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REPORT

IMPROVING THE REPRESENTATION OF REGIONS AND LOCAL AUTHORITIES IN EUROPE IN 2ND CHAMBERS

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The Italian case: bicameralism between constitutional reforms and defence of the *status quo*

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Introduction

1. Bicameralism has always been a peculiar and crucial aspect of the Italian system of government. The justification of the choice made by the Constituent Assembly in the matter has not easily been accepted by the legal doctrine, and the commentators frequently underlined the difficulties caused by the presence of two Chambers of the Parliament. The legislative decision making processes are complicated by the constitutional provision requiring the approval of the same legislative deliberation by both the Chambers: it happens frequently that a proposal of a law, approved by one Chamber, has to be submitted again to this Chamber because the another Assembly modified the text previously adopted, and the story can go on if the differences between the two Chambers persist and a solution is not found. Therefore it is understandable that the problem of the reform of the bicameralism has been present at the attention of the legislators and of the doctrine since the entry in force of the Constitution and, therefore, since the very beginning of the Republic. It is also true that the practicability of a reform of both the Chambers or, at least, one of them has been conditioned by the fact that a possible reform of the bicameralism could in any case affect the equilibrium of the relations between the political parties and inside them. Day by day the politicians have been getting well acquainted with the arrangements of the bicameralism presently in force, and it has been difficult to convince them to initiate a process of revision of the relevant provisions of the Constitution. When such a decision was adopted, it frequently happened that the discussion concerning the difficulties of a bicameral decision making process was immediately complicated by the submission of questions concerning the membership of the Chambers, and specially of one of them, the Senate. The idea of enlarging the scope of the debate was and is correct and legitimate, but, taking in consideration the lesson of the history, we get the feeling that it has been at the same time and frequently used as a pretext for delaying the concrete adoption of the solution of the urgent practical problems. Therefore the development of the debate on the Italian bicameralism has often been the story of hollow discussions which did not produce any positive results.

The bicameralism at the Constituent Assembly

2. The debate at the Constituent Assembly started with the acceptance of the principle of the bicameralism: only some left oriented political parties supported the idea of the monocameralism on the basis of the doctrine that the national political representation cannot be dual: the people is one and one has to be its representation, they said. But the other political parties supported the idea that bicameralism guarantees a better considered adoption of the parliamentary legislation, as far as the existence of a second Chamber offers the possibility of rethinking questions apparently settled and of giving adequate consideration to interests previously dismissed or forgotten. The choice, as it often happens with all the choices of principle, did not offer specific suggestions concerning the structure of the bicameralism, and specially the membership of the second Chamber. It was clear that one of the Chamber of the Parliament should be elected in compliance with the principle of the general national political representation by all the citizens alongside their preference for the concurring political parties, without giving any relevance to territorial or socio–economic differences. If the second Chamber had to be entrusted with the task of insuring a better considered adoption of the legislation, which composition should be adopted in view of a positive implementation of this design?

3. A second Chamber can offer a contribution to the improving of the legislation, if its members are in the position of representing interests which are different from the interests represented by

the national general representation present in the another Chamber, or they are able to offer the baggage of specific experience and knowledge.

4. The debate followed this line of inspiration and many proposals were submitted in view of the differentiation of the membership of the two Chambers. As a matter of fact all of them were rejected and, when the Constitution was adopted, the only differentiating element which remained in the text regarded the ages of the voters and of the possible candidates. All the voters who, on the day of the elections, have attained the major age are allowed to vote for the Chamber of Deputies, but only those who have attained the age of twenty five are eligible to be deputies. Instead senators are elected by the electors who have completed their twenty fifth year of age, and have to be at least forty years old (Articles 56 and 58). Both the two Chambers are elected by universal and direct suffrage. Evidently the opinion prevailed that the differences of age were sufficient elements to insure a well considered second reading of the legislation by the Senate. But the Constitution does not provide for the priority of one or another Chamber in the examination of the draft bills of law because they have an equal status in the system of government. It means that not only they have equal powers in the field of the legislation (Article 70), but also that they take part on an equal footing to all the political decisions even when the relations between the Chambers and the Executive are at stake, and – for instance - the granting or the withdrawal of the confidence of the Parliament have to be adopted (Article 94).

5. Therefore the Constituent Assembly did not accept the idea of having a second Chamber organized according to the principles of the economic and social representation, even if it could have been connected with elements of territorial representation. When the Constitution was adopted the Senate had to be elected for six years and the Chamber of Deputies for five years, but a constitutional revision adopted in 1963 cancelled even this difference. The idea prevailed that the membership of the Senate should fundamentally match the features of the Italian political system and the role of the political parties in its frame. Political parties did not accept any possible intermediation between themselves and the voters: this has been and will be a constant trait of the political debate about bicameralism in Italy. When a possible election of the senators through economic or social organizations or by local government bodies was at stake, they always defended their own prerogative to be the mediators between the electorate and the representative bodies of the State. The point specially deserves to be underlined if we take in consideration the fact that – at the same time – the Constituent Assembly introduced and mandated the parliamentary legislator to implement the devolution of a part of the national State's powers to the newly created Regions. If the Regions had to have a relevant political role, they should have been entrusted not only with their own legislative functions in matters of local relevance, but they should have been allowed to take part in national decisions, at least as far as there had been a connection between the national and regional interests. A Senate's membership directly or indirectly elected by the participation of the regional governing bodies would have insured to the Regions the possibility of influencing the relevant national deliberations. But the members of the Constituent Assembly were afraid that such a solution could not only modify the equilibrium between the political parties but could be also interpreted as a first step toward the creation of a federal State, which they were not ready to accept: as a matter of fact, the advent of the regional institutions was seen as an alternative to a federal choice, because it was apparently coherent with the idea that " the Republic, one and indivisible, (only) recognise and promotes local autonomies " (Article 5) and is not made up by the Regions and the other local territorial entities. Therefore the constitutional provision according to which the Senate is elected on a regional basis (Article 57) has been always interpreted as regarding the dimension of the electoral districts only.

Proposals of reform: the differentiation of the functions of the two Assemblies

6. The choice made by the Constituent Assembly deeply influenced the debate on the Italian bicameralism in the next years. The difficulties and the length of the legislative decision making processes, on one side, and the duplication of the functions exercised by the two Chambers, on

the other side, were at the centre of the debate.

7. In the meantime, while a constitutional revision was carried on to amend the original choice which differentiated the duration of the Chamber of Deputies and the Senate, new elements of differentiation were not introduced. In the Senate are not affected by the rule of the periodic electoral renewal only the five senators who may be appointed for life by the President of the Republic among citizens who have brought honour to the Fatherlands, and the past Presidents of the Republic who are senators by right and for life unless they renounce the seat (Article 59). But the practical implementation of these provisions and the mentioned minor changes did not affect the development of the discussion on the possible differentiation of the functions of the two Chambers.

8. Especially in the years '60 of the past century the idea of a division of functions between the two Chambers was discussed by the political forces and by the legal doctrine. The Chamber of Deputies should have retained – it was said - the power of the establishing, in coordination with the Cabinet, the main political guidelines of the State, leaving the exercise of the functions of political inspection to the Senate. This could have been a de facto solution without any revision of the Constitution; it could have be adopted by the parliamentary standing orders and had not implied any intervention in the equal participation of both the Chambers in the exercise of the legislative function. But it was a solution which did not take into account the fact that legislative functions, political decision making powers and political inspection attributions cannot be separated because they are expression of the unitary role of the Parliament, and therefore of both the two Chambers. As a matter of fact it happened that parliamentary internal rules were effectively partially modified, but the reform did not produce any relevant positive result. The membership of the two Chambers was based on the principle of the general representation through the political parties and the deputies and the senators were not ready to give up a part of their prerogatives and accept a reduction of their political authority.

9. In 1990 a new proposal of reform did not get better results, it was never accepted by the legislator. Its aim was the division of the work between the two Chambers without distributing the legislative matters according to a line of separation of competences. Only a restricted number of statutes had to be equally approved by the two Chambers (that is constitutional laws, electoral laws, ratification of the international treaties, State's budgets, delegation of legislative function to the Cabinet and transformation of a decree in a law), while in the other cases the approval by one Chamber was sufficient if – in fifteen days - the another Chamber did not ask to examine it. The splitting of the legislative function was not accepted, the principle of the bicameralism – it was said – did not allow a system which consented to the renouncing of the exercise of the legislative function by a Chamber, the guarantee of a well considered adoption of the legislation could not be disposed of so easily.

10. Day by day it was easy realizing that a reform of the bicameralism was possible only in the frame of a reform of the State. Therefore the problem was dealt with in the years '90 by two parliamentary bicameral commissions explicitly created to prepare a draft proposal for the revision of the Constitution. Special attention deserves one of the proposals which were submitted but not approved by the two Assemblies. It regards the transformation of the Senate in a s.c. Chamber of the guarantees. The proposal drew inspiration from an old idea of the legal and social philosopher von Hayek, according to which the socio economic legislation should be kept in the hands of the Chamber elected by all the citizens according a system ensuring a general proportional representation of all the political forces, while the second Chamber - elected with a clear preference for a system insuring a membership made up by the oldest and most experienced citizens - should deal with the implementation of the Constitution, the organization of the State and the protection of the fundamental rights. But in the draft of the bicameral commission the division of the work between the two Chambers did not follow the line of the design envisaged by von Hayek: the approval of both the Chambers was still required for some legislation, and the guaranteeing functions of the Senate specially regarded

all the appointments of constitutional relevance entrusted to the Parliament (constitutional judges, members of the superior council of the judiciary, high administrative authorities, and so on) only. It was a very restricted idea of the constitutional guarantees. Moreover the Senate should be elected according to a proportional electoral system, while the gerontocracy envisaged by von Hayek was not taken into account because of obvious reasons. This choice evidently was a clear rejection of a conservative aspect of the design, but at the same time there was not space for differentiating the two Chambers, notwithstanding that the Senate could not be dissolved and it was not competent to deal with the responsibility of the Cabinet and the adoption of the guidelines of the general policy of the State.

The representation of the autonomous regional and local entities

11. As I explained in the previous pages, during the activity of the Constituent Assembly the political parties which specially promoted and supported the establishment of the regional autonomies, tried to connect the solution of the problem of the membership of the Senate with the research of a representation of the new territorial entities at the parliamentary level. Their proposals were rejected and the justification of this decision as well as the their rationalization by the legal scholars were routinely based on the distinction between the Italian Republic, which was defined a regional State, and the model of the federal State, which only required the presence of a second Chamber entrusted with the task of representing the member States, whose constitutional status and powers could not be compared with those of the Italian Regions. A regional second Chamber was seen as a continuation of the residual sovereign powers of the constituent entities of a federal State, sovereign powers which the Italian Regions – the quoted doctrine said – don't have. Therefore the constitutional position of the Regions did not require in principle their participation in the national legislative decision making processes, participation which was, instead, an essential features of the constitutional role of the member States of a federation. In the Constitution we can find a sign of this debate in the provision according to which "the Senate of the Republic is elected on a regional basis "(Article 57), which was not interpreted as necessarily requiring that the senators have to be representatives of the Regions: as a matter of fact, the rule that the senators have to be elected by universal and direct suffrage by the electors (Article 58) was used as conditioning and restricting the construction of the mentioned Article 57, which could be read only as a rule providing for a regional dimension of the electoral districts.

12. But the terms of reference of the Italian constitutional debate have been changed since the day of the entry in force of the republican Constitution. In the meantime the concrete institution of the Regions has favoured an enlargement of the regional powers: everybody can realize today the growing connection of the activity of the Regions with the economic and social policies of the central State. The links between the respective activities require a coordination which can apparently be only the result of relations of collaboration between the State and the Regions, collaboration which require the common participation in a decision making body, which could be a regional Senate. It can be easily understood that the developments of the regional autonomies gave a new input to the discussion about the membership of the Senate, especially when the Parliament and its commission were dealing with the general problem of the reform of the State. And the reform of the State has been at the centre of the attention since new proposals for the transformation of the regional State into a federal State were submitted to the political parties and the public opinion. As it is evident, the problem of the differentiation between the Italian Republic as a regional State and the federal States has been at stake again in a discussion where the clarity of the concepts used by the participants in the discussion has been missing and the politicians have been adopting the federal terminology only for exigencies of propaganda, that is spreading false or exaggerated statements about their programs in order to gain the support of the electorate.

13. Elements for understanding the developments of this discussion can be drawn from a remark of Hans Kelsen in his General Theory of Law and State. He correctly underlines the fact

that the developments of a traditional federal States frequently imply a strengthening of the central State and – therefore – a growing importance of the organization of the central government. In this perspective the existence of a Chamber of the Parliament whose membership is made up by representatives of the constituent entities of the federal State, has special relevance. In some way we can say that, while in the past a State had a federal second Camber because it was a federal State, today it frequently happens that only a State which has a federal (or regional) Chamber is considered as a federal State. When a constitutional reform is in the agenda of the Parliament, territorial entities which are getting a representation in one of the Chambers of the national Parliament and are allowed in this way to participate in the decision making process of the national government, can envisage a change of their constitutional position in connection with an explicit or implicit reform of the constitutional order of the State itself. This is the development which is supposed to take place in Italy: the Regions are probably conscious of the difficulty of establishing a clear division of powers between themselves and the central State and, therefore, they see in the creation of a regional Senate an useful constitutional arrangement for an enlargement of their powers and for their participation in the national decision making processes.

14. But the choice of establishing a second Chamber representative of the Regions is only a choice of principle because different solution can be adopted about the membership of such an Assembly. The study of the comparative constitutional law offers us different alternatives, which differently affect the way of the regional representation. In Italy a solution which was specially appreciated by the Regions, was offered by some scholars who looked at the German constitutional experience and proposed the creation of a regional Chamber similar to the Bundesrat, that is a Chamber made up by the representatives of the regional Executives, which are supposed to be better acquainted with the concrete problems of the relations between the Regions and the State. This solution obviously entrusts the representation of every each Region to the political majority which has the control of the Executive of the interested Region, but it does not insure the presence of the political minorities which are not present in the regional cabinets. Moreover the political parties should be excluded from the processes of the appointment or election of the members of the second Chamber who have to be members of the regional cabinet. The policies aimed at the general interests of the regional territorial entities should be substituted for the individual policies of the political parties, which complain and claim that such a solution implies the postponement of the national, general interests to the particular local exigencies of the Regions. Moreover the establishment of a connection between the regional executive functions and the parliamentary membership could deprive the personnel of the political parties of a chance of political promotion.

15. As everybody knows, the political parties have an important, if not exclusive influence in the legislative work of the Parliament, and also in the constitutional reforms. It is easy to understand why the creation of an Italian Bundesrat was abandoned and new proposals were submitted to the attention of the legislators. The members of the second Chamber have to have a regional connection – it was said – but they have to be elected directly by the people on the basis of candidatures submitted by the political parties in the separated frame of every each Regions. The role of the political parties remained untouched and there was not a substantial modification of the constitutional provisions presently in force. That the preference of the political parties displays a relevant influence was demonstrated by a draft of complete reform of the second part of the Constitution (that is, the part dealing with the organization of the State), which was adopted in 2004 – 2006 and provided for a similar solution, according to which the senators had to be elected in the frame of the Regions directly by the people at the same time of the election of the regional assemblies. But this draft, which for the first time had had the approval of both the Chambers, notwithstanding the confused complexity of the division of the powers between the two Chambers, was rejected by the people by a referendum called in 2006. In the meantime it was not implemented the provision of the constitutional law adopted in 2001 allowing the standing orders of the two Chambers to provide for the participation of representatives of the Regions and local government authorities in the working of a bicameral

committee for the regional affairs.

16. Recently a Commission of the Chamber of Deputies was working to prepare a new draft for a partial and limited revision of the Constitution. It will not have a follow up because of the dissolution of the Parliament, but it could be interesting to underline the new choice in the matter of the membership of the Senate, which was called "federal senate", with evident concessions to the propaganda and to the wishes of the Regions but without any change in the distribution of powers between them and the State. It provided for the election of the senators by the legislative assemblies of the Regions and by the regional councils of the local government authorities. The adopted model is apparently similar to the model of the federal council established in Austria, and, if accepted, it could have produced the same results. It is well known that – according to the opinion of the legal doctrine – such an arrangement postpones the attention for the interests of the federal entities to the exigencies of the policies of the political parties, which have a relevant part in the nomination and the election of the members of the federal council. In any case some commentators have welcomed this choice and see it as a first step in the direction of a major participation of the governing bodies of the Regions in the formation of the Parliament. Moreover the draft provided for the collective approval by the two Chambers of a restricted number of laws only, reserving the priority of the decision in the other fields to the Chamber of the Deputies and entrusting to the s.c. federal Senate only the approval of the framework legislation aimed to establish the principles of legislation to be adopted by the regional legislators in the matters assigned to their competence.

Conclusions: a summary and new perspectives of the constitutional debate

17. My report is the story of many failures. The Italian political parties have not been ready to give a place to the regional and local territorial autonomous entities in the process of the formation of the second Chamber. They have seen the decision making processes of the national policies as their own prerogative, they have wanted to keep their role of the mediators of all the relevant national interests and they have not accepted – even in the recent draft - the idea of entrusting the research of a balancing of these interests to negotiations and agreements to be made by the representatives of territorial entities in the frame of a reformed Senate, at least as far as the matters given to the competence to the Regions are at stake.

18. Until today the debate has privileged the problem of the membership of the second Chamber notwithstanding that the problem of the efficiency of the legislative procedures is considered as one of the main difficulties of the present situation of the Italian constitutional organization. As a matter of fact the existence of two Chambers with equal powers in the field of legislation is a factor which seriously reduces the capacity of the Parliament to give immediate and quick answer to the socioeconomic exigencies of the State. Perhaps it could be advisable adopting a monocameral system of government. In any case it is true that practical and constructive solutions are difficult to be found, the postindustrial society presents complexities which cannot be easily dealt with by a State which has only recently abandoned the old principle of the centralistic approach to the exercise of the power and is not able to elaborate a correct distribution of functions between the central authorities and the periphery. The difficulties affecting the relations between the State and the Regions have also an impact on the identification of the respective role of the two Chambers in the processes of the legislation.

19. A realistic approach to the issue of the participation of the Regions in the national legislative processes could also suggest new choices. Recent studies on the functioning of the Conferences of the Regions whose work in coordination with the executive organs of the State (Cabinet and ministries) have demonstrated that these bodies are able to perform a representative role of territorial autonomous entities without passing through the intermediation of the political parties. The authors of these studies share the doubts on the possibility to get a

synthesis of the general interests in the Parliament which could counterbalance the centralistic approach of the Cabinet. The powers of the Cabinets are growing up in the contemporary constitutional systems and therefore the Regions (or similar entities) can truly have a say in the decisions of the State as far as they are able to negotiate and adopt agreements directly with the executive organs of the State. Conferences are supposed to be better situated to offer a cooperative link between Regions and State than a Senate of the Regions. The Conferences can be a meeting point between the national and regional executives which are the main actors of the respective policies.

20. It is evident that those who clearly show a preference for an arrangement which bypasses the problem of the reform of the second Chamber have in mind the example of the German Bundesrat which is supposed not to be a true legislative assembly and to perform a function in favouring the collaboration between federal entities and central authorities. But there is a problem: is it possible envisaging an arrangement of the relations between State and Regions which don't require the adoption of a specific legislation? It is true that the European regulations and directives, whose adoption is controlled by the national Executives, are frequently taking the place of the national legislation. But the competence of the European authorities are not completely overlapping with those of the national and regional bodies, whose correct functioning requires a Parliament to establish the frame of their activities and adopt the guidelines of the policies which have to be implemented by the State and have to be integrated and completed by the regional and local entities. The preference for policies exclusively decided by the executive bodies does not offer a complete guarantee of a correct functioning of a system of government which is democratic as far as it is representative. And only in the Parliament representative exigencies are truly satisfied. Therefore the problem of the reform of the second Chamber in the frame of a design of strengthening of the regional autonomies remains a relevant issue in the debate on the constitutional reform.