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Some reflections on the implementation of Article 116 (3) of the Italian Constitution. Law 86/2024 and limits to "differentiated regionalism"*

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1. Art. 116, paragraph 3, of the Constitution: the particular forms and conditions of enhanced autonomy for ordinary Regions

The approval of the Bill for the implementation of art. 116, paragraph 3 of the Constitution (law 86/2024), the so-called "Calderoli Bill", fulfills one of the main objectives pursued by the current Government in terms of institutional reforms.

Art. 116(3) represents an element of constitutional reform under Title V, Part II of the Italian Constitution, by introducing a model of specialization aimed at ordinary regions (*regioni "a statuto ordinario"*). It provides for the possibility of accessing the particular forms and conditions of enhanced autonomy in the listed areas, and also marks a partial deviation from the preference given by constitutional law 3/2001 for the uniform devolution of new powers to the regions.[1]

By reason of the amendment to art. 116, ordinary regions can negotiate particular forms and conditions of autonomy with the state, concerning the transfer of relevant

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[1] A comprehensive analysis of the parliamentary debate concerning approval of Article 116(3) Const. can be found in L. Gori, *L'autonomia regionale differenziata a partire dai lavori preparatori della riforma del Titolo V della Costituzione*, in *Osservatorio sulle fonti*, 1, 2023, pp. 60 ff., available at: http://www.osservatoriosullefonti.it.

powers relating to 23 subject matters. Any agreement must be approved by Parliament on the basis of an absolute majority[2].

Many definitions of this innovation have been proposed by scholars (the most frequently used is "differentiated regionalism"); however, all such definitions indicate the possibility for individual regions to expand their areas of competence beyond those pertaining to them in accordance with art. 117 of the Constitution[3].

In this way, individual ordinary regions may be differentiated not only as to the manner in which they implement their general competences, but also as regards additional areas of competence assigned to them.

This results in a further level of differentiation similar to that enjoyed by the five special regions on the basis of the Republican Constitution of 1948 and relevant statutes; nevertheless art. 116 (3) of the Constitution cannot be considered as a means to benefit from the status of being a special region beyond that provided for by art. 116 (1) Constitution.

Important differences remain between special and differentiated regional autonomy, which can be traced back to the four basic aspects given by: (a) ranking of individual statutes of autonomy, (b) sources of law concerning the assignment of legislative and administrative powers, (c) financial regime, (d) relationship with central government[4].

The procedure for approving the special statute provides a strengthened guarantee of autonomy since, with the sole exception of the financial regime provisions (which can be modified by Parliament, subject to agreement between the State and the region concerned), a constitutional law makes it more difficult to alter or amend legislative and administrative powers.

In addition, the reference framework relating to the powers of the five special regions is rendered more complex by the need to also refer to the Constitution (by virtue of the reference contained in art. 10, l. const. no. 3/2001), and to the legislative provisions of the state, both those of which delegate further competences to the special regions, and those laid down by governmental decrees implementing the special statutes.

Finally, concerning finances, each special region negotiates its own agreement with the centre - which is generous in allowing them to manage resources originating from the territory - on the basis of the principle of parity between each special region and the state.

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[2] See F. Palermo, *Asymmetries in the Italian regional system and their role model,* in E. Arban, G. Martinico, F. Palermo (eds.), *Federalism and Constitutional Law. The Italian Contribution to Comparative Regionalism,* London, 2021, p. 144.

[3] See, M. Olivetti, *Il regionalismo differenziato alla prova dell'esame parlamentare,* in *Federalismi.it,* 6, 2019, pp. 2-3.

[4] See, F. Palermo, *Asymmetries in the Italian regional system,* cit., p. 139.

The establishment of joint bodies (*commissioni paritetiche*), based on the principle of parity, is precisely aimed at negotiating with the state, on an equal footing, the implementation of the respective autonomy statutes. Given the involvement of the former, the bylaws implementing statutory provisions ("*norme di attuazione*") cannot be amended by ordinary parliamentary laws[5].

It is not surprising that, by virtue of this privileged legal regime, the "enactment decrees", designed to achieve the transfer of administrative functions from the state to regions and also to implement the relevant statutory provisions, have sometimes been used to integrate the contents of the special autonomy (in particular that for the autonomy of Trentino and South Tyrol). These governmental decrees have become, together with agreements concerning the financial regime, the point of reference for the implementation of art. 116 (3) of the Constitution[6].

Neither is it surprising that requests for greater autonomy from ordinary regions have increased in the two decades following the reform of Title V. This evolution is the response to a centralist reading of the new art. 117 of the Constitution that lists those areas or subject matters where the state is authorized to legislate, on the assumption that all other competences fall to the regions[7].

The constitutional reform of Title V marks a reversal in approach that should promote new dynamics. Nonetheless, the criterion of subject matters, in itself neutral, operates in a way that often penalizes regional autonomy[8].

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[5] The principle of democratic legitimacy is limited by the principle of parity to protect minority groups; see, among others, Constitutional Court, judgements No. 20/1956, 22/1961 237/1983, 160/1985.

[6] See, in particular, M. Cosulich, *Il decreto legislativo di attuazione statutaria nelle regioni ad autonomia speciale,* Naples, 2017.

[7] The constitutional reform of 2001 was approved under the leadership of the centre-left majority. This reform was put together quickly as the centre-left coalition that proposed it did so mainly to contrast the rising consensus of *Lega Nord.* However, the success of personal political parties with strong territorial roots represents in this context a transitory phase; as they consolidate at a national level, the new political subjects promote policies which limit local autonomy because the governing bodies of territorial entities are perceived as institutional centres for the diffusion/sharing of power, see S. Staiano, *Art. 5*, in *Italian Constitution*, Rome, 2017, pp. 73 ff.

[8] The methodical approach followed in the implementation of the first and second regionalism, i.e. pre and post 2001, is decisive; although in different ways, it is the state legislature that fills the subject matters listed in Article 117 Const. with content through a mechanism centred on the approval of a delegated law by Parliament, which entrusts the Government with the task of identifying the administrative functions that can be transferred (the latter has handed this task over to various ministerial bureaucracies), cf. R. BIN, *Le materie nel dettato dell'articolo 116 Cost.*, in *Forum di Quaderni costituzionali*, 26 June 2019, p. 10.

Subject matters continue to be labels that the state legislature fills with a high degree of political discretion, benefiting from the increasing complexity of policy making and the close inter-relationship among these subject-matters[9].

As the Italian Constitutional Court stated, state powers «may extend into the area of regional competences» when unitary interests need to be safeguarded[10].

The "subject matters-value" serves an example[11], but also regards concurrent legislation where the state legislature should only approve the framework of general guidelines, but also approves detailed provisions[12].

Furthermore, the Italian Constitutional Court has used its role to redesign the relations between legislative and administrative powers through the principle of subsidiarity[13]. Once again, where unitary interests require the uniform exercise of administrative powers, the state legislator can intervene in those areas assigned to the regions, provided that state and regions reach such an agreement (*intesa*)[14].

This re-interpretation of distribution of legislative competences has fuelled requests for greater autonomy from the regions and raises the question as to whether the implementation of art. 116(3) of the Constitution may still be considered as a general solution for dealing with factual, economic and political differences among territories.

It should not be forgotten that this process is seen by some as a threat to national unity and solidarity[15], inspiring numerous proposals for constitutional reform aimed at amending art. 116(3) of the Constitution[16].

Nonetheless, it is to be noted that the final paragraph of art. 116 Const. requires a systematic reading, taking into account both the other provisions of Title V of the

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[9] See R. BIN, *Primo comandamento: non occuparsi delle competenze, ma delle politiche*, in *Istituzioni del federalismo*, no. 2/2009, 203 ff., especially 209 ff.

[10] See Constitutional Court, judgement 278/2010.

[11] See Constitutional Court, judgements 536/2002 and 307/2003: the protection of the environment is rather an objective and not a predetermined subject matter.

[12] See Constitutional Court, judgement 336/2005.

[13] See J. Woelk, *The principle of loyal cooperation,* in E. Arban, G. Martinico, F. Palermo (eds.), *Federalism and Constitutional Law*, cit., p. 181.

[14] Even if it is possible to distinguish "weak" and "strong" forms of agreement, the central government always exercises the power of final decision (It CC judgement 303/2003).

[15] On this interpretation, that is probably the outcome of a biased stance, see, G. Viesti, *Verso la secessione dei ricchi? Autonomie regionali e unità nazionale,* Bari, 2019.

[16] A similar reading of the attempt to reform Article 116(3) Const. through Articles 30 and 39 of the Draft Constitutional Reform Bill A.S. 1429-B, 17th Legislature can be found in C. Tubertini, *La proposta di autonomia differenziata delle Regioni del Nord: un tentativo di lettura alla luce dell'art. 116, comma 3 della Costituzione*, in *Federalismi*, 18, 2018, p. 4.

Constitution, and the fundamental principles of the republican system (especially article 5 of the Constitution)[17].

On this basis, the path undertaken at the end of the 17th Legislature led to the signing by the Gentiloni Government of three distinct preliminary agreements, containing the general principles, the methodology, and an initial list of subject matters to be transferred for the purposes of reaching an agreement[18].

Later, events linked to the management of the Covid-19 pandemic marked an abrupt halt, which contributed to the spread of opinion that the powers assigned to the regions and the extent of differentiation between the regional health systems had hindered the reduction in the spread of infection. From this, there arose the need to find a new approach to requests for differentiation; one that would take account of the emerging tensions between differentiated regional, administrative organizations and the principle of equal enjoyment of fundamental rights (especially social rights)[19].

From this point of view, law no. 86 of 26 June 2024, containing provisions for the implementation of the differentiated autonomy of the ordinary regions makes an important contribution by filling the gaps left in this provision by the constitutional reform of Title V.

However, this law does not resolve all doubts regarding procedural and substantive limitations for implementing the so-called "differentiated regionalism" and calls for reflection as to whether the fundamental principles of the Constitution can be respected[20].

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[17] The affirmations of the unity-indivisibility of the Republic and the recognition of autonomous regions are in fact closely linked; the unity and indissolubility of the Italian state is reaffirmed because the recognition of local autonomies results in the attribution to the regions of many powers and functions that could be held to pose a danger to Italian unity, see C. Esposito, *Autonomie locali e decentramento amministrativo nell'art. 5 della Costituzione*, in Idem, *La Costituzione italiana. Saggi*, Padua, 1954, p. 67.

[18] On previous attempts to implement art. 116(3) of the Constitution, see C. Tubertini, *La proposta di autonomia differenziata delle Regioni del Nord: un tentativo di lettura alla luce dell'art. 116, comma 3 della Costituzione*, cit., pp. 2 ff.

[19] This is emphasized by, among others, F. Bilancia, *Differenziazione, disuguaglianze, asimmetrie. L'autonomia regionale nella dimensione della democrazia e la tutela dei diritti fondamentali, editoriale,* in *Istituzioni del federalismo,* n. 1/2020, 5 ff.

[20] The Regions of Sardinia, Puglia, Campania and Tuscany have recently lodged an appeal with the Constitutional Court to obtain adjudication on the compliance of law 86/2024 with the constitution (Region of Lombardy decided to oppose this appeal on 9 September 2024). Furthermore, it is to be noted that the Constitutional Court shall pronounce on the admissibility of a referendum that aims to repeal law 86/2024.

2. Observations on the ranking of framework law implementing Article 116(3) of the Constitution and on the procedural limitations under Article 116 (3) of the Constitution for concluding the "prior agreement"

After the constitutional reform of 2001, it was long thought that paragraph 3 of art. 116 of the Constitution would have remained "dormant" (except for the limited claims of Tuscany in 2003 and of Lombardy and Veneto in 2007).

With the beginning of the 18th legislature ("first Conte Government"), all three regions with which the "pre-agreements" had been stipulated in the 17th Legislature declared their intention to the Government to expand the list of subject matters to be transferred[21]; other regions also expressed their intention to initiate the process of implementing art. 116(3) Const.[22] .

The new draft agreements submitted to the Council of Ministers were then published[23].

Particularly from 2019, the advisability of approving a framework law supplementing the constitution began to be questioned.

Although the final paragraph of article 116 Const. does not require the approval of a general law on implementation, this option remains: the general nature of the legislative function empowers the legislature to legislate in any area, except in those areas reserved by constitutional provisions to other sources of primary rank[24].

Furthermore, the approval of parliamentary law raises the traditional problem of the ability of the current legislature to place constraints on future legislatures when dealing with the same rank of sources of law[25].

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[21] See *Supra* §1.

[22] The exact references can be found in Chamber of Deputies Research Service, *Le Regioni e l'autonomia differenziata*, January 29, 2024, at https://temi.camera.it//leg19/post/19_pl_18_4995.html.

[23] For an analysis of the content of the agreements, see F. Pallante, *Ancora nel merito del regionalismo differenziato: le nuove bozze di intesa tra Stato e Veneto, Lombardia ed Emilia-Romagna*, in Federalismi.it, 20, 2019, pp. 1 ff.

[24] See Constitutional Court, Judgment No. 26/1966 and recent Constitutional Court, Judgment 63/2023; on parliamentary regulations, see Constitutional Court, Judgment no. 237/2022.

[25] Starting from this premise, A. Morrone, *Il regionalismo differenziato. Commento all'art. 116, comma 3, Cost.*, in *Federalismo fiscale*, 2007, 139 ff., 154; and L. Ronchetti, *L'attuazione del regionalismo differenziato esige norme costituzionali d'integrazione*, in *Costituzionalismo.it*, 1, 2020, 117 ff., support the need for constitutional provisions of integration.

Indeed, the paradigm of the ordinary law aimed at constraining the future legislature has been applied on numerous occasions in our system[26], but the question of the legitimacy of constraints on the future legislature remains a subject of debate[27].

According to some legal scholars, the admissibility of such constraints derives from the logical priority of norms *on* the production of law (*norme sulla produzione*) over norms *for* the production of law (*norme di produzione*) operating at the same hierarchical level. Consequently, it has been argued that the norms *on* the production of law should necessarily be inserted as *norme interposte* (norms which do not have the status of constitutional norms, but which are part of the constitutional yardstick) in any constitutional adjudication involving the norms *of* production. Following this approach, Law 86/2024 could be considered as part of the constitutional parameter[28].

These arguments, however, while authoritatively stated, have failed to remove all doubt as to the binding efficacy that framework laws would deploy with respect to subsequent equated sources; this is so both from a theoretical-general perspective, and from the perspective of positive law, given that article 70 Const. provides that the legislative function is the responsibility of the (current) Parliament and that it cannot be limited except under the constraints placed directly by the Constitution.

Therefore, the idea prevails that, in the absence of a constitutional provision containing an explicit reference, a framework law can be derogated from by individual laws adopted subject to prior agreement in application of the general principles of the system, first and foremost with reference to the provisions of article 15 of the preliminary provisions *(preleggi)*[29].

The framework law, in short, remains similar to other specialized laws in force in our system, aimed at regulating the contents of laws or acts having the force of law and on several occasions derogated from[30].

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[26] See articles 14 and 15 of law no. 400/1988, and Articles 1, 2, 3 and 4 of law no. 212/2000 ("Statuto dei diritti del contribuente").

[27] A theoretical question has arisen in our system with the approval of incentive laws ("leggi di incentivazione"), which temporarily cannot be amended; on this point, see at least A. Pace *Leggi di incentivazione e vincoli sul futuro legislatore*, in *Studi in memoria di V. Bachelet*, III, Milan, 1987, 391 ff.; and M. Luciani, *Il dissolvimento della retroattività. Una questione fondamentale del diritto intertemporale nella prospettiva delle vicende delle leggi di incentivazione economica*, in G. Cocco (ed.), *L'economia e la legge*. Conference Proceedings (Milan, December 4, 2006), Milan, 2007, pp. 1 ff.

[28] See, F. Modugno, *Sul ruolo della legge parlamentare (considerazioni preliminari)*, in *www.osservatoriosullefonti.it*, 3, 2009, p. 4 ff.; P. Caretti, *La "crisi" della legge parlamentare*, ibid., 1/2010; A. Ruggeri, *La legge come fonte sulla normazione?* ivi, 2, 2010; Id., *Norme sulla normazione e valori*, in *www.rivistaaic.it*, 3, 2011, and in *"Itinerari" di una ricerca sul sistema delle fonti*, XV, Turin, 2012, pp. 368 ff.

[29] These reasons are clearly expressed by F. Rimoli, *Leggi a ciclo annuale e vincoli al legislatore futuro: un profilo teorico,* in *Federalismi.it – Focus fonti,* 2, 2019, 3 ff., especially pp. 15 ff.

[30] Practices so far established in other areas show multiple circumventions of the rules laid down for the purpose of constraining the action of the future legislature, see the *Dossier* jointly prepared

Based on these premises, law 86/2024 governs the aspects of procedure that do not fall under either article 64 of the Constitution, or the statutory autonomy of the regions (art. 2, paragraphs 1 and 5).

As regards the exercise of statutory autonomy, to-date no specific procedures have been introduced in order to conclude an agreement.

So far, seven more ordinary regions have formally mandated their President to open negotiations; however, the legislative Assemblies which are directly affected by new legislative powers, have been only marginally involved in drafting the contents of the regional proposals to be submitted to central Government[31].

Neither can these legislative Assemblies be replaced by a consultative referendum, as was attempted in 2017 in Lombardy and Veneto[32].

The framework is missing also as regards the involvement of local entities, even though art. 116 of the Constitution provides that both the agreement and the subsequent parliamentary law are subject to a constraint: i.e. hearing the local authorities of the Region concerned[33].

This provision is due to the fact that the other local authorities will have to perform most of the new administrative functions that have been transferred to the region following the negotiations[34]; nevertheless, the specific regulation for this phase has been deferred to statutory autonomy and it is still not clear whether the

by the Study Service of the Senate of the Republic and the Chamber of Deputies, *Disposizioni per l'attuazione dell'autonomia differenziata delle Regioni a statuto ordinario ai sensi dell'articolo 116, terzo comma, della Costituzione,* A. C. 1665, Feb. 5, 2024, esp. pp. 10-11, with respect to both Articles 13-bis, 14 and 17 of law No. 400/1988, regulating the activities of the Government and the organization of the Presidency of the Council of Ministers, and Articles 1, 2, 3, and 4 of law no. 212/2000, laying down provisions on the statute of taxpayers' rights. Exceptions include, of course, those cases in which the provision contained in the ordinary law must be understood to reproduce constitutional limits and provisions, since in such cases the legal scope of the provision derives directly from the constitutional provision and not from its mere reproduction in the provision contained in the ordinary law.

[31] Only the Statute of Lombardy has provided for the passing of a resolution by the Regional Assembly on the conclusion of the agreement, see 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,* 4, 2017, p. 655.

[32] Enhancing their autonomy in this area, some regions (Lombardy and Veneto) have resorted to referenda before activating the procedure provided for in Article 116, paragraph 3, Const., cf. A. Giannola- G. Stornaiuolo, *Un'analisi delle proposte avanzate sul federalismo differenziato,* in *Rivista economica del Mezzogiorno*, 1-2, 2018, p. 5.

[33] See D. Coduti, *Il raccordo tra Regioni ed enti locali come possibile limite alla differenziazione ex art. 116, comma 3 Cost,* in *Italian Papers of Federalism,* 1, 2023, p. 63.

[34] The danger of regional neo-centralism is highlighted by S. Valaguzza, *Il diritto delle città e il dibattito sull'autonomia differenziata,* in *Federalismi,* 19, 2019, p. 4.

involvement of local authorities should be through state or regional bodies (law 86/2024 does not regulate this aspect)[35].

A solution could be to involve these other local authorities prior to the agreement and the approval of the Bill that confirms new powers to the requesting region (in 2018 this consultation took place before the signing of the so-called pre-agreements). In this way, it might be possible to involve the territorial bodies mentioned in art. 114 of the Constitution and possibly also other local bodies (e.g. Universities or Chambers of Commerce): if any involvement has been omitted, the Government and Parliament will have to make an objection, as will the President of the Republic when promulgating the law or when authorizing the presentation of the government bill.

For now, reference to statutory autonomy only allows us to formulate hypotheses regarding the consultation, which may take place individually or collectively, but which must not be limited to the involvement of the "Consiglio delle autonomie locali" (so-called "CAL") or the associations representing the local administrations, nor be replaced by a consultative referendum; the resulting opinion is not binding.

On the procedural side, the final agreement is at the core of the implementation procedure: law no. 86 limits the possibility of making use of art. 116 (3) of the Constitution to each ordinary region on an individual basis, indicating the President of the region as the competent body to negotiate the preliminary draft and subsequently the definitive agreement (art. 2).

It follows that there is a marked centrality of the executive bodies in the process of implementing "differentiated autonomy"[36]. Even if, in theory, the procedure could have been based on the initiative of the regional legislative Assembly (having consulted local authorities) and the approval of parliamentary law, the rules provide that any additional forms and particular conditions of autonomy shall be provided for in the agreement between executive bodies[37].

For the state, in fact, the task of initiating the negotiations is entrusted to the Minister for Regional Affairs and Autonomy who has sixty days in which to acquire

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[35] In the Anci Paper, presented at the Joint Conference of 2 March 2023, the reduced involvement of local authorities in the various phases of implementation of the process regulated by the text is highlighted (see pp. 3-4).

[36] From the practice concerning the conclusion of 2018 pre-agreements and 2019 draft agreements, it emerges that during negotiations the state administrations affected by the proposed transfer of functions were informally involved in the procedure. It can be hypothesized that the involvement of different branches of administration in matters covered by the agreement may remain as an informal and not of a completely transparent nature.

[37] Broadly, see R. Di Maria, *La procedura per la attuazione del c.d. "regionalismo differenziato": dalla marginalizzazione delle assemblee elettive e degli Enti locali, alla perplessa definizione dei l.e.p.,* in *Italian Papers of Federalism,* 1, 2023, p. 34.

an evaluation by the competent minister in the area concerned, and also by the Minister of Economy and Finance for the purposes of identifying the necessary financial resources[38].

In this same phase, the President of the Council of Ministers or the Minister decides on the start of negotiations, taking into account the «financial framework of the region» and making use of the possibility of limiting their aims in order to protect the legal or economic unity, and protect priority public policies.

Whereas the involvement of the legislative Chambers is only envisaged at an advanced stage.

Once the preliminary draft agreement has been approved by the Council of Ministers, on the proposal of the Minister of Regional Affairs and Autonomies, and sent to the "Unified Conference" for its opinion within sixty days, Parliament can adopt acts of address (motions, resolutions etc.) for the Government.

These acts reproduce, to a certain extent, the practice of involving Parliament at the concluding stage of international treaties as envisaged by art. 80 of the Constitution[39]; nevertheless, they simply express a political constraint and do not exclude the adoption of a definitive agreement different from the indications received.

For this reason, having evaluated the opinion of the Unified Conference and on the basis of the policy documents, paragraph 5 of art. 2, provides for the preparation of the definitive draft agreement. In any case, once ninety days have passed and, if necessary «at the end of further negotiations», the Council of Ministers may approve the definitive draft agreement.

The rule, moreover, does not clarify whether this further negotiation represents a new start to the entire procedure, or a phase in which the state and the region can modify the preliminary scheme only as regards the findings formulated; it is not to be excluded that further negotiations will be used to manipulate the defined agreement scheme, given that there is no obligation for the text to be resubmitted to the legislative Assemblies.

As for the involvement of the Unified Conference, this is envisaged not only because the other regions lack an institutional forum to express their dissent, but also because local authorities in territories other than the one requesting greater autonomy have no possibility to be heard[40].

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[38] Art. 1, paragraph 571, law n. 147/2013 ("legge di stabilità" 2014) had already partly regulated the matter and has since been repealed, see, M. Mezzanotte, *La legge di stabilità 2014 e l'art. 116, comma 3, Cost.,* in *www.forumcostituzionale.it*, 14 july 2014.

[39] See F. Bruno, *Il Parlamento italiano e i trattati internazionali. Statuto albertino e Costituzione repubblicana,* Milan, 1997, p. 217-272.

[40] Furthermore, these bodies do not have the instruments for making a direct appeal to the Constitutional Court against the parliamentary law based on the agreement.

However, this marginal involvement takes place in a governmental setting, where mainly state and regional executives are represented[41].

This provision has also placed the central and the regional executives in a dominant position.

3. *Determination of agreement content: subject matters, competences or functions?*

Determination of agreement content represents one of the most controversial points in the implementation of "Italian-style" asymmetric regionalism; not only because article 116(3) Const. fails to specify which subject matters may be transferred, in particular, whether this concerns entire subject matters, competences, and/or functions, but also because the scope of application of this provision is potentially very broad and, in providing for the possible attribution of "Additional special forms and conditions of autonomy," it includes in the list of affected subjects as many as twenty-three items of concurrent legislative power and three items of exclusive state power.

Law no. 86/2024 specifies that the act of initiative of each region may «concern one or more subjects or areas of subjects and related functions» (paragraph 2 of art. 2), so differentiated autonomy will affect both legislative and administrative functions [42].

In addition, the implementation of Art. 116 (3) of the Constitution cannot apply to all the subject matters envisaged[43]: not only because some items are "structurally not devolvable" *(*«coordination of public finance and the tax system»), but also because they cannot be completely devolved (the environment, understood as "value" or major transport and navigation projects and national energy production and distribution of energy)[44].

At the same time, the power of the Italian Government to limit regional requests for new powers to respect priority public policies and legal and economic unity should protect an idea of autonomy that is neither merely negative, nor solipsistic[45].

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[41] See R. Bin, *La cooperazione nel sistema italiano di "multilevel government",* in A. Barbera, T. F. Giupponi (ed.), *La prassi degli organi costituzionali*, Bologna, 2008, p. 449.

[42] From this viewpoint, F. Cortese, *La nuova stagione del regionalismo differenziato: questioni e prospettive, tra regola ed eccezione,* in *Le Regioni,* 4, 2017, p. 696.

[43] For an analysis of the content of the agreements see F. Pallante, *Ancora nel merito del regionalismo differenziato*, cit., pp. 1 ff.

[44] See M. Olivetti, *Il regionalismo differenziato alla prova dell'esame parlamentare*, cit., p. 11.

[45] On the idea of autonomy as expressed by italian Constitution, see O. Chessa, *Autonomia negativa, autonomia positiva e regionalismo differenziato: come uscire dalla crisi del principio autonomista,* in J. M. CastellÀ, G. Rivosecchi, S. Pajno, G. Verde (ed.), *Autonomie territoriali, riforma del bicameralismo e raccordi intergovernativi: Italia e Spagna a confronto,* Napoli 2018, 175 ss. and C. Pinelli, *Cinquant'anni di regionalismo, fra libertà dallo Stato e culto per l'uniformità,* in *Diritto pubblico,* 3, 2020, 749 ss.

The choice to assume the functions as a starting point for the attribution of further forms and particular conditions of autonomy leaves the political authorities of the state a wide discretion in deciding the contents of the differentiation[46], in particular through the use of the classic "carving out" of administrative competences, in favour of state administrations.

It is unknown whether the requests for greater autonomy presented to the government seeking to implement article 116(3) of the Constitution will materialize; however, it is reasonable to hypothesize that state administrations would oppose an excessive expansion of the regional "*spatium deliberandi*", not only by affirming that some fundamental principles of the matter cannot be "regionalised"[47], but by asking to retain some functions[48].

Fundamental principles are, moreover, open to interpretation and it is the government that, in the first instance, has the possibility of identifying the same at the negotiation stage[49]; perhaps it might have been more useful to consider autonomous public policies[50], with regions having the necessary legislative and administrative powers for this purpose[51].

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[46] Subject matters are, in fact, a "blank page" to be filled in by the legislature, cf. L. PALADIN, *Problemi legislativi e interpretativi nella definizione delle materie di competenza regionale*, in *Foro. Amm.* 1971, III, pp. 3 ff., p. 39.

[47] An example is the obligation to pay for building permits, envisaged as a fundamental principle in matters of territorial government; this principle cannot in any case be derogated from, on pain of breaking the legal and economic unity of the system, cf., M. Gorlani, *Regionalismo differenziato e materie oggetto di trasferimento: valutazioni politiche e criticità tecniche, organizzative e finanziarie*, in *Italian Papers of Federalism*, 1, 2023, pp. 51 ff., especially p. 54.

[48] The methodical approach followed in the implementation of the first and second regionalism, i.e. pre and post 2001, is decisive; although in different ways, it is the state legislature that fills the subject matters listed in Article 117 Const. with content through a mechanism centred on the approval of a delegated law by Parliament, entrusting the Government to identify transferable administrative functions (the latter has handed this task over to various ministerial bureaucracies). However, the carve-up of state competences may result in a reduction or an expansion in the operational spaces of regional law, see R. Bin, *Le materie nel dettato dell'articolo 116 Cost.*, in *Forum di Quaderni costituzionali*, 26 June 2019, p. 9-10.

[49] This aspect is alluded to in Article 7, para. 2 of the law,which delegates to each agreement the specification, in an annex, of the "provisions of state laws ceasing have effect in the regional territory, with the entry into force of the regional laws implementing the agreement" [translation mine]. Therefore, the content of the agreement between state and individual region has the questionable effect of delimiting the competences of the other regions.

[50] Cf. R. Bin, *Primo comandamento: non occuparsi delle competenze, ma delle politiche,* in *Istituzioni del federalismo,* 2, 2009, pp. 203 ff., especially pp. 209 ff.

[51] See again R. Bin, *"Regionalismo differenziato" e utilizzazione dell'art. 116, terzo comma, Cost. Alcune tesi per aprire il dibattito,* in *Istituzioni del federalismo,* 1, 2008, p. 9 ff., p. 11. Concrete examples in this direction can be found also in E. Balboni - C. Buzzacchi, *Autonomia differenziata: più problemi che certezze*, in *Osservatorio sulle fonti*, 1, 2023, p. 46, available at: http://www.osservatoriosullefonti.it.

While the choice to exclude the use of "multi-subject matter" agreements is acceptable by limiting the negotiations between state and region to the single subject-matter when the requests for differentiation concern areas in which there is a need to guarantee the uniform availability of essential levels of public services throughout the national territory (art. 117 (2), lit. *m*).

Art. 3, paragraph 3, law 86/2024 lists the relevant items: with regard to these, a gradual implementation of article 116(3) of the Constitution is to be carried out, in order to comply with the constitutional provisions, both for financial reasons and for coherence with the logic of asymmetry.

To the contrary, the pre-agreements of 2018 (then also the draft agreements of 2019) triggered a competition to acquire new competences, generating a trend in contrast to the meaning of art. 116 (3) of the Constitution; furthermore, the agreements were also very similar to the statutes of the special regions, approved by state constitutional law.

However, in the context of single-subject agreements, each region will be able to discuss its objectives it intends to pursue in a given sector to protect the specific needs of its territory, demonstrating its own greater management capacity and the need for new powers[52].

3.1. Parliamentary approval of agreement

The definition of the agreement content raises the question of the role of Parliament in approving the same.

From art. 116 (3) of the Constitution only three elements emerge: formal adoption of a parliamentary law, approval on an absolute majority, and prior agreement between state and the region.

Art. 2, paragraph 8, law no. 86/2024 therefore provides that the Bill to which the agreement is attached, «is immediately transmitted to Parliament for deliberation, pursuant to article 116, paragraph 3, of the Constitution».

This rule is linked to indications given in the Constitution but leaves open the question as to whether the law approving the agreement may be amended.

The preliminary agreements signed by the Government with the regions of Lombardy, Veneto and Emilia-Romagna were based on the idea that parliamentary law had only to incorporate the content of the agreement.

Subsequently, however, the idea according to which Parliament participates in the decision-making process has attracted a greater following and more complex

[52] See M. Cammelli, *Flessibilità, autonomia, decentramento amministrativo: il regionalismo oltre l'art. 116.3 Cost.*, in *Astrid Rassegna*, 10, 2019, p. 7.

solutions have been proposed, aimed at recognizing the possibility of it also approving rules in additional matters provided there is no conflict with the agreement.

The approval of the agreement by an absolute majority, moreover, confirms the role of Parliament as the seat of national representation, in which adequate mediation of the interests at stake (the interests of the requesting region, those of the other regions and the interests of other local authorities) should be guaranteed[53].

It has been noted that special majority law envisaged by art. 116(3) of the Constitution offers a combination of rigidity and subnational involvement so as to introduce a derogation from art. 117 of the Constitution[54].

This excludes the Government's ability to solely decide upon the content of the law providing for the transfer of new powers to the requesting region: the approval of the agreement, concerning fundamental choices about sensitive issues, implements a new balance between regional autonomy and central integrity. Parliamentary law should not be superimposed on the political choices of the "governmental majority"[55].

The importance of Parliament's participation is also strengthened by virtue of art. 5, paragraph 1, law no. 86/2024, according to which agreements between state and region must not be limited to the identification of the subjects (or areas of subjects) to be transferred together with their related functions.

Indeed, the agreement governs: (a) criteria for identifying the assets and human, financial, instrumental and organizational resources necessary for the exercise by the region of further forms and particular conditions of autonomy, (b) methods for financing the attributed functions through the sharing of revenue from one or more state taxes collected within the regional territory (art. 5), (c) duration of the devolution and (d) monitoring of the functioning of devolved competences (arts. 7 and 8).

The agreement also should provide for the establishment of a joint body (*Commissione paritetica*), responsible for managing the transfer of subject matters on which an agreement has been reached: with respect to each region, this joint body should make proposals concerning the resources and assets to be transferred, on the basis of the criteria established by the agreement between state and region.

The resources are determined by decree of the President of the Council of Ministers, upon the proposal of the Minister for Regional Affairs and the autonomies,

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[53] See, M. Olivetti, *Il regionalismo differenziato,* cit., pp. 24-25.

[54] See M. Cecchetti, *Attuazione della riforma costituzionale del Titolo V e differenziazione delle regioni di diritto comune,* in *Federalismi,* 13 of December 2002, pp. 1 ff., especially p. 7. *Contra* L. Elia, *Introduzione,* T. Groppi, M. Olivetti, *La Repubblica delle autonomie. Regioni ed enti locali nel nuovo Titolo V,* Turin, pp. 7 ff., especially pp. 18-19.

[55] See R. Toniatti, *L'autonomia regionale ponderata*, cit., p. 645.

in agreement with the Minister of Economy and Finance and the Ministers competent for the matter (art. 5, paragraph 1)[56].

This provision should also prevent Parliament's role being reduced to one of merely approving the agreement, as the legislative Chambers bear the primary responsibility for the coordination of public finance and safeguarding compliance with EU economic and financial constraints.

Nonetheless, parliamentary regulations do not offer a specific procedure for this purpose (they have not been reformed) and only allows for the formulation of hypotheses on the basis of existing special procedures.

Parliamentary practice relating to procedures *ex*-arts. 8 and 80 of the Constitution confirms that in some cases the deliberative role of the legislative Assemblies is not incompatible with the limitation of the parliamentary role to the alternative of either approving or rejecting a law.

Nonetheless, the proposals of an analogy with laws regulated by arts. 8 and 80 of the Constitution have turned out to be misleading as arts. 8 and 80 Const. do not provide for a special majority law[57].

Instead, the procedure provided by art. 116(3) of the Constitution must also be used for the future modification of the agreement, while any total or partial repeal, by ordinary law, will be constitutionally illegitimate as the state provisions subsequent to the date of coming into force of the laws approving agreements must respect the content of the agreements[58].

In this regard, it should be emphasised that, although some authors have proposed the need for a constitutional law for the unilateral modification of the forms and conditions of autonomy, law 86/2024 attributes a central role to the special majority law.

Art. 7 of this law attributes to the agreement the task of defining the cases, times and methods with which state or region can request the cessation of its effectiveness. Approval is decided by an absolute majority of the legislative Chambers. In any case, the state, if there are justified reasons for the protection of cohesion and social

[56] The composition of the Joint Committee was supplemented with representatives of local authorities following amendments introduced in the Senate. This composition varies according to subject matter as representatives of relevant state and regional administrations are involved, see *Dossier, Disposizioni per l'attuazione*, cit., p. 41.

[57] On the possibility of passing new rules in Parliament, when international treaties are not *self-executing,* see E. Palazzolo, *Ordinamento costituzionale e formazione dei trattati internazionali,* Milan, 2003, pp. 235 ff.

[58] The agreement must therefore provide for the cases, times and methods with which the state or region may request the cessation of its effectiveness (approved by law with an absolute majority of the Parliament). The possibility of unilateral revocation is foreseen only with regard to the eventuality that «there are justified reasons for the protection of cohesion and social solidarity». In this event, the complete or partial cessation of the agreement is approved by Parliament upon an absolute majority.

solidarity, orders the entire or partial termination of the agreement, which is resolved by law on an absolute majority[59].

This article also provides for a "temporary" effectiveness clause of the agreement, which can only be amended by a new state-region agreement[60].

The need for a special majority law therefore reinforces the requirement that Parliament has real decision-making participation: not only because it is the place in which the national interest emerges in light of the different political and territorial articulations, but also because the law based on the state-region agreement must be recognized as being able to resist repeal by subsequent ordinary laws (so-called "reinforced passive force").

For this reason, it is essential that the interests at stake are adequately balanced: a lack of parliamentary mediation risks fueling conflicts similar to those following the constitutional reform of 2001.

It is therefore in the interest of the region involved that the law approving the agreement is legitimized by broad discussion and parliamentary deliberation.

On the contrary, a merely formal assent, without debate even after the signing of the agreements, risks consolidating an unbalanced system that, being difficult to rebalance even with the adjudication of the constitutional Court, could betray the *ratio* of article 116(3) of the Constitution, enabling reform outside of the constitutional framework[61] .

4. From functions to resources: respect for the principles of art. 119 Cost. as substantial limit to differentiated autonomy

The political and scientific debate on differentiated regionalism oscillates between a vision of art. 116 (3) of the Constitution as an opportunity to relaunch Italian regionalism and a reading of the same as a threat to the integrity of the system[62].

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[59] These reasons are associated with the regional failure to comply with the obligation to guarantee LEPs.

[60] See art. 7 of law 86/2024 («Duration of agreements and succession of laws over time»). The idea that the law envisaged by Article 116(3) is not a mere transposition of the agreement, although recessive in the political arena, is immediately supported in the doctrine by F. Biondi, *Il regionalismo differenziato: l'ineludibile ruolo del Parlamento,* in *Quaderni costituzionali,* 2, 2019, pp. 442 ff.; and M. Olivetti, *Il regionalismo differenziato*, cit., p. 24 and p. 40.

[61] On the need for a more careful reflection on the role of the central state and «its ability to manage and govern diversity in the absence of an established and functional model of cooperative and supportive regionalism», see A.M. Russo*, Il regionalismo italiano nel vortice autonomistico della differenziazione: l'asimmetria sperimentale tra integrazione e conflitti*, in *Istituzioni del federalismo*, 2, 2018, pp. 365 ff., esp. p. 391.

[62] See "*Appello dei Costituzionalisti sulle gravi criticità della legge sull'autonomia differenziata"*, in *www.articolo21.org.*

The only substantial limit provided by art. 116 (3) of the Constitution, given the respect for the principles of article 119 of the Constitution, allows the terms of this contrast to be clarified: thanks to the respect for these principles, in fact, it is possible to attribute differentiated government powers to the regions, guaranteeing an expansion of autonomy compatible with the principle of equality in the enjoyment of constitutional rights, and with the cohesion and economic unity of the Republic[63].

With reference to financial autonomy, paragraph 1 of art. 119 of the Constitution provides that all territorial entities shall have financial autonomy both as regards revenue and expenditure.

Such regions have to base their financing on autonomous resources, that is mainly through tax revenue linked to territorial fiscal capacity[64].

Furthermore, paragraph 2 of art. 119 of the Constitution enumerates the different types of sources and paragraph 3 provides that state legislation shall provide for an equalization fund for the territories with a lower per-capita fiscal capacity.

Compliance with the principles of art. 119 of the Constitution refers to law no. 42/2009 which, together with enactment decrees (i.e. d.lgs. n. 68/2011) was to complete the regional financing system. From this perspective, the law should have implemented the model implicit in art. 119 of the Constitution (the so-called "solidarity federalism") reconciling financial autonomy both as regards revenue and expenditure with solidarity, cohesion and coordination of public finance and with equality among all territories.

Nevertheless, law no. 42/2009 delegated the Government with the power to adopt several bylaws ("*norme di attuazione*") within two years, so as to bring about the functioning of fiscal federalism, but this choice rendered its implementation ineffective [65].

Parliamentary law basically replicates constitutional principles and sets only general criteria to regulate the new financial regime; therefore, the Executive is vested with the task to delineate the implementation of these rules and to obtain a broad consensus on this much debated matter[66].

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[63] See G. Rivosecchi, *Ulteriori forme e condizioni particolari di autonomia e norme costituzionali sulla finanza territoriale,* in *Nuove Autonomie,* special issue, 1, 2024, 66.

[64] See A. Valdesalici, *Financial relations in the Italian regional system,* in E. Arban, G. Martinico, F. Palermo (ed.), *Federalism and Constitutional Law,* cit., p. 85.

[65] See F. Scuto, *The Italian Parliament paves the way to fiscal federalism,* in *Perspectives on Federalism,* 2 (1), 2010, p. 67.

[66] The implementation of these principles, even in the presence of a body of legislation that has addressed almost all aspects of the enabling act, has nevertheless proved complex; not only because in some cases the "enactment decrees" have merely reproduced the provisions of the enabling act, but they have also frequently postponed further implementation to secondary-level measures (which have not been adopted), cf. most recently, the contents of *Audizione dei rappresentanti della Conferenza delle regioni*

This resulted in uncoordinated measures and postponement for the bringing about of fiscal federalism[67].

What is still lacking is a reconstruction of so-called "standard costs and needs", to ensure the full coverage of "essential levels of public services" (in the field of healthcare, education, social assistance and transport).

These types of public services are to be fully financed at the levels defined by the national legislator (with "governmental decrees") in accordance with the balanced budget principle[68].

The failure to complete implementation of fiscal federalism is an obstacle to the realization of differentiated autonomy[69]; furthermore, the 2023 Budget Law postponed the application of the current regulations on the fiscal autonomy of the regions and on equalization (which has awaited application since 2013) to 2027.

There is some perplexity, given that the implementation of fiscal federalism is envisaged by the PNRR for 2026[70].

The recent enabling legislation for tax reform ("legge delega" no. 111 of 9 August 2023) should reactivate the implementation process, given that it contains principles relating to different areas of the tax system[71].

Pending its full implementation[72], however, and taking into account the fact that the "enactment decrees" could result in a possible reduction in tax revenues guaranteed to regions from share of state taxes (with the need to review the other sources of financing regional public expenditure) [73], regulating the financing of so-called asymmetrical regionalism appears illogical.

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e province autonome sulle tematiche relative allo stato di attuazione e alle prospettive del federalismo fiscale presso la Commissione parlamentare per l'attuazione del federalismo fiscale, 8 February 2024, (24/22/CR05/C2), pp. 2 ff.

[67] On this aspect, broadly, A. Valdesalici, *Financial relations,* cit., p. 88.

[68] However, this results in a partial equalization as the related transfers shall not be based on effective needs, but on standard needs, see S. Staiano, *Anti-mitopoiesi. Breve guida pratica al regionalism differenziato. Con alcune premesse,* in *Federalismi,* 29, 2022, p. 192.

[69] On implementation of the so-called "fiscal federalism", as a necessary precondition for the implementation of art. 116, paragraph 3, of the Constitution, cf. lastly, Astrid, *Position Paper* no. 93: *L'autonomia regionale "differenziata" e la sua attuazione: questioni di procedura e di metodo,* in Astrid Rassegna, 7, 2023, especially pp. 40 ff.

[70] See art. 1, co. 788, law 197/2022 (2023 Budget Law).

[71] Cf. Artt. 13 and 14, law no. 111/2023 (on regional and local finance).

[72] In implementation of law No. 111 of 2023, eight legislative decree proposals have so far been submitted for parliamentary scrutiny; for seven of these, parliamentary scrutiny has been concluded, and six schemes have been published in the Official Gazette ("decreti legislativi" nos. 209, 216, 219, 220, 221 of 2023, and 1 and 3 of 2024).

[73] See article 2 of law no. 111/2023 that expressly refers to the "reduction of the tax burden" as a general principle of the delegation to be achieved (inter alia), "with a view to the transition of the system towards a single tax rate" [translation mine]; article 5 with regard to Personal income tax -*IRPEF*) and through the revision of the regional tax on business activities (article 8, law no. 111/2023).

Indeed, the model for financing additional competences must comply with the general mechanism provided for all the functions already falling under the competence of the regions and local authorities[74].

However, it is necessary to arrange for the prior determination of "essential levels of public services" under art. 117, paragraph 2, letter. m, of the Constitution.

Where the attribution of new powers affects this area, the prior determination of so-called LEPs, together with the "standard costs and needs", allows the resources to be defined which the regions need in order to provide for public services to be made available uniformly throughout the national territory (art. 3, law no. 86/2024)[75].

Regional spending for those services must be considered as constitutionally binding. The central power cannot deprive the regions of the necessary financial resources. It seems that this would jeopardize the level of equality essential for protecting the unity and indivisibility of the Republic.

For this reason, in the initial version of the implementation bill of art. 116 (3) of the Constitution, it was envisaged that the transfer of new competences to the regions would be preceded by the determination of the LEPs in all matters indicated as a possible subject matter of differentiation.

Following an amendment passed in the Senate, some items were expressly excluded, either because they were deemed not attributable to the protection of fundamental civil and social rights or because some services were not deemed quantifiable[76]: law 86/2024 therefore provides that in "non-Lep matters" the devolution of the requested competences can be carried out immediately, while with regard to the other items listed in paragraph 3 it will be possible to proceed with the agreements only after determining the LEPs.

Definition of LEPs was a central aspect in the debate concerning the implementation of differentiated regionalism.

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[74] The reference contained in Article 1, paragraph 1 of dd. AC 1665, to Article 14 of law no. 42/2009 - according to which: «The law by which special forms and conditions of autonomy are granted, pursuant to Article 116(3) Const., to one or more regions shall also allocate the necessary financial resources, in accordance with Article 119 Const. and the principles of this law» [translation mine] - must therefore be coordinated with the timeframe provided by the enabling act on tax reform. On the guiding principles and criteria of the enabling act No. 111/2023 on local finance, see Articles 13, 14 and 23.

[75] However, the deadlines for the conclusion of the process for determining standard costs have been postponed several times. Still, even for the part in which the procedure for identifying "standard costs and needs" has been completed, this tool is used not to guarantee equalization intervention by the State, but in a different logic, cf. *Dossier, Federalismo fiscale,* XVII Legislatura, in *www.camera.it.*

[76] See, *Technical and Scientific Committee with investigative functions for the identification of the Essential Levels of Performance* (CLEP, envisaged by the Budget Law 2023), *Rapporto finale*, 14 November 2023, p. 26.

Art. 3 of law 86/2024 implements the conclusions reached by the Technical-Scientific Committee with investigative functions for the identification of essential performance levels (CLEP), which has been assigned investigative functions for the identification of essential performance levels.

Some members of the Committee had argued that the prior determination of LEPs should be a precondition for the transfer of further powers in relation to each subject matter, in order to guarantee the coherency of differentiated regionalism with art. 119 of the Constitution[77].

Nonetheless, the alternative solution prevailed[78], which also left other fundamental issues unresolved: the unequivocal notion of "essential levels" and the problem of determining cost quantification criteria, to ensure the financing of essential services.

This approach will have consequences in terms of financing the devolved competences since the identification of "essential levels of services" indicates those services that are legally enforceable and represents the parameter for the organization and financing of fundamental social services, even when it is necessary to activate the state equalization function[79].

In relation to this aspect, art. 4 of the law, amended in the Senate, provides that if the determination of LEPs involves new or greater burdens on public finances, the transfer of functions must take place only after the entry into force of the provisions for the allocation of the necessary financial resources.

However, art. 4 refers to the financial coverage of LEPs in relation to the planned public finance objectives and the budget balance; not to the equalization criteria provided under art. 9 of law no. 42/2009 and implemented by "enactment decree" (d. lgs. n. 86/2011)[80].

To ensure the full financing of the functions connected to LEPs in all regions, a reference to the latter criteria should have been made, as the purpose of the

[77] It is to be noted that a specific working-group was established for subject matters not included in art. 116(3) of the Constitution.

[78] Some important subject matters which in theory can be devolved were excluded from the preliminary activities of the technical-scientific committee tasked with identifying essential levels of services. Therefore, the relating functions can now be immediately "transferred" (the Regions' international relations and relations with the European Union; foreign trade; the professions; civil protection; complementary and supplementary welfare; savings banks, rural banks, credit companies of a regional character; land credit institutions of a regional character, see *Rapporto finale*, cit., p. 7). This decision calls into question the compatibility of the clause's implementation process with the fundamental principles of the Constitution, as well as with Article 119 of the Constitution.

[79] See L. Antonini, *Federalismo fiscale (diritto costituzionale),* in *Enc. Dir.,* Annali X, Milan 2017, pp. 418 ff.

[80] See G. Rivosecchi, *Ulteriori forme e condizioni particolari di autonomia e norme costituzionali sulla finanza territoriale*, cit., p. 73.

equalization fund is to cover the difference between the "standard costs and needs" (see articles 9 and 8 of law no. 42/2009) and regional revenue.

Consequently, the equalization process should have been extended to functions that are exercised at regional level by virtue of a state law: even with respect to the latter, the state must guarantee an adequate financial endowment[81].

4.1. Principles of art. 119 of the Constitution as a limit for access to negotiations and a condition for the "sustainability" of differentiation

The full financing of assigned public functions through tax revenue must govern the distribution of functions between the territorial levels of government and be guaranteed both at regional and state level.

At the start of the procedure, it is necessary to guarantee that the region requesting further forms of autonomy fulfills some financial requirements, such as "sustainable public debt", adequate fiscal capacity, balanced local budget[82].

It is therefore provided that, for the purposes of commencing negotiations, the President of the Council of Ministers or the Minister for Regional Affairs and Autonomies is to take into account the "financial framework" of the region.

The region that requests greater legislative and administrative powers will have to demonstrate suitable financial characteristics to support the new functions. Firstly, respect for the principle of the balanced budget precludes the acquisition of further powers until the region's objective of rebalancing the budget is achieved.

To guarantee adequate resources also for those regions that do not conclude an agreement, the regions benefiting from the differentiation will have to obtain additional resources within the limits of strict correspondence with the transferred competences. Furthermore, the state must not incur additional costs for functions it is to carry out in other parts of the national territory.

However, this possibility is not to be excluded, even though law no. 86 contains a "financial invariance" clause concerning expenditure[83].

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[81] On the principle of correspondence between functions and resources, S. Pajno, *Le autonomie territoriali tra principio di sussidiarietà e principio di corrispondenza tra funzioni e risorse*, in *Federalismi.it*, 7, 2023, pp. 206 ff.

[82] See S. Mangiameli, *L'attuazione dell'articolo 116, terzo comma, della Costituzione con particolare riferimento alle recenti iniziative delle regioni Lombardia, Veneto ed Emilia-Romagna (novembre 2017),* in *www.issirfa.cnr.it.*

[83] See A. Zanardi, *Audizione dell'Ufficio parlamentare di Bilancio su attuazione e prospettive del federalismo fiscale e sulle procedure in atto per la definizione delle intese ai sensi dell'art. 116, terzo comma, Cost.,* was heard before the *Commissione parlamentare per l'attuazione del federalismo fiscale,* 10 July 2019, in *www.upbilancio.it,* pp. 11 ff.

It is not clear if the devolution of some competences may still result in "organizational extra costs", given that the functions carried out jointly by the state for the entire system will continue to be carried out for the "non-differentiated regions"[84].

The principle of correspondence between functions and resources raises the question concerning the criteria for financing any further competences transferred[85].

On the basis art. 119 of the Constitution, art. 5 of law 86/2024 identifies the instrument for financing the attributed functions from a share of the revenue of state taxes collected within the regional territory, in accordance with the criteria established by agreement with each region.

This provision establishes that such criteria are to be subsequently defined by Prime Ministerial Decree on the proposal of a specific State-Region-Local Authorities Joint Commission, governed by the agreement.

In relation to resources, there is a real risk that, in the years following the signing of any agreement, the financing mechanism based on a share of the revenue raised from taxes levied on the territory may result in insufficient, or "extra-funding" for the richest regions[86].

For this reason, monitoring is envisaged to guarantee the correspondence over time between collected tax revenue and functions acquired by the region (art. 8). However, the fact that the mechanisms for periodically adjusting the share of such revenue are managed by a complex procedure, centred on bilateral agreements, suggests a reconsideration of the role assigned to the Joint Commissions[87].

It would seem preferable, also in the light of comparative experience[88], to focus on multilateral cooperation, since this would be a suitable way to guarantee coordination between all subjects: the regions that request differentiated autonomy, those that do not, and the state[89].

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[84] See S. Pajno, *Il regionalismo differenziato tra principio unitario e principio autonomista: tre problemi,* in *Federalismi,* 2020, pp. 121 ff.

[85] Furthermore, from the principles of art. 119 of the Constitution there derives the need not to compress local financial and tax autonomy, maintaining the region's role as planning body and to ensure the functioning of the solidarity instruments envisaged by art. 119 Constitution.

[86] This possibility is highlighted by Svimez, *Sintesi Rapporto 2023, Third Party*, p. 2.

[87] Cf. Art. 8, ddl. AC 1665; and the reflections of A. M. Poggi, *Il regionalismo differenziato nella "forma" del ddl Calderoli: alcune chiare opzioni politiche, ancora nodi che sarebbe bene sciogliere,* in *Federalismi.it,* 3, 2024, xii.

[88] See A. Valdesalici, *Financial relations in the Italian regional system,* in E. Arban, G. Martinico, F. Palermo (ed.), *Federalism and Constitutional Law,* cit., p. 88.

[89] A clear indication in favour of the German model, as an alternative way for shaping relations between different levels of government, see L. Violini, *Esperienze di regionalismo differenziato: un raffronto tra ordinamenti nazionali, in Rivista del Gruppo di Pisa,* Quaderno n. 2, 2020, pp. 107 ff., especially pp. 117 ff.

5. *Concluding considerations*

The reform of Title V juxtaposed the original special status category (*specialità*) with another form of constitutional asymmetry and allows for further differentiation among ordinary regions.

The approval of Law 86/2024 fulfills an important stage relating to the implementation of the new constitutional rule.

However, many uncertainties remain regarding art. 116(3) implementation: this is due to the realization of fiscal federalism[90].

Furthermore, one political factor is highly relevant: the "emulation factor", given that prior to the approval of this law almost all the regions (even those without some indispensable financial requirements) had taken action to obtain almost all the available competences.

The "asymmetry clause" represents a complexity of variable scope due to its breadth of application provided by article 116(3) Const.; in fact, this provision is thinly formulated, but its generalised extension runs the risk of resulting in an unsustainable degree of entropy in the constitutional system, which could make it necessary, at a future date, to take further remedies in the direction of greater uniformity, especially in times of crisis or emergency[91].

Such an evolution can be seen from a comparative perspective: in the Spanish system, for example, (which many scholars agree is the example followed by the constitutional legislator in 2001) the "homogenisation of competences"[92] has induced the major Spanish political forces to review the promise of differentiation contained in the Constitution and thereby reduce the complexity of the system through the unilateral transfer of new competences to local authorities, in order to allow the survival of real forms of differentiation in limited, well-defined circumstances[93].

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[90] The reference contained in art. 1, paragraph 1 of law 86/2024, to art. 14 of law no. 42/2009 must therefore be coordinated with the times established by the enabling law on tax reform.

[91] See L. Pierdominici, G. Martinico, *Crisis, Emergency and Subnational Constitutionalism in the Italian context,* in *Perspectives,* 6 (2), 2014, p. 118 ff.

[92] See M. Iacometti, *Il regionalismo differenziato: una buona soluzione per gli ordinamenti composti? Minime considerazioni comparative su Spagna e Italia*, in *Rivista del Gruppo di Pisa, Quaderno n. 2, fascicolo speciale monografico su: "Autonomie territoriali e forme di differenziazione. Ordinamenti a confronto", in memoria di Paolo Carrozza,* 2020, 323 ff., 328.; on this aspect, see even, A. Galera Vicotria, *Pluralismo, Conflictos territoriales y reforma federal de la Costitución española,* in *Italian Papers of Federalism,* no. 2/2018, 1 ff.

[93] With reference to the Communities that enjoy greater autonomy, for example Catalonia and the Basque Country, see R. Tarchi, *In ricordo di Paolo Carrozza. Riflessioni sul percorso accademico, scientifico e sul pensiero in tema di federalismi nella prospettiva del regionalismo asimmetrico "Italian Style",* in Rivista del gruppo di Pisa, cit., 2020, 21 ff., p. 59, note 112.

A further example is offered by the German experience which, having enhanced the ability of the Länder to legislate in derogation of federal legislation[94], in exchange for a reduction in the rights of participation in the exercise of fundamental federal powers [95], is characterised by the approval of a new constitutional reform aimed at introducing the institutional instruments necessary to limit excessive recourse to debt, both by the Federation and the Länder[96]. The objective being to guarantee lasting stability to the budgets of the Federation and of the Länder in harmony with the European Stability Pact[97].

This has resulted in a resetting of the financial relations between the Bund and the Länder in a centralising sense, and in line with the traditional approach of the German federal system, which generally associates the centralisation of competences with the operation of collaborative mechanisms.

The experiences summarised above offer food for thought on how to implement art. 116 (3) of the Constitution, whose implementation process appears to be driven essentially by economic-financial reasons[98].

Thus, foreign experiences, for different reasons, support the idea that "differentiated regional autonomy" cannot only be used to acquire the autonomous management of new financial resources[99], since the attribution of further competences

[94] The reference is to the *Föderalismusreform* I of 2006.

[95] On the outcome of the choice: "not up to expectations", see G. Parodi, *Riforma del federalismo tedesco e riparto delle competenze legislative. Spunti per un primo bilancio*, in G. F. Ferrari, S. M. Moraldo (eds.), *La Germania tra integrazione europea e sovranismo*, cit., 155.

[96] This is the *Föderalismusreform* II of 2009. Briefly, on the contents of the reform, see Senate of the Republic, Study Service, 16th Legislature, *Dossier*, *La riforma costituzionale tedesca del 2009* (*Föderalismusreform II*) *e il freno all'indebitamento*, April 2011, No. 287, especially pp. 8-9.

[97] On this aspect, see G. Rivosecchi, *Legge di bilancio e controllo di costituzionalità, spunti dalla decisione del Tribunale costituzionale federale tedesco,* in *Diritto pubblico comparato ed europeo,* 2, 2024, pp. 451 ss.

[98] The transformations produced in this sense, also with regard to the autonomist claims of the Spanish system, are highlighted by M. Iacometti, *Il regionalismo differenziato*, cit., pp. 335-336. For constitutional reforms of the German system in 2006 and 2009 and impact of the richer *Länder* intolerant of equalisation, see also P. Carrozza, *I rapporti centro-periferia: federalismi, regionalismi e autonomie,* in P. Carrozza, A. Di Giovine, G.F. Ferrari, (eds.*), Diritto costituzionale comparato,* Rome-Bari, 2014, pp. 894 ff., especially p. 920.

[99] On the so-called fiscal residue, i.e. the positive balance between the amount paid by taxpayers residing in a certain territory and benefits received by them through direct public expenditure in that territory, see S. Staiano, *Salvare il regionalismo dalla differenziazione dissolutiva, Editoriale,* in *Federalismi*, 7, 2023, p. x. The use of this concept implies significant misunderstandings as it fails to take into account that redistribution between territorial areas, implemented by the public budget in Italy and recorded by indicators as tax residues, is generally the result of policies that are not motivated by a redistributive purpose on a geographical basis. On this point, see also cf. A. Giannola- G. Stornaiuolo, *Un'analisi delle proposte avanzate sul federalismo differenziato,* cit., pp. 8-9.

often introduces an element of tension with respect to satisfying the principles of equality, social solidarity and the harmonisation of public budgets.

In order to respect the above principles, the expansion of the forms and conditions of autonomy of ordinary regions must be circumscribed and gradual, containing clauses specifying periodic verification of the effects of differentiation[100].

Until now, the requests for autonomy presented in Italy are very broad; they may represent a reaction to the centralist interpretation of art. 117 of the Constitution.

However, the implementation of art. 116 (3) of the Constitution on a general basis is unnecessary and counterproductive.

It is unnecessary, because art. 117 of the Constitution, even if not always adequately implemented, was significantly modified by the 2001 reform, reversing the previous arrangement which reserved to the state all "non enumerated powers"[101] .

Furthermore, the implementation of art. 116(3) through the transfer of legislative competence up to 23 subject matters is counterproductive, because subject matters are increasingly interrelated.

This makes it even more important to examine how powers are shared and coordinated among levels of authority, rather than focusing «how they are divided»[102].

The implementation of constitutional reform has shown that in the Italian regional system, in the absence of constitutional provisions governing procedure in the event of interference of competences, a central role must be ascribed to the principle of loyal cooperation.

This principle resolves the problem of interference of competences when it is necessary to safeguard unitary interests and the subjects competent for the individual areas have an equal right to exercise their powers.

Theoretically, the collaborative models of relations between levels of government, long established to allow the realisation of the principles of the welfare state, can be realised in various ways, recognising greater or lesser "visibility" to state supremacy[103].

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[100] On this aspect, see, however, Arts. 7 and 8 of Law 86/2024.

[101] The reform of 2001 has completely altered the distribution of legislative and administrative powers between state and regions (the abolition of previous national control marks the equal rank of regional and national legislation). At the same time, financial autonomy of sub-national entities is enhanced, enabling them to keep most of the territorial tax revenue. See, at least, A. D'Atena, *Diritto regionale,* Turin 2022 and P. Caretti, G. Tarli-Barbieri, *Diritto regionale,* Turin, 2024.

[102] See F. Palermo, *Federalism and the European Union: asymmetry, policies and some recurring federal dilemmas,* in J. Kinkaid (ed.), *A Research Agenda for Federalism Studies,* (Edward Elgar), 2019, p. 204.

[103] Recently, on different declensions of the principle of loyal cooperation, P. Popelier, *Dynamic Federalism. A new Theory for Cohesion and regional Autonomy,* London-New York, 2021, especially pp. 151-153.

However, in Italy, cooperative regionalism is affirmed in ways that tend to give maximum "visibility" to the supremacy of the state[104]: the principle of loyal cooperation remains confined to intergovernmental relations and a procedural role[105]. Regions are often overburdened with delegated tasks, and become «policytakers not policymakers»[106].

Therefore, the basic question, in order to rebuild the political autonomy of the regions, is constituted by the type of cooperation that is practised.

It is important to allow adequate space for mechanisms by which state primacy is "attenuated", thereby rediscovering the authentic sense of coordination at the political level[107].

Article 116, paragraph 3, of the Constitution should remain a limited corrective to the model of Italian regionalism; at the same time, the regions wishing to offer particularly high standards in the provision of given services could do so and inspire the choices of other territories and the state.

The ability of central government to guide excessively broad and unjustified requests for the implementation of article 116(3) Const.[108], and to propose a reorganization of the formal links between state and territorial autonomy, will therefore be crucial to the implementation of so-called "Italian-style" differentiated regionalism. As is often the case, the fate of a model depends on the quality of the political class called upon to implement the same.

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ABSTRACT: Art. 116, paragraph 3, forms part of the constitutional reform under Title V, Part II of the Italian Constitution. It introduces a model of specialization aimed directly at the ordinary regions (regioni "ad autonomia ordinaria"), as it provides for the possibility of acquiring new competences covering up to 23 subject matters.

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[104] As mentioned by M. Luciani, in *Un regionalismo senza modello*, in *Le Regioni*, 5, 1994, pp. 1313 ff. After the 2001 constitutional reform, see R. Bin, *La 'leale collaborazione' tra prassi e riforme, Editoriale,* in *Le Regioni,* 3-4, 2007, pp. 393 ff., and recently, J. Woelk, *Loyal cooperation,* in E. Arban, G. Martinico, F. Palermo (eds.), *Federalism,* cit., pp. 170 ff.

[105] Within a system of shared powers, subnational entities are involved in central decision making. In our country, due to the lack of regional representation, Parliament does not function as a forum for balancing the roles in the new system.

[106] See, F. Palermo, K. Kössler, *Comparative Federalism. Constitutional Arrangements and Case Law,* Oxford 2017, p. 296, 315.

[107] See J. Woelk, *Loyal cooperation,* cit., p. 184-185.

[108] For a critical analysis of the "new approved levelling" emerging from the current demands for access to differentiated autonomy, see R. Toniatti, *L'autonomia regionale ponderata*, cit., p. 658.

Eleonora Rinaldi
Some reflections on the implementation of Article 116 (3) of the Italian Constitution. Law 86/2024 and limits to "differentiated regionalism"

The approval of law 86/2024 stimulates some observations concerning the "sustainability" of the asymmetrical option. The author examines, in particular, procedural and substantial limitations derived from the framework established by the state legislator to implement the so-called "differentiated regionalism", and the critical issues in relation to the respect for fundamental constitutional principles.

KEYWORDS: "Italian style" asymmetric regionalism - framework law implementing Article 116(3) of the Constitution - regional autonomy and determination of LEPs - solidarity federalism - sustainability of the asymmetrical option.

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