REFORMING THE CONSTITUTION: A DEBATE

THE "SECOND CHAMBER": A HISTORICAL AND COMPARATIVE SKETCH

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Abstract

The article focuses on the debate triggered by the proposal of reform of the senate in Italy. The author argues that such a debate has amounted largely to a missed opportunity as the core issue has been largely overlooked. What the reform is about, is a shift from a concept of representation revolving exclusively around the political will of the nation to a representation of territorial interests. This outlook is entirely new in the Italian constitutional landscape since 1945 but it can boast a long tradition within western constitutional thought. Starting with the American and French revolutions, it is easy to trace the origin of the struggle between two conflicting views of political representation. The former dismisses interests, whatever their source, as unworthy of being voiced as such, since only the nation in its unity deserves to speak on behalf of all its parts. The latter, without going so far as to challenge the primacy of the will of the people, still sets out the need for a representation liable to mirror the complexity of society. Local communities have always harbored a strong claim for a role within the compound of national legislation and the current crisis of political parties has supplied new steam to an old request. But how can we defuse the conflict looming between two chambers drawing their legitimacy from different sources? The answer is provided by the madisonian paradox. Second chambers can find their place in a contemporary constitution so long as they accept a subordinate role to the assembly embodying the principle of popular representation.

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TABLE OF CONTENTS

1. Rethinking the Representation

A missed opportunity. Sad as it is, we should acknowledge that so far the heated confrontation staged on the basis of the reform of the Italian Senate has been remarkable for the way it has avoided the real challenge: i.e. to introduce a new way of construing representation. What I am aiming at through this brief contribution is therefore to vindicate the profound meaning disguised under such a mundane and desultory debate. Let us start by stressing that the reform of the Senate is not simply about reducing public spending, nor is it a measure dictated by the sole requirements of functionality and rationality. Even though we might need a certain degree of imagination to be convinced, given the lack of doctrinal debate, we are witnessing a historic opportunity, whose roots date back very far in time. So far, in fact, that we have to return to the dawn of modern politics: not only to the revolutions of the late eighteenth century which gave birth to the concept of representation embodied in contemporary parliamentary assemblies, but even further, to the roots of the conceptual divide whose revival we are witnessing today in Italy. The representation of interests vs. the representation of a political will: along this boundary lies the heart of the matter.

"The representatives of the people's will", wrote Erich Kaufmann in the twenties, "are those individual persons who, as members of the people as a whole, have the ability to shape the previously unshaped people's will within themselves and to shape it in such a manner that the people feels and accepts it an expression of its own will"[1]. This description enshrines the

[1] Quoted in J. Jacobson, B. Schlink (ed.), *Weimar, A Jurisprudence of Crisis* (2000), 199.

deepest meaning of political representation, which was crystallised by Thomas Hobbes. The representative body does not imply the unity of the people, let alone its will: in itself, it creates unity through deliberation. The German language provides for an effective semantic distinction: *Vertretung*, when the deputy acts as a spokesman of the will of his principal: *Representation*, when the will is moulded irrespective of any previous mandate.

Once this new concept of representation stepped into modernity, the fate of the representation of interests seemed doomed for good. *Pour cause*, given that states and corporations did not mediate between interests and the law, or between society and authority, unconceivable as it was to draw a line between these poles, as obvious today as they were extraneous to the medieval mind. Indeed the old regime was wholly unaware that such poles would exist, since the private and public spheres were enmeshed deep inside the same institutions, which performed at the same time what we today call economic and state functions. To account for the functioning of representation in the past, resorting to our set of conceptual tools is a deeply flawed approach, since it neglects the absence of the basic assumptions needed to contrive the abstractions underpinning modern political thought. And abstractions they are indeed, flowing from three diaphanous figures: the individual, the nation (or the people), and the State. Otto Brunner, in his pivotal *Landschaft und Herrschaft* warned against the temptation of falling into anachronism. In Germany the estates were not the representatives of the territories: *they were the territories themselves*, taking part in the legislation[2].

At the beginning of this text I said that the representation of interests seemed doomed. Yet, and surprisingly, it has not dropped its claims. The resilience of the idea of the representation of interests has proved stunning. It is reasonable to surmise that its energy stems from an instinctive reaction to the all too radical drifting of parliament from its ancient moorings, hastily abandoned to follow a route shrouded in ambiguity. For all the fascination that radiates from modern constitutionalism, we should be fair enough to admit that the ideology of the nation is somehow a frail foundation for a representation capable of inspiring true confidence. Therefore the second chamber has

[2] O. Brunner, *Terra e potere* (1983), 603.

regained from time to time the place it deserved as an answer to the claim that the only legitimate political deliberation was that conveyed by the myth of the will of the people: *la loi expression de la volonté générale*.

2. The American Revolution

The challenge that the American Revolution faced in terms of representation was daunting.

Firstly, it had to justify its disavowal of the British idea of representation, which had been voiced in the celebrated words of Edmund Burke. During the eighteenth century, the British parliament rested on the assumption that representation did not imply general suffrage at all. Its legitimacy was based on the identity of interests and views between deputies and constituencies. An identity which was presumed but not checked through a close scrutiny of the people, discarded as an intrusion of factions and of the "mob". This was the idea of virtual representation. "Parliament", argued Burke, "is a deliberative assembly of one nation, with one interest, that of the whole, where it is not the local purposes, nor local prejudices that ought to guide, but the general good, resulting from the general reason of the whole"[3]. The American settlers did not share this view, which on the one hand they associated with the fight they had waged against the despotic British parliament, a body they had not elected, and on the other contradicted their experience of a representation close to the interests of the electors, to such an extent that instructions addressed by the constituencies to representatives where commonplace in state assemblies. Therefore representation had to be a faithful mirror of the interests and will of the people, guaranteed through frequent elections.

Secondly, the American founding fathers deeply distrusted parliamentary assemblies, which could easily turn into despots, eager to take advantage of their power to crush citizens' rights. "A single assembly", wrote John Adams, "is liable to all the vices, follies, and frailties of an individual- subject to fits of humour,

[3] Quoted by B. Baylin, *The Ideological Origins of the American Revolution* (1992), 163.

transport of passion, partialities of prejudice"[4]. But checking the power of representation without undermining democracy was no easy task. The British model of mixed government was of no avail, since it hinged upon a social differentiation, between aristocracy, monarchy and the commons, that Americans flatly rejected. Hence the choice of a second chamber called to moderate the other, without rooting its legitimacy in different qualifications of wealth and instructions.

Thirdly. Federalism was a challenge to the most widespread and embedded ideas about government. Something the founding fathers were deeply aware of.

The creation of the U.S. Senate is generally associated with two sovereignties: that of the nation and that of the state. A division of sovereignty? Impossible, declared Madison. An *imperium in imperio* would be a solecism: sovereignty cannot be divided. But if this is the axiom, how can states and federations be reconciled? The answer lies in the people: the holder of sovereignty is the American people. The principle of legitimacy lies in an abstract entity: the people as a whole; not the peoples of the individual states. States and federations are two systems which draw legitimacy from the same source: the people. But if the federal senate is a fully fledged national body, bestowed with powers ranging from diplomacy to appointments, its mission to protect parochial interests must be accidental, not ontological. Showing great insight, Madison understood from an early stage the inconsistency of the claim of States to represent the interests of their citizens better than a truly national institution. On the contrary, he countered, a Senate wholly emancipated from the oversight of the states, being directly elected by the citizens, would indeed voice the interest of the people far better than if it was built as a *longa manus* of local legislators. Madison observed that the people whose interests the states professed to interpret in no way constituted a homogeneous entity. Each state embraced within it a population internally divided by various opposing interests. No state could reasonably claim to speak on behalf of the interests of all its citizens. Madison therefore justified the claim that the federal institutions could represent, and act *directly* on the

[4] Quoted by M.W. Kruman, *Between Authority and Liberty. State Constitution Making in Revolutionary America* (1997), 144.

citizens of the republic because there was no diaphragm, no intermediate body which could claim to embody higher democratic legitimacy. The distinction was drawn between competences - national and state - and not between institutions, both springing from the same source: the sovereignty of the people. Thanks to this sophisticated analysis of the sociological reality of a complex society, Madison dismissed the typically mediaeval idea that the body - in this case the states - represented the parts. At least in America there was no room for an organic understanding of representation.

If Madison's proposal for a senate elected directly by the citizens was rejected, the reason lay elsewhere. There were two grounds for the concern of the small states about being overwhelmed by a majority of large states: a psychological one, i.e., the fear that the small have of the large; and a second, more concrete one, namely the issue of slavery, that was a matter for passionate debate. What other great interest if not slavery could distinguish the citizen of one state from that of another? The compromise reached was that of two senators for each state, elected by the legislative assemblies. In addition, the Senate was only able to amend the proposals submitted by the House of Representatives, directly elected in proportion to the population. But if the standpoint of the small states had prevailed, there could certainly be no room left for the two inconsistencies that we find in the Constitution of 1787. The first is the prohibition of the imperative mandate: Senators are not bound by any instructions concerning the vote. A big result, considering the concerns of small states about the temptation of larger states to exploit their greater power to the prejudice of the smaller. The second is the emoluments of the senators which were to be paid from the national treasury rather than from the budgets of the individual states. All in all, the compromise appeared somewhat ambiguous: on the one hand, the senate maintained a relationship with the individual states, but on the other, there existed conditions able to ensure that it would become the most influential national institution[5]. The first advantage the Senate could boast over the House of Representatives lay in its composition, given that in terms of duration and quality, the Senate presented itself as the

[5] J.N. Rakove, *Original Meanings* (1996), 171.

American aristocratic chamber, in contrast with the chaotic and plebeian House of Representatives that was renewed every two years. Even more so if we take into account the competences: the Senate took upon itself the most delicate tasks regarding the nation, such as diplomacy and war. Finally, to close the case, one more telling point is worth quoting. No-one at the Philadelphia Convention ever questioned the fact that the Federation could modify the boundaries of the states, which, if they were true sovereign entities, would hardly be conceivable.

Of course such a new and complex compromise could only lead to dissention. It did not take long before the crisis erupted. The "nullification" debate during the 1830s was triggered by southern states protesting against a commercial tariff which favoured the north and damaged the south. John Calhoun, the spokesman for the south, stated bluntly that when the national government exceeded its powers, the states were entitled to set aside the federal laws, reaffirming their sovereignty on behalf of their citizens[6].

Twenty years later, in 1850, Calhoun took the floor in Congress to ask for a sectional veto which could avert civil war granting the states of the South the right to foreclose any bill jeopardising slavery[7]. Given that the citizens of the South and the North did not share common values and interests, it was fanciful to hope that a compromise could overcome the looming squall. His proposal was rejected in favour of a laborious compromise (devised by Henry Clay) which did not, however, avert civil war ten years later. Understandably. The fiction of a unitary "people of the United States", so cherished by Madison, crumbled before the divide on slavery. The fate of the federation was sealed.

3. The French Revolution

In 1789 the French Constituent Assembly started from the same premise as the American revolutionaries - the sovereign people – but ended harbouring much more radical tenets. One nation, one law, and therefore one representation. There was no

[6] F. McDonald, *States Rights and the Union, 1776-1876* (2000).
[7] E.J. McManus, T. Helfman, *Liberty and Union. A Constitutional History of the United States* (2014), 175.

reason for a second chamber. The monism of the 'general will' left no room for a joining of interests. Interests? In eighteenth century France, the term was seen in the same negative light as 'factions': a slander! The task of representation was to display the mystical body of the nation, whose will and interest were one and indivisible. Dissent was nothing but selfish particularism, to be suppressed. The territories lost their individuality, and were reduced to being numbers marking anonymous constituencies. To elect was not to express a bias, but only to select the most suitable individuals[8].

It is true that after Thermidor, the Revolution tried to redeem itself from the excesses of the tyranny of the legislative assembly. The Constitution of 1795 (*de l 'an III*) provided for two chambers: the *Conseil of 500*, and the *Council of the Anciens*. The first had the task of proposing bills, while the second was entrusted with approving them. A disavowal of the principles of the Revolution? Far from it. As Pierre Avril has noted, it amounted only to a technical division inside the parliament, envisaged in order to rein in the "factions" which, as the Jacobin dictatorship had proved, could sway the whole assembly[9]. It was not a bicameral system, but a unitary assembly whose functions were allotted to different sections.

4. Taming the beast: Second Chambers and popular will

It comes as no surprise that after 1814, the whole of Western political thought focused on one single mission: to become free of the legacy of the revolutions. I say revolutions in the plural because the American revolution was viewed in no better a light than the French one. The disastrous war of secession, preceded by half a century of tension between the states and the Federation, had done away with any prestige that the American system might have enjoyed in the eyes of the Europeans (notwithstanding Tocqueville). As for the French Revolution, its abstract conception of representation had spawned the monster of

[8] P. Rosanvallon, *La société des égaux* (2011), 60.
[9] P. Avril, *Le "bicameralisme" de l'an III*, in *La Constituion de l'an III ou l'ordre republicain* (1996), 184.

the Jacobin dictatorship, redeeming, to the mind of many, the mediaeval institutions such as the corporations.

From the standpoint of representation, the XIX century was ridden with contradictions.

On one hand, liberals were struggling to reconcile the rise of democracy with individual rights – most of the time unsuccessfully. In this context the second chamber, aristocratic and even hereditary, turned out to be more a hindrance than a solution. Enough evidence of the strain to which the counterweight of aristocratic chambers subjected the constitution is provided by British history. Dismaying as it may seem, the stubborn resistance of the House of Lords to the electoral reform of 1832 almost dragged the country to the brink of a civil war. It is almost needless to say that in the chapter devoted to second chambers of his *Considerations on representative government*[10], Stuart Mill discarded the idea of relying on the House of Lords as a rampart against popular democracy as ludicrous. His dream of an upper house composed of the most talented of the nation had to wait well into the XX century to see its fulfilment. In the meantime, the decline of the House of Lords went on unabated, reaching its climax in 1911. The fatal blow was dealt by Lloyd George's *people's budget* that hit out at the House of Lords as an active political force, excluding it from ballots on money bills. It is all the more significant that Edward VII sided without the least hesitation with the government, resorting to the well-tested menace of creating dozens of new peers.

On the other side, Catholics and conservatives blamed liberalism for destroying the social bonds and the natural hierarchies which had once contributed to holding the subjects together. *C'est la faute à Voltaire, c'est la faute à Rousseau*! They strived to rebuild a link between state and society starting from the revival of the corporations, which the ideology of contract and a roughly liberal economy had wiped out. An influential current of thought involved catholic reformers such as von Ketteler, an outspoken advocate of corporations and guilds. But even a sociologist far from Christian social doctrine like Durkheim did not refrain from upholding the resurrection of a bond of solidarity

[10] J. Stuart Mill, *Considerazioni sul governo rappresentativo* (1997), 180-188.

within the division of social labour[11]. An unlikely pair, Ketteler and Durkheim, united in the idea of restoring an if not faithful, then at least useful representation, at the same time creating the premises for a dialogue between employers and workers. A debate which did not confine itself within the boundaries of theory. At the forefront was the reform of the Belgian Senate, an unsuccessful albeit popular attempt to transform it into a chamber of corporations[12]. Unfortunately we know all too well that the link between the corporate idea and representation proved fatal. Espoused with enthusiasm by Fascist and reactionary political culture, it failed to come unscathed through the Second World War.

Still, the need to sever the dangerous link between abstract representation and democracy inherited from the French Revolution continued to inspire new proposals.

The most successful and durable may be found in France. Shocked by the *Commune de Paris*, the French bourgeoisie was distrustful enough of democracy to exact a powerful pledge from republicans like Gambetta. If there had to be a republic, the condition submitted to its champions was to balance universal suffrage with a second chamber garrisoned by the provincial *notables*. The Senate of the Third French Republic was the price paid by the republicans for obtaining royalist consent to the new regime[13]. As an assembly of notables, made up of members elected by local administrators, it performed the task of keeping the democratic assembly chamber at bay. Given the absolute dominance of rural municipalities among the 36,000 French *communes*, the conservative majority was secured.

The French case was all the more significant because the political landscape in Europe witnessed a steady shift toward the hegemony of the first chamber, whose higher legitimacy seemed to be beyond defiance. Even the German *Bundesrat*, the strongest of the European second chambers, came under heavy fire when the call for parliamentary democracy rallied the powerful force of social democracy.

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[11] P. Costa, *Civitas* (2001), 119.
[12] P. Rosanvallon, *Le peuple introuvable* (1998), 151.
[13] M. Morabito, D. Bourmaud, *Histoire constitutionnelle de la France* (1996), 276.

5. Second Chambers after 1945

Setting aside the corporate option, relegated to marginal instances such as Salazar's Portugal, second chambers had to seek new legitimacy after 1945.

Since the debate ignited by the Weimar crisis, it was clear enough that second chambers could do little or nothing to support democracy. In the twenties, German jurists focussed on the conditions of a viable parliamentary democracy, either stressing the need to strengthen proportional elections, or seeking a radical alternative to parliamentary representation.

Whatever the side, the role entrusted to political parties, the new masters of democratic assent, remained unchallenged in a framework where universal suffrage was the dominant issue. Irrespective of their bias to right or left, jurists acknowledged the power of the parties as the *deus ex machina* of a constitution whose essence could no longer be sought in the ailing state.

Accordingly, it was on the parties that democracies after 1945 laid their stakes. Summoned to mediate between society and the State, the party tolerated no competitors. The party alone would ensure that contentious claims turned into a compromise and, ultimately, into legislation. Even trade unions were relegated to a lower rank, the realm of conflict that only political parties mastered the skills to handle, commanding the loyalty of the people and at the same time dominating the institutions. Gaspare Ambrosini as early as in 1921 made clear that only political parties, unlike trade unions, could play the role of producing harmony out of chaos[14].

But if this was to be the scenario, what place could be left for second chambers? If the party was the sole interpreter of the popular will, did it make sense to articulate political representation? The answer was a resounding no, except the limited exceptions of a genuine federal system, even if after War World II the partition between regional systems and truly federal ones would become much less clear than in the past.

Still, as a matter of fact, the only available tool to revive a role for second chambers was to establish their connection with the territory. But how?

[14] M. Gregorio, *Parte totale. Le dottrine costituzionali del diritto politico in Italia tra Otto e Novecento* (2014), 98.

In Joseph Kaiser's classic book devoted to the representation of organised interests, territories were neglected among the archetypes studied[15]. The reason for this exclusion is twofold. On the one hand, territorial interests are mediated by political parties and thus lose their corporate identity, while on the other, local authorities are elected and are therefore, by definition, political.

Nonetheless, such an exclusion is wrong.

Of course, if we consider the representation of organized interests as corporate, this phenomenon is not liable to be reproduced within the modern context[16]. It is unthinkable that a senator can represent Florence, Arezzo and Siena as if they were mediaeval *universitates*. But this sounds like a puerile objection. The point is not to replicate in the twenty-first century archaic forms of corporate subjectivity, in which the representative is the delegate of an organic body. No-one in their right mind could imagine reviving the fable of Menenius Agrippa or finding in St. Thomas the inspiration for the reconstruction of organic units. Nor does Gierke offer any inspiration, given the loss of prestige suffered by organic thought during the Thirties, and its lack of touch with post-modern societies. The core of the problem lies elsewhere. Nobody questions the fact that a democratic chamber should continue to represent the people as a single unit. Unity is a condition that does not pre-exist at the time of the ballot, but which is created by it: the people are an imagined community that acquire visible, even tangible features within the parliamentary ritual. Nor can it be doubted that in this context political parties carry out the function of settling the conflicts and creating a space of deliberation, even if with less effectiveness than in the past. The question is whether room may be left for a form of representation proceeding from different assumptions: not the nation, but the communities, given that local identities may supply a bond that, if not stronger, is at least equal to the national one. Citizenship appears today a multifarious concept, linking the individual to different legal orders (European and national at least), and vesting him with rights and powers which entail the need for representation. Local communities, which are at the forefront in

[15] J.H. Kaiser, *La rappresentanza degli interessi organizzati* (1993).

[16] B. Accarino, *Rappresentanza* (1999), 89.

asserting rights and performing duties, are entitled to put forward the request to have their voice heard on the national stage of legislation. Consistently, the role of the member of parliament or representative is bound to change within the compound of the representation of local interests. He is no longer the one who speaks on behalf of the nation without mandate; but a representative who is not ashamed to voice the standpoint of his community: he stands for the particular, not the general.

6. Germany and France: between tradition and innovation

The efforts pursued to link regionalism and representation have mostly resulted in a huge disappointment. Of particular note is the less than brilliant performance of the Spanish second chamber, a case that merits study in order to take note of the blunders rather than the virtues of constitutional engineering.

The most effective form of representation alternative to the nation/mystical body model is embodied by the German *Bundesrat*. It is not an *Ancien Régime* kind of chamber, but neither is it a modern parliament. Indeed, there is doubt among scholars as to whether it is indeed a true parliament: the majority would maintain that it is not[17]. The German constitutional jurisprudence in the famous Brandenburg case clarified that the vote must be expressed per delegation, and not per head (106 BVerfGE 310). This is not, strictly speaking, an imperative mandate, but it comes fairly close to it, if we remember that it is coupled with the recall of the delegation, which can be changed at once. Is there a representation of interests? Most certainly. Inherited from the Constitution of 1871, and later that of 1919, this representation has less to do with conflicting sovereignties than with allowing local voices to be heard and weighed. It is no coincidence that the representative task is entrusted to the executive branch of the *Laender*, which are the heavyweights within local government.

Of course, political party allegiance does matter.

The interference of the party membership of the delegates from time to time turns the *Bundesrat* into a forum for the

[17] F. Palermo, *Il Bundesrat in Germania e Austria. Tra esigenze di riassetto e maquillage istituzionale,* in S. Bonfiglio (ed.), *Composizione e funzioni delle seconde camere. Un'analisi comparativa* (2008), 89.

opposition, hindering the smoothness of legislative deliberation and jeopardising the mission of the body as a chamber for the territories and not for party politics. Still the very awareness that thanks to the *Bundesrat* "the Prime Ministers of the *Laender* are today the most important actors next to the federal Chancellor within the framework of the state as well as of the political parties" [18] discloses something very important about the way legislation and political process are conducted in Germany. The negotiation between local interests, biased as they may be by party strategies, and national bodies hints that the legislation bears the mark of a legitimacy unlike what could be expressed by the people as a whole.

In countries that have no federalist tradition, the concurrence between representation of the whole and the representation of local communities is even more interesting, being less obvious. The constitution of the Fifth French Republic states that the Senate ensures the representation of the *collectivités territoriales*[19]. How is it possible to reconcile this expression of interests with the Rousseauian unity and indivisibility of the Republic? The answer is that the local autonomous areas, being an integral part of the nation, have a distinct, but not antithetical voice. If anything, the problem should be sought in the identity of local authorities. If, during the nineteenth century, one could still argue that local communities were natural communities, it is very difficult to hold the same belief with regard to a great metropolis. But we could use the same argument even for political parties which, compared to half a century ago, are now very weak mediators between society and the State (not to mention the trade unions).

7. *Outlook*

It is from the dialogue between local and national, as well as from the appointment of representatives, not seen as priests of the mystical body of the nation, but as spokesmen for local interests - as mayors, governors, regional councillors - that a

[18] W. Heun, *The Constitution of Germany* (2011), 71.
[19] J.P. Duprat, *Représentation territoriale et modération politique: le Sénat francais*, 6 Revue internationale de politique comparée 98 (1999).

project to give new life to representation can begin[20]. In a chamber whose members are selected by the local authorities – regions and local governments - it could be possible to form majorities and trends different from those dictated by purely political/partisan considerations familiar to the traditional political representation. The investiture of representatives, who must be local legislators or administrators, is instrumental in the shaping of a legislative deliberation more pluralistic and concrete than the one political parties have made us accustomed to. A secret to achieve this result is to stand by the "Madisonian paradox": the second chambers which perform their tasks best as representatives of local interests are those vested with limited powers; whereas those which are endowed with ample powers will sooner or later turn into a national parliament, losing sight of and eventually betraying their original commission[21].

[20] J.A. Mazeres, *Les collectivités locales et la représentation*, 3 Revue de droit public et de la science politique 638 (1990).
[21] P. Martino, *Seconde camere e rappresentanza politica* (2009), 187.