EDITORIAL

THE IMPACT OF THE FINANCIAL CRISIS ON THE ITALIAN WRITTEN CONSTITUTION

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TABLE OF CONTENTS

I. Political and socio-economic aspects of the crisis. A brief introduction.

The financial crisis that struck the Euro-zone in 2008 and which reached its peak in 2011 has not only affected the economic arena, but has also had highly relevant consequences at constitutional level in most of the countries affected.

This is something of a novelty, if we compare today's crisis with previous ones, and it is linked, directly or indirectly, to what can be considered the main new feature of the crisis, namely, the role played by the supranational actors, and above all, the European Union (EU). In fact, since the establishment of the Economic and Monetary Union, many financial and economic functions are the province of the EU. However, as far as constitutional and institutional reforms are concerned, the EU lacks any kind of jurisdiction, and national governments are still required to enact EU reforms.

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Within this context, the Italian experience may be considered to be of particular interest. In fact, economic and financial crisis are nothing new to Italy. In the early nineties for example, Italy suffered another deep crisis, but without leading to any kind of constitutional consequences (at least from the formal point of view).

The origin of the Italian economic crisis can be traced back to some weakness in the economic system dating back to the pre-Republican period, but it was further exacerbated as the main consequence of the enormous public debt that has seen a continuous and tremendous increase since the early sixties. There are both political and economic grounds for the contemporary crisis.

The causes of the growing public debt are many, one of which is the consociational political system that characterized the Italian political arena in the aftermath of World War II. This system lacked a real political opposition able to control the government majority. In fact, as a consequence of the Cold War, the main opposition political party, the Communist Party, was excluded from the possibility of winning the elections and becoming part of the Government, in what has been called a "*conventio ad excludendum*".

In effect, the various governments that came to power after 1948 were all dominated by the Christian Democratic Party and they had been able to enforce spending policies geared to the maintenance of a high consensus without any form of control, in a climate of increasing political clientelism and corruption.

This party system collapsed after the fall of the Berlin wall in the early nineties thanks to the operation involving high level judicial investigations known as "Clean Hands" ("*Mani Pulite*"), which involved many political actors.

Since then, governments, irrespective of their political orientation, have tried to approve debt reduction measures, primarily to meet the Maastricht criteria and to allow entry and permanent national presence in the Economic and Monetary Union.

This has resulted in several public administration and welfare reforms (especially concerning the pension system), which have, however, brought only limited savings. More specifically, since 2008, room for manoeuvre has become even smaller, because

the government has had to face the consequences of the international economic crisis, which has resulted in a reduction of the GDP and a consequent decline in tax revenues.

In addition, we have at the same time witnessed an increase in public spending in order to deal with the liquidity crisis faced by the banking sector and the difficulties facing the private sector (related, apart from the economic crisis, to the "credit crunch"), which has led to the increasing use of social safety nets (especially redundancy payments).

In 2011, financial speculation led to a marked increase in the interest rates of public debt bonds and in their spread compared with those of other countries (most notably Germany).

The very moment when Italian politicians could no longer ignore the crisis was August 5th, 2011, when the European Central Bank (ECB) sent a letter to the Italian Government, in which it asked Italy to adopt policies to deregulate its economy, to introduce more flexibility in employment and to increase privatisation.

Since that moment, an incessant chain of events has been underway: a constitutional revision bill was introduced in Parliament by the Cabinet in order to introduce the balanced budget principle into the Constitution (later approved through Constitutional Law 1/2012); the fourth Berlusconi Government collapsed due to the political (and personal) difficulties it was already facing, and a new Cabinet, led by Mr Mario Monti, was nominated.

The main focus of the European institutions was the lack of political credibility of the Italian Government especially with regard to the reduction of public debt and the adoption of the structural reforms necessary to contain public spending.

Therefore, as will be further explained in the following paragraphs, the very grounds for the constitutional consequences of the crisis, especially as far as constitutional amendment is concerned, are strictly related to the need to improve the credibility of the Italian institutions in the global context.

II. The impact of the crisis on the "written constitution": A constitutional amendment in order to "reassure the financial markets"?

In Italy too, the financial and economic crisis has led, as in other countries, to the approval of a constitutional amendment. Constitutional Law no. 1/2012, of April 20th, has introduced the "balanced budget" principle into the text of the Constitution itself, modifying Art. 81.

In this regard, four aspects need to be underlined.

First of all, the timing of the revision, especially in connection with the development of the crisis.

Secondly, the analysis of previous constitutional rules on this matter.

Thirdly, the content of the reform.

Finally, the first comments on, and perspectives of, the implementation of the new rules.

Firstly, it should be underlined that formal amendments to the Italian Constitution are quite rare due to the prevailing legal culture that is not strictly linked to the text, and also because of the complexity of the process of constitutional amendment established by the Constitution itself.

In fact, according to Art. 138 of the Constitution, each of the two Chambers, the Chamber of Deputies and the Senate of the Republic, must proceed to 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. This complex procedure (whose rationale lies in the need to guarantee only those amendments on which a large consensus has been reached, equally as large as that reached in the Constituent Assembly) means that in the absence of a strong political will, many proposals are abandoned after approval by one Chamber and are not even submitted to the other.

In the case of the "balanced budget" amendment, after the approval of the Euro-plus agreement on March 11, 2011 by the Heads of State and Government of the Euro-zone, later shared also by the European Council of 24-25th March of the same year,

several constitutional bills have been filed in both Chambers, by the majority as well as members of the opposition.

However, only after the letter sent by the ECB to the Italian Government on August 5, 2011 (which stated that "a constitutional reform tightening fiscal rules would also be appropriate), the Government announced the presentation of a constitutional bill[1], filed on September 15, 2011 to the Chamber of Deputies[2]. The amendment was finally approved by the Senate of the Republic on April 17, 2012, and promulgated by the President of the Republic, Giorgio Napolitano, on April 20, 2012[3], thereby concluding a procedure that may be considered unique in the entire history of constitutional amendments in Italy.

First of all, it is very rare that such revisions are brought about through Government initiatives. Secondly, the process has been relatively fast, as shown by the dates of the deliberations[4], and lastly, the majorities obtained have been very large[5], thus obviating the necessity to call a referendum.

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[1] This occurred on August 11, 2011, at the sitting of the Constitutional Affairs and Budget Joint Committee, urgently called after the interruption of parliamentary activity for the summer break.

[2] Bill no. 4620, Chamber of Deputies, XVI legislature.

[3] Constitutional Law no. 1/2012

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

[5] 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 December 15, 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 2/3 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.

This might well be considered a "heterodirected" constitutional revision, insofar as it was requested by supranational institutions: this is because it was "encouraged" by the EU (even more after the Fiscal Compact), and because, as emerged repeatedly during the preparatory works, it was requested in order to "restore market confidence".

However, none of the above-mentioned European documents clearly requires a constitutional amendment: not even an international commitment on the part of the Government which would result in no modification of the Treaties could limit the power to amend the national Constitution. Moreover, it should be noted that in the Italian legal order, European obligations have immediate constitutional primacy under Article 11 of the Constitution, according to the interpretation provided by the Constitutional Court since decision no. 14/1964.

Thus, until today it was not deemed necessary to adapt the text of the Constitution to European obligations. When constitutional provisions are inconsistent with such obligations, an implicit adaptation of the constitutional text is preferred.

As far as the confidence of the market is concerned, this seems to derive more from the strong signal behind the constitutional amendment rather than the new constitutional rules themselves. It is a signal that the sustainability of public finances represents a goal shared by the whole of Italian society.

Therefore, it can be assumed that necessary unpopular political decisions will be adopted and implemented to this end without strong political or popular opposition.

In other words, the constitutional amendment was not legally essential in order to satisfy European obligations: it was rather the result of a political choice meant to give a strong signal to the financial markets.

The constitutional amendment introduced by Constitutional Law 1/2012 and the introduction of the "balanced budget" principle can be read, in particular, from the point of view of the national legitimacy of unpopular policies required at the international level: these policies, more than the constitutional amendment, have to be considered as "heterodirected".

III. The former constitutional rules on budget

Secondly, we should briefly recall the former fiscal rules deriving from the Italian Constitution. In the absence of a true "Economic Constitution" (according to the German definition of *Wirtschaftsverfassung*), these rules can be found in several constitutional dispositions, strictly linked to those protecting social rights.

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 Article 97 of the Constitution – by introducing the requirement that public administrations, in line with European Union directions, ensure "balanced budgets and public debt sustainability" – 117, paragraphs 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).

It is worth dwelling briefly on the original version of Article 81 of the Constitution, and in particular its last paragraph, to underline that the "balancing budget" issue was not unknown to the Constituent Assembly[6].

On one hand, the distinguished constitutionalist Costantino Mortati, one of the fathers of the Italian Constitution, highlighted that leaving the initiative regarding spending laws in the hands of MPs would have been too great a risk. On the other hand, Luigi Einaudi, a pre-eminent economist, later to become the first President of the Italian Republic, proposed two possible solutions to the problem posed by Mortati. The Constituent Assembly could have either denied MPs "the right to make spending proposals, or would have forced MPs to accompany them with an equivalent income proposal able to cover the expenditure, in order to give it an imprint of seriousness". The second proposal obtained the

[6] Art.81: 1) The chambers approve the budget and final balance submitted by the government each year. (2) Temporary execution of the budget may not be granted except by law and for periods of no more than four months in total. (3) No new taxes or expenditure may be adopted in the budget law. (4) All other laws implying new or additional expenditure must define the means to cover them.

approval of Ezio Vanoni, a prominent economist, later Minister of finance, who interpreted it as "a guarantee of the tendency towards a balanced budget".

He strongly pointed out the need for this principle to be always in the minds of political actors, "also from the legal point of view".

However, the prevailing interpretation of this provision, in the legislation, in the scholarship and in the constitutional case law, has, especially since the sixties, little by little deprived this rule of its legal value, leading to a significant increase in public debt.

Two aspects of this development should be underlined.

First of all, strict coverage of the financial burden, in the case of long-term spending, was deemed necessary only for the first year: this practice allowed a probable and reasonable evaluation for the following years.

Secondly, public borrowing was considered as a possible instrument for covering expenditure.

Two doctrinal positions animate the contemporary Italian debate: on one hand, those for whom a strict interpretation of Art. 81.4 would be sufficient to avoid the expansion of the public debt. On the other, those (the majority) who consider that this provision was not a sufficient obstacle to borrowing, as it was meant only to ensure that ordinary laws would not alter the balance of the budget, but was not binding on the budget law itself.

The Constitutional Court, despite considering public borrowing a legitimate means of covering expenditure, has several times denied since Decisions no. 1/1966 and 22/1968, an interpretation whereby Article 81.4 represented an effective constitutionalisation of the "balanced budget" principle.

The interpretation provided by the Court, on the contrary, stressed how the obligation to indicate, in laws other than those referring to the budget, the means to address new or additional expenditures consists substantially in bringing about an increase in income that could ensure the maintenance of the balance between income and expenses fixed through approval of the budget. This balance should be strictly observed only for expenses relating to the current year, while the same degree of strictness is not required for future periods, for which the "not arbitrary or irrational" (in the words of the Court itself) provision of a higher

income balanced with the expenditure expected in subsequent years and according to the economic and financial planning of the Government, would be enough.

This interpretation has been compounded by the difficult justiciability of any violations of Article 81.4, due to "bottlenecks" in the Italian system of constitutional justice in which it is quite difficult to challenge a spending bill without proper financial coverage in the Constitutional Court.

In fact it is hardly conceivable that such a challenge would take place within the "concrete review" procedure, which can be promoted only by judges when they have to apply a law in deciding a case. As far as the "abstract review" is concerned, parliamentary minorities or State institutions cannot challenge the law. State laws can be challenged only by Regional governments, in the event of the violation of parameters relating to their competences, which do not include Article 81. Conversely, the Government can challenge regional laws for any constitutional violation, including Article 81.4. Thus, it is no coincidence that the few laws declared unconstitutional because they violate the obligation of financial coverage are regional laws.

The Constitutional Court has long been well aware of this problem, thereby admitting, with reference to Article 81 as a constitutional parameter, the legitimacy of the intervention of the Court of Auditors in the exercise of its role of controlling the acts of the Government (Decision no. 226/1976 and 384/1991) and the equalization of the financial statement of the State and the regions (lastly, see Decision no. 213/2008).

At the same time, it also directed a stern warning to the legislator, inviting it to expand access to the Constitutional Court regarding financial issues (Decision no. 406/1989).

Neither the parliamentary instruments of control of coverage (increasingly developed during the Eighties) have proved to be more effective, nor has the Presidential power of veto (a power rarely exercised, although some of the rare cases refer precisely to the violation of the obligation of coverage).

IV. The amendment to Art. 81 and the necessary respect of the "balanced budget" principle

The gradual erosion of the legal meaning of Article 81.4 and the doctrinal and political debate that this practice has generated for decades[7], explains the favour the proposals coming from Europe in 2011 gained.

As already mentioned earlier, the constitutional bill presented by the Government followed a fast parliamentary procedure: few formal changes were introduced at first reading in the Chamber of Deputies which approved the text of the constitutional revision and it was not amended in successive readings.

Four constitutional provisions were changed. [8] We shall focus on Article 81, even if it should be noted that it is in Articles 97 and 119 (on the public administrations and territorial authorities) that reference to "economic and financial constraints derived from the European Union" was included, a reference lacking in Article 81.

The choice of the Italian constitutional legislator deviates from the German model and is closer to the French and Spanish models, as it introduced only a few provisions into the Constitution. According to Article 5 of the Constitutional revision law, the detailed legislation has to be enacted by an ordinary law, which must be approved by an absolute majority (in the absence of a source comparable to the organic law it can be labelled as "reinforced law" due to the special majority required).

Although the title of the constitutional bill refers to the "balanced budget", what has been introduced in practice is "the balance between revenues and expenditures" of the State budget, mitigated however by the possibility of taking into account periods of adversity and growth (paragraph 1). The establishment of the maximum deviation from the parameter of equilibrium is

[7] Even in the early eighties, in a commission to draw up major constitutional reforms (the Bozzi Commission), it was proposed to assign to the Court of Auditors (Corte dei Conti) the assessment of the actual cost of laws passed in previous years, with the possibility of referring to the Constitutional Court. Other proposals were advanced in 1993 (by the De Mita-Iotti Commission) and 1997 (the D'Alema Commission), all making a reference to the balance or equilibrium of the budget.

[8] Articles 81, 97, 117 and 119.

entrusted to the "reinforced law", under Article 5 of the constitutional law.

As has been pointed out, the meaning of this provision is not in itself too explicit, because it only refers to a difference between income and expenditure. Thus, the balance is always reached. In the actual budget, for example, the expenditure is matched by the revenue, with the peculiarity that among these there are a significant amount of resources acquired by public borrowing.

Far more significant in the amendment is the prohibition of public borrowing: it is permitted only upon parliamentary authorization (by absolute majority), with the sole purpose of considering the effects of the economic cycle and the occurrence of exceptional events (paragraph 1). These events will be more carefully defined by the reinforced law as established in Article 5.

However, such provisions must refer to the "net borrowing" balance, allowing the renewal of maturing bonds, not producing, therefore, any reduction of the total debt.

It should be noted, as far as borrowing is concerned, that a stricter provision is to be introduced on regional and local finance in Art. 119 of the Constitution. Even back in 2001, borrowing was permitted only to finance investment expenditure. "The contextual definition of the amortization schedules" is added to the limitation mentioned above and the requirement that the balanced budget be respected by all the local governments within each Region calls for close coordination. The requirement to cover expenditure laws has also been reinforced, so that every law must "provide" the means to cover (paragraph 3), and not simply "indicate" such means (as in the former text). The coverage of expenditure cannot be deferred to future provisions, such as the measures adopted in the budget law package.

In addition, also the budget law, which until now was excluded, is subject to compulsory coverage: thus, if revenues from borrowing are expected, the coverage of costs for the subsequent periods must be indicated.

The mechanism for monitoring compliance with the balanced budget principle is somewhat problematic: having rejected the proposals that would have entrusted the power to appeal to the Constitutional Court to the Court of Auditors, Article 5 provides two different types of control.

First of all, it reiterates, in paragraph 4, the already existing parliamentary control over the budget balance and on the "quality and effectiveness" of public spending, according to the methods prescribed by the parliamentary rules of each Chamber.

Secondly, it introduces in paragraph 1 letter f), a new independent authority (in the form of a Fiscal Council) to be established within the Chambers, which will be entrusted with the "task of analysing and verifying trends in public finance and

compliance with budget assessment rules".

Finally, it is worth noting that among the contents of the reinforced law, under Article 5, paragraph 1, letter g), also the way in which the State, in times of adversity or upon the occurrence of exceptional events, ensures that funding from other levels of government, essential levels of performance and the basic functions related to civil and social rights are included.

V. A "hasty" Constitutional amendment that undermines the Welfare State?

Finally, some considerations can be advanced on the future implementation of the new constitutional rules and their impact on the Italian form of State.

As already mentioned above, the constitutional amendment has enjoyed the widest consensus ever reached in Italy, even obtaining a positive vote from the Northern League (*Lega Nord*), the only party that still opposes the "government of experts" led by Mr Mario Monti. Despite the positive vote, the party leaders have repeatedly pointed out, in a critical way, the implicit transfer of national sovereignty it implies.

Two main positions have emerged among commentators and in legal scholarship.

On the one hand, there are those who fear that the rule is not strict enough and easy to get round (because, in fact, we are not speaking of "perfect equivalence" but of "balance").

On the other hand, there are those for whom the revision introduces an element of extreme rigidity that threatens to jeopardize the safeguard of fundamental rights and may even produce a recessive effect. In this context, also some criticism highlighting the loss of State sovereignty on economic policies,

now most certainly inspired by neo-liberal principles, has emerged.

One of the most critical aspects underlined by legal scholarship and quoted also in parliamentary debates, is the absence of an adequate monitoring system concerning compliance with the new constitutional rules, due to the lack in the Italian system, as already mentioned above, of the possibility for MPs or for the Court of Auditors to challenge the constitutionality of a statute directly in the Constitutional Court. Moreover, some commentators have eyed with suspicion the introduction of another independent authority.

Finally, the question remains open of the compatibility of the "balanced budget" revision, if taken seriously, with the guarantee of fundamental social rights, which is a fundamental characteristic of the Italian form of State (in other words, the "national constitutional identity") and that cannot be changed by means of the procedure described in Article 138. These principles represent the "core" of the Constitution itself. They thus fall within the purview of the "constituent power" (i.e. the constitution-making power) rather than within that of the "constituted" power (i.e. the constitution-amending power).

As we have attempted to show over these pages, the revision was enacted as a response to the financial markets, mainly to give national legitimacy to the unpopular policies required at this level. The lack of any public debate in this respect was justified by reference to the extremely technical nature of the matter and the external pressures coming from the markets and the EU institutions, which would have left no room for national decisions.

In this way, a potential hidden change in the "core provisions" of the Italian Constitution has been enacted without the participation of civil society.

At the moment, the ultimate protection of the fundamental values of the Italian Constitution lies in the hands of the Constitutional Court: its case law – up to now – seems impermeable to the effects of the economic crisis, as testified to by the fact that the main explicit reference to the crisis was included in a decision on a State law encroaching on the regional jurisdiction to guarantee a social right (the "social card" Decision n°10/2010).

Nevertheless, one could wonder how long the Court can resist the pressures in favour of the dismantling of the Welfare State it receives day by day from government decrees: in the end the judiciary can slow, but not block, constitutional change.

It is up to the organs of democracy to react: if they are unable to do so at national level, due to the power of the external financial and economic actors, the only solution to the protection of national constitutional values may be found in a political reaction at EU level.

But it would require a further step towards a European Federation.

Is Europe ready for that?