NOTES

THE CONSTITUTIONAL DISTRIBUTION OF LEGISLATIVE POWERS IN ITALY: RECENT JUDGMENTS OF THE CONSTITUTIONAL COURT*

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1. Explaining to a foreign audience the theme of Italian regionalism and, in particular, of the legislative jurisdiction of Regions in the light of the current Italian constitutional review is not an easy task. My whole lecture, in fact, will revolve around a single word that, among the many possible, I have chosen to summarise this theme and that is *complexity*. Therefore, in a first part, which is mainly historical, I will address the way in which such complexity has been growing and developing within the Italian legal framework (*infra*, § 2). Then, in a second part, which is essentially legal, I will explain how this complexity has become constitutional law (*infra*, § 3). Finally, in a third part, which is also political, I will focus on the current proposals of the so called Renzi-Boschi constitutional review, which has the main goal to reduce, if not to solve, such complexity (*infra*, § 4). Finally, I will raise two short questions, which remain unanswered in the current Italian constitutional review and in the present public debate (*infra*, § 5).

* Lecture at the conference "Italian Reforms: Constitutional and Administration at a Stake", 25th of June 2015, Faculty of Political Science, Sociology, Communication, University of Rome "Sapienza".

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2. Regionalism is a relatively recent acquisition for Italian constitutional history. It is known that the process of Italian national unification – which developed especially in the sixties of the nineteenth century – was founded on institutional structures firmly based on unity, due to both for the influence of the Napoleonic model in Italy and for the rejection of the mentality and the assets of the pre-unification States. Perhaps, less well known – but not less important – is the fact that, in two sectors in which such standardization did not take place, things went wrong. I am referring to the controversial coexistence of many Courts of Cassation, which lasted for several decades and determined the obvious difficulty of bringing uniformity to the interpretation of the law, and to the presence of many issuing banks, which gave rise to crises such as the famous scandal of the Banca romana in 1892.

The picture significantly changes after fascism and war, with the Italian Constituent Assembly of 1946-1947. Regions, in fact, were seen at the time as an important issue of counter-power and as a major expression of an institutional pluralism combined with a renewed social pluralism. Their main function was precisely legislative jurisdiction, with a clear break with the past, when law was conceived as a general act in force for the whole territory of the State. However, even in this case, Regions are a paradigmatic indicator of the implementation of the Constitution approved in 1947. Apart from the five Regions with special autonomy, more than two decades pass before the other fifteen Regions see the light and even then the transfer of powers from the State is slow and uncertain.

Since the two last decades of the twentieth century, the theme of regionalism intersects with the one of an overall constitutional review. The underlying idea, fostered by mainstream politicians, is that the foremost instrument for solving the political and institutional problems in Italy would be a comprehensive reform of the second part of the Constitution of 1947, involving the organisation of the Republic as a whole. Without delving into the merits and especially into the limits of such approach, it is sufficient now to underline that such idea is hegemonic, not in terms of doctrine, but of politics, for about thirty years.

Nevertheless, until today, widespread constitutional review processes have been unsuccessful and the only part of the Constitution actually amended concerned regionalism (in 1999 and 2001). The guidelines of such constitutional reviews – and, in particular, of the constitutional law n. 3 of 2001 – are three and they are all oriented to the strengthening of the Regions. First: an exaltation of the political and institutional role of the head of the Executive, who may now be directly elected by the regional electorate (so that the President of the Regional Executive is called in the press "governor"), under Article 126, paragraph 3. Second: a reinforcement of the legislative jurisdiction of Regions, organized through an exhaustive indication of the legislative power of the State (Article 117, paragraph 2), an extension of the cases in which the State and the Regions exert a concurrent legislative power (such legislative jurisdiction is vested in the Regions, except for the determination of the fundamental principles, which are laid down by the State: Article 117, paragraph 3) and the provision of a general residuality clause for the benefit of the Regions (Article 117, paragraph 4). Third: a double standard for the legislative jurisdiction, which follows the criterion of the breakdown by matters, and the administrative power, which is submitted to a number of general principles, such as subsidiarity, differentiation and adequacy, and whose key players are not the Regions but the Municipalities, under Article 118, paragraph 1.

3. This general legal framework sets the scene for the second point of my lecture, considering that in the last fifteen years the new part of the Constitution devoted to the legislative jurisdiction of Regions has proven extremely difficult to implement and, most of all, has left an overall mark of complexity. In fact, it is quite clear that one thing is to establish a distribution of matters in theory, and another to subsume in such predefined pattern all the concrete legislative acts from time to time approved by the State and the Regions. The reality of the single policies carried out respectively by the State and the Regions does not always conform to a predetermined grid, even a constitutional one. Hence, many federal systems include a supremacy clause in their legal orders, whereby, in the presence of a significant political interest, the State may nonetheless adopt the law. Such a

supremacy clause, as well as a second chamber for the expression at a central level of territorial interests and instances, are both lacking in the current text of the Italian Constitution. All this has provoked, in the absence of flexibility rules and political forums of dispute resolution, an impressive conflict between the State and the Regions before the Italian constitutional judge. Indeed, the Constitutional Court found itself invested with all the major issues affecting Italian regionalism in the last fifteen years. The Court, and not political bodies, as it is the case in contemporary democracies, has therefore held a sort of rock star status in this crucial field, with an "unsolicited and unwelcome role as substitute", according to one of the its Presidents, Gustavo Zagrebelsky.

It is impossible to explore here in depth the content of thousands of decisions, concerning Italian regionalism, issued by the Constitutional Court since 2002, also because of the small claims often subject of these disputes, ranging from the calendar of hunting seasons to small groups of regional precarious workers. However, two trends of such case law can be quoted, in which the Constitutional Court had made a real effort to solve the two problems of current Italian regionalism mentioned above.

Regarding the lack of political forums for resolving conflicts between the State and the Regions, the Constitutional Court has developed the principle of sincere cooperation, which involves the research by the State and the Regions of an agreement on many of the legislative acts to be approved from time to time. In fact, in the fundamental judgement No. 303/2003, the Constitutional Court ruled that "even in our constitutional system there are devices aimed at making more flexible a pattern that, in areas in which coexist, intertwined, different powers and functions, might frustrate, for the wide articulation of the competences, unification instances present in various contexts of life, which, in terms of legal principles, find support in the proclamation of unity and indivisibility of the Republic". This statement leads to the possibility for the State to adopt laws in fields apparently reserved to the Regions, but under the reserve of reaching an agreement with them.

Regarding the absence of a supremacy clause, through its many decisions, the Constitutional Court has inductively extended individual titles of exclusive or shared competence of

the State, as the "protection of competition" (e.g., judgement No. 14/2004), the "determination of the basic level of benefits relating to civil and social rights that must be guaranteed throughout the national territory" (e.g., judgement No. 282/2002), the "coordination of public finance" (e.g., judgement No. 376/2003). In yet other cases, the Court has extended to the law the application of the principle of subsidiarity, which is meant to cover only administrative functions (e.g., judgement No. 303/2003), or has made reference to context-related arguments, such as the current economic crisis in Italy (e.g., judgement No. 10/2010).

Ultimately, the Constitutional Court, according to most of the doctrine, has rewritten the constitutional provisions on the legislative jurisdiction of Regions. In my opinion, the Court has rather more subtly reworked and reassembled confused and fragmented constitutional provisions, using pragmatically the parameters and the opinions that could be useful each time to solve that complexity which we already highlighted. Certainly, if the intent of the constitutional review of 2001 was to strengthen the legislative jurisdiction of Regions, it can be said that the Constitutional Court, on the contrary, has adopted in its scrutiny an orientation rather favourable towards the State and has consequently enabled the adoption of policies in fields that were literally foreclosed to its legislative jurisdiction.

Basically, the Italian Constitutional Court has built its entire jurisprudence under the essential conviction that Italy is not a federal, but a regional State (e.g., judgment No. 365/2007), which, under Article 5, "recognises and promotes local autonomies, and implements the fullest measure of administrative decentralisation in those services which depend on the State". However, the implementation of such principle in the practice has led to major inconveniences to the point that, yet again, in the last annual report on the constitutional jurisprudence, published in 2015, the President-in-Office of the Italian Constitutional Court Alessandro Criscuolo has expressed the "hope of a reform of such Title [of the Constitution] inspired to criterions of simplification and clarity".

4. I rapidly come to my third point, because the proposals contained in the so called Renzi-Boschi constitutional review –

named after the current Italian President of the Council of Ministers Matteo Renzi and the Minister for Constitutional Reforms and Parliamentary Relations Maria Elena Boschi – spring from the poor condition of the Italian regionalism. The solutions presently under discussion concern three main topics, namely: an increase in connecting the political representation between the centre and the periphery, through a substantial transformation of the Italian second chamber, i.e. the Senato della Repubblica; the suppression of one of the territorial levels of power, such as the Provinces, due to the excessive economic cost and the low efficiency of a multi-level apparatus of five different territorial levels of power (i.e. Municipalities, Provinces, Metropolitan Cities, Regions and the State: Article 114, paragraph 1); the simplification of the legislative jurisdiction of the State and the Regions.

I will briefly touch on the latter aspect, which is the specific subject of my lecture. I have already recalled that the legislative jurisdiction of the State and the Regions is currently organized, under Article 117, paragraphs 2, 3 and 4, through: a first list of matters fully covered by the law of the State; a second list of matters with respect to which the State lays down the fundamental principles and the Regions the detailed provisions in their laws; a residuality clause, whereby all matters not included neither in the first nor in the second list are regulated by the Regions. The constitutional reform draft confirms a distribution of the legislative jurisdiction anchored on a matters-based criterion, but with only two lists: a first one – as it is today – enumerating the matters subject to a full legislative jurisdiction of the State and a second one containing the matters subject to a legislative jurisdiction belonging to the Regions.

This allocation of powers, which apparently might seem dual, is accompanied by two significant counterweights. First, concerning the legislative jurisdiction of the State, it is expected that certain competences, which are especially important for the Welfare State, will be regulated only under "general and common provisions". In this way, as can be seen, the legislative power of the State is not truly full, with effects on constitutional conflicts between State and Region before the Constitutional Court, which are difficult to predict. Second, regarding the legislative jurisdiction of Regions, it is expected, under the potentially amended Article 117, paragraph 4, that "the law of the State, upon

a proposal of the Government, can intervene in matters not reserved to its exclusive legislative jurisdiction when this is necessary for the protection of the legal or economic unity of the Republic or the protection of the national interest". In this way, an important flexibility clause in the distribution of legislative power, which would allow to repoliticize what before had been substantially delegated to the Constitutional Court, is finally introduced.

5. At the moment, this is in brief the state of the debate in Italy concerning the current constitutional review on the legislative jurisdiction between the State and the Regions. I would conclude, now, with two brief observations on this subject, referred to topics that are, in my opinion, crucial but too little taken into account in the current public debate inside the Parliament and outside it.

My first remark concerns some profiles of the theme of the legislative jurisdiction of Regions of which there is no trace in the constitutional reform draft. In fact, the submitted proposal concerns only the Regions endowed with an ordinary autonomy, while the Italian legal order includes also five important Regions with special autonomy (Article 116, paragraph 1). It is my firm opinion that the degree of acceptable differentiation among these Regions should be discussed, as such autonomy could result, even more so today in the light of the current economic crisis, in a real privilege, which could be difficult to maintain under its present terms. Regrettably, this aspect remains completely neglected in the current constitutional review and actually rather strengthened, as is the issue of the number, names and borders of the Regions, that are in some cases accidental and nevertheless have remained unchanged for almost seventy years.

My second statement calls into question the role of the Italian legal doctrine, which accompanied, in some cases enthusiastically, in other uncritically, the constitutional amendment of 2001, without advising enough the lawmaker on the systemic problems which would have widely occurred in the following fifteen years. An increased caution from the enthusiasts and a greater attention from the uncritics might have avoided at least the most evident mistakes in that text, considered by the

keenest scholars the same as a hasty "copy and paste". I would quote, for all, the placement of the matter of "large transport and navigation networks" between those subject to a concurrent legislative jurisdiction between the State and the Regions, and not to a full legislative jurisdiction of the State. These are small but capital errors whose prior resolution, however, would have avoided major conflict and damage.