DIFFERENTIATION AND INEQUALITIES: ASYMMETRIC REGIONALISM IN A ONE AND INDIVISIBLE REPUBLIC

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Abstract

The public debate on "autonomy" regarding the "further forms and particular conditions" of autonomy allowed by paragraph three of Article 116 of the Constitution shows the serious misrepresentation of the constitutional idea of autonomy, confused with independence, separateness and self-sufficiency from the rest of the Nation, instead of being correctly understood as self-government in the awareness of the interdependence between the entities of the Republic as a whole.

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1. Some axioms of Italian Regionalism

The many and unsustainable changes that the form of regional state has undergone in Italy demands that some cornerstones of Italian Regionalism be unceasingly recalled, in particular the fundamental principles of the Constitution and their interrelationships (De Martin, 2019; Ronchetti, 2020).

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It is apparently irrelevant to recall that Regionalism in itself represents the recognition of factual differences (Bin, 2012) and the promotion of differences in the policies of the various regional autonomies which, through their own laws approved by their representative institutions, adapt the fundamental principles contained in State legislation protecting the unity and indivisibility of the Republic to the specific needs of their communities and their territories.

The concurrent powers, i.e. the law-making powers shared by the State and the Regions, constitute in fact the hinge of a system whereby the Regions, which are autonomous, converge – albeit with a physiological degree of conflicts – with the political direction of the State and all the entities of the Republic can contribute to identifying and pursuing the national interest. Shared legislative powers, with their peculiar synergy between the principles of a matter set by the State and the detailed rules defined by the Regions, are the emblem of an idea of local autonomy as co-protagonist in the identification of the national interest, with a view to cohesion based on the awareness of interdependence (Ronchetti, 2018): each entity of the Republic contributes to the pursuit of the public interest, with the mediation but also with the intervention of the Constitutional Court where disputes arise, in the name of the Nation and its overarching interests. The participation of all legislators in defining the rules and regulations that govern a given subject matter, in fact, is the expression in practice of the awareness of the interdependence among the entities in identifying the national interest, pursued by laying down uniform norms that lay down uniform principles and norms that adapt those principles to the individual social, political and territorial realities.

This is the idea of autonomy enshrined in the Italian Constitution (Giannini, 1959) and indeed in 2001, despite the reversal in the sharing of powers between the State and the Regions, the centrality of concurrent powers remained intact, as the centre of gravity of the balance between autonomy and the unity and indivisibility of the Republic.

Secondly, the differentiation provided for in the Constitution aimed at recognizing and promoting the "needs of autonomy" pursuant to Article 5 of the Constitution, is strictly connected to all the other fundamental principles of the Constitution that irrevocably characterize our Republic.

The other fundamental principles include, in particular, the principle of equality pursuant to Article 3 of the Constitution that indicates how the meaning of autonomy is to be construed under Article 5: the ultimate objectives of the principle of substantial equality - full development of everyone's personality and true participation of everyone in the economic, political and social life of the Country - are the glue that allows the Republic to be one and remain indivisible, that makes the process of national unification a permanent one through the fight against the inequalities among the people, groups and territories.

And overcoming inequalities requires differentiation according to the different capacities and specific needs. Regionalism, therefore, is a form of state ontologically based on differentiation, which constitutes «a way of being of the Republic» (Berti 1975) which is one and indivisible from both a formal and substantial point of view because it contributes to the social cohesion of the Italian people (Salazar, 2017).

It is no coincidence that we talk about the autonomous regional governments as "welfare entities": based on Article 5 of the Constitution, the autonomous regional institutions are the instrument for pursuing the principle of substantial equality, and not levers for disrupting the national solidarity pact, just as, vice versa, the fight against territorial inequalities requires different types of intervention.

This leads to an additional corollary: the unceasing process of national integration which involves the elimination of inequalities presupposes the fulfilment of the «mandatory duties of economic, political and social solidarity» provided for by Article 2 of the Constitution and, therefore, only where regionalism is strongly rooted in solidarity can it act as a strong bond of the unity and indivisibility of the Republic.

National unity, which is inherently «multifaceted and manifold» (Modugno, 2011), cannot be given once and for all because it requires a permanent process of unification of society based on solidarity (Luciani, 2001). The substance of the awareness of interdependence, therefore, requires that solidarity be an on-going process that needs to be exercised permanently.

Enhancing competitiveness any further in our regionalism, on the other hand, would mortify its solidarity dimension and thus violate the Constitution. This is because the last axiom that characterizes the type of regionalism admitted by our Constitution consists in the fact that the aforementioned Articles 2, 3 and 5 have been read jointly with prevalence over Part II of the Constitution, hence orienting their interpretation, in our case with particular reference to Title V (Pezzini, 2015).

What is gradually emerging, however, is a serious distortion of the idea of autonomy as referred to in the Constitution, increasingly confused with and superimposed on independence, separateness, self-sufficiency from the rest of the Nation, instead of being correctly understood as self-government in the awareness of the interdependence among the entities of the Republic as a whole. The transfiguration of the very concept of autonomy is being promoted by a public debate on "autonomy" which refers to "further forms and particular conditions" of autonomy permitted under paragraph three of Article 116 of the Constitution.

2. From differentiation to asymmetries

The aforementioned paragraph three of Article 116 contains a provision introduced with the Constitutional Revision Law no. 3 of 2001 which envisages the possibility of an "asymmetrical" regionalism based on the physiological differences among the Regions: while up to 2001 regionalism allowed for differentiation among Regions having identical powers, after 2001 this differentiation may be asymmetrical because the provision does not require the framework set by the State to be uniform across Regions, but differs in relation to individual Regions for the twenty subject

matters over which powers are shared by the State and the Regions and the three other subject matters that the Constitution entrusts exclusively to the State in Article 117 of the Constitution (organisational requirements for the Justice of the Peace, general provisions on education, and protection of the environment, the ecosystem and cultural heritage).

Paragraph three of Article 116, therefore, contemplates as many as twenty-three subjects that can be transferred exclusively to the Regions while, pursuant to paragraph two of Article 117, the State has exclusive powers, once the three mentioned above are removed, over fourteen matters.

The devolution *en bloc* of all the subject matters referred to in the paragraph three of Article 116 in their (indefinable) entirety would mean that for the individual Regions, concurrent competence is abolished and configures a Region that makes laws and administers, on an exclusive basis, a larger number of subjects than those which come exclusively under the sole competence of the State. This hypothesis clearly embodies the idea that any form of interdependence, collaboration and synergy between the Region and the State is rejected, since having exclusive powers over the listed matters presupposes a hard and fast separation between the State and the Region and embodies a claim of self-sufficiency by the Region which repudiates the on-going exercise of interdependence required by the idea of concurrent or shared powers with the State. While concurrent legislative competence reflects institutional relations which converge towards unity and integration, the very idea of powers that are "exclusive" to an institution (whether it be the State or the Regions) expresses a self-centred vision, and leads to a separation of interests, oblivious to the needs of the national interest. Moreover, the national interest envisages complex public policies that are difficult to break down into individual subject matters, attributed exclusively to one body or another. This emerges clearly from constitutional case law which, in fact, in its efforts to solve cases of "intricate subject matters" has devised the principle of the "prevailing" matter, according to the objective being pursued by public policy in the given circumstances. When the complexity of the

social sector to be regulated makes it difficult to refer to only one single subject, priority must be given to the most prominent matter in accordance with the purposes being pursued by the law (Ronchetti, 2014).

Furthermore, it is very likely that in the future the State will regret having consented to this significant loss of law-making power over a number of areas and will firmly claim the broadest possible interpretation of its competence over the remaining areas, as already happened after the 2001 revision. This state of affairs is bound to cause a rise in the number of cases brought before the Constitutional Court precisely at a time when the cases of conflict between the State and the Regions had finally decreased. The case law on the overwhelming number of post-2001 constitutional disputes, however, has greatly reduced the actual exercise of the many, significant powers that the new Title V attributes to the Regions. It is therefore particularly difficult to understand why the State should be willing to grant exclusive law-making rights on all those matters given the fact that since 2001, even through its politically different Governments, it has encroached on the spaces of regional autonomy. The generic reference made by Article 116 to all concurrent competences listed in paragraph three of Article 117, moreover, would seem to imply that the concurrent matter of "financial coordination", which has so far been construed by constitutional case-law as a quasi-exclusive State matter because it "cuts across" all regional powers, is also under the exclusive competence of the Region.

For these basic reasons the devolution *en bloc* of matters to a single Region is not legitimate, just as the devolution of any matter without a specific motivation and without undergoing a rationality verification is not legitimate (Vandelli, 2019). Furthermore, there are some subject matters that inherently cannot be devolved exclusively to a Region (Olivetti 2019): for example, it is difficult to understand what kind of «financial *coordination*» can be regulated and organized by an individual Region. Therefore, there ensues from a systematic reading that not only the number but also the size of the subject matters indicated by Article 116, paragraph 3 needs to be delimited. It has been demonstrated, in fact, that even in the case of Emilia-

Romagna which claims fewer subjects, the devolution of powers would be no less impressive and destabilizing (Pallante, 2019).

From this point of view, a closer examination of the matter, if not a sharp and clear turnabout, by constitutional case law itself is necessary. So far there has been only Sentence no. 118 of 2015 in which the Constitutional Court considered legitimate the Referendum to be held by the Veneto Region in which voters were asked if they agreed on requesting «further forms and special conditions of autonomy». Although there was «no indication of what areas need greater regional autonomy on which voters are asked to express their opinion», the Constitutional Court merely found that these areas «can *only* [our italics] concern» matters of concurrent legislative powers, referred to in Article 117, paragraph three of the Constitution as well as the matters of exclusive legislative power mentioned above: according to the Court, «thus interpreted, the referendum query *does not envisage developments in autonomy that exceed the limits posed in the Constitution* [our italics]» (sentence 118 of 2015).

After the referendum (Violini, 2018), Veneto requested to take on all twenty-three subjects on an exclusive basis, Lombardy a few less and Emilia-Romagna sixteen. This in a context in which not even the ordinary constitutional division of competences is fully respected, in particular through three mechanisms for centralizing powers endorsed by the Constitutional Court. Constitutional case-law has created other "types" of powers, and in particular the goal-oriented powers of the State (cross-cutting nature of some matters under the exclusive competence of the State), and the power - in the name of unitary requirements - to "call for subsidiarity" thereby taking over administrative and legislative regional functions. And lastly, the anomalous cross-cutting nature of concurrent powers, namely "the coordination of public finances" intended essentially as a means for containing expenditure (Ronchetti, 2014).

The Constitutional Court, therefore, must be urged to specify that the «only» it used to indicate the matters referred to in paragraph three of Article 116 simply intended to delimit the range of subjects *within which* it is possible to request additional forms of autonomy

and only with specific and individual arguments based on the interest of the entire system of Regions. Even though the Court has expressly excluded that a formal declaration of independence can be made through a referendum, Constitutional case-law more generally should clarify that autonomy, although asymmetrical, cannot be a sort of independence, not even from a substantial standpoint. In the aforementioned 2015 ruling, indeed, the Court declared the regional law illegitimate, which provided for a consultative referendum to find out the will of the Veneto voters on the following question: «Do you want Veneto to become an independent and sovereign Republic? Yes or no?». In the opinion of constitutional case-law, this question suggested «institutional upheavals radically incompatible with the fundamental principles of unity and indivisibility of the Republic, pursuant to Article 5 of the Constitution» because «social and institutional pluralism and territorial autonomy (...) cannot be taken to extremes, to the point of causing a *fragmentation* of the legal system [our italics]». Is this illegitimate claim hidden in some way in the concrete forms emerging from the direct application of asymmetric regionalism?

This question is legitimate in the face of such radical and extreme requests, and it arises from the specific institutional context in which the asymmetrical configuration of regionalism was initiated.

3. An already broken context: length of residence in the territory

While following the reform of Title V, the State attempted to re-centralize the legislative powers constitutionally attributed to the Regions, it failed to exercise its main tasks: on the one hand, it failed to define the essential levels of services concerning civil and social rights; on the other hand, it failed to establish the forms of «equalization with no allocation restraints, for the territories having lower per-capita tax-raising capacity» (Article 119, paragraph 3), the «supplementary resources» and «special measures in favour of specific Municipalities, Provinces, Metropolitan Cities and Regions to promote economic development along with cohesion and social solidarity, to eliminate economic and social imbalances, to foster the

exercise of personal rights, or to achieve goals other than those pursued in the ordinary implementation of their functions» (Article 119, paragraph 5).

The absence of any redistribution activity took place in a context in which, especially following the 2008 crisis, the State made spending cuts with dramatic repercussions on the ability of local authorities to provide the services for which they are responsible. In this way, rights such as social services, housing, health care, education, training and job placement were jeopardized, making "regional citizenship" the protagonist of the "substantial" dimension of citizenship.

The downsizing of the spending autonomy of the Regions is one of the causes of the widespread tendency to reduce the number of beneficiaries of services by requiring long-term residence in the territory of the Region: with this criterion unreasonable discriminations have been introduced in the enjoyment of fundamental rights to the detriment of all those who are newcomers to the Region. These policies of exclusion of citizens (and even more so of non-citizens) who are living in a Region that they are not originally from clearly express a form of separation and isolation from the rest of the Nation: in this way the articulation of the people turns into fragmentation. This was well understood by the Constitutional Court which, with regard to the criterion of length of residence for access to social benefits, stated that «the rules that introduce this requirement (...) involve the risk of depriving certain individuals of access to public services only because they exercised their right to movement or because they had to change their Region of residence» in pursuance of Article 120 of the Constitution (sentence no. 107 of 2018).

This breakdown of the national community pursued by many Regions, especially in the North, through the criterion of long-term residence in the regional territory for access to social benefits is part of a dynamic of internal migrations consisting of people moving from the South to the North of Italy. This resumption of the abandonment of the South in favour of the North is determined by the widening of the Country's territorial gap (Svimez, 2019) due, not only to the

absence of territorial equalization policies, but even to a misunderstood fiscal federalism whereby public spending has been skewed in favour of the inhabitants of the Centre-North.

And yet the Northern Regions are witnesses to the much more significant privileges enjoyed by their neighbouring Regions which have special statutes. The difference in quality of life, far more than exquisite cultural issues, would seem to be at the basis of the phenomenon of the "migration" of their municipalities towards neighbouring specialties (Cortese, 2018). These are micro-secessions motivated by the desire to enjoy the considerably higher tax revenues in those Regions (Buglione, 2016).

In addition, the reprehensible - and in fact censured - «dilatory, spurious, ambiguous, incongruous or insufficiently motivated attitudes» (sentence no. 103 of 2018) attributed to the special Regions to restrict their contribution to the necessary process of fiscal consolidation of public accounts. This dispute also demonstrates the extent to which the guarantee of the bilateral agreement enjoyed by the Regions with a special statute can be abused, and hence is a warning against the direct application of differentiated regionalism based on agreements with each individual Region.

4. When claiming asymmetry means demanding inequalities

It appears significant that the other referendum approved by a law of the Veneto Region concerned the percentage of tax revenue, which is a salient distinctive feature of the 'special statute': the question addressed to the Venetians was if they wanted to "retain" eight tenths of the tax revenue raised on their regional territory. In sentence no. 118 of 2015, the Constitutional Court clearly explains that this hypothesis would have unlawfully entailed «the diversion of a large proportion of funds from general public finance, directing it to the exclusive advantage of the Region (...) and its inhabitants (...) thus affecting (...) the bonds of solidarity between the regional population and the rest of the Republic».

This passage shows that the claim to withhold this share of State taxes would have broken national unity that is underpinned by

the mandatory duties of solidarity, just as the declaration of independence would have violated the principle of unity and indivisibility of the Republic pursuant to Article 5 of the Constitution: therefore, both the territorial and substantial secession (Viesti, 2019; Villone, 2019) of part of the sovereign people from the duties of national solidarity are *contra Costitutionem*.

However, after the referendum, the Veneto Region continued to firmly claim its "right to receiving back" the wealth produced on its territory which, in its opinion, presented an "exorbitant fiscal balance" to its disadvantage because the regional public administration would have less resources than the taxes levied in Veneto for the provision of services for its resident citizens. The Constitutional Court, with sentence no. 83 of 2016, had already clarified, however, that the fiscal residue «cannot be considered a specific criterion of the provision contained in Article 119 of the Constitution, both because the appropriate methods for calculating the differential between fiscally acquired resources and their reuse in the territorial areas of origin are controversial, and because "the absolute balance between taxes levied and use of the latter in the territory of origin is not a principle laid down in the constitutional provision invoked" (sentence no. 69 of 2016)».

On closer inspection, the criterion of the regional origin of revenue, as well as the criterion of long-term residence in the Region in order to be given access to public services, expresses the idea of "we are served first and then everybody else", in clear violation of the principle of equality between people regardless of where they live on the national territory. Furthermore, with the direct application of asymmetrical regionalism, it was immediately found that, on the basis of a more careful assessment of the enlarged public expenditure, the complaints of the Region were groundless and that an unjustifiable inequality in treatment affected the Southern Regions. This is why the so-called "34% to the South clause" was introduced, in particular to ensure that public investments would gradually become commensurate with the size of the population residing there: even though the population residing in the South of the Country is 34% of Italy's total population, this area has on

average received about 26% of public resources. The mentioned 'clause' pursues the objective of bridging the gap in the flow of public resources between the Regions of the South and the Regions of the Centre-North.

Nonetheless, confirming the substantially secessionist nature of the requests made following the regional referendums for the application of paragraph three of Article 116, Regional Council resolution no. 155 of 15 November 2017, demanded, in order to exercise the powers to be devolved to them, «the following shares of the taxes collected by the State: nine tenths of personal income tax IRPEF, nine tenths of the income from taxes on businesses IRES, nine tenths of the revenue from value added tax VAT)»: shares that were even higher than the eight tenths already judged to be unconstitutional by the Court in 2015!

On 28 February 2018, the minister for regional affairs of the outgoing *Gentiloni* government signed three pre-agreements with the Lombardy, Veneto and Emilia-Romagna regions where – setting aside the hypothesis of "receiving back" the 'fiscal residue' - a mechanism was envisaged for transferring resources anchored to the criterion of historic expenditure, which has recently been found to cause very serious inequalities. According to the draft agreements signed on March 4 2019 by the Minister for Regional Affairs of the newly sworn-in government, the transition from historic expenditure to standard needs was to be entrusted to inter-governmental joint committees only after the approval of the law implementing the agreement. Furthermore, if such committees were not established within three years, the "fiscal privilege" of the guarantee of average per capita expenditure would be applied to the Regions concerned to the detriment of the others, given the supposed invariance of total public expenditure. Furthermore, the standard needs would be «calculated also taking into account regional tax revenues, and in any case without prejudice to the current level of services (i.e. only increases would be allowed). Up to now, tax revenues have never been considered in the complex calculations of the standard needs of the Municipalities, always and only connected to the territorial characteristics and socio-demographic aspects of the population.

Relating the financing of services to tax revenues means establishing an extremely important principle: namely that citizenship rights, education and health to begin with, can be different among Italian citizens; greater where per capita income is higher» (Viesti, 2019).

Even though there is greater awareness of the need to establish 'essential levels of services' (LEPs) and of the importance of ensuring uniformity in the services provided throughout the territory, the hypotheses currently under discussion are in favour of proceeding with devolution based on the «permanent resources entered into the State budget under the current law in force»: an unclear formula which, however, closely resembles historical expenditure.

Is it legitimate to devolve all the competences claimed by making permanent the unfair distribution of public spending based on the unjust inequality followed so far, in the hope that sooner or later we will be able to recalibrate the allocation of public resources according to criteria that do not contradict the principle of equality so much? It should be remembered that the autonomy principle detached from solidarity implies, or in any case risks, being reduced to mere competition and the promotion of indifference for the fate of others, under the claim of practicing independence disguised as autonomy.

If the autonomy principle is, as I believe, strictly connected to the objectives set out in Article 3, the forms taken on by the direct application of differentiated regionalism appear to diverge completely from the meaning of autonomy as laid down in our Constitution. The concept of autonomy has been misinterpreted by the institutions and political forces that prepared and initiated the process implementing the provision of paragraph three of Article 116 of the Constitution because they have gone blatantly against the principle of substantial equality, challenging the unity and indivisibility of the Republic with forms of substantial secession of part of the sovereign people from the duties of national solidarity.

5. Remedies

Before any concrete application, therefore, there is a need at least for a law implementing Article 116, paragraph 3. The Government in office is taking action in this direction to overcome «the absolutely reprehensible practice» of the past. One problem is that «the Constitution focuses only on the final moment» of approval of the law (Vandelli, 2019), which requires approval by an absolute majority on the basis of a State-Region agreement (paragraph three of Article 116). In order to integrate this rule I do not think that an ordinary framework law is suitable as proposed by the Minister for Regional Affairs (cfr. Mazzarolli, 2019; Olivetti 2019; Piraino, 2019; Bifulco, 2019; Gianfrancesco, 2000; Morelli, 2000) in line with the thinking on the issue of some scholars (Morrone, 2007). In my opinion a source of constitutional rank is required to supplement paragraph three of Article 116 (Ronchetti, 2020): constitutional rules are needed that explicitly set forth the procedural and substantive limits of asymmetric devolution, and that prevent Article 116 from being construed and applied in ways that undermine or go against the unity and indivisibility of the Republic, what is more in an almost irreversible way. I would like to recall that the law pursuant to Article 116, paragraph 3, not only cannot be modified without the consent of the Region concerned which works out the agreement jointly with the State, but it actually prevails, since it is reinforced, over the previous framework law which is a primary law. Furthermore the very object of the agreement, namely a derogation from the sharing of legislative powers and the necessary resources, is definitely of constitutional standing, and as such requires adequate guarantees.

The supplementary constitutional provisions must regulate the «principles» and «methods» pursuant to Article 5 of the Constitution that are to be followed. This is necessary in order to avoid that, in the name of autonomy and its needs of interdependence, separation and isolation from the rest of the Nation is pursued and, lo and behold, at the expense of the nation itself.

Indeed, the constitutional limits deriving from the fundamental principles of the Constitution must be expressed in

these supplementary rules, in particular by reinforcing the interconnection between the principle of autonomy and the principle of equality.

The first limit consists in subordinating any hypothesis of applying paragraph three of Article 116 to the determination of the essential levels of services and national solidarity interventions, which are the initial steps for any further territorial differentiation, under penalty of unsustainable inequalities. Only once the State has fulfilled these unavoidable and mandatory tasks is it possible to discuss the devolution of individual matters, where arguments going against the general public interest would not be acceptable. Furthermore, Parliament, the body holding the legislative power to be devolved, must be the true *dominus* of the agreement and, to this end, it will finally have to apply the norm of constitutional standing (Article 11 of Constitutional Law No. 3 of 2001) which establishes that Parliamentary regulations can envisage the participation of representatives of the Regions, Autonomous Provinces and Local Authorities in the Parliamentary Committee on Regional Issues. In this way our legislative power, with its disclosure guarantees, will be able to address the question of possible asymmetries together with the entire system of autonomous bodies, taking into account the interdependence that exists between them. As regards the sharing of powers between the State and the Regions, constitutionally provided for by Article 117, these initiatives also belong to the «constitutional matters» that Article 72, paragraph four of the Constitution expressly entrusts to the ordinary procedure of the legislative process, with sectoral parliamentary committees that refer back to the Assembly which is empowered to decide. Only with these procedural guarantees will the substantive issues relating to the size and number of powers and relevant resources be truly protected.

Asymmetry in differentiation - in itself a rather radical idea of regionalism and a potentially very weak idea of the State and of its role - directly questions the relationship between regionalism and the principle of equality. Taking to extremes the dual and compartmentalised vision of the State and of the individual Region and their respective powers involves massive interventions on the

distribution of public resources: what quota of public spending that is funded by taxes should go to the individual Region having asymmetrical powers compared to the other Regions?

The reflections on the relationship between differentiation and inequalities are to take into account above all the various answers to this latter question: further differences in the distribution of wealth and in the provision of public services can only be divisive, betraying that concept of interdependence that lies at the heart of the positive meaning of autonomy as a driver and defence of republican unity and national interest.

It is no small matter, as had been clearly understood by Vandelli (2019) the need to involve the social partners as being essential: his teaching is that a true and sincere upholder of autonomy cherishes the unity of the Republic and the indivisibility of the sovereign people, not only from a formal point of view but also from a substantial standpoint.

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