REVISTA *ARGUMENTUM*

INTRODUCTION TO CONSTITUTIONAL STRUCTURE AND PRACTICE OF LOCAL DEMOCRACY IN INDIA AND ITALY

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Autor convidado.

1. CONSTITUTIONAL AND HISTORICAL-CONCEPTUAL BACKGROUND: IN INDIA AND IN ITALY

India's constitutional democracy (Constitution of India came into force on 26th January, 1950) is primarily a two-tier level with the union (or the federal government) at the centre and the states/union territories at the second level with a heavy tilt towards the centre. Article 1(1), Constitution of India states, "India, that is Bharat, shall be a Union of States". After the "two names" of the country, "India" and "Bharat", there is an emphasis on its "unitary nature" with "federal existence" where it "shall be a union of states". "States" exist, and if they must exist, and that they should exist so long as "states" are mentioned in Art. 1(1), but they are "directed" or "move towards" the "Union" (given the use of language, it is also perhaps the ambition and aspiration of the constitution makers) where "shall be" is portraying the pre-eminence of the "Union" rather than the "states"; and a normatively or a prescriptively unionising trait rather than a federalising one, even when the existence of the states is acknowledged in a "unionising federal" (one might add), rather than a "federalising union" due to the Supreme Court of India holding "federalism" to be a "basic structure" of the Constitution.[1] The "judicial overreach" in

[1] Federalism was held to be the basic structure of the Constitution of India in *S.R. Bommai v. Union of India* (1994 (3) SCC 1). It affected the nature of centre (union, federal)-state relations since then by mandating a judicious use (by imposing categories and safeguards) of Art 356 in imposing President's rule by the Centre in any state. Besides, the imposition of President's rule under Art. 356 can always be challenged in the Supreme Court of India which is the final authority deciding on the constitutionality of its imposition.

protecting India's limited federal structure (or an Indian kind of federalism) is a constitutional afterthought by the top court (which also functions as India's highest Constitutional Court) by using a helpful constitutional fiction of "basic structure doctrine" (decided, determined, and interpreted by the Supreme Court acting in its *autopoietic* capacity).[2] It is a correct step in keeping with India's democratic polity, though it has a slim constitutional mandate (in the constitutional provisions *itself*) when Article 1(1) is read with Article 3 of the Constitution of India. It should also be noted how India's federal structure is symmetrical and has tendencies of moving towards symmetricalism (as a matter of constitutional and political fact) since the accession of princely states into the Indian union and the states reorganization commission of the 1950s until today when new states have been created over the decades with co-equal competences, limitations and responsibilities under the constitution.[3] If an asymmetry exists, it is only a matter of political expedience, and it would be about time when a symmetry would be created with political will working under the aegis of the Indian Constitution. On the other hand, and as a matter of fact, the present author does not believe that there is asymmetry in Indian federalism, rather there is a presence of different levels of symmetry which is structured (the present paper explains it subsequently). The creation of Telangana, a co-equal state as part of India's symmetrical federalism under the Constitution of India, is a recent example.

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[2] «The basic structure doctrine was announced by the Supreme Court in *Kesavananda Bharati v. State of Kerala* (sic., actual name was '*Bharathi*') in 1973 ((1973) 4 SCC 225). This doctrine places substantive limits on the amending power and has subsequently been applied to other forms of state action….basic structure review is an independent and distinct type of constitutional judicial review which applies to all forms of state action to ensure that such action does not 'damage or destroy' 'basic features of the Constitution'. These basic features of the constitution are identified through a common law technique and are general constitutional rules which are supported by several provisions of the constitution. » Cf. S. Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, Oxford University Press, 2010, p. x (preface).

«According to this doctrine of basic structure, the amendment power (of the legislature-parliament) is not unlimited; rather, it does not include the power to abrogate or change the identity of the constitution or its basic features…..Since *Minerva Mills* (*Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789), the 'Basic Structure Doctrine' has been accepted and applied in various other cases, and is now an established constitutional principle in India. It now includes general features of a liberal democracy, such as the supremacy of the Constitution, the rule of law, separation of powers, judicial review, judicial independence, human dignity, national unity and integrity, free and fair elections, federalism and secularism. » Cf. Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford University Press, 2017, pp. 42-47.

[3] Some commentators over-emphasize India's so-called "asymmetrical federalism", but what might be relevant is "cooperative federalism" functioning under "symmetrical federalism" which is the structure and mandate of the Indian Constitution. For the rest, asymmetricalism is only temporary and contingent as a constitutional practice, without the resultant creation of a constitutional convention. On India's constitutional history in general and federalism in particular, *See*: M.P. Singh, *Federalism in India*, New Delhi: Sage, 2022; G. Austin, *The Indian Constitution: Cornerstone of a Nation*, New Delhi: Oxford University Press, 2015; G. Austin, *Working a Democratic Constitution: A History of the Indian Experience*, New Delhi: Oxford University Press, 2003; A.K. Thiruvengadam, *The Constitution of India: A Contextual Analysis*, New Delhi: Hart, 2018.

In a globalized world, with huge immigrant and mixed cultural populations (not to mention many other differences which could be considered, making the list really long, some of which also predate globalization), the claim of India being a multi-national state is applicable to every other state in the world. No state can claim a uniform and perfectly homogenized population. So the appellation of India being a State-Nation is highly tendentious. It is as much a nation-state as any other in the world and exists as a self-defining (autopoietic), self-fulfilling, legal-constitutional institution in the sense of Santi Romano and Niklas Luhmann. For more, *See*: S. Romano, *The Legal Order* (edited and translated by Mariano Croce, with a foreword by Martin Loughlin and an afterword by Mariano Croce), Routledge, 2017; N. Luhmann, *Law as a Social System* (Trans. by: K.A. Ziegert), Oxford University Press, 2004; N. Luhmann, *Closure and Openness: On Reality in the World of Law* in G. Teubner (ed.), *Autopoietic Law: A new Approach to Law and Society*, New York: de Gruyter, 1987.

Article 3 (Constitution of India) gives the Union parliament preeminent right with regard to the creation, alteration and extinguishment of states, "Article 3 of the Constitution makes serious inroads into the position of States insofar as it authorises Parliament to form a new State by separating any territory from a State or by uniting two or more States or any part of them, or by uniting any territory to a part of any State. It may also increase or diminish the area of any State or alter the name of any State, subject to the condition that the diminished territory should remain part of the territory of India and not be transferred to any other country. The power to transfer any territory to any other country is not included in Article 3 because such transfer requires an amendment of the Constitution through Article 368. The only safeguard available to the concerned State in Article 3 is that its views are sought by the President on the proposed law within the specified time. But Parliament is not obliged either to consider these views or to modify the law. By this law Parliament may make all the consequential changes in any of the provisions of the constitution without the need to observe the procedure for amending the Constitution."[4]

Constitutionally (text of the constitution) speaking, Italy is a unitary state in no less certain terms but as conventions and constitutional practice (constitutionalism) indicates it has its own kind of a vibrant and functioning "federal" system (which is commonly referred to as regionalism or regional autonomy including local autonomy)[5], «The Italian Constitution provides for a unitary State in Art. 5, It. Const., which defines the Republic as "one and indivisible". [...] Despite its emphasis in the Constitution, the unitary character of the State has not stopped the development of a rather complex four-level system of autonomous territorial areas: Municipalities, Provinces, Regions and the State (as ordered by the new Art. 114, It. Const.). As a matter of fact, if one continues with a reading of Art. 5, It. Const., the Constitution itself requires a complex territorial sharing of powers. This provision favours the autonomous territories, as it affirms that the Italian Republic "recognises and promotes local autonomous territories". [] The Constitution's use of the words "to recognise" suggests that local autonomous territories are a pre-existing reality to the new legal order.»[6]

In terms of centre-state relations or relations between state-sub-state entities, Italy is a "compound state" or what is referred to as "cooperative federalism" by decentralizing-federalizing hopefuls, including the Supreme Court, in India, «If we were to differentiate *unitary* and *federal* States along a continuous linear spectrum, it is increasingly difficult to find clear examples that reside at the two opposite poles of that spectrum. On the contrary, the vast majority of constitutional systems in the world today would need to be classified somewhere in the middle

[4] M. Pal Singh, *The Federal Scheme* (Chap. 25), In: S. Choudhry, M. Khosla, P.B. Mehta (eds.), *The Oxford Handbook of Indian Constitution*, Oxford University Press, 2016, p. 458. There are 28 states and 8 union territories forming the Union of India presently. Hinting at a unifying trend not just in Indian democracy, but also in the mother of all modern federal states, the United States of America, *See*: R. Roy, R. Ranjan, *Local Democracy: Jefferson and Gandhi* (Chap. 11), In: R. Roy, R. Ranjan, *Essays on Modernism, Democracy and Well-Being: A Gandhian Perspective*, Sage, 2016, pp. 256-283.

[5] To understand the structure and principle of local autonomy in Italy, *See*: L. Vandelli, *Il Sistema delle Autonomie Locali*, Bologna: Il Mulino, 2004. For a more recent update on the principles and practice of local autonomy, *See*: G. Cavaggion, J. Luther (eds.), *Osservatorio Per Le Autonomie Locali (2014-2017)*, Roma: Aracne, 2018.

[6] L. Cuocolo, *The Regions* (Chap. 7), In: G.F. Ferrari (ed.), *Introduction to Italian Public Law*, Milano: Giuffrè, 2018 (2nd ed.), p. 117. Also *See*: A. Vedaschi, *Regional and Local Government Sources of Law* (Chap. 12), In: G.F. Ferrari (ed.), *Introduction to Italian Public Law*, Milano: Giuffrè, 2018 (2nd ed.), pp. 219-227.

of that spectrum. The difference between federal and unitary states seems to be losing its original significance, in favor of a form of "compound state," in which one finds a varying and dynamic equilibrium between central and peripheral powers. [] The Italian "regional State" can be said in a sense to have anticipated this trend, embodying a very peculiar balance between central State, Regions, and local "autonomies"1 (i.e., Municipalities, Provinces, and Metropolitan Cities). Within the Italian constitutional system, the distribution of powers between the central State and the 20 Regions (15 "ordinary" Regions and 5 "special" Regions) follows a very peculiar scheme, quite different from both classical federal systems and paradigmatical unitary States.»[7] Therefore, it is difficult to place Italy in the sub-state institutional structure models of western liberal democracies available to us, and against which, unfortunately, all state-structures are evaluated, as Justin Orlando Frosini rightly characterised, «Italy – in particular after the reform of Title V, Part II of the Italian Constitution – is actually a country that is difficult to classify in terms of its sub-state institutional structure and the relationship between the State and the Regions.»[8]

It is in this respect of being an outlier – of not being "purely" federal or unitary that Italy and India can be studied together, - despite obvious differences in which these two republics have been structured. In India, the competences over different subject-matters are specifically assigned in the form of union, states and concurrent lists, yet the union/central government and parliament has an upper hand in competences through the constitutional structure itself – and the Supreme Court of India (the highest Constitutional Court in the country; although the High Courts also have competence to hear and decide upon constitutional matters) gives effect to it, despite holding "federalism" to be a basic structure of the Constitution.[9]

The exact format (legislative competence is certain within the structure of the Constitution of India; but administrative, financial and other concerns of everyday functioning is pretty much dependent on the centre) in which federalism would pan out again depends essentially on the Government of India through the Union Parliament. The functioning of Indian federalism often swings like the pendulum with varying degree of federal practices, as a matter of constitutional fact, in a "cooperative federalism" model. One-party majority-led government at the centre leads to a stronger central government and a receding federal practice characterised through periods from 1952-1977; 1980-1989 and from 2014 – onwards. But when it is a slim majority, or a minority government, or a coalition government led by the single-largest party like between 1977-1979; and 1989-2014; due to pulls and pressures from regional/state centric parties as against national parties, there are greater federal tendencies. After all, the 73rd and 74th amendments to the Constitution (passed in 1992, in force from 1993) were brought about by a

[7] V. Barsotti, P.G. Carozza, M. Cartabria, A. Simoncini, *Italian Constitutional Justice in Global Context*, New York: Oxford University Press, 2016, pp. 183-184.

[8] J.O. Frosini, *Forms of State and Forms of Government* (Chapter 3), In: G.F. Ferrari (ed.), *Introduction to Italian Public Law*, Milano: Giuffrè, 2018, p. 41.

[9] In *S.R. Bommai & Others v. Union of India*, (1994 (3) SCC 1) federalism was added as a "basic structure" of the Constitution. Cf. M.P. Singh, R. Saxena, *Federalizing India in the Age of Globalization*, New Delhi: Primus Books, 2013, p. 53.

«[...] The Supreme Court in its judgement in *Kesavananda Bharathi v. State of Kerela* (1973), conceded the Parliament's power to amend any part of the Constitution, but bounced with the ingenious legal theory of the unamendability of the 'basic structure of the Constitution' as the Constituent power of the Parliament was limited to amendment, and did not amount to complete replacement, which only a new Constituent Assembly could do.» Cf. M.P. Singh, R. Saxena, *Federalizing India in the Age of Globalization*, New Delhi: Primus Books, 2013, p. 34.

minority government (with outside support) led by P.V. Narasimha Rao, does not get lost on the recent constitutional history of India. However, it is the present author's belief that only a strong one-party led central government can lead to greater devolution of competences to local self-government in India, otherwise the constitutional provisions would remain a dead letter without concrete implementation which has been led hostage by regional/state governments and parties. From the concrete two-tiered structure as envisaged by Article 1 of the Constitution, a three-tiered structure bringing representation and responsibility closer to the citizens requires a leap of faith and a strong political will for implementation. It might even require further constitutional amendment giving greater competence to local self-government in India. As far as the question of legal principle (concept) and practice of Indian constitutional democracy, including principles of federalism is concerned, there are at least two problems of theoretical-pedagogical approaches to its study which must be consciously understood and applied by all comparatists, as highlighted by Mithi Mukherjee, «First, the theoretical-pedagogical approach makes differences between western and non-western democracies appear as digressions, deviations, and signs of inadequacy or lack, rather than as the outcome of complex histories of discourses and institutions through time. Contemporary political scientists have referred to postcolonial India as a 'transitional' or 'follower' democracy, not only assuming the theoretical sameness of democracies everywhere, but also presupposing that the essential structure and the set of abstract categories that define democracy can be simply communicated or transferred from one author-nation to others. It is not surprising that while most historians of modern India terminate their research at 1947, the year of India's independence, assuming postcolonial political development to be inaccessible to historical research, most studies by political scientists have taken 1947 as their point of departure, as if the postcolonial political formation had emerged fully formed without any history. In the absence of an understanding of the historical processes through which what appear as contraries have nevertheless come together, the postcolonial Indian polity is likely to continue to appear as nothing more than a bundle of paradoxes.»[10]

After the Second World War, when the Italian constitution was drafted, and it was formed into a republic in 1948, a "noble compromise" was reached between the Christian Democrats on the one hand and the communists on the other in its constituent assembly to draft its Article 5 stating, «The Republic, one and indivisible, recognizes and promotes local autonomies.»[11] It was specifically drafted, «This article represents a very deliberate and careful use of legal language. The article begins by reaffirming the uniqueness and indivisibility of the Republic, a principle that puts this "regional" system clearly outside the family of "federal" systems, at least insofar as the latter are defined as "divided" States. Yet, immediately after this opening, the article uses the verb to "recognize" in reference to the local "autonomies." This verb has a clear meaning within Italian constitutional language, as previously seen with respect to the "recognition" of fundamental rights in Article 2. One can "recognize" only what is already existing; therefore, if the Republic "recognizes" a local entity (and does not simply guarantee, or promote, or protect it), this implies that the entity in question pre-exists the Republic and cannot be at the mercy of the State. Thus, in the Italian constitutional vision, it is generally understood that although local

[10] M. Mukherjee, *India in the Shadows of Empire: A Legal and Political History 1774-1950*, New Delhi: Oxford University Press, 2012, pp. 220-221.
[11] V. Barsotti, P.G. Carozza, M. Cartabria, A. Simoncini, *Italian Constitutional Justice in Global Context*, New York: Oxford University Press, 2016, p. 184.

authorities should always be regulated, they must never be eliminated. This permanence and conceptual priority of local units distinguishes the Italian regional model clearly from the family of the classically "unitary States."»[12]

The Constitutional Court of Italy in its Judgment 365/2007, where the case was brought by the State (the Union) against a regional law in Sardinia establishing a "Special Committee for the new Regional Charter of Autonomy and Sovereignty of the People of Sardinia."[13] The regional law was held to be unconstitutional for its use of the term "sovereignty". The Constitutional Court held, «Through the use of the term "sovereignty", the law attempts to attribute a structure to the Region that differs profoundly from the existing one and is characterized by institutions more appropriate and suitable for a federal model, which is normally the result of historical processes in which the territorial entities that comprise the federal State retain forms and institutions that are marked by their prior condition of sovereignty. [...]Art. 5 and 114 of the Constitution and Art. 1 of the Charter of the Special Region of Sardinia all use (and not by chance) the term "autonomy" or its related adjective to describe the space left by the Republican system to the individual choices of the various Regions. On the other hand, it is well known that the Constituent Assembly, which introduced regional autonomy into our system for the first time only after extensive and heated debate, was absolutely firm in its rejection of concepts that may even only appear to be broadly derived from federal, or even confederal, models.»[14] Therefore, much like India, the legislative competence is heavily tilted in favour of the State (Union) in Italy and regions are excluded from legislating on civil law (that is, on areas within the scope of the civil code) and criminal law issues apart from having a unified judiciary (and no separate regional or local judiciary).[15]

Much like "judicial legislation" through judicial review in India, the Constitutional Court of Italy has played a crucial role in determining the exact scope of the broadly framed constitutional provisions regarding the regional system and lack of proper legislation by the Parliament to give precise competences and/or filling in the gaps left even after the major reform of Title V of the Italian Constitution in 2001.[16] The purpose of the amendment was to strengthen local authorities as against the State (Union) resting on three main pillars. First was the change in Art 114 with symbolic consequences. The original article read, «[t]he Republic is divided into Regions, Provinces and Municipalities» whereas the amended article reads, «[t]he Republic is composed of the Municipalities, the Provinces, the Metropolitan Cities, the Regions and the State».[17] The symbolic consequence for such a change is quite drastic, « The change marks a significant shift in the meaning of the word "Republic." There is no longer a strict identity between the Republic and the (central) State. Rather, the Republic becomes an overarching term embracing all public authorities, from Municipalities to Provinces, Metropolitan Cities, Regions, and including the State itself. Therefore, both Regions and the State are equally constitutive elements of the greater

[12] *Ibidem*.
[13] *Ibidem* at p. 185.
[14] *Ibidem*.
[15] *Ibidem* at pp. 185-186.
[16] *Ibidem* at pp. 186-187.
[17] *Ibidem* at p. 187.

entity that is the Italian Republic. In this way all levels of public authority are put on the same constitutional plane, with only functional distinctions among them.»[18]

For India, both the "union" as well as the "states" are equally constitutive like the Italian constitution recognises local autonomies and yet the republic is one and indivisible. Article 1(1), Constitution of India states, «India, that is Bharat, shall be a union of states.»[19] With the use of the verb "shall", it becomes normative rather than just an acceptance of a fact or recognition of something which pre-exists. The given circumstances during India's independence and partition had put its set of challenges and its aspiration was to be a "union" of "states". The aspiration for being a union comes before the states which shall constitute it. It is not framed like: "states shall form a union"; or "states shall constitute a union". It has to be union and the union shall be constituted of states. Additionally, there is no mention of the number and names of states (unlike the fixed nature of regions in Italy, with 15 general ones and 5 special 'autonomous ones) – as the Union government can change it over the years – which it has done since the birth of the republic. What it certainly cannot do is to turn India into a loose confederation on the one end – it has to be a union – and eliminate the states altogether, i.e., turning India into a unitary state.

The second pillar of change in Italy has been the distribution of legislative competences and devolution from the State (Union) to the Regions (the autonomous provinces of Trento and Bolzano had some legislative competence already), «The constitutional amendment identifies three different categories of law-making power: (1) the exclusive enumerated legislative powers of the State (Union, *emphasis added*) in the matters listed under the Article 117, paragraph 2;6 (2) the concurrent enumerated legislative powers of both State and Regions in the matters listed under the Article 117, paragraph 3;7 and, finally, (3) the residual legislative power of Regions in all the matters not included in the previous two lists. The reform also removed the power of the State to challenge the constitutionality of regional laws prior to their promulgation and publication, limiting this executive power to the possibility of bringing a regional law before the Constitutional Court only after its entry into force.»[20] For India, legislative competence (in the form of Union List, State List and Concurrent List of Schedule VII of the Constitution read with Articles 245 and 246) between the Union and the States has been part of the original constitution which came into force on 26th January, 1950.

Additionally, the 1999 and 2001 reforms also gave powers to enact Charters, somewhat in the nature of a Constitution, to Regions.[21] Such competence is constitutionally absent in India and similarly to Italy which culturally is more union centric (including its Constitutional Court), there is no scope for state/provincial constitutions in India.[22]

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[18] *Ibidem* at p. 187.

[19] https://legislative.gov.in/sites/default/files/COI_1.pdf (at p. 23), The Constitution of India, Legislative Department, Ministry of Law and Justice, Government of India, https://legislative.gov.in/constitution-of-india (last accessed: September 5, 2021).

[20] V. Barsotti, P.G. Carozza, M. Cartabria, A. Simoncini, *Italian Constitutional Justice in Global Context*, New York: Oxford University Press, 2016, p. 187.

[21] *Ibidem* at p. 188.

[22] The former State/Province of Jammu and Kashmir used to have a Constitution, not based on an original constituent power, but as a derivative power through Articles 370 and 35 A of the Constitution of India. The differential treatment to the former state/province had made competences further restricted and the rights of Indian citizens living in this region further constricted with a number of Presidential ordinances passed over the years as mandated

The third pillar of reforms in Italy has been the administrative reforms, «The new Article 118 of the Italian Constitution begins from a totally different principle: "Administrative functions are attributed to the Municipalities, unless they are attributed to the Provinces, Metropolitan Cities and Regions or to the State, pursuant to the principles of subsidiarity, differentiation and proportionality, to ensure their uniform implementation." [] Thus, the level of public authority of the Republic that is in the first instance generally endowed with administrative powers is the Municipality, except for those functions that—for reasons of subsidiarity or differentiation or proportionality—need to be assigned to a higher authority (Province, Metropolitan City, Region, or State). Here the subsidiarity principle operates—to borrow an image from Italian legal literature —as an "elevator" that lifts administrative functions up from the local level towards higher levels (until the central State) only as necessary "to ensure their uniform implementation."»[23] This trend was in the early 2000s after the reform of 1999 and 2001, but there has been a reversal of trend in local autonomy soon thereafter. This reversal has been both due to a more centralising tendency spearheaded by the Italian Constitutional Court and the 2007-2008 economic crisis which forced many austerity measures (also scripted by the EU framework). To top it all, Italy's cultural constitutionalism is more inclined towards the centre rather than in federalising itself.

The Italian Constitution of 1948 added regions (to an already existing municipalities and provinces) which have become the most dominant feature of Italian federalism or the pivot of its democratic decentralization, «The Constitution of 1948 (Italy) provides for a complex system of autonomous territories based on Municipalities and Provinces, as in the past. To these levels of government, another level was added: the Region. The Region was destined to take on a leading role in the recent history of Italian autonomous territorialism, as the Constitution grants Regions (and not Municipalities or Provinces) legislative powers, which have increased in the last few years.» [24]

Much like Italy which is an indivisible "regional state" with local autonomies, India is a federal structure of its own, where it is neither unitary like France nor federal like United States

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by Article 370. On 5th August, 2019, by Presidential Order all the provisions of the Constitution of India were made applicable in the former state (thus making the discriminatory provisions of Art. 35A inoperative, along with making the discriminatory state constitution also inoperative), thus expanding the applicability of constitutionally protected and justiciable fundamental rights which are part of the basic structure of the Constitution of India which can no longer be violated (like protecting the rights of religious, ethnic and linguistic minorities of the former state). On August 6, 2019, all clauses but the first one of Article 370 were made inoperative thus ending differential and discriminatory treatment of the state and gave same federal rights as other Indian states. With the Jammu and Kashmir Reorganization Act, 2019, which came into effect on August 9, 2019, the former state has been sub-divided into two Union territories namely: (1) Jammu and Kashmir and (2) Ladakh, giving respite to Hindu, Buddhist, Sikh, Jain and Christian minorities in the beleaguered region, improving fundamental rights record, bringing peace and reducing the scourge of Islamic fundamentalism and terrorism. Though the Government of India is yet to rehabilitate half-a-million Kashmiri Hindus who were forced into exile due to Islamic Fundamentalism and terrorism leading to the genocide of Kashmiri Hindus in the Kashmir valley in the early 1990s.

[23] V. Barsotti, P.G. Carozza, M. Cartabria, A. Simoncini, *Italian Constitutional Justice in Global Context*, New York: Oxford University Press, 2016, p. 188.

[24] L. Cuocolo, *The Regions* (Chap. 7), In: G.F. Ferrari (ed.), *Introduction to Italian Public Law*, Milano: Giuffrè, 2018 (2nd ed.), p. 118.

or Germany.[25] "In many ways, it is a unique federal constitution in comparative federalism. It ensures Union's legislative supremacy not on the Union List, but also on the Concurrent List and residuary legislative jurisdiction; even on the State List the Union Parliament can legislate in specified and exceptional circumstances. The Union executive power overrides State executive power outside the area of exclusive legislative jurisdiction of the States. The constitution ensures Union Parliament's supremacy and initiative in taxation, in constitutionally anticipated emergencies, in all-India civil and police services (which are recruited and trained by the Union Government, and then allocated to the State Governments), in judicial administration, and in constitutional amendments. Even the very existence of a State is contingent on the will of the parliament which enjoys overriding powers with regard to redrawing the map of India and reorganization of State boundaries."[26]

As far as the provision for concurrent list in the constitution, there exists a similarity between India and Italy, and though in effect the state's (union's) competence overriding those of regions (sub-state entities, states in India) exists much like India, in the structure of the Italian Constitution the state (union) actually provides a template in the form of a series of guiding principles as contained in a legislation within which regions can legislate, «Italy under Art. 117.3, Italian Constitution, contains a list of so-called "concurrent subject matters" i.e. subject matters over which both the central government and the sub-state entities can exercise legislative power. In other words the state will approve a framework law containing a series of guiding principles which the sub-state entities have to follow when they approve a detailed law on that subject-matter. […] Art. 117.4 of the Italian Constitution provides that "the Regions shall have sole legislative power with respect to any matters not expressly reserved to State law".»[27] Italy has a unified administrative judiciary system with the State Council in Rome as the only court of appeal with First Instance Administrative Tribunals in each region (*Tribunali amministrativi regionali*, TAR).[28] India has bicameral legislature having differing competences, with the Lok Sabha or the House of People (House of Commons in British parliamentary set-up) having greater representation and competences, and the Rajya Sabha or the House of States (House of Lords in Britain) having lesser representation and competences; in keeping with classical notions of federalism. Whereas, Italy has a perfect bicameral system, with both houses of Italian Parliament, the Chamber of Deputies and the Senate of the Republic, which are nationally elected, performing same functions (even though the number of representatives is less in the Senate and the procedure of election has a regional basis but under Art. 67, Italian Constitution

[25] The recent case of *NCT of Delhi v. Union of India* (2018) 8 SCC 501 deals with India's federal structure in great detail. *See*: P. Kumar, *"Asymmetrical Symmetricalism" of Indian Constitutional Structure and Practice: Note on Govt. of National Capital Territory ("NCT") of Delhi v. Union of India. DPCE Online (DirittoPubblicoComparato ed Europeo)*, [S.l.], v. 43, n. 2, July 2020. ISSN 2037-6677. pp. 14. Available at: <http://www.dpceonline.it/index.php/dpceonline/article/view/1037>. pdf copy: http://www.dpceonline.it/index.php/dpceonline/article/view/1037/1011 (last accessed: Sept. 4, 2020).

[26] M. Prasad Singh, *Federalism: Constitution and Dynamics*, In: M.P. Singh, H. Roy (eds.), *Indian Political System*, Noida: Pearson, 2018, p. 146.

[27] J.O. Frosini, *Forms of State and Forms of Government* (Chap. 3), In: G.F. Ferrari (ed.), *Introduction to Italian Public Law*, Milano: Giuffrè, 2018 (2nd ed.), pp. 42-43.

[28] *Ibidem* at p. 43.

members represent the nation and not the region).[29] Thus, Rajya Sabha in India and Senate in Italy are not similar in their structure, form of election or in the constitutionally guaranteed competences which they enjoy. Besides, as both the houses of Italian Parliament are national; regions, sub-state entities or states as we refer them in India are not part of the constitutional amendment procedures, which is quite unlike federal states, including India.[30]

India is thus characterised as 'quasi-federal' just like Italy. While explaining Italian regionalism, Erika Arban, Giuseppe Martinico and Francesco Palermo write, « Sometimes referred to as "quasi-federal" or "hybrid" federal systems, regional states are imperfect or incomplete federal systems, as they lack some of the common features of federations and present a stronger centralist thrust.[…] some scholars may argue that regional states usually lack a "federal" chamber representing the interests of the periphery at central level, or that the judicial powers of peripheral units in a regional system are more limited than in federations, or that regional subunits do not have constitution-making powers. However, this type of analysis is not very conclusive, since there are fully-fledged federal systems that do not have a typical federal upper chamber (e.g. Canada), or whose constituent units lack constitution-making powers (e.g. Canada and Belgium). More than individual indicators, what perhaps distinguishes a regional from a federal system is the presence (or lack thereof) of the so-called "federal culture". Being a very broad concept, there is of course much discussion about what federal culture really means, yet scholars tend to acknowledge the fundamental importance of this idea of sharing of powers in order to have a truly pure federation. […] Rather than being rigidly anchored to the plainly vertical or horizontal dynamics typical of unitary and federal paradigms, regional states seem to espouse a more cross-sectional relationship between the centre and the periphery, one that takes into account additional levels of government (i.e. local autonomies such as municipalities and/or provinces). In this way, they are more prone to experimentation and adaptability. Italy provides numerous examples of that […]»[31] It is only in such characterisation that Italy and India are qualified together in constitutional-federal theory. They are both quite unique in their own structures otherwise. Italy is a unitary state with increase in federal capacity with the rise of regional autonomy.

[29] «A country will have a regional system if the second chamber does not represent the sub-state entities. This is one of the reasons why, despite the considerable autonomy that the Italian Regions enjoy, Italy is considered a regional and not a federal state. In fact, one should not be drawn into error by Art. 57 It. Const., which states that "the Senate of the Republic shall be elected on a regional basis…", because Art. 67 then goes on to clarify that "each Member of Parliament represents the Nation…", therefore the provision contained in Art. 57 merely indicates the procedure to be followed in order to elect the Senate, but its members represent the Nation not the Region they are elected in.» *Ibidem* at pp. 43-44.

[30] *Ibidem* at pp. 44-45.

[31] E. Arban, G. Martinico and F. Palermo, *Introduction: Why is the trajectory of Italian regionalism comparatively important and what does it have to offer?* In: E. Arban, G. Martinico and F. Palermo (eds.), *Federalism and Constitutional Law: The Italian Contribution to Comparative Regionalism*, Abingdon: Routledge, 2021, pp. 2-3.
Also *See*: A. Gentilini, *Regions and Local Authorities*, In: S. Mangiameli (ed.), *Italian Regionalism: Between Unitary Traditions and Federal Processes*, Springer, 2014, pp. 221-248.

2. LOCAL DEMOCRACY: PRE-COLONIAL, COLONIAL AND CONTEMPORARY

2.1. PRE-COLONIAL, COLONIAL AND GANDHIAN HERITAGE OF INDIA

In pre-colonial times, village-level self-governance (not self-government) had remained more or less stable despite changes in the central government including Islamic and colonial invasions and destruction.[32] Singh and Saxena write, "The history of local political institutions in India goes back to the ancient and medieval times. In ancient India, literary and historical sources mention *sabhas*, *samitis*, and *vidatha* in the Vedic period and *gramas*, *janapadas*, and *mahajanapadas* in the post-Vedic period in north India and *sabhas*, *urs*, and *nagarams* in early medieval south India. These institutions generally flourished with greater autonomy under the regional kingdoms but suffered a decline under the sub-continental states. In the medieval India, the sub-continental states were largely minimalist in the sense that they left the local social and political institutions with considerable autonomy so long as the revenue flow was uninterrupted."[33]The British colonial administration systematically enervated the local-level governance structures of villages (especially) and centralised it to tighten its control, both political as well as economic.[34] The near economic self-sufficiency and community life of villages was systematically destroyed, and brute power was employed to systematically destroy

[32] The cultural unity of India has been assumed since ancient times, though in terms of its polity, an all- India, all powerful central authority has been present only in limited stretches of time (Maurya, Gupta, Mughal).
B.B. Misra writes, «Though weak and generally fairly undeveloped, communication within the country, an essential condition for the growth of an integrative process, was not altogether absent. Pilgrims travelled great distances to visit shrines distributed throughout the country. Adi Shankaracharya had, for example, established during his lifetime four historic temples at Sringeri in the South, Badrinath in the north, Dwarka in the west and Puri in the east. These were sanctified as holy places for Hindus and encouraged through travel a spirit of cultural cross-fertilization. Large periodic assemblages of people on sacred river banks also perhaps served similar objectives. But the motive force which impelled people to action in all these performances remained religion, not the integration of the country into a nation, a territorial concept. » B.B. Misra, *The Unification and Division of India*, Oxford University Press, 1990, p vi.
Instead of religion, it should be seen in the larger context of culture, and nation should be seen not as a territorial but as a political concept, because through cultural unity territoriality was already assumed but nation as a political concept was lacking. In any case, nation as a political concept is of a recent vintage with the Treaty of Westphalia starting the process in 1648 in Europe and the French Revolution in 1789 giving it a more concrete shape and Italian (1848-71, *Risorgimento*) and German unification (1871) occurring as later as in the nineteenth century.
[33] M.P. Singh, R. Saxena, *Local Self Government – The Third Tier of Multi-Level Governance: An Unexplored Internal Frontier?* (Chap. 9), In: M.P. Singh, R. Saxena, *Indian Politics*, Delhi: PHI Learning, 2020 (3rd edn., forthcoming), pp. 240-241. I would like to thank Prof. Dr. Mahendra Prasad Singh for sharing the chapter in a forthcoming edition of his book on Sept. 22, 2020.
For more, *See*: U.N. Ghoshal, *A History of Indian Political Ideas*, Oxford University Press, 1959; A.S. Altekar, *State and Government in Ancient India*, New Delhi: Motilal Banarsidass, 2016; R.S. Sharma, *Aspects of Political Ideas and Institutions in Ancient India*, New Delhi: Motilal Banarsidass, 2015.
[34] For more, *See*: *How much money did Britain take away from India? About $ 45 trillion in 173 years, says top economist*, Business Today, New Delhi, November 19, 2018, cf. https://www.businesstoday.in/current/economy-politics/this-economist-says-britain-took-away-usd-45-trillion-from-india-in-173-years/story/292352.html (last accessed: January 20, 2020); the news is taken from the essay by Professor U. Patnaik, in S. Chakrabarti, U. Patnaik (eds.), *Agrarian and Other Histories*, Columbia University Press, 2018. This is one of the latest among a series of works recounting the destructive and dehumanising exploitation and legacy of British colonialism as against the gloss which is often put over it in the form of the legacy of English language, railways and the game of cricket, among other things. Also *See*: B.B. Misra, *District Administration and Rural Development in India: Policy Objectives and Administrative Change in Historical Perspective*, New Delhi: Oxford University Press, 1983.

the rural handloom industry among others to create market for British manufactured products.[35]This was in addition to altering the land relations by importing and implementing the British system of pernicious landlordism (feudalism was present but its structure and character was different) with the Permanent Settlement of 1793 for example to increase and regularise land-revenue from its Indian empire.[36]

The destruction of panchayati raj institutions at the local level in villages (there were guilds in trading cities) with the rise of colonialism and complete lack of representation and democratic accountability led to millions of deaths in different famines during the British colonial regime. Amartya Sen's research records it well how democratic representation and accountability automatically led to no loss of life as compared to authoritarian colonial regimes (and authoritarian regimes in general) whose very structure ensured immense loss of lives during famines when excess grains were rotting in its godowns.[37] First the British destroyed local governing structures and then after destroying it, when the report of the Famine Commission of 1880 pointed to the lack of institutionalized local bodies as the reason for impediment in bringing relief supplies, Lord Ripon's resolution of 1882 announced setting up of local self-government.[38] As a result, The Local Bodies Act of 1885 with majority of nominated members in local self-governing institutions was enacted but the recommendations in the Ripon Resolution and by the Royal Commission on Decentralization (set up in 1907 and submitted its report in 1909) were not implemented.[39] B.B. Misra records, «The demand for democratic decentralization came from the educated elite who wanted a share in the exercise of power and patronage. It was limited to local bodies and municipalities and based on the principle that local needs must be met by local taxation. This principle was incorporated by Lord Mayo in a Decentralization Scheme formulated by the Government in 1870, which made provision for local funds being raised locally by municipal and rural boards to meet their local requirements. [] The main object of Lord Mayo's scheme was to relieve the Imperial finances of the management of local needs. Lord Ripon extended a decentralized system of finance by transferring from the 'provincial' to 'local' activity such additional items of receipts and charges as might equalize local and municipal taxation to secure uniform progress in their development throughout the country. […] Lord Ripon also added a political dimension to the erstwhile scheme of financial and administrative decentralization to promote local development projects. His famous Resolution of 18 May 1882 thus said: 'It is not

[35] For a racy and lucid read on nearly 200 years of plunder and loot of India by the British, *See*: S. Tharoor, *Inglorious Empire: What the British Did to India*, London: C. Hurst & Co., 2017. Also *See*: S. Tharoor, *Oxford Union Speech on May 28, 2015 at the Oxford University*, https://www.youtube.com/watch?v=f7CW7S0zxv4 (last accessed: Jan. 8, 2021).

[36]*See*: P. Kumar, *Some Aspects of the Language and History of "Subaltern Peasants" Shaping Law in Modern India*, In: J. Luther, et al (ed.), *Interactions between Culture and Law in India and Europe*, Roma: Aracne, January, 2019, pp. 293-310.

[37] A. Sen, *Poverty and Famines*, New Delhi: Oxford University Press, 1998.
On administrative aspects of the history of famines from 1858 to 1905 of the colonial period, *See*: B.B. Misra, *District Administration and Rural Development in India: Policy Objectives and Administrative Change in Historical Perspective*, New Delhi: Oxford University Press, 1983, pp. 67-127. It was due to colonial apathy during this period that there was greater thrust on decentralization by political leadership of the national movement from this time around with government response lagging painfully behind. This aspect is dealt with by the rest of Prof. Misra's book.

[38] M. Aslam, *Panchayati Raj in India*, New Delhi: National Book Trust, 2015, pp. 11-12.

[39] *Ibidem* at pp. 12-13.

primarily with a view to improvement in administration that this measure [local self-government] is put forward and approved. It is chiefly desirable as an instrument of political and popular education', necessary for the acquisition of skill and experience required in the management of local affairs by the elected members of municipal and local boards. […] Ripon's local self-government policy thus seemed to attain a two-fold objective. The first was to build a provincially reinforced local fund in order to free Imperial finances from local functions such as the maintenance of certain kinds of roads, hospitals, dispensaries, drainage, water supply and sanitation, vaccination, education (chiefly primary), pounds and ferries, markets, rest houses and other minor public works. The second, on the other hand, was to reconstruct local bodies so as to provide additional avenues for educated employment and keep the politically motivated elites engaged in the exercise of a measure of power, influence and authority which, though of minor intrinsic importance, raised their social status and prospects of acquiring wealth.»[40] These recommendations unfortunately were never implemented in letter and in spirit and are now documents relevant for writing India's constitutional and administrative history.

The commitment to democratic decentralization and a bottom-up approach of the Indian Freedom Movement can be gauged from the 24th session of the Indian National Congress in 1909 itself which adopted a resolution urging the British Government to take steps in having elected local bodies in village panchayats upwards and elected non-official chairmen for local bodies with financial competence.[41] The Montagu-Chelmsford reforms of 1919 transferred local self-government under the control of Indian Ministers in the provinces but it covered only a limited number of villages wherein most members remained nominated with severely limited competences (including financial).[42]

Sarbani Sen records, «Under the colonial regime, local political organizations, especially indigenous village bodies, represented the antithesis of the British organizational structure, especially in Gandhi's ideas. In the framers' revolutionary experience, provincial municipal boards defied the law, municipal servants disobeyed the chief executive officers, and the public broke the by-laws and refused to pay taxes. Gandhian politics that almost entirely rested on the idea of popular participation in politics brought local and traditional forms of self-government to the forefront of the debate on forming a new polity. Thus there was a politicization of local governments.»[43]

There was a popular thrust for local democracy during India's struggle for independence led by leaders like Mahatma Gandhi, who wanted to revive self-government of villages. On '*village swaraj*' Gandhiji writes, « My idea of village swaraj is that it is a complete republic, independent of its neighbours for its own vital wants, and yet interdependent for many others in which dependence is a necessity. Thus every village's first concern will be to grow its own food crops and cotton for its cloth. It should have a reserve for its cattle, recreation and playground for adults and children. Then if there is more land available, it will grow *useful* money crops, thus

[40] B.B. Misra, *District Administration and Rural Development in India: Policy Objectives and Administrative Change in Historical Perspective*, Delhi: Oxford University Press, 1983, pp. 149-150.
[41] M. Aslam, *Panchayati Raj in India*, New Delhi: National Book Trust, 2015, at p. 13.
[42] *Ibidem* at pp. 13-15.
[43] S. Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations*, New Delhi: Oxford University Press, 2015, p. 150.

excluding *ganja,* tobacco, opium and the like. The village will maintain a village theatre, school and public hall. It will have its own waterworks ensuring clean water supply. This can be done through controlled wells or tanks. Education will be compulsory up to the final basic course. As far as possible every activity will be conducted on the co-operative basis. There will be no castes such as we have today with their graded untouchability. Non-violence with its technique of *satyagraha* and non-co-operation will be the sanction of the village community. There will be a compulsory service of village guards who will be selected by rotation from the register maintained by the village. [] The government of the village will be conducted by the Panchayat of five persons annually elected by the adult villagers, male and female, possessing minimum prescribed qualifications. These will have all the authority and jurisdiction required. Since there will be no system of punishments in the accepted sense, this Panchayat will be the legislature, judiciary and executive combined to operate for its year of office. Any village can become such a republic today without much interference, even from the present Government whose sole effective connection with the villages is the exaction of the village revenue. I have not examined here the question of relations with the neighbouring villages and the centre if any. My purpose is to present an outline of village government. Here there is perfect democracy based upon individual freedom. The individual is the architect of his own government. The law of non-violence rules him and his government. He and his village are able to defy the might of a world. For the law governing every villager is that he will suffer death in the defence of his and his village's honour. »[44] In his 'Last Will and Testament', just a day before his assassination, he had written, « India has still to attain social, moral and economic independence in terms of its seven hundred thousand villages. »[45]

Gandhi's idea of self-governed village republics was never the agenda of all the leaders but while framing the Constitution, the Constituent Assembly of India, could bring only Article 40 in the Directive Principles of State Policy (Part IV, guiding principles but cannot be claimed as a matter of right like fundamental rights in Part III). Article 40 states, "The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government." This article also mentions about self-government in villages and not in towns and cities (does not talk about municipalities). Additionally, the steps have to be taken by respective state governments which makes them the primary structural facilitator as per the Constitution. The state government's competence should be read with Item 5, of List II (State List which lists the subjects over which states enjoy legislative competence) of Schedule VII of the Constitution. It states, "Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, districts boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration." Despite the shared history of espousing decentralized local self-governments during the freedom struggle by most of its actors who then constituted as the members of the Constituent Assembly of India (or at any rate, most of its members and also

[44] J.M.Brown (ed.), *Mahatma Gandhi: The Essential Writings*, Oxford World's Classics, 2008, pp. 102-103.
[45] Cf. https://www.mkgandhi.org/mynonviolence/chap157.htm (last accessed: Jan. 10, 2021).

its dominant members), a moth-eaten amendment was proposed and accepted in the form of Article 40 as part of the directive principles of state policy.[46]

Thus, there was governance by the state governments but local self-governments were largely absent, or there were irregularities in implementation in case state legislations for such local self-government was present. In order to fill this democratic deficit at the local level, the Government of India had to bring 73rd and 74th amendment to the Constitution. The L.M. Singhvi Committee had recommended constitutional amendment to strengthen local government (panchayats in villages) but the Sarkaria Commission which is an important source for contextualising and structuring centre-state relations or Indian 'cooperative federal structure'[47] or 'dynamic or flexible federalism'[48] held otherwise. "The Sarkaria Commission preferred a model legislation to be prepared by the Government of India or alternatively, that specific support be provided to the various proposals through resolutions of the State Government. It recommended that the Inter-State Council, a constitutional body aimed at facilitating dialogue between the States, should be the forum in which a draft model law could be negotiated, and left to each State to individually adopt."[49]

2.2. CONTEMPORANEOUS ITALIAN CONDITION

Strong city-states (Genoa and Venice come easily to mind) and principalities (Sicily) emerged in the late middle-ages in Italy which have a very rich legal tradition in their respective regions. Republican ideas, democracy and federalism emerged gradually and simultaneously with the dissolution of empire (often drawing inspiration or guided by the leaders who opposed Empire, like the leaders of the Indian freedom movement) coupled with the formation of territorial and national states (similarities between Italy and India again), «The process of the gradual dissolution of the empire and the formation of territorial and national states was opposed by the reverse process of the gradual unification of small states into larger unions starting with confederations, in which every state preserved its own independence notwithstanding its perpetual union with other states (as originally in Switzerland), until for the first time we have the new and original formation of a federal state with the setting-up of the United States of America (1787). While the dissolution of the empire involves a ceding of power to the new states, the formation of a larger state from the union of smaller states represents a reinforcing of the power of the former over the latter: what they gain in strength vis-a-vis the outside by uniting with

[46] S. Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations*, New Delhi: Oxford University Press, 2015, pp. 150-151.
[47] *See*: M. Prasad Singh, V. Kukreja, *India: A Federation without Federalism?* In: M. Prasad Singh, V. Kukreja, *Federalism in South Asia*, Routledge, 2014, pp. 19-74; S.K. Mitra, *The Federal Structure: Balancing Unity and Diversity* (Chap. 4), In S.K. Mitra, *Politics in India: Structure, Process and Policy*, Oxford University Press, 2014, pp. 131-164.
[48] *See*: D. Amirante, *'Nation Building Through Constitutionalism: Lessons from the Indian Experience', in Hong Kong Law Journal*, v. 42, n. 1, 2012, p. 32; D. Amirante, and P. Viola, *'South Asian Constitutionalism in Comparative Perspective: the Indian "prototype" and some recent borrowings in the 2015 Nepalese Constitution (Chap. 6)'*, In: M.P. Singh, N. Kumar, (eds.) *The Indian Yearbook of Comparative Law 2018*, Springer, 2019, pp. 154-155.
[49] K.C. Sivaramakrishnan, *Local Government* (Chap. 31), In: S. Choudhry, M. Khosla, P.B. Mehta (eds.), *The Oxford Handbook of Indian Constitution*, Oxford University Press, 2016, p. 577.

others, they lose in internal independence. This was well observed by Montesquieu, to whose authority the authors of *The Federalist* appealed when he eulogized about the 'federal republic' which, 'capable of resisting foreign powers, can maintain its greatness without internal corruption' (1748). Only through federal union can a republic - considered for centuries after the end of the Roman republic the form of government most adapted to small states - become the form of government of a large state like the United States of America. This was understood by Mably when he praised the American Federal Republic in his *Observations sur le gouvernement et les lois des États-Unis d'Amérique* (1784). The suggestive force of the Federal idea - that is, of the model of a large republic formed out of the aggregation of small states - is sufficient to make plausible the idea of a universal federal republic embracing all existing states, making possible again the universalistic ideal of the empire, albeit with a reversed process: that is, no longer descending from high to low but ascending from below to above. The universal republic of confederated states, proposed by Kant in his *Pace Perpetua* (*Zum ewigen Frieden*, 1796), represents a genuine alternative, which can be called democratic on account of its inspiration and its potential development, to the medieval idea of the universal empire. The League of Nations after the First World War and the United Nations after the Second were developments, albeit partial, of this universal republic as opposed to the universal empire: even in the chosen formula of 'United Nations', the states which joined in this new confederation revealed which precedents they were inspired by (the *United* Provinces, the *United* States).»[50]

Until before Italian unification in 1861 (led by Savoy), the Italian peninsula was divided into many small principalities.[51] There were two currents in the 19th century: one inspired by the French revolution (1789) to develop into a strong unitary state and the other was the American revolution (with the promulgation of its Constitution in 1787) to have a federal union (and to a lesser extent the Swiss Confederation of 1848, though it has its origins since the thirteenth century).[52] Federalism was a product of the liberal inspiration in Italy (as against communist movement which was economy centric)[53] and also largely in Europe, where "a pacific union of states" in Kantian terms[54] or what the Italian thinker Cattaneo called a "United States of Europe"[55] to bring about peace, was preferred. Bobbio records, «Where international politics were concerned, European federalism was one of the most keenly felt "ideals of the Resistance"

[50] N. Bobbio, *Democracy and Dictatorship: The Nature and Limits of State Power* (trans. by P. Kennealy), Cambridge: Polity Press, 2006, pp. 98-100.

[51] « After the Congress of Vienna of 1815, the Italian peninsula was divided in eight states: the Kingdom of Piedmont and Sardinia, Lombardy-Venetia (a province of the Austrian Empire), the Dukedom of Modena and Reggio Emilia, the Dukedom of Parma and Piacenza, the Grand-Duchy of Tuscany, the Princedom of Lucca, the Papal state (including part of Emilia, Romagna, Marche, Umbria, and Lazio), and the Kingdom of the Two Sicilies.» cf. E. Arban, *An intellectual history of Italian regionalism* (Chapter 1), In: E. Arban, G. Martinico and F. Palermo (eds.), *Federalism and Constitutional Law: The Italian Contribution to Comparative Regionalism*, Abingdon: Routledge, 2021, p. 13.

[52] *Ibidem* at p. 14.

[53] N. Bobbio, *The Ideals of Resistance* (Chapter 12), In N. Bobbio, Lydia G. Cochrane, *Ideological Profile of Twentieth-century Italy*, New Jersey: Princeton University Press, 1995, pp. 143-156.

[54] I. Kant, *Perpetual Peace: A Philosophical Sketch*, In: Kant, *Political Writings*, Cambridge University Press, pp. 93-130.

[55] « Cattaneo famously contended that "We will have true peace only when we will have the United States of Europe" (Bobbio & Cattaneo, 2010, 27).» cf. E. Arban, *An intellectual history of Italian regionalism* (Chapter 1), In: E. Arban, G. Martinico and F. Palermo (eds.), *Federalism and Constitutional Law: The Italian Contribution to Comparative Regionalism*, Abingdon: Routledge, 2021, p. 14, n. 4.

shared by a number of parties. Some of the supporters of the Risorgimento, Cattaneo and Mazzini, for example, had already dreamed of uniting the major European nations into a strong federated state. After World War I, Luigi Einaudi took up the idea in articles criticizing the confederate model of the League of Nations, which, in his eyes, retained the pernicious dogma of national sovereignty. Thus, the notion was an integral part of the political program of some of the major figures in militant antifascism, men like Carlo Rosselli, Silvio Trentin, Ignazio Silone, and Andrea Caffi. It has quite rightly been observed that "an autonomist, federalist, and Europeist inspiration was characteristic of a good part of the impetus behind the Resistance and of the programs of several parties" who made up the Committee of National Liberation (Comitato di Liberazione Nazionale).»[56]

During *Risorgimento,* one of its major leaders, Mazzini preferred Italian unification by recognising regions, «Mazzini believed that the unification of Italy should be premised on the recognition of regions as intermediate entities between the central government and municipalities, and characterised by "secondary territorial features, by dialects, and by a predominance of agricultural, industrial, or maritime attitudes"»[57] Federalism which suffered a set-back during the totalitarian fascist regime, was also one of the ideas animating the resistance movement in Italy but also in France. Trentin (French Resistance) in his Stato-nazione, federalism stated how «to "federate" meant to emancipate the individual politically by the destruction of the totalitarian state.»[58]

As far as Italian regionalism is concerned and as it exists today, it is a compromise between unitary constitution on the one hand and federalizing tendency of regions on the other (through constitutional conventions as well as accompanying amendments and laws over the years, with some conventions and laws surviving the 1948 constitution) making it neither completely unitary nor wholly federal.[59]

Cities and its administration predate the constitution and have often been co-opted in the constitutional system after 1948 (what is referred to as the principle of harmonious construction in common law countries, also applied in India; in which, so long and to the extent a legislation and even a convention is not conflicting with the constitution, it is allowed application), «It is commonplace in political history that Italy is a 'Country of cities.' Since the Middle Ages, every city represents a unique place with its rules, customs, and culture, which is relatively separate from other authorities. As Cattaneo (1858) wrote, the Roman Empire itself began within a city and then extended the government of a city over the territories surrounding the Mediterranean Sea and beyond. The struggle between localism and centralism is a key factor in understanding modern Italy, but it is also a good framework to use in the analysis of the evolution of Italian

[56] N. Bobbio, *The Ideals of Resistance* (Chapter 12), In N. Bobbio, Lydia G. Cochrane, *Ideological Profile of Twentieth-century Italy*, New Jersey: Princeton University Press, 1995, p. 154.
[57] E. Arban, *An intellectual history of Italian regionalism* (Chapter 1), In: E. Arban, G. Martinico and F. Palermo (eds.), *Federalism and Constitutional Law: The Italian Contribution to Comparative Regionalism*, Abingdon: Routledge, 2021, p. 14.
[58] N. Bobbio, *The Ideals of Resistance* (Chapter 12), In N. Bobbio, Lydia G. Cochrane, *Ideological Profile of Twentieth-century Italy*, New Jersey: Princeton University Press, 1995, p. 153.
[59] E. Arban, *An intellectual history of Italian regionalism* (Chapter 1), In: E. Arban, G. Martinico and F. Palermo (eds.), *Federalism and Constitutional Law: The Italian Contribution to Comparative Regionalism*, Abingdon: Routledge, 2021, pp. 13-29.

institutions. [] The attempt to gain control over Italian local institutions has a long history. After the unification in 1860, the Piedmont-Sardinian king introduced a string central government, and created a well-established network of decentralized ministerial bodies (*Prefetture*) devoted to controlling cities and territories. The result was a highly centralized structure of government for such an urbanized government. The pre-republican territorial system was characterized by the simultaneous presence, at local level, of both state bodies and those of local authorities operating in the same fields, but before the enactment of the republican Constitution, the latter was not granted the power of self-government.»[60]

3. CONSTITUTIONAL PROVISIONS AND PRACTICE IN INDIA

3.1. CONCEPT AND PRACTICE IN INDIA (1947-1992)

Panchayati Raj or local/rural self-government did not come of its own until 1992, though different attempts were made at the national level and many state governments had adopted better local government practices in their respective states.[61] One such initiative was the Community Development Programme set up in 1952, which was only marginally successful as it remained bureaucratically controlled state funded development rather than any initiative to have a democratically elected responsible local government with defined competences. Due to lack of democratic accountability and coordination at the local level the stated government goals of the first five-year plans linked with Community Development Programmes could not be met. It was a classic top-down model to be implemented by, at best an inexperienced and disinterested bureaucracy (with a colonial hangover), or an incompetent one at the worst, which had no clue of the local problems and aspirations of the people and was (and perhaps still is) too self-obsessed in its mediocrity to cater to the needs and aspirations of India's citizens especially so at the local level.

To address the shortcomings of the Community Development Programmes, the Government of India had set up a committee led by Balwantrai G. Mehta in Jan., 1957 which gave its report in Nov., 1957 emphasizing on democratic decentralization or what is known as Panchayati Raj today. Its main findings were: «(1) Development cannot progress without responsibility and power. Community development can be real only when the community understands its problems; realizes its responsibilities; exercises the necessary powers through its chosen representatives and maintains a constant and intelligent vigilance on local administration; (2) one of the most important reasons for comparative lack of success of our non-urban local self-governing bodies is their exceedingly limited and inelastic resources; (3) the establishment of the panchayat samities with a wide devolution of power by the State Government has to be an act of faith – faith in democracy; (4) for the devolution of power: it should be a 3-tier structure from village to the district bodies having organic linkage with each other; there should be a genuine transfer of

[60] E. Longo, *Local governments and metropolitan cities: The Italian experience and its comparative relevance*, In: E. Arban, G. Martinico and F. Palermo (eds.), *Federalism and Constitutional Law: The Italian Contribution to Comparative Regionalism*, Abingdon: Routledge, 2021, p. 153.

[61] On a short history, evolution and practice of *Panchayati Raj* in India, *See*: K. Mathur, *Panchayati Raj* (Oxford India Short Introductions), New Delhi: Oxford University Press, 2013.

power and responsibility given to them; adequate resources should be transferred to the new bodies to enable them to discharge their responsibilities; all development plans/programmes at these levels should be channelled through these bodies; the system evolved should be such as will facilitate further devolution and transfer of powers and responsibilities in future; and, the higher level body, the Zilla Parishad, would play an advisory role.»[62] Rajasthan and Andhra Pradesh were the first to adopt this system and by 1959 all states had passed Panchayat Acts with varying measures of implementation.[63]

On the inclusion of panchayats (or village local self-government) in the constitution (Art. 40), and attempts at promoting democratic decentralization and local participation in development plans right from 1952 when community development (CD) programmes were set-up, Rajni Kothari gave its estimation in hindsight, «One of the more imaginative institutional innovations made by the national leadership – in the long run more imaginative than the linguistic reorganization of the states or the setting up of the Planning Commission – is the introduction of panchayati raj. It is a step that simultaneously is decentralizing the Indian polity and integrating it into a common framework of institutional allegiances. The leadership may not have fully perceived its consequences; indeed, the administrative and intellectual circles received the proposal with considerable doubt and cynicism. The credit for wholeheartedly supporting the decision goes to Nehru, whose uncommon faith in the efficacy of democratic processes made him defend the new institution against all criticism. He had equally defended the community development programme, the forerunner of panchayati raj.»[64]

Between 1965 and 1977, there was a decline in the democratic momentum gained in 1959 (with possible exceptions in Maharashtra, Gujarat, Karnataka and West Bengal) due to: (1) change in development priorities; (2) lack of clarity about the concept of local self-government; (3) lack of funds; (4) the Panchayati Raj System adopted by the various states was not uniform; and (5) political and bureaucratic resistance at the state level to the sharing of power and resources with the local level institutions.[65] The Ashok Mehta Committee of 1977 gave detailed reasons for the stagnation in local self-government (Panchayati Raj) in India, and made some innovative suggestions (implemented to encouraging results from just Karnataka and West Bengal) including a two-tier rather than a three-tier system (which was rejected by the state governments).[66] Many other committees were set up which reached similar conclusions in identifying the problems of local self-government and offered similar solutions, the more notable ones being: G.V.K. Rao Committee (1985); L.M. Singhvi Committee (1986); and Sarkaria Commission (1988). A watershed in local self-government, increasing democratic accountability with local development in a bottom-up approach was reached with the 73rd and 74th amendment to the Constitution of India in 1992.

3.2. CONSTITUTION OF INDIA (73RD AND 74TH AMENDMENT), 1992

[62] M. Aslam, *Panchayati Raj in India*, New Delhi: National Book Trust, 2015, at pp. 18-19.
[63] *Ibidem* at pp. 20-21.
[64] R. Kothari, *Politics in India*, In: *The Writings of Rajni Kothari*, New Delhi: Orient Blackswan, 2016, pp. 130-131.
[65] M. Aslam, *Panchayati Raj in India*, New Delhi: National Book Trust, 2015, at pp. 22-23.
[66] *Ibidem* at pp. 23-27.

The 73rd and 74th amendments to the Constitution of India were enacted in 1992 and made effective since 1993. These amendments added Part IX and 11th Schedule to the Constitution of India recommending devolution of 29 subjects to the Panchayats or village administration. And they added Part IXA and 12th Schedule to the Constitution recommending devolution of 18 subjects to the Municipalities or city administration. Within the given structure of the Constitution, the centre through the concurrent list (often coupled with the Union List) could legislate indirectly over matters in the State List[67], if these 29 and 18 subjects are also devolved to the panchayats and municipalities, the subjects and competences of the state governments would further get reduced. However, it will make local democracy a reality with greater participation of citizens and a better resolution of their needs and aspirations with competences available to these local bodies.

In Part IX of the Constitution, Article 243 is the definitional section which defines Panchayat [Art. 243(d)] as an, "institution (by whatever name called) of self-government constituted under Article 243-B, for the rural areas". It has a three-staged hierarchy, with the gram sabha at the lowest village level, intermediate level (depending on the population) and then at the district level (Arts. 243-A and 243-B). The composition (number of members) shall be decided by the Legislature of the state depending on the population and as far as possible has to be uniform across the particular state [243-C(1)] and has to be filled by direct elections [Art. 243-C(2)] providing for reservation of seats to scheduled castes and scheduled tribes (corresponding to the population) and women [1/3rd of total members, Arts. 243-D(2) and 243-D(3)]. 1/3rd members of the reserved 1/3rd for scheduled castes and scheduled tribes have to come from scheduled caste and scheduled tribe women to keep not just the overall membership of women at 1/3rd. but also provide membership for scheduled caste and scheduled tribe women. Art. 243-E provides for the duration of the panchayat to be 5 years, and regular elections should be held before the expiry of these five years or an additional six months from the date of its dissolution with elections to be conducted by the State Election Commission consisting of a State Election Commissioner appointed by the Governor (Art. 243-K) who can only be removed from office like that of a High Court Judge (Art 243-K(2)]. The autonomy of the State Election Commissioner is ensured but the law relating to the election to panchayats themselves are to be enacted by the Legislature of the State which makes the State Government paramount as far as panchayats are concerned [Art. 243-K(4)]. Additionally, the competences (powers, authority and responsibilities; Art. 243-G) including finances (Art. 243-H) of panchayats are determined by law enacted by the Legislature of the state concerned. Article 243-O bars the interference in electoral matters by the courts.

[67] In the author's considered view, even though there are lesser number of subjects in the Concurrent List [47 subjects] of the Seventh Schedule of the Constitution of India, in terms of competences (powers, functions and responsibilities), it is still higher than the ones mentioned in the State List [61 subjects, after reductions through amendments] because, often they are read and interpreted along with the Union List [97 subjects]. Though, in sheer number terms, State List has more subjects enumerated init.
Besides, once devolution of subjects from 11th and 12 Schedules to the Constitution (with most subjects enlisted in the State List) are done to the local bodies (Panchayats and Municipalities), the Concurrent List would even have numerically more subjects enlisted in it (apart from already enjoying more competence without devolution).
The author had made a mistake while presenting, in terms of identifying the exact numbers, though the analysis in terms of competences remains unaffected (which was the actual intention). *See*: https://www.digspes.uniupo.it/sites/default/files/programma_xii_settimana_autonomie_locali.pdf, https://www.youtube.com/watch?v=JJgOHd4jyfU (last accessed: Jan. 8, 2021).

In Part IX-A, dealing with municipalities, Art. 243-P is the definitional section defining "metropolitan area" [population more than a million, Art. 243-P(c)], "municipal area" [notified by the Governor, Art. 243-P (d)], and "municipality" [means an institution of self-government constituted under Art. 243-Q, Art. 243-P(e)] among others. Under Art. 243-Q, it also has a three-staged hierarchy, which includes nagar panchayat (area in transition from rural to urban), municipal council (smaller urban area) and municipal corporation (larger urban area). Similar to panchayats, under Art 243-T, the Constitution provides for reservation to scheduled castes and scheduled tribes (based on the proportion of their population) and women($1/3^{rd}$) with a duration of five years (Art 243-U) with members elected by direct election (Art. 243-R) to be held every five years or an additional period of six months of dissolution of the municipality (Art. 243-U). Interestingly and curiously, Art. 243-ZA mentions elections to the municipalities to be conducted by the State Election Commission which is formed by law of the legislature of the state respectively but there is no mention of a State Election Commissioner (which is a more empowered and independent office appointed by the Governor). The competences (powers, authority and responsibilities; Art. 243-W) including finances (Art. 243-X) of municipalities are determined by law enacted by the Legislature of the state concerned. Article 243-ZG bars interference in electoral matters by the courts.

In the case of «*Kishansing Tomar v. Municipal Corpn. Of the City of Ahmedabad* [(2006) 8 SCC 352] the court (Supreme Court of India, *emphasis added*) has unanimously held that the life of a municipality has been fixed for five years and elections for the constitution of new municipality must be held before the expiry of that period under Article 243-U. Both conditions are mandatory and must be strictly observed. The State Election Commission, whose powers in this regard are similar to the Election Commission of India, must take all necessary steps to ensure holding of elections as required in Article 243-U. the same should apply to the elections of panchayats under Article 243-E.»[68]

With more than 3 million representatives, the scale of democratic representation is unparalleled in the history of democracies, "The most significant changes that Parts IX and IXA introduced to local bodies were the constitutional recognition of elected local representatives and adult franchise for the same. The scale of representation is extraordinary; more than three million persons are elected to panchayats and municipalities across the country."[69]

Article 243Q, as an exception, allows for municipal services to be provided by an industrial establishment in an industrial township and would make Part XIA requirements of forming municipal governance inapplicable. The Tata Nagar Steel Township in Jamshedpur has been the oldest such exception. There is exceptional municipal efficiency in Jamshedpur without democratic legitimacy and representation at the local level. This exception then proliferated to other industrial townships and through the Special Economic Zone Act 2005 governing the Special Economic Zones (SEZs) led to more than 500 such entities in the country which lack democratic representation and accountability at the local level.[70] To avoid democratic legitimacy

[68] M. Pal Singh, *V.N. Shukla's Constitution of India*, Lucknow: Eastern Book Company, 2017 (with supplement 2021), p. 764.
[69] K.C.Sivaramakrishnan, *Local Government* (Chap. 31),In: S.Choudhry, M. Khosla, P.B. Mehta (eds.), *The Oxford Handbook of Indian Constitution*, Oxford University Press, 2016, p. 570.
[70] *Ibidem* at pp. 568-570.

even if it is at the local level of municipalities is contrary to the basic structure of the Constitution of India.

This constitutional structure to prohibit jurisdiction (Article 243ZG) was also adopted to avoid 'unnecessary' litigations with regard to the electoral process (like delimitation, allotment of seats, electoral process, and the like) between the local bodies and the State Government and the not too often taking over of functions of the State Election Commission (which should ideally function autonomously like the Election Commission of India) by the State Government[71] which then adversely affects democratic legitimacy at the local level. Though the High Courts and the Supreme Court have writ jurisdiction (where it concerns constitutional matters like the basic structure and democracy) which helps them overcome the jurisdictional prohibition (the courts *autopoietic* in the sense that they themselves decide whether their jurisdiction is prohibited or not) like the Delhi High Court which held in *Chand Kumar v. Union of India*, "Any delimitation if it falls foul of the statutory power under which it purports to have been made and smacks of arbitrariness, whim or fancy, offensive of Article 14 of the Constitution then it is open to judicial review under Article 226 of the Constitution on the well-established parameters."[72]

The autonomous districts or tribal regions [(numbering 10) Schedule VI, read with Arts. 244(1), 244(2) and 275(1)] within the meaning of the Constitution of India refers to autonomy from State Governments on subjects listed in List II (State List) or List III (Concurrent List) of Schedule VII of the Constitution of India. The Union of India has competence over List I (Union List) but also over List II and List III matters within the constitutional framework, thus for these autonomous tribal districts, it is the Union Parliament which becomes the primary legislative body but for regular functioning it is done through executive orders of the Governor of the respective State where the autonomous tribal district lies or the President of India. The Governor of the respective state can create, increase or diminish the autonomous districts and the President of India can apply or suspend the application of an act of Parliament (both the Governor and the President work on the aid and advice of the Council of Ministers of Union of India).[73]

3.3. CONTEMPORARY ITALIAN PRACTICE

The Italian Constitution provides for a unitary state (Art. 5, It. Cons.) though it has a four-layered system of governance: Municipalities (for cities, as many of the city governing structures predate the present Italian republic); Provinces (area wise they could be like a district in India, but in terms of competences they are very different, though not quite like the Indian states); Regions (could be considered similar to an Indian state, though unlike India, they became fully

[71] The Karnataka High Court held how the State Government could take over functions like delimitation of constituencies as it was not part of the electoral process itself but precedes it. This runs contrary to the functions of the Election Commission of India at the national level. *See*: *Chanigappa v. State of Karnataka* (2000) 6 KLJ 163, cf. K.C. Sivaramakrishnan, *Local Government* (Chap. 31), In: S. Choudhry, M. Khosla, P.B. Mehta (eds.), *The Oxford Handbook of Indian Constitution*, Oxford University Press, 2016, p. 573.

[72] (1997) 40 DRJ 695 (DB) (Delhi High Court). *See*: K.C. Sivaramakrishnan, *Local Government* (Chap. 31), In: S. Choudhry, M. Khosla, P.B. Mehta (eds.), *The Oxford Handbook of Indian Constitution*, Oxford University Press, 2016, pp. 573-574.

[73] *See*: https://www.mea.gov.in/Images/pdf1/S6.pdf (last accessed: August 31, 2020).

"operational" only in late 1970s) and the State (the Union of India as a matter of comparison).[74] The regions in Italy emerged in their concrete and present form as a result of the Constitution of 1948, though for the first two decades the constitutional prescription remained a dead letter.[75] Regions reached their full constitutional implementation only after the regional electoral law (1968), the regional finance law (1970) and the election of the first Regional Councils in 1970.[76] This is unlike India, where much like the "classical" federal entities, the states (sub-national entities) and the Union (the state) have well defined competences in the Constitution (powers, functions and limitations) and have been functional from day one of independence (15th August, 1947; and a republic, Jan. 26, 1950) and have had regular elections, forming of democratic governments taking constitutional responsibilities since the first general election of 1952. For Italy, despite not having constitutionally defined federal structure, through the "unreformed-Constitutional federalism" of "Bassanini Laws", delegated through legislation the principle of subsidiarity, where on matters not expressly identified by law the regions would have competence over administrative functions along with the power to legislate (parallel principle between legislative and administrative duties, something which is normally expected in a federal polity).[77]

The year 1990 was a watershed moment in Italy's move towards reorganization of local government and access to information (something similar happened with Right to Information Act 2005 in India). Paul Ginsborg writes, «During the period 1980-92, the two most significant pieces of legislation regarding the public administration were passed during Giulio Andreotti's last occupation of Palazzo Chigi, from 1989 to 1992: the law no. 142 of 8 June 1990 on the reorganization of local government; and the law no. 241 of 7 August of the same year, on administrative procedures and the right of access to public documents. The first introduced new areas of autonomy for local government, and defined clearly the relationships between local politicians and civil servants, granting to the first overall control and strategic planning, and to the second executive responsibilities. The second law tackled administrative procedures, and tried to lay down clear rules and limits for them. The different offices of the state were obliged to inform the public how long a procedure would take, identify a single functionary responsible for it, and grant right of access to documentation. For the first time in Italy, citizenship took on an administrative aspect.»[78]

The federal moment in Italy was in 2001 when Title V of the Italian Constitution was amended to bring about widespread reforms in democratic decentralization and improving aspects of local democracy, «In 2001, Title V of the Italian constitution – pertaining to the relationship between the central government and regional/local institutions – was significantly amended with a view to strengthening (at least on paper) peripheral powers. The reform further aimed at entrenching innovative features, including differential autonomy, the principle of subsidiarity, or metropolitan cities as layers of government. In the same wave of reforms, also a

[74] L. Cuocolo, *The Regions* (Chap. 7), In: G.F. Ferrari (ed.), *Introduction to Italian Public Law*, Milano: Giuffrè, 2018 (2nd ed.), p. 117.
[75] *Ibidem* at pp. 119-120.
[76] *Ibidem* at p. 120.
[77] L. Cuocolo, *The Regions* (Chap. 7), In: Giuseppe Franco Ferrari (ed.), *Introduction to Italian Public Law*, Milano: Giuffrè, 2018 (2nd ed.), p. 121.
[78] P. Ginsborg, *Italy and its Discontents 1980-2001*, London: Penguin Books, 2003, p. 222.

presidential system of government was introduced at regional level, making Italy the only European country where subnational governments are directly elected.»[79]

After the 2001 amendment to the Italian Constitution, subjects/items on which the state/union can legislate are exclusively listed (much like the Union List in the Indian Constitution: List I, Schedule VII, Constitution of India), so are listed the concurrent matters (like List III, Schedule VII, Constitution of India) on which both the state/union as well as the regions can legislate (subject to the legal principles outlined by the state/centre) and the regions would legislate on the residual matters (there is no regional list, Like List II, Schedule VII, Constitution of India for the states; and in variance to Italy, it is the union/state/central government which has constitutional competence to legislate on residual matters in India), «[…] as a result of the 2001 constitutional amendment, exclusive competence to legislate on matters mentioned in Art. 117.2 of the Constitution pertains exclusively to the state. Moreover, the state can also dictate the basic principles within the concurrent legislative competence (Art. 117.3), while the regions have residual legislative competence. Among the exclusive state competences, one should be underlined in particular, that provided in Art. 117.2, subpara e): 'money, protection of savings, financial markets, the protection of competition, the currency system, the state taxation system and accounting, and the equalization of regional financial resources'. Among the matters included in the concurrent competence list, we can find 'harmonization of the budgetary rules in the public sector and coordination of the public finance and the taxation system' (the latter has been changed by the 2012 constitutional amendment and exclusive competence moved to the state). Furthermore, according to Art. 119 of the Constitution, 'Municipalities, provinces, metropolitan cities and regions have financial autonomy regarding revenues and expenditures'. The last paragraph of this article (also subject to the 2012 constitutional amendment) states that 'Municipalities, provinces, metropolitan cities and regions have their own assets, assigned to them according to general principles established by state law. They may only contract loans in order to finance investment expenditure. State guarantees on such loans are excluded.»[80] Thus we can observe how the 2001 constitutional amendment with federalizing tendencies introducing the Union List, Concurrent List and giving competence to the regions to legislate on residual matters, could easily be upturned (the same provisions of the constitution) against the federalizing tendencies after the 2012 constitutional amendment in Italy. It is the Constitutional Court of Italy which is the sentinel so long as protecting social rights[81] are concerned, even if it went against

[79] E. Arban, G. Martinico and F. Palermo, *Introduction: Why is the trajectory of Italian regionalism comparatively important and what does it have to offer?* In: E. Arban, G. Martinico and F. Palermo (eds.), *Federalism and Constitutional Law: The Italian Contribution to Comparative Regionalism*, Abingdon: Routledge, 2021, p. 1.

[80] T. Groppi, I. Spigno and N. Vizioli, *The Constitutional Consequences of the Financial Crisis in Italy* (Chapter 3), In: X. Contiades, *Constitutions in the Global Financial Crisis: A Comparative Analysis*, Surrey: Ashgate, 2013, pp. 106-107.

[81] Apart from its own constitutional obligations, Italy as a signatory of the European Social Charter (ESC), and being a signatory of the European Convention on Human Rights is bound by the decisions of the European Court of Human Rights. On the challenges of meeting social rights obligations during times of economic crisis, *See*: L. Mola, *Protection of Social Rights in times of Economic Crisis under the ECHR and the ESC: A Comparative Analysis*, In: J. Luther, L. Mola (eds.), *Europe's Social Rights under the 'Turin Process'*, Napoli: Editoriale Scientifica, 2016, pp. 45-63. On the issues concerning European Union's (and thus also Italy) accession to the (Revised) European Social Charter, *See*: J. Luther, *Perspectives for an Accession of the European Union to the (Revised) European Social Charter*, In: J. Luther, L. Mola (eds.), *Europe's Social Rights under the 'Turin Process'*, Napoli: Editoriale Scientifica, 2016, pp. 135-156.

regionalism (Italian federalism) in Decision 10/2010.[82] It can then reasonably be hoped how the Italian Constitutional Court might protect regionalism (Italian federalism) in instances where it protects and expands social rights. This might be in keeping with Italian and even European constitutionalism, though it might be difficult to decide accordingly with a "balanced budget" principle enshrined in the Constitution itself, coupled with, and actually as a result of, a mounting economic crisis.

«The Italian system of local government derives from a variety of arrangements which were developed by Legislature implementing the principle of Autonomy established in Article 5 of the 1948 Constitution. The most recent developments in local government took place at the end of the twentieth century with the reforms of the Consolidated Act on Local Autonomies of 2000 and the reform of the Title V of the Constitution (Constitutional Law No. 3 of 2001), and in 2014 with the institutional reform of the Delrio Law. It deals with several problems regarding municipalities and other local authorities in both regional and federal systems, such as the issue of the constitutional entrenchment of local authorities, the problem of (over)regulation of municipalities, the issue of governing the development of urban areas, the question of democracy and participation, and the need for socio-economic reforms in times of austerity. [] the trajectory of Italy's constitutional and legislative reforms has clearly strengthened the powers of Regions and local government and, in general, increased their level of autonomy, but, at the same time, it has left some ambiguities.»[83]

4. CHALLENGES AND FUTURE ROADMAP

The state governments in India do not want to devolve their competences (powers and functions) to panchayats and municipalities under the existing constitutional structure. If it becomes a three-level government with greater devolution of competences to the panchayats and municipalities; it might be more democratic, more efficient and more accountable with easy access for citizens to their elected representatives at the panchayat and municipal levels but it would redesign the two level federal structure into a three-level structure with the competences of states/union territories/NCR over list II and List III of Schedule VII practically divided between itself and the panchayats/municipalities. This would increase the overall political weight of the union government as its competences remain unaffected, but the states would lose their influence

[82] «[…] the 'social card' judgment (the aforementioned Decision 10/2010), which contains an explicit reference to the current financial crisis: the quoted section has a different purpose, seeking to justify a state intervention to protect social rights. In this decision, the Constitutional Court rejected the constitutional challenge filed within the abstract control of constitutional review of legislation by three regions (Emilia Romagna, Liguria and Piedmont) against Decree-Law 112/2008, which introduced the so-called 'social card' (a debit card with 40 euros granted by the Italian government to citizens whose income falls below a certain minimum level, in order to provide them with credit for the purchase of foodstuffs and basic products): according to the regions, it touched on the matter of 'social policy', reserved by the Constitution to the regions.» cf. T. Groppi, I. Spigno and N. Vizioli, *The Constitutional Consequences of the Financial Crisis in Italy* (Chapter 3), In: X. Contiades, *Constitutions in the Global Financial Crisis: A Comparative Analysis*, Surrey: Ashgate, 2013, pp. 107-108.

[83] E. Longo, *Local governments and metropolitan cities: The Italian experience and its comparative relevance*, In: E. Arban, G. Martinico and F. Palermo (eds.), *Federalism and Constitutional Law: The Italian Contribution to Comparative Regionalism*, Abingdon: Routledge, 2021, p. 152.

vis-à-vis the union government which is why most regional parties are not in favour of this "grass-roots democracy".

Way back in 2002, the 'Justice Venkatachaliah Commission to Review the Working of the Indian Constitution' had recommended, «The Commission recommends that Panchayats should be categorically declared to be 'institutions of self-government' and exclusive functions be assigned to them. Even in the States which have shown political will to decentralise, devolution has not gone beyond entrusting to them responsibility for implementation of the schemes/projects conceived by the State or Union government. As a result, Panchayats have not blossomed into institutions of self-government. Instead they have been reduced to an implementing arm of the State Government. Article 243G along with the Eleventh Schedule indicates the kind of functions to be discharged by the Panchayats. It does not guarantee assignments of a set of exclusive functions to the Panchayats. Hence the kind of role they would be expected to play in governance depends on the regime that controls the government of a State. The Commission, therefore, recommends that Panchayats should be categorically declared to be "institutions of self-government" and exclusive functions should be assigned to them. For this purpose, article 243G should be amended […]»[84] Such an amendment which is yet to be implemented was proposed due to a lack of devolution of competences (powers and functions), or at any rate lack of uniformity in devolutions by different state legislatures.

Absence of fiscal competence[85]; lack of a Local List in the Seventh Schedule with corresponding amendments in articles 243H and 243X of the Constitution of India[86]; absence of synchronisation of the periods covered by the reports of Finance Commission with those of the State Finance Commissions [with requisite amendments in Article 280(3)(bb) and (c); and Article

[84] Justice M.N. Venkatachaliah led '*Report of The National Commission to Review the Working of The Constitution*', In: Dr. Subhash C. Kashyap (ed.), *Constitution Making Since 1950: An Overview, Vol. 6 (B. Shiva Rao, The Framing of India's Constitution in 6 Vols.)*, Delhi: Law & Justice Publishing Co., 2021, p. 432.

[85] «As an institution of self-government, the Panchayats should have adequate fiscal capability. To be an institution of self-government, a Gram Panchayat should, as far as possible, be a viable unit. It should be capable of generating internal resources by using its own fiscal powers that include taxing power commensurate with the functions assigned to it. The PRIs at present are principally grant-fed and their dependence upon the State Government even for carrying out their routine functions is heavy. Among the three-tiers of Panchayats, the Gram Panchayats (GPs) are comparatively in a better position. This is so because the GPs have some taxing power of their own, while the other two tiers are dependent only on tolls, fees and non-tax revenue for generating internal resources. The Commission feels that major fiscal restructuring and financial resources are necessary to enable the Panchayats to function as viable local self-government institutions (with emphasis added in the originals). Some of the measures necessary for such reforms may be taken even within the framework of existing constitutional provisions.» Cf. *Ibidem* at pp. 432-433.

[86] «Articles 243H and 243X are enabling provisions that give authority to the State Legislature to authorise the Panchayats and Municipalities in respect of levy, collection and appropriation of taxes, duties, fees and tolls aw well as for the creation of a fund within the Panchayat and Municipal institutions to regularise and control inflow and outflow of financial resources. The said articles do not serve their purpose since some State Governments appeal to be reluctant to share their fiscal powers with the local self-government institutions. The Commission, therefore, feels that the only way out is to introduce the concept of a separate tax domain for the local bodies (with emphasis added in the originals). The Commission considered the suggestion to provide a Local List in the Seventh Schedule for giving fiscal autonomy to the local-self-government institutions. However, the Commission feels that it would be too early to consider such a proposal. The Commission, therefore, recommends that the Eleventh and the Twelfth Schedules should be restructured in a manner that creates a separate fiscal domain for Panchayats and Municipalities. Accordingly articles 243H and 243X should be amended making it mandatory for the Legislature of the States to make laws devolving powers to the Panchayats and Municipalities.» Cf. *Ibidem* at p. 433.

243-I (1) and (4)][87]; competences of levying local taxes on professions,, trades, callings and employment under Article 276 requiring amendment; lack of competence of local-self-governments to recruit their own staff[88]; and changes in election rules (including State Election Commissions)[89]; dissolution of panchayats[90]; and the lack of audit and accountability[91], were

[87] «Sub-clauses (bb) and (c) of clause (3) of article 280 require the Finance Commission to make its recommendations in respect of the Panchayats and Municipalities "on the basis of the recommendations made by the Finance Commission of the State". The Eleventh Finance Commission found it difficult to work within this framework because of various problems. It found that in some States, the State Finance Commissions (SFCs) were either not constituted or did not submit their reports. Again, in view of the 'heterogeneity of approach' of different SFCs and differences in contents and periods covered by them, the Eleventh Finance Commission found it difficult to form its opinion only on the basis of their recommendations. For avoiding such a situation in future and in order to enable the Finance Commission to take a macro-level view, it is recommended that the provisions of article 280(3)(bb) and (c) should be suitably amended. The words "on the basis of the recommendation" in these clauses may be replaced by the words "after taking into consideration the recommendations." [] In order to enable the Finance Commission to give due weight to the reports of SFCs for assessing the situation in each State, it is necessary to synchronize the periods covered by the reports of both of them. In the part of clause (1) of article 243-I which calls for constitution of SFC at the expiration of every fifth year, in line with article 280(1), the words "or at such earlier time as the Governor considers necessary" may be added after the words 'fifth year'. While it is for the State Legislature to ensure that the Government implements fully its assurances, there should be constitutional obligations for placing the Action Taken Report (ATR) before the legislature within 'six months' after the submission of the report. Clause (4) of article 243-I may need to be amended accordingly.» Cf. *Ibidem* at pp. 433-434.

[88] «An institution of self-government must have the power to recruit and control the officers and other employees required for managing its functions. The Constitution is totally silent about this vital aspect of institutional autonomy. The Commission feels that failure to address the human resource issue has definitely affected the growth of Panchayats as self-governing institutions. It is necessary that an enabling provision is made in Part IX of the Constitution permitting the State Legislature to make, by law, provisions that would empower the State Government to confer on the Panchayats full power of administrative and functional control over such staff as are transferred following devolution of functions, notwithstanding any right they may have acquired from State Act/Rules. They should also have the power to recruit certain categories of staff required for service in their jurisdiction.» Cf. *Ibidem* at p. 434.

[89] «The State Governments often delay Panchayat elections on purely political considerations. They can do so, because they retain some powers relating to the conduct of elections under the State Acts/Rules. The State Election Commission (SEC) has to depend upon the State Government for logistic support that includes staff and finances. Besides, certain important powers like issuance of election notification, delimitation of constituencies, earmarking of reserved seats, etc. are retained by the State Governments in many States. Considering all these, the Commission feels that there is strong case for further strengthening the hands of the SEC by making specific provisions in the Constitution itself. [] Sometimes, the SECs have to fight long battles against the State Governments in order to fulfil their constitutional duty to hold elections as per the provisions of law. In order to ensure the accountability of the States in timely conduct of Panchayat and Municipal elections, it is felt that the SECs should function independent from the State Governments and draw expertise and guidance from the Election Commission of India. [] The Commission, therefore, recommends that article 243K and 243ZA should be amended.» Cf. *Ibidem* at p. 431.
The commission also provided provisions on how these articles could be amended in order to incorporate its suggestions.

[90] «Clause (1) of article 243E provides that every Panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer. However, the corresponding provision, namely, clause (1) of article 243U relating to Municipalities makes a specific proviso to the effect that a municipality shall be given a reasonable opportunity of being heard before its dissolution. It has been noticed that there is no corresponding proviso in article 243E relating to Panchayats. [] The Commission recommends that a proviso to clause (1) of article 243E may be inserted to the effect that a reasonable opportunity of being heard shall be given to a Panchayat before it is dissolved.» Cf. *Ibidem* at p. 434.

[91] «The Commission noted with concern that there is considerable lack of accountability of Panchayats because of inadequate provisions in law relating to audit of accounts of public bodies. There is no time frame to conduct the audit of accounts of a given year, submit the audit report or comply with the objections raised in the report. Delay in

some other pertinent recommendations of the Commission in 2002 which have still not been implemented.

Thus, we observe that local democracy has happened in the villages and municipalities in towns and cities to the extent that regular elections are held and people have their representatives at the local level who are aware of the local problems as well as the most appropriate solutions (in an ideal scenario). The problem is with respect to competences where local bodies lack financial competence as well as lack any legislative competence with regard to subjects they can handle. It is the state government which enjoys legislative and financial competence with regard to local subjects and devolution of power with regard to legislative, executive and financial competences has not happened, "State legislatures have leeway not just on how and when power devolves to local bodies, but on whether to devolve such power at all."[92] Even central government schemes and development projects are implemented through the state government machinery. It often leads to not knowing the exact local problems, or the local availability of resources (human and material) which can be used for local development and to create local employment opportunities (and reduce massive urban migration and urban poverty). These problems have been observed in the implementation of the Mahatma Gandhi Rural Employment Guarantee Act, for example, where funds are sometimes left unused or are allocated for projects which the local population does not need or there have been repeated allocations for the same kind of projects not catering to the diversified needs of the local population.

For Italy, the concerns are more of economic constraints having constitutional implications.[93] Public debt has been a recurring problem since the 1960s[94], getting more acute in the 1990s[95], but became unavoidable in the economic crisis between (2008-2011; propelled by the sub-prime crisis in the US). It led to the Euro Plus Agreement (March 11, 2011)[96] and a European Central Bank (ECB) strong letter recommending economic reforms but also 'a constitutional reform tightening fiscal rules would also be appropriate'[97], having an expected fallout in the constitutional amendment of 20th April, 2012 (Constitutional Law 1/2012) introducing the 'balanced budget principle' into the text of the constitution modifying Art. 81 (in addition to others). The gravity of the matter can be assessed by the swiftness and near unanimity with which the reform was effected despite protracted politics and tedious amendment procedure under Art.

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audit provides opportunity for misuse of funds, tardy implementation of projects and over-all weakening of the system. The Commission recommends that necessary provisions may be made for audit of Panchayat accounts to ensure that all works related to audit (conduct of audit, submission of audit report and compliance with audit objections if any) are completed within a year of the close of a financial year. To ensure uniformity in the practice relating to audits of accounts, the Comptroller and Auditor-General of India be empowered to conduct the audit or lay down accounting standards for Panchayats.» Cf. *Ibidem* at p. 435.

[92] K.C. Sivaramakrishnan, *Local Government* (Chap. 31), In: S. Choudhry, M. Khosla, P.B. Mehta (eds.), *The Oxford Handbook of Indian Constitution*, Oxford University Press, 2016, p. 574.

[93] T. Groppi, I. Spigno and N. Vizioli, *The Constitutional Consequences of the Financial Crisis in Italy* (Chapter 3), In: X. Contiades, *Constitutions in the Global Financial Crisis: A Comparative Analysis*, Surrey: Ashgate, 2013, pp. 89-113.

[94] *Ibidem* at p. 89.

[95] *Ibidem* at p. 89.

[96] *Ibidem* at p. 92.

[97] *Ibidem* at p. 92 and n. 4.

138[98] of the Italian Constitution, «[…] after receiving the letter sent by the ECB to the Italian government on 5 August 2011 did the government announce the presentation of a constitutional bill, filed on 15 September 2011, to the Chamber of Deputies. The amendment was finally approved by the Senate of the Republic on 17 April 2012, and promulgated by the President of the Republic, Giorgio Napolitano, on 20 April 2012, thereby concluding a procedure that may be considered unique in the history of constitutional amendments in Italy. First of all, it is very rare that such revisions are brought about through government initiatives. Second, the process has been relatively fast, as shown by the dates of the deliberations, and third, the majorities obtained have been very large, thus obviating the necessity to call a referendum.»[99] Despite popular support backed by constitutionalists for greater local autonomy, in harmony with "cooperative federalism", there was a reversal of trend after the constitutional amendment of 2012. Not just was Art. 81 amended, but changes were effected in articles 97, 117 (paras 1 & 2) and 119; nearly (some might say completely or even negatively) eliminating the gains for "local autonomy" (in Italian constitutional understanding) since the early 2000s.[100] Hardly had Italy (and the world) recovered from the crisis (2008-2011), when it entered into COVID-induced ongoing economic and constitutional crisis which is still unfolding. Early signs are not very encouraging for local democracy in Italy, but also in India, as part of the general challenges and concerns for liberal democracies worldwide.

[98] «[…] according to Art. 138 of the Constitution, each of the two Chambers, the Chamber of Deputies and the Senate of the Republic, must proceed with a double reading of the constitutional bill. During the first reading a majority of the deputies or senators present at the reading is required, while during the second reading a qualified majority of two-thirds of the components of each Chamber is needed. Art. 138 provides the possibility to call for a referendum if, at the second deliberation, the qualified majority of two-thirds is not reached, but there is at any rate an absolute majority.» *Ibidem* at p. 91.

[99] *Ibidem* at p. 92.

«The Committee debate in the Chamber of Deputies began on 5 October 2011 and ended on 10 November; the debate in the Chamber itself began on 23 November and ended on 30 November. In the Senate, the Committee debate began on 7 December 2011 and ended on 14 December 2011; the senators approved the text already approved by the House with no further amendment at the first reading on 15 December 2011. The second reading in the House took a single day for examination by the Committee, on 21 February 2012, and two in the Assembly, on 5 and 6 March. The amendment was definitively approved by the Senate on 17 April 2012.» *Ibidem* at p. 92 n. 8.

«The amendment was approved at first reading by 464 of the 630 members of the Chamber, with 11 abstentions and no opposing votes. The rest of the members of the Chamber were not present. As this was the first vote, the large majority reached was neither relevant nor necessary from the legal point of view. The amendment was approved by the Senate at first reading on 15 December 2011, by 255 out of 315 members, with 14 abstentions and no opposing votes. At the second reading (important in the light of Art. 138 of the Constitution, as a two-thirds majority eliminates the possibility of a referendum) it was approved by 489 members of the Chamber, with 3 opposing votes, and no abstentions. In the second reading by the Senate there were 235 votes in favour, 11 against, and 34 abstentions.» *Ibidem* at pp. 92-93 n. 9.

[100] «The main article we should refer to on the matter of budget is Art. 81, which is also at the core of the constitutional amendment (although the constitutional revision brings with it some changes to Art. 97 of the Constitution, by introducing the requirement that public administrations, in line with EU directions, ensure 'balanced budgets and public debt sustainability'; 117, paras 1 and 2, granting the state exclusive legislative power over the 'harmonization of public budgets', whereas it was previously shared between state and regions; and 119, on matters of regional and local finance, where more stringent constraints on the local authorities have been introduced).» *Ibidem* at pp. 93-94.

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