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EDITORIAL

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

Giacinto della Cananea[*]

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The Case for Reforming the Senate

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

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

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

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

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

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

4. The Case Against This Reform of the Senate

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

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

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

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

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

REFORMING THE CONSTITUTION: A DEBATE

THE "SECOND CHAMBER": A HISTORICAL AND COMPARATIVE SKETCH

*Stefano Mannoni**

Abstract

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

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1. Rethinking the Representation

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

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

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

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

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

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

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

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

2. The American Revolution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The French Revolution

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

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

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

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

4. Taming the beast: Second Chambers and popular will

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

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

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

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

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

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

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

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

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

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

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

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

5. Second Chambers after 1945

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

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

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

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

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

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

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

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

Nonetheless, such an exclusion is wrong.

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

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

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

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

6. Germany and France: between tradition and innovation

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

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

Of course, political party allegiance does matter.

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

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

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

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

7. *Outlook*

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

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

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

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

ON THE CONSTITUTIONAL REFORM IN THE PROCESS OF BEING APPROVED IN ITALY

Vincenzo Cerulli Irelli [*]

Abstract

The essay analyses the impact of the constitutional reform recently proposed by the Italian Government, focusing especially on the relationships between the State and the regions. Comparing the reform of 2014 with that of 2001 the author underlines the statist imprint, which derives from a widespread opinion about the unsatisfactory performance of regional governments and the scarcity of the contribution of regional legislation to the overall innovation of our country. In this perspective, the article lists the most salient points of the new text and criticises their implications not only for Regional legislative powers, but also for the entire legislative process.

TABLE OF CONTENTS:

1. A major constitutional reform

A major constitutional reform is in its first stage of approval in Italy, a reform which will have a significant impact on some important aspects relating to the form of government, both in terms of Parliament, and therefore the national legislative process, and in terms of regional and local governments, and their relationship with the State.

From the outset our Constitution was strongly marked by a sense of autonomy in the pluralistic articulation of the public authorities. Article 5 solemnly affirms the principle of the recognition

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by the Republic ("one and indivisible") of local autonomies. The Republic (the State) adapts the principles and methods of its legislation to the requirements of autonomy and decentralisation. And the same original text of the Constitution attributed legislative power to the regions (15 of ordinary statute and 5 with differentiated autonomy and more extensive powers of government), albeit in limited matters and to be exercised in the context of the principles established by the law of the State.

In 2001, a Constitutional reform was approved that greatly enhanced the autonomist characteristics of our system of government and the legislative power of the regions, extending it to all materials except those reserved for the exclusive or concurrent legislation of the State (the residuality clause, which is typical of federal systems). An attribution of materials that was so extensive it also involved interests with undoubtedly national characteristics, such as the production and distribution of energy, major public works, communications, etc. And in the same text, there is no reference to the authority of the State to issue norms on all materials that also come under regional competence, where prominent issues of national interest were involved (the supremacy clause, which is also present in federal systems). On the other hand, the reform introduced a series of principles relating to fiscal federalism, giving both regions and local authorities, extensive powers to act in tax matters and broad financial autonomy, in accordance with the principle that each body should live by its own means (their own revenues and their share of the proceeds of state taxes attributable to their areas); with the exception of equalisation by the State to be exercised on the basis of objective criteria based on the principle of the ability to pay. These principles relating to so-called fiscal federalism are still being implemented.

Also in terms of the administration, the text is strongly in favour of autonomy where it states that in principle the administrative functions lie with the local authorities, without prejudice to interests of a unitary character which make it necessary for it to be placed at a regional or central level of government.

On the approval of this reform, the question was raised of introducing changes to the structure of Parliament, in the sense of transforming one of the two Houses into a chamber that represented the regions and local authorities. Particularly as regards the regions, to which the text grants such significant legislative powers in so-

called competitive matters, delicate relations are established with the legislation of the State, since the border between the fundamental principles of law in those matters and applicative or detailed regulations is not always easy to define. It was considered appropriate that representatives of the authorities of local government, in particular the regions, should be included in the national legislative process, in order to avoid discrepancies and conflicts, and to subject national legislative choices to the consent of local authorities. This transformation of the Parliament, was not possible then for political reasons (there was a lack of sufficient consensus among the political forces) and the instrument that was foreseen then, that of a bicameral commission of mixed composition, of parliamentarians and representatives of the territorial institutions, with advisory powers in the legislative process, led nowhere.

A design, therefore, so heavily imbalanced on the side of autonomy in terms of the powers conferred on territorial authorities, but at the same time without a central support that put the interests of local authorities in the heart of the legislative process. Parliament remained what it was with two chambers both elected by the people and with completely homogeneous legislative powers.

2. The Case for Reforming the Senate

Beyond the question of the involvement of local authorities in the national legislative process, through a Chamber "of the autonomies", with a radical modification of the structure of our Parliament, the need was apparent (even before the reform of 2001) to revise this structure, characterised by the total homogeneity of the two Houses. Both the Chamber of Deputies and the Senate are elected directly by the people and carry out the same functions, both in legislative activity (every law must be passed in an identical from by both Houses) and in the activities of direction, inspection and control. And both are also called on to express confidence in the Government. The refusal to grant confidence on the part of one of the Houses leads to the resignation of the Government.

The reform of our Parliament and of the rules of the legislative process, differentiating the structures and functions of the two Houses, has therefore been under examination by the political forces and repeatedly urged by some scholars for some time now. But efforts at reform in the past have failed.

On the other hand, the need for a reform of Parliament in the sense of inserting into the legislative circuit a representative element for the local authorities, has become more pressing with the gradual strengthening of the competences (including legislative ones) of these entities.

After the entry into force of the Constitutional reform of 2001, whose implementation was not an especially smooth process, the need to review some aspects of that reform also became apparent, in particular in relation to the respective competences of the State and the regions.

The legislative power conferred on the regions in numerous matters, also extending beyond interests of a regional dimension, appeared excessive and made it very difficult to carry out important public policies of a national dimension, for example, in the field of major infrastructures and energy provision. On the other hand, the extent and quantity of matters of regional competence has produced a very high number of Constitutional conflicts, due in part to an uncertainty in the definition of the materials (in particular those of concurrent jurisdiction), and in part to the absence of the mechanisms of prior consultation and consent.

As a result of these factors, what has emerged in public opinion, both politically and at the Constitutional level, is that there is a need to carry out a reform of Parliament that would resolve these two defects – the absence of a representation of the local authorities and the total correspondence of the functions of the two Houses.

3. The Reform of 2014 Compared with that of 2001

Hence the origin of the reform now awaiting approval.

In general terms what can be seen in the new text, compared to the previous one approved in 2001, is a markedly Statist imprint, which derives from a widespread opinion (also fuelled by recent scandals that have emerged in the context of various regional administrations) about the unsatisfactory performance of regional governments and the scarcity of the contribution of regional legislation to the overall innovation of our country. So that orientation, which had been accepted in the 2001 reform, in favour of a strong decentralisation of government functions that tended to push the Constitutional system towards federalism, has now been superseded in the opinion of scholars and in the awareness of the

political forces. The Italian Constitution system takes up again more or less the same order that it had in the original text of the Constitution, even though the effect that might be produced by the new configuration of the Senate as a Chamber that is representative of local institutions cannot be underestimated.

The most salient points of the new text are as follows.

Parliament maintains its composition of two Houses but only one of these, that is the Chamber of Deputies, is representative of the Italian people and its members represent the Nation. And only the Chamber possesses the relationship of confidence with the Government and exercises the function of political direction and control (in terms of the Government) as well as the legislative function in its fullest sense. While the other House, which retains the name of the Senate, rather than representing the Nation represents the territorial institutions; it too exercises the legislative function in its fullest sense, in the cases laid down by the Constitution (Constitutional laws, laws relating to referendums, laws relating to the structure of local authorities, etc); while with regard to the approval of all other laws, the Senate has a function of proposition that can always be overruled by a vote of the other House, in some cases with an absolute majority. The Senate also functions as an institutional link with the European Union, for the evaluation and control of the public administration, as well as having an advisory capacity in those matters foreseen by law.

But in the cases laid down by the Constitution, such as the election of the President of the Republic both Houses make up the Parliament and their members meet in joint session (thus constituting a single organ). This means that the status of Member of Parliament, also as regards privileges and immunity from prosecution, remains the same, despite the diversity, respectively, of the functions and procedures for the election of members of both Houses.

4. The New Composition of the Senate

As regards the composition of the Senate, this text introduces significant changes. The Senate, as mentioned, is representative of the territorial institutions, that is, the institutions of local government, in particular the regions. As a result, it is composed of a number of senators elected by regional councils from among their

members and by a smaller number of mayors of municipalities, elected in turn by the regional councils from among the mayors of the municipalities located within the region. They are joined by five senators appointed for seven years by the President of the Republic, from among citizens who by their notable achievements have "brought merit to the nation".

In total 95 senators elected (by the regional councils), compared to the present number of 315 senators (elected by the people); five Senators appointed by the President, as under the current Constitution, but in office for seven years, and not for life.

In fact, regional "representation" in the Senate, through these elected members, appears a little weak since within the regions political power is generally concentrated in the person of the President, elected directly by the people. In order to provide the necessary authority to the Senate (particularly for making it the place for mediation and understanding between the interests of the central State and the regions in legislative choices) it would be opportune to include the Presidents as rightful members of the Senate.

The members of the Senate elected by the regional councils, retain the positions from which they come, that is, respectively, those of regional councillors and mayors, and their salaries remain under the responsibility of their institutions of origin. This undoubtedly represents a major difference between the new senators with respect to MPs, because the former retain a dual role of government respectively in the Senate and in their institutions of origin (although MPs too may retain the office of mayor of municipalities of fewer than 15,000 inhabitants). This figure may be a difficulty in the actual functioning of the Senate, in terms of members who will be involved in working to a large extent within their institutions of origin. It would be opportune to provide for at least the regional councillors, in line with the mandate of Senators, to suspend their role as members of the regional council. But the text under consideration seems to foresee the contrary, only limiting the ability to hold office within the organs of the Senate for members involved in carrying out regional or local government functions. This assumes that the members of the Senate retain their roles within their institutions of origin.

This difference in status between members of the House and the Senate also renders problematic the extension of the immunities currently provided to all Members of Parliament. This is a highly

problematic topic that is the subject of much discussion during the approval of the text.

According to Article 68 of the Constitution which is confirmed, by the new text, all Members of Parliament enjoy immunity: they cannot be called to answer for opinions expressed or votes cast in the exercise of their parliamentary duties, and, without the authorisation of the House to which they belong, they cannot be subjected to searches or arrested, except after final judgments or when caught *in flagrante*, nor can they be subjected to wiretaps or seizure of correspondence.

Given the unity of Parliament, despite being composed of two chambers, it seems difficult to justify the maintenance of immunity only for members of the Chamber of Deputies. On the other hand, the immunity confirmed for the new senators as well, who remain regional councillors or mayors, creates a different status within these categories. The point remains problematic, insofar as it touches on the opinion of eliminating immunity for all Members of Parliament or attributing the relative authorisations to the Constitutional Court.

The rule that all Members of Parliament carry out their duties "without a binding mandate" is confirmed by the new text. So even the Regional Councillors, although elected to the Council to which they belong, in the exercise of their functions as senator are immune to directions and are not responsible for the activities carried out in relation to the organ (in the region) that elected them. There is no relationship of representation, in the technical sense; although, on the political level, senators are called on to represent the regional community and defend their interests and needs. Significant in this regard is that the reference to representing "the Nation" for senators has been deleted, while obviously it is confirmed for MPs.

5. Implications for the legislative process

As regards the legislative process, only certain categories of laws require the approval of both Houses. All the others, and they are those that relate most directly to the implementation of the programme of the Government, shall be submitted to the Chamber of Deputies; once approved, they shall be submitted to the Senate, which may, within a short period, propose amendments. On these, the Chamber, within an equally short time, has to pronounce definitively, thus having the capacity to accept or reject the proposals

of the Senate. For certain categories of laws that relate to the structure of territorial government or regional and local finance, the rejection by the House of amendments proposed by the Senate, can only be decided by an absolute majority of the House itself. On this point, however, substantial criticism is expressed that with the new electoral law (which is very much in favour of the majority system), which is also in the process of being approved, the political majority that supports the Government will have a large majority in the House, which will make it easier to pass with an absolute majority proposals from the Senate that do not correspond to the direction of the Government.

As regards the legislative process, beyond simplification and saving time due to the suppression of perfect bicameralism, the new text also provides for bills, which the Government indicates as essential for the implementation of its programme, to be inserted into the order of the day as a priority and submitted to a vote within a tight deadline and with simplified voting. This rule could allow the overcoming of the practice, unfortunately prevalent in recent years, of submitting bills directly related to the programme of the Government to a vote of confidence in Parliament (which, in the event of rejection, involves the resignation of the Government and the "dismantling" of the majority); this makes approval rapid, but it drastically reduces the chances of an effective evaluation by Parliament of the legislative choices of the Government.

On this point, it should be noted the involution of our political system to forms of increased supremacy of the executive (and its premier) with respect to the legislative, a trend that the new text seems to accentuate.

6. A New Framework for Regions and Local Authorities

The second part of the text which reforms the Constitution deals with the amendments to the rules – contained in Title V (Part II) - governing local authorities.

Firstly, the local government authorities which number four in the current text – regions, metropolitan cities, provinces and municipalities – are reduced to three in the new text because the provinces (i.e. the territorial authorities for a large area at the intermediate level between municipalities and regions) are suppressed. On this point, there was a long debate in our country, in

which, despite opinions to the contrary, the idea prevailed that the needs of local government were sufficiently dealt with by the lower level, the municipality, entrusted in a privileged way with the exercise of administrative functions (Article 118); and by the larger body, the region, to whom are entrusted all general functions of planning and direction (but also administrative and management functions, which are expected to gradually decline), and legislative functions.

In metropolitan areas (characterised by strong economic and social integration including connected centres, around a larger centre, and by intense urbanisation) the institution of government is the metropolitan city, in which the smaller municipalities included in the area operate with a reduced role. Beyond the metropolitan areas, and particularly in inland and mountain areas, the presence of very small municipalities raises a problem of aggregation using associative entities and joint authorities, to which the exercise of the most important functions pertaining to local government are delegated.

In terms of the structure of local government, with respect to which these and other organisational questions remain unresolved (Article 118 in its principles of subsidiarity, differentiation and adequacy, remains largely unrealised), there is no renewal in the reform text (on these principles a broad consensus has been achieved over the years); except on the point relating to the provinces. What will arise in the implementation phase of the reform is the question of how (and where) to place the functions of the former provinces, some of which (such as the adoption of land-use plans or the planning of the transport system) require management "over a wide area", which presumably will have to be provided through consortia of municipalities of an adequate size.

7. Regional legislative powers

As regards the legislative powers of the regions, the changes in the new text are significant. To the exclusive legislation of the State, in addition to the traditional subjects (foreign policy, defence policy, security policy, the monetary system, cohesion and equalisation policies, and, of course, matters relating to the organisation of the State and the exercise of the administrative functions within its competence), as well as the determination of the

basic level of performance relating to civil and social rights to be guaranteed throughout the country, materials have been included which in the current text are shared between State and regional legislation, or clearly reserved to regional legislation, hence the regulations regarding communication, production, transport and distribution of energy, strategic infrastructures and major transport networks of national interest, and so on. And with regard to matters in which the regions have legislative power, the text stipulates that the State can dictate "the general and common dispositions" (this is really a new form of the concurrent legislation); matters regarding the environment, cultural activities, tourism, government of the territory, education, health, food safety, and occupational safety.

Yet the text again provides that the law of the State may intervene (on the proposal of the Government) also in matters not reserved to it "when necessary for the protection of the legal or economic unity of the Republic, or the protection of national interest" (the so-called supremacy clause). Thus, State legislation is very wide-ranging, while to the regions remain (beyond the formula – of tenuously practicality – referring to "all matters not expressly reserved to the exclusive competence of the State") a range of subjects related specifically to the interests of the territory and the population concerned, hence the planning of the regional territory, mobility within it, infrastructure (at regional level), the promotion of regional economic development, the regulation of cultural activities of regional interest, the enhancement of environmental, cultural and landscape assets,, as well as tourism of regional interest, and so on. So a legislation that is limited almost back to within the boundaries set by the original text of the Constitution, which was then modified by the 2001 reform.

This reduction (we might say delisting) of regional legislative power is partly compensated for by the presence of the Senate, where representatives of the regions sit (in a purely political sense). And the Senate, as we have seen, has powers to make proposals on all laws, more so on laws of regional and local interest. And in any case, the exercise of these powers, although in most cases merely proposals, makes a political rethink necessary on the part of the Chamber about the text of the laws approved by it and in some cases by a qualified majority.

From this perspective of rescaling regional autonomy it is also worth mentioning the rule that the law of the State can establish the

emoluments of the regional councillors within the limits of those assigned to the mayors of the capital cities of the region; as well as the rule that forbids paying expenses ("or similar monetary transfers creating a burden on public finances") to the political groups within the regional councils.

These are all political rules that arise as a result of significant extravagance in the management of the regional councils (whose council groups have recently been subjected to the control of the Court of Auditors), which were brought to the attention of public opinion due to various scandals.

The reform text does not affect the different status of the five special regions (Sicily, Sardinia, Val d'Aosta, Trentino Alto Adige, Friuli Venezia Giulia) which retain their own statutes approved by Constitutional law. This safeguarding clause itself is among the norms whose application to the special regions is expressly excluded (which undoubtedly represents a *vulnus* to the unity of the Republic that ought to be eliminated!).

THE REFORM OF ITALIAN BICAMERALISM: CURRENT ISSUES

Lorenza Violini[*]

Abstract

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Bicameralism and regional legislative powers

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

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

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

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

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

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

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

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

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

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

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

3. The functions of the second Chamber

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

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

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

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

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

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

4. The institutional design of the second Chamber

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[17] Ibid.

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

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

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

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

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

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

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

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

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

A NEW SENATE?
A FIRST LOOK AT THE DRAFT CONSTITUTIONAL BILL

Raffaele Bifulco *

Abstract

The essay analyses the draft constitutional bill containing "provisions for moving beyond an equal bicameral system, reducing the number of members of parliament, the suppression of the CNEL and the revision of Title V of Part II of the Constitution" and its consequences on the Italian form of the State. In particular, the author underlines, on the one hand, the strong influence that the draft bill would produce on the future of regional government in Italy, regarding Regional legislative powers, and, on the other hand, he examines the transformation of bicameralism and the subsequent configuration of the Italian legislative process, comparing the new system with Federal States.

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1. Introduction

The following observations arise from a presupposition: if the draft constitutional bill containing "provisions for moving beyond an equal bicameral system, reducing the number of members of parliament, the suppression of the CNEL and the revision of Title V of Part II of the Constitution" (March 12, 2014), is successful, it will profoundly change not only the form of government, but above all, the form of the State. It will affect the form of government for the

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obvious reason that the relationship of trust exists only with the Chamber of Deputies, and no longer with the Second Chamber, given the name of the Assembly of Autonomy (or simply 'the Assembly'). It will affect the form of the State in so far as the proposals for reform contained in the section on Title V of Part II of the Constitution change the position and functions of the Regional governments compared with how they have been understood so far.
The reflections that follow aim to try to bring out the main innovations in the proposal, without overlooking the risks that adoption may bring. I will consider first the structure of the Assembly of Autonomy and the legislative process before going on to an examination of the aspects most closely related to the revision of Title V. Needless to say, there is a very close link between these two parts of the government's proposal.

2. The new Assembly of Autonomy and its functions

According to Art. 55, the Assembly of autonomy represents the territorial institutions. To this end, the proposal invests the Assembly with four functions or roles: a) involvement in the legislative function, b) a link between the State, Metropolitan Cities (provinces no longer exist) and Municipalities, c) direct participation in decision-making on the creation and implementation of European Union legislation, d) verifying the implementation of the laws of the State and assessing the impact of public policies throughout the territory.

Leaving aside the last function, whose actual implementation is regulated by the Assembly itself, it should be noted that there are several innovations in the government's proposal. The first consideration is the Assembly's merely collaborative role in the legislative sphere, a function imputed solely to the Chamber of Deputies. Our thoughts turn to the German constitutional order, in which the *Bundesrat* (the German second chamber) is said to collaborate (*mitwirken*) in creating legislation. And then we cannot fail to turn our attention to the linking function assigned to the Assembly: unlike in Germany and in other Federal States, the future Italian Second Chamber is not limited to forming a link between the State and the Regions, but between the State and all the local authorities. An attempt will be made to ensure that this will occur in a consistent way through provisions subsequent to the government's

proposal, in particular in the design of the structure of the Second Chamber and the legislative process.

3. The composition of the Assembly of Autonomy

First of all, it may be said that the composition of the Assembly of Autonomy has three types of representatives: the first from the regional authorities, the second from the local authorities (Municipalities and Metropolitan Cities), and a third from civil society or rather a part of civil society, one that has best represented it from the cultural point of view. More precisely, we can say that the regions are strongly represented in the Assembly, although this presence is pluralistic rather than unitary. Each region sends its President of the regional council (including the autonomous provinces of Trento and Bolzano) and two regional councillors elected by the regional council. These three 'regional' representatives are supplemented by 'local' representatives, that is to say, three mayors elected by an assembly of mayors from the Region. So each region sends, in total, six representatives (seven in the case of Trentino-Alto Adige). A further twenty-one may be added, appointed directly by the President of the Republic for outstanding achievements in the social, scientific, artistic, and literary fields (the Chamber of Deputies will host life deputies, i.e., former Presidents of the Republic).

It is also worthy of note that the term of office of these three types of components may be very different: while the mandate of the 'regional' representatives is bound to their regional institutional period of office, the 'local' representatives and those representing civil society (the cynically-minded might call them the representatives of the President of the Republic) have a mandate of fixed duration, five and seven years respectively.

4. A problematic application of the pluralistic principle

A first problem area should also be considered: the pluralistic composition of the Assembly, which in itself could already be a problem from the territorial and institutional point of view, is likely to be extremely diverse given that there will be a hundred-and-twenty members, representatives of the regional authorities (from both the executive and legislative bodies), and local authorities

(mayors of the Municipalities and/or Metropolitan Cities), plus the twenty-one representatives of civil society appointed by the President.

The writer fails to see the logic of the presence of this component. In fact, the makeup of the civil society component cannot be defined as either minimal nor consistent with the function of the Assembly of Autonomy, which, as we have said, has the task of representing the national institutions (one thinks, once again cynically, of the hordes of Senators under the Albertine Statute). A possible explanation could be found, forcing the issue somewhat, in the suppression of the CNEL, appropriately provided for in the draft in question, and the partial transfer of the idea that led to its establishment in the Constituent Assembly within the new Second Chamber. Even so, the objective fact remains that the representatives of civil society form an over-diverse group with respect to the function that the Assembly is called upon to perform.

Furthermore, the number of representatives of civil society begs the question: why exactly twenty-one appointed by the President of the Republic? One has to imagine - by now it is needless to add 'cynically' - that the President of the Republic has to choose one per region (and again, two for Trentino-Alto Adige). But at this point, our sense of regionalism would become so surreal, if such a hypothesis were even thinkable, that out of a sense of love for our country, it would be better to drop it. Finally, the proposal says nothing about the emoluments of these twenty-one members: on the one hand, the aim is to reduce the cost of politics, but on the other, they are being pumped up again by the excessive presence of components of little use in terms of making the representative system work.

A second noteworthy aspect is the application of the arithmetical, rather than the geometric, principle in the makeup of the Second Chamber. This means that the Government has decided to give equal representation to the Regions irrespective of the extent of their territory and/or population, with the result that Molise and Valle d'Aosta have the same number of representatives as those that Lombardy and Sicily are entitled to. It is a legitimate choice that has precedents in many Federal States, whose Second Chambers are made up of the Member States, often represented in equal measure (as happens, for example, in the United States of America and Switzerland). It is true, however, that this principle tends to be

applied in Second Chambers whose members are elected directly by the people (as is the case of the two Federal States just mentioned).

Our observations on the arithmetic principle lead to a third problem area. Leaving aside for a moment the cumbersome presence of the representatives of civil society, the Government, in its organisation of the Second Chamber, seems to be aiming for something very different from the establishment of a second chamber in the traditional model of a Federal State. To put it in very simple terms, the impression is that the intent is the substantial constitutionalisation of the Joint Conference, in which the State, the Regions and the Local Authorities currently sit. As will become apparent, this impression will be even stronger after an examination of the legislative process and the new Title V.

5. Bicameral system and legislative process

The impact of the 'restructuring' of the bicameral system on the structure of the legislative process is highly significant. As we have already intimated, the rule becomes the following: the legislative function becomes the province of the Chamber of Deputies. The only exception is the laws regarding the revision of the constitution and the constitutional laws, which continue to be approved by both chambers. This statement needs to be substantiated by a more detailed examination of the legislative process (insofar as it is of interest here).

Article 70 provides that the Assembly of Autonomy, though unable to introduce a law, may examine every bill. This examination results in the formulation of an opinion, that the Chamber of Deputies is essentially free to accept.

In reality, Article 70, para. 4 appears to make an exception for some bills regarding the functions and autonomy of local authorities for which the bill provides that the opinion of the Assembly, if favourable, or favorable subject to amendments to the text, can be 'passed' by the Chamber of Deputies only after a final vote obtaining an absolute majority of its members.

It does not seem, however, that these procedural limitations are able to adequately protect the regions and local authorities represented in the Assembly, for the simple reason that such protection is essentially left to the electoral law that will be used for the Chamber of Deputies. It is in fact clear that if this law were to

ensure the absolute majority of the winning side, the provision of procedural limitation would be *devoid of purpose*.

This result would be particularly serious for territorial autonomy in all cases where the Assembly votes for the opinion with a particularly high majority, showing strong opposition to the bill by local governments. To avoid such effects nullifying the constitutionally recognised autonomy of local authorities, it would be appropriate to provide a more elastic clause - also to foster the ability for the Assembly to coalesce and vote in a way that would be able to supersede Party logic - so that getting round a negative or partially negative opinion, in these cases, can only be possible if the Chamber votes with the same majority as the Assembly (if the Assembly votes with an absolute majority, then an absolute majority will be sufficient, but if the Assembly produces a majority of two thirds, then the Chamber will also have to reach two-thirds). We are aware that this is a lot to ask in terms of the compactness of the majority, but the fate of the autonomist and pluralistic vocation of the Italian Constitution is at stake.

6. A new reform for the Title V of the Italian Constitution

We shall now examine the part of the government proposal concerning Title V. Here too, it is possible to identify a principle that binds together the many changes: the drastic reduction of the legislative power of the Regions, which thus become administrative bodies. And also in this case, this move cannot be endorsed by the writer. In a phase of State restructuring, a State whose functions are becoming increasingly intertwined with international and supranational powers and structures, it would be desirable that the internal organisation of composite States especially in the context of European regulation, should point towards forms of governmental federalism.

The guiding principle permeates, first of all, the new distribution of the legislative function, organised according to a criterion of exclusivity. In practice, Article 117, paragraph 2 contains a renewed list of fields over which the State has exclusive jurisdiction; the little that remains is the responsibility of the residual legislative powers of the Regions; joint competence is suppressed (except for the provisions of Article122, para.1, that, from this point of view, remains unchanged).

In this way, the government intends to remedy the deficiencies that the previous division brought to light by the constitutional revision of 2001. In addition to bringing back within the exclusive power of the State fields which, inexplicably, had ended up among those under joint competence, the Government's proposal also contains more specific innovations, such as functions (coordination, planning) in addition to subject matters as criteria on which to base the allocation of the legislative function and the provision of appropriate new subject areas within exclusive competence (e.g., the general rules of administrative procedure, the strategic planning of tourism).

It should be noted however that, in many cases, attributing to the State exclusive jurisdiction to create 'general rules', 'general principles', and rules or principles of 'strategic planning', rather than homogeneous areas of subject matter, will still be a cause of conflict because it will be up to the Regions to adopt specific, detailed, legislation. And it is expected that the conflict regarding respect for the competences will tend to multiply with respect to this new dimension of attribution. The Assembly cannot reduce the new areas of tension because it is not called upon to intervene in the matters mentioned in Article 117, para. 2, except through the expression of non-binding opinion.

In any case, the clearest demonstration of the intention to transform the Regions into administrative bodies is the inclusion of a supremacy clause contained in the new art.117, para. 5. Thanks to this, the State may, by making a law, intervene in Regional matters or functions in the event of "the need to safeguard the legal or economic unity of the Republic or to bring about economic or social reform in the national interest." Although it is expected that, in this case, the Assembly of Autonomy may strenuously express an opinion, so to speak, the intention of allowing the State to drastically reduce, practically at will, the legislative power of the Regions, is evident.

7. Conclusions

In these very short notes it is impossible to dwell on many other issues that also deserve careful consideration. One example is the necessary reform of the procedure for the election of five judges of the Constitutional Court of parliamentary origin. Another is the

incomprehensible lack of any coordination with the statutes of the Regions that have special autonomy.

In an attempt to draw some conclusions from the rapid analysis carried out thus far, the following three considerations emerge:

1) The draft bill has a strong influence on the future of regional government in Italy. In particular, the proposal of the Government regarding Title V will produce a major restructuring of legislative power, setting the stage for a drastic reduction of the Regional legislative powers. The removal of concurrent legislative power and the supremacy clause both contribute greatly to this end. The shift of the centre of gravity of Italian regionalism from the legislation axis to the administration axis seems wholly acceptable, provided that it is compensated for by the adequate involvement of the Regions in the State legislative process.

2) The transformation of bicameralism is equally profound and radical. The Assembly of Autonomy is called upon to represent not only the Regions, but all the local authorities. This creates a real balance both from the intra-regional point of view (municipalities and regions have equal representation) and from the interregional point of view (each region has an equal number of representatives). This is a choice that has no substantial equivalent in the lower chambers of Federal States. The presence of the twenty-one appointed by the President of the Republic, however, is in stark contrast with the representative function of the local authorities that the new constitutional provision confers on the Second Chamber.

3) The configuration of the legislative process is not able to compensate for the net loss of legislative powers by the Regions. Of course, much will depend on the electoral law that will be applied to form the Chamber of Deputies; it is clear, however, that in the presence of a hopefully compact majority in the Chamber of Deputies, the Assembly of Autonomy has no effective powers to enforce the point of view of the Regions in the legislative process, even in circumstances where the law has a major impact on their competences and legislative functions. It will be left with a purely consultative role. From this point, there are marked similarities with the function of the Joint Conference, which seems to be the unspoken model upon which the Government's draft is based.

In conclusion, the direction of the reform seems to go in the right direction, even if it shows obvious inconsistencies. Fortunately, what we have been discussing is only a draft!

THE REFORM OF ITALIAN BICAMERALISM: THE FIRST STEP

*Giulio Enea Vigevani**

Abstract

At the beginning of August 2014 the Italian Senate approved a constitutional bill amending 46 articles of the Constitution. The two cornerstones of the reform are the transformation of Italian bicameralism - by means of the transformation of the Senate to a not directly elected constitutional body, designed principally as a place for dialogue between national and regional legislators - and the revision of the allocation of competences between the State and the Regions drawn up by the constitutional reform of 2001, making it more flexible and re-dimensioning the legislative autonomy of the Regions. This essay aims at illustrating and discussing this deep transformation of the Republican Constitution. First, it examines the elements of continuity and novelty compared to previous attempts to change the Italian Constitution in the last thirty years. As a second step, it examines critically the governmental plan and the changes introduced during the parliamentary examination, especially with regard to a) the method of election and the functions of the Senate, b) the implications on the balances among the powers of the State and between the central and local authorities. The article argues that the reform may still change, due to the need of further parliamentary examination and that it even remains to be seen if it will ever see the light of day. In any case, the current constitutional bill is undoubtedly one of the most significant attempts to reform the institutional architecture of the Republic and therefore should be carefully followed in his path.

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1. The "great reform": procedural issues

The "Great Reform" of the Italian Constitution[1] has been on

[1] The literature on constitutional reform in Italy is almost entirely in Italian. For foreign readers, please refer to the following papers: N. Bobbio, *La crise permanente*, Pouvoirs 8 (1981); J. La Palombara, *Democracy Italian Style* (1987); D. Hine,*Governing Italy: The Politics of Bargained Pluralism* (1993); G. Sartori, *Comparative Constitutional Engineering* (1994); M. Bull and M. Rhodes (eds.), *Crisis and transition in Italian Politics* (1997); C. Fusaro, *The Politics of Constitutional Reform in Italy: A Framework for Analysis*, 2 South European Society and Politics 3 (1998), at 45-74; P. Pasquino, *L'Italie vers la démocratie majoritaire*, Pouvoirs 85 (1998), at 63-73; M. Russell, *Reforming the House of Lords: Lessons from Overseas* (2000); G. Cahin, *L'évolution de la République italienne*, Revue française de droit constitutionnel 705-720 (2001); L. Pegoraro, *Centralité et déclin du parlement*, in 4 Pouvoirs 105-127 (2002); G. Pasquino, *The Italian Senate*, in 8 (3) The Journal of Legislative Studies 67-78 (2002); M. Bull, *Parliamentary Democracy in Italy*, in 57 (3) Parliamentary Affairs 550–67 (2004); L. Morlino, *Anchors and Democratic Change*, 38 (7) Comparative Political Studies 743–70 (2005); M. Bull, G Pasquino, *A long quest in vain: Institutional reforms in Italy*, 30 (4) West European Politics 670-91 (2007); M. Bull, M. Rhodes (eds.), *Italy: A Contested Polity*, 30 (4) West European Politics 657-943 (2007); M. Cotta, L. Verzichelli, *Political institutions in Italy* (2007); S. Vassallo, *Government under Berlusconi: The Functioning of the Core Institutions in Italy*, 30 (4) West European Politics 692–710 (2007); A. Floridia, *Gulliver Unbound. Possible Electoral Reforms and the 2008 Italian Elections: Towards an End to 'Fragmented Bipolarity'*, 13 (3) Modern Italy 317-332 (2008); M. Keating, *Second Round Reform. Devolution and constitutional reform in the United Kingdom, Spain and Italy*, LEQS Paper No. 15/2009; C. Fusaro, *Italy*, in D. Oliver, C. Fusaro, *How Constitutions Change. A Comparative Study* (2011), at 211-234; G. Baldini, *The Different Trajectories of Italian Electoral Reforms*, 34 (3) West European Politics 644-663 (2011); S. Ceccanti, *Changements constitutionnels en Italie*, in

the political and parliamentary agenda for the last ten or so legislatures[2].

The leader of the Italian Socialist Party Bettino Craxi, writing in "Avanti!" can be credited with starting the ball rolling on this subject when an article of his was published on 28th September 1979. For him, «a legislature which was born under unfavourable auspices, threatened by the risk of a purely destructive political vote, will be successful if it becomes the legislature of the Great Reform; not sporadic, sectorial and in certain cases badly-planned reforms, destined to end up being disappointing, but a reform which has a uniform logic, uniform principles and is uniform also in its basic orientation»[3].

Since then, an increasingly widespread opinion has held that in the Constitution, and above all in its implementation, there are «more *checks and balances* than governmental power»[4], and that since this affects the whole form of government, it is the latter,

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Société de Législation comparée (ed.), *Les Mutations constitutionnelles. Actes de la journée d'etude du 5 avril 2013* (2013), at 169-184; C. Fusaro, *Bicameralism in Italy. 150 Years of Poor Design, Disappointing Performances, Aborted Reforms*, available at http://www.carlofusaro.it/in_english/Bicameralism_in_ITA_2013.pdf; S. Mangiameli (ed.), *Italian Regionalism: Between Unitary Traditions and Federal Processes. Investigating Italy's Form of State* (2014); F. Laffaille, *Chronique de droit politique italien*, Revue française de droit constitutionnel 487-493 (2014).

[2] On the peculiar nature of the Italian debate on constitutional reform, see. M. Olivetti, *Il referendum costituzionale del 2006 e la storia infinita (e incompiuta) delle riforme costituzionali in Italia*, 18 Cuestiones Constitucionales 111 (2008), which underlines how this debate is characterised «as a debate on the "great reform" of the Constitution, or rather on a constitutional change which is far more incisive than a mere "maintenance" (whether the latter is directed towards making the text consistent and legible, or towards achieving important sectorial reform)», but at the same time without having the purpose of creating a new regime.

[3] B. Craxi, *Ottava legislatura*, in *Avanti!*, 28th September 1979, 1, now published with the title *La Grande Riforma*, in G. Acquaviva, L. Covatta (eds.), *La "grande riforma" di Craxi* (2010), at 185-189.

[4] G. Amato, Il *PSI e la riforma delle istituzioni*, in G. Acquaviva, L. Covatta (eds.), *La "grande riforma" di Craxi* (2010), at 39, who remarks that: «it is very interesting in terms of the changes in collective culture that in the late 70s, saying these things found an almost general consensus, as if the fear of the tyrant, as I called it in those years, had lessened considerably, and people felt the need for a democracy which, apart from being able to create consensus, was also able to decide».

considered as a whole, that must be reformed, not only some parts of it.

A twofold consequence has derived from this. First, both during the lengthiest legislatures and the most stable majorities and in the shortest and most tormented ones, there have been several bicameral parliamentary commissions[5], government commissions made up of "wise men"[6], presidential messages to Parliament[7] and of course a huge quantity of reform projects[8] which put forward proposals to reform entirely the second part of the Constitution or at least the sections related to the form of government and the territorial autonomy. Secondly, the inevitable difficulty in achieving the "great reform" has on many occasions forced the Italian Parliament to implement "special" procedures, partially failing to comply with what is stipulated in Article 138 of the Constitution.

So, while the bicameral Commission chaired by Aldo Bozzi was set up in 1983 by means of two unicameral orders of similar content, approved by the two Chambers without modifying the constitutional reform procedure, the "De Mita-Iotti" Commission, set up in July 1992, also approved with two motions by the Chamber and the Senate, was subsequently given referent powers from the constitutional law no. 1 of 6th June 1993. These

[5] The Parliamentary Commission for institutional reforms of 1983, presided by the Right Hon. Bozzi, the Parliamentary Commission of 1992, chaired by the Right Hon. De Mita, then by the Right Hon. Iotti, and finally by the "D'Alema Commission", established by constitutional law n. 1 of 1997.

[6] The Committee for Institutional Reform, established by decree by Premier Berlusconi on 14th July 1994 and presided by Minister Speroni and the Commission, set up by Premier Letta by decree on 11th June 2013, presided by Minister Quagliariello.

[7] The formal message, based on Article 87 of the Constitution, sent to the Houses on 26th June 1991 by President of the Republic Cossiga and object of discussion in the two branches of Parliament on 23rd -25th July 1991.

[8] Among which, in the three legislatures preceding the current one, the constitutional bill bearing "Changes to Part II of the Constitution", approved by absolute majority vote by the Chamber in the second reading in 2005 and not confirmed by the electors in the constitutional referendum in June 2006; the unified text approved by the Commission for Constitutional Affairs in the Chamber of Deputies on 17th October 2007 (the so-called "Violante Draft"); the constitutional bill S-24, approved in first reading by the Senate on 25th July 2012 and subsequently rejected during the examination in the Constitutional Affairs Commission in the Chamber.

provisions granted the Commission the task of formulating a complete project of constitutional revision regarding the second part of the Constitution and suspended the effects of procedures foreseen by the Constitution, as well as by parliamentary rules with regard to constitutional reform.

Similarly, constitutional law no. 1 of 1997, establishing the bicameral Commission for institutional reform ("D'Alema Commission"), entrusted the Commission with the task of formulating proposals to reform the second part of the Constitution, partially derogating from the procedural rules established by the Constitution. It also provided for an *ad hoc* regulation for parliamentary examination and the inclusion of a people's referendum for the reform project.

The constitutional bill presented at the Senate on 10th June 2013 by the Letta Government (A.S. 813) followed a similar trend, but was blocked by the Chamber after being approved in the second voting by the Senate on 23rd October 2013. It aimed at introducing a derogation from the revision procedure established by Article 138 of the Constitution. Indeed, the referent phase was entrusted to a single bicameral body - the parliamentary committee for constitutional and electoral reforms - which was also empowered to examine all the projects for constitutional reform under the headings I, II, III and V in the second part of the Constitution, as well as those regarding the electoral system of the two Houses. There was, moreover, a precise time scale for the main phases of parliamentary works, that were expected to be completed within 18 months as of the coming into force of the bill. Finally, differently from Article 138, the *referendum* of confirmation could be requested even in the case the reform had been approved by a two-third majority vote in both Chambers[9].

A third constant factor of these last decades is the apparently secondary role played by the Government in its various attempts to revise the second part of the Charter. Even with the significant exception of the reform approved by the centre-right majority in 2005 but which was endorsed by the referendum that took place the following year, the subject of the "Great Reform" has been considered a typically parliamentary

[9] See A. Pace, *Il metodo (sbagliato) della riforma. Note critiche al d.d.l. cost. n. 813 Sen*, available at www.costituzionalismo.it, who is severely critical.

issue, both as regards the legislative initiative and the subsequent drafting of the text. Only the Letta Government, in 2013 had explicitly tied its own political destiny to the realisation of a programme of constitutional reform[10].

2. Constitutional reform today: a different design for Republican institutions?

More recently, on 8th April 2014 the Renzi Government presented to the Senate an extensive constitutional bill[11], made up of 35 articles amending 44 articles of the current text. The two cornerstones of the reform bill are the transformation of Italian bicameralism - by means of a radical change in its set-up and electoral system - and the revision of the allocation of competences between State and Regions, as provided by the constitutional reform of 2001, the trend being to attribute concurrent legislative powers to the State. While the governmental project foresees further and "more precise" revision of the Constitution, it provides for three other important changes. It modifies the rules governing legislation by decree law and their conversion by Parliament,, in order to avoid the most blatant abuses. It strengthens the impact of the Government in the legislative process. Finally, it suppress the National Council of Economy and Labour.

[10] In the case of the cabinet presided by Enrico Letta, the message read to Parliament by the President of the Republic Giorgio Napolitano on the day of his taking oath after re-election was of significant importance. This preceded by some days the nomination of the new Government. The Head of State encouraged Parliament to «make a clear, swift decision on the reform that Italian democracy and society needed without delay in order to survive and to advance», underlining in particular the "unforgivable" «lack of 2005 electoral reform» and the «no less pardonable ... fiasco in relation to albeit limited and targeted reforms of the second part of the Constitution, agreed upon with difficulty and then buried, and it was even never possible to break the taboo of equal bicameralism». The text of the presidential message is available at the website www.quirinale.it/elementi/Continua.aspx?tipo=Discorso&key=2688.

[11] Constitutional bill n. S-1429, presented to the Senate by the Premier (Renzi) and by the Minister for Constitutional Reform (Boschi), on 8th Aprile 2014: *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.*

A text of this kind can be easily collocated in the permanent constitutional reform process that distinguishes the last thirty-five years of the history of the Republic, but it presents novel elements different from those outlined here.

On one hand, this can be read as a further attempt to change the institutional framework designed by the Constituent Assembly, through a constitutional law that has an impact at the same time on a multiplicity of constitutional norms included in almost all the sections of the second part of the Constitution. In other words, it is not a simple work of "constitutional maintenance" or a sectorial reform, but, rather, a project of deep transformation of the Republican system, especially if it is linked to the electoral reform project approved in the first reading by the Chamber of Deputies on 12th March 2014.

On the other hand, there are elements of discontinuity which deserve to be highlighted. First of all, the choice to concentrate specifically on the reform of bicameralism and regionalism (even if in truth the reform impinges in no uncertain terms on the general balance between powers[12]) would seem to imply an abandonment of the palingenetic myth of the "Great Reform", or rather of the idea that it is necessary to intervene simultaneously and as a whole on the form of government, the system of territorial autonomy and the system of checks and balances[13].

A second and by all means no less significant feature of the

[12] As underlined by Giuseppe De Vergottini in the hearing before the Senate on 27th May 2014, «even if the question of the form of government does not appear to emerge directly, there is certainly some consequence. In certain cases even explicit: the provision giving priority registration to the agenda of the Cabinet (new art. 72) clearly indicates the intention to reinforce the Government in the Chamber of Deputies; the possibility to enact the clause of supremacy (art. 117, par. 4) places the Government in a strong position in relation to the Regions. But in general the clarification of the relationship of confidence that is bestowed on the single binomial Chamber of deputies/Government reinforces the latter (even more so if the electoral law were to move in the direction of decisive majority award attributable to the list or the coalition reaching at least 37% in the first ballot or if need be as winners of the second ballot; it should be noted, incidentally, that the ballot of the coalition can only work correctly in absence of perfect bicameralism)».

[13] On the myth of the "big reform", see P. Caretti, *L'ennesimo "revival" della Grande Riforma costituzionale in funzione palingenetica*, available at www.costituzionalismo.it/articoli/445/ (8th July 2013).

reform is the choice to follow the ordinary process of constitutional revision. This implies that no "special" procedure is necessary, coherently with what is established by Article 138 of the Constitution. It also implies abandoning the constitutional bill which has already been approved in a second reading in one branch of the Parliament, which foresaw the creation of a Parliamentary Committee for constitutional and electoral reforms.

Finally, an innovative feature is undoubtedly the central role that Government intends to play in the reform process. Quite apart from the obvious rhetorical exaggeration, it is not irrelevant that the Government has explicitly tied its political survival not on a generic aim to "make the reforms", but on a specific course of institutional revision, outlined in terms of time scales and essential strategy in the keynote address in the Chamber, in order to obtain the vote of confidence by the House. The President of the Council of Ministers, Matteo Renzi, after having in meaningful way informed senators of his will to be the «last Prime Minister to request confidence from this House», highlighted the following features as being the cornerstone of the institutional reform: a) modernisation of the «current Senate, making impossible for it to hold the vote of no-confidence in a Government as well as the power to approve the budget and transforming the post of senator, nowadays the result of a direct election and the grant of an allowance, by the creation of a non-elected regional chamber, like the German model, made up of officials from the Regions, to be given more responsibility over time. There would subsequently be the opportunity of appointment for individuals from the world of academia and culture»; b) «the need to review the exclusive competences of State and Regions and to introduce the possibility for Regions to legislate on any matter that is not otherwise assigned specifically, while at the same time introducing a clause for the possibility for permitting to resort on State legislation on matters which are exclusively assigned to the Regions, when required, due to reasons of economic and legal unity of the system»[14].

[14] Senato della Repubblica, XVII Legislatura, type-written report of the hearing no. 197 of 24th February 2014, document from the Premier Matteo Renzi, available at www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=Resaula&leg=17&id=00750049&part=doc_dc&stampa=si&toc=no.

Hence the option of the Government to present the Chamber with a text delimiting the aim and outlining the basic coordinates of the reform, despite the fact that the constitutional reform does not conform to the political orientation of the majority.

3. The goals of the reform and public debate

The Government's plan to reform the Constitution differs from earlier attempts in three important respects: a) the general significance of the reform is concerned (neither "great reform" nor "simple sectorial maintenance"), b) the method (recourse to procedure provided for in by art. 138 of the Constitution, even if with a bill with a broad and heterogeneous spectrum) and c) the role of the Executive (with full authority, at least in the phase of the legislative initiative).

As far as the goals of the reform are concerned, the constitutional bill intervenes primarily on the parts of the Charter where the political class and public opinion have over a considerable period of time come to the conclusion that a reform is essential, that is, the bicameral system and the division of competences drawn up by the constitutional reform of 2001.

In this last respect, there are some meaningful paragraphs from the annual address given by the President of the Constitutional Court on 27th February 2014. It is pointed out that the system of the division of functions «shows increasing signs of inadequacy, with reference to both the criteria of definitions of the subject matter and the tools linking the central State with autonomous territorial bodies» and the need within modern legal orders «for institutions involved in the political decision process, destined to satisfy the need for uniformity and autonomy (which already exists in procedure of the formation of state laws»). From here the Parliament was notified of the «two complementary requirements: on one hand it is crucial to simplify vigorously the criteria of the division of competences, while on the other it attempts to impose the reinforcement of an institutional forum in which to debate, with the aim to give back to politics a more effective means to govern clashes between central and regional government, without having to await any mending and patching

up by the Constitutional Court»[15].

There was broad consensus for the need for a reform on these specific topics in the work of the co-called "wise men committee" which was set up in June 2013, when there was unanimous agreement for the need to get rid of the perfect bicameral system, through "unicameral confidence", and to review the distribution of legislative powers between State and territorial autonomies, by making it more flexible. No shared hypotheses emerged, instead, with regard to the form of government and the electoral system[16]. There was also general consensus regarding further proposals for changes, which will be discussed during the current legislative process: the provision of a precise timing for the bills regarded as urgent by the Government, a rigorous control on the use of the emergency decree and the strengthening of the institutions of participation of the people[17].

There is a general agreement about the need to change these parts of the Constitution[18]. This consensus is quite large

[15] Report by President Gaetano Silvestri on constitutional jurisprudence of 2013, available at www.cortecostituzionale.it/documenti/relazioni_annuali/Silvestri_20140227.pdf, p. 2.

[16] See report of the Commission for Constitutional Reform to the Premier of 17th September 2013, available at http://riformecostituzionali.gov.it/public/Relazione_Commissione_Riforme__Testo_def_10ottobre_copia.pdf.

[17] A similar situation can be found in the hypothesis of reform planned thirty years ago; for example the so-called "institutional decalogue" presented by the then President of the Council of Minister Giovanni Spadolini in 1982, foresaw the provision for limits to the recourse of decree laws and the preferential lane for government bills.

[18] The results, published in November 2013, of a public consultation on constitutional reforms promoted by the Government Letta showed a broad consensus in favor of a radical reform of the institutional framework and in particular of the bicameral system. Fewer than 10 percent of the participants were in favor of the maintaining of the current model while the majority were in favor of the unicameral system or of a Senate representative of the local authorities (www.riformecostituzionali.partecipa.gov.it/). These results were largely confirmed by several surveys subsequent to the constitutional bill presented by the Renzi Government. For example, a survey of the Institute of Demopolis dated 1st April 2014 revealed that 76 percent of citizens were in favor of overcoming the perfect bicameralism, while according to an opinion poll of the IPR Marketing of the end of June 2014, only 6 percent considered it appropriate to maintain the current bicameral system.

among political parties and citizens, with regard to the basic plan which inspires the general institutional reform promoted by the Government: to achieve - through the constitutional reform and the adoption of an electoral system that ensures an absolute majority of seats in the elected Chamber to the winning coalition - the rationalisation of the forms of parliamentary government, which reinforces the stability of the Cabinet and guarantees an acceleration of the decision-making processes, first and foremost by means of a revision of the legislative procedure.

The change in the division of powers towards a model that emphasises the central role of the "Governing Power"[19] is not a novelty in the long drawn-out and still incomplete reform process of the institutional framework of Italy. Although the governmental plan is moving distinctly in this direction, it does not neglect - as will be seen later – the need to introduce some antidote against the risk of tyranny of the majority.

The attention - might we say almost the "obsession"[20] - for the speed of decision-making is a "child of our times". The governmental text does not limit itself to the provision of an asymmetrical bicameralism, in the original version not very different from a real unicameralism. The Senate's participation is for most laws merely possible. As will be mentioned, the governmental text foresees extremely limited terms within which the Assembly may debate amendments to the bills approved by the Chamber (Article 70 (3). Moreover, yet again in order to speed up the legislative process, it introduces a preferential course of

[19] On the concept of "Governing Power", see G. Bognetti, *La divisione dei poteri* (1994), at 91.

[20] Against such a simplistic view of the relationship between the speediness of the decisional process and the efficiency of democratic systems the words of Massimo Luciani are recalled: «If we still believe (as I personally do) that parliamentarianism is a technique useful to debate between different political opinions, which has to tend towards the identification of a compromised falling point, or if the less we believe that parliamentary confrontation, quite apart from its effective ability to generate compromise, helps the majority to understand the limitations of consensus towards their own legislative options and thus, the risks of their subsequent non-realisation or ineffectiveness, the time-scales of those debates are more of a resource than a hindrance»; M. Luciani, *La riforma del bicameralismo, oggi*, Speech given at the II Seminar of the Italian Association of Constitutionalists "Constitutionalists and the Reforms", held at the Università degli Studi di Milano on 28th April 2014, available *www.associazionedeicostituzionalisti.it* (2nd May 2014), p. 3.

action which is particularly broad for the bills indicated as essential by the Government for the implementation of the programme: for these bills, the Government may request priority inclusion in the agenda, that the final vote takes place within sixty days of the request and once that time has elapsed, the parliamentary vote is "blocked" with no possibility of presenting amendments to the text proposed or accepted by the Government (art. 72, comma 6, which introduces the so-called "certain date vote").

The specific solutions put forward in the government bill [21] have been the subject of heated debate. This bill has undergone considerable modifications in Parliament. When

the Senate approved it in first reading (on August 8, 2014), with 183 favorable votes and four abstentions, it endorsed several amendments approved by the Constitutional Affairs Committee or directly by the Assembly. In particular, the Senate modified the basic text as regards the distinguishing aspect of the reform, that is the set up and functions of the Senate, by outlining a balance between the two Houses with less of an imbalance in favour of the representative Assembly. From this perspective, the references of this paper will refer to the text approved by the Senate, pointing out the aspects of greatest distance with the original bill.

4. The bicameral model and the status of senators

The main goal of the government plan to reform the Constitution is, as noted earlier, to move away from the model of the equal bicameral system adopted by the Founding Fathers. According to this plan, the Senate will be transformed into a constitutional body acting as «a link between the State and the group of local authorities and as a guarantor for the balance of the institutional system»[22].

This goal can be achieved, first and foremost, by granting solely to the members of the Chamber of Deputies the function of representing the nation, while the Upper Chamber - given the name in the original project of "The Senate of Local Authorities" and now again "Senate of the Republic"- is entrusted with the task

[21] Government bill No S 1429, presented to Parliament on 8th April 2014 (it is the so-called "Renzi-Boschi" document).

[22] Report that illustrates the government bill No S 1429 (Author's translation),

of representing the local (regional, municipal) institutions (art. 55). Accordingly, it is only the Chamber of Deputies that has the general political representation, the function of political direction and control on the executive power and the relationship of confidence with the executive.

An institutional change of this kind has significant consequences on the status of senators. The text - both in its original version and in the one amended by the Senate - provides that the members of both the Houses may not be bound by any mandatory instructions, considering the nature of the Senate as a body which is representative of the local institutions in its entirety, rather than conceived as an expression of the individual local governments, as in the German model[23]. A choice of this kind was natural for the Senate depicted in the text presented to the Chambers, where a balance of representation between Regions and local councils was predicted and a significant number of "wise men" nominated by the President. This would seem to be less predictable in the event that the Senate were made up almost exclusively of elected members of the regional councils, as the bill approved by Senate provides. In this case, it might have been more consistent if the model of territorial representation followed the hypothesis that «the delegation from every region..... expresses its vote as a unit, pondering its importance depending on the number of members, so that the final result reflects the general interest of the people of that region, party-political leanings prevailing, also by encouraging internal deliberations»[24].

The theoretical difficulties in defining the constitutional position of the Upper Chamber also emerge with regard to the issue of immunity. What is controversial is not the choice to keep the guarantee of immunity for all parliamentarians with respect to

[23] In this perspective, it has been observed that the maintenance of the prohibition of mandatory instructions also for senators would constitute a break in our constitutional history insofar as there would be a default «in the reference, historically decisive to the relationship between national representation and free parliamentary mandate»; C. Martinelli, *Le immunità dei senatori e la natura del nuovo Senato*, in www.confronticostituzionali.eu (24th June 2014).

[24] V. Onida, *Senato come assemblea delle autonomie. Non tutte le Regioni hanno lo stesso peso*, in *Il Corriere della Sera*, 18th March 2014, p. 34. Similarly R. Bin, *Coerenze e incoerenze del disegno di legge di riforma costituzionale: considerazioni e proposte*, available at *www.forumcostituzionale.it* (22nd April 2014).

the opinions expressed or votes cast in the performance of their function. What is at issue is, rather, whether the prerogatives provided by Article 68 (2) and (3) of the Constitution, in defence of personal liberty and confidentiality of communications, should be extended to the members of the reformed Senate. The initial choice to reserve such prerogatives solely to the members of the Chamber of Deputies, quite apart from the reasons of political opportunity that may have inspired it, seemed to be in line with the idea of a Senate which represents regional and local institutions and is thus composed by members of local and regional authorities. The decision taken by the Senate to restore the guarantees of immunity is instead based on a very different premise, that is to say that the new Upper Chamber will truly be a "branch of Parliament". As a result of this, Deputies and Senators must enjoy equal guarantees. Nevertheless, the equality of treatment between parliamentarians ends up creating a differentiation in the system of immunity regarding regional councillors and mayors between those that are senators and those that are not.

Even the clearly populist-oriented decision to deprive senators of the right of indemnity provided for by Article 69 of the Constitution, granting them emoluments only for the local position held by them, is consistent with the very asymmetrical bicameral system outlined in the original text; it is, however far less logical in its strengthening of competences in the Upper Chamber as agreed in the amended text.

5. The new Upper Chamber: a Regional Senate?

The part of the draft constitutional bill that has been more amended is the one that concerns the set-up and the system of election of the Senate (articles 57-59).

In the original plan the "Senate of the local authorities" had a hundred and twenty-two members, representing the local institutions. The twenty-one presidents of Regions or autonomous provinces and the twenty-one mayors of the capital cities were members by right. Moreover, forty regional councillors elected by the regional assemblies were also part of it, along with forty mayors elected by an electoral board composed by the mayors of the Region. Equal representation was established in all the Regions, from Valle d'Aosta to Lombardy and an equal presence

of regional representatives and mayors. Furthermore, the President of the Republic could appoint up to twenty-one "illustrious citizens" who would hold office for seven years.

The new text approved by the Senate establishes a "Senate of the Republic"[25], whose composition differs radically from that just illustrated. The choice of an indirect election of the Senate remains but the assembly is envisaged as much more homogeneous, reflecting the regional communities. There would be a hundred senators, ninety-five of which would be representatives of local institutions and only five nominated by the President of the Republic, including life senators still in office (but not the former Heads of State, who are life senators by right). The ninety-five senators would be elected by regional councils with proportional representation, seventy-four of which among their own members and twenty-one among the mayors. The division of the constituencies is not equal insofar as the less populated Regions and the provinces of Trento and Bolzano are over-represented as they have the right to at least two senators, one of which is a mayor, while the bigger Regions should have at the most seven or eight.

If we compare the new text with the initial one, it soon becomes evident that there are not just changes in the "dosage" among the different components of the Senate, but a change in the "philosophy" which underpins the government bill. For sure, the role that it left to the Senate was not limited to a link between the State and the Regions and the safeguarding of their competences. Even in the context of a Senate which considered as a whole would be weaker than that which we have inherited from the Constitution, the Upper Chamber would have been entrusted with the task of guaranteeing the correct functioning of Italian

[25]The text takes up again the actual title "Senato della Repubblica", embracing a suggestion by Massimo Luciani who claims - starting from the current article 114 of the Constitution according to which " The Republic is composed of the Municipalities, the Provinces, the Metropolitan Cities, the Regions and the State" - that «Since all the territorial entities of the political community are united in the Republic, from the smallest to the State itself, to keep the old title would mean to highlight that the essential function of a Senate while elected directly but being "regionally based" could end up being not so much the agency ("rappresentanza") as the representation ("rappresentazione") of the regional interests at the level of state institutions (M. Luciani, *La riforma del bicameralismo, oggi*, cited at 19, 10).

institutions, a task that is suitable for a body of "mixed" set-up. The participation on equal footing with the other House in any further constitutional reform, the power to appoint two constitutional judges, the participation in the election of the President of the Republic and of a third of the elective members of the High Council of the Judiciary, the possibility to oblige the Chamber to re-examine bills already approved, no matter the issue: all this serves to define a second Chamber with a role of "guarantor" whose primary job is to healthily curb the executive power, especially in the context of a growing majoritarian trend.

In this light, it did not appear unreasonable to keep equal representation of Regions and municipalities within the Senate, «reflecting the structural features of the Italian local system, its strength being the communal identity»[26]. Above all, despite widespread criticism[27], it was reasonable to include a "deserving aristocracy" and thus the presence among senators of a significant number of individuals chosen on the basis of their high level of culture and skills that should integrate local representation and at particular times encourage choices which are more carefully considered[28].

The reasoning behind a "mixed" set-up has more impact in the case that Parliament decides to give more power to the Senate in the legislative process, to give it back the power of enquiry at least regarding matters of local autonomy and bestow on it other functions of control and guarantee, such as the evaluation of the activities of public administration and public policies, the control of the execution of State laws and the advice on appointments made by the executive branch.

In this perspective, it is hard to understand the choice made by the Senate, in favour of a composition that drastically reduces the component of the local council and the senators nominated by

[26] F. Bassanini, *Prime riflessioni sulla bozza di riforma del bicameralismo e del Titolo V del Governo Renzi*, 6 Astrid Rassegna (2014), at 5.

[27] Many objections have been raised to the idea of a Senate made up of a quota of "experts" without a democratic legitimation and even more to the proposal to grant one single person, be it the President of the Republic, the power to nominate twenty-one senators and therefore to influence the direction of the new Chamber; for all, M. Luciani, *La riforma del bicameralismo, oggi*, cited at 19, 6-7.

[28] In this sense, C. Melzi d'Eril - G.E. Vigevani, *Per un Senato previdente*, in *Il Sole 24 Ore*, April 13th 2014, at 37.

the President. A chamber represented almost exclusively by the Regions determines, in fact, a redefinition of the constitutional role of the Senate, which is designed principally as a place for dialogue between national and regional legislators and less as a "counter-power", with the job to contain political power within the confines provided for by the Constitution.

At this point there is a risk of having a Senate that would end up playing its role on the central-peripheral axis and, as observed by Gustavo Zagrebelsky, a former President of the Italian Constitutional Court: «it would be an internal expression of a single political system which needs to solve internally questions of essentially administrative nature, [...] a body of negotiation of financial resources and portions of public functions in a sort of *do ut des* which today can be found in the two "Joint Committees" ("Conferenze paritetiche")»[29]

6. The Senate's involvement in legislation

The "new" Senate is expected to carry out very different, much more limited functions than it does today, once it is no longer elected by the people and assumes the function of representation of regional and local authorities.

As far as legislation is concerned, the governmental bill and, albeit to a lesser extent, the text adopted by the Senate, on the whole confers the Upper House with a marginal role, even in matters regarding the interests of the local institutions which the House is called upon to represent.

It provides for the preservation of equal bicameral procedure only for constitutional laws or constitutional reforms and, subsequent to the changes made during the work of Parliament, for the matters referred to in Articles 29 and 32, second paragraph, of the Constitution) ([30]) and for laws regarding the protection of linguistic minorities, the implementation of constitutional regulations on matters of referendums and the

[29] Such was the letter sent to the President of the Constitutional Affairs Commission of the Senate on 4th May 2014, on occasion of the hearings regarding the constitutional bill no. S-1429, available at www.senato.it/Leg17/1122?indagine=43.

[30] This concerns family law, marriage and health treatment: see Article 55 (2) of the text approved by the Senate.

authorisation for the ratification of European Union treaties. It also provides for those laws regarding the regulation of local bodies, for the State legislation concerning the fundamental principles in matters of the electoral system and the ineligibility and incompatibility of regional bodies, as well as in other cases provided by the Constitution.

Not included among the bicameral laws are the electoral systems of the Chamber and the Senate, since the Commission of Constitutional Affairs rejected an amendment to this regard. This choice has been controversial, insofar as the provision for ordinary procedure does not give any stability to the electoral law, which could be easily modified by the political majority. The particular importance of electoral legislation is, nonetheless, acknowledged in another amendment approved during the parliamentary process, where it is foreseen that the laws that govern the election of the members of the Chamber and the Senate may be subjected to preventive judgement of constitutional legitimacy on the part of the Constitutional Court before their enactment, on the request of a consistent parliamentary minority (Article 73 (2)[31].

Apart from the relatively few examples where legislation is carried out collectively by the two Houses, the laws (Article 70 (2) «are approved by the Chamber of Deputies». In this way, the importance of this Assembly is endorsed, in line with the choice to bestow the self-same Chamber with the responsibility as the sole trustee of national representation, entitlement of the confidence relationship and public policy. The participation of the Senate as regards legislation is clearly reduced[32].

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[31] In the same perspective of the involvement of the Constitutional Court in the control of the uniformity of the elections, the legislator would have done well to introduce some changes in the institution of the control of the credentials of its members (art. 66 of the Constitution), by granting the Court the exclusive task on the subject or at least a role of judge of second instance to parliamentary decision; for a suggestion on this, see the report by Giuditta Brunelli published in the in-depth analysis attached to the report of the Commission for Constitutional Reform of 24th October 2013, available at http://riformecostituzionali.gov.it/documenti-della-commissione/relazione-finale.html.

[32] See B. Pezzini, *La riforma del bicameralismo*, Report given at the II Seminar of the Association of Italian Constitutionalists "Constitutionalists and Reforms", held at the Università degli Studi di Milano on 28th April 2014, available at *www.associazionedeicostituzionalisti.it* (2nd May 2014), p. 8.

More precisely, the final decision lies with the Chamber of Deputies, but the Senate may intervene both in the initial phase of legislation and after the approval of a bill on the part of the elected Assembly, assuming the function of "cooling down"[33], being able to propose changes or suggestions that the Chamber may accept or reject.

Indeed, as far as the power of initiative is concerned, each senator (like each MP) has the power to present a bill in the Chamber of Deputies on any matter, even if it is not of regional interest (Article 71 (1).

If this initiative is exercised by the Senate by an absolute majority, the Chamber shall make its pronouncement within six months from the resolution of the other branch of Parliament. As regards the approval phase of the bill, the reform project establishes that the Senate may intervene in all legislative processes with the role of "Chamber of Contemplation" but it has no power of veto, except in the few issues left in the sphere of equal bicameralism.

The legislative procedure established for the possible passage to the Senate is not particularly complex and, as already noted, is characterised by its acceleration in the decision-making process: each bill examined and approved by the Chamber of Deputies is necessarily passed on to the Senate; the examination on their part is not automatic but takes place if one third of its members requests it within ten days. In this case the Senate may deliberate proposals for change in the following thirty days, after which the Chamber of Deputies makes its pronouncement (Article 70 (3).

With a Senate which is the expression of local authorities, if bills concern issues of particular importance as far as the systems of regional or local autonomies are concerned, the amendatory proposals by the Senate may be disregarded by the Chamber through a final majority vote of the members (Article 70 (4), something which is not easily achieved even with the electoral system under examination by Parliament at the moment, which would guarantee a winning coalition with a slightly greater number of seats than an absolute majority.

[33] For further remarks, see A. Morrone, *Cento, non più di cento*, available at www.rivistailmulino.it (23rd June 2014), at 1.

The same "reinforced" procedure applies to the law laid down in Article 81 (6), which defines the content of the budget law and the one which establishes the forms and deadlines for the fulfillment of the obligations arising from Italy to EU. Similarly, for the budget law, regarding the matters provided for by the fourth paragraph of the Article 70, in the eventuality that the Italian Senate were to decide with an absolute majority of its members, if the Chamber is not in agreement it must also vote with an absolute majority (Article 70 (5)).

The new Senate would be vested with a highly important role, i.e. to act as a link with the institutional bodies of the European Union[34]: it would take part in direct decision-making both from the outset of the law-making process and in the carrying out of the European Union acts (Article 55 (5).

In the perspective of a Senate guarantor of the proper functioning of the public machine, it carries out the tasks of verifying the implementation of the State legislation and the evaluation of public administration and public policy and helps to give advice on the appointments which belong to the competence of the Government (Article 55 (5).

In accordance with this idea of the "Assembly of Contemplation"[35], to borrow a famous quotation from Walter Bagehot[36] who so cleverly summarised the powers of the sovereign, the latter has, above all, the power *to be consulted, to encourage and to warn* - the Senate may set up enquiries on matters of public interest concerning territorial autonomies, carry out fact-finding activities, as well as make comments on acts or documents even while they are being examined in the Chamber of Deputies.

The bill, it has been said, places the Senate in a clearly subordinate position to the elected Chamber. Sometimes it even seems to oust it from the decision-making process: one case in

[34] On the potential of such a clause in the different phases of the formation of the law of the Union, turn to F. Clementi, *Non un Senato "federale", ma un Senato "federatore". Prime note sul disegno di legge di riforma costituzionale del Governo Renzi*, avaialble at www.confronticostituzionali.eu (22 aprile 2014).

[35] Against, nevertheless, G. Salerno, *Il progetto di riforma costituzionale del Governo Renzi: qualche osservazione preliminare*, available at *Federalismi.it*, 8/2014, at 9, according to whom the new Senate «would have a somewhat indefinite role: it would not be an Assembly of Contemplation, only being able to postpone by a month the predominance of the will of the Chamber of Deputies».

[36] W. Bagehot, *The English Constitution* (1867), at 75.

point is the power to declare a state of war, which the text attributes as sole responsibility of the Chamber of Deputies along with, according to a reasonable interpretation[37], laws of amnesty and pardon and authorisation for ratification of international treaties, with the exception of the Treaties relating to Italian membership at the European Union (and, according to the original text, even the laws of the legislative delegation). Indeed, the text itself and some indications which emerge from the accompanying reports would seem to exclude the Senate from any intervention regarding these matters[38]. The reasoning behind this exclusion may be found in the opinion that such laws are basic acts of pure politics which are collocated closely within the realm of Chamber-Government confidence.

Such a text would certainly imply a change of not irrelevant significance: it would introduce into the Italian system veritable "unicameral laws" that the Senate would not even have the power to debate or propose changes. Objections have been made that such provisions «may be interpreted as being a pure and simple adaptation of the same text of reserving the exclusive right to the Chamber to "approve laws", as provided by the new Article art. 70 (2), of the Constitution», also when considering - before the amendments approved by the Senate - the «clearly absurd insertion in the category of the "unicameral" laws and also of the laws of legislative delegation»[39] (especially if the delegation concerns issues -very few- which are legislated collectively by the two Chambers) .

The second theory seems more convincing, in that for all the laws which are not legislated by the two Houses, the Senate may intervene in the formative procedure but the Chamber of

[37] G. Salerno, *Il progetto di riforma costituzionale del Governo Renzi: qualche osservazione preliminare*, cited at 34, p. 8.

[38] The draft constitutional bill provides that «Amnesty and pardon may be granted by a law which has received a two thirds majority in the Chamber of deputies» (Article 79 (1) and «the Chamber of deputies shall authorise by law the ratification of international treaties ..» (Article 80). The accompanying governmental report to the bill is clear in affirming its intention to reserve legislative competence on this subject to the Chamber of Deputies.

[39] G. Puccini, *La riforma del bicameralismo in Italia nella XVII legislatura: dalla relazione dei "Saggi" alla proposta Renzi*, available at http://www.astrid-online.it/Dossier--r/Studi--ric/Puccini_ASTRID-rif-cost-7-maggio-2014.pdf (6 maggio 2014), p. 30, note 76.

Deputies has the sole responsibility for the formal act. So, it would seem correct to believe that the law of authorisation of the ratification of treaties must follow the procedure prescribed by Article 70 (and the following ones). of the new text. There are more doubts as regards amnesty and pardon; indeed, it does not seem reasonable that the Senate may propose changes (with a simple majority) of a text deliberated in the Chamber by a two-third majority vote of members, and then it is not clear how large the majority should be in the Chamber in its non-agreement of the amendments proposed by the Senate. There is still the chance for clarification by the legislator during the parliamentary examination.

7. The reform of Bicameralism and the division of competences between State and Regions

The reform of perfect bicameralism lies at the very heart of all the other changes proposed in the constitutional reform bill - it is the first domino in the project of institutional innovation. The radical reform of the title V of the second part of the Constitution and in particular of the criteria regulating the division of legislative competences between State and Regions is inextricably linked to the creation of a Senate representing regional authorities.

The move from a «system of rigid spheres of authority "governed" by the Constitutional Court» to «a system of flexible spheres of authority "governed" by the involvement of the Senate»[40] has a sort of precondition, that is to say the existence of an institutional juncture between centre and periphery, like the Upper Chamber foreseen in the reform project. The participation of local authorities in the legislative procedure at national level is the political price of re-dimensioning the legislative and administrative autonomy of the ordinary Regions[41] and of the

[40] Hearing of Professor Augusto Barbera before the Constitutional Affairs Committee of the Senate of 27th May 2014, p. 7. In this text on page 2, Barbera highlights that «the main advantage of the government text is that of having linked the bicameral system reform to that in Article V».

[41] For the Regions having a special legal status the governmental text does not provide for any immediate change, but only a postponement for future modifications of the respective fundamental rules, on the basis of agreements with such Regions.

return of many legislative and regulatory duties to the State[42]. The constitutional bill does indeed eliminate concurrent legislation and returns to the exclusive legislative power of the State a significant number of matters assigned to the Regions by the constitutional reform of 2001 (Article 117 (2); in particular it deals with matters concerning inseparable interests of national importance such as «strategic infrastructures, transport and navigation networks» and «communications». Exclusive legislative powers would remain the domain of the Regions in the issues listed in Article 117 (3) as well as in all the matters that are not expressly covered by State legislation. However, the reform introduces as a closing rule of the system, a » -taken from the model in Article 72,2 in the Basic Law for the Federal Republic of Germany - under which on proposal of the Government, state law may intervene in issues which are not necessarily its responsibility, when the safeguarding of Italian juridical or economic interest or the defence of national interest are in question (Article 117 (4). As far as regulatory powers are concerned, the principle of symmetry between regulatory and legislative jurisdiction of the State and the Regions remains, except in the case of delegation from the State to the Regions. The abolition of any reference in the constitutional text to the provinces is an obvious sign of a reduction of local autonomy.

Therefore, there is without any doubt an about-turn insofar as «there is an obvious centripetal trend in the dynamics of decentralisation»[43]. The prestige that the Senate is able to obtain will be decisive in building a balanced relationship between centre and periphery. To this regard, the criteria for the set-up of the new assembly does not seem to ensure the necessary authoritativeness to carry out effectively its role of mitigation in the strong push for centralisation, born of the severe crisis of Italian regionalism.

[42] This is reflected also in the measures taken to comply with the anomalies emerged during the last years and which have limited regional autonomy. It limits the incomes of regional bodies and forbids exchange of reimbursement or transfer to groups in the regional councils.

[43] B. Pezzini, *La riforma del bicameralismo*, cited at 31, 4.

8. Differentiated Bicameralism, majoritarian democracy, and checks and balances.

The text under examination in the Parliament provides for further changes that have a bearing on the election and the powers of the President of the Republic, the institutions of direct democracy, the source of law system as well as on the existence of a body of constitutional relevance, the National Council for Economics and Labour designed by Article 99 of the Constitution that the bill aims, not without justification, to abolish.

Interventions of this kind, on first reading lacking organicity, seem to acquire a certain method when considered in the light of the option favouring a bicameral system with a Senate representing local authorities.

On the one hand, indeed, the move towards a majoritarian form of government - the result of the setting of the policies within the Chamber of Deputies-Government sphere and the strengthening of the executive power in Parliament - has led to the search for suitable checks and balances.

On the other hand, the choice to make the second Chamber a representative body for territorial institutions has prevented the path for a "Senate of Guarantees", to which the function of limiting the power of the majority is assigned and of guaranteeing the autonomy and pluralism of the bodies out of the sphere of government politics.

In other words, this Senate which is an expression of regional institutions and to a considerably less extent of the Councils, does not have effective legitimacy to act outside the matters regarding the relationships between the State and local authorities.

So, the question arises whether a body made up of regional councillors and mayors appointed by the Regions can be entrusted with a power to decide about constitutional reforms which is equal to that of the elected Chamber and can appoint two constitutional judges. Nor is it clear how senators will take part in the election of members of the High Council of the Judiciary. It would have been extremely difficult to grant the power to preventively submit a law to the Constitutional Court or to nominate members of independent administrative authorities, as it has also been proposed.

In this respect, in the course of parliamentary examination some corrective measures have been introduced to reduce the risks of an overflow of the majority and to endorse the value of the institutions of direct democracy, even as regards counteracting the power of the majority.

Checks and balances are also necessary, first and foremost with regard to the rules concerning the election and the powers of the President of the Republic. It was agreed during the examination in the Constitutional Affairs Commission that the quorum for the election of the Head of State should be raised: up to the fourth ballot it is necessary to have a two-third majority of the "big electors"[44], and from the fifth to the eighth three-fifths; only from the ninth ballot an absolute majority is required (Article 83 (3).

As far as the functions are concerned, the text established for the deferment of thirty days of the deadline for the transposition into law of a decree law, if the Head of State requests that the Chambers deliberate again. Thanks to this innovation the President may return a conversion law to the Chambers without this power being transformed into a veto, as happens today. Recalling Augusto Barbera's suggestion[45], the Head of State is granted the power to reject any law selectively, and to ask for a new deliberation even if it is limited to specific items. The plan on the whole would seem to strengthen the power of deferment, making it a tool of surgical checking of the law as opposed to the current extraordinary measure and maybe it would act as a "formal dialogue" between the legislator and the President.

The regulations that aim to "reinvigorate" the institutions of popular participation provided by the Constitution would serve to counterbalance the "tyranny of the majority", especially after the amendments passed during the parliamentary debates, which resolved some contradictory aspects of the text approved by the Commission.

On the subject of popular legislative initiative, the number of signatures for the presentation of a new bill has been raised to

[44]The election is attributable only to members of the two Houses; indeed, Parliament in ordinary session is no longer integrated by regional delegates, given the new composition of the Senate.

[45] A. Barbera, hearing before the Constitutional Affairs Committee of the Senate on 27th May 2014, p. 2.

150,000, but the guarantee that it will be discussed and subject to a final vote by the Chamber, in accordance with parliamentary rules has been introduced (Article 71 (2).

Even the new features of referendum are of the utmost importance. As far as the most typical referendum, that is used to abrogate legislation, the Senate introduced one change, but really significant. It provided that, if the proposal of popular referendum is signed by at least 800,000 electors, the threshold for the validity of the referendum (*quorum*) is no longer assessed with regard to the number of those who have the right to vote but to the number of those who took part in the last general election. In this way, the text introduces the principle of "equality of arms" between supporters and opponents of a referendum, lowering and making more flexible the threshold. Those who are aware of what has happened politically over the last decades will have no difficulty in understanding the historical importance of such an innovation: it weakens the use of the tactic almost always successfully employed by the opponents of the abrogation of a law, consisting in encouraging abstention rather than a vote against the proposal, as happened in almost all the referendums that have taken place since 1991 up to the present days.

In sum, an institutional policy emerges from the text adopted by the Senate. This policy strengthens participatory tools and brings the abrogative referendum back to its original function as a tool of opposition, available to minority groups which differ from the parliamentary opposition; it should thus be a guarantee against the legislative power.

It can be glimpsed, also, an opening, albeit conservative, toward the use of referendum in a "proactive" function: Article 71, last paragraph, introduces a *renvoi* to a constitutional law, having the task of establishing "conditions and effects of popular law-making and consultative referendum, as well as other forms of consultation, including social groups".

Other amendments introduced by the Senate can be seen as rebalancing elements in the majority dynamics that innervate the government plan for reform. The provision to bestow to the Rules of procedure of the Chambers the safeguarding of the rights of parliamentary minorities is also moving in this direction. The underlying idea is to ensure an appropriate constitutional basis for the "statute of the oppositions". Similarly, the procedure of

priority examination, with a vote on a defined date, as mentioned in paragraph 3, is precluded for in the case of bills on constitutional matter and on the other "bicameral" bills, on electoral matter, on ratification of international treaties and in case of the bills for which the Constitution provides a qualified majority. For these bills, the ordinary procedure must be followed.

It is precisely the introduction of the "certain date vote" aimed at guaranteeing a faster process for the Government in the approval of bills which are held to be essential for the carrying out of its programme that has created the opportunity to intervene in the constitutional rules on decrees having force of law in order to contain the use of this source of law within reasonable physiological limits. So, it is the Constitution - and not only an ordinary law - to provide that decrees law cannot regulate constitutional and electoral matters, delegating delegation, ratification of international treaties and the approval of budgets and accounts, nor can they reiterate provisions adopted by decrees which have not been converted or regulate the legal relations arisen from the rejected measure. They cannot also reapprove laws containing norms which have been declared unconstitutional because of defects which do not regard the process. Besides this, giving importance to the principles outlined in constitutional jurisprudence that the decrees must contain measures of immediate application and specific content, they must be homogeneous and correspond to the title, and other provisions not pertinent to the object or the aims of the decree law may not be approved in the course of examination of the conversion bills.

9. In conclusion?

It is a vain exercise to draw conclusions on a bill which is still in the processing phase as well as being the object of big changes and which is most likely destined to be further modified in quite a significant way during the examination by the Chamber of Deputy. It even remains to be seen if it will ever see the light of day.

Some remarks may be put forward in synthesis, above all regarding the novelties provided in the text approved on 8th August 2014 by the Senate.

The first point that emerges is that this latter text is of

broader scope, made up of 40 articles instead of 35, amending 46 articles of the Italian Constitution, and it intervenes in further issues of great importance, such as the method of election and the powers of the President of the Republic, the abrogative and law-making referendum and the function of the Constitutional Court. In spite of this enlargement of scope, there would seem to be a confirmation in the difference between the reform process which is underway and the attempts for a "Great Reform" that ensued over the last decades.

The second aspect that needs to be highlighted is that the Senate has weakened some forms of extremism in the original text by introducing some corrective measures which might limit the excesses of a majority government. It has not, however, overturned the basic line held by the Executive, «generally aimed at reshaping the possibility for the Government to carry out the political and legislative activities by making available specific tools for control and management of parliamentary activity»[46]. There is still the plan to replace "extraordinary powers" used by Governments in all eras of the Republic (recourse to the confidence vote, maxi-amendments, decrees law) with ordinary powers (in particular, the "certain date vote") and it still remains to be seen what the global impact on the system of checks and balances provided for in the Charter of 1947 might be.

Just as important is the radical change in the election of the Upper House. The text written by the Commission and voted by the Senate confirms the choice of second degree election of senators but rejects the option favouring a "mixed" set-up, which characterised the initial text and is oriented towards a Senate of regional nomination.

A little-known course was abandoned, which aimed at reconciling representation of the local authorities with the presence of individuals with specific expertise, and a better-known path was followed, that of the second house made up predominantly of regional councillors. This latter option, however is not without its drawbacks looking both at foreign examples and also at the crisis in the legitimation of regional institutions and also at the specific solution adopted, which provides the anomaly of regional nomination of municipal "representatives". Perhaps

[46] B. Pezzini, *La riforma del bicameralismo*, cited at 31, 3.

decades of discussion on reform of the bicameralism could have brought about a slightly less bizarre hypothesis than that presented by the Government, but more innovative, ambitious and persuasive than the one formulated by the Senate.

ARTICLES

THE *INQUIRY MODEL* IN URBAN PLANNING: A STRATEGIC TOOL FOR EFFICIENCY OF ADMINISTRATIVE ACTION? *

*Anna Simonati***

Abstract

In urban planning, *inquiries* may help in granting a fair management of the relationship with the private parties. The analysis of the British and the French models show the role of *inquiries* in avoiding the risks of scarce efficiency of the administrative action, due to a lack of participation by the stakeholders. The paper consists of an exam of the rules of law and of their evolution. It aims at demonstrating that there is not, even in the narrow field which has been considered, just one *inquiry model*. *De iure condendo*, it may be useful to re-think at the rules concerning participation by private parties, by distinguishing it into two different steps: the first should regard the strategic choices about the contents of the plan, the second should regard the technical issues. To this purpose, the British and the French *inquiry models* could represent an interesting source of inspiration.

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1. Introduction: Why the Inquiry Model?

The growing complexity of administrative action has been producing new risks of failure. One of the most important issues regards the relationship between the public authorities and the private parties. This topic shows interesting sides in urban planning, which is a basic sector in the perspective of the economic and social development and of the achievement of good standards of quality of life. Urban planning is a technical and political process, concerned with the use of land and the design of the urban environment[1]. It has the function of indicating the best destination of each portion of land, for a comprehensive evaluation of the positive and negative effects on the whole territory; the competent authority is normally the local one, more seldom the regional one. Urban plans have of course various contents. Some are general rules; other contents are related to specific uses of certain portions of land. So, besides measures with individual addressees (such as the ones regarding the localization of public works) there are often rules whose addressee is the entire population involved[2].

The importance of urban planning has been growing in the last decades, as land has become a sort of "scarce resource"[3]; so, its

[1] See N. Taylor, *Urban Planning Theory since 1945* (2007).

[2] In the Italian doctrine, especially Prof. Paolo Stella Richter offered numerous and basic contributions; recently see, for instance, P. Stella Rchter, *Diritto Urbanistico. Manuale breve* (2010), especially 9 and ff. In the British doctrine, see, for instance, R. Baldwin, *Rules and Government* (1995), especially 16 and ff. and 125 and ff.; see also D.J. Galligan, *Due process and fair procedures: a study of administrative procedures* (1996). In the French doctrine, particularly interesting is S. Traorè (ed.), *Les documents d'urbanisme* (2012), where the author tries to describe the specific nature of land planning acts.

[3] The importance of land as a "scarce resource" is nowadays evident from many points of view. For instance, an interesting evidence of this is the growing phenomenon of land grabbing. About this topic see, for example: M. Coker, *United Nation food chief warns on buying farms,* Wall Street Journal, September 10 2008, available at http://tinyurl.com/5uahmp; L. Cotula, S. Vermulen, R. Leonard, J. Keeley, *Land Grab or Development Opportunity? Agricultural Investment and International Deals in Africa*, 2009, available at http://www.ifad.org/pub/land/land_grab.pdf; J. Franco, M.B. Saturnino Jr, *Land concentration, land grabbing and people's struggles in Europe*, TNI, 2013,

use must be carefully managed. From this point of view, there are several evident dangers, which are born from the co-existence of different aims about the development of urban spaces.

The first problem is connected with the complicated emersion and protection of all the (public and private) relevant interests, especially the ones owned by the weakest parts of the populations. The main purpose is to indicate a fair method of action; so, the competent authority may keep in mind and carefully evaluate all the legitimate expectations. Of course, this fundamental need is common to the whole area of administrative law. But in the field of urban planning the desired balance among different expectations may be particularly hardly obtained. In fact, the conflicts among the involved parties are often difficult to solve. The "strongest" stakeholders usually don't want to renounce their advantages, that have normally been achieved in the light of the previous use of the land. From the opposite side, the "weaker" part of the population aims at getting, through a well balanced planning action, a new and fairer distribution of resources.

Besides, in urban planning, public law plays a peculiar role. In fact, when the rules of law (and the plans) are emitted, usually the management and use of land in great part have concretely already happened. So, all the legitimate expectations, that have become ripe before, must be considered and they must be harmonized with the public interests. These are of different kinds: some are "traditional", such as housing, some are typical of the last decades, such as the protection of environment.

Only the completeness of the preliminary step of procedures may grant that a fair decision is taken. Moreover, the completeness of the preliminary step is fundamental in the perspective of the private stakeholders. The private parties, in fact, aim at presenting their views to the competent authority and hope not to be addressees of unfavourable decisions.

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available at http://www.tni.org/sites/www.tni.org/files/download/land_in_europe-jun2013.pdf; Grain (ed.), *Land grabbing for biofuels must stop*, February 2013, available at http://www.grain.org/article/entries/4653-land-grabbing-for-biofuels-must-stop; B. Nyari, *Biofuels Land Grabbing in Northern Ghana,* December 2008, available at http://biofuelwatch.org.uk/docs/biofuels_ghana.pdf.

The prior involvement of the stakeholders plays a basic role not only to grant the assumption of the "best" choice in the light of all the relevant interests. It is also a method to avoid, after the emission of the administrative measures, complaints and applications for judicial review[4]. This result, of course, is strictly connected with the need to assure the financial and practical efficiency of the administrative action. The legal tools to reach this goal are many and the specific solutions may be quite different in the different contexts.

For instance, a useful tool may be the constitution of "intermediate" bodies, entrusted with the task of communicating with the public authorities. The purpose is to find out good solutions to manage activities related with the protection of the public interest. In this perspective, a very interesting suggestion comes from the US legal system, where the Citizens Utility Boards[5] are ruled by the national legislators, especially for the management of commons and utilities. The CUBs have their own place between private and public law, in the field of associations based on participation by the citizens and on democracy as the main guide-principle. A federal model act has been dedicated to these bodies[6]. The Model Act introduces common rules, that may be implemented in the single States[7]. The aim is to contrast,

[4] The idea of participation in the administrative procedures as an instrument to prevent and overcome dissent is well known and is deeply rooted, for instance, in the contribution of N. Luhmann, *Procedimenti giuridici e legittimazione sociale* (1995); see also N. Luhmann, *A Sociological Theory of Law* (1985) and Id., *Law As a Social System* (2003).

[5] See S. Flynn, K. Boudouris, *Democratising the Regulation and Governance of Water in the US*, in B. Balanyå, B. Brennan, O. Hoedeman, S. Kishimoto, P. Terhorst (eds), *Reclaimong Public Water. Achievements, Struggles and Visions from around the World* (2005), at 73 and ff.; B. Givens, R.C. Fellmeth, *Citizens' Unitility Boards: Because Utilities Bear Watching* (1991), at 90 and ff. Let me mention also A. Simonati, *La ripartizione dell'acqua negli Stati Uniti, fra diritti di proprietà e partecipazione dei privati. La democrazia come "metodo" per la gestione dell'acqua?*, Rivista giuridica dell'ambiente 837 (2012).

[6] About the model Act which rules the right of private parties to participate in the procedures regarding public utilities, see R.B. Leflar, M.H. Rogol, *Consumer Participation in the Regulation of Public Utilities: A model Act*, 13 Harvard Journal on Legislation 235 (1973). For the text of the Model Act see, for example, B. Givens, R.C. Fellmeth, *Citizens' Unitility Boards: Because Utilities Bear Watching*, cited at 5, 90 and ff.

[7] See sec. 29 of the model Act.

through a democratic method, discriminations due to social and economic differences among the various groups of private parties. Their right to participation is satisfied thanks to the creation of permanent non-for-profit organizations, funded by voluntary contributions and acting under the democratic control of their membership[8]. To grant an affordable service and to promote the adequate representation of residential utility consumers[9], the CUBs assist citizens in writing complaints, collecting funds and cooperating with the public law structures and authorities (for instance, the competent agencies) in the rule-making and adjudicating procedures[10]. This instrument could be very useful, but it does not fit well in all situations. In fact, it may efficiently work only in the legal systems where the democratic involvement of populations is deeply rooted at every institutional level (both the central and the local ones). Moreover, in general terms, one could say that the CUBs model does not represent a real solution in fields – such as spatial planning – where the problem is not so much of rationally distributing *ex novo* a scarce resource, as to efficiently use areas which are already partially or massively urbanized.

Also, the "ordinary" instruments of procedural participation (i.e. the traditional "right to be heard") are not able in urban planning to offer a sufficiently strong protection to the private parties. First of all, "isolated" participatory contributions are normally inspired by selfish and self-defensive visions and do not give a real support for the implementation of the public interest. Secondly, the solicitations coming from the private parties may be better formulated when their ideas are discussed in a public debate.

That's why it is particularly interesting to examine the *inquiry model*[11] in the field of urban planning.

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[8] This is the definition of the CUBs set out in sec. 2 of the model Act.

[9] The purposes of creation of the CUBs are set out in sec. 2 of the model Act.

[10] See sec. 5 and ff. of the model Act.

[11] It may be useful to mention the existence of a third family of legal tools, which is, to so say, in an "intermediate" position between the protection of the "right to be heard" in the administrative procedures and the creation of *ad hoc* structures. It is the conclusion of agreements, whose parties are, from one side, the competent authority and, from the other side, the private stakeholders. This instrument is well known and in many legal systems it is often used in the fields of urban law and public works, where the need of harmonization among

Leading a fair *inquiry* procedure may allow the administration to get a large number of information, which are extremely useful to rationally manage land. The *inquiry model* – which is itself an evolution of the ancient "right to be heard"[12] – could represent a good legal solution when the dialogue among the competent authorities, the populations involved and the private stakeholders assumes a primary relevance. An *inquiry* procedure is more complex than the acquisition of single participatory acts. It offers a more complete view of the case; so, it is potentially more effective, both from the point of view of the competent authority and from the point of view of the private parties. At the same time, its structure may be quite simple, because it does not require the organization of new democratic mechanisms.

However, it would be wrong to assume that the *inquiry model* consists of a unitary paradigm. To analyze this issue – and to narrow the extent of the analysis, as well – I have chosen two European legal systems, where the *inquiry model* has been developing during the last decades and has now reached a good degree of ripeness: they are the British system and the French system. In both of them, participation of the private parties in the urban planning procedures normally consists of a double-step mechanism. First, people (normally, the whole local populations)

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different positions is particularly strong (about this subject see, for instance, R. Caranta, A. Gerbrandy (eds), *Traditions and Change in European Administrative Law* (2011). The main issue regards the indication of the legal rules that may be used to solve the problems of implementation. In particular, the question is if they are public law or private law rules and, in general, one could say that almost always the answer given by the legislators and the courts is a complex one. I have decided not to examine this topic because only partially these agreements may offer good solutions to avoid complaints and applications for judicial review. In fact, the agreements produce their effects in the legal sphere (not of communities, but) of single individuals, who are bound by them together with the authority; then, third private parties who feel damaged by the agreement maintain their right to produce complaints ad applications for judicial review. So, the agreements may be not so useful in the perspective of overcoming the risks connected with the administrative action, which is the aim of this paper.

[12] For the analysis of the modern develop into the "dialogue model" of the traditional "right to be heard" in the administrative procedures of several legal systems, see, for instance, R. Caranta, A. Gerbrandy (eds), *Traditions and Change in European Administrative Law*, cited at 11.

may express themselves, in a rather informal way, about a preliminary draft of the plan. Then, when the content of the draft has been specified, a sort of *inquiry* sub-procedure is carried out. Notwithstanding this common starting point, the study of the British experience and of the French experience shows that their divergences are probably more numerous and more relevant than their convergences. By indicating the weak and the strong elements of the two kinds of *inquiry model*, hopefully I shall be able to infer some suggestions for its further implementation *de jure condendo* in other contexts and legal systems.

2. The British Model

In the UK, *public inquiries* were introduced for the first time in urban law with the 1947 *Town and Country Planning Act*[13]. These rules described the *inquiry* as a sort of tool of "second degree". It was used, at the local level of urban planning, after a period of time during which the interested people could express themselves about the general contents of the published preliminary drafted plan. The primary *inquiry model* consisted of a hearing based on

[13] See, for instance, Bar Council, Law Society, Royal Institution of Chartered Surveyors (editor), *Overarching and Underpinning: Planning in the 21st Century*, in *Journal of Planning and Environment Law, Occasional Paper 31*, 2003; the paper by S. Cirell (*The modernisation of local government and its impact on planning*) is particularly interesting, as it shows how the evolution of local power in spatial planning may change the administrative action. About the evolution of planning law in the UK legal system see, for example: Y. Rydin, *Urban and Environmental Planning in the UK*, New York, Basingstoke, 2003; B. Cullingworth, V. Nadin, *Town and country planning in the UK*, London, Routledge, 2006; R.M.C. Duxbury, *Telling and Duxbury's Planning Law and Procedure*, Oxford, New York, Oxford University Press, 2009. About the role of inquiries anche the right to be heard in the procedures, see, for instance: R.E. Wraith, G.B. Lamb, *Public Inquiries as an Instrument of Government*, London: Allen and Unwin, 1971; Senate of the Inns of Court and the Bar, Law Society, Royal Institution of Chartered Surveyors (editor), *Inquiries: The Right to be Heard?*, in *Journal of Planning & Environment Law, Occasional Paper 25*, 1997; T. Th. Ziamou, *Rulemaking, participation and the limits of public law in the US and Europe*, Burlington, Ashgate, 2001. In a general perspective, to comprehend the evolution of British administrative law, see, for example: C. Harlow, R. Rawlings, *Law and Administration*, London, Butterworths, 1997; H.W.R. Wade, C.F. Forsyth, *Administrative Law*, Oxford, Oxford university Press, 2000; P.P. Craig, *Administrative Law*, London, Sweet and Maxwell, 2012.

the cross-examination of private individuals by an inspector[14], who was indicated by the Ministry. The inspector could manage round table sessions to examine the strategic elements of the main issues; he (or she) could also fix less formal hearings to discuss about simpler aspects. At the end of the *inquiry*, he (or she) produced a final report. This had no binding effect, but the competent authority had to give reasons when it decided not to follow the report.

This mechanism was substantially confirmed ten years later by the Franks Committee[15], but it soon showed its weak points, in terms of excessive formalism and length of the procedure. So, the statute was later amended.

For the regional level structure plans, which contain the guidelines that must be implemented in the local plans, the 1971 *Town and Country Planning Act*[16] substituted the "old" *inquiry* with an *examination in public*. The *examination in public* looked like a sort of seminar, carried out in an advanced step of the procedure (when the main decisions about the content of the plan had already been taken). Just some private parties (normally, the technical experts and the stakeholders) were invited. Therefore, the "strong" participatory model, represented by the *inquiry* tool (that survived only for the local plans), was changed into a "weaker" one, which worked, to so say, like a round table about some strategic issues. The relevant issues were in advance indicated by the competent commissioner, who was delegated by the Ministry. The final report was non-binding.

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[14] F. Layfield, *The Planning Inquiry: An Inspector's Perspective*, Journal of Planning & Environment Law 370 (1996).

[15] In 1957, the Committee on Tribunals and Inquiries (Franks Committee) made only little changes: it decided that the inspector's final report must be published and it underlined that the inquiry used in the field of urban planning «*cannot be classified as purely administrative or purely judicial*»: H.W.R. Wade, C.F. Forsyth, *Administrative Law*, cited at 13, 938. See *Report of the Committee on Tribunals and Inquiries* (1957), section 262. About the ambiguity of the meaning of the term *inquiry* in the field of urban planning, see for instance M.J. Grant, *Urban Planning Law*, London, Sweet & Maxwell (1982), at 553. For a specific analysis of the British inquiry in the late Sixties of the 19th Century, from the point of view of a French scholar, see, for instance, J.L. Boussard, *L'enquête publique en Angleterre* (1969).

[16] See Town and Country Planning Act 1971, in particular sec 9 and sec. 13.

The *examination in public* was less flexible than the *inquiry* and the authorities (directly the regional ones, indirectly the central ones) kept a strong control on the whole procedure. In fact, the commissioner decided what issues deserved to be discussed. Besides, he (or she) had the power to invite (just) some private parties to join the meeting: the stakeholders were chosen because they had a deep interest in specific subjects. So, the *examination in public model* made the procedure simpler and quicker at the regional level, where admitting a strong and deep participation by (all) the public could lead to concretely inefficient solutions. Only one important convergence with the traditional *inquiry model* was maintained: the production by the commissioner of a final non-binding report. Notwithstanding the purpose of simplification connected with the introduction of the *examination in public model*, the result was in great part disappointing: the authority maintained a very (and maybe too) strong role and participation by the private parties was very (and maybe too) advanced in the procedure[17].

The 1990 reform led to the emission of a new *Town and Country Planning Act*, which produced deep changes in the British system of urban planning. In fact, according to this statute, three kinds of development plans worked at the different levels: the unitary development plans[18] in the metropolitan areas, the structure plans[19] and the local plans[20] in the other areas. But, from the point of view of participation in the procedure, nothing really changed. To form a development plan a *local inquiry* was normally

[17] That's why various proposals have been in the last years formulated to grant the private parties the possibility to participate earlier and more strongly in the procedure. For instance, the *Planning for a Sustainable Future: White Paper* was produced by different British Secretaries of State (the Secretary of State for Communities and Local Government, the Secretary of State for Environment, Food and Rural Affairs, the Secretary of State for Trade and Industry and the Secretary of State for Transport) and was explained to the Parliament in May 2007. See http://webarchive.nationalarchives.gov.uk/20120919132719/http://www.communities.gov.uk/documents/planningandbuilding/pdf/planningsustainablefuture.pdf, especially 97 and ff. and 121 and ff.

[18] See TCPA 1990, sec. 10-28A.

[19] See TCPA 1990, sec. 31-35C.

[20] See TCPA 1990, sec. 36-45.

requested[21]; the rules in force were contained in different acts (statutes and statutory instruments), but the model did not loose its previous characteristics. To form a structure plan, instead, an *examination in public* was normally still requested[22].

The last relevant statute is the 2004 *Planning and Compulsory Purchase Act*[23], still in force[24] even if amended by the 2011 *Localism Act*[25]. The 2004 PCPA should have been a turning point towards a further simplification. Urban planning was expressed at the regional level by the regional spatial strategy (RSS[26], now abolished by the *Localism Act*)[27]. At the local level the development plans were substituted by the local development framework, which is made of three parts: a local development scheme, the local development documents (LDD) and a statement of community involvement (SCI) which indicates the standards of participation that have to be assured by the local authorities in the procedure[28].

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[21] See TCPA 1990, sec. 16.

[22] See TCPA 1990, sec. 35B.

[23] A. Chaplin, *Planning for Local Development Framework: a new development plan regimes*, Journal of Planning and Environmental Law 260 (2004); L. Rozee, *The new development plan system*, Journal of Planning and Environmental Law 147 (2006); P. Thomas, *The Planning and Compulsory Purchase Act 2004. The Final Cut*, Journal of Planning and Environmental Law 1348 (2004); S. Tromans, M. Edwards, R. Harwood, *Planning and Compulsory Purchase Act 2004: A Guide to the New Law* (2005).

[24] The relevant legal framework is also constituted by the *Town and Country Planning (Regional Planning) (England) Regulations* 2004, the *Town and Country Planning (Local Development) (England) Regulations* 2004, the *Planning Policy Statement 11: Regional Spatial Strategies-PPS 11* and by the *Planning Policy Statement 12: Local Development Frameworks- PPS 12*.

[25] See in particular sec. 109-116. About the *Localism Act* see, among the scholars, J. Raine, C. Staite (eds), *The World will be your Oyster? Reflections on the Localism Act of 2011*, (2012) and P. Leyland, *The Localism Act 2011: Local Government Encounters the "Big Society"*, 4 *Le Istituzioni del federalismo* 767 (2013).

[26] See PCPA, sec. 1.

[27] See *Localism Act*, in particular sec. 109.

[28] The importance given in the British legal system to participation by the private parties in the urban planning procedures is shown by the existence in the official website http://www.communities.gov.uk of many papers regarding this issue. Among these, particularly interesting seems to be the *New streamlined planning guide launched online*, published on August 28, 2013 (https://www.gov.uk/government/news/new-streamlined-planning-guide-launched-online. Besides, see, for example, *Community Involvement in Planning: the Government's Objectives* (February 2004), in

In the PCPA, the traditional *inquiry model* is permanently deleted from the British urban planning system.

The *examination in public* is maintained for the regional-level plans; it aims at checking the soundness of the draft and its consistence with the national policies. The strong public discretionary power regarding its concrete carrying out represents, in a sense, a risk factor. In fact, it could make the participatory step more flexible and efficient, if it is used in an independent way to value all the contributions offered by a free and open discussion. Otherwise, it may determine the stiffness of the sub-procedure and the flattening of its results on the choices made upstream by the public authority (which, *de facto*, are not submitted to a real debate among all the stakeholders)[29].

At the local level, the interested populations first may informally participate in the procedure at a very preliminary step[30]. Then, they are involved, when the drafted plan has been emitted by the competent authority, in a compulsory *independent examination*, which is leaded by a commissioner nominated by the competent Ministry. The commissioner, who holds strong discretionary powers, must assure the respect of the basic administrative principles (impartiality, transparency, fairness) and the sub-procedure normally ends with a binding report[31].

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http://webarchive.nationalarchives.gov.uk/20120919132719/http://www.communities.gov.uk/documents/planningandbuilding/pdf/147588.pdf and *Participatory Planning for Sustainable Communities: International Experience in Mediation, Negotiation and Engagement in Making Plans* (2003), in http://www.chs.ubc.ca/archives/files/Participatory%20planning%20for%20sustainable%20development.pdf. Then, at the institutional level, a new awareness is growing up about the importance of the *inquiry model* as a participatory tool in urban planning: see, for instance, K. Barker, *Barker Review of Land Use Planning. Final Report - Recommendations (2009)*, available at http://www.ukcip.org.uk/wordpress/wp-content/PDFs/Barker_review_landuse.pdf. All these contributions show a new turmoil, which is progressively leading to best practices for participation in urban planning.

[29] See: PCPA 2004, sec. 6 and sec. 8; TCP Regional Planning Regulations, sec. 11, 13, 14 and 15; PPS 11, Annex 3, para. 5 and para. 19.

[30] See: PPS 12, para. 3.5. and paras 4.1 ss; TCP Local Development Regulations, sec. 25 and sec. 26.

[31] See: PCPA 2004, sec. 20; TCP Local Development Regulations, sec. 34 and ff.; PPS 12, Annex D, para. 41 and sec. 15. See also Planning Inspectorate,

So, the *independent examination* shows important convergences with the *examination in public* procedure, rather than with the ancient *inquiry*. The differences between the *independent examination* and the *examination in public* regard the compulsory nature of the former tool and the binding force of the report which is its final result[32].

In the British system, participation works in two different stages: at the beginning of the procedure, when the whole population may express itself on a draft which has only been sketched; almost at the end, when the competent authority chooses specific private stakeholders as interlocutors. The shape of the *inquiry model* in force is quite different than it used to be; the ancient cross-examination burdensome mechanism has been abandoned to search more flexible and effective solutions.

The main problem of course regards the mixed nature of urban planning procedures. Urban plans, in fact, are based on, to so say, partially normative and partially strictly administrative procedures; besides, the final act is able to affect the legal positions of a potentially unlimited number of addressees. In the perspective of the protection of the interest of the private parties to effectively participate in the procedure, the solution given by the British legislator perhaps is not fully suitable. In fact, the administrative authority holds a very strong power and may strictly control private participation, that is allowed when the plan has reached a good degree of substantial ripeness only to a few private stakeholders. So, formal simplification has (paradoxically) produced a procedural stiffness.

A sign of innovation could come in the near future from the 2011 *Localism Act*, which gives stronger rights to the local communities. This statute, in fact, introduces the new concept of *neighbourhood planning*, that enables people to put together their ideas about spatial policies affecting the local area. Participation normally is held via a series of forums and it is open to persons living, working or being an elected councillor in the area. The emission of a *neighbourhood development plan* is not compulsory,

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Development Plans Examination - a Guide to the Process of Assessing the Soundness of Development Plan Documents, 2005, 28 and ff.

[32] R.M-C. Duxbury, *Telling and Duxbury's Planning Law and Procedure*, , cit. at 13; V. Moore, *Planning in Britain: The Changing Scene*, in *Urban Law Annual: Journal of Urban and Contemporary Law* (1972), at 89 and ff.

but if it is adopted it is part of the overall local plan. An independent commissioner has the duty to check its compatibility with the other plans in force and with the guidance issued by the competent Secretary of State, but he or she has not the duty to test the soundness of the plan[33].

3. The French Model

The *enquête publique* tool is deeply rooted in the history of the French legal system. It was born at the beginning of the XIX Century as an instrument of protection of private parties (and particularly, at least at the origin of the evolution, of their ownership rights) in front of the growing administrative powers[34].

Notwithstanding this, the diachronic analysis of its evolution is not particularly interesting, because in urban law the *inquiry model* has maintained in time its own characteristics, with no significant changes[35].

Nowadays, several statutes[36] regulate various kinds of *enquête publique*, both in a general perspective[37] and regarding

[33] For interesting information, see, for instance, http://www.pas.gov.uk/neighbourhood-planning;jsessionid=25027C626049F1CE8E07C3D9DF3C791A.

[34] In a general perspective, about the evolution of the *inquiry model* in the French legal system, see, for example: A. de Laubadère, *Réforme de l'enquête publique*, in Actualité Juridique - Droit Administratif 363 (1976); A. Givaudan, *Prolifération des enquêtes publiques et régression de l'état de droit*, Revue Française de Droit Administratif 247 (1986); J.P. Colson, *La réforme des enquêtes publiques en France*, in *Revue Juridique de l'Environnement*, (1993), at 223 and ff.; R. Hostiou, J.C. Hélin, *Droit des enquêtes publiques* (1993); J.P. Colson, *La démocratisation des enquêtes et ses limites structurelles*, in août/septembre Géomètre 30 (1998); P. Zavoli, *La démocratie administrative esiste-t-elle? Plaidoyer pour une refonte de l'enquête publique et du référendum local*, in Revue de Droit Public 1495 (2000); Y. Goutal, P. Peynet, A. Peyronne, *Droit des enquêtes publiques* (2012).

[35] Of course, this does not mean that in recent history the *enquête* has not changed at all. For example, a particularly important reform is contained in the so-called *loi Grenelle I* (*loi* n. 2009-967, August 3 2009) and *loi Grenelle II* (*loi* n. 2010-788, July 12 2010), but it regards the field of environment law. Besides, also in this subject, the basic structure of the *inquiry model* has been substantially maintained. See, for instance, J. Caillosse, *Enquête publique et protection de l'environnement*, in Revue Juridique de l'Environnement 151 (1986).

[36] In particular, see artt. L122-11, L123-10 e L124-2, *Code de l'urbanisme*.

[37] In a general perspective, see, for instance, *loi* n. 83-630 (July 12th 1983, the so-called *loi Bouchardeau*) about «*la démocratisation des enquêtes publiques et à la*

specific sectors[38]. In the field of urban law, the instrument is now precisely described in the Urban Law Code (*Code de l'Urbanisme*)[39].

The French Urban Law Code normally requires, in the procedure for the approval of an urban plan, two compulsory steps of public participation. This is true for plans at all levels: *schemas de cohérence territoriale*, *plans locaux d'urbanisme* and *cartes communales*[40].

The first participatory step, at a very preliminary moment, consists of a *concertation* about the main elements of the plan among the competent authority, the other interested public bodies and the citizens. At the end of this step a *dossier* is produced and published[41]. The second participatory step consists of an *enquête publique*, which is carried out to gather opinions and proposals by the local populations and the stakeholders[42].

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protection de l'environnement». About the evolution of the *inquiry model* in the field of the protection of environment, see, for example, R. Hostiou, *Enquêtes publiques, Loi n. 83-630 du 12 juillet 1983: Démocratisation des enquêtes publiques et protection de l'environnement*, in Actualité Juridique - Droit Administratif 606 (1983) and J.C. Hélin, *La loi "paysages" et le droit des enquêtes publiques*, *Actualité* Juridique - Droit Administratif 776 (1993). Moreover, see art. 109, *loi* n. 93-1352 (December 30th 1993). See J.C. Hélin, R. Hostiou, Y. Jegouzo (sous la direction de), *Les nouvelles procédures d'enquête publique* (1986).

[38] For example, see *loi* n. 93-24 (January 8th 1993, the so-called *loi paysages*) and *loi* n. 2002-276 (February 27th 2002, about the «*démocratie de proximité*»). About the importance of the *inquiry model* for the so called "*démocratie de proximité*", see, for example, J.M. Pontier, *La démocratie de proximité: les citoyens, les élus locaux et les décisions locales*, Revue Administrative 160-168 (2002).

[39] The rules contained in the Urban Law Code – together with the ones contained in the Environment Code (*Code de l'environnement*) – represent almost completely the legal system of French public *inquiries* in administrative law. The two codes, in fact, have substituted numerous legal sources which were previously in force. It is evident that the existence of a Code which is entirely dedicated to urban law shows the great importance that the French legislator gives to this subject and to the need for a unitary body of rules. About the use of the *inquiry model* in the field of urban law, see, for instance: J.C. Hélin, *L'évolution récente du contrat d'aménagement*, Revue de Droit Immobilier 179 (1994); H. Jacquot, F. Priet, *Droit de l'urbanisme* (2004); B. Jadot (ed.), *La participation du public au processus de décision en matière d'environnement et d'urbanisme, Actes du colloque organisé le 27 mai 2004 par le Centre d'étude du droit de l'environment (CEDRE) des Facultés Universitaires Saint-Louis* (2005).

[40] See artt. L121-1 and ff., *Code de l'urbanisme*.

[41] See art. L300-2, I, *Code de l'urbanisme*.

[42] Initially, the relevant rules of law were contained in decree n. 85-453 (April 23th 1985), which was the implementing regulation of *loi* n. 83-630 (July 12th

The *inquiry* procedure is ruled basically in the same way with reference to the different kinds of plans[43].

It starts with the indication of a commissioner (or, in the more complex cases, of a commission) by the local administrative court[44], on request by the competent mayor or president of other local entity. The appointment is made within the following fifteen days. The mayor or president of the local entity which is emitting the plan indicates the object of the *enquête*, its lasting-time (usually between one and two months) and the place where it is carried out.

The action must be managed so to allow the widest participation by the population, with no subjective restrictions[45]. That's why all the relevant information must be published (also in newspapers and posters) at least fifteen days before the beginning of the *inquiry* procedure and throughout its entire duration. The private parties may produce written memories and in fact their participation in the procedure normally takes place in that way[46].

1983). In the *Code de l'urbanisme*, at present in force, see, about the *schemas de cohérence territorial*, art. L 122-10 and art. R 122-10; about the *plans locaux d'urbanisme*, see art. L123-10 and art. R 123-19; about the *cartes communales*, see art. R 124-6.

[43] Interesting data regarding the implementation of the *enquête publique* may be inferred looking at the case law. It shows that participation in the French urban planning procedures is almost normal by the private stakeholders, who own specific interests. On the contrary very seldom the *quisquis de populo* presents his or her views. One could say that this "quantitative" element brings, a little paradoxically, to qualitative consequences. In fact, the French inquiry model could be very "expensive" if strongly implemented, but it has effectively survived till now because it is almost exclusively used by the stakeholders and not by the other private parties who are not entitled with particular interests in the procedure. For an analysis of the case law regarding the *enquête publique* legal tool, let me mention A. Simonati, *Administrative law and the dialogue model in France: the administrative courts' contribution*, in R. Caranta, A. Gerbrandy (eds.), *Traditions and change in European Administrative Law*, cited at 11, 63 and ff.

[44] In some exceptional cases the commissioners are designated by the *préfet*: see, for example, art. R 123-23 and art. R 322-3, *Code de l'urbanisme*.

[45] It is interesting to notice that, according to art. 14, *décret* n. 85-453, the timetable regarding the public participation through access to the inquiry dossier by the interested population must be prepared as to «*permettre la participation de la plus grande partie de la population, compte tenu notamment de ses horaires normaux de travail*».

[46] On this topic, see the result of the research held by the Commission appointed by the French Government, which, in 2005, produced an interesting report

But there is also the possibility to be personally heard by the commissioners, who may dedicate some days to oral hearings.

A *réunion publique* may be fixed, which surely is the best solution in the perspective of the completeness of the preliminary step. To this purpose, the commissioners address a demand to the mayor or president of the local entity, if they find it necessary in the light of the particular characteristics of the single situation. In this case, of course, orality determines flexibility. Furthermore, it is quite clear that the potential presence in the meeting of the stakeholders all together allows a useful simultaneous expression of their views. As a consequence, the opinions expressed may be jointly considered by the commissioners and by the authority competent for the emission of the plan. The result of the *réunion publique* is part of the final report, that is written at the end of the whole *inquiry* procedure. It is important to notice, at this regard, that the oral debates among the interested citizens are increasingly used by administration: so, the *enquête* is transforming into a more and more flexible instrument[47].

Before the conclusion of the *inquiry* procedure, the commissioners may hear the private parties again.

A report is prepared and sent to the public authority author of the plan, together with the complete *dossier*, within one month from the date of termination of the *inquiry* step. The same documents must be put at the disposal of the public one year long. The *dossier* contains a summary of the procedure and the final remarks, with their reasons. The report is not binding, but it is often followed by the planning authorities, which, in case of disagreement, must give reasons[48]. Besides, if the results of the *inquiry* procedure have deeply changed the original draft, a new *enquête* must start[49].

(*Rapport sur la simplification des enquêtes publiques*, in http://www.ladocumentationfrancaise.fr/rapports-publics/064000115/index.shtml. See also, for instance, E. Le Cornec, *La participation du public*, Revue française de droit administratif 770 (2006).

[47] Information about the French rules and praxis regarding the *débat public* may be found in http://www.debatpublic.fr/debat-public/textes-fondateurs.html.

[48] B. Pacteau, *Le régime de motivation des conclusion qui clôturent l'enquête publique*, note to Conseil d'Etat, March 20 1985, Commune de Morigny-Champigny, Revue Française de Droit Administratif 703 (1985).

[49] However, it may be interesting to notice, in a general perspective, that the last relevant (even if still incomplete) step in the evolution of the inquiry model in

The French *enquête publique* shows positive and negative sides from the point of view of the protection of the participatory rights of the private parties.

First of all, it is important to notice that their right to participate in the procedure is very wide. But, at the same time, the procedure is normally carried out in written form and holding *réunions publiques* is merely optional. Moreover, the *enquiry model* is used in an advanced step of the planning procedure, when the strategic choices have already been taken. The delayed placement of the *enquête* only marginally is compensated by the rules regarding the preliminary *concertation*, which allows the interested population to openly discuss about the draft plan almost at the starting point.

4. *The British and the French Models Compared: Convergences and Divergences*

As is evident, the British and the French *inquiry models* are quite different.

There are some common elements.

Mainly, both the *inquiries* are an important step of the urban planning procedure. The private parties may discuss and express their views, in order to obtain the production by the competent authority of the best plan in the light of the harmonization between the public interest and the interests of the stakeholders.

Besides, both the *inquiries* may be described as a sort of "second stage participatory tool". In fact, they are used when the drafted plan has already reached an advanced level of ripeness and the interested populations have already been able to participate in the procedure at a very preliminary stage. From the point of view of the private parties, this of course may be a weak point, because it is not easy to obtain a change in an almost complete draft.

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the French legal system dates back to the *loi* n. 2004-1343 (December 9th 2004) about legal simplification, which instructed the Government to enact an *ordonnance* to «*regrouper les différentes procédures d'enquête publique et en simplifier et harmoniser les règles*», to «*autoriser le recours à une procédure d'enquête unique ou conjointe en cas de pluralité de maîtres de l'ouvrage ou de réglementations distinctes*» and to «*coordonner les procédures d'enquête publique et de débat public*»: see art. 60.

But, as already noticed, the divergences are more numerous and more important.

The first basic difference can be discerned by examining the diachronic evolution of the *inquiry model* in the two systems. The French *enquête* has substantially maintained in time its original characteristics, while the British tool has deeply changed.

The "original" *inquiry* has been eliminated by the British system of urban planning because of its excessive formalism, that made it non-effective. But in the modern participatory models (the *examination* ones) the main role belongs to the public authority. In fact, it chooses the private parties whose intervention in the procedure is considered useful, either because they own interests in opposition, or because they own a technical expertise and may offer suggestions concerning the implementation of the public works. So, while anyone could participate in the "original" *inquiry* (even just to cooperate with the authority in the general interest), nowadays the *examination model* primarily leads individualistic interests to be expressed in a self-protection perspective.

Here comes a sort of paradox in the rules in force. The attenuation of the impact of the public interest in the debate regarding the drafted plan is clearly due to the limitation of participation only to the stakeholders. It should maybe have had as a logical consequence the production of just advisory effects of the *inquiry* procedure. But this has happened only at the regional level. On the contrary, the results of the *examination* procedure bind the local planning authorities. The reason may perhaps be found out, from a side, in the legal and political relationship between the central authority and the one which is competent for the planning action. From the other side, a basic element is related to the different nature and content of the different plans. At the regional level, the plan aims at indicating some general principles and objectives, in a "large area planning" perspective; besides, the dialogue with the central power is easier and more direct. Anyway, the binding or advisory strength of the *inquiry* report is not so a relevant element as it seems to be, because, at all the planning levels, the key-factor consists of the action carried out by the commissioners named by the Secretary of State. In fact, they always own a very strong role and in practice they are often able to influence the content of the final report.

In France, the *enquête publique* has always been a participatory instrument which may be used by the interested populations, without any subjective limitations. In the recent history one may see a sign of transformation that could lead to a turning point to improve the efficiency of the *inquiry model*. It has been underlined, in fact, that the tool is gradually turning from a purely written procedure – as it used to be – into a participatory mechanism increasingly focused on orality and public debates. Perhaps, this could in the future produce a transformation in the sense of a deeper flexibility in the rules of law.

Another important difference between the British model and the French one precisely regards the role of the commissioners, which are presumed to be independent. But the principle of impartiality works in the two cases in very different ways. In the British model, the commissioners are designated by the Ministry; therefore, they are independent just from the specific interests of the local populations, not from the executive power. In the French model, instead, the commissioners are appointed by a judge: this means that they are independent not only from the interest of the local population involved, but also (and maybe primarily) from the Government and from the political power[50].

5. *Final Remarks*

From the point of view of the desired overcoming of the risks associated with the interaction between public authorities and private parties, the examined examples show some common problems.

One problem is connected with the moment chosen by the legislators for the *inquiry* to be used, which is when the strategic decisions have already been taken by the competent administration: too late to effectively allow a useful debate in the interested population. To this purpose, *inquiries* should be perhaps situated earlier in the procedure.

Another important issue regards the difficulty of "exporting" the *inquiry model* into very complex legal systems. The co-existence of different centers of public power at the different

[50] J.P. Papin, *L'impartialité du commissaire enquêteur*, Cah. jur. élec. Gaz. 165 (1983).

institutional levels (and the possible high degree of conflictuality among them) may represent an obstacle for the introduction of procedural mechanisms which are able to produce binding or strongly influent effects on the final plans.

Last but not least, it is not simple to set out good rules for the indication of the impartial commissioners encharged with the duty to carry out the inquiry step and to assess its results in the final report. The French solution is good, even if it could be perhaps useful – at least in the more complicated cases – to impose a sort of "mixed membership" for the commission designated by the administrative court: one of the members should be chosen among a group of experts indicated by the local authority, another among the experts indicated by the central authority and the third among a group of experts indicated by the private stakeholders. This method could maybe assure pluralism besides impartiality.

Notwithstanding these critical sides, the *inquiry models* applied in the British and in the French urban law may teach us much. They offer important suggestions, *de iure condendo*, to overcome the risks connected with an excessive "authoritative approach" in urban planning.

There is no doubt about the need to enhance the efficiency of participation by the private parties in the urban planning procedures. This need is much stronger today than in the past, because all the legal systems are now aware of the importance of the protection of rights of private participation in the administrative procedures and the citizens fully comprehend the deep relevance of their role (also) in the perspective of taking efficient planning choices.

The modern technologies may help in granting new paths (such as online participation) for the interested populations to get information and to express themselves[51]. This is not of course a

[51] In the French legal system something starts moving from this point of view. For instance, the *décret* n. 2011-2021 (December 29th 2011) is particularly interesting. It contains a list of projects, plans and programmes – which are included in the legal framework of art. 123-10, *Code de l'environnement* – that are compulsorily the object of an e-communication to the public before the inquiry starts. Notwithstanding these rules regard environment law and not urban law, they show that the French legislator aims at testing new instruments for making the participation of private parties in the administrative procedure easier, especially when primary public interests are involved. For the text of the *décret*, see

strictly legal phenomenon. But, in order to facilitate the emersion of all the contributions and to lead them into a public interest-oriented vision, the legislators should provide for mechanisms to convey them to the competent authorities. To this purpose, it may be useful setting out a specific step in the urban procedures where, when the draft still has a preliminary shape, the interested private parties may freely discuss and exchange their points of view, with the involvement of the planning authorities.

In the "background", to so say, there is however another important problem, which is strictly connected with the issue of effective communication. In fact, it is well known that the basic technical decisions about the future physiognomy of land are normally taken not by the boards of the local authorities, whose mission is to make the political choices in the perspective of the best social and economic develop of urban welfare. The technical decisions, instead, are taken – primarily in the very specialized field of urban planning – by groups of experts, holders of the necessary knowledge. As a consequence, the preliminary documents and drafts are written in a specific language, difficult to be fully understood by "common" people. This problem regards the members of the political boards, too: they formally have the power to emit the plan, but must normally trust the suggestions expressed by the groups of experts. However, the same problem regards, of course, participation by the interested populations. In other terms, formal and substantial transparency may not correspond to each other, because the technicality of the terminology used in the urban plans makes them hardly accessible to people without specific expertise.

In the light of all the indicated elements, it may be rational to think (or re-think) at the participation of the private parties, by distinguishing it into two steps.

The first step could regard the strategic choices about the contents of the plan. They regard political, social and economic issues and their comprehension does not require technical knowledge. The involvement of the private parties (not only the stakeholders, but also the interested population in wide sense) could happen almost at the beginning of the procedure, by an

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http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000025054387&dateTexte=&categorieLien=id.

"open" inquiry which could be similar to the French *enquête publique*. It should grant a real dialectical confrontation among the various views, to search the best develop of urban welfare.

The second step could strictly regard the technical issues related to the material implementation of the plan. This kind of participation could consist of a series of meetings, open to the public but involving as speakers (only) the competent authorities and the private technicians and stakeholders, similarly to what happens in the British *examination in public* model.

This solution could perhaps be a good compromise between (real) transparency and efficiency of administrative action.

At these conditions, a renewed *inquiry model* (which is maybe – not a son, but – a grandson of the traditional right to be heard) could play a basic role as a strategic tool for private participation in the urban planning procedures. In fact, it could assure a large – democratic in wide sense – debate on the general planning choices. These choices are very important if the planning action is the first step of develop of land. But they may be as much (or even more) important when the plans aim at adapting *ex post* to the public interest an urban space which has already been settled down. Precisely in the latter case a preliminary strong discussion among the interested population may help in identifying priorities and critical aspects. Later – when the purpose is to choose how the plan has to be implemented – a restricted debate among the competent authorities, the private stakeholders, the technicians and the representatives of the possible contractors (where the populations could be involved just as listeners) could grant at the same time efficiency and transparency of administrative action.

So, the *inquiry model* may be of primary relevance to get all the potentially useful contributions, in the perspective of a rational management of land.

At the first level, it represents a strong legal weapon to grant the completeness of the preliminary step of the planning procedure. This matters from the point of view both of the private stakeholders, who during the inquiry may express their views before the plan is adopted, and of the whole population (together with the public authorities themselves), because the *inquiry model* permits a deep exam of all the facets of the single issues.

At the second level, when the plan has been emitted and produces its legal effects, the *inquiry model* may be able to significantly reduce litigations about its implementation, because the main problems have been discussed and solved in advance, through a wide debate.

That is why, in my opinion, the *inquiry model* may be quite useful to overcome the risks of inefficiency of administrative action. Albeit with the necessary adaptations, it is a flexible instrument which could be successfully introduced in various legal systems, even if they are different in traditions and rules in force. This possibility is shown by the analysis of the British and the French experiences, where the *inquiry model* assumes different shapes, notwithstanding the existence of some common elements.

Of course, the choice of permanently introducing the *inquiry* tool in the urban law procedures could be very expensive, especially from the point of view of the implementation of the rules. However, also the costs of a frequent judicial review action and, in a more general perspective, of a lack of confidence in administration are particularly high. So, the adoption of the *inquiry model* may be really convenient, especially if – at least in the first testing period – its use is not the effect of binding rules, but of the carrying out by the legislators of a promotion campaign of good practices.

Participation by the private parties is in general a basic issue of administrative action. But in urban planning there are some specific factors, due to the aim of changing the physiognomy of the urban environment and of the allowed use of land. The complexity of the matter, the big number of different interests involved and the need for avoiding complaints and judicial review when the decisions have been taken make *ex ante* participation extremely useful. So, the *inquiry model* is in this field particularly suitable. However, it is quite clear that this model may more and more be considered as a fundamental legal tool also in other kinds of administrative procedures. In particular, a "large" inquiry could allow participation in the decision-making process by people who are not stakeholders in a technical meaning, but, as members of the community touched by the effects of the decision, aim at expressing their views before the act is emitted. The possible expansion of the inquiry tool (not only in urban law) may be nowadays easier because of the "new" rules – in force since the

last months in several European legal systems – about "e-transparency" of administrative action[52]. This could allow the wide circulation of information, which may make participation less complicated for the interested populations[53].

[52] For instance, in Italy d. lgs. March 14th 2013, n. 33 has ruled some new duties of publication of data in the websites of public authorities (see on this subject, for example, G. Mancosu, *La transparence administrative en Italie face au défi de l'*open data, Conférence-débat du CDPC sur la transparence administrative et ses déclinaisons technologiques récentes, Cycle *Les valeurs du droit public*, 15 avril 2013, available at http://www.u-paris2.fr). In France, it may be useful to mention Law October 11th 2013, n. 2013-907 (*Loi relative à la transparence de la vie publique*) and *Loi organique* October 11th 2013, n. 2013-906 (with the same name). The Spanish reform is very recent too: see *Ley de transparencia, acceso a la información pública y buen gobiern*, approved on November 28th, 2013.

[53] Moreover, the introduction of the *inquiry model* – especially in subjects where technical notions deeply influence the administrative choices, such as urban planning – may be particularly important in the European States which have signed the European Convention of Human Rights. In the light of the Convention, in fact, a procedural due process of law has become a basic legal value, especially when different interests have to be balanced. On this subject see, for instance, G. Della Cananea, *The Italian Administrative Procedure Act: Progresses and Problems*, 11 Jus Publicum Network Review (2011), available at http://www.ius-publicum.com/repository/uploads/12_01_2012_9_44_DellaCananea_EN.pdf, at 16. See also Idem, *Administrative Law in Europe: a Historical and Comparative Perspective*, 2 *IJPL* (2009), where a lot of interesting references are quoted. However, regarding the case law, it may be interesting to notice that the British House of Lords has expressed its view about the possibility to conduct inquiries under the conceptual umbrella of art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The answer given by the House of Lords is negative. See House of Lords, Alconbury, May 9th, 2001, [2001] UKHL 23, available at http://www.publications.parliament.uk/pa/ld200001/ldjudgmt/jd010509/alcon-1.htm (March 31st, 2014).

THE ITALIAN GOVERNMENT'S BALANCED BUDGET POSTPONEMENT

*Francesca Nugnes**

Abstract

The debate on European economic governance is witnessing a conflict between the hardliners of austerity and the advocates of flexibility. The Italian request for a postponement of the balanced budget allows us to reflect on how much room for flexibility is effectively provided by current European economic governance and to identify issues that remain. This report aims to highlight the fact that, though it is not necessary to reform the current juridical framework, the problems are due to the way that regulations are put into practice. Such rules suffer from the method in which investment for growth, structural reforms and the choice for a definitive way to calculate the budgetary deficit are identified. These are aspects that require a solution based on a common view about parameters and criteria, currently absent or still under construction in Italy and France. The examination of the Italian case highlighted not only technical issues, but also political ones: there is a mutual distrust that is shaping the debate on the flexibility of current economic governance, and it reflects two diametrically opposed views between North-European countries and South-European countries.

TABLE OF CONTENTS

1. Introduction

This Article analyses the postponement of the balanced budget implemented by the Italian government. The purpose is to understand the reasons behind the decision to postpone the balanced budget, and whether there is evidence of an inability to meet targets that are too strict, or whether European countries are still autonomous towards their own budget policies[1].

The Italian Parliament, by absolute majority, authorized the government to postpone the balanced budget to 2016 – according to the provisions of Art. 81, second paragraph of the Constitution and Art. 6 of Law 243 of 24 December 2012. This happened two years after the balanced budget amendment had been introduced in the Italian constitution. Following a new European economic regulation, member countries of the EU are required to comply with new parameters – incorporated into the Italian body of law according to Law 243/2012.

A deficit/GDP ratio of 3% was set, along with a public debt/GDP ratio of 60%; medium-term objective budgeting, equal to 0, was redefined. A new public debt regulation, which implies a yearly reduction of debt equal to 0.6 percentage points of GDP, will be fully phased in for Italy from 2015[2].

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[1] The Italian case can be interpreted as another manifestation of an unfinished process towards the realization of a so-called "magic triangle", which is a balance between monetary base, government spending and the rate of exchange with other currencies, notably the dollar. See F. Merusi, *Il sogno di Diocleziano. Il diritto delle crisi economiche* (2013) 3; more recently, *ex multis*, see M. Ruffert, *The European debt crisis and European Union Law*, in Common Market Law Review 1777 ff. (2011); P. Craig, *The Stability, Coordination and Governance Treaty: principle, politics and pragmatism,* in European Law Review 231 ff. (2012); F. Donati, *Crisi dell'euro, governance economica e democrazia nell'Unione europea,* in Dir. Un. Eu. 337 ff. (2012); G. della Cananea, *L'Unione economica e monetaria venti anni dopo: crisi e opportunità*, in Costituzionalismo.it (2011).

[2] See Art. 2, Reg. Ue 1467/97; Artt. 2 *bis* and 3 Reg. Ue 1466/97; Artt. 3, 5, 6 and 10, par. 3, lett. *b*) Reg. Ue 1466/97.

Further budget regulations have been introduced. Countries, which fail to meet their MTO, will have to reduce their structural budget balance by at least 0.5% every year. The Italian Government has outlined an economic and financial plan that involves a deviation from the rule of expenditure, the MTO and the public debt regulation.

The government has requested a derogation from MTO, asking for a reduction of the structural deficit of 0.2% of GDP instead of 0.5% of GDP, which will lead to postponement of the balanced budget to 2016. The postponement, drawing along with the recession, will have an impact on the path towards a reduction of the public debt/GDP ratio that will be evaluated in 2016.

This paper will mainly focus on the deviation from the second and third points – MTO and public debt regulation. Whilst not complying with the benchmarks established by the Commission, the public expenditure trend does not significantly affect the structural balance and the public debt.

The report begins with the reasons behind the Italian Government's decision to introduce the principle of a balanced budget in the Constitution. Procedures and substantial aspects of the whole process will be analysed in sections 1 and 2. The soundness of such a request by the Italian Government will be carefully weighed in sections 4 and 4.1.

This investigation will shed light on some problematic issues concerning European budgetary discipline (sections 5 and 6). It will also determine the open questions and soundness of current European budgetary discipline (sections 7 and 7.1).

The inquiry uses the Italian case as a gateway to highlight the nodal points of the present debate concerning the possibility of channelling European economic governance not only towards austerity but also towards flexibility (section 8).

2. The balanced budget reform in the Italian Constitution: a reform politically opportune but not judicially necessary

The Italian Senate approved on 18 April 2012, with 235 votes in favour, constitutional reforms of Articles 81, 97, 117 and 119. The principle of a public balanced budget was introduced in the Constitution. A set of exceptions was also introduced in order to draw upon money borrowing under

extraordinary circumstances.

Such a vast majority from the chambers and quickness to deliver this constitutional reform were essential due to pressure from the financial markets. This action was seen as a concrete answer to the indications included in the ECB memorandum of understanding, sent to the Italian government in August 2011[3].

In Italy's case it is not uncommon for economic and financial regulations to originate from external requests, such as from the ECB memorandum. A letter of intent was sent by the Italian Government to the IMF in March 1977. In this letter, Italy bound itself to commit to the rebalancing of public finance in order to respect the obligations that were the result of the credit it obtained to deal with the rise of the deficit/GDP ratio to 22%.

Before long, in August 1978, financial Law 468 was approved, a law that delivered an oversight on public finance planning. It is not possible to detail every single step that led from the financial law to the current stability law, although it is crucial to realize how the changes that occur within national financial regulations often originate from a supranational context, even before any internal debate.

The last Italian constitutional reform was a result of supranational political and economic pressures – despite there not being anything in the EU regulations to enforce a member state to modify its constitution. Neither the Europlus Pact nor the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed in Brussels in March 2012, made any such obligation. This treaty, the so called fiscal compact, provides that the budgetary rules shall take effect in the national law of contracting parties "through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary process" (Art. 3, paragraph 2 of TSCG).

In this perspective is the sentence of 9 August 2012 issued by *Conseil Constitutionnel* declaring that a *loi organique* needed to

[3] The EU memorandum of understanding sent on 5 August 2011 was later published by the newspaper Il Corriere della Sera on 29 September 2011; about the extraordinary quickness of the reform, see R. Perez, *Il pareggio di bilancio in Costituzione*, in Giorn. dir. amm. 929 and ff (2012); about the need of an urgent reply to the financial markets, see M. Luciani, *Costituzione, bilancio, diritti e doveri dei cittadini*, in Astridonline.it (2013).

be preferred over a constitutional reform, something formerly started and after abandoned[4]. It is for these reasons that a constitutional reform happened to be politically appropriate, but, at the same time, not judicially necessary. In fact, budgetary discipline originates from regulations that are immediately effective and the fiscal compact in large part confirms the regulatory framework[5]. In this perspective, it is possible to argue that the Italian constitution was reformed not to keep public finance in order but to make economic targets, tools and procedures more explicit. Juridical boundaries were set to recover credibility from both markets and international institutions.[6] For these reasons, the introduction of the principle of a balanced budget in the constitution is politically appropriate because it represents a warranty of trustworthiness necessary to cope with financial markets that is decisive to maintain a sustainable public debt[7].

3. The balanced budget in Art. 81 of the Italian Constitution and in the law implemented

For the reasons outlined so far, it is clear why the constitutional law approved on 20 April 2012 (Art. 1, "Introduction of the principle of a balanced budget in the constitution") was ratified after a parliamentary process that lasted less than seven months and without a significant public debate around it[8].

[4] See, *ex multis*, R. Casella, *Il Consiglio costituzionale francese e il trattato sul Fiscal Compact*, in Forum Quad. Cost. (2012).

[5] See G.L. Tosato, *I vincoli europei sulle politiche di bilancio*, in Il Filangieri, Quaderno 83 ff. (2011); Id., *La riforma costituzionale sull'equilibrio di bilancio alla luce della normativa dell'Unione: l'interazione fra i livelli europeo e interno*, in Riv. dir. int. 5 ff. (2014).

[6] See M. Marè, M. Sarcinelli, *Le regole del bilancio in pareggio: come assicurarla e a quale livello?* Paper presented to Congress on "*Il principio dell'equilibrio di bilancio secondo la riforma costituzionale del 2012*", Corte costituzionale, Rome 22 november 2013.

[7] See T. Groppi, *Editorial, The impact of the financial crisis on the Italian written Constitution*, in 1 It. J. of Publ. Law 6 ff. (2012).

[8] See A. Brancasi, *L'introduzione del principio del c.d. pareggio di bilancio: un esempio di revisione affrettata della Costituzione,* in www.forumcostituzionale.it (2012); R. Perez, *Dal bilancio in pareggio all'equilibrio tra entrate e spese,* in Gior. dir. amm. 929 ff. (2012).

The first comments on the reform underlined the ambiguity between the constitutional law's name (balanced budget) and the subsequent provisions that imply on one hand a balance between revenue and expenditure (Art. 81, first and sixth subparagraph of the constitution) and on the other a budgetary balance (Art. 97, first subparagraph of the constitution)[9].

Art. 81 of the Italian Constitution refers to the concept of balance, something different from the balanced budget indicated in the bill for the constitutional amendment; it does not even coincide with fiscal compact dispositions that refer to "budgetary position (…) balanced or in surplus" (Art. 3 paragraph 1, letter A). The difference between the two concepts is based on the desire to retain a degree of flexibility in the management of the budget that would be eliminated with the introduction of a pure balanced budget that has a static nature, consisting of the accounting par value between revenue and expenditure[10]. In contrast, the concept of balance is dynamic and does not necessarily coincide with the balance between income and expenditure, especially in light of trends in GDP and the public debt[11].

The formulation of the new Art. 81 connects the respect of a balanced budget to the different phases of the economic cycle. Consequently this allows the indirect economic opportunity to exhibit deficits in times of adversity or in case of favourable situations, fiscal surpluses. The provision actualizes what is a required of European legislation, that member states are asked to pursue a medium-term budgetary goal where structural balance is intended as nominal budget balance adjusted for the economic cycle and net of one-off measures.

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[9] See F. Bilancia, *Note critiche sul c.d. "pareggio di bilancio"*, in RivistaAic (2012); D. Cabras, *Su alcuni rilievi critici al c.d. "pareggio di bilancio"*, in RivistaAic (2012); R. Bifulco, *Jefferson, Madison e il momento costituzionale dell'Unione. A proposito della riforma costituzionale sull'equilibrio di bilancio,* in RivistaAic (2012).

[10] The dangers from the introduction of a tie in the Constitution are highlighted in a letter that eight major American economists sent in July 2011 to the President and Congress of the United States. The letter, published 28 July 2011, was signed by Kenneth Arrow, Peter Diamond, Eric Maskin, Charles Schultze, William Sharpe, Robert Solow, Alan Blinder and Laura Tyson. Available at http://www.cbpp.org/cms/index.cfm?fa=view&id=3543).

[11] See Servizio Studi del Senato, *Introduzione del principio del pareggio di bilancio nella Carta costituzionale Disegni di legge costituzionale AA.SS. nn. 3047, 2834, 2851, 2881, 2890 e 2965*, Dossier n. 322, 16 (2011).

Since the reform of the Stability and Growth Pact of 2005, the use of the structural budget balance was introduced in order to understand the extent to which the balance is attributable to the fiscal policies of the government, thereby avoiding the adoption of pro-cyclical fiscal policies.[12] To guarantee a balanced budget, the second subparagraph of Art. 81 provides that "borrowing is permitted only for the purpose of considering the effects of the economic cycle and, with the approval of the Chambers adopted by an absolute majority of its members to the occurrence of exceptional events". Introducing a safeguard clause, this provision contrasts adverse economic cycles. Since the absolute majority of the members of each house is required, this tool can be used to tackle exceptional events with the use of debt only when necessary.

An ambiguity concerning the conditions in which indebtedness is allowed (Art. 81 of the Italian Constitution, second subparagraph) was highlighted by some scholars[13]. There are two possible interpretations of this Art.. According to the first, indebtedness was allowed in the event of there being two conditions: "the occurrence of extraordinary economic events" and a proper consideration of "the impact of the economic cycle"; according to the second circumstance, just one of the conditions would have been considered necessary in order to borrow money according to Art. 3, paragraph 3, point b of the fiscal compact. However, this interpretation was not consistent with the first subparagraph Art. 81 of the Constitution, which states that is up to the state to implement counter-cyclical policies in order to grant a balance between revenue and expenditure. Overall, it was not coherent with the European budgetary parameters, which are of a structural nature and imply that the calculation of the budget must be net of the effects of counter-cyclical policies. Therefore, an interpretation of the law that allows the legislator to borrow

[12] See, *ex multis*, M. Buti, S.C.W. Eijffinger, D. Franco, *The stability pact pains: forward-looking assessment of the reform debate,* CEPR, Discussion Paper (2005); R. Morris, H. Ongena, L. Schuknecht, *The reform and implementation of Stability and Growth Pact,* 47 ECB Occasional Paper (2006); J. De Haan, M. Mink, *Has the Stability and Growth Pact impeded political budget cycles in the European Union?*, 1532 Cesifo Working Paper (2005).

[13] See A. Brancasi, *Il principio del pareggio di bilancio in Costituzione*, in osservatoriosullefonti.it 4 ff. (2012).

money not only during an economic downturn but also in the occurrence of extraordinary economic events has proven to be preferable. This would leave more leeway to politics according to Law 243, subsequently implemented in late 2012.

The first case in which the derogation is allowed confirms that it is possible for a member country to implement counter-cyclical policies, in according with the first paragraph of that same Art. and with the European legislation related to structural balances, net of the effects of economic cycles. In the second case, for exceptional events, borrowing is not limited to offset the negative effects of adverse cycles. This opens room for discretionary interventions by the decision maker, as long as there is a consensus in both houses wider than what is required for a motion of confidence[14].

In order to avoid recurring borrowing, it is left to the implementation of the reform law requirement for parliamentary authorization to indicate a debt limit. This provision, implemented by Art. 6 of Law 243/2012, describes the manner in which it is possible to depart from the balanced budget regulations. Law 243/2012, taking the provisions of EU regulation 1467/1997, paragraph 2, identifies both exceptional events in periods of economic downturn in the Eurozone or even in the entire EU and extraordinary events outside the control of the state, such as financial crises and severe natural disasters (Art. 6, paragraph 2)[15].

In such cases, the third paragraph of this law provides that in order to cope with exceptional events, the government can deviate temporarily from programmatic targets. After consulting the European Commission, a report, which updates the policy targets of public finance, needs to be shown to both houses of

[14] See G. D'Auria, *Sull'ingresso in Costituzione del principio del "pareggio di bilancio"(a proposito di un recente parere delle sezioni riunite della Corte dei conti)*, in V Foro it. 48 (2012).

[15] Law 243 is rather similar to French and Spanish organic laws; see N. Lupo, *La revisione costituzionale della disciplina di bilancio e il sistema delle fonti*, Il Filangieri Quaderno 89 ff. (2011); such laws can be abolished, modified or waived only through a law implemented by an absolute majority in both the Chamber of Deputies and the Senate. It is therefore an atypical ordinary law provided with greater strength than ordinary laws, decree-laws and legislative decrees.

parliament. A further authorization that indicates the extent and duration of the deviation is needed too. Available resources must be allocated according to it, defining the repayment plan and tying its duration to the gravity of the exceptional events. The repayment plan must be implemented with effect from the year following that for which the deviation is authorized, taking into account economic trends.

Each house can authorize the deviation and approve the repayment plan only by an absolute majority of its members. It is self-evident that, in this case, the borrowing is not tied to the cyclical effects of the balance and can also be extended beyond the maximum parameters defined by the EU. The borrowing is entirely within the discretion of the policy-maker. This point is underlined by the absence of an indebtedness cap in Law 243/2012. The establishment of such a cap, therefore, remains within the political debate between the government and parliament to be subsequently formalized by resolution of parliament.

It is expected that the resources needed to cope with exceptional events will have a bond of destination. They must be used only to fulfil the purposes described in the authorization request to the chamber (Art. 6, paragraph 4, Law 243/2012). It is on this basis that the Italian government has asked for the postponement of a balanced budget. It is this postponement, which we shall now analyse.

4. Postponing a balanced budget: procedural aspects

The request for a balanced budget postponement by the Italian government appeared likely since the closure of the EU excessive deficit procedure in May 2013. The procedure was accompanied by six recommendations by the European Commission (and endorsed by the Council): one relative to the maintenance of a deficit/GDP ratio below 3% and the remainders concerning other interventions in various sectors of public

administration, all aimed at strengthening the economic and financial stability of the country[16].

Cohering with these recommendations, the current economic and financial planning document outlines a budget plan divided into different areas: efficiency of public administration through spending reviews, intervention in the welfare state and labour market, intervention in inland revenue, encouragement of healthy competition in the market and intervention in the banking system and financial market. These are interventions that take place in a context of economic recession. It is unrealistic to expect these interventions to be feasible without the chance of negotiating greater flexibility in meeting the goals of the Stability and Growth Pact[17].

Hence the request for a balanced budget postponement which consists of a derogation from the adjustment path that will not break even in 2014 but will do so, according to government estimates, in 2016.

Before analysing whether the postponement request is coherent with the overall legal framework, some comments about the profile of the procedure are required. In the context of the European Semester, the stability program, which sets out the budget's targets, was submitted to the Commission and the European Council (EU Regulation 473/2013, Art. 4).

The European Council, on the basis of the Commission's assessment, examines the MTO's reliability in terms of economic outlook and considers whether the adjustment path towards the medium-term objective is appropriate, taking into account the evolution of the debt/GDP ratio. A temporary deviation requires the approval of both the commission and council (EU Regulation 1466/1997, Art. 5).

The request for authorization was made by means of communication from the Italian Government to the European Commission a few days prior to the submission of the request for

[16] European Commission, Brussels, 20 May 2013, COM (2013) 362 Final recommendation on the 2013 National Reform Programme of Italy, delivering a Council opinion on the 2012–2017 stability program of Italy.

[17] See R. Perez, *La chiusura per disavanzi eccessivi,* in Gior. dir. amm. 882 (2013). It is noted that Spain and France could overcome Stability Pact boundaries on the condition that they take measures in the fields of pensions, the welfare state, liberalization of the markets and in the field of taxation.

postponement of the balanced budget in parliament. The European Commission stated that it would assess the adjustment path towards the MTO in its assessment of the stability programme and the national programme[18]. Therefore, the timing for the approval of the document bearing the economics and finance report to parliament on net borrowing and debt and its application for authorization proved to be incompatible with the acquisition of an opinion from the Commission. Authorizing the postponement of the budget balance showed a full assumption of responsibility by the government and the parliament. It is a decision considered strategic for the economic revival of the country, but it is not without risks relating to the impact on public finance[19].

Financial policy, while being influenced by quantitative and procedural constraints arising from European legislation, remains in line with the principle of subsidiarity (Art. 5 TEU) and the competence and responsibility of the member countries. A thesis that attaches excessive rigidity to the decision by the current budgetary stance of Art. 81 of the Constitution is not grounded. Art. 81 of the Constitution, in fact, emphasizes the accountability of public finance policies, allowing for flexibility only if objectively recognized as such. The large majority required by the second paragraph of Art. 81 of the Constitution not only limits the use of debt but is also functional to the involvement of a larger parliamentary majority.

4.1. The postponement of the balanced budget: significant aspects of the decision

The request for a postponement of the balanced budget must be placed in a broader context of social and political tension in which anti-European sentiments and movements have grown increasingly remarkable. Social tension is determined by a persisting economic crisis, which past governments were inadequate to deal with, except for implementing austerity measures according to EU constraints. There is an increasing

[18] See Senate, XVII legislature, stenographic report of the 17 April 2014 meeting.
[19] Hearing of the Court of Auditors on the Document of Economics and Finance (DEF) 2014; joint budget committees, Chamber of Deputies and the Senate, 15 April 2014.

separation between the main political parties (especially left wing parties such as the Democratic Party) and their traditional electorate. An extra-parliamentary crisis led Italian Prime Minister Enrico Letta to step down less than a year after taking office.

Premier Renzi's government took office on 22 February 2014 with the intention of realising a revolutionary plan of reforms. The government's economic policy hitherto opposed the policy of restraint adopted by past governments, believed to be counterproductive in revamping the economy. In line with this approach, the government asked for a derogation from the adjustment path towards the medium-term budgetary objective (MTO). This dispensation consists of a reduction of the structural deficit of 0.2% instead of 0.5% of GDP as laid down by European and Italian legislation[20]. This way, MTO parameters will be met in 2016. The deviation was only requested for 2014 and was based mainly on two propositions. First, it highlighted the need to tackle the effects of the 2012 and 2013 recession using a "comprehensive strategy".

Speaking from a legal point of view, the reason for this postponement can be assessed by considering consistency with European legislation. The current EU Regulation 1466/1997, Art. 2, paragraph 2, provides that the Commission and the Council "can exceptionally consider an exceeding over the reference value resulting from a severe economic recession, if the excess is due to a negative growth rate of the annual GDP or to an accumulated loss of output during a protracted period of very low growth of the annual volume of GDP relative to potential growth".

In the Italian case, there was a contraction in GDP of -2.4% of GDP in 2012 and -1.9% of GDP in 2013. That determined a difference between the actual and potential GDP equal to 3.6%, far below the value that the European Commission considers feasible

[20] The goal of deficit/GDP ratio of 3% has been fully met. In this sense, the risk of incompatibility underlined by some economists would seem ungrounded. See B. De Witte, *European Stability Mechanism and Treaty on stability, coordination and governance: role of the EU institution and consistency with EU legal order*, in European Parliament (ed), *Challenges of Multi-tier governance in the Eu* (2012) 14 and ff.

in recessionary conditions of a normal cycle[21]. Therefore, the above assumptions appear viable to facilitate Italy's request for a temporary deviation from the path of achieving MTO.

A second motivation behind the Italian request for the balanced budget postponement is the need to improve economic growth and the sustainability of public finances. This appears to be consistent with European law. The Council and the Commission, "in defining the adjustment path to MTO, as well as in allowing a temporary deviation to the States that have achieved it, take into account (...) implementation of major structural reforms that are adequate to generate long-term financial benefits, including the raising of potential sustainable growth" (EU Regulation 1466/1997, Art. 5, paragraph 1, letter c).

The Italian Government aims to boost growth through structural reforms along two lines. The first shows new measures of intervention divided among ten areas: containment of public spending, federalism, administrative efficiency, market and competition, jobs and pensions, innovation and human capital, business support, support for the financial system, energy and environment, infrastructures and development[22].

The government aims primarily at reducing the tax burden and public spending, expecting to obtain a public debt reduction by 2.6% of GDP. In doing so, the margin of safety in respect of the "reference value of the deficit," accounting for 3% of GDP, is guaranteed[23]. The second line of action contains the updates of the measures taken in previous years to pay off public administration debts for a total of over 13 billion Euros, in addition to the 47 billion already allocated as a result of previous interventions[24].

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[21] See Ministry of Economy and Finance, *Economic and Financial Document* (2014-2018), 26; European Commission, *Report on public finances*, 4 European Economy 97 (2013).

[22] Ministry of Economy and Finance, *Economic and Financial Document*, cit., specifically 24.

[23] In particular, the measures to reduce the tax burden on labour, IRAP, auditing of financial income, spending review, liberalization and simplification, as well as measures related to the labour market, are expected to reduce the public debt/GDP ratio to 0.8 of GDP in 2015 to 1.3% of GDP in 2016 to 2.1% in 2017 and to 3.5% in 2018. Cfr. Ministry of Economy and Finance, *Economic and Financial Document*, cit., 33, Table III.8.

[24] This is Decree Law 35/2013 and Decree Law 102/2013, which placed, respectively, payments for 40 billion euros in the period from 2013 to 2014 and

The government has estimated that, since 2012, domestic demand has been depressed by both the credit crunch and the impact of the measures of fiscal consolidation[25]. Tax revenues have been lower than planned, leading to an output gap "significant and coincident with the liquidity conditions of enterprises far from normal levels"[26]. These factors, together with an unstable market situation, led the Italian Government to carefully assess the risks associated with adopting more restrictive measures of public finances, jeopardizing an already fragile recovery.

From this perspective, the payment of public administration debts becomes a key point in order to stimulate domestic demand[27]. Through the payment of these debts, the government aims to alleviate a serious situation that has become even more severe due to the financial and economic crisis and, paradoxically, in an attempt to cope with the principle of a balanced budget.

In fact, the postponement of payments by public authorities has been strategically used by both central and lower level governments in order to meet the Stability and Growth Pact parameters. This postponement was basically an accounting expedient imposed, in most cases, according to the rules of the Internal Stability Pact, which were not based on a long-term vision

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for more than 7 billion euros in 2013. Specifically, the Decree 35 of 8 April 2013, converted into Law 64/2013, marked a turning point in fighting the delays in payments by the government. See the comment made by M. Gnes, *Il pagamento dei debiti della pubblica amministrazione,* in Gior. Dir. Amm. 687 ff. (2013).

[25] The amount of public administration debt for 2012 was estimated by the Bank of Italy at 90 billion euros; see Bank of Italy, *Annual report submitted to the Ordinary of the participants*, 31 May 2013, 155 ff. available at bancaditalia.it; On 28 March 2014, according to data from the Italian government, payments were made by entities subject debtors to creditors amounting to 23.5 billion.

[26] See Ministry of Economy and Finance, *Economic and Financial Document*, cit., 28.

[27] Government intervention is not limited to the payment of existing debts but is aimed at shortening the time of payment in line with European rules, resulting in positive effects for the reduction of entry barriers, as required by the European Commission in a recent document, *Assessing product-market Reforms in Italy, Greece, Spain, Portugal. European Commission: note for the attention of line working group (*2014). Cfr. Decree 35/2013 and Decree 64/2013 24 April 2014; See M. Gnes *La nuova disciplina sui ritardi per i pagamenti*, cit., 115.

of economic and financial planning and which had a negative impact on both financial and economic situations[28].

The paradox is even more evident when we consider that the European legislation had been fighting the delays in payment since Directive 2000/35. Europe encouraged the government to pay its obligations because the issue of non-payment hinders the proper functioning of the internal market, twisting competition[29].

The delay of payments by the government, used to meet the parameters of the Stability and Growth Pact, produced the dual effect of slowing the domestic economy and threatening to upset the European market.

It should be noted that European legislation, as already mentioned, leaves wide discretion to national governments on how to achieve a balanced budget. On the other hand, the legislation is peremptory in terms of the payment of public administration. This has resulted in the need to continue with the turnaround that has already been adopted by Decree/Law 35/2012 and that continues through the operation announced by the Document of Economics and Finance. The delay of payments is a central problem that can produce long-term adverse effects in the face of false positive effects in the short-term.

However, it should be noted that the payment of public administration debt that should have already been implemented according to European regulations, does not exactly allow public expenses in order to create growth and development. It is more precisely related to liquidity in the system and aimed at creating the conditions for economic recovery that the same strict policies followed so far have helped to slow down[30].

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[28] See F. Merusi, *Il sogno di Diocleziano. Il diritto delle crisi economiche,* cit., 3; Banca d'Italia, Audizione preliminare all'esame del Documento di economia e finanza 2014, Commissioni riunite V della Camera dei Deputati (Bilancio, Tesoro e Programmazione) e 5a del Senato della Repubblica (Bilancio) Camera dei Deputati Roma, 15 aprile 2014.

[29] See Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on fighting delayed payments in commercial transactions. Guideline 2011/7/ of the EU Parliament and Council of 16 February 2011. See M. Gnes, *La disciplina Europea sui ritardi dei pagamenti*, in Gior. Dir. Amm. 821 (2011).

[30] See, *ex multis*, D. Schizer, *Fiscal policy in an era of austerity,* 408 http://ssrn.com/abstract=a948692; R. Boyer, *The four fallacies of contemporary austerity policies: the lost Keynesian legacy*, Cambridge Journal of Economics 36

5. The Council's recommendation: the rule of debt and other relevant elements

On 26 June 2014, the EU Council approved the recommendations for each member state's economic and budgetary policies[31]. As regards the request for a postponement of the balanced budget, the first of the eight recommendations addressed to Italy does not contain an explicit denial to it, but stresses the importance of strengthening the budgetary measures for 2014 in the light of the emerging gap relative to the Stability and Growth Pact requirements, namely the debt reduction rule, based on the Commission's forecast of spring 2014[32].

In 2015 a strengthening of the budgetary strategy to ensure compliance with the debt reduction requirement is required. In particular, the Council recommends to ensure that general government debt is on a sufficiently downward path to also carry out an ambitious privatization plan. The Council's recommendations allow flexibility in the pace of public debt reduction that is subject to two conditions: the carrying out of structural reforms and the carrying out of other relevant elements.

Many of the reforms recommended by the EU Council are already outlined in the Italian draft budgetary plan. For these reasons, the main issue now is not which reforms to implement but the need to carry them out as soon as possible. It is, therefore, a question of taking advantage of the flexibility allowed in current budgetary discipline.

Art. 2 of CE regulation 1467/1997 provides that member states with debt in excess of 60% of GDP must reduce the amount by which their debt exceeds the threshold by at least 1/20th per year over three years. This requirement is considered to have been fulfilled only when there is a decline in the debt differential in excess of 60% according to the EU forecast over a three-year period starting from the last year for which there are available data. To assess compliance with this regulation, the general

(2012); Y. Kitromilides, *Deficit reduction, the age of austerity and the paradox of insolvency*, Journal Post Keynesian Economics 33 (2011).

[31] See European Commission, *Recommendation for a Council recommendation on Italy's 2014 national reform programme and delivering a Council opinion on Italy's 2014 stability programme*, COM (2014) 413 final, 2 June 2014.

[32] See European Commission, *Vademecum on the Stability and Growth Pact, European Economy,* 151 Occasional Papers (2013).

economic trend will also be taken into account. If none of these conditions are met, the debt rule is considered unfulfilled. Member states in breach of this obligation will be the subject of an official report by the EU Commission according to Art. 126.3 of the Treaty on the Functioning of the European Union (TFEU).

For countries such as Italy that, in November of 2011, were subject to an excessive deficit procedure, this rule will come up to speed after a transition period of three years from the closing of the excessive deficit procedure[33]. During this transition period, the debt rule is considered met if the state gets a minimum annual reduction of the structural deficit (minimum linear structural adjustment, MLSA) established by the Commission for each country.

Italy, which came out of the excessive deficit procedure in 2013, is now required to record a reduction in structural deficit of at least 1.32% of GDP in the 2014–2015 period in order to comply with the MLSA established by the European Commission.

In 2014, Italian public debt increased to 134.9% of GDP due to the payments of public administration debts (13 billion) and also due to the slowdown in growth (from 2.9 to 1.7%). The process of reducing the debt/GDP ratio will begin in 2015.

The end of the repayment schedule of trade payables and income resulting from privatizations are estimated to positively affect the reduction of public debt (approximately 0.7% of GDP for each year in the period 2015–2017). It is an ambitious goal considering that in the previous decade the amounts resulting from privatization receipts amounted to around 0.2 % of GDP on average per year[34].

It should be considered that the current value of the shareholdings held by governments in listed companies is estimated to be equal to 1% of GDP. To this must be added that

[33] See European Commission, Brussels 29 May 2013, COM (2013) 385 Final, Council decision repealing decision 2010/286/EU around the existence of an excessive deficit in Italy. The decision to terminate this procedure has been taken on the basis of the data provided by Eurostat; R. Perez, *La chiusura di infrazione per deficit eccessivi*, cit., 884.

[34] See Banca d'Italia, *Audizione preliminare all'esame del Documento di economia e finanza 2014,* Commissioni riunite V della Camera dei Deputati (Bilancio, Tesoro e Programmazione) e 5a del Senato della Repubblica (Bilancio) Camera dei Deputati Roma, 15 aprile 2014, 7.

the Council of Ministers adopted two decree laws to dispose 40% of *Poste Italiane* and 49% of Enav on 16 May. Moreover, the economic and financial planning document presented the sale of other direct investments relating to Eni, StMicroelectronics and other indirect holdings (held by *Banca Depositi e Prestiti* and *Ferrovie dello Stato*).

It is necessary, in order to comply with the rule of debt, that, in 2016, these privatizations will be pursued, together with the achievement of the MTO. According to Art. 126, TFEU, paragraph 3 and Art. 2 of Regulation EU 1467/97, the Commission must assess compliance with the MLSA parameters by considering the significant factors that have led to the failure to reduce the debt at an appropriate pace (Regulation 1467/97, Art. 2, paragraph 1). In particular the relevant factors are:

a) the economic position including potential growth, the different contributions provided by labour, capital accumulation and total factor productivity, cyclical developments and the private sector net saving position;

b) the budgetary position and the record of adjustment towards the MTO, the level of the primary balance and developments in primary expenditure, both current and capital, and the overall quality of public finances;

c) the debt position, its dynamics and sustainability.

Furthermore, the Commission shall give due consideration to any other factors which, in the opinion of the member state concerned, are relevant in order to comprehensively assess, in qualitative terms, the excess over the reference value and which the member state has put forward to the Commission and to the Council. In that context, special consideration shall be given to budgetary efforts towards increasing or maintaining, at a high level, financial contributions to fostering international solidarity and to achieving European policy goals, notably the unification of Europe if it has a detrimental effect on the growth and fiscal burden of a member state.

In Italy's case, the paper discusses economics and finance-relevant factors, in addition to adverse economic circumstances and the aforesaid payment of trade payables of the public administration and financial support provided to countries in the

Eurozone[35]. This latter point is of particular interest because it highlights a connection between the discipline of public finance and the principle of solidarity, which had previously remained neglected[36].

6. The flexibility of the pact: solidarity and growth

EU regulation 1467/97, Art. 2, paragraph 3, letter c), provides that the Commission pays particular attention to the contributions of international solidarity to achieve the targets of the Union. This, as well as the payment of the debt, will result in financial stabilization. It is a provision that, if properly applied, could mark a revival of European integration focused on the maintenance of financial stability, which would not be incompatible with the values of solidarity.

Thus far, especially after the outbreak of the crisis, financial stability has been excessively emphasized to the detriment of the fundamental value of solidarity. The complementary nature of these two values is confirmed by the provisions of the Treaty on European Union and the Treaty on the Functioning of the Union. In the TEU, the goals of integration, such as peace and well being (Art. 3, paragraph 1), are pursued through the construction of an internal market and EMU, in addition to economic and social cohesion and solidarity among the member countries (Art. 3, paragraph 3).

TFEU contains rules such as the prohibition of excessive deficits (Art. 126), the prohibition of concession overdrafts by the ECB and the national central banks in the ESCB (TFEU Art. 123), the prohibition of privileged access financial institutions (TFEU Art. 124) and the prohibition of bail out (TFEU Art. 125). These regulations were set to preserve financial stability by avoiding the

[35] With regard to the effects of the economic cycle on debt reduction, studies have shown that a reduction in the structural balance equal to 1 or 0% of GDP can generate an economic contraction. This decline may be at least a ½ a percentage point of GDP if the adjustment in the structural balance has been done with an increase in the tax burden and can be equal to ¾ of a percentage point of GDP if the adjustment is done with spending cuts. See O. Blanchard, D. Leigh, *Growth Forecast errors and fiscal multipliers*, 13 IMF Working Paper (2013).

[36] See G. della Cananea, *L'Unione economica e monetaria venti anni dopo: crisi ed opportunità*, cit., 7.

behaviours that could cause moral hazard by member states. Financial stability, however, is pursued in order to achieve the original purpose of the Union, referred to in Art. 3 and the preamble of the treaty. It is, therefore, a means rather than an end. Overemphasis on short-term financial stability has overshadowed the need to pursue concrete actions that encourage investments and stimulate growth in the long term[37].

Emphasis has been placed primarily on a selection of coarse parameters, which are not necessarily indicative of the real wealth of a country[38]. The result of these policies was the contagion of the crisis from the financial to the economic dimension with an increase in unemployment, particularly among young people. This contradicts in full the objectives of solidarity and social inclusion contained in Art. 3 of the TFEU and confirmed as objectives of Europe 2020[39]. Austerity caused a political crisis in some countries, which facilitated the rise of anti-European parties and movements. These elements suggest that we need a change in the interpretation and application of the rules of public finance. It seems necessary to take full advantage of the flexibility of space allowed by the SPG, along with the implementation of measures

[37] The limits of GDP as an economic indicator were highlighted by J. Stglitz, A. Sen, J.P. Fitoussi, *The measurement of economic performance and social progress revisited: reflection and overview,* 16 http://ww.stiglitz-sen-fitoussi.fr/documents/overview-eng.pdf (2009); in other respects, the limits of an approach based on the maintenance of a deficit/GDP ratio within a certain threshold are demonstrated by O. Blanchard, D. Leigh, *Growth Forecast errors and fiscal multipliers*, 13 IMF Working Paper 19 (2013); on the inability of governments to make decisions on a long-term vision, see T.M. Padoa-Schioppa, *La veduta corta* (2009); P. Krugman, *Myths of austerity*, in The NewYork Times, 1 July 2010 Available at nytimes.com/2010/07/02/opinion/02krugman.html; P. De Grauwe, *The governance of a fragile Eurozone*, Working Document 346 (2010).

[38] See *ex multis*, P. De Grauwe, *What kind of governance for the Eurozone*? 214 September Paper, CEPS Policy Brief (2010). It shows that the solution to the crisis lies not within the constraints of the Stability and Growth Pact, but in the reform of private finance: "The root causes of the debt problems in the Eurozone is to be found in the accumulation of unsustainable debt in the private sectors to many Eurozone countries"; in this sense, but more widely, see F. Merusi, *Il sogno di Diocleziano* cit., 4 ff.

[39] See European Commission, *Communication from Commission, Europe 2020. A strategy for smart, sustainable and inclusive growth*, COM (2010)2020 final; to verify the results obtained in Italy and in other countries, see http:// ec.europa.eu/europe2020/reading-thegoals/target/index_it.htm.

of investment and growth on the part of national states from which they can derive both cohesion and solidarity.

The creation of the European Stability Mechanism and the conditionality of the grant of financial assistance to a needy country created additional bulwarks in the defence against opportunistic behaviour on the part of the member states in defence of financial stability[40]. The use of opportunistic increase in public debt by a state is in fact limited by the impossibility for the Governing Council of the ECB to buy government bonds in the absence of specific requirements. The beneficiary country must adhere to a programme of the European Financial Stability Facility (EFSF) or ESM[41].

This could consist of a macroeconomic adjustment program or a precautionary program (enhanced conditions credit line). But, above all, it is required to formalize commitments in a separate memorandum of understanding (MOU)[42].

The complex set of rules introduced following the crisis provides ample reassurance that allows countries to benefit from

[40] For a reconstruction of the last stages of evolution and of the implications for the role of the ECB, see S. Cassese, *La nuova architettura finanziaria europea,* Gior. dir. amm. 79 (2014); G. Napolitano, M. Perassi, *La Banca centrale europea e gli interventi per la stabilizzazione finanziaria: una nuova frontiera della politica monetaria?*, in G. Amato, R. Gualtieri (eds.), *Prove di Europa unita Le istituzioni europee di fronte alla crisi* (2013), 41; S. Antoniazzi., *La Banca centrale europea tra politica monetaria e vigilanza bancaria* (2013), 187.

[41] Regarding the strengthening of the role of the ECB during the crisis and the legal inconsistencies with the provisions of its statutes, see B. Krauskopf, C. Steven, *The institutional framework of the European Central Bank: legal issues in the first ten years of existence ITS,* in Common Market Law Review 144 ff. (2009); T. Beukers, *The new ECB and its relationship with the Eurozone member state: between Central Bank independence and Central Bank intervention,* in Common Market Law Review 1579 (2013); P. De Grauwe, *The European Central Bank: lender of last resort in the government bond markets?*, in F. Allen, E. Carletti, S. Simonelli (eds.), *Governance for the Eurozone: integration or disintegration?* (2012), 17 ff.; F. Capriglione, G. Semeraro, *Il Security Market programme e la crisi dei debiti sovrani. Evoluzione del ruolo della Bce*, in Riv. trim. dir. econ. 264 (2011); G. Napolitano, *La crisi del debito sovrano e il rafforzamento della* governance *economica europea*, in Id. (ed.), *Uscire dalla crisi. Politiche pubbliche e trasformazioni istituzionali* (2012).

[42] See M. Schwarz, *A memorandum of misunderstanding- The dorme road of the European stability mechanism and a possible way out: enhanced cooperation* in Common Market Law Review 389 (2014).

flexibility in the application of fiscal discipline[43]. From this perspective, Italy's situation provides further opportunity for the European institutions to give a signal that it is possible to search for a balance between austerity, growth and solidarity, in accordance with provisions in the preamble of the treaty and before the Schuman Plan.

7. Open questions: the implications of the method of calculation of the MTO

As mentioned above, the EU Council granted Italy with more flexibility for 2015, around two to three billion euros, and the opportunity to reduce public debt more slowly. Such flexibility was granted in exchange for the promise to make substantial public reforms in the fields of labour, public administration and education[44]. The EU Council reaffirmed that budgetary regulations are already flexible enough since they set economic targets that consider economic trends. Budget balance is set in structural terms and is net of one-time measures. Therefore, EU economic boundaries become less restrictive during recessions and more stringent during economic expansions. It is a problem to assess how much of a public deficit is due to cyclical causes and how much is structural. It is a rather arbitrary framework with a certain margin of error.

The European regulation provides that the "Member States may" deviate from the adjustment path towards the MTO with the deviation reflecting the amount of incremental impact of structural reforms on the general government balance" (EU Regulation 1466/1997, Art. 5, paragraph 1, letter c).

[43] With regard to the impact of the subsequent creation of the ESM European legal framework, B. de Witte, *Treaty games: law as instrument and as constraint policy* in *Governance for the Eurozone. Integration or disintegration?* (2012), 138 ff. observes that "the main game of economic governance will continue to be played within the European Union 'Institutional framework'"; more widely E. Chiti, P.G. Teixeira, *The constitutional implications of the Europeans' responses to the financial crisis and public debt* in Common Market Review 683 (2013).

[44] See T. Boeri, *Ma quella flessibilità è molto rigida,* in Repubblica.it, 30 June 2014.

Analyses conducted by independent research studies show that critical points, relative to the estimates of tax revenue, could be lower for several reasons[45].

First, the estimates of the entry submitted by the government are based on a favourable macroeconomic scenario. These estimates are different from the predictions of independent research institutes that show an overestimation of the yield of about two tenths of a percentage point in the 2014–2015 period and about five tenths of a percentage point in the period 2016–2018.

Secondly, the government anticipates the income from future revenues, amounting to around three billion Euros more revenue estimated for 2013, to lead to a reduction in future revenue in the period 2015–2016. At the same time, it creates a depreciation of receivables from credit and insurance institutions, which will reduce revenue by about two-thirds of the additional revenue provided by the law of stability for 2014[46].

A third factor of uncertainty, concerning the estimates of income, relates to the connection between income growth and the implementation of certain benefits/tax measures that would produce, according to government estimates, a volume of revenue between 26% and 62% in the period 2015–2018. Independent analysis shows an expense net of interest higher than that estimated by the government; interest expenditure is lower in the period 2014–2016 and becomes higher in the period 2016–2018[47]. In consideration of these critical elements that undermine the

[45] See Cer, Prometeia, Ref, *Previsioni per l'economia italiana*, Consensus Report prepared for the CNEL, 9 July 2013; in Italy, Law 243/2012 established the Office of the Parliamentary Budget fiscal council, responsible for verifying the performance of public finance and assessment of compliance with the fiscal rules. This institution has been formed with a delay of about two years and is still not fully operational. P. Chiti, *L'Ufficio parlamentare di bilancio e la nuova* governance *della finanza pubblica*, in Astridonline.it 8 (2014); R. Perez, *L'Ufficio parlamentare di bilancio*, in Gior. dir. amm 197 (2014); R. Hagemann, *Improving performance through fiscal councils*, OECD Economic Department Working Papers 829 (2010); X. Debrun, M.S. Kumar, *Fiscal rules, fiscal councils and all that: commitment devices, signalling tools or smokescreens?*, Paper no. 1 (2007), available at: http://www.bancaditalia. en/studiricerche/seminars/actions/fiscal.pdf.

[46] See Law 147, 27 December 2013, published in OJ 302 of 27 December 2013.

[47] See Cer, Prometeia, *Previsioni per l'economia italiana,* Rapporto di Consenso prepared for the CNEL, 9 July 2013.

reliability of the financial predictions for the Italian government, a positive opinion from the European Commission should not be taken for granted.

These differences in predictions prompted the European Commission to consider Italian public finance as "severely imbalanced," and able to negatively affect the functioning of economic and monetary systems[48].

The issue regarding the differences between the estimates of the government and those of the Commission puts the spotlight on a central point of coordination of fiscal policies in Europe, represented by the methodology used to quantify the MTO[49].

It is the way in which this parameter is constructed that determines the ability of governments to set more or less restrictive budgetary policies. According to EU Regulation 1466/97, as amended by EU Regulation 1175/2011, the medium-term budgetary objectives (MTO) for a specific country are shown in a range between -1% of GDP and the balance or surplus, in cyclically adjusted terms, net of one-off and temporary measures (Art. 2a)[50]. The Treaty on Stability, Coordination and Economic Governance, the so-called fiscal compact, lays down more

[48] See European Commission Communication COM (2014) 150 of 5 March 2014 on the results of the analysis conducted in accordance with EU regulation 1176/2011, prevention and correction of macroeconomic imbalances (procedure for macroeconomic imbalances).

[49] See Decree 54/2014, implementing Directive 85/2011 on requirements for budgetary frameworks of the member states, which imposes an illustration of the differences between the Commission's estimates and those of the government, explaining the most important differences. In the DEF, GDP growth is estimated at 0.8% for 2014 and 1.3% for 2015, while, in 2014, the European Commission winter forecast GDP growth is 0.6% in 2014 and 1.2% in 2015. See the 2014–2018 DEF, 20 where the differences are traced to the various basic data and the different methodologies used by the Commission. The Commission's estimates are based on unchanged policies and legislation. It does not, therefore, consider the effects of the legislation.

[50] In addition to the parameters of the deficit/GDP and debt/GDP ratios, the capacity of a member state to pursue the objectives of the budget in the medium term is also evaluated on the performance of the annual expenditure of public administrations. This is the so-called "rule of expenditure" provided in EU Regulation 1466/1997 and transposed into national law by Article 5 of Law 243/2012. "In particular, in the case of Italy, like the Member with a debt/GDP ratio above 60 percent," the annual expenditure growth should be lower than that of the potential GDP in the medium-term of a measure capable to reduce the structural balance of at least 0.5 % of GDP.

stringent standards, establishing that the balance is met "if the annual structural balance of the public administration coincides with the specific medium-term objective for the country, with the lower limit of a structural deficit of 0.5% of GDP" (Art. 3, paragraph 3, letter b). In the updated version of the Code of Conduct 2012, the MTO is identified with the borrowing of general government, net of the effects of the economic cycle and of one-off and temporary measures.[51] For Italy, the structural balance that is correct for the effects of the economic cycle, net of one-off and temporary measures, has been set equal to zero.

Under the current method of calculating, the measure of the effects of the economic cycle is determined by the result of the multiplication of the output gap for a parameter of semi-elasticity of the economic growth budget balance that, in the case of Italy, is equal to 0.55%. The output gap is the difference between actual and potential output, the latter at the maximum feasible extent, in the absence of inflationary forces and with the full utilization of the factors of production. According to government estimates, the cyclical component of the budget balance is equal to -2% in 2014 and will take on positive values only in 2018, which implies a structural balance of -0.6% in 2014. It may be equal to zero only as of 2016[52].

The calculation method used is common and compulsory for all member states; it has been defined by the European Commission on the basis of what was agreed by the Output Gaps Working Group (OGWG), which meets regularly under the Economic Policy Committee. A first observation is the conventional nature of the calculation methodology used for the output gap. This observation is of particular significance if we consider that the adoption of a balance adjusted for the cycle allows nominal deficits and, therefore, allows borrowing in periods when the output gap is negative; at the same time, when

[51] On 24 January 2012, the document Specifications on the Implementation of the Stability and Growth Pact and Guidelines on the Format and Content of Stability and Convergence Programs was made available. It is a further version of the Code of Conduct on the Implementation of the Stability and Growth Pact, revised compared to that approved by the ECOFIN Council of 7 September 2010.

[52] See the Ministry of Economy and Finance, *Documento di economia e finanza* - DEF, Tav. III. 9 (2014), 38.

the output gap is positive, it is necessary to produce a surplus to repay the debt[53].

Therefore, the use of debt is determined by formulas for the measurement of the output gap – necessary for purification from the effects of the economic cycle and for the assignment of weights to certain variables. In the Italian case, the MTO has been set equal to zero, which, in normal conditions, would exclude the use of debt. Such an exclusion is determined by formulas extremely burdensome for countries with debt above 60% of GDP and that have high costs associated with an aging population. This method has increased the level of the structural deficit for countries with high public debt and high unemployment, such as Italy, Ireland, Greece and Portugal, to an unrealistic and unjustified extent[54].

In order to correct these deficiencies, new methodologies to improve the definition of the structural deficit regarding states with high debt and high unemployment are objects of study. From 2013, as well as the adoption of semi-elasticity of the budget compared to the growth in the calculation of the output gap and parameters related to the structure of revenue, expenses and the individual elements that calculate the output have been updated[55]. This update does not have a direct impact on the calculation of the output gap but allows the production of more realistic data on the calculation of income and expenditure of the member states. It remains clear that, because of the various preliminary hypotheses that can be considered in the calculation of the MTO, there are

[53] See Servizio bilancio del Senato, *Introduzione del principio del pareggio di bilancio nella Carta Costituzionale*, Elementi di documentazione n. 5/2011, specifically 6 and 24-26 ff.

[54] See M. Cacciotti, C. Frale, S. Teobaldo, *A new methodology for a quarterly measure of the output gap,* Ministry of Economy and Finance, Department of Treasury Working Paper no. 6 (2013); P. De Ioanna, L. Landi, *Politica, tecnica democrazia*, Short note n. 3 (2012), available at econpubblica.unibocconi.it, specifically 11–17; European Commission, G. Mourre, G.M. Isbasoiu, D. Paternoster, M. Salto, *The cyclically-adjusted budget balance used in the EU fiscal frame workman update,* 478 Economic Papers (2013); C.E.V. Borio, P. Disyatat, M. Juselius, *Rethinking potential output: embedding information about the financial cycle,* Working Paper n. 404 (2013).

[55] The elasticity of the budget balance measured the impact of growth on the absolute value of the balance; the semi-elasticity measures the change in the budget balance as a percentage of GDP with respect to changes in economic growth; cfr. G. Mourres, G.M. Isbasoiu, D. Paternoster, M. Salto, *The cyclically-adjusted budget balance used in the Eu fiscal frame work: an update*, cit., 480.

elements of discretion that reduce the transparency of the methodology of that calculation and that are likely to induce national governments into decisions, which are inconsistent with the actual economic situation of a country[56].

As far as Italy is concerned, the measurements proposed by the European Commission which identify the persistence in 2014 and expansion in 2015 of the structural deficit should solicit the government to adopt corrective measures whenever an alternative calculation of the structural balance based on OECD data indicates, for the same period, a situation of surplus (equal to 0.4% in 2014 and 0.5% in 2015)[57]. It seems evident that, in this case, technicalities are crucial to the fiscal policy of national governments.

The discretionary component of the national decision maker is influenced by the introduction of automatic stabilization mechanisms as configured by the limits for borrowing. Also, the "if" and "when" of borrowing are ultimately traceable parameters and econometric models. From this perspective, the intergovernmental comparison moves to the definition of the calculation method that is the most appropriate to the needs of a country. What will be the result of mediation at the European level in which the role of bureaucracies is decisive? The non-uniqueness in the methodology strengthens the role of bureaucracies; they will have to determine which method to adopt, and this will have an impact on the transparency and the understanding of decisions[58].

[56] About the functions of the Output Gap Working Group and possible improvements to the methodology used so far, see F. D'Auria, C. Denis, D. Havik, K. McMorrow, C. Planas, R. Raciboski, W. Roger, A. Rossi, *The production function methodology for calculating potential growth rates and output gaps, European Economy*, Economic Paper n. 420 (2010); in 2012, the work done by the Output Gap Working Group has identified certain priorities such as the construction of a database on discretionary interventions of governments and their impact on the elasticity of the budget and the definition of medium-term projection methodologies for the variables in terms of potential output; see most recently, M. Cacciotti, C. Frate, S. Teobaldo, *A new methodology for a quarterly measure or output gap*, cit., 14.

[57] See OECD, *Economic Outlook*, 1 (2014), 107.

[58] See, *ex multis*, C. Lequesne, *La trasparence, vice ou vertu de la démocratie*, in J. Rideau(ed.), *La trasparence dans l'Union européenne* (1999), 11.

7.1. Open questions: the investment clause

In addition to MTO method calculating, there is another question underlined by the Italian government to promote flexibility in order for application of SPG, the investment clause. In this respect, the Italian government argues that removing the cost of strategic investments and structural reforms from the budget deficit is very important. The EU Commission resumed the provisions relative to public investment in line with the Stability and Growth Pact in the 2012 document Blueprint for a Deep and Genuine Economic and Monetary Union. The Commission especially referred to Art. 126.3 of the Treaty of the Functioning of the European Union (TFEU) in which, under the procedure for excessive deficit (EDP) "the report of the Commission shall also take into account whether the government deficit exceeds government investment expenditure".

The blueprint contents were taken forward by the EU Council in June 2012 and March 2013 and it was concluded that there was a need to "balance the productive public investment needs with fiscal discipline objective" [59]. The EU Council's conclusion was transposed in Art. 16.2 of EU Regulation 473/13 (part of the so called two-pack regulation) in which it was envisaged that "the Commission shall report on the possibilities offered by the Union's existing fiscal framework to balance productive public investment needs with fiscal discipline objectives in the preventive arm of SGP, while complying with it fully".

The former president of the EU Commission, during the EU parliament sitting on 3 July 2013, announced that the Commission, when assessing the national budgets for 2014 and 2013 financial statements, might leave room for temporary deviations from the adjustment path towards mid-term financial targets on a case by case basis and in full respect of the Stability and Growth Pact. On the same day, Olli Rehn, the EU Commission Vice-president and Commissioner for Economic and Monetary Affairs, sent a document laying down further specifications of the so called investment clause to ministers of finance of member states and to the EU Parliament.

[59] See Council Conclusions, 13–14 June 2012, 1 and 14, 15 March 2013, 2.

The EU Commission aims to reform Art. 5 of CE Regulation 1466/97 concerning the SGP preventing arm and examines the possibility of deviating temporarily from the medium term budgetary objective (MTO) and from the adjustment pact only when the following conditions are verified:

1) economic growth is negative or well below its potential;

2) the deviation does not lead to a breach of the 3% deficit ceiling and the public debt rule is respected;

3) the deviation from the MTO is linked to national expenditures on projects co-funded by the EU under its structural and cohesion policy, trans-European networks and connecting Europe facility.

It should be noted that adopting an investment clause does not imply that the EU Commission will contemplate the adoption of the so-called golden rule. In fact, the Commission specified that any of these provisions should not be confused with a golden rule that allows the subtraction of all public investments from the budgetary deficit. In this respect, the introduction of a golden rule could represent a threat to the medium and long-term sustainability of public debt.

The golden rule will not be adopted mainly because it is difficult to measure the impact of public investments on economic growth[60].

Being extremely hard to evaluate a single project's rate of return, it is not possible to determine if a project will have an economic comeback sufficient to cover costs or if, on the contrary, it will result in an increase in taxes or in spending cuts at the expense of future generations.[61] Intergenerational equity would require projects with significant rates of return. This would call for parameters that are shared by all the member states, and, in this respect, the debate seems rather untimely[62].

[60] See S. Micossi, F. Peirce, *Flexibility clauses in the Stability and Growth Pact: no need for revision*, Ceps Policy Brief (2014), 319.

[61] See F. Balassone, D. Franco, *EMU fiscal rules: a new answer to an old question?*, in Banca d'Italia (ed.), *Fiscal rules* (2001).

[62] See, European Commission, *Annual Growth Survey 2013*, COM (2012) 750 final, 28 November 2012.

8. Conclusions

The Italian case drew attention to the opportunity for taking advantage of the flexibility allowed by the current European juridical framework in order to promote growth and development and financial stability. One of the main themes asserted by the Italian government during the meeting of the EU Council on 26 and 27 June was the necessity to generate growth through structural adjustments and investments.

The Italian prime minister, in his first speech on 2 July, talked about a fresh start that must be founded on structural reforms and flexibility, promoting a change in the rigorist politics applied so far. The Italian semester of presidency is focused on growth, structural reforms and on a better use of the flexibility that is already allowed by budgetary boundaries. But there are political and technical difficulties in terms of meeting these targets.

Politically, a major barrier consists of persuading not only rigorist countries but also the European Commissioner for Economic Affairs[63]. It is a difficult challenge, but Italy can count on French support as both countries understand the necessity of tuning the European economy towards growth and employment. Italian and French governments share not only the need for flexibility but also the necessity to get public investments started in order to stimulate private ones. Both governments are persuaded that investments for structural reforms and public investments must be deducted from the deficit calculation. This operation must be carried out depending on the characteristics of each country and not relying on a single method.

However, it is still difficult for the Italian government to get a broader consensus on the issue of flexibility. One of the main obstacles is that past Italian governments did not make the reforms that were promised. Member states are still sceptical towards Italy, and they do not know what kind of structural reforms Italy will eventually make in order to secure flexibility. A general lack of trust characterized the last several EU meetings[64].

[63] See interview with European Commissioner for Economic Affairs Jyrki Katainen, in Die Welt, 19 July 2014, available at welt.de.

[64] See Interview with Italian finance Minister in A. Baccaro, *Patto Ue sulle riforme,* Corriere della Sera, 6 luglio 2014, 3.

In reality, despite scepticism, Italy's plan for reforms is clear. Italy is not asking for a budgetary discipline reform. Crises must be addressed with the growth of aggregate demand. This can be achieved through structural reforms that will have a positive effect on the economy but not for two or three years. Flexibility is crucial not only for Italy, a single member state, but also for the entire European economic system.

The newly named president of the EU Council, Jean Claude Juncker, has announced a plan of both public and private investments, in addition to granting financial incentives for countries that carry out structural reforms. The measures listed so far represent the initial steps towards a new course for the integration process. In this perspective, the Italian government's request for a balanced budget postponement, along with the need for flexibility and growth, represents a chance to rediscover the values of solidarity that were among the pillars of the EU integration project. However, this change will successfully take place only if both political and *especially* technical obstacles can be overcome.

From the reconstruction of the internal and supranational legal framework, it is evident that the existence of areas of discretion is left to national decision-makers. Such room is conditioned by the respect of adjustment trajectories of finance in order to maintain financial stability. Financial stability is functional and complementary to solidarity, a value protected by the Treaty of Lisbon. The pursuit of stability, growth and solidarity is conditioned by the way in which indexes of public finance are calculated by experts.

The choice of calculation methodology is influenced by national experts who themselves are under pressure from politics. "Politics" is a bit vague in order to identify methodologies, which are more favourable to national public finance[65]. In Italy's case, this can be interpreted as another manifestation of an unfinished process towards the realization of the so-called "magic triangle." The "magic triangle" requires a balance between the monetary

[65] In this sense, the interaction between technology and policy refers to what has already been pointed out by Schmitt about the permeability of technical institutions that have no real but only apparent neutrality; see C. Schmitt, *Der Begriff des Politischen,* trans. and edited by G. Miglio, P. Schiera, *Le categorie del politico* (1972), 182.

base, government spending and the exchange rate with other currencies, notably the dollar[66]. The crisis has highlighted how far away the reaching of the "magic triangle" is not only because the achievement of a balance between these three components is complex, but also because the approach taken so far to address the crisis was focused on a distinct vision of public finance as disjointed from private finance – and that is without taking into account the interrelationships between the two. As previously observed in this essay, using public law to establish a balance between the monetary base, government spending and the exchange rate is extremely complex because the three are not homogeneous. While monetary policy is defined centrally by the ECB, the public spending of individual states remains something non-homogeneous and something, which the rules of the Stability and Growth Pact have failed to stabilize.

The application of the constraints of the Stability and Growth Pact has accentuated the recession, especially for countries with higher public debt such as Italy. The key point is the need to manage public finance as a whole because operating only in the medium-term does not protect from the risk of recession. A balanced budget postponement for Italy, as well as previous postponements requested by Spain and France, is also a symptom of an unfinished process towards a federal-type structure. Strengthening fiscal coordination is destined to produce negative effects, which will occur periodically in the absence of a federal budget. This goal requires a reorganization of powers where there is a "European treasury," the ability to issue European bonds and the recognition of wider powers for the European Parliament, all steps that, although complex, are obligatory and urgent.

[66] See F. Merusi, *Il sogno di Diocleziano. Il diritto delle crisi economiche*, cit., 3-4.

EX-ANTE CONTROLS IN PROCUREMENT PROCEDURES: A WILD-GOOSE CHASE FOR PUBLIC AUTHORITIES? AN EU PERSPECTIVE

Fabio Di Cristina[1]

Abstract

Enhancing integrity in public procurement is a common aim of both nation States and supranational bodies and has thrust sharply into focus the size of prevention. On the one hand, different and wide notions of integrity and corruption exist, as well as partisan scientific approaches. On the other, the range of *ex ante* public controls over integrity violations, based on the belief that expelling corruptors is much more important than preventing corruption itself, seems too broad to be effective. What can we learn from the new European directives on public procurement? Is it possible to sketch a common *substratum* for integrity in public procurement entailing more defined public instruments to prevent illegality and drive out potential misconduct? Is it possible to move from a traditional public control-based model towards an incentive model using sector-specific rules to increase the costs of corruption?

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[1] Ph.D. in *Law and Economics* (University of Siena) and staff member of the Italian Ministry of Economy and Finance. This essay has been discussed during the inaugural conference of the International Society of Public Law - ICON-S (Florence, 26-28 June 2014). I want to thank professor Anne van Aaken (University of St. Gallen) for her precious suggestions.

1. Curbing corruption in public procurement: different approaches

As the title of this essay may suggest, fighting the misappropriation of public resources for the pursuing of private interests[2] could be a hard task, a true "wild-goose chase"[3]. Curbing corruption could be likely to prove pointless and unfruitful, especially if one thinks about public controls on integrity, in their many-sided forms, as a cure-all remedy[4].

The basic idea behind the consideration of control as a panacea for corrupt exchanges is that the more the controls are plentiful and effective, the more the willingness to corrupt decreases. Deterrence is thus considered the counterbalance of administrative burdens on both procedures and undertakings[5].

This idea could sound reasonable within a rational approach to both preventing and combating corruption but it conceals, as several recurrent worldwide procurement scandals highlight[6], the true dark side of controls: the tendency to put as many rules as possible on procurement procedures to clean the legislators' conscience. But, as evidence on procurement

[2] See in particular J. Gardiner, *Defining Corruption*, in A. Heidenhaime, M. Johnston (ed.), *Political Corruption. Concepts & Contexts* (2002), 25; and J. Andvig, O. Fjeldstad, I. Amundsen, T. Sissner, T. Soreide *Research on Corruption. A Policy Oriented Survey* (2000), 13.

[3] The term references a type of horse race which was popular in England in the 16th century: the pack of horses would follow a leader, often adopting a formation that casually resembled a flock of geese. The race was extremely challenging, and bettors often commented that it was difficult to predict the outcome of a wild-goose chase. The term was used by William Shakespeare in *Romeo and Juliet:* in Act 2, Scene 4, Mercutio referred to one of Romeo's harebrained plans using the following words: "Now, if our jokes go on a wild-goose chase, I'm finished. You have more wild goose in one of your jokes than I have in five of mine. Was I even close to you in the chase for the goose?".

[4] See S. Rose-Ackerman, *Corruption: a study in political economy* (1978), 35.

[5] D. Della Porta, A. Vannucci *The dark side of power. Norms and mechanisms of political corruption* (2011), 87.

[6] See, for example, the ones in the defence sector. A short overview is available at http://www.transparency.org/topic/detail/defence_security.

procedures suggests[7], even too many rules might open several windows of opportunity to corruption[8].

It must be underlined, at the very beginning of the essay, that one may wonder if an intertwined link among rules and corruption really exists. One might argue[9], otherwise, that the degree of corruption detectable in each country is linked to political culture, the share of common values or a high sense of the State and of the community[10]. Nonetheless, it seems quite hard to fill in the politicians (or the society itself) with integrity and, at the same time, it appears easier to remove or to correct some causes of "objective" corruption[11].

Preliminarily, it seems interesting to call up the two different approaches commonly used to study and debar corruption in public procurement. One can be defined as a "legal approach", and pertains to the idea that rules introducing controls, or sanctions, are a sort of "integrity bond": off-the-shelf illegal agreements are less probable as long as the stock of rules imposing controls increases. The second, which could be defined, borrowing an economic concept, the "rising costs approach", is mainly focused on the underlying incentives for being part of a shadow corruptive exchange[12].

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[7] M. Golden, L. Picci *Proposal for a new measure of corruption and tests using Italian data,* in *Economics and Politics* (2005), vol. 17, 37.

[8] See in particular G. D'Auria, *La corruzione e le leggi*, in M. D'Alberti, R. Finocchi (ed.), *Corruzione e sistema istituzionale* (1994), 23, for a deep analysis of the Italian situation during the 90's and *Mani pulite* scandal.

[9] See J.H.H. Weiler, *Why should Europe be a democracy: the corruption of political culture and the principle of constitutional tolerance*, in F. Snyder (ed.), *The Europeanisation of law: the legal effects of European integration* (2000), 114; R. Kroeze, T. Kerkhoff, G. Corni, *Corruption and the rise of modern politics* (2013), 52.

[10] For a sketch of the very fundamental feature of the concept, see G. Droppers, *The sense of the State,* in 15 Journal of Political Economy 109 (1907).

[11] See M. D'Alberti, *Corruzione "soggettiva" e "oggettiva"*, in M. D'Alberti, R. Finocchi (ed.), *Corruzione e sistema istituzionale*, cit., 49. "Objective" corruption referes to the institutional and legal causes beyond corrupt exchanges and its easiness at a lower cost.

[12] S. Rose-Ackerman *Corruption: an incentive-based approach,* in 1-2 Percorsi costituzionali 109 (2012). For a more extensive discussion, S. Rose-Ackerman *Corruption and government. Causes, consequences, and reform* (1999), *passim*.

Almost everyone is worried about the problem of bureaucratic and political corruption[13], but while most people and social scientists emphasize the role of values and ethics in this context, economists (as well as some legal scholars) usually take into account the second approach, focusing, instead, on the need for appropriate incentives[14] and on the need for increasing the cost of corruption by drafting appropriate sectorial rules[15].

Both approaches share common values and some valuable aspects. It is impossible to conceive an effective anticorruption strategy without specific *ex ante* and *ex post* controls of integrity and correct use of public money. But, at the same time, some forms of disincentives at the bottom of the legal framework for procedures shall be provided. Even a legal rule introducing down-raids or random inspections, or heavily sanctioning illegality, might entail disincentives to corrupt. Moreover, the draft of rules concerning, for instance, the functioning of purchasing bodies or information sharing on undertakings exclusions among different contract administrations may produce a disincentive effect to collude or corrupt[16].

2. A focus on the EU perspective

The EU perspective on this matter seems to refer to a subsided "legal approach". As a matter of fact, the 2014 "*Anticorruption Report*" of the European Commission[17] addresses

[13] W.A. Niskanen, *Bureaucracy and Representative Government* (1971), 19. See also E.C. Banfield, *Corruption as a Feature of Governmental Organization*, in 18 Journal of Law and Economics 587 (1975).

[14] P. Bardhan *The economist's approach to the problem of corruption*, in 2 World Development 341-348 (2006). See also A. Ades, R. Di Tella, *Rents, competition and corruption*, in 4 American Economic Review 982-993 (2001).

[15] See one of the most recent contribution dealing with this topic, D. Hough, *Corruption, anti-corruption and governance* (2013), 49.

[16] See F. Anechiarico, J. Jacobs *The pursuit of absolute integrity. How corruption controls makes government ineffective* (1996), *passim*.

[17] On February 3, 2014, the European Commission (Home Affairs Directorate General) published its first report on the issue of anti-corruption measures. The report covers all 28 Member States of the EU. It consists of a general chapter summarizing the main findings, describing corruption-related trends across the EU, and analyzing how Member States deal with corruption in public procurement. There are 28 country chapters providing a snapshot of the situation concerning corruption, identifying issues that deserve further

corruption in public procurement focusing on the major loopholes in procurement controls and on the scale of potential spill-over effects, such as the diversion of public funds. In the Commission's view, all Member States, even those traditionally considered as champions of integrity, are not immune to corruption[18] and public procurement is particularly prone to illegality, owing to deficient control mechanisms and risk management[19]. The Commission, shifting to the side of prevention, mainly strengthened the weak points of public controls and also put into evidence that "there is a considerable divide among Member States concerning prevention of corruption"[20].

Member States seem to fully adhere to the Commission's perspective. Following the subsided "legal approach", which has already been recalled, some European countries place a high burden on law enforcement on prosecution bodies or on anti-corruption agencies that are seen as solely responsible for addressing corruption in the public sector. While the activity of these institutions is, generally speaking, of utmost importance, deep-rooted corruption cannot be tackled without a comprehensive approach aiming at enhancing prevention and incentive-based mechanisms throughout the public administration, at central and local level. Moreover, some Courts of Audit, for example, have played a prominent role in pushing anti-corruption reforms forward[21]. However, their pro-activeness

attention, and highlighting good practices which might inspire others. The report also includes the results of two Eurobarometer surveys on the perception of corruption amongst European citizens, on the one hand, and companies, on the other. A further section of the report specifically deals with public procurement. European Commission, *Report from the Commission to the Council and the European Parliament – EU Anticorruption Report* [COM(2014) 38], February 3 (2014). See for a brief *résumé* R. Williams, *Anti-corruption measures in the EU as they affect public procurement,* in 1 Public Procurement Law Review 38 (2014).

[18] See also J.S. Hellman, G. Jones, D. Kaufmann, M. Schankerman, *Measuring governance, corruption, and state capture*, in Policy Research Working Paper Series (2000).

[19] See J.G. Lambsdorff, *The Institutional Economics of Corruption and Reform. Theory, Evidence and Policy* (2007), 56.

[20] European Commission, *Report from the Commission to the Council and the European Parliament – EU Anticorruption Report* [COM(2014) 38], cit., 10.

[21] See M. Kapstein, *Ethics management. Auditing and developing the ethical content of organizations* (1998), 56. In some cases, as the European Commission

is not matched with effective internal and external controls at regional and local level[22].

In several Member States, internal controls across the country (particularly, at local level) are weak and uncoordinated. In the Commission's view, there is a strong need to reinforce such controls and match them with strong prevention policies in order to deliver tangible and sustainable results against corruption[23]. That's a reason why the watchdog-based approach to anticorruption may result poor and over-timid.

At this point, some other specifications on the extent of controls in public procurement, and on some instruments to guarantee "compliance and enforcement" should be provided. Nonetheless, shifting from the already recalled watchdog approach (public powers are in charge of commanding and controlling) to a more slight information-base approach (transparency obligations could decrease the willingness to corrupt) does not always entail different results in the of prevention and repression of corruption in public procurement[24].

On the one hand, asset disclosure could also be considered as a form of *ex ante* control. Asset disclosure for officials in sensitive posts contributes to consolidating the accountability of public officials, ensures enhanced transparency and facilitates detection of potential cases of illicit enrichment, conflicts of interest, incompatibilities, as well as the detection and

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underlines, the Court of Audit is also the institution responsible for verification of party and electoral campaign financing. In a few Member States, the Court of Audit is active in notifying other relevant authorities of suspected corruption. However, its pro-activeness is not matched by effective internal and external controls at regional and local level.

[22] For a general perspective, see R. Klitgaard, *Controlling corruption* (1991), 101; A. Vannucci, *Corruption, political parties, and political protection* (2000), 14; S. Guriev, *Red tape and corruption* (2003), 16.

[23] For extensive *law and economics* literature on this matter, see M. Karpoff, D. S. Lee, V.P. Vendrzyk, *Defense procurement fraud, penalties and contractor influence*, in 107 Journal of Political Economy 809 (1997); S. Kelman, *Procurement and public management: the fear of discretion and the quality of public performance* (1990), 64; K. Krawiec, *Organizational misconduct: beyond the principal-agent model*, in 32 Florida State University Law Review 143 (2005); J.G. Lambsdorff, *Making corrupt deals. Contracting in the shadow of the law*, in 48 Journal of Economic Behavior and Organization 221 (2002).

[24] See S. Williams-Elegbe, *Fighting corruption in public procurement: a comparative analysis of disqualification or debarment measures* (2012), 111.

investigation of potential corrupt practices. In some Member States, bodies in charge of monitoring asset disclosure have limited powers and tools and controls are merely formalistic. In others, there is little evidence of active implementation or enforcement of those rules[25].

On the other hand, the issue of conflicts of interest has therefore been included in the scope of several supranational anti-corruption instruments and review mechanisms. Some Member States have dedicated entire legislation covering a wide range of elected and appointed public officials[26], as well as specialized agencies tasked to carry out controls. But the depth of the scrutiny varies from one Member State to another: some have independent agencies that monitor conflicts of interest, but the ability to cover these situations countrywide is limited and follow-up of their decisions is insufficient; others have an ethics commission in charge of controlling only members of Parliament. Verifications on substance are often formalistic and mostly limited to administrative controls. Conflicts of interest in decision-making, allocation of public funds and public procurement tenders, particularly at local level, form a recurrent pattern in many Member States[27].

Many crucial issues, such as fighting against corruption through sectorial rules, irregularities in tendering procedures and the prevention of anti-competitive conduct, has been left mainly

[25] European Commission, *Report from the Commission to the Council and the European Parliament – EU Anticorruption Report* [COM(2014) 38], cit., 15.

[26] See B.G. Mattarella, *Government ethics: the strange Italian "conflict of interests"*, in 2 I.J.P.L. 360 (2013): "[…] it should be pointed out that not every contrast or tension between different interests is a legally relevant conflict of interest. Political activity necessarily requires comparing and balancing different interests. In fact, comparing and balancing are required by every public function, including those of administrative agencies, and also by every private function, such as those of the contract representatives and of the company managers. […]. There is a conflict of interests only when one of the involved interests belongs to the office and the other belongs to the individual who is in charge of the office or works in it. Conflicts of interests imply conflicting loyalties on the part of an officer when his personal interest might get him to postpone or disregard the interest of the institution that he works for". For a comparative approach, see J.-B. Auby, E. Breen, T. Perroud, *Corruption and conflicts of interest: a comparative law approach* (2014), 98.

[27] See R.K. Goel, M.A. Nelson, *Causes of corruption: History, geography and government*, in 32 Journal of Policy Modelling 443 (2010).

unregulated by European procurement rules[28]. Having addressed to some methodological aspects, and having focused on the European Commission's view on the matter, it is possible to choose a "litmus test" for the basic assumptions of this paper. The new European directives on procurement and concession contracts[29], which shall be implemented by Member States of the European Union by middle-2016, will be taken into account as a specimen of fighting corruption through both general and sector-specific legal rules based on incentives and the increase or the decrease of corruption risk through legal provisions.

The balance between "legal" and "rising-costs" approach will be put into evidence, as well as the extent of the possible (and desirable) incentive-based drafting process. The general perspective which will be adopted is normative, aiming at provide some policy recommendations through legal instruments.

3. The twofold nature of ex ante controls in the new European procurement rules: an overview

Given the level of financial flows generated, and a number of factors pertaining to rent-seeking and political influence, public procurement is an area naturally prone to corrupt practices. But procurement is not just a matter of money-spending and sound procedures. As pointed out by the Organisation for economic co-operation and development in 2009, public procurement is increasingly recognized as a strategic profession (rather than a simple administrative function) that plays a central role in preventing mismanagement, waste of money and potential corruption. In this perspective, adequate public employment conditions and incentives, in terms of remuneration, bonuses,

[28] The current Art. 45 of the 2004 public sector directive, for example, has been considered as insufficient. See, in particular, H-J. Priess, *The rules on exclusion and self-cleaning under the 2014 public procurement directive*, in 1 Public Procurement Law Review 34 (2014).

[29] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing directive 2004/18/EC; directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing directive 2004/17/EC.

career prospects and personnel development, help attract and retain highly skilled professionals[30]. This issue, which is usually underestimated by both social scientists and policy makers, shall be taken into account when anticorruption rules have to be implemented (and Singapore, one of the country with the lowest level of percept corruption, has already taken into account these suggestions with great success)[31].

From a closer procedural point of view, the European Commission has already addressed the problem of corruption in procurement in its "Green Paper" of 2011[32], dealing with "sound procedures" to be ensured by national authorities. In the Commission's view, "most stakeholders (except for academia and legal experts) consider […] that European instruments are not needed to offset" risks of corruption: "[…] this issue should rather be addressed through national legislation, for subsidiarity reasons and in order to take account of the very different administrative and business cultures in the Member States". Indeed, an incentive-based approach to fighting corruption is neutral towards centralized (European) or decentralized (national) legal solutions for procurement procedures.

Beside the relations between European and national rules, some soft or strong safeguards must be enshrined in the EU public procurement and all stages of the public procurement cycle have to be considered: pre-bidding, including needs assessment and specifications; bidding, including selection, evaluation and contract award; and post-award. Moving from an evaluation of prosecuted cases, some incentive-based rules might be drafted.

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[30] As also pointed out by the Organization for Economic Co-operation and Development (2009) in its Principles for Integrity in Public Procurement document, "weak governance in public procurement hinders market competition and raises the price paid by the administration for goods and services, directly impacting public expenditures and therefore taxpayers' resources. The financial interests at stake, and the close interaction between the public and private sectors, make public procurement a major risk area".

[31] See, for instance, K.T. Hin, *Corruptuion control in Singapore* (2012), working paper, 13th International raining course on the criminal justice response to corruption – Visiting experts' papers, 2.

[32] European Commission, *Green paper on the modernization of EU public procurement policy. Towards a more efficient European procurement market* [COM(2011) 15], 27 January 2011, 113.

The most frequently prosecuted cases of corruption in public procurement in Member States, which refers to the ability of both public and private actors to distort the awarding procedure, concern [33] drafting of tailor-made specifications to favor certain bidders; splitting of public tenders in smaller bids to avoid competitive procedures; conflicts of interest affecting various stages of procedures and concerning not only procurement officials, but also higher level of contracting authorities[34].

Moreover other cases deal to disproportionate and unjustified selection criteria or unjustified bidders exclusion; unjustified use of emergency procedures; inadequate analysis of situations where bid prices were too low; excessive reliance on the lowest price as the most important award criterion to the detriment of other criteria regarding quality of deliverables and capacity to deliver; unjustified exceptions from publication of bids[35].

Given this premise, it should be underlined that the new European directive on public procurement (2014/24/EU: directives 2014/23/EU and 2014/25/EU provide some similar rules and will not be considered), addresses corruption in its preamble only few times. Thus, it does not address to those prosecuted cases and to the possibility of preventing them providing specific rules.

On the one hand, as the European legislator has pointed out, public contracts should not be awarded to economic operators that participated in a criminal organization[36] or were

[33] European Commission, *Report from the Commission to the Council and the European Parliament – EU Anticorruption Report* [COM(2014) 38], cit., 18.

[34] See on those cases Organization for Economic Co-operation and Development, *Fighting corruption and promoting integrity in public procurement* (2005), 45.

[35] For an extensive analysis, see F. Di Cristina *La corruzione negli appalti pubblici,* in 1 Riv. trim. dir. pubbl. 345 (2012).

[36] See P. Gounev, V. Ruggiero, *Corruption and organized crime in Europe: illegal partnership* (2012), 78; S. Caneppele, F. Calderoni, Org*anized crime, corruption and crime prevention: essays in honour of Ernesto U. Savona* (2013), 106; R.J. Burke, E.C. Tomlinson, C. L. Cooper, *Crime and corruption in organizations: why it occurs and what to do about it* (2011), 87.

found guilty of corruption or fraud[37]. On the other hand, the traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud[38].

The twofold nature of new European rules, and the too simple basic assumptions which has just been underlined, appear quite clear: even if the European Commission has tried to rebalance repression and prevention of corruption, expelling corruptors, when identified, seems much more important than preventing corruption itself [39]. Repression and controls are inversely proportional to prevention incentives.

4. The place for raising corruption's cost through sector-specific provisions in the new European procurement rules: an assessment

Some new European "targeted measures" against corruption shall now be examined. As already pointed out, they do not rely, as they should have done, on incentives and on the desirable decrease of corruption risk in procurement procedures.

Art. 26 of directive 2014/24/EU deals with the choice of procedures: tenders where "there is evidence of collusion or corruption" shall be considered as being irregular. The same rules shall be applied to electronic auctions (Art. 35). Moreover, on the side of exclusion grounds (Art. 57)[40], contracting authorities shall

[37] Preamble of the directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing directive 2004/18/EC, n. 100.

[38] Preamble of the directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing directive 2004/18/EC, n. 126. For a critical assessment, see G. Loewenstein, D. Cain, S. Sah, *The limits of transparency: pitfalls and potential of disclosing conflicts of* interest, in 101 American Economic Review 423 (2011).

[39] For a critical assessment of this balance, see Organization for Economic Co-operation and Development, *Integrity in Public Procurement – Good Practice from A to Z* (2007), 54.

[40] The grounds for exclusion from public procurement procedures have been strengthened and extended. In addition to conviction for fraud and corruption, grounds for exclusion include: i) situations where a company has unduly influenced the decision-making process leading to the award of a contract; ii) false statements in connection with the procedure for the award of a public contract, whether these relate to the absence of grounds for exclusion, the

exclude an economic operator from participation in a procurement procedure where they have established, by verifying the European Single Procurement Document, the means of proof available under national law or the e-Certis system, that the economic operator has been the subject of "a conviction by final judgment" for corruption [41]. Upon request, Member States shall make available to other Member States any information relating to the grounds for exclusion (Art. 60).

Several doubts could arise on the time-line of discovering of corruption (normally quite long) and the duration of procurement procedures (variable but not as long as trials)[42]. Nonetheless, if one follows the *fil rouge* of the new European legal framework, some incentive-based rules made for avoiding suspect cost-rising variations of contracts can be found out. Modifying contracts during their term without calling a new tender procedure may breach the rules on public procurement. The applicable rules have been clarified and simplified by the new European directives to remove any doubt in this regard[43].

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possession of professional, technical and financial capacities, or failure to send the necessary certificates; iii) agreements to distort competition.

[41] As defined in Art. 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union ("the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute active corruption") and Art. 2.1 of Council Framework Decision 2003/568/JHA ("(a) promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties; (b) directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties"), as well as corruption as defined in the national law of the contracting authority or the economic operator.

[42] R. Williams (2014), *Anti-corruption measures in the EU as they affect public procurement,* in 1 Public Procurement Law Review 38 (2014).

[43] A new call for tenders is not required for any modifications that are not substantive (i.e. do not change the nature or the economic balance of the contract); the value of which does not exceed the thresholds for application of

Moreover, Member States shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators (Art. 24).

For the first time in the history of European procurement rules, the concept of conflicts of interest has been clarified. It shall at least cover any situation where staff members of the contracting authority or of a procurement service provider, acting on behalf of the contracting authority, who are involved in the conduct of the procurement procedure, "may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure" (Art. 24).

As this cross analysis may suggest, even if the European legislator has tried to find the optimal balance between some remedies for debarring corruption and some other for expelling corruptors from tendering procedures. However, the latter seem to be overwhelming. Moreover, when the European legislator tries to deal with incentives, the result is utmost undesirable.

Other brief examples may clarify and strengthen this point.

First, the aggregation of demand in public procurement by single buyers or purchaser, which is strongly recommended by the new European directives[44]. Secondly, the choice of procedures

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the directives and is less than 10% of the value of the original contract for goods and services and 15% for work; specified in the contract, regardless of their value; arising from unforeseen events or relating to additional work, products or services needed but which, for technical reasons of interchangeability or interoperability or cost, can be provided only by the company holding the current contract. In both cases, the corresponding increase in price may not exceed 50% of the initial contract.

[44] Preamble of the directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing directive 2004/18/EC, n. 59: "There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalizing procurement management. This can be achieved by concentrating purchases either by the number of contracting authorities involved or by volume and value over time. However, the aggregation and centralization of purchases should be carefully

(Art. 26 of directive 2014/24/EU) and the selection criteria (Art. 58) are strongly affected by the new so-called "life-cycle costing" approach. In the European legislator's view, "to identify the most economically advantageous tender, the contract award decision should not be based on non-cost criteria only. Qualitative criteria should therefore be accompanied by a cost criterion that could, at the choice of the contracting authority, be either the price or a cost-effectiveness approach" [45]. Thirdly, preliminary market consultations (Art. 40) may be needed before launching a procurement procedure, in order to prepare the procurement itself and to properly inform economic operators. Contracting authorities may, for example, seek or accept advice from independent experts or authorities or from market participants[46].

Single purchaser units, the life-cycle approach beyond the selection criteria and market consultations are very useful tools for a more dynamic and competitive market[47]. From the point of view of incentives to conclude illegal agreements and the probability that corruption risk arise, some negative consequences may be determined. On the one hand, single purchaser units may be captured more easily. On the other, the life-cycle approach increases the discretionary power of tendering public bodies and prior market consultation may be prone to expose the administration to corruption risks and undeserved external pressure.

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monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs".

[45] Preamble of the directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing directive 2004/18/EC, *passim*.

[46] That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

[47] M. Essig, J. Frijdal, W. Kahlenborn, C. Moser, *Strategic Use of Public Procurement in Europe. Final Report to the European Commission Study commissioned by the European Commission [DG MARKT, MARKT/2010/02/C]* (2011), 67.

5. Conclusive remarks. A paradigm shift: a move from ex ante controls to incentive-based controls

In the well-known book "*The structure of scientific revolutions*"[48], Thomas Kuhn put into evidence that a "paradigm shift" is a change in the basic assumptions, or paradigms, within the ruling theory of science. Being very similar to the Hegelian *"Zeitgeist"*, a paradigm is what members of a scientific community, and they alone, share.

Moving from this point of view, the American philosopher strengthened the idea that successive transitions from one "spirit of the scientific age" to another via revolution represents the usual developmental pattern of mature hard-science. Conversely, social science seems characterized by a tradition of "claims, counterclaims, and debates over fundamentals"[49].

Following a slightly different perspective, Karl Popper argued in "*The open society and its enemies*"[50] that "piecemeal social engineering" is the better gateway to social reforms. Improving social institutions and legal rules by means of a systematic criticism and a piecemeal approach becomes a possible task.

Examining corruption in procurement or even corruption widely pertaining to public-private relations in more general terms, great diversity in issues and approaches could be highlighted[51]. The tradition of Kuhn's claims and counterclaims is thus well-rendered, while a piecemeal approach to repression and prevention is commonly used. Scholars try to use political-structural analyses focusing on systemic corruption and the need of integrity rules for politicians, rule of law approaches focusing on control and prosecution, public administration and systems

[48] T. Kuhn, *The structure of scientific revolutions* (1962). Among the most famous paradigm shifts in natural science there are, for example, the transition from a Ptolemaic cosmology to a Copernican one, or the transition between the worldview of Newtonian physics and the Einsteinian relativistic worldview. In the field of social science, some famous examples are the cognitive approach in psychological studies and the Keynesian revolution in both political economy and government sciences.

[49] T. Kuhn, *Logic of Discovery or Psychology of Research*, in I. Lakatos, A. Musgrave (ed.), *Criticism and the Growth of Knowledge* (1972), 6.

[50] K.R. Popper, *The Open Society and Its Enemies* (1971), 15.

[51] A. Disch, E. Vigeland, G. Sundet, *Anti-Corruption Approaches. A Literature Review* (2009), 9. See also J.G. Lambsdorff, *The new institutional economics of corruption and reform: theory, policy, and evidence* (2007), 67.

improvements analysis for preventing corruption by risk assessment or transparency and accountability obligations, capacity building and organizational development to strengthen society's ability to address corruption through education.

All these approaches share a common step-by-step framework and the idea that corruption should be fought with rules. In the field of combating corruption, a paradigm shift is needed and *ex ante* controls, which apparently are the most effective way to prevent the misuse of public money, are often the best way to burden procurement procedures following an insane counterproductive will. Moreover, controllers do not usually operate in an integrated system and the increase of costly efforts might occur.

The reason why the head-on approach to fight corruption seems to be failing is that it is built over a misleading assumption: corruption happens because of individual choice, weaknesses in the institutional and legal frameworks, or lack of capacity to enforce existing rules and regulations. Consequently, legal reform is considered the most suitable response[52]. As a matter of fact, in a neo-patrimonial political system or state capture, politics and senior civil servants are oriented towards maintaining control and influence through personal, commercial or financial bonds[53]. Political and bureaucratic *élites* are able to influence policies and manipulate the state apparatus to their advantage: coming to power and maintaining power is a resource-intensive process[54]. The ability to remain in power is thus dependent on access to considerable resources, which are accessed through various rent extraction activities, draining resources even from public procurement[55]. The way the legal framework is draft affects the probability of draining, having an impact on corruption risk.

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[52] J. Andvig et al.. *Research on corruption: a policy oriented survey* (2000), 38.

[53] For an extensive analisys, Transparency International, *Handbook for Curbing Corruption in Public Procurement* (2006), 61.

[54] See Organisation for Economic Co-operation and Development, *Guidelines for Fighting Bid Rigging in Public Procurement. Helping Governments to Obtain Best Value for Money* (2007), 2.

[55] For an extensive discussion, see J. Freeman, M. Minox, *Government by Contract, Outsourcing and American Democracy* (2009), 5. See also The World Bank, *Helping countries combat corruption. Progress at the World Bank since 1997* (2000), 12.

Integrity of civil servants is another crucial aspect of any anticorruption strategy but, as it is clear from the recurrence of procurement scandals all over the world, integrity and *ex ante* controls are just one side of the coin[56]. Bribes are obviously part of a two-side deal and operate like market prices: money is paid to receive a benefit which is quantifiable[57].

Generally speaking, one class of cases of corruption arises when public servants give out a benefit that is scarce and is supposed to be allocated on a basis other than willingness to pay. Hence, scarcity can produce obvious incentives for corruption and an increase of the incentives may be produced, for example, when public money for procurement is less and less during a long timeline[58].

Another class of cases arises notwithstanding scarcity. It can be related to qualification: the public benefit should only be provided to qualified individuals: that is the case of public works and urban administrative procedures. Another class of cases deals with the people's willingness to avoid costs imposed by governments, such as controls or inspections. As Susan Rose-Ackermann has recently written, "all of these incentives for bribery occur at the street level in the day-to-day activities of individuals and businesses, but […] these incentives also arise at the highest level of government where there is an intersection between public administration and politics"[59].

Anticorruption is a deserving crusade where ethical considerations are often needed to provide guidance to key actors. But morality is often an insufficient guide. Instead, to get

[56] Organisation for economic co-operation and development, *Bribery in Public Procurement. Methods, actors and counter measures* (2007), 11.

[57] S. Rose-Ackerman, *Corruption: an incentive-based approach*, cit., 109.

[58] On the opposition between a legal approach and an incentive-based approach, see J.G. Lambsdorff, *The organization of anticorruption. Getting incentives right!*, Diskussionsbeitrag, Volkswirtschaftliche Reihe V-57-08 (2012): "Governments and private firms try to contain corruption among their staff mostly in a top-down, rules-based approach. They limit discretion, increase monitoring or impose harsher penalties. Principles-based, bottom-up approaches to anticorruption, instead, emphasize the importance of value systems and employee's intrinsic motivation. This embraces the invigorating of social control systems, encouraging whistle-blowing, coding of good practice and alerting to red flags".

[59] S. Rose-Ackerman, *Corruption: an incentive-based approach*, cit., 110.

incentives right in order to increase the risks of corrupt behavior and the economic returns to integrity could be effective[60].

Which effective anticorruption agenda could be drafted, moving from the incentive-based approach to rules? To define its main strong points, one may argue if certain rules could be eliminated without any serious cost for the quality of public benefits, if other rules could be simplified to avoid "red tape", and if controls (somehow still necessary as a complement) could be streamlined rather than centralized[61].

Some other more precise recommendations dealing with an incentive-based approach to anticorruption and risk management strategies could finally be provided.

The first one is related to corruption risk. Corruption risk management should not only focus on the contractors, but also on subcontractors and other subjects involved in the execution of the contract. No outsourcing of public procurement activities should be performed by public entities to either private or public enterprises that are not subjected to public procurement laws.

The second one is related to information. A proper screening of contractors and beneficiaries must be conducted, especially their ultimate beneficiary owners, in order to discourage conflict of interest[62]. Pre-employment screening and periodical in-employment screening of all subjects involved in public procurement and specialized, well-trained public procurement staff must be used. A structured market analysis and sharing of market intelligence, also across EU Member States' borders, shall be performed, as well as optimal transparency in the entire public procurement process and maximal public availability of procurement information. Contracting authorities should make all necessary efforts to perform market analyses and invest in

[60] J.G. Lambsdorff, *The organization of anticorruption. Getting incentives right!*, cit.
[61] S. Rose-Ackerman, *Corruption: an incentive-based approach*, cit., 112.
[62] Organization for economic co-operation and development, *Managing conflict of interest in the public sector: a toolkit* (2005), 19. See also PwC, I-Force, *Corruption and conflict of interest in the European Institutions: the effectiveness of whistle-blowers. Study commissioned by the European Parliament - DG Internal Policies* (2011), 55.

good functioning systems for whistle blowers, including their protection[63].

The third one pertains to a change in the current anticorruption paradigm and in the way legal rules are conceived. On the side of repression, "Corrupt acts have to be detected and prosecuted and offenders have to be punished and deprived of their illicit proceeds"[64]. At the same time, opportunities for corrupt practices have to be reduced defining which sort of rules entail increasing corruption risks. Beside this, potential conflicts of interest have to be prevented through transparent and accountable administrative structures at the legislative, executive and judicial level, as well as in the private sector.

Moreover, as Transparency International has recently suggested, "the European Commission should make concerted use of its discretionary powers to exclude legal entities guilty of grave professional misconduct from […] public procurement […]. Its database of debarred companies should be made public, as a further deterrent against fraud and corruption"[65]. The importance of a European guide of integrity strategies across the continent seems of utmost and crucial importance.

The hunt for the wild goose can be possible and national legislators, by middle-2016, shall seriously take up the challenge.

[63] See PwC, *Identifying and Reducing Corruption in Public Procurement in the EU* (2013), 2. "[…] corrupt actors must be seduced to betray each other so as to destabilize corrupt transactions": J.G. Lambsdorff, *The organization of anticorruption. Getting incentives right!*, cit., 16.

[64] European Commission, *Commission Communication on a comprehensive EU policy against corruption* (2003).

[65] Transparency International, *The European Union Integrity System* (2014), 13. "Much financial information is publicly available, but not information on entities debarred from EU procurement". See on this matter H. Cendrowski, J.P. Martin, L.W. Pedro, *The Handbook of Fraud Deterrence* (2007), 57.

THE ADMINISTRATIVE JUDGE'S INTERLOCUTORY POWERS IN RELATION TO PUBLIC CONTRACTS

Massimo Nunziata *

Abstract

This paper aims at digging deeper the administrative judge's powers in relation to the annulment of the acts of a public tender procedure and in relation to public contracts. The paper will focus on the Italian administrative judge's recent policy to directly intervene on the contract, suspending its effects, during the interlocutory stage of the judicial proceedings.

TABLE OF CONTENTS:

1. Introduction

The relationship between the acts of public tender procedure and the contract agreed between the public administration and the contractor confirms to be one of the most interesting issues of contemporary administrative law, especially in connection to the new and incisive powers of the administrative judge.

As known, after the implementation in Italy of European law on the improvement of public tender procedures, the administrative judge who annuls the adjudication is also entitled to decide on the related contract.

Among the various questions raised by the new provisions, this paper aims at deepening the problem of the (controversial)

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possibility for the administrative judge to use such a power since the interlocutory stage of the process[1].

If, on the one hand, the suspension of the contract's effects allows to maintain the *status quo* till the judgment on the merit, on the other hand, the problematic compatibility between the discretion of the judge who provides for the contract's ineffectiveness and the summary jurisdiction that is typical of the interlocutory stage should be adequately taken into account. In particular, this is true when considering the various interests that are involved, such as that to ensure a high level of competition in the market of the public contracts, the interest of the other participants to the tender to obtain a full and effective judicial review, and the collective interest to a quick execution of the contract and to a safe and fair management of public funds[2].

2. The extent of the administrative judge's assessment on public contracts: the Italian and French cases.

The relationship between the administrative acts of a public tender procedure and the public contract agreed between the economic operator and the public administration is a controversial issue that raised a fascinating debate among the scholars as well as some sophisticated judicial solutions.

The various positions that have been expressed during the past years highlight the change of the public tender procedure's function, where – also due to the influence of European law[3] – the

[1] The problem may not arise in the cases, provided under Articles 11(10) and 11(10-*ter*) of Legislative Decree n. 163 of 12 April 2006 (the so-called "Code of Public Contracts"), where the possibility to conclude the contract is suspended.

[2] On the balancing of the various interests involved, see E. Chiti, *Directive 2007/66 and the difficult search for balance in judicial protection concerning public procurements*, in 1 IJPL (2010).

[3] For an analysis of the evolution of Italian administrative law in connection to the influence of European law see, among the others, D. De Pretis, *Italian Administrative Law Under The Influence Of European Law*, in 1 IJPL (2010).
As regard the procedures for the award of public contracts, see R. Caranta & M.E. Comba, *Award of contracts covered by EU Public Procurement rules in Italy*, in M.E. Comba & S. Treumer (eds.), *Award of Contracts in EU Procurements* (2013). For an analysis of the relationships between domestic law and European law as regard public contracts, please see E. Picozza, *L'appalto pubblico tra diritto comunitario e diritto nazionale. Una difficile convivenza*, in C. Franchini (ed.), *I contratti di appalto pubblico* (2010).

need for public administration's savings has been substituted by the principle of competition in the market of public contracts[4].

The Council of State endorsed the position[5] according to which an annulled adjudication leads to the automatic abrogation ("*caducazione automatica*") of the contract's effects[6]. Due to the close

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On the fundamental contribution that has been traditionally given by European law to the Italian judicial system, please see the studies of S. Cassese, *Il diritto amministrativo: storia e prospettive* (2010); C. Franchini, *Il giudice amministrativo fra tradizione e innovazione*, in 11 giustamm.it (2011); Id., *Giustizia e pienezza della tutela nei confronti della pubblica amministrazione*, in Vv. Aa., *Il diritto amministrativo oltre i confini* (2008); G. Greco (ed.), *Il sistema della giustizia amministrativa negli appalti pubblici in Europa*, (2010); A. Massera, *Annullamento dell'aggiudicazione e sorte del contratto: le molte facce di un dialogo asincrono tra i giudici*, in 2 Riv. it. dir. pubbl. comunit. 285 (2009); V. Cerulli Irelli, *Trasformazioni del sistema di tutela giurisdizionale nelle controversie di diritto pubblico per effetto della giurisprudenza europea*, in 2 Riv. it. dir. pubbl. comunit. 433 (2008); E. Picozza, *Il risarcimento in via autonoma contro gli atti della P.A. La tutela giurisdizionale si dimensiona su quella sostanziale e non viceversa*, in 5 Corr. giur. 647 (2009). Please also see the interesting comparative studies of E. Garcia De Enterria, *Le trasformazioni della giustizia amministrativa* (2010), where the Author finds that, in the absence of any coordination, the majority of the Member States adopted, in the same lapse of time, important measures that are substantially similar, leading to deeply re-model their administrative justice systems; see also M. Fromont, *La convergence des systemès de justice administrative en Europe*, in 1 Riv. trim. dir. pubbl. 125 (2001).

[4] The change of perspective has been analyzed by M. Clarich, *The rules on public contracts in Italy after the Code ok Public Contracts*, in 1 IJPL (2013).

[5] See Council of State's judgement, Section VI, 30 May 2003, n. 2992; Council of State's judgement, Section VI, 14 January 2000, n. 244; Council of State's judgement, Section V, 25 May 1998, n. 677; Council of State's judgement, Section V, 30 March 1993, n. 435. In the absence of the conditions for a regular selection of the contractor, an automatic abrogation of the contract's effects, or a supervened ineffectiveness of the contract takes place. This may be connected to the different prerequisites of the absence of a previous act or of a condition of the contract's effectiveness (see Council of State's judgement, Section V, 12 February 2008, n. 490; Council of State's judgement, Section V, 28 May 2004, n. 3465; Council of State's judgement, Section VI, 5 May 2003, n. 2332) or to the absence of the legitimation to express the contractual will (see Council of State's judgement, Section VI, 27 October 2003, n. 6666; Council of State's judgement, Section VI, 30 May 2003, n. 2992).

[6] As regard the thesis of the automatic abrogation, the scholars' position was not univocal. In favour, please see F. Merusi, *Annullamento dell'atto amministrativo e caducazione del contratto,* in 5 Foro amm. TAR *575* (2004). On the contrary, the position has been challenged by G. Greco, *La Direttiva 2007/66/CE: illegittimità comunitaria, sorte del contratto ed effetti collaterali indotti* in 5 Riv. it. dir. pubbl. comunit. 1029 (2008); F.G. Scoca, *Annullamento dell'aggiudicazione e sorte del contratto,* in 1 Giust. amm. 39 (2007), E. Sticchi Damiani, *La caducazione degli atti*

consequentiality between the public tender procedure and the contract, the judicial or administrative annulment leads to the automatic abrogation of the contract's effects on the basis of the functional link between these two acts[7]. Thus, there is a connection between the adjudication and the contract, according to the general rule "*simul stabunt, simul cadent*" ("together they stay, together they fall"), independently from the type of the annulment, judicial or administrative[8].

According to this reasoning, the mere declaratory judgement of the adjudication's unlawfulness was sufficient to determine the contract's abrogation.

Such necessary relationship has been firstly objected after the issuance of Legislative Decree n. 163 of 12 April 2006 (the so-called "Code of Public Contracts"), in relation to the awards of the strategic infrastructures, where the award's suspension or annulment does not lead to the abrogation of the contract that has been already signed, and the possible damage is restored exclusively in kind.

Subsequently, the generalized application of the automatic abrogation theory has been surpassed by the provisions introduced by Legislative Decree n. 53/2010, which have been incorporated in Legislative Decree n. 104/2010 (the so-called "Administrative

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amministrativi per nesso di presupposizione, in 2 Dir. proc. amm. 633 (2003); M. Lipari, *L'annullamento dell'aggiudicazione e la sorte del contratto tra nullità, annullabilità ed inefficacia: la giurisdizione esclusiva amministrativa e la reintegrazione in forma specifica,* in 1 Dir. e form. 259 (2003).

[7] See Council of State's judgement, Section V, 14 January 2011, n. 11; Council of State's judgement, Section V, 20 October 2010, n. 7578. The case-law raised these considerations not only in connection to public works contracts, public service contracts and public supply contracts: see, for example, Council of State's judgement, Section V, 7 September 2011, n. 5032, on swap and derivatives contracts.

[8] On this issue, part of the scholars, starting from the relationship between the adjudication and the contract intended as a connection between the prerequisite act and the subsequent act within the same proceedings, considered the public contract to be an administrative agreement integrating an administrative decision, in connection to the many authoritative and functional powers of the public administration. In this regard, the contract's effects were explained referring to the concept of the abrogating effect of the prerequisite act on the subsequent act (please see E. Sticchi Damiani, *La nozione di appalto pubblico. Riflessioni in tema di privatizzazione dell'azione amministrativa* (1999) and Id., *La caducazione del contratto per annullamento dell'aggiudicazione alla luce del codice degli appalti,* in 5 Foro amm. TAR 3719 (2006).

Process Code"). These provisions have re-shaped the remedies connected to public contracts, providing that the administrative judge – after having annulled the adjudication – may directly decide on the interests regulated by the contract. This solution surely strengthens the protection's effectiveness, focusing the powers of annulling the public tender procedure and its effects on the contract on the same judge. However, the administrative judge has not become the "judge for the contract", because the ordinary judge remains competent for any litigation on the contract[9]. In addition, the public contracts remain subject – also for the substantive law – to civil law, even if with significant exceptions[10].

The new provisions expressly qualify the contract's defect subsequent to the annulment of the acts of the public tender procedure in terms of "ineffectiveness". Recalling the principle of ineffectiveness provided under Directive 2007/66/EC[11], Italian law adopted a terminology that is expressly neutral and generic, not requiring a specific definition of the contract's defect. That shows a clear intention to not recognize any effect of the contract concluded with an unlawful contractor, for the system's exigencies[12].

In other words, according to EU law, ineffectiveness is the safest way to restore competition and create new commercial opportunities for the economic operators that have been unlawfully

[9] See Italian Supreme Court's judgement, United Sections, 29 May 2012, n. 8515, in *Urb. e app.*, 11/2012, pages 1148 et seq., with the comment of A. Travi, *La giurisdizione sul contratto fra giurisdizione amministrativa e giurisdizione ordinaria: la disciplina del c.p.a. e i nuovi interrogativi*.

[10] See M. D'Alberti, *Antologia dedicata a Massimo Severo Giannini*, in 3 Giorn. dir. amm. 316 (2011); C. Franchini, *L'appalto di lavori, servizi e forniture stipulato con le pubbliche amministrazioni*, in C. Franchini (ed.), *I contratti di appalto pubblico* (2010).

[11] The new measures introduced by Directive 2007/66/EC have been analyzed by E. Chiti, *Directive 2007/66 and the difficult search for balance in judicial protection concerning public procurements* cit. at 5, 132.

[12] For a criticism of the misuse of the concept of ineffectiveness, see F.G. Scoca, *Alcune recenti tendenze del diritto amministrativo,* in 6 apertacontrada.it (2012). According to E. Sticchi Damiani, *Annullamento dell'aggiudicazione e inefficacia funzionale del contratto*, in 1 Dir. proc. amm. 240 (2011), the ineffectiveness expresses not only the will to not give relevance to the legal-formal status of the contract under a civil-procedural profile, but it also leads to a contrary logical conclusion, i.e. that the contract must not produce effects on the future developments of the judgement and that it must not become an obstacle to the successive judicial decisions, whose contents may be different.

deprived of their possibility to compete[13]. Therefore, the declaration of the contract's ineffectiveness directly aims at ensuring the claimant's succession in the contract's execution. In this regard, considering the public interest of the contracting authorities to preserve the contract's effects, the protection of competition is progressively corresponding to the claimant's interest and to the possibility to succeed in the execution[14].

The new legislation is particularly complex because the consequences on the contract's effects vary on the basis of the defects of the public tender procedure. In this respect, ineffectiveness confirms the polyhedric nature of the decisions that the administrative judge may adopt on the contractual relationship.

Indeed, even if regulating in detail the relationship between the different procedural unlawfulnesses and the contract, the new provisions gave a wide power to the administrative judge in connection to serious infringements (Article 121 and, in relation to the other cases, Article 122 of the Administrative Process Code).

The administrative judge has therefore a widest discretion on the contract and, when he ascertains the ineffectiveness, he shall carefully evaluate, also on the basis of the principle of proportionality, the general interest to the free competition, the interest of the public administration to the contract's stability and the claimant's will. After this assessment, the public interest connected to the contract's execution, prevailing on that to free competition, with the intermediation of the claimant's interest to succeed in the contract, might lead to the preservation of the contract's effects.

The new provisions should have led to the final overcoming of the traditional relationship between the adjudication's annulment

[13] In this sense, see Recital n. 14 of Directive 66/2007/EC. On this issue, see also E. Sticchi Damiani, *Annullamento dell'aggiudicazione e inefficacia funzionale del contratto* cit. at 13, according to which the automatic abrogation of the contract after the adjudication's annulment represents the best protection for the principle of free competition.

[14] For a wider analysis of these aspects, see *ibidem*. On this issue, see also E. Follieri, *La prospettiva amministrativistica sugli appalti pubblici di lavori, servizi e forniture*, in 5 Foro amm. TAR 2757 (2004), which underlines how, for public contracts, the penetrating influence of EU principles and Directives led to a legislative selection of the interests that are involved. Such selection made the public interests directed to the entrepreneurs and to their freedom of economic activity in a market that should ensure the free competition and equal opportunities to all the economic operators, independently from their nationality, in a single European framework.

and the automatic contract's abrogation[15]. Indeed, after having decided on the unlawfulness of the tender procedure's acts, the judge shall decide on the contract balancing the interest to succeed (as expression of the general exigencies to protect competition) and the public interest to the rapid execution of the contractual obligations.

The judge has a wide discretion when deciding on the contract's effects, being called to indicate the date of the ineffectiveness and to ascertain the derogatory cases when the contract may not be deprived of its effects.

As mentioned above, under Italian law, the administrative judge's discretion on the contract is functional to the declaratory judgment of ineffectiveness and it operates exclusively after the adjudication's annulment, without covering the decision on the contract's defects.

It is noteworthy that in other countries, such as, for example, in France, the administrative judge is competent for the litigation on the *contrats administratifs*, both in connection to the public tender procedure and contract's execution[16].

In France, the public contracts' substantive law derogates from civil law and, on procedure, the *Conseil d'Etat* has full jurisdiction on the administrative contracts, both in connection to the public tender procedure and the contractual relationship.

It is also noteworthy that, in France, the administrative judge has wide powers of intervention on the contract. In this regard, the

[15] See Council of State's judgement, Section VI, 12 December 2012, n. 6374; Id., Section V, 5 November 2012, n. 5591; Id., 21 February 2012, n. 932.

[16] On the peculiarities of the French legal system on this issues, please see, among the others, M. Antonioli & F. Cardarelli, *Il recepimento della direttiva 2007/66/CE nell'ordinamento francese*, in G. Greco (ed.), *Il sistema della giustizia amministrativa negli appalti pubblici in Europa* (2010); S. Torricelli, *Tutele differenziate e riti speciali nei processi contro la pubblica amministrazione: qualche notazione comparatistica,* in G. Falcon (ed.), *Forme e strumenti della tutela nei confronti dei provvedimenti amministrativi nel diritto italiano, comunitario e comparato* (2010); B. Marchetti, *Il giudice delle obbligazioni e dei contratti delle pubbliche amministrazioni: profili di diritto comparato*, in 11 giustamm.it (2009); Id., *Annullamento dell'aggiudicazione e sorte del contratto: esperienze europee a confronto*, in 1 *Dir. proc. amm*. 95 (2008); V. Cerulli Irelli, *Il negozio come strumento di azione amministrativa*, in 9 *giustamm.it* (2001). In general, for an overview of the French system, see M. D'Alberti, *Diritto amministrativo comparato* (1992) and F.G. Scoca, *Recours pour excès de pouvoir o/e ricorso al giudice amministrativo stesse radici, simili problemi, soluzioni diverse*, 1 Dir. proc. amm. 1 (2013).

figures of the *référé precontractuel* and the *référé contractuel* are significant examples, as well as there is some significant case-law, such as the *arrêt Société Tropic Travaux Signalisation* of 16 July 2007.

The remedies that can be used in connection to public contracts have been completed with the introduction of the *référé precontractuel*[17] and of the *référé contractuel*[18], which are now regulated by Articles L551-1 *et seq.* and L551-13 *et seq.*, of the *Code de justice administrative*. The first one, having jurisdiction till the contract's subscription[19], allows to appeal before the administrative judge to obtain an interim suspension of the adjudication procedures for competition and advertising infringements, with the related judicial remedies. The second one, which is alternative and has no jurisdiction towards an appealant before the *référé precontractuel* when the contracting authority complied with the judgement[20], has further powers, including the possibility to directly intervene on the contract. For example, the *référé contractuel* may ascertain the invalidity and the contract's termination, reduce its duration and issue the conservative and interim measures to preserve the *status quo* of the contract's execution, pending the judgement.

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[17] The *référé précontractuel* has been introduced in the French legal system with the implementation of the first so-called Remedies Directives, with laws 92-10 of 4 January 1992 and n. 93-1416 of 29 December 1993. On this new figure, among the French authors, see D. Chabanol, *Marchés publics de travaux. Droit et obligations des signataires*, 2nd ed., Paris 1994, pages 57 and following; P. Martin, *The contractual Référé Procedure under Article L22 of the Administrative Tribunals*, in Publ. Proc. Law Rev., 1994, CS112; R. Vandermeeren, *Le référé administratifprécontractuel*, in *AJDA (numèro special: Actualité des marchés publics)*, 1994, pages 91 *et seq.*; F. Dieu, *L'irrésistible extension des pouvoirs du juge des référé précontractuel*, in *AJDA*, 2007, page 782; E. Geffray, S.J. Lieber, *Référé précontractuel: une bouffé d'oxygene,* in *AJDA*, 2008, page 2161.

[18] The *référé contractuel* has been introduced with the implementation of the Directive 2007/66/EC, with the *ordonnance* n. 2009-515 of 7 May 2009 that, as known, has modified the *partie legislative* of the *Code des marchés publics*, followed by the *décret* n. 2009-1456 of 27 November 2009, in connection to the *partie réglementaire* of the *Code*.

[19] In this regard, see the well-established case-law: traditionally, see the *Conseil d'Etat*'s judgement of 10 February 1997, n. 169694; *Conseil d'Etat's* judgement of 22 January 1997, in *Rev franç. dr. adm.*, 1997, page 421; *Conseil d'État*'s judgement of 3 November 1995, in *AJDA*, 1995, page 945; *Conseil d'Etat*'s judgement of 17 January 1996, *ibidem*, 1996, page 1090; *Conseil d'Etat*'s judgement of 21 June 1996, n. 171155.

[20] On these issues, see also M. Antonioli & F. Cardarelli, *Il recepimento della direttiva 2007/66/CE nell'ordinamento francese*, in G. Greco (ed.), *Il sistema della giustizia amministrativa negli appalti pubblici in Europa* (2010)

The fact that the *référé precontractuel* had jurisdiction only before the contract's subscription was a big limit to the effectiveness of such remedy. This led the *Conseil d'Etat*, with the mentioned notorious judgement *Société Tropic Travaux Signalisation* of 16 July 2007, adopted by the Assembly for the Litigation, to introduce a new instrument of protection, recognizing the legitimacy to directly appeal the contract's validity also for the so-called *tiers évincéss*, i.e. the subjects whose patrimonial rights would be harmed by the conclusion of a public contract[21]. Also in this case, the judge has significant powers: he may integrally or partially annul the contract, declare its termination, change some clauses, decide on the prosecution of the execution and restore the damages connected to harmed interests and rights.

3. The anticipation of the restitution in kind through the suspension of the contract's effects: concerns and new horizons

The issue of the suspension of the contract's effects is very recent and constitutes the new horizon of the litigation on public contracts.

As regard the protected interests, the declaratory judgment of ineffectiveness that is functional to the succession in the contract ensures free competition in the market of public contracts. In addition, the permanent contract's effectiveness satisfies the collective interest to the rapid execution of the contractual obligations. Such interest, however, may not always coincide with the subjective interest of the public administration, which is subject to the alternative sanctions when the contract remains effective.

[21] On this issue, see, among Italian scholars, A. Massera, *Lo Stato che contratta e che si accorda* (2011); Id., *Annullamento dell'aggiudicazione e sorte del contratto: le molte facce di un dialogo asincrono tra i giudici*, in 2 Riv. it. dir. pubbl. comunit. 285 (2009); M. Antonioli & F. Cardarelli, *Il recepimento della direttiva 2007/66/CE nell'ordinamento francese*, in G. Greco (ed.), *Il sistema della giustizia amministrativa negli appalti pubblici in Europa* (2010).
As underlined by French scholars, the *arrêt Tropic* is an exception to the general principle of the relativity of the contract's effects that, in the administrative law, leads generally to the rejection of the appeal proposed by a third party against an administrative contract (see P. Idoux & M. Ubaud-Bergeron, *Procedure de recours applicables aux contracts de la commande publique – A propos de l'ordonnance du 7 mai 2009, 36* SJEG 201 (2009).

This is a delicate evaluation involving different public and private interests, such as the compulsory exigencies connected to a general interest, the alternative mechanisms protecting competition in the case of infringements provided under Article 121(1), letters a) and b) of the Administrative Process Code, the effect of the infringement of the procedural standstill period on the possibility for the claimant to obtain the award[22], the defect's entity, the state of the contract's execution, the interests of the public administration and of private parties, and the possibility for the claimant to obtain the adjudication and to succeed in the contractual relationship.

The question is whether the wide judicial discretion connected to the declaratory judgment of the contract's ineffectiveness is compatible with the summary jurisdiction that is typical of the interlocutory procedure. Indeed, once disregarded the relationship between the adjudication's annulment and the contract as automatic abrogation, the interests set by the contract are up to the administrative judge's evaluation, which has exclusive jurisdiction.

According to a literal interpretation of the provisions of the Administrative Process Code's provisions – Article 121(1), reading "*the judge that annuls the final adjudication ascertains the contract's ineffectiveness*", and Article 122, reading "*the judge that annuls the final adjudication decides whether to ascertain the contract's ineffectiveness*" – the administrative judge's jurisdiction on the contract seems to necessarily require a preliminary intervention, annulling the adjudication, to be carried out during the judicial investigation, which is typical of the merit phase.

The contract's conclusion while the appeal is still pending has traditionally represented a strong obstacle to the interlocutory protection[23].

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[22] For an analysis of the particular importance of the standstill period, see E. Chiti, *Directive 2007/66 and the difficult search for balance in judicial protection concerning public procurements*, cit. at 5.

[23] In this respect, the interim measure is considered to be the best instrument to prevent the administration from entering in the contract. The following statement is common among Italian case-law: "*there seem to be the pre-requisites of seriousness and urgency, which may justify the upholding of the interim appeal, because the final adjudication de qua has taken place, but the related contract has not been concluded yet*" ("*appaiono sussistere profili di gravità e urgenza tali da giustificare l'accoglimento dell'appello cautelare, atteso che è stata disposta l'aggiudicazione definitiva della gara* de qua *ma non risulta ancora stipulato il relativo contratto*"). In this regard, among the

Subsequently, excluding the litigation related to the so-called strategic infrastructures – for which the award's suspension or annulment do not include the abrogation of the contract that has been already concluded – this trend has been significantly reconsidered even if, in the majority of the cases, the judicial decision is limited to the suspension of the adjudication's effects or to the generic upholding of the request for interim measures. This has been resulted into a postponement of the decision on the contractual relationship till the judgment on the merit to the phase of active administration[24].

While the administrative judge was first diffident to directly intervene on the contract during the interlocutory stage[25], he recently granted interim measures whereby, also with the single judge[26], he decided on the contract's effects, providing for its express suspension.

EU law does not provide for specific guidelines on this issue, leaving the choice of the judicial remedies to the Member States, even if in line with the principle of effective protection[27].

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various judicial decisions, see the Council of State's order, Section V, 30 November 2011, n. 5207, in *Urb. e app*., 4/2012, pages 479 *et seq*.).

[24] See Council of State's order, Section IV, 8 May 2013, n. 1680; Id., Section VI, order of 20 December 2010, n. 5815.

[25] Among the first interim decisions of the administrative judge suspending the contract's effects, see: Council of State's order, Section V, 24 October 2011, n. 4677, , with the comment of S. Fantini, *L'inefficacia "cautelare" del contratto*, in 6 Urb. e app. 703 (2012). Implicitly, the possibility to directly intervene on the contract already in the interlocutory stage of the judgement, was admitted by the Administrative Court of Lombardia, Section I, 14 October 2010, n. 1097. Among the scholars, the issue has been analyzed, *inter alia*, by E. Follieri, *I poteri del giudice amministrativo nel decreto legislativo 20 marzo 2010 n.53 e negli artt. 120-124 del codice del processo amministrativo,* in 4 Dir. proc. amm., 1067 (2010), according to which, being the interim measure shaped on the basis of the decision-making powers, the administrative judge, whereas believes that the claimant's interest to the execution of the contract prevails in the balancing of interests, could suspend the effects of the adjudication and of the contract, being this measure instrumental to the judgement on the merit that annuls the adjudication and declares the contract to be ineffective.

[26] See, for example, Council of State's decree, Section IV, 2 May 2013, n. 1590.

[27] Pursuant to Article 2(1), letter a, of Directive 2007/66/EC, Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to: (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned,

In Italy, the administrative judge's power to suspend the contract's effects is substantially based on the atypicalness of the interim measures, which is a corollary of the fundamental principle of the protection's effectiveness[28], and on Article 125(3) of the Administrative Process Code, according to which, beyond the cases provided under Articles 121 and 122 of the Administrative Process Code, the suspension or the annulment of the award does not imply the abrogation of the contract that has been already concluded[29].

As known, the Administrative Process Code has provided for the progressive increase of the judicial power in the interlocutory stage, being the judge entitled – according to Article 55 – to adopt the measures that are "*most suitable to provisionally ensure the effects of the final judgement*". After all, this is in line with the increase of the decisional power of the administrative judge, according to the judicial interpretation of the Administrative Process Code's provisions.

Consequently, an interim measure that – finding the adjudication's unlawfulness – suspends the contract's effects, allows to preserve the *status quo* till the judgment on the merit. Whereas this

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including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority. In addition, pursuant to Article 2(5), Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

[28] For a general overview on this issue, please see M. D'Alberti, *L'effettività e il diritto amministrativo* (2011), where the Author underlines the fundamental role of EU and International law for the effectiveness of the judicial remedies against the public administration. On the effectiveness of the appeals against public contracts, see B. Raganelli, *Efficacia della giustizia amministrativa e pienezza della tutela* (2012).

[29] According to the mentioned Council of State's order, Section V, 24 October 2011, n. 4677, the power to decide on the contract's effectiveness may be used by the administrative judge also in the interlocutory stage, being the interim measures under Article 55(1) of the Administrative Procedure Code not typical, and being the interim measures generally directed to provisionally anticipate the measurers that can be adopted with the final judgement. This is also confirmed by the fact that Article 125(4) of the Administrative Procedure Code, provides for, as a way of exception, that the adjudication's suspension for strategic infrastructures does not imply the automatic abrogation of the contract that has been already concluded. This is without prejudice for the general principle, according to which the adjudication's suspension may influence the effects of the contract that has been concluded.

confirms the contents of the order, it might provide for the claimant's succession in the contractual relationship, being the declaratory judgment of ineffectiveness functional to such succession, as stated above. The interim measure would confirm to be typically temporary and instrumental to the judgment on the merit[30]. In this regard, it is noteworthy that part of the scholars recognizes the wideness of the interlocutory power in this matter, and states that the judge may, with a solid *fumus boni iuris*, also provisionally assign the adjudication and the contract to the claimant, suspending the effects of the subscribed contract. The judge is entitled to operate this way because the contents of the interim measures that are instrumental to the merit may determine, even if provisionally, the same effects of the final judgments[31].

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[30] The reference is to the so-called "instrumentality internal to the process", intended as instrumentality of the interim decision to the final judgement. See P. Calamandrei, *Introduzione allo studio sistematico dei provvedimenti cautelari* (1936).

[31] See E. Follieri, *I poteri del giudice amministrativo nel decreto legislativo 20 marzo 2010 n.53 e negli artt. 120-124 del codice del processo amministrativo*, cit. at 26, according to which these elements of the interim measure, among the others, characterize the speciality of the process on public contracts. In this regard, perhaps, it would be possible to pass from the so-called "internal instrumentality" to the "external instrumentality".

As known, the Italian Supreme Court stated that the word "instrumentality" may have at least two different meanings. First, the interim measure's instrumentality to the judgement on the merit, which is internal to the final judgement. Second, the interim measure's instrumentality has a function also outside the process, being a balancing element between the public power and the private claim (see Italian Supreme Court's judgement, United Sections, 24 June 2004, n. 11750). Under this second meaning, the interim measures, in particular when they relate to interests that are aimed at securing a gain ("*interessi pretensivi*"), would be instrumental to the "essential good" ("*bene della vita*") in question and, therefore, not in connection to the judgement, but to the administrative action following the judicial annulment. In this regard, the interim measure might intervene in a irreversible way on the merit, making the continuation of the process on the merit useless. See E. Follieri, *Giudizio cautelare amministrativo e interessi tutelati*, (1981); Id., *Sentenza di merito "strumentale" all'ordinanza di sospensione di atto negativo*, in 1 Dir. proc. amm. 137 (1986). According to these positions, the instrumentality would operate externally to the process as a "primary factor balancing the public power" (as stated by A. Travi, *Sospensione del provvedimento impugnato*, in 14 Dig. disc. pubbl. 384 (1999), critizing such position, according to which "on the basis of this interpretation, the interim measure's instrumentality is verified not in connection to the judgement, but in connection to the administrative action concerning the execution of the judgement").

The suspension of the contract's effects, ensuring a remunerative succession in the execution, would satisfy not only the claimant's interest to obtain a full and effective protection of his harmed position[32], but also the general public interest to competition in the market of the public contracts, in line with the new EU provisions[33].

The fact that the declaratory judgment of ineffectiveness is functional to the decision of succession is also relevant under a different double profile.

First, also in the interlocutory stage, the judicial assessment on the impact of the adjudication's suspension on the contract's effectiveness must be carried out on the basis of the requirements provided under Articles 121 and 122 of the Administrative Process Code[34]. Otherwise, the same principle of effective protection would be infringed, due to the asymmetry of criteria between the interlocutory and the merit stages[35].

Secondly, the contract – and perhaps also the adjudication, whereas the contract has been already concluded – can not be suspended if, being the tender procedure appealed, the claimant's position can be protected only restarting the tender procedure. If this is the case, indeed, interim measures would provide a higher degree of protection than the judgment on the merit[36].

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[32] On this issues, the recent Council of State's judgement, Section V, 18 February 2013, n. 966, must be recalled; according to this judgement, the restitution in kind is a primary objective, and the restitution in value is instead a residual measure that is generally subordinated to the partial or the total impossibility to correct the public power, as shown by the judicial and legislative regime on the declaration of ineffectiveness of the public contract.

[33] In general, on the EU principles, see, among the others, M.P. Chiti (ed.), *Diritto amministrativo europeo* (2013); G. Della Cananea & C. Franchini, *I principi dell'amministrazione europea* (2013); A. Massera, *I principi generali*, in M.P. Chiti & G. Greco (eds.), *Trattato di diritto amministrativo europeo* (2007); G. della Cananea, *Al di là dei confini statuali. Principi generali del diritto pubblico globale* (2009); A. Massera, *I principi generali dell'azione amministrativa tra ordinamento nazionale e ordinamento comunitario,* in 4 Dir. amm. 707 (2005); J. Schwarze, *Rules and General Principles of European Administrative Law*, in 4 Riv. it. dir. pubbl. comunit. 1219 (2004).

[34] See Council of State's order, Section V, 24 October 2011, n. 4677.

[35] S. Fantini, *L'inefficacia "cautelare" del contratto*, cit. at 26

[36] Indeed, an interim measure might not ensure to the claimant a result (a new start of the public tender procedure) that might be achieved only in the case of an annulment of the concluded public tender procedure. In other words, the interim measure itself, intended as a provisional measure that is instrumental to the final

In order to ensure the certainty of the law and to limit the responsibility of the contracting authority, an interim measure that – being the contract already concluded – not only ascertains the unlawfulness of the acts of the procedure, but that also rules on the interests deriving from the contract, should be welcomed. In the absence of such a decision, there would be a situation of uncertainty in relation to the decision's effects, in particular whereas the judge considers that the prejudice of the claimant can be protected only with a rapid fixing of the hearing on the merit without issuing specific interim measures[37]. Indeed, in these cases, an autonomous decision of the public administration on the successive contract's effects not only is possibly in contrast with Articles 158 and 159 of Presidential Decree n. 207/2010 (the so-called "Regulation implementing the Code of the Public Contracts"), which provide for some compulsory cases of suspension, but it would also expose the contracting authority to a double risk of claims for damages (i) in the case of contract's suspension, by the original contractor, due to the unjustified locking up of means and resources, and (ii) in the case of a positive result of the judgment on the merit, and in the absence of the suspension, by the claimant, due to the missing profit caused by the omitted execution of the contractual obligations[38].

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judgement on the merit and that aims at preserving or anticipating the judgement's effects, appears to be incompatible with the interest to appeal a tender procedure to obtain the chance of a new adjudication. In this regard, and on the concept of the so-called instrumental interest, please see E. Sticchi Damiani, *I limiti della tutela dell'interesse strumentale nel processo amministrativo,* in 2 Dir. e proc. amm. 533 (2013).

[37] The reference regards Articles 55(10) and 119(3) of the Administrative Process Code, where the judge gets any protection exigency over through the anticipation and the acceleration of the subsequent judgement.

[38] On this point, the Council of State's judgement, Section V, 7 July 2011, n. 4089, has been innovative: according to this judgement, the annulment of the public tender procedure and the declaratory judgement of the contract's ineffectiveness may lead to the recovery of the funds paid to the unlawful contractor. In this regard, see also Italian Supreme Court's judgement, United Sections, 8 August 2012, n. 14260, , with the comment of S. Fantini, *La giurisdizione esclusiva del G.G. sulla sorte del contratto in caso di annullamento in autotutela dell'aggiudicazione*, in 1 Urb. e app. 24 (2013). In this regard, see also the Recital 21 of the Directive 2007/66/EC, reading "*the consequences concerning the possible recovery of any sums which may have been paid, as well as all other forms of possible restitution, including restitution in value where restitution in kind is not possible, are to be determined by national law*".

4. Conclusions

The power of the administrative judge to suspend the contract is a big step in the evolution of public contracts and, more in general, of administrative law[39], aiming at ensuring the implementation of the principle of free competition among economic operators[40] as well as a full and effective protection of the legal situations of the citizens.

After all, the empirical experience confirms that, also in the interlocutory stage of the judgment, it is not always possible to ensure an effective protection whereas, pending the judgment, the contracting authority enters into the contract, vanishing the expectations of the winning claimant to enter into the same contract.

However, despite the big potential of this judicial remedy, some perplexities could remain in connection to its compatibility with the traditional two-phases characteristic of the public contract, with the exigencies that the contract is inviolable, and with the need to ensure a rapid execution of the contractual obligations.

In order to provide for the interim suspension of the contract, after having positively ascertained the existence of the *fumus boni iuris*, the judge will have to carry out a complex assessment on the existence of the serious and irreparable prejudice. In this regard, the judge shall take into account the claimant's interest to succeed in the contract, which is mainly protected by the provision being functional to the general interest to competition, as well as the interest to the rapid execution of the public work. If this last one is recessive, then the contract's effects may be suspended[41].

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[39] In general, on the evolution of the Italian system of administrative justice and on the new measures introduced by the Administrative Procedure Code, see F.G. Scoca, *Administrative justice in Italy: origins and evolution,* in 2 IJPL (2009).

[40] On the role of the amministrative judge as a "judge of the market", see P. de Lise, *Relazione sull'attività della Giustizia amministrativa*, in 1 giustamm.it (2011).
In general, for an analysis of the relationship between the principle of competition and the administrative law, see M. D'Alberti, *Libera concorrenza e diritto amministrativo*, in 2 Riv. trim. dir. pubbl. 347 (2004); Id., *Il diritto amministrativo fra imperativi economici e interessi pubblici*, in 1 Dir. amm. 51 (2008).
On the connection between the market, the globalization and the evolution of the administrative law, see the introduction to the study of A. Massera, *Lo Stato che contratta e che si accorda* (2011).

[41] According to the mentioned scholars, these interests would be anyway satisfied because the judge might, when finding a significant *fumus boni iuris*, also provisionally award the claimant with the adjudication and the contract, suspending the effectiveness of the contract that has been already concluded (see E. Follieri, *I poteri del giudice amministrativo*, cit. at 26, 1067.

In other words, even if with the summary investigation that is typical of the interlocutory stage, all the various interests involved must be taken into account, such as that to ensure free competition in the market of public contracts, that of the participants to the tender procedure to have a full and effective judicial review, that of the community to the rapid execution of the contract and to a safe and fair management of public funds, and that of the specific contracting authority to maintain the contract.

Finally, it is noteworthy that in a contract where the interest of one of the parties is manifestly recessive, this same interest finds an adequate protection if the judge provides for the succession, only as a vehicle to satisfy the general interest to the free competition[42].

[42] In this regard, see also the study of E. Sticchi Damiani, *Annullamento dell'aggiudicazione e inefficacia funzionale del contratto*, cit. at 13, with the question whether "*which contract has its destiny decided on the basis of a conflict between two public interests, and where the private party has not any remedy*".

OBITUARY

IN MEMORIAM ANTONIO ROMANO TASSONE

*Alberto Romano**

1. Antonio Romano (he added his mother's surname - Tassone - when he began to publish scholarly writings simply to avoid confusion with other scholars) was born of Calabrian stock in 1952 in Pisa, where his father was working as a judge.

He graduated there at twenty-two years of age, under the supervision of Franco Ledda, a pupil of Piero Bodda, who held the chair of Administrative Law at the University of Turin. Although Pisa is a small Tuscan town, it is home to a centuries-old prestigious University. And it was here, in fact, that he met his first and most influential mentor.

2. Franco Ledda was an important administrative lawyer, whose erudition extended well beyond legal studies; he was an earnest man with a deep-rooted sense of ethics - traits that he shared with Antonio Romano. A very intense relationship developed between the young scholar and his mentor that would last for decades, and Ledda took a close interest in Romano's work especially after reading his monograph on the duty to give reasons[1]. Antonio Romano made a speech at the ceremony held at the *Consiglio di Stato* in Ledda's memory, and wrote his eulogy[2]. The ramifications of this life-long relationship were profound and mutual.

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[1] A. Romano Tassone, *Motivazione dei provvedimenti amministrativi e sindacato di legittimità* (1987).

[2] A. Romano Tassone, *In memoria di Franco Ledda,* 2 Dir. Amm. 357 (2000).

Ledda's influence on his pupil is evident, as can be seen even in the above-mentioned monograph. The great importance that Antonio Romano gave to the term "*administrative decision*" (*provvedimento amministrativo*) emerges here - and we shall return to it later - to link it more closely to the better consolidated line of thought running through his entire academic opus: the third chapter[3], the most important for theoretical purposes, concerns, in fact, "*the moment of the decision and its dependence on the definition of the problem at hand*," with the "*consequent application of the parameters for the reasoning behind the decision*." In this respect, three fundamental concepts emerge: the decision, the reasoning behind the decision, and the substantive legality of the decision, concepts that Romano inherited from Ledda[4]. This framework would have very important consequences, and would run throughout his entire output: the decision becomes an assessment of the values which are analysed during the administrative procedure and stated in the measure. The decision therefore takes on the character of a rational decision and replaces the concept of measure: it also challenges the traditional emphasis put on the authority of the measure[5]. The essence of objective rationality, moreover, is united with the axiological theory of value, also largely inherited from Ledda, and thus becomes "*substantive legality*"[6].

Antonio Romano also found confirmation of these ideas in some fundamental positive norms. First and foremost, Article 3 of the Italian Administrative Procedure Act (Law no. 241/1990)[7] does not refer to the measure but to the reasoning behind the "decision". For Romano, programmatic adherence to a concept, that of the rational administrative decision which Ledda had envisioned, is a conscious choice. It was one that he had developed in greater depth, especially in the study of reasoning after the entry into force of this legislative provision, and returned to it, among other things, in an

[3] *Ibidem.*

[4] See, especially, F. Ledda, *La concezione dell'atto amministrativo e dei suoi caratteri,* in U. Allegretti, A. Orsi Battaglini & D. Sorace (eds.), *Diritto amministrativo e giustizia nel bilancio di un decennio di giurisprudenza* (1987).

[5] A. Romano Tassone, *Esiste l'atto autoritativo della pubblica amministrazione? In margine ad un recente convegno dell'AIPDA,* 4 Dir. Amm. 759 (2011).

[6] See A. Romano Tassone, *Motivazione dei provvedimenti amministrativi e sindacato di legittimità,* cit. at 1, 363.

[7] The original title was "*Legge sul procedimento amministrativo"*, since 2005 the title is "*Norme generali che regolano l'attività amministrativa*".

essential, but little known entry on legal reasoning[8]. When considering Ledda's approach, he said that for him it was a confirmation of "method", a "reaffirmation of value", and "culture", and essentially it was the "collective consciousness" of the jurist[9].

3. Shortly after Antonio's graduation from Pisa, his father was transferred yet again, this time to Messina, and so he too moved there with the family. He thus found himself close to Calabria, the land of his origins, once again. And it was here that he did most of his teaching.

In the meantime, he rose through all the stages of his academic career. Notably, he became associate professor in 1984 - teaching administrative law at the University of Messina from that year - and in 1990, he was awarded a chair in the same field at the Faculty of Law at the University of Reggio Calabria. He divided his teaching between the two Universities of Calabria before finally returning to Messina in 2005. As in his previous positions, here too he was always much involved in teaching in general until his health began to deteriorate. Meanwhile, he taught as *professeur invité* at the Université de Paris 1 (Sorbonne) and the University of Lyon 3 (Jean Moulin).

He also as member of the scientific committees (in some cases as one of the founders, deputy editor or co-editor) of important journals of administrative law: among others, we specifically recall, "*Administrative Law*" - where he was member of the scientific committee since its foundation (1993), and lately one of the editors of "*Diritto e Processo Amministrativo*", "*Ius publicum*" (an international network of the leading European public law journals).

Last but not least, he was a member of the Steering committee of the "*Associazione Italiana dei Professori di Diritto Amministrativo*" (AIPDA), and Vice-President of the "*Associazione Italo-Argentina di professori di diritto amministrativo*."

4. After moving to Messina, Antonio Romano maintained his strong ties with Ledda, but his new environment provided many other stimuli. His closest colleague was Nazareno Saitta, an

[8] See A Romano Tassone, *Motivazione nel diritto amministrativo,* in 13 Dig. Disc. Pubbl. 683 (1997).

[9] A. Romano Tassone, *Il contributo di Franco Ledda alla teoria del provvedimento amministrativo*, in 2 Dir. Proc. Amm. 499 (2007.

administrative lawyer with whom he built a very important and meaningful relationship from both the academic and human points of view. But the greatest influence was the cultural atmosphere at the Messina Law School, which boasted a private law school of nationwide repute.

Two scholars really stood out: Salvatore Pugliatti (1903-1976), and Angelo Falzea (1914 -). Salvatore Pugliatti was a highly cultured man in various fields, and an eminent figure in the cultural life of Messina. He was also a musicologist and taught the history of Music; he became President (*Rettor*e) of the University, and in this role contributed to the achievement of an internationally acclaimed exhibition on Antonello da Messina in the 1950s. In addition, he was an antiques collector, and so much more. And also in Angelo Falzea we find many of these characteristics. Antonio Romano soaked up many of these stimuli, being also an avid bibliophile.

As far as legal scholarship is concerned, the theories of such leading private lawyers that appear most significant for an understanding of the work of Antonio Romano concern legal facts or realities. In 1945, Salvatore Pugliatti published his fundamental essay "I fatti giuridici", later reprinted in 1996 "with revision and updates" by Angelo Falzea.[10] The main idea is that legal facts or realities are those "considered in terms of the effects they have on the sphere of a subject"[11].

The idea that a fact or reality is considered in terms of the effect it has or produces has two important implications. Firstly, such a fact or reality is distinct from the legal rule which refers to it, albeit in abstract terms. Secondly, it is assessed according to the effect arising from it. This legal effect is inherent to the legal situation of the subject involved. In Pugliatti's brief definition we already see Falzea's theory of causation, which later develops into the theory of legal effectiveness that he set out in the fifties, and then, more fully in 1965, in his entry in the *Enciclo*ped*ia del diritto*[12]. There, right from the *incipit*, he stated that the problem of legal effectiveness is the problem of jurisprudence and the law itself; and the legal effect is nothing but value, interest[13]. Once again, it is an axiological

[10] S. Pugliatti, *I fatti giuridici* (1996).

[11] *Ibidem*.

[12] A. Falzea, *Efficacia giuridica,* in 14 Enc. Dir. 432 (1965).

[13] *Ibidem*, 452 (affirming that: «Il problema dell'effetto giuridico è in ultima istanza il problema più generale della scienza del diritto, anzi… è lo stesso problema del

conception that consequently emerges, a conception drawn from analytical philosophy. Falzea brings it into the domain of the law[14], Antonio Romano Tassone applies it to administrative law.

On the other hand, Salvatore and Angelo Pugliatti Falzea, as private lawyers, were convinced legal positivists, and saw the production of effects from the perspective of a direct and immediate relationship between the law that regulates them, seen as a result of a "dispositive fact", and the effects themselves. They held that in order to produce such effects, legal acts (contracts and other transactions) were to be regarded merely as dispositive facts. These jurists had, therefore, a very different approach compared with other civil law schools, which, on the one hand, emphasized the role of the contracting parties, and, on the other hand, emphasized the importance of unilateral acts and, with regard to them, of the will of the author as a central factor in determining their content and effects. Seen from this point of view, the legal rule is not the true basis of such effects, the real factor that produces them: on the contrary, one can merely recognize them as an expression of contractual power, of the private will of those carrying out such acts - in so far as these acts prove lawful and properly formulated. In brief, the negotiating power of individuals, an alien concept especially in the sphere of private law, permeated legal studies at the Messina Law School, during the second half of the last century. Antonio Romano, it would seem, absorbed many of these cultural influences and wrote extremely well on a purely objective level about the formation of the measures, which placed great importance on values, but had no interest in seeing those same measures as the expression of the thorny question of the autonomy of the authorities.

However, this axiological perspective would always mark Romano's thinking. This is what guided his theorising on

diritto visto su piano strettamente scientifico», adding: «ciò che in termini di causalità si chiama l'effetto giuridico è in più corretti termini niente altro che un peculiare valore, il valore peculiarmente giuridico»; «Il diritto è un valore reale oggettivo… Se si conviene di chiamare interesse questo valore oggettivo reale, secondo la felice intuizione di Jhering, che opponeva interesse a volontà…è lecito dire che il fondo del diritto è interesse»).

[14] A. Falzea, *Efficacia giuridica*, cit. at 12, 432: the idea of legal value «richiedeva una non superficiale presa di contatto con la teoria filosofica dei valori, anche considerato il larghissimo impiego che se ne fa, specialmente in Germania, tanto nella filosofia del diritto quanto nella metodologia (e persino nella dogmatica) della scienza del diritto».

administrative law, adopting it as a method and developing it as dogma. And it is in the fruits of his research in this field that we can see his major original contribution to scholarship on administrative law.

In this light we can see a thread that binds together three of his favourite themes: power, validity, and subjectivity - whose importance, however, was limited by the premises mentioned above, covered in three separate works: his writings on power, the monograph and other studies on legal reasoning, and his entry on subjective legal situations[15]. Lack of space permits only a few remarks on these works here, and these remarks are not meant to summarize their content, but the connections between them, thus respecting Romano's own natural conviction. He himself often repeated that he did not want to paraphrase the works of others, because one only ends up impoverishing them, producing ugly summaries[16], so we shall focus only on the common ground running through his works.

His first work was on power[17]. He showed that the power exercised by a public authority is based on political legitimacy, and the law reflects this. He found and deepened the relationship between the political and the legal order. This is a relationship that he would not forget[18]. He used it to frame the relationship between power and the act, between the legitimacy of power and the legal validity of the act. And he did so by giving a clear direction to that relationship: it is the legitimacy of political power that conditions the positive nature of legal acts[19].

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[15] See A. Romano Tassone, *Note sul concetto di potere giuridico,* 1 Ann. Fac. Ec. Messina 442 (1981); Id., *Motivazione dei provvedimenti amministrativi e sindacato di legittimità* (1987); Id., *Situazioni giuridiche soggettive (diritto amministrativo),* 2 Enc. Dir. 966 (1998).

[16] A. Romano Tassone, *Il contributo di Franco Ledda*, cit. at 9, 489.

[17] A. Romano Tassone, *Note sul concetto di potere giuridico*, cit. at 15, 442; also his last work was on the subject of power, but his health did not allow completion of the volume. See A. Romano Tassone, *A proposito del potere, pubblico e privato, e della sua legittimazione*, in 4 Dir. Amm. (2013), published posthumously.

[18] He had recently returned to the topic: A. Romano Tassone, *Sui rapporti tra legittimazione politica e regime giuridico degli atti dei pubblici poteri,* in P. Carta & F. Cortese (eds), *Ordine giuridico e ordine politico* (2008).

[19] A. Romano Tassone, *Sui rapporti tra legittimazione politica e regime giuridico degli atti dei pubblici poteri,* 1 Dir. Proc. Amm. 140 (2007) : «esiste invece un rapporto assai stretto che collega il concreto assetto di volta in volta assunto dal potere pubblico (più esattamente: gli effettivi principi cui si ispira la sua legittimazione politica), ed

He formulated two major theories. The first was a theory of the decision taken by a public authority, which had emerged already in discussing legal reasoning in the monograph; the second is the theory on the invalidity of acts, a recurrent theme of his works.

In the aforementioned work on legal reasoning, which is still fundamental despite the years that have passed since 1987, he rejected the traditional idea. Legal reasoning, he argued, was not a formal statement of reasons: reason is not a usable category, because it has no precise technical dimension[20]. Rather, Romano elaborated a complex approach in order to explain the nature and importance of the requirement to give reasons in the field of administrative law. For him reasoning refers to the 'decision'[21]. Decision and reasoning form a binomial. And among them there is a third element to be inserted: the judgment. The judgement is needed to highlight the distinction between fact and value; both become the object of the decision: the decision is handed down and relates to the value of the problem inherent in the fact.[22] And this decision can only be controlled in one way: through objective rationality, with parameters of reasonableness. The decision taken by the public authority is thus the result and expression of reasonableness; the same that is inherent in the basis of power, and it is here that power and decision come together in the same matrix of objective rationality[23].

We can clearly see his predilection for 'objectifying decision-making based on reason', and Romano's declared inclination for the philosophy of law inspired by the lectures of Franco Ledda[24]. So his thought is marked by an evident passion for rationalism and method; and yet there is another, almost antithetical part, the realism that characterizes any encounter with power, political legitimacy, and authority. Reason and power: for him an 'enigma', a 'human mystery'[25]. From this perspective, one could read an attempt to solve the dilemma in his entry on subjective legal situations, where he puts

il regime giuridico positivo degli atti cui le decisioni autoritative mettono infine capo, nel senso che il primo costituisce invariabilmente il sostrato assiologico- *ergo: l'humus* sistematico- in cui il secondo affonda le proprie radici».

[20] A. Romano Tassone, *Motivazione dei provvedimenti amministrativi,* cit. at 1, 13-25.

[21] A. Romano Tassone, *Motivazione dei provvedimenti amministrativi,* cit. at 1, 39-49.

[22] A. Romano Tassone, *Motivazione dei provvedimenti amministrativi,* cit. at 1, 255.

[23] A. Romano Tassone, *Motivazione dei provvedimenti amministrativi,* cit. at 1, 363.

[24] A. Romano Tassone, *Il contributo di Franco Ledda*, cit. at 9, 496.

[25] A. Romano Tassone, *Il contributo di Franco Ledda*, cit. at 9, 490.

the person before the law, its constitutive limit[26]. But perhaps, and above all, he sought to solve the dilemma in a final reflection on law and politics, almost an epigraph: 'The political order, therefore, gives historical substance to the legal order and its essential lexicon ... The legal order structures and permeates the "discourse of power": it reduces (but does not eliminate) its mythical and rhetorical character. It confers systemic substance upon its rational life-blood'[27].

[26] A. Romano Tassone, *Situazioni giuridiche soggettive,* cit. at 15, 966.

[27] See A. Romano Tassone, *Sui rapporti tra legittimazione politica e regime giuridico degli atti dei pubblici poteri*, cit. at 19, 154. A few pages before, he said: «L'ordine giuridico, in sintesi, più che alla auto rappresentazione del potere, aderisce alla sua sostanza storica, rivelandone l'intima essenza e sviluppandone … le implicazioni profonde e l'intrinseca razionalità. Si tratta dunque di un processo di rielaborazione, piuttosto che di riproduzione».