A NEW SENATE?
A FIRST LOOK AT THE DRAFT CONSTITUTIONAL BILL

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Abstract

The essay analyses the draft constitutional bill containing "provisions for moving beyond an equal bicameral system, reducing the number of members of parliament, the suppression of the CNEL and the revision of Title V of Part II of the Constitution" and its consequences on the Italian form of the State. In particular, the author underlines, on the one hand, the strong influence that the draft bill would produce on the future of regional government in Italy, regarding Regional legislative powers, and, on the other hand, he examines the transformation of bicameralism and the subsequent configuration of the Italian legislative process, comparing the new system with Federal States.

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1. Introduction

The following observations arise from a presupposition: if the draft constitutional bill containing "provisions for moving beyond an equal bicameral system, reducing the number of members of parliament, the suppression of the CNEL and the revision of Title V of Part II of the Constitution" (March 12, 2014), is successful, it will profoundly change not only the form of government, but above all, the form of the State. It will affect the form of government for the

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obvious reason that the relationship of trust exists only with the Chamber of Deputies, and no longer with the Second Chamber, given the name of the Assembly of Autonomy (or simply 'the Assembly'). It will affect the form of the State in so far as the proposals for reform contained in the section on Title V of Part II of the Constitution change the position and functions of the Regional governments compared with how they have been understood so far.
The reflections that follow aim to try to bring out the main innovations in the proposal, without overlooking the risks that adoption may bring. I will consider first the structure of the Assembly of Autonomy and the legislative process before going on to an examination of the aspects most closely related to the revision of Title V. Needless to say, there is a very close link between these two parts of the government's proposal.

2. The new Assembly of Autonomy and its functions

According to Art. 55, the Assembly of autonomy represents the territorial institutions. To this end, the proposal invests the Assembly with four functions or roles: a) involvement in the legislative function, b) a link between the State, Metropolitan Cities (provinces no longer exist) and Municipalities, c) direct participation in decision-making on the creation and implementation of European Union legislation, d) verifying the implementation of the laws of the State and assessing the impact of public policies throughout the territory.

Leaving aside the last function, whose actual implementation is regulated by the Assembly itself, it should be noted that there are several innovations in the government's proposal. The first consideration is the Assembly's merely collaborative role in the legislative sphere, a function imputed solely to the Chamber of Deputies. Our thoughts turn to the German constitutional order, in which the *Bundesrat* (the German second chamber) is said to collaborate (*mitwirken*) in creating legislation. And then we cannot fail to turn our attention to the linking function assigned to the Assembly: unlike in Germany and in other Federal States, the future Italian Second Chamber is not limited to forming a link between the State and the Regions, but between the State and all the local authorities. An attempt will be made to ensure that this will occur in a consistent way through provisions subsequent to the government's

proposal, in particular in the design of the structure of the Second Chamber and the legislative process.

3. The composition of the Assembly of Autonomy

First of all, it may be said that the composition of the Assembly of Autonomy has three types of representatives: the first from the regional authorities, the second from the local authorities (Municipalities and Metropolitan Cities), and a third from civil society or rather a part of civil society, one that has best represented it from the cultural point of view. More precisely, we can say that the regions are strongly represented in the Assembly, although this presence is pluralistic rather than unitary. Each region sends its President of the regional council (including the autonomous provinces of Trento and Bolzano) and two regional councillors elected by the regional council. These three 'regional' representatives are supplemented by 'local' representatives, that is to say, three mayors elected by an assembly of mayors from the Region. So each region sends, in total, six representatives (seven in the case of Trentino-Alto Adige). A further twenty-one may be added, appointed directly by the President of the Republic for outstanding achievements in the social, scientific, artistic, and literary fields (the Chamber of Deputies will host life deputies, i.e., former Presidents of the Republic).

It is also worthy of note that the term of office of these three types of components may be very different: while the mandate of the 'regional' representatives is bound to their regional institutional period of office, the 'local' representatives and those representing civil society (the cynically-minded might call them the representatives of the President of the Republic) have a mandate of fixed duration, five and seven years respectively.

4. A problematic application of the pluralistic principle

A first problem area should also be considered: the pluralistic composition of the Assembly, which in itself could already be a problem from the territorial and institutional point of view, is likely to be extremely diverse given that there will be a hundred-and-twenty members, representatives of the regional authorities (from both the executive and legislative bodies), and local authorities

(mayors of the Municipalities and/or Metropolitan Cities), plus the twenty-one representatives of civil society appointed by the President.

The writer fails to see the logic of the presence of this component. In fact, the makeup of the civil society component cannot be defined as either minimal nor consistent with the function of the Assembly of Autonomy, which, as we have said, has the task of representing the national institutions (one thinks, once again cynically, of the hordes of Senators under the Albertine Statute). A possible explanation could be found, forcing the issue somewhat, in the suppression of the CNEL, appropriately provided for in the draft in question, and the partial transfer of the idea that led to its establishment in the Constituent Assembly within the new Second Chamber. Even so, the objective fact remains that the representatives of civil society form an over-diverse group with respect to the function that the Assembly is called upon to perform.

Furthermore, the number of representatives of civil society begs the question: why exactly twenty-one appointed by the President of the Republic? One has to imagine - by now it is needless to add 'cynically' - that the President of the Republic has to choose one per region (and again, two for Trentino-Alto Adige). But at this point, our sense of regionalism would become so surreal, if such a hypothesis were even thinkable, that out of a sense of love for our country, it would be better to drop it. Finally, the proposal says nothing about the emoluments of these twenty-one members: on the one hand, the aim is to reduce the cost of politics, but on the other, they are being pumped up again by the excessive presence of components of little use in terms of making the representative system work.

A second noteworthy aspect is the application of the arithmetical, rather than the geometric, principle in the makeup of the Second Chamber. This means that the Government has decided to give equal representation to the Regions irrespective of the extent of their territory and/or population, with the result that Molise and Valle d'Aosta have the same number of representatives as those that Lombardy and Sicily are entitled to. It is a legitimate choice that has precedents in many Federal States, whose Second Chambers are made up of the Member States, often represented in equal measure (as happens, for example, in the United States of America and Switzerland). It is true, however, that this principle tends to be

applied in Second Chambers whose members are elected directly by the people (as is the case of the two Federal States just mentioned).

Our observations on the arithmetic principle lead to a third problem area. Leaving aside for a moment the cumbersome presence of the representatives of civil society, the Government, in its organisation of the Second Chamber, seems to be aiming for something very different from the establishment of a second chamber in the traditional model of a Federal State. To put it in very simple terms, the impression is that the intent is the substantial constitutionalisation of the Joint Conference, in which the State, the Regions and the Local Authorities currently sit. As will become apparent, this impression will be even stronger after an examination of the legislative process and the new Title V.

5. Bicameral system and legislative process

The impact of the 'restructuring' of the bicameral system on the structure of the legislative process is highly significant. As we have already intimated, the rule becomes the following: the legislative function becomes the province of the Chamber of Deputies. The only exception is the laws regarding the revision of the constitution and the constitutional laws, which continue to be approved by both chambers. This statement needs to be substantiated by a more detailed examination of the legislative process (insofar as it is of interest here).

Article 70 provides that the Assembly of Autonomy, though unable to introduce a law, may examine every bill. This examination results in the formulation of an opinion, that the Chamber of Deputies is essentially free to accept.

In reality, Article 70, para. 4 appears to make an exception for some bills regarding the functions and autonomy of local authorities for which the bill provides that the opinion of the Assembly, if favourable, or favorable subject to amendments to the text, can be 'passed' by the Chamber of Deputies only after a final vote obtaining an absolute majority of its members.

It does not seem, however, that these procedural limitations are able to adequately protect the regions and local authorities represented in the Assembly, for the simple reason that such protection is essentially left to the electoral law that will be used for the Chamber of Deputies. It is in fact clear that if this law were to

ensure the absolute majority of the winning side, the provision of procedural limitation would be *devoid of purpose*.

This result would be particularly serious for territorial autonomy in all cases where the Assembly votes for the opinion with a particularly high majority, showing strong opposition to the bill by local governments. To avoid such effects nullifying the constitutionally recognised autonomy of local authorities, it would be appropriate to provide a more elastic clause - also to foster the ability for the Assembly to coalesce and vote in a way that would be able to supersede Party logic - so that getting round a negative or partially negative opinion, in these cases, can only be possible if the Chamber votes with the same majority as the Assembly (if the Assembly votes with an absolute majority, then an absolute majority will be sufficient, but if the Assembly produces a majority of two thirds, then the Chamber will also have to reach two-thirds). We are aware that this is a lot to ask in terms of the compactness of the majority, but the fate of the autonomist and pluralistic vocation of the Italian Constitution is at stake.

6. A new reform for the Title V of the Italian Constitution

We shall now examine the part of the government proposal concerning Title V. Here too, it is possible to identify a principle that binds together the many changes: the drastic reduction of the legislative power of the Regions, which thus become administrative bodies. And also in this case, this move cannot be endorsed by the writer. In a phase of State restructuring, a State whose functions are becoming increasingly intertwined with international and supranational powers and structures, it would be desirable that the internal organisation of composite States especially in the context of European regulation, should point towards forms of governmental federalism.

The guiding principle permeates, first of all, the new distribution of the legislative function, organised according to a criterion of exclusivity. In practice, Article 117, paragraph 2 contains a renewed list of fields over which the State has exclusive jurisdiction; the little that remains is the responsibility of the residual legislative powers of the Regions; joint competence is suppressed (except for the provisions of Article122, para.1, that, from this point of view, remains unchanged).

In this way, the government intends to remedy the deficiencies that the previous division brought to light by the constitutional revision of 2001. In addition to bringing back within the exclusive power of the State fields which, inexplicably, had ended up among those under joint competence, the Government's proposal also contains more specific innovations, such as functions (coordination, planning) in addition to subject matters as criteria on which to base the allocation of the legislative function and the provision of appropriate new subject areas within exclusive competence (e.g., the general rules of administrative procedure, the strategic planning of tourism).

It should be noted however that, in many cases, attributing to the State exclusive jurisdiction to create 'general rules', 'general principles', and rules or principles of 'strategic planning', rather than homogeneous areas of subject matter, will still be a cause of conflict because it will be up to the Regions to adopt specific, detailed, legislation. And it is expected that the conflict regarding respect for the competences will tend to multiply with respect to this new dimension of attribution. The Assembly cannot reduce the new areas of tension because it is not called upon to intervene in the matters mentioned in Article 117, para. 2, except through the expression of non-binding opinion.

In any case, the clearest demonstration of the intention to transform the Regions into administrative bodies is the inclusion of a supremacy clause contained in the new art.117, para. 5. Thanks to this, the State may, by making a law, intervene in Regional matters or functions in the event of "the need to safeguard the legal or economic unity of the Republic or to bring about economic or social reform in the national interest." Although it is expected that, in this case, the Assembly of Autonomy may strenuously express an opinion, so to speak, the intention of allowing the State to drastically reduce, practically at will, the legislative power of the Regions, is evident.

7. Conclusions

In these very short notes it is impossible to dwell on many other issues that also deserve careful consideration. One example is the necessary reform of the procedure for the election of five judges of the Constitutional Court of parliamentary origin. Another is the

incomprehensible lack of any coordination with the statutes of the Regions that have special autonomy.

In an attempt to draw some conclusions from the rapid analysis carried out thus far, the following three considerations emerge:

1) The draft bill has a strong influence on the future of regional government in Italy. In particular, the proposal of the Government regarding Title V will produce a major restructuring of legislative power, setting the stage for a drastic reduction of the Regional legislative powers. The removal of concurrent legislative power and the supremacy clause both contribute greatly to this end. The shift of the centre of gravity of Italian regionalism from the legislation axis to the administration axis seems wholly acceptable, provided that it is compensated for by the adequate involvement of the Regions in the State legislative process.

2) The transformation of bicameralism is equally profound and radical. The Assembly of Autonomy is called upon to represent not only the Regions, but all the local authorities. This creates a real balance both from the intra-regional point of view (municipalities and regions have equal representation) and from the interregional point of view (each region has an equal number of representatives). This is a choice that has no substantial equivalent in the lower chambers of Federal States. The presence of the twenty-one appointed by the President of the Republic, however, is in stark contrast with the representative function of the local authorities that the new constitutional provision confers on the Second Chamber.

3) The configuration of the legislative process is not able to compensate for the net loss of legislative powers by the Regions. Of course, much will depend on the electoral law that will be applied to form the Chamber of Deputies; it is clear, however, that in the presence of a hopefully compact majority in the Chamber of Deputies, the Assembly of Autonomy has no effective powers to enforce the point of view of the Regions in the legislative process, even in circumstances where the law has a major impact on their competences and legislative functions. It will be left with a purely consultative role. From this point, there are marked similarities with the function of the Joint Conference, which seems to be the unspoken model upon which the Government's draft is based.

In conclusion, the direction of the reform seems to go in the right direction, even if it shows obvious inconsistencies. Fortunately, what we have been discussing is only a draft!