TERRITORIAL REPRESENTATION IN UNITARY STATES. REFORMING NATIONAL LEGISLATURES IN ITALY AND IN THE UNITED KINGDOM

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Abstract

Important reforms of constitutional significance have recently affected national legislatures in Italy and the United Kingdom. In both cases, those reforms modified—or attempted to modify—the composition of national Parliaments by creating or bolstering territorial representation, and responding to a call for territorial differentiation in one of the Houses of Parliament. In the case of Italy, the 2014 constitutional reform—rejected by the 2016 referendum—required the Senate to represent "territorial institutions"—and no longer "the Nation"—as it happens in many Second Chambers of fully-fledged federal States. In the case of the United Kingdom, the 2015 House of Commons Standing Orders reform introduced the "English Votes for English Laws" procedure: legislation at the UK level affecting England (and Wales) will be enacted only with the consent of Members of Parliament for constituencies in England (and Wales), thus excluding MPs representing devolved legislatures. Against this

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backdrop, the article will be divided into two sections. Section I will analyse the above-mentioned constitutional reform of national legislatures both in Italy and in the United Kingdom, also focusing on the connections between this sort of "territorialization" of national legislatures and the vertical allocation of powers between central State and territorial autonomies/devolved legislatures. Section II will explore the possible rationale, functions, and constitutional significance of territorial representation for *unitary*, rather than *federal* States. It will then highlight the theoretical and empirical difficulties in embedding territorial representation in unitary States, where the trustee model of political representation and the dogma of unitary sovereignty are still dominant.

TABLE OF CONTENTS

Section I. Territorializing national legislatures: recent "constitutional" reforms in Italy and the United Kingdom

Important reforms of constitutional significance have recently affected national legislatures in Italy and the United Kingdom. In both cases, those reforms modified—or attempted to modify—the composition of national Parliaments by creating or bolstering territorial representation. In both cases, those adjustments were significantly intertwined with the division of legislative competences between the central State and territorial autonomies.

As far as the United Kingdom is concerned, on 22 October 2015 the House of Commons approved Standing Orders changes introducing the "English Votes for English Laws" procedure: legislation at the United Kingdom level affecting England (or England-and-Wales) should be enacted only with the consent of Members of Parliament (MPs) for constituencies in England (or England-and-Wales), thus excluding MPs representing devolved legislatures. This reform was expressly presented by the Conservative Government as a response to the long-standing "West-Lothian Question", which asks why Scottish MPs should vote on English-only affairs when English MPs have no right to vote on comparable issues in the Scottish Parliament. In this respect, the EVEL reform, which, to a certain extent, "territorializes" the House of Commons, is clearly triggered by the devolution of legislative powers to the Scottish Parliament. These

powers have been further increased by the Scotland Act 2016, which followed the 2014 Scottish independence referendum.

As far as Italy is concerned, a Constitutional Bill aimed at revising Italian Constitution was presented by the Government on 8 April 2014. If entered into force, it could have amended in a dramatic way the so-called "perfect bicameralism" characterizing the Italian legal order, which sees both the Houses of Parliaments directly elected and performing the same functions. Also in this case, the constitutional reform attempted to "territorialize" of one of the House of Parliaments. While the House of Deputies should have represented "the Nation", with the exclusive power to grant and revoke confidence to the Government, the Senate should have represented "territorial institutions". Against this backdrop, Italian Second Chamber (which in the Government proposal should have been named the "Senate of the Autonomies") was no longer directly elected by citizens. It should have been composed by a certain amount of majors of Italian municipalities and by representatives of regional legislative assemblies. Also in this case, the reform was extremely linked with the vertical allocation of powers between the State and the Regions, reshaped by the very same constitutional bill: the necessity of involving the Regions into the national legislative process—giving them adequate representation at the central level through a Second Chamber—was indeed meant to decrease the huge amount of competence conflicts between State and Regions brought before the Constitutional Court.

In this first section, the article will illustrate the above-mentioned constitutional reforms of national legislatures both in Italy and in the United Kingdom. In section II, the paper will explore the possible constitutional and political significance of territorial representation for *unitary* (rather than *federal*) States, also focusing on the connections between this sort of "territorialization" of national legislatures and the vertical allocation of powers between central State and territorial autonomies/devolved legislatures. The final part of the article will analyze the theoretical and empirical difficulties in embedding territorial representation in unitary States, where the trustee model of political representation and the dogma of unitary sovereignty are still dominant.

1. The case of the UK: English Votes on English Laws in the House of Commons

1.1. The rationale behind EVEL: responding to the "English Question"

The introduction, in October 2015, of "English Votes for English Laws" procedure within the House of Commons was presented as a response to the longstanding *West Lothian Question,* animating the late 1970s debate on the very first attempts to introduce devolution in the United Kingdom. In that occasion, in light of the proposal to transfer to sub-national legislative assemblies—such as the Scottish Parliament—some of the powers exercised by the national Parliament, Tam Dalyell, the Labor MP representing the "West Lothian" constituency, asked "for how long will English constituencies and English hon Members tolerate….at least 119 ho. Members from Scotland, Wales and Northern Ireland exercising an important, and probably often decisive, effect on English politics, while they themselves have no say in the same matters in Scotland, Wales and Ireland".[1]

While these concerns were partially put aside because of the failure of the Scottish and Welsh devolution referendums in 1979, they were raised again during the 1990s, when, under the Labor Government, the Westminster Parliament eventually voted to proceed with devolution within the United Kingdom. The "West Lothian Question" emerged at that time under the label of the "English Question", and reached its apex when some bills mainly affecting England only (such as the ones related to the increasing of tuition fees and the establishment of foundation

[1] The parliamentary debate of the seventies is reported in House of Commons, Public Administration and Constitutional Affairs Committee (PACAC), *The Future of the Union, part one: English Votes for English laws,* Fifth report of Session 2015-16, 11 February 2016, p. 6. The issue of the over-representation of Scottish MPs within Westminster Parliament, indeed, is a long-standing one, dating back to the 1707. Even in the very first Parliament of the United Kingdom, "Scotland was over-represented with forty five members in the Commons: but this was done by reference to an argument that has continuing resonance. Since a whole country was being incorporated into a larger, there was special reason to secure that its interest could not be ignored or belittled. There was also concern about un fair discrimination against the interest of a minority with a long prior history of conflict with the new majority", as reminded by N. MacCormick, *Questioning Sovereignty. Law, State, and the Nation in the European Commonwealth* (1999).

hospitals) were approved without holding a majority among English MPs, and, consequently, thanks to the vote of non-English MPs.[2] More recently, the English Question exploded after the decision to devolve further powers to Scotland, after the failure of the 2014 referendum on Scottish independence. During the referendum, indeed, many leaders promised Scotland more devolved powers if it remained part of the United Kingdom.[3] In its turn, devolving more powers to the Scottish Parliament triggered a strong desire of "fairness" by English constituencies. In the reading of the Conservative Government, allowing only English MPs to have a say on English-only legislation, could mitigate this sense of unfairness and balance the asymmetries created by devolution. Hence the Conservative Government proposal to introduce "English Votes on English Laws" (EVEL) within the House of Commons.[4]

Despite being one of the key-point of the Conservative Manifesto for the 2015 elections, the EVEL proposals were already

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[2] This happened during the 2001-2005 legislature (Health and Social Care Bill 2002-03 and the Higher Education Bill 2003-04), as reported in D. Gover & M. Kenny, *Finding the Good in EVEL: an Evaluation of English Votes for English Laws in the House of Commons,* Centre on Constitutional Change Report (2016). For a recent analysis on the impact of EVEL, arguing that it failed to provide meaningful English representation at Westminster, see D. Gover & M. Kenny, *Answering the West Lothian Question? A Critical Assessment of English Votes for English Laws in the UK Parliament* (2018). On the West Lothian Question more generally, see B. Winetrobe, *The West Lothian Question* (1995) and R. Hazell (ed.), *The English Question* (2006).

[3] This agreement, known as "the Vow", took the form a joint statement by the leaders of the three main unionist parties (David Cameron, Ed. Miliband, and Nick Clegg). The Scottish independence referendum took place on 18 September 2014 with a turnout of 84.6% of the electorate. In replying to the question "Should Scotland be an independent country?" 55.3% of Scottish voted No and 44.7% voted Yes. See S. Tierney, *Legal Issues Surrounding the Referendum on independence for Scotland,* 9 Eur. Const. Rev. 359 (2013); T. Mullen, *The Scottish Independence Referendum 2014,* 41 J. L. & Soc. 627 (2014).

[4] In the words of the Cabinet Office (*English Votes for English Laws: an Explanatory Guide to Proposals,* July 2015), the reform "addresses the so called West Lothian Question – the position where English MPs cannot vote on matters which have been devolved to other parts of the UK, but Scottish, Welsh and Northern Ireland MPs can vote on those same matters when the UK Parliament is legislating solely for England. As devolution to Scotland, Wales and Northern Ireland is strengthened, *the question of fairness for England* becomes more acute".

on the floor in the past.[5] Nevertheless, past proposals, while being equally concerned with the necessity to give a louder voice to England within the Parliament, put forward "softer" versions of the EVEL procedure.

In fact, a Commission of experts, chaired by Sir William Mc Kay, a former clerk of the House of Commons, and established by the Coalition Government in January 2012 to consider how the House of Commons might deal with legislation affecting England only, issued a report, entitled "Consequences of Devolution on the House of Commons", and published on 25 March 2013[6]. The report called for the adoption of a resolution of the House of Commons endorsing the following constitutional principle: decisions at the United Kingdom level with a separate and distinct effect for England (or for England-and-Wales) should *normally* be taken only with the consent of a majority of MPs for constituencies in England (or England-and-Wales). It has been argued that this position rested on the principle of reciprocity. "Devolved legislatures' wishes with respect to incursions by Westminster into area of devolved competence are *normally* respected (via the use of legislative consent motions under the Sewel Convention), but are not *necessarily* respected (because Westminster could, at least in theory, override their wishes by asserting its legislative supremacy, which is undiminished by devolution)".[7] Consistently with this principle of reciprocity, the several procedural options proposed by the McKay Commission to receive the consent of English MPs on issues affecting England only, did not end up attaching a veto power to English MPs (which is what the amended Standing Orders actually do). The Commission, indeed, characterized its procedural suggestions "as a "double-count" rather than a "double-lock": relevant bills (or parts of bills) would

[5] Some scholars deemed it as a "less radical option" if compared with the idea to create an English Parliament. See in particular P. Leyland, *The multifaceted constitutional dynamics of U.K. devolution,* 9 Int'l J. Const. L. 267 (2011).

[6] The Report of the Commission for the Consequences of Devolution on the House of Commons (published on 25 March 2013) is available here: http://webarchive.nationalarchives.gov.uk/20130403030652/http://tmc.independent.gov.uk/report-of-the-commission-on-the-consequences-of-devolution-for-the-house-of-commons/

[7] M. Elliot, *Bogdanor on "English Votes for English Laws". A response*, http://publiclawforeveryone.com/2014/09/25/bogdanor-on-english-votes-for-english-laws-a-response/ (25 September 2014)

be considered and voted upon by the whole House of Commons *and* by a committee of English MPs, but the latter would not be able to overrule the former". [8] The argument of the Mc Kay Commission was basically that the position of the English Members should be visible to all the MPs, which should vote accordingly.[9]

After the McKay Commission, possible procedural options to implement EVEL were presented in December 2014 in a Command Paper issued by the Government.[10] Some of these options gave English/English and Welsh MPs a decisive say over the content of the legislation without introducing any new stages to the legislative process.[11] Nevertheless, the 2015 Manifesto of the Conservative Party decided to sponsor the procedural option which most detached from the recommendation of the McKay Commission, providing English MPs with and effective *veto* rather than a strengthened *voice* on English affairs.[12] Eventually, the latter option was the one implemented by the Conservative Government through the changes to the House of Commons Standing Orders introduced on 22 October 2015.

1.2. The changes to the House of Commons Standing Orders

The new EVEL procedure amends the House of Commons legislative process. While Government Bills[13] affecting the whole

[8] M. Elliot, cit. at 7.

[9] Executive Summary of the McKay Commission Report cit. at 6, in particular paragraph 15.

[10] "Implications of Devolution for England", Cm 8969, December 2014, outlining some of the Conservative and Liberal Democrat proposals, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387598/implications_of_devolution_for_england_accessible.pdf

[11] This by simply reforming the Amending Stage of bills without excluding non-English MPs. See Option 1, named "Reformed consideration of Bills at all stages", and Option 2, named "Reformed Amending Stages of Bills" of the Command Paper are summarised in the of the PACAC Report, *infra* footnote 1, at pp. 12-13.

[12] Option 3 of the Command Paper, entitled "Reformed Committee Stage and Legislative Consent Motion"

[13] Private Members' Bills are not subject to the new rules (see Art. 83 J, par. 10 of the Standing Orders). The amended version of the Standing Orders (Public Business, 2016) is available here:

of the UK will be adopted through the ordinary legislative procedure, those Bills that either in their entirety or in single parts affect England (or England and Wales) only, will be subject to special procedures: the latter ensure that decisions affecting England, or England and Wales, can be taken only with the consent of the majority of Members of Parliament representing constituencies in those parts of the UK.

The first step of the newly introduced procedure is the certification of Government bills (or elements of Bills, proposals to change Bills and secondary legislative instruments) which will be subject to EVEL. Through an act of certification—as per Art. 83J, par. 1 of the Standing Order—the Speaker must assess that the bill (or any clause or schedule of it): a) relates exclusively to England or England and Wales, and b) is within devolved legislative competences. As explained in the cabinet office explanatory memorandum, "the two elements of the test are both required: in general, a clause that relates only to England will often be on a matter which is devolved, but this will not always be the case."[14] In certifying if a Bill applies to England only, the speaker might "disregard any minor or consequential effects outside the area in question"[15]. Moreover, the same Speaker, who may be assisted by two MPs, must announce to the House the decision for certification without giving reason for it.[16]

After the certification, the legislative process starts. Normally, the legislative process within the House of Commons is divided into the following steps: an Introduction and a First Reading (where the Bill is presented and there is no debate); a Second Reading allowing for a debate on the general principle of the Bill; a Committee Stage, which is the first opportunity to consider amendments to the Bill; a Report Stage in the whole House, which is the second opportunity to amend the Bill; a Third Reading, which gives the whole House the final opportunity to approve or reject the Bill before it goes to the House of Lords. In

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http://www.publications.parliament.uk/pa/cm201516/cmstords/0002/so-2.pdf

[14] Cabinet Office, *English Votes for English Laws: Revised Proposed Changes to the Standing Orders of the House of Commons and Explanatory Memorandum*, October 2015, p. 24

[15] No. 83 J, par. 2, of the House of Commons Standing Orders.

[16] No. 83 J, par. 9 of the House of Commons Standing Orders.

case the Speaker opts for a certification—and then solicits the House to legislate through the EVEL—there are two different paths to follow, which are related to the nature of the bill. In case of an entirely English-only bill, the EVEL mechanism occurs at an earlier step of the legislative process—the Committee stage. In case of a bill with just some provisions affecting England only, the EVEL mechanism occurs after the Report stage.

More specifically, in the latter case, a bill will be discussed by all MPs throughout the first and second Reading, the Committee, and Report Stage. Nevertheless, if at this stage the bill is amended by the whole House of Commons, it must be reconsidered by the Speaker for certification. This because, if there are new provisions affecting England (or England and Wales) only, the consent of English (or English and Welsh) MPs is required. In order to gain this consent, a new legislative stage has been created soon after the Report stage. It contemplates the creation of a Legislative Grand Committee—composed only of English/English and Welsh MPs—which vote on "legislative consent motions" to accept and/or reject the certified provisions.

By way of contrast, as to the first case (entirely England-only bills), soon after the discussion of the general principles of the Bill within the whole House at the Second Reading, the EVEL procedure steps in already at the Committee Stage: this means that since from the very first possibility to amend the bills only MPs representing English constituencies are involved. Then the bill will be considered on Report Stage, which is the second opportunity to amend the Bill and takes place in the whole House. If there are no changes, the England-only bill will proceed to Third Reading. If there are changes, the consent of only English MPs will be asked again through the Legislative Grand Committee called to issue a legislative consent motion.

For both the cases, there is a Reconsideration stage, namely a sort of dispute resolution mechanism between the House as a whole and English/English and Welsh MPs, in the event of a legislative consent motion being rejected. If, after reconsideration, the Legislative Grand Committee continues to withhold consent to a bill as a whole, then the bill may not be given a third reading. The same holds true for any vetoed provisions: they need to be amended or removed in order to allow the Bill to reach the third

reading.[17] Also the Lord amendments to Bills will be certified by the Speaker if they relate to England/England and Wales only. In this case, a double majority of both the whole House and of English/English and Welsh MPs is needed, which is why the votes of this two parts will be ascertained in a single vote but "recorded separately".[18]

1.3. The main criticisms

Several criticisms surrounded the introduction of EVEL into the House of Commons. Before discussing the merit of the amendments, the very same choice to use Standing Orders to implement such a far-reaching constitutional change was heavily criticized by those who pushed the Government to use primary legislation to introduce EVEL.[19] Moreover, the sustainability of the Standing Orders' amendments itself seems not to be sound, if we consider that in the division on 22 October 2012, all 312 MPs voting in favor of the amendments came from the Conservative benches, which means that all the other political parties voted against the introduction of EVEL via Standing Orders. This would endorse the thesis that EVEL might be a political instrument in the hand of the Conservative party to accommodate their electors—mainly belonging to English constituencies—and to obstacle a possible future Labor government. The latter might indeed loose its majority within the House of Commons when English-only issues are discussed and MPs from Scotland and other devolved areas—allegedly belonging to Labor party—would not be allowed to vote.

As noted by the Public Administration and Constitutional Affairs Committee (PACAC), the current standing Orders "may be unlikely to survive the election of a Government that cannot command a double majority of both English and UK MPs". In this respect, the PACAC Committee suggested "to develop proposals that are …more likely to command the confidence of all political

[17] See No. 83 L, M, N of the House of Commons Standing Orders.

[18] See No. 83 O of the House of Commons Standing Orders.

[19] The position of those arguing that using Standing Orders to implement a major constitutional change was "an abuse of process" is well explained in the House of Commons Library, *English votes for English laws,* Briefing Paper Number 07339, 23 October 2015 (by Richard Kelly), p. 17.

parties represented in the House of Commons and therefore likely to be constitutionally durable".[20]

Turning to the merit of the changes to the Standing Orders, the very first criticism related to the complexity of the procedure. The fact that Sir William McKay, a former clerk of the House of Commons, described the new Standing Orders as a "forest in which I lose myself", worried particular the PACAC Committee. Also the Procedure Committee found the procedures potentially burdensome and suggested not to implement them on every Government Bill, but only when there was a clear political necessity for an English/English and Welsh majority on specific issues. The Procedure Committee suggested that decisions on whether to subject bills to EVEL should have been voted by the whole House. The Government rebuffed such a proposal, and now it is upon the Speaker to certify whether a Bill can be qualified as English/English and Welsh only and be subject to the English/English and Welsh vote only.

The politicization and strong discretionary power conferred to the Speaker was another major concern of the critiques of the reform. First, the power of certification of the Speaker is very arbitrary in the sense that he/she is not required to give any reason for it. Second, in exercising this power the Speaker is likely to be influenced by the Government, at the point that some MPs suggested that the Government's view on the scope of a bill should not be asserted "overtly or aggressively".[21] Third, and most importantly, it is quite difficult, even for judicial authorities and experienced clerks, to understand where the boundaries of devolution lie. The Speaker will be called to have an unusual technical role, in selecting those Bills considered to be as English only and belonging to devolved matters, and in disregarding any "minor or consequential effect" on devolved territories to that end. As noted by Professor Tomkins in his written evidence to the PACAC, the wording of the Standing Orders are similar to that of the Scotland Act 1998, according to which an Act of the Scottish

[20] PACAC Report (*infra* footnote 1), p. 27.

[21] In the words of Mr. Charles Walker MP during the Emergency debate on EVEL of July 2015, as reported in the PACAC Report, p. 19. Nevertheless, evidence show that, during the first year of EVEL, there was little influence of the Government on the activities of the Speaker D. Gover & M. Kenny, *Finding the Good in EVEL* cit. at 2.

Parliament is outside competence if it "relates to reserved matters". In light of the growing body of UK Supreme Court case law on "border disputes" and competence conflicts, usually characterizing federal countries, Adam Tomkins concludes that "determining what legislation "relates exclusively" to England may not always be straightforward and may on occasion be contested and open to different reasonable interpretations".[22] Asking the Speaker to enter such a debate "appears inevitably to invite judicial challenge sooner or later".[23]

The third, and maybe most important, criticism is that the new Standing Orders create "a veto" rather than a "voice" for English MPs on England-only bills, since any vetoed bills or provision within the Legislative Grand Committee is prevented from reaching the Third Reading Stage. As Angela Eagle—then the Shadow Deputy Leader of the House of Commons—pointed out, this solution goes much further than the McKay Commission envisaged in its 2013 Report. In the reading of the Commission, English MPs' voice on English affairs should have been strengthened through a declaratory resolution (similar to the *Sewel* Convention) *normally* requiring the consent of English MPs on Bills affecting England only. In no case, such a *voice* should equal a *veto,* and, accordingly, "the right of the House of Commons *as a whole* to make the final decision should remain"[24]. By way of contrast, after the introduction of the EVEL procedure, MPs representing devolved legislatures are excluded from some stages of the legislative process. As per Standing Order No. 83 W (8), "any Member who is not a member of a legislative grand committee may take part in the deliberations of the committee *but shall not vote or make any motion or move any amendment*". It is telling that the McKay Commission explicitly warned against such an exclusion, stating that "MPs from outside England should not be prevented from voting on matters before Parliament", since this would create "different classes of MPs". [25] Not surprisingly, this

[22] Written evidence from A. Tomkins, *English Votes for English Laws and the Future of the Union – Part 1* (2015).
[23] P. Reid, *English votes on English law: Just Another Running Repair*, U.K. Const. L. Blog (2015)
[24] Executive Summary of the McKay Commission Report, cit. at 6, par. 14.
[25] T. Fairclough, *Constitutional Change, Standing Orders, and EVEL: A Step in the Wrong Direction?*, U.K. Const. L. Blog (22nd Feb 2016). According to some

kind of narrative related to the "two tiers of MPs", was very present during the parliamentary debates related to the adoption of EVEL procedure.

Last but not least, another line of criticism warned against the possibility for these procedural novelties to spread into other type of proceeding calling for a stronger representation of England, such as the one hypothesized by Lord Lisvane who asked, during the parliamentary debates: "what about other ways of calling the Executive into account? Might there be the pressure for an English-only Question time, for example?".[26] This latter provocation, together with the strong reaction of Scottish MPs during the discussion of the Housing and Planning Bill—the first ever to be approved through the EVEL procedure—clearly show that the recent reforms risk to "territorialize" the House of Commons—namely a "national" legislature—along divisive lines following the "sub-national entities" composing the United Kingdom. EVEL, indeed, can be regarded as "an attempt to create an English Parliament in the House of Commons".[27]

scholars, while the double veto "does not necessarily rebut the argument that EVEL has created two classes of MP, it does mean that MPs from outside England (or England and Wales) are in no weaker position to block legislative changes than they were previously: all legislation continues to require the backing of the whole House. They are, however, in a weaker position to force through legislation that applies only in England (or England and Wales) against the wishes of English (or English and Welsh) MPs" (D. Gover & M. Kenny, *Finding the Good in EVEL* cit. at 2, 23).

[26] House of Commons PACAC Report (*infra* footnote 1), p. 22. Similar fears were expressed also in scholarly literature, see for example V. Bodganor, *The New British Constitution* (2009) (related to the possible "bifurcation" of Government).

[27] In the words of Pete Wishart MP (SNP) during the emergency debate on EVEL (7 July 2015), as reported in House of Commons Library, Briefing Paper Number 07339R. Kelly, *English votes for English laws* (2015).

2. The case of Italy: a Second Chamber representative of territorial institutions

2.1. The rationale behind the reform: overcoming "perfect bicameralism" and streamlining the vertical division of powers

A constitutional bill aimed at amending the Italian Constitution was presented by the Government on 8 April 2014[28]. Although the Parliament voted in favor of it, the constitutional reform failed because the popular vote rejected it through a referendum held on 4 December 2016. If entered into force, the reform would have affected two pivotal features of Italian legal order, namely the "perfect bicameralism" and the vertical division of power between the central State and territorial autonomies characterizing Italian regionalism.[29]

As to the first point, the Government proffered a territorialization of national legislature, by changing the composition of one of the Houses of Parliament, namely the Senate, in order to create a Second Chamber representative of territorial autonomies. This was a bold revision of the "perfect

[28] Disegno di legge costituzionale N. 1429, "Disposizioni per il superamento del bicameralismo paritario, la riduzione del numero dei parlamentari, il contenimento dei costi di funzionamento delle istituzioni, la soppressione del CNEL e la revisione del titolo V della parte seconda della Costituzione" (herein after "constitutional bill"). It is worth recalling that a previous attempt to modify the Italian Senate in a federal way was presented in the past and equally rejected. For a general overview see A. D'Andrea, *La riforma del bicameralismo italiano al traino dell'inesistente federalismo ovvero quando il bluff delle parole è smascherato dal niente dei fatti,* 1 Costituzionalismo (2012) and G. Serges, *Crisi del bicameralismo e rappresentanza degli interessi regionali. Qualche spunto sulla riforma del Senato*, in S. Bonfiglio (ed.), *Composizione e funzioni delle seconde camere. Un'analisi comparative* (2008), on the reform rejected by the 2006 constitutional referendum.

[29] Early comments on the constitutional bill presented by the Government can be found, among others, in P. Costanzo, A. Giovannelli & L. Trucco (eds.) *Forum sul d.d.l. costituzionale "Renzi-Boschi". Dieci studiosi a confronto* (2015) and A. Lucarelli & F. Zammartino, *La riforma costituzionale "Renzi-Boschi". Quali scenari?* (2016). For interesting comments in English see R. Bifulco, '*A New Senate? A First Look to the Draft Constitutional Bill,* 1 IJPL (2014); V. Cerulli Irelli, *On the Constitutional Reform in the Process of Being Approved in Italy*, 1 IJPL (2014); G. della Cananea, *The End of (Symmetric) Bicameralism or a Novus Ordo?*, 1 IJPL (2014); G. Vigevani, *The Reform of Italian Bicameralism: the First Step,* 1 IJPL (2014); L. Violini, *The Reform of Italian Bicameralism: Current Issues,* 1 IJPL (2014). B. Guastaferro, *Constitutional Reform in Italy: the Senate as a Second Chamber Representative of Territorial Institutions,* 2 Dutch Const. L. J. (2016).

bicameralism", according to which the two Houses of the Parliament (namely the House of Deputies and the Senate of the Republic), besides having the same kind of legitimation, hold almost the same functions. Indeed, despite few differences related to the electoral laws and to the requirements to become a Member of the two Houses, in Italy both the Deputies and the Senators are elected by universal direct suffrage for five years. Both Houses are entitled with the legislative functions (in that each law requires the consent of both the Chamber of Deputies and the Senate) and both Houses must give the confidence to the Cabinet, in line with the parliamentary form of government requiring the Executive to be accountable to the political majority within the Parliament.[30]

As to the vertical division of power, Italy can be qualified as a unitary State organized in regional autonomies. The Regional State can be "distinguished, on the one hand, from the Napoleonic model of State, to the extent that Regions are invested with legislative, and not only administrative functions, and, on the other hand, from the federal model, usually presupposing a fusion into a Federation of formerly sovereign State".[31] The Constituent Assembly drafting the Italian Constitution soon after the second Word War, indeed, rebuffed the federal option, but insisted to acknowledge the autonomist principle as one of the core founding principles of the legal order. As per Article 5 of the Italian Constitution, "The Republic, *one and indivisible*, *recognizes* and *promotes local autonomies*". The strong recognition of territorial pluralism notwithstanding, Article 5 has often been used by the Italian Constitutional Court as glue keeping the system together, fostering the unitarian spirit of the Republic. In this respect, the history of Italian regionalism is characterized by a sort of "ambivalence". On the one hand, Regions have expressed their "identitarian" claim, resulting in a propensity for differentiation of objectives and rules in their policy-making choices. On the other hand, Regions have been conceived as an essential instrument of political decentralization, representing the executive branches of

[30] On the main features of the Italian constitutional order G. Martinico, B. Guastaferro & O. Pollicino, *The Constitution of Italy: axiological continuity between domestic and international level*, in A. Albi (ed.), *The Role of National Constitutions in European and Global Governance* (2018).

[31] C. Pinelli, *The 1948 Italian Constitution and the 2006 Referendum: Food for Thought*, 3 Eur. Const. L. Rev. 333 (2006).

the central State.[32] As a matter of fact, the establishment of the Regions only occurred in the 1970s, namely almost twenty years after the drafting of the 1948 republican Constitution. Nevertheless, a major constitutional reform in 2001 significantly bolstered the powers of the Regions, allowing them to legislate—as it happens in many federal States—in all those areas that the Constitution does not explicitly reserve to the central power of the State.[33]

The Italian Government, while presenting the 2014 constitutional bill before the Parliament, clearly stated the rationale of the reform. Indeed, differentiating perfect bicameralism by creating a Second Chamber representative of territorial autonomies, responded to the urgent need of an institutional settings able to voice the interests of territorial autonomies and try to coordinate them with the public policy outcomes set out by the central State. In this respect, the first aim of the reform was that of rationalizing the multilevel system of governance creating more coordination between the interests of the central State and those of territorial autonomies. Such coordination was deemed to be necessary to face the challenges coming from the new European economic governance and to meet Italian international commitments. In a related fashion, the reform also wanted to revisit the constitutional allocation of power between the State and the Regions trying to avoid the growing expansion of competence conflicts before the Italian Constitutional Court. In the reading of the Government, a Senate representative of territorial autonomies could allow a preventive composition of possible conflicts between the varying interests of each level of government. The resolution of the possible tensions at the (*ex ante*) political level could possibly reduce the (*ex post*) judicial overloading of competence conflicts before the Constitutional

[32] G. De Martin, *Le autonomie regionali tra ambivalenze, potenzialità, involuzioni e privilegi,* Amministrazione in Cammino (2013).

[33] On this kind of "federal" reform see L. F. Del Luca, P. Del Luca, *An Italian Federalism? The State, its Institutions and National Culture as Rule of Law Guarantor,* 54 Am. J. Comp. L. 799 (2006). A diachronic analysis from the "first regionalism" sponsored by the Constituent Assembly to the 2001 reform can be found, among others in A. Lucarelli, *Percorsi del regionalismo italiano* (2004).

Court.[34] Last but not least, the reform wanted to bolster the efficiency of the legislative process avoiding a burdensome duplication of the roles of the two Houses of the Parliament, which were provided with different functions.

Turning to the most important aspect, we will now explore the envisaged composition of the new Senate. As in the United Kingdom, the reform was an attempt to "territorialize" one branch of national legislature—in this case the Second Chamber of the Italian Parliament—called to represent territorial autonomies.

2.2 The new composition of the Senate

Consistently with one of the functions performed by Second Chambers in other constitutional systems[35], Italian Second Chamber imagined by the 2014 constitutional bill should have represented territorial autonomies, so to be named, as per the very first governmental draft, "Senate of Autonomies". It is interesting to note that the draft presented by the Government opted for "the arithmetical, rather than the geometric, principle in the makeup of the Second Chamber", thus giving "equal representation to the Regions irrespective of the extent of the territory and/or population".[36] By way of contrast, the members of Parliament rebuffed this proposal. According to the final draft, differently from fully fledged federal system such as the US, each Region was not represented in the Senate in an equal number. The numbers of Senators attributed to each Region were proportional to the varying size of the population of the Regions, although each Region had no less than two Senators.

Against this backdrop, the constitutional bill amended the notion of political representation provided by the 1948 Republican Constitution according to which both the Houses of the Parliament represent the Nation, and specified that while the House of Deputies represented "the Nation", the Senate of Republic represented "territorial institutions".[37] For this reason,

[34] Report of the Government attached to the constitutional bill, p. 16, available at https://www.senato.it/service/PDF/PDFServer/DF/302471.pdf

[35] S. Mannoni, *The Second Chamber: a Historical and Comparative Sketch,* 1 IJPL (2014).

[36] R. Bifulco, *A New Senate?*, cit. at 29, 49.

[37] Article 1 of the constitutional bill, modifying Art. 55 of the Italian Constitution.

the members of the new Senate were no longer directly elected by citizens, but by the legislative assemblies of the Regions (called regional Councils). The members of the Senate were chosen among the regional councilors themselves and among the majors of the local municipalities belonging to each Region.[38]

If we consider that both the regional Councilors and the Majors, in their turn, are directly elected by the citizens during the regional and municipal elections, some scholars argued that the members of the new Senate were basically chosen through a system of "indirect" democratic election. Nevertheless, during the Parliamentary debates, this choice—contained in the very first draft of the constitutional bill—was sharply criticized. Many scholars and politicians noted that this system would have deprived citizens from their constitutional right to directly elect the members of one of the Houses of Parliament.[39] In light of this, the final version of the draft states that Senators will still be elected by regional Councils, but in accordance "with the choices expressed by the electors in voting for the renewal of regional Councils".[40] The addition of this sentence seemed to entail that at any elections scheduled to renew the legislative assemblies of the Regions, citizens could know, in advance, which of the candidates running for the office of regional Councilor would also become a member of the Senate.[41] In light of this sort of "functional coupling" between members of the Regional Councils and members of the Senate, the latter did not receive any parliamentary additional compensation. The appointment of the Senators equaled the duration of their mandate as either regional councilors or Majors. In this light, the Senate was imagined as a

[38] Some opponents to the choice to include majors argued that, in case of delegation having only two representatives, the necessity to have one major for each regional delegation would create a strong imbalance in favour of the majors, L. Violini, *Note sulla riforma costituzionale*, 1 Le Regioni 300 (2015).

[39] Among others, A. Pace, *La riforma Renzi-Boschi. Le ragioni del no*, 2 AIC (2016); G. Zagrebelsky, *Dite con parole vostre*, in Aa.Vv., *La Costituzione bene comune* (2016) and F. Sorrentino, *Sulla rappresentatività del Senato nel progetto di riforma costituzionale*, 2 AIC (2016).

[40] Art. 57, par. 5 of the Constitutional Bill.

[41] On the possible interpretation of this clause see, among others, V. De Santis, *La "doppia investitura" dei senatori consiglieri e le difficoltà di rappresentare "al centro" le istituzioni territoriali, Considerazioni sull'emendamento all'art. 2, co. 5 del d.d.l. cost. n. 1429-B*, 11 Forum Quad. Cost. (2015).

permanent body with a varying composition following the electoral mandate of each of its members, rather than a body periodically renewed every five years through a direct suffrage as for the House of Deputies.

The constitutional bill also provided for a "non elective" quota of Senators, to be appointed in light of their distinguished contributions in the social, scientific, literary and artistic fields. This quota, which was quite significant in the draft presented by the Government, was drastically reduced in the parliamentary debates, also because many members of Parliaments—as well as many scholars—found this quota inconsistent with the idea of a Second Chamber representative of territorial autonomies.

2.3 The new legislative process

In light of the different composition of the two Houses of Parliament, the "perfect bicameralism", which actually sees the Senate and the House of Deputies performing the same functions, was amended by the 2014 constitutional bill. Only the House of Deputies—directly elected by the citizens and representing the Nation—could give and revoke confidence to the Executive—consistently with what happens in other federal States such as Germany. Accordingly, only the House of Deputies will hold the genuinely political functions aimed at holding the Government accountable to the Parliament. In its turn, the Senate—representing territorial institutions—had other important functions, such as the coordination between the State and lower levels of government, the participation to the decision aimed at implementing EU law, the impact assessment of public policies, and the evaluation of the impact of EU policies on local territories.

At a general level, the constitutional bill seemed to attach to the Senate not only a function of representation of territorial autonomies but also a function of guarantee. Indeed, in light of its exclusion by the genuine political dynamics related to the giving and revoking of the confidence to the Government, the Senate also acted as a "second thought" chamber, called to amend the Constitution and appoint important institutional offices such as the President of the Republic and the Judges of the Constitutional Court: all functions which should not be in the hand of a political majority but should find a broader consensus in the political arena. More specifically, with regard to the legislative process, the

constitutional bill presented by the Government deeply streamlined the legislative process. It attached to the House of Deputies the main legislative function, but quite accurately envisaged the modalities through which the Senate could intervene in the legislative process, in an attempt to overcome the perfect bicameralism requiring, for any law to be approved, the full agreement between the two Houses of Parliament.

According to the last version of the constitutional bill, the legislative process could be both unicameral (i.e. exercised mainly by the House of Deputies) and bicameral, but, as to the latter possibility, only in those cases expressly enumerated by the Constitution.[42] As per Art. 70 (1) of the Constitution, as amended by the constitutional bill, the Senate was a co-legislator in case of laws amending the Constitution and establishing the participation of Italy in the formation and implementation of EU law, in case of laws regarding the protection of linguistic minorities, popular referendum, the fundamental functions of lower level of governments—such as municipalities and metropolitan cities—and in other cases provided by the same article. In all other cases, as per Art. 70(2), the legislative function was mainly attached to the House of Deputies. Nevertheless, even in this generalized "unicameral" legislative procedure, the Senate was not completely ousted. Art. 70 (3) allowed the Senate—upon request of one third of its members—to examine the draft legislative proposal issued by the House of Deputies and ask for any amendments. Nevertheless, it was up to the House of Deputies to approve the final version of the law, thus holding a discretionary power in accepting or disregarding the amendments coming from the Second Chamber. By way of contrast, in specific cases in which State laws were likely to encroach upon the legislative prerogatives of the Regions, the "weak" intervention of the Senate was abandoned, and the House of Deputies was called to take in due consideration the opinion of the Second Chamber representative of territorial autonomies, thus strengthening its involvement into the legislative process.

[42] On the novelties introduced to the legislative process see, among others, S. Staiano, *Le leggi monocamerali (o più esattamente bicamerali asimmetriche)*, 1 AIC (2016); R. Romboli, *Le riforme e la funzione legislativa,* 4 AIC (2015); E. Rossi, *Procedimento legislativo e ruolo del Senato nella proposta di revisione della Costituzione*, 1 Le Regioni (2015).

Sec. II. Territorial representation in unitary States

The reform of national legislatures analyzed so far is an interesting phenomenon because it highlights—notwithstanding the differences between Italy and the United Kingdom—a call for a territorial differentiation within national Parliaments which usually characterizes *federal*, rather than *unitary* States, and is usually expressed in the Second Chambers. It has been noted that "amongst the 22 states which are federations, 18 have upper houses", but "in all of these cases the upper houses represent the subnational units of the federation".[43] The questions this section wants to address are: what does territorial representation mean in unitary rather than federal states? What are its political and constitutional implications? Why there is a growing demand to design one of the branches of Parliaments along territorial lines also in unitary States? Does this demand respond to growing identity claims from territorial autonomies?

As it has been argued, "in a country with devolved tiers of government, there may be many benefits from using the second chamber to provide links from the territories to the national parliament. Such an arrangement has the potential to bind the nation together, minimize the dangers of fragmented decision-making and encourage common positions to be found which are to the benefit of both the nation and its component territories".[44]

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[43] M. Russell, *The Territorial Role of Second Chambers, The Journal of Legislative Studies* (2001). It is worth recalling that, in the in-depht debate on the federal or regional nature of the Italian Republic, also the scholars considering the federal/regional dichotomy as strong at the theoretical level but very weak at the empirical level, deem the presence of a Second territorial Chamber (ant its participation into the revision of the Constitution) as almost the sole distinctive feature of a federal (rather than a regional) State. So, for example, A. D'Andrea, *Federalismi, regionalismi e autonomie,* 21 Federalismi 9 (2007), while arguing that "La differenza tra Stato regionale e Stato federale…tende nella realtà a sfumare e a divenire prevalentemente teorica", states that "l'unico elemento che potrebbe segnare…una differenza apprezzabile sul piano della struttura dello Stato tra ordinamento regionale e ordinamento federale è la presenza, costante nel secondo caso, di una Camera degli Stati". A summary of the debate on the distinction between federalism and regionalism can be found in B. Caravita Di Toritto, *Stato federale*, in S. Cassese (ed.), *Dizionario di Diritto pubblico* (2006).

[44] M. Russell, *The Territorial Role of Second Chambers*, cit. at 43, 109. At a more general level, it is worth stressing that the issue of territory recently started to puzzle Italian constitutional law scholarship. See the recent interesting work by L. Antonini, *Alla ricerca del territorio perduto. Anticorpi nel deserto che avanza*, 3

In this respect, any country with a multilevel system of government—independently from its professed federal or unitary nature—may benefit from one of the Houses of Parliament performing the territorial role usually played by upper chambers of federal States. On the one hand, this role entails representing the territories (and their interests) at the national level and, more generally, linking the national parliament to territorial autonomies (what I will name the *federal concern*). On the other hand, another possible meaning of territorial representation in unitary states is that of responding to the identity claims of some sub-national units, through institutional arrangements accommodating those claims to bind the nation together and avoid the risk of secession (what I will name the *unity concern*). Both the *federal* concern and the *unity* concern seems to drive—with obvious different intensity—the debate on constitutional reform in Italy and in the UK, as it will be showed in the following paragraphs.

3. Possible rationale and functions of territorial representation in unitary States

3.1. A *federal* concern? Voicing territorial interests at the national level

The territorial role of upper houses in federal States consists in representing territorial interests at the national level. Such a goal is basically achieved: a) by giving the members of the house representing sub-national units extended powers over legislation which affects these units particularly; b) by ensuring that the representatives of autonomies within national Parliaments are accountable to the territorial institutions they represent. Here, the "sample" model might be Germany, where the seating and voting arrangements within the *Bundesrat*, together with its legislative functions, attach to the Second Chamber a proper territorial function. Indeed, the members of the *Bundesrat* sit in delegations representing the Government of each *Land* and expressing a single weighted vote. Moreover, they are accountable to their respective assemblies through an intense activity of scrutiny. Last but not least, the involvement of the *Bundesrat* into the legislative process

AIC (2017), E. Gianfrancesco, *La riorganizzazione territoriale: un puzzle anche per il costituzionalista,* 2 Federalismi (2019) and in-depht study of I. Ciolli, *Il territorio rappresentato. Profili costituzionali* (2010).

is strengthened on bills possibly affecting the *Länder*: here the Second Chamber holds a veto power, rather than the delaying power that it has on ordinary bills.[45]

This kind of "federal concern" clearly animated the debate on Italian constitutional reform. As we have seen, in creating a Second Chamber representative of territorial institutions, the 2014 constitutional reform explicitly aimed at voicing the interests of territorial autonomies within the national Parliament. In this reading, the Senate was supposed to become the institution through which territorial autonomies could monitor draft legislative acts, could possibly amend them, and could assess their impact on local territories. In sum, the Second Chamber could allow for coordination between the central and the regional levels of government composing the Italian Republic, thus solving possible conflicting interests within the political arena rather than before a judicial body such as the Constitutional Court. Moreover, the legislative process envisaged by the reform strengthened the involvement on the Senate in case of bills particularly affecting the Regions or possibly encroaching upon their legislative competences.

This was for example the case of bicameral laws (requiring the consent of both the Houses of Parliament) and of bills approved under the so called "national interest" clause. The latter clause, interpreted as a sort of "safeguard of unitarianism", and similar to Article 72.2 of the Basic Law of the Federal Republic of Germany[46], allowed central legislature to act in subject areas devolved to the Regions in case this would be necessary to protect national interest and the legal and economic unity of the State[47].

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[45] M. Russell, *The Territorial Role of Second Chambers*, cit. at 43. Interesting considerations on the connections between the autonomy of subnational entities and their participation at the national decision-making process are in the recent comparative analysis edited by F. Palermo & K. Kössler *Comparative Federalism. Constitutional Arrangements and Case Law* (2017), in particular Part II dedicated to Self-rule and Shared-rule

[46] Art. 72(2) of the German Basic Law allows the Federation to legislate in some of the subject areas belonging to the concurrent legislative power "if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest".

[47] Art. 117(4) of the Italian Constitution as amended by Art. 31 of the Constitutional bill. A similar strengthened role of the Senate was also required

Since through the activation of this clause, the State was clearly likely to encroach upon the prerogatives of the Regions, a major involvement of the Chamber representing territorial autonomies was required within the legislative process, in order to avoid an arbitrary use of it. Indeed, as per Art. 70(4), if an absolute majority of the Senate proposed to amend a draft legislative act based on the "national interest" clause, the House of Deputies could disregard the amendment only by an absolute majority voting. In this respect, in case of draft legislative acts able to circumvent the constitutional allocation of powers between the State and the Regions, the participation of the Senate to the legislative process—while not being equal to a veto power—was significantly strengthened, if we consider that in the "ordinary" unicameral legislative procedure, the House of Deputies hold a complete discretionary power (i.e. not linked to any majoritarian threshold) in disregarding the amendments of the Senate.

If in Italy the constitutional reform explicitly reshaped the Second Chamber to allow it to perform a territorial function, in the UK the call for territorial differentiation of national legislature elucidated in the first section came from the House of Commons, rather than from the Second Chamber (namely the House of Lords).[48] For this reason, the federal concern of voicing territorial interests within national legislature seem to be less straightforward if compared to the Italian debate. Nevertheless, EVEL procedure explicitly address what has been defined the "constitutional anomaly related to the current imbalanced representation of England's national voice within the UK", which emphasizes that "whilst Scotland, Wales and Northern Ireland's devolved assemblies have direct powers over some policy areas, there is no equivalent institution or process that *represents*

in those specific cases in which art. 120 of the Constitution allows national power to substitute regional one.

[48] Nevertheless, it is worth recalling the 2000 Wakeham Report proposal to elect some of the Lords on a regional basis, and the Ed Miliband mention to a "Senate of Nations and Regions" in his 2014 Labour Party Conference Speech. An endorsement of such a solution is in P. Leyland, *The Second Chamber debate in the UK revisited: life, afterlife, and rebirth?*, 2 AIC (2017). On the past and possible future proposals for the House of Lord reform see M. Russell, The contemporary house of lords (2013).

England's sub-state national interests".[49] Also in this case, the "federal concern" of representing a sub-national interest at the national level is present. But rather than creating a second chamber, such a goal is achieved by create an "English Parliament within Westminster Parliament". Moreover, similarly to the extended powers which are given to the house representing sub-national units in legislation affecting these units particularly, EVEL modifies the legislative process in a sense that the right to vote a bill is expressed only by those affected by it. This shows how, in both the unitary states, the process of "territorialisation" of national Parliaments was triggered by the "federal concern" of voicing or strengthening sub-national interests at the central level or, more specifically, within the legislative process.

3.2. A *federal balance*? Linking territorial representation to the vertical division of competences

In order to understand the legal and political implications of territorial representation in unitary states, it is worth exploring not only the "federal concern", namely the necessity to voice the interests of territorial autonomies at the central level, but also what I name a "federal balance", namely the strict connection that seems to exist between the territorialisation of national legislatures and the vertical division of competences. Indeed, both in Italy and in the United Kingdom, the bolstering of territorial representation at the central level has been coupled with a reshuffling of the division of competences between State and territorial autonomies. More specifically, there seems to be a sort of causal link between the territorialisation of national Parliaments, on the one hand, and the devolution of competences to the Regions/devolved legislatures, on the other.

This link is very clear in the case of the Italian constitutional reform, where a single text, namely the constitutional bill, addressed at the same time both the changing composition of the Senate and the vertical allocation of powers. More specifically, the Government explicitly presented the new vertical division of competences "as a result of" the changing composition of the Senate: the representation of territorial autonomies within the

[49] Written evidence from A. Mycock & A. Giovannini, *PACAC Inquiry on the constitutional implications of EVEL* (2016).

Senate could justify the reallocation of powers between the State and the Regions at the expense of the latter. In other words, the institutional design presented by the Government outlined a sort of compensation mechanism between the loss of power of legislative assemblies at the local level, and a gain of power in their being represented, for the very first time, at the central level within the Parliament. Such a "compensation" mechanism was nevertheless sharply criticized, being "the configuration of the legislative process …not able to compensate for the net loss of legislative powers by the Regions".[50]

As a matter of fact, this net loss was evident. Differently from the 2001 constitutional reform, which devolved more legislative powers to territorial autonomies, the 2014 constitutional reform reshuffled the vertical division of competences at the expense of the Regions. Indeed, since 2001, Italian Constitution enumerates both the exclusive competences of the States, and the competences to be shared between the State and the Regions, thus leaving to the Regions the power to legislate on the remaining (unspecified) subject areas. This "federal" allocation of power wanted to strengthen the powers of territorial autonomies, left with significant residual legislative competences. By way of contrast, the 2014 constitutional reform clearly enumerated the competences of the State, on the one hand, and the competences of the Regions, on the other. Most importantly, the reform abolished the category of shared competences and attached many of them to the exclusive power of the State.

This "centripetal" taste of the amended division of competences was compensated by the new composition of the Senate, called to represent territorial autonomies and, most importantly, to be significantly involved within the legislative process. In the rationale of the reform, if Regions are directly involved into the legislative process, thanks to their representation

[50] R. Bifulco, *A New Senate?*, cit. at 29, 53. But see also A. Ruggeri, *Una riforma che non dà ristoro a Regioni assetate di autonomia*, 1 Le Regioni 246 (2015). Another important criticism, related to the inconsistencies of the reform, is raised by Michele Belletti. According to the Author, "l'odierna riforma costituzionale pare un po' "strabica", poiché, elimina la potestà concorrente, ma prevede la supremacy clause e la Camera di rappresentanza territoriale che, in un certo senso la presuppongono", see M. Belletti, *Le materie di potestà legislativa concorrente*, 2 Oss. AIC 19 (2016).

within the Senate, they can promote national legislation which is less intrusive into the competences of the Regions. The "autonomist principle" enshrined in Article 5 of the Italian Constitution would be then safeguarded through the Regions involvement at the central level, without requiring an expansion of their competences at the territorial level. In other words, between the two institutional and political strategies to implement the autonomist principle, *enhancing central representation* or *strengthening territorial autonomy,* the Italian Government sponsoring the reform favored the first.

This kind of compensation mechanism between the (decreasing) legislative powers of the Regions and their (increasing) involvement within the national legislative process—through their representation within one of the Houses of the Parliament—is typical of federal States. Just to give an example, in Germany, after the Second World War, the growing intervention of the State, legitimized by the principle of the welfare state, concentrated many tasks and responsibilities at the federal governmental level, especially in terms of social spending. The consequent contraction of the political autonomy of the *Länder*, was compensated by the constitutional institutionalization of cooperation mechanisms between State and Regions, and, most importantly, by extending the powers the *Bundesrat*—namely of the House representing the *Länder*—in the law-making process.[51]

Along similar lines, in the United States, in the early decades of the twentieth century, the 1929 Great Depression triggered strong nationalist policies within the framework of the New Deal, backed by a shift in the case law of the Supreme Court. Instead of defending States' prerogatives vis-à-vis the expansion of Federal competences, the Supreme Court stressed that it was already the "political process" to "ensure(s) that laws that unduly

[51] E. Bockenforde, *Stato sociale federale e democrazia parlamentare,* in M. Nicoletti & O. Brino (ed.), *Stato, costituzione, democrazia. Studi di teoria della costituzione e di diritto costituzionale* (2006), with reference to the growing use of the laws requiring the Second Chamber approval (*Zusimmungsgesetze*) – different from the ordinary laws merely allowing for the Second Chamber opposition (*Einspruchgesetze*) – as a compensation for the increasing powers of the Federation.

burden the States will not be promulgated".[52] The representation of States within the Senate, and the Senate's involvement within the legislative process, constituted a "political safeguard of federalism"[53] which was sufficient to prevent national legislation to infringe upon States' powers. In the words of the Court, "the principal and basic limit on the federal (commerce) power is that inherent in all congressional action – *the built-in restraints* that our system provides *through state participation in federal governmental action*".[54] Both in Germany and in the US, the shrinking of States' power has been always justified by recurring to—and sometimes strengthening—the "political safeguard of federalism". This notion, which actually dates back to James Madison and John Marshall, expresses the idea that US Constitution "primarily protects federalism indirectly: rather than entrenching a rigid allocation of authority directly, the Constitution entrenches rules for representation and procedures for law-making. Those rules and procedure then create a *political* dynamic that, in turn, protects federalism and other fundamental structural values"[55].

Interestingly enough, this kind of "federal balance" seems to characterize also the current reform of constitutional legislatures in *unitary* States, witnessing the same sort of compensation mechanism between *autonomy* and *representation*. In Italy, the constitutional bill intended to *increase* the representation of Regions at the central level through the new Senate, while *decreasing* regional legislative competences. Also in the UK, we have an analogous compensation mechanism, which nevertheless follows an opposite direction: the *increasing* devolution of powers to Scotland (and other devolved legislatures), comes at the expense of a *decreasing* representation of representatives of devolved territories within the national Parliament.

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[52] Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), 550-1 and 556, quoted in R. Schutze, *Looking Outside: A Comparative Federal Perspective,* paper presented at the conference "The United Kingdom: Federalism Within and Without", Durham Law School, 26 and 27 November 2015.

[53] H. Wechsler, *The Political Safeguards of Federalism: The Role of the States on the Composition and Selection of the National Government,* 53 Col. L. Rev. 543 (1954).

[54] Garcia v. San Antonio Metropolitan Transit Authority, cit. at 52.

[55] E. Young, *What British Devolutionaries Should Know about American Federalism,* in J. Fedtke & B. Markesinis (eds.), *Patterns of Regionalism and Federalism* (2001).

Indeed, even without a grand constitutional momentum amending at the same time both the vertical division of competence and the composition of national legislature—such as the launch of a constitutional reform witnessed in Italy—in the United Kingdom all the debate on the time and pace of devolution has been always accompanied by a necessity to reconsider Scotland's representation within the House of Commons. The very same title of the McKay Commission—"Commission on the *consequences of Devolution for the House of Commons*"—shows that the issue of further transfer of power to devolved legislatures could not be pushed too far without reconsidering the question of parliamentary representation at the central level. Most tellingly, the decision to introduce EVEL—which is a clear measure to affect representation within Westminster Parliament—was extremely linked to the decision to expand Scotland's power.

Indeed, on 19 September 2014, the same day in which Scotland voted to remain within the Union, the Prime Minister announced a cross-party Commission, chaired by Lord Smith of Kelvin, to devolve further powers to Scotland in the field of tax, spending, and welfare. In the very same occasion, the Prime Minister stated that "the question of English Votes for English laws required a definitive answer" and launched a Cabinet Committee, chaired by William Hague, to explore possible proposals to implement the new procedure. Those proposals needed to be taken forward "in tandem with, and at the same pace as" further devolution to Scotland. In this respect, I consider EVEL to be a measure which goes into the same direction of the shrinking of Scotland representation within the House of Commons triggered by the first wave of devolution, when Scottish seats were reduced from 72 to 59 by way of the Scotland Act 1998 as amended. In other words, also in recent times, a causal link emerged between the Scotland Bill 2015-16 decision to *increase the autonomy* of devolved legislatures, and the decision to *decrease representation* at the central level for non-English MPs. The difference is that through EVEL, the institutional strategy undermining central representation of Scottish MPs did not take the form of a reduction of seats, but of their "exclusion" from some stages of the legislative process.

3.3. A *unity* concern? Binding the nation together

Another possible meaning of territorial representation in unitary States might be that of minimizing the risk of fragmented decision making and binding the nation together.

In Italy, this function should have been explicitly attached to the Second Chamber. The Senate, indeed, was supposed to coordinate the positions of the two levels of government (the central State and the Regions) at the legislative level, both with an internal goal (that of preventing competence conflicts before the Constitutional Court), and with an external goal (that of minimizing fragmentation in the implementation of EU law).[56] Moreover, the unity concern of the Italian constitutional reform was visible in the attempt to strengthen the voice (but not the veto) of the Regions (via their representation within the Senate) any time that, in order to protect national interest, the State was allowed to legislate in areas belonging to regional competences (by recurring to the national interest clause).

To sum up, the territorial representation introduced in the Second Chamber should have managed to bind the nation together in a double sense: first, by promoting coordination between levels of government in the law-making process; second, by preventing the central level of government to encroach upon regional legislative autonomy.

Also the UK institutional and political history shows that the issue of territorial representation (paradoxically) has a strong unitary impetus. As to the past, the very same launch of devolution, although transferring some competences to sub-national units thus giving the impression to *divide* powers, was characterized by a strong unity concern: that of binding the nation together.[57] Indeed, in some cases, devolution responded to the

[56] G. Amato, *Conclusioni al convegno "Il sindacato di costituzionalità sulle competenze legislative dello Stato e delle Regioni. La lezione dell'esperienza", Roma, Palazzo della Consulta, 15 maggio 2015.*

[57] It is not a case that almost all the devolution proposal are somehow linked to the growing consent of the Scottish National Party. On the unitary character of devolution, see, among others, V. Bogdanor, *Devolution in the United Kingdom* (2001) and N. Burrows, *Unfinished Business: The Scotland Act 1998,* 62 Mod L. Rev. 2 (1999). Also more recently the response to the risk of secession represented by the 2014 referendum on Scottish independence has been more devolution, as shown by "the Vow". On the complexity of public policies used to manage national diversity in a unitary States such as the UK see S.

identity claims of some sub-national units through institutional arrangements which—in partially accommodating those claims—avoided the risk of secession. As to the present, the issue of ensuring unity—and avoiding the dissolution—of the kingdom seems to be the major concern of the new institutional arrangements facing the sensitive issue of UK territorial constitution.[58] The anxiety on a lack of a wider constitutional strategy in managing devolution[59] is significantly growing both in legal and political discourse.

The recent House of Lords report on *The Union and Devolution* makes clear that the "devolve and forget" strategy used all over the years needs to be dropped if the Kingdom wants to remain united. In considering the referendum on Scottish independence an "existential threat" to the longstanding flexibility and resilience of the UK Constitution, the report complains the lack of a "*guiding strategy …to ensure that devolution develops in a coherent or consistent manner and in ways which do not harm the Union*. Instead, successive Governments have responded individually to demands from each nation…with different constitutional conversations taking place separately in different parts of the country".[60] By way of contrast, "devolution needs to be viewed through the lens of the Union, with appropriate

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Tierney, *Giving with one hand: Scottish devolution within a unitary state,* 5 I-CON 730 (2007); M. Keating, *The independence of Scotland: Self-Government and the Shifting Politics of Union* (2009).

[58] To this purpose, S. Tierney proposed to keep more attention to the "shared-rule" than to the "self-rule" side of federalism, thus binding devolved legislature more closely within the institutional structure of the central state, 'Is a Federal Britain Now Inevitable?' (27th November 2014) (available at http://ukconstitutionallaw.org). According to the Author, the "minimal role for the devolved territories in central decision-making within a system driven only by the imperative of the autonomy" would create a "representation deficit" (S. Tierney, *Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017,* in R. Schuetze & S. Tierney (eds.), *The United Kingdom and the Federal Idea* (2018).

[59] P. Leyland, *The multifaceted constitutional dynamics of U.K. devolution* cit. at 5, 251, considered also the late nineties devolution launched by the New Labour government "a radical constitutional change … not undertaken as part of a wider strategy of constitutional transformation".

[60] House of Lords, Select Committee on the Constitution, *The Union and Devolution,* HL Paper 149, 25 May 2016, p. 109-110.

consideration given to the needs of, and consequences for, the Union as a whole".[61]

In this respect, also the call for territorial differentiation enshrined in "English Votes for English Laws" seems to be driven by a sort of unity concern. Indeed, simply conceding more devolution to Scotland soon after the independence referendum, would have meant, once again, to respond to the autonomy claim of one part of the nation without considering the "consequences for the Union as whole". By way of contrast, in the very same day of the launching of the Smith Commission, English constituencies were to a certain extent appeased by the launch of English Votes for English laws[62], so that the *autonomy* claims of Scotland were satisfied without harming the *representation* claim of England.

Without underestimating the political reasons which pushed the Conservative to launch EVEL, it is submitted that the latter procedure, from a constitutional point of view, promotes a form of "territorial representation" which, rather than pushing towards diversity, pushes towards unity. In this respect, in the recent reform of the House of Commons, a *constitutional argument* – we need to safeguard the unity of the Kingdom accommodating the desire of *fairness* of English constituencies – seems to prevail upon a *popular argument* – we need to grant more voice to English MPs accommodating the desire of *distinctiveness* of English constituencies.

On the one hand, indeed, the issue of "fairness" was very present in the legal and political discourse surrounding EVEL and it was the primary concern underlying the Prime Minister launching of the reform: "as the people of Scotland will have more power over their affairs, so it follows that the people of England, Wales and Northern Ireland must have a bigger say over theirs".[63] On the other hand, the popular or "identity-related" nature of the

[61] *Idem.* For a recent excellent debate on the legal and political implications of the 2014 Scottish referendum see M. Keating (ed.), *Debating Scotland* (2017).

[62] "We have heard the voice of Scotland - and now the millions of voices of England must also be heard. The question of English votes for English laws…requires a decisive answer." Prime Minister's office, *Scottish Independence Referendum: statement by the Prime Minister* (19 September 2014).

[63] *Ibidem.*

reform was very week,[64] as proved by two different but intertwined aspects.

First, other solutions brought to the fore to solve the English Question and much more suitable than EVEL to express a sense of English identity—such as the creation of an English Parliament or of Regions within England[65]--never gained the same kind of consent. Indeed, in the last years surveys, EVEL emerged as the favorite option for the governance of England[66], and, most importantly, this kind of support seemed to be shared by Welsh and Scottish electorates, namely by non-English people.

Second, EVEL supporters in English constituencies, more than by a desire of cultural differentiation, were driven by a sense of discontent related to the awareness that public services were being delivered differently in Scotland and Wales. The future of England Survey found evidence of a growing correlation between "a gradual strengthening of English national identity…and a sense of discontent about England's position within the domestic union".[67] As a matter of fact, complaints by the lack of an equivalent level of representation came from the socially disadvantaged English Regions bordering Scotland and Wales.[68]

In my opinion, more than accommodating an identity claim, EVEL represents an institutional response to the constitutional imbalance created by devolution. In this reading,

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[64] More generally on "Englishness" see M. Kenny, *The Politics of English Nationhood*, Oxford University Press, 2014.

[65] On the failure of the referendum held in 2004 under the Regional Assemblies (Preparations) Act 2003 and on the difficulties in creating an English Parliament, possibly a strong competitor to the Westminster Parliament see P. Leyland, P. Leyland, *The multifaceted constitutional dynamics of U.K. devolution* cit. at 5, 266. More generally, P. Leyland, *Post Devolution; Crystallising the Future for Regional Government in England,* 56 N. Irel. Leg. Q. 435 (2005) and J. Tomaney, *The evolution of Regionalims in England,* 36 Reg. Stud. 721 (2002).

[66] As to the Written evidence from the Mile End Institute, Queen Mary University of London (EVE 8), p. 2, "on the question of whether Scottish MPs should no longer be able to vote on legislation that affects only England, data from the British Social Attitudes and Future of England surveys record a steady increase in the proportion why strongly agree, from 18 % in 2000 to 55 % in 2012".

[67] *Ibidem*.

[68] "This is where one finds the strongest perception of having missed out economically in comparison with the devolved parts of the U.K.", P. Leyland, *The multifaceted constitutional dynamics of U.K. devolution*, cit. at 5, 265.

the strengthening of territorial representation through the introduction of EVEL—which gives voice to the interests of England within Westminster Parliament—holds a strong unitary impetus, in that it balances and compensates the unfairness of devolution, rather than fostering a sense of English diversity. It is telling that the last report on EVEL, issued by the House of Lords, seems to put more emphasis on presenting this instrument "as a pro-Union–and not as a narrowly pro-English–measure.".[69]

4. Unitary sovereignty and political representation under stress: the winding road of territorial representation in unitary States

The first section of this article analyzed very recent reforms of national legislatures in Italy and in the UK, both responding to a strong call for territorial differentiation within national Parliaments. The first part of the second section showed how territorial representation might perform some important functions also in *unitary* states, especially when the decentralization process have developed so far to create some of the needs shared by *federal* States, such as the necessity to balance unity with diversity in compound polities. I showed how territorial representation in unitary states served the purpose to respond to some "federal claims" such as the necessity to voice sub-national units at the central (parliamentary) level, or the necessity to use the "political safeguard of federalism" to counter-balance the loss of powers of local autonomies. I also showed how territorial representation could help minimizing the risk of fragmented decision making among level of governments. Last but not least, in some cases, territorial representation avoided the risk of dissolution of the State by responding to the identity or constitutional fairness claims of some sub-national unities.

Notwithstanding the important functions potentially or actually performed by territorial representation in *unitary* States, it is submitted that in these States this form of representation does

[69] House of Lords, Select Committee on the Constitution, English Votes for English Laws (2 November 2016), HL Paper 61, par. 84, p. 24, reporting the suggestions of the Mile End Institute evidence. On the unity of the Kingdom under stress, see R. Jones et al., *England and Its Two Unions: The Anatomy of a Nation and Its Discontents* (2013).

not develop smoothly, since it ends up overtly clashing with the dogma of unitary sovereignty[70] and with the modern notion of political representation based on the *trustee* rather than on the *delegate* model or representation. Both in Italy and in the UK, indeed, the above-analyzed institutional responses to territorial differentiation did not have easy life. For the sake of clarity, they will be analyzed separately.

4.1. The problematic aspect of EVEL and its constitutional implications on the concept of political representation

The Standing Orders' amendment introducing EVEL, *de facto*, "territorializes" the House of Commons. Indeed, the veto power attached to MPs belonging to English constituencies is likely to introduce a new territorial cleavage within the House of Commons: in the specific cases in which EVEL applies, MPs will be called to vote upon Bills not necessarily in light of their political affiliation, their personal opinions or their constituency's demands, but in light of their belonging to a specific territorial sub-national entity. This belonging, in its turn, can trigger exclusionary dynamics towards other MPs. Against this backdrop, a crucial question arises: "How consistent is EVEL with the House of Commons' status as a United Kingdom legislature?".

Although the Public Administration and Constitutional Affairs Committee posed—among many others—this question in its call for evidence on the Government's proposal to establish EVEL, the issue has not been extensively addressed in the written evidence. Few opinions raised the possibility that EVEL will foster divisive territorial disputes[71] and will accentuate tensions, in particular when non-English MPs will feel overruled by the application of the procedure in case of indirect consequences of a Bill on their constituencies.[72]

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[70] On the challenges to the understanding of unitary sovereignty see K. Armstrong, United Kingdom, Divided on Sovereignty?, in N. Walker (ed.), Sovereignty in Transition, Oxford Hart, 327 ss. and N. Walker, Beyond the Unitary Conception of the United Kingdom Constitution, Public Law, 2000.

[71] Written evidence from the Federal Trust for Education and Research (EVE 13), PACAC inquiry into English Votes for English Laws, p. 5.

[72] Mile End Institute evidence, *infra* fn. 66, point 16. Some evidence on how this happened in the course of the Charities, Protection and Social Investment Bill in D. Gover & M. Kenny, *Finding the Good in EVEL*, cit. at 22, 21.

In my opinion, EVEL is not completely consistent with the House of Common's status as a United Kingdom legislature, because it channels legislative deliberation through territorial lines, deprives some MPs of their right to vote in specific sub-stages of the legislative process, and solicits MPs to pursue their particular sub-national interest rather than the general interest of the United Kingdom.

While this is exactly what territorial representation *should do* in *federal* States, it is not clear how it could be consistent with the institutional arrangements of a *unitary* State. The House of Commons is not the Second Chamber of a fully-fledged federal state, where the single sub-national entities are empowered by the Constitution to express their interests and voice their claims within the Parliament. The House of Commons is, still, a UK legislature, and any attempt to draw a divisive line among different territories could affect the integrity of the Parliament[73] and challenge the very same modern notion of political representation.[74]

Modern legislative assemblies endorse a *trustee model of representation,* where the Members of Parliament pursue the general interest rather than the particular interests of their constituencies, and challenges the *delegate model of representation,* where the representative acts as an agent strictly bound by the mandate of his/her principals[75]. This latter model of representation, indeed, characterized the Parliament of the fourteenth century, which was simply a body authorizing the King to raise revenues. Consistently with the parliamentary power of bargaining with the Crown, the Parliament represented the interests and the grievances of those who selected its members.

[73] *Contra,* see A. Tomkins, *infra* fn. 22, who thinks that Westminster parliament might be also an English Parliament.

[74] B. Guastaferro, *Disowning Edmund Burke? The Constitutional Implications of EVEL on Political Representation*, U.K. Const. L. Blog (2016).

[75] H.F. Pitkin, *The Concept of Representation,* Berkeley: University of California Press, 1967. For an in-depth conceptual analysis on the category of representation see S. Staiano, *La rappresentanza,* in *Rivista AIC,* n. 3/2017, pp. 1-42. On the similar specific dichotomy scrutinized by Pitkin, opposing the "private" and the "public" nature of representation Sandro Staiano argues: "E' questo, tra gli approcci dicotomici alla rappresentanza, il più compatto e il più resistente, anche in ragione del pregio della sua costruzione teorica, che trova compiutezza nella distinzione-opposizione tra *Vertretung* e *Repräsentation*" (5).

The mandate of the MP was not free, but legally bound by the instructions of the groups and territories—such as counties and boroughs—it meant to represent. By way of contrast, when the Parliament acquired the function to legislate (rather than bargain) with the Crown, the free mandate of the Member of Parliament emerged. Any representative entering the legislative assembly with a pre-constituted peculiar interest or with an onus to refer back to his constituency, would have precluded the soundness of the deliberation and jeopardized the genuine search for the common interest.

The trustee model of representation, currently embraced by several democratic Constitutions, found its first codification in the 1791 post-revolutionary French Constitution, which explicitly prohibited any form of mandatory instruction upon the elected representatives, and explicitly stated that they could not represent a particular department, but the entire nation.[76] Nevertheless, such a modern notion of representation—looking at the representative as a trustee rather than an agent of his/her electors—is a legacy of the common law tradition. Indeed, it can be traced back to Edmund Burke's speech to its electors, delivered on 3 November 1744, according to which, although chosen in a specific constituency, he did not feel "a member of Bristol", but "a member of Parliament". "Parliament is not a *congress of ambassadors* from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates" but rather "a *deliberative assembly* of one nation, with one interest, that of the whole".[77] Burke's fierce opposition to constituents' "authoritative instructions" — also inspiring US constitutionalism — was based on the assumption that "government and legislation are matters of reasons and judgment and *not of inclination*".

In this respect, even if EVEL seems to be the most favored option to solve the English Question, this form of territorial representation *within* the House of Commons—considered as a legislature of the entire Kingdom rather than of England only—has some constitutional implications on the modern notion of political representation, where MPs should be called to represent

[76] Title I, Chapter I, Section 3, Art. 7 of the 1791 French Constitution.
[77] E. Burke, *Speech to the Electors of Bristol*, 3 November 1774.

the *whole*, consistently with Edmund Burke's legacy. As far as English MPs are concerned, it is not difficult to understand the ambiguities that EVEL creates around their status and their "additional English role". Indeed, while "MPs elected directly to an English Parliament would possess a specific mandate for performing this role…MPs elected in a General Election to the UK Parliament …would not enjoy the same democratic legitimacy in so doing".[78]

English MPs, indeed, have not been elected to rule on English affairs—as if they were members of a sub-national English Parliament—but as Members of a UK legislature. By way of contrast, in light of the new procedure, English MPs could be highly responsive to the threat of sanction by their constituencies if they do not act as the guardian of English interest, which is something more familiar to a *delegate* than to a *trustee* model of representation. In this respect, the refusal of Labor English MPs to take part in the EVEL procedure during the approval of the Housing and Planning Bill—namely the first Bill approved with the new procedure—shows the difficulty of embedding territorial representation in unitary state: Labor MPs made their political affiliation prevail upon their territorial one.

4.2. The possible divisive nature of EVEL and the House of Lords "unity" concerns

If the first paragraph focused on the puzzling implication of EVEL on the modern notion of political representation, this paragraph will highlight the strong divisive potential of the procedure, also emerged during the parliamentary debate on the Housing and Planning Bill, the very first Bill subject to EVEL procedure in February 2016. "For the first time in the history of this House and this Parliament" —a non-English MP from the SNP noted[79]—"Members of Parliament will be banned from participating in Divisions of this House, based on nationality and

[78] Written evidence from the Federal Trust for Education and Research (EVE 13), PACAC inquiry into English Votes for English Laws, p. 4-5: "MPs in the House of Commons are more than simply representatives of a particular geographic locale. They are part of a collective that deliberates on behalf of the UK as a whole"

[79] See the link to the parliamentary debates: publications.parliament.uk/pa/-cm201516/cmhansrd/cm160112/debtext/160112-0003.htm#16011280004400

the geographic location of their constituencies". This clearly highlight how the territorial cleavage created by EVEL within the House of Commons affects not only the status of English MPs, but, most importantly, the status of non-English MPs, treated as "international observers"—as provocatively declared by Pete Wishart MP during the above-mentioned parliamentary debate. As a matter of fact, throughout the years, the devolution process significantly decreased non-English MPs' capacity to be fully representative of the devolved territories they belong to. Having already "no say" in policy fields for which the devolved Parliaments, rather than Westminster Parliament, are responsible, after the introduction of EVEL non-English MPs will suffer from a further exclusion from some stages of the legislative process. Against this backdrop, EVEL might lead to a paradoxical outcome: introduced to address the desire of *fairness* of English MPs in order to keep the Kingdom united, the new procedure might increase a sense of *unfairness* among non-English MPs (possibly fueled by the SNP). In this respect, the procedure holds a possible divisive potential within Westminster Parliament.

The 2013 McKay Commission's report, called to find a solution to the "English Question", was aware of this. Indeed, the report had the merit to propose two suggestions aimed at reducing the divisive potential of EVEL. First, "the concerns of England should be met *without provoking an adverse reaction* outside England".[80] Most importantly, "the right of the House of Commons *as a whole* to make the final decision should remain…MPs from outside England would then continue to vote on all legislation but with prior knowledge of what the view from England is".[81] Unfortunately, these suggestions have not been completely followed in changing the House of Commons Standing Orders, although it has been argued that "….by opting for the double-veto form of EVEL, the Government has attempted to balance the need for a separate English 'voice' in the House of Commons with the need for Parliament to remain a sovereign chamber representing the whole of the UK".[82]

[80] Executive Summary of the McKay Commission Report cit. at 6, point 15.
[81] *Ibidem*, point 14.
[82] House of Lords report on EVEL report, *infra* fn. 69, p. 3.

It is interesting to point out that also the House of Lords Report on the Union and devolution recommends the Government to worry about "the political effect of the veto within parliament. *Although the government intends that the veto should stabilize the union, there is a danger that the proposals could instead serve to promote territorial rivalries or accentuate tensions.* The most serious dangers are likely to arise where a UK government lacks an English majority—particularly if a single opposition party has a majority of English MPs instead—potentially providing the basis for rival claims of legitimacy in governing England".[83]

If the divisive nature of EVEL has not emerged so far despite in the last year several pieces of primary legislation have been certified as subject to EVEL by the Speaker[84], it is basically because during the first year of the procedure, the Government was able to command a sound majority of both the whole House and those members representing English (and Welsh) constituencies. To say it with First Parliamentary Counsel, Elizabeth Gardiner, "*given the current makeup of the House of Commons, I would say that EVEL has not been tested in anger*".[85] In mentioning this quotation, the House of Lords report on EVEL added that "the next few years will see a series of votes on matters relating to the UK's exit from the EU which may well provide a "stress test" for the procedures".[86] In this respect, in light of the changed composition of the Parliament after the last general election[87] and, most importantly, in light of the split between Scotland (voting to remain part of the EU) and England (voting to leave the EU), it is likely that the procedures related to Brexit

[83] House of Lords report on The Union and Devolution, *infra* fn. 60, pt. 16, p. 5.

[84] An overview of the legislation passed through EVEL is in D. Gover and M. Kenny, *infra* fn. 2, pp. 39-40. According to the Authors during EVEL's first 12 months of operation the Speaker certified half of the bills that were eligible to be considered for certification, namely 9 out of 20. These were the Housing and Planning, the Childcare, the Charities, the Energy, the Enterprise, the Policing and Crime, the Finance (No.2), the Higher Education and Research, the Neighborhood Planning Bills (p. 20).

[85] House of Lords report on EVEL, *infra* fn. 69, p. 12.

[86] *Ibidem*.

[87] Some consideration on what could happen after the last elections are in R.B. Taylor, *The West Lothian Question, EVEL and the 2017 General Election*, U.K. Const. L. Blog (2017).

might well constitute a test for assessing the possible divisive nature of the procedure within Westminster Parliament.

It is interesting to note that the Government, called to revise the EVEL procedure after one year from their implementation, has recently issued its report on 30 March 2017, from which a clear intention not to adopt "any substantive change" is visible, notwithstanding the criticisms of many scholars.[88]

4.3. The puzzling contradiction of the Italian constitutional reform: a territorial Second Chamber embracing the *trustee* model of representation

Also in Italy the legitimate expectation to introduce territorial representation within Parliament to give voice to sub-national entities into the legislative process turned out to be problematic. Also in this country, indeed, the attempt to territorialize one of the Houses of Parliament clashed with the dogma of unitary (popular) sovereignty and created some puzzling contradictions with the modern notion of representation.

As to the latter point, while the professed function of the reformed Senate was that of "representing territorial institutions", leaving to the sole House of Deputies the function to "represent the Nation", the new composition of the Senate seemed not suitable to achieve this goal.

At a general level, it must be highlighted that, besides the representatives of Regions, the new Senate should have included also mayors and a non-elective quota of people representing and honoring the Nation by virtue of their professional achievements. In this vein, the constitutional bill seemed to be informed by *pluralism* rather than *federalism*: the main concern seemed to render the legislative process more inclusive and open to different (and not necessarily similar) voices coming from both Regions and local municipalities rather than creating a "corporative" Second Chamber defending the interests of territorial autonomies vis-à-vis those of the central State.

More specifically, a crucial question animated the scholarly and political debate: was the new Senate envisaged by the 2014

[88] D. Gover & M. Kenny, *The government's "English Votes for English Laws Review": an assessment,* posted on 5 April 2017, by the Constitution Unit. Another recent study on EVEL is J. Gallagher, *The Problem of EVEL: English Votes and the British Constitution* (2015).

constitutional reform really able to voice the interests of territorial autonomies? At first glance, the fact that the Senate was composed by representatives of territorial autonomies and local communities—rather than being directly elected by citizens—provided the new Second Chamber with a strong territorial representation. Indeed, while direct election is more likely to tie Senators to a political party affiliation, the coincidence of the political mandate of the Senators with their electoral mandate as regional councilors or as mayors, strengthened the idea that Senators could sit in the Parliament to represent a territorial community.[89] Nevertheless, on closer inspection, the Second Chamber envisaged by the reform did not empower the representatives of territorial autonomies to genuinely promote their "territorial interests".[90] Indeed, the Senate did not include members of the executives of each Regions (as it happens with the *Bundesrat* in Germany and as it was proposed by the first Government draft[91] and by several scholars[92]), but only members of the legislative assemblies of the Regions. In addition, the reform required regional delegations in the Senate to be chosen through a proportional vote, thus including also regional councilors not belonging to the political majority of the specific Region. This means that the regional delegation could not voice a coherent representation of the need and interests of a specific Region, being

[89] It was noted also that the constitutional bill did not oblige the Senate to organize itself into Parliamentary Committee which proportionally represents the political parties, thus opening to the possibility of forming parliamentary groups according to not necessarily political affiliations (See, among others, E. Catelani, *Venti risposte o quasi su Regioni e riforme costituzionali: occorre ancora far chiarezza sul ruolo dello Stato e delle Regioni*, 2 Federalismi (2016) and N. Lupo, *La (ancora) incerta natura del nuovo Senato. Prevarrà il* cleavage *politico, territorial o istituzionale?*, 2 Federalismi (2016).

[90] This is why some scholars pointed out that more than being representative of "territorial interests", the Senate seemed to be representative of "territorial institutions". Di Cosimo, *Incoerenze fra fine e mezzi*, 1 Le Regioni 153 (2015).

[91] Nevertheless it was argued that the silence of the Constitutional Bill did not exclude the possibility for Presidents of the Regions to seat within the Senate, following a possible and desirable agreement between regional councillors (N. Lupo, *infra* fn. 89, p. 4).

[92] L. Violini, *Note sulla riforma costituzionale*, cit. at 38; C. Fusaro, *Venti questioni su Regioni e riforma costituzionale*, 1 Le Regioni (2015).

possibly fragmented along the lines of the majority/opposition cleavage embedded within the regional legislative assembly.[93]

In other words, although the new Senate was conceived to perform a "territorial function", that of representing territorial autonomies at the central level, its composition was more likely to favor a *political*, rather than *territorial* cleavage, within the Senate[94]. This impression was strengthened by the fact that the constitutional bill, in accordance with a legal tradition embracing the *trustee* model of representation, kept on banning for all the members of Parliament (namely also for the Senators) the *delegate* model of representation. This was perceived by many scholars as a clear obstacle to the possibility for each regional delegation to express a single vote as it happens in the German model.[95] Without a delegate model of representation, it was also less likely to develop an effective scrutiny system ensuring the accountability of the Senators to the territorial institutions they represent.[96]

Indeed, if the Senate was supposed to "represent territorial institutions", it should have been composed by representatives of the Regions able to speak with one voice and, most importantly, receiving authoritative instructions by the members they were representing. By way of contrast, the constitutional bill generated a puzzling contradiction. On the one hand, the bill amended the principle according to which all MPs represent the Nation,

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[93] R. Bin, *L'elezione indiretta del Senato: la peggiore delle soluzioni possibili,* in forumquadernicostituzionali.it (20 marzo 2015)

[94] See, among others, G. Tarli Barbieri, *Venti questioni su Regioni e riforme costituzionali,* in Le Regioni, No. 1/2015, p. 258: "Una camera siffatta appare uno strano ibrido che non sembra rispondere alla *ratio* della sua istituzione e che per le modalità della sua elezione (elezione da parte dei consigli regionali, assenza di vincolo di mandato), potrebbe ben atteggiarsi come una Camera politica svincolata dal rapporto fiduciario"; and P. Caretti, Venti questioni su Regioni e riforma costituzionale, Le Regioni 1/2015.

[95] According to some scholars could have a positive impact on diminishing constitutional conflict and facilitating the double mandate of Senators. See, among others, R. Bifulco, *Osservazioni sulla riforma del bicameralismo (d.d.l. cost. A.C. 2613-A)*, 1 Le Regioni (2015) and E. Gianfrancesco, *Regioni e riforme costituzionali. Alcuni (non pochi) profili problematici,* 1 Le Regioni (2015).

[96] Comparative analysis shows that it is not automatic that members of the upper house are elected by sub-national assemblies are accountable to those assemblies by virtue of their double mandate. "Unless mechanisms are put in place for formal reporting to assemblies, this may not happen" (Spain is the example). See M. Russell, *The Territorial Role of Second Chambers*, cit. at 43, 112.

creating a dividing line between the Members of the House of Commons—still representing "the Nation"—and the Members of the Senate, representing "territorial institutions". On the other hand, the bill did not amend the Article of the Italian Constitution enshrining the *trustee* model of representation, currently characterizing almost all modern legislative assemblies, and stating that each Member of Parliament "carries out his/her duties without a binding mandate".[97] The inconsistency of the 2014 constitutional bill was to create a Senate representative of territorial institutions where, nevertheless, in accordance to the modern notion of political representation, its members were not provided by appropriate means to genuinely pursue their territorial interests.

4.4. The 2016 failure of the Italian constitutional reform and the "democratic" concerns of its opponents

The interesting aspect of the Italian debate on the constitutional reform was that, on the one hand, some of its critiques found the new Senate "not enough federal", calling for some institutional devices—such as the inclusion of regional Executives, or the introduction of authoritative instruction—which would have better enabled the Senate to pursue the professed goal of representing territorial autonomies.

Nevertheless, on the other hand, the 2014 constitutional reform found its opponents also among people, and scholars, deeming the reform "too federal". According to this line of criticism, direct elections of legislative assemblies would be a supreme principle of Italian Republic which could not be subject to constitutional amendment.[98] The *Bundesrat* model, which was advocated by some scholars and by some drafters of the reform, would be completely inconsistent with Italian democratic culture built on popular sovereignty. It would be possible only in fully-fledged federal States such as Germany, sharing a long-standing history where the single constituent units of the Empire (then turned into the *Länder*) needed to be represented at the central level and speak with one single voice.[99]

[97] See Article 67 of the Italian Constitution.
[98] A. Pace, *La riforma Renzi-Boschi*, cit. at 39.
[99] M. Dogliani, *Audizione alla I Commissione Affari Costituzionali, Senato della Repubblica*, 3 agosto 2015.

Indeed, according to some critiques of the reform, the idea of creating a Second Chamber representative of territorial institutions was overtly inconsistent with article 1 of the Constitution, and with the principle of popular sovereignty herein enshrined. Article 1, paragraph 2 of Italian Constitution states that "sovereignty belongs to *the* people who shall exercise it in the forms and limits of the Constitution". The fact that the 1948 Constitution wants the Parliament to be directly elected by the people—who holds the popular sovereignty—would exclude any form of "indirect election" as the one proposed by the Renzi Government: here, the Senate was no longer directly elected by the people (conceived of as the holder of unitary sovereignty), but was composed by representatives of territorial autonomies (elected by the legislative assemblies of the Regions). The same critiques based the inconsistency of the indirect election of the Senate with article 1 of the Constitution also on one important judgement of the Italian Constitutional Court, related to the electoral law. In that occasion, indeed, the Court stated that "the will of the people expressed through the elections is the main instrument of the manifestation of popular sovereignty".[100]

It is not a coincidence, indeed, that during Parliamentary debates the draft initially presented by the Government was partially revised to respond to this kind of criticism and—to a certain extent—to bring "the people" back in. Eventually, indeed, the idea of an "indirect election" of Senators was adjusted to allow people to know in advance which of the Regional councilors could have become Senators so to bolster the direct link which should exist between the citizens and the Parliament, and which lies at the heart of the democratic principle.

It is worth mentioning that also another aspect of the constitutional reform initially presented by the Government and significantly bolstering territorial representation, was then adjusted and revised by the Parliament since it clashed with the

[100] Italian Constitutional Court, Judgement No. 1/2014. For a recent analysis on popular sovereignty and the role of Parliament in the Italian legal order see S. Cassese, *La democrazia e i suoi limiti* (2017). On the Italian model of judicial review, V. Barsotti, P. Carozza, M. Cartabia & A. Simoncini (eds.), *Italian Constitutional Justice in Global Context* (2016).

dogma of the sovereignty of the people.[101] While the Governmental draft contemplated the same numbers of Senators for each region, the final draft tempered this sort of arithmetical criteria in composing the second Chamber—typical of federal States such as the US—with a geometrical criteria taking into account the demographic consistence of each of the Regions. If in the Madisonian architecture providing an equal representation to each of the States was a necessary argument to convince the anti-federalist to join the federation—ensuring that at least one of the Houses of Parliament genuinely represented the States—the notion of popular sovereignty which should characterize the Parliament represented a clear obstacle to the reform of the Senate launched by the Renzi-Government. In other words, the federal principle enshrining the equality of the constituent units of the Federation clashed with the democratic principle of one man, one vote, which in the final draft reallocated the seats for each Region in a way which was more representative of the demographic principle.

Sec. III. Concluding remarks

The analyzed empirical evidence stressed the difficulty to embed forms of territorial representation—typical of federal States—in unitary States, even when, from the functional point of view, introducing territorial representation within national Parliaments seems to be the most suitable institutional response to territorial differentiation. Indeed, in both Italy and the UK, the recent reforms territorializing national legislatures pursued a legitimate goal: coordinating the multilevel system of government as well as preventing the State to encroach upon the legislative powers of the Regions, in the case of Italy; responding to the constitutional imbalances created by the devolution, in the case of the UK.

My argument is that the territorialisation of national Parliaments—although responding to objective functional needs—did not have easy life because, in unitary states, it turned out to be

[101] On the concept of popular sovereignty in the Italian legal order see, among others, G. Amato, *La sovranità popolare nell'ordinamento italiano,* in *Rivista trimestrale di diritto pubblico* (1962) and L. Carlassare (ed.), *La sovranità popolare nel pensiero di Esposito, Crisafulli, Paladin* (2004).

inconsistent, on the one hand, with the dogma of unitary—whether popular or parliamentary—sovereignty, and, on the other, with the *trustee* model of representation, characterizing modern legislative assemblies.

In the case of the UK, EVEL, by creating distinctions between MPs at some points of the legislative process, introduced a territorial cleavage within the House of Commons which is not related to the "neutrality" of the constituency as an electoral district but to the potentially "exclusionary" sense of belonging to a particular sub-national entity. This new cleavage might affect both the modern notion of political representation and the status of the House of Commons as a UK legislature. Although the Government decided not to revise the procedure, it is worth pointing out that the recent report of the House of Lords on EVEL share the same kind of fears: "attempting to provide a separate voice for England through the membership and institutions of the UK Parliament carries risks. Parliament is a unifying body at the center of the political union, where all citizens, regardless of where they live, have the same say in the laws and policies that govern them. Using the same institution to provide a separate and distinct role for England could risk undermining Parliament's position as a UK, rather than English, institution".[102]

In the case of Italy, the 2014 constitutional reform attempt to introduce territorial representation within the Senate—by transforming it into a Second Chamber representative of territorial autonomies rather than of the entire Nation—was deeply jeopardized by its inconsistency with the dogma of unitary popular sovereignty and with the modern notion of political representation. If, in line with the principle of popular sovereignty, national Parliament represents the people, than it should be political representation—rather than territorial representation—to drive the composition of both of its Chambers. It is worth pointing out that all the adjustments made by the Italian Parliament to the initial governmental draft made the constitutional bill less *federal* and more *democratic,* cutting out all the provisions bolstering territorial interests (such as the inclusion of regional Executives within the Senate, or the equal representation of Regions within the Senate) and trying to bring

[102] House of Lords EVEL Report, *infra* fn. 69, p. 2.

the general interest of "the people" back in (allowing for example the citizens to choose their representative within the Senate).

To conclude, this study on the difficulties in embedding territorial representation in unitary States shows how constitutional culture might affect institutional arrangements. The recent reforms of national legislature in Italy and the UK aimed at strengthening a typical feature of federal States (namely territorial representation within national Parliament) in two States that—at several stages of their institutional history and for different reasons—rebuffed federalism[103], and opted for a unitary conception of sovereignty.[104] I am sure this is not the only reason explaining the failure—in case of Italy[105]—or the strong opposition—in case of the UK—that those reform needed to face. Nevertheless, the analysis of "new" constitutional reforms allowed me to reflect on an "old" problem: that on the inconsistencies—rather than commonalities—between federalism and democracy, well exemplified in the imaginary dialogue—reported by Robert Dahl in his pivotal work on democracy—opposing *James* and *Jean-Jacques.*[106]

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[103] It is not possible to outline here all the arguments against federalism. For the UK, see, at least, the 1973 Royal Commission on the Constitution, dismissing the federal option as inappropriate for Great Britain and J. Kendle, *Federal Britain. A History,* Routledge, 1997 and the recent contribution edited by Robert Schuetze and Stephan Tierney, *The United Kingdom and the Federal Idea,* Oxford Hart, 2018. For Italy, see the extensive debate within the working documents of the 1948 Constituent Assembly drafting the Italian Constitution and favouring a "regional" rather than a "federal" form of State.

[104] In his seminal work on the independence of Scotland, M. Keating (*The Independence of Scotland,* OUP, 2009) emphasized how he wide range of constitutional reforms which, short of independence, could provide Scotland with more devolved powers found an obstacle in the unwillingness of English opinion to abandon the unitary conception of the State.

[105] For a recent reflection on the possible causes of the failure of the Italian constitutional reform in comparative perspective M. Russell, *The failed Senate Reform in Italy: international lessons on why bicameral reforms so often (but not always) fail,* posted on *The Constitution Unit* (20 July 2018), available at constitution-unit.com/2018/07/20/the-failed-senate-reform-in-italy-international-lessons-on-why-bicameral-reforms-so-often-but-not-quite-always-fail/#more-6849.

[106] R. Dahl, *Democracy and its critiques* (1989). On federalism as a system dividing power see K. Lenaerts, *Constitutionalism and the Many Faces of Federalism,* 38 Am. J. Comp. L. 205 (1990): "As a system of divided power, federalism proceeds from the very essence of constitutionalism, which is limited government operating under the rule of law".