

# CONSTITUTIONS AS INCOMPLETE SOCIAL CONTRACTS

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## 1. *Decentralization in Italy and Spain*

Besides sharing a common cultural background, Italy and Spain also share a similar institutional framework. Both are unitary states in the European Union that have devolved responsibilities of mandatory services to be provided nationwide at the sub-national level within rules set at the Constitutional level. Both assign to the regional level – the *Regioni* and the two *Province Autonome* in Italy (Regions from now on), the *Comunidades Autonomas* (ACs) in Spain – the ability to legislate via own laws on specific matters within the rules defined by the Constitution. As for Italy, it is art. 117 of the 1948 Constitution, reformed in 2001, that defines matters on which the central government has the exclusive right to legislate, and matters on which it shares instead a joint right with regional governments. As for Spain, the art. 148 in the 1978 Constitution lists functions on which only the ACs can legislate, leaving to art. 149 those on which only the State can exercise this right.

In terms of resources (funding and spending), the most prominent areas for regional policies are healthcare (both in Spain and Italy; Costa-i-Font and Turati, 2017) and education (in Spain and in three Special Statute Italian Regions; Turati *et al.*, 2017). Given the importance in political terms of these services, it is hardly surprising that the Constitution contemplates a joint responsibility of the central government and of regional governments. The Con-

stitutional ideal design in both countries leaves to the central government the right to preserve national unity and solidarity across Regions, and to regional governments the right to regulate the supply of services. More in details, the Italian and Spanish Constitutions specifically assign to the central government the role of defining the level of services to be provided in all constituencies: in Italy, the «essential» level of services concerning civil and social rights to be guaranteed across all Regions, art. 117 Constitution, § 1, letter m; in Spain, although art. 148 specifies the list of areas where the ACs can intervene, art. 149, § 1, also states that the central government has exclusive competence on the regulation of the basic conditions that guarantee the equality of all Spaniards in the exercise of rights and in the fulfillment of constitutional duties. Therefore, both Constitutions assign to the central government the right to legislate on fundamental principles, while leaving to regional governments the right to regulate these matters subject to those principles defined by the central government, which represents the unity of the State.

In order for this division of roles to work, it is required that the Constitution assigns to the central government also a key role in funding, so to guarantee across all territories the same constitutionally defined standard in the supply of these services. In Italy, this is done by the art. 119, which explicitly states that regional governments: *a*) are autonomous in terms of funding and spending; *b*) have own resources; *c*) have the right to participate in central government revenues; however the central government sets up a fund to equate resources for all territories that do not have enough tax base per capita. Similarly, in Spain, art. 156 and art. 157 establish that the ACs enjoy financial autonomy for the development and execution of their competences in accordance with the principle of coordination with the State Treasury and solidarity among all Spanish citizens.

The design of how regional governments are financed is understandably important in many aspects. In particular, this might have important implications during hard economic times, when central governments need to consolidate their debts like most EU countries in the latest years. As discussed by Mussons in «Fiscal Decentralization and the Cycle in Spain: an Empirical Analysis of Fiscal Policy Responses» in this Special Issue, the ACs' discretionary fiscal policies have been pro-cyclical, especially during the most recent crisis. One interpretation is that central government shifted the burden of consolidation during these hard times on sub-national governments (Ahmad *et al.*, 2016). This is worrisome, since health, education and social services expenditures have a direct impact on citizens' welfare and are within the main regional responsibilities. Shifting consolidation has turned out to be a sensible political issue in times of crisis, and it has likely been the straw that has broken the camel's back, fueling the recent surge of independence claims in Catalonia.

## 2. *The incompleteness of the Constitutional contracts*

Constitutions set principles, vague principles. They are incomplete social contracts (Aghion and Bolton, 2003). They do not specify – for every possible future contingency – what the level of services would be across all territories, what the level of taxation would be, what the redistribution rules would be. If they were complete contracts, then the only social choice rule that would be working ex-post is the Wicksellian unanimity principle: the move toward a new social contract must be Pareto improving. But the social criterion rule we observe ex-post is always some version of the majority rule enshrined in the voting mechanisms at both the central and the regional level, in the working rules for Parliaments, in how Parliaments are designed (one or two Chambers, one Chamber representing the interest of Regions and other sub-national entities). Establishing the Constitution as an incomplete contract allows flexibility but presents its own drawbacks: on the one hand, it can open the door to Condorcet cycles; on the other hand, it can generate an excessive degree of ex-post redistribution, not only in terms of public resources but also in terms of a more general definition of political power. It is the well-known problem of the «tyranny of the majority» which might expropriate the minority, a problem pushing toward qualified majorities (or supermajorities) ex-post. How does this qualified (or super) majority translate into practice is the crucial issue. And, again, it is a matter defined at the Constitutional level when designing the legislative process.

When looking at the case of Italy and Spain along this perspective there are common features that clearly stand out: first, some territories claim that ex-post redistribution is excessive, so that the «tyranny of the majority» is a real issue in both countries. This has been made clear loudly in the case of Catalonia, leading to a recent referendum whose validity has not been recognized by the central government and induced the central government to use violence when Catalan people were casting their votes, that has brought the Catalan Parliament to vote for independence, and the central government to entirely dismiss the Catalan government and jail some representatives. The Catalan vote for independence on October 1<sup>st</sup>, 2017, is clearly illegal within the rules set forth by the Spanish 1978 Constitution. This is a (peaceful, for now) revolution in the heart of the European Union; and revolutions are never legal according to Constitutions. Also in Italy a couple of Regions, Lombardia and Veneto, ran a consultative referendum, on October 22<sup>nd</sup>, 2017, to ask their citizens whether the regional government should start negotiating with the central government for more autonomy on the matters allowed by the Italian Constitution according to art. 116. A third region, Emilia Romagna, did start these negotiations following

the rules set in art. 116, thanks to the mandate received by the regional Parliament.

Similarly to Catalonia in Spain, these are all rich Northern Italian Regions that contribute with their taxes to finance services in other Regions. The size of the contribution is usually measured by fiscal flows; and the paper «Catalan's grievances: Do fiscal flows matter?» by Bosch and Espasa in this Special Issue takes up exactly this problem, discussing how fiscal flows can be computed, how they look like in federal advanced countries, besides Spain and Italy, though with a prevalent focus in the Catalan vs Spain case. Their main result is that, using fairly standard methodologies, Catalonia has always had a persistent fiscal deficit with the Spanish central public sector. The authors also evaluate that the magnitude of the Catalan deficit is high in comparison to those found in other Regions of advanced countries. There are other territories with a similar deficit, but relatively richer than Catalonia or with special characteristics. Also the invited policy paper «Italy: fiscal federalism and the division between North and South» by Bordignon (a member of the European Fiscal Board) in this Special Issue discusses fiscal flows as a potential explanation for why the South of Italy is poorer and non converging, coming to the conclusion that despite attempts at decentralization, Italy remains a strong unitary country, where public spending is basically uniform across territories because the central government exercise its constitutional right of equating resources across territories both for matters specifically under its control (for instance, education and justice) and for matters for which it shares responsibility with regional governments (healthcare).

In both countries, the «tyranny of the majority» does not seem however to be limited to an excessive redistribution of resources. This is just one, though important, piece of the story. Another claim concerns the real degree of autonomy in political terms, namely in drafting legislation, allowed by the Constitution to regional governments on matters that are under the joint responsibility of central and regional governments. As stressed before, Constitutions are vague and set principles. To fill the holes in this incomplete social contract one can rely on ordinary laws issued either by the central government or by regional governments. In both cases, however, central or regional governments can ask the Constitutional Court whether a given law comply with the Constitution, that is, whether it respects the vague principles set forth in the social contract defining the unitary State. Here comes one large difference between Italy and Spain: the pattern of decentralization has been different between the two countries.

In Italy, the 1948 Constitution largely reflected the territorial unity of the country after the unification in 1861, a process which required, for instance, the use of centrally managed education to start building a shared national

identity in a country where cities (more than Regions) always played an important role. It is true that Regions were already defined as sub-national administrative entities in the original Republican Constitution, but they were really created about twenty years later. And decentralization, as a process of devolving functions and resources to Regions, started in the Nineties, with the explicit aim of improving efficiency in the management of resources at the local level. Indeed, according to the theoretical literature on fiscal federalism, devolution increases accountability of policy makers, hence leading to more efficiency. Since resources were the real issue at the center stage of the Italian-style federalism, it does not come as a surprise that there have been a number of cases discussed by the Constitutional Court on this matter. One important case in this respect has been the Decision 296/2003 on the Regional Law of the Regione Piemonte n. 20/2002, allowing the exemption of the Agency for the 2006 Winter Olympic Games in Turin from the payment of the regional tax on productive activities (IRAP), which was introduced in the tax system with the D.Lgs. 446/97 (a national law). This regional law has been challenged by the central government, who was claiming the exclusive right to legislate on the IRAP. The Constitutional Court had then to decide whether the IRAP, a regional tax in the national law, could be really considered a regional own tax according to the article 119 of the Constitution. And the interpretation of the incomplete constitutional contract was that the IRAP cannot be considered – in legal terms – a regional tax. This judgment is based on the argument that a regional own tax needs to be introduced in the legislation by a regional law; which was not the case of IRAP. This is just but one example of the centralist stance taken by the Constitutional Court, enough to stop the attempts at devolving some degree of real fiscal autonomy to Ordinary Statute Regions in the country. There are some Regions enjoying more political autonomy, the Special Statute Regions, but this largely reflects historical reasons and international treaties (the bordering Regions Valle d'Aosta and Friuli Venezia Giulia, and the Autonomous Provinces of Trento and Bolzano), or geographic specificities (the two major islands, Sicily and Sardinia). All these territories have statutes recognized by Constitutional laws, according to which they contract more specifically with the central government the degree of autonomy on functions and resources.

In Spain, on the contrary, the 1978 Constitution agreed after Franco's death was a compromise among the quest of autonomy by historic «nationalities» (terminology finally agreed to be used to refer to historical nations within the Iberian Peninsula), the democratic forces that fight in clandestinity to gain democracy and, implicitly, with the authoritarian State build up for more than forty years after the Spanish Civil War (1936-1939) and after a long period of hard repression of the defeated. For some of the newly cre-

ated ACs it was the only way to defend a specific national identity in front of a dictatorial State controlled by the army that, still in 1981, tried to intimidate a newborn democracy with a Coup d'État (the Tejero putsch) that failed. The tenuous agreements reached in 1978 translated into the vague norms of the Constitution that worked for more than thirty years; that is, for the initial steps of a democracy after a long and dark period of authoritarianism that did not end as a result of a dramatic change of regime but as the transformation of one regime into another (the recently named *régimen del 78* to identify the democratic period). However, regional powers, such as Catalonia, grew up and started to push the limits of the Constitution further in search of more autonomy and to fulfill their aspirations of more self-government and the full recognition of a national identity within Spain.

The Catalan 2006 *Estatut d'Autonomia* marked a milestone. Following all constitutional and legal procedures, like for the special statutes of the more autonomous Regions in Italy, the Catalan citizens voted for a new basic institutional norm (that can be seen as an integral part of the Constitution itself) to provide an answer to a XXI century society, calling for more financial and policy making powers. The appeal against it set up by the right-wing Popular Party (now in power) blew up the constitutional way to accommodate the Catalan insert into the Constitutional corset. Especially after 2006, a turning point for the Catalan dissatisfaction, many laws issued by the Catalan Parliament have been constantly repealed by the Constitutional Court. Laws such as the protection of the poor in front of fuel poverty (unanimously approved by the Catalan Parliament); a law to prevent (certain type of) evictions; a law on gender equality; a law on business hours and a trade law; a law to regulate the use of fracking techniques to generate energy; a nuclear energy tax; a tax on bank accounts; a tax on empty properties; a euro fee on medical prescriptions, a tax on providers of electronic communications services and, very recently, a tax on sugary drinks are all examples of laws repealed by the Spanish Constitutional Court. In front of such situation a crucial question has started growing within the Catalan (as well as other) communities: what is the real degree of autonomy? How much are really autonomous the ACs in Spain?

This brings us to the third issue that makes Italy and Spain similar: in both countries, requests by sub-national entities do not end up discussed in one of the Chambers of the Parliament, since in both countries there is nothing like the German Bundesrat. Hence, Regions in Italy and ACs in Spain do not directly participate to the legislative process at the national level. This situation impacts also on the composition of the Constitutional Court in both countries, since the two Chambers of the Parliament vote to elect some of the Constitutional judges. And this might explain why the Constitutional Courts take a centralist stance in Italy as well as in Spain.

### 3. *The road ahead*

Constitutions will remain even in the future incomplete social contracts. They have to be incomplete, if they need to serve a country for extended periods of time. Hence, the quest for more political autonomy by some territories, and/or the protests for an excessive ex-post degree of redistribution needs to be considered by interpreting and completing the Constitutions with laws enacted by the national or the regional Parliaments, on which the Constitutional Courts have still to express a judgment. No matter how one can reform the Constitutions.

The recent proposal to reform the Italian Constitution in 2016 was approved by the Parliament in April, but then rejected by a national referendum held in December. According to the Renzi government who made the proposal, there were a number of significant changes in the vertical relationship between the central government and the regional governments (except for the five Regions with autonomous statutes; Pisauro, 2016). Leaving technicalities aside, it was certainly a proposal moving the centre of gravity of power in favor of the central government, even though it would have introduced also a Senate of Regions and municipalities with the power to directly affect the laws concerning sub-national governments and territories. One of the most debated issues was the passage from a shared responsibility on some areas to a clear distinction (at least in the idea of proponents) between matters on which the central government has the exclusive right to legislate and matters on which this exclusive right rests on Regional governments; somewhat like in the Spanish Constitution. But, again, also in the presence of an exhaustive and clear list of functions, words have to be interpreted. What is the exact meaning of the «planning and organization of healthcare services» that the reformed Constitution would have assigned exclusively to regional governments? Where does legislating on this matter begins to clash with the «general rules for the protection of health», which the reformed Constitution would have assigned exclusively to the central government? The Constitution will never specify anything more than that. The vagueness would be solved when one starts legislating on specific issues like, for instance, suspending electroconvulsive therapy. In this case, the Constitutional Court could be asked to intervene to decide whether a regional law on this matter is constitutionally valid (e.g., Sentence 282/2002 Italian Constitutional Court, Regione Marche vs Central government, concluding that it is not valid). Or, similarly, the vagueness is solved when one starts defining how funds should be redistributed across Regions. And the Constitutional Court somewhat ruled also on the D.Lgs. 56/2000, the decree with which the central government tried to introduce some seeds of

fiscal federalism in the country, together with norms dictating the functioning of the equalization fund (e.g., Order 252/2007 Italian Constitutional Court, Regione Campania vs Central government). The difficulties in applying the D.Lgs. 56/2000 generated the practice of writing multiannual pacts to apportion funds between the central government and the regional governments, within the so-called State-Regions Conference (an institutional solution to negotiate regional affairs without having a dedicated Chamber). Though these pacts are closer to complete contracts than the Constitution, they have been sometimes reneged by the central government invoking the need to preserve the unity of the country. At present, the problem of apportioning funds among Regions is still an open issue requiring some bargaining, even though the Law 68/2011 established the principle of «standard costs». These are, however, far from those that can be obtained from an exercise like the one proposed in the paper «Comparing the efficiency of hospitals in Italy and Spain: a non-parametric approach» by Martorana in this Special issue. In terms of efficiency dynamics, the paper finds divergent processes in Italy and Spain: on the one hand, the process of convergence for hospitals in Italian Regions was not able to significantly reduce the gap between Northern and Southern Regions; on the other hand, hospitals in Spanish Regions diverged, as only leading ACs managed to improve efficiency.

Finally, like article 150 of the Spanish Constitution, the constitutional reform proposal put forward by the Renzi government contained a supremacy clause attributing the final word on regional laws to the central government. Even if the Senate of Regions and municipalities would have had strengthened powers about the invocation of the supremacy clause, this provision would have clearly twisted the balance of power towards the central government. Centralize everything is however a solution only if one thinks that the quest for autonomy can be curbed in some way by the central government, under the implied assumption that, after all, revolutions to break the unity of a country are unlikely. A different way of looking at the problem is to try to introduce checks and balances to equilibrate the centripetal power of the central government with the centrifugal attitudes of Regions. The absence of a political institution where regional matters can be discussed calls for a reform transforming one of the two Chambers into a real Chamber for sub-national governments. This would have consequences also on the composition of the Constitutional Court, as long as some of the judges are elected by the Chambers.

This view is in line with the perspectives put forward by Castells (former Minister of Economy and Finance of the Generalitat de Catalunya from 2003 to 2010) in «Some comments on territorial conflicts and economic is-

sues: the Catalonia-Spain case», the second invited policy paper included in this Special Issue. Castells points out that financial issues are not the only relevant issues in territorial conflicts within countries. Political issues, such as the distribution of political power between the different levels of government, the existence of «national» minorities, the constitutional design, and the territorial conception of central institutions are indeed crucial. According to this approach, as long as Spain is a very special hybrid of unitary and federal system, with a radial-center based model and with important «national» minorities, one option to solve the Spanish-Catalan conflict within the present framework could be a bilateral deal that brings a differentiated treatment to satisfy the legitimate aspirations of those territories with a clear national identity. In essence, this deal would be a more complete Constitutional contract, fixing the level of redistribution in *ex-ante* terms. This is much in line with what the Italian Constitution already allows to the five Special Statute Regions, and what the Spanish Constitution already allows to Navarre and the Basque Country. If a bilateral agreement guaranteeing some sort of special statute to Catalonia cannot be achieved, independence would still be an available option.

The Catalonia-Spain case is informative about what might happen also in Italy in the near future. At present, some Regions have started, using different approaches, to exercise for the first time the option allowed by art. 116 of the Constitution of gaining more autonomy in some specific functions listed in art. 117. This could lead the country to some sort of multi-speed (or differentiated) federalism, an institutional option discussed also in the contribution by Bordignon. We do not know what these Regions will really obtain from the central government. However, if their requests will not be satisfied, at least to some extent, one might imagine that also these (or other) Italian Regions will try to find satisfaction for their claims of autonomy in alternative ways. For instance, Veneto's citizens seem to be much more supportive of regional autonomy than Lombardy's, having already run another consultative referendum for independence back in 2014. As the Catalan case (but also the Brexit at the EU level) is teaching, people's anger feelings make a new equilibrium unpredictable. But finding new constitutional ways of balancing functional and fiscal autonomy at the local level with a real sense of solidarity to be pursued at a more higher level is one of the crucial issues in present times, that cuts across Regions in Italy, ACs in Spain, as well as countries in the European Union. The debate is open.

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