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The Importance of Consistent Interpretation in Subnational Constitutional Contexts: Old Wine in New Bottles?

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Abstract

In this paper I will focus on the role of national common judges (“giudici comuni”) in systems that are not characterized by a dual court system (one of the elements identified by Gardner as peculiar to fully fledged federal states) especially looking at the lower courts.

This paper is structured as follows: first, I am going to recall the debate on the consequences- in terms of legal uncertainty- of the proliferation of fundamental charters in non- federal systems; second, I am going to frame this issue within the categories of some fashionable constitutional theories; third, I will try to explain why national (lower) judges may play a fundamental role in solving many of the normative inconsistencies that this scenario creates.

Key-words

Subnational constitutionalism, consistent interpretation, constitutional openness, national judges



1. Goals and structure of the paper

In his seminal piece on subnational constitutionalism Gardner strongly connected the idea of subnational constitutionalism to the concept of federalism by describing the former as an “inherent consequence of federalism”ⁱ

Indeed, as Ginsburg and Posner pointed out: “Americans understand subconstitutionalism as federalism”,ⁱⁱ but the American federalism conceives of two levels of judiciaries and two levels of constitutional interpretations that are not always present in Europe.

There are many risks behind this association. From a methodological point of view, for instance one could question the general concept of “subnational constitutionalism”: is subnational constitutionalism a mere “penumbra” concept, which lies in the shadow of federalism?

In this piece I would like to pay attention to the role of national common judges (“giudici comuni”) in systems that are not characterized by a dual court systemⁱⁱⁱ (one of the elements identified by Gardner as peculiar to fully fledged federal states) especially looking at the lower courts.

Deliberately I am going to leave national Constitutional courts out of the picture, trying to emphasize the role of the “every-day judges” in contexts characterized by subnational constitutionalism and constitutional openness.

A second reason for doing this is given by the absence of these actors in many (not only European) contexts.

Another feature of the literature in this field consists in the general focus on the relations between subnational and national law. In this short piece, instead, I will try to emphasize the legal continuity among legal orders and its impact on the role of national lower judges.

My understanding of multilevel constitutionalism in fact does not limit itself to the whole set of relations involving national and supranational law but tries to represent subnational constitutional law (if any) as one of the levels of the multi-layered constitutionalism.

This permits us to “consider” and apply, in this ambit, instruments, theories and doctrines that have been conceived for the solution of the conflicts occurring between national and international/supranational laws.



Among such techniques, consistent interpretation plays an important role and in order to show its potential in this field I am going to develop some considerations discussed elsewhere (Delledonne - Martinico, 2009).

This paper is structured as follows: first, I am going to recall the debate on the consequences- in terms of legal uncertainty- of the proliferation of fundamental charters in non- federal systems; second, I am going to frame this issue within the categories of some fashionable constitutional theories; third, I will try to explain why national (lower) judges may play a fundamental role in solving many of the normative inconsistencies that this scenario creates.

2. The issue: how to deal with this “mushrooming” of fundamental charters?

A recent “wave” of subnational constitutionalism is characterizing countries like Italy and Spain.

When it comes to the *Estatutos de Autonomía* of Spanish *Comunidades Autónomas* (CAs) or the *Statuti* of Italian regions, therefore, both the Constitutional courts and dominant scholarship tend to deny that they are subnational Constitutions. There is, however, much political pressure to fill these charters with provisions whose content is typically “constitutional” in the most proper sense. If one considers the whole previous history of subnational constitutionalism, this might appear surprising.

In Italy, the engine of this new wave has been the constitutional reform of 1999 which amended, among others, Art. 123 of the Constitution. This Article looks at the regional fundamental charters (*Statuti*) that are approved by the regional legislatures (called *Consigli regionali*) in order to regulate “the form of government” and that include the “basic principles for the organisation of the Region and the conduct of its business” (Italian Constitution, Article 123, p. 1).

Statuti are required to be ‘in compliance with the Constitution’ (Italian Const., Article 123, p. 1).

In 2001, the reform of the Title V of the second part of the Italian Constitution was completed giving, according to many commentators, Regions the opportunity to



provide themselves with “micro” Constitutions, which is why the new approved *Statuti* are so rich in provisions devoted to rights and principles.

Moving to the Spanish case, the new process of reforms there started in 2004 after the election of the first Zapatero government^{IV}.

All the *Estatutos* present important novelties^V, both *substantively* and formally: they are longer than in the past; they present a long list of “regional rights” (above all social ones); they re-write the list of competences of the *Estatutos*; they enlarge the fiscal and financial autonomy of the CA’s; they contain provisions regarding the power of the judiciary; they revise the discipline governing the cooperative relations with the nation-state and the EU; and they contain provisions devoted to the issue of identity.

Almost all the *Estatutos* contain provisions on rights and principles. Scholars began to reflect on the nature of such provisions, reaching conclusions similar to those in the Italian debate.^{VI} It is a relatively new question, since the old texts were silent on these points. (Maluenda Verdú, 1999; Ruggiu, 2007; Mastromarino, 2005).

To make a long story short, some of these provisions, in both contexts, were challenged before the respective national Constitutional courts.

As seen elsewhere the national Constitutional courts of these two countries argued that some of the contested provisions were not legal norms at all, but were mere “*cultural statements*”^{VII}.

This way both the Constitutional courts achieved a double effect: on the one hand, they saved these contested provisions from the accusation of being unconstitutional but, on the other hand, created a sort of *grey zone of legality*, favoring the emergence of particular cases of antinomies that I elsewhere defined as *complex* (Delledonne - Martinico, 2009).

What are the consequences- in terms of legal certainty- of this on the activity of national lower judges? Why should consistent interpretation be preferable to other approaches in this context?

In order to provide this question with an answer, I am going to contextualize these subnational dynamics in a more general multilevel scenario and recall the importance given to the national common judges (especially lower courts) and the instrument of consistent interpretation in this context.

Finally, I will explain why they can have a similar crucial task with regard to subnational constitutionalism.



3. The importance of thinking “multilevel”

In order to understand why consistent interpretation can, in this case, play a role and why constitutional openness matters even when dealing with subnational constitutionalism, I will briefly try to define this subnational legal level as part of a broader multilevel and ‘complex’^{viii} constitutional scenario.

According to Pernice it is possible to study and analyze the dynamics of the European Union process from a constitutional point of view. Among the premises of his thought we can recall the following: sovereignty is conceived as integrated while the Constitution is seen as a process rather than as a document. This Constitution is the outcome of the complementarity of the national and supranational legal orders and these two constitutional levels are parts of a unique and composed Constitution.

As Pernice said the national and supranational legal systems are “*closely interwoven and interdependent, on cannot be read and fully understood without regard to the other*”^{ix} and, from a dynamic point of view this legal “interlacement”) is well represented by the idea of complexity.

The adopted notion of complexity stems from a comparison of the different meanings of this word as used in several disciplines (law, physics, mathematics, psychology, philosophy) and recovers the etymological sense of this concept (complexity from Latin *complexus* = interlaced). By applying the idea of complexity developed by Morin, I argue that the multilevel legal order is a complex entity that shares some features with complex systems in natural sciences. The *mot-problème*^x “complexity” is used in several ways. Millard, for instance, recalls at least four different meanings of the word complex (Millard, 2007). Complex, in fact, is often used as a synonym of “complicated” and in this sense an antinomy may be understood as complex given its difficulty in being solved because of the legal “abundance” caused by the coexistence of so many legislators in the EU and of the consequent difficult manageability of the several materials, languages and meanings present in the multilevel system. Secondly, complexity may refer “à la situation d’un objet fragmentée, découpée. L’ensemble social n’est pas simple, au sens d’une théorie des ensembles: il résulte de l’addition ou de l’interaction entre une pluralité d’ensembles



partiels, eux- mêmes sans doute s’entremêles” (Millard, 2007, 143). Thirdly, complex is understood as a non-aprioristic or pragmatic concept; in this respect a reason is complex when it cannot infer choices and decisions from general, clear and abstract principles which were defined aprioristically. Finally, complexity is meant as interdependency of the objects with regard to their relative autonomy: in this paper I focus on the relative autonomy of the legal orders (subnational, national, supranational and international) in the multilevel system.

Complexity well describes the multilevel scenario where the legal orders are not only undistinguishable but also “interlaced”.

Scholars^{XI} interested in multilevel constitutionalism have traditionally paid attention to the relation between the national and supranational levels while the subnational level has been usually neglected on the grounds of its presumed homogeneity.

However, looking at the constitutional variety at the subnational level (not only in federal contexts), one could see how it might represent a factor contributing to the complexity of the multi-layered system.

The interplay between levels gives the idea of the how difficult it is to distinguish neatly between the legislative domains belonging to the various players involved.

As a matter of fact, one of the most relevant difficulties in the multilevel legal system is represented by the existence of shared legal sources, which make the attempt at defining legal orders as *self-contained regimes* very difficult. This is consistent with the attempt to provide an integrated and *complex* reading of the various levels, and represents one of the most fascinating challenges for constitutional law scholars. At the same time, as a consequence of the lack of a precise distinction within the domains of legal production, it is sometimes impossible to solve the antinomies between different legal levels on the grounds of the prevalence of a legal order (e.g. the national) over another (e.g. the supranational).

Developing this idea I elsewhere attempted to describe a “complex” legal system as an “entity” characterized by the following features: *non-reducibility*, *unpredictability*, *non-reversibility* and *non determinability*^{XII}.

Against this background, the subnational system should be understood as part of a complex multilevel system and probably we can attribute these qualities to the antinomies characterizing the multilevel system, arguing that they present the following features:



- First type of complex antinomy. An antinomy may be defined as complex when it is due to the interlacement described above and by the consequent non distinguishability among the different levels. According to this definition one could say that an antinomy is complex if it cannot be resolved looking at the relations between legal orders (e.g. starting from the assumption of the prevalence of order A over order B we cannot say that norm x always prevails over norm y because x belongs to the order A while norm y succumbs because it belongs to order B. This occurs because, in an integrated and interlaced system x and y could belong to both legal orders, A and B).
- Second type of complex antinomy. An antinomy may be complex because it is not predictable. The unpredictability of the system consists in the difficulty to foretell or foresee its evolution by looking at the starting position. In a deterministic system it is always possible to predict the final state if the initial state is known. In a complex adaptive system it is not possible to predict the final state of its evolution if we know the initial state of the components. Similar antinomies, whose solution is not predictable simply by looking at the starting circumstances of the legal system, are conflicts that concern certain ‘materials’ (i.e. documents lacking binding legal effect, but enjoying a wide social consensus) which are drawn by keen law makers from the grey zones of the law, and which consequently acquire a sort of influence on the legal order (this effect is due to the effort of the legislature, which translates this influence into a legislative text). This is precisely the case of regional cultural statements, which an external observer cannot perceive as a specimen of legal material, especially if he or she has in mind the Constitutional courts’ doctrine (whereby the regional cultural statements cannot attain the *status* of norms)^{XIII}.
- Third type of complex antinomy. The absence of univocal norms of collision influences the “reducibility” and the “resolvability” of the constitutional conflict in a multi-layered system. Looking at this scenario, in fact, multilevel constitutionalism suffers from the absence of an unambiguous *primacy* clause^{XIV}. These antinomies can be resolved only on a case-by-case basis and not by an unequivocal solution offered by the existence of a precise rule for collision norms, such as a clear and undisputed supremacy clause, because in a context like this a provision which, *prima facie*, seems to belong to the subnational level



could actually be the repetition of another norm existing at international or supranational level.

What are the consequences of this on the role of national judges? A consequence of the impossibility to trace these principles back to the wording of a univocal primacy clause, has underscored their role. My assumption is that this context exalts the case-by-case judicial approach to solving legal conflicts between rules. The impossibility of operating a distinction between legal orders implies the end of interpretative autonomy for these courts. The judicial side thus represents a privileged perspective for studying the relations between interacting legal orders, especially when looking at the multilevel and pluralistic structure of the European constitutional legal order.

Returning to the Italian Regional case, one could say that the main risk of the judgements of Italian Constitutional court is to create complex antinomies in the first two meanings we have recalled: the fundamental principles which have been rescued by the Italian and Spanish Constitutional courts could represent the basis for regional legislation (that is ordinary legislation characterized by indisputably binding effects) which could contrast with the Constitution.

We can identify some possible hypotheses of complex antinomies with regard to the regional case, arguing that the main risk of the Constitutional court's judgments is to create complex antinomies which are both 'non-reducible' and 'unpredictable'.

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

Ostensibly, the conflict will involve only the implementing laws and the Constitution, but in reality the implementing laws will embody the already existing principle contained in the regional cultural statement. This reveals how absurd the Constitutional



courts' strategy is. The fact that the regional fundamental charters contain a similar provision to the regional legislation implementing them implies the possible reappearance of the conflict between the regional implementing law and the Constitution, which had seemed earlier to have disappeared by considering the fundamental charters' provision a merely 'cultural' statement and not legally binding.

4. The necessity to distinguish between real and virtual conflicts: the importance of a “unitary” application of the consistent interpretation

Having drawn out the dangerous consequences of the decisions of the national Constitutional courts, it is time to say how consistent interpretation might serve as the main instrument to distinguish the compatible regional principles from the incompatible ones.

When is there a real conflict between provisions on regional principles and the Constitution? In other words, when is there a real antinomy between the Constitution on the one hand and the Regional fundamental charters and regional legislation based thereon on the other, when both are applicable simultaneously?

The scholars of jurisprudence and of general theory of law^{xv} usually distinguish between virtual and real antinomies: the former can be resolved through interpretation while the latter represent a real example of irreconcilable normative conflicts. Although probably many cases of conflict between the regional cultural statements of the fundamental subnational charters and the Constitution only embody virtual antinomies, some exceptions could exist.

Today national Constitutions do not provide an exhaustive list of fundamental rights, as a consequence of that constitutional openness described above. For instance, with regard to the Italian case, it was said that the general clause of protection of fundamental rights that is contained in Article 2 Constitution is to be considered an 'open' norm.^{xvi} This reading of Article 2 has allowed the Constitutional court to recognise and guarantee the so-called new rights (the right to know, the right of privacy, environmental rights) and to keep the Constitution up-to-date with respect to the need to protect the 'person' (*principio personalista*).



This process of constitutional updating was due to the pressure coming from the international law of human rights, which forced the Italian Constitutional court to deal with issues not considered in 1948, i.e., when the Italian Constitution came into force. Looking at the question from this perspective, it seems that no problem of real inconsistency could ever exist for those regional principles which repeat what forms part of the Italian Constitution or the case-law of the Italian Constitutional court. On the contrary, more problems exist for those regional principles (cultural *statements*, as the Constitutional court classified them) which do not do so.

To me, in this case the interpreter should try to find the possible origin of these regional ‘cultural statements’ at the supranational legal level (European Convention of Human Rights, EU Treaties, European Court of Justice’s case law^{XVII}). If the interpreter is able to identify the ‘pattern’ of the regional ‘cultural statement’ at this supranational level, he will attempt to interpret the regional law in the light of the supranational norm, trying to find there a consistency between the regional statement and the Constitution.

On the contrary, if the interpreter were not to be able to find such a supranational or international pattern, it could be necessary to set aside the subnational provision (in a system of diffuse review of legislation) or to raise a question of constitutionality before the Constitutional court which might conclude that the regional instrument was unconstitutional (in a centralized system of review of legislation). Looking at Italy, for instance, the very fact that the *Statuti* refer to provisions of international conventions to which Italy is a party, gives the norms of the *Statuti* a presumption of constitutionality, because of the existence of Article 117 (1) of the Constitution, which reads: “Legislative power belongs to the state and the regions in accordance with the Constitution and within the limits set by European Union law and international obligations”. So both the national legislature and the regional legislatures have to respect international and EU obligations.

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



“Multilevel constitutionalism” is a descriptive formula which does not say which level will prevail on the others and why. It comes with the price of not having an unambiguous supremacy clause for the rights that cannot be classified as competences of one level or another.

Of course, in this case, if we limit our perspective to the mere relation between national and subnational laws, a supremacy exists and it belongs to the national Constitution but, as said before, before using the *extrema ratio* of the unconstitutionality of the subnational provisions, one should be sure of the impossibility of finding a corresponding norm at international and EU level.

This approach corresponds to a unitary conception of consistent interpretation, although normally scholars distinguish among different forms of consistent interpretation depending on the document to be taken as reference by the interpreter (interpretation consistent to the Constitution; interpretation consistent to public international law; interpretation consistent to EU law, on this tripartition see: Luciani, 2007).

Those who deny this unitary conception of consistent interpretation tend to emphasize the axiological superiority of the Constitution over public international and EU laws and conceives the Constitution as the apex and the moment of closure of the domestic legal system.

According to another construction Constitutions should not be understood as a moment of closure but, rather, as documents (or set of principles) open to those external influences that can enrich the protection of the goods estimated as fundamental (Ruggeri, 2010).

Going beyond a positivistic logic, Constitutions can be influenced by the international documents and doctrines if this can improve for instance the protection of fundamental rights.

According to this scheme, there is no clear border between domestic and supranational/international law, the latter being the engine of a sort of steady process of constitutional update and improvement.

As a consequence, there is no need to break down consistent interpretation in the three forms seen above; in fact, consistent interpretation is arguably a unitary instrument (Ruggeri, 2010).



This seems to me a construction which better responds to the complex (i.e. interlaced) nature of the multilevel system, where a sharp distinction among levels is not always possible.

At the same time, this does not prevent Constitutional courts from defending their fundamental charters: to this end, they can make use of those techniques already used to manage the relation between international/supranational law and domestic law, such as, the counter-limits doctrine^{XIX}.

5. Constitutional openness and the role of national judges

Having recalled the unitary nature of the instrument of consistent interpretation and its importance in a multilevel and complex system, it is time to clarify why the role of national common (especially lower) judges may be crucial in dealing with complex antinomies due to the emergence of subnational constitutionalism. As we know, national judges play a fundamental role in the multilevel system, being at the same time the guardians of the application of national law (they are the first guardians of the Simmenthal doctrine as for EU law, Claes, 2006) and, at the same time, the first adjudicators of the ECHR in national systems because of the principle of judicial subsidiarity (Carozza, 2003).

EU law is just one of the factors inducing multiple loyalties in the ordinary judges. Similarly these national judges have a crucial role in the application of the European Convention on Human Rights (ECHR), and recently scholars have defined them as the natural judges of international law (Tzanakopoulos, 2011). Against this background, what renders EU law particular is the preliminary ruling mechanism which makes the relationship between national judges and the ECJ even stronger. The preliminary ruling mechanism has indeed had a fundamental role in the evolution of EU law thanks to the lucky alliance between national judges and the Luxembourg Court^{XX}.

More generally, this emphasis on national judges is not new in public international law studies. It has however been boosted by the contents of post - World War II Constitutions and this can be regarded as a confirmation of the open nature of these Constitutions, especially in the field of fundamental rights.



In fact, an evident reaction to totalitarian experiences is traceable in the language of domestic Constitutions, particularly in the openness shown by these fundamental charters to international law and in their acknowledgment of peace as a fundamental constitutional principle, not only as a strategic foreign policy option. In Spain^{xxi} and Portugal^{xxii} there is a preventive check operated by the Constitutional courts on the compatibility between the Constitution and international treaties. In Spain, in case of conflict between an international treaty and the Constitution, the latter has to be amended according to Article 95^{xxiii} before the stipulation of the Treaty. In Portugal, on the other hand, the Treaty has to be approved by the Assembly of the Republic with a special majority and then it may be ratified^{xxiv}. Even after ratification the Treaties may be object of a control of constitutionality. According to the literature the particular force of the Treaties in the domestic legal order can be inferred from Article 8^{xxv} of the Portuguese Constitution and Article 96^{xxvi} of the Spanish one, although these two provisions seem to be about the validity of these Treaties rather than on their efficacy (Montanari, 2002, 108).

Nevertheless the most important confirmation of the special ranking reserved to human rights treaties in Spain is given by Article 10.2^{xxvii}, relating the so-called “interpretive guide” for reading the constitutional clauses devoted to fundamental rights, although the Spanish Constitutional court has specified that such a technique does not give a constitutional *status* to the human rights treaties^{xxviii}. As for Portugal, the fundamental provision is Article 16 of the Constitution^{xxix} which recognizes international human rights treaties as having a complementary role to the constitutional text, although the second paragraph of the Article, which accords an interpretative role to the Universal Declaration of the Rights of Human Rights alone, seems to exclude an extension to other conventions like the ECHR. Moreover in 1982, a deliberate attempt to insert the ECHR into the text of the Constitution was rejected, but the issue is not yet clear because of the existence of other judgments of the Portuguese Constitutional court, which used the ECHR as an important auxiliary hermeneutic tool for interpreting the Constitution^{xxx}. A similar provision is included in Article 20, par. 1 of the Romanian Constitution: “Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to”.



Article 5 of the Bulgarian Constitution^{xxxI} seems to recognize a general precedence of international law (including the ECHR and EU law) over national law, and also covers the duty to interpret national law in a manner which is consistent with EU law and the ECHR (and the case law of their respective courts). In 1998, the Bulgarian Constitutional court ruled that:

“The Convention constitutes a set of European common values which is of a significant importance for the legal systems of the Member States and consequently the interpretation of the constitutional provisions relating to the protection of human rights has to be made to the extent possible in accordance with the corresponding clauses of the Convention”.^{xxxII}

As we can see, according to all these provisions, national law shall be interpreted in light of the contents of the ECHR (and other treaties devoted to human rights), and in this way a sort of interpretive priority is acknowledged to the ECHR.

Consistent interpretation is a very well known doctrine even in EU law (see the *Von Colson*^{xxxIII} and *Marleasing*^{xxxIV} judgements). More generally, consistent interpretation is a widespread doctrine in multilevel systems^{xxxV} since it guarantees some flexibility in the relationship between laws of different orders and gives the role of gatekeeper to judges (see the *Hermès*^{xxxVI} and *Dior*^{xxxVII} judgments concerning the relationship between EU and WTO laws). Traditionally the literature conceives the obligation of consistent interpretation as a recognition of “indirect effect” to EU law since it confirms its primacy by giving a sort of interpretive priority to it. This is particularly convenient when the conflict between norms cannot be solved by using the *Simmenthal* doctrine because of the absence of direct effect for the EU law provisions.

This is a well known story which does not need repeating at length. The only thing I would like to point out is the increasing importance of consistent interpretation in the multilevel legal system, as recently stressed by Rodin (Rodin, 2010.): The *Simmenthal* doctrine is a rigid one which leads to a unilateral conclusion in cases of constitutional conflict (i.e., a conflict between constitutional supremacy and the primacy of EU law) while the consistent interpretation makes it possible somewhat to neutralize or soften constitutional conflicts.



The duty to interpret national law in a manner which is consistent with the ECHR provisions is sometimes based on legislative provisions, as is the case of the UK, under the Human Rights Act. In 1998, the ECHR was incorporated in the famous UK Human Rights Act, which actually carried out a sort of selective incorporation of the rights of the ECHR (the so-called “Convention Rights”). Section 3^{xxxviii} provides the necessity to interpret domestic law “*so far as is possible*” in a way consistent with the Convention Rights. In sum, national Constitutions recognize themselves as texts open and willing to be complemented by the international Treaties on fundamental rights.

These are just examples of the importance that consistent interpretation might acquire in contexts characterized by constitutional openness.

6. Advantages and Risks connected to the proposed approach

In my view, to solve constitutional conflicts peculiar to contexts of subnational constitutionalism, it is necessary to bear in mind that certain rights are protected by more than one provision belonging to different legal sources (at regional, international, national and supranational level). Granted that judges are supposed to acknowledge the superiority of their Constitution, an open reading of the constitutional text could, however, relieve Constitutional courts of the pressure and offer them the possibility to give a legal content to conflicts seemingly affected by political interests.

Elsewhere (Delledonne – Martinico, 2009) I tried to stress how behind these clauses there is quite often the political will to present a given subnational context as “peculiar”, provided with a special nature and Ruggiu (Ruggiu, 2007, 133) has already shown how this choice is based on “strategic motivations” which go beyond genuine cultural aspirations.

Thanks to the use of consistent interpretation for solving conflicts due to subnational constitutionalism the system would be able to carry out a triple selection with regard to constitutional conflicts:

- 1) it would be able to give a legal “tone” to otherwise political/cultural conflicts, trying to reconstruct the “parameter” in a multilevel way;



- 2) it would entrust to national common judges the solution of the virtual antinomies thanks to consistent interpretation and an open reading of the national constitutional texts;
- 3) it would give Constitutional (or Supreme) Courts the last say in case of real conflicts that may not be solved by using the consistent interpretation doctrine. In this case, as well, national common judges would have a crucial role in presenting the question (in case of an *incidenter* proceedings where provided) in the most legally precise way possible (ie. by identifying the possible international and supranational- if any- patterns of the subnational provisions whose constitutionality is put in doubt).

As said at the beginning of this short contribution, the chemistry represented by consistent interpretation and constitutional openness gives a strong power to common judges, even in contexts characterized by the absence of a Constitutional court/tribunal properly understood.

Of course this does not mean that this instrument does not present any inconvenience: on the contrary, scholars have repeatedly recalled how risky could be an abuse of this technique: National common judges would not be “qualified” for performing such a delicate task; quite often they do not have the knowledge and (linguistic) skills to do so (Luciani, 2007 and Ruotolo, 2007)^{xxxix}.

However, the benefits of this solution are also clear. This option makes lower courts the “pivot” of the multilevel system and would free Constitutional and Supreme Courts from the obvious political pressures that characterized both the Spanish and Italian cases.

Why? Because Constitutional and Supreme Courts are more exposed and visible, and each question pending before them inevitably acquires a certain degree of political tone (see, for instance, the reactions and newspapers titles after the judgement of the *Tribunal Constitucional* on the Catalan *Esatuto*^{xl}).

Notwithstanding the crucial role played by national lower judges within the policy consistent interpretation, this technique can of course be used by national higher courts as well. Higher Courts are, nowadays very open to taking into account the case law of human rights tribunals, as Bjorge recently stressed with regard to the ECtHR (Bjorge, 2011).



To be clear: the use of the consistent interpretation cannot magically solve the problems due to this “constitutional pluralism” (Avbelj- Komárek, 2012) but it can help interpreters to deal with constitutional conflicts, favouring a more stringent control over the legal reasoning of the judges and their motivations in case of departure from a possible consistent interpretation of subnational law.

Higher Courts will be always under siege, especially Constitutional courts when dealing with cases brought before them through direct proceedings (as with the *principaliter* proceedings before many Constitutional courts) but even in these cases they could reinforce their decisions, if the economy of the case will permit this, by relying on the case law or trying to have a dialogue with other courts (for instance, the ECtHR and the CJEU). In other words, consistent interpretation could serve for them, even in this case, both as a resource (in order to understand better the meaning of an international treaty or other supranational provision which could serve as a model for the regional legislator) and as a shield against political attacks.

Of course consistent interpretation may be object of abuse (as the Spanish judgment on the Catalan *Estatut* shows^{XLI} (on this see: Ibrido 2011^{XLII}) but it would be an error to close the door to this option as the Italian Constitutional court did in 2004^{XLIII}).

In conclusion, constitutional conflicts produced by subnational constitutionalism do not seem to represent a major issue, because it is difficult to conceive seriously dangerous antinomies, due to the fact the Regional Charters’ fundamental principles usually codify values and principles which already exist at national, supranational and international level. On the contrary in many cases these subnational provisions might work as a factor of constitutional update in a context of ‘experimental federalism’ (Poirer, 2008) which emphasizes a process of mutual learning between levels of government and which permits an improvement in the guarantees of constitutional rights.^{XLIV}

However, it is important to stress the existence of fundamental principles in Regional Charters because it could produce asymmetries in the guarantees of rights, providing the ground for differentiated policies, which in turn could discriminate between citizens because of their belonging to a specific region rather than another.

This might create asymmetries that cannot always be conceived as compatible with that fundamental and homogenous level of protection frequently required in multilevel contexts^{XLV} In cases like these we cannot hope to have a complete solution from Courts,



since in this case we would be in presence of a *lacuna* that should be solved by the political actors of the system.

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^I “It is possible that federalism, properly understood, operates in such a way that the creation of a sub-national constitution in a federal system inherently reflects the presence of sub-national constitutionalism. The absolute minimum function of a sub-national constitution, like any other constitution, is to create and order sub-national power by defining and authorizing it, and establishing constraints on its use. In so doing, a sub-national constitution necessarily establishes a framework for the practice of self-governance by the sub-national population to which it applies”, Gardner, 2007a.

^{II} Ginsburg - Posner, 2010, 1588.

^{III} “I shall therefore pursue in the balance of the paper the much more modest goal of suggesting some reasons for caution in concluding that the appearance of sub-national constitutions in a federal state implies the appearance of sub-national constitutionalism. In particular, I discuss below five such reasons: (1) the easy availability of national constitutional politics as a vehicle for resolving questions of social and political significance; (2) the practice of resorting to extraconstitutional politics instead of law to resolve fundamental issues of governance and identity in many parts of the world; (3) the rise, especially in Europe, of subsidiarity as the prevailing political theory of sub-national power; (4) the growing emphasis in many parts of the world on supranational and international regimes as primary protectors of human rights; and (5) the lack of dual judicial systems in many federal states. In the United States, subnational constitutionalism is favored by the dual structure of the court system, in which each state and the national government has its own independent judiciary. In this system, each level of government has the final responsibility for interpreting its own constitution. Because state and national authority overlap in the U.S. federal structure, this arrangement has a tendency to put the national and sub-national judicial systems into a kind of dialogue with one another, a dialogue carried on through judicial interpretation of constitutions at each level. A dual court system is by no means essential to the emergence of sub-national constitutionalism, but it is helpful. As a result, throughout most of the world sub-national constitutions do not exist within the structural conditions most conducive to the emergence of a robust state constitutionalism.” Gardner, “In search of Sub-national Constitutionalism” Working Paper version (to be understood as slightly different from Gardner, 2007b).

^{IV}For a chronicle of the process, see the special issue of the *Revista general de derecho constitucional*, n 1, 2006. As I wrote elsewhere (Martinico, 2010) the CAs' progressive loss of competences or, better, the progressive transformation of the Spanish system into a system of executive federalism: the autonomía of the CAs has just an administrative character, while the political responsibility of the biggest choices belongs to the State.;

2 The big issues of the means of regional funding and of the system of territorial equalization: this reason applies above all to Catalonia, which contributes tax money to the State more than what it receives from the State in terms of State investments or available resources.

3 The lack or the non-functioning of the mechanisms of cooperation and participation at both the horizontal and the vertical levels;

4 The so-called “identity questions”, related to the acknowledgment of national realities different from that of the Spanish nation.

^V Currently, eight CAs have approved new Estatutos: Comunidad Valenciana (ley orgánica, 10 April 2006, n. 1), Catalonia (ley orgánica, July 19, 2006, n. 6) , Baleares (ley orgánica, 28 February 2007, n. 1) , Andalucía (ley orgánica, 19 March 2007, n. 2) , Aragón (ley orgánica, 20 April 2007, n. 5), Castilla y León (ley orgánica, 30 November 2007, n. 14), Navarra (ley orgánica 27 October 2010, n. 7), and Extremadura (ley orgánica 28 January 2011, n. 1).

^{VI} For a comparison, see: Mastromarino - Castellà Andreu, 2009.

^{VII}See, for instance, Corte Costituzionale (Italy) judgments 372-378-379/2004, available at: www.cortecostituzionale.it/Delledonne. On this see Martinico, 2009 and Delledonne - Martinico, 2011. As for



Spain, see the considerations made on the new Catalan *Estatut* (sentencia no. 31/2010, available at <http://www.tribunalconstitucional.es/en/jurisprudencia/Pages/Sentencia.aspx?cod=9873>) by Delledonne, 2011.

^{viii} Morin, 1990, 10. About law and complexity see: Ost - van de Kerchove, and Delmas Marty, 2006; Martinico, 2007.

^{ix} Pernice, 2002.

^x Morin, 1993 and Morin, 1989. On Europe as a complex system see: Morin, 1988.

^{xi} See Pernice: 'The European Union is a divided power system in which each level of government - regional (or Länder), national (State) and supranational (European) - reflects one of two or more political identities'. Pernice, 1999. 707. I. Pernice, 2002.

^{xii} *Non-reducibility*: the result of the relationship among diversities does not present itself as a mere sum of the latter but it is something different.

Non-reversibility: for a complex system non reversibility is the impossibility to return to the *status quo* spontaneously and precisely. Unlike the reversible processes, in fact, where from the final condition it is possible to return to the starting condition, the complex systems are non reversible due to the non linearity of the evolution.

Unpredictability: it is difficult to foretell or foresee its evolution by looking at the starting position. In a deterministic system it is always possible to predict the final state if the initial state is known. In a complex adaptive system it is not possible to predict the final state of its evolution if we know the initial state of the components.

Non-determinability (rectius, non determinism): the complex system does not follow necessary and univocal laws according to a linear concept of the evolution based on the dialectic cause/effect.

^{xiii} Several possible cases of complex antinomies can be identified with regard to the regional legal order. According to many new Italian Regional fundamental charters a new body of control (usually named Consulta Statutaria or Commissione di garanzia statutaria in the language used in the Statuti) will be charged with the specific task of giving its advice on possible conflicts between regional laws and the Statuti. (See for example Article 57 Statuto of Tuscany and Article 69 of Statuto of Emilia-Romagna) The opinions of such bodies create the obligation for the Regional Legislative Assembly (Consiglio regionale) to review the regional law, which can then be adopted a second time.

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

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

Other cases of conflict between the Constitution and the Statuti can be thought of. As we saw, Tuscany's regional Statuto contains a provision devoted to the acknowledgement of forms of cohabitation which are different from those of families founded on marriage, the basis of the natural family according to Article 29 of the Italian Constitution (Article 29: 'The family is recognized by the republic as a natural association founded on marriage. Marriage entails moral and legal equality of the spouses within legally defined limits to protect the unity of the family'). This provision represents one of the first acknowledgements of the necessity to give a legal and official status to the 'other forms of cohabitation' (currently, there is no specific legal regime for the cohabitants' rights and duties).

Some regions, like Puglia, recently decided to extend to these forms of cohabitation the same legal treatment as provided for families founded on marriage with regard to the right of enjoying social services (regional law of Puglia no. 19/2006 c.d. 'Disciplina del sistema integrato dei servizi sociali per la dignità e il benessere delle donne e degli uomini di Puglia', See the text here: http://www.issirfa.cnr.it/download/File/NAPOLITANO_PUGLIA/Puglia%20L%2019_06%20PDF.pdf?P_HPSESSID=b4e62468a96940ae6ae687d571bbb063).



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

A similar debate took place at the local level when some municipal Statuti had given extra-communitarian immigrants the right to vote in local elections (1. All citizens, men or women, who have attained their majority are entitled to vote.

(2. Voting is personal, equal, free, and secret. Its exercise is a civic duty.

(3. The law defines the conditions under which the citizens residing abroad effectively exercise their electoral right. To this end, a constituency of Italians abroad is established for the election of the Chambers, to which a fixed number of seats is assigned by constitutional law in accordance with criteria determined by law.

(4. The right to vote may not be limited except for incapacity, as a consequence of an irrevocable criminal sentence, or in cases of moral unworthiness established by law.). The Consiglio di Stato (Consiglio di Stato, sez. I, parere of the 16th March 2005 n. 9771/04, <http://www.giustizia-amministrativa.it/> On this see Finocchi Ghersi 2006) – which gave an advisory opinion according to the procedure described in the Article 138 of the 'Code of municipalities' ("Testo Unico degli enti locali", D.lgs. 267/2000) – decided to deny the possibility to extend such a right to vote (The Consiglio di Stato recalled Article 117(2) of the Constitution, under which the national legislator has "an exclusive legislative power" in "the electoral legislation ... of municipalities, provinces and metropolitan cities").

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

^{XIV} Scholars have identified at least four different meanings of primacy/supremacy in ECJ case law. Moreover, the notion of primacy enshrined in Art I-6 of the Constitutional Treaty seems to be different from that used by the ECJ. See eg Claes, 2006) 100–101. In order to find a solution to this ambiguity, some scholars have devised a 'law of laws'. On this see Eijsbouts - Besselink, 2008.

^{XV} On the antinomies see for example Bobbio, 1993, 409 ff.

^{XVI} Article 2 Constitution: 'The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed.'

^{XVII} Where there is no supranational or international model for a regional charter statement, it would indeed be inconsistent with the Constitution. In this case, there is no way to "rescue" the regional provision. A good example would be a regional statement which guarantees a very broad acknowledgement of cultural identities and practices of some ethnic minorities. As a matter of fact, it could pave the way for the admission of practices contrasting with the dignity of the woman or with the integrity of the body. It is to be recalled that, according to Article 32 of the Constitution, health is conceived both as an individual right and a public interest. Regional legislation which would protect a similar right to practices violating the dignity of women should be considered unconstitutional. The case of infibulation (and other forms of female genital mutilation) is partially different because it is considered as a crime according to Law No. 7 of 2006 and it is banned by several international documents.

^{XVIII} See, for instance, judgments n. 348 and 349/2007, both available at www.cortecostituzionale.it

^{XIX} This formula was introduced in the Italian scholarly debate by Paolo Barile: Barile, 1969.

By counter-limits scholars mean those fundamental principles of the Italian Constitutional that may not be jeopardized by European integration. The identification of these barriers to European integration represents the essence of the counter-limits doctrine (*dottrina dei controlimiti*), devised in case 183/73, the so called *Frontini* judgment (but see also case 170/84, the so called *Granital* judgment) by the Italian Constitutional court. Corte Costituzionale, sentenza 183/73, *Frontini* : [1974] 2 *Common Market Law Review* 372 and Corte Costituzionale, sentenza n. 180/1974. *Granital* : [1984] *CMLRev* 756

^{XX} See the reports in Slaughter - Stone Sweet - Weiler, 1997.

^{XXI} Art. 95.2 Constitution (Spain) :“(1) The conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment.

(2) The Government or either House may request the Constitutional court to declare whether or not such a contradiction exists”.

^{XXII} Art. 278 Constitution (Portugal): “1. The President of the Republic may ask the Constitutional court to conduct a prior review of the constitutionality of any rule laid down by an international treaty that is submitted to him for ratification, by any decree that is sent to him for enactment as a law or executive law, or



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- by any international agreement, the decree passing which is sent to him for signature.
2. Representatives of the Republic may also ask the Constitutional court to conduct a prior review of the constitutionality of any rule laid down by a regional legislative decree that is sent to them for signature.
 3. Prior reviews of constitutionality shall be requested within eight days of reception of the document in question.
 4. In addition to the President of the Republic himself, the Prime Minister or one fifth of all the Members of the Assembly of the Republic in full exercise of their office may ask the Constitutional court to conduct a prior review of the constitutionality of any rule laid down by any decree that is sent to the President of the Republic for enactment as an organisational law.
 5. On the date on which he sends any decree to the President of the Republic for enactment as an organisational law, the President of the Assembly of the Republic shall notify the Prime Minister and the parliamentary groups in the Assembly of the Republic thereof.
 6. The prior review of constitutionality provided for in (4) above shall be requested within eight days of the date provided for in (5) above.
 7. Without prejudice to the provisions of (1) above, the President of the Republic shall not enact the decrees referred to in (4) above until eight days have passed after their receipt, or, in the event that the Constitutional court is asked to intervene, until it has pronounced thereon.
 8. The Constitutional court shall pronounce within a period of twenty-five days, which the President of the Republic may reduce in the case of (1) above for reasons of emergency”.
- XXIII Art. 95 Constitution (Spain): “(1) The conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment.
(2) The Government or either House may request the Constitutional court to declare whether or not such a contradiction exists.”
- XXIV Art. 279.4 Constitution (Portugal): “If the Constitutional court pronounces the unconstitutionality of any rule contained in a treaty, the said treaty shall only be ratified if the Assembly of the Republic passes it by a majority that is at least equal to two thirds of all Members present and greater than an absolute majority of all the Members in full exercise of their office”.
- XXV Art. 8 Constitution (Portugal): “1. The rules and principles of general or common international law shall form an integral part of Portuguese law.
2. The rules set out in duly ratified or passed international agreements shall come into force in Portuguese internal law once they have been officially published, and shall remain so for as long as they are internationally binding on the Portuguese state.
3. Rules issued by the competent bodies of international organisations to which Portugal belongs shall come directly into force in Portuguese internal law, on condition that this is laid down in the respective constituent treaties.
4. The provisions of the treaties that govern the European Union and the rules issued by its institutions in the exercise of their respective responsibilities shall apply in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law”.
- XXVI Art. 96 Constitution (Spain): “(1) Validly concluded international treaties once officially published in Spain shall constitute part of the internal legal order. Their provisions may only be abolished, modified, or suspended in the manner provided for in the treaties themselves or in accordance with general norms of international law.
(2) To denounce international treaties and agreements, the same procedure established for their approval in Article 94 shall be used”.
- XXVII Art. 10 Constitution (Spain): “(1) The dignity of the person, the inviolable rights which are inherent, the free development of the personality, respect for the law and the rights of others, are the foundation of political order and social peace.
(2) The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain”.
- XXVIII Tribunal Constitucional, Judgment 30/1991, available at www.tribunalconstitucional.es.
- XXIX Art. 16 Constitution (Portugal): “1. The fundamental rights enshrined in this Constitution shall not exclude such other rights as may be laid down by law and in the applicable rules of international law.
2. The provisions of this Constitution and of laws concerning fundamental rights shall be interpreted and construed in accordance with the Universal Declaration of Human Rights”.



xxx Portuguese Constitutional court, decision 345/99, available at <http://www.tribunalconstitucional.pt/tc/home.html> The episode is mentioned by Coutinho, 2010. On Portugal: Montanari, 112. See also Cavagna - Monteiro, 1992.

xxxI Article 5.4 Constitution (Bulgaria): “Any international instruments which have been ratified by the constitutionally established procedure, promulgated, and come into force with respect to the Republic of Bulgaria, shall be considered part of the domestic legislation of the country. They shall supersede any domestic legislation stipulating otherwise.”

xxxII See Constitutional court Decision no. 2, of 18 February 1998: Official journal no. 22, 24 February 1998. The cases reported are quoted by Fartunova. 2010

xxxIII Case 14/83, *Von Colson* [1985] ECR 1891

xxxIV Case 106/89, *Marleasing* [1990] ECR I 4345.

xxxV Even in the US: Charming Betsy “canon”, 6 U.S. (2 Cranch) 64 (1804).

xxxVI Case C-53/96, *Hermès International (a partnership limited by shares) v FHT Marketing Choice BV* [1998] ECR I-3603.

xxxVII Case C-300/98 and C-302/98, *Dior and others* [2000] ECR 11307.

xxxVIII Section. 3 “(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section –

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility”.

xxxIX On consistent interpretation see: Sorrenti, 2006 and A.Ciervo, 2011.

xl Tribunal Constitucional, 31/2010

xlI Castellà Andreu, 2010. For an idea of the use conception of consistent interpretation by the Spanish Constitutional court see: Ibrido, 2010.

xlII See, for instance, the lack of consistency between the use of consistent interpretation in this judgment and the previous case law of the Spanish Constitutional court.

xlIII Again, I am referring to judgements n. 372-378-379/2004, available at: www.cortecostituzionale.it

xlIV Partially concurring with this conclusion, Vespaziani, 2005.

xlV Even in non-federal contexts: see Art. 117, 123 and Art. 5 of the Italian Constitution, which confirm the need for a homogeneity in the regional system and, in a similar way, Art. 149.1.1 of the Spanish Constitution

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