# EDITORIAL

## THE END OF (SYMMETRIC) BICAMERALISM OR A *NOVUS ORDO*?

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*1. The Past of Constitutional Reforms in Italy: a Sketch*

Too often books on constitutional and public law, in Italy, have been for the most part content to describe in a more or less accurate and dispassionate detail institutions whose merits may be, to say the least, debatable. While the years that preceded and followed the entry into force of the new Constitution (1948) were characterized by critical analyses, mainly written by those – such as Luigi Einaudi and Costantino Mortati - who took part in its drafting and were unhappy with some of its parts, the following decades were – despite some significant exceptions – mainly years of self-satisfaction. Only during the 1970's did the problems of good governance become evident. They were analyzed by a strand of literature, in law and political science, that did not hesitate to use terms such as "crisis" and "great reform". However, most textbooks and other formalized descriptions of the constitutional framework continued to neglect the pros and cons of our main political institutions.

Whether this depended on the reluctance of lawyers to move from description to evaluation and thus abandon the safe harbours of positivism (with its clearcut distinction between 'is' and 'ought') or from the lack of appropriate standards of assessment is another question, and by all means an interesting one. Another possible explanation is that, in concrete terms, the debate about reforms was not very productive. Indeed, a first parliamentary commission for institutional reforms, chaired by Aldo Bozzi, was set up and produced a ponderous study, which was not followed by any change of the Constitution, although some important steps to improve government action were taken few years later through the ordinary legislative process, in particular that concerning secondary and tertiary legislation (Act

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n. 400 of 1988). Nor were the two following commissions – chaired by Nilde Jotti (subsequently by Ciriaco De Mita) and Massimo D'Alema, respectively – more successful. Even some of the authors of those attempts admit that they tended to retreat into useless generalities about desirable models, and did not succeed to change the Constitution.

During those years, the burgeoning (and increasingly popular) literature on institutional reforms was mainly a product of political scientists. A particular emphasis was put on "constitutional engineering" (Giovanni Sartori). It was only when a first wide-ranging constitutional reform was approved in 2001, and reshaped State-Regions relations, that several lawyers paid attention to them, generally with a benevolent attitude. Conversely, many more criticized the attempt to reform central institutions which failed in 2005, due to the negative outcome of the constitutional referendum requested by Article 138 of the Constitution when the majority of the two thirds in both Houses is not reached. Whether and the extent to that their criticism was determined by the attitude of self-satisfaction that dominated in the previous decades or by the belief that their task was to protect the Constitution from unskilled reformers, it remains to be seen.

What is sure is that the idea that the institutional framework provided by the Constitution corresponded to our needs conquested neither Italian politicians, who continued to put its reform in their agendas, nor external observers, who increasingly called for reforms. The letter sent by two central bankers to the President of the Council of ministers in the summer of 2011, suggesting – among other things - to reduce the number of local authorities, is but the best known example of this. As a result of the acute political and institutional crisis that has characterized the last years, there has been a growing dissatisfaction with the order that we have inherited from the Constituent Assembly. A new commission (two members of which, Mannoni and Violini, contributed to this issue of the IJPL) has been set up in order to discuss and elaborate a coherent set of reforms. Whatever the intellectual soundness and political feasibility of such proposals, they have been drafted, sent to our major political institutions and rapidly made available to the general public.

*2. The Present of Constitutional Reforms: Unmaking (Some) Changes Made in 2001*

This is the context in which the Senate has just (at the beginning of August, 2014) approved for the first time a constitutional bill that modifies radically both its composition and its powers, whilst reducing the competences assigned to regions and eliminating a central institution with a high status but whose performance has never met the expectations of its founders. This institution is the *Consiglio Nazionale dell'Economia e del Lavoro*, a sort of clearing house between social forces. While this choice is relatively unproblematic, from the point of view of both the effectiveness of decision-making processes and the solidity of checks and balances, the other two – concerning regions and the Senate – deserve further analysis.

As far as regions are concerned, almost all who – in academic circles and political institutions - are aware of the huge problems raised by the constitutional reform enacted in 2001 agree that it was far from being a success.

This judgment is not inspired by any sentiment that the Constitution did not require any change in that respect. While few academic commentators criticized the unprecedented break of the constitutional convention according to which no reform of the Constitution could be carried out without a large consent between the major political forces (the Chamber of Deputies approved it with a majority of only four votes, the Senate discussed it for few days), many more would agree that the new division of competence between the State and the regions has not clarified who must do what. Quite the contrary, it has made the division of competence more complex and uncertain. Not only have several important measures been delayed, but the number of disputes about competence has grown, and has increasingly absorbed the work of the Constitutional Court. Meanwhile, the expectation to increase the transparency of fiscal relations has not yet been met and the government of public money has appeared to be dominated by factions and lobbies more than ever. Virtually no well-informed observer, therefore, would argue that the present order of things deserves to be left untouched. Rather, some constitionalists have given voice to the concern of overshooting, that is to say to make several steps backward in the direction of

centralization. Although this is a very serious issue, there is no evidence that reformers are willing to take it into account.

Their choices can be summarized in the following way: i) while provinces, the local authorities which operate between municipalities and regions, will be eliminated within few years, regions will be kept; ii) the distinction, introduced by the Constitution, between the five regions with special status and the other fifteen will not be modified, though it is increasingly debatable why certain privileges should be maintained; iii) nor will the uniform institutional structure of regions be altered;

iv) only the division of legislative and administrative competence introduced by the reform of 2001 will be modified, in order to bring some of them back to the State, with specific regard to infrastructures, energy and electronic communications; v) likewise, the State is entrusted with the power to lay down general principles of administrative action, in order to ensure adequate constitutional protection to the administrative procedure act of 1990. While the last two choices are but a long overdue return to criteria which are shared by the major partners within the European Union, the least that can be said is that no serious attempt has been made to improve decision-making processes concerning the other policy areas. This is a gap, given that the main goal of reformers is to enhance the effectiveness of government action.

### *3. The Case for Reforming the Senate*

The goal of improving our system of governance is particularly evident, according to most commentators, in the other part of the constitutional bill. It seeks to achieve this goal by devising a structural solution to the problem of "symmetric" Bicameralism (this term is more appropriate that than the frequent characterization of our Bicameralism as "perfect"), that is to say that the two branches of Parliament have the same functions, though their electoral legitimacy is partially different because of the higher requisites of age provided for electing (and being elected as) a member of the Senate. It does so by redesigning the composition and the role of the Senate. Since this issue of the IJPL hosts several comments (those already mentioned, as well as those of Bifulco, Cerulli Irelli, and Vigevani), some in favor of this

reform and other more critical, what follows is not an attempt to synthetize their arguments. It is, rather, a quick analysis of some lines of reasoning that have emerged in the academic and political debates about the Constitution.

Basically, two arguments are used to affirm that the Italian Senate must be radically reformed, by reducing the number of its members and the scope and significance of its powers, particularly with regard to the choice of the heart of the executive branch, the President of the Council of ministers and his ministers. While some advocates of the reform simply emphasize, somewhat generically, the need to get rid with the contradictions and absurdities that we have inherited from our past, the main argument is a mixed one. On the one hand, it is argued that in 1947, after the fall of Fascism and the institutional referendum against the Crown, the majority of those who wrote the Italian Constitution agreed on the necessity to limit the power of the executive branch of government, and this is simply a fact, which cannot be contested. On the other hand, it is voicefully argued, first, that the system of checks and balances, including a "symmetric" Bicameralism, intolerably reduces the effectiveness and promptness of governmental action and, second, that we do not need anymore to be protected against the risk of an unbalanced constitution. The first part of the argument has some strength, because of the frequent lack of agreement between the two branches of Parliament. It can be said that they have all to gain by reaching agreement, that it is a part of the art of negotiation and compromise, and that this is what political parties are for. However, there is no provision ensuring that, at least in some cases, when the two branches cannot arrive at a common policy to govern a particular set of actions, one or the other branch will prevail and make the decision. Nor is it clear, since much of government policy is not initiative but response to events, and then policy must be made quickly, how the government of the day could have avoided to give response by way of decrees, though their increase is clearly not coherent with the division of responsibility between Government and Parliament established by the Constitution.

The second part of the argument – according to which we do not need to protected against the risk of an unbalanced

constitution – is, instead, a respectable opinion, but a questionable one, for the reasons that will be stated later.

A variant of the "we-do-not-need-it-anymore" argument about this part of our system of checks and balances is that the 'others' do not have it. It is, rightfully, observed that neither the House of Lords nor the French Senate have powers comparable to those of our Senate. It is added that in the whole European Union only few countries have an upper chamber (15 out of 28 do not have it and only five are directly elected by citizens) and, where it exists, it is not based on the assumption that bicameralism must be sysmmetric. From this argument based on the "nature of the things" it is inferred that there is no need to keep this sort of "Italian exceptionalism". Whether this inference is correct, however, it depends on the premises.

*4. The Case Against This Reform of the Senate*

Before turning to the specific measures that are being introduced to restructure our Bicameralism, we might briefly consider an issue of method. What is at issue is whether the law, in particular public law, is concerned with the order of things or, rather, with the order of meanings, which calls into question the thoughts about what public law should be and the interpretations of institutions and norms. The evaluative element in the work of analysts is, therefore, an essential component and should give enough weight to this issue of the IJPL.

A first problem with the argument based on the "nature of the things" is that, from the point of view of a balanced constitution, what really matters is not the number of the competences attributed to the upper chamber. It is, rather, whether and the extent to that the upper chamber fulfils its fundamental function of mitigating the excesses of passion and haste, as the Founders Fathers of the American Constitution wisely held. It should not be forgotten, moreover, that it was only after attenuating drastically, by way of the referendum of 1991 and 1993, the proportional character of our electoral system that the risk of the tyranny of the majority became evident. Whether such risk may be even greater in another institutional environment, where the executive is dominated by a strong central leadership (where ministers are not anymore appointed by

the President of the Republic), is an important question, which should not be neglected.

A second problem regards the technical expertise of the members of the Senate. While the House of Lords has shown its capacity and willingness, if not to check and curb the missteps of the executive branch of government, to monitor and report about them in order to provide the public with adequate and organized information, it is not clear whether a group of well-intended members, but who have been selected and elected to run a small local authority, will be adequately equipped to discuss about the implications of constitutional reforms or of the new policies of the European Union. There is the risk that many of those members would come to see the world much as the executive sees it. Nor is it clear how the new members of the Senate, chosen between the representatives of regional and local communities, will divide their work between the two institutional engagements and this is the kind of things for which it is trite wisdom, but still wisdom, that the devil lies in the details.

Third, while the preceding remaks raised some doubts about the main arguments used by the advocates of a "great reform", there is a more radical objection. It does not focus on the skills of the new reformers, compared with those of the drafters of the Constitution. It focuses, rather, on the idea, that is cultivated especially by some political scientists, that there is nothing too seriously wrong about a constitutional framework that a coherent set of institutional reforms would not cure. What underpins this idea, in contrast with the reflections of earlier constitutional thinkers who argued that political institutions were product of experience and had therefore been shaped by incremental changes, is the underlying assumption that institutional reforms are very similar to the work of an engineer, which can be carried out everywhere more or less in the same way. Whether this is the case, it is highly questionable. A certain institutional device, for example an upper chamber with a regional basis, that works well in Germany may hardly or never produce the same, or similar, results in Italy, because of the lack of a tradition according to which political parties are expected to reach agreement on the basis of reciprocity.