human Rights Act.

[67] Lord Falconer declared: *"(...) By creating a Supreme Court we will separate fully the final court of appeal from parliament*".

[68] E. GIBSON-MORGAN, *The United Kingdom Supreme Court and Devolution Issues: Towards Constitutional Review?*, q., 94.

[69] This kind of judgments could be compared to the "*sentenze-monito*" ("*warning judgments*") of the Italian Constitutional Court.

[70] Italian Constitutional Court, judgment no. 470/1992 and Italian Constitutional Court, judgment no. 496/2000.

[71] ItCC, judgment no. 470/1992, *Considerato in diritto*, par. 4: "*A questo va aggiunto il rilievo che il procedimento di formazione delle leggi dello Stato - quale risulta fissato negli artt.70 e ss. Costituzione - viene a caratterizzarsi per una tipicità che non consente di introdurre, nella fase della iniziativa affidata al Consiglio regionale, elementi aggiuntivi non previsti dal testo costituzionale e suscettibili di "aggravare", mediante forme di consultazione popolare*

adopted by the ItCC was a formal one, focused on the law-making procedure's typicalness[72]. In the later ruling (no. 496/2000), instead, the Court used more substantial arguments to support the incostitutionality of a regional consultative referendum to change the Constitution's provisions about the autonomy of the Italian ordinary regions: it explained that the danger was represented by the fact that the regional popular initiative could influence the national electorate, by directing it towards the constitutional basis.[73] At the same time, the ItCC identified the main function of the referendum in the democratic representative system, which is that - in fact – of "vivifying representation", not because the choices made by referenda have to support those made in the representative seats, but because the referenda serve to prevent the implosion of the system of political delegation, when it is no longer able to record and satisfy the questions from below[74]. However, it has to be taken into account that these two rulings were adopted before the costitutional reform 2001, which introduced the possibility for the ordinary regions to get greater autonomy in specific matters.

In 2014 the Region Veneto introduced a new law (no. 15/2014), which included – among other things – the opportunity of holding a regional consultative referendum to get greater autonomy, without mentioning directly the article 116(3)[75]. In particular, the regional law no. 15/2014 provided for a negotiation between the Regional President and the national government to define the contents of the advisory referendum on the acquisition of additional forms and conditions of autonomy for Veneto[76]. In case of unsuccessful negotiations, article no. 2 authorized the Regional President to call for an advisory referendum on five different questions, as detailed below. The Italian

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variabili da Regione a Regione, lo stesso procedimento. Tale considerazione, se vale in relazione al potere di iniziativa delle Regioni così come configurato in generale nell'art. 121 Cost., vale a maggior ragione nei confronti di una iniziativa regionale quale quella in esame, destinata ad attivare un procedimento di revisione costituzionale ai sensi dell'art. 138 Cost.:e questo anche in relazione al fatto che la disciplina costituzionale prevede già, al secondo comma dell'art. 138, una partecipazione popolare al procedimento, ma nella forma del referendum confermativo, cui può essere chiamato, per il rilievo fondamentale degli interessi che entrano in gioco in sede di revisione costituzionale, solo il corpo elettorale nella sua unità".

[72] See M. DOGLIANI, F. CASSELLA, *La "solitudine" del Parlamento nella decisione sulla forma dell'unità nazionale,* in *Le Regioni*, 1993, from 1304; N. ZANON, *I referendum consultivi regionali, la nozione di procedimento e le esigenze del diritto costituzionale materiale*, in *Giur. cost.*, 1992, from 4252.

[73] ItCC, judgment no. 496/2000: *Considerato in diritto*, par. 5: "*Se, muovendo da questo quadro sistematico, si passa allo scrutinio della legge impugnata, non é difficile rendersi conto che essa, per il ruolo che pretende di assegnare alla popolazione regionale in un procedimento che ha come suo oggetto e come suo fine politico immanente il mutamento dell'ordinamento costituzionale, incrina le linee portanti del disegno costituzionale proprio in relazione ai rapporti tra l'istituto del referendum e la Costituzione. E' innanzitutto evidente che laddove il popolo, in sede di revisione, può intervenire come istanza ultima di decisione e nella sua totalità, esso è evocato dalla legge regionale nella sua parzialità di frazione autonoma insediata in una porzione del territorio nazionale, quasi che nella nostra Costituzione, ai fini della revisione, non esistesse un solo popolo, che dà forma all'unità politica della Nazione e vi fossero invece più popoli (...). Né varrebbe affermare che nel referendum consultivo in questione il corpo elettorale agirebbe come espressione di autonomia politica e non come istanza di innovazione costituzionale. Anche intesa nella sua accezione più lata, l'autonomia non può infatti essere invocata per dare sostegno e forma giuridica a domande referendarie che investono scelte fondamentali di livello costituzionale. Non è quindi consentito sollecitare il corpo elettorale regionale a farsi portatore di modificazioni costituzionali, giacche le regole procedimentali e organizzative della revisione, che sono legate al concetto di unità e indivisibilità della Repubblica (art. 5 Cost.), non lasciano alcuno spazio a consultazioni popolari regionali che si pretendano manifestazione di autonomia.*

[74] See M. LUCIANI, *I referendum regionali (a proposito della giurisprudenza costituzionale dell'ultimo lustro)*, in *Le Regioni*, no. 6/2002, 1390-1391. See also ItCC, judgment no. 453 del 1989: "*La partecipazione delle popolazioni locali a fondamentali decisioni che le riguardano costituisce un principio di portata generale che è connaturale alla forma di democrazia pluralista accolta nella Costituzione repubblicana ed alla posizione di autonomia riconosciuta agli enti territoriali nel Titolo V, Parte II, della Costituzione. La possibilità di concorrere alla determinazione delle scelte delle quali si è destinatari, infatti, vivifica gli istituti della rappresentanza offrendo agli organi politici e amministrativi l'opportunità di un più stretto raccordo con le popolazioni amministrate*".

[75] See D. TEGA, *Venezia non è Barcellona. Una via italiana per le rivendicazioni di autonomia*?, in *Le Regioni*, no. 5-6/2015, 1141-1146.

[76] See T. CERRUTI, *Istanza autonomiste e secessioniste nelle pronunce dei giudici costituzionali*, in *Federalismi.it*, no. 7/2018, from 95.

Government challenged the constitutionality of the regional law before the Constitutional Court, which adopted a partial but significant overulling[77] despite for its two previous judgments on the same issue, analyzing every single questions contained in the referendum law and underlining – one again – the importance of the territorial referenda[78].

The first question intended to ask citizens of Veneto whether they would be in favour of additional forms and conditions of autonomy for the region. Even if this question made no explicit reference to article 116(3), Const. and so did not specify the subject matters on which to seek more autonomy, the Italian Constitutional Court upheld it in its ruling because the regional disposition echoed the tone and wording of article 116(3) Const.[79]: basically, the eventual referendum to held would have concerned simply the matters listed in the art. 116(3) Const. and according its procedure. The ItCC, infact, highlights that the referendum is a connecting tool between the (regional) population and the representative institutions, stating its placement upstream of the procedure of the art. 116(3): the regional referendum remains a separate process, but its outcome could have a great political value also in the context of the differentiate regionalism. This perspective, emerging from the needs and requests of Veneto's people, shows the pragmatical character of the referendum's proposal, which is completely new to the Italian system and brings this experience closer to the devolution one[80].

All the other questions were struck down by the ItCC as unconstitutional: questions no. 2 and 3 dealt with fiscal issues and drew a financial pattern in which the tax revenues collected in the territory of Veneto should be kept there for at least 80% or, in the portion cashed by the central government, at least 80% should be used locally: the ItCC argued that these two issues collided with the constitutional principles of coordination of public finance and fiscal matters. The same result had the question no. 4 concerning the removal of all allocation constraints still existing on the financial resources belonging to the region[81].

Finally, question no. 5 asked "Do you want that Veneto becomes a special region?"[82]. Also in this case, the ItCC declared the unconstitutionality of the question, as it infringed a fundamental constitutional issue falling outside the scope of a regional referendum.

Nevertheless, this ruling seems to represent the beginning of a new way of considering the regionalism in Italy by the Constitutional Court, in a more favoured point of view towards local self-government, enhancing the institutional pluralism. The judgment also testifies a new approach to the direct democracy instruments, which upgrades the role of the citizen in the decision-making process. Indeed, there is a perceptible connection between the introduction of new sub-levels of government (or the reinforcing of the existing ones) and direct democracy tools: the referendum

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[77] M. BERTOLISSI, *Riforme, referendum che porta ad un bivio*, in *Il Tirreno*, September 29, 2017.

[78] P. LEYLAND, *Referendums and the UK Constitution: Parliamentary Democracy versus the explosion of Popular Sovereignty*", in *Federalismi.it*, no. 1/2017.

[79] E. ARBAN, *The referenda for more autonomy in Veneto and Lombardia: constitutional and comparative perspective*, in *Perspective on Federalism*, Vol. 10, issue no. 1, 2018, 254. "(…) in other words, the fact that the language used was almost identical to the constitutional provision was enough for the ItCC to conclude that the only additional forms and conditions of autonomy that Veneto could seek were those in compliance with the constitutional provision of article 116(3).

[80] Taking into account, in a public comparative point of view, also other European experiences, the referenda represent the main tool used to support the local populations' demand to get greater autonomy, like in Veneto, Scotland, but also in Catalonia.

[81] For the ItCC this question touched upon article 119(5) Const. on fiscal federalism, and thus upon a constitutional principle that is excluded from referendum.

[82] F. CORTESE, *La nuova stagione del regionalismo differenziato: questioni e prospettive, tra regola ed eccezione*, q., 692: "*Che il regionalismo differenziato ex art. 116, comma 3, Cost. non possa essere la via all'autonomia speciale è acquisizione smentita, in primo luogo, dalla circostanza (assorbente) che il comma 1 della medesima disposizione nomina espressamente quali possano essere le specialità regionali, accreditandone così il numerus clausus (come ha ricordato anche la Corte costituzionale nella sent. 118/2015, sulla quale si tornerà infra nel testo) e affidandone la definizione dello statuto ad una legge costituzionale*".

could be used, as a strong endorsement capable to force also the resistance of the national parliaments, enhancing the popular will[83].

In front of these new territorial issues, the ItCC was able to apply its balancing and "*breathing role*"[84], listening to the local demands[85]. On the other hand, what is controversial about the ruling is the persistent formal approach of the ItCC regarding also the role of the citizens in those particular issues: in fact, the Court did not accept to trace the consultative referendum under the sphere of the freedom of expression[86].

6. *Axa and Agnew cases: is the UKSC "just" a Supreme Court?*

Scotland has the strongest form of devolution of power: the Scotland Act 1998 vested the Scottish Parliament with the power to make primary legislation for Scotland. Scottish devolution's model is based on the traditional separation between parliamentary and executive functions[87]. Greater powers has been introduced with the *Scotland Act 2012* and, following the *Scottish Independence Referendum 2014*, with the *Scotland Act 2016*, with a particular regard to the tax-raising power. Even if the "No" won, such popular support in the referenda has given strong legitimacy to the devolution process, so that any future devolution rentrenchment should be approved by popular vote[88]. Infact, Scotland Act 2016, transposing the Smith Commission's indications[89], changes the constitutional *status* of the Scottish Parliament, providing that the Scottish Parliament and the Scottish Government "*are a permanent part of the United Kingdom's constitutional arrangements*" and that they cannot be abolished unless through a Scottish referendum[90]: this aspect also affects the UK constitutional dynamics and, particularly, the concept

[83] On the connection between sub-national governments and direct democracy see P. LEYLAND, *Referendums and the UK Constitution: Parliamentary Democracy versus the explosion of Popular Sovereignty*", in Federalismi.it, no. 1/2017 and E. HARRIS, *Redifining Parliamentary Sovereignty: the example of devolution referenda*, in Perspective on Federalism, Vol. 3, Issue no. 3, 2011.

[84] P. Grossi, 2016, Report of the Constitutional Court President in which he states that the Constitutional Court is an "*organo formalmente estraneo al sistema della tripartizione dei poteri, ma sostanzialmente dotato di compiti di "giustizia", più che solo di stretta giurisdizione, esso svolge come una funzione "respiratoria" dell'ordinamento, indispensabile nella dimensione costituzionale della convivenza*".

[85] The Veneto's referendum took place on the 22th October 2017: the partecipative quorum was reached (57.2%) and more than 98% of people voted in favour of getting more autonomy. Since that moment, a negotiating between State and Veneto has begun to find an agreement on the new matters subject to greater autonomy:

[86] C. FASONE, *Una, indivisibile, ma garantista dell'autonomia (differenziata): la Repubblica italiana in una recente pronuncia della Corte Costituzionale sulle leggi regionali venete nn. 15 e 16 del 2014*, Revista Catalana di Dret Pùblic, August 4, 2015: "*La Corte non considera in alcun modo fondata l'eccezione sollevata dalla difesa della Regione Veneto secondo cui il referendum sull'indipendenza altro non sarebbe che un "sondaggio formalizzato" e precisa che"è giuridicamente erroneo equiparare il referendum consultivo a un qualsiasi spontaneo esercizio della libertà di manifestazione del pensiero da parte di più cittadini, coordinati tra loro (par. 5)", ex art. 21 Cost. Al contrario, a parere della Corte, tutti i tipi di referendum popolari, nazionali o regionali che siano e anche se non immediatamente produttivi di effetti giuridici*".

[87] The Scottish Parliament is composed of a single chamber of 129 elected members and it appoints the First Minister, which is empowered to nominate the ministers of the Scottish Executive (now called the Scottish Government). The Scottish Government is the administrative body and it is responsible for the implementation of policy in Scotland, see P. HOGWOOD, *The Asymmetric Institution and Politics of Devolution*, q., 414.

[88] P. LEYLAND, *Referendums and the UK Constitution: Parliamentary Democracy versus the explosion of Popular Sovereignty*", in Federalismi.it, no. 1/2017, 7.

[89] The Smith Commission was set up to handle the new devolution stage after the Scottish referendum 2014. It consisted of two representatives of each major Scottish party. On May 22 2015, it issued his own *Command Paper*, titled "*Scotland in the United Kingdom: An enduring settlement*", which included the so-called *Draft Scotland Clauses 2015*, that provided the basic structure of the *Scotland Act 2016.*

[90] Scotland Act, 2016, Part 2A.

of parliamentary sovereignty[91]. According to *section 29, par. 1, Scotland Act 1998*[92], an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament, that is limitated by the matters reserved to Westminster Parliament[93]. All other matters are devolved and, on those, Scottish Parliament may issue both primary and secondary legislation.

With regard to the legislative power, Scotland Act, sec. 28 (7) also affirms: "*This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland".* This provision emphasizes the principle of parliamentary sovereignty, stating that Westminster Parliament remains competent for all the matters, including the devolved ones[94]. However, section 28 has to be read and interpreted taking into account the so-called "*Sewel convention*", which represents the soft law's first application to the devolution context[95]. The Convention – reached between the British and the Scottish authorities after the Scotland Act 1998 - states that the UK Parliament would not normally legislate, with regard to the devolved matters, without the consent of the devolved legislature: the consent would be expressed by the Scottish Executive, through a *motion* to be submitted to the Scottish Parliament. The Scotland Act 2016 has formalized the "*Sewel Convention*", introducing the sec. 28(8) which states: "*But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament"* [96].

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[91] See M. ELLIOT, "*The Draft Scotland Bill and the sovereignty of the UK Parliament*", in *Public Law for Everyone blog*, 22 January 2015; K. CAMPBELL, "*The draft Scotland Bill and limits in constitutional statutes*", in *Uk Constitutional Law Association*, January 30, 2015.

[92] Scotland Act, sec. 29: *(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.*

(2) A provision is outside that competence so far as any of the following paragraphs apply—

(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,

(b) it relates to reserved matters,

(c) it is in breach of the restrictions in Schedule 4,

(d) it is incompatible with any of the Convention rights or with EU law,

(e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.

[93] Some reserved matters are: the Constitution, Political Parties, Foreign Affair, Public Service, Defend, Treason, Financial and Economic matters (not entirely), Home Affairs (not entirely), etc.

[94] P. LEYLAND, *The multifaceted constitutional dynamics of U.K. devolution*, q., 269; A. GAMPER, *Devolution in the United Kingdom: a new model of European Federalism*, q., 1106.

[95] In the devolution framework the criterior of competence was often juxtaposed with that of *consensus*, in order to avoid the conflicts in front of the Supreme Court and to ensure a deep connection between the different governance's levels: the Sewel Convention is the first evidence of this view. The soft law method represents a milestone of the Scottish devolution: it creates several agreements, containing operative protocols in order to improve the cooperation among the various tiers of government. This approach makes sure that there were so few case law about devolution issues before the United Kingdom Supreme Court. The soft law method, which includes the Sewel Convention, has allowed to integrate the devolution original structure - because of its open-ended nature – contributing to maintain the continuity of the legal system, facilitating the smooth transition of policy and helping the communication between the many overlapping layers of the new governance. The use of soft law is one of the reasons for the almost lacking of litigation between the devolved government and the central power in front of the UK Supreme Court: the key role of concordats, for the administrative implementation of devolution, has largely avoided positions of conflict between the central and devolved institution. On the Sewel Convention: "*La sua rilevanza è massima se si pensa che con essa si assiste all'introduzione «in via convenzionale» del principio di competenza il quale, ragionando conformemente alla teoria della sovranità parlamentare, non avrebbe patria nel Regno Unito*", I. RUGGIU, *"Devolution" scozzese quattro anni dopo: "the bones... and the flesh"*, in *Le Regioni*, no. 5/2003, 767; and P. LEYLAND, *Inter-governmental relations post devolution in the U.K.: Coordination, Cooperation and Concordats*, in VV.AA., *Regional Councils and Developed Forms of Government*, CLUED, Bologna, 2006, 160.

[96] "*The practise regarding Sewel Motions, which are now referred to officially as legislative consent motions, has not turned out exactly as predicted because the Scottish Parliament, Northern Ireland Assembly and latterly the Welsh Assembly have been prepared to allow Westminster to continue to legislate in a number of devolved areas. Nevertheless, it should be stressed that the original practice in Scotland was revised requiring the express agreement of the whole Scottish Parliament to avoid the risk of devolved parliaments and assemblies becoming "mere legislative"*

In the light of above, the UKSC has faced, thanks to the devolution issues, two different constitutional questions regarding the role of the Scottish Parliament (Axa case) and that of the Sewel Convention (Agnew case).

Infact, the main question of the Axa case[97] was whether the Acts of Scottish Parliament are amenable to judicial review, and if so on what grounds. Lord Hope defines the issue as "*a matter of great constitutional importance*", because it goes "*to the root of the relationship between a democratically elected legislature and the judiciary*"[98].

Indeed, the UKSC affirms that the all the courts, in general, and also itself are limited in their ability to scrutinise Acts of Scottish Parliament, because it benefits from a special *status*[99], shared with U.K. Parliament, arising "*from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate*"[100]. So, the UKSC ultimately established that Acts of the Scottish Parliament could not be subject to judicial review on the grounds of unreasonableness, irrationality and arbitrariness[101]. In fact, even if the Scottish Parliament is not a sovereign parliament in the sense that Westminster can be described as sovereign, it enjoys two reasons for its authority: the first is that the U.K. Parliament has vested in the Scottish Parliament the power to make laws that are within its devolved competence; the second is given by its tradition of universal democracy, from which "*it draws its strength from the electorate*". So the UKSC could judge on its competence's limits, as also specified in the Scotland Act.

That decision represents a fundamental standpoint to understand the nature of the Scottish Parliament, its relationship with the U.K. Parliament and also with the Supreme Court: although

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"branch factories" working to the timetable and convenience of Westminster'. As a result, these motions have generally been used for minor provisions in Westminster Bills", P. LEYLAND, *Constitutional Convention and the preservation of the spirit of British Constitution*, in Rivista AIC, no. 4/2014, 8-9; see also S. TIERNEY, *Giving with one hand: Scottish devolution within a unitary state*, in *International Journal of Constitutional law*, October 2007, 750: "*These "Sewel resolutions" have been used extensively, largely to ensure U.K.-wide uniformity, to give legislative effect to EU law and other international obligations, and, more controversially, to create time for the Scottish Parliament to pursue other matters*". See G. CONTI, *Un secondo referendum scozzese tra parliamentary sovereignty e popular sovereignty*, in Rivista AIC, no. 3/2017, 5.

[97] The *Axa case* (2011) concerned a challenge by insurance companies, through judicial review, to the legality of the *Dameges (Asbestos-related Conditions) Scotland Act 2009,* which provides that asbestos-related pleural plaques constitute personal injury which is actionable under Scottish law. The case reached the UKSC on appeal against the judgment of the Court of Session ruling that the 2009 Damage Act was within the competence of the Scottish Parliament.As first, the companies argued that the Act was incompatible with the right to property under art. 1 of Protocol 1 to the ECHR. Secondly, they affirmed that the Act represented an unreasonable, irrational and arbitrary exercise of the Scottish Parliament's legislative authority: this argument is really prominent from a constitutional point of view, because it was based on the idea that there are common laws, as well as statutory, which limit the Scottish Parliament's competence. The second challenge, infact, reflects an intimate question about the nature of the Scottish Parliament.

[98] (2011) UKSC 46, par. 42.

[99] (2011) UKSC 46, par. 49.

[100] (2011) UKSC 46, par. 49. According to the common law tradition, the judges, who are not elected, have the duty to protect the indivudual rights, instead elected members of a legislature have to chose what are the best interests for the whole country.

[101] The only judicial review admitted on the Acts of the Scottish Parliament, is that so called "*supervision jurisdiction*", in which – only in case of exceptional circumstances – the guiding principle is to be found in the rule fo law, as ultimate controlling factor. "*There has, justifiably, been much debate about the implications of the judgments of the Supreme Court of the United Kingdom in (...). What is perhaps the most constitutionally significant aspect of these judgments is the court's professed residual power to review legislation on common law grounds. (...) Two residual categories have been identified by the Law Lords in these two cases. The first of these is 'exceptional circumstances review' as outlined by Lord Steyn in Jackson and Lord Hope in AXA. This category of review may arise where a statute violates the rule of law and the court is required to invalidate the statute because of its duty to protect the rule of law. The second is where review can be justified on the principle of legality as outlined by Lord Reed in AXA,* S. WHEATLE, *The Residual Powers of the Court*, in Uk Constitutional Law Association, July 10,2012,*";* see also M. GORDON, *What is the point of exceptional circumstances review?*, , June 18, 2012. J. DUNNE, *What has been the most significant Supreme Court case and why?, ibid.*, March 30, 2012.

there was a political approval of the Scottish Parliament's and a formal recognition of its position, the supremacy of Westminster Parliament still strongly remains undoutbed, even if it may assume less absolute character[102].

This last statement has been picked up again by a recent judgment of the UKSC, the so called *Miller case* about Brexit, in the reference named *Agnew case*. The UKSC faced two questions regarding the relationship between *Brexit* and the devolved legislature: the potential existence of legislative competences of the devolved Parliaments in relation to the withdrawal of United Kingdom from the European Union and the possibility of recognizing a not merely political value to the *Sewel* convention.

As regards the first question, the Court has ruled out that Westminster Parliament should obtain the consent of the devolved legislatures before leaving the European Union. Indeed, the fact that in the devolved statutes has been included the compliance with the obligations deriving from the European Union does not imply that there is a legislative competence in the definition of international relations with the EU, which remains in the exclusive domain of the central government[103].

Although there is no jurisdiction over relations with the European Union in relation to the devolved legislature, the withdrawal from EU will result in the elimination of the aforementioned constraints imposed by the European Union provisions and presumably in a re-organization of responsibilities by Westminster. As has been said, the legislative measures made by the central Parliament in devolved matters require anyway the previous consent of the devolved legislative bodies. On that particular issue, the UKSC held that section 28(8), which has formalized the *Sewel* Convention, was not a legal rule, but merely a political convention, which cannot be enforced by the UKSC[104]. The UKSC specified that the UK Parliament is not seeking to convert the *Sewel* Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising the convention for what it is, namely a political convention, not a constitutional

[102] "*La sentenza Axa General Insurance and others v Lord Advocate and others [2011] UKSC 46 merita di entrare negli annuari del nuovo ordine devolutivo britannico. Con essa la Corte Suprema ha preso in esame la posizione del Parlamento scozzese e dei suoi atti legislativi nel contesto costituzionale del Regno Unito, concludendo che esso, a differenza di altri enti pubblici (tra cui le Assemblee gallese e nordirlandese che partecipano anch'esse della devolution), è organo politico nel senso pieno del termine a norma dello Scotland Act 1998 che ha devoluto alla Scozia una potestà legislativa nel senso completo del termine. Pertanto, a meno di non aver oltrepassato i limiti posti dallo Scotland Act 1998 (ad esempio invadendo il campo delle reserved matters che sono prerogativa del Parlamento di Westminster) l'attività normativa del Parlamento di Holyrood, pur rimanendo formalmente assoggettata al diritto di Westminster, acquisisce nell'ordine costituzionale britannico una posizione sui generis che argina l'influenza in Scozia della sovranità parlamentare del Legislativo britannico e impone alle Corti un obbligo di maggior deferenza e di cautela interpretativa; la Corte Suprema ha fondato i primi elementi di quella che potrebbe diventare la dottrina della sostanziale analogia (anche se non parità costituzionale)tra il Parlamento di Westminstere lo Scottish Parliament che nell'ambito della sua competenza esercita "the highest legal authority" inquanto "the dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy. It draws its strenght from the electorate"*; A. TORRE, *Devolution, quasi-federalismo e indipendenza*, in *Le Istituzioni del Federalismo*, q., n. 1/2013, 171. Therefore, it could become necessary to rethink the idea of sovereignty, including the new structures, mechanisms and languages of devolution phenomenon and having regard to what the constitutional actors make in order to govern themselves within variety of constitutional context. See J. MORISON, *A sort of Farewell: sovereignty, Transition and Devolution in the United Kingdom*, in VV.AA., "*Sovereignty and the law*", Oxford University Press, Oxford, 2013, 123 - 124: *"How can we change the way at we look at sovereignty? In order to do this and so gain the advantages that I will argue flow from reorienting our approach to sovereignty, it is important to stop considering sovereignty as a "thing in itself". Instead we should try to see sovereignty as a way of thinking, and one that is connected to a wider project and exercise of government*".

[103] S. GIANNELLO, *Il caso "Miller" davanti alla UK Supreme Court: i principi del costituzionalismo britannico alla prova della Brexit*, in *Rivista AIC*, no. 1/2017, 19.

[104] The validity of conventions cannot be the subject of proceedings in a court of law, see [2017] UKSC 5, par. 146. "Judges are therefore neither the parents nor the guardians of political conventions; they are merely observers".

parameter[105], and is effectively declaring that it is a permanent feature of the relevant devolution settlement[106].

Even if the UKSC does not exercise the judicial review of legislation, with the advent of devolution the UKSC dealt with and decided above constitutional issue: in this way, the role of the UKSC seems to be closer to that of guaranteeing a pre-constituted constitutional order, which is quite similar to that of a Constitutional Court in a proper sense. And this shift came directly from the territorial upheaval of devolution's phenomenon, confirming the intimate connection between the sub-national governments' arrangement and the system of constitutional justice.

7. *Conclusions: towards new challenging paradigms*.

The close link between sub-national dynamics and the systems of constitutional justice seems to be confirmed, even in a differente perspective: this connection emerges, not only with reference to the birth of a non-unitary State, but also during the changing periods involving the vertical structure of a State, the so called "type of State"[107].

In particular, considering the Italian case, it has been possible to see how the concrete application of a new constitutional provision (art. 116, co. 3) has had an impressive effect on the Court's case-law, forcing it to review - if at all - its previous position on regional consultative referendums. The judgment no. 118/2015, in addition to opening the doors to the differentiated regionalism in Italy[108], reiterates - even if timidly - the role of the citizen in the institutional dynamics and, in particular, in the local ones. On the other hand, the UKSC that does not exercise a constitutional review over the laws of the British Parliament (and the devolved ones) has faced - thanks to the suggestions offered by the devolution issue[109] - questions of crucial importance, ruling judgments, such as those on the Scottish Parliament's nature and on the *Sewel Convention*'s value, characterised by an uncontroversial constitutional meaning[110]. Moreover, the pragmatic devolution devolpment has

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[105] E. VELASCO, C. CRUMMEY, *The reading of he Reading of Section 28(8) of the Scotland Act 1998 as a Political Convention in Miller*, in Uk Constitutional Law Association, 3.02.2017: "The holding of the majority in *Miller* that section 28(8) of the Scotland Act 1998, which echoes the wording of the Sewel Convention, creates no *legal* obligation on the UK Parliament to seek the consent of the Scottish Parliament before passing legislation to leave the European Union was remarkably underdeveloped in comparison with its commendably clear treatment of the main questions concerning the prerogative power".

[106][2017] UKSC 5, par. 148:"That follows from the nature of the content, and is acknowledged by the words ("it is recognised" and "will not normally"), of the relevant subsection. We would not have expected UK Parliament to have used words if it were seeking to convert a convention into a legal rule justiciable by the courts".

[107] See references no. 3 and 4 of this paper.

[108] F. CORTESE, *La nuova stagione del regionalismo differenziato: questioni e prospettive, tra regola ed eccezione*, q.

[109] The mutual influence between the UK devolution's process and the United Kingdom Supreme Court is an impressive constitutional question: in a State, that hasn't a written Constitution, the impact of devolution's development has been so huge that affects directly the configuration of the type of State, strengthening the role of the Supreme Court. See R. MASTERMAN, J. MURKENS, *What Kind of a Court is the UK Supreme Court?* in Uk Constitutional Law Association, 11/10/2011: "*The United Kingdom Supreme Court (UKSC) is something of a novel institution among apex courts. It is not a typical supreme court with strong powers of constitutional review, but it has powers to determine the legality of administrative and executive acts and to review statutes on human rights and European Union law grounds. It cannot be conceived as the 'ultimate guardian of the constitution', but it clearly discharges a range of constitutional functions, which are in many ways approximate to those carried out by top courts elsewhere. It is not a federal court, but has power to determine competence disputes between the Westminster Parliament and devolved legislatures and administrations. It is not an agent of the legislature, though its work is conditioned by the doctrine of parliamentary sovereignty*".

[110] This arrangement does not rule out that one day the UKSC could have the power to declare Acts or Bills unconstitutional under a codified Constitution for the United Kingdom: this process could be considered under way, with regard to the significant development of statutory sources, the introduction of devolution statutes and the strong debate of the legal experts of this point: See House of Commons Political and Constitutional Reform Committee, Seventh Report of Session 2014 – 15: *Consultation on A new Magna Carta?* Even if the UKSC is considered a mere

contribuited to reform the whole legal system, giving a renewed shape to the constitutional arrangement: it seems to appear more fixed and stable, slowly abandoning the traditional theory of Parliament's sovereignty and moving close to the concept of "*constitutional supremacy*"[111].

Therefore, there is a general trend towards partecipatory decision-making, regarding the sub-national government dynamics. Infact, the referenda set out have proved to be tools of constitutional relevance both in the British context, both in the Italian one, with a substantial difference[112]: the UK political parties and the public institutions menaged to handle it without applying to the UK Supreme Court's; instead, the Veneto's referendum attempts - for demanding greater autonomy - have all been screened by the Italian Constitutional Court in a strong conflict's perspective between the State and the Region[113]. What actually needs to be highlighted is that the Constitutional Court/Supreme Court dichotomy seems to get thinner, or even disappears, when the Court's activity is related to the regulation of the relationship between the *centre* and the *periphery*: in those issues the "apex" Courts intervene to carry out their highest role, namely to safeguard the constitutional order of a State[114].

Not using the traditional classification (federal State/regional State), but analysing and comparing[115] the systems considering the issue of the *Centre vs Locality*, the legal expert can pick up some substantive aspects of the constitutional framework, that he could not have seen before**.** In fact, to adopt the factual comparative method [116], through the study of the pragmatic features of the constitutional phenomena, has allowed to clearer grasp some similarities between the two legal

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"Supreme" Court and not a constitutional one, this solving function has a strong constitutional value, which cannot be neglected. "The United Kingdom Supreme Court (UKSC) is something of a novel institution among apex courts. It is not a typical supreme court with strong powers of constitutional review, but it has powers to determine the legality of administrative and executive acts and to review statutes on human rights and European Union law grounds. It cannot be conceived as the 'ultimate guardian of the constitution', but it clearly discharges a range of constitutional functions, which are in many ways approximate to those carried out by top courts elsewhere. It is not a federal court, but has power to determine competence disputes between the Westminster Parliament and devolved legislatures and administrations. It is not an agent of the legislature, though its work is conditioned by the doctrine of parliamentary sovereignty": R. MASTERMAN, J. MURKENS, *What Kind of a Court is the UK Supreme Court?* in Uk Constitutional Law Association, 11/10/2011. See also L. GARLICKI, *Constitutional Courts versus supreme courts*, in *International Journal of Constitutional Law*, q., 44-68.

[111] See A. HARDING, *The "Westminster Model" Constitution Overseas: Transplantation, Adaptation and Development in Commonwealth States*, in Atti del Convegno dell'Associazione Diritto Pubblico comparato ed europeo, Università degli Studi di Bari, 29-30 maggio 2003, from 541; P. HOGWOOD, *The Asymmetric Institution and Politics of Devolution*, in Atti del Convegno dell'Associazione Diritto Pubblico comparato ed europeo, Università degli Studi di Bari, 29-30 maggio 2003, 410.

[112] P. LEYLAND, *Referendums, Popular Sovereignty and the Territorial Constitution*, in R. RAWLINGS, P. LEYLAND, A. YOUNG, *Sovereignty and the Law*, Oxford University Press, Oxford, 2013, 159.

[113] The reference is to the Italian Constitutional Court's judgment no. 470/1992, 496/2000 and 118/2015, which will be discussed in paragraph 5.

[114] T. CERRUTI, *Istanza autonomiste e secessioniste nelle pronunce dei giudici costituzionali*, q., 120-122: "*Nei casi di manifestazioni di istanze separatiste o autonomiste il contributo dei giudici supremi o costituzionali è determinato innanzitutto dalle previsioni della Carta fondamentale ma non si sottrae alla contemporanea influenza di fattori ulteriori che inducono tale organo, in virtù del ruolo di garante supremo dell'ordinamento che gli è attribuito, ad intervenire per salvaguardare l'ordine costituito dando un'interpretazione anche flessibile dei poteri che gli spettano e delle disposizioni, di rango costituzionale e non, che gli sono sottoposte. (...) Tornando infine alla posizione delle Corti, in quasi tutte le ipotesi in cui si è richiesto il loro intervento queste hanno svolto un ruolo determinante, trovando delle soluzioni, più o meno condivise, che hanno inciso sull'articolazione dei rapporti fra gli enti territoriali e sul complessivo modo di intendere la forma di stato del loro Paese.*

[115] According to Paolo Grossi, the comparison "serve to intensify critical insight", P. GROSSI, *Metodologie giuridiche della modernità*, Giuffrè, Milano, 2005, 9.

[116] See R. SCARCIGLIA, *Diritto globale e metodologia comparativa: verso un approccio verticale?*, q.; A. HARDING, P. LEYLAND, *Comparative Law in Constitutional Contexts*, q.; G. TIEGHI, *Fiscalità e diritti nello Stato costituzionale contemporaneo*, q.; R. HIRSCHL, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, Oxford, 2014, 21.

systems analysed, such as the differential regionalism trend[117] and the use of popular participation tools.

Those are means that bring citizen closer to the institutions decisions, in the perspective of Anglo-Saxon "*Constitution*" that contains the State-citizens relation[118]. The indisputable recurrence of these two factors in the models examined leads to update the legal approach used in the public law debate with new paradigms[119], directly connected with the concepts of differentiation, participation and institutional pluralism, in a challenging perspective aimed at constitutional dialogue[120].

[117] The differentiation trend among the sub-national governments is a pivotal constitutional issue, which has to be faced taking into account the principle of equality. In fact, the principle of differentiation of powers and functions between sub-national governments is thought to accommodate diversity, maintaining the union of the State and guaranteeing the principle of substantial equality. But, this *special autonomy* has to be often assessed by a constitutional organ in order to not generate unjustified condition of privilege, like in the Italian case of the "special" regions.

[118] See par. 1, 1.

[119] In other words: M. BERTOLISSI, *Autonomia e responsabilità sono un punto di vista,* q., 73, in which he mentions: M. BERTOLISSI, *L'autonomia finanziaria regionale. Lineamenti costituzionali*, Cedam, Padova, 1983 "*ammessa l'esistenza di una pluralità di dogmatiche, è essenziale che la dogmatica prescelta non mortifichi la propria vocazione sistematica nel caso in cui si accorga che le trasformazioni storiche sono tanto rapide da non consentire più alle sue costruzioni di essere nuove e utili"* and P. BILANCIA, *Stato unitario accentrato, decentrato, federale: dalle diverse origini storiche alla confluenza dei modelli*, in *Anuario Iberoamericano de Justicia Constitucional*, no. 9, 2005, 43: "*In un'analisi degli ordinamenti contemporanei però, non possiamo più fare riferimento a modelli monolitici quali Stato federale, Stato unitario accentrato o Stato Regionale (Stato unitario decentrato) perché nella realizzazione di questi modelli si sono avute una serie di varianti che, quasi in una sorta di osmosi dei criteri ordinatori da un modello ad una altro, non ci consentono oramai di riferirsi a prototipi. Muovendosi in quest'ottica, la classificazione tradizionale Stato federale, accentrato o regionale diviene perciò insufficiente a cogliere le complessità e le sfaccettature dei fenomeni in atto: principi o strumenti degli ordinamenti federali pervadono Stati unitari tradizionalmente accentrati, così come ordinamenti federali finiscono con l'adottare istituti o strumenti che ricordano il vecchio Stato accentrato*".

[120] "*Dialogo … è sinonimo di 'confronto creativo', che 'tiene sempre aperte le vie della collaborazione'; di 'confronto' finalizzato 'a una conclusione, a una decisione operativa'. Porsi in questa prospettiva significa accettare, implicitamente ma chiaramente, l'idea che le istituzioni sono il campo nel quale sorgono, si sviluppano e si contrappongono relazioni umane, che via via costruiscono e definiscono rapporti permeati di valori, secondo lo splendido insegnamento dantesco per cui il diritto è* 'hominis ad hominem proportio'. *Significa avere sempre presente, dinanzi a sé, che, alla fine, si dovrà rendere conto, indipendentemente dal rischio di una qualche sanzione formale, perché non si potrà mai sfuggire al giudizio della propria coscienza*": M. BERTOLISSI, *Pensare le istituzioni come il bene comune,* in C.A. CIAMPI, *Dizionario della Democrazia* (a cura di D. Pesole), Milano, 2005, 8.