

ON THE CONSTITUTIONAL REFORM IN THE PROCESS OF BEING
APPROVED IN ITALY

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Abstract

The essay analyses the impact of the constitutional reform recently proposed by the Italian Government, focusing especially on the relationships between the State and the regions. Comparing the reform of 2014 with that of 2001 the author underlines the statist imprint, which derives from a widespread opinion about the unsatisfactory performance of regional governments and the scarcity of the contribution of regional legislation to the overall innovation of our country. In this perspective, the article lists the most salient points of the new text and criticises their implications not only for Regional legislative powers, but also for the entire legislative process.

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1. A major constitutional reform

A major constitutional reform is in its first stage of approval in Italy, a reform which will have a significant impact on some important aspects relating to the form of government, both in terms of Parliament, and therefore the national legislative process, and in terms of regional and local governments, and their relationship with the State.

From the outset our Constitution was strongly marked by a sense of autonomy in the pluralistic articulation of the public authorities. Article 5 solemnly affirms the principle of the recognition

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by the Republic (“one and indivisible”) of local autonomies. The Republic (the State) adapts the principles and methods of its legislation to the requirements of autonomy and decentralisation. And the same original text of the Constitution attributed legislative power to the regions (15 of ordinary statute and 5 with differentiated autonomy and more extensive powers of government), albeit in limited matters and to be exercised in the context of the principles established by the law of the State.

In 2001, a Constitutional reform was approved that greatly enhanced the autonomist characteristics of our system of government and the legislative power of the regions, extending it to all materials except those reserved for the exclusive or concurrent legislation of the State (the residuality clause, which is typical of federal systems). An attribution of materials that was so extensive it also involved interests with undoubtedly national characteristics, such as the production and distribution of energy, major public works, communications, etc. And in the same text, there is no reference to the authority of the State to issue norms on all materials that also come under regional competence, where prominent issues of national interest were involved (the supremacy clause, which is also present in federal systems). On the other hand, the reform introduced a series of principles relating to fiscal federalism, giving both regions and local authorities, extensive powers to act in tax matters and broad financial autonomy, in accordance with the principle that each body should live by its own means (their own revenues and their share of the proceeds of state taxes attributable to their areas); with the exception of equalisation by the State to be exercised on the basis of objective criteria based on the principle of the ability to pay. These principles relating to so-called fiscal federalism are still being implemented.

Also in terms of the administration, the text is strongly in favour of autonomy where it states that in principle the administrative functions lie with the local authorities, without prejudice to interests of a unitary character which make it necessary for it to be placed at a regional or central level of government.

On the approval of this reform, the question was raised of introducing changes to the structure of Parliament, in the sense of transforming one of the two Houses into a chamber that represented the regions and local authorities. Particularly as regards the regions, to which the text grants such significant legislative powers in so-

called competitive matters, delicate relations are established with the legislation of the State, since the border between the fundamental principles of law in those matters and applicative or detailed regulations is not always easy to define. It was considered appropriate that representatives of the authorities of local government, in particular the regions, should be included in the national legislative process, in order to avoid discrepancies and conflicts, and to subject national legislative choices to the consent of local authorities. This transformation of the Parliament, was not possible then for political reasons (there was a lack of sufficient consensus among the political forces) and the instrument that was foreseen then, that of a bicameral commission of mixed composition, of parliamentarians and representatives of the territorial institutions, with advisory powers in the legislative process, led nowhere.

A design, therefore, so heavily imbalanced on the side of autonomy in terms of the powers conferred on territorial authorities, but at the same time without a central support that put the interests of local authorities in the heart of the legislative process. Parliament remained what it was with two chambers both elected by the people and with completely homogeneous legislative powers.

2. The Case for Reforming the Senate

Beyond the question of the involvement of local authorities in the national legislative process, through a Chamber “of the autonomies”, with a radical modification of the structure of our Parliament, the need was apparent (even before the reform of 2001) to revise this structure, characterised by the total homogeneity of the two Houses. Both the Chamber of Deputies and the Senate are elected directly by the people and carry out the same functions, both in legislative activity (every law must be passed in an identical form by both Houses) and in the activities of direction, inspection and control. And both are also called on to express confidence in the Government. The refusal to grant confidence on the part of one of the Houses leads to the resignation of the Government.

The reform of our Parliament and of the rules of the legislative process, differentiating the structures and functions of the two Houses, has therefore been under examination by the political forces and repeatedly urged by some scholars for some time now. But efforts at reform in the past have failed.

On the other hand, the need for a reform of Parliament in the sense of inserting into the legislative circuit a representative element for the local authorities, has become more pressing with the gradual strengthening of the competences (including legislative ones) of these entities.

After the entry into force of the Constitutional reform of 2001, whose implementation was not an especially smooth process, the need to review some aspects of that reform also became apparent, in particular in relation to the respective competences of the State and the regions.

The legislative power conferred on the regions in numerous matters, also extending beyond interests of a regional dimension, appeared excessive and made it very difficult to carry out important public policies of a national dimension, for example, in the field of major infrastructures and energy provision. On the other hand, the extent and quantity of matters of regional competence has produced a very high number of Constitutional conflicts, due in part to an uncertainty in the definition of the materials (in particular those of concurrent jurisdiction), and in part to the absence of the mechanisms of prior consultation and consent.

As a result of these factors, what has emerged in public opinion, both politically and at the Constitutional level, is that there is a need to carry out a reform of Parliament that would resolve these two defects – the absence of a representation of the local authorities and the total correspondence of the functions of the two Houses.

3. The Reform of 2014 Compared with that of 2001

Hence the origin of the reform now awaiting approval.

In general terms what can be seen in the new text, compared to the previous one approved in 2001, is a markedly Statist imprint, which derives from a widespread opinion (also fuelled by recent scandals that have emerged in the context of various regional administrations) about the unsatisfactory performance of regional governments and the scarcity of the contribution of regional legislation to the overall innovation of our country. So that orientation, which had been accepted in the 2001 reform, in favour of a strong decentralisation of government functions that tended to push the Constitutional system towards federalism, has now been superseded in the opinion of scholars and in the awareness of the

political forces. The Italian Constitution system takes up again more or less the same order that it had in the original text of the Constitution, even though the effect that might be produced by the new configuration of the Senate as a Chamber that is representative of local institutions cannot be underestimated.

The most salient points of the new text are as follows.

Parliament maintains its composition of two Houses but only one of these, that is the Chamber of Deputies, is representative of the Italian people and its members represent the Nation. And only the Chamber possesses the relationship of confidence with the Government and exercises the function of political direction and control (in terms of the Government) as well as the legislative function in its fullest sense. While the other House, which retains the name of the Senate, rather than representing the Nation represents the territorial institutions; it too exercises the legislative function in its fullest sense, in the cases laid down by the Constitution (Constitutional laws, laws relating to referendums, laws relating to the structure of local authorities, etc); while with regard to the approval of all other laws, the Senate has a function of proposition that can always be overruled by a vote of the other House, in some cases with an absolute majority. The Senate also functions as an institutional link with the European Union, for the evaluation and control of the public administration, as well as having an advisory capacity in those matters foreseen by law.

But in the cases laid down by the Constitution, such as the election of the President of the Republic both Houses make up the Parliament and their members meet in joint session (thus constituting a single organ). This means that the status of Member of Parliament, also as regards privileges and immunity from prosecution, remains the same, despite the diversity, respectively, of the functions and procedures for the election of members of both Houses.

4. The New Composition of the Senate

As regards the composition of the Senate, this text introduces significant changes. The Senate, as mentioned, is representative of the territorial institutions, that is, the institutions of local government, in particular the regions. As a result, it is composed of a number of senators elected by regional councils from among their

members and by a smaller number of mayors of municipalities, elected in turn by the regional councils from among the mayors of the municipalities located within the region. They are joined by five senators appointed for seven years by the President of the Republic, from among citizens who by their notable achievements have “brought merit to the nation”.

In total 95 senators elected (by the regional councils), compared to the present number of 315 senators (elected by the people); five Senators appointed by the President, as under the current Constitution, but in office for seven years, and not for life.

In fact, regional “representation” in the Senate, through these elected members, appears a little weak since within the regions political power is generally concentrated in the person of the President, elected directly by the people. In order to provide the necessary authority to the Senate (particularly for making it the place for mediation and understanding between the interests of the central State and the regions in legislative choices) it would be opportune to include the Presidents as rightful members of the Senate.

The members of the Senate elected by the regional councils, retain the positions from which they come, that is, respectively, those of regional councillors and mayors, and their salaries remain under the responsibility of their institutions of origin. This undoubtedly represents a major difference between the new senators with respect to MPs, because the former retain a dual role of government respectively in the Senate and in their institutions of origin (although MPs too may retain the office of mayor of municipalities of fewer than 15,000 inhabitants). This figure may be a difficulty in the actual functioning of the Senate, in terms of members who will be involved in working to a large extent within their institutions of origin. It would be opportune to provide for at least the regional councillors, in line with the mandate of Senators, to suspend their role as members of the regional council. But the text under consideration seems to foresee the contrary, only limiting the ability to hold office within the organs of the Senate for members involved in carrying out regional or local government functions. This assumes that the members of the Senate retain their roles within their institutions of origin.

This difference in status between members of the House and the Senate also renders problematic the extension of the immunities currently provided to all Members of Parliament. This is a highly

problematic topic that is the subject of much discussion during the approval of the text.

According to Article 68 of the Constitution which is confirmed, by the new text, all Members of Parliament enjoy immunity: they cannot be called to answer for opinions expressed or votes cast in the exercise of their parliamentary duties, and, without the authorisation of the House to which they belong, they cannot be subjected to searches or arrested, except after final judgments or when caught *in flagrante*, nor can they be subjected to wiretaps or seizure of correspondence.

Given the unity of Parliament, despite being composed of two chambers, it seems difficult to justify the maintenance of immunity only for members of the Chamber of Deputies. On the other hand, the immunity confirmed for the new senators as well, who remain regional councillors or mayors, creates a different status within these categories. The point remains problematic, insofar as it touches on the opinion of eliminating immunity for all Members of Parliament or attributing the relative authorisations to the Constitutional Court.

The rule that all Members of Parliament carry out their duties “without a binding mandate” is confirmed by the new text. So even the Regional Councillors, although elected to the Council to which they belong, in the exercise of their functions as senator are immune to directions and are not responsible for the activities carried out in relation to the organ (in the region) that elected them. There is no relationship of representation, in the technical sense; although, on the political level, senators are called on to represent the regional community and defend their interests and needs. Significant in this regard is that the reference to representing “the Nation” for senators has been deleted, while obviously it is confirmed for MPs.

5. Implications for the legislative process

As regards the legislative process, only certain categories of laws require the approval of both Houses. All the others, and they are those that relate most directly to the implementation of the programme of the Government, shall be submitted to the Chamber of Deputies; once approved, they shall be submitted to the Senate, which may, within a short period, propose amendments. On these, the Chamber, within an equally short time, has to pronounce definitively, thus having the capacity to accept or reject the proposals

of the Senate. For certain categories of laws that relate to the structure of territorial government or regional and local finance, the rejection by the House of amendments proposed by the Senate, can only be decided by an absolute majority of the House itself. On this point, however, substantial criticism is expressed that with the new electoral law (which is very much in favour of the majority system), which is also in the process of being approved, the political majority that supports the Government will have a large majority in the House, which will make it easier to pass with an absolute majority proposals from the Senate that do not correspond to the direction of the Government.

As regards the legislative process, beyond simplification and saving time due to the suppression of perfect bicameralism, the new text also provides for bills, which the Government indicates as essential for the implementation of its programme, to be inserted into the order of the day as a priority and submitted to a vote within a tight deadline and with simplified voting. This rule could allow the overcoming of the practice, unfortunately prevalent in recent years, of submitting bills directly related to the programme of the Government to a vote of confidence in Parliament (which, in the event of rejection, involves the resignation of the Government and the “dismantling” of the majority); this makes approval rapid, but it drastically reduces the chances of an effective evaluation by Parliament of the legislative choices of the Government.

On this point, it should be noted the involution of our political system to forms of increased supremacy of the executive (and its premier) with respect to the legislative, a trend that the new text seems to accentuate.

6. A New Framework for Regions and Local Authorities

The second part of the text which reforms the Constitution deals with the amendments to the rules - contained in Title V (Part II) - governing local authorities.

Firstly, the local government authorities which number four in the current text - regions, metropolitan cities, provinces and municipalities - are reduced to three in the new text because the provinces (i.e. the territorial authorities for a large area at the intermediate level between municipalities and regions) are suppressed. On this point, there was a long debate in our country, in

which, despite opinions to the contrary, the idea prevailed that the needs of local government were sufficiently dealt with by the lower level, the municipality, entrusted in a privileged way with the exercise of administrative functions (Article 118); and by the larger body, the region, to whom are entrusted all general functions of planning and direction (but also administrative and management functions, which are expected to gradually decline), and legislative functions.

In metropolitan areas (characterised by strong economic and social integration including connected centres, around a larger centre, and by intense urbanisation) the institution of government is the metropolitan city, in which the smaller municipalities included in the area operate with a reduced role. Beyond the metropolitan areas, and particularly in inland and mountain areas, the presence of very small municipalities raises a problem of aggregation using associative entities and joint authorities, to which the exercise of the most important functions pertaining to local government are delegated.

In terms of the structure of local government, with respect to which these and other organisational questions remain unresolved (Article 118 in its principles of subsidiarity, differentiation and adequacy, remains largely unrealised), there is no renewal in the reform text (on these principles a broad consensus has been achieved over the years); except on the point relating to the provinces. What will arise in the implementation phase of the reform is the question of how (and where) to place the functions of the former provinces, some of which (such as the adoption of land-use plans or the planning of the transport system) require management "over a wide area", which presumably will have to be provided through consortia of municipalities of an adequate size.

7. Regional legislative powers

As regards the legislative powers of the regions, the changes in the new text are significant. To the exclusive legislation of the State, in addition to the traditional subjects (foreign policy, defence policy, security policy, the monetary system, cohesion and equalisation policies, and, of course, matters relating to the organisation of the State and the exercise of the administrative functions within its competence), as well as the determination of the

basic level of performance relating to civil and social rights to be guaranteed throughout the country, materials have been included which in the current text are shared between State and regional legislation, or clearly reserved to regional legislation, hence the regulations regarding communication, production, transport and distribution of energy, strategic infrastructures and major transport networks of national interest, and so on. And with regard to matters in which the regions have legislative power, the text stipulates that the State can dictate “the general and common dispositions” (this is really a new form of the concurrent legislation); matters regarding the environment, cultural activities, tourism, government of the territory, education, health, food safety, and occupational safety.

Yet the text again provides that the law of the State may intervene (on the proposal of the Government) also in matters not reserved to it “when necessary for the protection of the legal or economic unity of the Republic, or the protection of national interest” (the so-called supremacy clause). Thus, State legislation is very wide-ranging, while to the regions remain (beyond the formula – of tenuously practicality – referring to “all matters not expressly reserved to the exclusive competence of the State”) a range of subjects related specifically to the interests of the territory and the population concerned, hence the planning of the regional territory, mobility within it, infrastructure (at regional level), the promotion of regional economic development, the regulation of cultural activities of regional interest, the enhancement of environmental, cultural and landscape assets,, as well as tourism of regional interest, and so on. So a legislation that is limited almost back to within the boundaries set by the original text of the Constitution, which was then modified by the 2001 reform.

This reduction (we might say delisting) of regional legislative power is partly compensated for by the presence of the Senate, where representatives of the regions sit (in a purely political sense). And the Senate, as we have seen, has powers to make proposals on all laws, more so on laws of regional and local interest. And in any case, the exercise of these powers, although in most cases merely proposals, makes a political rethink necessary on the part of the Chamber about the text of the laws approved by it and in some cases by a qualified majority.

From this perspective of rescaling regional autonomy it is also worth mentioning the rule that the law of the State can establish the

emoluments of the regional councillors within the limits of those assigned to the mayors of the capital cities of the region; as well as the rule that forbids paying expenses (“or similar monetary transfers creating a burden on public finances”) to the political groups within the regional councils.

These are all political rules that arise as a result of significant extravagance in the management of the regional councils (whose council groups have recently been subjected to the control of the Court of Auditors), which were brought to the attention of public opinion due to various scandals.

The reform text does not affect the different status of the five special regions (Sicily, Sardinia, Val d’Aosta, Trentino Alto Adige, Friuli Venezia Giulia) which retain their own statutes approved by Constitutional law. This safeguarding clause itself is among the norms whose application to the special regions is expressly excluded (which undoubtedly represents a *vulnus* to the unity of the Republic that ought to be eliminated!).