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THE FUNCTIONS OF THE REGIONS

ANNUAL REPORT - 2011 - ITALY

(March 2011)

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1.

The functions of the Regions are governed by the Constitution of the Republic of Italy in the fifth title of the second part (articles 114-133), which has been profoundly modified by the constitutional law of 18th October 2001, no. 3.

The core of regional autonomy is represented by lawmaking and administrative functions. The Constitution, moreover, provides for the participation of the Regions in the central organization of the Italian Republic also through the exercise of other functions. In particular:

a) each Regional Council can propose draft laws to the Chambers[1];

b) five regional Councils can request the referendum to abrogate, either totally or partially, a law or an act having the validity of a State law[2];

[1] Art. 121, second paragraph, Constitution.

c) five regional Councils may request the referendum on constitutional laws approved at second vote by a majority of less than two thirds of the members of each Chamber[3];

d) for the election of the President of the Republic, the Parliament, sitting in full session of the members of both Chambers, is supplemented by three delegates per Region who are elected by Regional Councils in accordance with procedures that insure minorities are represented; the Valle d'Aosta Region has only one delegate[4].

The first three functions were not effectively exercised in 2010. The President of the Republic was elected in 2006 and remains in office for seven years.

Article 11 of Constitutional Law 3/2001 has finally determined that Parliamentary rules may provide for the participation of representatives of the Regions, of the autonomous provinces of Trento and Bolzano and of local bodies in the Parliamentary Committee for regional affairs. When a draft law, relating to matters in which the Regions enjoy concurrent legislative power or regional financial autonomy and financial autonomy of local authorities, contains provisions on which the Parliamentary Committee on regional affairs, as thus supplemented, has expressed a contrary advice, or a favourable advice that is subject to the introduction of specifically formulated changes and the Committee which carried out the examination at the referral stage has not accepted such changes, the Assembly must decide by absolute majority of its members

This provision, however, has not been implemented and the problem of the participation of the Regions in the formation of new State laws which may impact upon regional and

[2] Art. 75, first paragraph, Constitution.

[3] Art. 138, second paragraph, Constitution.

[4] Art. 83, first paragraph, Constitution.

local autonomy has not been resolved in a manner which may be considered satisfactory (see *The conferences between State, Regions and local authorities)*. It is very common for the Regions to impugn new State laws before the Constitutional Court for infringement of their autonomy.

2.

The lawmaking functions of the Regions are regulated differently for the fifteen ordinary Regions and for the five Regions governed by special Statute.

According to the primary text of the Constitution, the ordinary Regions were granted legislative power over those matters indicated in a list of peremptory character. This legislative power was required to be exercised within the limitation of the fundamental principles laid down or inferable, for each matter in question, by and from the laws of the State, so it was referred to as *concurrent* legislative power; moreover it was also circumscribed by the national interest and the interest of the other Regions[5]. The residual legislative power, for all matters other than those attributed to the concurrent legislative power of the Regions, vested in the State. However State laws could grant the Regions the power to issue legislative rules for their implementation[6].

However for the five special status Regions, legislative power was governed by the relevant special Statutes adopted by constitutional law. The Statutes provided for three types of legislative power: *a)* a concurrent legislative power, corresponding to that of the ordinary Regions; *b)* a legislative power referred to as *exclusive* and not subject to the

[5] Art. 117, first paragraph, Constitution (primary text).

[6] Art. 117, second paragraph, Constitution (primary text).

limitation of the fundamental principles established by or inferable from the laws of the State, but only to the limitations of the general principles of the legal order of the State, of the fundamental principles of the economic-social reforms of the Republic, of compliance with international obligations and national interest; *c*) a legislative power of integration, as well as of implementation, of State laws. Each Statute, however, established separate lists of matters for the various types of legislative power. The Statute of the Valle d'Aosta Region provided only for exclusive legislative power and the power of integration and implementation. The Statute of the Trentino-Alto Adige Region granted legislative, exclusive and concurrent legislative power also to the Provinces of Trento and Bolzano, over matters included on lists that were different to lists of those matters attributed to the legislative power of the Region.

The Constitutional Law of 18th of October 2001, no. 3 has profoundly reorganised the distribution of legislative power between State and ordinary Regions. A number of general limitations have now been established, common to the legislative power both of the State and of the Regions: namely compliance with the Constitution, the obligations deriving from European Union law and those deriving from international obligations[7].

The limitation of compliance with the Constitution was already implicit in the old system due to the binding force of the Constitution, which prevails over all other sources of law; however the other limitations are new. The limitation of the obligations deriving from European Union law allows the State to impugn regional laws before the Constitutional Court, to obtain a declaration of constitutional illegality[8] and thus promptly to remove the conflict between regional laws and European rules, even those that are not directly

[7] Art. 117, first paragraph, Constitution.

[8] Constitutional Court, 3rd of November 2005, no. 246; id., 23rd of March 2006, no. 129.

applicable. The limitation of compliance with international obligations, which historically originated in the analogous limitation placed on the exclusive legislative power of the special Regions, facilitates the closer integration of the whole legal order of Italy with the international legal order. The Constitutional Court has highlighted this limitation, stating that the provisions of the European Convention of Human Rights represent *intermediate law* in cases held to determine the constitutional legitimacy of internal sources of law: the infringement by the State law of provisions of the European Convention of Human Rights therefore becomes a constitutional infringement which may be censured by the same Court[9].

According to the Constitutional Law 3/2001, moreover, there are now three types of legislative power:

a) the exclusive legislative power of the State, which is exercised in relation to the matters indicated in a list of peremptory character[10]; *b*) the concurrent legislative power of the State and Regions, which is exercised in relation to the matters indicated in another list, also peremptory in character[11]; *c*) finally the residual legislative power of the Regions, in relation to all matters other than those indicated in the two lists[12]. The Regions exercise concurrent legislative power, as mentioned above, in compliance with the fundamental principles laid down by State laws. After the reform, the Constitutional Court held that the State in regard to matters of concurrent legislative power may only lay down fundamental principles, but not detailed provisions, not even of a supplementary (i.e. applicable only in

[9] Constitutional Court, 24th of October 2007, nos. 348 and 349.

[10] Art. 117, second paragraph, Constitution.

[11] Art. 117, third paragraph, Constitution.

[12] Art. 117, fourth paragraph, Constitution.

the absence of regional provisions) or transitory character (i.e. destined to cease application in all Regions following the establishment of Regional legislative provisions)[13]: the distinction between State and regional legislative power is now more well-defined than in the past.

The differences from the old system are significant. The residual legislative power now resides with the Regions, and no longer with the State. The national interest is no longer envisaged as constituting a limitation on regional legislative power. The list of the matters of concurrent legislative power does not correspond with the old list of the primary text of the Constitution. State laws can no longer grant the Regions the legislative power of implementation.

The reform of 2001 also regulated the power to enact regulations, which is still a lawmaking power, but at a level subordinate to legislative power. The power to enact regulations belongs to the State in the areas of exclusive legislation, in the absence of delegation to the Regions; in all other matters the power to enact regulations belongs to the Regions[14].

Constitutional Law 3/2001 did not affect the legislative power of the Regions subject to special Statute and of the autonomous provinces of Trento or Bolzano, but provided for the possible future adjustment of the individual Statutes. Until this adjustment occurs, the provisions of the same law apply also to the special Regions and to the autonomous

[13] Constitutional Court, 26th of June 2002, no. 282; id., 27th of November 2007, no. 401; id., 30th of December 2009, no. 340.

[14] Art. 117, sixth paragraph, Constitution.

Provinces for those parts in which wider forms of autonomy are provided for than those they have already been granted[15].

The Government, following appropriate legislative delegation, has identified the fundamental principles, as inferable from current legislation in force, only in three matters of concurrent legislative power[16]. However the Parliament has not made a contribution to defining the areas of exclusive legislation of the State and the new matters of concurrent legislative power, nor has it issued new general policy laws laying down the fundamental principles in these matters: the uncertainties about the extent of these matters and about the fundamental principles, which must be inferred by means of interpretation from the legislation in force, have translated into a significant body of litigation before the Constitutional Court. The Statutes of the special Regions, finally, have not been adjusted to the Constitutional reform. During the course of the 14th legislature (2001-2006) the Parliament undertook not so much to fully implement the Constitutional reform of 2001[17],

[15] Constitutional Law 18th of October 2001, no. 3, art. 10.

[16] Legislative Decree 2nd of February 2006, no. 30, in the area of the professions; Legislative Decree 12th of April 2006, no. 170, in the area of harmonisation of public budgets; Legislative Decree 18th of April 2006, no. 171, in the area of savings banks, agricultural banks, credit institutions of a regional character and land and agricultural credit institutions of a regional character. The legislative delegation had been provided by Law 5th of June 2003, no. 131, art. 1, paragraph 4.

[17] As a result of a broadly prolix judgement, the Law of 5th of June 2003, no. 131, *Provisions for the adjustment of the legal order of the Republic to the Constitutional Law of 18th of October 2001, no. 3*, did not provide any genuinely useful elements for the full implementation of the constitutional reform.

but rather to approve a draft constitutional law proposing a complete reform of the second part of the Constitution, relating to the organization of the Republic, including the system of regional and local autonomies[18]. The constitutional draft law was approved by the Parliament at the end of 2005, but a popular referendum was requested on foot of it[19] and the draft law was rejected[20]: the reform therefore was not completed. In the 15th legislature (2006-2008) there were no significant initiatives. In the 16th legislature, which opened in 2008, the political initiative of the Government and of the Parliamentary majority focused on themes referred to in political jargon as *public property federalism* and *fiscal federalism*. However, these are overblown terms, which relate only to the transfer of State property to ordinary Regions, Provinces and Communes and of a partial reform of the system of financing of these entities.

[18] Parliamentary Acts Senate, XIV legislature, constitutional draft law no. 2544, presented by the President of the Council of Ministers Berlusconi on 17th of October 2003.

[19] The referendum was promoted by fifteen Regional Councils and, separately, also by over 800,000 electors.

[20] The referendum took place on 25-26 June 2006 and registered a wider majority of votes against (15,791,293, equivalent to 61.3% compared to 9,962,348 votes in favour, equivalent to 38.7%).

These reforms have been implemented by ordinary delegation law, which has been followed by a number of Legislative Decrees[21]. The implementation of these reforms will still require other provisions as well as a suitable period of time. No new state initiatives relating to regional legislative power have, however, been implemented.

The general body of legal opinion, based on the broad case law of the Constitutional Court, holds that the new provisions introduced by Constitutional Law 3/2001 are more formal than substantial: the regional legislative power is characterised much more by continuity with the old constitutional order than by radical innovation. The State has exclusive legislative power in a number of areas, commonly referred to as *transversal*, such as the safeguarding of competition or the establishment of the essential levels of the services corresponding to those civil and social rights which must be guaranteed throughout the national territory: these *transversal* areas give the State significant room for intervention in regulating matters relating to concurrent legislative power and also the residual power of the Regions. The national interest, which is no longer specifically referred to in the Constitution, has been retrieved through the limiting effect of fundamental principles in the matters of concurrent legislation and a number of areas of exclusive legislative power of the State: for example, the system of civil and criminal law and protection of the environment, the ecosystem and cultural assets, in addition to the *transversal* areas just mentioned, allow the State to broadly influence regional legislative

[21] The Law of 5th of May 2009, no. 42, Delegation to the Government in the area of fiscal federalism, in implementation of article 119 of the Constitution; Legislative Decree of 28th of May 2010, no. 85, Grant to Communes, Provinces, metropolitan Cities and Regions of property in accordance with article 19 of Law of 5th May 2009, no. 42; Legislative Decree 26th of November 2010, no. 216, Provisions relating to the determination of the costs and standard requirements of Communes, metropolitan Cities and Provinces.

autonomy. In the very many cases in which a legislative intervention is referable at the same time to several areas within the competence partly of the State and partly of the Regions, the Constitutional Court - applying the criterion of the *prevailing area* or the principle of *loyal collaboration* between State and Regions - has contributed to a further reduction of the areas of regional autonomy potentially acknowledged by the reform. The strict division of legislative power between State and Regions has been, finally, attenuated by a judgement of the Constitutional Court of 2003, mentioned below, and by subsequent similar judgements of the Court which followed it.

3.

The primary text of the Constitution established the principle of parallelism for the administrative functions of the Regions: the Regions were entitled to exercise administrative functions in the same matters in which they held legislative power, except for the local interest functions which could be granted by State law to Provinces, Communes or other local authorities[22]. State law could also delegate to the Regions the exercise of other administrative functions[23]. The Regions were generally expected to exercise their administrative functions by way of delegation to the Provinces, or other local authorities or by availing of their offices[24]. The VIII transitional and final provision of the Constitution imposed on the Republic's laws the duty to regulate, for each branch of public administration, the transfer of State functions to the Regions: this provision, despite its location, has been deemed to be non-transitory, but rather of permanent character. In effect,

[22] Art. 118, first paragraph, Constitution (primary text).

[23] Art. 118, second paragraph, Constitution (primary text).

[24] Art. 118, third paragraph, Constitution (primary text).

the most important transfers of State administrative functions to the Regions occurred in three stages, always by way of Legislative Decrees subsequent to the delegation law. The first regionalisation occurred in 1972, immediately after the first election of the Regional Councils[25]. The second regionalisation occurred in 1977[26]. The third regionalisation occurred in 1997-98, with significant innovation over the past[27]: the delegation law was aimed at *granting* functions to Regions and local authorities, thus including the transfer, delegation and assignment of functions; the fundamental criterion of the delegation was the principle of subsidiarity, already introduced into the Italian legal order through the European Charter of local self-government[28]; the areas relating to the assignment of

[25] Presidential Decree 14th of January 1972, nos. 1-6; Presidential Decree 15th of January 1972, nos. 7-11; these Legislative Decrees were issued following the legislative delegation provided for by Law 16th of May 1970, no. 281.

[26] Presidential Decree 24th of July 1977, no. 616, issued following the legislative delegation provided for by the Law 22nd of July 1975, no. 382.

[27] The legislative delegation was provided for by Law of 15th of March 1997, no. 59, followed by various Legislative Decrees: Legislative Decree of 4th of June 1997, no. 143; Legislative Decree of 19th of November 1997, no. 422, modified by Legislative Decree of 20th of September 1999, no. 400; Legislative Decree of 23rd of December 1997, no. 469; Legislative Decree of 31st of March 1998, no. 112, modified by Legislative Decree of 29th of October 1999, no. 443.

[28] The Law of 30th of December 1989, no. 439 had authorised the ratification of the *European Convention relating to the European Charter of local self-government,* signed in Strasbourg on 15th of October 1985; the principle of subsidiarity was provided for by the Charter in article 4, paragraph 3.

functions were not specifically indicated, and only the excluded matters were mentioned. The third regionalisation therefore involved the devolution of new and important administrative functions to the Regions.

The Statutes of the special Regions equally provide for the principle of parallelism between legislative functions and administrative functions; they also provide that the transfer of state administrative functions should occur by appropriate rules implementing the Statutes, issued by the Government subject to the advice of a joint State-Region committee.

Constitutional Law 3/2001 has also profoundly modified the constitutional rules on the administrative functions of the ordinary Regions. The principle of parallelism between legislative functions and administrative functions has been abandoned and replaced by the principle of subsidiarity, together with the principles of adequacy and differentiation. What has been clarified, however, is that the new constitutional principles on the administrative functions of the Regions do not apply automatically, but require the intermediation of new State laws. But after the constitutional reform, no new and broad-based transfer of State administrative powers to the Regions was put in place. It is widely considered that the administrative autonomy of the Regions has increased only as a result of the third regionalisation, considered as a reform of *federalism with an unchanged Constitution,* to which the Constitutional Law 3/2001 subsequently granted constitutional cover, but without significant new effects.

The Constitutional Court has made it clear, moreover, that the State may continue to exercise a significant role in relation to important national interests in the matters of regional legislative competence, even after the constitutional reform. In particular, State law in these areas may provide for subsidiarity in relation to administrative functions of an intrinsically unitary character, with particular regard to tasks relating to the planning and execution of public works of strategic importance for the country, even if based on agreements between State and Regions; moreover, this would involve the State recovering

legislative power over these functions[29]. The principle of subsidiarity, therefore, may operate not just in favour of the Regions, Provinces and Communes, but also in favour of the State, and may have repercussions – still in favour of the State – also on the constitutional distribution of legislative power between State and Regions.

What has been evident is not just the absence of any new transfer of administrative functions to the Regions. A number of significant new laws have in fact strengthened, for the relevant areas, the role of the state administration: for example, the cultural heritage and landscape Code[30], and the so-called environment Code[31]. The new State laws in several areas have not given true prominence to the principle of subsidiarity and they also lack adequate connections to ensure loyal collaboration between the State and regional administrations (see *The conferences between State, Regions and local authorities*).

[29] Constitutional Court, 1st of October 2003, no. 303.

[30] Legislative Decree of 22nd of January 2004, no. 42, subsequently repeatedly amended.

[31] Legislative Decree of 3rd of April 2006, no. 152, *Rules on the environment*, also repeatedly amended.