

## **The Italian Constitutional Reform of 2016: An ‘Exercise’ of Change at the Crossroad between Constitutional Maintenance and Innovation**

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### **Abstract**

The essay analyses the Italian Constitutional Reform of 2016, starting from provisions concerning the frame of government and specifically the overcoming of the Italian model of ‘perfect bicameralism’. The essay then explores the reform of the relationships between the State and the Regions, which were successfully reorganised in 2001 but still occupy the most significant part of the Constitutional Court litigation load. The last part of the analysis is devoted to the provisions amending the Italian system of constitutional adjudication and specifically to the introduction of a form of *contrôle préventif* on electoral laws. Finally, the Author provides some conclusions about the 2016 reform as an example of ‘*manutenzione costituzionale*’.

### **I. The Italian Reform of 2016: Origins, Cultural Background and Fundamental Choices beyond the ‘Constitutional Maintenance’ Logic**

If one is tempted to understand the ideological inspiration or the theoretical premises behind the Italian Constitutional Reform of 2016,<sup>1</sup> he may well be disappointed by the persistent combination of two arguments in both pamphlets and essays dedicated to the topic. The first one is the (obvious) acknowledgment of the validity of the table of values and principles of the 1948 Constitution, which needs neither revision nor actualization.<sup>2</sup> The second one is the call for efficiency and efficacy of both the Parliament’s and the Executive’s action. Proponents of the reform advanced the two arguments as they mutually contribute to provide for a justification to the amendment

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<sup>1</sup> ‘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 II della Costituzione’ *Gazzetta Ufficiale* 15 April 2016 no 88. The text is also available at [http://www.camera.it/\\_dati/leg17/lavori/stampati/pdf/17PDLo027272.pdf](http://www.camera.it/_dati/leg17/lavori/stampati/pdf/17PDLo027272.pdf) (last visited 20 March 2017).

<sup>2</sup> See the foreword to the volume *Perché sì* written by the former Minister of Reforms Maria Elena Boschi: M.E. Boschi, ‘Prefazione’, in C. Fusaro, C. Pinelli et al, *Perché sì* (Roma-Bari: Laterza, 2016), V-VIII.

procedure. On the one hand the fundamental values remain untouched, on the other the interventions are designed to speed up legislative procedures and advance the efficiency of the whole system of government.<sup>3</sup> To put it differently, the first part of the Constitution stands, while the second is amended to correct original sins, first and foremost the ‘perfect bicameralism’.<sup>4</sup>

The former argument declares the continuity between the ideological inspirations of the framers and that of the proponents of the new reform. The latter conceals the theoretical premises behind a clear-cut logic, which was apparently responsive to a widespread discontent emerging from both the Italian electorate and international partners.

From a political viewpoint the arguments strived to downsize the dramatization of the debate over a major change in Italian constitutional history, with the proponents keeping good memory of the previous unsuccessful attempts to amend the Constitution.<sup>5</sup> In other words, the lack of a broadly-conceived and values-inspired revision has been presented as the key for the potential success of the reform, on the assumption that the *maintenance* (*manutenzione*)<sup>6</sup> of the constitutional text would not have raised as many controversies as a comprehensive revision.

The argument has been advanced to answer criticism of those who maintained the heterogeneity of the constitutional bill or even its subversive

<sup>3</sup> Political science literature on the issue is broad. See *ex multis* S. Bolgherini, ‘Crisis-driven Reforms and Local Discretion: An Assessment of Italy and Spain’ *Italian Political Science Review*, 71-91 (2016), arguing that the reform has been prompted by the global financial crisis, which forces Governments to pursue efficiency and fast-track normative procedures. See also M. Morelli and M. Osnabrügge, ‘Some Neglected Reasons to Eliminate Perfect Bicameralism: The Italian Constitutional Reform and Legislative Efficiency’ *Vox*, 26 November 2016, available at <http://voxeu.org/article/italian-constitutional-reform-and-legislative-efficiency> (last visited 20 March 2017). The Authors insist more directly on the need to overcome bicameralism in order to achieve efficiency and facilitate policy changes via ordinary legislation. Massimo Morelli and Moritz Osnabrügge specifically focus on other neglected effects of bicameralism, including fostering the resort to decree laws (*decreti legge*) and legislative decrees (*decreti legislativi*).

<sup>4</sup> Alternatively named ‘full and/or symmetric bicameralism’: see G. Tsebelis, ‘*Compromesso storico*: The Role of the Senate after the Italian Constitutional Reform’ *Italian Political Science Review*, 87, 88 (2017) and G. Tsebelis and J. Money, *Bicameralism* (New York: Cambridge University Press, 1997). The Italian Government used the locution ‘perfectly equal bicameralism’ in the English translation of the reform explanatory note.

<sup>5</sup> See J. Luther, ‘Learning Democracy’, in this issue.

<sup>6</sup> See for example C. Fusaro, ‘Le ragioni di una riforma’, in Id and G. Crainz eds, *Aggiornare la Costituzione. Storia e ragioni di una riforma* (Roma: Donzelli, 2016), 129. Constitutional maintenance (*manutenzione costituzionale*) is highly controversial term in Italian constitutional law. It has been used by Alessandro Pizzorusso (*La costituzione ferita* (Roma-Bari: Laterza, 1999), 47) with the purpose of identifying modifications, updating and corrections of the existing constitutional text with a view to incorporate factual or normative changes developed after its entry into force. Later on Italian scholars developed a partially different understanding of the concept, which is often used to label constitutional changes not necessarily entailing a formal revision or consisting in minor (*revisione minima*) or strictly focused changes (*revisione mirata*): see F. Palermo, ‘La “manutenzione costituzionale”: alla ricerca di una funzione’, in F. Palermo ed, *La «manutenzione» costituzionale* (Padova: CEDAM, 2007), 4.

nature.<sup>7</sup>

Irrespective of the validity of those theses, some scholars argued that the argumentative strategy contributed to the failure of the December referendum<sup>8</sup> because the efficiency logic<sup>9</sup> does not fit constitutional debates, in the sense that it is an argument incapable of sensitising citizens to major constitutional changes.

On the contrary, constitutional reforms need to gain momentum through values-oriented discussions prevailing over purely political (and all the more so legal) fundamental choices.<sup>10</sup>

Irrespective of any arguable consequences-oriented judgment, one has to consider if it is true that the reform does not purport any other ideological inspiration apart from the efficiency and efficacy arguments (within which the '*governabilità*' or governability played a major role).

The efficiency and the effectiveness of the frame of government may well have been the crucial concerns of the reform, nevertheless there are fundamental choices reflecting a certain theoretical framework. That framework has consequences in terms of the institutional arrangements assumed to be essential to straightening up the functioning of the parliamentary system.

In other words, while the *reasons* behind the constitutional project have been sufficiently investigated, the *motives* have been somehow neglected in scholarly and public debates.

To understand the aforementioned fundamental choices one should start from the Final Report of the Committee of Wise Men.<sup>11</sup> It is clear from the document, dated September 2013, that the experts were basically divided along two lines. More precisely, a group of experts identifies the dysfunctions of the Italian system with the endemic structural weakness of the Executive; while another group maintains that the parliamentary government is improperly balanced, with functions unnecessarily duplicated between the two Chambers or confused between the Legislative and the Executive power. In other words,

<sup>7</sup> See A. Pace, 'Una riforma eversiva della Costituzione vigente' 4 *Rivista AIC*, 1-4 (2016).

<sup>8</sup> See for example B. Caravita, 'Considerazioni sulle recenti vicende sociali e istituzionali del Paese e il futuro della democrazia italiana' *Lo Stato*, 291, 293 (2016). The Author argues that the proponents inadequately explained the cultural background of the constitutional reform, undermining the power of the two core arguments: the overcoming of perfect bicameralism and the reframing of legislative authority between the State and the Regions.

<sup>9</sup> Especially in recent years there are many studies on the impact of institutional arrangements over States' economic performances: see W.J. Henisz and E.D. Mansfield, 'Votes and Vetoes: the Political Determinants of Commercial Openness' 50 *International Studies Quarterly*, 189-211 (2006). See also S.L. Kastner and C. Rector, 'International Regimes, Domestic Veto-players, and Capital Controls Policy Stability' 47 *International Studies Quarterly*, 1-22 (2003).

<sup>10</sup> See P. Pombeni, 'Ripensare la Costituente settant'anni dopo' *Rivista Il Mulino*, 398, 400 (2016). See also A. Cerri, 'Riflessioni sull'esito del referendum costituzionale' 1 *Rivista AIC*, 1-5, 2 (2017), and M. Bertolissi, 'Riforma costituzionale e contesti' 2 *Rivista AIC*, 1-8, 2 (2016).

<sup>11</sup> The Committee has been appointed by the Former President of the Republic, Giorgio Napolitano, pursuant to Decreto del Presidente del Consiglio dei Ministri 11 June 2013.

the malfunctions are to be located within the relationship between the Parliament and the Government.<sup>12</sup>

The two arguments bear some consequences when it comes to the proposed amendments to the Constitution. Those arguing for strengthening the Executive were open to the possibility of adopting the semi-presidential system; while those insisting on the relationship between powers defended the parliamentary system, only supporting those changes that would *rationalize* the functioning of the current frame of government.

The constitutional bill mirrored the latter argument. The reformers made the fundamental choice to identify the problem of the existing frame of government with Parliament's functions and attributions. In other words, the logic of the reform was to concentrate the efforts in reframing the legislative power to the benefit of the whole system.

The new Senate, the rationalization of the vote of confidence, the limitations on law decrees all were expressions of the same premise: the need to solve the problems by returning the legislative power to the Parliament (and specifically to the Chamber of Deputies) and reducing the intersection of normative functions with the Government.

Even the amendment of the provisions concerning the relationships between the State and the Regions mirrors the same 'constitutional logic':<sup>13</sup> to avoid clashes of legislative competences and to reduce conflicts and litigation.

The goal was to achieve a more efficient functioning of the existing frame of government, focusing on the legislative function and more broadly on the role of Parliament.

## **II. The Constitutional Procedure and Parliamentary Debate: An Overview**

The reform would have amended forty-five articles and abolished two articles (Arts 58 and 99) of the one hundred and thirty-four in force (and of the one hundred and thirty-nine of the original text).

The constitutional amendment procedure started on 8 April 2014 with the Senate Act no 1429, on government initiative. Few days later, on the 15<sup>th</sup>, the President of the Senate appointed the two majority rapporteurs. The Senate amended twenty-four of the forty-four articles of the Government proposed constitutional bill, and introduced changes to three more articles, not included in the original text. Specifically, the Senate submitted modifications to Art 63 (enabling the Senate to regulate Senators' incompatibility between offices

<sup>12</sup> Commissione per le riforme costituzionali, 'Per una democrazia migliore. Relazione finale, 17 September 2013', available at [bpr.camera.it/bpr/allegati/show/CDBPR17-127](http://bpr.camera.it/bpr/allegati/show/CDBPR17-127) (last visited 20 March 2017).

<sup>13</sup> C. Fusaro, n 6 above, 50-51.

hold at the regional or local levels); Art 73 (charging the Constitutional Court with the preventive control of constitutionality on electoral laws) and Art 74 (conferring to the President of the Republic the power to send selected provisions of a given law back to the Chambers for new deliberation).<sup>14</sup>

Readings and debates took four month and the final text was passed to the Chamber of Deputies on 8 August 2014. The Chamber approved fifteen of the twenty-four Senate amendments and introduced three brand new (minor) changes to Art 78 (on the majority required to deliberate on the state of war); Art 97 (on the principle of transparency in public administration) and to Art 122 (enabling the State to impose the principle of gender equality in regional electoral law). Moreover, the Chamber extended the provision on preventive constitutional adjudication to electoral laws approved during the current legislative term. Finally, it amended the provision concerning the election of constitutional judges to restore the bicameral appointment. After seven months, on 3 April 2015, the Chamber approved the text with no further change.

Pursuant to Art 138 of the Italian Constitution, requiring a double deliberation of the two Chambers at intervals of not less than tree months, the bill passed to the Senate. The Upper House amended four of the fifteen articles of the Chamber's first reading. The most relevant changes at this stage were three. First of all, the Senate insisted on separating the voting procedure on Constitutional Court's nominees (see below, para VI). Secondly, it raised the quorum for the election of the President of the Republic (three fifths of voters for each Chamber). Thirdly, the Senate introduced a subsection to Art 57, requiring the election of Senators to be consistent with the choices expressed by the electors. The amendments ended at this point. The Chamber approved the text with no changes on 11 January 2016; the Senate ten days later. The Chamber's final approval took place on 4 April 2016, after two years from the beginning of the parliamentary debate.<sup>15</sup>

### **III. Overcoming the 'Perfect Bicameralism' and Reframing the Legislative Authority: The Parliament in the Constitutional Reform Bill**

The central core of the constitutional reform is the overcoming of symmetric bicameralism. There is virtually unanimous agreement on the need to put an end to the duplication of functions between the two Chambers.<sup>16</sup> The

<sup>14</sup> The Chamber of Deputies later rejected the amendment to Art 74.

<sup>15</sup> It is worth mentioning that the reform, in the final session, has been approved by one hundred and eighty Senators, representing fifty-six per cent of the members, and by three hundred and sixty-one Deputies, representing the fifty-seven per cent of the members. See C. Fusaro, n 6 above, 57. The record of the parliamentary proceedings is available at <http://www.cameraitalia.it/temiap/2016/10/13/OCD177-2444.pdf> (last visited 20 March 2017).

<sup>16</sup> See C. Lavagna, 'Prime considerazione per uno studio sulla migliore struttura del Parlamento'

Italian system indeed is a unique example of perfect bicameralism.<sup>17</sup> The choice could be easily traced back to the founding fathers' intention to confer the Parliament a central role in the frame of government, after the marginalization it had suffered during the fascist regime. Nonetheless, it is historically more accurate to underline that the framers predominantly focused the discussion on the alternative between monocameralism and bicameralism, discarding the former for the fear of an *assembly dictatorship*.<sup>18</sup>

Especially in recent years, political science literature insisted on the connection between this peculiar institutional arrangement and both the legislative gridlock and the governmental instability that have long beleaguered Italy.<sup>19</sup> The reform addressed the issue by redesigning the nature of the Senate and by excluding it from the vote of confidence.

Even if there were no proposal to change the name, the new Senate would have been a Chamber of representation of Regions and local Governments.

According to the constitutional bill, the Senate would have consisted of a maximum number of one hundred members: ninety-five senators elected on a proportional basis and up to five senators appointed by the President of the Republic for a non-renewable seven-year mandate.

Seventy-four of the ninety-five would have been elected by the Regional Councils among their own members, while twenty-one by each Region among

*Studi di diritto costituzionale in memoria di Luigi Rossi* (Milano: Giuffrè, 1952), 278; L. Carlassare, 'Un bicameralismo discutibile', in L. Violante ed, *Storia d'Italia, Annali 17* (Torino: Einaudi, 2001), 325; P. Ciarlo and G. Pitruzzella, 'Monocameralismo: unificare le due camere in un unico Parlamento della Repubblica' 1 *Osservatorio AIC*, 1-4 (2013); R. Bin, 'Referendum costituzionale: cercasi ragioni serie per il no' 3 *Rivista AIC*, 1-6, 3 (2016). It is worth to be mentioned that the simultaneous functioning of the two Chambers has been contradicted by the constitutional praxis of rendering the Senate and the lower House more and more autonomous as far as their orders of business were concerned. Especially in recent years, for example, the extraordinary summoning of one Chamber no longer automatically triggered the summoning of the other, at least in some circumstances, as it is required by Art 62: see V. Di Ciolo and L. Ciaurro, *Il diritto parlamentare nella teoria e nella pratica* (Milano: Giuffrè, 2013), 355-356 and R. Di Cesare, 'Convocazione straordinaria e convocazione di diritto delle Camere' *Forum di Quaderni costituzionali*, 9 October 2016, available at [http://www.forumcostituzionale.it/wordpress/images/stories/pdf/old\\_pdf/372.pdf](http://www.forumcostituzionale.it/wordpress/images/stories/pdf/old_pdf/372.pdf) (last visited 20 March 2017).

<sup>17</sup> See M. Calamo Specchia, 'Un'analisi comparata del nuovo senato della repubblica disciplinato dalla legge costituzionale: verso quale bicameralismo?' 3 *Rivista AIC*, 1-27 (2016). The Author discusses the Italian constitutional reform in a comparative law perspective, arguing that new Senate would have been a hybridization of the Austrian and the German models.

<sup>18</sup> At the same time the founding fathers were aware of the risks of perfect bicameralism. To address this issue, the *Assemblea costituente* distinguished the two Chambers by differentiating composition, term and system of election. Nevertheless, the constitutional provision has been eluded firstly in 1953 and then again in 1958 with the anticipated dissolution of the Senate in order to level off its term with that of the lower House. Finally, with legge costituzionale 9 February 1963 no 2 the terms of the two Houses were levelled off. L. Paladin, *Diritto costituzionale* (Padova: CEDAM, 1997), 289 discusses the premature dissolution and especially the missed differentiation of the electoral systems. See also C. Fusaro, 'Per una storia delle riforme istituzionali' *Rivista trimestrale di diritto pubblico*, 431, 436 (2015).

<sup>19</sup> See G. Tsebelis, n 4 above, 87.

its mayors. Both elections were requested to be consistent with the choices expressed by the electors at the regional and local levels.<sup>20</sup> The locution ‘consistent with the choices’ has been interpreted in the sense of allowing the regional electors to indicate their preferences concerning the members of the Regional Councils they would like to be elected to the Senate.<sup>21</sup>

As the senators would have been expression of their territorial communities, the length of the senators’ mandate would have been the same of that of the Regional Councils that elected them and they would not have received additional emolument for their national office. The logic has been that of the co-existence (*compresenza*)<sup>22</sup> of the two levels of representation with a view to foster the dialogue with regional and local authorities.

In the constitutional design, the Senate would have been excluded from the vote of confidence, thus leaving the Chamber of Deputies the only one to directly control Government’s political accountability (see below para IV).

The exclusion of the Senate from the legislative-executive confidence circuit meets the need to guarantee governmental stability, reducing at the same time the impact of the Senate as veto player.<sup>23</sup> In the intention of the framers, there was also an additional (though intimately connected) result: to ensure that the Senate would have authentically functioned as the filter of Regional and local needs and exigencies, rather than a political chamber with some kind of veto power over policy changes.

The Senate and the Chamber of Deputies would have continued to exercise equal legislative functions according to a bicameral procedure in a limited number of areas and specifically: laws reforming the Constitution and other constitutional laws; implementation of the Constitution in subjects related to the protection of linguistic minorities, referenda regulation, functions and electoral legislation concerning municipalities and ‘metropolitan cities’; the Senate’s electoral system; and, finally, legislation attributing to the Regions further autonomy than is already envisioned in the Constitution.<sup>24</sup>

Consistently with its role, the constitutional reform bill involves the Senate in all the decisions related to Regions and local Governments, including the protection of linguistic minorities.

The procedure for non-bicameral laws has been designed to reduce uncertainty in both timing and outcomes. More precisely, the reform introduced deadlines for specific stages, including for the conversion of law-decrees into

<sup>20</sup> The provision, which was introduced during the third of the Senate’s deliberations, was one of the most controversial as it seemed to call into question the election by the Regional Councils. See I. Ciolli, ‘Il Senato della riforma tra forma e sostanza’ 4 *Rivista AIC*, 1-20, 14 (2016).

<sup>21</sup> See F. Sorrentino, ‘Sulla rappresentatività del Senato nel progetto di riforma costituzionale’ 2 *Rivista AIC*, 1-5, 3 (2016).

<sup>22</sup> See C. Fusaro, n 6 above, 60.

<sup>23</sup> See G. Tsebelis, n 4 above, 90.

<sup>24</sup> See Art 70 as amended by 10 of the constitutional reform bill, n 1 above.

law.

The Senate would have been granted the possibility to ‘recall’ the bills for examination, but the lower Chamber would have kept the last word. Some scholars have argued that this would have been a case of asymmetrical bicameral laws (*leggi bicamerali asimmetriche*).<sup>25</sup> Going into details, the examination of bills would have been initiated by the Chamber, which immediately would have transmitted the draft to the Senate after its approval. After deciding whether to examine it, the Senate could have proposed modifications to the text. The Chamber in turn would have been free to decide whether to accept them or not.

According to the constitutional reform proposal, the Senate examination of bills in the field of public budget would have been mandatory. Similarly, the Senate would have examined the bills covered by the so called ‘supremacy clause’, that is bills intervening in areas not attributed to national exclusive competence. Nevertheless, in both circumstances, a reduced duration of the procedure was prescribed.

Had the Senate approved amendments referred to bills covered by the aforementioned ‘supremacy clause’ by absolute majority, the Chamber could have overridden them only by absolute majority.

In all legislative procedures, the Government could have asked for a ‘vote by a certain date’ to ensure a ‘fast track’ (seventy days or eighty-five, at most) to the bills deemed to be essential to the implementation of its program. Some categories of laws, and specifically electoral laws and ratification of international treaties, would have been excluded.

The reform bill affected also the law-decrees. It would have *constitutionalised* the limits, currently established under legge 23 August 1988 no 400 as well as under the Constitutional Court’s case law, for issuing law decrees. Finally, the Renzi-Boschi reform provided for an extended deadline (of thirty days) for the conversion of law-decrees into a law when the President of the Republic asks the Chambers for a new vote on the conversion.

The reform would have required a joint session of the two chambers of the Parliament in a number of cases, including the election of the President of the Republic. The new composition of the Senate would have affected the requested quorum: two-thirds of the members of Parliament from the first to the third count, three-fifths in the following three counts, and absolute majority from the seventh count onwards. Given the size of the Senate, the Chamber of Deputies would have played the major role in the election, the Deputies being approximately the eighty-six per cent of the electorate.

The joint session would not have been preserved for the election of constitutional judges. The Senate proposal prevailed over a reluctant Chamber.

<sup>25</sup> See S. Staiano, ‘Le leggi monocamerali (o più esattamente bicamerali asimmetriche)’ 1 *Rivista AIC*, 1-9 (2016).



With a (presumable) view to promoting the democratic legitimacy of the body,<sup>26</sup> the vote on Constitutional Court's sittings would have been split into two distinct elections, with the Senate choosing two judges, and the lower House three.

#### IV. The Functions of the Senate in the Frame of Government

New functions would have been bestowed upon the Senate. Among these functions, both the representation of territorial institutions and the coordination between the State and the regional and local Governments would have been consequential to the Senate's role in the constitutional frame.

The constitutional bill introduces other functions. More precisely, the reform would have entrusted the Senate with: a) the evaluation of public policies and of the activities of the public administrations; b) impact assessment of European Union (EU) policies on the territories; c) participation on decisions regarding formation and implementation of EU law and policies. Moreover, the Senate would have participated in three additional functions: d) coordination between State, other entities of the Republic and the European Union; e) control over the implementation of State laws; f) advice on governmental designations of high-level officials.

At least some of the aforementioned functions (and specifically those cited under a); b) and e)) can be summarized in a broad concept of 'oversight functions'. Although parliamentary law, as a scholarly field, tends to couple parliamentary control with political sanctions on the Executive (and precisely with political accountability, ie the Executive's duty to resign from office),<sup>27</sup> it must be recalled that in contemporary parliamentary systems the Parliaments experience a number of alternative ways to exercise an influence over the Governments.<sup>28</sup> In other words, even if the Chamber of Deputies would have kept the monopoly on the vote of confidence, the Senate could still have had a strong impact on the legislative-executive circuit of political accountability.

<sup>26</sup> As it is provided in most of the federal and quasi-federal systems. The most cited example is the German Constitutional Court. See J. Luther, 'La composizione dei tribunali costituzionali e le autonomie territoriali: esperienze straniere', in A. Anzon, G. Azzariti and M. Luciani eds, *La composizione della Corte costituzionale. Situazione italiana ed esperienze straniere* (Torino: Giappichelli, 2004), 68. See also Id, 'I giudici costituzionali sono giudici naturali?' *Giurisprudenza costituzionale*, 2478, 2484 (1991). The Author argues that the mechanism of selection of the judges of the *Bundesverfassungsgericht* is designed to guarantee democratic legitimacy and representativeness to the Court.

<sup>27</sup> See A. Manzella, *Il Parlamento* (Bologna: Il Mulino, 2003), 441.

<sup>28</sup> See M. Luciani, 'Funzione di controllo e riforma del Senato' 1 *Rivista AIC*, 1-5 (2016), who specifies that the strictly political control (*controllo politico parlamentare in senso stretto*) is reserved to the Chamber of Deputies. The Author resorts to the difference between institutional political accountability (*responsabilità istituzionale*) and diffused accountability (*responsabilità diffusa*), elaborated by Giuseppe Ugo Rescigno, to explain the broad meaning of parliamentary function of control over the Government's conduct. See G.U. Rescigno, *La responsabilità politica* (Milano: Giuffrè, 1967).

One interesting aspect of the Senate's oversight functions is their latitude. The constitutional bill included activities that have both a local and a national dimension, such as the evaluation of public policies and of the activities of the public administration, as well as the control over the implementation of State laws; not to mention the involvement of the upper House in the EU bottom-up policy-making. One may be tempted to conclude that, although it would have had a region-based representation (and legitimization), the Senate would have been intensely involved in national policies. An alternative reading could be that the Upper House would have still performed its functions considering its position in the frame of government,<sup>29</sup> ie evaluating and assessing national policies only with the aim of guaranteeing the best impact on the Regions or to minimize externalities at local level.

The constitutional structure designed by the reform is potentially open to multiple strategies by institutional actors. More broadly, some scholars underlined that the frame of government resulting from the reform does not exclude in principle the ability of the Senate to paralyse the lower House at least in some specific circumstances. Apart from the obvious reference to bicameral laws, the scholarly debate concentrated on constitutional revision.

The procedure for constitutional reforms and constitutional laws has not been amended by the reform. Many commentators, working both in the field of constitutional law and of political science, insisted on the risk of gridlock in keeping perfect bicameralism in this context relying on the analysis of veto players in unicameral and bicameral arrangements.<sup>30</sup>

A completely different argument has been put forward by scholars who link the bicameral nature of the constitutional revision procedure to the quasi-federal asset of the Italian State (which is better qualified by the Italian locution *Stato autonomistico*). From their viewpoint, the reform bill is perfectly consistent with solutions coming from other legal systems with comparable institutional arrangements.<sup>31</sup>

## V. The Relationship between the State and the Regions

<sup>29</sup> This seems to be the reading of the constitutional reform suggested by M. Luciani, n 28 above, 4.

<sup>30</sup> Among constitutional law scholars see: M. Luciani, n 28 above, 4. Among political scientists see G. Tsebelis, n 4 above, 93-94. Others argued that the so called '*combinato disposto*', ie the combination between the constitutional reform and the electoral law (now declared partially unconstitutional) would have created a situation in which the majority party would have monopolized the Chamber of Deputies, thus substantially preventing future corrections to the imbalance of powers caused by the Renzi-Boschi reform: see V. Tondi della Mura, 'Se il rimedio è peggio del male. I rischi di una riforma costituzionale non emendabile' 3 *Rivista AIC*, 1-10, 9 (2016).

<sup>31</sup> See U. Allegretti, 'Un giudizio positivo e notevoli riserve. Appunti critici sulla riforma costituzionale' 2 *Rivista AIC*, 1-5, 4 (2016).

As far as the relationship between the State and the Regions is concerned, the constitutional reform intended to rationalize and reorganize the legislative competences.

The concurrent competence (*competenza concorrente*) would have been abolished, with the goal to reduce possible conflicts between the entities that form the Republic (and thus to decrease constitutional litigation). The shared competences would not have been entirely and expressly allocated to the State or to the Regions; therefore, the list of subject-matters would have been only partially transferred under national or regional competence.<sup>32</sup> For the subject-matters no longer included in the new catalogues the interpretation by the Constitutional Court would have been crucial.

Indeed, the other trajectory of the constitutional reform was to bring back to the State some key competences that had been neglected by the framers of the 2001 reform of Italian regionalism,<sup>33</sup> such as labour policies, anti-trust regulation and strategic infrastructures. Some of the State's competences would have been attributed with a special formula: the State would have adopted only general and common provisions (*disposizioni generali e comuni*), thus leaving to the Regions the power to integrate legislation according to specific needs and policy preferences.

The residual competence would have been left to the Regions in areas not falling under the State's exclusive legislative domain. Nevertheless, the constitutional bill introduced a 'supremacy clause', providing for national legislation, subject to a proposal by the Government, even on subject-matters of regional competence when necessary to protect the country's legal or economic unity or to guarantee the national interest.

The 'supremacy clause' has been widely discussed by Italian scholars. The core issue would have been to understand if the prerequisites for legislative intervention (country's legal or political unity and national interest) would have been considered justiciable or not by the Constitutional Court.<sup>34</sup>

In any case, the centripetal thrust would have been compensated<sup>35</sup> firstly

<sup>32</sup> According to some scholars, a solution of this kind can potentially determine an increased centralization: see S. Mangiameli, 'Il riparto delle competenze normative nella riforma costituzionale', in Id., *La riforma del regionalismo italiano* (Torino: Giappichelli, 2002), 116.

<sup>33</sup> See M. Belletti, *Percorsi di ricentralizzazione del regionalismo italiano nella giurisprudenza costituzionale. Tra tutela di valori fondamentali, esigenze strategiche e di coordinamento della finanza pubblica* (Roma: Aracne, 2012), 252.

<sup>34</sup> Some scholars argued that given the precedents, the Constitutional Court would probably interpret the clause exclude the justiciability of the prerequisites, thus risking to transform the supremacy clause into a 'vampire clause': see A. D'Atena, 'La specialità regionale tra deroga e omologazione' 1 *Rivista AIC*, 1-14, 9 (2016). According to other authors the supremacy clause would have introduced (*rectius* constitutionalised) a tool to make more dynamic the distribution of competences, thus addressing the concrete and diverse needs of complex societies: see A. Morrone, 'Lo Stato regionale e l'attuazione dopo la riforma costituzionale' 2 *Rivista AIC*, 1-12, 5-6 (2016).

<sup>35</sup> See A. D'Atena, n 34 above, 8.

by the creation of a Senate as a Chamber of Regions and secondly by the simplification of the legislative procedure required to deliberate on extended autonomy for both ordinary Regions and for those granted with special status. In other words, under the existing constitutional framework, it is possible to establish, by means of ordinary law, a kind of differentiated regionalism. Pursuant to Art 116, ordinary Regions can be granted special conditions of autonomy by requesting the Parliament to pass a law, which needs to be approved by absolute majority. As a consequence, Italian regionalism can be articulated as follows: Regions with ordinary attributions, 'special Regions' (*Regioni a statuto speciale*), and Regions with heightened autonomy.

The constitutional reform would have repealed the requirement of absolute majority, only requiring the Parliament to assess the Region's economic and financial conditions (and specifically the budget balance) in order to grant higher conditions of autonomy. Moreover, the new Art 116 would have been applied also to the *Regioni a statuto speciale*.<sup>36</sup>

For sure, an impulse in the direction of centralization has come from the global economic crisis, which has determined a centripetal trend in institutional arrangements all over Europe.<sup>37</sup> Indeed global competition between economic systems has pushed States towards centralism with a view to concentrate economic strategic choices at the national level, sometimes frustrating principles of federalism and, more broadly, local diversities and peculiarities.<sup>38</sup>

In the Italian scenario, though, this synthesis is somehow partial and oversimplifying. The centralized turn in Italian regionalism dates to the early days of the post 2001 constitutional reform. The quasi-federal arrangement of the aforementioned revision has been progressively eroded by concurring factors, including the organization of administrative competences, the reshaping of the distribution of legislative competences and the need for centralizing decisions in some sectors, such as environmental protection and regulation.

Some scholars argued that the centripetal trend has been a reaction to the flaws of the 2001 revision. The wide attribution of legislative competences was not properly balanced with institutional mechanism of coordination, with the result of allocating some shares of decision-making procedures to institutional places other than legislative assemblies (the so-called system of conferences or *sistema delle Conferenze*).<sup>39</sup> The final outcome was a certain rigidity of the dialogue between State and other territorial entities and ultimately their

<sup>36</sup> On the consequences of the constitutional reform on the status of the 'special Regions': see V. Onida, 'Regioni a statuto speciale e riforma costituzionale. Note minime su una singolare (futura) norma transitoria' 3 *Rivista AIC*, 1 (2016).

<sup>37</sup> S. Bolgherini, n 3 above, 71.

<sup>38</sup> On this global trend and with specific reference to the US case see: H.K. Gerken, 'Foreword: Federalism All the Way Down' 124 *Harvard Law Review*, 4, 44 (2010-2011).

<sup>39</sup> See A. D'Atena, 'Dimensioni e problemi della sussidiarietà', in G.C. De Martin ed, *Sussidiarietà e democrazia. Esperienze a confronto* (Padova: CEDAM, 2008), 43.

marginalization. On the contrary, the reform would have pursued the creation of a different kind of regionalism, with the allocation of powers being distributed according to a dynamic approach.<sup>40</sup>

Finally, the Renzi-Boschi reform would have amended the already existing power to replace (*potere sostitutivo*) regional and local institutions in the exercise of their functions. The new discipline would have been consistent with the new functions of the Senate. The Upper House would have had the function of advising the Government on the exercise of the aforementioned power when regional and/or local inaction would have violated international (including EU) obligations or compromised public safety, legal and economic unity or the guarantee of essential conditions for the exercise of rights. In line with the historical contingencies, the reform also provided for the possibility to remove from their functions the office-holders of governmental regional and local bodies in case they directly determined a situation of budgetary imbalance.

The constitutional reform of 2016 conceived the implementation of Italian regionalism as an objective to be achieved first and foremost via institutional mechanisms.

At the same time, though, the reform continued the tradition of Italian regionalism by focusing on regulating the perimeter of national and regional subject-matters and by adopting the solutions elaborated by the Constitutional Court in the last fifteen years.<sup>41</sup>

## **VI. The Constitutional Guarantees. The Constitutional Court and the Adjudication on Electoral Laws**

The constitutional reform would also have had an impact on the system of constitutional guarantees by reshaping existing institutions of direct democracy (popular legislative initiative and referendum) and introducing new instruments, such as propositional referenda (*referendum propositivi e di indirizzo*). Those new provisions were introduced during the Senate first examination of the text and not included in the government project of reform. Neither occupied the scholarly debate very much.<sup>42</sup> The disposition on popular legislative initiative partially mirrors provisions of the existing Senate's rules of procedure by prescribing precise timing for the examination of bills of popular initiative. The reform would have regulated the *referendum abrogativo* (the referendum to repeal laws in force) by lowering the validity quorum from the majority of

<sup>40</sup> See A. Morrone, n 34 above, 6.

<sup>41</sup> Ibid 5.

<sup>42</sup> See E. Castorina, 'Gli istituti di democrazia diretta nella legge di riforma costituzionale Renzi-Boschi: cosa cambia sul versante della democrazia partecipativa' 4 *Rivista AIC*, 1-14, 4 (2016) and E. De Marco, 'Il referendum propositivo nell'attuale progetto di riforma costituzionale. Aspetti problematici e spunti di riflessione', in A. Ruggeri ed, *Scritti in onore di Gaetano Silvestri* (Torino: Giappichelli, 2016), 776.

the electorate to the majority of the voters in the last elections, had the proposal been filed by at least eight hundred thousand voters.

The most interesting innovation would have been the *referendum propositivi e di indirizzo*, which would have been regulated by an *ad hoc* constitutional law. Those two instruments were included in Art 71 para 4, concerning the right to popular legislative initiative. This choice has been interpreted as the intention to draw a line between this kind of direct democracy and the one that is conveyed via the *referendum abrogativo*.<sup>43</sup> The latter is a kind of negative legislative intervention, which cannot surrogate the ordinary means to pass laws. The former is a form of active participation into the exercise of the legislative function.

Among the most interesting amendment of the constitutional reform of 2016, there is the preventive control of constitutionality on electoral laws. As is well known, the Italian system of constitutional adjudication is repressive, in the sense that constitutional adjudication intervenes after a law entered into force. In virtually all cases, with one exception,<sup>44</sup> the control is also concrete, being grounded on the application of an existing law. Therefore, the Renzi-Boschi reform would have introduced a brand new way to access the Constitutional Court. The proposed Arts 73 para 2 and 134 para 2 would have allowed one-fourth of the deputies and one-third of the senators to lodge a claim to challenge their electoral laws before the Constitutional Court within ten days from their approval. The Constitutional Court should have decided within ten days; during that period the law could not have been promulgated.

The introduction of *contrôle préventif* on electoral laws has a clear factual background, which is substantially unrelated to the core content as well as the driving force of the Renzi-Boschi reform. The Constitutional Court's ruling no 1 of 2014 paved the way to the debate over the *constitutionalization* of preventive adjudication of electoral laws.

There are at least two reasons why the decision was a pivotal one for the constitutional reform project. Firstly, the Court affirmed its jurisdiction even if the Italian system of constitutional adjudication could have theoretically prevented the proceeding to be brought before the *Consulta*.

Indeed, the case originated from an ordinary proceeding, whose central claim was the violation of the right to vote. The ordinary judge declared a stay and referred the case to the Constitutional Court, arguing for the unconstitutionality of the electoral law. According to some scholars, the incidental proceeding was *de facto* translated into a brand-new possibility to directly access the Court for the adjudication of constitutional rights.<sup>45</sup>

<sup>43</sup> See E. Castorina, n 42 above, 11.

<sup>44</sup> See Art 123, Italian Constitution concerning the preventive control of Regional Statutes (*statuti regionali*).

<sup>45</sup> See A. Anzon Demmig, 'Accesso al giudizio di costituzionalità e intervento "creativo" della Corte costituzionale' *Giurisprudenza costituzionale*, 34, 36 (2014). See also R. Romboli, 'La

The *Consulta*'s decision to declare the admissibility of the question of constitutionality contradicted the consolidated interpretation according to which electoral laws are a matter for parliamentary scrutiny.<sup>46</sup> In the judgment no 1 of 2014 the Court argued that Parliament's control (the so called *verifica dei poteri*) does not prevent ordinary judges to adjudicate on fundamental rights and especially on political rights.

The Constitutional Court's stand made sufficiently clear that electoral laws cannot longer be a 'no man's land' (*zona franca*)<sup>47</sup> of constitutional adjudication.

The second reason why the decision of 2014 was crucial to the constitutional reform is that the political mediation of interests failed and found a (controversial) surrogate in constitutional litigation.<sup>48</sup> The judicial proxy of the political confrontation had a number of consequences, including the opening of a debate over the legitimacy of the Parliament in office, notwithstanding the Court's statement concerning the legal legitimacy of the Parliament.<sup>49</sup> Eventually, the scholarly discussion affected the debate over the reform, with some opponents arguing the legislative assembly was not entitled to pass a constitutional law because of its illegitimacy<sup>50</sup> or, alternatively, because of its weak political legitimization.

In this scenario, the Senate decided to charge the Constitutional Court with the task of preventive adjudication of electoral laws with a view to couple the political assessment of conflicting interests with an immediate juridical scrutiny. At the same time the proponents intended to prevent the hybridization of the model of constitutional adjudication, which circumscribes the cases of direct access to the Constitutional Court.<sup>51</sup>

costituzionalità della legge elettorale 270/05: la Cassazione introduce, in via giurisprudenziale, un ricorso quasi diretto alla Corte costituzionale?' *Foro italiano*, I, 1836 (2013).

<sup>46</sup> See Art 66, Italian Constitution and Art 87, para 1, Decreto del Presidente della Repubblica 30 March 1957 no 361. See M. Siclari, 'Il procedimento in via incidentale', in R. Balduzzi and P. Costanzo eds, *Le zone d'ombra della giustizia costituzionale* (Torino: Giappichelli, 2007), 26 and A. Ciancio, 'Il controllo preventivo di legittimità sulle leggi elettorali ed il prevedibile impatto sul sistema italiano di giustizia costituzionale' *federalismi.it – Focus Riforma costituzionale*, 1-23, 19 (2016), available at <http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=32552> (last visited 20 March 2017).

<sup>47</sup> See A. Pizzorusso, '“Zone d'ombra” e “zone franche” della giustizia costituzionale italiana', in A. D'Atena ed, *Studi in onore di Pierfrancesco Grossi* (Milano: Giuffrè, 2010), 1021.

<sup>48</sup> See E. Grosso, 'Riformare la legge elettorale per via giudiziaria? Un'indebita richiesta di “supplenza” alla Corte costituzionale, di fronte all'ennesima disfatta della politica' 4 *Rivista AIC*, 1-12, 4 (2013).

<sup>49</sup> As was foreseen by Antonio Ruggeri since the press release of the Constitutional Court, before the handing down of the judgment: see A. Ruggeri, 'La riscrittura, in un paio di punti di cruciale rilievo, della disciplina elettorale da parte dei giudici costituzionali e il suo probabile “seguito” (a margine del comunicato emesso dalla Consulta a riguardo della dichiarazione d'incostituzionalità della legge n. 270 del 2005)' *Consulta Online*, 1-6, 5 (9 December 2013), available at <http://www.giurcost.org/studi/ruggeri31.pdf> (last visited 20 March 2017).

<sup>50</sup> See A. Pace, n 7 above, 4.

<sup>51</sup> See B. Caravita, 'La riforma costituzionale alla luce della sent. 1/2014' *federalismi.it*, 1-7 (2014), available at <http://www.federalismi.it/nv14/articolo-documento.cfm?artid=24022> (last

Proponents of the reform argued that the preventive nature scrutiny would have reduced political conflicts, while opponents maintained that those conflicts would have been simply transferred to the Court, politicising constitutional adjudication without benefiting the political climate.

For sure the preventive adjudication cannot preclude neither the jurisdiction of ordinary judges nor their activism. The theoretical possibility of a new incidental proceeding concerning the electoral laws would have been still in place.

In any case, despite the peculiar circumstances surrounding its introduction in the constitutional reform bill, the preventive adjudication of electoral laws would have emphasized the Constitutional Court's role as guarantor of the legality of the whole system, rather than as guarantor of constitutional rights.<sup>52</sup>

## **VII. The Simplification of the Constitutional Structure: The Abolition of the *Consiglio Nazionale dell'Economia e del Lavoro* (CNEL)**

It is worth mentioning that the constitutional reform bill would have abolished the *Consiglio Nazionale dell'Economia e del Lavoro* (CNEL – National Council for Economy and Labour), which is probably one of the most unknown and academically unexplored constitutional auxiliary body.

The Council is formed of sixty-five members: ten experts on economic, social and legal affairs, forty-eight representatives of public and private sectors producers of good and services and six representatives of association of social promotions and charities. There is also a president who is appointed by the President of the Republic.<sup>53</sup> The CNEL was designed to perform consultative functions to the benefit of the Parliament and the Government and to exercise legislative initiative on economic and social matters.

There was almost no debate on the abolition, in both academic literature<sup>54</sup> and political confrontation.<sup>55</sup>

There is a reason for that: the Council has never functioned properly. The establishment of the CNEL is generally explained with the need to add a room

visited 20 March 2017).

<sup>52</sup> A. Ciancio, n 46 above, 8.

<sup>53</sup> See legge 22 December 2011 no 214.

<sup>54</sup> Even those who strongly opposed the reform do agree on the need to abolish the Council: see U. De Siervo, 'Appunti a proposito della brutta riforma costituzionale approvata dal Parlamento' 2 *Rivista AIC*, 1-6 (2016). A different perspective comes from Adriana Apostoli, who maintains the need for an intermediate body which is able to function as neutral institution of dialogue between conflicting interests, citing the institutional experience of other European countries and the existence of similar bodies at the European Union level: see A. Apostoli, 'La soppressione del CNEL', in Id, M. Gorlani and S. Troilo eds, *La Costituzione in movimento: la riforma costituzionale tra speranze e timori* (Torino: Giappichelli, 2016), 227.

<sup>55</sup> See the parliamentary records of the debate on the reform, available at <http://www.camera.it/temiap/2016/10/13/OCD177-2444.pdf> (last visited 20 March 2017).



for filtering needs coming from the world of professionals, workers, and employers with a view to foster labour and economic reforms. More broadly, the CNEL mirrors the logic of integrating political representation with the representation of workers and professionals on the assumption that the combination of the two forms of representation is necessary to face the needs of complex societies.<sup>56</sup>

In practice, the Council has never performed this role due to many factors, including the implementation measures, which have *de facto* limited the exercise of constitutional attributions, circumscribing the power of legislative initiative.<sup>57</sup> Moreover, the Council has been progressively marginalized by the operation of parallel channels of dialogue between the social groups (the so called '*rappresentanze degli interessi*') and the legislative-executive circuit.<sup>58</sup>

According to many scholars, rather than a Council propelling reforms and policy changes, it works like a highly expensive research and analysis unit, with modest practical impact especially when reforms are compelled by historical contingencies.

Thus, the abolition fits perfectly the logic of the constitutional reform bill, since the suppression clearly pursues efficiency and reduction of costs connected to politics and the functioning of public administration.

### VIII. Some Conclusions

This analysis was meant to be a 'fresco' of the constitutional reform and does not claim to provide for an explanation of the failure of the referendum held in December 2016.

Moreover, there is no (presumed) inherent flaw of the constitutional bill that is able to explain *per se* the result of the referendum more than the complex political climate, the historical circumstances and the so-called implicit question of the referendum that is the approval/disapproval of Renzi's political choices.

The Italian constitutional reform affected many provisions of the Constitution, even beyond the initial content of the Government's proposal. Some scholars argued that the heterogeneity of the amendments intervention

<sup>56</sup> See M. Volpi, 'Crisi della rappresentanza politica e partecipazione popolare', in N. Zanon and F. Biondi eds, *Percorsi e vicende attuali della rappresentanza e della responsabilità politica* (Milano: Giuffrè, 2001), 129.

<sup>57</sup> Legge 5 January 1957 no 33 and legge 30 December 1986 no 936.

<sup>58</sup> See F. Pizzolato and V. Satta, 'I Consigli regionali dell'economia e del lavoro: fondamenti costituzionali e percorsi di attuazione', in C. Buzzacchi, F. Pizzolato and V. Satta eds, *Regioni e strumenti di governance dell'economia. Le trasformazioni degli organi ausiliari* (Milano: Giuffrè, 2007), 17.

was one of the weakness of the reform.<sup>59</sup> On the same basis, others derived the inadmissibility of the referendum question, relying on an analogic interpretation of the Constitutional Court's case law concerning the admissibility of referenda called for to repeal statutory laws.<sup>60</sup>

For sure the political climate urged changes that were not foreseen by the government proponents, including the new attribution of the Constitutional Court. From this viewpoint, the rhetoric of the '*manutenzione costituzionale*', which was supposed to minimize the escalation of political confrontation revealed itself as a double-edge sword. On the one hand the *fil rouge* of the constitutional reform (the reframing of the Senate and the consequential rethinking of the relationship between the State and the Regions) was partially watered down by the concurrence of other elements of constitutional design (such as the strengthening of some forms of direct democracy or the preventive control on electoral laws). On the other hand, the constitutional logic of maintenance probably downsized the theoretical premises of the reform.

In any case, the formula '*manutenzione costituzionale*' does not adequately sketch the Italian attempt to amend the Constitution. It may well have been a '*manutenzione*' from a formalist viewpoint, as fundamental principles remained formally untouched. Nonetheless and irrespective of any assessment of the contents of the reform, the constitutional bill intended to solve many problems connected to the functioning of the frame of government as well as to the efficiency of the system as a whole.

This peculiar feature of a reform project does not make less relevant the need for a constitutional change to be effectively rooted in the civil society,<sup>61</sup> rather than in the theoretical goodness of the legal solutions.

<sup>59</sup> See M. Cosulich, 'Degli effetti collaterali del voto referendario' 1 *Rivista AIC*, 1-14, 2 (2017).

<sup>60</sup> See B. Randazzo and V. Onida, 'Note minime sull'illegittimità del quesito referendario' 4 *Rivista AIC*, 1-7, 3 (2016).

<sup>61</sup> See A.A. Cervati, 'Diritto costituzionale, mutamento sociale e mancate riforme testuali' 1 *Rivista AIC*, 1-7, 2 (2017). The Author underlines that '*le costituzioni, quanto le stesse riforme costituzionali, sono un portato della storia e hanno radici nelle esigenze di mutamento sociale, spesso avvertite più dai comuni cittadini che dalla cultura specialistica o dal volontarismo dei politici di professione*' ('constitutions, as well as constitutional reforms, are the result of historical processes and have their roots in the demands for social change, which are often perceived first and foremost by citizens, rather than by specialists or politicians').