THE REFORM OF ITALIAN BICAMERALISM: CURRENT ISSUES

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Abstract

There are two basic institutional choices at the basis of the new architecture elaborated by the Italian Government and recently approved by the Senate. First, the Senate itself would be radically transformed with regard to its composition, functions and powers. Second, the division of legislative competence between the State and Regions would be altered in favor of the former. For different reasons, after years of debate, both parts of the constitutional framework are likely to be significantly changed. Unless the constitutional bill is modified, the author concludes the first change may not simply redefine bicameralism.

TABLE OF CONTENTS

1. A preliminary question: keeping bicameralism or abandoning it?

For a number of decades, attempts to reform Italian bicameralism have been on the agenda of political parties as well as of constitutional scholars. In some cases the process of amending the Constitution on this point even reached the threshold of parliamentary approval, but with no success at all thus far. The issue of keeping bicameralism or translating to

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unicameralism has deep roots dating back to the very dawn of our republican history: the echoes of the debates over having two legislative chambers at the Constituent Assembly had yet to fade when one of the most prominent Italian constitutional scholars, Costantino Mortati, and other leading scholars were calling for reforming it. More than 60 years later the entry into force of the Italian Constitution that issue is still open.

The last significant effort to change the constitutional rule that grants legislative powers to two legislative chambers with no distinct membership, has been made under the pressure of the current President of the Republic. On June 11, 2013 Giorgio Napolitano appointed the Commission for constitutional reform with the function of supporting the Government in designing the changes of the pillars of the constitutional framework. They included the form of government, the electoral law, the relationship between the State and the regions, and the structure of Parliament[1]. The Commission began its proceedings from the latter issue - the least disputed of those to be discussed - and produced a set of proposals. One of such proposals was radical: it consisted in adopting a unicameral model so that it would have been possible to easily reduce the number of members of Parliament and to cut down the related costs; to avoid the problem of choosing which Chamber is to be conferred the power to grant a vote of confidence to the Government; to leave unchanged the regulations on voting and standing as candidate (while, of course, amending the electoral law), as would those regarding functions[2].

[1] The Commission, made up of about 40 experts, mostly but not entirely in constitutional law, concluded its proceedings in early September 2013, and put out its final report at that time. The proceedings and results of the Commission were published in the volume *Per una democrazia migliore, Relazione Finale e Documentazione*, Presidenza del Consiglio dei Ministri (2013). It must be borne in mind that the Commission produced no draft bill, but, coherently with its mandate, went no further than to merely outline a variety of possible solutions to the constitutional problems under discussion - solutions deemed impossible to put off any longer. In this way, the different political and cultural tendencies of the members of the Commission emerged entirely and became manifest in the final report (*Relazione Finale*) and its accompanying documents, with full respect for pluralism of opinions and for individual choices.

[2] The unicameral option and the reasons for it are set out in the Commission's *Relazione finale* cited here. See *Per una democrazia migliore, Relazione Finale e Documentazione*, cit., 34. Unicameral systems were adopted by some of the

However, the new government led by Matteo Renzi did not follow this path. Rather, it opted in favour of a new form of bicameralism with the two chambers having different roles and powers[3]. Such a decision could take advantage of the opinion, widespread scholars, according to which opting for transforming the second Chamber into a *Senate of Autonomies* would be consistent with a highly decentralized government as that which Italy should have according to the Constitution[4]. The draft constitutional Bill no. 1429 intends to transform the Senate into a Chamber elected not by the people but by the representatives in the regional and local governments. No one can say if there will be enough political commitment to the governmental proposal to amend the Constitution in this way. Since Senators are reluctant to vote themselves out of office, in the current Italian Senate there are several members, cutting across party lines, who keep fighting for keeping a directly elective Senate. And this obviously would

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European Countries precisely for the reasons pointed out in the text. See, e.g. Denmark (1953), Sweden (1975), Greece (1975) and Portugal (1976)

[3] There are at least two reasons that justify opting to reform (and not abolish) the second Chamber and to transform it into a body aimed at supporting the regional interest at the central level: it is *consistent* with our form of highly decentralized State as designed by the Constitution, and is also the most *necessary* for completing this form. Indeed, in the almost unanimous opinion of the legal scholarship, there is a two-way relationship between the federal/regional/highly decentralized form of state and the second national Chamber with territorial representation, a relationship that makes the latter necessary for the former and the former complete only in the presence of the latter. The United States remains the primal example of this. As has been pointed out, "all the motivations that in the past led to forming bicameral Parliaments now appear outmoded or weakened, except for that brought by the makers of the American Constitution in 1787, who were first to deal with the problem of giving shape to the parliamentary institution in creating a federal state": V. Lippolis, *Il bicameralismo e la singolarità del caso italiano*, in 1 Rass. Par. 33 (2012). Similarly, L. Paladin, *Tipologia e fondamenti giustificativi del bicameralismo*, in Quad. Cost. 220 (1984).

[4] This is the term chosen by *bill no. 1429* among the many proposed in the past (Chamber of the Regions, Senate of the Regions, Federal Senate, etc…). This bill (*Measures for overcoming bicameralism with both chambers having the same role and power, reducing the number of Members of Parliament and their costs, suppressing the National Council for Economics and Labour (CNEL) and revising Title V of Part II of the Constitution)* has been presented by the government to the Senate on 8 April 2014 and sent for consultation to the *First Standing Committee (constitutional affairs)* where it is still being debated.

accentuate the political dimension of the second Chamber, to the detriment of a configuration more sensitive to the needs and interests of the territories[5].

This paper describes in details two aspects of the bill currently under the examination by the Parliament. First, some insight will be provided with regard to the part of the governmental bill which aims at reforming the section (Title V, Part II) of the Constitution which governs the relationship between the State, Regions, and local authorities. The reason is that there is a strong link between the constitutional "federal" design and the functions of the second Chamber. Second, the functions and the structure of the new Senate will be illustrated and compared with the different models for second (federal) chambers which characterize modern democracies.

2. Bicameralism and regional legislative powers

Since, as remarked above, the process to reform the Italian Parliament is setting out to transform the Senate into a regional chamber, it is worth noting that there is a strong link between the recentralisation of areas of legislative competence (which is one of the contents of bill no. 1429) and the powers to be conferred to the new chamber[6]; in other words, if the constitutional amendments under discussion aim at giving to Regions a role in the framework of the national institutions through the second parliamentary chamber, this is the logical (and institutional) consequence of (and

[5] A recent argument against the politicization of the second Chamber and in favour of accentuating its technical dimension by lengthening its legislatures and putting in place severe requirements for standing for election was made by G. Zagrebelsky, *Riforme e pregiudizio*, in *La Repubblica*, 17 May 2014, 1. An element that would help configure the regions' representations in a partially non-political way would be abolishing the prohibition against imperative mandate (not provided for in bill no. 1429).

[6] M. Scudiero, *Prefazione*, in Id. (ed.), *Le autonomie al centro* (2007), XI – XII. Bill no. 1429 establishes that the Senate may pronounce itself on all the laws decided upon by the Chamber, if one third of its membership so demands. For certain matters, the Chamber then has the final word, if voting by *simple* majority ; for the laws that affect the Regions and local authorities, in order to have the final word against the Senate's proposals, the Chamber must cast a vote by *absolute* majority.

redress for) the sharp reductions of the legislative powers of the local authorities in favour of the national government.

There is general agreement on the proposal of eliminating the list of concurrent legislative competences between State and Regions, which has been present since the Constitution entered force in 1948, and which was substantially increased by the constitutional amendments enacted in 2001. The controversial choice made with regard to several policy fields included in that list (such as those concerning the production of energy or nationwide transportation) have triggered a strong activism by the Constitutional Court in interpreting the constitutional written provision in favour of the central government. As a result, central institutions can exercise their legislative powers in a number of fields that are not listed in the Constitution; moreover, in order to restore a balance between the State and Regions, the Court's case law has quite often decided to subject the exercise of the national legislative powers to an agreement with the Regions to be negotiated within the framework of the so-called State-Region Committee, composed of representatives of the central and regional Executives[7].

The twofold step designed by the draft constitutional bill - more legislative powers to central government accompanied by a new role for the Regions in the second Chamber - thus seems useful for correcting the inefficient implementation of the present constitutional provisions occurred over the past thirteen years. During those years, on the one hand the Constitutional Court easily extended the scope of State legislation in cases in which national Parliament had to define by law the principles that should govern the exercise of regional powers in matters of concurrent competence; due to the difficulties of drawing a sharp line between *principles* (entrusted to the national government) and *details* (entrusted to regional legislation), the Court tended to rule in favour of the national government when Regions appealed over a breach of their field of action. On the other hand, the Regions, acting under an undefined set of competences, very often tried to enact legislation in different fields hoping to escape the control of the Government and of the Court; since this rarely occurred,

[7] For an effective argument on the point, S. Mangiameli, *Il Senato federale nella prospettiva italiana*, in www.issirfa.cnr.it 7 (2010).

regional legislation was mainly struck down after the fairly long and costly process of constitutional adjudication, with a disruptive effect on the political and administrative activity of the Regions. Not to speak of the constitutional requirement of the agreement between the two parties, added in most cases by the Court's case law, which compelled them to face long, exhausting and often unsuccessful negotiations.

All these developments justify the purpose of abolishing the concurrent areas of competence in favour of two lists of mutually exclusive powers[8], and of introducing a clause allowing

[8] The list of the exclusive legislative powers entrusted to the national Parliament is extremely long and detailed. It includes: a) foreign policy and international relations of the State; relations with the European Union; right of asylum and legal status of non-EU citizens; b) immigration; c) relations between the Republic and religious groups; d) defence and army; State security; e) currency, savings protection and financial markets; competition; international trade; State taxation and accounting systems; harmonization of public budgetary laws; coordination of public finance and the tax system; equalization of financial resources; f) State agencies and relevant electoral laws; state referenda; elections to the European Parliament; g) legal and administrative organization of the State and of national public agencies; general regulations on the administrative procedure and on the regulation of public employmenth) public order and security, with the exception of local administrative police; i) citizenship, civil status and register offices; l) jurisdiction and procedural law; civil and criminal law; administrative judicial system; m) determination of the basic levels of benefits related to civil and social rights to be guaranteed throughout the national territory; general norms for the protection of health and food safety, and occupational protection and safety; n) general provisions on education; the school system; university education, strategic programming of scientific and technological research; o) social security, including complementary and supplementary social security; p) legal system, government bodies, electoral legislation and fundamental functions of the Municipalities, including their forms of association, and of the metropolitan cities; legal system of authorities over large area; q) customs, protection of national borders and international prophylaxis; foreign trade; r) weights and measures, standard time; statistical and computerized coordination of the data in state, regional, and local administration; intellectual property; s) environment, ecosystem, cultural and scenic assets; general norms on cultural activities, tourism, and on the sport system; t) legal system of intellectual professions and of communication; u) general norms on the government of the territory; national system and coordination of civil protection; v) national energy production, transport and distribution; z) strategic infrastructures and large transport and navigation networks of national interest, and related safety regulations; civil airports and ports of national and international interest.

the national government to enact legislation under certain circumstances, such as the protection of national interests and economic reforms - thus entrusting the central government with a virtual complete monopoly over the legislative process[9], in which regions participate through the second Chamber.

3. The functions of the second Chamber

The constitutional bill under discussion entrusts to the new Senate powers in matters involving the relationship between State and Regions, as well as some broader tasks such as the voting of constitutional laws[10], the power to make legislative proposals in every matters and the possibility to propose amendments to all the laws approved by the first Chamber at the request of one third of the Senators. Nonetheless, the ability of the first Chamber to decide definitively on the bill with voting by simple majority will not be impaired; when dealing with regional and local issues, in order to overcome the Senate proposal, the absolute majority of the first Chamber is required.

The Senate should also continue to take part in the election of the members of the Superior Council of the Judiciary, of the Judges of the Constitutional Court, and in the election and

[9] According to the draft constitutional bill, Regions will exercise legislative powers in matters "not expressly reserved for the exclusive legislation of the State, with particular reference to planning and to the infrastructure of the regional territory, and to mobility within it, to regional-level organization of services to enterprises, of social and healthcare services and of school services, as well as professional training and education". This provision is strongly impaired by the following rule that states: "At the Government's proposal, the State's law may intervene in matters or functions reserved for the exclusive legislation when so required by the protection of the juridical or economic unity of the Republic, or necessitated by the development of economic and social reforms or of programmes of national interest".

[10] According to the Commission for constitutional reforms, the list of the so-called *bicameral laws* should have been far longer. The list included, in addition to the electoral laws, the laws ratifying international treaties, the laws of legislative delegation, those regarding the prerogatives and functions of the constitutional bodies, the conversion into law of decree laws, and the approval of the budgets. See the Bill submitted to the Chamber of Deputies in the sixteenth legislature, A.C. no. 5386); a similar proposal had been made in 2007, during the fifteenth legislature (A.C. no. 553 - the so-called "Violante draft").

impeachment of the President of the Republic. Although it performs relevant functions touching upon the national institutions and not only upon regional areas of interest, there is substantial agreement as to excluding the second Chamber from the vote of confidence to the Government. It should granted to it a series of monitoring powers for assessing the impact of national and regional policies; in the exercise of the latter functions, it should replace the Italian Economic and Labour Council (*Consiglio Nazionale dell'Economia e del Lavoro* - CNEL), which the draft constitutional bill abolishes as it is deemed to be too costly and inefficient.

Finally, it is worth clarifying that the differentiation of the roles of the two Chambers, which is being introduced by the draft constitutional bill, involves the status of their members as well. Only the members of the Chamber of Deputies will enjoy immunity and allowances, while the office of senator will be of an honorary nature.

4. The institutional design of the second Chamber

If the primary objective of a second Chamber is to foster participation at the centre by Regions and local authorities, an important (and highly disputed) feature of the new attempt to reform the Italian Constitution deals with the election of its members, i.e. who can be elected and by whom. The comparative landscape offers a variety of solutions for this problem. Such solutions can be summed up in two major models: the pure one, that leads to an homogeneous composition of the Chamber (Germany's *Bundesrat*, Austria's *Bundesrat*, and the United States Senate[11],) and the hybrid one, which aims at creating several set of members, each one representing the different components of the territorial organisation through different rules to vote and stand for election.

The *pure* models hold within them a number of varieties, given that the two forms of Bundesrat are elected indirectly (by the *Länder*'s executives in Germany and by the state legislatures in Austria) and with a proportional representation of the federated entities whereas the United States Senate is elected directly and

[11] R. Bifulco, *Ordinamenti federali comparati* (2010), 122.

the different States have equal representation (two Senators per State)[12].

The American model does not appear to be suitable for a new Italian Senate, as it is set within a dual federal system not comparable with our highly intertwined system of relations between the State and the autonomous bodies. The Austrian one, based upon the indirect designation of its members by the *Landtage* – the legislative assemblies of the *Länder* – and with members chosen from outside this body, does not appear to be suitable for Italy as well: according to some legal scholars, national political parties strongly influence the composition of such second Chamber and tend to suffocate the emergence of territorial and institutional interests, which end up being substantially the same as those expressed in the elective Chamber. The limits shown by the Austrian system caution against adopting a similar solution - without appropriate adjustments - in a system like that of Italy, which is characterized by a high degree of party conflict. It would be likely to neutralize the regional nature of the new Senate.

The German *Bundesrat* has been considered a proper and efficient example for reforming the Italian bicameralism[13]. The proposal for Italy to adopt the *Bundesrat* model - in which the second federal Chamber is composed by local executives, with the two corollaries of imperative mandate and of en bloc voting by each delegation[14] - is not a new one. However, one may fully share

[12] In the American model, the link between bicameralism and form of government clearly emerges. As Mangiameli points out, "on this point, the original history of the American Senate appears significant, in which the generalized acceptance (at the federal and state levels) of Presidentialism was followed by entrusting entirely to the state legislatures election of the two Senators representing the state": S. Mangiameli, *Il Senato federale nella prospettiva italiana*, cit., 3.

[13] A. D'Atena, *Un senato "federale". A proposito di una recente proposta parlamentare,* in 1 Rass. Par. 245 (2008).

[14] If this model were to be adopted, the members of the Italian Senate should be the expression of the regional executives (certainly the Presidents of regions and other members belonging to the Regional Governments that appoint and revoke them). In this model, the members representing each Region should be able to express their votes en bloc, and the votes should be weighted based on each Region's population. This solution had in the past been advanced by G. Bognetti in *Gruppo di Milano*, *Verso una nuova costituzione* (1983).

the criticism raised by Stelio Mangiameli[15], who pointed out how this model can work only if at local level a parliamentary form of government has been adopted. Since Italian regional governments are directly elected and have dominance over the institutional framework, limiting the participation in the second Chamber to members of the executives would cause a further decrease of the functions – already dampened by the 1999/2001 constitutional reform – of regional lawmakers.

All these reasons seem to discourage the adoption of a pure model like the above mentioned ones and suggest to opt for a Senate characterised by a mixed composition: it should encompass both the Presidents of the Regions and regional ministers under obligation to vote en bloc, and representatives of the local legislative Assemblies. In this latter case, the alternative would be between regional deputies who choose among themselves the member of the second Chamber or regional deputies who elect the Senate members out of party lists composed by party members not included in the regional Councils.

The former solutions would favour the institutional dimension of the second Chamber at the expense of its more political dimension, in which the Senators belonging to the Councils might constitute an element of linkage between legislators[16]. In this way, the second Chamber could play an effective role of bringing regional interests "to the centre," thus making the Senate a place of mediation between the various levels of government. The election of the Senators within the members of Regional Councils would also mitigate some of the limits

[15] According to the author, "the acceptance of a chamber expressing the *Länder*'s executives appears linked to the general acceptance of the form of parliamentary government, one reinforced, moreover, by the institution of constructive no-confidence, which allows the *Länder*'s legislatures, albeit in the continuity and guarantee of government stability, to decide freely as to the life of the regional executives. Otherwise, in the Italian system, after constitutional law no. 1/1999 and the abrogation of the council foundation of the regional government, a chamber of regional executives would end up exacerbating the state of tension that exists between the Region's constitutional bodies and might lead to a disarticulation of the legislative function with the executive one": S. Mangiameli, *Il Senato federale nella prospettiva italiana,* cit., 3.

[16] Party-based articulation of the parliamentary groups in the Senate should also be avoided, opting instead for one reflecting regional provenance. On the point, see A. D'Atena, *Un senato "federale"*, cit., 245.

mentioned earlier with regard to the Austrian model, which tend to create a strict commitments towards the national political parties and a misrepresentation of the interests of the territories[17].

Alongside the model here described, there may be other mixed-type solutions that call in particular for some form of representation of the local authorities. This option, quite accepted by the legal scholarship, appears to be in line with Article 114 of the Constitution which emphasizes the autonomy of the local authorities. The fact that traditionally Italian local authorities have a strong identity and are deeply rooted in the territory[18] support this latter choice. Nonetheless, many reasons suggest to remain in the path of the classical federal tradition with two levels of government (central State and regions) with a second Chamber representing the Regions[19]. The Regions themselves could be committed with the power of choosing the future members of the upper House[20]; they could choose whether to elect members of the Senate from among the members of the Regional Councils, the Council of Local Autonomies, or the local administrators of the municipalities present in the regional territory. In this way, however, a non-uniformity might be created within the Senate, with some Regions represented only by regional deputies and others by members of the local authorities. To avoid the problems that might arise from an excessively fragmented representation, it is reasonable to believe that, at the outset, a Senate composed by

[17] Ibid.

[18] In particular, "both for the elections within the regional Council and for those in the Council of local autonomies, it would indeed be a matter of a second-degree election entrusted to "boards," but this kind of election would maintain a strong democratic charge which would succeed in two aims: first, to connect the ruling class that operates in the territory (Regions and local autonomies), which currently appears rather separate from the one operating on the national landscape; secondly, to strengthen and balance the regional system as well, through the formation of Councils of local autonomies, no longer entrusted to regional sources alone (regional law and statute), but also to a state law of principle (art. 18)", S. Mangiameli, *Il Senato federale nella prospettiva italiana*, cit., 4-5.

[19] On the point, L. Garlisi, *Le ipotesi di riforma del bicameralismo "perfetto" alla luce alla luce di un'analisi comparata,* in Norma, Quotidiano di informazione giuridica 26 (2013); S. Bonfiglio, *Il dibattito sulla trasformazione del Senato in Italia*, in www.associazionedeicostituzionalisti.it.

[20] This hypothesis is also under debate in the Italian Senate's Committee on Constitutional Affairs, brought forward in the *Calderoli's Agenda.* See *infra*, no. 5.

only regional representatives (though coming both from the legislative and from the executive body) is the most convenient option for the Italian system.

5. The new composition of the Senate: a never-ending story?

And yet, this was not the choice adopted by the government in the draft constitutional bill currently under debate. As is known, the bill outlines a mixed-type hypothesis: it establishes that the Senate is composed of the Presidents of the regional governments, the mayors of the largest municipalities and two members elected by each Regional Council within its members; moreover, the Senate should be composed of two mayors elected by an electoral board set up in each Region by all the mayors. These members, who express a local representation, should be joined - issue indeed highly debated in the legal scholarship - by twenty-one citizens that have honoured the country for great merit in the social, scientific, artistic, and literary fields, named by the President of the Republic (the so called Senators for life - *senatori a vita*)[21].

The proposal under discussion has raised a strong opposition from the Senators currently elected directly, who are destined to disappear when replaced by local administrators brought to Rome. Giving voice to the dissent present in the political class and among scholars, an Agenda has been approved by the Committee on Constitutional Affairs of the Senate aiming at reforming the government's bill. According to the Agenda, the Senators should be directly elected in each Region in proportion to that Region's population; this election will occur the very same day of the election of the Regional Council. This document ask for increasing the list of the bicameral laws, which the government bill limits to constitutional laws, and the list of matters of exclusive regional competence. The Senate should be also granted power to appeal to the Constitutional Court in defence of its competences.

[21] This highly criticized norm should see major changes if the proposals of the so-called *Calderoli's Agenda* are to be included in a new basic text to be debated in the Committee and subsequently in the Chamber; there, in fact, senators for life are to be reduced from 21 to 3.

The game is therefore still open: it is up to Parliament to bring it to a conclusion. After 60 years, the country expects (and deserves) to see the end of a so longstanding debate and of a never-ending story of unsuccessful proposals of reform.