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ON THE ROLE OF THE CONSTITUTION IN THE SPANISH TRANSITION 25 YEARS EXPERIENCE (1978-2003)

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REPORT ON

«The advent of the Regional State in Italy from the Constituent Assembly onwards»

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1. The proposal to create Regions in Italy goes back to the period of unification of the National State.

After the annexation to the Savoia Kingdom of Lombardia, Tuscany and the provinces of Emilia-Romagna, which posed the question of the administrative reorganisation of the new State, Prime Minister Cavour decided to create a special Commission before the 'Consiglio di Stato' (consultative body of the national government) with the task of studying the issue of regionalization. That Commission, established by a ministerial decree of July 1860, discussed for some months the proposals of the Minister for Internal Affairs Luigi Carlo Farini and of his successor Marco Minghetti, which provided the introduction of true autonomous Regions within the country. But since the majority of the members of the Commission contrasted this view, Marco Minghetti decided to override such opposition by presenting the 14th March 1861 four bills to the Chamber of Representatives, one of which regarded the institution of Regions. But even the Committee of the Chamber rejected the 18th May 1861 his proposal. This meant the definitive abandonment of the regionalization of the Italian Kingdom, and, a fortiori, of the creation of a Federal State, that Carlo Cattaneo, perhaps the most acute Italian intellectual of the XIX century, had vigorously sponsored.

According to the general law on local government of 20th March 1865 n. 2248, the only local authorities recognized within the Italian Kingdom were municipalities ('Comuni') and provincial districts ('Province'). While some Comuni had a longstanding tradition of selfgovernment and democracy, especially in the North and in the Center, Provinces were created as mere agencies of the State according to the Napoleonian model of administration, which was simply imported in Italy, with no consideration of its historical and territorial peculiarities. This led to an extraordinary uniformity of the regime of local government within the Italian Kingdom, irrespective of the fact that, in the first decade of the XX century, some Comuni were really autonomous from the center, being led from political parties (such as the Socialist and the Popular Party) which were not included within the parliamentary majority at the national level.

Under the Fascist regime, the autonomy of Comuni and Province was of course banned, these entities being reduced to mere administrative agencies of the State.

2. Therefore, when the members of the Constituent Assembly elected the 2th of June 1946 posed themselves the question of the territorial structure of the new democratic Republic, they could not recall any tradition of local governance in the experience of the national State. On the other hand, the number of decentralized countries was far lower than now, and these countries were Federations gathering States which were originally sovereign. On structural grounds, 'regional State' designates a unitary State which recognizes broad autonomies, including the legislative power on certain issues, to its regional entities. While now there are cases of unitary States which have given powers to territorial units similar to those of Member States of a

Federation (e.g. Belgium), this was not the case fifty years ago. So far, the distinction between federal and regional States was sharper than it is now.
The only historical example of a regional State was that provided from the Constitution of the II Republic of Spain of 1931. The Spanish example was very significant, since it foreshadowed (as E.Llorens, La autonomia en la integracion politica, Madrid, 1932, and A.Posada, La nouvelle Constitution espagnole, Paris, 1932 had pointed out) a rather radical changing towards pluralism, and participation of local communities to the national polity, for the monolithic state which had characterized the previous period in continental Europe. In the meanwhile, the Constitution of 1931 could be connected with the Constitution of the Weimar Republic of 1919 since it provided social rights and, therefore, the abandonment of the neutrality of the State in the economic field.

Gaspare Ambrosini, a Sicilian constitutional scholar and a leading figure in the debate on regionalism at the Constituent Assembly, was perfectly aware of the Spanish model of regionalism of 1931, and he attempted to adjust to it the center/local government relationship. Ambrosini succeded in his attempts for what concerns the crucial point of giving legislative powers to the Regions. But, apart from this, the Italian Constituent Assembly followed its own path in shaping the Regional State, not only because the Spanish model had not been really experimented, since the II Republic had lasted for a very short period, but also because of the need of balancing properly the center/local government relationship in Italy, which suddenly appeared a very delicate task.

One point was sufficiently clear. The Republic would have been one and indivisible as it had been the Italian Kingdom, and, at the same time, it would have widely recognized territorial autonomies not only at the local but also at the regional level. This was the point of departure for the representatives of the bigger parties (Christian Democrat, Socialist and Communist), and even some of the little ones, such as the Republican and the 'Partito d'Azione', supported strong territorial autonomies rather than a true federal model.

But if this point was sufficiently clear, the 'Regional State' appeared nothing more than a middle-road notion between the 'extreme' models of the federal and the centralistic or unitary. In order to specify the regional model, it was necessary to clear not only the powers of the regional and local autohorities, but also their relationship with the central State. And, on this ground, the approach which dominated the discussion within the Constituent Assembly was driven more from political considerations than from the need for a general institutional reassessment (including the central State) corresponding to the promise of pluralism emerging from the I Part of the Constitution. Why did this occur?

Before the Constituent Assembly had begun its workings, there had been a strong pressure for autonomy, if not for separation, in four Regions: Sicily, Sardinia, Valle d'Aosta and Trentino-Alto Adige. These episodes are very important to recall, since they happened within the period of transition from fascism to democracy.

Sicily was certainly the most delicate case, since the Sicilian separatism was very aggressive. In March 1944 a regional body called 'Consulta' was constituted, with the task of giving the island a Statute, which was adopted and then approved from the national Government with a legislative decree of March 1946. It provided not only a huge legislative autonomy for Sicily (limited only by general principles of the legal national order, international obligations of the state and principles of economic and social national reforms on some subjects and by the principles of the national legislation on other subjects), but also a Constitutional Court for reviewing the laws both of the State and of the Region.

Also the other four Regions had their own Statutes before the Constituent Assembly. The fact that the most acute tensions between single Regions and the State were composed before the drafting of the Constitution might be a peculiarity of the Italian transition, and it might also help in the understanding of the following developments.

In fact, once solved the main tensions between single Regions and the central State, the quest for a genuine balancing between the belonging to the same national community and the good reasons for an original development of local communities, although clearly foreshadowed in Article 5 of the Constitution, was left aside. The climate within the Constituent Assembly was rather dominated by contingent considerations of political parties both for what concerns the separation of competences between the State and the Regions, and with regard to the chances of representation of the Regions at the national level.

It is worth recalling that, during the workings of the Constituent Assembly, the Communist and the Socialist Party left the parliamentary majority run by the leader of the Christian Democrats Alcide De Gasperi, and this let them realize that they could obtain at the regional level some of the political power which they had lost at the centre. The opposite happened for the Christian Democrats, which became colder towards decentralization. Such political changings certainly influenced the final solution concerning the legislative powers of the Regions provided with ordinary statutes, which, according to Article 117 of the text enacted January 1st of 1948, were bound to respect the fundamental principles enshrined in the national legislation.

On the other hand, the issue of a second Chamber representing the territorial autonomies (and, to some extent, professional and working cathegories and classes) was compromised from the suspicion of the left wing of the Assembly, right or wrong it might be on constitutional grounds, that such solution might endanger the primacy of political representation as reflected within the Chamber of Representatives. The result was that the Senate doubled the first Chamber, both for its composition and for its functions.

3. Leaving aside the five Regions and the two Provinces provided with special autonomy in light of their geographical or historical peculiarities ("Regioni a statuto speciale"), constitutional provisions concerning Regions were not implemented for a longwhile. The fifteen Regions provided with ordinary autonomy ("Regioni a statuto ordinario") were constituted only by a law enacted in 1970.

The text of the Constitution in force from 1948 until 2001 entrusted also Regions with administrative powers whithin the field constitutionnally reserved to their own legislation, adding that such powers should usually be delegated from Regions to local authorities. The framers of the Constitution considered in fact unnecessary the creation of a third level of administration between the central and the local.

The process of decentralization starting in 1970 was characterized from the following points:

1) Since 1948, the constitutional distribution of competences between State and Regions had become more and more divorced from the needs which contemporary political institutions and public services are expected to comply with. While in listing the subjects constitutionnally reserved to Regions the framers of the Constitution had presupposed a pre-industrial economy mainly based on agriculture, on 1970 Italy was already one of the prominent industrial countries of the western world. Moreover, it had

become clear that, in providing services such as education, health, housing, and transport, national and local administrations needed co-ordination rather than the rigid separation of competences and tasks provided from the Constitution. On such grounds, even the implementation of the Constitution was not fully correspondent with the needs of the country.

2) Contrary to constitutional provisions, national and regional laws enacted during the '70 delegated very rarely regional administrative tasks to local authorities. Those tasks were rather driven from Regions, thus creating a third level of administration between the central and the local, which increased the bureacratization of the whole system.

3) The model of the new regional administration was in fact very similar to that of the state, that is, a bureaucratic administration, devoted to the execution of the laws and rigidly divided into departments headed by Ministers. The internal division of the regional administration into 'assessorati' repeted exactly that of national departments. Also within the administrative staff, servants were hierarchically ordered as in the state model, and submitted to the political authority of the heads of each department ('Assessori'), corresponding to Ministers.

4) According to the Constitution and to the legislation, acts of regional and local authorities were reviewed from commissions and committees whose members were for the most part appointed from the central government, thus giving the state a powerful instrument for limiting the autonomy of Regions and of local authorities. Again, as at the national level, such reviews were tightly centered on the correspondence of each single act of regional and local authorities with legal rules, without giving attention to its capability of pursuing the ends which it had to comply with, or to the outputs of the administration's activity.

These elements suffice to demonstrate that the process of regionalization which took place during the '70 increased the difficulties of local government. In implementing constitutional provisions which were themselves far from responding to the needs of an industrial society, the legislation of that period imposed heavy burdens on regional and local authorities. The central state was still the sun around which peripheric authorities were bound to turn.

Why, then, that system has not been seriously questioned until the last decade of the XX century? Two main factors have concurred in maintaining the balance between central and local authorities for over twenty years. First, the national parties were still sufficiently strong for finding in the creation of Regions new occasions for expanding, rather than for limiting, their own power. In fact, local administrations and services employees were frequently appointed from parties and driven from partisan considerations. This might help in understanding why maladministration was not an exception, but the rule, particularly in Southern Regions and municipalities.

It should be added that the need for modernizing the administration was insufficiently perceived, nor it was connected with a true process of decentralization. Only narrow political and academic elites were aware that it was time for changing, and that a successful changing would depend on involving both national and local structures within the process of reform.

4. During the ’90 four major events concurred in pressing for decentralization, if not, as it was naively called, “federalism”.

Firstly, on 1992-93 a huge number of national and local political leaders was obliged to leave from office, being accused from judges of corruption and other crimes committed against the public administration. The whole political system, whose national structure had heavily undermined the chances of regionalization, was under attack. Secondly, a strong protest arose in the Northern Regions questioning central decisions concerning the distribution of financial resources between regional and local authorities. Thirdly, criticism widened in the public opinion with regard to the functioning of central and local bureaucracies. Finally, high public dept posed the problem of cutting expenses in the public sector and thus of a deep reorganization of institutions.

The whole structure of the Republic, the traditional center-periphery balance included, needed urgent reform.

The first changing occurred at the local level. Law n. 83/1993 stated that, with the exception of the smaller Municipalities and Provinces, Mayors and Presidents of Provinces should be directly elected from the people and appoint members of their own government without needing the approval of local assemblies. These rules, reflecting strong popular criticism with political parties, have considerably changed the functioning of local authorities. Accountability of Mayors towards the electorate enhanced the stability of local governments and created the need for better performances from local administrations and services. That reform, in turn, became a model for Regions, where the rule of directly electing the President from the people was introduced with Law n. 49/1995.

The main administrative structures and procedures of the State have also been invested from a huge process of reform, partly connected with the changings occurring at the regional and local level.

Three main features of that process might be mentioned. The first consists in the distinction between politics and administration, regarding whichever level of government. Legislative Decree n. 29/1993 establishes that Ministers, or “Assessori” at the local level, are responsible for policies, defining strategies and objectives and assessing results, while administrative chiefs are responsible for administration, being entrusted with broad powers and provided with correspondent financial and human resources. Direct involvement of politicians in administrative functions, which was very frequent at the national level and even provided from the legislation at the local level, was thus barred.

A second and strictly connected aspect of the reform concerns modernization of all public administrations. While the traditional administrative tasks were centered on executing the laws, the new model established from Legislative Decree n. 29/1993 and further developed from other laws draws attention to the outputs of the administration’s activity, attempting to reconciliate respect for legal rules with efficiency and efficacy. Accordingly, new rules concerning the review over administrations approved from 1994 onwards are centered on the administrations performances not less than on the legality of their own acts.

Thirdly, the reforms of the ’90 reflect full awareness of the fact that classical departments, the legacy of the Napoleonian model, were only one side of the administrative structure, and that that structure needs therefore to be properly adjusted to the different tasks which the

administration is bound to comply with in different fields. Agencies, boards, independent authorities have thus grown in few years, creating a landscape which has left aside the uniformity characterizing the division into administrative departments since the Unification of the Italian Kingdom (1861).

Nonetheless, the most important aim of the process of reform consisted in changing the allocation of powers between central and regional or local authorities, on the assumption that, in contemporary societies, the State should concentrate only on issues deserving national ruling, and that local authorities should manage all the other services and activities. Such distribution was far from being reflected by legislative and even constitutional provisions.

The first step was taken through the approval of Law n. 59/1997, delegating national Government to trasfer to regional and local authorities all the functions and tasks which could be transferred to such authorities under the constitutional provisions in force. It was an intense process of reform, requiring a huge number of legislative decrees and regional laws.

The second step consisted in the approval of Constitutional Law n. 3/2001, now in force. Since the draft text was approved with the absolute majority of each house of Parliament, instead than with two-thirds, according to Article 138 of the Constitution that text was submitted to referendum, and finally approved with a small majority of the electorate.

5. The content of Constitutional Law n. 3/2001 might be summarized into the following points:

1) While the former Article 114 of the Constitution stated that "The Republic is divided into regions, provinces and municipalities", the new text provides that "The Republic is constituted by municipalities, provinces, metropolitan cities and the state", thus listing political entities from the smallest to the largest and modifying decisively the traditional state-centered order;

2) Contrary to the old version, Article 117 of the Constitution enlists the issues over which exclusive legislative competences of the State is provided, then issues over which the State dictates guidelines which Regions will give further development, and finally gives Regions legislative power on all other issues. This not only enlarges regional law-making power, but reflects the idea that national regulation should exclusively regard issues which cannot be regulated at the regional scale;

3) According to the old text of Article 118, administrative powers both of the State and of Regions were parallel to legislative powers, and local authorities were only entrusted with tasks concerning issues of "local interest". To the contrary, the new version of Article 118 states that "All administrative functions are assigned to municipalities, except while conferred to provinces, metropolitan cities, regions and the state for ensuring their uniform exercise according to the principles of subsidiarity, differentiation and adequacy". Relying on the literal meaning of such proposition, one should infer that, since in principle administrative functions are assigned to municipalities, assignment of such functions to higher levels of government needs to be justified in light of the standards established in that provision. This is not to say that competences of the State over issues such as defence, security or mail will be questioned. Article 118 reflects rather the assumption that in our age decentralization of administrative tasks needs to be pushed on to a wider extent than decentralization of legislative powers, and that, at least in the huge area of public services, central government is less fit in management than the local.

4) Another distinctive feature of the reform consists in the abolition of the heavy reviews over regional and local administrative activity provided from the Constitution of 1948. Scholars still discuss whether the silence of the new text on such reviews barrs Parliament from introducing new kinds of review. At any rate, for the moment, the only review still in force over regional administrative acts consists in the auditing function exerted from judges of the 'Corte dei Conti', according to Article 100 of the Constitution and the correspondent legislation.

6. Even the brief exposition before afforded suffice to demonstrate that both the process and the content of the reform of regional and local authorities have been rather complex. Therefore, many points of the new system are open to different interpretations.

This is not surprising. By abandoning a longstanding tradition of centralism and uniformity, the reform clearly presupposes that the autonomy of regional and local authorities does not depend only on the amount of powers conferred to such authorities, but also on their capability of finding their own way for governing local collectivities. Since autonomy is a qualitative rather than a quantitative notion, it implies differentiation of structures and an experimental approach to the problems of government. This is particularly demonstrated from the fact that, according to the new text of Article 118, the distribution of administrative functions between political entities is not settled once for all, but it depends on evaluations concerning the best allocation of interests, which might change from time to time.

The inevitable cost of this, especially for local authorities, is the loss of certainty. In accomplishing their tasks, local authorities are invited from the new constitutional and legislative provisions to abandon old habits founded on the tight respect for legal rules (although, as already said, this has never diminished the degree of maladministration). Local authorities are implicitly but clearly invited to choose among different solutions, and to balance legality with efficiency, in order to be kept accountable for the accomplishment of their own functions. But, at least for the immediate, these choices are felt more as heavy burdens than as new chances, given the fact that the traditional mentality of local public servants needs time for being abandoned.

Sadly enough, uncertainty affects both local and central authorities also for other reasons. The parliamentary majority in charge has repeatedly attacked the spirit of Constitutional Law n. 3/2001, as if it still was a product of the political will of the majority of the past Legislature, rather than an integral part of our Constitution. Not only Constitutional Law n. 3/2001 has not been fully implemented yet, but bills of constitutional reform have been presented in Parliament. Although such bills do not question but some aspects of the reform, the political climate is characterized with bitter quarrels rather than with a constructive tension. At date (and, I am afraid, for the whole Legislature), a deep uncertainty surrounds therefore the decisive choices which still need to be taken in changing the center-periphery relationship.

7. Since the Constituent Assembly, Italian regionalism has been a hard challenge to the previous institutional assessment rather than an effective and really partaken model of government. In this sense, we can still speak of "the advent of the regional State", en attendant Godot.