Constitutional Law in Italy

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Valerio Onida
Enzo Balboni
Marta Cartabia
Paolo Cavaleri†
Fabrizio D'Addabbo
Marilisa D'Amico
Antonio D'Andrea
Giovanni Guiglia
Matteo Nicolini
Maurizio Pedrazza Gorlero

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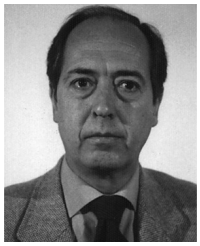
The Authors

Prof. Valerio Onida was born on 30 March 1936. He has been professor of Constitutional Law in the University of Milan, Faculty of Law, since 1983. Previously he had been teaching in the Universities of Verona, Sassari, Pavia and Bologna. He has been Justice in the Italian Constitutional Court from 1996 to 2005, and President of the same Court in the last four months of his term. He is presently President of the Italian School for Judiciary. His research activity covers different branches of the Italian Constitutional law, namely the budget process and the spending power, the working of the Italian system of Government, the Italian Regional system and the constitutional adjudication. Among his publications: *Pubblica amministrazione e costituzionalità delle leggi* (Milano, 1967); *Le leggi di spesa nella Costituzione* (Milano, 1969); *L'applicazione della Costituzione fra magistratura e Corte costituzionale*, in *Scritti per Mortati* (Milano, 1977); *'Costituzione italiana' e 'Costituzione provvisoria'*, in *Digesto delle discipline pubblicistiche* (Torino, 1990); *Il giudizio di costituzionalità delle leggi. Materiali di giustizia costituzionale*. I. *Il giudizio in via incidentale* (Torino, 1998); *La Costituzione* (Bologna, 2007, 2nd ed.); *Compendio di diritto costituzionale* (2nd ed.) with M. Pedrazza Gorlero (Milan, 2011).

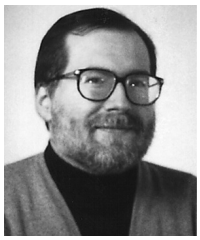
Prof. Enzo Balboni (1942) is professor of Constitutional Law, in the Catholic University of Milan, Faculty of Law, where he also teaches Comparative Constitutional Law. He coordinates the PhD School on 'problems of legality' in his university. Previously, he had been teaching in the Universities of Cagliari, Bologna, Trento and Brescia. His fields of research and publications have been on administrative law, regional and local law, comparative constitutional law, constitutional history. Beside other essays and articles, he has published: *Le origini dell'organizzazione amministrativa del lavoro* (Giuffré, 1968), *Il governo locale negli Stati Uniti d'America* (Giuffrè, 1975), *Amministrazione giudiziale* (Cedam, 1986), *Lezioni di diritto pubblico* (ISU, several editions up to 2000) and *Compendio di diritto costituzionale*, under the direction of V. Onida. (Giuffrè, second edition 2009). He is member of the board of directors of the legal periodicals *Quaderni Costituzionali* and *Diritto pubblico*.

The Authors

Prof. Marta Cartabia, was born on 14 May 1963. She is professor of Constitutional Law and was appointed Judge of the Italian Constitutional Court by the President of the Italian Republic on 2 September 2011. She was professor of Constitutional Law in the University of Milano-Bicocca, and previously she was professor of Public law and European Law, in the University of Verona. PhD in Law, at the European University Institute of Florence, in 1992. Research Fellow at the Law School of the University of Michigan, 1993. From 1993 to 1999, she had been Research Assistant of Constitutional law, at the University of Milan. From 1993 to 1997, she had been also Research Assistant to the Constitutional Court. She was member of FraLex, Framewor of legal experts of the European Agency of Fundamental Rights, Vienna. She was Inaugural Straus Fellow, at the New York University. The main fields of research cover the relationship between the Italian legal system and the EU; Constitutional justice; the sources of law and human rights. Among others, Marta Cartabia has published *La tutela dei diritti nel procedimento amministrativo* (Milano, 1991); and *Principi inviolabili e integrazione europea* (Milano, 1995); M. Cartabia – J.H.H. Weiler, *L'Italia in Europa*, Bologna 2000; M. Cartabia, *I diritti in azione* (Bologna, 2007); M. Cartabia, *Dieci casi sui diritti in Europa*, (Bologna, 2011).



Prof. Paolo Cavaleri was born on 2 December 1943. He has been professor of Public Law and Regional Law in the Faculty of Economics of the University of Verona. He is author of several publications concerning constitutional and regional Law, among which *Iniziativa economica privata e Costituzione 'vivente'* (Padova, 1978); *L'assistenza tra disciplina pubblica e libertà dei privati* (Milano, 1992), *L'evoluzione dello Stato regionale in Italia* (Padova, 1997); *Diritto regionale* (Padova, 2003).



Dr Fabrizio D'Addabbo was born in Pavia on 10 July 1957. He graduated in Law, from the University of Pavia. He accomplished post-graduate studies in the University of Milan, where he received the PhD in Constitutional Law, in 1992. In 1993, he received a research grant by the University of Milan. At present, he is researcher in Public Law in the faculty of Law of the University of Brescia. In recent years he has been teaching Regional Law in the University of Brescia. His major field of research concerns the constitutional organization of the State, in particular the President of the Republic. He is co-author of the following books: *La difficile alternanza. Il sistema parlamentare italiano alla prova, 1985–1987* (Milano 1988; *Verso l'incerto bipolarismo. Il sistema parlamentare italiano nella transizione (1987–1999)* (A. D'Andrea editor, Milano, 1999). His most recent publication is *Sovranità popolare e forma di governo: l'investitura dell'Esecutivo e lo scioglimento delle Camere secondo una concezione rispondente al principio democratico*, in *Alle frontiere del Diritto costituzionale. Scritti in onore di Valerio Onida*, edited by M. D'Amico and B. Randazzo (Milano, 2011).

The Authors

Prof. Marilisa D'Amico was born on 12 June 1965. She is Full Professor of Constitutional Law, Constitutional Law advanced and Constitutional Justice at the University of Milan, School of Law, Department of Public Italian and Supranational Law, Director of the Division of Constitutional Law and barrister before the Supreme Court(s). From 2011, she is also scientific coordinator of two specialization courses in Equal Opportunities and Discrimination and in women and corporate governance. In 1991 PhD in Constitutional Law, at the University of Milan. She has been doing research in Bayreuth (Germany), under the Supervision of Prof. Dr Peter Haeberle. She is author of several publications, among which: *Parti e processo nella giustizia costituzionale (1991); Giudizio sulle leggi ed effetti temporali delle decisioni di incostituzionalità (1993)*, *Donna e aborto nella Germania riunificata (1994); Il controllo di costituzionalità delle leggi. Materiali di giustizia costituzionale. Il giudizio in via incidentale (1998)*; *I diritti contesi* (Milano, 2008); *Il difficile cammino della democrazia paritaria* (Torino, 2011).

Prof. Antonio D'Andrea was born in Cerchiara di Calabria (Cosenza) on 19 August 1958. He has been a student in the Ghisleri College (Pavia) and graduated in the University of Pavia, Faculty of Law. He is professor of Constitutional Law in the Faculty of Law of the University of Brescia. He also teaches Public Law in the Faculty of Economics within the same University of Brescia. In past years, he had been teaching Public Law in the University of Calabria. His major field of research concerns the State constitutional organization, focusing in particular on the concrete way of working of the system of government in Italy. He has published several essays, among which: *Accordi di governo e regole di coalizione* (Torino, 1991); *Autonomia costituzionale delle Camere e principio di legalità* (Milano, 2004); *Costituzione alla mano* (Gussago, 2007); *Il Governo sopra tutto* (Gussago, 2009); in cooperation with others authors, *Verso l'incerto bipolarismo*. *Il sistema parlamentare italiano nella transizione 1987–1999* (Milano, 1999); *Lo sviluppo bipolare della forma di governo italiana* (Milano, 2003); *La rigidità bipolare del parlamentarismo italiano. Cinque anni di centrodestra (2001–2006)* (Gussago, 2008).

Prof. Giovanni Guiglia was born in Vercelli on 7 August 1956. He graduated in Law at the University of Pavia. He got a post-graduate diploma (Master) in Law of Environment and of Territory. He has been carrying out researches by the Universities of Pavia, Milan, Verona. He is currently Professor in Public Law Institutions at the University of Verona, Department of Law. Since 2010, he is responsible for the coordination of the activities concerning the PhD in Italian and European Constitutional Law, Verona University. Since 2011, he is Member and Coordinator of the Italian section of the *Academic Network on European Social Charter* (ANESC). He has published several essays, among which: '*L'autorizzazione alla*

presentazione dei disegni di legge governativi', Giappichelli (Turin, 1991); '*Il diritto all'assistenza sociale nella prospettiva multilivello*', CEDAM (Padua, 2005); '*I livelli essenziali delle prestazioni sociali alla luce della recente giurisprudenza costituzionale e dell'evoluzione interpretativa*', CEDAM (Padua, 2007); '*The opportunities of the European Social Charter (in Italy)*', in: http://www.europeanrights.eu (11 May 2011); '*I servizi sociali nel processo di integrazione europea*', ESI, Naples, 2012.

Dr Matteo Nicolini was born on 11 November 1977. He got his PhD in 'Italian and European Constitutional Law' in 2005. He is assistant professor of Comparative Public Law, Department of Law – University of Verona. His specific research fields are Comparative, Italian and European Constitutional Law; Federalism and Regionalism; Italian, European and Comparative Regional Law; Constitutional Adjudication; and Territorial Readjustment. He has been doing research in Chile and in Spain. He is author of several publications, among which are *Partecipazione regionale e 'norme di procedura'. Profili di diritto costituzionale italiano ed europeo* (Naples, 2009); with Francesco Palermo (eds.), *Federalismo fiscale in Europa. Esperienze straniere e spunti per il caso italiano* (Naples, 2012).

Prof. Maurizio Pedrazza Gorlero was born in Verona on 17 March 1940. He got his degree in law at the University of Milan. He has been teaching constitutional law in the Universities of Padua, Sassari, Verona, Milan and Catania. At present, he is honorary professor of Constitutional Law, Department of law – University of Verona, where he teaches constitutional foundations of journalism and media law. He has been doing research in Germany, France and Great Britain in the fields of fundamental rights, information, regions and sources of law. He is author of several publications, among which: *Le variazioni territoriali delle regioni*, I and II (Padua 1979 and 1991); *Giornalismo e Constituzione*, (Padua, 1988); *Le fonti del diritto* (Padua, 1995); *Il potere e il diritto* (Padua, 1999); *Breviario delle fonti del diritto* (Milan, 2005); *Saggi per un corso di diritto dell'informazione giornalistica* (Padua, 2006); *Il patto costituzionale* (Padua, 2009), *Le fonti dell'ordinamento repubblicano* (Milan, 2010); with Valerio Onida (eds), *Compendio di diritto costituzionale* 2nd edition (Milan, 2011); *L'ordine frattalico delle fonti del diritto* (Padua, 2012).

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List of Abbreviations

ANESC	Academic Network on European Social Charter
CSM	*Consiglio Superiore della Magistratura*
CICR	*Comitato Interministeriale per il Credito e il Risparmio*
CIPE	*Comitato Interministeriale per la Programmazione economica*
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
MP	Member of Parliament

List of Abbreviations

General Introduction

Chapter 1. Historical Outline of Italian Constitution

by Valerio Onida

§1. The Origins of the State

1. Italy is a relatively young State. The Kingdom of Italy came into being in 1861 as the result of the transformation of the Kingdom of Piedmont and Sardinia. At the beginning of the nineteenth century, after the Napoleonic wars followed by the restoration of the French Monarchy, the territory of the peninsula was still divided into a number of States. The north-western Kingdom of Piedmont and Sardinia, ruled by the House of Savoy, comprised the present regions of Piedmont, Valle d'Aosta, Liguria and Sardinia, in addition to Savoy itself. The central-eastern region of the north of the peninsula, presently occupied by Lombardy, Veneto, Trentino-Alto Adige and Friuli-Venetia Julia regions, were part of the Austrian Empire.

The central part of the country was occupied by the Duchies of Parma and Piacenza and of Modena, and the Grand Duchy of Tuscany, while the Papal States comprised the area which is presently Emilia Romagna (with the exception of the area which belonged to the above-mentioned Duchies), the Marches, Umbria and Latium. The Kingdom of the Two Sicilies, whose capital was Naples, stretched across the south under the reign of the Bourbon family.

2. The 1821 and 1848 liberal revolutionary uprisings brought about the creation of provisional governments in different parts of Italy, but it was only in the Kingdom of Piedmont and Sardinia that the *Statuto* promulgated under King Carlo Alberto in 1848 survived the temporary defeat of the liberals. The political aspirations of Italian liberals included unification of the peninsula, although they had very different ideas on how to achieve this goal. The supporters of Giuseppe Mazzini were in favour of a unitary Italian Republic, while other liberals thought they could build a federation of States under the leadership of the Pope as the sovereign of the Papal States.

Towards the middle of the nineteenth century, the political situation in Europe and Italy was such that the plan to unify the peninsula politically could be implemented through the expansion of the Kingdom of Piedmont and Sardinia, with the gradual annexation of the other territories after the so-called wars of independence.

3. Lombardy was annexed after the 1859 war, in which the Kingdom of Piedmont allied itself with France against Austria; at the same time Savoy was transferred to France. Shortly afterward, in 1860, the territories of the States in central Italy, including those of the Papal States with the exception of Rome, were annexed to Piedmont after plebiscites. The same happened of the Kingdom of the Two Sicilies, in the aftermath of the expedition of the 'thousand' headed by Giuseppe Garibaldi. The Kingdom of Piedmont therefore included almost the entire Italian peninsula (except for Rome and the region around Venice, still under the rule of the Austrian Empire), and the Piedmontese Parliament proclaimed the Kingdom of Italy (1861).

The political unification of the peninsula was largely completed in the following decade. The 1866 war resulted in the annexation of Venice and the Veneto region. In 1870, Italian troops conquered Rome and destroyed what remained of the Papal States. The capital of the Kingdom, earlier in Turin, and temporarily in Florence, was moved to Rome.

4. The regions in the north-east of the country (Trentino and Friuli-Venetia Julia) still remained outside the kingdom's borders and only became part of the Italian State after the First World War (1915–1918) and the end of the Austrian Empire, along with the South Tyrol area, where a large part of the population still speaks German.

Italy took over the territories to the east (Dalmatia) but subsequently lost them after the Second World War (1940–1945) together with a part of Venetia Julia (Trieste only returned to Italian rule in 1954). The Austrian border of Brenner and, except for a few modifications, the French border, remained unchanged.

5. It is also worth mentioning that Italy played a role, albeit a minor one, in the history of colonial expansion with the occupation of Somalia (1887–1889), Eritrea (1889) and Ethiopia (1936) in East Africa, and Lybia (1911–1912) in Northern Africa. After the Second World War all overseas territories were declared to be no longer under Italian rule, except for the temporary trusteeship on Somalia granted to Italy by the United Nations, which ceased in 1960.

§2. The Constitution of the Kingdom of Italy

6. Even after the capital was transferred to Rome in 1870, the Constitution and laws of the Kingdom of Italy remained largely those of its predecessor, the Kingdom of Piedmont and Sardinia, as enlarged by the annexations. This is understandable in light of the historical process described above.

The legal foundations of the new kingdom were found in the Savoy monarchy and the *Statuto* promulgated under King Carlo Alberto in 1848. The creation of the Italian State did not, therefore, coincide with any constituent process: the Piemontese *Statuto* became the first Constitution of the Italian State and continued to govern it, even if only formally, for over a hundred years.

7. The civil, criminal and administrative laws of the Kingdom of Piedmont were extended to the new territories. Piedmont's strongly centralized administrative structure, based on the French model because of the special ties between the House of Savoy and France, set the standard, with only minor changes, for the whole kingdom. This explains how a State born from the unification of many different territories and States, each with its own traditions and institutions, managed to become a centralized unitary State with total uniformity as to legislation and administration. Political unity was laid on the deep cultural, social and economic differences existing among the various regions of the country. It must be remembered that, although the regions annexed to the new State had very different political and institutional backgrounds, they had never experienced self-government. The new State, therefore, never had to face opposition arising from experiences in self-government that pre-dated unification. The State was instead perceived, at least by the cultural and political élite, as the historical realization of their aspirations for the freedom and unity of the country. The authorities were nonetheless very careful to prevent the newly gained unity from collapsing. Even very modest plans for administrative decentralization, such as the one proposed by Minghetti in 1862, were rejected for fear that they would jeopardize the newly won unity of the country. A grand project of legislative unification was carried out in 1865.

8. These statutes remained for a long time, and sometimes are still considered, the basis for the disciplines of the major areas of life, especially administration.

After the adoption of the *Statuto* in 1848, the Piedmontese State and, therefore, the Kingdom of Italy, became a 'constitutional' or 'representative' monarchy, modelled on the French Orleans monarchy of 1830 and the Belgian Constitution of 1831. The legislative power was exercised both by the King and by a bicameral Parliament, composed of a *Chamber of Deputies*, elected by a very limited franchise through a single member constituency majority voting system (except for a short period from 1882 to 1891), and by a *Senate* appointed by the King.

Legislation passed by both chambers was submitted to the King for assent and promulgation. The executive power, as well as the powers to set the rules for the implementation of the law and those relating to international diplomacy, rested formally with the King, who appointed and removed Ministers. The latter were declared 'responsible', unlike the King, whose person was deemed 'sacred and inviolable'.

9. In practice, a sort of English-style parliamentary government was established from the outset. The office of Prime Minister was held by a deputy who enjoyed a parliamentary majority and exercised the political leadership of the executive. In case of disagreement between the King (and the government) and the parliamentary majority, the *Chamber of Deputies* could be dissolved.

The government was organized both centrally, through ministries headed by a Minister, and locally, through prefects, representatives of the government in the provinces, as well as various decentralized bodies. Initially, only self-governing administrative organs were the municipalities, governed by elected mayors and councils, but enjoying limited autonomy and strictly controlled by the prefects and

the government. Subsequently also the provinces, run by elective bodies, became autonomous, albeit with very limited powers.

10. The judicial power was exercised by career magistrates, appointed by the King in accordance with law and not completely independent from the executive.

The *Statuto* recognized the traditional rights of civil freedom (personal freedom, freedom of domicile, of the press, of assembly – though not of association) and economic freedom (property rights), equality before the law without any distinction of 'title or rank', right to admission to civil and military offices.

The definition of rights was left to statutory law and their effective protection therefore depended on the fact that the relevant rules had to be adopted by the Parliament.

11. The system of guarantees was initially based on the power of the judicial to resolve all disputes concerning 'civil or political' rights, though judges were not allowed to annul any administrative act (pursuant to the 1865 Law No. 2248, attachment E).

In the aftermath of an 1889 reform, the Council of State (modelled on the French *Conseil d'État*) was given jurisdiction over citizens' appeals against administrative acts. This paved the way for a system of 'administrative justice' which is still emblematic of the Italian system.

The difference between civil and administrative justice is based on the case law distinction between 'perfect' rights (whose protection is left to ordinary judges) and 'legitimate interests', namely private rights that the law protects indirectly through the regulation of administrative actions. In practice, since the public administration can frequently and significantly affect the rights of individuals, disputes between the latter and the administration are settled by administrative judges, except when it is clear from the outset that the administration cannot exercise jurisdiction over the supposedly violated rights and except for private-law disputes involving patrimonial rights.

12. Once an act was passed by Parliament and had received royal assent, it was considered the supreme source of law and its contents could never be limited by any superior provision. Indeed, no institution could review the constitutionality of an act, except with regard to procedural flaws, since judges were not allowed to question legislative intent. This Constitution has therefore been defined 'flexible', since it could be derogated by an act of Parliament and because the *Statuto* mentioned no procedure for the amendment of its own provisions (which, in fact, were never expressly or explicitly amended).

13. The *Statuto* declared that the Catholic religion was 'the religion of the State', while other religions were 'tolerated in according to laws'. In fact, the relationship with the Catholic Church was one of the most important constitutional issues that the new State had to face, especially since the conquest of Rome had weakened the temporal powers of the Pope. The 'Roman question' remained open for decades. The Italian State passed the 'Law of Guarantees' (No 214/1871). This act sanctioned the freedom of the Church although it partially subordinated its institutional

life to the State. The State supervised the appointment of bishops but the Church was granted privileged status.

However, for a long time the Holy See stoutly asserted its claim to temporal power and its independence from the 'usurper' State, by advising the Catholics not to take part in the political life of the kingdom (this policy became known as the '*non expedit*').

14. A 'conciliation' with the Italian State, prepared for a long time, was finally reached in 1929, during the Fascist regime, with the stipulation of the 'Lateran Pacts' (comprising the Treaty, the Concordat, and a financial convention), which put an end to the 'Roman question'.

These agreements provided that the State would yield a small territory which gave rise to the Vatican City State, while the Holy See definitively renounced its claims on the rest of the old Papal States. It also reaffirmed the principle enshrined in the *Statuto* whereby the State recognized the Catholic religion as its official creed (Article 1 of the Treaty) while the Concordat, conceived as a bilateral act similar to international treaties, defined the rights and obligations of the Church towards the Italian State (covering privileges of the clergy, civil recognition of Catholic marriage, Catholic religion instruction in State schools, and recognition of ecclesiastical corporations). The pacts also provided for compensation to the Holy See for the transfer of ecclesiastical property to the State.

15. The post-unification Italian political system had a very limited franchise (in 1870 those entitled to vote constituted only 2% of the population). A small pool of voters with a specified income and cultural level was shared by 'parties' which were relatively unstable parliamentary groupings, often formed around the most prominent political leaders.

A progressive broadening of the suffrage took place in the last decades of the nineteenth century and the first decades of the twentieth, quite late compared to other European countries. Universal suffrage was granted, though only to men, in 1919.

In the meantime, both as a cause and an effect of the broadening of the suffrage, parties with modern features were founded in Italy. They took the form of stable and well-established organizations all over the country, which formulated political programmes and selected candidates for parliamentary elections, and tried to influence national politics in the Parliament and local politics throughout the country.

The Socialist Party was founded in 1896, and by 1919 it was the largest party of Parliament (in 1921 a split gave birth to the Communist Party. The Popular Party, composed of the democratic Catholics headed by Don Luigi Sturzo, was founded in 1919 and was largely represented in Parliament in the following period.

The establishment of new mass parties and the decline of the old liberal political class were accompanied by a 1919 change of the system of electing the Chamber of Deputies, which was reformed according to a proportional list method.

§3. The Fascist Regime

16. In Italy, as elsewhere in Europe, the First World War marked the beginning of a new era, including on a constitutional level. As mentioned above, the first Parliament elected after the war, in 1919, was composed of a largely new political class linked to new parties.

Nevertheless, the evolution of constitutionalism between the two wars, which inspired the experiences of Weimar Republic, republican Spain, and Austria, was missed by Italy, not only because of the persistence of the monarchy, but also and most importantly owing to the rise of the Fascist regime in 1922. Like those later established in Germany and Spain, this regime founded its doctrine and procedures on the explicit rejection of the principles espoused by the European liberal constitutionalism.

17. No Constitution was adopted under Fascism (the concept of Constitution being in sharp contrast with the culture of the totalitarian regime), and the country therefore continued to be ruled under the *Statuto* adopted by Carlo Alberto. But the legislation and the politics of the regime emptied the *Statuto* of its meaning: liberties were drastically curtailed by repressive laws; political pluralism was abolished with the transformation of the Fascist Party into a State institution and the prohibition of anti-fascist parties; and Parliament was deprived of its powers by a government dominated by its own leader, the 'duce' of fascism in the shape of Benito Mussolini. The ability to elect the Chamber of Deputies was first practically eliminated by providing for elections with a single list of candidates and no guarantee of a secret ballot (1934), and then formally suppressed with the dissolution of the Chamber itself and its replacement with a Chamber of Fascist groups and guilds, substantially appointed by the government (1939). The freedom of trade unions was suppressed by the establishment of single government unions and strikes were prohibited.

Only the monarchy, which saw its influence decreased by the primacy of the 'duce', and institutions like the Senate, which were connected to the King, were still alive, although no trace remained of the 'representative monarchical government' mentioned in Article 2 of the *Statuto*.

§4. The Collapse of Fascism and the Constituent Phase

18. During the 1930s, the Fascist regime enjoyed very high levels of passive support in Italy and its crisis came only with the war and the defeat of the German–Italian alliance.

In 1943, after the Allies landed in Sicily, the King, supported by portions of the fascist party, by the armed forces and the opposition which had developed within the Fascist Party, dismissed Mussolini and appointed Marshal Badoglio as the Head of Government. The latter shortly thereafter negotiated an armistice with the allied forces. Rome and most of the country were militarily occupied by the Germans, and the King and the government fled to the South, where the occupation troops of the

allied forces were advancing. At the same time armed resistance was beginning to build up in the North.

19. Italy was a theatre of war for two years. An 'Italian Social Republic' headed by Benito Mussolini and proposing a republican version of Fascism was set up in the North, under German occupation.

In the meantime, anti-fascist parties organized and established a *National Liberation Committee* (CNL), which claimed the political leadership of the country and opposed the monarchy's attempt to restore the constitutional order existing before the advent of Fascism. A truce was established between the King and the anti-fascist parties: the 'institutional question', that is, the choice of the constitutional order, whether monarchic or republican, was deferred until such time as the war was over and the entire country liberated. The King had to transfer his powers to his son, as a 'deputy of the Kingdom' and a provisional government was to be formed by exponents of the parties. At the end of the war a Constituent Assembly, elected by the people, would take any decision regarding a new Constitution. This agreement was put into effect after the liberation of Rome, in 1944.

After the liberation of the northern regions (25 April 1945), the supporters of the monarchy maintained that the choice of the form of State be submitted to the people by means of a referendum, which took place the same day when the Constituent Assembly was elected (2 June 1946, with women voting for the first time). The republican choice prevailed with around 12.5 million votes to around 10.5 million in favour of the monarchy, beyond 1.5 million blank or void ballots. The King Umberto II – who had in the meantime succeeded to his father Vittorio Emanuele III, as the latter had abdicated – left Italy and fled to Portugal, and the transition to the republican regime was assured by the Prime Minister Alcide De Gasperi, until the Assembly elected Enrico De Nicola as provisional Head of State.

20. The Constituent Assembly, three-quarters of which comprised representatives of the three main anti-fascist parties (Christian Democrats, Socialists and Communists), entrusted the drafting of the new Constitution to a seventy-five-member commission, chaired by Meuccio Ruini and made up of many leaders and renowned jurists from all parties. The new Constitution was approved by the Assembly by a majority of 85% on 22 December 1947, was promulgated on 27 December and came into force on 1 January 1948. On 18 April 1948, the first election of the Chamber of Deputies took place (the Christian Democrat party gained almost the 50% of votes) and shortly thereafter the new President of the Republic, Luigi Einaudi, was elected.

Chapter 2. The Features of the Republican Constitution

by Valerio Onida

§1. Rights and Duties of Citizens

21. The Constitution of the Italian Republic, adopted by the Constituent Assembly in 1947, reflects the main trends of the European tradition and embodies many of the principles which took root in continental Europe between the two World Wars.

The classical rights of civil and political freedom are proclaimed and developed in the Constitution. They are also enriched by more specific provisions and more precise guarantees and accompanied by a long list of social rights, peculiar to the 'welfare state' or 'social state', even though this term is not explicitly used in the Constitution, as it is, for instance, in the 1949 German *Grundgesetz*.

22. Freedom of association is expressly guaranteed along with other civil rights (Article 18). Much importance is given to the freedom of religion (Articles 19 and 20), and the choice made by Italy when it entered into the 1929 Concordat, as concerns relations with the Catholic Church, are confirmed (Article 7), even if the Constitutional Court has clarified that the Concordat cannot contradict the 'supreme principles' of the constitutional order and the main substance of the fundamental rights, and if the same Concordat was revised in 1984. The same pattern is followed for relations with other religions, which must be regulated by law on the basis of agreements with their respective representatives (Article 8).

The Constitution also places strict limits on criminal law, with the prohibition of the death penalty (Articles 25 and 27).

23. As concerns political rights, a prominent role is played by both the constitutional principle of universal suffrage (Article 48), and the acknowledgement of the role of the parties as a tool for citizens to 'contribute, by democratic means, to national policy' (Article 49).

24. Whereas constitutional provisions in the field of civil and political rights are mainly intended to set precise limits to the exercise of power, thus stressing the inviolability of certain freedoms, economic rights, as they tend to expand even to the detriment of other people's freedom and dignity, are recognized and guaranteed with more caution. Statutes must define the appropriate goals and methods of ensuring that property and freedom of initiative are not exercised at the expense of other rights.

25. In practice, when dealing with personal freedom, freedom of expression or voting rights, the Constitution is concerned with deciding *under which conditions* limits can be set or restrictive measures introduced (with formulas such as 'by an explained act of the judicial authority and only in cases provided for by law', Article 13). On the contrary, when it comes to economic rights, the Constitution specifies

that these 'cannot be applied in such a manner as to conflict with social utility' and that statutes are to prescribe 'such planning and controls as may be advisable for directing and coordinating public and private economic activities towards social objectives' (Article 41), as well as to ensure 'the social function' of private ownership and make it 'accessible to all' (Article 42).

26. The proclamation of 'the inviolable rights of the person, both as an individual, and as a member of the social groups in which his or her personality finds expression' and the appeal to fulfil the 'unalterable duties of political, economic and social solidarity' correspond to this approach (Article 2). The same can be said for the representation of the classical principle of equality, not only before the law 'without distinction as to sex, race, language, religion, political opinions, and personal or social conditions' (Article 3(1)), but also as 'substantial equality'. It is the responsibility of the Republic to 'remove all obstacles of an economic and social nature which, by limiting the freedom and equality of citizens, prevent the full development of the individual and the effective participation of all workers in the political, economic and social organization of the country' (Article 3(2)).

27. Besides these fundamental liberties the Constitution grants rights of 'welfare' benefits in the field of work (Article 4), education (Article 34) and social security (Article 38), the provision of which is left to Parliament within the limits of available resources, mostly coming from a tax system based on the citizen duty to contribute to public expenditures in proportion to their resources, and characterized by progressivity (Article 53), with the purpose of ensuring a redistribution of wealth in furtherance of social justice.

A prominent role is played by the rights of the workers (Articles 35–40), which can be defended and promoted through trade union activities (Article 39) and the right to strike, as defined by legislation (Article 40). Several constitutional principles express particular favour for private saving, widespread small property (Articles 44, 47), cooperative societies (Article 45).

28. These rights are guaranteed in part by the constitutional requirement that some matters be regulated by statute, thus limiting the resort to regulations or discretionary decisions passed by administrative bodies. Other guarantees are the full acknowledgement of the right to institute legal proceedings and defend oneself in a court before a judge (Articles 24, 25 and 113), and the creation of a judicial body in order to protect the Constitution, namely the Constitutional Court (Articles 134–137).

29. It is clear that judicial enforcement of welfare rights is only possible if the substance of these rights is defined by acts of Parliament. However, the constitutional provisions relating to these rights cannot be considered as merely deferring to specific laws or political 'programmes' left to Parliament's goodwill. On the contrary, constitutional provisions outlining aims can pre-empt conflicting legislative acts (and in case of violation justify review by the Constitutional Court), and guide the interpretation of acts of Parliament.

Moreover, the procedures for reviewing the constitutionality of laws make it possible to integrate and correct the contents of statutory provisions, especially by the frequent appeal to the principle of equality and the connected principle of reasonableness, thus allowing for a broader and more complete implementation of rights.

§2. The Organization of the State

30. The organization of the State, as outlined by the Constitution, is based on the unconditional recognition of the principle of democracy (Article 1, 'Italy is a democratic Republic founded on labour. Sovereignty belongs to the people who exercise it in the manner and within the limits laid down by the Constitution'), with a clear approach aiming at distributing powers and safeguarding individuals against oppressive State actions.

Among the political forces that were particularly involved in the adoption of the Constitution, those leaning towards liberal-democratic and social-Christian ideas (especially the Christian Democrats) tried hard to impose a vision of 'institutional pluralism' which, although in a totally democratic context, could avoid the risks and excesses of parliamentary unlimited 'sovereignty'. Marxist political groups, especially the Communist Party, were more in favour of a system granting as much power as possible to Parliament, which was considered the supreme expression of popular sovereignty, through the mediation of political parties.

31. The 'pluralist' vision prevailed. Its fundamental constituent elements are: a 'perfect' bicameral system of government, with two chambers having exactly the same powers; considerable Head of State's powers; some mechanisms aimed at guaranteeing the stability and authority of the government, which is nonetheless responsible to Parliament; stronger guarantees of independence of the judicial power from the executive; the existence of a body, independent from Parliament, responsible for reviewing the constitutionality of legislation and resolving other constitutional controversies; a regional form of government, with the Regions enjoying legislative and administrative powers, as well as the possibility of influencing national political developments; the possibility of organizing referenda to repeal national laws, on popular or regional initiative, which might oppose Parliament's legislative decisions (Article 75). Another very important characteristic of the 'pluralist' vision is a Constitution which cannot be modified by ordinary legislation, but only through a more rigid procedure which, although based on parliamentary resolutions, requires four readings and larger majorities. Such a method also allows parliamentary minorities (and actors outside Parliament, such as a group of voters or Regional Councils) to call a referendum on constitutional reforms that have been approved only by a bare parliamentary majority (Article 138).

32. Not all these elements had, or still have, the same importance, meaning and fate with regard to the evolution of the Italian constitutional experience, as will be shown in the following chapters, especially when dealing with the system of government.

33. The country's political government is based on political representation in Parliament and the principles of the parliamentary system, the application of which will be dealt with in more detail in Part II, Chapter 1. For the time being, we shall only examine its main features.

34. Parliament is composed of two Chambers elected (entirely in the case of the Chamber of Deputies and almost entirely for the Senate) by universal suffrage (Articles 56–58, see Part II, Chapter 3). Government is appointed by the President of the Republic (Article 92), and must enjoy the confidence of a majority in the two Chambers, and remains in office as long as it retains that confidence (Article 94, see Part II, Chapter 6). The Head of State, elected by Parliament which also comprises regional delegates on this occasion (Article 83), does not control government but has powers of coordination and guarantee, especially for the resolution of political and parliamentary crises, and can dissolve Parliament before the natural end of the legislature (Article 88, see Part II, Chapter 2). The representative system is also enriched by institutions of direct democracy, the most important being the referendum, which can be called at the request of a group of voters (almost 500,000) or five Regional Councils, in order to repeal statutes or acts having the force of law (Article 75, see Part I, Chapter 5).

35. As far as the territorial distribution of powers is concerned, the Constitution has confirmed the choice of a unitary State (Article 5), made when the Kingdom of Italy was established, although it provides for significant forms of administrative as well as legislative and political devolution, by the creation of twenty Regions (Articles 114–131), governed by elective bodies with legislative and administrative jurisdiction. The Republic also has over 8,000 municipalities and over 100 (today destined to be reduced) Provinces (Articles 114 and 118). This part of the Constitution has been deeply reformed by Constitutional Law No. 3/2001 (see below, §4).

36. The 'pluralist' nature of the Constitution appears mainly in its guarantee provisions. In accordance with the continental European tradition, the judicial function (see Part II, Chapter 7) is performed by professional magistrates (except for limited cases), usually selected by competitive examinations (Article 106) designed to test their technical skills. Their *status* is guaranteed both by the absence of external restraints (judges are subject only to the laws: Article 101, paragraph 2), and by a centralized system of government that has at its summit a Council composed mainly of representatives elected from among the magistrates themselves, besides other members elected by Parliament (Article 104, see Part II, Chapter 7, §2). The independence of 'special' courts (with jurisdiction over administrative, accounting and military matters) is instead statutorily guaranteed (Articles 103 and 108): statutes provide for a similar system of partial self-government. Although the judicial function is performed 'in the name of the people' (Article 101, paragraph 1), it cannot be influenced by political decisions taken directly or indirectly by the people in compliance with the democratic principle of majority.

37. Magistrates are not representatives of the people. They are called upon to enforce the law as their knowledge and conscience instructs them: policies are

established by parliamentary enactments or executive regulations and decisions, the fair enforcement of which is guaranteed by the judicial bodies and the trial system, culminating in the Court of Cassation's review of the uniform enactment of law (Article 111).

Criminal prosecution is compulsory (Article 112) and hence not dependent on the merely discretionary choices of the prosecutors, which can avail themselves directly of the judicial police force (Article 109). Citizens are protected from possible violations or miscarriages of justice by the trial system (divided into various jurisdictions) and the rules of fair trial, in which everyone can fully exercise their right of defence (Articles 24 and 111).

38. A special feature of the institutional order embodied in the 1947 Constitution is the creation of an organ of constitutional justice. In addition to the classical liberal guarantees of rights (such as the guarantee that certain rights be limited only by statute, the right of judicial protection, and the independence of the judiciary), this choice introduced not only a new form of guarantee designed to ensure the observance of constitutional provisions, but also a new element in the balance of powers, through the review of the constitutionality of laws and, more generally, the attribution of the power to settle constitutional controversies to the Constitutional Court, a non-representative, judicial body (Article 134). The latter is based on a model first established in Europe with Kelsen's Constitution of Republican Austria, then spread more recently to many European States.

39. The Constitutional Court (see Part II, Chapter 9) is composed of legal experts, partially taken from the judiciary and partially elected or appointed by other constitutional or representative bodies (Parliament and the President of the Republic, Article 135), but all fully independent. This choice reflects the two sides of the constitutional function of the Court: the impartial enactment of constitutional provisions, although often expressing general principles, and the political character of judicial review of legislation, hence entrusted to an independent body, different from the common judiciary. The Court is also called upon to settle constitutional disputes such as controversies between the central and regional powers, or between different State powers, to decide on the impeachment of the President of the Republic, and to rule on the admissibility of referenda (Article 134; Article 2 of Constitutional Law No. 1/1953).

§3. The Implementation of the Constitution

40. The implementation of the Constitution was a long and uneven process. Provisions dealing with the relations between Parliament, Government and the Head of State, peculiar to the parliamentary system, were implemented from the outset. The ones applying to the Constitutional Court, however, were not implemented until 1955. The system of self-government for 'ordinary' magistrates in the form of the High Council of Judges (*Consiglio Superiore della Magistratura*, CSM) was only instituted in 1958. Moreover, most of the acts of Parliament passed before or during the Fascist regime, including the civil, criminal and procedural codes dating back to

the 1930s and early 1940s, remained in force, mainly unchanged, and it was only in 1956 that the Constitutional Court started to repeal, though often in a partial and gradual manner, the provisions openly in conflict with the new Constitution (a new criminal procedure code was enacted only in 1988).

41. The Referendum Law was only passed in 1970, as a result of a political agreement between the sponsors of the Divorce Law (No. 698/1970) and the Catholic forces who supported a referendum for its repeal. Since the 1974 divorce referendum, in which 59% of the voters opposed the repeal of the law, a high number of referenda have been held, and only in very recent years have voters proved less willing to take part in them. They have been aimed at both contesting new legislation and promoting the modification of old statutes that Parliament hesitated or never bothered to change. The success of referendum petition often encouraged the Parliament to carry out reforms before the referendum itself could be held.

42. The Constitution's other major innovation, namely the regional system, was not implemented quickly, beginning with only the five 'Special Statute' Regions, set up in the main islands (Sicily and Sardinia) and in some border zones (Valle d'Aosta, Trentino-Alto Adige and Friuli-Venetia Julia, the later in 1963) established from the outset. The other regions were not set up until 1970, when the State Administration had already been restructured and consolidated according to a centralized pattern. The result was both partial and unsatisfactory, owing to the persistence of centralist legislative and administrative practices, the inadequacy of regional Administrative bodies, as well as the 'national' character and centralization of all political and social forces at least until the 1990s. A stronger devolution programme was enacted by means of ordinary laws in 1997–1998, while in 1999 and 2001 a constitutional reform has dramatically enhanced the powers of Regions and local bodies and reduced the State's control over them.

There was also a delay in implementing reforms of the central bodies of Government and the administration, as well as in modernizing and adjusting legislation to new problems. The Law dealing with the Prime Minister's Office and Government's rule-making power was passed in 1988, and only in 1999–2000 was legislation passed on the reorganization of the central administrative apparatus.

The new Criminal Procedure Code was also passed in 1988. The year 1990 saw the enactment of the law on strikes in public utilities, and the Television Law that definitively ended the State monopoly, which had already been challenged by a series of rulings of the Constitutional Court. That law crystallized the 'mixed' State-private system begun with the occupation of transmission frequencies by private firms, during a long-lasting legislative vacuum.

43. Relations between the State and the Church were long 'frozen' by the 1929 Concordat, explicitly cited in the Constitution. It was not until the 1970s that rulings of the Constitutional Court started to call some of its aspects into question. A global revision of the Concordat was carried out in 1984, and only afterwards 'agreements' with minority religious confessions were made in compliance with Article 8 of the Constitution, but as yet there is no general law on non-Catholic denominations, after Law No. 1159/1929.

§4. The Evolution of the Political System and Constitutional Reforms

44. The implementation (or lack of implementation) of the Constitution and, subsequently, the progressively growing doubts about the Constitution itself went hand in hand with the evolution of the political system.

45. The 1947 Constitution was primarily the result of the agreement among the three main political forces of the Constituent Assembly, namely the Christian Democrats, the Socialist Party and the Communist Party, albeit with significant contributions from representatives of other political currents, especially the liberal democrats. These forces were quite divergent. The former leaned towards Catholic liberal and social political ideas, but was long dominated by conservative groups. The latter were both of Marxist origins. The Socialist Party was the heir of the party founded at the end of the last century, while the Communist Party was the result of a 1921 split within the Socialist Party.

These three parties cooperated on a governmental level during the first years of the constituent period. In 1947, however, this cooperation came to an end and was replaced by the age of 'centrism', in which the Christian Democrats (whose first leader was Alcide de Gasperi) ruled with the support of smaller parties of the centre, while the Socialist and Communist parties to the left and the neo-fascist party to the right remained in the opposition.

It was with this political system that Italy joined the North Atlantic Treaty Organization (NATO) (1949), was one of the founding countries of the European Communities (1950–1957), carried out agricultural reform (1950–1954) and promoted an internal market economy, though one with strong participation by the State through shareholdings in State-holding companies such as IRI and ENI. The delayed and partial implementation of the Constitution during its first two decades partly stemmed from the harsh conflict between the centrist governments and the leftist opposition. Paradoxically, the staunchest defenders of the Constitution turned out to be the opposition parties of the left that had opposed some of its pluralist lines (such as regionalism and constitutional justice).

46. In the 1960s, the Christian Democrats, the Republicans and the Social Democrats (but not the Liberal Party) started a centre-left policy of coalition with the socialists that promoted, among other things, economic reforms aimed at increasing public control over economic development, as well as speeding up the remaining implementation of the Constitution.

The 1970s saw the first crisis of the centre-left coalition, and an attempt to build governments of national unity supported by the Communist Party (1976–1979) in a climate marked by plots, bombings, and massacres, and by the 'Red Brigade' terrorists who kidnapped and killed the leader of the Christian Democrats, Aldo Moro, in 1978. During the 1980s, governments were again mainly supported by Christian Democrats and Socialists and marked by intense political competition and conflict, the latter having taken an anti-Communist stand, whilst the communist opposition remained strong in Parliament.

47. In this period the majority and the opposition (favoured by parliamentary rules, such as the new parliamentary orders of the Chamber of Deputies, adopted in 1971), used to share many legislative decision powers, and there was a difficulty in articulating consistent government policies, owing to the proportional voting system and the high number of political parties.

48. Beginning in the 1970s, constitutional reforms were discussed more in depth, especially with the aim of giving more strength and stability to the executive. Parliament set up special commissions to draft reforms for the second part of the Constitution, dedicated to the organization of the State (although the fundamental principles and the first part, concerning the rights and duties of citizens, were not discussed), but in vain. The political forces were unable to reach an agreement on any of the proposed reforms (strengthening of the executive, the direct election of the President of the Republic, the revision of the bicameral system, and the strengthening of the regional system).

In the early 1990s, in the new international climate created by the collapse of the Eastern-bloc communist regimes, the Italian political system suffered a rapid crisis. On the one hand, political groups with a regional rather than a national scope (such as the Northern League, with its anti-fiscal and autonomist programme that later became, for a while, almost separatist) made their appearance and were successful. On the other, national members of the two main parties, the Christian Democrats and the Socialists, and their minor allies, were prosecuted after judicial inquiries unveiled a covert system of party funding, notwithstanding the laws passed in 1974 and 1981 on the State financing of political parties.

49. Public opposition to the party system increased significantly. The evolution of the political system was accompanied and partially influenced, or at least favoured, by electoral reform. A 1991 referendum and above all a 1993 referendum led to a change in the voting system for both the Chamber of Deputies and the Senate (1993), with a shift from a proportional to a majority system with single member constituencies, with a quarter of the seats proportionally distributed among the party lists or groups. Such a system was derived from the partial repeal of the former law for the election of the Senate, which was decided by the referendum; the Parliament subsequently adopted it, after a few changes, for both branches of Parliament. A separate vote from the lists, however, was envisaged for the Chamber of Deputies in order to assign the proportional share.

50. The last elections to use the old voting system took place in 1992. The following governments had a transitional character and were mainly composed of 'experts', responsible for initiating the process of balancing of the State budget, after years of resorting to national deficit spending. After Parliament was dissolved once again in 1994 before the end of the legislature and the first elections with the new voting system were held, the old party system looked deeply altered.

The Christian Democrats, now the People's Party, became a minority and suffered two successive schisms. The Socialist Party disappeared. The two main parties thus lost most of the electoral support they had previously enjoyed.

On the contrary, the Communist Party, though it was considered one of the main protagonists of the crumbling system, remained the most important component of the left, after changing its name to the Democratic Party of the Left, then Democrats of the Left, and losing its extremist wing, the Refounded Communist Party.

Most of the former Christian Democrat and especially Socialist voters contributed to the success of a new party, 'Forza Italia', established in 1993 by Silvio Berlusconi, a well-known media entrepreneur, owner of the three major private TV channels, who identified himself as the leader of the moderate part of public opinion.

On the right of the political spectrum, the small neo-fascist party, the Italian Social Movement, had abandoned its most prominent links with the fascist past and transformed itself into 'National Alliance', and managed to dramatically extend its support among the electorate, thanks in part to its alliance with 'Forza Italia'.

51. The 1994 elections were won by the centre-right coalition, allied with the Northern League, while the People's Party, which wanted to be the third political force, remained in the minority. The resulting government fell eight months later upon the withdrawal of the Northern League. In the wake of yet after another 'technical' government, the 1996 elections saw the victory of the centre-left line-up, the 'Olive Tree' coalition, headed by Romano Prodi, allied with the Refounded Communists, which did not, however, participate in Government and only partially shared its programme, thus preventing the new coalition from achieving the necessary stability. In 1998, the government of Romano Prodi lost its majority in the Chamber of Deputies, but new centre-left governments, headed by Massimo D'Alema, former Secretary of the Democrats of the Left, then by Giuliano Amato, were established, in a very fragmentary parliamentary situation with many small and unstable groups. In any case both Chambers reached their ordinary term. In the 2001 elections, the centre-right coalition, headed by Silvio Berlusconi, and of which the Northern League had become a stable partner, won a large majority both in the Chamber of Deputies and in the Senate, and Mr Berlusconi became the Prime Minister.

Also the new legislature reached its ordinary term in 2006. The majority leaded by Mr Berlusconi led to the enactment of some very disputed laws: statutes challenging the judicial power and trying to stop trials opened towards the Premier (one of those laws was annulled by the Constitutional Court); a new reform of the electoral system which went back to a proportional system in which the voter chooses the party but cannot choose the person, and includes a 'majority prize' ensuring a 55% majority in the Chamber to the most voted (even if from far less than the 50%) coalition; and finally a reform of the second part of the Constitution, that failed to be approved in the confirmative referendum (2006).

In the 2006 general elections, the centre-left coalition headed by Romano Prodi won with a very thin majority: after about two years the dissent of a few members of the Parliament produced the dissolution of the majority, and new elections took place. They were won by the Berlusconi's party, which in the meanwhile had lost the 'centrist' group 'Unione di centro', but had unified 'Forza Italia' and 'Alleanza

Nazionale' with the new name of 'Popolo della libertà'. New conflicts between politicians and judges took place; a new statute aimed to stop trials towards Mr Berlusconi was approved but after a while annulled by the Constitutional Court. Not even the new majority remained stable. A group headed by the Speaker of the Chamber of Deputies, Gianfranco Fini, split from the majority; many members of Parliament changed their flag towards one direction or another, and the Premier could maintain the parliamentary confidence only due to the support of isolated single members: until, in November 2011, while the economic and financial crisis in Italy and in Europe became heavier, he was pushed by the President of the Republic, Giorgio Napolitano, to retire. A new Government was put in charge, headed by Mario Monti, just appointed as life Senator, formed by Ministers qualified as 'technic' ones, and supported in Parliament, not without difficulties and conflicts, by both the Popolo della libertà and the largest parties of the former opposition, in a sort of 'large coalition', though not fully accepted and negotiated. Minor groups remained at the opposition, both on the right wing (Northern League) and on the left one (Italia dei valori). [In 2013 new general election took place].

52. In the 1980s and 1990s, the debate on constitutional reform grew to become one of the central issues in Italian politics. Appeals for a radical and comprehensive change of the constitutional system, particularly encouraged by the President of the Republic, Francesco Cossiga, in a 1991 message to the Chambers, became so strong that many talked, albeit improperly, of the advent of a 'Second Republic'. Many proposals were also put forward in favour of a constituent process that could make a break with the old system through the election of a special assembly.

53. Some currents of opinion reckoned that the system of government should radically change as a consequence of the reform of the proportional voting system which took place in 1993. In fact, the electoral reform and the concomitant reorganization of the political system, which was both a cause and a consequence of the reform, indicate that the parliamentary system envisaged in the 1947 Constitution, in line with those of most European countries, from Great Britain and Germany to Spain, is able to function in many different ways and to reflect innovations in the political system. It can also give rise to the stable and efficient government desired by many proponents of constitutional reform, when certain political and other conditions permit.

54. Many proposals, especially those supported by the centre-right forces, tend to change the parliamentary system into one where the chief executive (Head of State or Prime Minister) would be elected by universal and direct suffrage, and to reform the bicameral system. Furthermore, tensions between political and parliamentary forces on the one hand, and judges on the other have paved the way for proposals for a constitutional reform of the judicial system which would distinguish between investigating and adjudicating magistrates, introduce some form of control on the exercise of the powers of the prosecutors, and reduce the judiciary's powers of current nearly full self-government. Proposals to widen the powers of the Regions and local authorities were largely supported as well.

55. To date, several attempts to draw up, by means of special parliamentary commissions, and to approve a comprehensive reform of the Constitution concerning the whole part dealing with the organization of the State, have failed (see Part II, Chapter 4, §4). The only reforms which have been successful in the late 1990s and early in 2000, are those concerning the principles of 'fair trial' (Constitutional Law No. 2/1999); the organization and the powers of Regions and local authorities (Constitutional Laws No. 1/1999, No. 3/2001); and the vote for Italian citizens resident abroad (Constitutional Laws No. 1/2000, No. 1/2001). In particular, early in 2001, a little before the end of the legislature, Parliament passed, albeit with a very thin 'absolute' majority of the members, a constitutional law which radically amended Title V, Part II, of the Constitution dealing with Regions and local authorities. A referendum was requested both by the centre-left majority (in order to reach a popular confirmation of the law), and by the opposition (in order to oppose the law). In October 2001 the voters approved the law, although only about 35% of voters went to the polls: in this case, in fact, the Constitution did not require a 'quorum' to make the referendum valid.

56. After the failure of the last attempt to pass an 'organic' constitutional reform in 1998, attention was focused on the issue of electoral reforms. A referendum designed to eliminate the remaining proportional share in the electoral system of the Chamber of Deputies took place twice, in 1999 and in 2000, but on both occasions less than 50% of voters went to the polls, making the referendum invalid.

57. Finally, the centre-right majority passed in 2005 a new comprehensive reform of the second part of the Constitution, but, as already mentioned, the constitutional law failed to be confirmed in the referendum of 2006. Since then, no reform of the Constitution, except the balanced budget in the State budget, requested by European institutions and passed in 2012 (Constitutional Law No. 1 of 2012), has been approved, though many proposals have been presented to the Chambers. Neither has been successful to date the proposals aimed to change the electoral system, although negotiations inside the new large majority are in course.

As the constitutional reforms are concerned, the author of these pages is convinced that the issue was actually 'mythicized' in Italy, as if the roots of evil in this country were to be sought – and remedied – in constitutional rules. The political, social and economic roots of such problems, the likelihood of resolving them by legislation and political procedures, and most of all the risks that hazardous reforms could pose to the institutional balance of powers have been underestimated. However, the possibility of carrying out constructive reforms both at the constitutional and other levels aimed at improving the functionality of the system, have often been neglected in order to pursue the 'myth' of an overall constitutional reform or of a deep change in the system of government.

Part I. Sources of Law

Chapter 1. Introduction

by Maurizio Pedrazza Gorlero – Matteo Nicolini

58. The Italian legal system belongs to the civil law legal tradition. As a consequence, the main source of Italian law is legislation, and the legal system is mainly based on written law. It should be recalled that custom is a source of law as well; however, it cannot contradict written legislation nor originate legal norms conflicting with written provisions. Indeed, custom cannot act *contra legem*. To put it another way, customary law can only fill in gaps where the written law is silent or insufficient, or integrate written legislation. Custom accepted by the legal order may be classified as custom *secundum legem* or as custom *praeter legem.* A typical example of custom *secundum legem* is trade custom, which only applies to subject matters regulated by written legislation, providing that law explicitly refers to it (see Article 8, General Provisions of the 1942 civil code). The importance of custom as a source of law at constitutional level is much more debated, albeit it is possible to recognize room for its existence. First, the Constitution does not provide for a detailed regulation of all the relevant aspects of State organs. Thus, customary law can interstitially integrate the written constitution. Second, the Constitutional Court acknowledged the existence of customs at constitutional level both in the case of the autonomous estate of constitutional organs' accounts (CC n. 129/1981) and in the case of withdrawal of confidence to a specific minister (CC n. 7/1996). In addition, the Constitutional Court recognized the possibility that customary law integrates the parliamentary legislative process (CC n. 140/2008).

59. The Constitution does not provide a complete account of the sources of law. An incomplete and obsolete list can be found in Articles 1–4 of the General Provisions of the civil code, where the sources are arranged on a hierarchical scale, based on their legal force. Thus, we find laws, regulations, corporative norms, and customs. However, the civil code was enacted in 1942, that is to say prior to the Constitution. Provisions referring to corporative norms are no longer in force, since they were repealed after the defeat of Fascism and the dismantling of its corporative system. Corporative norms should be now replaced by collective labour agreements under Article 39 of the Constitution. This provision, however, has never been implemented (see above, General Introduction Chapter 2). To sum up, the general provisions of the civil code set an incomplete list of sources of law because they do not take into account the numerous sources of law introduced by the Constitution.

60. Nor does the Constitution gives a comprehensive list of the sources of law. Indeed, under the 1948 Constitution, there has been a remarkable increasing in their number. For instance, the Constitution added new sources at constitutional level, i.e., having a force superior to that of the acts of Parliament, such as constitutional laws amending the Constitution and constitutional laws that are not formally incorporated in the body of the Constitution. Moreover, Italy has a regional form of government, so that the Constitution regulates legislation at regional level as well. Furthermore, the Constitution contains provisions that deal with specific subjects, such as the relationships between the State and religious denominations. In other words, Italy has a pluralistic-oriented constitution: there are numerous legal sources and several entities are entitled to legislate.

61. The sources the Constitution sets forth are those placed at constitutional and legislative level. The legislative power cannot set up sources different from those mentioned in the Constitution without having recourse to the constitutional amending formula set in Article 138 of the Constitution. Vice versa, the Constitution does not regulate secondary or subordinate legislation. The sole references to subordinate legislation can be found in Articles 87 and 116, VI, of the Constitution. Whereas Article 87 of the Constitution refers to the enactment of executive regulations by the President of the Republic, Article 116, VI, distribute subordinate legislation powers between the different tiers of government. As a consequence, secondary legislation is 'open' and can be changed and integrated by subsequent acts of the legislative power. The most relevant provisions regarding executive regulations can be found in Law No. 400/1988. Regional basic laws set regional regulations. Local authorities' regulations are made under Article 7 of the Legislative Decree No. 267/2000.

62. Such a high number of sources of law – created partly by the Constitution and partly at legislative level – can be classified according to different criteria, which are particularly useful in order to solve antinomies between inconsistent norms conflicting with each other.

The criteria for solving antinomies are: the chronological criterion, the hierarchical criterion and the criterion of competence. The chronological criterion applies to solve conflicts between laws enacted by the same legislative body or between laws with general or equal competence and rank: between two statutes of the National Parliament, between two statutes of a Regional Legislature, between a statute of Parliament and a legislative decree, etc. In case there are two inconsistent or conflicting statutes, the later repeals the earlier to the extent of the inconsistency (*lex posterior derogat priori*').

The hierarchical criterion applies between sources arranged on a hierarchical scale: the source of higher rank determines the invalidity of the source of lower rank inconsistent therewith. For example, subordinate legislation must be consistent with primary legislation; where there is inconsistency between primary and subordinate legislation, the former prevails.

The criterion of competence refers to sources, to which the Constitution confers the regulation of a specific subject matter, to the exclusion of the others. For example, the internal organization of the Houses of Parliament is a matter reserved

to their own rules (Article 64 of the Constitution). An incompetent source regulating a reserved matter is invalid and can be challenged before the Constitutional Court. In certain cases, it is necessary to apply different criteria in order to solve antinomies between sources of law. For instance, both the criterion of competence and the hierarchical criterion are applied to regulate the relationship between the acts of the Parliament and regional laws.

63–65

Chapter 2. External Sources: International Law

by Maurizio Pedrazza Gorlero – Matteo Nicolini

63. The Italian system is an 'original' system, i.e., a legal system that draws from itself the foundation of its own effectiveness. In this respect, it considers the system of international law – as well as those of foreign countries – as separate. In order for international law to enter into national law, some legislative action must be enacted at domestic level. As a consequence, all international sources must be incorporated in order to produce any domestic legal effects. To sum up, Italian legal system is impenetrable to legal rules originated by external sources, unless it allows them to get legal relevance within it. This is a form of self-imposed limitation of sovereignty, which must derive from the Constitution when it operates automatically, as for international customary law (Article 10, I, Constitution). In the case of international treaties, the incorporation of international law requires a legislative procedure. The ranking given to international provisions depends on the provision incorporating the treaty. Thus, customary norms acquire quasi-constitutional ranking; international treaties enjoy the same ranking of the internal provisions. The Italian legal system has connections with the international legal system, the foreign systems and the European legal system. These connections are regulated by procedures and rules, and differ from each other for importance and effectiveness.

§1. Incorporation of International Law into Domestic law

64. The way through which international law is incorporated into the domestic legal system depends on the nature of the source. Thus, international customary law and international treaties are incorporated according to different procedures.

§2. Incorporation of International Customary Law

65. 'Customary law' can be defined as an unwritten source of law. It exists where there is repetition of a certain legal practice having such regularity of observation in a place ('objective component': *usus* or *diuturnitas*) as to justify an expectation that the relevant actors consider it to be law and observe it on the ground of its binding legal effect ('subjective component': *opinio juris ac necessitatis*).

Under Article 10, I of the Constitution, Italy incorporates 'the generally recognized tenets of international law' – i.e., international customary norms – into its legal system. Pursuant to Article 10, I of the Constitution, harmonization of national law with international customary law is accomplished through a mechanism of automatic incorporation. It is what Italian jurisprudence calls 'mobile' (or 'formal') reference to the norms produced by international sources at customary level.

International customary norms (*rectius*, the domestic provisions which incorporate them) place themselves at a level, which is intermediate between the Constitution and primary legislation. As a consequence, the internal sources incorporating

international customary norms can be defined as 'atypical', because they enjoy a special rank (an intermediate one) in the Italian legal system. If customary norms and subsequent primary legislation are inconsistent, the earlier are deemed to repeal the latter to the extent of the inconsistency. Vice versa, inconsistent primary legislation is void and can be challenged before the Constitutional Court (CC n. 278/1992, 172/1999, 131/2001).

Customary norms which have come into force prior to the Constitution prevail on the Constitution according to the *lex specialis rule*. Customary norms may depart from constitutional provisions, but cannot violate the 'basic principles' of the same constitutional system (CC n. 48/1979).

§3. Incorporation of International Treaties and Agreements

66. Italy adopts a dualistic approach to international law. As a consequence, international treaties are part of international law, and have no relevance in domestic law until an act of the Parliament is enacted to give them effect. Hence, international treaties require some legislative action for their incorporation into the national legal system.

Incorporation of international treaties requires either an act of Parliament, which reproduces the provisions of the treaty (*legge di esecuzione* in the strict sense) or an act, to which the treaty is annexed (*ordine di esecuzione* or enforcement clause). Whilst the earlier directly incorporates the treaty, the latter (enforcement clause) refers to the content of the annexed treaty. The enforcement clause is said to ensure a 'fixed' (or 'material' or 'upon receipt') reference to the specific provisions laid down by the international treaty.

The act of Parliament incorporating international treaties is an ordinary act of the Parliament. As a consequence, it can be ranked as an act of primary legislation hierarchically inferior only to constitutional sources. It may therefore be repealed by a subsequent act of Parliament (CC n. 14/1964 and No. 96/1982), notwithstanding the consequences for the State within the international system as a result of the repeal. On the contrary, abrogative referenda cannot be held on acts incorporating international treaties (CC n. 16/1978; CC n. 26/1982). This last assumption is held on the ground of the constitutional provision prohibiting laws authorizing the ratification of international treaties to be submitted to abrogative referenda (Article 75, II, of the Constitution).

§4. Incorporation of Lateran Pacts

67. According to Article 7, II, of the Constitution, the acts of Parliament incorporating the Lateran Pacts can be amended only by a subsequent act of the Parliament, provided that the proposed amendment has been preceded by a bilateral agreement between the State and the Catholic Church. This is due to the mutual recognition of sovereignty of State and the Church within their respective jurisdictions. To put it another way, the Constitution regulates State–Church relations

according to the so-called concordat principle. Thus, Article 7, II of the Constitution confers upon the acts incorporating the Lateran Pacts a force of law that is superior to that of the other acts of Parliament. Moreover, such acts are able to depart from constitutional provisions that do not contain 'the supreme principles of the constitutional system' (CC n. 30/1971), such as the principle of equal protection of the laws (CC n. 18/1982).

In addition, they cannot be repealed by constitutional provisions, which do not contain the 'supreme principles of the constitutional legal system'. As mentioned above, the amendment to the Pacts require an 'atypical' act of Parliament, which must be preceded by an agreement between the State and the Catholic Church. This agreement must be stipulated in the external common legal system. The acts incorporating the Lateran Pacts have a force of law comparable to constitutional laws. In fact, the phenomenon of the 'atypical' sources consists in the separation of form and effectiveness of the source. As a consequence, the active force – i.e., the ability of innovation of the legal system – corresponds to a different resistance to abrogation (passive force).

§5. International Treaties Binding Primary Legislation under Article 117, I of The Constitution

68. Article 117, I of the Constitution, as amended by the constitutional act No. 3/2001, states that legislative powers shall be vested in the State and the Regions in compliance with international obligations. Thus, Article 117, I of the Constitution sets up an additional limit to State legislative power. Such a limitation was previously set forth only in the basic laws of the 'Autonomous' Regions (Article 3, I, basic law for Sardinia; Article 2, I, basic law for Valle d'Aosta/Vallée d'Aoste; Article 4, I, basic law for Friuli Venezia-Giulia; Article 4, I, basic law for Trentino Alto-Adige/Südtirol). However, the Constitutional Court extended such provisions in order to bind all Regions to the respect of international obligations (CC n. 49/1963).

As for the State legislative powers, it has been disputed whether Article 117, I simply reasserts what Article 10, I states with regard to international customary law, or it introduces a legal obligation of compliance with international treaties. It should be argued that, under Article 117, I of the Constitution, Italy does not adhere to the monistic doctrine. The constitutional provision does not refer to any source of law, neither domestic nor international. On the contrary, it refers only to the effects of the incorporation, i.e., to the binding effects of international obligations over the national legal system. Article 1, I of the Law No. 131/2003 – which implements Article 117, I of the Constitution at legislative level – holds the same assumption, by expressly referring both to international customary law and to international agreements as a source of the international obligations binding the legislative power.

The Constitutional Court held that the international treaties binding primary legislation under Article 117, of the Constitution are only those consistent with the Constitution. In addition, they must have been incorporated into domestic law by an act of the Parliament at legislative level. Moreover, the incorporated treaty must implement constitutional rules and principles, such as in the field of human rights

protection. If the incorporated treaty is consistent with the mentioned criteria, it can be used as a parameter for challenging the constitutional validity of primary legislation before the Constitutional Court. In this respect, an act at legislative level, which does not comply with international undertakings, is inconsistent with the international treaty and, through the same, with Article 117, I of the Constitution. The European Convention on Human Rights is the most relevant treaty, which implements and integrates the duty of compliance with the international obligations set forth in Article 117, I of the Constitution (among others, see CC nn. 348 and 349/2007, n. 39/2008, 331 and 317/2009, 93/2010, 113/2011, 78/2012).

§6. Conflict of Law Rules

69. The relations between the Italian legal system and the legal systems of foreign countries are regulated by the so-called conflict of law rules (or private international law rules). They are procedural rules set by an act of Parliament (Law No. 218/1995), which determines the legal system and the jurisdiction applicable to a specific dispute with a foreign element (e.g., a contract to be enforced in another country). According to the conflict of law rules, Italy governs the scope of its jurisdiction (Articles 3–5 of Law No. 218/1995) and detects which law is applicable for resolving the dispute (Articles 20–63 of Law No. 218/1995). Moreover, it sets the proper regulation for the recognition and enforcement of foreign judgments.

70–71

Chapter 3. European Sources

by Maurizio Pedrazza Gorlero – Matteo Nicolini

70. European sources are neither external nor domestic sources. In fact, they cannot be properly considered external sources, since European law may be regarded as a *sui generis* legal system. Although European sources belong to a legal system that is external to the Italian one, they operate within the Italian legal system according to the principles of direct applicability and direct effect. In addition, they prevail upon internal sources, according to a principle similar to that of competence. In other words, European law is supreme over national law (CC n. 183/ 1973). This peculiar relationship between European and internal sources of law is due to the coordinated separation between two legal systems having the same personal and territorial elements (CC n. 170/1984). Article 1.2.b of Treaty of Lisbon (2007) states that the Union shall be founded on the Treaty on European Union (TEU) and on the Treaty on the Functioning of the European Union (TFEU) and that 'The Union shall replace and succeed the European Community.'

§1. The Incorporation of the Treaty on European Union and of the Treaty on the Functioning of the European Union (Former EEC Treaty)

71. The statutory instruments incorporating the treaties establishing the European Communities (now the TFEU), and their subsequent amendments (the Merger Treaty 1965, Acts of Accession, budgetary Treaties, the Single European Act 1986, the Treaty on European Union 1992, the Treaty of Amsterdam 1997, the Treaty of Nice 2000, and the Treaty of Lisbon 2007) are passed by the National Parliament (Law No. 766/1952, Law No. 1203/ 1957, Law No. 454/1992, Law No. 209/1998, Law No. 102/2002, Law No. 130/2008).

Such acts do not follow the principles that apply to the laws incorporating 'ordinary' international treaties. In fact, they cannot be repealed by an ordinary act of the Parliament. Moreover, they establish sources of law, which have to be enforced in the Italian legal system. The provisions of the treaties, which establish European sources of law, have a legal force that is comparable to that of constitutional provisions. This is due to Article 11 of the Constitution. Under conditions of equality with other states, Article 11 of the Constitution allows Italy to limit its sovereignty to the extent of the creation of a legal system that ensures peace and justice among Nations. Furthermore, Article 117, I, of the Constitution (as amended by constitutional act No. 3/2001) states that Legislative powers shall be vested in the State and the Regions in compliance with constraints deriving from EU-legislation. In this way, Article 117, I explicitly acknowledges the supremacy of European law. Moreover, under the Treaty on European Union, the Charter of Fundamental Rights of the European Union of 7 December 2000 (as adapted on 12 December 2007) has the same legal value as the Treaties and therefore the same supremacy EU law enjoys within the Member States. The Constitutional Court holds such assumption as well (CC n. 80/2011).

§2. The Reception of European Law

72. EU primary legislation comprises the treaties incorporated by the Parliament. European secondary legislation is passed by EU institutions under Article 161 EURATOM Treaty and Article 288 EU Treaty.

Secondary legislation comprises 'regulations', 'directives' and 'decisions'. Article 288 of the Treaty on the Functioning of the European Union define these terms as follows:

> 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States'.
>
> 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'
>
> 'A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them'.

§3. EU Regulations

73. Article 11 of the Constitution has created a 'legislative automatism', which allows European regulations to come into force in the matters where they have competence, and to regulate specific fields of legislation to the exclusion of internal sources. This 'legislative automatism' inhibits the decisional power of the domestic source. As a consequence, domestic norms inconsistent with EU regulations become legally irrelevant.

The relations between European regulations and domestic laws are not regulated by the criteria that govern antinomies between internal sources. The Constitutional Court played a central role in shaping the relations between domestic law and European sources. The Italian Constitutional Court originally applied the chronological criterion, privileging the *lex posterior* (CC n. 14/1964). However, this thwarted the supremacy of European law. In a subsequent judgment, the Constitutional Court held that it was necessary to challenge the constitutional validity of Italian legislative provisions inconsistent with European regulations (CC n. 232/1975). Thus, the Constitutional Court was able to take under its control a source of legislation of an external system. The European Court of Justice harshly criticized this case law. Finally, the Constitutional Court configured the conflict between domestic laws and regulations as a 'direct violation' of the European law (CC n. 170/1984). The Constitutional Court affirmed that regulations take precedence over previous and subsequent domestic legislation. Moreover, national courts must set aside domestic legislation inconsistent with European regulations and must apply the latter in its entirety. However, the Constitutional Court has the possibility to set aside national and regional legislation challenged in accordance with Article 127 of the Constitution, which sets the jurisdiction of the Constitutional Court over legislative disputes between State and regions (CC n. 384/1994, 94/1995, 102/2008).

Nevertheless, it should be recalled that both the acts incorporating EU treaties and EU regulations could derogate from constitutional laws that do not carry supreme principles. If the provisions of the regulations impair one of the supreme principles, the Constitutional Court may set aside the acts incorporating EU treaties to the extension of the inconsistency (CC n. 170/1984).

§4. EU Directives

74. The European directive binds only Member States, leaving no discretion as to their objectives. On the contrary, they do leave some discretion as to manner of implementation. As a consequence, some legislative action must be enacted for their implementation. The 'Act implementing directives' has a legal force that is superior to that of the ordinary acts of Parliament, since it can repeal previous laws and determine the invalidity of subsequent ones. It is, therefore, an 'atypical' source, which is not even subject to abrogative referenda. This is due to Article 117, I of the Constitution, which binds State and regional legislation to the respect of EU constraints and calls for compliance with EU law (among others, CC n. 406/2005, n. 126/2006, n. 28/2010, n. 18/2012).

Some directives lay down obligations which are clear and precise, so that they are not subject to any exception and condition, and do not require intervention on the part of Member States. It follows that these directives can be regarded as directly effective. Therefore, they confer enforceable individual rights, and impose obligations upon individuals. Both the European Court of Justice and the Italian Constitutional Court have expressly acknowledged this (ECJ 5-2-1963 C n. 26/1962; CC n. 182/1976) and held that directives can have a direct effect only between State and individuals (horizontal effect of EU law: ECJ 26-2-1986 C n. 152/1984).

§5. The Annual Acts of Parliament Setting the Proper Measures for Ensuring the Fulfilment of EU Obligations

75. Legislative actions to be enacted at national level for implementing EU law are regulated by Law No. 234/2012. The legislative actions are contained in the so-called *legge europea*, and in the so-called *'legge di delegazione europea'*, i.e., an annual acts of Parliament, which set the proper measures for ensuring the fulfilment of EU Obligations (Articles 29 ff Law No. 234/2012). Under this act, the Parliament directly incorporates and implements directives and ECJ judgments and repeals primary legislation inconsistent therewith. In addition, the Parliament can have recourse both to primary and subordinate delegated legislation (Article 35 Law No. 234/2012).

Moreover, Law No. 234/2012 implements Article 117, V of the Constitution on the participation of the Regions in the European decision-making process. The Regions are enabled to incorporate EU directives in their fields of legislation in observance of procedures set by State law (Article 40 Law No. 234/2012). In addition, an act of Parliament sets the proper measures for the State to act in substitution of the regions in case the latter do not fulfil EU obligations. Like the State,

several Regions approve an annual act, which establishes the proper measures for ensuring the fulfilment of EU obligations as well (CC n. 63/2012).

The acts setting proper measures for ensuring the fulfilment of EU obligations, have the same force and effect as the single act implementing EU directives (Article 34 of Law No. 234/2012).

76–77

Chapter 4. Domestic Sources

by Maurizio Pedrazza Gorlero – Matteo Nicolini

§1. The Constitution

76. The Constitution is the fundamental law providing the comprehensive legal framework of the State. It sets all other internal sources and is hierarchically superior to them. Indeed, it can be said that the validity (or invalidity) of all the internal sources depends upon whether they are enacted according the legislative process set thereforth. The Italian Constitution is 'entrenched' or 'rigid': the constitution stipulates stringent procedures to be followed in any attempt to amend its provisions, and protects the same provisions from subsequent amendments, which do not respect the amending formula. In this respect, procedures for constitutional amendments are more burdensome than those envisaged for ordinary laws (Article 138 of the Constitution). Some constitutional provisions and norms cannot be amended nor repealed, as in the case of the 'republican form of government' (Article 139 of the Constitution). The republican form of government has to be intended not only in the limited sense of periodical election of the Head of State (Articles 83 and 85 of the Constitution), but also in the broader context of a pluralist democracy. Thus, the republican form of government involves popular sovereignty (Article 1 of the Constitution), autonomy of the local authorities (Article 5 of the Constitution), the election of political representatives (Articles 56 and 57 of the Constitution), freedom of thought, association, vote (Articles 21, 18, 48 of the Constitution), etc. Moreover, the rigidity of the Constitution limits both the constitutional and the ordinary legislator, as well as the judicial review of legislation (Article 134 of the Constitution). As a consequence, the 'guaranteed rigidity' is an implicit restriction to the amendment of the Constitution, as well as the 'inviolable rights' and the 'supreme principles of the constitutional system' (CC n. 1146/1988).

The Constitution as a source hierarchically superior to any other source of law – hence as a 'super-constitution' – comprises those constitutional provisions, which set the amending procedure and establish the explicit or implied limits to constitutional amendments.

§2. Constitutional Laws

77. Article 138 of the Constitution provides a unitary legislative procedure for approving constitutional acts amending the Constitution and for the constitutional laws, which are not formally incorporated into the body of the Constitution. It is not easy to detect the distinctive features and the fields of competence of constitutional laws not formally incorporated into the body of the Constitution.

The constitutional laws rank for their effectiveness at the highest level of the system of sources. They can amend every constitutional source with the exception of the provisions that cannot be amended nor repealed by any inferior source (i.e., 'the

super-constitution'). They cannot be submitted to abrogative referenda, since their amendment and repeal is envisaged only as set forth in Article 138 of the Constitution.

Constitutional laws providing territorial alteration of the Regions and constitutional laws, which adopt the basic laws of 'special' Regions, can be regarded as atypical acts at constitutional level.

I. Constitutional Laws Providing the Territorial Alteration of the Regions

78. Constitutional laws increasing, diminishing, or otherwise altering the number of the Regions can merge the existing Regions into a new one or create new Regions having a minimum of 1 million inhabitants. The request for territorial regrouping must be called for by a number of Municipal Councils representing not less than one-third of the populations concerned in the territorial regrouping. Once the population concerned has approved the *referendum*, the Parliament can pass the act for territorial readjustment. Before passing the act, however, the Parliament must require the advice of the Regional Legislatures (Article 132, II of the Constitution).

Thus, the Constitution provides a legislative process for creating constituent units. The process has recourse to a *referendum*, through which the regional population decides its own 'self-identification' as a regional community. This decision must be consistent with the 'national concern' set forth in Article 5 of the Constitution. In case of consistency with the national concern, the National Parliament can confer upon the self-determined new Region the seal of general will. This way, the will of the new constituent unit counts as general will.

II. Constitutional Laws Adopting the Basic Laws of 'Autonomous' Regions

79. The Italian constitution establishes twenty Regions (Article 131), five of which enjoy a higher degree of autonomy. From 1948, these five so-called autonomous Regions (Trentino-Alto Adige/Südtirol, Friuli-Venezia Giulia, Aosta Valley, Sicily and Sardinia) had their own 'basic law' (*statuto*), approved by a constitutional law of the State (Article 116, I of the Constitution). Such constitutional laws have a specific object, a proper *nomen juris* (basic laws) and limited jurisdiction, because their authority is confined within the regional territory. As a consequence, they are constitutional laws, which are not incorporated in the body of the Constitution. However, they partially amend constitutional provisions in order to provide autonomous regions with 'special forms and conditions of autonomy'. They have, however, a special status, since they cannot amend all the constitutional provisions, but only those falling within their specific competence.

Constitutional laws adopting the basic laws of 'Autonomous' Regions can be amended by subsequent constitutional acts. They can be amended by regional acts at legislative level as well. In fact, constitutional Act No. 2/2001 granted autonomous regions the capability to determine their form of government and electoral

system by adopting an act by absolute majority of the members of the regional legislature. The constitutional Court held that such act is an expression of regional constitutional autonomy (CC n. 370/2006). In addition, constitutional Act No. 2/2001 states that constitutional laws adopting the basic laws of 'Autonomous' Region cannot be submitted to confirmative *referendum* under Article 138, II, of the Constitution.

80. Moreover, the provisions concerning intergovernmental fiscal relations set forth in the basic laws (Article 54, IV, basic law for Sardinia; Article 50, V, basic law for Valle d'Aosta/Vallée d'Aoste; Article 63, V, basic law for Friuli Venezia-Giulia; Article 104, I, basic law for Trentino Alto-Adige/Südtirol) can be amended by either an act at constitutional level approved by the Parliament or by an act at primary-legislative level. The latter is possible if there is an agreement between the State and the Region concerned. In this case, the act of Parliament based on a State-Region agreement counts as a constitutional amendment. The same assumption is held for some provisions related to the governmental system of 'Autonomous' Regions (i.e., the direct election of the regional president, as well as of the speaker of the regional legislature).

Furthermore, constitutional Act No. 3/2001 provides a transitional provision. It establishes (Article 10) that, as long as the autonomous Regions do not change their basic laws, the broader forms of legislative and administrative autonomy set out in Title V for ordinary Regions, applies to them as well (CC n. 377/2002 and 408/2002).

§3. Primary Legislation

I. Acts of Parliament (or 'Formal' Laws)

81. The National Parliament approves primary legislation according to Articles 70 ff. of the Constitution. The acts of Parliament are also called 'formal' laws, because they outline the model of typical connection between form and effect of the source.

II. Laws Granting Amnesty and Pardon

82. 'Amnesty' and 'pardon' are collective acts of mercy whereby crimes are wiped out and sentences are commutated, remitted or reduced. They are granted by an act of Parliament, which has to be approved by two-thirds of the members of both Houses voting on each single article and on the statute as a whole (Article 79, II, of the Constitution). The act therefore requires the approval of both the 'majority' and the 'opposition', that is to say, the two dialectic subjects of parliamentary democracy.

Due to the entrenched legislative process required for their approval, laws granting amnesty and pardon have a force of law which is higher than that required by

the nature of the effect it produces – i.e., the 'temporary suspension' of the effectiveness of criminal law. Moreover, they cannot be repealed by an ordinary act of Parliament. Indeed, if an ordinary act of Parliament repealed an act granting pardon and amnesty, it would infringe the Constitution. Laws granting pardon and amnesty are explicitly excluded from abrogative referenda (Article 75, II, of the Constitution).

III. The So-Called 'Atypical' Laws

83. The 'atypical' nature of the source gives rise to the separation of the form and effect of a law-making type. The atypical character of an act of Parliament is due to a peculiar legislative process incorporating additional procedural stages. Italian Constitution sets several 'atypical' laws, such as, for example, the laws incorporating the Lateran Pacts and their subsequent amendments (Article 7, II, of the Constitution). Moreover, Article 132, II of the Constitution allows provinces and municipalities to be separated from a Region for their aggregation to another one. A *referendum* must be held in order to acquire the consent of the population of the sole municipalities and provinces concerned (CC n. 334/2004). Once the population of the provinces and municipalities concerned has approved the *referendum*, the Parliament can pass the act for territorial readjustment. In addition, Parliament can pass an act for altering the boundaries of the provinces within a Region. The Constitution requires the advice of the representative bodies of the municipalities concerned (CC n. 230/2001). Finally, the Parliament approves the laws incorporating the agreements between the State and non-Catholic religious denominations (Article 8, III, of the Constitution). The Parliament is not compelled to incorporate the agreement. If it decides to do so, however, it cannot amend the text of the agreement.

Article 116, III of the Constitution, as introduced by constitutional act No. 3/2001 regulates another 'atypical' source. The constitutional provision establishes a legislative process through which it confers additional special forms and conditions of autonomy to ordinary Regions upon their initiative. This is now possible if both Houses approve the agreement between the State and the Region concerned with the absolute majority of their members. The demanded additional special forms and conditions of autonomy are indicated in a list of specified heads of legislative powers (concurrent and State exclusive legislative powers). The act must comply with the principles on State-Regions financial relations set forth in Article 119 of the Constitution, after consultation with local authorities.

Moreover, constitution act No. 1/2012, which amended Article 81 of the Constitution, introduced a new atypical law. According to the new Article 81, IV of the Constitution, both Houses of Parliament must approve the contents of budgetary laws (as well as the laws setting fundamental principles governing the balance between revenue and expenditure) by an absolute majority. In addition, such laws must be consistent with the principles set forth by an act at constitutional level, which has to be passed by the Parliament within 2013. However, such constitutional provisions will enter into force on 2014.

§4. Executive Orders at Legislative Level

I. Decree-Laws

84. Decree-Laws are provisional measures having the force of law. The Government (i.e., the Council of Ministers: see Article 92, I of the Constitution) can enact them in extraordinary cases of necessity and urgency and has to submit them on the same day to the Houses of Parliament for confirmation. Decree-Laws must be confirmed (i.e., turned into an act of Parliament) within sixty days from their publication in the Official Gazette. Otherwise the decrees lose effect from their inception. The Houses of Parliament, even if dissolved, shall be especially summoned and shall assemble within five days from the presentation of the decrees. They can either ratify or reject the turning into law of the decree. However, the Houses of Parliament may confirm rights and obligations arising out of not-confirmed law-decrees by passing a specific act at legislative level (Article 77 of the Constitution) (see Part II, Chapter 4).

85. Decree-laws may regulate all the fields reserved to primary legislation. Limitations to the enactment of the emergency decrees of the government can be deduced from the Constitution. First, a decree may not be used where a field of legislation implies ministerial responsibility. It follows that in those fields only the Parliament can legislate. We can mention primary-delegated legislation, approval of budgets, acts authorizing the president of the Republic the capability to ratify international treaties. Second, decree-laws may not be enacted for regulating and sanctioning rights and obligations arising out of non-confirmed law-decrees. Third, they cannot reproduce the content of a non-confirmed law-decree. Finally, the content of the law-decree does not have to be different from that appearing from the heading.

Article 15 of Law No. 400/1988 contemplates all these hypotheses, so implementing constitutional provisions. In addition, it states that decree-laws cannot restore the effectiveness of provisions set aside by the Constitutional Court. This provision applies to ordinary laws and regional laws as well (CC n. 350/2010). Article 15 of Law No. 400/1988 also introduces additional restrictions to the enactment of law-decrees as well. In this respect, Article 15 of Law No. 400/1988 sets restrictions that cannot be traced to constitutional provisions, such as the exclusion from the urgent decree procedure of electoral matters. The Constitutional Court acknowledged the possibility of enacting a law-decree in the electoral field (CC n. 161/1995), since there is not any significant link between the Parliamentary reserve, precluding recourse to a legislative decree, and the assembly reserve for electoral matters in Article 72, IV, of the Constitution.

The Cabinet ought to have recourse to law-decrees only if there are extraordinary cases of ‘necessity’ and ‘urgency’ (CC n. 29/1995). These are referred to the current legislative situation, and not to the legislative situation that will occur in the future (Article 15.3 of the said Law No. 400/1988). (On the practice concerning the application of these constitutional rules see: Part II, Chapter 4). The effectiveness of decree-laws is limited in time and is destined to fail if the decree is not-confirmed within sixty days from their publication. In order to avoid the loss of effect of the decree, the government has fostered the practice of ‘reiterating’ the decree-laws.

This practice may be considered legitimate as long as the necessity and the urgency – which are the rationale of the enactment of such decree – still continue. On the contrary, the constitutional Court held that the reiteration of decree-laws is inconsistent with the Constitution. In fact, decree-laws can be reiterated providing that they are based on new extraordinary cases of necessity and urgency, which justify their adoption (CC n. 360/1996).

86. The act of Parliament confirming law-decrees is an ordinary one. Parliamentary rules of orders (Article 78 Senate Rule of Orders; Article 96*bis* Chamber of Deputies Rules of Orders) and Article 15, V of Law No. 400/1988 provide for the possibility both of a partial conversion of the decree, and of an amendment to its provisions. The confirmation law renders the legislative decree definitely effective and innovates the source of the rules set by the decree. It is disputed whether the conversion law can validate substantial and formal defects of the law by decree. According to the Constitutional Court, the act confirming the law-decree cannot validate it, if it is inconsistent with the constitutional requisites of 'necessity' and 'urgency'. Thus, the confirmation act is invalid and the Constitutional Court must set it aside (CC n. 171/2007 and 128/2008). In a recent judgment, the Constitutional Court held that the Parliament cannot amend the law-decree by inserting into it provisions which are not 'homogeneous' to those contained in the law-decree as enacted by the Government (CC n. 22/2012).

II. Legislative Decrees

87. As stated in Articles 76 and 77, I, of the Constitution, the Houses can delegate the exercise of legislative powers to the government. The Parliament, however, must specify principles and criteria of guidance, and delegate the legislative power only for limited time and well-specified subjects.

The legislative decree concurs with the ordinary acts of Parliament. Antinomies between acts of Parliament and legislative decree are solved in accordance with the chronological criterion.

88. The act delegating legislative powers to the government is an ordinary act reserved to the Houses of Parliament (Article 72, IV, of the Constitution). Legislative delegation can deal with any field of legislation. Limitations to the enactment of legislative decrees can be deduced from the Constitution. A decree may not be used where a field of legislation implies ministerial responsibility. We can mention the approval of budgets and final accounts, the turning into law of decree-laws, etc. Fields of legislation reserved to assembly approval (see Article 72, IV, of the Constitution) are not excluded from delegation, since there is no significant connection between the phenomenon of delegation of the legislative function and that of the assembly reserve.

Delegation is assigned to the government for a limited period of time. The Constitutional Court (CC n. 163/1963) censured the practice of delaying the publication of the enabling act, in order to draw advantage from a period of time that is longer than that provided in the enabling act. The delegated legislation must comply with

principles, i.e., fundamental norms regarding the delegated subject, and with guiding criteria, provisions, which are instrumental to the purposes of the delegation (see Part II, Chapter 4).

89. The validity and effectiveness of the legislative decree is dependent upon observance of the limits set by the enabling act. The enabling act may contain both constitutional and additional limits (see Part II, Chapter 4). The justification of these additional limits can be traced to the fact that delegated power is inherently limited. The constitutional limits represent the essential part of the limitation.

A legislative decree, which does not comply with the principles set forth in the enabling act, is deemed to be inconsistent with the delegation law and, through the same, with the Constitution as well (CC n. 3/1957).

III. 'Atypical' Delegation of Legislative Powers: Legislative Decrees in the Event of War

90. The President of the Republic declares war according to the decision of the Parliament (Article 87 of the Constitution), which assigns the necessary powers to the government (Article 78 of the Constitution). It has been disputed whether the decision of war undertaken by the Parliament is either a legislative or a non-legislative bicameral act, since it is questionable whether or not it lays down innovative system rules. On the contrary, the assignment to the government of the necessary powers implies the assignment of legislative powers, and can only be carried out through an act of parliament according to the paradigm of legislative delegation. This kind of delegated legislation, however, constitutes an 'atypical' delegation, because all the limitations for ordinary delegation (principles, guiding criteria, limited time, specified ends) are lacking.

IV. Legislative Decrees Implementing the Basic Laws of 'Autonomous' Regions

91. The legislative decrees implementing basic law of 'Autonomous regions' are to be found in the constitutional laws adopting the basic laws of the same 'autonomous' regions (Article 43 basic law for Sicily; Article 56 basic law for Sardinia, Article 107 basic law for Trentino-Alto Adige/Südtirol; Article 65 basic law for Friuli-Venezia Giulia; Article 48*bis* basic law for Valle d'Aosta/Vallée d'Aoste). Through such legislative decrees, the regional basic laws allow the government to transfer the offices and government staff to the 'Autonomous' regions, and to implement, integrate and specify basic law provisions. Whereas the object and – in part – the governing criteria and principles can be implicitly derived from the regional basic laws, there is indication of a limited time for their enactment. However, albeit appended (Article 108, I, basic law for Trentino-Alto Adige/Südtirol), the temporal limit is widely eluded. The temporal limit configures the delegation for the implementation of the special constitutions as a continuous delegation, which can

be carried out by several acts. This tends to configure such delegation as an 'atypical' one. Moreover, it could be considered an 'atypical' delegation because the delegation itself derives from a provision at constitutional level to the exclusion of the acts of Parliament (CC n. 316/2004).

A decree comes into existence through a procedure that must provide for an advisory opinion or a proposal on the outline of the decree, formulated by State-Regions joint committees. The participation of joint committees to the drafting of the decrees set them among the 'atypical' sources.

V. Legislative Decrees Setting Consolidated Acts

92. Consolidated acts are set by legislative decrees. They represent a re-enactment of legislation, which generally exists in several statutes, gathered in a comprehensive manner. Consolidated acts enable previous primary legislation to be repealed. In order to approve consolidated acts, the Parliament must delegate to the Government the necessary legislative powers. The limits of time, object, guiding criteria and specific limited time can be implicitly derived from the function carried out by consolidated law.

In some cases, consolidation acts cannot introduce any change in the law: it is a mere consolidation of all the law on a particular matter within one legislative decree (*testi unici compilativi*: see Article 17*bis*, II of Law No. 400/1988). The government – which normally consolidates when the Parliament delegates the necessary legislative powers – cannot amend the legislation in force (CC n. 80 and 162/2012).

§5. The Outcome of Abrogative Referenda as a Source of Law

93. Another act with force of law is the outcome of an abrogative referendum, i.e. the deliberation of the electoral body deciding the total or partial repeal (Article 75, I, of the Constitution) of act at legislative level with binding force of law.

There is a dispute regarding the quality of source of law represented by a bill produced by an abrogative referendum, since it has the power to terminate the effectiveness of act with binding force of law, but cannot change the system. Two observations can be made. First, the abrogation of a rule leads to changes with regard to the legislative meanings in the regulatory system, and hence, innovates the legal system itself, especially when, as the constitutional rule allows, the referendum is partial. Second, referendum promoters have used the partial abrogation, in order to cut a new law out of the text of the existing law for submission to the approval of the electoral body, thus giving rise to a kind of *lex rogata* or popular law.

§6. Other Sources of Law at Legislative level

94. The standing orders of Parliament, as well as the regulations and rules of procedure before the Constitutional Court should be considered acts with force of

law. Indeed, they are subordinate only to constitutional sources. The criterion applicable to conflicts between such sources of law and primary legislation is that of competence.

I. Parliamentary Standing Orders

95. Articles 64, I, and 72, I, II, III, of the Constitution refer to parliamentary standing orders. Article 64, I establishes that 'Each House adopts its own rules by absolute majority of its members'. Article 72, I, II, III states that the Houses of Parliament can set rules of orders establishing shortened procedures for urgent draft legislation. In addition, they set the ways in which the workings of committees are made public, the procedures for the consideration of bills (such as the examination and approval of bills is deferred to committees and standing committees).

The matters reserved to parliamentary rule of orders cannot be regulated by primary legislation, but only by sources at constitutional level. Conflicts between parliamentary standing orders and constitutional provisions can arise autonomously or may derive from an act of Parliament approved in accordance with an invalid rule of order. In both cases, the Constitutional Court held that standing orders are *interna corporis acta* and therefore their constitutional validity is unchallengeable. In this respect, the Constitutional Court ruled that parliamentary standing orders could not be subject to judicial review of legislation, since they do not have binding force of law (CC n. 154/1985). As regards laws conflicting with invalid orders, the act of Parliament approved in accordance to them should be inconsistent with the Constitution as well. However, the Constitutional Court held that the principle of incontestability of the *interna corporis* could be opposed only if the standing orders directly infringe constitutional rules (CC n. 9/1959).

II. Regulations and Rules of Procedure before the Constitutional Court

96. The regulations of the Constitutional Court are provided in Article 14 of Law No. 87/1953 – i.e. an ordinary act of the Parliament, which implements the constitutional provisions concerning the Constitutional Court. The regulations of the Constitutional Court govern its organization and functioning. Additional rules of procedure before the Constitutional Court can be set therein (Article 22, II, of Law No. 87/1953). They are approved by the majority of members of the Court and published in the Official Gazette.

As mentioned above, such regulations are set forth by an ordinary act of Parliament. However, they can be considered as primary legislation sources. Indeed, the Court enacts them in the exercise of a legislative power that can be directly traced to the Constitution. In this respect, the regulations and the rules of procedure before the Constitutional Court are deemed to be an expression of the constitutional autonomy of the organ performing the judicial review of legislation. As a consequence, Law No. 87/1953 does not then create a new source of law, but it simply acknowledges a regulatory power directly granted by the Constitution.

In addition, the limitations to the principle of constitutional autonomy of the Court operate either directly or through an act of primary legislation. In other words, the organization and functioning of the Court is carried out by an overlapping jurisdiction, in which both primary legislation and regulations concur. Where primary legislation and regulation are inconsistent, it is the act of Parliament, which prevails. To sum up, the rule that has been adopted is the doctrine of paramountcy of primary legislation. The Constitutional Court holds that the validity of both the regulations and the rules of procedure are not unchallengeable before the Court itself (CC n. 295/2006).

§7. Secondary Sources

97. Secondary sources, which are the sources hierarchically subordinate to primary legislation, laws and other acts with binding force of law, are above all the regulations of the executive authority. Executive regulations are listed in Article 17, I and II of Law No. 400/1988. It is not, however, an exhaustive list, since the law, where the legal basis of subordinate legislation lies, allows new types of regulations to be set up. It should be recalled that Article 117, VI of the Constitution sets the distribution of subordinate legislative powers between State and Regions. Whereas the State can enact regulations within the fields of its exclusive legislative jurisdiction – insofar as it does not devolve such power to the Regions – the power to issue by-laws is vested in the regions in any other matters.

I. Executive Regulations: Rules and Regulations Supplementing Primary Legislation

98. Such rules and regulations govern 'the implementation of laws and legislative decrees and EU regulations' (Article 17.1.a of Law No. 400/1988), as well as 'the implementation and integration of laws and legislative decrees, in which fundamental principles lay down, with the exclusion of those principles relating to subject matter reserved for regional competence' (Article 17.1.b of Law No. 400/1988).

Rules and regulations supplementing primary legislation represent the paradigm of 'subordinate' or 'secondary legislation', i.e. of the enactment of rules for supplementing the laws and legislative decrees. The extension of the concept at hand ranges from supplementing in the strict sense (as a specification of the legislative rules), to the implementation and integration of principles set forth in legislative provisions.

II. 'Independent' Regulations

99. Independent regulations govern 'subject matters where there is no regulation set by acts with force of law at legislative level, provided that they do not refer

to subject matters which are in any case reserved for law' (Article 17.1.c. of Law No. 400/1988).

Independent regulations differ from those regulations, which implement and integrate laws. In fact, whereas the ambit of operation of the latter is covered by fundamental principles set by an act of Parliament, independent regulations provide even in the absence of law. The lack of law must nevertheless be interpreted both as an absence of an explicit legislative regulation assigning statutory power and as a presence of an implicit rule conferring such power.

III. Regulations Organizing Public Administration

100. Regulations governing the 'organization and the functioning of the public administrations according to the provisions dictated by laws' (Article 17.1.d of Law No. 400) are enacted according to Article 97, I of the Constitution. Indeed, the constitutional provision states that law ensuring the proper and fair operation of public affairs determines the organization of public offices; moreover, areas of competence, duties, and responsibilities of public officials must be defined in regulations on public offices according to the law.

The organizational regulations represent a unique model, since they imply the law to be implemented by subordinated legislation according to the constitutional principles of good performance and impartiality of the administration. They are basically rules and regulations supplementing the provisions of legislative provisions, which set fundamental principles.

IV. 'Delegated' Regulations

101. 'Delegated' regulations are authorized to replace primary legislation under the authority conferred by an act of Parliament. In other words, they can deregulate entire legislative sectors by revoking legislative regulation and replacing it with statutory one, but only if the subject matter is not entirely reserved to primary legislation. According to Article 17, II of Law No. 400/1988, the repeal of provisions at legislative level must have been foreseen by the act assigning statutory power to the government. If the act did not foresee the repeal of legislative provisions, it would be inconsistent with the Constitution, since it cannot establish a source in competition with itself. The justifications for 'delegated' regulations can hold good provided that the powers granted are precise and clear, and conferred on an identifiable field. The repeal of legislative provisions will become effective when 'delegated' regulation comes into force. Some objections have been made to the enactment of 'delegated' regulations. However, it is not the 'delegated' regulation which repeals primary legislation, but the act conferring the delegated powers. On the contrary, the 'delegated' regulation would repeal an act, which is hierarchically superior to the regulation itself. Moreover, the act revoking legislative norms previously in force also sets forth 'the general rules regulating the subject matter'. As a consequence, the subject matter itself will be regulated both by the ordinary act

(which sets forth the fundamental principles) and by the regulation (which sets forth the specific and detailed provisions).

Article 17, IV*bis* of Law No. 400/1988 explicitly reserves to 'delegated' regulations the possibility to set forth the provisions regarding the organization and functioning of Ministry departments and offices. In addition, under Article 20, II of Law No. 59/1997 (as amended by Article 1 of Law No. 246/2005 and Article 4 of Law No. 69/2009), the Government must have recourse to 'delegated' regulations for replacing legislative provisions concerning administrative proceedings.

V. Regulations Implementing European Directives

102. Regulations implementing European directives are 'delegated' regulations, which are authorized to replace primary legislation under the authority conferred by annual act of Parliament setting the proper measures for ensuring the fulfilment of EU obligations. In other words, they can deregulate entire legislative sectors by revoking legislative regulation and replacing it with statutory one, to the exclusion of the following subject matters: setting up administrative organs and structures or forecasting new expenses or less revenues. The annual act of Parliament setting the proper measures for ensuring the fulfilment of EU obligations directly provides for the implementation of European directives concerning the introduction of penal and administrative fines, the identification of the public authorities to which the administrative functions relating to the new rule are to be assigned (Article 34 of Law No. 234/2012). The Government can adopt such regulations to act in substitution in case Regions do not fulfil EU obligations (Article 35 of Law No. 234/2012).

VI. 'Consolidated' Regulations

103. Article 17, IV*ter* of Law No. 400/1988, as introduced by Article 5, I, of Law No. 69/2009, assigns the government the powers for the re-enactment of subordinate legislation, which generally exists in several acts. 'Consolidated' regulations cannot introduce any change in the law: they are mere consolidation of all the provisions enacted at a level inferior to primary legislation.

VII. Ministerial and Inter-ministerial Regulations

104. The Parliament can expressly confer on one or more ministers the power to issue statutory instruments in the form of rules and regulations for supplementing the provision of an act of the Parliament itself. (Article 17, III of Law No. 400/1988). Ministerial and inter-ministerial regulations must conform both to primary and executive subordinate legislation. They are, therefore, third-level sources (i.e., hierarchically subordinate to secondary sources).

§8. Sources of Territorial Autonomy

105. The contemporary State is characterized by a plurality of political decision- and law-making entities, coordinated by the central order of government. This can be considered as a communitarian perspective of the State, useful for giving an answer to the needs for political-institutional pluralism. The 'State-as-a-community' perspective marks the blackout of the concept of sovereignty, by replacing it with a new one, which corresponds to the relationships between Nation-State sovereignty (for the purpose of unification and inter-subjective coordination) and autonomy, i.e., the power of the subjects of pluralism to self-organize and self-regulate.

The granting of autonomy to regional constituent units implies the power to legislate. In this respect, autonomy involves the constitutional distribution of legislative power between the central (national) authority and several regional authorities. As a consequence, subnational units have the capability of enacting acts and regulations that concur in the creation of the so-called *diritto oggettivo* (the legal system). 'Autonomous' sources include regional and local sources. It should be recalled that such sources has been profoundly modified by three constitutional amendments (constitutional acts No. 1/1999, constitutional acts No. 2 and 3/2001), which radically changed the constitutional design with regard to intergovernmental relations (between the State, the Regions and, to a lesser extent, the municipalities), regional and local sources of law and the structure of government within the Regions.

I. Sources of Law at Regional Level

106. Legislation at regional level comprises regional basic laws (Article 123 Constitution), regional laws (Articles 117 and 122, I of the Constitution) and regional regulations (Articles 117, VI and 123, I of the Constitution). Abrogative referenda can be held 'on the laws and administrative measures of the Region' (Article 123, I of the Constitution) and therefore on regional regulations. Abrogative referenda on regional laws and regulations are set at the primary or subordinate legislation level accordingly.

II. Basic Laws of the 'Ordinary' Regions

107. 'Ordinary' Regions are allowed to enact their own basic laws by passing an act at legislative level. Such basic laws must determine the form of government and the fundamental principles of organization and functioning of the Region in accordance with the constitution. In addition, they define the exercise of initiative and abrogative referenda to be held on regional laws and administrative decisions. Moreover, they regulate the forms of publication of regional laws and regulations (Article 123, I of the Constitution). Finally, basic laws provide for a council of local governments, which functions as a body for consultations between the Region and local authorities (Article 123, IV of the Constitution).

Basic laws of the 'ordinary' Regions are passed according to an entrenched procedure, which was introduced by constitutional act No. 1/1999. Regional Legislatures pass them with an act approved by an absolute majority of its members, with two subsequent deliberations at an interval of not less than two months. This act does not require the approval of the Government commissioner. The Government of the Republic may submit the constitutional legitimacy of the regional statutes to the Constitutional Court within thirty days from their publication.

Thus, 'ordinary' Regions enjoy a degree of constitutional autonomy that is higher than that conferred to 'autonomous' regions. In this respect, the so-called autonomous Regions had their own 'basic law' (*statuto*) approved by a constitutional law of the State (Article 116, I of the Constitution), without any significant participation or influence of regional Legislatures (see above §79). Nevertheless, under constitutional act No. 2/2001, special regional basic laws can partially turn into 'regional' basic laws with regard to the form of government and the electoral system. The regional act amending the form of government and the electoral system must be approved by an absolute majority of the members of the regional legislature. This act can be submitted to popular referendum if a certain fraction of the electors of the Region or of the members of the Regional Council so request.

III. Relationships between Regional Basic Laws and the State and Regional Sources

108. The Regional basic law is governed by the criterion of competence, since it can regulate only those specific fields of legislation the Constitution confers upon it. Moreover, such fields of legislation are reserved matters: under Article 123 of the Constitution, as amended by constitutional act No. 1/1999, the form of government and the basic principles of organization and functioning of the Region can be regulated only by regional basic laws to the exclusion of State ordinary laws (CC n. 188/2007, n. 201/2008, n. 182/2011 and n. 188/2011). It is, therefore, a source of primary legislation, and has necessarily to regulate those contents the Constitution refers to in Article 123. In fact, they must contain provisions regarding the right to initiate legislation and promote abrogative referenda on the laws and administrative measures of the Region as well as the publication of laws and of regional regulations (Article 123, I of the Constitution). With regard to its formal effectiveness, the Regional Statute (*rectius*, the regional statutory act) is hierarchically superior to other regional laws.

IV. Regional Laws

109. Regional laws are the legislative acts deriving from the exercise of legislative powers at regional level. They are approved in accordance with the provisions set forth in the Constitution, in the basic laws and in the rules of order of the Regional Legislatures. Albeit Regional Legislatures enjoy different degree of legislative powers (exclusive legislative powers, concurring legislative powers, residuary legislative powers) (see Part III, Chapter 1), regional laws may be considered as

unitary category and as an expression of a sole legislative type. In fact, all regional laws have the same *nomen juris* (i.e., the same legal definition: 'regional law') and are passed according to the same legislative process. They have common features to their contents as well (i.e., the same limits).

Before the 2001 constitutional amendments to Title V of the Constitution (constitutional act No. 3/2001), 'ordinary' Regions had only a limited legislative power in specific fields listed in the national constitution. The constitutional act No. 3/2001 led to a reversal in the distribution of legislative powers: the State maintains exclusive legislative power on a limited number of matters (Article 117, I) and Regions are vested with implied powers in all subject matters not expressly covered by State legislation (Article 117, IV).

In this respect, the distribution of powers between the State and the regions introduced by the constitutional act No. 3/2001 represents a complete upset of the former State–regions relationships. Whereas the former Article 117 allowed regions to make laws providing that there was a constitutional foundation of their legislative powers, now regional legislative powers encounters only those limitations deriving from the existence of a subject matter reserved to State legislative powers (CC n. 282/2002). The State, however, has exclusive legislative powers in the subject matters listed in Article 117, II. This list covers subject matters that traditionally are prerogative of the central State, in order to preserve the legal and economic unity of the Republic. Apart from exclusive legislative powers, the State may make laws in relations to the subject matters indicated in the list of specified heads of legislative concurrent powers (Article 117, III of the Constitution). In the subject matters covered by concurring legislation, legislative powers are vested in the Regions, except for the determination of the fundamental principles, which are laid down in State legislation. A regional law, which does not comply with such fundamental principles set forth in the State legislation, is deemed to be inconsistent with the State legislation and, through the same, with the Constitution as well (CC n. 161/2012).

The Constitutional Court stated that State legislation – which is still in force in those fields now devolved to Regional Legislatures – might apply until Regional Legislature has already 'covered' the same field with its laws. The juridical effects of the 'covering the field' test are those typical of pre-emption (CC n. 282/2002). The same assumption is held by the act of Parliament, which implemented the constitutional act No. 3/2001 (Article 1, III of Law No. 131/2003).

Several important rulings rendered by the Constitutional Court after the reform had, in essence, a highly centripetal effect, thus developing an ever more centralistic doctrine. Patent examples of such trend are those judgments establishing a peculiar doctrine of subsidiarity (set in Article 118, I of the Constitution), which allows the State to absorb regional legislative powers if there is the necessity to comply with the national concern in several fields Regions are vested in by the Constitution (CC n 303/2003, 6/2004, 383/2005, 278/2010 232/2011, 163/2011). Furthermore, it must be reminded that the reform addressed ordinary Regions, but did not have a direct impact on the competences of 'special' Regions, whose powers still derive from their basic laws. Moreover, Article 10 of constitutional act No. 3/2001 establishes that, as long as the autonomous Regions do not change their basic laws, the broader forms of legislative autonomy set out in Title V for ordinary Regions, applies to them as well. In other words, the legislative powers of 'special'

Regions can be considered as the outcome of the intersection of (often overlapping and contradicting) catalogues contained both in the national constitution and in their own basic laws.

V. 'Atypical' Regional Laws

110. 'Atypical' regional laws are those relating to and those concerning territorial alteration of municipalities. They depart from the ordinary legislative procedure. The Region may establish new Municipalities within its own territory and modify their districts and denominations (Article 133, II of the Constitution). The laws establishing new Municipalities and modifying their districts and denominations are *leggi-provvedimento* (i.e., legislative measures). They are approved by Regional legislatures 'after consultation with the populations concerned'. The Regional legislature can either receive or reject the proposed change approved by the electorate concerned. It is hard to imagine, however, whatever the legal nature of the referendum may be, that the representative body would disregard the will of the people. Albeit the State can determine the fundamental principles of organization and functioning of municipalities (Article 117, II, p, of the Constitution), the Constitutional Court strongly affirmed that the State could not interfere with the regional exclusive jurisdiction over territorial regrouping (CC n. 261/2011).

111. The recent amendments to Title V of the Constitution introduced new regional 'atypical' laws as well. Atypical regional (and provincial) laws can amend special regional basic laws having recourse to a constitutional act with regard to the form of government and the electoral system. Moreover, regional laws ratify agreements reached by a region with another region aimed at the better exercise of their functions, including the establishment of joint bodies (Article 117, VIII of the Constitution). In addition, Regions ratify agreements with foreign States and understandings with territorial entities that belong to foreign states in the areas falling within their responsibilities (Article 117, IX of the Constitution). Finally, the basic laws of 'ordinary' regions introduced entrenched laws, such as budgetary and money laws, laws adopting regional electoral systems, etc. (CC n. 2/2004).

VI. Regional Acts with Force of Law

112. Unlike the State, Regions are not able to issue decree-laws and legislative decrees. An act with force of law is that resulting from the referendum to repeal regional laws. Moreover, regional basic laws introduced new kinds of regional acts with force of law. Among them, we can mention the consolidated acts, which are approved by Regional legislatures. The rules of order of Regional legislatures are not sources of law (CC n. 288/1987).

VII. Regional Regulations

113. Regional regulatory powers have been deeply modified by the constitutional acts No. 1/1999 and No. 3/2001. Former Article 121, II, of the Constitution attributed regulatory powers to Regional legislatures. The Constitution Act No. 3/2001 replaced Article 121, II of the Constitution without indicating which regional organ (the legislature or the executive) should exercise regulatory powers. The Constitutional Court stated that the decision upon the conferral of regulatory powers either to the legislature or to the executive is reserved to regional basic laws (CC n. 313/2003 and n. 119/2006).

Moreover, regulatory powers shall be vested in the Regions with respect to the subject matters where they have legislative powers (i.e., exclusive and concurring legislative powers). In addition, the Regions shall exercise the regulatory powers with regard to subject matters of exclusive legislation of the State, but only if the State delegates such powers to the Regions (Article 117, VI of the Constitution).

Regional basic laws can set the same regulations envisaged at State level: rules and regulations supplementing primary legislation; regulations organizing public administration; 'delegated' regulations; regulations implementing European directives. The relationships between regulations and regional laws are governed according to the hierarchical principle. Regulations may be subjected to regional abrogative referendum. The relationships between regional sources and regulations delegated from the State to Regions under Article 116, VI of the Constitution are governed in accordance to the criterion of competence.

VIII. Local Sources: Municipal and Provincial Basic Laws

114. Article 114, II of the Constitution, as amended by the constitution act No. 3/2001, states that municipalities, metropolitan cities and provinces shall have their own basic laws in accordance with the principles laid down in the Constitution. Municipal and Provincial Statutes are regulatory acts through which these local entities set their internal organization in order to fulfil the duties assigned to them. They differ from regulations and administrative acts of local entities. First, they have to be approved by a majority of two-thirds of the Councillors; if such majority is not achieved, two subsequent deliberations with absolute majority will be required (Article 6.2 of the Consolidated Act No. 267/2000 concerning local authorities). Second, the law indicates which subject matters have to be regulated by the basic laws (Article 6.2 of the Consolidated Act No. 267/2000 and Article 4, II of Law No. 131/2003). Furthermore, it indicates those subject matters where the intervention of the basic law is optional (Article 8.3 and 11.1 of the Consolidated Act No. 267/2000).

The organization of the local authority is a matter reserved to basic laws. Primary legislation can alter the ambits reserved to the local sources. However, such an alteration cannot interfere with the constitutional autonomy of local authorities set forth in Article 114, II of the Constitution, which expressly guarantees the self-organization of municipalities and provinces and the adoption of local basic laws. Basic laws are 'limited' sources. This is established by the Consolidated Act No.

267/2000 concerning local autonomies (Article 6.2 of the said Act), which provides that the statute must be contained within the framework of principles established by law.

IX. Municipal and Provincial By-laws

115. Article 117, VI of the Constitution, as amended by constitution act No. 3/2011, expressly provides local regulations in the form of by-laws with a constitutional foundation. In fact, Municipalities, Provinces and Metropolitan Cities are granted regulatory powers as to the organization and implementation of the functions attributed to them, as well as a tool for regulating their locality according to particular localized needs.

Local regulations are typical examples of subordinate legislation, which implement primary legislation. The nature of local regulations is twofold. For the one part, they implement State and Regions statutory provisions regarding local organization (so-called organizational by-laws). In this respect, regulations are hierarchically subordinate to State and regional laws. For another part, they supplement State and regional laws concerning the exercise of local functions in accordance with Articles 7 of the Consolidated Act No. 267/2000 and 4, IV of Law No. 131/2003 and the principle of competence. In other words regulations constitute the means of bending State and regional legislative rules to local requirements with regard to particular localized needs. Hence, they must respect State and regional provisions according to the criterion of hierarchy, but exclude State and regional regulations, according to the principle of competence. To this extent, Article 4, II of the general provisions of the civil code – according to which regulations of authorities other than the government may not be inconsistent with executive regulations – must therefore be considered repealed.

§9. Labour Agreements

I. Collective Agreements Under Article 39 of the Constitution

116. Article 39 of the Constitution provided for collective labour agreements 'having mandatory effect for all persons belonging to the categories referred to in the agreement' (i.e., collective labour agreements with *erga omnes* effectiveness). In order to enter into these agreements, the Constitution stated, on the one hand, that the contracting trade unions must have obtained legal status by registration at local or central offices, according to the provisions of the law. On the other, the Constitution required, as the sole condition for their registration, that their by-laws lead to internal organization of democratic character. Moreover, the stipulation of the contract must be entrusted to a single representative body made up in proportion to the number of registered members of the various stipulating unions (Article 39, IV of the Constitution). However, the constitutional provision has never been implemented. In case of inconsistency between primary legislation and labour agreements, it is the primary legislation, which prevails.

II. Private-Law Collective Agreements

117. As mentioned above, Article 39 of the Constitution has never been implemented. As a consequence, labour relations are regulated by rules laid down in private-law collective agreements, which bind only those belonging to the unions that stipulated the agreements.

Nevertheless, private-law collective extended their effectiveness beyond the contracting parties, achieving quasi-*erga omnes* effectiveness. Moreover, primary legislation (Article 2113 of the Civil Code) and several judgments rendered by the courts of law made reference to private-law collective agreements for regulating labour relations, thus extending the guarantees the Constitution grants to workers (Article 36 of the Constitution).

Relationships between law and private-law collective agreements are governed by the same criteria applied for solving antinomies between primary legislation and *erga omnes* collective agreements. In case of inconsistency, it is the primary legislation, which prevails.

§10. Trade Customs Referred to in Laws and Regulations

118. The customs directly envisaged by the Italian legal system are the so-called *usi* (trade customs). Under the general provisions of the civil code, they apply providing that laws and regulations expressly refer thereto (Article 8 of the general provisions of the civil code). Trade custom is therefore placed on the last rung of the hierarchical ladder, as a third or fourth level source: they must be consistent with primary and subordinate legislation, and with ministerial and inter-ministerial regulations as well.

As mentioned above, there is no room for *contra legem* customary sources within the Italian legal system, but only for *secundum* and *praeter legem* customary rules.

Trade customs can be collected into a special official gazette. Customary rules contained therein are deemed to exist unless it is otherwise proven (Article 9 of the general provisions of the civil code). Publication in those collections does not guarantee either the existence of the custom or the correspondence of the collection itself to the customary rules in force. The parties will have to prove the existence of the custom and the custom rule. The court of law who cannot use the *iura novit curia* principle, will therefore decide on the fact, the law and its source.

Chapter 5. Forms of Direct Democracy and Abrogative Referenda

by Marta Cartabia

§1. Popular Sovereignty, Referenda and Article 75 of the Constitution

119. As in other post-war European democracies, the Italian Constitution provides for instruments of direct democracy alongside those elements of representative democracy which form the backbone of the legal and political system. Article 1 of the Constitution, states that, '[s]overeignty belongs to the people, who exercise it in the manner, and within the limits, laid down by the Constitution'.

According to the wording of the Constitution, popular sovereignty does not imply an exclusive choice either in favour of direct democracy or representative democracy, but instead opens the way to different forms of democracy, so that representation may be combined with the direct exercise of the popular will, within the limits set by the Constitution.

The instruments of direct democracy provided for by the Constitution are the consultative referendum (*referendum consultivo*) to modify regional, provincial and communal boundaries (Articles 132–133; see also, Part I, Chapter 4), referendum to amend the Constitution (*referendum costituzionale*) (Article 138; see also, Part I, Chapter 4; Part II, Chapter 4), and the abrogative referendum (*referendum abrogativo*) to repeal laws or other legally valid acts (Article 75). Other instruments of direct democracy provided for under the Constitution include the popular initiative (Article 71) which allows the electorate (with a minimum of 50,000 signatures) to propose a bill to Parliament, and the popular petition (Article 50) which allows citizens to petition Parliament directly or to request the introduction of a specific legislative measure. Among the instruments of direct democracy, however, it is the abrogative referendum which is the most relevant.

Article 75 of the Constitution establishes that referenda can only be held in order to repeal, totally or in part, laws or other measures having the force of law. The success of this frequently used and, it is often argued, abused, form of direct democracy, is paradoxical given its purely abrogative as opposed to propositive nature and the fact that it constitutes a unique instrument of popular yet 'negative legislation'.

However, this frequent recourse to the instrument of the abrogative referendum is not as paradoxical as it appears if examined in the context of the work carried out by the Constituent Assembly leading up to the drafting of the Constitution. This was the result of a creative and complex project of direct democracy begun by the Italian jurist, Costantino Mortati, in the early 1940s. Mortati's original plan provided for instruments, such as a referendum on the adoption of laws (*referendum approvativo*), to be used when the Head of State returns a bill to Parliament for reconsideration or in order to settle disputes between the Senate and the Camera on the adoption of legislation, a suspensive referendum (*referendum sospensivo*) to suspend the adoption of a law by Parliament, the popular initiative in line with the American or Swiss model so that were Parliament to botch, or dramatically amend,

a popular legislative initiative, that law would, for example, be subjected to subsequent popular approval, and finally the abrogative referendum to repeal existing legislation, then considered less likely to be used than the other instruments. In the last instance, however, the Assembly progressively excluded, or made significant cuts to Mortati's original proposals, partly due to the atmosphere of general mistrust of direct democracy prevailing in Europe at the time, and partly because many of the proposals were simply considered too difficult to apply in the representative model of democracy favoured by the Constituent Assembly. For this reason, the Assembly only accepted the proposals to introduce abrogative, constitutional and consultative referenda, together with popular legislative initiative and the popular petition, all now contained in the Italian Constitution.

§2. The Implementation and Practice of Constitutional Provisions by Law 352/1970

120. The constitutional provisions on referenda were supposed to be implemented, as other key constitutional norms, by means of an ordinary Act of Parliament, but the final legislation was only adopted over twenty-five years later in 1970. Law 352/1970 stipulates the procedural norms to be followed in the case of referenda from the initial proposal through to the popular vote. The passing of the referendum legislation was to some extent facilitated by the political climate prevailing at the time, which favoured the final implementation of the constitutional provisions (the regional system, which had until then been a dead letter was implemented in the same year), and by two watershed political events in the form of the introduction of two hotly contested pieces of legislation, the 1978 law on abortion (Law 194/78) and 1970 divorce law (Law 898/1970). The party of the Christian Democrats tried to have both pieces of legislation repealed by means of referendum and that led to Italy's first real test of the abrogative referendum procedure, starting with the referendum on divorce in 1974 and followed by the referendum on abortion in 1981.

Since the early 1980s, however, Italy has witnessed a dramatic change in both the number and type of referenda. The succession of referendum campaigns since the 1980s have put a wide range of issues to the popular vote, some quite relevant from a political perspective, others less so. The issues have often appeared more akin to legislative proposals than attempts to repeal existing legislation. In many instances it was not even an entire law that was proposed for popular vote, but small parts of it, or even single lexical expressions, which thus transformed the referendum from an abrogative to a 'manipulative' instrument which would in effect change the meaning of provisions rather than repeal them. Hence, referenda have been used to contest legislative choices, to promote new ideas, or to introduce legislative proposals. An example of this trend is constituted by the referenda on electoral reform in 1991 and 1993 which transformed the Italian electoral system from a fully proportional model to a mixed electoral regime combining elements of 'first-past-the post' with proportional representation (see, Part II, Chapter 3).

In such cases, the Constitutional Court, which is empowered to judge on the admissibility of referenda, in a recent declaration has stated that the abrogative referenda provided for by Constitution cannot be used to amend legislation in force. Therefore, when a referendum concerns the partial repeal of a law, its object must be constituted by a part of the text of the law having an autonomous legal meaning rather than, for example, the abolition of single expressions or single word with no specific legal meaning (see, e.g., Decisions 17/197, 30/1997 and 36/1997 of the Constitutional Court).

§3. Referendum Proposals

121. Article 75 of the Constitution states that a popular referendum may be held if called for by a minimum of 500,000 of those entitled to vote or five Regional Councils. At the opposite, other constitutional organs, such as the Head of State or Government are not vested with the power of taking a referendum initiative in order to prevent the organs of the State from acting in a populist fashion with regard to referenda.

Initiative has often been taken by the electorate, at times motivated or 'pushed' by a political party or parties which organized the referendum campaign and collection of signatures (Articles 27–28 of Law 352/1970).

In the late 1990s, Regional Councils also called for referenda on legislation considered as obstacles to regional autonomy, such as those dealing with the regulation of ministries carrying out functions in which regions have legislative and administrative competence (such as the Ministries of Health, Tourism, or Agriculture). A regional referendum initiative is valid if voted by at least five Regional Councils with an absolute majority, and in compliance with the strict terms established by law (Articles 29–30 of Law 352/1970).

In order to avoid superimposition with other polls, a referendum cannot be called in the twelve months prior to the end of the legislature or in the six months following parliamentary elections (Article 31 of Law 352/1970).

A referendum proposal must be submitted to the Central Office for Referenda, appointed annually within the Supreme Court (*Corte di Cassazione*) in the period 1 January–30 September. If, after a referendum has been officially called, either the Senate or the Camera is dissolved in advance, the referendum is suspended for 365 days (Article 34 of Law 352/1970), thus postponing the vote for a period of time up to two years.

§4. Legality Review by the Central Office for Referenda

122. All referendum proposals are subject to legal review by the Central Office for Referenda, and a subsequent control of 'admissibility' on the part of the Constitutional Court.

The Office has to certify that the proposal is in conformity with Law 352/1970. The Office must verify, for example, that the conditions set out in law have been met; that is, the authenticity and number of the signatures if the referendum has been

called by the electorate, or the validity of the deliberations of the Regional Councils, and the nature of the measure submitted to referendum, which can be only a law or measure having the force of law, thus excluding governmental regulations or constitutional provisions.

One of the key tasks of the Central Office is to merge referendum questions dealing with very similar issues (Article 32 of Law 352/1970), and to block the referendum procedure if Parliament repeals or amends the provisions submitted to referendum prior to the popular vote (Article 39 of Law 352/1970). However, in its Decision 68/1978, the Constitutional Court stipulated that the intervention of Parliament does not imply the interruption of the referendum procedure if the new law leaves the inspiring principle or the basic legal content of the previous provisions largely intact.

The referendum will still be held and the issue at stake will be the new law passed by Parliament. The Central Office also formulates the official wording of referendum questions in consultation with the initiative's promoters, so as to help voters if they are required to vote on more than one issue at a time (Law 173/1995).

Finally, the legal review of the Central Office must be carried out by 15 December of the year in question and the documentation must then be submitted to the Constitutional Court for a review of admissibility, to be made by 10 February of the following year.

§5. The Review of Constitutional Admissibility by the Constitutional Court

123. The referendum proposal is submitted to the Constitutional Court for a control of admissibility/for constitutional review in order to certify that the referendum is not being held to abrogate laws explicitly exempted under Article 75, that is, fiscal or budgetary laws, amnesties or pardons, or laws authorizing the ratification of international treaties. The Constitutional Court is empowered to adjudicate on the admissibility of referenda on the basis of Law 1/1953, amended by Law 352/1970. The Court must certify that the law to be abrogated does not fall into one of the exempted under Article 75 and that it is not closely linked to one of the exempted categories. This is the case, for example, for laws dealing with the implementation of international treaties, which cannot be submitted to referendum as they are closely linked to those for the authorization to ratify international treaties. The same applies to financial laws, which are linked to budgetary laws, explicitly listed under Article 75, paragraph 2.

Among the category of the laws authorizing ratification of international treaties an important role is played by those implementing Community regulations (see, e.g., Decisions 31, 41 and 45/2000). Constitutional jurisprudence tends to exclude referendums on such laws, because their eventual repeal would cause a breach with regard to Community legislation that could be sanctioned by the Court of Justice of the European Union.

Moreover, in a key decision (Decision 16/1978), the Constitutional Court established that the review of constitutional admissibility should also be based on other

criteria, deriving from the nature of the referenda themselves, as set out by the Italian Constitution. As referenda can only be held to repeal laws or measures having the force of law, the Court established that the latter must not concern either constitutional provisions or other constitutional laws or provisions, 'having a content closely connected to the Constitution'; that is, provisions so closely linked to constitutional laws whose abrogation would affect fundamental constitutional principles. The Constitutional Court stated that the constitutionality of the remaining legal provisions (i.e., the legal provisions that would become effective in case of referendum approval) cannot be adjudicated during the admissibility review (even if – through the prohibition of the repealing laws having a content closely connected to the Constitution – the admissibility review appears similar to a constitutional review of legislation).

A distinction must be drawn between the 'Constitution content connected laws' and the 'binding or essential laws', a category which includes laws dealing with the election of Parliament and other constitutional organs (decisions 17/1997, 42, 49/2000, 45/2005). The Court ruled in favour of the admissibility of abrogative referendum, despite the fact that this category should be exempt under Article 75; the final text failed to make this specification due to an error on the part of the drafting committee of the Constitution so that whilst the will of the Constituent Assembly was clear, the Constitutional Court chose instead to take the Constitution literally, without considering the original intent of the Framers. Nevertheless, referendum on electoral laws governing constitutional organs are highly sensitive matters insofar as their repeal may have a paralyzing effect on the institutions involved. The Constitutional Court (see, in particular, Decisions 32/1993, 5, 10/1995, 26/1997, 13/1999, 33, 34/2000, 15, 16, 17/2008, 13/2012) considers these effects unacceptable, and has therefore ruled that, despite the theoretical admissibility of electoral referenda, the latter must not prevent the institution from functioning effectively. Therefore, an electoral referendum is only admissible where this will not interfere with the effective functioning of the electoral system.

In the same way, referenda cannot be held concerning laws 'with a particular resistance to abrogation', which includes laws dealing with the implementation of the Lateran Treaties (see, e.g., Decision 16/1978).

The Constitutional Court also adjudicates on the 'homogeneity' of issues subject to referendum. In Decision 16/1978 it established that a referendum must not consist of a series of questions on heterogeneous issues insofar as this would tend to inhibit the effective and free expression of choice on the part of voters, who can only respond collectively 'yes' or 'no' (Article 48 of the Constitution). The concept of homogeneity has been interpreted as 'internal homogeneity', or that a single referendum cannot include numerous heterogeneous issues, and in terms of the 'homogeneity-completeness' of the questions, according to which the referendum should submit all the provisions concerning the issue to be abrogated to popular vote. In some cases, incomplete questions have been rejected because the exclusion of some provisions strictly linked to those to be abrogated were judged likely to mislead voters. Homogeneity may also simply mean that the aim of the referendum should be clear to voters. Sometimes, homogeneity requirement has been considered as 'teleological clarity': in these cases, the Constitutional Court looked at the clearness of the specific aim of the referendum.

§6. The Vote and the Announcement of the Results

124. After a referenda proposal has been certified for its formal legality and constitutional admissibility, the referendum proper is held on a Sunday in the period 15 April–15 June, and the result is announced by the Head of State.

The proposal submitted to referendum is approved, as per Article 75, if the majority of those eligible to vote took part in the referendum and if the latter won a majority of valid votes ('white' or 'void' votes are not considered).

If the proposal is approved, it takes legal effect from the day following publication of the decree of the President of the Republic announcing the abrogation in the Official Journal. This decree may, however, postpone the effects of the abrogation for up to sixty days (Article 37 of Law 352/1970). On the contrary, if the referendum is not approved, the repeal of the measure in question cannot be reproposed for the next five years (Article 38 of Law 352/1970).

Part II. Form of Government

Chapter 1. Introduction to the Italian System of Government

by Valerio Onida

§1. The Italian System of Government: An Outline

125. The Italian system of government embodies many of the classical principles and features of the republican parliamentary system:

(a) a Parliament composed of two elective chambers exercising legislative power and political control over the executive;
(b) a collective Government appointed by the Head of State, which is politically responsible only to Parliament and remains in office while retaining its confidence;
(c) a President of the Republic, the Head of the State, who is elected by Parliament (joined by a number of representatives of the Regions), although his term is longer than the legislature and not revocable. The President is not politically responsible and participates, at least formally, in many activities of Government. He promulgates the laws and issues other important governmental acts. He also exercises the two powers typical of the parliamentary system for heads of State, namely that of appointing the Government and dissolving the chambers before the end of their normal term.

126. The 1947 Constituent Assembly acted in accordance with the principles of the European parliamentary tradition, which Italy had adopted before the advent of fascism and which were subsequently modified by the passage from the Monarchy to the Republic following the referendum on 2 June 1946. Many of the improvements suggested by the experience of the parliamentary republics between the two World Wars were also included in the new Constitution.

127. When the system of government was debated by the committee of the Constituent Assembly responsible for drawing up the new Constitution, a resolution (proposed by Tommaso Perassi) stated indeed that the presidential and directorial systems were not suited to the Italian situation, and that a parliamentary system tailored to avoid ‘the degeneration of parliamentarianism’ had to be chosen.

Many members of the Constituent Assembly were also concerned with devising an institutional order which would avoid attributing all powers to one elective assembly, that is, to its (possibly changing) majority, thus supporting the major innovations that were eventually adopted within the Constitution.

128. As far as the system of central government is concerned, the following points deserve special mention:

(a) The bicameral structure of Parliament has not allowed for a substantial distribution of power, since both chambers are elected by direct universal suffrage, on the basis of similar electoral systems. Proposals to introduce 'non-political' or professional representatives in the Senate, or to make it a chamber in which the Regions might be, at least partially, represented were never implemented. Recent reform proposals to achieve this objective met with staunch resistance among parliamentary forces, who refused to accept a considerable reduction or change in the role as national representatives, presently played by the members of the upper house. The Constituent Assembly distinguished the Senate from the Chamber of Deputies by setting different ages both for eligible voters and candidates, providing for a 'regional basis' for the election of the Senate, a small number of non-elected life Senators and different terms for the two chambers (five years for the Chamber of Deputies and six for the Senate). It also envisioned (but did not provide in the Constitution) a single member constituency voting system for the Senate to be implemented, thus distinguishing it from the proportional system of the Chamber. After a reform in 1963, however, the chambers were both given five-year terms; and the voting system for the Senate, adopted in 1948 and not reformed until 1993, was a fundamentally proportional system, though one still based on regional electoral districts. The only slight remaining differences between the two chambers concern the age of eligible voters and candidates and the presence of a few life Senators. After the 1993 electoral reform the voting systems for both chambers lost their mainly proportional character and became very similar, although not identical. A new electoral reform in 2005 adopted a proportional system in large constituencies, with a 'majority prize' in favour of the most voted coalition of parties, on a national basis for the chamber, on a regional one for the Senate which. In sum, the Chamber of Deputies and the Senate are very similar from a political point of view. The political groups making up both the assemblies have an essentially national character, even though they often differ in their specific legislative choices (thus lengthening and complicating legislative proceedings, while enriching the decision-making process) and share the same general political orientations.
(b) The Constitution provides for Government's decisions to be taken collectively, according to the parliamentary tradition, although the President of the Council of Ministers plays a fundamental leading role, having to 'maintain unity in general political and administrative policy' (Article 95 of the Constitution). So far, however, the practice has shown that coalition governments and factionalism within government parties limit the concentration of power in one person in the executive. This tendency is reinforced by the role that each Minister plays in

the formulation and implementation of policies in various fields. One of the main problems faced by the Italian system of government has been therefore to ensure that the executive and the majority which supports it pursues a consistent political and legislative course of action. However, in recent years, the role of the Prime Minister has been becoming in fact stronger and stronger.

(c) Relations between Government and Parliament are based on parliamentary rules, according to which Government depends on the confidence of the parliamentary majority but, at the same time, plays a leading role in the legislative process of that majority. The Constitution requires an explicit vote of confidence when Government is sworn in and an explicit no-confidence motion passed by vote in which the chambers give their reasons, to force its resignation (Article 94 of the Constitution). Government can also use its role of 'leading committee' of the majority in order to force the latter to adopt its proposal, by moving a vote of confidence. Such a procedure prevents Parliament from assuming exclusive control over all main political and legislative decisions, but it cannot prevent the so-called extra parliamentary crisis, when the government spontaneously resigns, due not to a vote of no-confidence but rather to disagreements within the majority or decisions of the parties composing it. The precariousness of Italian governments and the frequent changes in their composition seemed to be for a long time typical of the country's political scene, due to the relationships among the different parliamentary forces (no one of them being majoritarian in Parliament) and between the members of the government executive and party leaders. In recent years deep changes in the political parties and in the electoral system produced such Parliaments in which political groups are always a large number but they are less stable, the life of Governments becomes longer, but the Government more and more frequently 'forces' its majority to support its proposals by moving votes of confidence, or even adopting itself legislation by decree, so that the Chambers often seem to be deprived of a substantial influence on the legislation.

(d) The legislative power is exercised both by Parliament and Government. The former can delegate the latter to legislate, adopting an act specifying an object, a time-limit and guidelines. In case of need and urgency, Government can adopt 'decree-laws' which lose their validity retroactively, unless subsequently validated by both chambers within sixty days. In recent decades, the use of 'decree-laws' and of delegated government legislation has become increasingly more and more frequent. However, these acts of Parliament converting the 'decree-laws' often change the text of governmental decrees even in a very substantial way. Recently there have been many efforts to provide for certain matters to be regulated by Government rather than by Parliament, unless they are covered by the 'legal reserve', so as to avoid having to ask for parliamentary approval every time a change in law is necessary.

(e) The role of the President of the Republic is only partially outlined in the Constitution. In particular, there is no definition of the limits on his ability to influence political decisions, especially in the very frequent cases in which he is called upon to formally enact acts provided for by the Constitution. The only explicit rule is that every act of the President has to be countersigned by a minister, who assumes political responsibility for the act. The President does not

formally have a role as a political leader. He is rather a sort of guarantor of the Constitution, enjoying powers of 'persuasion and influence', that he is able to exercise efficiently on the many occasions in which he is called upon to participate formally in the adoption of acts of other constitutional bodies, especially the Government. There are, however, some decisions which are the exclusive competence of the Head of State, namely the appointment of five justices of the Constitutional Court, and of five non-elected Senators. The President's practical influence over major political decisions depends not only on his own personality (he occupies the only constitutional office composed of a single individual), but also on the political and parliamentary situation. If Government can count on a strong and stable majority and has an unquestioned leadership (as was the case, for instance, in the early 1950s) the influence of the Head of State is limited and becomes more discreet. If, on the contrary, the political situation is unsettled, Government does not rest on stable foundations and the political leadership is uncertain (as is often the case in periods of transition when a new balance is still being sought), the Head of State, thanks to his formally dominant position with respect to the government's activities and to the stability afforded by his long-term, ends up exercising a wider authority and representing an essential point of reference in the country's political developments. Even the most significant powers that the President enjoys 'autonomously', namely choosing the President of the Council with the aim of giving the country a new government, and dissolving the chambers in advance, allow him to play a more or less important role depending on the political context. Indeed, the choice of the Premier is conditioned by the situation in Parliament, on which Government depends for support, whereas the Chambers are generally dissolved only if there is no stable majority and the government they support is unable to implement its own main policies.

§2. The Political System

129. In practice, the way in which the system of government works depends on the configuration and dynamics of the political system, namely on the general features and stability of parliamentary forces, expressed through elections, as well as on the role played by social forces.

130. Until relatively recently, Italian parties were fragmented but relatively stable, and the whole system was based on a relative majority party of the centre (the Christian Democrats, which could count on about 35% of the vote, even if they were divided into many different conflicting groups). Other parties had been allied to the Christian Democrats for long or short periods of time: the small Social Democratic Party, Republican Party, and Liberal Party, and mainly, since the 1960s, the Socialist Party, with 10%–15% of the vote. The strongest opposition party was of the left: the Communist Party, with votes ranging from 20%–30%, that never took part in government and was rarely associated with the majority, although it had a strong impact on parliamentary decisions. Finally, there was a small opposition party of the right (the Italian Social Movement, which could count on 8%–10% of

the vote, mainly concentrated in the central and southern regions of the country). Like the Communists, this party was never associated with Government.

131. The main elements of this system were defined during the constituent period and remained mostly unchanged, in spite of the various electoral fortunes of each political force, due in part to the proportional voting system which made it impossible for one party to gain an absolute majority in Parliament (with the sole exception of the Christian Democrats in 1948). This is why the Italian system had been defined by Giorgio Galli as an 'imperfect two-party system', with one party permanently in office (the Christian Democrats), and one permanently in opposition (the Communists) in an unmodified balance, dependent as it was on the international competition between the two blocs and the nature of the Communist Party, linked to the Soviet experience.

132. After the first provisional government coalitions between the three main parties of the Constituent Assembly, the various phases of the republican period, although quite different, were basically characterized first by the dominant role of the Christian Democrat Party (with its internal divisions), then by the cooperation-competition between the Christian Democrat and Socialist Parties. The Communist Party remained in opposition and played a varying important role in decision-making.

This system, as mentioned above (General Introduction, Chapter 2, §4), collapsed in the early 1990s, due to the deep changes in the political scene, in conjunction with judicial inquires pointing to corruption and parties funding, and with the adoption of essentially majority voting systems.

133. In the last twenty years, old 'historical' parties disappeared, changed their names several times, lost their traditional support by the voters. New parties appeared, most based on personal leaderships, sometimes pretending to represent certain territorial areas of the country. At the end of the past century and in the first years of the new century two main coalitions, of centre-left and centre-right, seemed to affirm their stable presence (the centre-left won the 1996 and 2006 elections, the centre-right the 2001 and the 2008 ones). But since then it has become more and more clear that the divisions among the parties of the same coalition and often inside the parties themselves, the strictly personal character of some leaderships (like that of Silvio Berlusconi), the increasing differences among the political demands in the various areas of the country, joined with the strengthening and the diffusion of an 'anti-political' attitude and of an increasing vote abstaining, and with the consequences of the heavy economic and social crisis that stroke Europe and the world in past few years, makes it impossible to describe the current situation as enough consolidated. Therefore it is difficult to foresee which will be the Italian political, electoral, and even constitutional, landscape at the time of the next general elections (2013) and after them.

§3. The Social Forces

134. The array of social forces has remained relatively more stable than its political equivalent. The organizations of the traditional 'class' trade unions, originally linked in different ways to the historical parties – CGIL (*Confederazione Generale Italiana del Lavoro*, Italian General Labour Federation), CISL (*Confederazione Italiana Sindacati Lavoratori*, Italian Federation of Trade Unions), and UIL (*Unione Italiana Lavoratori, Italian Workers' Union*) – have always represented most workers, especially those in the private sector. For a long time they seemed willing to maintain a fundamental unity of action among them, but in recent years their policies seemed often to split. Other organizations, such as 'autonomous' occupational trade unions and trade unions with political orientations that differ from those of the historical parties, have also been set up, especially in the public sector.

As far as employers are concerned, industry, especially the large and medium-sized, is represented mainly by Confindustria (*Confederazione Generale Italiana dell'Industria*, Italian General Federation of Industry), whereas other occupational trade unions, sometimes linked to political parties (though less so today), represent the sectors of agriculture, trade and artisan crafts. All these organizations, especially the three workers' 'federal' trade unions and Confindustria, regularly participate in political life, partly through arrangements between Government, labour and employers, regarding both work and wage conditions and the government's economic, fiscal and financial policies. Such agreements have often constituted a central aspect of national politics.

These unions are national organizations, according to nation-wide interests and interacting mainly with the national government. This confirms and strengthens the national unitary scope of the Italian political system, only recently questioned by new regional parties like the Northern League.

135. Political parties were traditionally powerful in Italy. Their huge financial resources were often connected to secret funding systems, recently unveiled by the judicial investigations that have brought change to the Italian political world. These parties deeply influenced the choice of elected and appointed officials, as well as the main decisions on the country's political life. They also deeply affected both the choice of public leaders at all the levels in which powers of nomination were exercised by political bodies (sometimes even in the business sector, through State-owned companies), and the political and legislative decisions taken by Government and Parliament.

This situation was usually referred to as 'government by political parties' and, in recent years, has been the target of much criticism that contributed, among other things, to the weakening of the traditional political system. Currents of public opinion sometimes seem to go so far as to challenge the legitimacy of parties as tools for citizens to 'contribute to national policy' (Article 49 of the Constitution). This has paved the way for open demonstrations of disaffection with regard to politics and dangerous trends towards forms of 'plebiscitary' democracy such as, for instance, calls for the direct election not only of regional and local leaders (as already provided by law), but also for the President of the Republic or the Prime

Minister. Another trend has been the heavy recourse to referendum not as a 'corrective' measure but rather as a tool for citizens to express their open opposition to the party system.

As mentioned above, this system has undergone profound changes. Most of present parties have poor ideological and programmatic characters and depend on the strength and personality of their leaderships. Changes have arisen also as to the role of the media (especially television, since people reading print media still constitute a minority) and the ways to win electoral support (e.g., the increasing importance of opinion polls, advertising systems, and money in political activities). It is therefore quite difficult, also from this point of view, to imagine how the Italian political situation will look in the future.

Chapter 2. The President of the Republic

by Fabrizio D'Addabbo

136. Title II (Articles 83–91), Part Two of the Constitution (Organization of the Republic) is devoted to the President of the Republic. Provisions concerning the Head of State can be found in other sections of the Constitution as well (i.e., Articles 59, 62 second clause, 73 first and second clause, 74, 92 second clause, 93, 104 second clause, 126 fourth clause, 134 paragraph 3, 135 first and seventh clause). Furthermore, a number of laws and regulations refer to the Head of State (the most important will be mentioned in the following pages).

§1. The Election: The Electoral College

137. The two Houses of Parliament in joint session are responsible for the election of the President of the Republic. Three delegates from every Region (except for the Valle d'Aosta Region which is represented by only one delegate), elected by the Regional Council in such a manner as to ensure that minorities are represented, take part in the election (Article 83, first and second clause, of the Constitution). The rules of this electoral college are the same applying to Parliament in joint session. One of these is Article 63, second clause, of the Constitution, which sets out that the President of the Chamber of Deputies and its President's office will preside whenever Parliament meets in joint session.

Owing to the parliamentary nature of this college the choice of the person who represents the unity of the Nation (see Article 87, first clause, of the Constitution) depends mainly on political parties, represented by their respective groups in Parliament.

Regional delegates taking part in the election are chosen from among the members of regional Councils, even though the Constitution does not exclude the possibility of electing other people. Election within the Councils usually by a vote limited to two names is a guarantee of the protection of minorities provided for by the Constitution.

The presence of regional delegates was meant by the Constituent Assembly as a way to increase the President's powers of representation. In practice, however, the political membership of the delegates prevails over their regional origin, as well as the need for an equilibrium among the various national political forces prevails over the autonomous representation of the Regions. The fact that there are only fifty-eight regional delegates within an assembly of over 1,000 members, moreover, speaks for itself: their participation is just a symbolical way to remind that the President is supposed to represent the whole Nation.

§2. The Electoral Procedure

138. Thirty days before the seven-year presidential term lapses, the President of the Chamber of Deputies summons Parliament in joint session together with the

regional delegates to elect the new President of the Republic (Article 85, second clause, of the Constitution). According to most of academic commentators and in practice, the day set out by the Constitution is not the one on which the college should meet, but rather that on which the President is to set a date when Parliament will meet and he is to issue the order summoning the assembly (the termination of the presidential term is calculated starting from the day on which the Head of State was sworn in). This provision is aimed at ensuring that a new President has already been elected upon termination of the period of office of the outgoing one. Since the election might sometimes require a high number of votes (the maximum so far was twenty-three ballots in sixteen days for the election of Giovanni Leone in 1971), someone believes that the electoral college should meet on the day set out in Article 85, second clause, rather than on a subsequent date, set at the discretion of the President of the Chamber.

139. If Parliament has been dissolved or is to be dissolved within three months, the election is held within fifteen days from the first meeting of the new Chambers. In the interval, the powers of the existing President are prolonged (Article 85, third clause). The reason for such a short term is the need to reduce the *prorogatio* of the outgoing President to the bare minimum. With respect to this subject in the past, the dissolution of the Chambers could be only at the end of their five years term, given that Parliament could not be dissolved in advance during the last six months of the President's term of office. Presently, however, the President of the Republic can order an early dissolution also in case of coincidence, even partial, between the last six months of his term and the last six months of Parliament. (Article 88, second clause, of the Constitution, as amended by Article 1 of Constitutional Law No. 1 of 4 November 1991).

In case of 'permanent incapacity' or death or resignation of the President of the Republic, the President of the Chamber of Deputies provides for the election of a new President within fifteen days, unless a longer period be foreseen because the Chambers are dissolved or because their term has less than three months to expire (Article 86, second clause, of the Constitution).

140. Official candidacy for the office of President by submitting specific programmes is prohibited in practice. The names of candidates can be put forward only informally by the political groups or during the voting. Debates over such 'unofficial' nominations are not allowed during the election.

Indeed, when meeting in joint session, pursuant to Article 83 of the Constitution, Parliament acts as an 'imperfect' electoral college, which is not allowed to debate but only to vote. Only remarks about the procedure and reference to the standing orders are allowed (the standing orders applied are those of the Chamber of Deputies since there is still no special provision on joint sessions: see Article 35, second clause, of the standing orders of the Chamber and Article 65 of those of the Senate).

If official names of candidates were put forward during the assemblies, the choice of the President of the Republic might be seen as the expression of particular political and ideological tendencies. The Head of State, on the contrary, is a representative of the whole Nation and he is supposed to guarantee the observance of the Constitution rather than play a political role.

141. Members of the electoral college vote by secret ballot. The purpose is always to ensure the independence of the President elected from any political influence that might arise during an open vote. Voters write the name of their favourite candidate on the ballot paper and put it into the ballot box. Those who do not wish to indicate any name can cast a blank ballot.

Passing before the box without inserting any ballot paper, thus expressing the intention to abstain from voting, is behaviour tolerated in practice but criticized. This visible expression of a 'non-vote' has often been imposed by some parliamentary groups on their members to prevent them from voting for unwelcome candidates, thus influencing the decisions of the groups and the result of the following votes. This behaviour allows political groups to exert their influence on voters, somehow violating the principle of secret voting. However, when MPs and regional delegates do indicate a specific name on the ballot paper their autonomy is fully guaranteed because their parties cannot verify if their instructions about the candidate to be voted were actually followed. Voters have often disregarded these instructions and votes have therefore gone on fruitlessly or resulted in the election of candidates different from those who had been supported from the beginning by the most important political groups.

142. Pursuant to Article 83, third clause, presidential elections need a majority of two-thirds of the assembly during the first three ballots. After the third ballot an absolute majority is sufficient. The person who is supposed to represent national unity must therefore enjoy wider parliamentary support than the Government (the confidence to the Executive can be expressed by a simple plurality of votes).

So far, owing to the very fragmented composition of the Chambers, the lack of an absolute majority party and the little unity shown by the political groups, the election usually has been a compromise between both majority and opposition groups. The election of the Head of State has been 'the moment of maximum dislocation and separation of political parties' (L. Elia), since the choice has almost never been the result of party convergence corresponding to the Government coalition. Since run-off elections are not allowed in this case, there is no limit to the number of votes necessary to reach a majority, which in practice has often been very high. Since the Constitution has come into force, only two Presidents were elected during the first ballot: Francesco Cossiga in 1985 and Carlo Azeglio Ciampi in 1999; large majorities, sometimes more than two-thirds, were reached other times as well, but only after long series of votes. The current President, Giorgio Napolitano, was elected on 10 May 2006 on the fourth ballot, receiving 543 votes out of the 1010 electors. In spite of all the rules aimed at ensuring that the elected President is independent, authoritative and supported by most parliamentary groups, the election of the Head of State inevitably takes on a strong political meaning, thus ending up being very conflicting.

The fact that parties strive to elect one of their members or at least someone whose political tendencies are not incompatible with their policy should not be surprising if we consider that the elected President is at the centre of institutional and political life for seven years, usually without the possibility of revocation, although he does not become the political leader of the country. Recently, moreover, his influence has increased, especially due to the uncertain political situation. Difficulties in

reaching an agreement that satisfies most of the groups explain why the votes are very often protracted, besides being criticized by the press and public opinion. Hence the proposals to change the present electoral procedure.

§3. Qualification for Election

143. Pursuant to Article 84, first clause, of the Constitution 'any citizen of fifty years of age enjoying civil and political rights is eligible for election as President of the Republic'. The fact that the Head of State should be a 'citizen' (male or female) seems to exclude not only foreigners and stateless people, but also 'Italians who do not belong to the Republic' whom 'the law may place on a par with resident citizens in the matter of admission to public office and elective positions' (Article 51, second clause, of the Constitution). As far as the rules on citizenship and civil and political rights are concerned (without prejudice, of course, to the constitutional rules on the matter: for instance, Articles 22 and 48), Article 84, first clause, implicitly refers to laws in force, except for the special cases of incapacity.

The minimum age requirement is aimed at ensuring that only a mature, experienced and authoritative person be elected as President, on account of both his previous *cursus honorum* and his merits, even outside the political spectrum.

Although every citizen with the above characteristics can run for election and there have been recent cases of candidacy of famous people having no connection with the political and parliamentary classes, so far the office of President has been held by renowned politicians and, almost always, former members of Parliament. The first Head of State to be elected by the Republican Parliament, Luigi Einaudi, and Carlo Azeglio Ciampi, President from 1999 to 2006 do not represent an exception to the rule. The former, a famous economist and former governor of the Bank of Italy, was also a member of the Constituent Assembly and subsequently Minister of the Budget. The latter also as former governor of the Bank of Italy; he was never a member of Parliament, but he became President of the Council of Ministers and subsequently Treasury Minister.

§4. The Oath, the Term of Office and Cases of 'Prorogatio'

144. Before taking office the President of the Republic swears an oath of loyalty to the Republic and observance of the Constitution before Parliament in joint session, which is no longer made up of the regional delegates (Article 91 of the Constitution). By this solemn act, the elected President also expresses his will to accept the charge. After reciting the ritual formula, the Head of State gives his inaugural address to the Chambers and, indirectly, to the whole Nation. In doing so, he exercises his power of *esternazione*.

The seven-year presidential term (see Article 85, first clause, of the Constitution) elapses from the day of the oath, by which the President is empowered to exercise his functions. The Constituent Assembly distinguished the length of the presidential

term from that of the two Chambers, which was previously five years for the Chamber of Deputies and six for the Senate (subsequently shortened to five years by Constitutional Law No. 2 of 9 February 1963: see the present version of Article 60, first clause, of the Constitution). The Constituent Assembly decided that the presidential term should be longer than the one of the Chambers especially in order to ensure the President's independence of the majority electing him. Moreover, the President is not supposed to exercise any political functions and there is therefore no need for his term to be short. His role as 'guarantor' rather requires a certain stability allowing him to stay away from political disputes and party influence.

As stated above, if the election of the President's successor is postponed because Parliament has been dissolved or is to be dissolved within three months, the President's powers are prolonged beyond the seven-year term. This is the only case of *prorogatio* of the Head of State explicitly provided for by the Constitution (Article 85, third clause). Moreover, in spite of some authoritative contrary opinions, academic commentators usually admit the *prorogatio* whenever Parliament, does not manage to elect the new President pursuant to Article 85, second clause, before the term of his predecessor comes to an end. The 'prolonged' President of the Republic is allowed to perform acts of extraordinary management only if they cannot be deferred under the Constitution or the law, while he can issue decrees submitted by the Government without any particular restriction.

§5. The *STATUS* of the President: Cases of Incompatibility

145. Pursuant to Article 84, second clause, of the Constitution 'the office of President of the Republic is incompatible with any other office'. This provision covers all the cases of incompatibility, much more than the rules on the other constitutional organs. Its interpretation is usually very broad, even broader than its text suggests. The office of President is therefore incompatible not only with elective or non elective, political, administrative and public positions, but also with private offices, both as employers and employees. The President, moreover, is not allowed to perform trade and professional activities. Such a high number of cases of incompatibility is justified by the need to preserve the President's independence and impartiality, which would no doubt be jeopardized if he enjoyed the political and economic power deriving from the offices listed above.

The office of President, of course, is also incompatible with party activities. He should not be allowed to remain or become a member of political groups or movements, even though he renounces to any sort of charge or responsibility. He could join instead cultural and scientific associations as a simple member with no managing function, on condition that these associations are not linked to any political party.

§6. Temporary and Permanent Incapacity and Other Cases of Early Conclusion of the Presidential Term

146. Pursuant to Article 86, first clause, of the Constitution, if the President of the Republic proves to be unable to fulfil his duties, they are carried out by the President of the Senate. The Italian constitutional system does not provide for a 'vice-president of the Republic', with the special institutional role of replacing the President whenever he proves to be unable to fulfil his duties or delegates part of them. In the exercise of presidential powers, which is necessarily personal and direct, no solution of continuity can be allowed; therefore the Head of State, in case of need, must be replaced by a person holding a different office, such as the President of the Senate.

The President of the Republic could never be replaced by his own choice, given that his powers cannot be delegated at will. He can be replaced only if specific circumstances prevent him from fulfilling his duties. Should the incapacity be temporary, the President remains in office and, once the incapacity is over, he regains the powers he had transferred (the so-called *sede plena* replacement). Should the incapacity, on the contrary, be such as to prevent the President from ever holding his office again, his duties are fulfilled by the President of the Senate until a new Head of State takes his oath of loyalty (the so-called *sede vacante replacement*). Article 86, second clause, lists the various cases of early conclusion of the presidential term: permanent incapacity, death or resignation. In all these cases, the procedure to elect a successor must be started rapidly. Two other cases should be added to the list, as will be seen later on: loss of office and removal from office.

In truth, the Constitution deals with this subject in an inadequate and incomplete manner. Cases of both permanent and temporary incapacity can be supposed, but the Constitution does not explain how to distinguish the former from the latter, nor, more in general, how to recognize a case of incapacity:

(a) The first case that deserves mention is physical or mental illness. For the President to be declared incapable, however, the disease should seriously jeopardize the 'quality' of his working activities, so much so that he is no longer able to fulfil his duties. Incapacity is considered as permanent not only when, according to the medical reports, his illness seems irreversible, but also when, although it is likely to be cured in the end, it could last for quite a long and indefinite time, maybe beyond the end of the term. Replacement by the President of the Senate, is considered indeed as exceptional and temporary and should never extend over many months or even years. In practice, verifying if the incapacity of the President of the Republic is caused by a disease and if such incapacity is temporary or permanent can be a very hard task. In any case, if the Head of State is able to do it, he can declare himself incapable of fulfilling his duties. If he declares himself temporarily incapable, his declaration must be countersigned by the President of the Council of Ministers. If, on the contrary, he declares himself permanently incapable, most academic commentators reckon that there is no need for a countersignature, since the declaration is considered

a resignation act, which is a *personal* act. The declaration of permanent incapacity is indeed identical to 'a resignation act, which should explain the reasons that justify or impose the resignation itself' (L. Paladin).

If, on the contrary, the President cannot or is not willing to recognize that he suffers from a disease that makes him unfit for work, it becomes very difficult to deal with his case, since the Italian Constitution does not specify who should establish the President's incapacity. However, the mere statement of incapacity gives rise to the consequent legal effects, especially to the replacement procedure.

Verifying the President's physical or mental incapacity to fulfil his duties implies two different evaluations: the first is medical-scientific, therefore technical, while the second is political and is also aimed at establishing if the incapacity is temporary or permanent. The ensuing decision is expressed in the document by which the Head of State is officially declared incapable. This case occurred only once, in August 1964, when President Antonio Segni was affected by cerebral thrombosis. According to a notice issued by the Prime Minister's Office, the medical bulletin on the Head of State's conditions was transmitted by the Secretary General of the Presidency of the Republic to the Presidents of the two Houses of Parliament and the President of the Council of Ministers. The latter reported it to the Council of Ministers, which *recognized* the impossibility for the President of the Republic to fulfil his duties.

The President of the Senate then convened the President of the Chamber of Deputies and the President of the Council for the 'appropriate evaluations' and the three *agreed* on the need to enforce Article 86, first clause, of the Constitution. The President of the Senate was therefore appointed as temporary substitute of the Head of State. Although, at first, President Segni's incapacity to fulfil his duties was carefully deemed temporary, the serious disability he suffered as a result of the disease soon turned out to be irreversible. A few months later, he decided to resign, thus preventing a very likely official procedure to declare him permanently incapable.

Although this procedure was criticized, it had the merit of establishing that the incapacity should be ascertained jointly and on an equal footing by the President of the Senate, in his capacity as the President substitute, by the President of the Chamber, who, in case of permanent incapacity of the Head of State, should provide for the election of his successor and preside over the electoral college and by the President of the Council, as a representative of the Executive responsible to Parliament.

(b) If the Head of State goes abroad on an official visit and his absence from Italy is likely to be rather long and should he be very far from the country, all the presidential duties that do not concern the mission abroad are carried out by the President of the Senate, pursuant to Article 86, first clause, of the Constitution.

The replacement in this case is aimed at preventing the difficulties that might arise owing to the long distance and impossibility for the President to come back immediately in case of need, with serious drawbacks on the country's constitutional life. This is, however, an anomalous case of 'partial' replacement: the activities carried out abroad by the Head of State pertain to his role of representative of Italy in international relationships while, as long as he is away, the

rest of his duties are fulfilled by the President of the Senate. The President of the Republic himself takes the initiative of drawing up the related act, which is countersigned by the President of the Council.

(c) Pursuant to Article 12, fourth clause, of Constitutional Law No. 1 of 11 March 1953 (as amended by Article 3 of Constitutional Law No. 1 of 16 January 1989), the Head of State can be suspended from office by the Constitutional Court in case of impeachment for high treason or attempt on the Constitution, as provided for by Article 90 of the Constitution. It is worth mentioning that the impeachment procedure does not necessarily imply suspending the President from office, a measure which can be taken by the Constitutional Court only if it really deems it necessary (which, given the circumstances, should happen in most cases) (see Part I, Chapter 2).

(d) As stated above, the presidential term may end before the natural date not only for permanent incapacity, but also in case of death, resignation, loss of office or removal from office in case of conviction following an impeachment procedure, pursuant to Article 134 of the Constitution, paragraph 3.

As the fifteen days period within which the election of the successor must be provided for runs from the moment the President resigns (see Article 86, second clause, of the Constitution), the resignation takes effect immediately and is irrevocable, without the need for other constitutional organs to accept it. Once it is signed, the resignation act replacement starts automatically. According to most academic commentators, the act being *personal*, i.e. performed by the President not in the exercise of his functions but rather as a private citizen, it should not be countersigned.

Six of the ten presidents elected so far by the republican Chambers decided, for various reasons, to resign before the end of their term. Antonio Segni, as we said before, was obliged to resign owing to a serious illness; Giovanni Leone, the target of violent attacks from journalists aimed at disclosing his alleged business and finance offences, decided to resign in 1978 since (in his own words) the 'defamatory campaign' seemed to have 'damaged the political groups' trust' in him; Sandro Pertini resigned in 1985, Oscar Luigi Scalfaro in 1999 and Carlo Azeglio Ciampi in 2006, respectively nine, thirteen and three days before the end of their seven-year term, so as to allow their already elected successor to take up the office of Head of State without delay; Francesco Cossiga, whose institutional behaviour during the last part of his term gave rise to fierce criticism, resigned in 1992, a few months before the end of his term, for the reasons that he explained in his address to the Nation, broadcast by the most important television channels (Regarding himself as a President with no more authority and credibility, in order to overcome the severe political and institutional crises of that period, he affirmed the necessity to elect a new Head of State).

His resignation act, as well as Leone's (he too had addressed the citizens from the cameras to announce his resignation and give reasons for it) did not contain any explanation, unlike the acts signed by Presidents Segni, Pertini and Scalfaro. In the act signed by Ciampi on 15 May 2006 there was only a reference to the fact that the resignation would have taken effect on the same day that the newly elected President, Giorgio Napolitano, would be sworn in before Parliament in joint session.

(e) Save for the case of impeachment, the possibility that the Head of State might lose office owing to the loss of one of the conditions to be elected President (Italian citizenship, enjoyment of civil and political rights) is purely theoretical. Should this highly improbable event occur, the President would be automatically prevented from continuing his term and immediately replaced.
(f) About consequences of conviction following an impeachment procedure, like removal, sanctions, etc., see Part II, Chapter 9, §10.

§7. Replacement

147. The President of the Senate may take up the office of Head of State *pro tempore*, as long as the President is unable to fulfil his duties or, should the President retire, until the oath of his successor. The President of the Senate, of course, is allowed to replace the Head of State as long as he retains his office of President of the Senate.

As explicitly stated in some decrees issued in order to provide for the replacement of the President while abroad, when the President of the Senate replaces the Head of State he is called 'substitute President of the Republic'. In case of both temporary and permanent replacement, the substitute takes office without taking any oath which, as a matter of fact, is not provided for by the Constitution. In order to fulfil his duties correctly, the substitute is subject to the same restrictions as the President of the Republic as regards cases of incompatibility. As long as he replaces the Head of State, the substitute is not only suspended from his duties as President of the Senate, but also from any other office or activity incompatible with the office of President of the Republic. Like the President of the Republic, his substitute cannot be held responsible for acts carried out in the exercise of his duties, pursuant to Article 90 of the Constitution. He also enjoys the same legal protection of his person and honour (see Article 290*bis* of the Criminal Code).

Some academic commentators do not agree with the fact that the substitute enjoys exactly the same powers as the Head of State. In any case, the substitute must unquestionably perform all the acts that cannot be delayed pursuant to the Constitution or by law and he is empowered to issue all the decrees that are formally presidential but actually moved by the Government. He is also empowered to perform duties implying a control on decisions taken by other authorities (such as returning a bill to the Houses of Parliament for renewed consideration). Generally speaking, although the Constitution does not explicitly limit his powers in any way whatsoever, the substitute should follow conventional rules of behaviour that change according to the circumstances and the necessity to ensure the efficiency of the institutions. If the replacement is *sede vacante*, the substitute cannot exercise his power to dissolve the Chambers, since the election of the new President of the Republic must be provided for within the short period set out in Article 86, second clause, of the Constitution.

§8. Re-election: Assignment of the Office of Life Senator to Former Heads of State

148. Re-election of the President of the Republic for another seven years (and for other successive terms) is not forbidden by the Constitution. It has never occurred, however, that the same President of the Republic was re-elected, even though there is no conventional rule opposing it. [It occured for the first time in 2013, with the re-election of Giorgio Napolitano]. This possibility, indeed, is often taken into consideration by political groups. According to some academic commentators, excluding this possibility by a constitutional amendment would preserve the President's independence and impartiality, which could be jeopardized during the last period of his term if he tried to win the favour of most of the political groups.

Pursuant to Article 59, first clause, of the Constitution, any person who has held office as President of the Republic is by right a senator-for-life, unless he refuses to accept the nomination. When senators by right and for life enter the Senate, the President just informs the assembly, without the need to verify the validity of their admission.

§9. Allowances and Endowments; The General Secretariat of the Presidency of the Republic

149. Pursuant to Article 84, third clause, of the Constitution the allowances and endowments of the President, which allow him to provide for the needs of his private life and family (*assegno*), are established by law. The office of President must be remunerative, especially because it is incompatible with any other office. According to Article 84, third clause, the allowances and endowments, as well as the inalienable movables and immovables (such as the Quirinale Palace in Rome) allocated to the President for the fulfilment of his institutional duties (*dotazione*) are established by law too.

The Head of State is assisted by the General Secretariat of the Presidency of the Republic, set up by Law No. 1077 of 9 August 1948, which implemented Article 84, third clause.

The Secretary General is the highest authority of the Secretariat. He is appointed by means of a decree of the President of the Republic, countersigned by the President of the Council, after consultation with the Council of Ministers. This advice being obligatory but not binding, the choice of the Secretary General depends almost entirely on the President of the Republic. Should the Secretary General no longer enjoy the confidence of the Head of State, he can be removed from office following a procedure similar to his appointment.

By virtue of the power of self-organization guaranteed to each constitutional organ, the President may organize the secretariat offices and services, determine the legal and economic status of its staff and manage the financial resources allocated to the Presidency.

§10. Responsibility

150. Whereas the King could not be held responsible for his actions, his person being 'sacred and inviolable' (as it was solemnly set out in Article 4 of the *Statuto albertino*), under the Republican Constitution the Head of State is only partially exempt from answering for his illegal actions.

Pursuant to Article 90, first class, the President of the Republic cannot be held responsible 'for acts carried out in the exercise of his duties' save 'in cases of high treason or attempt on the Constitution'. The President must answer for such serious crimes within the framework of the so-called political justice (see Part II, Chapter 9, §10). The Head of State, on the contrary, enjoys no immunity from civil and criminal jurisdiction either for acts unrelated to the fulfilment of his presidential duties, or for activities carried out before taking office, for which he must answer like any other citizen.

The President can, therefore, be subject to judicial proceedings or measures restricting his personal freedom, or even be sentenced to prison terms (in the last two hypothesis – if he does not resolve to resign – the President is no longer capable of fulfilling his duties and his incapacity can be temporary or permanent depending on the circumstances). Some academic commentators, however, reckon that the President should be accused but not prosecuted as long as he stays in office for crimes not covered by Article 90. This would prevent any unjustified or hasty judicial action against the President, who should be fully protected during his seven-year term. Although this opinion was applied in the past by the investigating judicial authorities in a case concerning President Oscar Luigi Scalfaro, it is not laid down in any constitutional rule or law. In fact, in 2003 and 2008, Parliament had approved two ordinary laws aimed at excluding the 'high offices of the State' from undergoing criminal proceedings up until the end of their term. Both these laws – which, for the President of the Republic, related to crimes unconnected with activities pertaining to his office – were, however, declared constitutionally illegitimate by the Constitutional Court (see, respectively, the sentences No. 24/2004 and No. 124/2008).

As stated above, although he cannot be held responsible for acts carried out in the exercise of his duties, the President can be prosecuted for the crimes of high treason and attempt on the Constitution by the two Houses of Parliament in joint session and judged by the Constitutional Court (see Part II, Chapter 9, §10).

According to an academic theory, attempt on the Constitution and high treason are not provided for by criminal legislation but rather by the Constitution in a very concise manner. Providing for presidential crimes would mean protecting the values that the President himself is supposed to defend: unity and integrity of the Republic and respect of the Constitution. 'High treason' would therefore consist of behaviour aimed at jeopardizing the security or interests of the Nation, or even at damaging the integrity of the State and its institutions (especially if committed with the assistance of foreign authorities), whereas a serious and malicious violation of constitutional fundamental principles, and of the constitutional provisions concerning the President's powers, could be considered an 'attempt on the Constitution'. Doubts have been raised over the conformity of this theory with the fundamental principle of legality of crimes and punishment. In any case, although this and other

theories may seem plausible, the Head of State's responsibility should be established case-by-case, by the impeaching and judging authorities. The distinction between criminal and political liability may thus be rather vague.

It should be noted, however, that the President's behaviour can never be judged in terms of political convenience. The Head of State, indeed, is supposed to guarantee constitutional rules and sometimes admonish or encourage institutional authorities and political parties but never play an active political role.

Nevertheless, the President is exposed to the criticism of political groups, the media or ordinary citizens which, however, can only be aimed at influencing the Head of State's behaviour indirectly. Political censure, furthermore, must never take the form of defamation of the Head of State, which can be prosecuted under Article 278 of the Criminal Code.

§11. Countersignature of the Acts of the President of the Republic

151. Article 90 of the Constitution is closely linked to Article 89, which sets out that 'no act of the President is legal unless it is countersigned by the Ministers who have submitted it and accept its responsibility' (first clause); 'measures having the value of law and such others as are laid down by law shall also be countersigned by the President of the Council of Ministers' (second clause).

Pursuant to Article 5, first clause, letter d) of Law No. 400 of 23 August 1988, the *Premier* endorses every act of the Head of State that was subject to a resolution by the Council of Ministers. Given that the President cannot be held responsible for acts carried out in the exercise of his duties, the legal and political responsibility (the former before courts of criminal, civil and accounting jurisdiction, the latter before Parliament) must be taken up by members of the Government; the countersignature is therefore essential for the acts of the President to be considered as valid. The expression 'Ministers who have submitted the act' contained in Article 89, first clause, is, however, rather misleading (it was apparently a mistake during the elaboration of the Constitution), since not all the acts of the President are submitted by members of the Government. Most presidential decrees are the form taken by acts containing normative political or administrative provisions entirely defined by the Executive. One or more Ministers and, if required, the President of the Council submit and countersign the act and accept its responsibility as a result of Government decision-making power. Before issuing these acts, the President verifies their legality and sometimes, according to part of the academic commentators, also their merits.

Some presidential acts, on the contrary, can be adopted by the President of the Republic on his own initiative. These acts are countersigned by the Ministers having jurisdiction over such matters. The most important acts must be endorsed by the President of the Council in accordance with law or constitutional practices. In this case, the responsibility of the members of the Executive consists in controlling the act, by countersigning it, not its authorship, resting solely with the Head of State. The control concerns mainly the legality of the act, although it is also aimed at protecting governmental political trend.

According to authoritative sources, there is a third category of presidential acts, termed 'complex', which must be approved by both the Head of State and a Government member. The decrees by which the President of the Council of Ministers is nominated and the two Houses of Parliament are dissolved could be considered as such, although it is probably more plausible to consider them as an expression of the President's autonomous powers.

152. Not all the acts that formally belong to the President are promoted by the Executive or the Head of State himself (or by both). Some of these acts are substantially defined by other authorities: the decrees by which criminal and civil judges are appointed are issued in compliance with the resolutions of the *Consiglio Superiore della Magistratura*. Those concerning the commissioners of the *autorità per le garanzie nelle comunicazioni* (which supervises the activities carried out in the field of communications) formally approve the appointments made by the Chamber of Deputies and the Senate, etc. In all these cases, endorsement by the Minister having jurisdiction or the President of the Council is just aimed at verifying that the act comes from the President of the Republic, a mere certification of the authenticity of his signature.

Finally, exceptions to the rule set out in Article 89 of the Constitution are some presidential acts which need not be countersigned. They include *personal* acts, such as the resignation act, which are not performed by the President in the exercise of his functions but rather as a private citizen, regulations and other acts concerning the organization and the staff of the Presidency of the Republic, performed by the President by virtue of the autonomy to which every constitutional organ is entitled.

The same applies to measures undertaken by the Head of State as the President of the *Consiglio Supremo di Difesa* and of the *Consiglio Superiore della Magistratura*. The verbal *esternazioni* by which the President expresses his opinion about the various political and institutional current events, of course, are not susceptible of being countersigned.

§12. Powers: Powers Concerning the Parliamentary System

153. The President of the Republic plays a major role in the formation of the Government. When a Cabinet resigns, it must do it before the President who, after an usually long and complicated procedure, accepts the resignation, appoints the new President of the Council and the Ministers who are proposed by him (Article 92, second clause, of the Constitution).

The decree by which the President accepts the resignation of the Government must be considered an expression of the presidential autonomous power, although it is influenced by the parliamentary situation. The Head of State can, in fact, reject the resignation (unless it was the result of a no-confidence vote) and invite the Executive to formally ascertain the orientation of the Chambers. The act in question, issued without the need of a formal proposal, is countersigned by the new President of the Council, pursuant to Article 1, second clause, of Law No. 400 of 23 August 1988.

The decree of nomination of the President of the Council of Ministers can be considered an expression of the President's autonomous powers as well. This act should also meet the requirement of choosing a person who will be able to obtain the confidence of the Chambers. Sometimes, however, Governments were appointed in spite of the lack of a parliamentary majority support and, hence, of the fact that they were unlikely to obtain the confidence (in view of a following dissolution of Parliament). Unlike the previous ones, the decree of nomination of Ministers is not an expression of the President's autonomous powers, since the choice of the Ministers who will join the Government is up to the President of the Council. In practice, however, the Head of State has sometimes interfered with this choice. The decree of nomination of Ministers, countersigned by the President of the Council who is entitled to propose the Ministers pursuant to Article 92, second clause, of the Constitution, is issued at the same time as the two other presidential acts examined above, at the end of the new Government formation.

154. One of the most important acts among those expressing the President's autonomous powers is the one decreeing an early dissolution of Parliament. Pursuant to Article 88 of the Constitution, 'the President of the Republic may dissolve one or both Chambers after consultation with their Presidents'; this power, however, cannot be exercised 'during the last six months of his term of office, unless they coincide, partially or entirely, with the last six months of Parliament'. This is the only provision on early dissolution: the Constitution does not specify when the Chambers could or should be dissolved.

However, according to the principles on which the form of parliamentary government is founded, it is inevitable that there will be an early dissolution of Parliament when the political factions in the Chambers are unable to form a majority sufficient to confidently support an Executive representing that majority. Furthermore, there are no alternatives to dissolution if, for the two Chambers, it proves impossible to regularly perform the parliamentary functions (for instance, where irreconcilable political differences between one and the other end up by paralyzing the legislative activity).The Presidents of the Chambers to be dissolved, who must be consulted before issuing the related decree, give a non binding advice, that the President of the Republic is free to disregard. The act in question, although it is countersigned by the President of the Council, does not imply a Government proposal, nor, even less, a resolution of the Council of Ministers on the matter. This confirms that the act of dissolution is 'entirely presidential' and that the Prime Minister does not share in the decision, but is only supposed to control its legality. The grounds for the dissolution are never specified in the decree. Sometimes they have been given by the Presidency of the Republic or the Council.

During the last six months of his term (the so-called white semester), the Head of State is not allowed to dissolve the Chambers. This rule is aimed at preventing him from encouraging the formation of an electoral college which might support his reinstatement, if the Parliament in office does not seem to favour his re-election. Some academic commentators rather believe that the reason why the President should not perform this duty is that his powers are 'weakened' during the last part of the seven-year term.

Just over twenty years ago, the President of the Republic was entitled to dissolve the Chambers even in the last six months of his term if this period coincides, even partially, with the last six months of Parliament. This exception was introduced by Constitutional Law No. 1 of 4 November 1991, in order to avoid the inconveniences that the almost contemporaneous end of the tenth Republican Parliament and seven-year term of President Francesco Cossiga in 1992 would have caused on an institutional level. In the nearly sixty-five years since the Constitution came into force, the early dissolution of one or both Houses of Parliament was all but rare: only once, during the fourth Parliament (1963–1968), both Chambers lasted until the end of their term. The Senate alone, which at that time had a term of office of six years, was dissolved twelve months in advance in 1953, 1958 and 1963, always in order to combine its re-election with that of the Chamber of Deputies. The Senate term was finally reduced to five years by Constitutional Law No. 2 of 9 February 1963, which amended Article 60, first clause, of the Constitution.

Since the beginning of the 1970s, no Parliament has ever come to the natural end of its term: both Chambers have been dissolved early eleven times. Seven of these (in 1972, 1976, 1979, 1983, 1987, 1996 and 2008) were the result of government crisis brought about by the impossibility of forming a majority and hence a Cabinet supported by Parliament. In February 1992, according to the debatable opinion of President Cossiga, the Chambers were dissolved some months before the natural end of their term owing to their incapacity to legislate and adopt the necessary institutional reforms and for fear that the citizens would associate the 'delegitimisation' of the Parliament in office and the political class with that of parliamentary institutions and politics as a whole. President Scalfaro, instead, stated that he dissolved the Chambers in January 1994 for three different reasons. The first was the result of the 1993 referendum, by which the Italians voted in favour of turning the voting system of Parliament from a proportional into first-past-the-post one, and the ensuing need to elect new MPs by respecting the citizens' will. The second was the remarkable gap between the numerical composition of parliamentary political groups and the result of two important local government elections held in June and November 1993. The third reason was the discovery by the judiciary of generalized corruption in the management of public funds. This scandal involved many MPs still in office, as well as former Ministers, local authorities and people working in the economic and financial sectors. Finally, President Ciampi dissolved the Chambers in March 2001 two months before the natural end of their term, in order to avoid holding the Parliament election during the period of summer vacation, as expected if the constitutional term had been respected. For the same reason, and particularly for the purpose of preventing a 'constitutional blockage' which would have been created due to the end of the fourteenth Republican Parliament in quick succession with the end of his seven-year term as President of the Republic, Ciampi dissolved the legislative Chambers in February 2006 just under four months early.

§13. Other Powers Concerning the Electorate and the Chambers

155. The President of the Republic provides for the election of a new Parliament (Article 87, third clause, of the Constitution) within seventy days from the dissolution of the preceding Parliament (Article 61, first clause, of the Constitution). By the same decree, he sets the date of first meeting of the new Chambers, which must be held not later than twenty days after the elections (see *again* Articles 87, third clause, and 61, first clause, respectively). The decree is issued after a resolution of the Council of Ministers, on proposal of the President of the Council and the Minister of the Interior, who also countersign the decree. The same happens when the Head of State provides for a referendum in all the cases laid down by the Constitution (Article 87, sixth clause,). These acts are an expression of the Government's powers, though limited, which can be exercised only by means of a presidential decree. Indeed, the only discretionary element in providing for the elections and referenda and setting the date of the first meeting of the Chambers, i.e., choosing the dates within the limits allowed by the Constitution and by law, is left to a decision of the Council of Ministers.

156. Pursuant to Article 59, second clause, of the Constitution, the Head of State may nominate, as senators-for-life, five citizens who have brought honour to the Nation through their exceptional merits in social, scientific, artistic and literary fields. These nominations are the expression of the President's autonomous initiatives and decisions, and the related acts therefore do not suppose any government motion. The only grounds given in the act are the field in which the person who was nominated has had exceptional merits. The act is countersigned by the President of the Council of Ministers.

In the first decades of the Constitution being in force, the maximum number of senators-for-life was believed by most academic commentators to be five (excluding former Heads of State, who become senators-for-life *ex officio*) and this was the practise.

In 1984, instead, with the consent of the then President of the Senate, Cossiga, and the Senate Committee on the Elections, President Pertini decided to follow a different interpretation, according to which each Head of State could nominate up to five senators, regardless of the total number of those already in office. This innovative interpretation was also followed by the successor of Pertini, Cossiga. It was very debatable, since it considered the nominations more a prerogative of the President of the Republic rather than an institute aimed at ensuring a limited integration of the Senate with particularly blameworthy personalities. However, the successors to Cossiga have aimed to restore the previous practice and, as a consequence, today the persons who have become senators-for-life thanks to a President are only five.

157. The Head of State may take the initiative of convening each Chamber in extraordinary session (Article 62, second clause, of the Constitution); this is a presidential power in the very strict sense of the word, and it is exercised quite rarely in practice. The related act must be countersigned by the President of the Council of Ministers.

158. Pursuant to Article 87, second clause, of the Constitution, the President of the Republic may send messages to Parliament in order to draw the MPs' attention to what he considers to be particularly important issues. These are formal, written acts coming exclusively from the Head of State who freely determines their contents. These acts do not imply a ministerial motion and are countersigned by the President of the Council or by a Minister. Given that the message is strictly presidential, the countersignature does not mean that the Government agrees with its contents but only that the legality of the act is thus certified. This power has been rarely exercised so far. The President who has sent the most messages to Parliament so far is Francesco Cossiga. On 26 June 1991, for instance, he sent a very broad and debated message on institutional reforms which was later discussed in both Chambers. The latter, however, usually did not carry out presidential messages and sometimes did not even discuss them.

These messages must be distinguished from the informal written communications from the Head of State to other authorities (the President of the Council of Ministers, the Presidents of the two Houses of Parliament, etc.) and from the speeches he sometimes delivers in Parliament (such as his inaugural address) or, more often, elsewhere (during public ceremonies, official visits abroad or from the TV screen). The messages should also be distinguished from the interviews and impromptu declarations to journalists. In all the above cases, the President does not exercise his constitutional power to send messages but rather the general *facoltà di esternazione* he is entitled with. Therefore, the countersignature is not required (verbal declarations, of course, are not susceptible of being countersigned), while the Government is often informed about the text of the speeches before they are delivered. Recently, this presidential faculty has been exercised more than ever before.

By now, Presidential 'declarations' of every type have increased disproportionately, thus increasing a continual and – it would seem – unfettered flow. Today the President of the Republic pronounces on any important issue in current politics, 'interfering' to an ever greater extent which, although undermining the neutrality of the office, reveals the substantial participation in guiding the State's political direction, in exercising a role that should be, in fact, unrelated to the constitutional design of the form of government.

159. The President of the Republic promulgates the laws (Articles 73, first clause and 87, fifth clause, of the Constitution) with a different formula for ordinary and constitutional laws laid down in Articles 1 and 2 of Decree of the President of the Republic No. 1092 of 28 December 1985 (see Part II, Chapter 4, §3). Although the promulgation is formally a presidential measure, it is part of a process in which the resolving power is basically in the hands of Parliament. Its function is therefore to express the 'rule-making will' resulting from the approval of the bill by the two Chambers. The promulgation need not be moved by the Government and is countersigned by the President of the Council and the Minister or Ministers having jurisdiction on the matter of the bill. Ordinary laws must be promulgated within one month from their final approval. In cases of urgency this term can be shortened by means of a resolution of each Chamber passed with an absolute majority (Article 73, first and second clause).

Nevertheless pursuant to Article 74, first clause, of the Constitution, before promulgating a law the President may request a new consideration. If the Chambers vote the bill once more, however, the law must be promulgated (Article 74, second clause). This is the result of an autonomous decision on the part of the Head of State and therefore the relevant act is not moved by the Government, which has other means to influence the course of laws and could never oppose the passing of a law approved by Parliament. Bills are returned by means of a written message, in which the President gives reasons for the new consideration. Since Article 74 does not specify any particular reason for returning the bills, these reasons can be related not only to formal or substantial constitutionality, but also to merits. Given his *super partes* role, however, the Head of State must be very cautious in returning a bill basing his decision on political grounds. In practice, mainly in the past, bills have been returned so far for breach of the constitutional rule providing for means for covering new expenditures (see Article 81, fourth clause, of the Constitution).

During the last period of Cossiga's presidential term, doubts were raised on the possibility for the Chambers, after having been dissolved, to re-examine and pass once more a law for which the Head of State asked for a new consideration. Cossiga's negative opinion, besides having been opposed by most academic commentators, was contradicted by the activities of the Parliament which, in 1992, after having been dissolved, approved a bill which had been returned (thus obliging the President to promulgate it) and started re-examining another one.

In the seven years of Carlo Azeglio Ciampi's presidency, during the parliamentary procedure of important bills, the President of the Republic felt it appropriate, with observations made beforehand, to point out to the Government and to the government ranks the elements of constitutional illegitimacy present – in his opinion – in the legislative bills being examined: approving the laws without deleting the reasons for unconstitutionality would inevitably have caused their return to the Chambers by the President. This practice resulted in puzzlement because the Constitution does not allow for interventions by the Head of State, albeit informal, aimed at changing the content of laws while they are being formed, and furthermore, if the Chambers accept the points made by him and thus approval becomes 'rubber-stamped', in practice the President of the Republic is prevented from exercising his power to send back the bill for reasons other than those already proposed.

Ciampi's successor, Giorgio Napolitano, implemented another contentious line of conduct. In some cases, while consenting to promulgate the legislative bills deliberated by the Chambers and then allowing them to come into force, the Head of State sought to publicly illustrate reasons for dissent or doubt about the provisions submitted for his examination, usually by letters sent to the Presidents of the two Chambers and to the President of the Council. However, the Constitution does not provide for a promulgation that is 'dissenting' or 'with reservations'; strictly speaking, if a law appears to him to be seriously flawed, the President may and perhaps should send it back to the Chambers, and then be held to promulgate it if it is approved again even without any modifications being made.

§14. Powers of Participation in the Activities of the Government

160. Pursuant to Article 87, fourth clause, of the Constitution, the President of the Republic authorizes the submission to Parliament of bills moved by the Government upon a resolution of the Council of Ministers. In truth, this power is above all a historical vestige of the time in which the executive power and the power to promote bills rested formally with the King. As the republican Constitution explicitly entrusts this power to the Government, the latter should not need any authorization whatsoever to exercise it. Anyway, the presidential act just fulfils a control function within the process of legislative initiative in which the resolving power is in the hands of the Council of Ministers. Hence, the President of the Republic cannot deny his consent, but only return the bill to the Government for renewed consideration, giving reasons for it, by means of a note, usually not made public, to the President of the Council. This informal process is similar to the one by which the Head of State returns a bill to Parliament for a new consideration before promulgation. The relationships between the President and the Government, two distinguished and independent constitutional organs, are marked, however, by a more permanent and discreet cooperation in which the former can exercise his powers of persuasion and influence on the latter.

161. The Head of State can exercise the same powers before issuing decrees having the value of laws (decree-laws and legislative decrees) and regulations (Article 87, fifth clause, second part, of the Constitution,). The President's function in this case is to manifest the rule-making will expressed by the Government.

Issuing decrees having the value of laws and regulations approved by the Council of Ministers is equivalent to promulgating the laws voted by Parliament; pursuant to Article 5, first clause letter c), of Law No. 400, of 23 August 1988, these decrees and regulations are moved by the President of the Council, who countersigns them together with the Ministers having jurisdiction over the matters of the acts.

Regarding the acts having value of law, the President of the Republic has a similar function of control to that entrusted to him for laws. Therefore, even if regarding decree-laws and legislative decrees, the Constitution does not make express provision for a power of 'suspension veto'. He may only put forward reservations and objections, of constitutionality or merit, on the bills submitted for his signature, and ask the Council of Ministers to revise the controversial aspects. In practice, there have been sent back to Government both decree-laws due to a lack of the requisites of necessity and urgency required by Article 77 of the Constitution or for violation of other constitutional regulations and, more rarely, legislative decrees due to non-compliance with the constraints established by the delegating law.

162. Pursuant to Article 87, seventh clause, of the Constitution, the President of the Republic appoints, in the cases laid down by the law, the officials of the State. The related acts, although they formally come from the President, are defined by the Government, which is responsible for administrative matters and therefore charged with taking decisions concerning the appointment of State officials. A number of other administrative measures taken by the Government, and in particular all

the ones approved by the Council of Ministers, take the final form of decrees of the President of the Republic. These acts are all listed in Article 1 of Law No. 13 of 12 January 1991. The proposal and countersignature are up to the President of the Council (always when the measure is approved by the Council of Ministers) or, according to cases, to the Ministers having jurisdiction.

§15. Powers Concerning International Relationships

163. The President of the Republic, in his capacity as the 'Head of State' (see Article 87, first clause, of the Constitution) represents Italy in relationships with other nations, though not exclusively. Pursuant to Article 87, eight clause, he accredits and receives diplomatic representatives. The accrediting concerns Italian representatives and consists in an official request addressed to the foreign Heads of State (or the highest authority of the international organization) to welcome the diplomat representing Italy. The related credential letter, drawn up according to a fixed formula, is proposed and countersigned by the Minister of Foreign Affairs, who is empowered to select the diplomats and to assign them specific functions. Likewise, the President of the Republic receives the credential letters of foreign diplomats who officially are introduced to him.

In his capacity as representative of the Nation in international relationships, the Head of State also ratifies the international treaties signed by the Government, i.e. issues the acts by which the Republic complies with international agreements and becomes responsible to the other signatories (Article 87, eighth clause, of the Constitution). This does not exclude, in practice, that some agreements be reached 'in a simplified manner' that do not require the President's ratification. The latter is substantially decided by the Government and the related act is countersigned by the Minister of Foreign Affairs. Pursuant to Article 80 of the Constitution, ratification of international treaties of a political nature, or providing for arbitration of judicial settlements, or implying variations of the Nation's territory or financial burdens, or modifications to laws, must be authorized by the Chambers by means of a law.

Finally, owing to his representative role towards the rest of the international community, the President declares a state of war when it has been decided by Parliament (Article 87, ninth clause, last part, of the Constitution). The decision is therefore left to Parliament (see Article 78 of the Constitution) while the President's duty is to officially manifest the will of the State.

§16. Powers Concerning the Armed Forces

164. Pursuant to Article 87, ninth clause, of the Constitution, the President of the Republic commands the Armed Forces.

Employment of the Armed Forces' members depends on the Government but, since they have to remain politically neutral, their non-political and 'non-operational' leader must be an authority such as the Head of State, the representative of national unity (see Part V, Chapter 4). The President can exercise this 'high command' by sending messages, taking part in ceremonies, receiving Armed

Forces' members. As we shall see later on, the President also presides over the *Consiglio Supremo di Difesa* (Supreme Defence Council).

Usually, however, the President does not take formal measures, which might give rise to the question of the relationship between the President's and the Government's will. It is worth remembering that the question of the Armed Forces' command in cases of emergency was explicitly raised by President Cossiga in 1986–1987 by means of letters to the Presidents of the Council of Ministers of that time. The Government set up a commission of experts charged with studying the constitutional side of the issue. The commission drafted a report outlining, among other things, that the 'non-operational command' given to the Head of State is not merely formal and symbolical but should be considered as a way for the President to exercise his typical function of protection of constitutional values (from the condemnation of war to the need to keep the Armed Forces apolitical).

The Head of State also presides over the *Consiglio Supremo di Difesa* (Article 87, ninth clause, second part, of the Constitution, see also Part V, Chapter 4). The Head of State's duties are those normally fulfilled by the President of a collegiate body: summoning the meetings and deciding the agenda, as well as directing the debates. The related acts need not be moved nor countersigned by a Minister.

§17. Powers Concerning Guarantee Organs

165. Pursuant to Article 135, first clause, of the Constitution, the President of the Republic nominates a third of the fifteen judges of the Constitutional Court. These nominations are the result of autonomous initiatives and decisions by the Head of State. Hence, the related decrees need not be moved by the Government but are countersigned by the President of the Council of Ministers.

166. The President of the Republic presides over the *Consiglio Superiore della Magistratura* (Articles 87, tenth clause, and 104, second clause, of the Constitution see Part II, Chapter 7, §2). This is aimed at preventing both the dependence of the criminal and civil judiciary on the Government and its complete separation from the other State powers. The Head of State's duties within the *Consiglio* are those normally fulfilled by the President of a collegiate body (summoning the meetings and deciding the agenda, as well as directing the debates). These acts need not be moved nor countersigned by a Minister. In fact, however, the President seldom attends the meetings and the chair is usually taken by the vice president of the *Consiglio* (during Cossiga's presidency, however, tensions were high between the Head of State and the *Consiglio*, especially over the agenda of the meetings). Some of the most important acts approved by the *Consiglio* concerning the magistrates' careers take the form of decrees of the President of the Republic (not in his capacity as President of the *Consiglio Superiore della Magistratura*) countersigned by the Minister of Justice.

The form of these acts is set out in Article 17, first clause, of Law No. 195 of 24 March 1958 (see now Article 1, first clause letter f), of Law No. 13 of 12 January 1991).

167. Law No. 195 of 1958 also provides that the *Consiglio Superiore della Magistratura* can be dissolved before the end of its four-year term by a decree of the President of the Republic, having consulted the Presidents of the two Houses of Parliament and Presidency committee of the *Consiglio* itself (Article 31, first clause), should it not be able to carry out its activities. This power is not provided for by any constitutional rule, that the Head of State has never exercised. The dissolution act should probably be countersigned by the President of the Council of Ministers.

§18. The Other Nomination Powers

168. The Head of State appoints the President and the other members of the *Consiglio Nazionale dell'Economia e del Lavoro* CNEL (National Economic and Labour Council). This council is composed of experts, representatives of production categories and representatives of the social promotion associations and the voluntary organizations, and is an advisory body to Parliament and the Government. It has the power to promote legislation and can contribute to the drafting of economic and social laws according to the principles and within the limits allowed by the law (Article 99 of the Constitution). It is composed of sixty-four members, plus the President, who is designated by the Government (his name is proposed by the President of the Council, after a resolution by the Council of Ministers) and appointed by means of a decree of the President of the Republic.

The Head of State autonomously chooses eight of the ten 'qualified representatives of economic, social and legal culture' making up the Council, according to the current text of Article 2, first clause, of Law No. 936 of 1986. The related nomination acts must not be moved by the Government and are countersigned by the President of the Council of Ministers. The other members of the CNEL are, instead, appointed by means of a decree of the President of the Republic, moved by the President of the Council after a resolution of the Council of Ministers.

169. The Head of State also issues various acts concerning the composition of judicial and auxiliary bodies and the legal status of their members. These measures are not substantially presidential, since the related decisions are taken by other bodies, such as the *Consiglio Superiore della Magistratura*, self-governing bodies of special judges or, on various occasions, the Government.

170. Pursuant to Article 1, third clause, of Law No. 249 of 31 July 1997, the President of the Republic appoints, by means of a decree, the President and eight commissioners of the *Autorità per le Garanzie nelle Comunicazioni*, an agency which does not depend on the Executive and carries out important activities in the telecommunications and radio-television sectors. In order to enforce the rules and make sure that the limits laid down by law are respected, the *Autorità* has a wide range of powers, such as advisory, motion and control powers, but also the powers to take resolutions, issue regulations and levy sanctions. The President is nominated by the Head of State after a proposal of the President of the Council of Ministers, having agreed with the Minister of Economic Development and having consulted the parliamentary commissions having jurisdiction. The commissioners are elected half by

the Senate and half by the Chamber of Deputies. Hence, these nominations are only formally made by the President of the Republic.

§19. The Remaining Powers

171. Pursuant to Article 87, eleventh clause, of the Constitution, the President of the Republic may grant pardons and commute sentences. The power to remit the whole or part of the criminal punishment inflicted to single convicts or commuting their sentences has always been attributed to the Head of State. Nowadays, however, the authority charged with receiving the applications, examining them and making the related proposals is the Government, in the person of the Minister of Justice. Applications addressed directly to the President of the Republic are also transmitted to the ministry for preliminary examination. The pardon takes the form of a presidential decree, moved and countersigned by the Minister.

However, the Head of State can also reject the Minister's suggestions or, vice versa, he can take the initiative for granting pardon and adopt the corresponding decree even if the Minister is opposed; in this case, the countersignature of the Minister is limited to affirming the completeness and regularity of the investigation and of the procedure followed. This is the situation of this issue after the Constitutional Court, by sentence No. 200/2006, resolved a conflict of attribution between powers of the State promoted by President Ciampi against the Minister of Justice, the subject matter of which was their respective roles in the procedure for granting pardons. According to the Court, it must be considered an 'exceptional instrument used for meeting extraordinary needs of humanitarian nature' which, in the end, has the function of implementing the constitutional values asserted by Article 27, third clause, of the Constitution. There is therefore to be recognized a substantial power of decision by the President of the Republic 'as the *super partes* office, "representative of national unity" … who is called upon to impartially assess the actual existence of the humanitarian requirements' able to justify 'the adopting of the measure for leniency'.

172. According to the former version of Article 79 of the Constitution, even the amnesty and extinguishment of criminal punishments were granted by the President of the Republic, on the basis of laws approved by the Chambers delegating such powers. Constitutional Law No. 1 of 6 March 1992, however, introduced new provisions preventing the Head of State from exercising this power. Today extinguishing crimes or punishments is the duty of the two Houses of Parliament by means of laws passed with a majority of two-thirds section-by-section and in the final vote.

173. The Head of State, after consulting a commission on regional affairs composed of members of the two Houses of Parliament and formed according to the laws of the Republic, may dissolve each regional Council and remove the President of the regional Junta by means of a decree, giving reasons for it. He may do so when the Council and the President of the Junta perform acts contrary to the Constitution or commit serious violations of the laws, or even for reasons of national security

(Article 126, first clause, of the Constitution, as amended by Article 4 of Constitutional Law No. 1 of 29 November 1999; see also similar provisions contained in the statutes of special Regions). Moreover, the approval of a motion of no-confidence against the President of the Junta elected through direct universal suffrage, the removal, permanent incapacity, death or voluntary resignation of the President himself and, finally, the concurrent resignation of the majority of its members cause an early dissolution of the regional Council (see the present version of Article 126, third clause, of the Constitution).

The dissolution act, as confirmed by the Constitutional Court, is only formally presidential. The Head of State, however, protects the fundamental guarantees of the Regions by controlling the dissolution act decided by the Government before it is enacted. Pursuant to Article 2, third clause letter o), of Law No. 400 of 23 August 1988, this presidential decree is issued after a resolution of the Council of Ministers and is proposed and countersigned by the President of the Council (see also Part III, Chapter 1, §10).

174. Pursuant to Article 87, twelfth clause, of the Constitution, the Head of State confers the honours of the Republic. Today decisions in this field are taken mainly by the Government, although, by virtue of the traditional prerogatives of the King in chivalry matters, the initiative may sometimes be taken by the President of the Republic himself. The presidential decree is therefore issued *motu proprio* or is moved by the Minister having jurisdiction, who is also supposed to countersign it.

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Chapter 3. The Structure of Parliament

by Antonio D'Andrea

§1. The Bicameral System: An Introduction

175. The Italian Parliament consists of two Houses, the Chamber of Deputies and the Senate of the Republic (Article 55, first paragraph of the Constitution), both elected by voters.

The members of both Houses are elected for a period of five years, which may not be extended save by law and only in the event of war (Article 60 of the Constitution). One or both Houses can be dissolved by the President of the Republic before the natural end of Parliament (Article 88 of the Constitution). Article 61 provides that the election of the new Houses should take place within seventy days from the dissolution of the preceding Parliament and the powers of the latter continue until the newly elected Parliament meets.

176. The Chamber of Deputies and the Senate exercise identical functions (perfect bicameral system). Pursuant to the Constitution, each Chamber drafts its own standing orders (by virtue of the so-called autonomy to issue internal regulations), which include important parliamentary rules, as we shall see later on. Some of these rules are simply drawn from constitutional provisions, others are entirely and freely introduced by the Houses.

The autonomy to issue regulations mitigates the effects of the perfect bicameral system, since it remarkably distinguishes the activities of the two Houses, as well as the use by the Government of some essential tools (such as the confidence vote) in order to reach its political aims.

The two Houses also enjoy accounting autonomy, which allows them to draw up and approve their own budget without being submitted to the audit of external bodies, such as the Court of Accounts (see Constitutional Court, Decision No. 129/1981).

Each House, by providing for special procedures and by appointing 'internal' judges chosen among the MPs, can also act as a judge on appeals concerning the status and the legal and economic career of its public officers (home jurisdiction).

Mention should also be made to the Houses' privileges, which prevent security forces from entering their seats, unless the respective presidents expressly order it. Defamation of the Chambers (Article 290 of the Penal Code) and actions preventing the exercise of their functions (Article 289 of the Penal Code) constitute an offence too.

177. The Constitution also provides for some exceptional cases in which Parliament should meet and take decisions in joint session of both Chambers, i.e.:

(a) during the secret ballot election of the President of the Republic (delegates from every region also participate in the election, according to Article 83 of the Constitution) and when the Head of State swears an oath of loyalty before taking office (Article 91);
(b) in the case of proceedings against the President of the Republic for high treason or breaches of the Constitution (this decision should be taken by secret ballot and an absolute majority vote: Article 90);
(c) in order to elect one-third of the members of the *Consiglio superiore della magistratura* (Article 104) and one-third of the Constitutional Court's members (Article 135);
(d) in order to draw up, every nine years, a list of persons from which sixteen judges are chosen to support the fifteen judges usually making up the Constitutional Court in the case of proceedings against the President of the Republic (Article 135, last paragraph).

Article 63, second paragraph, of the Constitution states that the President and the Presidents' bureau of Parliament in joint session are those of the Chamber of Deputies. As provided for by Article 35 of the standing orders of the Chamber of Deputies and Article 65 of those of the Senate, when Parliament meets in joint session the applicable standing orders are those of the Chamber of Deputies. The Senate's provision, however, recognizes the right of Parliament to issue its own internal regulations when meeting in joint session.

§2. The Electoral System of the Chambers

178. Since provisions on the electoral system of the two Chambers are not included in the Italian Constitution, their definition is left to Parliament.

For over forty years, the two electoral laws in force in Italy (Decree of the President of the Republic No. 361 of 30 March 1957, which included most of Law No. 6 of 20 January 1948 for the Chamber of Deputies and Law No. 29 of 6 February 1948 for the Senate) have provided for proportional voting systems, especially for the Chamber of Deputies. These laws were modelled on legislation relating to the election of the Constituent Assembly (Legislative Decree of the Viceroy No. 74 of 10 March 1946).

This legislation has probably encouraged the remarkable fragmentation of the Italian political system, thus allowing medium or even small parties to play an important political role, often disproportionate to their election results. Also for this reason, specific requests for an abrogative referendum on proportional electoral legislation had already been put forward towards the end of the 1980s by political groups 'alternative' to the traditional ones, whose aim was to overcome the idleness of legislative bodies by introducing a first-past-the-post system. This aim was not reached immediately. In 1991, the Constitutional Court ruled the application for a referendum on the Senate electoral law inadmissible, while it authorized a partial referendum on the preferential vote for the Chamber of Deputies election. In the Court's opinion, electoral laws can be put to a referendum only if the (partial) repeal

does not concern 'fundamental rules' provisions. Otherwise, the risk of a legislative vacuum preventing the election of the Chambers would be too high.

In 1993, during the eleventh Parliament (1992–1994), which was characterized by a general crisis of legitimacy of Italian parties, another application for a partial abrogative referendum on the Senate electoral law was ruled admissible and approved with a large majority, paving the way for reforms. In August 1993, Parliament (which had just moved the electoral law for municipalities and provinces in the direction of a first-past-the-post system by introducing the direct election of Mayors and Presidents of Provinces: Law No. 81 of 1993) passed the new electoral laws for the Chamber of Deputies (Law No. 277 of 4 August 1993) and the Senate (Law No. 276 of 4 August 1993), both based on the mechanism introduced by the referendum. They provided that three-quarters of Deputies (475) and of Senators (232) were elected in single member constituencies, by a simple majority single round vote (the candidate who had obtained the highest number of votes cast was elected: first-past-the-post voting system).

The remaining 25% of the seats was distributed by a proportional representation system, each law having different features. As for the Chamber of Deputies, the Law No. 277 of 1993 divided the national territory into twenty-six electoral districts (Article 1) and implied that every candidate standing in single member constituencies had to be linked to special lists of candidates standing in each of those districts. Only the lists that had obtained at least 4% of the votes cast on a national level would have participated in the distribution of this portion of seats. As for the Senate, the Law No. 276 provided for the formation of groups of candidates standing in the various districts of each region and connecting each other on the basis of the political affinity.

Lists and groups, therefore, participated in the share of the remaining quarter of the seats (155 seats for the Chamber of Deputies and 83 for the Senate) to be allocated proportionally. This was aimed at softening the effects of the first-past-the-post system and at favouring the smallest political groups, whose candidates' election in the single member constituencies would have been more difficult. The latter, in particular, could benefit from a mechanism devised to the detriment of the biggest groups. As for the Chamber of Deputies (where voters could cast two distinct votes on two different ballot papers, one for the election of the candidate in the single member constituency, the other for the list, although they could not express preference votes as for the grading of the candidates of the list), the law provided for a deduction from the election result of each list of part of the votes obtained by the candidates linked to those lists and elected in single member constituencies. As for the Senate, the votes obtained by candidates elected in the regional single member constituencies were subtracted from the global election result of each group of candidates.

Between April 1999 and May 2000, two requests for a partial abrogative referendum on the electoral legislation of 1993, ruled admissible by the Constitutional Court, were aimed at strengthening the first-past-the-post system, through the repeal, at least for the Chamber of Deputies, of the proportional distribution of seats among lists.

However, the two referenda, that were not supported by any of the biggest political forces, did not achieve the promoters' objectives, because in both cases the quorum established by Article 75 of the Constitution was not reached (namely the majority of those eligible to vote did not take part in the referendum). Therefore there was not a consolidation of the first-past-the-post, which had contributed to changing the Italian political system in the 1990s. As a matter of fact, the use of the new electoral system in three political elections (March 1994, April 1996, May 2001) had progressively produced an increasing bipolarization of Italian politics, allowing the making up of two coalitions, the centre-left one and the centre-right, which alternated in the government of the country. These coalitions, particularly in the thirteenth Parliament (dominated by the centre-left) and in the fourteenth Parliament (dominated by the centre-right), although with some problems, managed to stay united for the entire five-year period.

179. The Law No. 270 of 21 December 2005, passed by the Chambers at the end of the fourteenth Parliament (just before the elections) with the hostility of the opposition, changed the first-past-the-post system of 1993, based, as mentioned, on single member constituencies aimed at inducing parties to join in only two coalitions in order to have reasonable expectations of success.

The Law No. 270/2005, as described below, provides for a proportional system which abandons single member constituencies, while taking care to preserve the bipolarization of our political system through other mechanisms (such as the 'majority bonus' assigned to the list or coalition of lists which obtains the highest number of votes cast and the provision for more favourable 'survival conditions' for small parties that become part of coalitions).

As a matter of fact, in the 2006 election (when the new electoral law was applied for the first time), the competition involved the two alternative coalitions that had been characterizing the country for about twelve years. However, the small advantage of the centre-left majority and the accentuation of quarrelsomeness within the government coalition (including many, even small, political forces), had come to challenge the new electoral mechanisms (as well as the strategy of that coalition and its leadership). In fact, three different requests for an abrogative referendum on some provisions of Law 270/2005 were immediately put forward, with the aim to allow a competition only among single lists rather than between opposing coalitions.

However, these initiatives (at first suspended because of the early interruption of the fifteenth Parliament) did not produce any result, since in the 2009 referendum the quorum was not reached. Actually the elections of April 2008, were preceded by profound change of the 'alliance strategy' on the part of the biggest political forces and by the emergence, both in the centre-right (which won the election) and in the centre-left, of new formations made up of the 'old' parties, previously only allied. This resulted in a significant reduction of the political forces represented in the Chambers in the sixteenth Parliament; the two biggest parties (*Popolo delle Libertà* and *Partito Democratico*) opposing each other got about 70% of the votes cast and 76% of the available seats.

Therefore, despite the electoral system introduced in 2005 had been immediately criticized for having further increased the political fragmentation and for the mechanism chosen to allocate the 'majority bonus' in the Senate (within each Region and not at national level), after the 2008 elections (namely after its second utilization, and also thanks to the 'self-reform' of the biggest parties), it allowed the emergence of a clear majority in both Houses of Parliament.

However, it cannot be said that a new two-party system has developed, because of the failure of the mentioned electoral referenda aimed at favouring the biggest political forces and, above all, because of the low resistance of parliamentary groups in the sixteenth Parliament, which led, in November 2011, to the crisis of the fourth Berlusconi Government and the formation of a new Cabinet.

180. Lastly, mention should be made of constitutional Law No. 1 of 17 January 2000, which has modified Article 48 of the Constitution, to ensure the effectiveness of the right of vote to Italian citizens living abroad. Thanks to that modification, the latter have been given the right of electing a small number – fixed by a constitutional provision – of Deputies and Senators, in a so-called Foreign District, according to rules stated by ordinary law.

The Constitutional Law No. 1 of 23 January 2001 provided for the election, within the Foreign District, of twelve Deputies and six Senators. The first election of these MPs took place in 2006.

The electoral law for Italian citizens living abroad is provided for by the Law No. 459 of 27 December 2001 (and subsequent Regulations). It distinguishes, within the Foreign District, four areas: Europe (including the Asian territories of Russia and Turkey); South America; North and Central America; Africa, Asia, Oceania and Antarctica. For each area, a list of the Italians living therein is drawn up and updated periodically, so that they can vote by postal ballot, unless they choose to vote in Italy.

The Law No. 459/2001 states that one Deputy and one Senator must be elected in each of the area mentioned above, whilst the remaining seats (eight Deputies and two Senators) are distributed among those territories depending on the number of Italian citizens who live in the States belonging to them.

Seats are allocated among the lists standing in each territorial division according to the Hare quota and the largest remainder method. Since the lists are open, the individual electoral results of each candidate determine the elected persons within each list.

The official count is made at the Central Office for the Foreign District contextually to that relating to the votes cast in the national territory.

§3. The Election of the Senate

181. Under Article 58 of the Constitution, senators are elected by voters over 25 years of age while voters over 40 years of age are eligible for the Senate.

Article 57 of the Constitution, moreover, states the following:

– Elected senators' number 315, six of which are elected in the 'Foreign District'.

– The Senate is elected on a regional basis, except for the seats reserved for the 'Foreign District'.
– No region may have less than seven senators (with the exception of Molise and Valle d'Aosta, having two and one senators respectively).
– Distribution of seats among the regions is made according to the proportion of their population on the basis of the terms specified above.

Any person who has held office as President of the Republic is by right a senator-for-life, unless he or she refuses to accept the nomination. The President of the Republic may nominate, as senators-for-life, five citizens for their services to the country (Article 59 of the Constitution). Can each Head of State nominate five senators or is this the maximum number of senators nominated by Presidents of the Republic who can sit in the Senate? This question is still much debated by academic commentators (for further details see Part II, Chapter 2, §13).

182. The election of the Senate is regulated by Legislative Decree No. 533 of 20 December 1993, as modified by Law No. 270/2005.

Except for the use of first-past-the-post system for two regions (Valle d'Aosta and Trentino-Alto Adige/Südtirol), the allocation of seats within each region is made only among lists beyond 8% and among coalitions of lists matching two requirements: having achieved, at regional level, more than 20% of votes and including at least one list beyond 3%. The sum of votes obtained by these lists and coalitions is then divided by the number of seats assigned to the region, in order to obtain the district quota; the global number of votes of each list or coalition is eventually divided by this quota.

The result of these divisions, which could produce fractional remainders, determines the number of seats to be allocated to the mentioned lists or coalitions, whilst the remaining seats are allocated to the lists or coalitions with the highest remainders. The seats allocated to coalitions are then distributed among the 'internal' lists beyond 3% on the basis of the coalition quota, calculated by dividing the global number of votes of these lists by the number of seats to be allocated to the coalition. However, if the Regional Electoral Office verifies that no list or coalition has obtained at least 55% of the seats to be allocated within the region, it directly provides a further addition of seats in favour of the list or coalition having achieved the highest number of votes cast, so that the mentioned threshold is reached. Lastly, taking account of the seats allocated with the 'majority bonus', one has to proceed to the distribution (in the manner described above), on the one hand, of the remaining seats among the other 'admitted' coalitions and lists and, on the other hand, of the seats within each coalition.

On the basis of the seats allocated to each list, the candidates are proclaimed Senators following the order of presentation within that list, which cannot be changed by voters, who cannot express preference votes but only cast a vote for the favoured list.

The most controversial aspect, apart from the 'closed lists' and the very high threshold for lists outside a coalition, is the allocation of the 'majority bonus' region-by-region, that complies only apparently with Article 57 of the Constitution, which states that the Senate is elected 'on a regional basis'. Actually the legislative

provision seems to be unreasonable, given that the Senate, as well as the Chamber of Deputies, is a branch of the national Parliament, which has to express only a single political majority. On the contrary, the 'majority bonus' splitting (which moreover does not take place if the most voted list or coalition obtains the 55% of regional seats) may produce a political majority not corresponding to the global national situation (which for a proportional system is quite paradoxical). In any case, this mechanism may make it harder to achieve a majority, thus defeating the very purpose for which it is used.

§4. The Election of the Chamber of Deputies

183. The Chamber of Deputies is elected by citizens of age, i.e. who have reached the age of 18 (Article 48 of the Constitution); those who have reached the age of 25 are eligible for membership (Article 56, third paragraph, of the Constitution).

Pursuant to Article 56, the Chamber of Deputies is composed of 630 members and the distribution of seats among the electoral districts, the number of which is not specified, must reflect the proportion of the population of each district except for the twelve seats reserved for the 'Foreign District'.

184. The Law No. 270/2005 has deeply modified the electoral law for the Chamber of Deputies, the Decree of the President of the Republic No. 361/1957, which, despite the changes about the mechanisms for the allocation of seats, is still in force and regulates the entire electoral procedure, from the preparation stages to the voting and counting operations.

According to the provisions in force, the distribution of the Chamber of Deputies' seats is made among the lists of candidates standing in the electoral districts, which are still the same twenty-six established for the quarter of seats proportionally allocated under the precedent system (plus the region Valle d'Aosta, which is a single member constituency and elects a single Deputy). These districts, which have no longer the old single member constituencies, are very large and elect a significant number of Deputies (Puglia elects 45 Deputies, Emilia Romagna 43, the three districts in which Lombardy is split elect a total of 106 Deputies, etc.).

185. Voters, as already said about the Senate, can only cast a vote for one of the list whose symbol appears on the ballot paper, but cannot express preference votes for one candidate within the list. So in the ballot paper the names of candidates do not appear, although the order in which they are presented within the 'closed list' is decisive to proceed to the allocation of the seats among the candidates of each list.

Pursuant to the 2005 provisions, each political force, in presenting its symbol, must also file an electoral manifesto and formally indicate the 'head of the political force'; the lists, through mutual formal declarations, can connect to each other in a coalition: in this case, the coalition is required to file a single electoral manifesto and to indicate a single 'head of the coalition'.

These provisions, which also apply to parties presenting their lists for the election of the Senate, should not result, at least formally, in a reduction of the constitutional powers of the President of the Republic about the appointment of the Government.

The allocation of seats among the lists which, alone or in coalition, compete in the twenty-six electoral districts is carried out at a centralized level, by using the proportional method of the Hare quota with a possible 'majority bonus' to be allocated to the most voted list or coalition, if neither the one nor the other has obtained at least 340 seats. Therefore the National Central Office, which collects the electoral results from the District Central Offices, after having determined the national election result of each list and coalition (consisting in the sum of votes obtained in each district) must immediately determine which force has achieved the highest number of valid votes cast.

186. The allocation of seats is made only among the single lists that have obtained 4% of the votes cast at national level, and among the coalitions of lists that have achieved, at national level, 10% of votes and that include at least one list having obtained 2% of votes or a list representing a linguistic minority having achieved 20% of votes in a district belonging to a special region that protects that minority (this list representing the linguistic minority, however, participates in the distribution of seats even if its coalition does not obtain 10% of votes). Once verified the lists or coalitions that have overcome the above-mentioned thresholds, the Central Office distributes the seats among them, after having calculated the national electoral quota (by dividing the global number of votes of the coalitions and lists beyond this threshold by the number of seats to be allocated, which, without the twelve assigned to the Foreign District and the one assigned to Valle d'Aosta, are 617) and divided the national votes of each list or coalition by this quota. The results of these divisions determine, for the integer part, the number of seats to be allocated to each list or coalition, whilst the remaining seats are allocated, until exhausted, to the lists or coalitions having obtained the highest remainders.

If, at the end of this operation, the Central Office verifies that the most voted list or coalition has not obtained at least 340 seats, it allocates them to that list or coalition directly. Consequently, the Office also proceeds to determine, for the subsequent allocation of seats at district level, both the 'majority quota' (which is obtained by dividing the global number of votes of the most voted list or coalition by 340) and the 'minority quota' (which is calculated by dividing the global number of votes of the other lists or coalitions participating in the allocation by 277, namely the number of the remaining seats).

This means that, at least in the Chamber of Deputies, the existing electoral mechanism allows the emergence of a certain parliamentary majority, probably expression (as the practice confirms) of a coalition of lists rather than of a single list.

The current provisions also lay down the rules for the allocation of seats obtained by the coalitions among the lists of which they are made. In addition to the lists that have obtained 2% of votes on national level or 20% in the districts of special regions which protect linguistic minorities, also the list that, although not reaching 2%, has achieved the best result among those excluded can participate in the allocation. Also

this 'internal' distribution is made with the Hare quota method (namely dividing the result of each 'admitted' list by the 'coalition quota', which is calculated by dividing the sum of the electoral results of all the 'admitted' lists belonging to that coalition by the number of seats to be distributed to the whole coalition itself, and by allocating the remaining seats to the lists with the highest remainders).

Once the seats at national level have been allocated to the lists having right to them, the Central Office must distribute those seats in the twenty-six districts. For each list or coalition one has to verify the so-called index of seats, which determines, in relation with the seats to be allocated in the various constituencies, the 'district quota' and, for each coalition, the list to which the seats of the coalition have to be allocated on the basis of the 'coalition district quota'.

Only after the conclusion of these further count operations and the subsequent allocation of all seats among the lists district-by-district, the task of the National Central Office ends and the President of the District Central Office can proclaim the elected persons on the basis of the number of seats to which each list has right and following the order of presentation of candidates within the lists.

The most controversial aspect of the described electoral mechanism is the combination of the 'closed lists' and the great extent of the electoral districts, which gives to the party leaders that draw up the lists a downright power to 'appoint' Deputies (as well as Senators). Moreover, many political leaders usually propose their candidacy in more than one district, so that they are elected in different districts. This is not prevented by the current legislation and further influences the 'choice' of MPs, because the opportunity to choose *ex post* the district of one's election has clear effects on the election of other candidates, which are therefore in a state of 'subjection' both before and after having been 'appointed' by their leaders.

§5. Election Campaign Laws

187. Law No. 515 of 10 December 1993 contains provisions, which have undergone a number of amendments, that should ensure equal treatment and access to State Radio and Television Services (RAI), as well as regulate ways and forms of electoral propaganda through other means of communication by parties and candidates involved in election campaigns. These provisions apply both to State Radio and Television Services and to private mass media, starting from the date of the decree calling the election to the end of election day, namely in the period of the election campaign for the national parliamentary elections (there are also provisions aimed at guaranteeing equal opportunity to the access to mass media relating to European, regional, provincial and municipal elections).

188. As for the access to State Radio and Television Services, Law No. 515 of 1993 provides that, according to the directives of a special parliamentary committee (the Committee on Radio and Television Services), equal treatment, completeness and impartiality of information should be ensured for all parties involved in the election campaign. The latter should be granted enough room for their general propaganda activities and election programmes, according to rules set by the Committee itself. As far as national parliamentary elections are concerned, legislative

provisions state that, in the above-mentioned period, candidates and members of political parties, as well as members of Government, regional Executives, regional Councils and local authorities cannot participate in radio and television programmes of either State or private networks, save for programmes specifically intended for electoral propaganda and for news which give complete and objective information (Article 1, paragraph 5, Law No. 515 of 1993, as modified by Law No. 28 of 2000).

Further provisions aimed at granting equal treatment and conditions of access to information and election programmes to all parties and candidates during electoral and *referendum* campaigns are now provided for by the Law No. 28 of 22 February 2000, which regulates the 'political communication', and the Law No. 313 of 6 November 2003, which includes specific provisions for local television and radio broadcasting.

In particular, Article 5 of Law No. 28/2000 states that, in the election period, the parliamentary Committee on Radio and Television Services and the AGCOM (i.e., the Authority for Communication Guarantees, an administrative and independent authority which is charged with enforcing the administrative rules by levying, if necessary, a series of sanctions, ranging from warnings to pecuniary penalties as well as to revoking the television franchise) must, each for its own competence and after consulting each other, fix the criteria that the information programmes of both State and private national mass media have to comply with. More specifically, it is forbidden to give, even indirectly, hints or voting preferences in any programme which is not expressly intended for electoral propaganda, and television operators are required to manage their programmes 'correctly' and 'impartially', so that voters are not surreptitiously steered.

Moreover, the Government and all Public Administrations are forbidden to carry out any propaganda activities, unless they are made in an impersonal way and are strictly connected with their institutional activities. It is finally forbidden to broadcast the result of opinion polls on the elections and voters' political tendencies during the fifteen days preceding the election day.

It should be noted, however, that until now the existing complex set of sanctions (previously levied by the 'Commissioner for Broadcasting and Publishing', then substituted by the AGCOM) has not been enough to achieve the initial aims of the law itself, namely ensuring equal conditions of access to mass media to all the protagonists of the elections. This should have helped public opinion to form free and conscious beliefs, trying to avoid the political bias brought about by the electoral propaganda of the owners of mass media.

Further detailed but confused provisions were introduced by Decree-Law No. 83 of 1995 (the so-called decree-law on 'equal conditions'), which, however, is no longer in force, since Parliament decided not to pass it into law.

189. The above-mentioned Law No. 515 of 1993 also provides rules about the maximum amount, type and form of expenses of candidates, parties and political groups for election campaigns. These rules are intended to guarantee equal chance of propaganda activities to candidates who have different financial capacity.

In particular, each candidate should appoint an electoral agent, who acts as the only intermediary through whom he or she can raise the funds for the campaign

(Article 7(3)). This provision is aimed at ensuring a certain degree of transparency of the sources available to each candidate.

At the end of the election campaign, the electoral agent has to present a report on funding and expenses to a Committee on Elections (Article 13), composed of magistrates and experts. The committee approves the report and, in case of irregularities, can levy sanctions (usually pecuniary), which can go so far as, in case of election of the candidate, to draft a report for the Chamber he or she belongs to with the aim of convincing it to vote upon a resolution disqualifying the candidate from holding the office. Actually, the introduction of the 'closed lists' by virtue of the Law No. 270/2005 has drastically reduced the need for propaganda activities on the part of individual candidates, as well as their financial commitment (which is rather directed to their party).

If the two Chambers and a special panel set up by the Court of Accounts find out instead that these limits were exceeded by parties or political groups running for elections, they can levy pecuniary penalties which can even affect the allocations provided for by Article 9 of Law No. 515 for the refund of election expenses borne by candidates and parties that obtained a minimum election result.

§6. Verifying Credentials to become a Member of Parliament

190. Article 66 of the Constitution provides that the chambers (but not the judges) decide as to the validity of the admission of their own members, with the aim of protecting their autonomy and avoiding interference between the judiciary and elected bodies MP.

Verifying the credentials to become a member of Parliament is aimed at ensuring, on the one hand, that the various electoral offices operate correctly and, on the other, that there is no cause of ineligibility, which might make the candidates' election invalid, or any cause of incompatibility. The office of member of Parliament being incompatible with any other office, the MP would be forced to choose between the two.

The Law establishes both causes of ineligibility (see Decree of the President of the Republic No. 361 of 30 March 1957, providing for the Chamber of Deputies election) and causes of incompatibility (see Law No. 60 of 15 February 1953), although the Constitution itself lists the following: incompatibility between senator and deputy (Article 65), between member of Parliament and member of the *Consiglio Superiore della Magistratura* (Article 104), or member of the Constitutional Court (Article 135). Ineligibility causes are usually justified as a way to protect freedom of vote, since the presence in the election of candidates holding particular offices (such as, for instance, prefects, Armed Forces' senior officers, magistrates in the districts falling under their jurisdiction, etc.) or other governing offices (such as majors of towns with a population of over 20,000 inhabitants, regional councillors, etc.) would influence the election itself.

Incompatibility causes, on the contrary, are more justified as a need to prevent MPs from simultaneously holding managerial offices in agencies directly or indirectly controlled by the State, which could give rise to conflicts of interest.

Ineligibility causes (which include, of course, the loss of the power to vote and be elected) and incompatibility causes may appear after the MP's election. This would produce the effects described above: disqualification from holding the office in the former case and need to opt either for the new office or the parliamentary one in the latter.

191. According to the standing orders of both branches of Parliament, a fundamental role verifying the credentials to become a MP is played by two small committees: the Committee on Elections within the Chamber of Deputies and the Committee on Elections and Parliamentary Privileges within the Senate. The former is composed of thirty members and is regulated by provisions adopted by the Chamber on 6 October 1998. The latter is made up of twenty-three senators working in accordance with the special rules approved on 23 January 1992.

Pursuant to parliamentary standing orders, appointment of the two committees' members (which cannot be replaced during the term of office of a Legislature) is left to the Presidents of the chambers who, although they are not required to do so, keep the size of parliamentary groups in mind when taking this decision. This enhances the political nature of bodies entrusted with basically judicial tasks, although the presidency of these committees is conventionally left to a member of the opposition. Indeed, whenever the competent committee challenges a MP's election, the proceeding set in motion within the Chambers has a judicial nature. The challenge might be due to an appeal by candidates who declare themselves damaged, for various reasons, by a supposedly illegitimate election. The parties are admitted before the committee and allowed to file written briefs. The committee's decision is taken in chambers.

This kind of decision actually take the form of recommendations made by the committee to both Houses, which can either accept or challenge them.

Decisions on the validation or annulment of elections, as well as those by which a MP who did not opt for the electoral mandate when a cause of incompatibility was established is disqualified from holding the office, are taken by the full House. In practice, however, the latter hardly ever reject the committee's recommendations, always furnished with findings of inquiries illustrated in the attached written report.

Doubts can be raised, however, on the effective impartiality of the decisions of the two Chambers, given the essentially political nature of their activities, even when they deal with individual legal positions and interests having nothing to do with politics.

§7. Parliamentary Privileges

192. Under the *Statuto* promulgated by King Carlo Alberto in 1848, the Italian legal system already enshrined the right of MPs to exercise the functions connected with their office freely and without the interference of judges. The latter, during the liberal era, were institutionally linked to the King, head of the executive power (as provided for by Article 68 of the *Statuto* 'justice is derived from the King and is administered in his name by the judges he appoints').

The 1948 Constitution (the same which declares that magistrates are autonomous and independent of any other State power and only subject to the law), provides for parliamentary privileges as well (Article 68), after having stated, in Article 67, that each MP represents the Nation and carries out his/her duties without a binding mandate.

In its first version, the first paragraph of Article 68 mentioned the so-called unchallengeability of opinions expressed or votes given by MPs in the exercise of their duties; second and third paragraphs, on the contrary, provided for the so-called criminal immunity of MPs who could not be subjected to criminal proceedings or otherwise deprived of personal liberty during their parliamentary mandate, pursuant to the ordinary rules of criminal procedure.

On the one hand, judicial authorities were prevented at any time from prosecuting MPs for opinions expressed in the exercise of their duties and for the reasons that had induced them to give certain votes within their respective chambers. On the other, the same authorities, especially investigating magistrates, could not subject MPs to criminal proceedings or otherwise deprive them of their personal liberty, even in order to enforce a judgment which can no longer be appealed, without being previously authorized by the Chamber to which the MP belonged (the authorization was therefore meant as a condition for proceeding).

The arrest of a MP was allowed in only one case, namely when he or she was caught in the act of committing a crime for which law provided the arrest as a compulsory measure. The judge in charge of the case was therefore obliged to ask the relevant Chamber's consent to keep the MP in a state of detention.

193. Constitutional Law No. 3 of 29 October 1993 has subsequently modified Article 68 of the Constitution by introducing less favourable provisions for MPs.

Following the amendment of the above rule, especially of its second and third paragraphs, the Italian system no longer forces the judicial authorities to ask the Chamber to which a MP belongs for leave to prosecute him or her. Judges should no longer inform the interested Chamber about any criminal proceedings regarding one of its members. Moreover, no permission must be asked in order to enforce a sentence passed on an MP.

The consent of the Chamber to which a MP belongs is still necessary, instead, for the MP to be subject to restrictions on his or her freedom, such as the arrest (except for the case of *flagrante delicto* described above), or search warrants on his or her person or domicile. Distraint of MPs' correspondence and interception of their conversations or communications in any way whatsoever is also forbidden by the Constitution (Article 68, second and third paragraphs).

In any case, the Constitutional Court, in the judgment No. 225 of 2001, recognized to prosecuted MPs a 'legitimate impediment' to participate to the hearing before the judicial authority if they have to take part in a concurrent parliamentary activity. The criminal hearing is consequently postponed.

194. Pursuant to Article 68 of the Constitution, first paragraph, MPs still may not be proceeded against for opinions expressed or votes given in the exercise of their duties (total and permanent immunity). This immunity covers not only criminal but

also civil liability, as well as any other form of responsibility different from the one to which they are bound under the standing orders of the Chamber they belong to.

Doubts have been raised on the scope of the constitutional provision protecting MPs for 'opinions expressed in the exercise of their duties'. The Constitutional Court (according to a settled case law starting from judgments No. 10 and No. 11 of 2000) has ruled that this provision covers activities carried out by MPs not only within but also outside their Houses, provided that such activities are connected with their electoral mandate and that there is a link between this 'external' activity and the parliamentary one.

As concerns decisions on the impossibility to challenge MPs' opinions considered by other citizens as detrimental to their honour and other property protected by law, opinions expressed by the Chamber to which the MPs subjected to judicial proceedings belong (and in some cases the MPs themselves) and by judicial authorities called upon to pass the judgment often differ. The Law No. 140 of 20 June 2003 contains provisions just on the relationships between Parliament and judicial authorities. In particular, it states that, if the judicial authority considers Article 68, first paragraph, not to be applied in the proceedings during which the question is raised, it must stay the proceedings and transmit the documents to the Chamber involved for a decision on the case in issue. The Chamber's decision may also be directly stimulated by the interested MP; in this case, the Chamber itself can ask for suspension of the judicial proceedings (Article 3, paragraph 7, of Law No. 140/2003).

If the Chamber, which must decide within ninety days from receipt of documents, reckons that the immunity should be applied in the case in issue, a judge in disagreement cannot disregard that decision directly. Judges can challenge parliamentary decisions interfering in their jurisdiction by raising a conflict of power before the Constitutional Court, which, in short, must ensure the correct exercise of the powers of the Houses to declare their members' opinions unimpeachable.

195. The competence of the Constitutional Court to assess the parliamentary decisions about Article 68, first paragraph, by means of the conflicts of power was for the first time affirmed in the judgment No. 1150 of 1988. Since then, the Constitutional Court has been frequently asked by judicial authorities to declare parliamentary decisions based on arbitrary assumptions null and void.

Although these mechanisms provided for by Law No. 140/2003 may seem questionable, the Constitutional Court stated, also recently (see judgment No. 46 of 2008), that there is no constitutional illegitimacy. Therefore, in the Italian legal system the only remedy for judicial authorities to challenge parliamentary decisions is to raise a conflict of power before the Constitutional Court.

Actually, this remedy was deemed insufficient by the European Court of Human Rights, which has repeatedly condemned Italy for 'denial of justice' towards those who assume having been injured by MPs' defamatory opinions. The Constitutional Court, in fact, does not always come to a decision about these immunities, so that, in that case, they are exempt from any judicial control.

In addition, during the settlement of a specific conflict of power raised by the Chamber of Deputies against a penal judge, the Constitutional Court affirmed (Decision No. 379/1996) that judicial authorities cannot investigate cases of MPs' conduct if the object of the enquiry is their status as member of the Chambers. This conduct may fall outside the categories protected by immunity and have negative repercussions on other MPs' functions, thus jeopardizing the correct operation of parliamentary activities (as in the case of false certification of identity and replacing absent MPs during a vote).

196. The Italian system no longer provides for the need to ask the Houses leave to subject one of their members to criminal proceedings. The Chambers' consent, on the contrary, is still necessary for penal judges to deprive MPs of their personal liberty, in the broadest sense of the word, or their freedom of domicile.

The existence of provisions preventing MPs from being prosecuted during and only until the end of their mandate are understandable, from a historical and logical point of view, in light of the need to allow the Houses to judge any persecutory intent (the so-called *fumus persecutionis),* arising from judicial initiatives damaging their members and representatives of the Nation.

However, the above-mentioned constitutional provisions do not mention, unfortunately, which parameters should be used by the Houses when evaluating judicial authorities' requests for leave to prosecute MPs. This gives high discretionary powers to the Houses which can, in fact, deny their consent without even giving reasons for that.

Presently, given the low number of warrants of arrest of MPs (whose arrest was sometimes, also recently, authorized) and the fact that the Houses can deny their consent only for the above-mentioned measures restricting personal liberty (and not for subjecting their members to criminal proceedings), these powers no longer appear as a dangerous tool that Parliament can use to replace or interfere with judicial authorities, especially investigating ones.

197. As regards the proceeding set in motion by the Houses when asked by judicial authorities for leave to prosecute one of their MPs, it is worth underlying the fundamental role of parliamentary committees. The Chamber of Deputies has its own Committee on Privileges (composed of twenty-one members of the Chamber appointed by the President, theoretically without the need to reflect the size of the political groups but practically respecting their proportionality). The committee within the Senate, as stated above, is called Committee on Elections and Parliamentary Privileges.

The committees collect the evidence after consulting the MP concerned if necessary (or after going through his briefs) and draw up a proposal of consent or denial of the request to prosecute the MP, accompanied by a written report. Both documents are laid before the full House, which can even contradict the proposal (even when Parliament takes decisions on MPs' immunity, the relationship between the committee and the full House is always the same as that existing between a promoting and a legislative body).

The vote on the leave is open in both Houses, according to a questionable interpretation of the standing orders, adopted shortly before the amendment of Article

68, when voting by secret ballot was abandoned to reduce the risk that MPs might prevent criminal proceedings against themselves from being initiated. However, voting by secret ballot is still possible if a number of MPs explicitly request it and in compliance with general voting rules of the Houses.

§8. Standing Orders

198. Pursuant to Article 64, first paragraph, of the Constitution each House drafts its own standing orders by an absolute majority of its members. This is an expression of the autonomy enjoyed by the two Houses of Parliament and of their independence from the other constitutional organs.

Standing orders are not subordinate to acts of Parliament (see Part I, Chapter 4, §6), but should in any case observe the principles relating to the workings of the Chambers set out in constitutional legislation.

The Constitutional Court has so far excluded, owing to formal reasons, that the standing orders might be subjected to the review of constitutionality (see Constitutional Court, Decision No. 154/1985, widely criticized by some academic commentators).

Standing orders regulate the organization and workings of the Houses and their internal sections, as well as the procedures they follow to exercise their functions, including those which are bound to influence the relationship of confidence between the Houses and the government (including confidence or no-confidence votes and the 'question of confidence').

199. Although standing orders contain provisions which are supposed to regulate the Houses organization and workings permanently, they are frequently modified to adapt them to the changing political and institutional requirements.

A global review of the standing orders was undertaken by the Houses in 1971, resulting in the adoption of completely new rules. Subsequently, both Houses repeatedly modified many provisions, also by introducing, after bitter debates within the Houses, organic sets of rules (such as in 1981, 1987, between the end of 1988 and the first months of 1989 and, most recently, in 1997 and in 1999 for the Chamber of Deputies and between February and July 1999 for the Senate) aimed most of all at strengthening the position of the Government and main political groups and therefore often contested by the opposition and minor groups.

The amendment procedure aroused lively discussion and controversy involving the presidencies, especially the president of the Chamber of Deputies.

Since the Constitution does not contain specific provisions on the matter (except for the rule which implicitly imposes an absolute majority vote for amending existing rules), the Houses follow quite different procedures. The Senate's method is very similar to the legislative process. The Chamber has a very different method (especially with regard to the discussion and voting of amendments), centred around the proposing and drafting role of the Committee on Standing Orders (chaired by the president of the Chamber), charged with the drafting of the final text to be laid, along with the amendments, before the full House for approval.

§9. The Sections of the Chambers

200. Within each House there are a number of internal bodies, such as the President, the parliamentary groups, the Conference of the Presidents of parliamentary groups, the Standing Committees and other permanent bodies.

In compliance with Article 63 of the Constitution, each House elects its President following different procedures (as provided by their standing orders), both by secret ballot voting and qualified majorities.

The President's task is to represent the House and supervise the progress of its works. Pursuant to Article 86 of the Constitution, moreover, the President of the Senate carries out the President of the Republic's duties any time the latter proves to be unable to fulfil them.

With reference to the Presidents of the two Houses, as well as to the President of the Republic and the President of the Council of Ministers, both Law No. 140 of 20 June 2003 (Article 1) and Law No. 124 of 23 July 2008, though with different mechanisms, had provided for the suspension of possible criminal proceedings towards them during the entire period they remained in office. These disputable rules, however, have been declared unconstitutional by the Constitutional Court first with the judgment No. 24 of 2004 and then with the Decision No. 262 of 2009. The Court stated that those rules disregarded the principle of equality and introduced a significant departure from the rule of law without the approval of a constitutional law.

Both Presidents have their own bureau supervising all the activities carried out within the respective Houses. The bureau is also composed of four vice-presidents, three Sergeant-at-arms and eight secretaries, so as to reflect the composition of all the groups sitting in the House.

Until 1976, the Presidents of the two Houses of Parliament had always been members of the majority. From 1976 to 1994, on the contrary, the Presidents of the Chamber of Deputies were members of the main opposition party (the Communists, followed by the *Partito Democratico della Sinistra,* Democratic Party of the Left). From 1994 to date there was another reversal of trend.

According to the standing orders, the Presidents' most important tasks include scheduling the activities of the Houses following the suggestions of the government and parliamentary groups. Both Houses, indeed, regularly convene a Conference of the presidents of parliamentary groups, always informing the government, which might send one of its representatives. The Conference takes formal decisions on the scheduling of the activities of the Chambers and can be convened by the Chamber's President in order to analyse the general progress of parliamentary works. In practice, the importance of this body (whose sittings are open to the public) has considerably increased. Anyway, the majority sustaining the Government is able to direct the progress of parliamentary works on the basis of its convenience.

201. Standing orders provide that parliamentary groups are essential bodies of the Chambers and must be composed of at least twenty MPs for the Chamber of Deputies and ten for the Senate. However, the bureau of both Chambers' Presidents can allow for the creation of groups with a lower number of MPs, in order to favour

smaller parties, provided that these groups represent a party which was organized inside the country and had a certain election result on a national level.

Members of Parliament whose number is not high enough to form a group or who do not wish to join any parliamentary group can form one mixed group within their own Chamber (the mixed group of the Chamber of Deputies can be further divided into political entities, also in order to represent the linguistic minorities protected by the Constitution).

Each parliamentary group elects its own President. The groups and their presidents enjoy specific procedural powers.

202. Provision was made for other important permanent bodies as well. Although they only enjoy the power to make suggestions to the full House that takes the final decision, these bodies are involved in the delicate judicial proceedings falling under the jurisdiction of Parliament. As stated above, matters such as parliamentary immunity and procedures to verify election results are dealt with by the Committee on Elections and the Committee on Privileges (there is only one committee in the Senate, the Committee on Elections and Parliamentary Privileges). These committees jointly make up the Committee on Impeachment, charged with presenting a report to Parliament in joint session before the deliberation on impeachment of the Head of State (Article 90 of the Constitution. See also Part II, Chapter 2, §10).

As regards the amendment of the standing orders of the Chamber of Deputies, mention has also been made to the Committee on Standing Orders, a body provided for by the rules of the Senate as well, where it is chaired by the President of the Chamber. The task of these committees (composed of ten members in both Chambers) is to settle disputes arising over the interpretation of the standing orders.

Pursuant to the standing orders, the Presidents of the Chambers must nominate the MPs who will make up the committees, without any obligation to reflect the proportions among the political groups or the number of their members, given the special 'technical' functions of the committees. However, as stated above, the balance among the various groups is always taken into account, which confirms the basically political role played by these committees.

203. Article 72 of the Constitution, which provides a general description of legislative process (see Part II, Chapter 4), states that every bill laid before either Chambers must be examined by a committee which can also be a standing one. Indeed, there are Standing Committees dealing with specific matters, partly coinciding with those dealt with by the Ministers.

There are presently, both within the Chamber of Deputies and within the Senate, fourteen Standing Committees (among the most important, the Constitutional Affairs Committee, the Justice Committee, the Budget Committee and the European Union Policies Committee). Unlike the other ones, their nature is merely political. They are therefore set up by the Chambers' Presidents at the beginning of Parliament and they have to reflect the number of members of the groups, as well as the appointments proposed by the groups themselves. These committees are re-elected every two years.

Members of the committees who join the Government are replaced by other MPs belonging to the same group.

Each committee elects its own president (and a president's office) charged, among other things, with organizing the works of the committee in coordination with the activities of the Chamber. Committees enjoy general powers over the matters they are entrusted with, not only with regard to legislative process. They also exercise general direction and supervision functions on governmental activities and can order parliamentary hearings.

It is also open for the Chambers to set up ad hoc committees for single legislative processes or other duties. Special committees can also be set up with the aim of carrying out parliamentary inquiries (see Part II, Chapter 4, §10).

§10. Bicameral Committees

204. Bicameral committees, made up of an equal number of members of the two Houses, are sometimes set up in order to solve the problems of the 'perfect' bicameral system. The Parliamentary Committee for Regional Matters is the only bicameral committee provided for by constitutional provisions (Article 126 of the Constitution). Article 11 of constitutional Law No. 3 of 18 October 2001, which has modified Title V of the second part of the Constitution related to Regions and Provinces, provided that the bicameral committee for regional matters could also include representatives of Regions and other Local Bodies, according to the standing orders of the Chambers, at least until the present bicameral organization of the Italian Republic – which actually does not have a Chamber directly representative of Regions and Local Bodies – is not changed.

When acting in such composition, the bicameral committee for regional matters is charged with the task to express opinions and evaluations on ordinary laws stating the fundamental principles of matters included in shared legislative powers of State and Regions or on laws providing rules about matters reserved to the State legislative power but involving the financial autonomy of Regions. Either the Chamber of Deputies or the Senate could disregard these evaluations only by voting with a qualified majority. This integration, however, has never occurred, although the constitutional organization of Italian Parliament has not been changed yet.

Various acts of Parliament regulate the setting up of bicameral bodies exercising general political control and supervision functions (such as the Committee on Radio and Television Services) or advisory functions.

In particular Bicameral Committees on Constitutional Reforms have been recently set up (see Part II, Chapter 4, §4).

§11. General Provisions on Resolutions Taken by the Chambers

205. Article 64 of the Constitution sets out that sittings are open to the public, although the Chambers may decide to assemble in private. Government's members, even though they are not members of the Houses, are entitled to attend meetings and are obliged to be present if called upon.

Ministers, moreover, have a right to be heard whenever they request this right. Each House is usually convened by its President that announces the agenda and time of the following sitting. The Chambers must meet twice a year and may be convened in extraordinary session on the initiative of their President or of one-third of their members or of the President of the Republic. When one Chamber is called upon to meet in extraordinary session, the other Chamber is also convened *ipso jure*. Actually, except for a brief summer break, the workings of the two Houses are scheduled all the year long.

206. Article 64, second paragraph, sets out that the decisions of the Chambers are not valid unless the majority of their members are present, and unless they are voted upon by a majority of those present, save when the Constitution provides for a special majority (such as, for instance, in case of adoption of the standing orders or passing of laws amending the Constitution). When it comes to election procedures (such as the election of the Presidents of the Houses), even the standing orders (and acts of Parliament) sometimes provide for special majorities. This does not conflict with the above constitutional provision, which refers to decision-making phases.

The Chamber of Deputies and the Senate have different ways of considering abstentions. According to Article 48 of the standing orders of the Chamber of Deputies, members abstaining from voting are considered as absent and therefore cannot make up the majority. Pursuant to Article 107 of the standing orders of the Senate, on the contrary, senators abstaining from voting (who are therefore counted among those voting against a decision) can be considered as part of the *quorum*. As a result, if a senator does not wish to affect the result of a voting, he or she, unlike their counterparts in the Chamber of Deputies, should not participate in the voting itself (this obviously results in a decrease of participants to the votings).

207. Article 94 of the Constitution provides for voting procedures concerning the relationship of confidence between the Chambers and the Government, including a nominal vote, which is a form of open vote by which every single MP is personally asked to say yes or no.

As regards the other decisions taken by the Chambers, the various forms of expression of the vote are set out in the standing orders.

The 1988 review of the standing orders also included the secret ballot as the most common way of voting in Parliament. Changing in favour of open voting was an important reform, aimed at making MPs more responsible to their voters but, most of all, at strengthening the position of the executive within the Chambers. The Government, indeed, was often exposed to *francs tireurs,* i.e. MPs of the majority who, by profiting of secret ballot voting, expressed a negative vote on governmental measures without giving any reason for their dissent.

Presently both the Chamber (Article 49 of its standing orders) and the Senate (Article 113) usually vote by show of hands, while secret voting is provided only for votes concerning the election of persons. Secret ballot can be asked by a number of members of the Chamber (thirty) and of the Senate (twenty) with respect to some legislative decisions having neither financial consequence nor affecting principles and freedoms granted by the Constitution (Article 49 of the standing orders

of the Chamber of Deputies contemplates this request also in other cases, such as passing of electoral laws, setting up Committees of Enquiry, etc.).

In both Chambers, voting within the committees is always open, except for votes by which people are elected.

Chapter 4. Parliament: Its Activities

by Antonio D'Andrea

§1. The Passing of Laws: The Equal Role of the Chambers and the Governments Supremacy in Promoting Bills

208. Pursuant to Article 70 of the Constitution 'legislative duties are carried out jointly by the two Chambers'. This means that a law is considered as formed only when an identical bill is adopted by both Chambers.

The Chamber going through a bill in second reading may, according to its standing orders, follow a different procedure than the one adopted by the other in first reading and modify the text approved by the first Chamber. Should this happen, the bill is passed from one Chamber to the other through the so-called *navetta* (the bill is re-examined only with regard to changes made by the other Chamber and amendments proposed with regard to these changes) until both Chambers adopt an identical text. The law is therefore promulgated by the President of the Republic and enters into force after being published in the Official Gazette.

The Constitution, therefore, does not give one of the two Chambers more powers with regard to the legislative process.

Legislative initiative pertains to the Government (which must be formally authorized by the President of the Republic), to each member of the two Chambers, each Regional Council, the *Consiglio nazionale dell'economia e del lavoro* – National Council of Economy and Labour, a body assisting the Chambers and the government in the economic and social sectors – and not less than 50,000 voters. Legislative initiative can also be conferred to other authorities and bodies by means of a constitutional law (Article 71 of the Constitution).

MPs are obliged to introduce their bill into the Chamber they belong to, from which the passing of the bill formally starts. The others are free to introduce it into the Chamber of their choice, thus determining the order of priority between the two Chambers.

209. Legislative initiative coming from the Government is doubtless the most important form of initiative, especially in a parliamentary system in which the executive depends on the relationship of confidence with Parliament. The Government can also avail itself of technical and logistical support when drafting its bills. In some cases, moreover, the Constitution explicitly or implicitly sets out that the Government has exclusive initiative on some laws (see laws regulating relationships between the State and religious groups, Article 8; acts by which decrees are passed into laws, Article 77; laws authorizing the ratification of international treaties, Article 80; budget laws, Article 81).

The Government's role in legislative procedures is actually very different from the one of the other people or bodies having legislative initiative, although the Constitution does not grant special powers to the Executive, except for the possibility (set out in Article 72 of the Constitution) of demanding that a bill adopted directly by a committee be discussed and voted on by the relative Chamber.

The Government's leading position in the legislative field is rather determined by parliamentary standing orders and sometimes by acts of Parliament: see Act No. 196 of 31 December 2009, that has strengthened the Government's legislative initiative in the financial sector by granting the Executive a role of technical support of Parliament with regard to the financial effects of bills and amendments proposed by other bodies.

The Government was therefore given the possibility of 'orienting' both the legislative course within the Chambers and parliamentary decisions and debates. Some examples are the power of the executive to propose amendments departing from what is allowed to other bodies, or to draw up special technical reports on the quality and enforceability of provisions contained in the laws, the power both to place time-limits on debates, in order to 'crush' filibustering by the opposition and, in order to control majority groups, the recourse to open voting and, most of all, to confidence motions.

§2. The Different Procedures for Considering Bills

210. Once introduced into the Chambers, the bill is handed over to one of the fourteen Competent Committees, which is chosen on the basis of the specific matter of the bill. The powers of the committee towards the chamber vary according to the procedure. Article 72 of the Constitution provides for two different procedures: the normal procedure, in which the committee examines the bill in a reporting capacity, the passing of the bill being left to the full house, and the decentralized procedure, in which the committees meet in a legislative capacity, by examining and adopting the bill directly. The standing orders also provide for a third kind of procedure, in which the bill is examined by the committee in a drafting capacity, on different conditions in each Chamber. In case the full house of both Chambers (as to the Chamber of Deputies, this decision can also be taken by the majority of the members of the Conference of the Presidents of parliamentary groups) states that a bill is urgent (often on the Government's request), times provided for by the standing orders are reduced by half (the so-called abbreviated procedure which, in the Chamber of Deputies, can be adopted only for a limited number of bills, depending on the length of the works).

Pursuant to Article 72, fourth paragraph, the normal procedure for debating and voting bills by the Chambers is always applied in the case of bills of a constitutional and electoral nature and for those delegating legislative powers, for authorization to ratify international treaties, and for voting on budgets and rectified budgets. The normal procedure is provided for by both standing orders in the case of bills converting decree-laws too.

Furthermore, an important role with regard to the choice of legislative procedures and relevant committees is played by the President of each Chamber, although the standing orders of the Senate are the only ones fully recognizing this power.

211. When the bill is handed over to a committee meeting in a reporting capacity, the latter first examines the text and, if advisable, amends it. Other committees can (and sometimes must) be called upon to give their advice. After the last reform

of its standing orders, carried out in 1999, the Chamber of Deputies, if requested by one-fifth of the members of the relevant committee (regardless of the capacity in which it meets), can ask the Committee on legislation, consisting of ten members of the Chamber appointed by the President so as to represent equally both majority and opposition, to give its advice on a specific bill. The committee should say if the bill is homogeneous and simple and if it is properly worded.

The committee finally draws up a written report on the bill (which will be illustrated to the full house by a referee chosen from among the members of the committee), including the text of the bill as amended by the committee itself. This text is the basis for the debate and vote by the full house. The standing orders of both Chambers also provide for the presentation of reports by referees belonging to dissenting groups.

The bill is debated by the full House in general and, subsequently, pursuant to Article 72, examined section-by-section and put to the final vote. When each section is examined, the relative amendments are debated and voted upon.

After the changes to the standing orders of both Chambers, the final vote on bills is open, save for the above exceptions (see Part II, Chapter 3, §11) and is usually made by an electronic procedure.

212. If bills are examined by committees meeting in a legislative capacity, their final text must be approved by the committee itself, without any involvement of the full House. Although, pursuant to the standing orders of the Chamber of Deputies, this procedure can be followed only for bills not relating to 'particularly important matters of a general nature' (Article 92), in practice it is used without any distinction between more or less important bills of a general nature, save for bills for which examination by committees meeting in a legislative capacity is forbidden by constitutional rules or the standing orders.

Even though the above procedure is followed, MPs who are not members to the committee can propose amendments by illustrating them before the committee itself. General rules on the debate and passing of bills by the full house are applied.

Mention should finally be made to the constitutional rule (Article 72, third paragraph) providing that a bill, until it is finally voted upon, is introduced into the Chamber, if the Government or one-tenth of the members of the Chamber or one-fifth of the committee demand that it be debated and voted on by the Chamber itself or laid before the latter for its final approval. Moreover, the standing orders of both Chambers provide for the automatic referral to the full House of the bills for which the Committee meeting in a legislative capacity is obliged to ask to the 'Filter Committees' (in both Chambers, they are the Constitutional Affairs Committee and the Budget Committee) to give their advice, in the case it does not intend to follow that advice.

213. The third kind of legislative procedure, set out in the standing orders and little used in practice because of its complexity, provides for examination of bills by a committee meeting in a drafting capacity. As far as the Senate is concerned, the relevant committee approves each section of the bill and just leaves the final vote

on the whole text to the full House. As regards the Chamber of Deputies, on the contrary, the full House votes on each section drafted by the committee before the final vote, without debating or proposing amendments.

The standing orders of both Chambers, moreover, provide that the full House should set the standards and principles that the committee should comply with when drafting the sections. Article 72, third paragraph, can also be applied to this case. As mentioned before, this rule provides that the Government or one-tenth of the members of the Chamber or one-fifth of the committee could demand that the bill, until it is finally voted upon, be debated and voted on before the full House, according to the ordinary standing orders.

§3. The Promulgation and Publication of Laws

214. Once the bill has been finally voted upon by the Chambers, the House that last examined it sends it to the Government (Article 70 of the standing orders of the Chamber of Deputies and Article 75 of those of the Senate). The law is then passed on to the President of the Republic for promulgation.

Pursuant to Article 74, first paragraph, of the Constitution, the Head of State may, however, before promulgating a law, request a new consideration by means of 'a message to both Chambers in which the reasons for such action are set forth' (see Part II, Chapter 2, §13). According to the Constitution, it is at the discretion of the President of the Republic to assess the conditions that justify this request. The Head of State may therefore return the law for both legitimacy and substantive reasons. This presidential power has been little used in practice.

If the Chambers are asked for a new consideration, standing orders provide that the House of Parliament that was first in voting the bill should re-examine it with the ordinary procedure. If the Chambers vote on the bill once more (no special majority is provided for), the President of the Republic is obliged to promulgate the law: the President, as a matter of fact, can exercise the power to return the law only once (Article 74, second paragraph, of the Constitution).

Laws are promulgated by the President of the Republic within thirty days of their having been voted upon, unless a shorter period of time is laid down in laws themselves (adopted by an absolute majority vote of the two Chambers). However, this has never occurred in practice.

Article 1 of Decree of the President of the Republic No. 1092, dated 28 December 1985 contains the text of the form of the promulgation of ordinary laws, including the statement announcing that the Chambers have passed the bill, the writs of publication and execution, the endorsement and the signature of the *Guardasigilli* (Minister of Justice).

Laws are published both in the Official Gazette (within thirty days of their promulgation) and in the Official Collection of the Legislation of the Italian Republic.

Laws come into force after the so-called *vacatio legis*, i.e., on the fifteenth day after their publication in the Official Gazette, unless the laws themselves provide otherwise (Article 73, third paragraph, of the Constitution).

§4. The Legislative Process of Constitutional Laws

215. The process for amending constitutional provisions and passing constitutional laws is set out in Article 138 of the Constitution and is defined as a 'special' process, since it is more complicated than ordinary legislative procedure.

In fact, constitutional bills (that, according to the Constitution, can be introduced into the Chambers by all those who have legislative initiative for ordinary laws) are passed by the Chamber of Deputies and the Senate, following the normal procedure for debating and voting bills, in two successive sessions at an interval of not less than three months. Pursuant to the standing orders of both branches of Parliament, constitutional bills are handed over to the First Standing Committee on Constitutional Affairs in a reporting capacity and they must be approved for the second time by an absolute majority of the members of each Chamber.

The standing orders provide that, whenever the Chambers examine a constitutional bill during a second reading, each of them, after the general debate, immediately proceeds to the final vote of the bill without discussing its sections, since no amendment or removal of one or more provisions is permitted (Article 99 of the standing orders of the Chamber of Deputies and Article 123 of the standing orders of the Senate).

Once they have been passed by both Chambers during a second reading, constitutional laws are published in the Official Gazette (in this case, the publication is just for information) and are put to popular referendum when, within three months of their publication, 500,000 electors or five Regional Councils or one-fifth of the members of either Chamber demand it. This referendum is not subject to any validity condition related to the number of those participating in the voting.

The President of the Republic may therefore promulgate constitutional laws in two different cases: if none of the authorized persons or bodies demand the referendum within three months or if, once the referendum has been demanded, the law is approved by the majority of the voters participating in the referendum. The promulgation is followed by the publication of the constitutional law and its entry into force. Obviously, the promulgation does not occur in case of negative result of the constitutional referendum.

In order to favour a large agreement among parliamentary groups, the Constitution states that the referendum is not held if the law has been approved in both Chambers, during a second reading, by a majority of two-thirds of the members of each Chamber (Article 138, third paragraph, of the Constitution). In this case, the law is immediately promulgated and comes into force after the usual publication.

216. Does the procedure set out in Article 138 make it too difficult to carry out constitutional reforms? This question has been much debated recently.

Since the Constitution has come into force, this procedure has been followed on a number of occasions, not only to pass important constitutional laws, but also to adopt specific reforms of constitutional legislation. In 1963, for instance, the provisions on the composition and term of office of the Chambers were modified; in 1967, there was an amendment to the rules providing for the term of office of the judges of the Constitutional Court; in 1989, jurisdiction to adjudicate on offences committed by ministers was eliminated by the Constitutional Court; in 1991–1992

the procedure for the granting of amnesty and indult was modified and the provision on the early dissolution of the chambers was changed as well; in 1993, there was an amendment to the provisions on MPs' privileges; in 1999, a constitutional reform has introduced the principles of 'fair trial' (Article 111) and has modified some constitutional provisions concerning the organizational structure of the Regions; in 2000, there was the creation of the 'Foreign District' for the election of members of either Chamber (Article 48) and, in 2001, the number of Deputies and Senators elected in that District was fixed; again in 2001, Title V of the second part of the Constitution concerning Regions and other Local Bodies was modified; in 2002, the effects of the transitory provision which prevented the members of the House of Savoy from accessing and sojourning in the national territory were eliminated; in 2003, the principle of equal opportunities between women and men for the purposes of access to public offices and elected positions was introduced; in 2007, the constitutional ban to the death penalty has been extended also with reference to war military laws; lastly, the constitutional Law No. 1 of 2012 has introduced the principle of the balanced budget.

217. Special mention should be made to Bicameral Committees on institutional reforms. These committees (which are not standing committees) are set up in order to make deep changes to the present constitutional rules, so as to find a solution to the problems occurring in practice, especially with regard to the workings of political decision-making organs.

The first Bicameral Committee was set up by the Chambers during the ninth Parliament (1983–1987), by a motion passed separately on the same day (12 October 1983) and was made up of twenty members of the Chamber of Deputies and twenty members of the Senate, so as to reflect the proportions among the various parliamentary groups. It was chaired by Mr Aldo Bozzi, a prominent member of the small Liberal Party who had also been a member of the Constituent Assembly. The committee was charged with putting forward proposals of amendments to the Constitution, in order to 'strengthen political and republican democracy' to be passed into legislation.

The 'Bozzi Committee' remained in office for fourteen months (from December 1983 to January 1985) and, in a climate of strong clashes of opinions among parliamentary groups, presented to the President of the Chamber of Deputies a majority report (signed by the President himself) and as much as six minority reports on 29 January 1985.

The results of the work carried out by the 'Bozzi' Committee had no practical application.

218. The Chambers decided to set up a second Bicameral Committee at the beginning of the eleventh Parliament (1992–1994).

In the meantime, the debate over reforms and the ways to get as early as possible to their approval had been speeded up after the then Head of State, Francesco Cossiga, had sent a message on the matter to the Chambers (26 June 1991). Also the newly elected President of the Republic, Oscar Luigi Scalfaro, in his address to Parliament in joint session before taking office (25 May 1992), had confirmed the need

for institutions to undergo deep changes and for a new ad hoc parliamentary body to be set up.

The committee was set up following two distinct resolutions taken by the Chambers on 23 July 1992 and was composed of thirty members of the Chamber of Deputies and thirty senators, so as to reflect the proportions among parliamentary groups. At the beginning, it was chaired by Ciriaco De Mita (previously Head of Government and Secretary of the Christian Democrats, i.e. the relative majority party until 1994) and, when the latter resigned, by Mrs Nilde Iotti (a communist member of the Constituent Assembly, formerly President of the Chamber of Deputies).

Following the setting up of the so-called De Mita-Iotti Committee, the Chambers increased its role, as well as its capacity of making proposals to the Chambers, by Constitutional Law No. 1 of 6 August 1993, which empowered the committee to present a unique and organic project of amendment of the second part of the Constitution (the one dealing with the organization of the Republic, with the exception of the section concerning the amendment of the Constitution itself) and gave it, to this end, special reporting powers towards the two Chambers of Parliament. Such a task had to be accomplished within six months of the coming into force of the law itself (i.e., one day after its publication in the Official Gazette, on 10 August 1993).

Article 3 of Constitutional Law No. 1 of 1993, moreover, provided for a departure from the procedure to amend the Constitution set out in Article 138 of the Constitution, in that it established that the project drafted during the six months by the committee and approved by each Chamber, according to normal procedures (two resolutions and qualified majorities), had to be put to popular referendum within three months.

The referendum, however, was not held and, owing to the early dissolution of Parliament in 1994, the Chambers could not even start to examine the text of the project drafted by the committee just a few days before the dissolution.

219. At the beginning of the thirteenth Parliament (April 1996), Constitutional Law No. 1 of 24 January 1997 set up a third Parliamentary Committee on Constitutional Reforms, composed of thirty-five members of the Chamber of Deputies and thirty-five senators, charged with putting forward proposals of review of the second part of the Constitution with regard to the system of government and the bicameral system. Such Committee has been chaired by Massimo D'Alema. At the time he was the political secretary on the majority party (PDS, then turned into DS), which supported the Government led by Romano Prodi. Later, in the course of the same legislature, Massimo D'Alema himself became President of the Council of the Ministers.

The 'D'Alema Committee' too was granted special legislative tasks by the Constitutional Law by which it was set up (Articles 2 and 3). With a further departure from the procedure to amend the Constitution, that law provided that the Chambers should approve an organic project of constitutional amendment and, in case of two successive votes in favour of it, hold a popular referendum within three months, as a definitive vote on the constitutional reform (Article 4). At the end of the first phase of its works (30 June 1997) and within the specified time-limits, the committee drew up a draft, rather innovative, project of reform. Examination of this project, however, was suspended in March 1998 – in the period of office of the XIII legislature,

which represented the time-limit for the activity of the Committee – with the consent of all parliamentary groups because of strong conflicts among the political groups about the passing of legislation relating to the powers of the President of the Republic, for which the committee had proposed the direct election.

With regard to Constitutional Laws No. 1 of 1993 and No.1 of 1997, it should be remembered that academic commentators criticized the decision of legislators of modifying the procedure for amending the Constitution set out in Article 138 of the Constitution. These provisions, in their opinion, must be considered as the expression of a supreme principle of the legal system, which cannot be altered in any way whatsoever.

At the end of the thirteenth Parliament (February–March 2001), despite the failure of the 'D'Alema Committee' and of the 'method' used to approve constitutional reforms, the then centre-left majority, by a narrow margin of votes (only four votes in the Chamber of Deputies and nine in the Senate) and after bitter debates with the opposition, passed the reform of Title V of the second part of the Constitution, relating to Regions, Provinces and Municipalities, with the aim of completing the 1999 constitutional reform (which had strengthened the statutory autonomy of Regions and introduced, although provisionally, the direct election of their Presidents).

Therefore, after the victory of the centre-right in the elections of May 2001, at the beginning of the fourteenth Parliament (2001–2006), the first constitutional referendum in the history of the Republic was held. Curiously enough, the referendum was promoted also by the parties which had approved the reform, with the purpose of favouring a direct involvement of the electoral body in the reform itself. Anyway, the constitutional reform passed by the centre-left was directly approved by voters in the referendum held on 7 October 2001, with a poll turnout of just 34.1%; it was approved by 64.2% of valid votes.

Again during the fourteenth Parliament, the centre-right Governments, with the full support of the parliamentary majority (which, though being large, did not reach the two-thirds of the Chambers), promoted a global reform of the second part of the Constitution, which was approved by the two branches of Parliament in November 2005, just few months before the new elections and with the firm aversion of the opposition, that won the 2006 elections, thus creating a centre-left Executive. Also this constitutional reform was put to a referendum, which was held on 25 and 26 June 2006. In a climate of greater popular involvement (with a turnout of 52.3%), the electorate clearly rejected, with 63.2% of 'no', the rewriting of the second part of the Constitution. In this case, therefore, the attempt to amend the Italian Constitution with only the votes of the parliamentary majority was avoided and, given the extent of that reform, it was possible to speak of a 'popular re-legitimization' of the 1948 Constitution.

§5. Laws Delegating Legislative Powers and Legislative Decrees

220. Pursuant to Article 76 of the Constitution, the Government can be delegated by the Chambers to exercise legislative functions by issuing decrees having the value of ordinary laws (the so-called legislative decrees).

The delegation must take the form of an act of Parliament (called 'delegating law'), having the contents set out in Article 76 and adopted according to the ordinary procedure.

In principle, it is impossible to delegate legislation over matters that, according to the Constitution, must absolutely be regulated by ordinary laws (see Part I, Chapter 4).

The fact that the Government is obliged to exercise delegated legislative powers is still debated by academic commentators. The Executive, in practice, has not often exercised this power within the specified time-limits.

Pursuant to Article 87, fifth paragraph, of the Constitution, once issued by the Council of Ministers delegated decrees are promulgated by the President of the Republic under the name of 'legislative decrees', as explicitly provided for by Article 14 of Law No. 400 dated 23 August 1988. They enter into force after being published in the Official Gazette, after the ordinary fifteen day period of *vacatio* provided for ordinary laws, unless they specify a different period.

The exercise of legislative functions may be delegated to the Government only within the limits allowed by the Constitution, which also sets out the contents of delegating laws. Such laws must clearly specify the object of delegation (i.e., definite matters and not matters to be determined by Parliament or other organs); main principles and criteria which the Government has to follow when exercising delegated legislative functions; the period of time within which the Government can exercise the power.

In practice, however, legislation delegated to the Government has sometimes more than one object (such as in the case of the implementation of a plurality of EU directives) and rather vague and uncertain criteria and principles. Sometimes, on the contrary, the latter are so detailed that they almost look like the final text of the legislative decrees to be passed by the executive. In order to limit the praxis of delegating laws containing vague and uncertain criteria and principles, Article 16*bis*, paragraph 6*bis* of the standing order of the Chamber of deputies, provides that the Committee for legislation is bound to express its own evaluation about delegated laws passed by the Government, as concerns their homogeneity, clearness and simplicity.

Article 14, second paragraph, of Law No. 400 of 1988 provides that the Government should transmit the text of legislative decrees to the President of the Republic for promulgation at least twenty days before the end of the delegation period.

In practice, delegating laws have often imposed other obligations (not mentioned by Article 76 of the Constitution) that the Government was to fulfil before being able to issue delegated decrees. One of these was the need to ask for the advice of the competent parliamentary committees or other, even ad hoc, bodies on the text of the decree, before the final decision of the Council of Ministers. As a general rule, anyway, whenever legislative delegation lasts over two years, the Government is obliged to ask for advice on the text of delegated decrees to the relevant parliamentary committees (Article 14, fourth paragraph, of Law No. 400 of 1988).

In principle the legislative decree is only one, expression of the instantaneous character of the legislative function delegated to the Government. The rule may however be deviated from by the delegation law, which can legitimize the repeated use of legislative decrees under the same delegation bill. The law on Government

activity also states that 'if the legislative delegation refers to a plurality of distinct objects subject to separate regulation, the Government may exercise it through several subsequent bills for one or more of the aforesaid objects' (Article 14.3 of the said Law No. 400). With the introduction of Article 96*ter* of the standing order of the Chamber of Deputies, on request of one-fifth of the members of the Committee which has to express its evaluation about drafts of legislative decrees by the Government, these drafts are transmitted to the Committee for legislation so that it can express its evaluation concerning the above-mentioned criteria.

§6. Decree-laws in the Constitution and in Practice

221. Article 77, second paragraph, of the Constitution provides that the Government must issue, on its own responsibility and in exceptional cases of necessity and urgency, 'provisional measures having force of law' (i.e., *decreti legge*, decree-laws). Pursuant to Article 87, fourth paragraph, the latter must be promulgated by the President of the Republic with the name 'of decree-laws and the description, in their preamble, of the circumstances … explaining the reasons why they were issued and stating when the Council of Ministers took the decision' (Article 15(1) Law No. 400 of 1988).

After being promulgated, decree-laws are immediately published in the Official Gazette and usually come into force on the same or following day.

Decree-laws lose effect 'as of the date of issue' (*ex tunc*) if they are not passed into law within sixty days of their publication. This is why the Government, the very day that the decree is issued, is obliged to lay it before Parliament which, even if it is in recess, must meet within five days to consider the decree.

If the decree is converted into law within sixty days of its publication, the law converting the decree is promulgated and published, and enters into force on the same day of its publication, as the law itself usually provides for. If, on the contrary, the decree-law is not converted into law by the chambers or not within the fixed time-limits, it loses its effect.

In the first case, the negative decision of the Chambers, taken before the end of the sixty days, is immediately reported by the President of the Chamber which took the decision to the Minister of Justice, who 'immediately' (the day after the voting) publishes it in the Official Gazette. The decree-law thus loses any effect. In the second case, immediate notice that the decree has lost its effect because the time-limit has elapsed is given anyway in the Official Gazette by the Minister of Justice (Article 15, sixth paragraph, of Law No. 400 of 1988).

If the decree is not passed into law, as stated above, it loses its effects retroactively, namely also those produced during the period in which it was provisionally into force.

Article 77, third paragraph, of the Constitution, however, provides that the Chambers may adopt laws to regulate legal questions arising out of decrees not yet passed into law, even validating the effects already produced by governmental measures (the so-called curative laws of the effects of non-converted decree-laws).

By Law No. 400 of 1988, Article 15, Parliament explicitly defined and thus confirmed the limits that decree-law are met with within the Italian legal system (see also Part I, Chapter 4, §4).

222. The use of decree-laws by the Government has become very frequent from the fourth Parliament (1963–1968) and, gradually, their number has so increased that we can say today that there is no matter within the Italian legal system which has not been regulated, at least once, by means of a decree-law.

In practice, the Government has often issued decree-laws without meeting the constitutional requirements of necessity and urgency. As a consequence, Parliament has had to examine an increasing number of converting laws and it was often unable, partly due to the high number of proposed amendments to the decrees, to approve them within the fixed time-limits.

When a decree-law was not ratified by Parliament, the Government, at least until the Constitutional Court declared it illegal in its Decision No. 360/1996, used to issue a new decree-law having an identical text or a text modified according to the amendments proposed or approved by the Chambers when the decree is passed into law. The reiteration of decrees not passed into law has often occurred for over ten times, thus subtracting the Chambers, for a long time, part of their legislative powers.

With Decision No. 360/1996, the Constitutional Court has stopped this practice, by declaring null and void a decree introduced more than once into Parliament, stating in no uncertain terms that 'if there is no new and extraordinary assumption of necessity and urgency, a decree-law having the same contents as another that previously lost its effect because it was not passed into law' is unconstitutional for breach of Article 77. Only on some occasions has the President of the Republic, in his turn, refused to promulgate decree-laws that, in his opinion, were neither extraordinary nor urgent.

§7. Conversion of Decree-laws

223. Converting laws are made up of only one section and must be examined by the Chambers according to their standing orders which provide that these bills be included in the Chambers' schedule under particular conditions and actually establish easier examination procedures. For this reason, the Government often makes use of decrees to take advantage of the 'fast track' reserved for them and to obtain a quick parliamentary approval of the proposals for reform supposedly more contrasted and controversial.

The attempt to curb the Government's tendency to issue a high number of decrees was based on the standing orders too. Since November 1981 (as regards the Chamber of Deputies) and March 1982 (as regards the Senate), before starting to examine a converting bill on its merit, the Chambers were obliged to pronounce their opinions on the existence of the constitutional requirements of necessity and urgency of the bill separately.

In practice, however, these measures did not stop the Government from issuing decree-laws, since the standards used by the Chambers when considering the bills

were mainly political, thus aimed at supporting or opposing the Government, depending on the occasions.

224. The Senate still entrusts the evaluation of the existence of constitutional requirements for decree-laws to the Committee on Constitutional Affairs and, subsequently, to the full House, which can definitively reject the converting laws considered as lacking these requirements (Article 78 of the standing orders of the Senate). The Chamber of Deputies, after amendment of Article 96*bis* of its standing orders in September 1997, no longer requires the examination by the Committee on Constitutional Affairs and the decision as to the existence of constitutional requirements for the decrees is only left to the full House.

The Chamber of Deputies, anyway, always entrusts the examination of converting bills to the Committee on legislation for an opinion on the matter of the decree, as well as on the respect of the limits set out in Article 15 of Law No. 400 of 1988.

In any case, if the first control of the constitutional requirements of the bill has a positive result, the Chambers can examine the decree on the merit and they can still decide if they wish to pass it into law.

225. During the examination of the converting bill, the Government itself and the groups forming the majority frequently propose amendments to the text of the decree. Parliament, as a consequence, has often passed converting laws having very different contents with respect to the document initially submitted by the Government. In this case as well, but once again unsuccessfully, the standing orders were used to try to discourage MPs from proposing amendments, especially if unconnected with the object of the decree.

Doubts were raised as to the effects of amendments made to decrees during their conversion: Article 15, fifth paragraph, of Law No. 400 of 1988 provides that amendments to the text of the decree start to be effective when converting law comes into force (*ex nunc*), unless the converting law itself provides differently.

§8. Political Orientation and Control of Government Activities by Parliament: Non-legislative Acts of Political Orientation

226. The Chambers contribute, as well as the Government, to the determination of the country's political orientation, first of all by passing laws, especially those through which Parliament performs its functions in compliance with the Constitution, such as amnesty and indult laws (Article 79), laws authorizing the ratification of international treaties (Article 80) and laws by which the budgets are approved (Article 81).

The Chambers, however, also adopt non-legislative acts of political orientation, aimed at influencing the decisions. The most important acts of this kind are motions, resolutions and agendas.

Motions can be voted upon only by the full House. By means of these motions, each Chamber expresses its opinions about the Government political orientation and obliges the latter to comply with them or carry out specific activities.

Resolutions, unlike motions, can be voted upon by both the full House and the committees. They can be submitted by every single member of Parliament and are usually voted upon by the full House after the debate that follows 'communications to the Chambers by the President of the Council', i.e. every time the executive is asked or is willing to illustrate its plans and future developments of its political actions (see Part II, Chapter 5, §5).

Resolutions aimed at promoting governmental initiatives can also be adopted by the relevant committees, even upon presentation to the Chambers of popular petitions, and after the examination of the decisions of the Constitutional Court, which are always transmitted to the two branches of Parliament.

Pursuant to parliamentary standing orders, the Chambers or the committees can also express their opinions or suggestions to the Executive by means of agendas. These requests anticipate or are subsidiary to the contents of various decisions (such as motions, sections of a bill, etc.). Agendas make it possible to understand the criteria of enforcement of the main resolution to which they are connected. Agendas can be voted upon or simply accepted by the Government, sometimes with a low degree of political engagement if considered as 'recommendations'.

§9. Parliamentary Control on the Governments Political Activities

227. The ways for Parliament to control Government activities include questions (the easiest and most commonly used). Questions are addressed in writing to ministers having jurisdiction over a certain matter, in order to learn which measures the executive intends to take in relation to a specific event. The Presidents of the Chambers must verify if the question can be addressed. The Government reply (in the person of a minister or a deputy minister) can be given in writing or orally and, if the second form is chosen, before the full House or the relevant committee, depending on what was specified by the MP who put the question. In case of oral reply, the MP can say whether he or she is satisfied or not with the reply. The Government can refuse to reply to a specific question or ask that the reply be postponed, giving reasons for it.

Pursuant to parliamentary standing orders, some of the meetings of the full House and of the committees of the Chamber of Deputies must be dedicated to questions with immediate reply (question time) made by MPs belonging to the different groups, by turns, on general subjects that are particularly urgent or topical from a political point of view. When these meetings take place at the Chamber of Deputies, the standing orders provide for television broadcasting and the intervention of the President or Vice President of the Council of Ministers and, in any case, of the ministers having jurisdiction. After the illustration of the questions, the Government's representative is given a few minutes to reply to each question and the persons who put the question can briefly reply in their turn.

228. The *interpellanza* consists, on the contrary, in a question by a MP to the Government asking the latter to explain the reasons or intentions of its political action on particularly important or general questions.

The *interpellanza* is different from the other questions because of its political-institutional nature, since it urges the Government to account for its actions in fields in which its political orientation finds expression.

The difference between the *interpellanza* and the other questions seems very obvious in the standing orders, but is not so clear in practice. Both methods are often used contemporaneously to enquire about specific issues.

The *interpellanze* are first of all illustrated by the MPs who submit them. After the reply of the Government's representative, the MPs may say whether they are satisfied with it or not. Pursuant to Article 138 of the standing orders of the Chamber of Deputies, if the MPs are not satisfied with the Government's reply, they can file a 'motion', thus fostering further debate on the question so as to get the Chamber to take an official decision.

The standing orders of the Chamber of Deputies allow Government's members not only to postpone the reply, but also not to give any reply at all to the *interpellanze* giving reasons for it. Provision was made in the Chamber of Deputies, as well as in the Senate for a number of MPs to submit urgent *interpellanze*, which are rapidly placed on the agenda.

229. Pursuant to Law No. 14 of 1978, the Government should ask for the Chamber's advice before providing for appointment or recommendations of designation of presidents and vice-presidents of public bodies and agencies, even operating in the economic sector. Parliamentary advice, which is not binding for the Government, is given in the two Chambers by the relevant committee and must be motivated. The Government shall notify the Chambers of the nominations or recommendations, giving reasons for them.

§10. Parliamentary Enquiries

230. Article 82 of the Constitution provides that each Chamber may order inquiries 'into matters of public interest'. To this end, it appoints special committees of enquiry so composed as to reflect the proportions among the various political groups.

Each Chamber may therefore order inquiries autonomously, by voting special motions. In practice, however, the Chambers have frequently passed special laws setting up Bicameral Committees of Enquiry. Once set up, these Committees may autonomously raise (or resist in) a conflict of power before the Constitutional Court.

Inquiries may serve the purpose of investigating the behaviour of State agencies more thoroughly and giving a political evaluation of the matter, but also gathering information that the Chambers deem useful to carry out their legislative activity or other kinds of activities.

It must be noted, however, that proposals to set up committees of enquiry follow the same rules governing the formation of laws in both Chambers. Decisions concerning these committees, therefore, are always taken by the majority, although the Government, according to the standing orders, cannot raise the 'question of confidence' on them.

231. Article 82, second paragraph, provides that the committees of enquiry carry out their investigating activities with the same powers and the same limitations as judicial authorities. This may result in interference between the committee of enquiry and criminal judges if they both investigate the same facts, though with different objectives. Some committees of enquiry, for instance, investigated and still investigate, sometimes permanently since they are changed with every new Parliament, the terrorist bombings that occurred in the past or organized crime (they are called Anti-Mafia Committees). Sometimes, the committees of enquiry enjoy even more investigating powers than judicial authorities.

Academic commentators are divided on the constitutionality of such provisions. The Constitutional Court stated that the committees are obliged to transmit all the documents in their possession to the judicial authorities if these documents regard facts that the latter are investigating (see Decision No. 231/1975). In order to prevent such interference prejudicing the achievement of the different objectives of the criminal enquiry and the parliamentary one, the Constitutional Court, in solving a conflict of powers, has imposed the two powers to act in accordance with the principle of loyal cooperation (see Decision No. 26/2008).

Neither the Constitution nor the standing orders provide for a procedure of examination of the conclusions reached by the committees of enquiry. Their activity therefore ends when they submit a report and, if necessary, one or more minority report to the Chambers. These reports do not necessarily entail a parliamentary debate.

§11. Parliamentary Hearings

232. The two Houses have more general cognitive powers. Pursuant to their standing orders, the Chambers, and the committees in particular, may order hearings aimed at gathering all the necessary information to fulfil their institutional tasks. Parliamentary hearings, unlike enquiries, are exclusively aimed at gathering information. Therefore, the committees charged with these hearings cannot exercise coercive powers on anybody but only invite them to cooperate spontaneously with Parliament.

In order to gather useful information for parliamentary activities, the committees and the full Houses can ask the advice of specialized bodies such as the National Council of Economy and Labour and the Court of Accounts on the matters lying within their province.

233. Parliamentary standing orders also allow standing committees to order the convening and hearing of Ministers, officials and directors of the agencies subject to Government's control. Members of the Executive must provide the committees with the information required and can also be invited to account for, even in writing, the enforcement of laws, agendas, motions, resolutions voted upon by the Chambers or accepted by the Government. The same applies to state officials and managers.

§12. Links between the Chambers, the European Union and Other International Organizations

234. Provision was made in both Chambers for committees charged with giving advice and promoting debates on the EU activities and measures and on the implementation of international agreements.

This allows Parliament to participate in the taking and implementation of the decisions of the EU, also by directing and controlling the European policies adopted by the Government. At present, both in the Senate (where in the past there was a Committee on European Communities Affairs) and in the Chamber of Deputies, the Fourteenth Standing Committee on European Union Policy carries out these duties.

Both committees examine, in a reporting capacity, the 'Community Bill' which the Government must present to Parliament within 31 January of every year; they also examine the annual reports drawn up by the Government on the Italian participation to EU and write their own reports for the full House.

In fact, since Law No. 86 of 9 March 1989, Parliament has to adopt a 'community law', proposed each year by the Government and laying down the provisions implementing community directives directly or through legislative delegation or government's regulations. The latter might contain provisions so detailed and complete that they can be directly enforced by judges and prevail in case of conflicting national legislation.

The above procedure, which has helped Italy to make up for its delay in implementing community rules, caused by the typical slowness of its legislative procedures, is presently regulated by Law No. 11 of 4 February 2005.

This law, which has undergone a number of amendments, has institutionalized, among other things, the Parliament's participation in the EU decision-making process. So the relevant parliamentary bodies, among which is the XIV Standing Committee, are called upon to make observations and to adopt orientation acts. Therefore the Government, until the parliamentary stage has been completed, has to place the measure to be adopted under parliamentary reserve within the EU Council of Ministers. However, it can dispense from parliamentary indication after twenty days have passed without any opinion having been issued by the Parliament.

Law No. 11/2005 also provides that the Chambers are regularly informed about judicial proceedings and judgments of the Court of Justice concerning Italy, as well as the financial flows between Italy and EU.

The amendments made by the Lisbon Treaty provided, among other things, that at European level National Parliaments ensure compliance with the principle of subsidiarity on the part of the Union's institutions in preparing the EU-legislation. The procedures will have to be governed through specific amendments of the Houses' Standing Orders. Anyway, pursuant to Law No. 11/2005, the Government must give adequate and timely information to the Chambers about European legislative initiatives.

Chapter 5. The Executive

by Giovanni Guiglia

§1. The Government: Introduction

235. The term 'Government' has different meanings in Italian legal literature *strictu sensu*, it indicates the supreme body of the executive power.

Part II, Title III, of the Italian Constitution in force specifically concerns Government. Section I regards the Council of Ministers and starts with the Article 92, paragraph 1, which specifies that 'the Government of the Republic consists of the Prime Minister and of the Ministers, jointly constituting the Council of Ministers'. Thus, the Constitution defines the basic structure of the government structure, which is essentially identified with the Council of Ministers.

236. Title III also includes two other sections in addition to Section I ('Council of Minister': Articles 92–96): Section II (Articles 97–98), that deals with the 'Public Administration' and Section III (Articles 99–100) that regards the 'Auxiliary Bodies', although it is clear that neither are part of the constitutional structure of the Government and this confirms the variety of meanings attributable to the term 'Government' in the Italian legal language. Indeed, the term is often replaced by the synonym 'Cabinet', not to be confused with the recently established Cabinet Council, which includes the Prime Minister and a limited number of Ministers and that cooperates with the Council of Ministers, even if it has a distinct nature (as afterwards explained).

237. This chapter focuses on those government bodies explicitly defined in the Constitution, that are consequently essential, and on the bodies not defined in the Constitution but established on the grounds of practice, custom or by law and referred to as additional, contingent or optional government bodies.

The *essential government bodies* are:

– the Prime Minister;
– the Ministers;
– the Council of Ministers.

The *additional bodies of government* are:

– the Vice Presidents of the Council of Ministers;
– the Ministers without Portfolio;
– the Under Secretaries of State, some of whom can be vested with the competences of Vice Ministers;
– the High Commissioners;
– the Special Government Commissioners;
– the Ministerial Committees and the Interdepartmental Committees;
– the Cabinet Council.

The principle of *government self-organization* has long played an important role in the Italian constitutional system, allowing a remarkable degree of structural flexibility.

This is mainly due to the fact that for forty years, from 1948 to 1988, the latest paragraph of Article 95 of the Constitution, which stipulates that 'the law contemplates regulations concerning the Presidency of the Council of Ministers and establishes the number, the responsibilities and the organization of the various Ministries', was not implemented. Law No. 400 of 23 August 1998 entitled 'Rules on government activity and organization of the Presidency' has partly dissipated the doubts about power-sharing among government bodies and, more notably, has regulated their structure, thus contributing to the rationalization of practice, convention and custom. It was, however, only very recently that the legislator has defined the number, the responsibilities and the organization of the various Ministries (see Decree No. 300 of 30 July 1999, Decree No. 217 of 12 June 2001 converted into Law No. 317 of 3 August 2001, Law No. 244 of 24 December 2007 and Law No. 172 of 13 November 2009).

§2. Structure

I. Essential Organs: The Council of Ministers

238. The analysis of the essential organs of the Government starts with the *collegiate body* of government that consists of the President of the Council of Ministers and Ministers, including Ministers without Portfolio. Its composition is strictly defined by the Constitution, according to the above-mentioned pattern. Other public officials may attend or participate in the meetings of the Council, but are not eligible to vote. The presidents of the Special Status Regions (Sicily, Sardinia, Valle d'Aosta, Trentino-Alto Adige, and Friuli-Venezia Giulia) *must* on the contrary be invited to participate in the meetings of the Council of Ministers whenever an issue where the region has a specific interest is discussed. Similarly, the presidents of the Special Provinces of Trento and Bolzano are admitted to the sittings of the Council too, according to the provisions of the Constitution of Trentino-Alto Adige. The participation of these representatives in the meetings of the Council of Ministers is legitimized by the Statutes of the particular Province or Region which have been adopted by constitutional law.

A particular role is played by the Under Secretary of State of the Presidency of the Council of Ministers whose main responsibility is to act as secretary of the Council of Ministers, and therefore attends all meetings of the Council. The Law No. 400/1988 and the internal regulation of the Council of Ministers (D.P.C.M. 10 November 1993) rationalized the long existing procedure, which dated back to the *Statuto Albertino*. This procedure became established over time, although it is in open contrast with Royal Decree No. 466/1901 ruling that the most junior Minister should act as secretary.

The meetings of the Council may also be attended by other authorities, although there is no regulation providing for this. These include, for example, Secretaries of State, High Commissioners, Special Government Commissioners, who are invited

to make contribution on grounds of their specialist knowledge of a given item on the Council agenda. Recently Law No. 81 of 26 March 2001 permits the position of Vice Minister for up to a maximum of ten Under Secretaries of State. Vice Ministers can attend the Council of Ministers in order to refer to items to which they are delegated, when invited to do so by the Premier with the agreement of the Minister in question. It is clear, however, that their participation of people other than Ministers cannot alter the structure of the Council, since they are not eligible to vote.

239. The *competence of the Council of Ministers* is clearly stated by Law No. 400/1988, in particular Article 2. The first paragraph of Article 2 provides that the Council of Ministers determines the *general line of government policy* and the *administrative policy* necessary to implement it.

The Council is also called upon to deliberate on 'any matter concerning the general policy of Government for which the Chambers have expressed their confidence'. The latest section of this paragraph provides a definitive solution to the time-old debate as to which body is responsible for settling 'conflicts of powers among Ministers', by finally making the Council responsible. In so doing, the competence of the collegiate body, i.e. the Council, has again been confirmed. Although provided by Royal Decree No. 466/1901, during the fascist period this power was indeed transferred to the Prime Minister, under Law No. 2263/1925.

Article 2(2), which should be read in concomitance with Article 2(3) *a* and Article 5(1) *b* dealing with the responsibilities of the President of the Council of Ministers, provides for the competence of the Council of Ministers with regard to the proposal of a *vote of confidence* and the relating procedure (see Part II, Chapter 6). The President of the Council makes the proposal, on which the Council of Ministers must agree. The announcements to be delivered in Parliament concerning the matter for which a vote of confidence is requested must also be agreed upon by the President of the Council.

Article 3(2) provides a list of subjects on which the Council is called upon to deliberate. The list underlines that the Council of Ministers deliberates on all the statements concerning the political line, the programmes and the matters for which the Government requires the confidence of Parliament, as above explained (letter a). This list also includes:

– draft legislation and proposals for the withdrawal of legislation already been submitted to Parliament;
– decrees having the force of law and regulations to be issued under the form of a Decree issued by the President of the Republic;
– measures providing for orientation and coordination of the administrative activity deriving from Article 127 of the Constitution and from the special status of Regions and of the Provinces of Trento and Bolzano, apart from the special *status* of two Regions: Sicily and Valle d'Aosta, (see Constitutional Court, sentence No. 408/1998);
– guidelines provided by government commissioners for the exercise of administrative functions which have been delegated to the Regions;
– proposals made by the Minister concerned to fulfil the duties falling within the competence of regional governments whenever they need to be replaced due to

persistent inactivity in the exercise of delegated functions to be performed within mandatory time-limits or whenever rendered necessary by the nature of the interventions;
– proposals to raise conflicts of powers between Government and special status Regions and Provinces;
– guidelines concerning international policy and the EU, draft treaties and draft international agreements irrespective of their political or military nature;
– measures regulating relations between the State and the Catholic Church (Article 7 of the Constitution), which are in turn regulated by the Lateran Pacts;
– measures concerning the relations between the State and religious denominations other than Catholicism (Article 8 of the Constitution);
– measures to be issued under the form of a decree issued by the President of the Republic, subject to the advice of the Council of State, whenever the Minister concerned refuses to conform to such advice;
– requests for filing by the *Corte dei conti* (Court of Accounts) giving reasons for it under Article 25 R.D. No. 1214/1934;
– proposals for the dissolution of Regional Councils;
– all measures for which the President of the Council of Ministers considers a Council decision is needed.

It is worth stressing that the list of measures on which the Council of Ministers decides is to be considered a definite and by no means an exemplifying list (Article 12(8), Legislative Decree No. 303/1999).

Article 3 of Law No. 400/1988 provides that the Council of Ministers is also responsible for appointing the chairmen of national bodies, institutions or companies falling within the competence of the Public Administration, with the exception of public lending institutions.

240. The President of the Council of Ministers convenes the Council, determines the meeting agenda and superintends work. The Council Standing Orders, recently adopted under a Decree of the President of the Council of Ministers of 10 November 1993, grants the Prime Minister broad discretionary powers on such matters, whilst no mention is made of the structural quorum, i.e. the number of members officially necessary to make a meeting legally valid, and the functional quorum, i.e. the number of votes necessary to take decisions during a meeting. As a consequence, the role of the Premier is visibly enhanced both at political and constitutional level. In determining the voting procedure, the Prime Minister can indeed decide that for some decisions the Council must deliberate unanimously, thus subordinating the existence of Government to this prerequisite.

In practice, however, resolutions are rarely put to the vote and the Council usually decides unanimously, putting off controversial decisions. This indicates the marked collegial nature of the Italian government system.

Recently (starting from the XIV Legislature) there is an increasing adoption of voting procedures in the Council of Ministers, consisting in the use of majority and generating divergences among the Ministers and the political forces of the parliamentary majority.

241. It is worth noting that the Standing Order requires that matters and proposals concerning draft legislation, legal provisions, and general administrative measures are examined in preparatory meetings of the Council of Ministers. This is a *sine qua non* for including the items in the agenda of the meeting of the Council of Ministers. The preparatory meetings are usually coordinated by the Under Secretary/Secretary of the Council of Ministers and are attended by senior ministerial officials and by the Presidency of the Council.

II. The President of the Council of Ministers

242. For a better understanding of the role of the second essential body of government, i.e. the President of the Council of Ministers or the Prime Minister, we need to take a brief look at the pre-fascist experience of the constitutional monarchy in Italy when a parliamentary monarchy was in place. At this time the role of Prime Minister was not constitutionally autonomous; he chaired the Council but was substantially like any other Minister, and had no special powers. This is indicated by the fact that he was also often responsible for the Ministry of the Interior. His degree of authority depended essentially on his political weight. Royal Decree No. 466/1901 regulated the responsibilities of the Prime Minister, while those of the Ministers were stipulated in the laws establishing the Ministries or in other acts subsequently adopted on this matter.

243. During the fascist period the role of the Premier was visibly strengthened. He was renamed 'Head of Government', enjoyed significant key powers in terms of the workings of Parliament, and was also the *Duce del fascismo* (Duce of the Fascism), and supreme head of the Fascist Party (subsequently a State institution).

244. The republican Constitution restored the parliamentary model, while still acknowledging a greater political and institutional role to the Prime Minister as compared to the other Ministers. According to the Constitution, the Prime Minister conducts and is responsible for the general policy of Government' for which he is therefore accountable. The Prime Minister also promotes and coordinates the activities of the Ministers so as to maintain unity in their general political and administrative activities (Article 95).

As to the structure of Government, the Constitution provides for the *monocratic principle* whereby the Prime Minister conducts the general government policy and proposes the appointment of Ministers; the *collegiate principle* whereby Government is jointly accountable and responsible for the most important political decisions such as the adoption of government bills and decrees; and the *principle of ministerial autonomy* where Ministers are responsible for any acts adopted in the exercise of their respective Ministries. Due to the decade-long lack of specific legislation dealing with the Presidency of the Council (Article 95 of the Constitution), and in particular, the number, responsibilities and organization of the Ministries, and given the influence of coalition governments and the *de facto* power of the political parties, governance practice has favoured the consolidation of the autonomy of the

single Ministries, whereas the role of the Prime Minister, often caught between contrasting political needs and interests has lacked a clear and autonomous role. The Presidency of the Council retained some specific administrative functions, while other cross-departmental functions were assigned to Ministers without Portfolio, i.e. responsible for Ministries not explicitly provided by law. Furthermore, the Constitution has not explicitly resolved the question of whether the Head of State has the power to withdraw the authority of a Minister on the proposal of the Prime Minister and indeed, this is still a matter of discussion today (together with the question concerning the revocation of the same Prime Minister).

245. A reorganization of the government system only took place in the last twenty years when Law No. 400/1988 and Legislative Decree No. 303/1999 regulated and reformed the organization of the Presidency of the Council and the competences of the Council of Ministers, as well as the rule-making activity of Government. Similarly, Legislative Decree No. 300/1999, carrying out the legislative proxy provided for by Article 11 Law No. 59/1997, and Decree No. 217/2001 (transformed in Law No. 317/2001) have reorganized the remaining government structure, reducing the number of the Ministries from 18 to 12, then up to 14. The Law by Decree No. 181/2006, now Law No. 233/2006, brought the number of Ministries again to eighteen. Finally Article 1, paragraph 376 of Law No. 244/2007 (Financial Act 2008) establishes that from the first Government of the XVI Legislature (i.e., after the II Prodi Government, that is the IV Berlusconi Government) Ministries should be reduced to twelve. During the IV Government of Berlusconi Law No. 172/2009 brought Ministries to thirteen and this number is confirmed by Monti Government too.

246. The *responsibilities of the Prime Minister* are strictly linked to *government's general policy activity* and to the need to *maintain unity in overall political and administrative activities*, so that 'the Prime Minister is responsible for providing political and administrative guidelines to the Ministers for the implementation of the decisions of the Council of Ministers, as well as those guidelines concerning the responsibility of the Prime Minister for conducting general government policy'. It should be noted, however, that there are no provisions regulating either the duties of Ministers in their relations with the Prime Minister or the precise mandatory nature of the presidential guidelines. Instead, Article 5(2)*a* of Law No. 400/1988 states that the Prime Minister provides political and administrative guidelines to Ministers, but does not imply that they are obliged to follow them. First, because the relations between the Prime Minister and Ministers are not hierarchical. Second, because the infringement of the Prime Minister's guidelines does not entail special sanctions. Third, because guidelines are merely an instrument to achieve the objectives set by the coalition partners, at the time they entered into a government agreement.

This means that a Minister may not conform to a guideline on grounds of its political interpretation, i.e. insofar as it is not conducive to unity in general political activities, as established in the coalition agreement. It is evident that the effectiveness of the guidelines depends on the judgment of single Ministers. In contrast to

the past, when Ministers were real 'delegates' of their respective government parties, they are now keen political representatives who will try to steer government action as near as possible to their own political line, so as to make their party more visible within the coalition and, even more important, before the electorate.

The recent simplification of the political system after the election of April 2008 drastically reduced the parties' number in the same majority coalition; however it is not excluded that the single Ministries continue to cooperate with their actual political party, without following the presidential dispositions.

247. However, possible contrasts between the Prime Minister and the Minister may need an 'out-of government settlement', namely during ad hoc meetings with the leaders of the coalition parties, despite the tenor of Article 5(2) of Law No. 400/1988 states that the Prime Minister has the following competences:

– the promotion and coordination of the activities of Ministers with respect to measures of general government policy;
– the suspension of the adoption of measures by the Ministers based on political and administrative grounds which are on the agenda of the meeting of the Council of Ministers;
– in cases of disagreement among government bodies responsible, albeit in different ways, for adopting measures, the Prime Minister can submit the controversial issue to the Council of Ministers for a comprehensive evaluation and a harmonization of the public interests involved and entrust the Council with a decision (Article 12(2), Legislative Decree No. 303/1999);
– agreement with Ministers on their official statements whenever the latter are likely to affect general government policy because they exceed their ordinary jurisdiction.

Equally important are the responsibilities of the Prime Minister in the name of the government (Article 5(1), Law No. 400/1988):

– the notification of the composition of Government as well as any possible reform of the Chambers;
– requesting a vote of confidence – either personally or by delegating a Minister – on proposals concerning the implementation of the general government policy;
– the submission of laws to the President of the Republic for promulgation;
– the submission of draft legislation to the President of the Republic before presenting them to Parliament, as well as decrees having the force of law and government regulations for promulgation;
– countersigning decrees by which laws are promulgated as well as any measure put to the vote of the Council of Ministers, acts having the force of law and, together with the proposing Minister, any other act as explicitly provided for by law;
– presenting draft government legislation to Parliament, also through the delegated Minister, and exercises the powers of government with regard to the legislative procedure to be followed (see Article 72 Constitution);

– exercising the powers granted by the legislation in force, with regard to the relations with the Constitutional Court and adjudication of questions of constitutionality as well as of conflicts of powers set by the Court itself (questions of constitutional legitimacy and conflicts of powers; see Part II, Chapter 9);
– taking the necessary steps to ensure that Government complies with the rulings of the Constitutional Court;
– informing Parliament of controversies pending before the Constitutional Court;
– indicating, either personally or on the proposal of the Ministers concerned, fields where Government may legislate with regard to the outstanding cases of constitutional legality.

The following functions are equally relevant, also pursuant to Article 5(2) of Law No. 400/1988:

– guaranteeing the impartiality, the efficiency of Public Administration Offices and carrying out the necessary controls;
– the promotion of the action of Ministers to ensure that public institutions and corporations work according to the objectives set by the laws regulating their autonomy and in line with the general political and administrative policy of Government;
– exercising the powers provided by law with regard to national security and State secrecy;
– establishing ad hoc Committees of Ministers which conduct a preliminary examination of issues of shared competence and gives his own opinion about the guidelines of government activity as well as on relevant issues to be submitted to the Council of Ministers, possibly involving experts who are not part of the Administration;
– establishing working and study groups in such a way as to represent all the fields of competence of Ministries concerned and possibly involving the opinion of external experts.

Finally, in compliance with Article 5(3) of Law No. 400/1988, the Prime Minister, either directly or indirectly via the delegated Minister is responsible for:

– the promotion and coordination of government action with regard to EU policies and ensures a consistent and timely government and public administration action with respect to policy implementation, on which the Prime Minister periodically reports to Parliament (see also Article 8 and following ones of Law No. 11/2005);
– taking the necessary steps to ensure that Government complies with the rulings of the European Court of Justice, through the opportune communication to the Chambers of the above-mentioned rulings in order to allow permanent parliamentary commissions to analyse them; submitting the Parliament an annual relation concerning the steps taken to execute the above-mentioned rulings (Article 1 Law No. 12/2006);
– the promotion of the enforcement of the judgments of the European Court of Human Rights towards Italy;

– providing prompt and precise information to Parliament concerning EU legislative activity as well as the position of government with regard to the same subjects (see Article 3 Law No. 11/2005 too);
– the promotion and coordination of government action concerning the relations with the autonomous Regions and the Provinces of Trento and Bolzano while supervising the work of Government Commissioners.

248. In order to carry out its own duties as well as its initiative, promotion and coordination activities as provided by the Constitution, the Prime Minister can avail himself of the Secretariat General of the Presidency of the Council of Ministers, reorganized in 1999 (Legislative Decree No. 303/1999) and composed of numerous Departments, Offices and Services. They are established by every Prime Minister with specific decrees (see, in particular, the recent decree of the Prime Minister of 1 March 2011), taking into account the organizing autonomy that the Prime Minister has from time-to-time and in the light of his government programme.

Departments are general management structures comprising various Offices, which may share the same functions and sometimes enjoy almost as much functional autonomy as the Departments (see, e.g., the Secretariat Office of the Council of Ministers) and are subdivided into Services, that is internal bodies supporting the Departments and the Offices without having general management structures.

As to carry out specific tasks, to reach particular results or to perform defined programmes the President of the Council establishes specific ad hoc *missions*, whose length is specified in their institutive decree (see, e.g., the Decree of the President of the Council of Ministers of 30 September 2008). Under Article 2, paragraph 4 of the Decree of the President of the Council of Ministers of 1 March 2011) these structures can also be established to give organizational support to the Ministers without Portfolio and to the Under Secretaries that have no liability and no direct dependence on the general offices.

The Secretary General is responsible for the *Secretariat General* of the Presidency of the Council of Ministers and is assisted by the *Vice Secretary*. The Secretary General runs the Secretariat, has an organizational role and manages the human and instrumental resources of the Presidency of the Council of Ministers (see the Decree of the President of the Republic No. 520/1997; Article 7.1. and 3 Legislative Decree No. 303/1999; the Decree of the President of the Republic of 23 July 2002; the Legislative Decree No. 343/2003 and, for example, the Decree of the General Secretary of 18 January 2010, Decree of the President of the Council of Ministers 1 March 2011).

The Prime Minister determines the organization of the Secretariat General whose activity benefits the Ministers delegated by him (in particular Ministers without Portfolio, as subsequently analysed) and Secretaries of State, i.e. the Under Secretaries of the Presidency of the Council of Ministers.

As to those bodies for which Ministers or delegated Secretaries of State are responsible, management functions are carried out by government officials and not by the Secretary General of the Presidency. The relations between the political body and the managerial powers of the government are regulated by the Articles 4 and 14 of the Legislative Decree No. 165 of 30 March 2001; when a Department is not

managed by a Minister without Portfolio, the Head of the same Department is coordinated by the Secretary General of the Presidency (Article 21 Law No. 400/1988).

Furthermore, the Prime Minister determines which offices will cooperate directly with him, which offices will be linked to the Ministers without Portfolio or to the Under Secretaries of the Presidency and determines their composition accordingly (see Decree of the President of the Council of Ministers of 1 March 2011). This composition can be modified under proposal of the same Ministers and Under Secretaries interested. In particular, when a Department of the Presidency of the Council of Ministers is managed by a Minister without Portfolio, the Head of the Department is appointed through a Decree of the Prime Minister in accordance with the proposal of the Minister concerned.

In case of tasks requiring the cooperation of more Departments or Offices (comparable to Departments), the Prime Minister can establish by decree specific *Units of interdepartmental coordination*.

249. The Prime Minister is supported by the work of the Secretary General of the Presidency of the Council particularly in the exercise of the following staff and integrated functions (Article 2, Legislative Decree No. 303/1999):

– management and relations with the Council of Ministers;
– relations between Government and Parliament and between Government and other constitutional organs;
– relations between Government and European institutions;
– relations between central and local government (Regions, Provinces and Communes);
– relations between Government and religious denominations (Articles 7–8 of the Constitution);
– general policy planning and general political decision-making activity;
– coordination of governmental rule-making activities;
– coordination of governmental administrative activity and of internal supervision systems;
– promotion and coordination of equal opportunities policies and of government activities in view of preventing and eliminating discrimination;
– coordination of the institutional communication activities of Government;
– promotion and evaluation of innovative measures in the public sector and coordination in the field of public works;
– coordination of key government sector policies;
– evaluation of the implementation of general and sectoral government general policies.

On the whole, Legislative Decree No. 303/1999 has rationalized the previous administrative organization, and introduced important innovations to improve the efficiency of the Departments and Offices of the Presidency mainly in terms of the *flexibility principle*. This has allowed for a more comprehensive implementation of Article 95(3) of the Constitution stating that the law contemplates regulations concerning the structure of the Presidency of the Council. Legislative Decree No. 303/1999 – like Law No. 400/1988 – did not limit itself to rationalization, in accordance

with the flexibility principle. Instead, it went further, to cover the principles of '*speciality*' and '*exclusiveness*'. In this way the objective, supported by enlightened academic commentators, of regulating the relations between the different bodies of the Presidency by law (i.e., the *rationalization principle*) has been achieved. Similarly, the need for a special, i.e. 'atypical', organization of the Presidency as compared to ordinary governmental bodies, has been satisfied and those functions which do not fall under the competence of the Prime Minister have been eliminated from the duties of the Presidency. With regard to this, it is necessary to underline that at least eight structures (i.e., Departments and Offices) have been transferred to specific agencies or to the Ministries boasting the most similar competences. Therefore, from the XIV Legislature (2001) the Presidency of the Council of Ministers started having a simpler structure aimed at dealing with the activities that are more coherent with the institutional role of the Prime Minister (management, impulse, trend and coordination). This process led to the Law No. 3/2003, followed by several normative and administrative measures to give the Presidency of the Council of Ministers structures already operating by the Ministries (see, e.g., the Law by Decree No. 181/2006, then transformed in the Law No. 233/2006, and the Decree of the Prime Minister of 22 October 2007); however, these structures made the organization heavy again.

250. Nonetheless, the organization pattern which can be derived from Law No. 400/1988 and Legislative Decree No. 303/1999 is not exhaustive (in spite of the above-mentioned measures), since the Secretariat General of the Presidency of the Council does not merely provide instrumental support to the work of the Prime Minister, but also supports the activities of the Ministers without Portfolio and the Under Secretaries of the Presidency. The elimination of certain operational and managerial structures within the Presidency of the Council is, however, likely to affect the role of the structures themselves, which will be reduced to the functions delegated to them by the Prime Minister. In this way, they will fit perfectly into the institutional system as defined by the Constitution and by the above-mentioned provisions.

251. The organizational and functional peculiarities of the Presidency of the Council of Ministers is confirmed by the fact that the Office of the Secretariat of the Council of Ministers is still run by the Under Secretary of State of the Presidency of the Council and Secretary of the Council of Ministers. The Office, which cannot include more than two Services, deals with the arrangement of the decrees concerning the formation of the Government, with the activities that precede the meetings and the agenda of the Council of Ministers and relative documentation, as well as with the activities deriving from the collegial deliberations adopted, the arrangement of the reports, the acts necessary to enact laws and the issuing of acts of the Council of Ministers, also ensuring their rapid publication on the Official Gazette (Article 20 Law No. 400 of 1988 and Article 37 of the Decree of the President of the Council of 1 March 2011).

III. Ministers

252. Thus, the relations between the Prime Minister and the other essential organs of Government – namely the Ministers – have become more complicated. In this section we examine the role of Ministers with Portfolio, i.e. Ministers heading administrative bodies called *ministeri* or *dicasteri.* Article 95 (latest paragraph) of the Constitution stipulates in its second part that 'the law establishes the number, competence and organization of the various Ministries'. After more than five decades the legislator has finally reduced the Ministries to the following thirteen. The Ministries of Monti Government are:

(1) Foreign Affairs.
(2) The Interior.
(3) Justice (the only ministry explicitly provided for by the Constitution, Article 107).
(4) Defence.
(5) Economy and Finance.
(6) Economic development.
(7) Agriculture, Forestry and Food policies (new denomination introduced by the Law-Decree No. 85/2008).
(8) Environment, Land and See Protection.
(9) Public Transport and Infrastructure.
(10) Labour and Social Policies.
(11) Education, Universities and Research.
(12) Cultural Heritage and Activities.
(13) Health (established by Law No. 172/2009).

In the above-mentioned Ministries there are two first-level structures: the *General Directions*, that have maintained their traditional internal organization which mainly reflects the nineteenth century model of the Kingdom of Piedmont and Sardinia, and the *Departments*. In the Ministries in which the first-level structures include Departments it is not possible to establish the Secretary General, which must be eliminated under previous laws or regulations (Article 1 Legislative Decree No. 287/2002). In other words each administration has been given the opportunity to choose its own administrative structure, opting between Departments or General Directions, and, in this second case, to have or not the Secretary General, that is directly managed by the Minister.

Departments are responsible for carrying out tasks concerning comprehensive groups of matters and relevant instrumental tasks including the orientation and coordination of the units of which Departments are composed, and with the organization and management of instrumental, financial and human resources available to them. A Head of Department will replace the Secretary General for each Ministry, responsible for the coordination, direction and control functions. Whenever the Secretary General is eliminated, his functions are shared by the Heads of Departments (as concerns the relations between Ministers and Managers, under Legislative Decree No. 29/1993).

253. The reform of the Ministries has also introduced a new body in the organization of the central government, i.e. the Agency, whose responsibility includes technical and operational tasks of national interest, previously carried out by the Ministries and Public Institutions. Agencies work for the benefit of public government institutions, also at a regional and local level. They enjoy full autonomy, within the limits set by law and are under the supervision of the *Corte dei conti* as well as of Ministers concerned in accordance with their orientation and monitoring powers. They are also autonomous as concerns the balance, within the limits of the funds given under the budget of the competent Ministry. Agencies must achieve the objectives set by Ministers. They are also subject to the adoption of their programmes of activity, of their balances and accounting, as well as to governmental inspections to verify that ministerial guidelines are duly implemented.

The Agencies provided for by Legislative Decrees No. 300/1999 and 303/1999 include for example:

– the Agency for Defence Industries: a public agency with special rights and responsibilities established by law which operates under the aegis of the Ministry of Defence (Articles 20.1.a. and 48 Legislative Decree No. 66/2010), and runs the activities of the productive and industrial units of the Defence (Articles 131–143 Decree of the President of the Republic No. 90/2010);
– the national Agency for the administration and the use of criminal organizations' properties confiscated; it was established with Article 1 of the Law-Decree No. 4/2010 (transformed in Law No. 50/2010), has public legal status, is autonomous at organizational and accounting level, its main offices are in Reggio Calabria and is supervised by the Minister of the Interior;
– the Agency for the development of technologies for innovation, established by Article 1, paragraph 368, letter d, of Law No. 266/2005, in order to 'improve the competitive abilities of the small and medium concerns and of the industrial districts through the spreading of new technologies and of their relative industrial applications'. This Agency has public legal status, has an autonomous regulation and is submitted to the guidelines and the controls of the *Corte dei conti*. The Agency is the main Government's way to support Ministries and Regions in carrying out innovative projects at European and international level.

254. In the Italian legal system Ministers are not only appointed as Heads of their relative Ministries. They actively support the activity of the Council of Ministers, which is the collegial body of the Government expressly provided for by the Constitution. Their liability, as explained in the following paragraphs, is both individual – as concerns the acts of their Ministries – and collegial, as regards the deliberations of the Council of Ministers.

Besides, under Article 89 Constitution, Ministers countersign the acts issued by the President of the Republics in accordance with their fields of competence and are political (before Parliament) and juridical liable (i.e., at civil, criminal and administrative level).

255. As members of Government and although 'they are not members of the Chambers', Ministers have the right 'and if requested the duty' to participate to their

sittings. When requested they have to be heard by the Chambers under Article 64, latest paragraph Constitution). As analysed in this chapter, some Ministers can also be appointed as Presidents of Committees of Ministers and of Inter-ministerial Committees: i.e. collective bodies including several Ministers (but also officers) with tasks of sectorial line and coordination.

IV. Additional Government Bodies: The Vice President of the Council of Ministers

256. It is now possible to analyse the numerous range of the so-called additional government bodies, starting with those which are *ex officio* members of the Council of Ministers, the most important being the Vice President of the Council of Ministers.

257. It has been noted that the Vice President of the Council of Ministers is a common element of many republican governments to a point that some authors have considered it as the result of constitutional custom, rather than merely the outcome of practice. It should also be said that, unlike the previous practice where a Minister – either with or without portfolio – was appointed Vice President by the same decree of appointment of Ministers, Law No. 400/1988 now provides that the assignment of the office of Vice President to one or more Ministers can be proposed during a meeting of the Council of Ministers. It is evident that this discussion can only take place after the appointment of Ministers, simply because prior to the appointments the Council of Minister does not yet exist. In practice, following the introduction of the law, once the Prime Minister has decided to appoint a Vice President, he usually submits his proposal during the first meeting of the Council of Ministers. The appointment takes the form of a Decree of the President of the Republic which is then published in the Official Gazette. The literal tenor of Article 8 of Law No. 400/1988 may suggest that the appointment is a prerogative of the Prime Minister. However, the Vice President of the Council of Ministers is substantially a political figure, since the appointment is usually subject to specific political agreements whose object is to enhance the participation of one or more parties to government coalition. During the meeting of the Council of Ministers the Prime Minister usually proposes the appointment to the vice-presidential office of a prominent political leader of a party different from his own. However, the Vice President cannot be considered the Prime Minister's vicar. Law No. 400/1988 only cites the case where the Prime Minister has to be temporarily replaced, as Article 8 reads: 'in case the Prime Minister is temporarily absent or unable to perform his functions'. This law also states that in case the appointment of a Vice President has not yet been decided, and unless otherwise provided by the Prime Minister, the most senior Minister in Government must be appointed to this office.

V. Ministers without Portfolio

258. Ministers without Portfolio constitute the second type of additional organ of government. One of the reasons for their introduction was to combine their role

with the functions of the Vice President of the Council, even if this coalition prevailed in the oldest praxis because of the political impact of the role of Minister without Portfolio. The introduction of Ministers without Portfolio, i.e. Ministers who are not responsible for a Ministry, dates back to 1848, when the *Statuto Albertino* came into force. In the past, Ministers without Portfolio have only been used to allow some coalition parties to enhance their representation within the Council of Ministers, as their vote is equivalent to that of other Ministers.

259. Furthermore, praxis highlights another profile of this subject, included in Law No. 400/1988. The Ministers without Portfolio have no sectorial but horizontal functions, which are potentially linked with the general coordination of the activities of the Government and assigned to the President of the Council. In fact Ministers without Portfolio are increasingly described as 'Ministers of the Presidency', i.e. Ministers who directly assist the Premier and are responsible for a number of tasks falling within the jurisdiction of the Prime Minister. In addition, they are often put at the head of the Departments mentioned above, which are part of the Presidency of the Council – thus reinforcing their link with the Prime Minister. This is the case of the Ministers without Portfolio responsible for Public Offices, Regional Affairs, Relations with Parliament, and Institutional Reform.

260. Law No. 400/1988 widely considers these Ministers without Portfolio as 'Minister of the Presidency', that is assistant of the President of the Council. In fact the Law provides for under Article 9 that they are appointed with the same appointing decree of the other Ministers 'by the Presidency of the Council' on proposal of the President of the Council. They receive a specific appointment by the President of the Council (through this latest's decrees) and can be in charge of Departments and Offices of the Presidency.

The fact that the functions of the Ministers of the Presidency have been increased by law has led to the institutionalization of their role. Nonetheless, Article 9 of Law No. 400, recently amended by Law-Decree No. 181/2006 (transformed in Law No. 233/2006) provides that, 'whenever the law or any other normative instrument assign, even with a proxy, specific functions to a Minister without Portfolio or to specific offices or departments of the Presidency of the Council of Ministers, these functions are intended to be respectively assigned to the President of the Council of Ministers, who can delegate them to a Minister or to a Under Secretary of State, and to the Presidency of the Council of Ministers'.

261. Before examining other additional organs of Government, it is worth pointing out that a Minister responsible for a Ministry or the person responsible for governmental functions, such as a Minister without Portfolio may be replaced *ad interim* by another Minister or by the Prime Minister himself. This often happens in practice and, although it is not explicitly provided for by the Constitution, this procedure is now regulated by Law No. 400/1988 (Article 9(4), see Law No. 400). *Interim* office should not be confused with cases where a Minister heads more than one Ministry or a Member of Government has more than one assignment. Ministers

ad interim are appointed where there is a vacancy due to the resignation of a Minister or for other causes, whenever the outgoing Minister is not to be replaced permanently. *Interim* office is sometimes used when forming the government for those government offices which are not to be entrusted to a specific person or in case the definitive appointment is to be postponed.

Interim offices are established by Decrees of the President of the Republic, on the proposal of the Prime Minister. Pursuant to Law No. 400/1988, the decrees are then published in the Official Gazette.

VI. Under Secretaries of State and Vice Ministers

262. Under Secretaries of State are also part of the accessory organs of government, although they have existed alongside Ministers since 1888. In the past they were chosen from among Members of Parliament, which is not always the case today. Although the 1948 Constitution makes no mention of Under Secretaries of State, the number of Under Secretaries has increased radically since the Constitution came into force sixty years ago. Law No. 400/1988 has finally rationalized their role, while also introducing some relevant changes (Article 10). They are appointed with a Decree of the President of the Republic, on the proposal of the Prime Minister in agreement with the Minister concerned and after consulting the Prime Minister.

263. Under Secretaries of State have essentially two types of assignments. First, they are entitled to attend sittings in Parliament as well as the meetings of the Parliamentary Commissions in their capacity as government representatives. They participate in the debates, in accordance with the guidelines of their respective Ministers and can be asked to answer questions in Parliament. They are mainly responsible for *political and constitutional representation* as confirmed by Law No. 400/1988, and as stated in the Law No. 5195/1888 which established them. Second, they are responsible for carrying out administrative functions, delegated them by the Minister concerned. Functions are delegated *ad personam* which means that they are valid only as long as the Minister or government official and the Under Secretary of State remain in office. The handing over of functions is formalized by a ministerial decree – according to the 1888 provisions – which is then registered by the *Corte dei conti* and published in the Official Gazette.

Under Secretaries of State do not normally attend the meetings of the Council of Ministers since this is not explicitly provided for by the Constitution. Even when their participation is required, they are not entitled to take part in the decision-making phase and are not eligible to vote. As stated above, the only Under Secretary entitled to attend the meetings of the Council of Ministers is the Under Secretary of State to the Presidency of the Council who acts as Secretary of the Council. He is also the first to be appointed, even before the Under Secretary of State to the Council of Ministers and the Under Secretaries to the various Ministries. His appointment is formalized by an ad hoc Decree of the President of the Republic on the proposal of the Prime Minister, and in agreement with the Council of Ministers, and countersigned by the Prime Minister. As to his responsibilities, the

practice of giving the Secretary of State the functions of the Secretary of the Council of Ministers has taken root since the time of the Monarchy, thus contravening Article 3 of Royal Decree 466/1901 providing that this office was to be held by one of the Ministers. Besides legalizing this practice, Article 4 of Law No. 400/1988 also provides that the Secretary of State concerned is responsible for the minutes of the meetings as well as the filing of the deliberations (see also, Articles 11–12 of the Standing Orders of the Council of Ministers). The Prime Minister can also decide to delegate a number of functions to this Secretary of State, for example in the field of national security and State secrecy. Besides the President of the Council can also delegate him the responsibility for Departments and Offices (Article 20 Law No. 400/1988).

Politically, the Under Secretary/Secretary of the Council of Ministers is considered as very reliable by the Prime Minister. In practice, then, he belongs to the same party or political group as the Premier, whereas the other Under Secretaries of State of the Council of Ministers often belong to a different party.

264. The Under Secretaries of State are not hierarchically subordinated either to the Prime Minister, or to their Minister, but simply receive guidelines from the Prime Minister or Minister concerned. They cannot countersign measures of the President of the Republic which, according to Article 89 of the Constitution must be countersigned either by Ministers or the Prime Minister. Under Secretaries are legally liable before the ordinary judicial authorities under criminal and civil law.

From a political and institutional point of view it is worth noting how the number of Under Secretaries of State increased in the past, up to sixty-nine in 1991 during the VII Andreotti Government. However, this number is not significantly diminished in the latest decade (sixty-six Under Secretaries appointed during the II Prodi Government in 2006), mainly due to the duration of the shared system of coalitions. The Law of 1888, which was immediately eluded in practice to a point that, according to the doctrine, constitutional custom tending in the opposite direction became the norm, limited the number of Under Secretaries of State to one per Minister. Law No. 400/1988 has referred the solution of the numerical issue to the law concerning the organization of the various Ministries, in accordance with the provisions of Article 95 of the Constitution. The Article 1.376 of the Financial Act 2008 (Law No. 244/2007) provides that, starting from the subsequent government after the II Prodi Government – that is the first government of the XVI Legislature: 'The total number of the members of the government, included Ministers without Portfolio, Vice Ministers and Under Secretaries, cannot exceed sixty subjects.' Therefore a remarkable reduction of Under Secretaries was necessary too: Twenty-six Under Secretaries at the establishment of Monti Government (Vice Ministers excluded), then reduced to twenty-four.

265. As already mentioned, Law No. 81/2001 and Law-Decree No. 217/2001, then transformed in Law No. 317/2001 maintain the political responsibility and the political policy of the Ministers under Article 95 Constitution, but also provide that: 'no more than ten Under Secretaries can be appointed Vice Ministers' when they are delegated to manage areas or projects that compete to one or more departmental

structures or more general Directions. In this case they are delegated by the competent Minister, through the additional assent of the Council of Ministers and after the proposal of the President of the Council.

As aforesaid the President of the Council, together with the competent Minister, can invite them to take part to the sittings of the Council of Ministers, without possibility to vote, in order to debate about matters related to their delegated competences.

The reasons fixing limits to the increase of Under Secretaries that are appointed Vice Ministers are evident and exquisitely political. In fact there is no connection between the range of functions delegated by a Minister to a Under Secretary of State and the relative appointment of Vice Minister, because the *de qua* regulations does not avoid a Minister to delegate a Under Secretary of State an entire area of competence of one or more departmental structures or of more general Directions, even if there is no appointment of Vice Minister.

Second, the inadequacy of this new disposition regarding Vice Ministers appears evident because there is no organic procedural regulation in case of annulment of the delegating procedure aimed at assigning the title of Vice Minister, but also, generally speaking, in case of annulment of a Vice Minister. Therefore, the juridical configuration of Vice Ministers is *sic et simpliciter* similar to Under Secretaries' one.

In the third place the *nomen iuris* adopted by the Legislator for this kind of Under Secretaries of State is not appropriate too. In fact, the expression 'Vice' reminds functions which are generically vicarious and reflect a generalized institutional substitution and that cannot be dealt with by these subjects. In fact, besides considering what Law No. 81/2001 provides for political powers and relative ministerial responsibility, it is necessary to notice that, in case of absence or obstacles of the Ministers concerned, Vice Ministers cannot be assigned functions and powers that the Constitution directly and exclusively assigns Ministers. In particular it is obvious that Vice Ministers, as the Under Secretaries as well, cannot countersign any act of the President of the Republic under Article 89 Constitution. It is also evident that a possible Vice Minister of Justice, in case of absence or impediment of the person in charge for this Minister, cannot take disciplinary measures against magistrates, because this is a faculty (*rectius*: a power) that Article 107, paragraph 2, of the Constitution directly and exclusively assign the competent Minister for this specific area and the same Minister, and not the Vice Minister, is politically responsible to Parliament.

Moreover, when carefully analysing the involvement of the Council of Ministers, the legislator's attempt to further organize the government's structure in order to better develop, coordinate and realize sectorial and inter-sectorial policies can cause remarkable difficulties in the relations between Ministers and Vice Ministers. In fact, Vice Ministers can also not necessarily be members of the same party of their Ministries and can attempt to rid themselves from their directives underlying the council approval of the delegating system. Even in the recent praxis it has been noticed that the political-administrative relations among Ministers and Vice Ministers in the ministerial structures in which their presence is provided for have basically become competitive. But the relations among the same President of the Council and the Ministers risk to get complicated, because when the Premier intends

to invite a Vice Minister to the sittings of the Council of Ministers he must now find an agreement with the Minister concerned.

VII. Government High Commissioners

266. High Commissioners are not provided for by the Constitution. They are therefore part of the accessory government organs, although they have played a relevant role, especially in the past. The High Commissioner for Hygiene and Public Health, set up in 1945, which became part of Government in 1958, the High Commissioner for Tourism set up in 1947, which became a government Ministry in 1959, are just a few examples. High Commissioners may be compared to *out-of-cabinet* Ministers in the British system. They are not part of the Council of Ministers, although they have the right to attend the meetings any time a matter lying within their province is debated (but are not eligible to vote). They are responsible for specific administrative matters which are not dealt with by any Ministry. In the past, whenever operational flexibility was particularly necessary, the ministerial machinery was streamlined by setting up administrative bodies under the supervision of a High Commissioner which enjoyed a certain degree of autonomy and to which a number of functions were handed over.

If we consider the Italian experience, High Commissioners are completely different from Ministers without Portfolio who, as stated above, belong *ex officio* to the Council of Ministers. Furthermore, unlike Ministers without Portfolio, High Commissioners are not accountable before Parliament, and indeed they do not depend on Parliament's confidence. They cannot countersign Presidential Decrees and are subject to criminal law, since they cannot benefit from Article 96 of the Constitution. High Commissioners are accountable before Government since their appointment is formalized by a Presidential Decree on the proposal of the Prime Minister and in agreement with the Council of Ministers.

High Commissioners are thus subject to general policy of the Government expressed by the orientation and coordination powers of the Prime Minister, and in close cooperation with the Minister concerned.

For example, Law No. 3/2003 established a High Commissioner in order to prevent and fight corruption and other crimes inside public administration. The High Commissioner was directly and functionally supervised by the President of the Council. The Law-Decree No. 35/2005 (transformed in Law No. 80/2005) established in its turn a High Commissioner for the fight against forgery, that is appointed by decree of the President of the Council after proposal of the Minister of Productive Activities (the High Commissioner should operate in this latest Ministry). However, the subsequent Law-Decree No. 112/2008 (transformed in Law No. 133/2008) eliminate these two bodies (Articles 68.6. letters a. and b.) and transferred their respective functions to the competent Ministers, who can delegate them to an Under Secretary.

VIII. Special Government Commissioners

267. Law No. 400/1988 established and regulated the role of Special Government Commissioners which, for some aspects, is similar to that of High Commissioners and possibly more important. They are appointed by a Decree of the President of the Republic, on the proposal of the Prime Minister, subject to a decision of the Council of Ministers. This decree lists the responsibilities of the commissioners as well as the resources available to them. The duration of their office is specified in the appointment decree, unless their mandate is extended or annulled. Parliament is immediately informed of the appointments which are then published in the Official Gazette (Article 11.2 of Law No. 400/1998). Article 11(1) explains the reasons for appointing such commissioners and that, as well as exercising the governmental functions provided for by law, Special Government Commissioners must achieve 'specific objectives in the framework of programs or guidelines adopted either by Parliament or by the Council of Ministers or which are necessary to satisfy the need of temporary operational coordination among public administration departments'. Article 11(3) provides that either the Prime Minister or a delegated Minister shall report to Parliament on the activity of the Special Government Commissioner. The direction and coordination functions of the Prime Minister are once more enhanced by the appointment of such Commissioners and, above all, by the fact that it is the Prime Minister who proposes the appointment – and not the Minister or Ministers concerned.

For example, a Special Commissioner has been recently appointed to develop and promote all the activities necessary for the widening of the American military area in the airport 'Dal Molin' of Vicenza. This Special Commissioner must periodically report to the President of the Council specifying the activities and the initiatives taken, indicating the problems risen and the relative measures to take (see Article 1 Decree of the President of the Republic of 13 July 2007).

IX. Interministerial Committees and Committees of Ministers

268. The Inter-ministerial Committees and the Committees of Ministers ware among the first additional government organs to be established in Italian constitutional history. They are collegiate bodies consisting of a number of Ministers with competences of orientation and coordination and sometimes responsible for special tasks. Some Committees are established by law (e.g., the Inter-ministerial Committee for the European Union affairs – CIACE, established by Article 2 Law No. 11/2005), others are set up by administrative measures, in accordance with the general principle of government self-regulation.

Law No. 400/1988 distinguishes the Inter-ministerial Committees and the Committees of Ministers 'established by law' (Article 6(3)), but does not explain the difference between the two. The doctrine, nonetheless, has tried to make a distinction between them, especially in terms of the composition of the Committee and the validity – internal or external – of its measures. The distinctions that generally prevails is that Committees of Ministers are made up exclusively of Ministers, whereas the Inter-ministerial Committees are also open to senior Government officials and

experts. In practice, there has been a proliferation of these bodies due to the increased workload of the Public Administration and because coordination among Ministries cannot be achieved solely by the 'agreement' principle so that some sort of improved coordination encouraging for stability was needed. As a result, the number of committees has increased to a point that the general policy line of Government adopted by the Prime Minister has been in danger of becoming fragmented.

In an attempt to avoid this, Law No. 400/1988 introduced some coordination rules, while making the Government responsible for the adoption of measures having the force of law and designed to limit and reorganize the number of committees, including those not established by law together with the Inter-ministerial Committees provided for by the regulations in force, with the exception of the Interministerial Committee for Loans and Savings (*Comitato Interministeriale per il Credito e il Risparmio*, CICR). This has led to the abolition of twelve Committees. Today the Committees include: the Inter-ministerial Committee for Economic Planning (*Comitato Interministeriale per la Programmazione economica*, CIPE), and the Committee for Information and Security (*Comitato Interministeriale per le Informazioni e la Sicurezza*, CIPES), whose composition and functions are partly connected with the activity of the Inter-ministerial Committee for the Security of the Republic (CISR), established by Article 5 Law No. 124/2007.

Law No. 400/1988 (Article 5, paragraph 2, letter *h.*) also provides that the Prime Minister can issue a decree establishing special Committees of Ministers whose task is to carry out a preliminary analysis of issues lying within the province of different Ministries and to issue opinions on directives concerning government activity and on relevant matters to be submitted to the Council of Ministers. An example is given by the Committee for the celebration of the one hundred and fiftieth anniversary of the Italian Unity, established with a Decree of the President of the Council of Ministers on 24 April 2007.

There is a clear attempt by the legislator to 'reclaim' the powers of the Prime Minister and the Council of Ministers. In practice, committees have indeed mainly benefited those Ministers invited to take part in them and who consequently find themselves in a position of power and influence, also thanks to the fact that the Prime Minister is not a member of any such committee.

X. The Cabinet Council

269. The Cabinet Council is the last of the accessory government bodies – also chronologically, since only recently reinstated in the Italian legal system. Indeed, it was in 1983 that this collegiate body reappeared, after a brief appearance during the 'period of transition' before the Constitution came into force. Law No. 400/1988 has regulated and formalized this practice, and Article 6(1) stipulates that: 'The President of the Council of Ministers, in the exercise of his duties in accordance with the provisions of Article 95(1) of the Constitution, can be assisted by a Committee to be named "the Cabinet Council", consisting of the Ministers of his choice, in agreement with the Council of Ministers.'

In the past, the Cabinet Council included, besides the Prime Minister and the Vice President of the Council of Ministers, seven to eight other Ministers. The composition of the Council of Ministers used to be essentially governed by political criteria in an attempt to ensure the participation of the most prominent members of the coalition parties – the so-called heads of the delegation – on a proportional basis, i.e., as to reflect the various proportions of the parliamentary groups regardless of the actual importance and of the competence of the single Ministries. Ministers could however be invited to attend the meetings of the Cabinet Council, according to their specific competence. This practice has been regulated by Article 6(2) of Law No. 400/1988. The highly political nature of this organ was evident from the start, when the Cabinet Council was established under the first Craxi government and has indeed been confirmed by the practice following the introduction of Law No. 400/1988. According to law, however, the Cabinet Council, if indeed established (interestingly enough this has not been the case with recent Governments), must limit its work to the competence of the Prime Minister and not of the Council of Ministers, thus preserving, albeit formally, the competence of the Council of Ministers. In practice, the political composition of the Cabinet Council can indeed relieve the Council of Ministers of its responsibility to provide for general government policy. The present absence of a Cabinet Council probably helps reduce the political weight of parties and enhances both the autonomy of the Prime Minister and his relations with the Council of Ministers.

§3. Government Formation

270. The procedure for Government formation includes a long series of informal actions and formal measures leading to the appointment of the Prime Minister and Ministers before the President of the Republic and ending with the swearing-in procedure (Articles 92–93 of the Constitution). This procedure is only partly regulated by written provisions. The Constitution only provides that the Head of State appoints the Prime Minister and the Ministers (Article 92(2)) and that they be sworn in before him (Article 93). All the preliminary phases are regulated by relatively constant practice, *conventions* and *constitutional custom* (see Part I, Chapter 4 §10)

271. The first phase concerns the notification to the President of the Republic of the resignation of the Government in office. Following this notification the President of the Republic:

– may simply accept the resignation of Government as occurred for the first time in 1998 following a vote of no-confidence on a question put by the I Prodi Government to the vote of the Chamber of Deputies, and as also occurred in 2008, after the unfavourable vote of confidence of the Senate presented by the II Prodi Government. These were unconditional and due acceptances, since it is established that a Government must resign after a vote of no-confidence (Article 94 Constitution; see Part II, Chapter 6). Nonetheless, the acceptance of resignation must be accompanied by the request of the President of the Republic to the resigning Government to remain in office ‘to deal with current matters’;

– may decide to defer his decision, while requesting that Government remains in office to deal with current affairs, in case the Government resigns 'spontaneously', i.e., not on receiving a vote of no-confidence;
– may decide to reject the resignation of a Government on the grounds that it was not due to political reasons, but merely to the respect of '*constitutional rules of fairness*' towards the President. For example, when the Government in office notifies its resignation to the neo-elected President of the Republic. At this point, the President can request Government to provide a political justification for its resignation in a parliamentary debate during which the actions taken by Government and the reasons making it impossible for Government to remain in office are discussed (see, in particular, the I and the II Prodi Government).

If the President accepts the resignation of the Government, the ensuing decree is not signed until a new one is formed, otherwise the nation would be left with no government.

272. In times of government crisis, government activity is limited to ordinary business. However, there is only one written provision limiting the powers of Government in such a situation, namely Article 14, latest paragraph, of Royal Decree No. 2441/1923 which is still in force and which provides that the outgoing government is not entitled to make use of its power of registration of measures which the *Corte dei conti* has declared illegal. The registration practice was established in an attempt to submit government measures declared illegal by the *Corte dei conti* to Parliament for political examination, which is possible thanks to the confidence-based relations between Government and Parliament.

In order to limit the powers of the resigning government, the Presidency of the Council issues ad hoc circulars at the outset of the crisis. In the past, after resigning, some governments preferred to avoid appointing, promoting and transferring officials, or adopting draft legislation, whilst others did the reverse.

During the ordinary administration the government is only allowed to carry out strictly necessary activities, that is those ones reflecting the main and permanent interests of our legal system, aimed at protecting the constant functioning of public institutions and at guaranteeing public permanent and irrepressible interests. An outgoing government without the Chambers' confidence, such as the I and the II Prodi Government, cannot carry out activities aimed at respecting the political targets of its programme, on which the parliamentary majority was established, because the same majority has disappeared after the parliamentary vote.

Furthermore, it is essential to underline that during the II Prodi Government acts of relevant international importance (such as for the recognition of Kosovo) were issued, imposing duties, obligations or efforts to the other institutions, bodies and private subjects which were justified by reasons of emergency (such as for the case of the waste in Campania). However, the government preferred to consult the entire party system before deciding, also in order to enforce social cohesion and political consent, that are generally essential to optimize all the objectives of public interest.

However, the supervision of the President of the Republic in accordance with his high powers of control and guarantee is still relevant when concerns the acts of a resigning government (such as bills and acts having binding force). The President

of the Republic must ensure that the acts of the actual government are constitutionally correct and conform to the juridical needs of the activities that the government intend to adopt.

273. In the praxis, after the presentation of the resignation, the President of the Republic can ask consultations in order to take the most appropriate decisions and to choose the subject who will form the new government.

Some experts consider these consultations compulsory in accordance with a *constitutional custom*. In fact the subjects consulted are political personalities: members of parties represented in Parliament (political Secretaries and Presidents too) and the Presidents of the respective parliamentary groups, on whom the government's confidence depends. Besides the previous Presidents of the Republic and the high offices of State, in particular the Chambers' Presidents, are consulted. Sometimes the representatives of social and economic organizations are consulted too.

The consultation praxis has always been used since the entry into force of the Constitution, keeping the same praxis adopted with the *Statuto Albertino* before the fascism advent. However, the procedures and the number of the subjects consulted have changed. Consultations obviously reflect the personality of the President of the Republic, as well as specific needs from time-to-time underlined. However, it is given relevance to those subjects boasting the major political and parliamentary role, also asking for longer consultations and informal telephone contacts.

In the most recent praxis (since 1996) voters are previously indicated by each political party the name of the candidate chosen to lead the government. This praxis and the clearness of the voting results have helped in reducing remarkably the consultations of the President of the Republic, which have now a more formal aspect.

274. Sometimes the President of the Republic, before forming the new government and after his own consultations, assigns an 'exploratory mandate' or 'exploratory mission'. As subsequently explained, this is not a real assignment or a 'pre-assignment', because the subject chosen for this mandate is not required to form the government and is not the candidate to perform this task, but has only the task to analyse through other consultations and meetings with the representatives of the parties represented in Parliament the possibilities to solve the crisis.

Usually this kind of mandate is invariably assigned to the President of a branch of the Parliament, because he has an institutional *super partes* position that makes his position similar to the one of the President of the Republic.

275. The President of the Republic, when there are uncertainties on the possibility to reach a positive result through the subject to assign, gives before the mandate a '*pre-mandate*', in order to verify if there are the conditions for a possible mandate (after contacting the representatives of the political parties) to confer the same subject who is asked to perform the '*pre-mandate*'.

276. By granting the assignment to the '*President responsible*' – verbally, as has been the case since 1958 – the President of the Republic entrusts a person whom he believes will command the confidence of both parliamentary chambers to form a Government. The 'President responsible' conducts consultation or talks in order to

form the Cabinet, at present mostly on the grounds of the coalition agreements settled before the vote, although it is still possible to extend the agreement to other parties wishing to join the majority. The President of the Republic must bear in mind the ultimate objective of forming a government likely to be granted a vote of confidence in both Chambers of Parliament, in accordance with constitutional provisions. For this reason, the assignment is usually given to a prominent figure of the political line-up most likely to command a majority in Parliament. However, the assignment may also go to representatives who are not part of the relative majority party or of the main parliamentary parties. Indeed, three times since 1948 the person responsible for forming the Government has been neither a political representative nor a Member of Parliament – namely presidents Ciampi, Dini, Monti – but this was exceptionally due to a period of crisis in the Italian changing political system.

Since 1996, the assignment of the mandate has been influenced by the electoral legislation and therefore it appears to be easier thanks to the previous indication given to voters by each political party (the 'coalitions') regarding its own government candidate. However, it is still necessary to form a coalition government and the political parties that intend to take part to government to agree concretely not only about the programme but also about the appointment of the Ministers.

Besides, it can happen – as it happened in 2011, after the resignation of the IV Berlusconi Government – that in case of a government crisis during a legislature it is necessary to verify the intentions of the parties about the former coalition agreement. In comparison with the past this coalition reflects the pre-electoral agreements among the parties and the indications offered voters; but this coalition could also involve other political parties, which are available to take part to the government majority after the elections. The same electoral Law 2005 does not exclude this hypothesis, although it highlights the figure of the 'head of the coalition' to voters.

It is therefore relevant that during the establishment of the IV Berlusconi Government (2008) the President of the Republic had previous and informal contacts with the leader of the new majority, not President of the Council in charge yet. The exchange of opinions concerned the procedures and the criteria adopted to form the Government under Article 92 Constitution, which requires a collaboration with these subjects based on a strict respect of their own prerogatives. This innovation allowed the President of the Republic to know in advance the trends of the President of the Council in charge about the establishment of the government and to explain the same President of the Council his view about the most important matters that the establishing procedure underlined in the latest years in order to align praxis to the constitutional regulations.

In fact, it is evident that since 1996 the identifying of the President of the Council is easy thanks to the presentation to voters of opposite coalitions with their own leader (with the above-mentioned consequences regarding the consultations of the President of the Republic). However, it is also clear that no President of the Council (practically automatically appointed) could rid himself of the political parties of his coalition even if he was the coalition's leader acclaimed by people when appointing Ministers and defining the government programme. This programme generates a

political debate as well as a substantial and preventive approval of voters. As abovementioned, the increasing number of members of the Government and the flexible number of Ministers (abusing of provisional decreeing) are the most manifest demonstration that the Constitution has been often eluded in praxis in order not to meet the needs of a good administration, but the requirements of the current government majorities.

In other words, the role of the President of the Republic continues being essential during the complex stages of the formation of the government. This role is important both considering the electoral legislation and the presidential prerogatives aimed at ensuring the respect of the Constitution and the fairness of the current parliamentary structure's activity while forming the Government. The electoral legislation did not transform this form of parliamentary Government in a semi-presidential system or in a '*Premierato*' (premiership). The same Constitutional Court underlined that the electoral Law of 2005 has an ordinary *status*, and not a constitutional one, and it highlighted that this Law cannot modify the constitutional *status* of the President of the Council (see Constitutional Court, sentence No. 262/2009 and No. 23/2011).

In particular, Article 94(1) of the Constitution stipulates that Government must enjoy the confidence of the two Chambers, thus making it virtually impossible to form minority governments. A majority can, however, be obtained by the abstention of one of the parliamentary groups, since absolute majority in both Chambers is not essential. In fact, the confidence does not require the absolute majority of the Chambers, that is the positive vote of more than a half of their members.

The subject designated promotes in his turn consultations and meetings in order to verify the concrete possibility to form a new government. In pursuant of the new electoral laws for Chamber and Senate, that propitiated the tendential polarization of our political system, if the subject designated is also the leader of one of the two major opposing coalitions of the electoral campaign the time for consultations and meetings is widely reduced because the electoral results make easily determine which are the political forces that intend to support the new government.

However, as already mentioned, the real difficulties for the subject designated are the definition, or the simple finishing off, of the previous 'programmatic agreements' with the political partners and the drafting of the list of the Ministers of the President of the Republic.

Afterwards the subject designated cancels every former reservation (recently the same subject tends to avoid reservations considering the clearness of the electoral results), definitely accepts the assignment and presents the list of the Ministers to the President of the Republic.

During the formation of his IV government, On. Berlusconi, who was the leader of the political majority emerged during the elections of 2008, innovated the abovementioned praxis. Thanks to the electoral results obtained and to the indication of the leader provided for by the current electoral regulations, he promoted consultations and meetings before the assignment of the mandate. These meetings aimed at defining precisely the programmatic profiles and the composition of the new government. Thus, when the President of the Republic assigned him the mandate, he accepted without reservations and contextually presented the list of the Ministers.

In other words, thanks to the above-mentioned innovations in praxis, the most recent experience seems to underline a major autonomy of the Premier in choosing the Ministers.

277. At this stage of the process of formation, the President of the Republic, if he has not accepted the resigning of the Government yet, for the above-mentioned reasons and under a consolidated praxis, cancels all the reservations that arose during the government's resigning and issues a decree of acceptance of the resignation. This decree is adopted without any proposal and, such as the decree of acceptance of the resignations of the Under Secretaries of State, is currently countersigned by the new President of the Council, in accordance with a quite recent innovation (1993) in praxis that despite some doubts was included in the Law No. 400/1988 concerning the Government regulation (Article 1.2.).

In accordance with Article 92(2) of the Constitution, the President of the Republic appoints the new Prime Minister and Ministers by issuing two successive decrees. The decree appointing the President of the Council is countersigned by the incoming President of the Council himself, although it is common practice that the Premier has not yet taken office at the time of countersigning the decree. The countersignature of the incoming Premier – and not that of the outgoing Premier as was the case under the Monarchy, before the advent of Fascism – at the foot of decrees of acceptance of the resignation of the President of the Council and those by which the same President of the Council is appointed can be explained with the need to avoid the possibility that the endorsement be denied, which would lead to dangerous confrontations or obstacles to the existence of the Government.

The President of the Republic appoints the Ministers by a separate decree, on the proposal of the Prime Minister (Article 92 of the Constitution) who also designates the other government bodies. As widely underlined, in practice, however, because of the need to form coalition Governments, to ensure a balance of power among the various groups, also within the same party and above all to ensure a governmental parliamentary majority, political leaders have often played a significant role in the designation of Ministers. Only recently has this trend been partially reversed with the Premier claiming and partly making use of greater autonomy in his choice of Ministers. On the contrary, the President of the Republic has always had a certain influence on the choice of Ministers. He signs the decree of ministers' appointment, which means that the Head of State can affect the procedure either by means of an 'informal veto' on appointments, or by expressing his favour for the appointments; this is often the case when a government which is not a direct and clear expression of Parliament's political groups is formed.

278. In accordance with Article 93 of the Constitution, before assuming office the Prime Minister and the Ministers must be sworn in before the President of the Republic and take the following oath: 'I swear to be faithful to the Republic, to abide loyally by its Constitution and its laws and to exercise my duties in the exclusive interest of the Nation.' This wording has recently been included in Article 1(3) of Law No. 400/1988, and is substantially the same as the one normally used in republican systems, since no mention of it is made in the Constitution. The

swearing-in procedure is a *sine qua non* for the legitimate exercise of governmental functions.

279. The wide range of powers attributed to Government which has not yet been granted parliamentary confidence is another matter of discussion and this situation can be compared to the resigning government's one. Indeed, also in this case Government must limit itself to carry out 'current affairs', although the possibility of intervention in case of emergency as well as the accomplishment of previously agreed commitments concerning the presentation of government draft laws are not excluded. As concerns government draft laws, the number of limits that the Government waiting for parliamentary confidence meets is lower than the number of limits of the resigning Government, because it is supposed that the Government will surely be granted the confidence of the Parliament.

280. When the Government is formed and during its activity the substitution of one or more of its Ministers could be necessary. In praxis this substitution is called *reshuffle*, that is when one or more Ministers are absent or resign for different reasons which are sometimes political ones. In particular, resignations can be caused by changes regarding the coalition of government (e.g., as happened during the IV Berlusconi government after the resignations of the members of *Futuro e Libertà per l'Italia* – FLI), but also by death, personal or health reasons or jobs that are not compatible with the government activity.

In case of reshuffles caused by political reasons, the praxis comprehends parliamentary debates and after that government confidence is voted through a business on the agenda or a motion or a resolution.

§4. The Status and Responsibility of Government Members

281. The *status* of government members is not explicitly regulated by the Constitution which only covers the issue of criminal liability for offences committed in the exercise of governmental duties. If members of the executive are Members of Parliament, then they will be granted the same treatment as Members of Parliament (see Part II, Chapter 3 §7). There is no legal provision preventing Members of Government from being Members of Parliament. On the contrary, since the Constitution introduced a traditional parliamentary system during the first decades of the Republic, government members were almost exclusively chosen from among Members of Parliament. Since the 1990s, however, Ministers and more recently Under Secretaries of State, are frequently chosen from outside Parliament. This growing trend resulted in the appointment of three Premiers (in 1993, 1996 and 2011) who were not Members of Parliament (Ciampi, Dini and Monti), called upon to lead a Government on grounds of their technical expertise. In the framework of a government reorganization, several proposals have been made to modify the Constitution so as to declare the incompatibility of government offices with a parliamentary mandate.

Nonetheless, a debate has been going on for some years on the need to regulate this matter in an attempt to avoid a '*clash of interests'*. A recent legislative regulation (Law No. 215/2004) determines some cases of incompatibility between government offices and parliamentary mandate.

282. According to the *principles of the parliamentary system*, Government is politically accountable before both Chambers which grant or refuse a vote of confidence, in accordance with the provisions of Article 94 of the Constitution (see Part II, Chapter 6).

Article 95.1 of the Constitution specifies that the President of the Council of Ministers is politically liable for the general political leadership of the government. Article 95.2 Constitution speaks about *political liability* (before Parliament) and *juridical liability* (i.e., civil, criminal and administrative liability) of the Ministers. The Ministers are not only appointed Heads of their Ministries, because they fully take part in the activities of the Council of Ministers. Therefore, their liability is both individual (as concerns the acts of their Ministries) and collegial (as regards the deliberations of the Council of Ministers). In particular, the political liability of the single Ministers can be asserted through an individual motion of confidence, which is not expressly provided for by the Constitution. The individual motion of confidence is, although in different ways, accepted by both Chambers, that regulate it in accordance with the procedural rules of Article 94, latest paragraph, Constitution. The Minister who is subject to a motion of confidence is obliged to resign, as confirmed by the same Constitutional Court (see sentence No. 7/1996).

Furthermore the Ministers, when countersigning the acts issued by the President of the Republic in accordance with their relative competences and under Article 89 Constitution assume both a *political and juridical liability*. Also the President of the Council, who is liable for the general policy of the government and under Article 89 Constitution, countersigns the acts issued by decree of the President of the Republic, that is the acts for the promulgation of the laws, the acts having binding force, the regulations of the Government and the acts issued by the Council of Ministers (see Article 5.1. Law No. 400/1988).

283. The countersignature is typical of parliamentary systems and represents an essential element of presidential acts, whose validity depends just on them. However, the countersignature is not necessary for the swearing-in procedure of the President of the Republic, because this latest subject takes non-transferable liabilities through the countersignature (Article 90 Constitution), as well as through acts with which he expresses his opposition to the government and through activities that are typical of the home administration of the President of the Republic. Moreover, the various ways through which the President of the Republic expresses his opinion about current political and institutional matters do not require any countersignature (see Part II, Chapter 2 §11).

284. Article 96 of the Constitution regulates the criminal liability of government members but was amended by Parliament with Constitutional Law No. 1/1989.

Article 96 reads as follows:

> The President of Council of Ministers and Ministers, even if no longer in office, may be prosecuted for the offences committed in the exercise of their duties, upon authorization by the Senate or the Chamber of Deputies in accordance with the provisions set out in a constitutional law.

The parliamentary procedure for impeaching Government as well as the special jurisdiction to which it was subject have been eliminated. In the past Parliament could indeed decide in joint session to impeach the Prime Minister and Ministers. Furthermore, they were summoned before the Constitutional Court which adjudicated with an enlarged composition.

In accordance with the provisions of Law No. 219/1989, however, a specially set up board of ordinary magistrates must make preliminary enquiries. The authorization required in accordance with Article 96 differs from that needed in the past for Deputies and Senators, in that, while the latter was limited to the duration of the parliamentary mandate, the former can now be extended beyond the expiry of governmental office.

Constitutional Law provides that Ministers who are also Members of Parliament may only be prosecuted upon authorization by the Chamber to which they belong, while in the case of Ministers who are not Members of Parliament or in case of legal proceedings against Ministers belonging to different Chambers, the authorization must be issued by the Senate. Parliament can stop criminal proceedings only when it shows by an absolute majority of its members that the defendant has tried to protect a constitutionally relevant interest of the State; in other words, that he tried to pursue a prominent public interest in the exercise of his duties. In accordance with the Standing Orders of the Chambers, before the concerned Chamber decides, a preliminary examination of the request must be carried out by the Committee of Privileges. If the committees decide to issue the authorization, and if there are no votes against (a minimum of twenty Deputies or twenty Senators), the conclusions expressed by the committee are adopted, and a vote of Parliament (either Chamber) is not necessary.

285. With the exception of the provisions of Articles 90 and 96 Constitution and after the Law No. 140/2003 (usually called '*Lodo Schifani*') provisions for the suspension of any criminal proceeding against the President of the Council and the highest offices of State, excluded Ministers and members of the Parliament have been introduced; these dispositions cover any kind of violation, even crimes committed before the acceptance of an office and till its suspension. However, the sentence No. 24/2004 of the Constitutional Court considered these provisions of the law illegitimate, in particular because they clash with Articles 3 and 24 of the Constitution.

At the beginning of the XVI Legislature the Government presented the Parliament a new bill having the same object and called '*Lodo Alfano*'. This bill became Law in no less than a month (Law No. 124/2008). However, the sentence No. 262/2009 of the Constitutional Court declared its constitutional illegitimacy because it was in contrast with Articles 3 and 138 of the Constitution. The Law, which included '*Provisions concerning the suspension of any criminal proceeding against*

the high offices of the State' and provided for the suspension of any criminal proceeding against the President of the Council, of the President of the Republic and of the Chambers' Presidents from their date of appointment to the conclusion of their offices or functions, introduced by ordinary law and not by constitutional law a new and exceptional form of immunity (or privilege) in favour of the four abovementioned offices.

Therefore, the Court stated that new forms of immunity are abstractly possible in order to protect all the interests that reasonably require safeguard – such as the continuity and the normal procedure adopted by the highest offices of State and their quiet activities. However, they can be introduced only with an appropriate normative source.

After the above quoted Court's decision it was issued a new constitutional bill on 12 May 2010 (A. S. No. 2180), which proposed again 'Provisions concerning the suspension of criminal proceedings against the high offices of State' and that is now before Parliament.

While waiting for the passage of this bill, Law No. 51/2010 concerning 'Provisions to prevent appearance in a hearing' (so-called *Legittimo impedimento*, Lawful impediment) introduced a presumption of lawful impediment to appear as defendant in the hearings of criminal proceedings under Article 420*ter* penal code in favour of the President of the Council and of the Ministers.

In particular the lawful impediment is allowed the President of the Council during the concomitant exercise of one or more offices provided for by-laws or regulations (in particular Articles 5, 6 and 12 of Law No. 400/1988; Articles 2, 3 and 4 of the Legislative Decree No. 303/1999 and the internal Regulation of the Council of Ministers established with a Decree of the President of the Council of Ministers on 10 November 1993), of the relative preliminary and consequent acts as well as of every activity which is essential for government functions. For the Ministers the lawful impediment regards the exercise of the activities provided for by the law and by dispositions that regulate their offices as well as every activity which is indispensable for the government functions.

As it happened for the Law No. 124/2008 it was immediately proposed a specific request for the abrogation of Law No. 51/2010 through a popular referendum under Article 75 of the Constitution; this abrogation was obtained after the referendum of June 2011.

In the meantime the sentence of the Constitutional Court No. 23/2011 already declared the constitutional illegitimacy of Article 1.3 of the same Law, 'in the part in which it does not provide for that the judge can concretely value the impediment adduced under Article 420*ter*, paragraph 1, penal code' and of Article 1.4, because 'it produces the same effects of a temporary suspension of a proceeding connected with the title of the office, that is with a prerogative established in favour of the titular subject'.

286. The *civil and administrative* (*as well as accounting too*) *liability* of the Prime Minister and Ministers is regulated by the common provisions of Article 28 of the Constitution. Since they are compared to officials and employees of the State, they are considered responsible for acts committed in violation of rights. In such cases, civil liability is extended to the State and to public bodies.

§5. Government Competences

287. The analysis of the essential and additional government bodies shows that the Italian Government now plays a greater role as compared to the past, when it was limited to 'executive functions', because its activity aims at performing concretely as per the guidelines promoted by the Parliament in its legislative function. The expression *executive function* is nowadays inadequate because of the several tasks the Italian government has to deal with after the process of government enforcement during the twentieth century. The highest organ of the Executive Power is collocated in the middle of a *form of parliamentary government* which favours the collaboration among powers that are generally, but not exclusively, related to the traditional functions of a State (legislative, executive and jurisdictional powers) and that does not highlight a strict separation among the same powers, as occurred within other forms of government. In fact, while analysing our system, it was specified that the Government represents at the same time the 'executive committee' and the 'directive committee' of the parliamentary majority.

Here is a summary of the most relevant activities for which Government is responsible, which are introduced and analysed in detail in other chapters of this Digest:

– *general and sectorial policies*: Government presents draft laws to Parliament (see Part II, Chapter 4 §1), among which the most important are: the draft law for the adoption of the State Budget (i.e., the estimated, the final and the multi-year budget) of the Finance Act and related acts (see Part II, Chapter 11), as well as draft laws authorizing the ratification of international treaties (see Part V, Chapter 3), whereas defence policy (also at domestic level) depends largely on Italy's participation in international organizations and on the preventive or subsequent intervention of Parliament (see Part V, Chapter 4);
– *law-making activities*: Government issues law-decrees, legislative decrees and regulations (see Part I, Chapter 4);
– *administrative orientation and coordination activity* (the historic *legis executio*), including administration at the central and local levels and the adoption of measures with regard to the orientation and coordination of the administrative activity of the Regions (under the new Title V, Part II of the Constitution and the Law No. 131/2003; see Part III, Chapter 1), as well as the coordination of powers which were handed over to regional governments and the possible replacement of regional governments themselves in case of inactivity and non-fulfilment (in accordance with Article 120 Constitution).

§6. Government and Political Parties

288. The functioning of this sort of pivotal structure which is central to many parliamentary systems, is strongly affected by the daily life of the country's political system.

In the republican experience, due to the fact that for many years Members of Parliament were elected according to a proportional system (see Part II, Chapter 3) governments were built on more or less broad majorities comprising different parties.

At the beginning, centre-oriented coalitions prevailed including the Christian Democrats as a simple majority party as well as the Social Democrats and the Liberal Party. From 1963 onwards, centre-left coalitions were formed consisting of the Christian Democrats, the Socialist Party, the Social Democrats and the Republican Party. For a short span (1976–1979) a 'national unity' coalition was formed including centre-left parties and the Communist Party, followed by centre-left coalitions extending to the Liberals. Majority parties were often part of Government – with the exception of the Communist Party because of its so-called *conventio ad excludendum* – and sometimes only provided support in Parliament to governments consisting of other parties or even the Christian Democrats alone. For years the Prime Minister has been a representative of the simple majority party, the Christian Democrats, whereas in the 1980s, senior representatives of the Republican and Socialist parties were also appointed to this office.

As already stated, coalition governments tend to lead to a fragmentation within Government, whereby single Ministers, appointed by the respective parties and enjoying a high degree of autonomy, sometimes disagreed so that the Prime Minister had difficulties in carrying out his duty to maintain unity. This has consequently enhanced the autonomy of administrative sectors belonging to the different Ministries.

289. The crisis of the Italian political system, which emerged in 1992 with the dismantling and the reorganization of traditional parties, is still present. In 1993 the electoral system was reformed, assigning three-quarters of the seats to single member constituency and developing a pure majority system. Following this reform a centre-left and a centre-right electoral coalition were formed, allowing for a decade the testing of a political system which was basically bipolar and based on the lack of unity inside the coalitions. This lack was in particular caused by the presence in the electoral system both of a majority and proportional principle, that enlarged the need of 'visibility' of the minor parties by their relative voters.

After the electoral reform in 2005, which adopted a proportional system with a plurality premium and the abolition of the single member constituency, the political situation has further changed and from some points of view has become complicated. During the election in 2006 the new Law, which was hardly criticized for the above-mentioned reasons, did not allow the formation of a parliamentary majority of the Senate and in 2008 the Government was forced to resign because of the non-assent of a confidence matter. The crisis which followed determined the breakup of the two previous political coalitions and the early dissolution of Parliament and caused an electoral competition between the two biggest political parties in the meantime (*Partito Democratico* and *Popolo della Libertà*). These two parties were surrounded by several minor political groups and electoral lists: some groups are united with the two new parties, while others are not united yet. In 2008, the elections resolved the problem of the breaking up of the political system. The electoral result was determined by various factors, among which it is to highlight the political intent of the two principal leaders to present their relative new compositions in their electoral competition almost completely alone; the choice of the citizens to concentrate their votes only to the two new subjects (*rectius*: to the main coalitions)

and the *soglie di sbarramento* (blockage threshold) that blocked the majority of the minor political groups to get seats in Parliament.

However, the results of the elections in 2008 overcame only temporarily this political instability and the long period of transition which started in 1992. The creation of two new big political parties (*Popolo della Libertà* and *Partito Democratico*), which were in competition during the elections, was not sufficient to eliminate the several contradictions of our political system. In fact our system lacks cohesion inside the two 'poles' and has parties which are scarcely structured in a society which has more and more difficulties in representing the general interests. The dissents inside the coalition of centre-right were not eliminated and emerged clearly in 2010 with the resignations of some members of the Government and with the formation of a new political group (*Futuro e Libertà per l'Italia* – FLI), deriving from the separation of a relevant number of members of the party *Popolo della Libertà*. The confusion generated afterwards caused a relevant reduction of the members of the Parliament in favour of the Government and their consequent return in the majority coalition (in particular in the Group of Responsible Initiative). This is the typical example of an almost endemic transformism. In fact, the formation of blocked lists of candidates has transformed Parliament in a gathering of appointed subjects at the mercy of the leading groups and in particular of their relative leaders who can easily attract them and get their favour through various promises (some of them even caused the opening of judicial inquiries). As a consequence the leading groups and their leaders get the total control of their actions, because they fear not to be proposed again as candidates or to be listed with an uncertain position.

The governability of the country has suffered damages because of the complications of the political system. Besides governability suffers the worsening of the national and world economic and financial crisis.

This complex reality, the progressive crumbling of the parliamentary majority and the contemporaneous attack of the international financial markets against Italy caused the resignation of Berlusconi IV Government in November 2011.

The subsequent Government, led by Professor Mario Monti and defined by the same Prime Minister 'A Government of national efforts', is exclusively made up of no members of the Parliament, that is of experts, officials and scientific authorities – the so-called technicians – who are not directly linked with any political party.

Monti Government obtained under Article 94 Constitution a very large confidence by the Chambers; in particular, its parliamentary majority (the highest in the history of the Italian Republic) has been defined by both the political subjects (*Popolo della Libertà* and *Partito Democratico*) which faced each other during the elections in 2008, while *Lega Nord* and *Italia dei Valori* (IdV) represent the opposition parties.

The institutional and constitutional reforms were eagerly awaited in order to have more unity and stability in government activities. These reforms are submitted again to Parliament by some of the parties that support the Government in the difficult situation summarily described. As a matter of fact there is a kind of divaricating process of the political line.

On one hand there is the line of the Government, aimed at saving Italy from the economic failure and at facing the financial speculation that attacks us in the international markets; on the other hand there is the line of the parties which represent

the composite majority of the Parliament, aimed at gaining again credibility through some institutional and constitutional reforms and in a fit of ostentatious display of efficiency. Apart from the real goodness of the solutions proposed, these reforms intend to improve the role of the Executive in our form of Government.

However, it is necessary to notice that in the latest years numerous political and institutional events, as well as a parliamentary praxis in doubtful legitimacy, have already enforced the Government in respect of the Parliament. Therefore, doubts emerged on the compatibility of the imbalance of the two relative powers with the form of parliamentary government established by the Constituent Assembly. And some experts fear this imbalance to become more and more evident.

The maximum attention is fundamental; the reforms in progress are also aimed at enforcing the role of the President of the Council but without a real debate with the civil society and without a concrete discussion in Parliament. These latest reforms risk being rash and unbalanced: they are the perverse and dangerous fruit of the hurry that some political parties have in trying to be efficient, to gain more favour in the voters in view of the political elections in 2013.

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Chapter 6. Government in Parliament: The Relationship of Confidence

by Antonio D'Andrea

§1. The Presentation of the Government to the Chambers

290. Once the President of the Republic has signed the decrees nominating the Head of Government and the government members, the latter are sworn in individually before the Head of State. The form of the oath is provided for by Article 1, third paragraph, of Law No. 400 of 1988.

From that moment on, the new Government takes office and replaces the previous one. Its powers, however, cannot be fully exercised until it is granted the confidence by both Chambers. Pursuant to Article 94, third paragraph, of the Constitution the Government must present 'within ten days of its formation' its programme to Parliament to obtain its vote of confidence (the so-called *voto d'investitura*). Article 94 provides that each Chamber grants its confidence to the Executive by a motion voted on by the simple majority of its members, in which it gives its reasons and which is put to a nominal vote.

If one of the Chambers does not grant its confidence to the Government, the Executive must immediately resign. In practice, this has sometimes happened in the past with the so-called minority governments, namely newly appointed governments which could not rely on a pre-constituted parliamentary majority.

291. In compliance with the principle of equality of the two branches of Parliament, the newly appointed Government usually presents its programme before a Chamber different from the one chosen by the previous government.

Pursuant to Article 2, third paragraph, of Law No. 400 of 1988, the Head of Government, speaking for all the ministers, presents its programme (previously approved by the Council of Ministers) before the first Chamber.

This declaration is not repeated in the second Chamber, the text being rather distributed among the members.

After the debate and the President's reply, each Chamber votes its confidence by a motion usually submitted by the presidents of majority groups. In compliance with the Constitution, the Chambers' reasons are given in the motion by simply quoting the Prime Minister's declarations.

If there is more than one confidence motion, the Head of Government decides which motion should be put to the confidence vote.

The vote is nominal, i.e. each MP grants or refuses his or her confidence to the Government by saying 'yes' or 'no' before the bench of the President, thus assuming public responsibility before the group they belong to and the electorate.

§2. A Contrary Vote on Government's Proposal

292. Article 94, fourth paragraph, of the Constitution provides that 'the contrary vote of one or of both Chambers on a Government's proposal does not necessitate resignation'.

The Constitution distinguishes the contrary vote expressed by the Chambers towards specific measures proposed by the Government, which is unlikely to affect the relationship of confidence, from the case provided for by Article 94, fifth paragraph, of an explicit vote of no-confidence, which must be expressed by means of an ad hoc motion passed by the Chambers (see below, §3). The fact that the Constitution does not force the Government to resign in case of the contrary vote by the Chambers on Government's proposals does not totally exclude this possibility. Presidents of the Council, indeed, have more than once inferred from a series of parliamentary contrary votes that they would not be able to carry out their political programme, owing to the lack of support from their majority. They have consequently resigned, even in the absence of an explicit vote of no-confidence, thus giving rise to 'extraparliamentary' crises, which were actually caused by some political groups within the Chambers.

§3. A Motion of No-confidence

293. Each Chamber can withdraw its confidence to the Government in office at any time by a motion in which it gives its reasons and which is put to a nominal vote of the majority of its members. Pursuant to Article 94, fifth paragraph, this motion must be signed by at least one-tenth of the Chamber's members (who must sign the same motion, since only one motion is allowed). The Constitution also provides that the vote of no-confidence be debated only three days after it has been proposed, so as to avoid 'surprise attacks' by the opposition, which could be tempted to take advantage of the momentary absence of majority MPs from the Chamber.

The passing of a no-confidence motion, unlike the simple contrary vote, forces the Government to resign.

In practice, however, no Government has ever resigned owing to an explicit vote of no-confidence. The various Government crises, with the exception of those of the Prodi Government, the first of which occurred during the thirteenth Parliament and the second during the fifteenth Parliament (see below paragraph 4), have always been, at least formally, 'extraparliamentary', i.e. caused by the spontaneous resignation of the Government owing to disagreement within the majority.

On some rare occasions, the Chambers have debated no-confidence motions but have always voted against them or have been preceded by the Government's resignations.

The majority political groups and the Government itself, indeed, generally consider it useless or even dangerous to come to the point of voting, when the reasons or conditions of the relationship of cooperation on which the majority was based cease to exist.

In any case, the constitutional rule providing for the explicit vote of no-confidence allows the Government to decide, in the absence of a motion of this kind, whether it is advisable to resign, according to its political evaluation.

294. The Head of State has sometimes rejected the spontaneous resignation of the Head of Government, inviting the Government to verify the existence in Parliament of the political conditions necessary to carry out its activities, or rather to investigate more thoroughly the reasons for the crises virtually open by its resignation (the so-called parliamentarization of Government crisis). The President of the Council is free to turn down the Head of State's proposal and to confirm his resignation.

295. Both Chambers allow their members to submit 'individual' motions of no-confidence towards single ministers.

296. In the absence of a constitutional provision on the matter, doubts have been raised about the legality of parliamentary votes aimed at forcing one single Government member to resign, thus distinguishing his or her political responsibility from the whole context of the relationship of confidence. In practice, however, motions submitted by opposition groups blaming the attitude of single ministers and asking for their resignation have been debated and voted on by Parliament. The Government has generally replied by asking for a confidence vote (see below §4) on a resolution submitted by the majority expressing support to the minister in question, thus identifying the single minister with the whole Government.

297. Once, however, a motion of no-confidence was voted on a minister who disagreed with the Government on some points and had not resigned even after an open invitation of the Head of Government. The minister, who was subsequently replaced by the Head of State as suggested by the President of the Council, raised a conflict of power before the Constitutional Court, which rejected the reference (see Decision No. 7/1996).

298. Provisions on the debate of no-confidence motions about single ministers in both Chambers are exactly the same as those set out in Article 94 for no-confidence votes towards the whole Government:

(1) the Chambers must give their reasons for the motion, which must be signed by at least one-tenth of their members;
(2) the motion must be put to a nominal vote and can be debated only three days after it has been submitted;
(3) the motion must be voted upon by the simple majority of the Chamber's members.

§4. The Question of Confidence

299. If the Government fears a negative parliamentary vote on a resolution that it considers as relevant for the fulfilment of its political objectives, it often makes it

a 'question of confidence' before the Chambers, thus declaring that, if the Chambers vote against the resolution, this vote will be meant as a no-confidence vote and will bring about the resignations of the Government. This tool is used by the Government whenever it wishes to verify the confidence of parliamentary majority towards its actions and to get Parliament to approve its plans quickly.

This tool had already been used even in the absence of a specific constitutional rule providing for it and well before the question of confidence was partially regulated, in 1971, by the adoption of a special provision in the rules of the Chamber of Deputies.

The question of confidence is presently provided for by both standing orders, as well as by Law No. 400 of 1988. Article 2, first paragraph, letter b, provides that the President of the Council of Ministers, directly or in the person of a delegated minister, is charged with raising the question of confidence before the full House, and not before parliamentary committees, with the consent of the Council of Ministers. Article 161 of the rules of the Senate just provides that the Government cannot make proposals to amend the standing orders or the general conditions and internal workings of the Senate a question of confidence.

Article 116 of the rules of the Chamber of Deputies is a more complex provision. Not only does it set out restrictions on the use of this tool by the Government, such as in case of votes unrelated to its political programme concerning, for instance, the setting up of committees of enquiry, or committees granting leave to prosecute a MP or verifying the result of elections or nominations, etc., but also the procedural effects of the government's initiative.

300. Both branches of Parliament provide for procedures which differ from the ordinary ones when dealing with questions of confidence.

First, the vote must be nominal, just like all the confidence votes set out in Article 94 of the Constitution. During the past, when voting in Parliament was usually by secret ballot, questions of confidence were even used to impose nominal votes, thus preventing the risk of *francs tireurs* within the majority.

Second, since the subject of the confidence vote is chosen by the Government, the latter manages to force the Chamber to vote on that subject exclusively, thus preventing votes on any amendments. This is why questions of confidence have been used in order to overcome the problem of filibustering by the opposition through the submission of various amendments to a particular text of law.

301. There is no provision on the effect of a negative vote by Parliament on a question of confidence. In that event, however, the President of the Council of Ministers is supposed to be forced to resign immediately, since Parliament's decision should not be considered as simple dissent, given the meaning that the Government itself has attached to the question.

In practice, every time the Government has made a specific matter a question of confidence, the parliamentary majority has always approved its proposals, with the exception of the two votes asked by Head of Government Prodi in October 1998 and in January 2008, which revealed the end of cohesion within his majority (see below).

§5. The President of the Council's Request to Verify Parliamentary Confidence

302. The last case to be mentioned is when the President of the Council of Ministers, after speaking to the Chambers on behalf of the Government, makes the passing of resolutions proposed by the leaders of the majority to their respective Houses a question of confidence, to make sure that his or her Government still enjoys the confidence of Parliament.

This generally occurs following a positive control of the political unity of the majority parties, or after the Government's crises, started because of disagreement within the majority, is solved by the reunification of the coalition, which prevents the Head of State from forcing the executive to resign. In both cases, the confidence vote towards the executive by the two branches of Parliament has always had the meaning of a 'ratification' of the settlement of the dispute within the majority, which helped the Government to resume its political activities.

In two cases, however, the first on 9 October 1998, during the thirteenth Parliament (when the Chamber of Deputies rejected by 312 votes to 313 the resolution which the Head of Government Prodi, after his communications, had made a question of confidence) and the second on 24 January 2008, during the fifteenth Parliament (when the Senate rejected by 156 votes to 161 a resolution of the second Prodi Government), the Parliament did not approve the Government's resolutions, bringing about its immediate resignations and the consequent Government crises. The result of these crises, caused by an explicit declaration requested by the Government, has been therefore identical to the one that would be produced by a no-confidence motion voted upon by the Chamber towards the executive.

The President of the Council of Ministers choice to ask the Chamber of Deputies for a confidence vote after the control of the political unity of his majority had failed seemed rather questionable, especially on a political level. Until that moment, nobody had proposed a no-confidence motion towards the Government, neither the opposition nor that part of the majority which had started to be rather critical of the Government political choices and which finally decided not to confirm its confidence to the Government, forcing the President of the Council of Ministers to resign.

Chapter 7. The Judicial Power

by Marilisa D'Amico

§1. 'Judges Are Subject Only to the Laws'

303. By stating that 'justice is administered in the name of the people' and that 'the judges are subject only to the Law', Article 101 of the Constitution sets out a fundamental principle that gives the judiciary a very different role than the one it used to play under the *Statuto Albertino*. The *Statuto* stated indeed that justice was administered 'in the name of the king' by judges personally appointed by the monarch himself.

The main characteristic of Italian judges is therefore their being subject only to the Law and independent of any other authority, especially the executive. During the past, on the contrary, judges were officials dependant on the government and its political power. Hence, the principle of separation of powers, which is far from being applied to the relationship between legislative and executive power, is strictly observed when it comes to the judiciary.

The fact that judges are only subject to the Law, besides guaranteeing their independence, creates a link between the judiciary – which is neither elected nor carries any political responsibility – and popular sovereignty, expressed by-laws passed by organs elected by the people and responsible for their political actions.

The activities of judges and their relationship with the law have changed dramatically in our century, especially if compared to the eighteenth century model of State, in which judges (who were defined as 'the mouth of the law') were only supposed to enforce the law without any discretionary power.

There is a growing awareness that every kind of interpretative activity has an intrinsic creativity, especially in a complex and pluralistic legal system producing a wealth of rules like the Italian one.

Nowadays, furthermore, the judiciary (judges of ordinary jurisdiction and, if necessary, the Constitutional Court) is also charged with reviewing the constitutionality of laws, which requires something more than just a literal interpretation of the law.

§2. The 'External' Independence of Judges: Composition and Functions of the *Consiglio Superiore Della Magistratura*

304. The Constitution ensures the independence of judges in two different ways:

(a) The external independence of the judiciary as a whole from outside pressures by any other State organ, especially by the Government.
(b) The internal independence of every single judge within the judicial system, namely from interference by other judicial organs.

The independence of judges is guaranteed both by preventing any sort of influence on their activities and pressures that might derive from decisions on their careers. The external independence of judges is guaranteed by preventing any influence exerted on them by any other organ, also pursuant to Article 104 of the Constitution, which states that 'the judiciary is an independent structure and is not subject to any other authority'. In order to achieve this aim, the Constituent Assembly decided that the Ministry of Justice, as well as any other authority not strictly connected with the judiciary, was not allowed to take decisions on the career of ordinary judges, such as transfers, promotions, disciplinary measures, etc. The Assembly reckoned that this might have influenced the autonomy of judges and, as a direct or indirect consequence, their independence and thus decided to entrust these functions to a 'governing body of the judiciary', composed mainly of magistrates: the *Consiglio superiore della magistratura* (Higher Council of the Judiciary). The *Consiglio* is not a judicial body (except when it delivers disciplinary measures) but mainly carries out administrative functions.

Pursuant to Article 105 of the Constitution, the *Consiglio* is competent to appoint the judges by competition, assign them to the various offices, confer functions on them, as well as dealing with promotion and disciplinary aspects.

The *Consiglio* is thus enabled to prevent any sort of influence on the judiciary as a whole and individual judges. As a representative body of magistrates, it often comes to their defence, even against the criticisms and threats coming from politicians towards individual judges' actions or decisions.

The *Consiglio* is chaired by the President of the Republic and is composed of twenty-seven members. Sixteen are magistrates elected from and among their own ranks, while the remaining eight are either full university law professors or advocates, all of whom are elected by a joint session of the two houses of Parliament. The President and General Procurator of the *Corte di Cassazione* are ex officio members of the *Consiglio*.

The sixteen ordinary judges of the *Consiglio* are elected by magistrates among 'the belonging to all categories' (see Article 104, clause 4, Const.), by personal, secret and direct vote. Aiming at the implementation of this rule, the Law 44/2002 provides that two of the sixteen seats are allocated to judges of the *Corte di Cassazione* who are still in office, four seats are allocated to public prosecutors with merit's function and ten seats are allocated to judges with merits' function. Candidates are elected in three national electoral colleges for each of the mentioned categories according to the number of votes (Article 23, clause 2, L. n. 195/1958 modified by the Law No. 44 of 2002). Every elector votes for a candidate in each category through the sign of his/her name on the voting paper. Candidates are chosen from various lists normally representing the currents in which the National Association of Magistrates is divided.

305. Pursuant to Article 22 of Law No. 195 of 1958, the other members of the *Consiglio* are elected by Parliament in joint session, by secret ballot and the majority of three-fifths of the members of the two houses (or the majority of three-fifths of the voters after the second counting). Candidates must be full university law professors and advocates of at least fifteen years practicing experience.

Owing to the numerical superiority of members elected by judges, the Council is defined as 'self-government body' of the magistracy. It is not, however, a complete self-government, owing to the presence of lay judges, who prevent the judiciary from being totally detached from the other powers.

Therefore the composition of the *Consiglio* meets two important requirements: it avoids external interference and prevents the independent judiciary from turning into a detached and exclusive guild.

The elected members of the *Consiglio* hold office for four years and are not immediately re-eligible.

Pursuant to Article 5 of Law No. 1 of 1981, they cannot be 'prosecuted for the opinions expressed in the exercise of their functions with regard to a specific matter'. The Constitutional Court highlighted that such immunity concerns 'any form of expression of the thought, though not other forms of behaviour for which the members of the *Consiglio* may be criminally prosecuted' (Constitutional Court, Decision No. 148/1983). The Court also ruled this provision 'consistent with the design of the Constitution', especially with Article 104 and following articles, which set out that the exercise of the functions of the *Consiglio* is a fundamental way for the judiciary to preserve its autonomy and independence (see Decision No. 148/1983).

As stated above, the functions of the *Consiglio* mainly concern the career of judges. It also fulfils, however, auxiliary duties such as advising the Minister of Justice on questions concerning the judicial system.

306. Measures concerning the status of magistrate are undertaken by means of a decree of the President of the Republic, after a proposal of the Minister of Justice, or by a decree of the minister himself and always in accordance with a resolution of the *Consiglio*. They can be appealed to a court of administrative jurisdiction. The Constitutional Court highlighted that this form of judicial control, which is necessary for the protection of individual rights and interests under the Constitution, does not conflict with the autonomy of the judiciary (Constitutional Court, Decision No. 168/1963).

A proper section of the *Consiglio* is charged with disciplinary measures towards the judges. It is composed of nine effective and six deputy members. The effective members are the vice president of the *Consiglio*, in his capacity as chairman, two members elected by Parliament, one of whom is vice president of the section, a judge of the *Corte di Cassazione* who adjudicates on points of law and five magistrates who adjudicate on the merits of laws.

The disciplinary process can either be set in motion by the Minister of Justice (Article 107 Const.) or by the Procurator General of the *Corte di Cassazione*. More precisely, only the second has the duty to proceed (Article 14 Leg. D. No. 109/2006). In general, disciplinary actions follow the same rules as trials (Constitutional Court, Decision No. 12/1971): the judgment, termed *sentenza*, must not take the form of a presidential or ministerial decree, unlike all the other acts of the *Consiglio*. Decisions of the disciplinary section can be appealed to the *Corte di Cassazione* on points of law.

Sanctions include reprimands, loss of seniority and dismissal from office.

In the past (before the reform) the *Consiglio* has often been obliged to work, in the absence of specific provisions, in a self-regulating manner, i.e. by taking general resolutions on the careers of judges. But the Law No. 105/2005 and the Leg. D. No. 106/2006 introduced the predetermination of offences and disciplinary conduct relevant and remedied the problem of indeterminacy of the same offences, since the original formulation of the rule on disciplinary offences referred to behaviour likely to injure the prestige of the judiciary. The current framework, specifically stating the disciplinary offences, limits the discretion of the Council in identifying behaviours considered deserving of sanction.

§3. The Powers of the Minister of Justice

307. The Minister of Justice has very little powers compared to the past, although these powers are quite important:

- He is entrusted with the organization and operation of services concerned with the administration of law (Article 110 of the Constitution).
- He can make specific requests to the *Consiglio* with regard to the legal status of judges (appointment, assignment to the offices, conferring of functions, transfers and promotions);
- He can ask for and give information on the administration of justice.
- Pursuant to Article 107, second clause, of the Constitution, he is entitled to undertake disciplinary actions towards the magistrates (a process which have to be set in motion at the same time by the General Procurator of the *Corte di Cassazione* pursuant to Article 14 Leg. D. No. 109/2006).
- He can advise the *Consiglio* on a number of issues, including the conferral of executive powers, a question that must be agreed upon by a committee of the *Consiglio* itself and by the minister. The Constitutional Court ruled that the agreement must be based on a principle of fair cooperation although, if the two do not manage to reach an agreement, the *Consiglio* is empowered to take the last decision. (Decision No. 379/1992; Decision No. 380 del 2003).

§4. The 'Internal' Independence of Judges

308. The independence of judges as individuals is set out, as stated above, in Article 101, second clause, of the Constitution which, by providing that 'the judges are subject only to the Law', ensures their utmost independence of any sort of influence but their own professional skills and devotion.

This aim is also pursued by other constitutional provisions, which concern their appointment by competition, security of tenure and the absence of hierarchy within the judiciary.

Entry to the judiciary is by competitive examination (Article 106, first clause, of the Constitution), i.e. by an unbiased selection which is usually open to everybody who has taken a degree in Law.

The Constitution itself provides a few exceptions to this rule. First, honorary magistrates can be appointed to perform judicial functions (not by profession). Pursuant to Article 106, second clause, they may even be elected, although they are not today, and they can perform only the duties attributed to individual judges, as they cannot be part of a collegiate body. These magistrates are presently the *giudici di pace* (Law No. 374 of 21 November 1991).

The second exception are *giudici popolari*, i.e. ordinary citizens with secondary school qualifications who are selected by drawing lots to sit on the *Corte d'Assise* of first instance and of appeal. This is the only implementation of citizens' direct participation in the administration of justice provided for by Article 102 of the Constitution.

Pursuant to Article 107, first clause, of the Constitution, judges cannot be removed from office, nor transferred without their consent. They can be dismissed or suspended from their duties or even transferred to other courts or given other duties only by means of a decision of the *Consiglio Superiore della Magistratura*, taken for reasons laid down by regulations.

No other public employee enjoys so many guarantees. The aim is to allow magistrates to pass their judgments with the utmost objectiveness. Therefore judges, first of all, can be transferred against their will only if they have committed a disciplinary wrong (Article 13, Leg. D. No. 196/2006). This kind of transfer is a disciplinary sanction which can be ordered at the end of a disciplinary action. Second, pursuant to Article 2, second clause, of Legislative Decree of the King No. 511 of 31 May, modified by the Leg. D. No. 196/2006, magistrates can be transferred if they cannot, for any objective reason but not their fault (otherwise there a disciplinary sanction), even against their will, 'administer justice under the conditions required by the prestige of the judicial system' (the so-called environmental incompatibility).

The consistency of this rule with Article 107, first clause, of the Constitution has always been questioned. If magistrates must be above all suspicion, this could lead to control of their private life in order to prevent behaviour that might jeopardize their credibility.

Pursuant to Article 107, third clause, judges differ from one another only on account of their functions. This means that hierarchies are not allowed within the judicial system: no senior judge could ever give instructions to a junior judge on his way of passing judgments (see Constitutional Court, Decision No. 40/1964). The Constitution provides that the powers of every single justice department should never interfere with the powers of higher departments (see Constitutional Court, Decision No. 143/1973).

There are, however, different degrees of adjudication: decisions taken at first instance can be appealed and be quashed in whole or in part and be further appealed to the *Corte di Cassazione*. This does not mean, however, that courts of first instance are hierarchically subordinate to courts of appeal and the latter to the *Corte di Cassazione*: judges are completely independent in the exercise of their functions. Moreover, all judgments have the same degree of enforceability, regardless of the judge that pass them. This is why the judicial power is defined as *diffuso* (widespread).

Magistrates do have a professional status, however, and the Constitution therefore provides for their career and promotion (Article 105). In order to prevent decisions on the career of magistrates – though exercised by their self-governing body

or under its supervision – from influencing their independence, a system of automatic promotion according to seniority or non-discreditable actions was introduced. Seniority is more and more taken into account when assigning judges to specific departments or conferring executive functions on them. This has made the selection of magistrates according to their merit and industriousness harder and harder.

§5. The Organization of Justice in Italy: Civil and Penal Jurisdiction; the Constitutional Role of the Public Prosecutor

309. The principle of judicial unity implies that all the judicial functions are performed by one judiciary enjoying full independence. Opponents of this principle advocate the existence of various judicial units with jurisdiction over the different types of law.

The Constituent Assembly reached a compromise between these two extremes. Although it proclaimed that the principle of judicial unity was as a fundamental aspect of the Italian legal system and explicitly forbade the appointment of special judges (i.e., outside the ordinary judicial system) and extraordinary judges (i.e., specially appointed to settle previous disputes) (Article 102 of the Constitution), it admitted a number of exceptions to the appointment of special judges (Article 103).

Provision was also made for the revision of the special jurisdictions existing before (VIth Transitory and Final Provision) and for specialistic sections joined by 'properly qualified citizens who are not members of the judiciary' (Article 102). In the words of the Constitutional Court, these sections are not a '*tertium genus* between special and ordinary courts, but rather a *species* of the latter' (Decision No. 76/1961).

310. The Italian judicial system is therefore a system in which ordinary courts are supported and supplemented by special courts with significant functions.

A reform introduced remarkable changes in the general organization of civil and penal justice (see Legislative Decree No. 51 of 1998 implementing Law No. 254 of 1997 – delegation to the Government for the implementation of the *giudice unico*).

For the purposes of criminal jurisdiction, the reform provided for the dissolution of the *Preture* and for transferring its powers to the *Tribunale*, which is composed of three judges only in particular cases, and is a monocratic court in all the others, even when it acts as a Court of Appeal of decisions taken by the *Giudice di Pace*.

For the purposes of civil jurisdiction, the law provides that the *Tribunale* must be composed of three judges in a number of cases and be a monocratic court in all the others.

311. Courts of criminal cognizance also include the *Tribunale del riesame* empowered with the review, even on their merits, of measures restricting personal freedom (Article 309 criminal procedure code). There is a *Tribunale del riesame* in each district of Court of Appeal. The cognizance depends on the place where the court that originally heard the case is situated.

The *Tribunale* can either allow or reject the appeal (to be made within five days of the judgment being handed down) and uphold or quash the decision of the lower court by an *ordinanza* passed in chambers.

Investigating departments are staffed by judicial magistrates acting as *pubblico ministero* within the *Procure* (*Procura generale* near the *Corte di Cassazione; Procure generali* near the *Corti di Appello; Procure della Repubblica* near the *Tribunali* and *Tribunali dei minorenni*).

Pursuant to Article 112 of the Constitution, the *pubblico ministero* 'is responsible for instituting penal proceedings', although he or she has jurisdiction over some civil and administrative matters as well.

Criminal investigations by the *pubblico ministero* are therefore mandatory. The aim is to ensure the equality of citizens before the law, as well as the impartiality of the *pubblico ministero*, whose autonomy is thus guaranteed.

The Italian justice excludes solutions in force in other systems, such as the plea bargaining, in which the public prosecutor and the defendant can negotiate the sentence and eventually drop some of the charges.

The power to institute penal proceedings is usually denied to private citizens, who can only submit their complaints to the *pubblico ministero*, who will then set the criminal process in motion. There is therefore a distinction between crimes prosecuted ex officio by the judiciary and those prosecuted upon a complaint, which is sometimes a necessary condition for instituting penal proceedings.

The *pubblico ministero* is a magistrate of ordinary jurisdiction safeguarded by the guarantees of independence laid down by the law (Article 107, last clause, of the Constitution), not necessarily the same enjoyed by the *giudici*.

The *procure* are hierarchical structures in which the heads of the departments may give instructions to their assistants, who can also be assigned or revoked the causes with a justification.

The system of distribution of the causes is different from that adopted by judicial magistrates.

According to the Constitution, the judicial police are at the direct disposal of the judiciary (Article 109 of the Constitution). This constitutional provision was not implemented by creating a specialistic section of the criminal police, but rather by entrusting specialistic sections especially set up within the ordinary police forces (*Polizia di Stato, Arma dei Carabinieri, Guardia di Finanza*) with the tasks of the criminal police. The double dependence of the criminal police on the judiciary and on the force they belong to caused inconvenience which the new Code of Criminal Procedure tried to solve by creating specialistic sections of the criminal police under the supervision of the *Tribunale*, the *Giudice* and the *Pubblico Ministero* and by increasing the functional dependence of criminal police agents on the judiciary as well as, at the same time, by reducing their hierarchical dependence on the force they belong to (Article 55 and following sections, Code of Criminal Procedure).

§6. Constitutional Provisions Regarding Special Judges

312. As stated above, the principle of judicial unity is mitigated by the presence of special judges.

Some of these are explicitly provided for by the Constitution (Article 103): the *Consiglio di Stato* (Council of State), a court having jurisdiction to review administrative decisions, the *Corte dei Conti* (Court of Accounts) and the military courts. Moreover, pursuant to Article 125 of the Constitution 'first degree courts for administrative actions', the *Tribunali amministrativi regionali*, are set up in every region under Law No. 1034 of 1971 (on administrative judges see Part II, Chapter 8).

Pursuant to Article 103, third clause, military courts in times of peace have jurisdiction over military offences committed by members of the Armed Forces. Such offences are provided for by the Military Code of Peace: Decree of the King No. 1022/1941 and following amendments. The Constitutional Court has declared the special provisions on military offences and severe punishment provided for by the code unconstitutional, thus making them more similar to ordinary offences and punishment.

The decisions of military tribunals of first instance can be appealed to the *Corte militare di appello* (Article 57 military order code). Both the military courts and the Court of Appeal are composed of military magistrates and officials of the force the defendant belongs to, although the number of military magistrates is always higher. Decisions of the military courts can be appealed to the *Corte di Cassazione* (judging in its normal composition) on the same grounds set out in the code of criminal procedure (see Constitutional Court, Decision No. 1/1983). The prosecutors are instituted by the *Tribunali militari*, the *Corte militare di appello* and the *Corte di Cassazione* (Article 58 military order code).

Independence of the military courts is guaranteed by the *Consiglio della magistratura militare* (Council of the military magistracy) (Leg. D. No. 66/2010, so-called military order code), chaired by the President of *Cassazione* and composed of the General Procurator of the *Cassazione* itself, two members elected by military judges, including at least one military magistrate of the *Corte di Cassazione* and one member having no connection with military justice appointed by the two presidents of the houses of Parliament.

§7. The Revision of Special Jurisdictions

313. Although the Constitution (VIth Transitory and Final Provision) explicitly stated that a revision of the special courts set up before the promulgation of the Constitution (and not provided for by Article 103) was to be carried out within five years of the effective date of the Constitution, the intention of saving these courts prevailed over the wish to repeal them.

The time-limit set out in the Constitution was not deemed as mandatory and the term 'revision' was meant as an obligation for Parliament to change the organization of the courts, so as to ensure their independence pursuant to Article 108, second clause, of the Constitution (Constitutional Court, Decision No. 41/1957).

Special courts therefore continued to carry out their activities, often with compositions and rules very far from the principles set out in the Constitution with regard to the judiciary. The constitutionality of these instances was raised so often that the Constitutional Court eventually eliminated those which did not comply with the principles of unity and independence of the judiciary (see Decisions No. 133/

1963; No. 93/1965; No. 55/1966; No. 30/1967; No. 49/1968; No. 60/1969; No. 121/1970 and No. 164/1976). Other times, however, the court feared that the activities of some of these courts could not be easily transferred to the ordinary judiciary and preferred to wait for their revision rather than ruling them unconstitutional.

The example of tax courts is emblematic. The Constitutional Court, in its effort not to declare these courts unconstitutional for breach of the principle of independence, initially stated that their nature was 'administrative rather than judicial' (see Decisions No. 6 and 10/1969). Once the revision of these courts was undertaken by Legislative Decree No. 636 of 1972, the Court affirmed that the judicial nature of these courts had been ascertained by promoters of the decree by a sort of 'authentic interpretation' (see Decisions No. 287/1974 and No. 215/1976).

Therefore, today there are still other special jurisdictions in addition to those provided for by Article 103. The most important ones, especially for the volume of their case-loads, are tax courts (on this subject see Part II, Chapter 8).

§8. Judicial Activities and Constitutional Rights of Citizens

314. The Constitution provides not only for the organization of the judicial system, the legal status of magistrates and the exercise of judicial functions, but also for the protection of the rights of citizens from the judiciary:

(a) Article 25, first clause, of the Constitution sets out the fundamental principle of the *giudice naturale* (natural judge), strictly connected to the prohibition of appointing special judges (Article 102, second clause). 'No one may be punished except on the basis of a law already in force before the offence was committed' also means that everybody is entitled to a judge appointed on the basis of a law which has come into force before the offence was committed. Article 25, first clause, prohibits not only any change of competence with retroactive effects, but also the appointment of a competent judge by anyone but the legislator. The Constitutional Court, however, ruled that exceptions to Article 25 are allowed if the change is aimed at protecting the independence of judges with objective and general rules (see Decisions No. 50/1963 and 10/1966). The new code of criminal procedure, with the aim of excluding any discretionary power when a cause is passed from a court to another for questions of joiner, states that the standards for the assignment of causes and replacement of judges are set in advance by the *Consiglio Superiore della Magistratura* (Article 4 of the Decree of the President of the Republic No. 449 of 1988).
(b) Article 24 of the Constitution guarantees the right to legal proceedings ('all are entitled to institute legal proceedings for the protection of their own rights and legitimate interests') and to defence ('defence is an inalienable right at every stage of legal proceedings'), which means that the parties are free to assert their rights (right to self-defence) and that legal aid is provided to everybody (Constitutional Court, Decision No. 59/1959). Article 24, however, was not enforced immediately. For criminal purposes, for instance, it was not enforced until 1988,

with the new Code of Criminal Procedure. The Constitutional Court had to make up for this legislative vacuum by a number of decisions. Mention should first of all be made to the enforcement of the right to defence from the act of the Judicial Police (i.e., acts carried out during investigations prior to the trial: gathering information about the person indicted, searches, gathering probative material) (see Decision No. 86/1968), as well as during the phase of investigations in criminal procedure. The court also enforced the principle of equality between prosecution and defence, by ensuring, for instance, the possibility for the defender to participate in the examination of the defendant, which was previously granted to the prosecutor alone (see Decision No. 190/1970). The Constitutional Court enforced the right to institute legal proceedings and to defence in civil proceedings as well, by repealing some rules that hindered its full implementation. It is worth mentioning, for instance, the declaration of unconstitutionality of the so-called *solve et repete* in fiscal matters, i.e. the principle according to which appeals against decisions of fiscal authorities were allowed only subject to the payment of the tax (Decision No. 21/1961). Mention should also be made to the various decisions by which the Court ruled that the parties to a trial must be guaranteed the same rights to produce evidence of their innocence, and provision of a legal counsel in proceedings of separation of spouses (Decision No. 171/1971). The court also wondered if the right to defence implied the right to reject the legal counsel (thus opting for self-defence). It eventually ruled that the legal counsel ensures the full defence of the parties as well as the right progress of the trial (Decisions No. 125/1979 and No. 188/1980), therefore it limited the discretionary choice made by the parties to the trial.

(c) Article 24, third clause, of the Constitution, states that 'the indigent are entitled, through special provisions, to proper means for action or defence at all levels of jurisdiction'. This principle has been enforced by Law No. 217/1990 and now by the Article 74 and ff. of the Legislative Decree No. 115/2002, adding to the old system of legal aid a new provision of free advocacy in court for all those who do not reach a minimum level of income provided for by law.

(d) Article 25, second clause, states that 'no one may be punished save on the basis of a law which has come into force before the offence has been committed'. The aim of this rule is to prevent any arbitrary action against the freedom of citizens, as well as to acknowledge the definite and exact nature of criminal offences, to be meant as a ban to issue criminal rules which do not state clearly what is lawful and what is not (see Decision No. 393 and 394/2006).

(e) Article 27, first clause, states that 'criminal responsibility is personal', i.e. that no one can be held responsible for offences committed by somebody else. According to this principle, people should never be held responsible if there is no relationship of cause and effect between their own will and the offence they committed (see Decision No. 3/1956). This principle also led the Constitutional Court, in its famous Decision No. 364/1988, to rule Article 5 of the Code of Criminal Procedure, which stated that ignorance of criminal law was totally irrelevant, partially unconstitutional. The court affirmed that no one can be held responsible if ignorance of criminal law depends on an event independent of one's fault.

(f) Article 27, third clause, provides that the accused 'are not considered guilty' until final sentence has been passed upon them. It also entails the obligation to regulate trial proceedings and institutions in such a way as to prevent the accused from suffering any negative effects before their culpability has been definitively established.
(g) Another principle concerning the exercise of judicial functions is the obligation to provide valid reasons for all legal proceedings (Article 111, third clause, of the Constitution). It has a double function: first, it allows citizens who are parties to a trial to defend themselves against an unfavourable decision in the various degrees of adjudication; second, it allows all citizens and all the other judges to learn the reasons that prompted a judicial decision.

§9. Constitutional Review of Article 111 of the Constitution and Introduction of the 'Fair Trial' Principles

315. On 10 November 1999, the constitutional law on 'the introduction of the fair trial principles in section 111 of the Constitution' was finally adopted, following a long legislative path. This reform was launched also to deal with some practical difficulties and followed a dubious outcome of a decision passed by the Constitutional Court (No. 361 of 1998) providing for new rules with regard to evidence production in criminal trials. This reform introduces a number of innovative elements which have an impact not only on the principles governing the judicial system, but also on some other principles – which we have just mentioned – contained in the first part of the Constitution, namely the right to institute legal proceedings and to defence (Article 24) and the principle of the natural judge established by law (Article 25). The reform of Article 111 of the Constitution introduces some important principles in the Constitution which were already contained in Article 6 of the European Convention on Human Rights as well as in Article 14, Clause 3, of the International Covenant on Civil and Political Rights.

The first part of the law concerns all kinds of trials. It reads: 'Fair trials must be provided for by law' and also adds that 'All trials must be carried out according to the principle of cross-examination, on a fair basis and before an impartial judge.'

Finally, the general rule of the 'reasonable duration' of trials is stated, so introducing the principle already stated by the above-mentioned international treaties.

316. The second part of the reformed text of Article 111 of the Constitution contains principles pertaining only to criminal trials. It establishes that: 'in the criminal trials, everyone who is charged with a criminal offence has the statutory right to be notified promptly and confidentially of the nature and cause of the charges made against him/her; she/he must be given adequate time and conditions to prepare his/her defence; she/he has the statutory right to examine, or have examined, the witnesses testifying against her/him in court, to obtain the attendance and examination of witnesses on her/him behalf under the same conditions as witnesses against her/him and to obtain all other evidences on her/his behalf; she/he must be assisted by an interpreter if she/he cannot understand or speak the language used during the trial'. This shows how detailed this matter is.

The text then contains some rules which were introduced in an attempt to overrule Decision No. 361 of 1998 of the Constitutional Court providing for different principles. The new text reads: 'Criminal trials are regulated by the principle of cross-examination for evidence gathering. The indicted person cannot be declared guilty on grounds of the statements made by a person who has deliberately refused to be examined by the indicted himself/herself or by his/her lawyer.' However, the following clause provides that: 'the law regulates those cases in which evidence is not gathered according to the principle of cross-examination following an agreement with the indicted person, or due to practical impossibility or to proved misconduct'.

A very critical aspect of this reform is the impact that it will have on pending trials. In fact it is evident the risk of a long suspension of those trials on the ground of their consequential illegitimacy, declared by the judges or raised by the opposing parties, due to the reform.

Article 2 of the reform text states that a 'law' will regulate the application of the principles contained in the text itself to criminal trials pending on the date of its coming into force. This provisional matter has been considered by Parliament by passing the Law No. 265/2001. But the enforcement of this Law provoked mainly new workload for the Courts and incremented the loss of time. Although the presence of the Law No. 265/2001 the European Court of Human Rights condemns often Italy for the breach of Article 6 of the European Convention of Human Rights.

Chapter 8. Judicial Control of Administrative Action

by Enzo Balboni

§1. Introduction

317. The subject, that we are now briefly confronting, constitutes the core of the matter known in the university syllabus as administrative law, even if it has important constitutional implications. In fact, some articles of the Constitution deal directly with this matter: Articles 24, 103, 111, 113 and 125. Moreover, to have or not to have a constitutional backing and guarantee of one's rights against the Public Administration is, from all points of view, noteworthy and in many instances decisive.

§2. Evolution of the Principles of Administrative Justice in Italy

318. The ancient and conservative conception of the State – what is known as the type of State that adopts the 'Rule of law' – or better a certain idea of the relationship between the citizens and the State – implies a position of (fundamental) equality between these two subjects.

This means that, when a dispute arises between public powers and citizens concerning the limits of their respective areas of competence and/or power, another subject, extraneous and impartial with regard to the contending parties, must be appointed in order to settle the dispute. The legal system entrusts the jurisdictional function to this 'third subject': the ordinary judge with his distinct status and independent position.

Behind this conception – that we may call purely liberal – there was a strict interpretation of the principle of the separation of powers, according to which it was essential that the administration was completely separated from the jurisdiction in order to place the public and the private interests at the same level before an impartial judge.

The Belgian Constitution of 1831 took this direction. The same position was adopted – some years later – by the members of the Italian Parliament which, under Premier Marco Minghetti's guide, drafted the law, which, promulgated with No. 2248, Annex E, on 20 March 1865, is part of the body of Laws of the Unification and still today is a fundamental piece of public law legislation.

§3. Powers and Limits of the Ordinary Judge Over Public Administration

319. The above-mentioned Annex E abolished the Tribunals of the *contenzioso amministrativo* (*contentieux administratif*, in the French tradition), which were administrative organs existing in the different States before the Unification.

They were entrusted with the resolution of certain disputes between citizens and public authorities. Meanwhile the ordinary judges (who until that moment only knew of disputes between private parties) were entrusted with all matters involving a civil or political right.

Within this area of matters there were included all those cases where it was possible to show that – to a certain extent – the Public Administration could be concerned.

However, according to the liberal principles of a strict separation of powers, the ordinary judge was not permitted to revoke or modify the administrative act done by the various authorities.

The ideological assumption was that, in case he would revoke or modify the administrative act, the ordinary judge would actually interfere in the exercise of the administrative power which he was forbidden to take count of.

However, when knowing of an illegitimate administrative act, he simply ought not to apply it, meaning that he should have judged leaving out of consideration of the existence of that act.

All these principles, even if they enlarged the judge's competencies (and consequently, they extended also the protection of the citizen, considering that the acts and behaviour of the administrative authorities which infringed a right were submitted to the judge), simultaneously came to limit, to a high degree, his powers.

These issues determine still today the powers and limits of the ordinary judge's action whenever an administrative act involves a right of a subjective nature (*diritto soggettivo*).

§4. The *Diritto Soggettivo Perfetto* (Full Subjective Right)

320. This can be defined as the legal position of a citizen which is protected in a direct, actual and personal manner.

We refer to a right within a legal relation, in the sense that the subjective right is, in the administrative sphere, the reverse of an obligation which falls on the Administration. For instance, where the Public Administration is part of a relation involving rights of a private nature, its contractual obligations (for instance: the payment of debts in due time) will certainly create a position of right in favour of the citizen who enters into a legal relation with the Administration itself.

Far more complicated is the matter of the so-called public subjective rights. In this regard, over the centuries and even in the nineteenth century (when liberal views coexisted with other still authoritarian ones) an approach has been consolidated according to which the administrative power – as the engine active and responsible for pursuing the public interest – had (and still today has) the power to weaken and – to a certain extent – 'degrade' the position based on a right of a subjective nature, turning it into a different position (and a less protected one) called legitimate interest (*interesse legittimo*).

§5. The *Interesse Legittimo* (Legitimate Interest)

321. So the property rights of the individual are not considered absolute and untouchable rights anymore, but they are regarded as rights conditioned on the existence – or, reciprocally, the survival – of a public interest which aims, in case of necessity and always in a legitimate and proper manner, towards a quantitative and, sometimes, qualitative reduction of the rights that can even lead to its elimination.

To give an example, let us consider the compulsory acquisition of a piece of land (*espropriazione per pubblica utilità*), motivated by the need to build a railway or a road. In this case, the owner of the land is entitled to the following expectations protected by law: the right to receive an expropriation indemnity and the legitimate interest that the Administration, when exercising its power to reduce or eliminate his property right, behaves in a legitimate matter, that is to say respecting all the guarantees, that expropriation law provides for, which must be fulfilled by the expropriation order.

Another example of a legitimate interest is that of the person who asks the Mayor to grant him/her a building permit in order to build in a land which he/she owns. In fact, also in this case the so-called *jus aedificandi* is conditional on and limited by the right of all citizens to a rational use of the land, which the Mayor exercises on behalf of the whole community when granting or denying the building permit, stating at the same time the reasons why, so that the unsatisfied part may ask redress.

§6. Simple and Diffuse Interests

322. Placed a step downwards with regard to the position of the 'legitimate interest' there are those types of general interest that everyone of us have in that the Administration must always pursue, in the best way, the public interest: so that it builds roads, hospitals, aqueducts, etc … , it approves a town planning scheme or it protects the environment. Furthermore, in the last quarter of the twentieth century, a movement has been started, especially by protectionist associations, with the aim of obtaining the recognition of the subjectivity of the so-called spread interests, also from a legal point of view.

The extension of the *locus standi* eventually reached the statute book (Law No. 241/1990) and now concerns also other qualified associations, with regard to the interests specified in their respective original statutes. As a consequence the power to challenge the administrative acts deemed illegitimate is now a larger one.

Indeed, associations devoted to the protection of environment and consumers' rights have now the power to impugn administrative decrees and acts concerning their field of activity: so actions, which could not be easily promoted by individual citizens (for lack of a distinctive and personal and actual interest), are brought on by trained and resourceful social formations.

§7. The Historical Evolution of the Administrative Justice System

323. Let us tackle again, briefly, the historical evolution of administrative justice in Italy. After the law of 1865 which protected legal positions of a subjective nature, all those other positions that were defined, at that time, of legitimate interest, as described above, remained unprotected.

Moreover, the law of 1865 was interpreted by ordinary judges in a strict sense. Thus, they would not recognize a right, but only an interest – to which regard citizens could only file a complaint before administrative authorities – each time a provision which granted the power to degrade a right was issued, even if that provision was found, during the subsequent examination of the case, to be illegitimate.

In order to put an end to this harsh situation and to provide for a judge in charge of the interests, and thanks to statists such as Silvio Spaventa and Francesco Crispi, the Law No. 5992 of 31 March 1888 was approved. This law created the fourth section of the Council of State (this organ has existed as a consultative body since the reign of King Carlo Alberto, 1831).

In this manner, the jurisdictional attributions concerning incompetence, excess of power and breach of law against acts – of individual or general quality – issued by the administrative authorities having as their object a legitimate interest, were assigned to the Council of State. The power of the Council of State was limited to the annulment of the contested act. But its competence was extended so that it could require the Administration to fulfil its obligations to comply, with respect to that particular case, the decision taken by the ordinary judge which recognized an infringement of a civil or political right.

The fundamental infrastructure and moreover the mind of administrative justice – and therefore of the judicial control of administrative action – was built in the direction now described and, with minor changes, is still in force today. Also the recent codification of 2010 has stated a progress without revolution: in other terms a confirmation.

§8. The Principles Enshrined in the Constitution

324. We have dwelt long on the legislative evolution of the principles of administrative justice in Italy because the fundamental reasons of our system can only be understood as a succession of stratifications beginning from 1865, through which the matter has been mould again, but never to such an extent as to deny its fundamental principles.

Specifically, these consist in the creation of a legal position – peculiar to the Italian legal system – named legitimate interest, which is different from that of a subjective nature, and in the establishment of two different systems of protection entrusted to two different judges – the administrative and the ordinary judge, respectively – endowed with different powers.

Eighty years after the original choice was made and in a completely different social environment with respect to the liberal ideology then prevailing, the Italian

Constitution could – as someone maintained – have radically changed the fundamental principles of administrative justice. On the contrary, these principles were confirmed and completed, even renewed by the Constitution.

Therefore, it is possible, for our purposes, to draw the fundamental principles on the matter from the articles of our basic law. These are:

(a) solemn confirmation of the fundamental basis of the protection granted: 'Everyone shall have the right to undertake legal proceedings in order to protect his rights and legitimate interests' (Article 24 Const.);
(b) confirmation of the creation of a specific judge for the legitimate interests: 'The Council of State and the other organs of the administrative justice' (this reference caused the subsequent creation of the Regional Administrative Tribunals, TAR) 'have jurisdiction to protect, against the Public Administration, the legitimate interests and also the rights of subjective nature, concerning some specific matters indicated by the law' (Article 103);
(c) establishment of an Administrative Tribunal in each region (together with the possibility of having decentralized sections of it in other cities of the region) as the first instance of administrative jurisdiction (Article 125). Actually, the TAR were established by the Law No. 1034 of 6 December 1971 and are nearly thirty all over the country (not counting the internal sections);
(d) attribution to the supreme ordinary jurisdictional body – the Court of Cassation – of the power to decide, but only with regard to legal grounds related to the jurisdiction itself, on complaints against decisions issued by the Council of State or the Court of Counts (Article 111);
(e) solemn reconfirmation of complete jurisdictional protection, without exceptions, of the legal position related to a right or a legitimate interest harmed by any act of the Public Administration (Article 113, paragraph 1);
(f) postponement to the instrument of the general law for the determination of the jurisdictional organs which shall be entrusted with the power to annul any illegitimate or non-expedient administrative act (Article 113, paragraph 2). At present, this power is endowed to the TAR, and to the Council of State, on appeal.

Law No. 205 of 2000 with special regard has deeply changed the pre-existing system of the exclusive jurisdiction of the Administrative Judge (see §11). Both subjective rights and legitimate interests in some very wide matters: public services, town planning and buildings and public contracts were entrusted to the Administrative Tribunals and the Council of State (see §10) that decide every question about any kind of public and private rights and interests in these fields.

§9. The Jurisdiction of the Ordinary Judges

325. According to what has been said above, it should be clear that the citizen goes before the ordinary judge so that he/she gives judgment about the unlawfulness of the line of conduct that the Administration has, eventually, undertaken when executing an illegitimate administrative act. On account of the well-known limits

laid down by the rule of the separation of powers which pervades the whole subject, it will only be possible to ask the ordinary judge in passing a judgment condemning the Administration to compensate the citizen for the damage he/she suffered, but only once the administrative act has been annulled by the administrative judge.

§10. Administrative Jurisdiction

I. Organs and Structure

326. From 1 January 1974, in compliance with the previously mentioned Law No. 1034 of December 1971, the TAR started to operate all over the country as first instance organs of the administrative jurisdiction. In all the regional capitals (and also in some separated cities) there's a TAR consisting of a president and at least five judges nominated as a result of an open competition. (For this part the enrolment is similar to that of ordinary judges.) The judging bench is formed by three judges.

The TAR of Lazio – obviously based in Rome – is organized into three sections and several subsections, necessary because of the higher number of petitions (*ricorsi*) converging there. That TAR is competent to know all those acts – starting with the ones issued by the central organs of the State: the ministries – which have effect beyond a single regional district.

The Council of State, in its turn, is the judge to whom – as we already know – in general, the citizen or the administrative authority, which have lost the case in the first instance, can appeal. Its judgments cannot be the object of further appeal. It is only allowed to appeal to the *Corte di Cassazione*, understood as the Court competent in settling conflicts upon grounds of jurisdiction (Article 111 Const.): that happens, for instance, whenever the Council of State has ruled on a matter which was not in its competence but entrusted, instead, to ordinary jurisdiction.

The Council of State is organized into three jurisdictional sections. These are flanked by three other sections with consultative functions, through which the Council of State carries out its parallel duty of high legal-administrative advisor, as we saw before.

Each section, when exercising its jurisdictional function, is made up of five judges. From the organizational point of view, the TAR and the Council of State are not considered as part of the judiciary system in the strict sense: they are special jurisdictions, and the Council of State is, as well, an advisor of the government.

At the same time, however, while acting as a jurisdictional body, the Council of State has become more independent but inevitably its members maintain links and acquaintances with the effective centres of the Government.

II. Jurisdiction of Administrative Judges

327. First of all, the administrative judges have the important general competence of controlling the legality of the administrative acts which are deemed to be unlawful.

The grounds upon which the administrative act can be declared unlawful are called *vizi* (vices); they are the following:

(a) *incompetence*: when it has been issued by an authority which is different from that which has the power of acting in the particular case. The incompetence can be territorial as well as related to the matter concerned or the degree (in the hierarchical scale of the Public Administration) of the issuing Administration;
(b) *excess of power*: when the administrative authority has wrongly exercised its discretionary powers. This happens whenever a public authority exercises its power in case and for purposes different from those which it was given by the law. The act can be annulled for excess of power if it is proved before a TAR (or the Council of State on appeal) that it clearly contradicts previous measures, or that it caused an open and evident injustice, or that there was inequality of treatment, or that the motivation for it was lacking or deficient;
(c) *breach of law*: when the administrative act that has been issued fails to comply with a provision of law or regulation. This is, for instance, the case in which the law requires the advice or opinion of a technical organ before the act can complete its issuing process. Forgetting to ask such a required opinion could expose the act to the risk of being challenged and subsequently annulled.

There is also a special jurisdiction on the merits of an administrative decision, its concern being not the lawfulness but the expediency or opportunity of the administrative action.

This type of jurisdiction is provided for few and numerated matters. It is sufficient to remember here two of those. The most important one is certainly that regarding the complaints presented with a view to obtaining compliance and fulfilment of the obligations that falls on the administrative authorities to accept, follow and give execution to the judgment of ordinary and administrative judges. A second matter concerns – for instance – the urgent municipal ordinance issued by the Mayor, when exercising his power as a Government official, with regard to construction, public order or health urgent issues.

While exercising this jurisdiction – that is significantly called ‘on the merits’ – which allows a control wider than that of strict legality the judge has a wider power both to receive and consider the proof proposed and to reform – and not only annul – the administrative act challenged.

Finally, there is an ‘exclusive’ jurisdictional competence appearing in those situations in which there is an inextricable connection between a right of subjective nature and a legitimate interest. In these cases the legislation has entrusted, from 1923 onwards, the competence to decide on the issues to the administrative judge with a view to avoid a situation in which the citizen is compelled to start two different legal procedures, and consequently to file two cases.

The principal matter in this type of complaints was the one regarding public employment, until in recent years the labour relations of almost all the employees of the public administrations have been reconduced to the common civil law system and to the jurisdiction of the ordinary judges.

§11. Special Administrative Jurisdiction

328. Since 1998 and especially due to Law No. 205 of 2000, other very broad matters have been entrusted to 'exclusive' jurisdiction of Administrative Judges: so public services, town planning and buildings, and public contracts and also against the decisions of the independent administrative authorities. Furthermore, the Administrative Judge has been given the power to condemn the Administration, which has adopted illegitimate acts, to restore the damages so caused to privates.

In the past, the citizen damaged by an illegitimate act had first to impugn it before the administrative judge, then to ask for restoration before the ordinary judge (and if legitimate interest were damaged, often ordinary judges would deny any kind of restoration). This meant that full restoration was mostly impossible and always extremely slow (it could easily take a decade to end every instance both of ordinary and of administrative judgment). Today, both annulment and restoration can be requested before the administrative judge, which also has a broader array of provisional protection and inquiring powers. This – and many special, quicker judicial procedures – has led to a stronger and more effective protection of private and public interests.

Nevertheless, this system seems to many scholars to have gone a long way far from the one underlying Article 103 of the Constitution. To distinguish between ordinary and administrative jurisdiction, the aforementioned disposition referred first and foremost to the distinction between subjective rights and legitimate interests: exceptions were admitted, only if provided for by law. Now, actually, areas of exception, i.e. of exclusive administrative jurisdiction, are provided for by law: but they are so large, that they have become the main criteria of jurisdiction division, not mere exceptions. But the Constitutional Court that have saved the constitutionality of Law No. 205 with her decision of 2004 (n. 204) prompted the legislative body to arrive to a thorough definition of the matter which took effect from Decree No. 104 of 2010.

In general terms, the approach of our Constitution is contrary to the existence of special jurisdictions of any type (the most dangerous ones are obviously the criminal ones) including the administrative ones. Article 102 of the Constitution establishes an express prohibition to create new special jurisdiction.

Nevertheless, the Sixth *disposizione transitoria e finale* (Provisional and Final Statement) of the Constitution established that the special jurisdictions already existing on 1 January 1948, except the Council of State, the Court of Accounts and the military Tribunals, had to be reviewed within five years (but this has been done far later and in a rather partial and disorganized way).

Meanwhile, many special jurisdictions have been declared contrary to the Constitution by the Constitutional Court on the basis of a lack of independence and impartiality of the judges (this happened, for example, for the municipal councils

on election matters, Decision No. 93 of 1965; for the *Giunte Provinciali Administrative*, Decision No. 30 of 1967; and for the *Consigli di Prefettura* regarding accounting matters, Decision No. 55 of 1966; etc.).

Now we give a short reference to the principal special administrative jurisdictions existing at present.

I. Tax Commissions

329. Tax Commissions are regulated by the Legislative Decrees of 31 December 1992, No. 545 and No. 546, which have reviewed the organs already existing for the settlement of disputes between citizens and tax authorities concerning taxation.

The jurisdiction is organized at two levels: local, before the Tax Commissions of first instance, at provincial level; on appeal, before the Tax Commissions of second instance, at regional level. Against the decision of appeal one can lodge a claim to the Supreme Court of Cassation exclusively about the correct application of Law or claiming that of the reasons given for the decision taken are not adequate.

II. Water Tribunals

330. Concerning a scarce and precious good, the special competence with regard to water has its origin in the particularity of the issues connected with public water regulation. As a matter of principle, water is normally property of the State or other public bodies and can only be conceded to a private for a regulated use. The disputes on this subject are judged by special regional tribunals, which are – actually – specialized sections of the Courts of Appeal existing in each Region's capital. These specialized sections are formed in a manner so as to make good use of the knowledge and experience of technicians (functionaries on the administrative side) together with those of the ordinary magistrates. In Rome there is the *Tribunale superiore delle acque* (Water Supreme Court) that usually operates as the Judge of Appeals and, concerning some minor matters, as the unique judge.

III. Court of Auditors (*Corte dei Conti*)

331. We will examine in a wider way the Court of Auditors – that can also be translated as Court of Counts – when we will analyse the ways and means of the administrative control, whose functions were entrusted to this body of magistrates created a long time ago (see Part II, Chapter 10).

Now we will concisely examine its jurisdictional functions established in Article 103 of the Constitution, and which are exercised by the regional sections and, in second instance, by the central sections or sometimes by the united sections of the Court.

The Court of Auditors has competence with regard to:

(a) the so-called *giudizi di conto* (account trials) which can be started against accountants, treasurers and whoever handles public money and is therefore obliged to give an account for the use he made of it;
(b) the trials regarding the *administrative liability* of functionaries and public managers who, through their conduct – active or by omission, even if not done on purpose but only with negligence (provided that is gross negligence) – have generated damages to the Administration; in this case those persons are bound to indemnify for the damages caused (see Article 28 Const.);
(c) the trials concerning *pension issues* with regard to public, civil and military worker, and war pensions.

IV. Military Justice

331.1. It has competence for the crimes committed by the members of the Armed Forces and has a distinct and somehow specific organization different from that of the ordinary judges. Anyway, its real importance has decreased from the year 2000 when the compulsory military draft was suspended.

Chapter 9. The Constitutional Court

by Marilisa D'Amico

§1. Functions

332. Like the President of the Republic, the Constitutional Court is considered by the Constitution as separate from the three State powers. Its task is to ensure that these powers are exercised correctly and, more generally, that the Constitution is observed.

According to Article 134 of the Constitution, the Constitutional Court's most important function is to review the constitutionality of laws or acts having the force of law (legislative decrees and decree-laws) and to ensure that they conform to the requirements of the Constitution.

Its second task is to settle questions of jurisdiction between the various organs of the State, the State and the regions, and between the regions themselves. The Court must decide which organ has jurisdiction over the contested function or, in case of conflict between the State and the regions, if the State or the region have respectively interfered with regional or State jurisdiction. The third function, exercised by the Court with a different composition, is to try accusations against the President of the Republic for high treason or breach of the Constitution. The fourth function of the Court, as provided for by Constitutional Law No. 1 of 1953, is to adjudicate on the admissibility of referenda aimed at repealing State laws (see *supra*, Part I, Chapter 5).

§2. Composition

333. Since it is supposed to guarantee the protection of the whole Constitution, the Court has a mixed composition and its judges are chosen by three different State powers.

The Court's composition, as well as the requirements for being appointed judge, are a guarantee, on the one hand, of the judges' professionalism and technical skills and, on the other, of the fact that they are not the expression of any political force.

The Constitutional Court is composed of fifteen judges. Pursuant to Article 135 of the Constitution, one-third is appointed by the President of the Republic; one-third is elected by Parliament in joint session and the other five are elected by the members of the ordinary and administrative Supreme Courts. The Court therefore meets two important requirements: it keeps a close link with the organs reflecting representative democracy and it is supposed to be as independent as the judicial power. In order to ensure that the Court's judges possess the highest technical skills, the Constitution states that 'the judges of the Constitutional Court are chosen from among the magistrates of the High and Administrative Courts, including those in retirement, professors of law, and lawyers who have been in practice for a minimum period of twenty years' (Article 135, second clause). In order to grant the stability of the Court and the independence of its judges, as well as a certain degree of

replacement, the Constitution provides that judges stay in office for a long period (nine years) and are not eligible for immediate re-election.

In case of proceedings against the President of the Republic, the Court is enlarged with sixteen persons chosen from 'a list of citizens having the necessary qualification to be elected to the Senate, which Parliament prepares every nine years by means of election under the same procedure used for appointing ordinary judges' (Article 135, clause 7).

334. The procedure for appointing the judges of the court is set out in Law No. 87 of 1953 and Constitutional Law No. 2 of 1967 and can be briefly summarized as follows: judges appointed by the President of the Republic are chosen by an act which can be defined as personal (i.e., by which the President decides personally, without the influence of any other authority). Judges appointed by Parliament, as provided by Article 3 of Constitutional Law No. 2 of 1967, are 'elected by the two chambers in joint session, by secret ballot and the majority of two-thirds of their members', while a three-fifth majority is enough for the votes following the third one. These judges have always been appointed as a result of agreements between majority and opposition parties (although the agreement must be validated by a majority vote).

Judges nominated by the Supreme Courts are elected by three different constituencies, one made up of all the members of the Court of Cassation, one consisting of all the judges of the Council of State and one of all the judges of the Court of Accounts. Three judges are elected by the first constituency and the others by each of the remaining constituencies.

Pursuant to the Constitution, the Court elects from among its own members a President who remains in office for a period of three years and may be re-elected. The President of the Constitutional Court plays an important role, especially in organizing the various activities and assigning the cases to each judge. Every single decision of the Court, however, is discussed and taken by the plenary assembly, following the report of a judge. The decision and its grounds are read and approved by all the judges who are not allowed to express 'dissenting' or 'concurrent' opinions, like in other countries. The choice of the referee, however, plays an important role, especially for minor issues.

§3. The Origins of Constitutional Reviews

335. Before the Republican Constitution entered into force in 1948, there was no judicial review of legislation in Italy, since the 1848 Statute could be amended by any ordinary law. The question of the review of constitutionality was much debated by the Constituent Assembly. Its members saw it as a valid tool for the protection of liberties and had large expectations on the role of constitutional justice.

Many recommendations were made at the beginning as to the kind of control to be chosen. The choice was between a widespread control by all the judges, consisting in ruling that the challenged rule is unconstitutional but only in the particular hearing in which the constitutionality is raised (North American system) and a centralized control by a single body separate from the judicial power, which may

declare that the rule is unconstitutional and therefore invalid, with *erga omnes* effects (the system in force in Austria at that time).

The Constituent Assembly eventually chose the latter solution, which reflected the typical fear of Europeans of giving too much power to the judiciary.

Three proposals were put forward on the ways of raising the constitutionality of norms before the Constitutional Court. The first one was to raise it before a court hearing a particular case (*in via incidentale*). In this case, the decision would have applied only to that particular hearing unless, as proposed by Calamandrei to the second subcommittee, the parties to the hearing during which the constitutionality had been raised would have appealed to the Constitutional Court, which could have declared the norm invalid with *erga omnes* effects. The second possibility, and maybe the most important for the members of the Assembly, was to allow citizens to raise the constitutionality directly, within a certain limit of time (*giudizio in via principale e astratto*). The third and final possibility was that the constitutionality could be raised by a certain number of citizens, regional councils or qualified organs (see Patricolo's project, submitted to the second subcommittee). The question, however, was not solved by the Constituent Assembly, owing to communist opposition to the proposal of the citizens' direct action, for fear that 'any' citizen, for personal interests, might raise the constitutionality of a law of Parliament, thus opposing the will of the representatives of the people.

The decision was eventually taken by the Constituent Assembly by Constitutional Law No. 1 of 1948, which states that the constitutionality should be raised during a particular hearing and be therefore limited to the solution of a defined dispute (Article 1, Constitutional Law No. 1 of 1948). The direct appeal to the Constitutional Court was limited to the disputes between State and regions (see Article 127 of the Constitution and Article 2, Constitutional Law No. 1 of 1948).

This choice limited the potentiality of the review but, at the same time, made judges of ordinary jurisdiction much more aware of the importance of the matter.

Our system, as a matter of fact, entrusts the courts of ordinary jurisdiction with deciding in which cases a question of constitutionality has to be referred to the Constitutional Court.

Adjudication *in via incidentale* seemed the best way to guarantee an intervention of constitutional judges in all the branches of our legal system.

§4. ADJUDICATION *IN VIA INCIDENTALE*

336. The features of our system of judicial review of legislation are largely the result of the above-mentioned decisions.

In order to be admitted to the review of constitutionality, the question must be raised during a particular hearing (*in via incidentale*), i.e. when the law is concretely enforced by ordinary judges. The role of ordinary judges was clear since the first years of existence of the Constitutional Court. There was a fear of the judges refraining from referring the questions of constitutionality to the Court, thus preventing it from adjudicating upon these cases. This fear partially proved to be groundless.

As stated above, the question of constitutionality must be raised during a particular hearing. The Constitutional Court has interpreted the word 'proceeding' in a very broad manner, so as to include hearings before courts of special jurisdiction (Constitutional Court, Decisions No. 6 and 10/1969 and 274/1974), or even before organs which do not have real judicial functions (Constitutional Court, Decisions No. 12/1971, No. 226/1976, No. 384/1991).

The decisions of the Constitutional Court on the matter have evolved progressively, not always in a consistent manner. In order to encourage judges to raise the highest possible number of questions, the Court stated that they could be raised both during a proceeding that could be qualified as a hearing according to the principles laid down by the Court itself, even if the case is not heard by judicial organs (*objective principle*), and during a proceeding before a judicial organ, even if it exercises an administrative function (*subjective principle*) (Decision No. 83/1966).

The Court subsequently reviewed the 'subjective' principle. According to its latest decisions, the matter should only be referred by a judicial body in the exercise of its 'adjudicating' functions (see Decision No. 17/1980, Decision No. 376/2001 and Decision No. 218/2011).

The Court has always recognized the right of bodies such as the disciplinary section of the *Consiglio Superiore della Magistratura* (Superior Council of Judges) (Decision No. 12/1971) or the Court of Accounts when it exercises its auditing functions (Decisions No. 226/1976 and 384/1991) to raise questions of constitutionality. The admissibility of such a referral is substantially due both to the position the Consiglio Superiore della Magistratura and the Court of Accounts have within the legal system and to the type of cases heard by these courts. Therefore, questions which are not usually raised before judicial organs can be referred to the Court for adjudication on their constitutionality. The Court considers the arbitrator also capable to raise questions of constitutionality.

The constitutionality can be raised by one of the parties, the investigating magistrate, or even by the judge (Article 1, Law No. 1 of 1948 and Article 23, Law No. 87 of 1953).

337. The judge of the proceeding during which the question is raised (*giudice a quo*) must, however, verify the existence of two conditions before referring the matter to the Constitutional Court. First, the judge must make sure that the question is essential for the proceeding, i.e. that 'the decision may not be given independently of having resolved the connected issue of constitutional legitimacy of the law' (Article 23, Law No. 87 of 1953).

In other words, enforcement of the rule suspected not to conform to the provisions of the constitution must be included in the reasoning made by the judge to settle the case (see Order No. 130 of 1971). If the question is unnecessary to settle the case, however objectively relevant and well-grounded it may be, it cannot be raised in any way whatsoever. The close link between the settlement of the proceeding and the solution of the question of constitutionality has often been underlined by the Constitutional Court.

The Court has often rejected the reference for lack of relevance or topicality, or because it was tardy or premature, or even too abstract.

It is the judge of the hearing, however, who decides if the question is relevant. The Court verifies, often very thoroughly, that the reasons given by the judge to claim the relevance are plausible. The judge must subsequently verify if the question is manifestly groundless. Judges therefore enjoy high discretionary powers, which they can even use to prevent the Court from adjudicating on the questions of constitutionality. Judicial activities being widespread, however, the question can be raised by any of the judges called upon to enforce a particular rule. Judges, moreover, must explain why they declare the question manifestly groundless (Article 24, Law No. 87 of 1953).

338. If the question is relevant and not manifestly groundless, the judge refers it to the Constitutional Court for adjudication by means of a special *ordinance*, in which he/she explains the limits and grounds of the question by stating which rule is thought to be unconstitutional and which constitutional rules are supposed to be violated. He should also explain why he believes that the question is relevant and not manifestly groundless. The court must therefore adjourn until the final decision of the Constitutional Court.

The order by which the matter is referred to the Constitutional Court is very important because it represents the opening act of the hearing. The object of the proceeding itself, the so-called *thema decidendum*, is defined by this act.

The *thema decidendum* must be clear and cannot be limited to a generic assertion of unconstitutionality of the law by the judge of the case. The judge, moreover, cannot raise questions of constitutionality by proposing two different interpretations of the rule, leading to two different questions, nor just ask the Constitutional Court to solve an interpretative question.

Furthermore, the judge's approach to the question often influences the decision of the Constitutional Court. The Court, however, can modify the judge's general approach and sometimes widen the range of the proceeding by raising itself, before itself, related questions. The order must be notified to the parties and to the investigating magistrate (Article 23, Law No. 87 of 1953) and is published on the Official Gazette, so that everybody (citizens and judges) knows that a question of constitutionality is pending before the Constitutional Court.

Within twenty days of the filing, the parties to the hearing have a right to be represented in the proceeding before the Constitutional Court in order to support their reasons. The prosecutions are not allowed to appear before the Court, because they are not a 'proper part' and have a peculiar role in the criminal proceedings (Decision No. 262/2009).

The President of the Council of Ministers, through lawyers appointed by the government, or the President of the regional *Giunta*, if the question concerns a regional law, have the same right within the same period of time. They all usually defend the challenged rule.

The constitutional hearing thus includes a sort of cross-examination which is not essential, however, to the final decision: in fact their presence is just possible (*Zagrebelsky*) and not necessary.

The Constitutional Court usually does not allow persons who are not parties to the proceeding when the matter is referred to the Court to join it. However, there

have been many exceptions to this rule, since the intervention of subjects bearing relevant interests have been tolerated.

The Court gives judgment in chamber if the parties are not represented or the referral seems to be manifestly groundless (Article 26, Law No. 87 of 1953). In all the other cases, the trial is public.

The Court may carry out preliminary investigations in order to gather evidence, although it has seldom adopted this kind of measures, probably because they cannot be requested by the parties to the constitutional hearing.

§5. Adjudication *in Via Principale*

339. Applying directly the Constitutional Court to have the constitutional legitimacy of a law or act having the force of the law judged is a prerogative of the State and the regions, which can respectively challenge regional or State laws interfering their constitutionally guaranteed jurisdictions.

A constitutional reform (Const. Law No. 3 of 2001) has amended the previous system of direct referral to the Court by making the two procedures uniform.

Therefore, the government can refer a question of constitutionality on a regional law within sixty days from its filing on the only ground that the regional law exceeds its own competence. Regions have the right to challenge State or other regional laws, if they exceed their own competence, within the mandatory time-limit of sixty days from the filing of the referred law.

More precisely, the reference to the Court could be made by Government on the grounds that the law exceeded regional competence in the broadest sense of the word: any breach of the Constitution could justify the challenge. On the contrary, it is necessary that Regions complain the violation of the constitutional rules regarding their own competences (Decision No. 274/2003).

Unlike in proceedings *in via incidentale*, in proceedings *in via principale* the Constitutional Court is seized directly and is the only court called upon to rule on such disputes. The constitutional process is consequently a party process and ceases if the appellant releases the action with the consent of the other party; second, the Court acts as 'court of last resort' (since there may be no appeal against its decisions). Therefore, the Constitutional Court recognized its own standing to make a preliminary request of ruling to the European Court of Justice pursuant to Article 19 of the Treaty on European Union (Decisions Nos 102/2008 and 103/2008).

Finally, in consideration of the nature of party process, the Law No. 131 of 2003 introduced an precautionary power of the Court in the proceeding *in via principale*: it is settled that the Court is able to suspend the effectiveness of the contested act if its execution may present a 'risk of irreparable harm to the public or to the legal order of the Republic', or 'a risk of serious and irreparable harm to the rights of citizens'. This is a very important power that law assigns to the Court, but until now it has been rarely requested by the parties and not yet been admitted by the Court (Decision No. 204/2010).

§6. Effects of Different Types of Constitutional Court Decisions

340. If the reference is allowed, the Constitutional Court may decide that the norm is unconstitutional. Only in cases concerning regional laws challenged by government before those laws are enacted, according to the previous system, the Court's decision of unconstitutionality definitely forbids the promulgation either of the entire law or of that part of the law that the Court has declared null and void. In the other cases the Court's decisions concern laws already enacted and promulgated.

In compliance with Article 136 of the Constitution, decisions of unconstitutionality have *erga omnes* effects.

The possibility of extending the effects of the decision not only to future cases but also to previous ones (with the exception of final judgments) has been long debated.

The solution came with Law No. 87 of 1953, which provides that rules declared to be unconstitutional can no longer be enforced, thus admitting that the declaration of unconstitutionality can also be applied to pending trials, even though they were started before the declaration itself. The retroactive effects of the declaration, after all, are a consequence of the subsidiary nature of the constitutional hearing: it would be illogical to oblige the judge who raised the question of constitutionality to enforce that law, consequently declared unconstitutional, simply because the trial was pending when the Constitutional Court decided: in this case the interest in raising (see Constitutional Court, Decision No. 127/1966).

341. Decisions of unconstitutionality, therefore, also apply to cases started before the ruling of unconstitutionality but yet 'unsettled'.

The question of the limits in enforcing the decisions of unconstitutionality, after all, falls under the jurisdiction of ordinary judges, even though the Constitutional Court has sometimes assumed this task (see Decisions No. 266 and No. 501/1988; No. 50/1989; No. 1 and No. 124/1992, by which the Constitutional Court specified the limits of the retroactive effects of such judgments). There is only one case, provided for by Law No. 87 of 1953, in which the decision of unconstitutionality can be applied to previous final judgments, i.e. when it concerns a criminal rule which led to a final criminal sentence. In this case, the judgment and its effects are no longer valid (Article 30, fourth clause, of Law No. 87 of 1953).

The Court can also reject the reference, although this type of decision does not hold that law to be valid; other judges can raise the same question in a different case and the Court itself can allow it. Only the judge of the hearing in which the question was already raised cannot raise the same question again during the same hearing.

The decision of the Court can also take the form of orders or judgments which do not define the merits of the question but rather settle the proceeding related to the original hearing (the so-called decisions of inadmissibility).

Within adjudications *in via incidentale* these decisions can both be due to the lack of relevancy of the question and to formal defects of the order by which the acts are

transferred to the Court, such as, for instance, the fact of providing inadequate reasons to support the relevancy of the question or its irrelevancy or a wrong submission of its *thema decidendum*. Within adjudications 'in via principale', decisions of inadmissibility can be due, for example, to formal defect of the act of reference or to defect of a real interest of the Regions to protect their legislative competences.

§7. Interpretative and Manipulative Judgments

342. The Constitutional Court has adopted further judgment techniques, going beyond the simple alternative between ruling that a norm is constitutional or unconstitutional. If a rule can have more than one interpretation, the Court may reject the interpretation given by the act of reference, thus rejecting the reference itself not because the question is irrelevant, but rather because it is based on a wrong interpretation. These judgments are called interpretative.

These decisions, however, are not binding for the judges, who are subject only to the law in compliance with Article 101 of the Constitution. If they decide to raise the question afresh, the Court might reconsider the matter and eventually allow the reference by ruling that the norm is unconstitutional.

If questions are raised on the basis of indisputable interpretations usually given by the judges (*diritto vivente*, 'living law'), the Court always allows them, even though it means taking a decision of unconstitutionality.

In the absence of a uniform and indisputable interpretation, the Court, of course, is free to give its own interpretation of the rule. The Court itself has always repeated that judges have the right and the duty to choose among the various interpretations of the law the one which 'conforms to the requirements of the Constitution'.

The Court may also rule that a norm is unconstitutional only in the part in which it states something or in the part in which it does not state something or even in the part in which it states something instead of something else. These judgments are called manipulative.

This 'something' does not coincide with words already contained in the text of the law, which remains unchanged, but rather with new provisions set out in the decision of the Court. This technique has been widely criticized for allegedly invading the field of legislator and judges. In the words of Gustavo Zagrebelsky: 'if the legal system provides for a rule, it is up to judges (all judges) to "draw it from the system"; if such a rule does not exist, it is up to legislator (and nobody else) to introduce one. The Court cannot interfere with the jurisdiction of the courts in the former case, and that of legislator in the latter'.

Vezio Crisafulli replied that the Court does not create new rules but just takes them as they are from the Constitution or the legislative system. The Court has often taken decisions of this kind, especially to avoid the legislative vacuums usually created by mere decisions of unconstitutionality, thus solving the problem of adapting the legal system to the constitutional guarantees without waiting for the intervention of the legislator. The Court did so, for instance, to avoid vacuums in the Penal Code and in the Code of Criminal Procedure, which contain rules introduced before the Constitution and never modified by the legislator accordingly.

The Court's recent tendency is to consider norms unconstitutional in the part in which they do not provide for something, without stating explicitly what should be added but just the general principles that legislators will have to comply with. These judgments might create problems to enforce the norm if the legislative power neglects or takes a long time to re-enact it.

§8. Disputes between State Powers

343. The Court is also charged with deciding on conflicts about the limits of functions between the powers of the State if they break out between organs which are competent to express the will of the power they belong to irrevocably (Article 37 of Law No. 87 of 1953).

If the dispute involves the Government, which has a very hierarchical structure, the executive is represented in the proceeding by the President of the Council of Ministers (see Law No. 400 of 1988 Article 2, No. 3, letter g)). The Court, however, has ruled that the process can be set in motion by Ministers as well, insofar as their individual responsibilities are concerned (Decisions No. 379 of 1992; No. 7 of 1996; No. 200/2006).

As far as the judicial power is concerned, each judge is entitled to set the process in motion, but only 'when exercising their judicial functions' (see Decision No. 87/1978). Investigating magistrates, like the other judges, are denied the same possibility by the Constitutional Court when they do not exercise their judicial functions (Decision No. 16/1979), but they are recognized as 'powers of the state' when they exercise their non-fungible powers of criminal prosecution (see Decisions No. 263, 264, 265, 462, 464 of 1993 and, above all, No. 420 of 1995).

As far as the legislative power is concerned, the two chambers are entitled to set the process in motion (Decisions No. 1150/1988; No. 406/1989; No. 339/1996; No. 132/1997; No. 334/2008), while the same power was denied to their internal organs.

In particular, the parliamentary commissions of inquiry set up under Article 82 of the Constitution were considered by the Court constitutional powers as they necessarily replace the plenum of the two Houses and emanate their powers. The Court also recognized that ceased the Commission of Inquiry, for example because of the expiry of the term, the standing to be a part in the conflict returns to the Chamber (Decision No. 241/2007).

The President of the Republic (Decision No. 150/1980; Decision No. 154/2004; Decision No. 200/2006), the Constitutional Court (Decision No. 77/1981) and the Court of Accounts when exercising its auditing functions (Decision No. 406/1989) have the same power because, although they do not belong to the three classical and traditional powers of the State, they enjoy constitutionally guaranteed functions. The process can also be set in motion by committees promoting referenda, as representatives of the 500,000 voters who signed the request of referendum (see Decisions No. 69/1978; No. 1 and 2/1979; No. 30 and 31/1980; No. 137/2000; No. 198/2005; No. 38/2008). The Court, however, has excluded this possibility if the legislation is likely to undergo further changes after the referendum (Decision No. 9/1997).

The disputed matter must consist in 'the delimitation of the competence of each power of the state pursuant to the Constitution' (Article 37 of Law No. 87 of 1953). This power can either be explicitly set out in constitutional legislation or be inferred from it. It can also be inferred from ordinary laws implementing constitutional legislation.

The proceeding can be initiated not only in cases of alleged abuse of power (*vindicatio potestatis*), but also when the improper use of a power by an organ results in interference with the jurisdiction of another organ (Decision No. 1150/1988 is very clear on this point). This possibility has increased the importance of this legal institution.

The Court adjudicates on the limits of the jurisdiction exercised by the challenged powers and, if a measure was taken in the meantime, the Court declares it invalid (see Article 39 of Law No. 87 of 1953).

§9. Disputes between State and Regional Powers

344. This type of proceedings between the State and the regions can only concern administrative or judicial measures.

In fact, disputes over legislative measures are dealt with by the Constitutional Court according to the rules set by the procedure *in via principale*.

The State can be represented by the President of the Council of Ministers and the region by the President of the *Giunta*.

The measure can be challenged within sixty days from its service or publication (Article 39, first clause, of Law No. 87 of 1953).

This remedy often concurs with the one granted by administrative courts, so entailing a problem of coordination between constitutional and ordinary jurisdiction. In fact, on the one hand no other party than the State and the region is allowed to be represented in this kind of hearing; on the other, there is uncertainty about the limits of admissibility of this type of constitutional proceeding.

The object of the conflict can also consist in a behaviour that interferes with the jurisdiction of another organ (Decisions No. 11 and 12 of 1957).

The Court decides which organ is entitled to the challenged power and, if a measure was undertaken in the meantime, it declares it invalid.

§10. Criminal Jurisdiction of the Constitutional Court

345. The Constitutional Court has jurisdiction over criminal matters as well. It is charged with trying accusations against the President of the Republic for offences committed in the exercise of his State functions: high treason or breach of the Constitution (Article 90 of the Constitution).

The power to try accusations against ministers for offences committed in the exercise of their functions formerly rested with the Constitutional Court, but was transferred to ordinary judges by Constitutional Law No. 1 of 1989, which sets out special provisions on the matter. This power allowed the Court to pronounce its unique criminal judgment in 1979, in the *Lockheed* case. There has been a long

debate over the meaning of presidential offences. Some scholars reckon that they should be treated as ordinary crimes, according to the principle which states that crimes and punishments should be absolutely established by law (Article 25, second clause, of the Constitution and Article 2 of the Criminal Code).

Others believe that the political meaning of these offences demands a certain degree of flexibility when implementing the relevant constitutional provisions.

The President is impeached by Parliament with a procedure consisting of two different stages: the examination by a bicameral committee (Article 3, Constitutional Law No. 1 of 1989) followed by the decision of the assembly.

In case of indictment, a proceeding starts before the Constitutional Court. According to section 13 of Constitutional Law No. 1 of 1953, 'one or more commissioners are elected for the prosecution'.

The Court judges with its 'enlarged' composition (see §2 above). The proceeding consists of the preliminary investigations and the trial. The final judgment cannot be appealed in any way whatsoever.

In compliance with section 13 of Constitutional Law No. 1 of 1953, the Court can enforce criminal punishment, within the limits of the maximum penalty allowed by the legislation in force, as well as by other constitutional, administrative and civil penalties, depending on the type of offence.

The Court's discretionary power in determining these sanctions is therefore very high.

§11. Decisions on the Admissibility of Referenda

346. Besides exercising the powers provided for by Article 134 of the Constitution, the Court also acts as a judge on requests of repealing referenda, in compliance with Article 2 of Constitutional Law No. 1 of 1953. As recognized by the Court in its Decision No. 16/1978, this power is different from all the others, since it consists in a mandatory form of control, an explicit request being absent. Law No. 352 of 1970 describes this decision as a fundamental stage of the referendum; it cannot be omitted without affecting the correctness of the procedure and automatically follows the decision of legitimacy given by the Court of Cassazione. Actually, the Court of Cassazione has to judge the referendum in order to verify its conformity to the provisions of Law No. 352 of 1970; after this first control, the Constitutional Court is automatically involved in the referendum procedure, in order to carry out the control of admissibility of the referendum (for more details on this two-folded control see Chapter 5).

347. With regard to the procedural aspects of the judgment of the Constitutional Court, it could be noticed that, following Article 33 of Law 352 of 1970, the Court decides over the admissibility of referenda without public hearing, but only in Chamber. However, Article 33 of Law 352 of 1970 prescribes that the government, and the Committee or the Regional Councils that have promoted the referendum can introduce written acts in order to defend their reasons. On the contrary, the law neither allows nor forbids oral interventions aimed at illustrating the reasons for the

admissibility or the inadmissibility of the referendum. However, the Court has interpreted the silence of the law on this point in the sense that it permits an oral discussion within the Chamber (see Decision No. 33/2000): the subjects who are mentioned in Article 33 can take part in this discussion before the Court, illustrating the reasons for or the reasons against the admissibility of referendum (see Decision No. 45/2005). As already explained above, these subjects can be the government, the regions, the committees promoting the referendum – as mentioned by Article 33 of Law 352 of 1970 – but the Constitutional case law has extended this opportunity also to other subjects, such as committees against the referendum (see Decision No. 31/2000). In any case these subjects cannot be qualified 'parties of the process' in the technical sense of the word and have not the right to discuss in Chamber, but they are in some way *amici curiae* (45/2005).

If the Court rules a decision of inadmissibility of a referendum, this does not prevent a new referendum concerning the same subject from being proposed again in the future. Because its decision is an intrinsic part of the referendum procedure, the Constitutional Court is deeply affected by the political problems and the tensions often occasioned by referenda. According to Article 2 of Constitutional Law No. 1 of 1953, the Constitutional Court should only verify that the legislation submitted to referendum is not included in the categories for which the referendum is expressly forbidden under the Constitution (Article 75, second clause, of the Constitution), i.e. amnesties or pardons, laws authorizing the ratification of international treaties, fiscal or budget laws. Starting from its Decision No. 16/1978 on, the Court has provided further reasons of inadmissibility (on this subject see Part 1, Chapter 5).

Chapter 10. The Public Administration in the Constitution

by Enzo Balboni

§1. Duties and Powers of the Public Administration

348. The duties entrusted to the State, to its organs as well as to other public bodies have been subject to a continuous expansion specially during the last hundred years. Public duties were once restricted to the national defence, the maintenance of security and public order, the construction of general interest works (roads, bridges, ports and so on) and to the regulation or protection of a few economic activities (special manufactures, internal or international commerce, etc.).

Those duties have subsequently been multiplied, extended and developed to include instruments of cultural and civil growth, economic and social welfare for the benefit of the universal population (for instance, public services such as Education, Transport, Public Health, Social Security, and Assistance of the poors). All these activities and public services were entrusted to public bodies and were – and to a certain extent also nowadays are – carried out by public employees who are part of the Public Administration.

The latter refers not only to the State and its organs (and internal offices) but also to any type of public territorial and/or functional body when it is collectively considered. To those, or better to their activities, it has been granted the distinctive characteristic which makes the difference from the activities of private persons: 'the power to command' that is equivalent to 'power to give peremptory orders'.

This power confers the capability to unilaterally modify the legal position of private persons to whom administrative measures are addressed. This is, of course, the prevailing difference of administrative acts in comparison with contracts which, by definition, requires the mutual consent of two parties placed at the same level.

The main foundation for the Public Administration's power stands on the basic presumption that becomes a principle that it acts for the general benefit of the people: the public interest. Once the public interest is correctly identified and the power is exercised according to the law, the interest of private persons must give way and submit.

This is the so-called authoritative side of the public activities (functions) which presents also a welfare dimension that is characteristic of contemporary democratic States.

Since 1990, many statutes and mainly Law No. 241 of 1990 (the general law on administrative procedure) allow the Administration to make contracts with privates, instead of exerting its authoritative and unilateral powers, when this is not in contrast with public interest. Sometimes, these contracts actually take the place of traditional public acts: sometimes, they only establish some points, the Administration is bound to respect in the exercise of its powers. This has given great momentum to so-called consensual administration, as an alternative way of public activity. It is actually rather obscure whether these pacts are ordinary civil contracts or peculiar public law contracts.

§2. The Constitutional Principles Regulating Public Administration Activities

I. The Principle of Legality

349. The powers of the Public Administration as relevant as above defined could not be justified unless in the frame of the legality principle that in English juridical terms can be squarely defined as the rule of law.

According to this principle, the public activity puts into effect a superior will which has been quite accurately defined in a statute (*legge*) passed by Parliament and through which certain intrusive powers and particular means have been conferred to different public bodies.

According to the fundamental principle of legality, any administrative action must respect the limits established in a general and abstract manner by the law. In fact, those limits cannot be exceeded by the administrative acts which are begotten by the law. When this happens we are in presence of an illegitimate use of power. Therefore the act can be declared void and be annulled.

As we will see later on, the Public Administration must make good use of its power, specially with regard to the remedies which are at citizens' disposal against illegitimate and/or inappropriate administrative acts.

350. The principle of legality is put into effect through many and efficacious means: either at the level of the internal controls of the Administration or through the judicial review operated by special Administrative Tribunals (not to be confused with those of the same name operating for instance in Great Britain) or by ordinary courts.

II. The Principle of Reserve of Legislation (*riserva di legge*) in the Organization of Public Offices

351. In order to complete the indications concerning the principle of legality, we should observe that the Constitution (Article 97) requires that the so-called organization of the public offices must be regulated by statutes, adopted by the Parliament, and not by government within the exercise of its administrative and regulatory function.

We face, therefore, an application of the *riserva di legge* principle. It is common knowledge that this principle refers to the cases in which the Constitution itself requires that a certain question or matter can only be regulated by statute. Consequently, we hold that issue is *reserved to the law*. This choice is made because the Parliament's instrument is considered the most appropriate mean, and the one that better protects the rights of the individuals, in order to regulate certain matters which are deemed to be particularly sensitive and important.

With regard to the organization of the public offices we must make reference to a *riserva di legge* principle considered in a relative way, according to which only the guidelines and the essential elements of the matter concerned are regulated by the legislative branch, whereas the executory and more detailed aspects can be

established by regulations and other administrative acts which stay in the government's domain.

In the last few years, statute law has indeed strengthened the normative power of Administration about the organization of public offices. Nowadays, statute law mostly dictates very broad principles, leaving vast areas of this subject to administrative regulation: often, in order to do so, statute law abrogates pre-existent statutes, only to make room for administrative regulation to take their place (this is the so-called *delegificazione*). Though, many scholars consider this evolution a breach of the *riserva di legge* and a not so appropriate way of enlarging the Executive sphere.

III. Principle of Democracy

352. We should never forget that our form of State is deeply inspired and modelled by the principle of democracy, according to which the sovereignty belongs to the people and is exercised in its name. This is not insignificant: one thing is to have a Public Administration at the service of a State as a property of an absolute king or of a dictatorial regime, and a different thing is to have a Public Administration at the service of a democratic State, that should mean: at the service of all citizens.

Bringing the Administration nearer to the citizen's needs, and more efficient, is the aim of the administrative reforms which have been initiated in the last decades, concerning, among other issues, the legal regime of civil servants, powers and responsibilities of the leading officers and their relations with political organs, the structure of the different Administrations.

According to the principle of subsidiarity, in the last few years a vast reform – known as Bassanini reform, from the name of the Minister who promoted it – has transferred or devoluted a great number of powers to regional and local administration. This and the 2001 reform of Title V of the Italian Constitution (see Part III, Chapter 1), has brought an all-new administrative system, nearer to the people (albeit in its intent) than ever since Italy exists as a single national entity. Whether this will bring an actual increase of effectiveness and democracy in public activities, it is still to determine: but such is the ambitious aim of these reforms that have now constitutional coverage and strength.

IV. Impartiality Principle

353. This principle is expressly established in Article 97 of the Constitution, where it is prescribed that 'public offices are established and organized by the law (i.e., a statute) so that the good functioning and the impartiality of the Administration are assured'.

Accordingly, the Administration when carrying out its duties must exclusively pursue the public interest. There is no room, therefore, for favouritism, arbitrariness or punitive activities against anyone. Everyone must be treated in the same way, respecting the equality principle.

In case of an infringement of this principle, ascertained by the judge, the administrative acts considered to be partial can be annulled.

V. The Good Functioning Principle

354. The Constitution not only places the administrative activity under the law and requires that this activity does not proceed to unjustified discriminations, but establishes a further leading principle: the good functioning principle, in other words: efficiency and good performing. We are actually facing an indefinite concept; yet this encloses the following more specific indications: fairness and correctness during action together with the best use of public means and resources. A particular branch of studies, the science of administration, is the field where are monitored the procedures and techniques suited to improving the quality of public action. Efficiency, however, must never be seen as an end in itself, but as the most concrete, incisive and economic way to achieve general interest.

355. The principles of impartiality and good functioning should gain effectiveness in administrative procedure. Law No. 241 of 1990 has given the general discipline of administrative procedure, that is the sequence of acts and activities that bring to the final decision of the administrative authority. The procedure is open to privates who are interested in that decision: they can read and copy administrative documents and express their opinions, that the Administration is bound to consider in its decision. The decision must be motivated and the beginning of the procedure must be communicated to those who may be interested in it. This allows the Administration to be informed – through the action of interested privates – of all the aspects of the relevant issues and so to reach a more rational and objective decision.

VI. The Principle of Responsibility of the Public Officers

356. Introducing a notable and severe innovation, the Constitution (Article 28) dictates that State and other public bodies officials and employees (i.e., civil servants) are directly responsible, according to criminal, civil and administrative laws, for actions done in breach of a right.

Therefore, a citizen who might be harmed by an administrative act or by an unlawful action which has caused him an ‘unjust damage’ can start legal actions directly against that official. Moreover, since often the official or the employees are not able to respond with their personal properties and goods of the damages they caused, Article 28 states that, in these cases, the civil responsibility is extended to the State and to the public bodies which employ the official or employee who is liable for the damages. As a consequence, in this case, the state (or other public bodies) and the official are jointly liable for damages.

VII. The Principle of the Respect of the Balance of the Budget

357. A very new provision recently approved and due to be enforced from 2014 requires, in general terms and according to EU rules, that all actions of the Public Administration should be carried on respecting the principle of the balance of the budget and the sustainability of the debt.

VIII. The Access to the Public Offices on the Basis of the Equality Principle

358. Article 51 of the Constitution establishes that: 'All citizens of either sex can have access to public offices, included the elective ones, under equal conditions and according to the requirements established by the Law.' This is a specific application and confirmation of the equality principle contained in Article 3, specially relevant regarding the access to working activities.

In relation to offices subject to election some recent electoral laws, had established, for promotional purposes, that both males and females had to be included among candidates both for the municipal, provincial or regional assemblies and for the Parliament. Nevertheless, a 1995 decision by the Constitutional Court (No. 422) has declared unconstitutional this situation (the quotas), for breach of the principle of equality, but the male – female ticket was restored in recent municipal elections.

It may be of interest to underline that the 2001 reform of Title V of Italian Constitution has specifically bound (Article 117, VII paragraph) regional statute laws to positively promote woman equality in the access to elective public offices. A similar but wider provision is under discussion in Parliament as for the revision of the before mentioned Article 51).

IX. The Principle of Open Competition for Access to Public Offices

359. In order to grant access to public offices to the best among the applicant citizens, the admittance to the Public Administration as a civil servant is subject to an open competition. Likewise, all citizens meeting the requirements requested and wishing to apply compete on equal terms and on an equal status and the most competent, able or appropriate should result (hopefully) winners (Article 97).

However, the Constitution, as an exception to the rule above described, provides the possibility of accessing to public offices without an open competition, in cases provided by statute Law.

Nevertheless, in the last few years it has gained consent to the idea that politic bodies and offices – and especially the political head of administration at each government level – centrally or locally should be able to freely choose top-level public bureaucrats on a contract base of some years duration. So, the so-called spoils system has been accepted in recent statutes as an exception, allowed by the Constitution, to the principle of access to public offices by competitive examination (concorso). One must admit that this practice has highlighted various abuses.

X. The Decentralization and Autonomy Principles

360. The Constitution include among the 'fundamental principles' enshrined in the first twelve of its articles those referring to the administrative decentralization, regarding the services which are the responsibility of the State, and those devoted to promote and bring forward 'the local autonomy' with a general view to foster the institutional pluralism. For a detailed analysis of these principles we refer to Part III, Chapter 1, dedicated to regional, provincial and municipal autonomies.

XI. The Principles Assuring 'Justice' in the Administration

361. As a further implementation of the principle of legality it is provided that all administrative acts issued by the Public Administration can be submitted for a review by an Administrative Tribunal or in a first jurisdiction or in appeal by the Council of the State. Furthermore, the administrative bodies are often organized in such a way, that their acts can be submitted for an internal re-examination by an administrative authority different from the one that issued them.

With regard to this subject that is of particular importance we refer to Part II, Chapter 8.

§3. Administrative Organs with Consultative and Control Functions

362. In addition to the organs of active administration of the State, with the Government and ministries at the top of the hierarchy, which we examined in General Introduction, Chapter 2, besides the territorial public authorities established or recognized by the Constitution (the regions, the provinces, the municipalities and now the metropolitan cities) entrusted with public duties characterized by the principle of political and administrative autonomy, which will be examined in Part III, Chapter 1, and lastly, in addition to the peripheral bodies of the central State organization, two other peculiar subjects are part of the Public Administration and both combine an administrative and a judicial function.

The two institutions are the Council of State and the Court of Counts which, first of all, are established and regulated at constitutional level. Both carry out two separate functions: a legal, administrative and consultative function for the benefit of Parliament and government, on the one side, and that of a special jurisdictional body on the other side (Article 100).

Let us analyse briefly these two institutions.

I. The Council of State

363. The Council of State was established in Savoyard Piedmont in 1831, following the Napoleonic model of the French Conseil d'Etat. Also at our days the Council of State is the top-level legal-administrative advisory institution in Italy.

In addition, it carries out very important functions for the safeguard of justice in the exercise of the administration. In fact, as we will see in the chapter dedicated to administrative justice, it is for the Council of State to issue final decisions with regard to the recourses submitted by private citizen or by public entities against administrative acts deemed to be unlawful or grossly inappropriate.

The Council of State enjoys a remarkable and well-deserved good reputation. Even if its role commands to be careful of the State and Government demands and necessities, its advices and its decisions usually show competence, solidity and impartiality and are received with respect and attention.

The Council of State performs its advisory function through three of its six sections (the remaining perform jurisdctional functions). Each section consists of a President and of at least seven councillors. In cases of complicated or very relevant matters, the Council of State may exercise these functions through the full Assembly (*Adunanza generale*) of all three advisory sections.

Half of the members of the Council of State come – following an internal promotion procedure – from inside: that is from the Regional Administrative Tribunals (TAR) and a quarter are chosen through a very selective public open competition of a double grade.

The last 25% of the councillors are discretionally nominated by the Government among persons who, considering the activities, experiences and studies they carried out, fulfil the suitability and quality requirements. The law guarantees the independence of the members of the Council of State before the Government. Measures concerning the career and specific charges of the councillors are adopted by a body whose head is the President of the Council himself, and most members of which are elected by the magistrates of the Council and of administrative tribunals, except for four of them who are appointed by the Chambers of Parliament.

364. The Council of State is asked by the Government to give legal opinions (*pareri*) on administrative matters. This is a general power that can be exercised anytime without any particular provision. However, the most important cases in which the Council of State intervenes are provided for by the law. In this situation, a difference should be made between facultative and mandatory opinions. The latter, if provided for by the law, must always be requested, otherwise the act, adopted without hearing the opinion required, could be annulled on the grounds of infringement of the procedure.

A mandatory opinion is required in the following case concerning:

(1) every administrative general regulation adopted by the Council of Ministers or by any single Minister and every *testo unico* (a compact text that collects and coordinates all the existing primary and secondary regulations about a single subject);
(2) decrees deciding the extraordinary petitions addressed to the President of the Republic for the annulment of illegitimate public acts;
(3) general ministerial guidelines for public contracts.

In the past, the Council opinion was requested for a much wider range of acts: nowadays, statute law trend is to reduce preventive controls on public acts and to enforce general management controls, such as the one of the Court of Counts.

Sometimes, the opinion is considered to be binding or partially binding. When it is binding (e.g.: in the very rare cases when the Government decrees about the reacquisition of Italian citizenship, after it has been lost) the opinion must be followed. Again in the case of extraordinary petitions to the President of the Republic: *ricorso straordinario*, the opinion of the Council must be followed.

The several provisions concerning the administrative functions of the Council of State were included in the *Testo Unico* No. 1024 of 1924 and in its implementing and/or amending regulations.

II. The Court of Auditors

365. The Court of Auditors is, like the Council of State, an independent body with a long and solid tradition. Moreover, like the Council of State it enjoys a remarkable reputation.

Like the *Consiglio di Stato*, the *Corte dei Conti* carries out two different types of functions: a control function and a jurisdictional one. The latter is exercised on the following matters: public accounting, civil and military pensions and public employees responsibility towards the Public Administration and is treated in a different place where we deal with the administrative jurisdictions.

366. As a preliminary remark, we should only note that each control function is, essentially, a review of the act issued by an independent and specialized body from the point of view of legitimacy and/or the correct exercise of discretion.

With regard to the moment when the control is exercised, we can distinguish between a preventive and a subsequent control on the performance of the executive power in a wide sense.

Considering the total of fourteen sections of the Court of Auditors, only three administrative ones carry out control functions in form of control; the other eleven sections exercise jurisdictional functions.

The head of the Court of Auditors is its general President but each section has its own President assisted by councillors (*consiglieri* and *referendari*); the *procuratore generale* exercises the functions of a public prosecutor (*pubblico ministero*) supported by the vice-*procuratori*.

The members of the Court of Auditors – whose title is magistrates – are generally designated on the basis of an open competition (*concorso*).

Nevertheless, a certain number of councillors (up to half of the members) can be appointed among experts chosen by the Government by a resolution of the Cabinet. One must underline that is a relevant and unusual power.

367. The Constitution (Article 100) and the law guarantee the independence of this institution and also provide that the members of the Court of Auditors are basically irremovable, enjoying a status equivalent to that of ordinary judges.

A special independent board – whose Head is the President of the Court himself, and most of which members are elected by all the magistrates of the Court (the '*Procuratore generale*' is a member as well), except for four of them who are appointed by the Presidents of the Chambers of Parliament – deliberates about measures on appointment, specific charges and career of the magistrates of the Court.

368. Article 100 of the Constitution states that the Court of Auditors carries out the control over the legitimacy of governmental acts.

The laws which regulates this matter indicate the acts subject to control. In particular: government decrees deliberated by the Council of Ministers; regulations; contracts exceeding a certain (large) amount; general instructions upon administrative activity.

Given the preventive nature of such a control, the act subject to it does not come into effect – therefore it cannot be enforceable – unless the Court of Counts gives its visa (*visto*).

Usually, the acts are submitted to the Court by the different Ministers at an internal office, specially created for that purpose, entrusted to a Court of Auditors councillor.

If the councillor makes remarks, he sends the act to the section with control functions for a motivated decision on the point.

In case the decision confirms the remarks raised, the Minister concerned can:

(a) accept the remarks and, consequently, modify the act following the indications given by the Court of Auditors;
(b) prompt to issue a motivated resolution by the Council of Ministers ordering the Court of Auditors to carry out the act anyway.

In the latter case, the Court of Auditors proceeds to the registration 'with qualification' – in legal wording – of the act subject to its control. As a consequence, the Court of Auditors will fortnightly transmit to the Parliament the list of the decrees recorded 'with qualification'.

This allows the Parliament – specially the Opposition – to ask the Government to answer during Question Time and give justification for its conduct.

However, it is important to underline that the cases of an act being registered with qualification are few. In any case, the Court of Auditors' watchdog function is noteworthy and causes a sound awe.

369. Article 100 of the Constitution specifies that the Court of Auditors carries out a more important subsequent control on the administration of the State budget. The subsequent control takes place once the administrative acts have been entered in force.

Every year the Court of Auditors is requested to issue a report on the regularity – which is called the *parificazione* of the final balance – and of the property accounts of the State.

This is the stage in which the Court of Auditors experiences the most suggestive nature of its power: that of matching cold budget figures and estimations with the point of view of political opportunity, expediency and efficiency. Furthermore, Law

No. 20 of 1994, states that the Court of Counts carries out a subsequent control on the administration of the budget and of the estates of all Public Administrations, included the autonomous ones, as well as a control on the expenditures of EU's funds. The Court of Auditors therefore controls the legitimacy and regularity of the acts of administration as well as the performance of every administration's internal controls. Besides, the Court of Auditors assesses, even on the basis of other controls, the compliance of the administrative activity with the objects established by the law while estimating, from a comparative point of view, costs, means and timing of the performance of the administrative action. The Court of Auditors sets out, every year, the programmes and landmark criteria to which it refers while exercising its control function and issues a general report for the Parliament. Finally, the Court of Auditors takes part, in the cases and in the ways which are regulated by the law, in the subsequent control on the financial administration of those bodies to which the State grants ordinary financial contributions (thus, excluding occasional or extraordinary ones).

Also in this case, the main function of the Court of Auditors is to control the good use of public money and to refer about it to the Parliament.

Finally, we must refer to the constitutional innovation arisen from the review and integration of Article 81 Const., which requires the balance of the State budget. The constitutional law that must be approved in consequence of this new provision shall not ignore the prerogatives of this relevant body.

§4. The National Council of the Economy and Labour (CNEL)

370. Given the difficulties to find a better position, we shall follow the order of the Constitution which place in the same section (at Article 99) the basic regulations concerning another auxiliary organ of the State with consultative function for the benefit of Parliament and Government: the National Council of the Economy and Labour (CNEL).

The CNEL was established in Italy in 1957 and its regulation was modified and rationalized by Law No. 936 of December 1986.

This body updates an old and, to a certain extent, an unusual and sometimes dangerous idea (that of an organic representation of the productive categories: workers and entrepreneurs) and resumes some experiences which took place between the two World Wars in the Weimar Republic, in France and during the Italian fascism (the corporative experiment of the 1930s).

Its members are: the President, ninety-nine representatives of the categories producing goods and services in public and private sectors and twelve experts, to be nominated among exponents of economic, social and legal culture.

The appointments are made by a decree of the President of the Republic upon a resolution of the Council of Ministers. Members hold office for five years; there is an incompatibility between the position of CNEL's members and that of member of Parliament.

371. The government and the Houses of Parliament may ask the CNEL for opinions and advice on the matters which involve guidelines on economic, financial and

social policy and, generally, on every issue falling within the field of economy and labour.

On its own initiative, with regard to the same matters, the CNEL can address to Parliament and to the Government its evaluations and suggestions, as well as it can propose legislation, in this way exercising its own legislative initiative.

This power is relevant from a constitutional point of view, but it has actually been exercised only on a few occasions. As a matter of fact, the CNEL has never really taken off because of the little political attention paid to it by the social parts. Effectively, both the trade unions and the organized entrepreneurs have preferred to negotiate directly in a reciprocal way and with the Government taking part as an high guarantor.

After the more recent legislative review, the CNEL has, to some extent, regained momentum and importance as an institution able to develop a serious analysis in the field of employment and economics, as well as a laboratory of agreements between the productive forces of the nation, even beyond the narrow borders of strict economic matters. Nevertheless, the political importance of CNEL is not relevant and sometimes someone calls for its suppression.

§5. The Independent Administrative Authorities

372. In order to meet a need that can no longer be disregarded in several market economies, including Italy over the last thirty years, several administrative commissions following the anglo-american model have been created. They have been designated with different names and competences but they have in common, at least, the following characteristics: they carry out, independently from the Government and ministers' activity, a regulatory and surveillance function with regard to important economic sectors with a view to guarantee that those operating in the economic scene behave with loyalty, fairness and honesty in order to maintain a real competition among them, and taking into account the consumers' and users' interests.

It is sufficient to indicate here the essential elements of the main recently established authorities, taking into account that they are composed of few members chosen from personalities with specific and ascertained professional qualification and experience and with undisputed morality and a strong sense of independence.

The members of the authorities are usually nominated by the President of the Republic following the proposal of the President of the Council of Ministers after a deliberation by the Council.

Sometimes the Parliament also takes part in the nomination through the power of designation held by the Presidents of both Houses.

373. Somehow, the Bank of Italy may be considered a forerunner of such authorities. It enjoys a sound and solid tradition of independence from government and Parliament. Its Governor is appointed by the Government for six years renovable only once. Nowadays, after the creation of the European Central Bank, the Bank of Italy has lost the monetary function ('coining') but still performs relevant surveillance functions on the banks and the entire credit function.

Law No. 216 of 1974 (subsequently amended and updated) created the CONSOB (*Commissione nazionale per la società e la borsa)*: a kind of watchdog on Stock Exchange and related markets. The CONSOB is entrusted with the delicate and extremely important mission of surveillance of the best fairness and accuracy of shares, stocks and bonds and of the activity of the companies whose securities are object of daily quotation at the Stock Exchange. The CONSOB can take all the measures deemed necessary to guarantee the transparency of the information and the fairness of the transactions on the markets. It can do so quickly if necessary, through handful of provisional orders.

Law No. 516 of 1987 created the ISVAP (*Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo).* The ISVAP has the objective of controlling those private companies that sell insurance and related finance products.

374. Nowadays, in the political and economical field, the mass media (television, radio, internet, newspapers and periodicals) are of extreme importance in the information (and manipulation) of the public opinion. The producers of mass communication include public entities (RAI-TV) as well as big private entities.

In the field of the mass communication media, it is necessary to control the concentrations and, in general, to supervise the maintenance of an effective competition in the system in order to assure that different opinions can be expressed and to guarantee the objectivity (at least in a tendential way) of the information. In that field, regulatory and surveillance duties are now entrusted to the *Autorità per le garanzie nelle comunicazioni* provided by Law No. 249 of 1997.

375. An important role is given to the *Autorità Garante della Concorrenza e del Mercato* – also known as the Anti-trust Commission – created by Law No. 287 of 1990.

As its name suggests, the main duty of the Commission is to control the enterprises operating in the market in order to prevent any company or economic entity from abusing of monopolistic or dominant positions in the market. To this end, the Commission has the power to prohibit certain conduct and to issue regulations and harsh fines as well as offer its professional opinion on questions of concentration.

376. Law No. 675 of 1996 has instituted the *Garante per la protezione dei dati personali*, that oversees the protection of personal information handled both by private and by public powers. In the last years almost every organization, private or public, has had to deeply change the management of information about physical persons, so as to comply with the strict regulations of the Authority, which has also the power to inflict sanctions on trespassers (up to the complete prohibition and block of every data management).

377. We should consider, lastly, the *Autorità per l'energia elettrica e il gas,* created by Law No. 481 of 1995, with a view to regulate and supervise, also for the protection of users and consumers, these very important sectors of the national economy and the associated public services. This authority is the only one located in Milan, all other have their head offices in Rome.

Chapter 11. The Budget Process

by Valerio Onida

§1. The Budget

378. On the subject of the budget and public spending, the Italian Constitution has adopted the basic rules typical of all democratic States (and already existing in the constitutional system prior to the Republic), according to which Parliament is responsible, on the one hand, for basic decisions of a legislative nature in matters regarding taxation (Article 23, 'No personal service or payment may be imposed, save according to law'), and on the other hand, an annual law is required to pass the State budget, an accounting document which analytically shows all revenues and expenditures forecast during the fiscal year, and states the conditions for the administration's use of the powers of financial management, particularly the spending powers (Article 81).

379. Constitutional Law No. 1 of 20 April 2012 *(Introduction of the principle of a balanced budget in the Constitution)* has amended the Constitution's Articles 81 (about the National budget), 97 (on the obligation of public administrations, including non-governmental ones, to ensure balanced budgets and the sustainability of public debt), 117 (on the 'harmonization of public accounts' as a matter of exclusive competence of the State) and 119 (on regional and local finances and the obligation to ensure balanced accounts and to comply with the constraints imposed by EU law). It has introduced in the Constitution the principle of a balanced budget, in accordance with the provisions of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union agreed between the countries in the Euro area and another eight EU Member States, according to which (Article 3, paragraph 2) the 'Contracting Parties' undertake to put into effect the balanced budget rules 'through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'.

380. The new constitutional law provides that 'the State guarantees the balance between revenue and expenditure in its budget, taking into account the adverse and favourable times in the economic cycle' and that 'borrowing is only allowed in consideration of the effects of the economic cycle and, with the approval of the Upper and Lower Chambers by absolute majority of its members, when exceptional events occur' (new text of Article 81, first and second paragraphs).

It also provides (new sixth paragraph in Article 81) that, with the law passed by an absolute majority of members of each Chamber, there will established 'the content of the budget law, the fundamental rules and the criteria for ensuring the balance between revenue and expenditure in budgets and the sustainability of debt by the entire public administration'.

The law for change to the constitution will only apply from 2014, and until such time the previous text will remain in force. The law stated in the sixth paragraph of

Article 81 was finally approved by the Senate on 21 December 2012 and will be applicable as of 1 January 2014 or, for some parts (regarding balancing of budgets by the local authorities and the content of the budget law), as of 1 January 2016. Therefore, at this juncture, the rules covering the Italian budget are in transition from the previous to the new order.

381. According to Article 81 of the Constitution, the budget is annual, is prepared and submitted by Government and is approved by Parliament which passes a specific law. Article 81 states that such approval must normally occur prior to the beginning of the financial year to which the budget refers, failing which, if the approval is not given in time, a special law has to authorize the so-called 'provisional budget period', lasting a maximum of four months (since the financial year now coincides with the calendar year, the temporary financial period may not go beyond 30 April). The law today requires the annual budget to be accompanied by a multi-year budget showing revenue and expenditure forecast for three years (see Law No. 196/2009, Article 22).

382. The Constitution does not specify how the revenues and expenditures should be broken down in the budget. In traditional accounting systems, the basic unit of the budget is represented by the single 'item' of revenue and expenditure: as regards expenditure, the amount shown under the item represents the maximum ceiling not to be exceeded by the administration. The parliamentary approval – and therefore the need to have recourse to a Law in order to modify them – concerns larger amounts (types as regards revenues), projects (grouped into 'missions', indicating the main tasks and the strategic objectives) as regards expenditure; each programme is entrusted to a single responsible office for management. The units are divided into items by an administrative process entrusted to the Ministers, who can vary them, within each unit even after the parliamentary approval. The units and the items are classified according to criteria of functional and economic analysis.

Corresponding to each large division of the administration (Prime Minister's Office and ministries) there is a table of expenditures, approved as a special section of the budget law.

The revenues and expenditures are today represented both on an accrual basis (i.e., entering to the budget the amounts which are expected to become payable to Government during the year, and those in respect of which the administration is authorized to undertake financial commitments during the same year), and on a 'cash basis' (i.e., indicating the amounts which are, respectively, expected to be received and paid out during the year). The accrual basis financial situation may break-even, or close with a surplus or a deficit: in the latter case the government must obtain funding for these expenditures through the financial market, in other words, through an increase in the public debt.

383. Each year Parliament is also called on to approve the final report or statement of accounts, showing the revenues and expenditures relating to the last fiscal period and the financial results for such period. Again, this report is drawn up by Government, based on data produced by the administration. It is then audited to ensure its credibility and compared to the budget by the accounting supervisory

authority, the Court of Auditors (*Corte dei conti*), by means of a jurisdictional procedure (so-called 'parificazione', i.e., equalization), and is then submitted to Parliament for approval by a special law. The approval of the statement of accounts does not, however, condition the work of the administration, and may therefore be delayed without immediate consequences.

384. Under the Constitution, the laws passing the budgets and final accounts are subject to the ordinary approval procedure on the part of the two parliamentary assemblies (hence they may not be enacted by the committees, Article 72, paragraph 4), and are not subject to repeal by referendum (Article 75, paragraph 2). Clearly, since they are instruments of parliamentary direction and control on the executive authority, the budget laws could never be enacted by Government either under delegation of the Parliament or as an urgent measure by decree-law, even if this is not explicitly stated in the constitutional text.

§2. Other Financial Acts

385. Since the budget is passed by issuing a law, which is the same type of formal act whereby Parliament exercises its primary legislative authority, and in order to avoid confusion between the budget decisions and the legislative decisions relating to individual revenues or expenditures (the so-called *cavaliers budgetaires* of parliamentary tradition), the Constitution had established that the budget law might not 'establish new taxes and new expenditures'. This provision has been repealed by the new text of Article 81 resulting from the Constitutional Law No. 1 of 2012.

386. However, the need to boost the rationality of the decisional process relating to the budget and public spending pushed in the sense of providing an annual legislative tool that could introduce into the system the changes in existing laws needed to achieve the objectives of the budget 'manoeuvre', producing an amending effect (in fact, in recent years, mostly increasing revenues and curbing expenditures) compared to the tendential results for the period, i.e., those that would result from no change in legislation. For this reason, from 1978 it was provided that the budget process would take place through a coordinated series of instruments of which the annual budget forecast was only the end result. Specifically, it was expected for there to be an annual approval of the 'finance law', aiming to establish the principal elements of balance in the annual budget, the annual amounts of multi-year expenditures, the funds set aside for approving new expenditures, and also the legislative measures designed to adjust the revenues and expenditures of the State to conform to policy objectives**.** The parliamentary debate on the finance law took place, as regards both Chambers, in a special budget session and was normally concluded prior to the beginning of the year. Immediately after the finance law the Chambers approved the annual budget law, the significant contents of which were however conditioned by those of the finance law.

The finance law was not in fact restricted by the veto as regards imposing new taxes and new expenditures, which the Constitution imposes (before the 2012 reform) as regards the budget law.

387. Very often in the past years, the administrations and members of Parliament tended to include a variety of legislative contents in the finance law, also through amendments during examination by Parliament, even though these may not be related or not directly related to the financial profiles of the budget manoeuvre: hence reforms of the administrative departments affected by public spending, organizational reforms, delegations to Government for new legislation, specific spending decisions in the various sectors. The financial laws thus became the main venue not only for an annual debate on government policies, and for Government talks with its majority, but also for the negotiation of special individual measures with parliamentary groups and economic and social forces. This was due above all to the fact that the financial law has a privileged course in Parliament, relatively guaranteed as regards its definition times, and regarding which there is a maximum political commitment on the part of the Government and the majority, also with recourse to the question of confidence (see Part II, Chapter 6), sometimes placed on Government amendments grouping, to subject them to a single vote, a multitude of different legislative provisions (hence the case of laws issued with few sections, each of which comprises hundreds of clauses). The finance law thus became a convenient 'convoy' to which 'cars' of legislative and spending provisions could be attached, which would otherwise have had greater difficulty or scarce possibility to pass parliamentary examination.

This, however, was causing the legislative process to become muddled and less transparent.

According to a legislative reform in 2009 of the finance law it was renamed the 'stability law', and it had to contain 'solely rules aimed at achieving financial effects starting in the three year period covered by the multi-year budget', excluding 'laws delegating to the Government or of organizational character' and of 'measures of a local or micro-sector nature' (Article 11, Law No. 196 of 2009).

388. The constitutional reform of 2012 has, however, abolished the rule whereby the law approving the budget 'cannot establish new taxes and new expenditures'. Consequently, with effect from 2016, it will be the budget law that contains the legislative provisions that previously formed part of the 'finance' or 'stability' law. It will contain provisions 'regarding revenues and expenditures relating to quantitative measures for achieving the policy objectives', and will specifically contain the provisions relating to revenues and expenditures 'with financial effects starting in the three year period considered by the budget', while it cannot contain 'laws delegating to the Government or of organizational character, or measures of a local or micro-sector nature.' In essence, it will also replace the finance or stability law (Articles 15 and 21, paragraph 2, law approved on 21 December 2012).

389. According to current regulations, the Government has to present to the Chambers by 10 April each year the 'Document of Economy and Finance' (DEF) in order to conduct non-legislative parliamentary deliberations, and by 30 April it presents to the Council of the European Union and to the European Commission the 'Stability Programme' and the 'National Reform Programme'. The DEF contains the schedule of the Stability Programme which sets out the objectives of economic policy, the framework of economic and public finance provisions for the following

three years, the policy objectives, the trends predicted according to current legislation, and also the National Reform Programme which also indicates the state of progress in the reforms started, the priorities of the country and the main reforms to put in place.

By 20 September, the Government has to present an 'Update Report' on the DEF to Parliament for its deliberations; and by 15 October, the bill for the Stability law (which is due to disappear) and the bill for the State Budget.

§3. The Financial 'Cover' of Laws Providing for New Expenditure

390. The budget as such, even if a law is issued to approve it, does not on its own constitute a sufficient base for the administration to collect revenues and arrange the expenditures: both revenues and expenditures must be based on existing legislation (amended and completed as appropriate by the annual legislation, or, in the future, by the same budget law). Reference is made in the Constitution to all the laws which give rise to a new or additional expenditure with respect to that resulting from previous legislation (Article 81, new text, paragraph 3), stating that they should 'set forth the means' for covering the expenditure in question. This is a constitutional provision intended to avoid Parliament being able, through spending legislation, to negatively impact the balance of budgets without taking on responsibility for the measures needed to reinstate the same. It does not, as such, preclude recourse to public debt, and hence to deficit spending policies, but requires Parliament to explicitly assume responsibility when deliberating a new or additional expenditure; and moreover, after the reform of 2012, compliance is required with the criteria and parameters related to balancing the budget, according to the European rules.

391. This constitutional obligation (breach of which has on several occasions given rise to the remittance of laws to Parliament by the President of the Republic – see Part II, Chapter 2 – and to statements concerning the constitutional illegitimacy of laws, especially regional laws, on the part of the Constitutional Court) is necessary whenever the new or additional expenditure is intended to weigh on the budget for the period underway at the time of approving the law, or when it will weigh on the budgets for future periods (not only those considered in the multi-year budget), running the risk of jeopardizing their equilibrium. This is extended to all government and regional legislative measures, as well as those imposing new or additional expenditures charged to the budgets of other entities of the so-called enlarged public sector (regions, provinces, municipalities and other public authorities) and also to the laws which reduce the revenues.

The indication of means may consist in the utilization of any kind of revenues, or in the reduction of other expenditures, or even of funds already set aside in the budget to cover the new expenditure. 'Recourse to borrowing for operations relating to financial items' is not allowed, unless having to deal with 'extraordinary events outside the control of the State, including serious financial crises or serious natural disasters, with significant effects on the country's overall financial situation' (Article 6, law approved on 21 December 2012).

392. The constitutional obligation to indicate financial cover for the new or additional expenditures is integrated with the parliamentary regulations aiming to make it more difficult for the Chambers to approve legislative provisions without correctly complying with this obligation, through the opinions of the budget committees, which may only be opposed with the vote of the plenary assembly. However, despite the existence of the said obligation, over time a sizeable public debt accumulated – perhaps because the obligation was not always correctly observed, with insufficient or contrived forms of financial cover, and partly because it was unsuitable to contain the higher expenditures, sometimes subject to automatic increase mechanisms, finally financed using the debt – and the interest charges, especially in times of high inflation, largely contributed towards maintaining and increasing the budget deficit situation. In recent years, there have been many attempts to correct this with widespread restrictive financial manoeuvres, aiming, through increased taxation and other revenues, and cuts and delays in spending, to eliminate the 'primary' deficit (i.e., that caused by the imbalance between revenues and expenditures, net of interest on the debt), and start reducing the public debt: but until now, even due to the economic and financial crisis burst in 2008, the debt reached the 120% of the gross domestic product. The new text of Article 81 of the Constitution binds now Government and Parliament to meet the new constraints of the budget balance and debt reduction.

393. However, it is presently hard to predict how and to what extent it will be possible to effectively guarantee at a constitutional level – apart from the obligations and penalties that may come from the institutions of the European Union – compliance with the new constraints in preparing legislation and budgets, given the nature of these constraints and given the ways in which the Constitutional Court may be called to deal with the matters concerned. In Italy, access to the Court is still limited (except for disputes between State and Regions in which the national and regional governments may respectively challenge acts by the Regions and the State) to judges who, in the course of proceedings, may raise questions about the constitutionality of laws in exceptional proceedings, as well as to State bodies that have constitutional powers in case of conflict of powers between authorities (see Ch. 9, §§4 and 9).

Part III. The State and its Subdivision

Chapter 1. Regions and Local Authorities

by Paolo Cavaleri

§1. Regional and Local Self-governing Authorities in the Italian Constitution

394. The complex system of territorial autonomies described in the Italian Constitution of 1948 has recently undergone a major reform. Constitutional Law No. 1/1999 makes changes to the governance and statutory autonomy of the Regions, and Constitutional Law No. 3/2001 (confirmed by popular referendum) has radically changed Title V of Part II of the Constitution and redesigned the form of the State, significantly reinforcing the role of regional and local autonomies. As administrative authorities, the Regions, Provinces, Communes, and Metropolitan Cities all management the interests of their communities through the election of representative bodies, but have very different historical points of departure. The Regions are relatively young, dating back to the 1948 Republican Constitution, which made legal provision for five regions with special statute (Article 116) and fifteen regions with ordinary statute (Article 131). The Provinces are the result of a process of institutional evolution, and started as territorial authorities grafted onto the old administrative constituencies during the monarchic-liberal period and now cover the competences of many secondary State institutions, such as the Prefectures, the Superintendences of Finance, and Local Education Authorities. The Communes existed long before Italian Unification, and were modelled on a pattern of local authorities dating back to the French Revolution and based on two principles: the institution of a municipality for each local community, however scarcely populated; and the introduction of a unique legal status for the Communes, regardless of the differences among them in terms of size, geographical location, economic situation, or historical traditions. Finally, the Metropolitan Cities, for which provision was first made by Law No. 142/1990, are even more recent but only assumed constitutional significance following the 2001 reform. They have never been effectively realized, Article 23 of Law No. 42/2009 (see at §9) provides that, on proposal from the Communes and Provinces concerned, subject to popular referendum, in each of the areas around the main Italian cities, a Metropolitan City can be instituted, which will acquire the functions of the Province and adopt a special regulation. For the capital Rome, a special regulation is to be adopted and was recently defined by

Article 14 of the same Law No. 42/2009 and by the subsequent Legislative Decree No. 156/2010.

395. The reform of Title V of Part II of the Constitution appears to place all territorial authorities on the same level. Indeed, the new text of Article 114 asserts that the Republic, apart from the State, is constituted by, rather than 'divided into', Regions, Communes, Provinces, and Metropolitan Cities, which are defined as 'autonomous authorities with their own statutes, powers and functions according to principles set out in the Constitution'. This may appear to be a significant innovation with respect to the preceding constitutional framework, where only the autonomy of the Regions was defined directly by the Constitution, at least in its key features, while the autonomy of the other territorial authorities (then Provinces and Communes) was only dealt with indirectly, through the State legislator whose task it was to define this guardianship in more detail. In my opinion, however, the reform of Article 114 must be considered primarily as a declaration of principle, given that other constitutional data reveal that many, and certainly not negligible, differences still exist between the Regions and the smaller territorial authorities. It is the Constitution which specifies the functions of the Regions whereas those of the Communes, Provinces and Metropolitan Cities are still governed by State and regional law. The same applies for statutory autonomy which is only regulated by the Constitution for the Regions. Moreover, only the Regions have legislative jurisdiction (i.e., the power to pass legislation); only the Regions have the power to make recourse to the Constitutional Court to challenge State legislation in the making deemed prejudicial to those constitutional norms which defend the role of the Regions, and only the Regions have the power to challenge the State over conflicts of competence with regard to acts considered detrimental to regional autonomy.

It is not coincidental that Italian regulation is generally defined as 'regional'; the fact that Italy is constituted by Regions means that the body of regulation has a very particular form which must be kept distinct from the 'federal' one, even if the distinction is justified basically in quantitative terms, as argued by Kelsen. Even following the constitutional reform of 2001, the Italian Regions still appear to lack many of the powers traditionally associated with a federal State. In particular, they are excluded from the formulation of State policy (often legislative), insofar as no provision has been made for either of the two Chambers of Parliament to be composed of regional representatives; in specific policy areas, where 'concurrent' jurisdiction has been maintained they are compelled to legislate according to the basic principles established by State legislation; they cannot take part in the process of constitutional review; they have neither the legal power nor the public force to maintain internal order; and their organs are subject to various forms of State control (substitutive interventions, the dissolution of the Regional Councils, and removal of the President).

396. On the basis of the Constitution (cf. in particular, the new text of Articles 117 and 118), the territorial authorities now enjoy legal and administrative autonomy, with the difference that in the case of the Regions, legal jurisdiction comprises both legislative and regulatory responsibility, whilst the smaller local authorities only enjoy regulatory responsibility in the organization and execution of the

administrative functions assigned to them. Thus, the regulation appears to attribute political autonomy to all the territorial authorities, in the sense that the latter can to pursue ends, and to meet needs and make freely selected choices, in the sphere of the powers attributed to them, and of their respective competences.

Prior to the recent reform of Title V, legislative responsibility was only assigned to the Regions in matters expressly indicated by the Constitution and Special Statutes, with the consequence that it was the State which enjoyed wide-ranging powers in all areas *not* explicitly assigned to the Regions. More recently, however, Constitutional Law No. 3/2001 has assumed the stance typical of a federal system of governance, and reversed this criterion so that it instead specifies those matters where the State has legislative responsibility, whilst simultaneously affirming the principle that 'the Regions retain legislative responsibility in all matters not explicitly reserved to State legislation' (new text of Article 117, paragraph 4). This same criterion applies, in substance, to the dividing up of regulatory responsibility between the State and the Regions.

With regard to administrative jurisdiction, Constitutional Law No. 3/2001 generally assigns administrative functions to the Communes, except where these are conferred to, 'the Provinces, Metropolitan Cities, Regions and the State in order to guarantee their unitary exercise […] on the basis of the principles of subsidiarity, differentiation and proportionality' (new text of Article 118, paragraph 1).

The constitutional reform thus presented has a clear line of continuity with Law No. 59/1997 which, in order to introduce what is referred to as 'administrative federalism' (Article 1, paragraph 2), prepared the ground for the conferral to the Regions and local authorities of 'all the functions and administrative tasks relating to the treatment of the interests and promotion of the development of the respective communities', and 'all the administrative functions and tasks localizable in the respective territories […] exercised by any organ … of the State … or through … other public subjects'. This conferral excludes only those functions and tasks traceable to policy areas explicitly listed by the law, in particular, foreign affairs, defence and public order, justice, education, and monetary policy. This process has been realized through a series of legislative decrees adopted by government on the basis of the delegation in Law No. 59/1997. Of these, Decree No. 112/1998 stands out for making provision for the Regions and local authorities to enjoy a wide range of functions and administrative competences (the other decrees dealt with *specific* sectors).

397. One can say that this is, above all, the result of the progressive consolidation of the principle of subsidiarity in Italian regulation, according to which – without concealing the ambiguities that may emerge – functions and administrative tasks must be distributed among the different levels of government in such a way as to allocate to the higher levels only those competences which cannot be carried out with the necessary levels of efficiency and rigour by the levels of government nearest to the citizens concerned. This principle was introduced by the convention on the 'European Charter for Local Autonomies', and resumed in Italian regulation with Law No. 439/1989, and subsequently by the EC Treaty (following the changes introduced with the Maastricht Treaty in 1992). It has now been included at the constitutional level, not only in the 'vertical' (or 'institutional') sense mentioned above

(Article 118, paragraph 1), but also in a 'horizontal' (or 'social') perspective, in order to maximize the role of the private actors in the satisfaction of the needs of the community. It must be stressed that the new Article 118, paragraph 4, commits the State and the autonomous territorial authorities to lend support to, 'autonomous initiatives on the part of citizens, as single individuals and members of associations, in activities of general interest, on the basis of the principle of subsidiarity'.

On the basis of the new text of Article 118, paragraph 2, the classification of the administrative functions falling within the competence of the various territorial authorities is performed on the basis of the principle of subsidiarity, not only by State law, but also by regional law. In perspective, the situation which emerges is anything but rigid or homogenous, in the sense that the distribution of the functions among the different tiers of government varies in relation to the characteristics of the different local communities and the organizational resources of each territorial context.

Generally speaking, the smaller territorial authorities (primarily the Communes) are assigned the functions of active administration, whilst those tasks of wider-ranging coverage, such as coordination and planning, are assigned to the Provinces, leaving the Regions exclusive jurisdiction in the functions of policy-making, planning, coordination, and promotion for the entire territory.

§2. The Origins of the Italian 'Regional' State

398. The historical origins of the Italian Regions must be understood in the light of the scheme for administrative regionalization formulated in 1861, at the dawn of Unification, by the then Ministers of the Interior, Farini and Minghetti. The project was based on the assumption that the creation of Regions would increase the protection of the cultural, social and economic features of the various local areas, improve the effectiveness of their administrative actions, and the selection of their political class. In the last instance, however, the fear that the creation of the Regions would – in addition to being a useless and expensive duplication of public institutions – undermine the newly conquered unity of the State, prevailed and the scheme was rejected by Parliament. Even though they were not implemented on an institutional level, regionalist theories continued to fuel debate well into the interwar period. This was when regions started to be conceived of as genuinely political entities, especially thanks to the People's Party, founded in 1919 by Don Luigi Sturzo, and coincided with the annexation of Trentino-Alto Adige and Venetia Julia (which had always manifested strong separatist trends *vis-à-vis* the Austro-Hungarian Empire) to Italy.

In Italy, the onset of Fascism in 1922 imposed a totally centralist conception of the State, frustrating autonomist expectations and suffocating any pre-existing provincial and communal authorities. For the next twenty-five years the prospects of the 'regional' State were effectively blocked by the fascist regime and only began to emerge with its collapse and the onset of the radical reforms of the State by the anti-fascist political forces in the second half of the 1940s. In 1946/1947 the Constituent Assembly was entrusted with drafting the Constitution of the new Republican State following the first post-war elections in June 1946, and was encouraged to grant a

strong element of autonomy to regions by the Christian Democrats (successors to the People's Party), the Action Party, the small Republican Party and part of the Liberal Party. However, the other political forces in the Assembly were preoccupied with the protection of the unity and indivisibility of the State. In the last instance, however, the thesis promoted by the Catholic forces, that fundamental human rights must include the right to realize oneself within a plurality of social groups, including local communities, had a catalysing effect on the Assembly and produced the necessary number of votes in favour of a regional structure of government.

This decision was also influenced by the strong autonomist trends which had been previously manifested in parts of the country (in some cases, as in Sicily, even taking the form of separatist attacks). A High Commissioner and an Advisory Committee (representing the various political and social forces) had been established since 1944 in Sardinia and Sicily as extraordinary and provisional bodies of local government. The Council of Sicily had even devised an autonomous system which included wide-ranging legislative powers and led to a plan for a Regional Statute, which was approved in slightly amended form by Government with the Royal Legislative Decree No. 455/1946 in order to avoid the risk of armed insurrection. In 1945, the Valle d'Aosta also witnessed the creation of the new 'autonomous district of Valle d'Aosta', which replaced the old Province of Aosta. This was headed by a President, a Junta and an Elective Council, and was immediately allocated administrative functions which were supposed to be followed by legislative autonomy.

399. Finally, the De Gasperi–Gruber agreement between Italy and Austria, signed in Paris in September 1946, provided not only for a series of measures to protect the German-speaking inhabitants of Alto-Adige, but also, and more importantly, for the exercise of autonomous legislative and executive powers in that territory. These measures anticipated the creation of the Trentino-Alto Adige Region and the Autonomous Provinces of Bolzano and Trento, and had a structure and functions that made their institutions very similar to those of the Regions.

In the circumstances, the Constituent Assembly could choose either to set up regions solely in this part of Italy or to extend this structure of government to the entire national territory. After extended debate, the Assembly opted for the latter, a choice which highlighted the existence of differing viewpoints among the political forces. The *plenum*, for instance, decided that the Regions should not enjoy all the legislative powers proposed by 'the Commission of 75', responsible for drafting the Constitution. The provisions dealing with the regional system were finally included in the Constitution and were, in the words of Meuccio Ruini, one of the most authoritative members of the Constituent Assembly, its 'greatest innovation'. This then is the genesis of the constitutional provisions dealing with the regional autonomies, and suggest why regional governance has been divided into two distinct levels.

400. The first level concerns those Regions which enjoyed particular forms and conditions of autonomy under the Special Regional Statutes adopted by a State constitutional law (Article 116 of the Constitution). These Regions had already satisfied some of their autonomist expectations prior to the introduction of the Constitution in 1947. In order to abide by Article 116, the Constituent Assembly was

reconvened (in compliance with final and transitional provision XVII) to assimilate the Regional Statute already in force in Sicily by means of Constitutional Law No. 2/1948, and to approve the Special Regional Statutes for Sardinia, the Valle d'Aosta and Trentino-Alto Adige (Constitutional Laws Nos 3/1948, 4/1948 and 5/1948). The only Special Regional Statute not approved by the Constituent Assembly was that of Friuli – Venetia Julia, considered a Special Status Region on account of its Slovene minority; its Special Statute was only adopted fifteen years later (by Constitutional Law No. 1/1963) owing to outstanding difficulties, both at the national and international level, which lasted until long after the end of the Second World War.

The second level of autonomy is defined as 'ordinary' and includes the other fifteen Regions (the fourteen Regions initially scheduled were joined in 1963 by Molise, after it separated from the Abruzzi Region). Given the lack of objective criteria on their geographical, administrative and economic identity, these Regions were classified on the basis of outdated statistics used in the Kingdom of Italy to collect demographic and economic data in the previous century. This reveals the inherent weakness of the Ordinary Regions and their lack of common historical roots.

The Constituent Assembly also made provision for fusing existing Regions or creating new ones by means of a constitutional law (Article 132 of the Constitution), and moving Provinces or Communes from one Region to another with an ordinary Act of Parliament, probably in view of adjusting the original plan.

§3. The Creation of the Regions

401. The approval of the four Special Regional Statutes in 1948 constituted the first step towards the regionalization of Italy. It did not coincide, however, with the full and practical implementation of regional autonomy, since most of the constitutional rules required special implementing provisions (mainly for the transfer of State administrative functions to each of the Regions), which were passed quite late. But in spite of the difficulties, the Special Regions were not left in the sort of institutional limbo in which the Ordinary Regions remained for so long and which, despite the fact that the Constitution provided that the election of their Councils should be held by 31 December 1948, were only formally instituted twenty years later.

The approval of Law No. 62/1953 on the legal institution and organization of regional bodies did not lead, as was hoped, to the rapid institution of the Ordinary Regions. Governmental political forces clearly feared that the opposition parties might 'highjack' or 'occupy' the regional 'machinery' in areas where they had a majority, with evident repercussions at the national level. These obstacles were only removed when Centre-Left Cabinets, in the 1960s, created a different political and ideological climate and led to the enactment of the most important constitutional provisions concerning the regional system, i.e., those relating to the Ordinary Regions, in 1970.

At the beginning of the fifth legislature, the changed political and institutional situation meant that all the measures necessary to create the Ordinary Regions and

render them operative were passed one after another. Law No. 108/1968 on the election of Councils (passed in June 1970), Law No. 281/1970, on regional finance; the May–July 1971 laws on the approval of the Regional Statutes by Regional Councils; the January 1972 decrees on the transfer to the Regions of State administrative functions, followed by three implementing decrees of 24 July 1977, in particular, Law No. 616/1977.

§4. The Organization and Competencies of the Ordinary Regions

402. The Constitution makes provision for the overall organization of the Ordinary Regions, the distribution of tasks among their governing bodies and their relations, in a system of governance based on a Council, Junta and President, and by each Regional Statute. In November 1999, some key amendments were made to the provisions contained in the Constitution which have, among other things, reshaped the system of regional government, particularly with the introduction of the direct election of the President of the Junta; they have modified the drafting procedure for the Regional Statutes, and have empowered the Regions to regulate election procedures for the Council (previously regulated by State provisions).

Up to now, however, only a few Regions have exercised this power, and not always consistently. The most significant innovations have been introduced by Tuscany, Campania, Marche and Umbria, while in the other Regions, the system for electing Councils generally continues to be that laid down by national legislation. This refers to Law No. 43/1995 which modified the electoral system provided for by the older Law No. 108/1968 by which the first Regional Councils were elected in 1970. The aim of the electoral reform of 1995 to harmonize the voting procedures of the Regional Councils with a basically first-past-the-post system introduced by the 1993 laws which reformed the election procedure for the two Chambers, and communal and provincial councils. However, this objective was only partly achieved. The mechanism has remained basically proportional for the distribution of 80% of seats with only 20% being distributed according to a first-past-the-post system, and which is in effect a plurality premium designed to guarantee the stability of regional government.

The Council only exercises legislative powers according to a procedure (described in the Regional Statute and Council standing orders), similar to that adopted for the drafting of State laws with the difference that regional laws are passed by a single chamber and cannot be voted by a committee.

Following the changes introduced by the constitutional reform of 1999, the powers of the Council have been considerably reduced. Not only has it been deprived of the power to issue regulations (i.e., measures belonging to the category of secondary legal sources), but, even more important, the President of the Junta – who is elected by direct and universal suffrage – has the power to appoint and revoke the members of the Junta (prior to the reform, both the Junta and its President were elected by the Council). The Council, however, can still vote a motion of no-confidence on the President of the Junta, leading to the resignation of the entire Junta and the dissolution of the Council.

The most significant element of this renewed constitutional framework is the prominent position occupied by the President of the Junta over and above the collegiate executive body, despite the fact that the Constitution states that it is the Junta which is 'the executive branch of regional government'. As well as representing the Region, passing laws and regulations, supervising the administrative functions allocated by the State, the President 'oversees the policy of the Junta for which he is also accountable'. Hence, the previous structure of governance of the Ordinary Regions (mainly of an assembly type), which accorded all functions (above all, that of determining overall regional policy) to the competence of the Council, has been discarded. Since the reform of 1999, a new system of regional governance has been in place; this is based on two bodies elected by direct franchise, namely the President of the Junta who is responsible for conducting general policy, and the Council which exercises the powers of supervision and guarantee.

This rough pattern will be integrated into the new Ordinary Regional Statutes which will replace the present ones pursuant to the new text of Article 123, subject to the passing of a law by each Regional Council adopted by absolute majority in two successive decisions. Government has the power to submit the question of the legality of this implementing law/Regional Statute – and only that – to the Constitutional Court. The Regional Statute can be subject to a referendum upon request by one-fiftieth of the Region's voters or one-fifth of the Members of the Council. The Constitution explicitly states, however, that the new Regional Statutes can make provision for a system of governance which diverges from the model described above (without prejudice to the basic principles of the Constitution), for example, by not introducing the election of the President by direct and universal franchise.

403. In addition to dealing with the regional form of government, the internal organization of the Regions and their basic operational principles, the Regional Statutes also contain rules governing the right of legislative initiative, referenda and the publication of laws and regulations (Article 123). The Regional Councils, however, have unanimously decided to extend the coverage of their Regional Statutes, by introducing a series of general principles to be followed by specific regional activities.

It is also worth mentioning the provisions dealing with forms of popular participation in political life. Pursuant to the Constitution, the regional referenda for which provision is made under the Regional Statutes can, unlike their State counterpart, not only repeal laws but also repeal administrative measures and, in the case of consultative referenda, alter Regional, provincial and communal boundaries. Moreover, the Statutes of the Ordinary Regions provide for the right of citizens, associations and local authorities to submit opinions or recommendations to the Regional Councils and for the Council Commissions to consult local authorities, citizens, and social groups in order to improve the performance of regional tasks. The Regional Statutes also stipulate that citizens should participate in the drafting of general administrative measures.

§5. The Organization and Competencies of the Special Statute Regions

404. The organizational order of the Special Regions, outlined in their statutes, is based on the allocation of functions among the Council, Junta and President. The fact that, according to Article 116, such statutes are 'adopted with constitutional laws', and therefore discussed by the Italian Parliament, may suggest that such Regions lack the sort of statutory autonomy enjoyed by the Ordinary Regions. Indeed, in the original version of the Special Statutes, only those of Sardinia (Article 54, u.c.), and the Valle d'Aosta (Article 50, u.c.) make explicit provision so that in typically statutory matters (i.e., form of governance, organization of internal regional affairs, the right of legislative initiative, the right of referendum, and the publication of laws and regional regulations) the rules of the respective Special Statutes could be changed in the forms for which provision is made under Article 123, paragraphs 2–3, by the respective Regional Councils.

With the recent introduction of Constitutional Law No. 2/2001, however, Italy has now moved on to the partial reform of the Special Statutes, in particular, with the provisions for the direct election of the Presidents of Special Statute Regions and the Autonomous Provinces of Trento and Bolzano, and the recognition of the power of domestic self-governance similar to that assigned to the Ordinary Regions and to *all* the Special Statute Regions (and not just Sardinia and the Valle d'Aosta). Following the reform, each Special Statute assigns the task of determining the form of regional governance, the procedures for the election of the President and members of the Junta, the relations between the organs of the Region, the exercise of the popular legislative initiative, and the rules governing regional referenda, to a 'reinforced' regional law. This is approved with a process very similar to that provided for under the new text of Article 123 for the approval of the Ordinary Statutes, with the difference that the decision is taken with a single, rather than a double vote, with an absolute majority.

Quite apart from this (partial) alignment of the special regulations with those of the Ordinary Regions, the fact remains that the Special Statutes have a different function from the Ordinary Statutes, insofar as they provide for the principles governing the election of the Councils (implemented by a regional law), regional financing, the supervision of regional organs, and also specify the policy areas assigned to the competence of the Region. In synthesis, they carry out in relation to each special regulation the role exercised by the Constitution in relation to the regulation of the Ordinary Regions as a whole.

To date, the governance of the Special Regions has generally been considered of a basically parliamentary nature. This qualification is supported not only in the textual provisions of the Special Statutes, so much as in consolidated practice (confirmed by Council regulations), from which one can deduce that it has usually been the Junta, elected by the Council, which formulates the political programme requiring a vote of confidence on the part of the Council.

This situation changed following the approval of Constitutional Law No. 2/2001, from the moment that content of the decisions made with regard to the governance of the Ordinary Regions was effectively extended to the Special Statute Regions so

that, with the exception of the Valle d'Aosta, Trentino-Alto Adige, and the Autonomous Province of Bolzano, the same standard model, based on the popular direct election of the President, has been provisionally introduced for the Special Statute Regions. At the same time, each Special Region can now assert some degree of independence (with the reinforced regional law), in autonomously determining its form of government. It is worth noting that Regional Statutes, like the laws amending the Constitution and other constitutional laws, cannot contrast with the 'supreme principles of the constitutional system' and are therefore subject to constitutional review, as explicitly stated by the Constitutional Court (Sent. No. 1146/1988).

§6. General Aspects of Regional Legislative Autonomy

405. The main function of regional autonomy is the legislative function. Prior to the 2001 reform, we can deduce from the Constitution and the Special Statutes that the Regions could exercise various types of legislative responsibility in those policy areas explicitly assigned to them, and which are differentiated on the basis of the limitations to which each was subject.

Following the stance generally adopted in legal theory and practice, in the first place, the so-called primary or full legislative responsibility, recognized solely to the Special Statute Regions and the Autonomous Provinces had to be taken into consideration. In addition to being bound by the Constitution, this responsibility was limited, externally, by 'limitations of merit', that is, the national interest and the interests of other Regions, which it was Parliament's task to safeguard and by limitations of legitimacy, that is, the basic legal norms of State legislation dealing with economic-social reform, international obligations, and general legal principles, monitored by the Constitutional Court.

The second type of legislative responsibility, the so-called 'concurrent responsibility', was recognized, both to the Special Statute Regions and Ordinary Regions. In addition to the limits cited above, this is subject to an internal constraint, represented by the basic principles established for each policy area by State legislation.

In addition to the two types of responsibilities described above, there is the so-called activating and integrative-activating regional power to implement and integrate the provisions of State laws which enables the Regions to legally implement State legislation adapting it to specific local conditions.

It was the job of the ordinary State legislator to concretize the constitutionally defined limits of the legislative jurisdiction of the Regions also with respect to the national interest. The 'limitation of merit' has frequently been used (with the guarantee of constitutional jurisprudence) in order to justify State legislation in policy areas assigned to the Regions and which make 'cuts' of competences to the benefit of the State and the detriment of the Regions; in this sense the 'limitation of merit' is invoked to defend the national interest and not as a criterion to evaluate the legislative discretion of the Regions. In this sense, for example in the areas denoted as 'fairs and markets', 'public health care and hospitals', and 'mines' the functions concerning national fairs, the classification of key national hospitals, and the overall planning of mining activity, are reserved to the State (see paragraph 364).

In addition, the State legislator has also introduced, *praeter Constitutionem*, another limitation, initially designed to circumscribe the administrative autonomy of the Regions, but which ended up being extended to legislative responsibility. This is the limit associated with the performance of the function of policy-making and overall coordination. The objective here is to guarantee the needs of a unitary character, an activity which is consequently, reserved to the State. Notwithstanding the fact that it was only provided for by ordinary law, and not explicitly dealt with by the Constitution, the consolidated jurisprudence of the Constitutional Court has accorded the State power of policy-making and overall coordination a certain, albeit implicit, constitutional basis. According to the Court, this limitation had to be applied without exception 'to the entire circle of autonomous authorities', that is to say, not only the Ordinary Regions, but also the Special Statute Regions, and the Autonomous Provinces.

406. In comparing the reform of Title V to the constitutional order, one has the impression that the latter has generated significant innovative and confirming effects which maintain, in other words, institutions or principles for which provision is already made in the original text of the Constitution, and more importantly, the 'constitutionalization' of decisions already codified in ordinary legislation. The most striking innovation introduced by the constitutional reform of 2001 is the inversion of the criterion used to distinguish the spheres of the legislative responsibility assigned respectively to the State and the Regions. Indeed, while in precedence it was the areas of competence of the Regions which were explicitly listed (by the Constitution and the Special Regional Statutes), the reform of Title V instead indicates the policy areas where the State has 'exclusive' legislative responsibility, whilst simultaneously affirming that 'the legislative responsibility with reference to all areas not expressly reserved to the legislation of the State is due to the Regions' (new text of Article 117, paragraph 4). So that, for example, industry, commerce, public works, insurance, and social welfare all fall within the jurisdiction of the Regions, whilst policy domains such as foreign affairs, defence, the monetary system, public order, civil and criminal regulation remain within the competence of the State.

With this reversal of the perspective adopted by the Constituent Assembly in 1947, the reform reinforces the legislative authority of the Regions, and makes provision for the completion, with the indispensable constitutional adaptations, of the operation carried out at the administrative level with the 'Bassanini Law' No. 59/1997, which granted the territorial autonomies all those administrative functions not explicitly reserved to the State.

However, the reform does not constitute a complete break with the past. Even if the activating and integrative-activating responsibilities are abolished, concurrent legislative responsibility is maintained (i.e., between the State and the Regions) with the policy areas specified in paragraph 3 of new Article 117, and constitutes an element of (questionable) continuity with the preceding constitutional order. Whilst it is true that this concerns very different policy areas from those listed in the original text of Article 117, the continuity is, structurally speaking, evident because the determination of the basic principles is still reserved to State legislation, whilst all the remaining matters are left to the Regions.

However, two significant innovations in this field merit special attention. The first concerns the inclusion of fiscal autonomy as a matter of concurrent competence (see paragraph below), thanks to which the Regions can set their own income and regional taxes, in conformity with the basic principles of State legislation (previously the Regions were only empowered to implement existing State legislation). The second is that the power of the Regions in matters within their competence, to directly realize (via legislation where necessary), the normative acts/legal acts of the EU (see §13 in this chapter) has been explicitly 'constitutionalized', and a similar power is also recognized, *ex novo*, with regard to international agreements (see §12 in this chapter).

It is beyond the scope of this analysis to evaluate the range of areas assigned to the exclusive competence of the State, and the concurrent competence of the State and Regions, or to analyse whether the remaining matters (the competence of the Regions) are really strategic, in the sense that they finally realize regional autonomy, or whether, on the contrary, the matters (completely or in part) reserved to the State are, in both number and nature, redundant with respect to the sole objective that can justify such a legal reserve, that is, the protection of the unitary needs and indivisible interests of the Italian State. Although we cannot expand on the thorny problem of the identification of the meaning and content of these matters, we can note that prior to the reform of Title V, the State legislator, starting with Presidential Decree No. 616/1977, sought to adapt the reading of the – frequently obsolete – categories specified in the Constitution to the times, and that the Constitutional Court generally concurred with the choices made. Indeed, after a first phase where the 'objective' criterion of interpretation prevailed (linked to the content of the matters understood *strictu sensu*), jurisprudence has successively adopted a more dynamic interpretation, in some cases even to the point of adopting a 'teleological' criterion (which includes the end result, even where the original activity is not strictly covered by the matter in question). It is likely that the orientation of the Court will continue to exert considerable influence in the future, and perhaps even more than in the past. This is not only because it has always been through the positive classification of policy areas that the sphere, the competence of the State and (negatively) that of the Regions are identified, but because many of the matters reserved to State legislation have been defined in the new Article 117 in such a way as to justify, depending on their interpretation, more or less marked interference (referred to as 'transversal' in practice) in the competences assigned to the Regions, particularly in the areas of education, the environment, and civil and social rights.

This concise overview attempts to describe the basic structure of the new legislative autonomy of the Ordinary Regions shaped by the reform law, without going into too much detail. Nevertheless, one specific consideration must be stressed, and that is the introduction, alongside the special autonomy of the five Special Statute Regions, of a new form of 'speciality' which can be described as 'widespread'. The new text of Article 116, paragraph 3, stipulates that the forms and particular conditions of autonomy can also be attributed to other Regions (on the initiative of the Region involved and subject to consultation with the local authorities) with a law approved with an absolute majority by the Chamber of Deputies and Senate, on the basis of an understanding between the State and the Region.

This greater autonomy consists of the participation of the regional legislator in the regulation of some of the matters which fall within the exclusive jurisdiction of the State; in particular, law and order, general rules governing public education, the protection of the environment, the ecosystem, and Italy's cultural heritage, and at the same time the simultaneous abolition or attenuation of the constraint imposed by the basic principles established by the State in some areas (to be singled out one at a time) covered by concurrent/concurrent regional legislation.

§7. The Limits of Regional Legislative Autonomy

407. Apart from the distinction between State legislation which is specialized by policy area, and regional legislation of a more general nature, the other basic feature of the reform is the 'levelling out' between the two responsibilities, both subjected to the same limits, stipulated in the new text of Article 117, paragraph 1 in observance of the Constitution, Community regulation and international obligations. However, the reform did not completely discard the preceding constitutional rule which specified that the content of the limitations of regional legislative responsibility must be determined by State legislation, insofar as concurrent regional responsibility has been maintained, and is bound not only by the limits cited above, but must also still comply with the basic principles governing the issues at stake which are established by State legislation.

On the basis of this deeply innovative stance one can conclude that (although legal theory is divided on this point) regional legislative responsibility is not subject to any constraint, other than those explicitly indicated by the Constitution which expresses and defends the value of the unity of the regulation of the Italian Republic consecrated in Article 5. The consequence is that respect for the unitary requirement can *only* be imposed on the legislative responsibility in this form and using this instrument.

In particular, limitations which had been stipulated in the preceding system precisely in order to defend the unitary needs of the Italian State, such as the basic rules governing State legislation on economic or social reform, and general legal principles, no longer apply. For the same reason, following the reform the 'limitations of merit' (in particular, that of the national interest) also appear to have been abolished; there is now no trace of them even in the provision dealing with the supervision of regional laws (cf. the new text of Article 127). This constitutes a considerable step forward for regional autonomy, especially if one considers that the national interest has often been invoked by the Constitutional Court as a justification for State laws intended to limit – but which in fact heavily circumscribe – regional competence.

Finally, the same conclusion applies for the State power of policy-making and overall coordination which has always been conceived – closely linked with the national interest – as an instrument to protect the unitary and indivisible interests of the Italian State. In this sense, the body of constitutional jurisprudence, according to which the State power of policy-making and coordination has to date been deemed to have a certain, albeit implicit, constitutional basis, should not constitute a stumbling block. Indeed, once the constitutional situation of reference changes, it

is reasonable to expect that the future orientation of the Court will realign itself, although this hypothesis will need to be verified in the light of legal praxis.

408. It remains applicable to the differentiated autonomy Regions, whose legislative authority is defined by the old special statutes still in force. These have retained their original structure and list the matters attributed to the Region they refer to – distinguishing those of primary (or full) authority from those of concurrent authority and those of supplementary-implemental authority – and not the matters for State competence, as instead does the new Article 17 of the Constitution. However, it should be said that Constitutional Law No. 3/2001 is not entirely without effect as regards the special Regions since it adds a 'clause in greater favour' to their advantage in Article 10, whereby, up to adjustments of their respective statutes, the provisions of the reform do not just apply to the ordinary Regions but also to the special Regions in the parts that provide for broader forms of autonomy than those already attributed to the special Regions (and the autonomous Provinces).

The effective application of this clause to the legislative authority of the differentiated Regions presumes – evidently – two steps. First, there must be ascertained whether the limits set by the special statutes for the old primary (or full) authority were greater than the limits set by the reformed Article 117 of the Constitution on the new general-residual authority of the ordinary Regions. Subsequently, there has to be identified by what right each special Region (or autonomous Province) is competent to legislate in the various matters, by means of comparing the catalogues of the respective statutes and those, partly explicit and partly implicit, that emerge from the new Article 117 of the Constitution.

Considering that some of the limitations originally set by the special statutes have not been precisely reprised by the new Title V, and therefore should no longer be applied (this is the case of the fundamental rules of the State laws for economic-social reform and of the general principles of the juridical system), the general-residual authority certainly appears more advantageous. This has been admitted by the Constitutional Court which, for instance, has denied the applicability of the limitation of the State rules of economic-social reform to the legislative authority of a special Region in a matter which, catalogued in accordance with the statute among those of primary (or full) authority, according to the new Article 117 of the Constitution, forms part of the general-residual authority of the ordinary Regions (cf. Constitutional Court No. 274/2003).

It still needs to be clarified what is the solution to give to the other cases that may arise. Considering the above legal rulings, it appears that the clause of greater favour should, without doubt, be applicable even in the hypothesis of a matter – of concurrent authority according to the special statutes – that can be ascribed to the area of general-residual authority as per Article 117, paragraph 4, of the Constitution.

What does seem hard to resolve, however, is the case of a matter that is of primary regional authority according to the statutes, but of concurrent authority or exclusively pertaining to the State's authority according to the new Article 117: here perhaps the statutory discipline should be retained (an idea in this respect can be taken from Constitutional Court No. 48/2003), with the consequent application of

the old limitations represented by the fundamental rules of the economic-social reforms and by the general principles of the juridical system.

As it is possible to see, as things stand, the reconstructing of the limitations that the legislative authority of the differentiated Regions (and the autonomous Provinces) is subject to in the various matters is excessively complex, and all falls onto the shoulders of the constitutional judge. It would therefore be appropriate to finally proceed with a thorough revising of the special statutes, as is already required by the already mentioned Article 10 of Constitutional Law No. 3/2001.

§8. The Administrative Autonomy of the Regions

409. According to the original text of Article 118, paragraph 1, the Regions must carry out administrative functions for all those areas in which they have legislative competence, according to the principle of 'parallelism'. Paragraph 3 of Article 118 adds that the Regions should 'as a rule exercise their administrative functions through delegation to the Provinces, Communes, other local authorities or their offices'. The reasoning behind the provision was to limit the functions carried out directly by the Regions to a minimum, thus relieving them of the burden of active administration, and leaving them free to carry out the tasks of planning, coordination, policy-making, and financing. In this way the Constituent Assembly wanted to achieve the double objective of reducing the number of regional offices to an indispensable minimum, and of ensuring that administrative action, exercised by the territorial authority closest to the citizens, corresponded as far as possible to the needs of the local collectivities (with a sort of anticipation of the principle of subsidiarity).

However, these constitutional recommendations have generally been overlooked. For a number of reasons (primarily because the smaller territorial authorities were not always deemed capable of operating efficiently or economically), the Regions have preferred to create their own complex administrative apparatus, and have moreover set up a series of practical bodies, companies, agencies, and joint-stock companies.

The new Article 118 has completely reshaped this situation, with a system of public administration characterized by a move away from all forms of regional and State centralism. In the first place, the reform sets aside the principle of 'parallelism' and delegation to local authorities, and establishes a general rule that basically assigns all administrative functions to the Communes, with State or regional laws, except in cases where these are 'conferred on the Provinces, Metropolitan Cities, Regions and State, on the basis of the principles of subsidiarity, differentiation and proportionality' in order to 'guarantee their unitary exercise'. It should be noted that, following their inclusion in the Constitution, these principles can be employed by the Constitutional Court as parameters to evaluate the legitimacy of the choices made by State and regional legislators in the distribution of administrative functions among the different levels of government.

Another effect should be the allocation of a much more limited number of administrative functions to the Regions so that, for example, the tasks of direct management are entrusted to the smaller territorial authorities, with the consequent reorganization of the regional administration.

Finally, the reform of Title V may well contain the key to resolving what has always been one of the most controversial issues in matters of regional administrative competence, that is, the question of the legal legitimacy of State intervention in the function of 'policy-making and overall coordination'.

Over a thirty-year period of law, leading up to the reform of 2001, the Constitutional Court constantly held the belief that, since the State function for direction and coordination is a means for guaranteeing the unity and harmony of the system, it should be sure of a definite, even if implicit, constitutional foundation, even thought this aspect is not directly considered in the Constitution (cf. §6).

However, after the reform, it is to be considered that the State power in question no longer has the right of citizenship in the system. This is because of two reasons: first, because this power generally appears to be entirely incompatible with the tendency for parity between the State and Regions established by the reform of 2001. Second, according to a textual argument, because Constitutional Law No. 3/2001 attributes to State law the task of regulating specific forms of coordination between State and Regions in matters strictly indicated (cf. Article 118, paragraph 3 of the Constitution, which refers to immigration, public order and security, and protection of cultural heritage, and also Article 119, paragraph 2 of the Constitution, which refers to public finance and the tax system), but makes not the slightest mention of a function of direction and coordination of a general nature. Not surprisingly, Article 8, paragraph 6, Law No. 131/2003 excludes that this power may be exercised in the matters of residual and concurrent regional competence.

Instead, given the explicit mention in Article 117, paragraph 2, lett. r), of the Constitution to a 'coordination of statistics and digital information' of the State's competence, it is clear that it is admissible for there to be a government power of 'technical' direction and coordination of this type, which has a very different nature from the political-administrative one which was dealt with previously.

§9. The Financial Autonomy of the Regions

410. The Constitution also recognizes the financial autonomy of the Regions, evidently considering this an indispensable precondition for other forms of autonomy. This is usually interpreted as comprising both the power of self-determination in matters of expenditure, and decision-making capacity in matters of revenues (fiscal autonomy).

The original formulation of Article 119, paragraph 1 States that the Regions, 'have financial autonomy in the forms and modes established by the laws of the Republic, which coordinate it with the financing of the State, Provinces and Communes'. In constitutional praxis and jurisprudence this has been interpreted as a sort of open deferment to the discretionary power of the ordinary legislator, rather than as a guarantee for the Regions.

From the institution of the Regions until today, the State legislator has followed very different lines of conduct, traceable to two distinct phases in implementing the constitutional provisions. Until 1996, a basically 'derived' or 'transferred' model of regional finance was adopted, in the sense that the Regions enjoyed the financial means specified and quantified (prevalently) by the State, and only in small part determined by them. The Regions received practically all the resources necessary to carry out their normal functions from the sharing out of what is referred to as 'the general fund' and 'special funds'. The first, after having been initially supplied by revenues from Treasury taxes, ended up by being determined discretionally by the State legislator, annually during the drawing up of the State budget. The second, very considerable source of funds, were assigned to the Regions, via the appropriate legislation and earmarked for specific sectors (e.g., agricultural activity, family health clinics, public transport, and health). Among the sources of regional income, 'own' regional taxes, generically provided for by Article 119, played a very marginal role. Such taxes (e.g., the tax on regional concessions, the regional car tax, the tax on the State concessions of State property and national patrimony), were not only specified by State law, but precisely regulated in all respects of assessment, collection, and liquidation. The Regions only retained the authority to set quotas of State tax revenue, with maximum and minimum values pre-set by the State legislator.

As of 1996, the policy focus of Italian fiscal legislation has partly changed, concentrating on a marked reduction of the derived character of regional finance on the income side, and the removal of the destination constraints on the expenditure side. The reform process (which culminated in Decree No. 56/2000, implementing the delegation of Article 10 of Law No. 133/1999), takes as its guideline the replacement of the greater part of the fiscal transfers, both free and entailed, with other forms of income. The latter take the form of new 'own' regional taxes, i.e. the tax on university study, the special tax on solid waste disposal and, above all, the regional tax on productive activities (IRAP), in addition to Treasury taxes, i.e. the consumption tax on methane gas and personal income tax (IRPEF), and in profit-sharing with Treasury taxes, i.e. the indirect tax on petrol and value added tax (IVA).

This new system of financing, which finally began to take the local tax yield into account, is completed by the institution of a '*fondo perequativo nazionale*' which is, as its name suggests, designed to reduce territorial socio-economic inequalities and allow the Regions to guarantee uniform and minimum levels of performance throughout Italy. Finally, one must emphasize that the financial autonomy of the Regions should be set within the context of the EU, and that, as a consequence, the Regions are also bound, for what falls within their competence, to work towards the general objective of rebalancing Italy's public finances, in line with the EU's 'stability pact'.

411. The new text of Article 119 includes much of its original content and thus largely confirms the legislative scenario introduced by the 1999–2000 measures. At the same time, however, the reform makes some premises to give further breath to the financial autonomy of the Regions. As regards confirmation, the provision formally specifies a principle already deemed implicit in the old text, and that is, regional financial autonomy in terms of both resources and expenditure; moreover,

it confirms the emphasis on 'own' regional taxes and profit-sharing (calculated on the basis of the local income from Treasury taxes).

However, having a greater effect are the new features, on which only some very sketchy evaluations can be expressed at this time which, moreover, should be verified on the basis of the indispensable interventions by the national legislator, as will be seen, and the constitutional law. The main observations seem to me to be the following. The first concerns the constitutional coverage provided to the equalization fund, first provided for simply by ordinary law. Another one of great importance is that Article 119, paragraph 2 of the Constitution, according to which the Regions 'establish' and 'apply' their own taxes and revenues, seems to legitimize the Regions to introduce new taxes without the need for a State law for instituting them, and to regulate them entirely. Thought could be given to exercising a 'concurrent' type of legislative authority which, as such (see §6), is of the Region's competence, except for the determining of fundamental principles, reserved to the State. In support of this conclusion there is, on one side, the fact that, in the list of matters of concurrent legislation (referred to in Article 117, paragraph 3, Constitution) there is a matter called 'coordination of public finance and the tax system'; on the other side, as a corollary, it is possible to invoke the words of Article 119, paragraph 2 of the Constitution, which, after having attributed tax powers to the Regions, then limits the exercising to complying with the 'principles of coordination of public finance and the tax system', which must be evidently established by the State. In my view, this assumption is clearly in tune with the overall reasoning of the reform since the acquiring by Regions of the power to tax is crucial for increasing their overall autonomy.

Also important is the affirming of the principle contained in the new text of Article 119, whereby the resources available to the Regions (as well to the Communes, Provinces and Metropolitan Cities) should allow to 'fully' finance the public functions attributed to them. This indication ensures the economic sustainability of Regional activities and, as pointed out in literature, also gives the Regions the possibility to appeal, as regards the State regulations for implementation, for the control of reasonableness from the Constitutional Court.

There are some reservations, however, about the provision in paragraph 5, according to which the State shall set aside 'additional resources' and carries out 'special actions' ad hoc in favour of certain Regions, to enable them to provide for 'purposes other than the normal exercise of their functions', to remove economic and social imbalances, and to facilitate the exercise of the individual's rights. Given the wording of the provision, there continues to be a doubt whether, in actual application, this instrument will consolidate the position of the Regions or increase the powers of the State. In any case, the Constitutional Court has provided some criteria for avoiding that these funds become 'an indirect but pervasive means for State interference … and of allowing policies and guidelines governed centrally to overlap those legitimately decided by the Regions' (Constitutional Court No. 16/2004).

Notwithstanding all this, in order to implement this new design of regional finance it is also essential, as pointed out by the Constitutional Court, to have prior intervention by the State legislator which, 'in order to coordinate all the public finances, should not only establish the principles that Regional legislators should follow' and determine 'the general lines of the entire tax system' but also identify

'the limits' within which the power to tax by the State and by the Regions can take place (Constitutional Court No. 37/2004).

For many years, the State legislator has failed to achieve any concrete results, until there was approved Law No. 42/2009 that set forth the 'Mandate to the Government on fiscal federalism, being implemented by Article 110 of the Constitution', which has been recently followed by a series of legislative decrees.

I believe that the so-called fiscal federalism, which the above Law No. 42 aims to achieve, should be identified in a system characterized by effective regional self-government and by the accountability of the governing bodies of the Regions to their communities. The key step in this direction consists of overcoming the derived funding, eliminating transfers from the centre and replacing them with the resources available in the territory from taxes imposed by the Regions themselves or by jointly participating in State taxes. For a balanced and sustainable 'fiscal federalism' it is essential, however, also to equalize in favour of territorial areas 'with less fiscal capacity per inhabitant'. This is not to achieve a total uniformity (which would contradict with the very reason for Regionalism to exist) but to ensure throughout the national territory the level essential for the enjoyment of fundamental civil and social rights, while respecting the values of unity and of solidarity that are the foundation for the existing constitutional order.

I think that the complex legislative manoeuvre ushered in by Act No. 42/2009, currently nearing completion because of the implementation decrees, tends to be pursuing these objectives, even though it may only make its effects felt after a few years. As regards revenues, its most significant parts relate to identifying the taxes of the Regions, that of joint participation in State taxes and the ways for determining the equalization fund. As regards expenditure, great importance is given to introducing the mechanism of standard costs for covering the most important services of the Regions (for instance, in health, education and social assistance), instead of the criterion of 'historic expenditure' applied up to now since this is considered a source of inefficiency and waste.

The special Regions are to be considered separately. In particular, it should be emphasized that the financial regime reserved to them, from the point of view of the resources made available, has proved to be very favourable in proportion to the costs they must incur for performing the functions attributed to them. Their financial structure is largely based on a system that gives them significant shares (generally quantified in seven-tenths or nine-tenths) of the income from the State taxes that are duly indicated in the respective statutes.

It is to be noted that the reform of Title V in 2001 also has some effect on the finance for the special Regions, since it is to be expected that the new Article 119, paragraph 2 of the Constitution, attributes also to them, in the same way as to the ordinary Regions, the concurrent legislative authority to introduce and regulate taxes. This is an extending of their financial autonomy because, before the reform – according to current opinion – only Sicily could take advantage in matters of concurrent authority, while all the other special Regions merely possessed authority that was supplementary to the State legislation.

However, as regards the achieving in special Regions of 'fiscal federalism', referred to in the aforementioned Law No. 42/2009, Article 27 of this Law essentially postpones the solution of the problem, probably because of being politically

such a thorny issue to unravel. The above provision restricts itself to committing the competent State and Regional bodies to adjust in the future the regulations of the special Regions, taking into account the needs of solidarity and national equalization set by the whole of public finance.

§10. The State Supervision of Regional Activities

412. In order to guarantee the limits applied to regional competences, the constitutional regulation makes provision for State mechanisms of supervision of regional acts and organs, all of which have recently been subject to reform. Starting with the supervision of regional laws, the new text of Article 127, paragraph 1 States that, 'when it considers that a regional law exceeds the competence of the Region, the Government may raise the question of [its] constitutional legitimacy before the Constitutional Court within sixty days of its publication'. This 'successive' supervision is extremely linear, and is the result of a simplification of the original system in two basic respects. In the first place, through the suppression, as per the original text of Article 127, of the deferral (preceding the promulgation and publication of regional legislation), that government can request in order to generate a new decision by the Regional Council. And second, with the abolition of the 'supervision of merit' (albeit unknown in praxis), provided as a guarantee of respect for the national interest or that of other Regions, and which was entrusted to Parliament. It should be noted that, in continuity with past trends, current legal theory tends to interpret the expression, 'exceeds the competence' in the sense that the violation of *any* constitutional norm, and not only those relative to the sharing out of competences between the State and the Regions, can be lodged with the Constitutional Court.

413. Prior to the reform of Title V in order to understand the State control of the administrative acts of the Regions, one needed to refer, in the first place to Article 125, paragraph 1, and to a series of legal provisions that created a general and preventive system of legitimacy control. In cases of important decisions, this supervision was extended to their merit, by referring them back to the Regional Council, with a reasoned request for re-examination. In the last decade, this body of regulation has undergone a series of amendments (introduced by Decrees No. 40/1993 and 479/1993, and subsequently Law No. 127/1997, grafted onto the trunk of Law No. 62/1953), that have progressively reduced the acts subject to control and abolished the 'control of merit'. In a more radical intervention, Constitutional Law No. 3/2001 made explicit provision for the abrogation of Article 125, paragraph 1, from which, according to the interpretation taking root in the praxis, is also derived the abrogation of the ordinary legislation relative to the matter, and thus the abolition of the controls on the relative regional administrative acts.

The only exception is constituted by the survival of the 'management control', which basically consists of the verification of the 'correspondence of the outcomes of administrative activity to the objectives established by law, [making] a comparative evaluation of the costs, modes and time-limits [necessary to] carry out administrative action' (introduced by Article 3, paragraph 4, Law No. 20/1994, and

entrusted to the Court of Auditors). Indeed, as stressed in the past by the Constitutional Court (see sentance No. 29/1995), this supervision of the functionality and efficiency of the administrative action need not necessarily be traced to the repealed Article 125 (which instead refers, implicitly, to external controls, carried out *ex ante*, on single acts). Moreover, seeing that the management control consists of an overall and *ex post* verification, with no impact on the legal efficiency of single acts, one can say that this is a question of a control sui generis, which can only lead to an 'auto-correction' on the part of the authority controlled.

Finally, we must specify that Article 134 has not been the object of reform, so that the power of Government to lodge a complaint with the Constitutional Court for any act committed by the Regions deemed to encroach on the sphere of competence assigned to the State by the Constitution, raising the question of a conflict of competence, still applies. Until recently, it was considered self-evident that this was a question of non-legislative acts, but more recent constitutional jurisprudence has shown signs of a different orientation. According to Articles 39–40 of Law No. 87/1953, an appeal can be lodged with the Court within sixty days from publication of the act, and the latter can, for serious reasons, be suspended pending the Court's decision.

414. The 'substitutive' interventions that the State is authorized to adopt in the event of persistent inactivity on the part of the Regions in the execution of their functions to the potential detriment of the national interest or defaulting on Community obligations, can also be considered an expression of a power of control. This substitutive control has been regulated, over time, by various State legislative provisions, the most recent being Article 5 of Decree No. 112/1998 which provides for a procedure whereby the Prime Minister sets the defaulting authority a time-limit within which to comply, after which the Council of Ministers nominates a Commissioner who intervenes in substitution. In extremely urgent cases this provision can be adopted directly by the Council of Ministers, but must be immediately communicated to the Conference on the State and Regions (see §11, below), which can request its re-examination within fifteen days.

It is important to note, in this regard, the new Article 120, paragraph 2, which, for the first time, regulates at the constitutional level a substitutive power that can be exercised by Government in relation to the Regions (besides the other territorial authorities) in the event of failure to '[r]espect international rules and treaties or Community regulations, or of a grave risk to public safety and security, or when necessary for the protection of juridical or economic unity and in particular the protection of the basic levels of the performance concerning civil and social rights'. This is a controversial provision, primarily because in one sense it can be interpreted as legitimating Government intervention exclusively on the administrative level, whilst in another sense it can be interpreted as being extended to legislation. It is likely that the problem will only be resolved when, as foreseen by Article 120, it is the ordinary legislator who defines, 'the procedures enacted to guarantee that the substitutive powers are exercised with respect for the principle of subsidiarity and the principle of fair collaboration', and whose behaviour the Constitutional Court will have occasion to judge.

415. Until recently, the State control of regional organs consisted of the dissolution of a Council which had performed acts contrary to the Constitution or seriously infringed the law, an extraordinary and exceptional measure that has never been applied. The reform realized with Constitutional Law No. 1/1999 also introduced the power to dismiss a President of the Junta again for having performed acts contrary to the Constitution or for having seriously infringed the law. The dissolution and dismissal must be made with a Presidential Decree, proposed by Government, and subject to the opinion of the Interparliamentary Committee on Regional Affairs.

According to the new formulation of Article 126 of the Constitution, the dissolution of the Council and the removal of the President can be ordered for reasons of 'national security' (understood as a general safeguarding clause covering unforeseeable situations).

Contrary to what appeared in the old text of Article 126 of the Constitution, no provision is made for the Council to be dissolved when it does not meet the request from the Government to replace a Junta or President that has committed acts contrary to the Constitution or serious infringements of the law, since there has been introduced in these cases the direct removal of the President.

In addition to these cases of 'sanctionary' dissolution, it should be noted that the 1999 reform also introduced a 'functional' dissolution in the case of approval by the Council of a 'no-confidence motion against the President of the Junta elected by universal and direct suffrage'. Hence comes – as seen (cf. above §4) – not only the obligation for the resignation of the entire executive but also the dissolution of the Council, based on the clause *aut simul stabunt, aut simul cadent*.

Also leading to the dissolution of the Council is 'the removal, the permanent incapacity, the death or the voluntary resignation' of the directly elected President, and the 'simultaneous resignation of the majority of members of the Council' (Article 126, paragraph 3, of the Constitution).

§11. Cooperation between the State and the Regions

416. This distinction of competences and the complex system of controls do not mean that State–Region relations are exclusively characterized by a logic of clear separation (if not opposition) between the respective spheres of competence. In effect, a coordinated and efficient execution of the legislative and administrative functions cannot ignore the contemporary context and the harmonization of regional interests with national interests, as indicated so synthetically in Article 5 of the Constitution which combines the unity and indivisibility of the Republic with the values of autonomy and decentralization.

Moreover, the fact that the regulation also adopted the criterion of cooperation to describe the relations between the State and the Regions not only emerges from constitutional declarations of principle, such as this, but also from other factors. First, the Constitution regulates in detail the participation of the Regions in many key State functions: for example, the presentation by the Regions of bills and requests for referenda (abrogative and constitutional); the participation of regional delegates in the election of the President of the Republic; and the role of the Regions in the

procedures to be followed when altering the territorial boundaries of the Regions, Provinces and Communes. Second, there is the fact that within the framework of the constitutional system the Constitutional Court has gradually defined the principle of 'fair collaboration', to the point of making it a constant point of reference. From the body of constitutional jurisprudence one can deduce that such a principle imposes an elastic vision of the distinct competences of the State and the Regions, but that above all it requires, on the one hand, that the instruments of communication created by the State legislator are applied not out of mere formalism, but in order to realize a concrete and efficient collaboration. On the other hand, even without precise legislative provisions, when there is, 'a multiplicity of heterogeneous interests, referable to different subjects [… .] of constitutional importance', some sort of linkage must be made (Sent. No. 286/1985). The third and final factor is the behaviour of the ordinary State legislator, which has gradually created a vast range of instruments of collaboration between the State and Regions, ranging from the simplest forms, such as the reciprocal obligation of information, to more complex and incisive ones, such as formal agreements requiring the consensus of all the actors involved. Between these two extremes there are a whole series of proposals, requests for opinions, conventions, consultations, planning agreements, and the creation of politically mixed collegial organs.

With regard to the latter, it is important to stress that their role and number have been reorganized following the institution, in 1988, of the Conference on the State and Regions. This is a permanent body composed of the Prime Minister, and the Presidents of the Regions and Autonomous Provinces, with the participation of the Ministers involved and civil servants as required. Following the recent introduction of additional measures, the tasks of the Conference are no longer limited to those of information, consultation and communication, but have been extended (see, Article 9 of Law No. 59/1997 and Decree No. 281/1997), so as to allow it to promote and ratify understandings and agreements between the State and the Regions. Moreover, it must be obligatorily consulted on the plans for legal State provisions in matters of competence of the Regions, and it should generally take part in all decision-making processes of general interest.

417. Some rather unstructured appeals for State–Region cooperation also surface in the reform of Title V. Starting with the new Article 120, paragraph 2, which makes the first explicit reference to the 'principle of fair collaboration' as a guiding principle (together with that of subsidiarity) to inspire the ordinary legislator in the regulation of the substitutive power of government. Furthermore, Article 118, paragraph 3 stipulates that the legislator must provide forms of coordination and understanding between the State and the Regions in matters of immigration, public order and security, and the protection of cultural goods (matters that fall under the exclusive legislation of the State). Finally, Article 11 of Law No. 3/2001, which – until the structure of Parliament is changed to transform one of its branches into a chamber representing the Regions (and local authorities) – stipulates that 'the regulations of the Chamber of Deputies and the Senate […] can make provision for the participation of representatives of the Regions, the Autonomous Provinces and the local

authorities in the Parliamentary Committee for Regional Issues'. This is an evidently interlocutory solution (which has come under criticism from various perspectives of legal theory), and anything but lacking in importance, since in the event that the Committee expresses a contrary opinion on a bill on concurrent legislation or financial coordination it must be voted with an absolute majority by the Assembly.

§12. The Regions and International Relations

418. In political, scientific and legal situations, there has long dominated the opinion that the monopoly of taking on obligations at international level and their execution within the legal system should be attributed to the State. With the result that the regions could be stripped of that part of their competencies as and when affected by the international activities of the State.

Later, however, the evolution of the legal system, characterized by a gradual increase in the role of territorial autonomies, led to the tempering of the rigid notion whereby the so-called power over foreign affairs should be allocated exclusively to the State, and also led to the affirmation of the principle that it is not entirely precluded to the Regions to perform some activities at an international level.

In a first stage, the Regions were authorized to carry out both 'promotional activities abroad' and 'activities of mere international importance', because of some measures by the Government going back some time (this specifically relates to Article 4, paragraph 2, D.P.R. No. 616/1977 and D.P.R. 31 March 1994), the effects of which are combined with those of an innovative constitutional jurisprudence (cf. mainly Constitutional Court No. 179/1987).

To perform 'promotional activities abroad' it was necessary to obtain prior agreement with the Government, which could also be achieved tacitly if the Government did not object within forty-five days of learning about the programme of initiatives that the Regions intended to pursue abroad in the following year. As for the 'activities of mere international importance', there had to be distinguished those for which no formalities were required for them to be performed (studies, information, exchange of information, conferences, etc.) from those (such as twinning, statements of principles and intents, formulating of proposals) for which the Regions had to give prior notice to the Government to obtain its consent, which would be understood as granted if, within twenty days, the Government had not opposed it, with the exception of any contrast with the broader policies of the State or being outside the scope of regional interests.

The reform of Title V marks a second phase, which sees a further advancement of this process. On one side there is included in the concurrent legislative authority the matter of international relations of the Regions (Article 117, paragraph 3) and, on the other, these Regions are enabled – within their sphere of competence – to proceed with international agreements (Article 117, paragraph 5).

But there is more, because Constitutional Law No. 3/2001 stipulates that the Regions can enter into agreements with States and with local authorities within another State, even 'in the cases and with the forms governed by State law' (Article 117, paragraph 9 of the Constitution).

This last provision was implemented by Article 6 of Law No. 131/2003. As regards the relations with territorial bodies within another State, it is allowed (Article 6, paragraph 2, Law No. 131 cit.) that the Regions and Autonomous Provinces of Trento and Bolzano, in matters within their legislative powers, can enter agreements 'designed to foster their economic, social and cultural development and also to perform activities of mere international importance'. Before signing for these activities, they must be notified to the Presidency of the Council of Ministers and to the Foreign Affairs Ministry so that they and the relevant Ministries may make any comments, which must be sent within the following thirty days. Only after thirty days have elapsed without comments from these subjects can the Regions sign the agreement.

The most significant profile, however, is the *treaty-making power* which, as a result of the 2001 reform, the Regions can exercise with foreign States. This power is limited by Law No. 131/2003 (Article 6, paragraph 3) to 'executive and application agreements for international agreements that have duly come into force', to 'agreements of a technical-administrative nature' and to 'policy agreements aimed at promoting their economic, social and cultural development', in compliance with the Constitution, with the constraints deriving from international obligations and with the lines and directions of Italian foreign policies, as well as with the fundamental principles dictated by the State laws in matters of concurrent regional competence. Some procedural limitations were also introduced, in the sense that the autonomous Regions and Provinces are required to promptly notify the Ministry of Foreign Affairs and the Presidency of the Council of Ministers about negotiations, and they in turn notify the relevant Ministries. The Ministry for Foreign Affairs may indicate principles and criteria to be followed in conducting negotiations. If these negotiations take place abroad, the relevant diplomatic representations and the competent Italian consulate departments, in agreement with the autonomous Regions or Province, shall cooperate with conducting the negotiations. The 'authority to sign' under the rules of general international law and the Vienna Convention of 1969 – by which the international activity of the Regions becomes binding on the State under international law – is granted to the Regions by the Ministry of Foreign Affairs only after this Ministry has ascertained 'the political expediency and legitimacy of the agreement'. In case of disagreement between the Ministry and the Region, the question is referred to the Council of Ministers which decides once having heard the President of the Region concerned. Once this preventive verification process has been implemented, the Ministry of Foreign Affairs is required to give full powers to the Regional body responsible for the negotiations and conclusion, and cannot deny them at its own discretion (cf., in this respect, Constitutional Court No. 238/2004).

In any case, the autonomous Regions and Provinces cannot express opinions about the State's foreign policies, nor can they take on commitments from which derive financial obligations or charges for the State or which damage the interest of Communes, Provinces and Metropolitan Cities.

As already noted, according to Article 117, paragraph 5 of the Constitution, 'the autonomous Regions and Provinces of Trento and Bolzano, in matters within their competence … shall be responsible for opening and implementing international

agreements'. Article 6, paragraph 1, Law No. 131/2003 implements the constitutional requirement stipulating that the autonomous Regions and Provinces shall 'directly' be responsible for implementing and executing just those international agreements ratified by Italy, notifying the Ministry of Foreign Affairs and the Presidency of the Council of Ministers beforehand, which can formulate criteria and comments over the next thirty days. If failing to do so, without prejudice to the responsibility of the Regions to the State, the provisions relating to the substitutive power of the State will be applied, which the same law (Article 8, paragraph 1, paragraph 4, and paragraph 5) provides for pursuant to Article 120, paragraph 2 of the Constitution.

§13. The Regions and the European Union

419. By virtue of Italian membership of the EU and the primacy of Community law over Italian law, European norms can affect regional competences, to the point of departing from the 'normal constitutional distribution of domestic competences' (Sent. No. 126/1996 Constitutional Court). This can only occur on the basis of the organizational requirements of the EU and on the condition that the basic principles of the constitutional regulation and the inalienable rights of the individual are respected. This general stance, which has already been adopted by constitutional jurisprudence, is now echoed by the new text of the Constitution which formally subordinates the legislative jurisdiction of both the State and the Regions, in line with the constraints deriving from Community regulation. Paradoxically, the Constitution had ignored the phenomenon of European integration until the reform of 2001.

Apart from this significant innovation, the reform of Title V arguably provides a constitutional basis for the rather diversified body of regulation governing relations between the Regions and the EU which had already been stipulated by the ordinary State legislator. First of all, there is the inclusion, in the concurrent legislation, of 'relations between the Regions and the European Union' (Article 117, paragraph 3). Indeed, beyond the broader content that can be traced to a sector thus defined, we can conclude that in this way the Regions are constitutionally guaranteed what the legislator has already attributed to them for some time; that is, the faculty to provide for and to operate regional offices, or other mechanisms of communication and information within Community institutions.

Finally, and above all, Article 117, paragraph 5 which states that, 'The Regions … ., in matters within their competence, take part in the decisions to formulate normative Community acts and make provision for the implementation and execution of the acts of the EU, in conformity with the procedural rules set by State legislation that regulates the exercise of the substitutive power in the case of default' can be interpreted as giving a constitutional foundation to Region–EU relations. In particular, all the legislation in force dealing with the drafting and implementation of Community law can be traced to Article 117, paragraph 5.

420. With regard to the phase of formulation, to date the involvement of the Regions has been realized through the obligation on the part of the Prime Minister

to transmit details of regulatory Community projects and Directives to the Regions, and with the recognition to the autonomous authorities the power to submit their consequent observations to government. In these terms the regional presence is anything but incisive. Moreover, it was subsequently decided that the Conference on the State and Regions should dedicate at least two sessions a year to discuss 'linking up the lines of national policy on the elaboration of Community acts with the needs of the Regions' (Article 5 of Decree No. 281/1997).

It is clearly a question of small steps. The basis for a EU as an expression of States understood as overall systems of governance comprising all the institutional tiers of the State collectivity, including the Regions, and no longer as central apparatuses on a purely domestic level, has not yet been integrated into Italian regulation. Moreover, not even the Maastricht Treaty, which could have accelerated the process by extending it to all the Member States, is particularly active in this direction, since the only relevant innovation has been the setting up of the Committee of the Regions. This body is composed of representatives of the regional collectivities nominated by governments, but is only empowered to submit opinions to the Council and the European Commission. The prospect of active regional involvement could be relaunched, with the thrust of the new Article 117, paragraph 5, if the State legislator identifies more incisive forms of participation for the Regions in the drawing up of Community legislation.

421. By contrast, the role of the Regions in terms of the implementation of Community law is better articulated and defined. The existing legislation empowers the Regions to implement normative Community acts, but, in parallel, assigns the State a substitutive power in the case of regional inertia. With regard to Community Directives, which normally need to be implemented via national legislation, the Regions are empowered to give immediate effect to Community Directives in matters of both exclusive and concurrent competence. In the event of inertia on the part of the regional legislator, the State can temporarily apply all the provisions of general principle and of specific detail stipulated by State sources in order to avoid defaulting on the execution of EU obligations. However, these provisions are only valid until such time as the regional laws come into effect so as to protect the autonomy of the Regions.

The execution of Community regulations, and more generally, of all directly applicable Community sources, is also entrusted, administratively, to the Regions. In the event of the 'ascertained inactivity' on the part of the regional organs, Article 5 of Decree No. 112/1998 provides that the Prime Minister must assign the defaulting authority a time-limit within which to comply, after which the Council of Ministers nominates a Commissioner who makes provision in substitution. In urgent cases the provision can be adopted directly by the Council of Ministers, but must be communicated immediately to the Conference on the State and Regions, which can request its re-examination within a period of fifteen days.

§14. The Local Authorities

422. On the basis of the new Article 114, paragraph 2, the Communes and Provinces (together with the Regions and the still 'virtual' Metropolitan Cities) constitute 'autonomous entities with their own statutes, powers and functions according to the principles set down in the Constitution'. However, the very summary description of the autonomy of the smaller territorial authorities at the constitutional level, means that we need to examine the ordinary legislation to understand the precise dimensions of this autonomy. In this context, we must emphasize that it is only very recently that the old rule governing the regulation of the local autonomies, partly constituted by the fascist *testo unico* of 1934 and partly by the monarchic-liberal regulation of 1915, has been replaced with Law No. 142/1990. It was only in 1993 with Law No. 81/1993 on the elections of the key organs of the Communes and Provinces and which integrated the content of Law No. 142/1990 that we arrive at a definitive delineation of the body of regulation governing the local authorities. Both laws and subsequent amendments are now contained in Law No. 267/2000.

423. Schematically speaking, the organization of the Provinces and Communes is based, like that of the Regions, on three key bodies: the Council, Junta and President (or Mayor in the Communes). In accordance with Law 81/1993 it is the electoral college which appoints not only the Council, but also the President of the Province (or Mayor) with direct and universal suffrage for terms lasting fifteen years. The recent reforms have certainly reinforced the role of the monocratic organ. Indeed, the power to nominate and revoke membership of the Junta falls within the jurisdiction of the President of the Province (or Mayor), legitimated by direct popular election. In Communes with over 15,000 inhabitants this role is incompatible with membership of the Council. The President of the Junta (or Mayor), with the collaboration of the Junta itself, is responsible for the supervision and overall management of the local authority within the framework of the general lines of the political-administrative policy programme presented to the Council. The duration of the Council depends on the President's term of office, but the power to pass a vote of no-confidence on the executive with an absolute majority, with the consequent removal not only of the President of the Province (or Mayor) and Junta, but also the dissolution of the Council, and the need to call new elections, is assigned to the Council, as the organ of command and control.

Finally, the mayor also works as a 'government official' in the sense that he carries out, in his capacity as the head of a State organ, various functions, for example in matters relating to the public Registrar, public law and order, elections, and the collection of statistics. Moreover, he has the power to adopt contingent and urgent provisions in order to 'prevent or eliminate serious dangers threatening the safety of the citizens'.

As regards the functions respectively assigned to the local authorities, at the moment the Communes are generally in charge of all tasks relating to the population and the Municipal territory, mainly in the sector of services to people; the Provinces, however, are in charge of functions relating to the entire provincial territory and extensive inter-Commune areas, particularly in the sectors of school building, roads, the labour market, ground and environment protection, hunting, fishing in

inland waters, and above all the programming functions which includes the territorial coordination plan that determines the directions for the general structure of the territory.

This framework is due to be radically revised when the State and the Regional legislation implement Article 118 of the Constitution, redistributing the administrative functions among the local authorities in accordance with the principles of subsidiarity, differentiation and adequacy (see above, §1, No. 386).

It should be stressed here that, in recent times, the need to implement this part of the 2001 constitutional reform is no longer at the centre of the political-institutional debate since priority has been given to all the measures necessary to meet the urgent crisis in Italian public finances. In this respect, the Government led by Mario Monti, which took office towards the end of 2011, also adopted certain measures to reduce the bodies and functions of the Provinces in order to reduce the 'cost of politics'. The situation is that Article 23 of Law No. 214 of 22/12/2011 (converting Decree No. 201 of 6/12/2011) provides that the Provincial Juntas are abolished, that Councils be composed of not more than ten members elected with a system of grade II by the elective bodies of the Communes belonging to the Provincial territory, that the President of the Province is elected by the Provincial Council and no longer by direct general vote and, above all, that the functions of the Provinces are substantially depleted in favour of Communes and the Regions, reducing them to unspecified functions of direction and coordination of the activities of the Communes, in the matters and in the limits to be specified by future State or regional laws.

Some consider this measure as the first step towards the abolition of the Provinces – although this would be impossible without an explicit revising of Article 114 of the Constitution – in the belief that the Provinces are unnecessary and costly. This is not a unanimously shared opinion because, according to authoritative sources of doctrine, the Provincial level is to be considered the most useful for performing those 'wide-area' functions that cannot be carried out either by the Communes, too small, or by the Regions, too far away to assess and properly meet the needs of local communities. The solution that promises to be the most reasonable is not abolition but the merging of some Provinces in order to significantly reduce their number (at least by half) on the basis of parameters such as population, land area and the number of Communes within the various Provinces.

§15. The Relationship between the Regions and the Local Authorities

424. In the original text of the Constitution, the relations between the Regions and local authorities were based on two key axes. The first required the Regions to carry out their normal administrative competences via the Provinces and Communes using the instruments of the delegation of functions or use of local authority offices (ex Article 118, paragraph 1). The second was the power attributed to a regional organ to carry out general and preventive supervision of the acts of the local authorities (Article 130, paragraph 1).

The reform of Title V provides for more delegation, and attributes administrative regional functions directly to the Communes (see §8 above), whilst simultaneously abrogating Article 130, with the effect of eliminating the preventive supervision of the acts of the Provinces and Communes. This may lead us to suspect a serious weakening of the constitutional fabric of the relations between Regions and local authorities, but this is not the case. Constitutional Law No. 3/2001, indeed, demonstrates a desire to place the relations between the Regions and the local authorities on a new footing so as to guarantee their effective and constant collaboration. Although signs of this were already present in the regulation prior to the reform (thanks to provisions stipulated in many statutes of the Ordinary Regions), the Constitution was silent on this point. This gap has now been filled with the new text of Article 123, paragraph 4 which imposes the creation of an ad hoc organ ('in every Region the Statute regulates the Council of the local autonomies, as the organ of consultation between the Region and the local authorities'), which could play an important role, for example in view of the content of regional legislation in fiscal matters, or those concerning the allocation of administrative functions in the application of the principles of subsidiarity, differentiation, and proportionality.

Part IV. Citizenship and Fundamental Rights

Chapter 1. The Citizenship

by Marilisa D'Amico

425. As far as citizenship is concerned, the Constitution (Article 22) only sets out that no one can be deprived of his or her citizenship (…) for political reasons. This section is peculiarly important. In fact, some of the principles stated in the Charter apply indifferently to everybody, but other rights and duties expressly refer to the Italian or foreign Citizens (e.g., Articles 10, 16).

426. The rules which are currently in force in Italy are included in the Law No. 91/1992 and in Law No. 736/1994.

427. Citizenship is obtained according to *ius sanguinis*: anyone who was born of someone who is already a citizen is a citizen by right, regardless of his or her birthplace. Previously, only those who were born of an Italian male parent could become Italian citizens. The present legislation, in accordance with the principle of equality between the sexes, states instead that the child of a father or mother who are already citizens, is a 'citizen by birth' (Law No. 91/1992, Article 1 see also Constitutional Court, Decision No. 30/1983).

428. The principle of *jus soli*, i.e. the acquisition of citizenship according to the birthplace, is enforced to avoid cases of statelessness: a person who is born within the Italian territory becomes an Italian citizen by birth if both parents are unknown or Stateless or, according to the law of the parents' state, the citizenship of that State is not transmitted by birth (Article 1).

Moreover citizenship can be acquired:

(a) By a minor recognized or declared to be the child of an Italian citizen, or even adopted by an Italian citizen (Articles 2 or 3) or by a minor living with a parent who has acquired citizenship (Article 14). In this case, the citizenship can be relinquished when the child comes of age, if he or she is already a citizen of another country (acquisition by *juris communicatio*).
(b) By choice, by the foreign or Stateless person whose father or mother, grandfather or grandmother has a citizen by birth, or does his military service or is a civil servant in Italy, or has been living for at least two years in Italy when he or she comes of age. Foreigners who were born and have always been living in

Italy when they come of age can also choose to become Italian citizens. In all these cases citizenship can be acquired by expressing the wish to become an Italian citizen and by making this request within the specified period (Article 4) (acquisition by choice).

(c) By request, accepted by means of a decree of the Minister of the Interior, by the foreigner or the stateless person married to an Italian citizen after he or she has been living in Italy for six months or after three years of marriage. This request can be rejected if the person was convicted for particular crimes, or for justified reasons related to national security, upon the agreement of the Council of State (ss. 5 and 8) (acquisition by request, that must be accepted by means of a decree of the Home Secretary).

A foreign woman who marries an Italian citizen, instead, can no longer obtain the Italian citizenship *ex lege*.

(d) By concession of the President of the Republic, having consulted the Council of State and upon the proposal of the Home Secretary, by the foreigner who has been living in Italy for a number of years (from three to ten). Pursuant to Article 9 of the act, this number can vary according to the fact that the foreigner:
- is a child or second degree grandchild of an Italian citizen by birth – an immigrant's child or grandchild – or was born in Italy;
- was adopted after the age of majority by an Italian citizen;
- is a citizen of an EU Member State or Stateless;
- has been a civil servant for at least five years (acquisition by concession of the President of the Republic, upon the proposal of the Home Secretary. Previously the President must consult the Council of State).

Therefore, the acquisition of Italian citizenship very often depends on residence in Italy (except for the case of foreigners who do their military service or work as civil servants).

429. Even the most important case of loss of citizenship is connected to residence. When Italian citizens:

(1) are also citizens of a foreign country;
(2) acquire for the first time a foreign citizenship; or
(3) acquire it again

they may lose the Italian citizenship if they reside or take up residence abroad (Article 11).

On the contrary, an Italian who chooses to acquire the citizenship of another country does not automatically lose the Italian citizenship automatically: the Italian law still provides for double nationality.

The loss of citizenship can also take the form of a sanction towards citizens who have accepted a public employment or a public office offered by a foreign state, agency or international organization which Italy is not a member of. In this case, they must refuse to comply with the request of the government to resign. The same sanction applies to citizens who, during the war with a particular State:

(a) have accepted or held a public office or a public employment in that State;
(b) have chosen to do their military service in that State; or
(c) have even taken the citizenship of that State.

The loss of citizenship occurs at the end of the state of war (Article 12). Doubts have been raised about the conformity of this provision with Article 22 of the Constitution.

430. Citizenship may be voluntarily acquired again by all those who have lost it and particular conditions (i.e., residence in Italy, military service, State employment) occur. The Home Secretary, however, after consulting the Council of State, can forbid the new acquisition 'for serious and justified reasons', within a year from the occurrence of the above conditions (Article 13). The status of citizen gives entitlement to a series of specific rights and duties, which are not recognized for non citizens. In particular, the Constitution guarantees some political rights, especially the right of vote, to citizens only. Likewise, only citizens are supposed to accomplish with some public duties (such as the duty to defend the homeland, or to do their compulsory military service in all the cases provided by law). Anyway, in 2010 the Court confirmed that the rights (apart from political rights) must be recognized 'the individual not as participants in a given political community, but as human beings' (Decision No. 105/2001, 249/2010).

It should be mentioned here also in the European citizenship, which bears more resemblance to that of nation States for the importance of the consequences of its possession. Every citizen of the EU Member States has this kind of citizenship; as stated in the Article 20 of the Treaty on the Functioning of the EU (which replaces Article 17 TEC), it does not replace national citizenship but 'it adds'.

An EU citizen shall enjoy the rights conferred by the Treaties. Therefore, at first the Article 3 of the Treaty on the European Union states that the EU shall offer its citizens an area of freedom, security and justice without internal frontiers in which both the free movement of persons. Second, the Article 21, clause 1, of the Treaty on the Functioning of the EU recognizes, for example, the right to move and reside freely within the territory of EU Member States and Article 22 of the same treaty provides for the right to vote and candidate in municipal elections in the place of residence and the right to vote in the country of residence for the European Parliament elections.

431–432

Chapter 2. The General Aspects of Fundamental Rights

by Marta Cartabia

§1. Introduction

431. Part I of the Constitution contains a long and detailed 'Bill of Rights', especially from Article 13 to Article 54 which is divided as follows:

– Title I – Civil Relations.
– Title II – Ethical and Social Relations.
– Title III – Economic Relations, and
– Title IV – Political Relations.

Before this 'Bill of Rights', however, the Constitution deals with some fundamental principles helping the reader to understand the global organization of the relations between State and society. Article 2 of the Constitution States that:

> The Republic recognises and guarantees the inviolable rights of the person, both as an individual and as a member of the social groups in which their personality finds expression, and imposes the performance of unalterable duties of a political, economic and social nature.

Here we examine the following fundamental principles:

(a) the inviolability of fundamental rights;
(b) entitlement to fundamental rights; and
(c) the acknowledgement of fundamental unwritten rights.

Before analysing these principles, it must be noted that the Italian Constitution never mentions the words 'fundamental rights', but rather 'inviolable rights'. It is not wrong, however, to consider these two expressions as equivalent, except for the legal meaning that the term inviolability sometimes assumes in the Italian legal system.

§2. The Inviolability of Constitutional Rights

432. The proclamation of the inviolability of fundamental rights by Article 2 is not just a way to lend moral weight to the rights subsequently listed in the Constitution. It has a precise legal and cultural meaning.

Affirming that fundamental rights are inviolable is tantamount to a rejection of the public rights theory elaborated by German academic commentators of the nineteenth century (Gerber, Laband, and Jellinek) and subsequently taken up in Italy. This theory considers citizens' rights vis-à-vis the State as a consequence of the self-limitation of State powers, which the latter could always change in its favour.

Affirming that fundamental rights are inviolable means, on the contrary, that they must be respected by all public authorities, including legislators and the authorities responsible for amending the Constitution. Inviolability therefore means the absolute immutability of such rights. The State has no control over fundamental rights and cannot breach them, not even with regard to the complex procedure for amending the Constitution (see Part II, Chapter 4). This then is the legal meaning of inviolability as proclaimed by Article 2: inviolable means definitive, mandatory and untouchable. Fundamental rights are therefore protected not only against the executive power – as in the eighteenth century, especially in the liberal era when the main provision with respect to fundamental rights was the fact that they could only be limited by statute – but also constitute a limit for acts of Parliament as well as for any other legal act, including constitutional laws, laws amending the Constitution, and other equivalent sources (EU provisions, international customary laws and Concordat provisions). The Constitutional Court shares this opinion. In one of its leading decisions (Decision No. 1146/1988) it stated that the supreme principles of the Italian Constitution, including the inalienable rights of individuals 'cannot either be subverted or modified in their essential contents, not even by laws amending the Constitution or other constitutional laws'. In spite of the lack of a constitutional provision explicitly stating that such fundamental rights cannot be the object of a constitutional amendment (such as Article 19, paragraph II of the German Constitution or Article 53, paragraph I of the Spanish Constitution), the Court has clearly declared their absolute inviolability. The Constitutional Court's judgments, however, have not done away with all the doubts as to the meaning and scope of such inviolability.

433. First of all, it is necessary to identify which aspects of constitutional rights are to be considered inviolable. Clearly, inviolability cannot cover every single expression and implication of these rights. This is why the Constitutional Court deems that only the essential content of fundamental rights cannot be the object of constitutional amendment and must therefore be considered inviolable. The different ways of expressing these rights can, and sometimes must, be changed with the passing of time by Parliament, either by means of an ordinary law or an amendment to the Constitution.

The general constitutional provisions protecting fundamental rights can therefore be changed. What cannot be changed in any way whatsoever is the basic content of these rights. The laws, including laws amending the Constitution, producing such an effect would certainly be considered in breach of the Constitution by the Constitutional Court (see again Decision No. 1146/1988).

Another difficult question is how to identify the inviolable rights from among all those set out in the Constitution. The Constitution is not clear in this respect. Inviolable rights are cited generically in Article 2 and there is no reference to which of the rights subsequently mentioned in Article 13 and the following articles can be considered as such. Later on the Constitution defines as inviolable only some of the rights, namely personal liberty (Article 13), freedom of domicile (Article 14), the liberty and secrecy of correspondence (Article 15), and the right to a judicial defence (Article 24), but this selection is not intended to exclude all other rights. Analysing the text of the Constitution will clearly not provide a solution to this

problem. It is self-evident that some rights, such as freedom of expression or association, are inviolable even though this is not explicitly stated in the Constitution. However, other cases are not so clear.

Given the absence of precise indications in the text, the task of identifying inviolable rights and defining their basic contents is largely left to the Constitutional Court.

§3. The Beneficiaries of Fundamental Rights

I. Individuals and Social Groups

434. Article 2 of the Constitution obliges the Republic to recognize and guarantee the inviolable rights of the person, 'both as an individual, and as a member of the social groups in which their personality finds expression', thus protecting, besides the individual, the social groups in which the social dimension of men and women is expressed. This and other constitutional provisions, which develop the contents of Article 2, especially freedom of association (Article 18), together with the rights of the family (Articles 29–34), freedom in the organization of trade unions (Article 39), freedom to freely form political parties (Article 49), freedom of religious affiliation (Article 19), the basic freedoms enjoyed by religious denominations (Articles 7–8), and the protection of linguistic minorities (Article 6), indicate that the Constitution favours pluralism and the autonomy of social groups.

The philosophy of the Italian Constitution, as well as many other Constitutions since the Second World War, is in contrast both with the nineteenth century theory which only acknowledged the relations between the individual and the State and, most of all, under fascism, when the State tried both to incorporate professional associations into State bodies – the corporate State – and distrusted any other form of private association. This highlights the innovative scope of the Republican Constitution, which contains a set of provisions particularly in favour of social groups, to the extent that it offers them the same fundamental rights as individuals (see General Introduction, Chapter 2). What exactly do we mean by social groups? Which forms of associations are entitled to fundamental rights? Even though it is quite difficult to give a precise definition, it can be inferred from the Constitution that it includes both natural groupings, such as the family and linguistic minorities, and voluntary groupings, namely associations (even those not legally recognized), political parties, trade unions, religious denominations, etc.

Public institutions are certainly excluded from the group since they cannot be considered the expression of social pluralism: the distribution and decentralization of public agencies is the expression of another principle, i.e. institutional pluralism, protected and promoted by Article 5 of the Constitution.

A more debated question is the possibility of including companies and economic associations in general under the category of social groups enjoying fundamental rights protected by the pluralistic principle of Article 2. Even those who adopt a broad interpretation of the notion of social group usually tend to distinguish groups

having an economic nature from the others by affirming that they cannot enjoy fundamental rights on the same conditions. Thus, even though all social groups, including economic ones, are deemed to enjoy important rights such as freedom of domicile and liberty and secrecy of correspondence, there are doubts as to their entitlement to freedom of expression including, for example, advertising.

435. Can social groups be considered the direct beneficiaries of fundamental rights? Most academic commentators conclude that social groups are only indirect beneficiaries of such rights, and that the latter are solely enjoyed by individuals. Increasing the value of social pluralism would only allow individuals to benefit from those rights that are usually exercised collectively. With this aim in mind, for instance, there should be no right of associations to freely establish themselves, but rather a right of individuals to freely establish associations. This interpretation appears to be confirmed by the Constitution. Article 2 does not touch on the rights of social groups as such, but instead cites, 'the inviolable rights of the person. … in the social groups in which his personality finds expression'. However well-founded, this specification about the direct or indirect way in which social groups benefit from fundamental rights does not appear to produce significant practical consequences, since providing for the 'rights of individuals to form associations' means in many cases recognizing these same rights to the 'associations of individuals'.

II. Citizens and Non-nationals

436. Article 2 of the Constitution does not distinguish between citizens and foreigners. On the contrary, it recognizes inviolable rights to every human being and does not allow arbitrary distinctions based on citizenship.

However, if it is true that in the Italian regulations foreigners are beneficiaries of fundamental rights, it is also true that their right protection does not coincide perfectly to the protection granted to citizens. The position of the foreigner with regards to fundamental rights is determined by a group of constitutional provisions – Article 2, in the part that recognizes and grants fundamental human rights, Article 3, in the part in which it establishes the principle of equality and of equal social dignity, Article 10(2), which states that the juridical condition of the foreigner is determined by the law in accordance to the international treaties on this issue – which do not exclude, anyway, a differentiated treatment of the foreigner compared to the one granted to the citizen.

As a matter of fact, although the Constitutional Court has always repeated that, when it comes to fundamental human rights, the principle of equality does not admit any discrimination between citizens and foreigners (i.e., C. cost. No. 54/1979, No. 62/1994, No. 454/1998, No. 172/1999, No. 432/2005), this does not prevent differentiating the situation of citizens to the one of foreigners when factual differences reasonably call for it: 'the recognized equality of subjective situations in the area of beneficiaries of liberty rights does not at all exclude that, in concrete situations, factual differences among equal subjects cannot occur, differences that the legislator can appreciate and regulate by his discretion' (C. cost. No. 104/1969). One should

not forget that, in fact, in regulating the juridical position of the foreigner it is necessary to reconcile numerous and contrasting interests and values: there are the reasons of human solidarity but also the State duty to protect borders, also for reasons of international responsibility, and even the necessity to avoid that the protection granted to foreigners results detrimental to the national collectivity or to other foreigners, lawfully resident within the national territory (C. cost. No. 353/1997). From here it derives that, on one side, not every fundamental right granted to citizens is automatically recognized also to foreigners; on the other side, even in case a fundamental right is granted to a foreigner, it is not certain that the extent and the limits of that right coincide with those that a citizen meets when enjoying the same right.

The general trend is to extend inviolable rights also to foreigners as much as possible, rights that are granted 'to individuals not just because they belong to a determined political community, but because they are human beings' (C. cost. No. 105/2001 and No. 249/2010), but this principle, while affirming the necessity of extending some inviolable rights to everybody, simultaneously reaffirms that some rights, which are linked to the fact of belonging to a determined political community, can be reserved to citizens.

It is certain, for example, that the foreigner is not granted political rights, such as the right to vote and the right to associate in a political party: the legislator eventually will be able to extend political rights to foreigners – as it happened, owing to the EU Treaty, for the electoral rights of EU citizens residing in Italy with regards only to local elections – nevertheless foreigners cannot claim such rights on the grounds of constitutional norms: in order extend political rights to foreigners an ad hoc legislative measure would be necessary. In spite of some legislative proposals for the recognition of the right to vote to foreigners being occasionally raised, none of them has been approved so far.

The difficulty, to which the Constitutional Court has not given a satisfactory answer yet, stands in defining the criterion on the base of which it is possible to identify those fundamental rights that are not to be granted to foreigners. Also in this case the textual argument cannot be of any use. In the Italian Constitution some rights are expressly granted only to citizens: apart from political rights, the Constitution grants to citizens, among all, freedom of movement, right of residence and to migrate abroad (Article 16); right of assembly (Article 17) and association (Article 18); right to maintenance and to social assistance (Article 38). However, it is apparent that a too strict literal interpretation of the Constitution would lead to unacceptable results: on the ground of such interpretation one should deny to foreigners the right of association and assembly, which instead are indisputably granted to everybody, without distinctions on the grounds of citizenship. This hypothesis aside, the Italian legal order lacks a criterion that allows differentiating with certainty between fundamental rights granted just to citizens and fundamental rights that are common to every human being. In the absence of this univocal criterion, the Constitutional Court proceeded on a case-by-case base, recognizing to foreigners, after all, also the freedom of movement (C. cost. No. 46/1977), the right defence (C. cost No. 198/2000), the right of health and medical care (C. cost. No. 252/2001), the right to life (C. cost. No. 54/1979). This list, brief and purely for example purposes, does not fulfil an explicit criterion, which still the constitutional jurisprudence lacks of. A

helpful tool could perhaps be given by the international treaties on human rights ratified by Italy: Article 10(2) states that 'the juridical condition of the foreigner is ruled by the law in conformity to the norms and international treaties' so that, on the basis of this provision, the international norms could constitute an authoritative point of reference for the identification of rights that belong indistinctively to every human being.

437. As it was said, even when the foreigner is recognized the beneficiary of a fundamental right, the same protection is not always guaranteed to him. In some cases there is an effective equation between citizen and foreigner (i.e., enjoyment of freedom of assembly and thought), whereas in other cases the foreigner is subjected to stricter limits than the citizen as far as the enjoyment of fundamental rights is concerned. This last hypothesis is particularly evident in case of freedom entrance, movement and residence within the Italian territory, also in the light of the fact that international law does not recognize an individual right of entrance into the territory of a different State than the one in which the citizen is national, but just the right to migrate (Article 13 Universal Declaration of Human Rights).

438. Today this issue is object of numerous national legislative interventions, among which Decree-Law 25 July 1998, No. 286, modified several times, Law 24 July 2008, No. 125 and some European directives such as the so-called returns directive, of the 26 December 2008, 2008/115/CE that rules in detail the procedures to follow for the returning of illegally staying third country nationals. Recently, the Italian legislation has been considered contrary to the Community one by the Court of Justice of the European Union (CJEU 28 April 2001, C-61/11), given that it encompassed criminal sanctions for the illegal immigrant that did not respect the order of the Italian authorities to leave the territory. According to the Court of Justice, the Italian legislation should have provided more procedural guarantees, such as that the decision of the return of the illegal immigrant could be immediately operative without immediately recurring to criminal sanctions if the illegal immigrant did not comply with the first order. In this field, of some relevance it is also the decision of the Italian Constitutional Court that declared the constitutional illegitimacy of the aggravating circumstance of being illegally resident (Decision No. 249/2010), that is the normative provision that provides an increase of penalty for crimes committed by the person that is residing illegally within the national territory (D.l. No. 92/2008, converted in L. No. 125/2008). Hence, although both the Italian Constitutional Court and the Court of Justice of the European Union confirmed that the violation of the rules on migration control could be sanctioned through criminal law, the use of criminal law to tackle illegal immigration is subject to the penetrating control of both of them.

§4. The Status of Non-nationals

439. Besides enjoying (to some extent) the fundamental rights protected by the Italian Constitution, non-nationals are directly affected by some constitutional provisions.

As has already been pointed out, Article 10, paragraph 2 states that, 'the legal status of foreigners is governed by [Italian] law in conformity with international law and treaties'. Consequently, the Italian Parliament is not completely free when enacting rules concerning non-nationals, because of the limitations imposed by international law and treaties that Parliament is constitutionally obliged to follow. So, the position of non-nationals is guaranteed by a re-enforced 'reserve of law' (on the notion a 'reserve of law' or *riserva di legge,* see in this Chapter §9 below).

Second, the Constitution deals with the right to political asylum. Pursuant to Article 10, paragraph 3 of the Constitution, 'foreigners, who cannot actually enjoy the democratic liberties protected by the Italian Constitution in their own countries, are entitled to the right to asylum within the territory of the republic, on the conditions established by laws'. The condition of political asylum for non-nationals is established by Law No. 39/1990. In order to enjoy this right it is not necessary that non-nationals are persecuted in their own country (in this case the rights of refugees are applied, as per international law). For political asylum-seeker status to apply it is sufficient that a country does not guarantee the main fundamental freedoms, even though those freedoms may be formally recognized in a bill of rights.

Third, following Article 10, paragraph 4 of the Italian Constitution, non-nationals cannot be subject to extradition for political reasons, but this limit to extradition cannot be applied to crimes of genocide (see Constitutional Law No. 7/1967). Another limit to extradition, not explicitly written in the Constitution, but recognized by the Constitutional Court (see Decision No. 54 of 1979 and Decision No. 223 of 1996), concerns crimes punishable by the death penalty.

Considering that the Italian Constitution, Article 27, prohibits the death penalty – except in times of war – the Constitutional Court has deducted that Italy cannot cooperate with other countries by means of extradition when the country of origin of the non-national is likely to apply penalties forbidden under the Italian Constitution.

§5. 'New Rights'

440. Article 2 generically recognizes the inviolable rights of individuals before the detailed 'Bill of Rights' poses a crucial problem of interpretation. Is it intended as a summary clause of the rights subsequently set out in the same text, or an open clause implying the recognition of implicit, unwritten, fundamental rights?

On the one hand, the development of social life generates new human needs that deserve the same protection enjoyed by fundamental rights. Although its aim is not to evoke natural law, Article 2 could stimulate the recognition of new fundamental rights by the courts, going beyond the boundaries of positive written law. On the other hand, the introduction of new fundamental rights could alter the balance of constitutional values and jeopardize the protection of written rights by weakening or suppressing some of them. Indeed, since the rights are kept together by a complex network of relations, introducing new fundamental rights could weaken the original rights written in the Constitution.

If we look for a solution to this fundamental problem in the line of constitutional cases, we find that the Constitutional Court's explicit declarations on the meaning

of Article 2 have been constant and homogeneous from 1956 to date. The Court has always declared, as a matter of principle, that Article 2 only extends generic, resume coverage compared to the specific rights set out elsewhere in the Constitution, thus concluding that it is impossible for rights not explicitly provided for by the Constitution to be protected under Article 2. However, the analysis of the line of constitutional cases cannot be limited to declarations of intent.

In spite of its incontrovertible declarations on the impossibility of founding new inviolable rights on the basis of Article 2, the Constitutional Court's attitude towards new rights is not strict and narrow-minded, since it admits the existence of 'fundamental inviolable rights … which necessarily derive from those enjoying constitutional protection' (Decision No. 98/1979), are both assumed and implied by written rights.

The Court has recognized, for instance, the rights of unborn child to life (Decision No. 25/1975), and the right of sexual identity (Decisions No. 98/1979 and No. 161/1985). It has also recognized the rights of decorum, honour, respectability, privacy and reputation as inviolable (Decision No. 38/1973), as well as the right to housing (Decisions No. 217/1988, No. 404/1988 and No. 252/1989), and, more recently, the right to privacy (Decision 139/1990), the right to leave one's country (Decision 278/1992), the fundamental right to keep one's own name as an essential distinguishing mark of personal identity (Decision No. 13/1994) where the Constitutional Court based its judgment solely on Article 2, although the right to a name is explicitly provided for by Article 22 of the Constitution, the right to life (Decisions No. 223/1996), and the right to social liberty (i.e., the right to freely engage in any activity personally chosen: C. Cost 50/1998).

In conclusion, the Constitutional Court tends to use Article 2 as a tool to qualify as inviolable those rights which are explicitly or implicitly referable to constitutional provisions. The Court refuses to consider Article 2 as an open clause, i.e. as an autonomous source of rights which can be inferred from the other constitutional provisions. This does not mean that Article 2 cannot be interpreted as a principle which allows the potential protection of a greater number of rights connected to those already listed.

§6. Fundamental Rights under the Italian Constitution and International Legal Norms

441. The above matter is in some way connected to the problem of introducing 'new' rights into the Italian constitutional system through international legislation. The international protection of human rights has gradually increased, especially thanks to the European Convention of Fundamental Rights and Fundamental Freedoms signed in Rome in 1950 and its judicial remedies. Italy has signed many international treaties and is part of the system introduced by the European Convention. In order to understand the role of these international declarations and their relations with the fundamental rights protected by the national constitutional system, it is necessary to explain the status of international legal norms in the national legal sources.

An important change occurred with the Constitutional revision of 2001 as far as the legal status of international treaties is concerned.

According to the dualist Italian tradition, every international treaty must be ratified by the national Parliament in order to be enacted. Consequently, international legal norms generally assume the force of the source on the basis of which they are transformed into internal provisions. Thus, it is necessary to distinguish between international legal norms of a customary nature and legal norms based on specific international treaties.

The former are assimilated through the 'permanent transformer' of Article 10 of the Constitution (the so-called automatic adjustment), and assume the legal status of constitutional rules, since they are only subordinate to the supreme principles of the constitutional system. The regime of international treaties, on the contrary, changed over the years. Before the Constitutional revision of 2001, they usually assumed the force of the law (see Part I, Chapter 2, and Part V of Chapter 3). The position of international treaties, including those protecting human rights, was therefore subordinate to the Constitution and basically equivalent to that of ordinary laws (see Decisions No. 323/1989 and No. 15/1996 for more details). The Constitutional revision of 2001 has introduced a new version of Article 117 of the Constitution, that reads: 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU-Legislation and international obligations.' This provision has been interpreted by the Italian constitutional court as granting international treaties an 'intermediate' value, between the Constitution and the ordinary legislation enacted by the Parliament. Consequently, they are not allowed to derogate the Constitution, but, however, the national legislation is required to conform to them.

As a result, the international treaties are more and more important within the case law of the Constitutional Court. Even before the revision of 2001, the Court has frequently quoted these treaties, especially the European Convention of Human Rights, in its judgments. Even though the provisions contained in these treaties were not used directly as parameters of the Court's judgments, they have played a major interpretative role in the Italian system, often allowing the Court to broaden the scope of the rights protected by the Italian Constitution (see Decisions No. 376/2000, No. 388/1999, No. 342/1999, and No. 399/1998). After the revision of 2001, the importance of the international treaties, and in particular the European Convention of Human Rights, has grown, since they have been formally recognized as parameters in the judgments of judicial review of legislation (see below paragraph 9).

§7. European Multilevel System for the Protection of Fundamental Rights

442. The Italian constitutional protection of individual rights is part of a multilevel system of fundamental rights protection, where an important role is played by the European Court of Human Rights (ECHR), and the European Union Court of Justice. Some constitutional provisions (i.e., Articles 11 and 117.1 of the Constitution) have been interpreted, by the Constitutional Court, to incorporate in the Italian system of rights the European Courts' case law. In this Chapter, the European systems of protection of fundamental rights will be examined separately.

443. At the very beginning of its existence, the protection of fundamental rights was not one of the goals of the European Community (now EU). The first treaties of the 1950s did not contain any catalogue of fundamental rights and the need to ensure the protection of those rights in the European community was not even mentioned. The lack of any form of protection of fundamental rights can be explained by the decision to entrust to the national constitutions the task of ensuring respect for fundamental rights in the European area. Before the European Court of Justice ruled the principle of supremacy of EU law, national constitutional provisions were considered prevailing over all the acts of the Community institutions and therefore also the protection of fundamental rights was guaranteed by national constitutions and national courts for what concerned EC competences.

However, once the principle of the supremacy of Community (European) Law and its direct effects were established, as a consequence, a free regulation zone was indirectly created, where no protection of fundamental rights was granted. After several requests from national constitutional courts, the European Court of Justice, since the Stauder decision (C.J. 12 November 1969 no. 2969), held that the protection of the fundamental rights of citizens against acts of the Community Institutions falls within its powers, thus covering a gap in human rights enforcement.

In recent years, since the proclamation of the Charter of Fundamental Rights of the EU, signed in Nice on 7 December 2000, the protection of fundamental rights gained a growing importance: after the Treaty of Lisbon (signed on 1 December of 2009) the Charter of Fundamental Rights of the European Union came into effect, acquiring the same legal value of the European Treaties.

444. Article 6 TEU lists the European guarantees of the fundamental rights. The new text, after the Treaty of Lisbon, reads:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. […]
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. […]
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Within the EU, the protection of fundamental rights is now based on three major instruments: the Charter of Fundamental Rights, the European Convention of Human Rights, the constitutional traditions common to the Member States:

(a) *The Charter of Fundamental Rights,* was approved in 2000, but it is only when the Treaty of Lisbon entered into force in 2009 that the Charter was granted legal bounding force. The Charter is nowadays recognized as having the same value of the European Treaties.

(b) *The European Convention of Human Rights* The European Convention and the decisions of the Strasbourg ECHR have played an important role in the Court of Luxembourg case law. Although the EU is not as such part of the Convention, the European Court of Justice takes very seriously the case law of the European Court of Human Rights. Today, Article 6 TEU, as amended by the Treaty of Lisbon, provides that the EU shall accede to the European Convention of Human Rights.
(c) *The Constitutional Traditions Common to the Member States*. Before a written Bill of Rights was adopted, the Court of Justice has elaborated the fundamental rights taking them from the constitutional traditions common to the Member States and by the European Convention on Human Rights.

Considered the system of protection of fundamental rights of the EU, what is the relationship between that system and the Italian Constitutional one?

This relationship can be described in three major points:

(a) *Separation*. The legal relations between the European and national protection of fundamental rights should run along a precise demarcation line: two systems of reference values, two orders of courts, two specific areas of application. More specifically, the fundamental rights are guaranteed by the European Court of Justice against acts of the European institutions, referring, as judicial standards, to the Charter of Fundamental Rights, the principles drawn from national constitutional traditions of the Member States and to the European Convention of Human Right. Different provisions of the European Law provide that the protection of fundamental rights of the European institutions shall not extend in any way the competences of the Union as defined in the Treaties (Article 6 TEU and Article 51 of the Charter of Fundamental Rights). However, national Constitutions and Constitutional Courts keep on preserving their effectiveness against all the national acts not involved in European Law enforcement.
(b) *Incorporation*. The separation doctrine did not resist untouched over time. Very soon, the Court of Justice ruled that although his decisions refer essentially to acts of the European institutions, they also affect, to some extent, the Member States, in cases where government regulations come within the scope of European Law (so-called incorporation doctrine). Until recent years, the Court of Justice has been rather cautious in referring to this doctrine. Today there is a tendency to expand more and more European protection rights even in areas that should remain within the Member States powers.
(c) *Counter-limits*. Following Article 11 of the Constitution, that reads: 'Italy agrees […] to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations', the Italian legal order complies with all obligations deriving from the EU legal system, including fundamental rights. However, since decision 183 of 1973, the Italian Constitutional Court has reiterated the counter-limits doctrine, that implies that the limitation of sovereignty cannot include the basic fundamental principles of the Italian constitution. Therefore, the Italian constitutional court is required to protect those principles from any breach, included those that might derive from the European legislation.

§8. The Fundamental Rights and the ECHR

444.1. Chronologically, the relationship between the Italian legal system and the European Convention on Human Rights (ECHR) has to be divided into two stages, the watershed moment being when the Italian Constitutional Court handed down judgments 348 and 349/2007.

Originally, in dealing with the ECHR Italy employed the dualistic approach traditionally used in the relationship between the Italian legal system and International law. On the basis of this approach the ECHR took effect when it was implemented by Law 848 in 1955, thereby giving it the efficacy of an ordinary law. As a consequence, for many years, the ECHR was pacifically considered a primary source of law from a domestic standpoint that could be derogated by subsequent primary legislation or acts have force of law (such as law-decrees and legislative decrees).

In truth, a part of Italian legal scholarship considered this approach unsatisfactory. Indeed, the protection of fundamental rights is a imprescindible element of all modern constitutions, as icastically demonstrated by Article 16 of the Declaration of the Rights of Man and the Citizen of 1789. On the basis of these considerations many writers saw the need to provide the ECHR with a kind of 'constitutional entrenchment' that was more in line with the fundamental rights that it contained. More precisely, without putting aside Italy's dualistic approach to international relations, an attempt was made to find a way to provide the ECHR with a passive force against primary sources of law so as to avoid domestic law from derogating from the provisions of the ECHR.

For a long time these interpretations elaborated by Italian legal scholarship remained merely theoretical and speculative. In the 1990s, however – in coincidence with the entry into effect of Protocol 11 of the ECHR which radically reformed the jurisdictional system of protection from violations of the ECHR by allowing individuals to apply directly to the Court, once all domestic remedies had been exhausted – the Constitutional Court began to test new theories on the basis of proposals put forward by legal scholars. The first case to be mentioned is judgment 10/1993 handed down by the Constitutional Court. In this decision the Constitutional Court established the atypical nature of international provisions protecting human rights in order to justify their special legal efficacy with respect to the legislative instrument they are contained in. Given that it is an atypical source of law the ECHR should be recognized a particular resistance to abrogation. As a consequence – the Constitutional Court stated – the rules contained in the ECHR could not be validly contradicted or abrogated by the provisions of other domestic laws 'because they are provisions deriving from a source that is the result of an atypical competence and, as such, they cannot be abrogated or modified by the provisions of an ordinary law'.

Although many considered this decision to be a one-off episode, which was then denied or not consolidated by the subsequent case law of the Constitutional Court, there is no doubt that this was a break with the previous period. By putting into discussion the fact that the ECHR had the value of ordinary legislation and by underscoring its specificity with respect to other international treaties, the Constitutional

Court opened the way to a period of 'crisis' in the relationship between the Italian legal system and the ECHR which lasted for many years to come.

From then on the Constitutional Court has always appreciated the value of the ECHR and the case law of the Court in Strasbourg at least from an interpretative standpoint. A famous statement was made by the Constitutional Court in judgment 388/1999, according to which the Constitution and the international human rights treaties 'integrate and complete each other through interpretation'. In the meantime, many of the ordinary judges and even the Court of Cassation began to enhance the role of the ECHR far beyond that foreseen for ordinary legislation.

As underlined above, the real epochal change took place in 2007 when the Constitutional Court handed down judgments 348 and 349/2007. In truth a decision by the Constitutional Court had been expected ever since the amendment to Title V of the Italian Constitution in 2001 and, in particular, Article 117, paragraph 1, which affirms that 'legislative power shall be exercised … in accordance … with international obligations'. According to many writers, this provision allowed the ECHR and also other international treaties to be accorded a greater passive force with respect to ordinary laws and therefore be considered interposed parameters in constitutional review without actually being elevated to constitutional rank in terms of their active force. This was indeed the interpretation given by the Constitutional Court in judgments 348 and 349/2007.

With these two decisions, the Constitutional Court established several fundamental principles with regard to the relationship between the Italian legal system and the ECHR. In particular, from the standpoint of sources of law, the Constitutional Court defined the ECHR as an ordinary source of law, but it accorded it constitutional entrenchment through Article 117, paragraph 1 of the Italian Constitution. In terms of judicial remedies, the Constitutional Court affirmed that all issues concerning the compatibility of domestic laws with the ECHR implicate judicial review of constitutionality which is competence of the Constitutional Court and that conflicts of this nature cannot be resolved by the ordinary judges through disapplication of the national law violating the ECHR. In the two judgments of 2007, the Constitutional Court unequivocally affirmed that issues concerning the contrast between domestic legislation and the ECHR are issues of constitutionality and therefore are not under the jurisdiction of the regular courts. More precisely, in the presence of contrasts between domestic legislation and the ECHR the ordinary judges may resort to *conform interpretation*, but they cannot resort to *disapplication* of domestic law: 'the regular judge has the task of interpreting the domestic provision in conformity with the international provision, within the limits established by the texts of the provisions in question. If this is not possible, then the judge must appeal to the Constitutional Court to address the issue of constitutional legitimacy'. (Decision n. 349/2007). Of course, in practice, there will be no lack of cases where the dividing line between conform interpretation and disapplication is very blurred and difficult to trace. That said, the clarification made by the Italian Constitutional Court could be of great aid in safeguarding the system of protection of human rights in all its complexity, something that cannot but involve the Constitutional Court itself. More precisely, in judgment 317/2009 the Constitutional Court clarified the exact tasks of the national legislator, the regular courts and the Constitutional Court itself on the protection of rights deriving from the ECHR:

> the final evaluation concerning the efficacy of the protection in single cases is the fruit of the virtuous combination of the following: the obligation of the national judge to conform with the principles established by the ECHR — through the judicial interpretation institutionally accorded to European Court of Human Rights on the basis of Article 32 of the ECHR — the obligation of the national judge to interpret domestic law in conformity with the provisions of the ECHR and, finally, the obligation of the Constitutional Court — when conform interpretation is not possible — to not allow a provision to remain effective within the Italian legal system when it does not protect a fundamental right.

In other words, the *legislator* has the task of *conforming* the Italian legal system to the rights protected by the convention, *the ordinary judges* have the task of *interpreting* the law *in conformity* with the ECHR and the Constitutional Court has the task of declaring *unconstitutional* a domestic law that does not offer sufficient safeguards for the rights protected under the ECHR.

A couple of examples of this new attitude showed by the Court are: decisions no. 80 and 113 of 2011. In the first judgment, the Court heard a challenge to legislation which permitted 'proceedings relating to measures involving a deprivation of freedom to be conducted in public', including specifically those before the Court of Cassation. The Court considered the status of the Nice Charter, and held that it only applied to cases in which an issue of Union Law already arose, and did not set forth general standards to be applied to all legal disputes across the board. On the merits, the Court dismissed the complaint on the grounds that the right to request a public hearing before the trial court was sufficient to ensure compatibility of Italian law with the ECHR.

In the second, the Court considered a reference from the Bologna Court of Appeal concerning the constitutionality of the provision of the Code of Civil Procedure which did not provide for criminal proceedings to be reopened if the original judgment had been ruled unfair by a final judgment of the European Court of Human Rights. The Court ruled that the situation was unconstitutional, and that the relevant provision had to be read as granting the right to request that a criminal trial be reopened under those circumstances.

§9. The Principle of Equality

445. The principle of formal equality proclaimed by Article 3, of the Italian Constitution that, 'All citizens are invested with equal social status and are equal before the law' is anything but new, since it dates back to the French revolution and was adopted during the liberal era by all States governed by the rule of law.

The principle of equality, however, has gradually assumed new meanings, as in other constitutional systems of the period after the Second World War. First, the fact that the principle of equality is set out in a rigid constitution such as the Italian one, makes it binding for the legislator too. If, in other times, the main provision of the principle of equality was the law, the present need is to protect equality even against the law. Therefore, in the present constitutional system, the principle of equality is

binding not only for the judiciary (see also Article 101 of the Constitution), and public administration (see also Article 97 of the Constitution), but also for legislators.

Second, even the content of the principle of equality has become more complex. This principle is designed to prevent both arbitrary discrimination among individuals in identical or similar situations, and arbitrary assimilation among individuals in different situations. In short, the Constitutional Court concludes that, by virtue of the principle of equality, identical situations should enjoy identical legal treatment while different situations should enjoy a different legal treatment. In particular, legislation based on the 'suspect' criteria mentioned by Article 3, paragraph 1, are deemed unconstitutional and are subject to the strict control of the Constitutional Court. We are talking about distinctions based on sex, language, race, religion, political beliefs and personal and social status. Laws causing a discrimination according to these criteria are deemed unconstitutional by the Constitutional Court.

Legislative distinctions based on criteria different from those mentioned above are examined by the Court in the light of the principle of reasonableness. In other words, the Court judges the consistency of the distinctions and assimilation made by the legislator by comparing them with the treatment used in other de facto situations.

As a consequence, judgments on laws dealing with the principle of equality must take into account not only two elements such as the contested provision and Article 3 of the Constitution, but also a third element or *tertium comparationis*, i.e. a third provision which is compared with the original provision subject to constitutional review. The violation or respect of the principle of equality by a specific provision emerges from the comparison with another provision of an ordinary law.

It is no doubt difficult to set general rules on the matter. Nevertheless, the Court has defined the following general criteria:

a. the fairness of the classification made by the legislator with respect to the individuals taken into account and considering the reference legislation;
b. the provision of homogeneous treatment that reasonably takes into account the essential features of the classification […] of people to whom such a treatment is reserved; [and]
c. the proportionality of the legal treatment to the classification made by the legislator, taking into account the objective aim of the reference legislation. Such proportionality must be examined in relation to its practical effects (Decision No. 163/1993).

446. Article 3, paragraph 2, completes and develops the principle of formal equality by affirming the principle of *substantial* equality when it states that:

> It is the responsibility of the Republic to remove all economic and social obstacles which, by limiting the freedom and equality of citizens, prevent the full development of the individual and the participation of all workers in the political, economic and social organisation of the country.

The principle of substantial equality justifies and encourages the passing of legislation designed to ensure the equality of treatment and opportunity to the weakest individuals or classes of individuals in unfavourable situations. The Constitutional Court has appealed to the principle of substantial equality in order to justify affirmative actions that guarantee privileged treatment to weak categories. To date, such actions have taken the form of laws in favour of women in the professional field (Decision No. 109/1993).

The principle of formal equality and the principle of substantial equality do not contradict, but instead complement each other, given that Article 3, paragraph 2, justifies legislation that, although apparently discriminatory towards certain categories or groups of citizens, actually reaffirms the equality of conditions, realizing full legal equality. Article 3, paragraph 2, on the one hand, includes an autonomous principle, i.e. the principle of substantial equality, which justifies interventions in favour of some groups of individuals and, on the other hand, also acts as an interpretative criterion for the principle of formal equality. The latter, in any case, is affirmed by distinguishing the legal provisions applying to the various categories of individuals depending on their actual differences.

§10. Two Instruments for the Protection of Fundamental Rights

447. The Constitution ensures the protection of some rights by providing that they must be regulated by acts of Parliament and not by regulations passed by Government. This limit is frequently applied to fundamental rights, considered a basic element of the life of citizens and the democratic nature of the legal system. It is the body representing the popular will, and not the executive, that is therefore allowed to pass legislation in this field. This instrument is called a ‘reserve of law’.

This rule, however, is also a burden for Parliament, which is obliged to pass legislation in this field without being able to defer it to other sub-legislative sources. The government, in truth, can issue legislation equivalent to formal laws in the field of fundamental rights, i.e., Decree-Laws and Legislative Decrees, not only for formal reasons (because these decrees are equivalent to laws passed with the ordinary procedure), but also for substantial reasons, since the passing of these decrees must always be preceded or followed by an act of Parliament (see Part I, Chapter 4). Government, however, cannot issue regulations in this field and the public administration, and to a certain extent, the judiciary, cannot be accorded powers that can be used to establish the scope and limits of fundamental rights.

This reserve may be absolute or relative. If it is absolute, the matter must be entirely regulated by acts of Parliament. If it is relative, the principle legislation must be issued by statute, although it can be subsequently developed and completed by the regulations of the executive. Since it is not easy to understand when the Constitution provides for the absolute or relative reserve of the rights it enshrines, the choice is partially made according to a literal or formal interpretation. When the Constitution states that restrictions on personal liberty are permitted only in such cases and manner as the law provides (Article 13), the protection is deemed to be absolute. On the contrary, when it states that no personal service or payment may

be forced on anyone, save 'according to law' (Article 23), or that public departments are organized 'according to the provisions of the law' (Article 97), the protection is considered to be relative. According to this principle, the protection of fundamental rights is presumed to be absolute: legislation passed in this field can only take the form of laws and acts having the force of law.

According to some academic commentators – an opinion recently confirmed by the Constitutional Court – what really matters is not the kind of protection (absolute or relative), but its object and scope. The general principle is that only Parliament is allowed to make the essential choices regarding some matters set out in the Constitution. The essential elements of some matters are very broad (as is the case for crimes and punishment) while for other matters the protection is ensured by providing that ordinary laws regulate the essential elements and the necessary rules of implementation be issued by subordinate acts (see Constitutional Court, Decision No. 383/1998).

When the reserve is relative (e.g., Article 23 Const., providing that individual duties and taxes, or Article 97 Const., about public office organization) the law cannot provide for a broad allocation of power: for this reason, the Constitutional Court has recently ruled the unconstitutionality of statutory provisions which attributed to city mayors a broad power to take urgent measures in order to prevent and eliminate threats to public safety and urban security (Decision No. 115/2011).

448. The second instrument for the protection of fundamental rights applies above all to the Articles of the Constitution dealing with 'civil relations'. Thanks to this instrument restrictions on fundamental rights, especially personal liberty, freedom of domicile, correspondence and press can be prescribed only by means of an official judicial order or '*mandato*'. The reason for this provision is that the judicial authorities are called upon to enforce the law impartially and independently (Article 101), and to guarantee the respect of the limitations imposed by the Constitution and statutes on fundamental rights.

Enforcement of laws placing restrictions on fundamental rights may thus be a prerogative of the judicial authorities. Nevertheless, the police authorities may also carry out provisional measures in urgent cases. Such measures, however, must be ratified by the judicial authorities within a very short period of time.

§11. Judicial Remedies for the Protection of Fundamental Rights

449. The Italian legal system does not provide citizens with specific judicial remedies for the protection of their fundamental rights. The violation of a fundamental right can be reported, in general, to an ordinary or administrative judge with due jurisdiction. Understanding the judicial remedies for the protection of fundamental rights requires an analysis of the organization and powers of the judiciary (see Part II, Chapter 7, Chapter 8).

Thanks to its role of prevention of violations coming from legislators, or the power to amend the Constitution, the Constitutional Court is considered the final and essential element of the judicial protection system of fundamental rights.

The Italian system, however, does not allow citizens to appeal directly to the Court for the protection of their rights. Such an appeal must take the usual forms, in particular, that of the preliminary ruling (see Part II, Chapter 9). Chapter 3. Key Rights Enshrined in the Constitution

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Chapter 3. Key Rights Enshrined in the Constitution

by Marta Cartabia

§1. Introduction

450. All the classical rights deriving from the liberal state, and rights typical of contemporary social-democracies are enshrined in the Italian Constitution. The rights set out in Title I of the Constitution have been inherited mainly from the liberal era. These are, for instance, personal liberty and freedom of residence, freedom of expression and religion, the right to judicial protection, as well as the principle of formal equality.

These rights are designed to protect individuals from interference by the State and are referred to as negative freedoms, i.e. those which oblige the State to *refrain* from action.

In harmony with the development of many other contemporary constitutions, the content of the Italian Constitution is much broader compared to the first declaration of rights: in addition to the classical nineteenth century freedoms, the protection of which has been confirmed and reinforced, the Constitution also recognizes political rights, especially the right to vote and to freely form political parties, which can be considered rights of the citizens to make their contribution to the life of the State. Provision is also made for social rights (right to education, health, health care, etc.) that oblige the State to guarantee certain services by means of positive action. Economic freedoms have lost their inviolable nature, especially the right of ownership and the freedom of contract. These freedoms were considered inviolable and sacred in liberal states, while today they are guaranteed insofar as they have a social function and utility. Let us take a closer look at the most important inviolable rights enshrined in the Italian Constitution.

§2. Personal Liberty

451. Article 13 of the Constitution proclaims the inviolability of personal liberty. Natural persons are thus protected against situations of temporary or lasting subjection resulting from physical coercion. Personal liberty therefore consists of all the faculties possessed by natural persons and its expression is the claim to avoid illicit physical coercion.

The Constitution concentrates on the problem of arbitrary detention and provides for the traditional habeas corpus. Article 13 provides that ‘no form of personal detention, inspection or search is permitted, nor other restrictions on personal liberty save by order of the judiciary for which the motive must be stated, and then only in such cases and manner as the law provides’.

The cases and manner in which an individual can be subjected to restrictions to freedom can be established by an act of Parliament only (or an act having the force of law). There is therefore an absolute protection of these rights, since Parliament is

the only authority empowered to issue detailed legislation on the matter. Such legislation must be complete so as to protect the citizen both against the executive, which cannot issue regulations on the matter (except for regulations which implement legislation), and against the misuse of discretionary powers by the judiciary.

This is why the Constitutional Court does not hesitate to declare unconstitutional those rules prescribing restrictions on personal liberty without determining precisely the cases and manner in which such restrictions can be imposed by the judiciary (see for instance, Decision No. 238/1996 on taking blood samples).

Moreover, restrictions on personal liberty can only be authorized by a motivated act of the judiciary, in compliance with the law. Pursuant to the Constitution, the police authorities may also take provisional measures placing limits on personal liberties, though only in 'exceptional cases of necessity and urgency, strictly defined by law'. It follows that the legislator is obliged to specify the precise circumstances in which the police authorities can impose restrictions on personal liberties so as to prevent the police from acting too freely. In any case, these measures are provisional and must therefore be communicated within forty-eight hours to the judiciary. If the latter do not ratify them within this time, the measures are revoked and declared null and void.

452. Provisional measures that can be taken by the police authorities (on condition that they are ratified by the judiciary) include mandatory and optional arrest in the case of people caught in the act of committing certain crimes (Articles 380–381 of the Code of Criminal Procedure), investigative detention of people seriously indicted of certain crimes, even if they are not caught in the act of committing the crime, when there is a risk of evasion (Article 384 of the Code of Criminal Procedure), as well as compulsory attendance for the examination or confrontation of a defendant (Article 376 of the Code of Criminal Procedure).

Besides these provisional measures, there are three other forms of restrictions on personal liberty.

First, there are restrictions on personal liberty following conviction to a prison sentence.

Mention should also be made of precautionary measures in criminal proceedings, taken prior to judgment, which are only admissible in compliance with Article 27 of the Constitution, for which a person cannot be considered guilty until final sentence has been passed. According to the Constitutional Court, precautionary measures must never anticipate the punishment and can only be ordered for precautionary reasons or reasons strictly pertaining to the trial (Decision No. 64/1970). Indeed, Article 274 and the following articles of the Code of Criminal Procedure provide that precautionary measures can only be taken in the three following cases:

(a) for investigation purposes, especially in order to preserve the authenticity of evidence;
(b) in order to prevent the defendant from escaping;
(c) in order to prevent the defendant from committing other serious crimes.

The need for preventive detention must be established on every single occasion. It is therefore forbidden to order the preventive detention of all those accused of a particular crime. In addition, Article 13 provides that the maximum period of preventive detention should be laid down by law. The Constitutional Court ruled that the calculation of maximum period of preventive detention, provided by the criminal procedure code, must cover the period of imprisonment that the accused suffered abroad waiting for the extradition towards Italy or in execution of European Arrest Warrant (Decision n. 253/2004 and n. 143/2008).

Besides detention for conviction and preventive detention, the legislation in force (especially Law No. 1423/1956 amended by Law No. 327/1988) envisages preventive measures that can be applied to suspects, even in the absence of a crime, in order to fight forms of organized crime such as the Mafia.

Such measures can be imposed on vast and heterogeneous categories of people, such as Mafia suspects, those convicted of crimes related to arms trafficking, habitual vagrants, people notoriously and habitually involved in unlawful business, etc. Other categories of people who can be subjected to coercive preventive measures are stipulated in Law No. 575/1965 and 646/1982, concerning the Mafia and the Camorra. One could also add Law No. 152/1975, enacted in order to combat 'political terrorism' in the 1970s; and Law Nos 401/1989 and 45/1995, to combat violent behaviour in football stadiums and at other sporting events; and Law No. 438/2001, which extends the field of application of preventive measures to those suspected of taking part in acts of international terrorism. These measures can even be taken in the absence of a crime and have consequently been widely criticized, since the cases provided for are too vague and give the competent judicial authorities too broad discretionary powers. The Constitutional Court has generally judged these preventive measures as constitutionally legitimate, although it has specified that they cannot be taken on the basis of mere suspicion, namely on the basis of subjective and uncontrollable assumptions (Decision No. 126/1983).

Citizens enjoy special provisions and judicial remedies against these measures, including the opportunity to appeal to the Court of Freedoms or *Tribunale delle Libertà*, called upon to render very rapid judgments on the merits of measures placing limits on personal liberty taken by the judiciary. Moreover, appeals to the Supreme Court against measures limiting personal liberty are always allowed (Article 111 of the Constitution).

§3. The Right to a Fair Trial

453. This right has been introduced by a constitutional review in 1999 (on this point see Part IV, Chapter 1 paragraph 9).

§4. Inviolability of Personal Domicile

454. Article 14 of the Constitution states that personal domicile is inviolable, thus protecting the privacy of the activities carried out by citizens in isolated places. Freedom of domicile is protected by *jus prohibendi*, i.e. the right to forbid the

admittance of other people into one's own domicile, and *jus admittendi*, i.e. the right to admit other people into one's own domicile.

It is worth stressing that the notion of domicile set out in Article 14 is very broad. In order to receive the protection of the Constitution, domicile should consist of a privately owned dwelling – a definition which includes workplaces, offices, firms, seats of political parties, trade unions and associations, besides, of course, personal dwellings. In a contested judgment of the Constitutional Court, the protection of Article 14 was extended to motor cars (Decision No. 88/1987). The only indispensable condition for a person to enjoy the freedom of domicile is the actual possession, even illicit, of the place in which he or she wishes to enjoy privacy. Possessing by virtue of a lawful title is therefore not necessary in order to exercise freedom of domicile. Any place, provided that it is isolated from outside and actually owned or occupied on a private basis, could therefore be considered as a protected domicile in compliance with Article 14. In this regard, the Constitutional Court stated that the constitutional protection cannot be triggered in case of police shooting on private conducts potentially visible to third parties, such as the one that takes place on a balcony overlooking the public way (Decision No. 149/2008).

As regards provisions on the restrictions on freedom of domicile, Article 14, paragraph 2 refers to Article 13 on personal freedom: no inspection, search or attachment can be carried out save in cases and in the manner laid down by law and by order of the judiciary for which the motive must be stated. In exceptional cases of necessity and urgency, the police authorities may carry out provisional measures which must be ratified by the judiciary.

Article 14, paragraph 3, provides for some exceptions to the general rules on the restrictions of freedom of domicile. Public authorities other than judicial ones can carry out verifications or inspections of personal domicile for reasons of public health and safety, or for economic and fiscal purposes. Work inspectors, for instance, can carry out their supervisory activities in workplaces (Constitutional Court, Decision No.10/1971), and the police can enter buildings used for commercial or industrial activities in order to carry out inspections and supervision for economic and fiscal purposes (Constitutional Court, Decision No.122/1974). Inspections and other measures of Article 14, paragraph 3, cannot be coercive in character, but must be conducted with the cooperation of the individual.

§5. The Freedom of Movement, Residence, Expatriation and Emigration

455. Article 16 of the Constitution provides for freedom of movement and residence in any part of the country.

All citizens have the right to travel freely anywhere in the country (freedom of movement) and to take up residence, abode or work in any part of the national territory (freedom of residence).

Restrictions on the freedoms of movement and residence can be prescribed only by an act of Parliament. The protection, in this case, is reinforced since the legislator is first of all bound by the Constitution not to impose restrictions on freedom of movement and residence of particular individuals but only general restrictions,

i.e. restrictions that can be imposed in the abstract to a general category of individuals. It should be noted that the Regions cannot adopt provisions hindering the free movement of persons and goods in the national territory (Article 120 of the Constitution). Moreover, legislators can impose restrictions on the freedom of movement and residence only for reasons of health and security, namely to protect the physical and mental health of citizens or to guarantee the so-called material public order, safeguarding peaceful cohabitation, and the safety of people and goods.

No restriction may be prescribed for any kind of political reason. A special prohibition of entry and residence in Italian territory for former kings of the House of Savoy, their wives and male descendants is set out in a final provision of the Constitution (XIIIth Transitory Disposition). In recent times this prohibition is under debate because some political parties are considering that the time has come to abolish the XIIIth Transitory Disposition. They consider that Italian historical and political conditions have dramatically changed since 1947 and that consequently the exile of the Savoy is no longer necessary, either for the survival of democracy in Italy or for other constitutional reasons.

In contrast, freedom of movement and freedom of residence can be limited by police and other administrative authorities, as well as by the judiciary.

456. Freedom of expatriation allows citizens to leave the territory of the Republic and re-enter it freely, save for such limitations as prescribed by law.

Legislation on passports (Law No. 1185/1967) outlines three main kinds of obligations that can temporarily restrict or impose conditions on the freedom of expatriation. These obligations are connected to family relations, such as the need for parental consent on the expatriation of minors, or legal requirements, in case of pending criminal proceedings, or persons subject to security measures, or even to military obligations, especially during military service. If the restrictions provided for by law do not apply, the relevant authorities are obliged to issue the passport and cannot exercise their discretionary powers.

Freedom of expatriation is also connected to freedom of emigration, protected by Article 35, paragraph 4. The Constitution, however, provides for a particular kind of right to expatriation, distinct from the individual right to emigrate, and that is, the collective right of economically disadvantaged social classes to emigrate in order to seek work abroad. This is why, unlike freedom of expatriation, freedom of emigration is not simply a negative freedom (i.e., consisting in the freedom to leave Italian territory), but also a positive freedom, requiring State activities of assistance and control of the phenomenon of emigration for the protection of the emigrants themselves, through the setting up of offices, even abroad, that provide assistance for preparing the documents of expatriation, transport and labour, as well as social welfare services. It is worth mentioning Law No. 172/1990, setting up the committees of Italians abroad (the so-called *comitati per gli italiani all'estero*), which carry out activities connected to social and cultural life, social welfare and school assistance, as well as vocational training of Italian émigrés.

The law, however, can restrict freedom of emigration or impose obligations for reasons of public interest, as it did with Article 9 of the Royal Legislative Decree No. 2205/1919, empowering Government to restrict the emigration towards a certain region for reasons of public order of in case of danger for the emigrants.

§6. Freedom of Assembly

457. Article 17 of the Constitution entitles citizens to 'hold meeting peaceably and without arms'. The wording of Article 17 should not be interpreted strictly as the freedom of assembly also applies to non-nationals.

Meetings are protected by the Constitution on condition that they are held peaceably and do not represent a threat for the safety or security of other citizens (hence the ban on arms).

The right of meeting is not subject to authorization on the part of the authorities. Citizens are free to gather in private places or in places open to the public, where access is free subject to the respect of certain conditions (theatres, universities, cinemas, etc.). On the contrary, notice must be given to the authorities for meetings in public thoroughfares (streets, squares). Specifically, the organizers of this kind of meeting must notify the police headquarters at least three days prior to the meeting. Notice is compulsory for the organizers, who can be fined in the case of non-compliance. The rights of other citizens attending the meeting should not, however, be jeopardized by the organizers' attitude and the spontaneous meeting posing no real danger for public safety or security should not be forbidden for the simple lack of notice to the authorities (see Constitutional Court, Decisions No. 90/1970 and 11/1979).

Meetings, wherever they are held, can only be forbidden, according to the Constitution, for well-established reasons of security or public safety. Meetings in public thoroughfares must be notified in advance in order to allow the police to prevent those that may pose a risk to public security and safety, depending on the circumstances in which they are held, and also to set the time and location for such meetings. Prior notification also allows the police authorities to supervise the course of the meeting and, if necessary, interrupt it if it degenerates and becomes dangerous for public safety and security.

§7. Freedom of Association

I. Associations in General

458. Protecting freedom of association is part of a wider project outlined in different parts of the Constitution. Its aim is to increase the value of social pluralism and groups, defined mainly by Article 2 of the Constitution (see §2 above). Article 18, which provides for freedom of association, deals more specifically with voluntary social groups. This provision is coordinated with other constitutional rules providing for some special kinds of associations, such as trade unions, political parties, religious associations, etc.

The freedom of association supports the right to form new associations without public authorization (see Constitutional Court, Decision No. 193/1985), and to join, refrain from joining, or withdraw from existing associations (the so-called negative freedom of association, Decision No. 239/1984 of the Constitutional Court). Furthermore, it is forbidden to make the enjoyment of individual rights conditional on membership of any particular association, except in cases such as membership of

professional associations with public interest objectives (see Constitutional Court, Decisions No. 69/1962, 11/1968, 25/1968 and 40/1982).

Article 18 protects all kinds of association, regardless of their aims unless the latter are forbidden to individuals by criminal law. The law cannot impose on restrictions on associations which are not already prescribed for individuals. Only the activities forbidden to individuals by criminal law represent a limit for associations. These are, for example, criminal conspiracy or associations connected to the Mafia (Articles 416 and 416*bis* of the Criminal Code). Consequently, if certain behaviour is not (or no longer) qualified as a crime when committed by an individual, the same activity cannot be considered a crime when conducted by an association (see Decisions No. 87/1966 and 243/2001 of the Constitutional Court for an interesting application of this principle).

Besides the limits deriving from criminal law, it is also forbidden to set up secret associations and associations which pursue political aims by means of organizations of military character.

The constitutional rules on secret associations were enforced by Law No. 17/1982: it is not possible to consider an association as secret, and therefore to forbid it, because it simply does not reveal its articles of association, the names of its members, or some of its activities. Secret associations can only be forbidden if, by concealing some of their characteristics, their aim is to set up occult centres of power and to pursue covert political aims. The law forbids those associations which, 'by hiding their existence and not revealing their aims and social activities, or not disclosing their members partially, entirely or even reciprocally, carry out activities aimed at interfering with the functions of constitutional organs, public authorities […]' (Article 1, Law No. 17/1982).

Associations with a military organization are also forbidden if they pursue political aims (Legislative Decree No. 43/1948).

Secret and paramilitary associations are forbidden in order to protect the effective democracy of the political system, by preventing the setting up of organizations whose purpose is to conquer or administer power without respecting the democratic rules set out in the Constitution.

Associations pursuing aims which conflict with the content of Article 18 can be dissolved. Before the administrative authorities can dissolve an association, the judicial authorities must verify the existence of the conditions listed in Article 18. An important exception to this rule was the ban on the Freemasons' Lodge 'P2', dissolved by Law No. 17/1982 without judicial pronouncement.

Except for the limits set out in the Constitution, the Italian legal system provides for complete freedom of association. In recent years, moreover, constitutional protection of social pluralism and groups has been increased by statute, especially by means of various financial measures which benefit associations which work to promote the aims of the Constitution. See for instance Law No. 266/1991 on voluntary organizations, providing for a broad range of tax allowances and incentives to registered associations carrying out social activities provided for by law; and more recently Law No. 383/2000 which recognizes the public function of 'associations of social promotion', i.e. non-profit associations carrying out social functions, at times, on behalf of the public authorities.

II. Political Parties

459. Article 49 of the Constitution protects the freedom to freely form political parties as an expression of the general freedom of association. Civil law defines political parties as simple unrecognized associations subject to the general legal status of this kind of association (Article 36 of the Civil Code). The Constitutional Court ruled that political parties are organizations of the civil society, to whom are attributed constitutional functions (C. C. Dec. No. 79/2006).

These associations are dealt with in a separate part of the Constitution because political parties are groups of people by which citizens can 'contribute by democratic means to national politics' (Article 49).

The Constitution takes party pluralism as granted when it hints at competition among political parties. Citizens can therefore set up new political groups without authorization.

The only limitation laid down by the Constitution is the democratic nature of the parties' political activities. This limit does not concern the structure and internal party organization, which is not now subject to restriction, but rather the methods of political competition with respect to other political parties. As the Constitutional Court has pointed out, the democratic method is aimed at preventing the 'violent usurpation of powers' and orientating the political action towards the 'respect of popular sovereignty entrusted to legally formed majorities, the protection of minority rights and compliance with freedoms set out in the Constitution' (Decision No. 87/1966).

The Italian Constitution, unlike other constitutions such as the German one, for instance, does not forbid so-called anti-system parties, which do not support the values enshrined in the Constitution, but instead tries to oppose them. The reorganization of the former Fascist Party, however, is prohibited, as stated by the XIIth Transitory Provision.

According to Article 98 of the Constitution, the right to join a political party is subject to limitation for those categories of citizens who must guarantee impartiality in the exercise of their public or institutional function, such as members of the judiciary, members of the armed forces on active duty, members of the police, and diplomatic and consular representatives abroad.

The activities of Italian political parties can be funded through a system which has been the object of a lively political debate and significant reform in recent years. Initially, provision was made for a direct State subsidy as a refund of election expenses for political parties which had presented their lists in a certain number of constituencies and obtained a specified minimum result at the elections (see Law No. 195/1974, subsequently amended by Law No. 11/1978, Law No. 659/1981 and Law No. 22/1982). The grants for election expenses were partly allocated in equal measure to all the entitled parties, partly in proportion to the votes obtained during the elections. Provision was also made for a further State subsidy for parliamentary groups' activities and the 'functional activities of their parties'. Given the close links between parliamentary groups and parties, it is self-evident that the second grant was aimed at funding the parties. These grants too were distributed partly in equal measure to all parliamentary groups and partly in proportion to the number of their members.

This system provoked lively discussion, so much so that, when the citizens were called upon to give their opinion on the matter in a referendum held on 18 April 1993, legislation providing for State subsidy to the parties through parliamentary groups was repealed, whereas State grants to help cover election expenses remained in force as provided for by Law No. 515/1993. Subsequently, new legislation (Law No. 2/1997) was issued to allow taxpayers to decide, when paying their income tax, whether to allocate a very small share of their income tax (with a minimum set by law) to funding movements or parties with at least one elected representative in Parliament. A special tax deduction system has also been envisaged for grants in favour of movements or political parties made by both natural persons and corporations or commercial entities. However, the provisions of Law No. 2/1997 were not very successful, because very few citizens opted to support political parties through voluntary contributions.

In 1999 the Parliament passed a new law, concerning public funding for political parties, Law No. 157/1999. The new provisions focus on the refund of electoral expenses. The global sum that can be distributed among the different parties is circa Euro (EUR) 2 for every citizen entitled to vote (45 million citizens). The different parties in proportion to the electoral results share this sum, so that there is no relation at all between the funds attributed to each political party and its electoral expenses. The funds are supplied in annual quotas, and in the case of an early end to the legislature the distribution is interrupted. Because of all these characteristics, the new law seems to have re-introduced a system of public funding to political parties, under the guise of electoral reimbursements.

III. Trade Unions

460. Another kind of association explicitly protected by the Constitution are trade unions. Article 39 states that the '[F]reedom in the organisation of trade unions is [declared] affirmed' and provides for the total freedom to set up, organize and become members of employees' or employers' unions. Trade unions that opted for the legal form of unrecognized associations (which give them the greatest freedom of action and organization) are thus granted full freedom and autonomy.

The Constitution does more than just enshrining the freedom and autonomy of trade unions. It gives them a special status, different from that of other associations. This provision, however, is still ineffective, given that no enforcing law has been passed to date.

According to the Constitution, without prejudice to the freedom of trade unions to be set up as simple unrecognized associations, trade unions registered with local or central offices and statutes providing for an internal organization on a democratic basis are entitled to make collective agreements which are generally enforceable (for all the members of the category of workers to which the agreements are addressed), through trade union representatives, who must reflect proportionally the wishes of their members.

Today, however, trade unions are still private associations: their collective labour agreements lack general legal enforceability and are only binding for their signatories, as all other private-law agreements.

However, the decisions of the Constitutional Court extend the economic effects of collective agreements to all workers belonging to a particular category because in these matters the collective agreements contains the economic parameter necessary to give practical application to the right to a sufficient wage in proportion to the quantity and quality of the work carried out (Article 36).

§8. Freedom of Religion

460.1. Religion is dealt with in the Constitution in many provisions: in both articles specifically dedicated to it (Articles 7, 8, 19 and 20 of the Constitution), in the enunciation of the principle of formal equality in Article 3, c. 1 of the Constitution, which explicitly prohibits any discrimination based on religious grounds.

Article. 19 of the Constitution protects the freedom of the each human being to profess and propagate his religion. Each individual is recognized and guaranteed, therefore, not only the freedom to personally adhere to a particular religion, but also freedom to propagate their faith to induce others to join, possibly through the criticism of other people's religious beliefs as long as the criticism is not expired in contempt (as Decision No. 188/1975). Complementary to the freedom to adhere and propagate any religion is the so-called negative freedom of religion, or freedom from religion, that is not to profess any.

The Constitution also protects freedom of worship, both individually and in a group, both in a private and in public places: the only limit that meets the freedom of worship is that it can be applied with rites contrary to morality (on interpretation of this common limitation of freedom of expression, cf. *infra*, §20). This is without prejudice, however, to the application of the rules governing meetings taking place in a public area. Even if they have a religious nature, they can be prohibited or dissolved, if they might act as a threaten to public safety (generally on freedom of assembly, cf. above, §17).

The Italian Constitution explicitly protect freedom of religion even in its collective moment: social groups with religious purposes are protected, whether they are associations or religious denominations. In particular, according to the Article 20 'The ecclesiastical nature and the purpose of religion or worship of an association or institution may not be due to special legal limitations or special taxation with respect to its constitution, its legal status or any form of activity.' It is forbidden, therefore, to impose special burdens on social formations because of religious purposes they may pursue.

Traditionally, in Italy the majority of the population has always been Catholic. For this historical reason, the Italian legal system has recognized a specific position to Catholicism. The Constitution provides a concordat between the State and the Catholic Church, and an agreement for the religious denominations who wish to formalize their relations with the State (Articles 7 and 8 of the Constitution). In recent years, the main problems related to freedom of religion originated, on the one hand, by the flows of immigrants from outside the EU involving the spread of a wide variety of religions among the population, and, on the other hand, by the spread of secular positions in the public sphere. Thus, the Constitutional Court has repeatedly affirmed the principle of the secularism (*laicità*), understood as not indifference of

the State before the religious experience, but the equidistance and impartiality of the law with respect to all religious denominations, as the supreme principle inviolable (Decisions no. 329/1997, no. 149/1995, no. 203/1989). As a result, the Constitutional Court has repeatedly intervened to affirm the equality of treatment of different religions, for example in the field of blasphemy law (Decisions no. 440/1995, no. 329/1997, no. 508/2000, no. 327/2002, no. 168/2005), the witness oath (C. cost. no. 149/1995) and as far as tax incentives and exemptions in favour of religious denominations were concerned (Decision no. 235/1997).

In recent years, many disputes have arisen regarding the display of religious symbols in public buildings such as polling stations, courtrooms and schools. In particular, the presence of crucifixes in classrooms was the subject of a complex court case, which stemmed from the Veneto Administrative Court, involved the Council of State, the Constitutional Court and even the European Court of Human Rights (ECtHR). Some argue that the public display of the symbol of a religion followed by the majority of the population, as is the crucifix, is a violation of freedom of religion of the people who do not recognize this symbol, either because they follow other religious beliefs or because they are atheists. While the Constitutional Court has not yet come to rule on the merits of the controversial question (Decision no. 389/2004), the European Court of Human Rights has finally considered that the presence of the crucifix in Italian schools does not result in any violation of individual rights (ECtHR, Grand Chamber, 18 March 2011, cn 30814/06, Lautsi c. Italy). The European Court noted that the presence of a symbol does not exercise any form of compulsion on individuals, it does not force students to acts of worship or other actions of a religious nature and thus does not violate freedom of religion. In addition, whereas in Italian public schools there is an atmosphere of openness to the presence of other religious expressions, using symbols and teaching marked with pluralism, the European Court stated that the crucifix does not determine any infringement of freedom of education.

§9. Freedom of Communication

461. Article 15 of the Constitution protects the liberty and secrecy of correspondence and of all forms of communication. This liberty is different from freedom of thought since it protects the secrecy of interpersonal communications and correspondence addressed to previously determined individuals, for instance, with personal correspondence, telephone and telegraph conversations.

The liberty and secrecy of correspondence and interpersonal communications are provided for by Article 15 so that limitations on this freedom can ‘only be enforced by decision, for which motives must be given, by the judiciary with the guarantees laid down by law’. This freedom is more heavily guaranteed than others, so much so that nobody is allowed to interfere with these communications, save by an act of the judiciary. The intervention of the police is thus expressly excluded but intervention is authorized, though only exceptionally, in the case of personal liberty and freedom of residence.

The Constitutional Court has underlined that the provisions of Article 15 of the Constitution also apply to the interception of telephone calls, which must be made

under the direct control of a judge (Constitutional Court, Decision No. 34/1973). This concerns not only the content of telephone conversations, but also the so-called external data, such as the time and date of the conversation, the number dialled, and so forth (Constitutional Court, Decision No. 81/1993 and no. 281/1998).

§10. Freedom of Expression and Freedom of the Arts and Science

462. The freedom to express one's thought as set out in Article 21 of the Constitution has always been defined by the Constitutional Court as a fundamental element of democracy and an authentic keystone of the entire system (Decisions No. 9/1965 and 84/1969).

The specific object of the right protected by Article 21 is the expression of thought, that is, the Freedom not only to hold any sort of opinion or conviction, but also to make them manifest to other people.

Article 21 includes freedom of opinion, as well as freedom of information: since it is very difficult to distinguish facts from opinions, provision is made without distinction for the freedom to disseminate news, opinions and comments (Constitutional Court, Decision No. 105/1972), even though the right of information as interpreted by the courts is conditioned by limitations, such as the truth of the facts described, the need to meet an effective social interest by making these facts known, and the correctness of declarations (Decision No. 5259/1984 of the Supreme Court). Moreover, revealing facts concerning the private life of people is subject to the limits prescribed by the right to privacy, explicitly provided for by Law Nos 575/1996 and 576/1996. According to this legislation, which is very detailed with regard to the protection of personal information, journalists and other people working in this field, can gather and disclose personal information without the limitations laid down by law under the supervision of a special Independent Authority, but only if the information activity regards facts of public interest. They also have to follow the rules of a special ethical code formulated by the Press Association and enforced by the Independent Authority.

In addition, Article 21 only protects the mere expression of thought and does not cover behaviour which may influence actions. This is why the Constitutional Court considers that behaviour such as criminal incitement should not be protected by Article 21 (Decisions No. 16/1973 and 65/1970).

The only explicit restriction laid down by the Constitution on the freedom to express one's thought is the respect of 'buon costume', i.e. the respect of sexual decency (see Constitutional Court, Decisions No. 1063/1988, and 293/2000). This restriction cannot, however, be imposed on the particular expressions of thought in the arts and sciences, given that liberty of the arts and science and the teaching of these subjects is provided for by Article 33.

Although the only explicit restriction is sexual decency, the Constitutional Court has identified another (implicit) limitation on the freedom of expression, i.e. public order in a material sense, implying, for instance, the prohibition to 'express one's thought freely in the middle of the night with a loudspeaker at full volume' and the need to make arrangements for public meetings and speeches which can be rescheduled if and where necessary (Decisions No. 168/1971 and 138/1985). In general,

freedom of expression must take into account all the other values enshrined in the Constitution, such as personal honour, the right to privacy and respect for secrets designed to protect constitutional values. This means that freedom of expression should be reasonably balanced with other constitutional rights and values deserving the same kind of protection.

Article 21 also provides for the means by which thought can be expressed, i.e. 'by word of mouth, in writing, and by all other means of communication'. A brief reference should therefore be made to the most important *media*: press, radio, television and show business.

The Constitution is only explicit with regard to the press which cannot be subject either to authorization, i.e. discretionary measures taken in advance by the public authorities, or to censorship, that is supervision of the content of documents. The only repressive means allowed is seizure, which can be ordered by the judiciary or the police in case of real urgency and when the immediate intervention of the judiciary is not possible subject to ratification within the next forty-eight hours. Seizure is allowed only in the case of offences specified in the press law, or in the case of a violation of the provisions prescribed by law in order to render public the name of the director responsible (see Law No. 47/1948).

The Constitution also lays down that the law may prescribe, 'by means of provisions of a general nature, that the financial sources of a periodical publication be made known', with the clear aim of allowing the reader to be informed on the underlying interests of the various newspapers. Besides these transparency requirements, the Constitution does not deal in more detail with publishing. It was only in 1981, with Law No. 416 (and subsequent amendments) that the creation of monopolies, oligopolies and dominant positions was prohibited in the publishing sector, thanks also to the supervision of a special Independent Authority (now the Independent Authority for Publishing and Telecommunications, after Law No. 247/1997). The strict restrictions on concentrations in publishing and, as we shall see later on, television companies, constitute an essential element for the protection of the fundamental value of pluralism in the field of information (see Constitutional Court, Decisions No. 826/1988 and 155/1990).

463. Radio and television broadcasting is not taken into consideration by the Constitution. The legislation concerning these activities has varied considerably over time. Originally, the radio and television media were a State monopoly until around the middle of the 1970s. At around that period, various decisions by the Constitutional Court opened up, although only marginally, the opportunity for private citizens to run local cable television installations (Constitutional Court, Decision No. 255/1974), and relay stations for foreign broadcasting (Constitutional Court, Decision No. 226/1974). In the meantime, the Constitutional Court kept promoting legislation which guaranteed a stronger degree of pluralism in the RAI (the Italian Television and Radio Network) as the sole holder of the public concession, still the holder of almost the half of the national TV service. The RAI was, therefore, subject to the directives of a parliamentary Commission and the direction of a board whose members were appointed by the Presidents of the two Chambers of Parliament with a view to 'opening it to the various social, cultural and political currents' (Law No. 103/1975).

A few years later, the Constitutional Court also liberalized local television broadcasting by Decision No. 202/1976, thus paving the way for the erosion of the State monopoly in the television sector, which was implemented also through various links among different local broadcasting stations. In less than ten years, in the absence of legislation on the use of frequencies and the problem of concentrations, Italy witnessed the emergence of some national private TV channels with the presence, which rapidly became dominant, of one single group. At the beginning, Parliament simply legalized the existing situation (Law No. 10/1985, previously Decree No. 807/1984, which the Constitutional Court found in compliance with the Constitution by Decision No. 826/1988 only due to the provisional nature of the legislation), then, starting from 1990, passed general legislation in the TV sector (Law No. 223/1990).

The system provided for by law is mixed (public and private). The RAI owns three national networks and private citizens are allowed to run televisions installations, upon authorization, on condition that a dominant position is not established. Most importantly, nobody is allowed to own either more than three networks or more that 25% of the networks provided for by the national plan, or to create multimedia concentrations involving the press, radio and television. With regard to these restrictions, the Constitutional Court has ruled that some of the provisions of Law No. 223/1990, preventing a single private citizen from possessing up to three television networks were illegitimate because they were against the principle of pluralism in the information sector (Decision No. 420/1994). The organization of this sector, however, is still provisional, partly due to the influence of new technologies (satellite, digital television, etc.).

Later on, Law No. 249/1997 set up an Independent Authority for publishing and telecommunications, a real governmental body in this field, having an important control function with regard to the respect of the anti-trust legislation, amended by the same law. The value of the pluralism in the national television broadcasting was recently asserted in the Decision No. 466/2002.

Broadcasting market is now regulated by Legislative Decree No. 177/2005. To promote competition and pluralism, the act provides for a complex discipline to regulate the transition from analogic to digital broadcasting (so-called switch-off), now definitively set at 31 December 2012.

Until today, however, the multiplication of channels allowed by new technologies did not bring any benefits in terms of increasing external pluralism. In an oligopolistic market, the temporary regulation introduced by the law only asked for a future plan of national frequencies, granting temporary administrative licences to the same subjects which already exercised a national broadcasting activity. In this way, the main incumbents (the public corporation – RAI – and the private corporation – Mediaset) had a great advantage over all other possible competitors, managing over 90% of the economic resources of the broadcasting market).

In recent years, some important provisions were enacted by the EU. The directives of 2002, about electronic communications, and two specific interventions of the Court of Justice of the European Union and the European Commission, tried to make Italian broadcasting system more competitive. The Court of Justice stated that

the temporary regulation of the digital switch over reduced competition, overprotecting the incumbent operators. According to the Court of Justice, the Italian system violated the EU rules because it did not grant a procedure to assign frequencies based on objective, transparent, non-discriminatory and proportionate standards. (case Centro Europa 7 C.J. 31 January 2008 No. 380/2005). Together with the Court of Justice decision, European Commission (opinion 18 July 2007) issued an infringement procedure against Italy, stated that the Italian legislative framework on broadcasting television violated the European directives on electronic communications.

In response to EU decisions, the Parliament approved the Electronic communications code (Law No. 101/2008). Indeed, it is still an open question how to proceed to the new allotment of the frequencies, since in a first time they were distributed among the main incumbents.

As concerns theatre and cinema, Law No. 161/1962 provides that films should be submitted to prior control on the part of special commissions so as to prevent offences to public morality and to decide whether a certain film may be shown to everybody, or whether it is not suitable for those under the ages of 14 or 18. Theatre performances are no longer subject to prior control but, like films, subsequent controls aimed at suppressing violations of public morality, especially the committing of crimes. The competent authorities for such a control are the judicial authorities of the place in which the first projection or performance took place.

§11. Protection of the Family

464. The Constitution deals with the family and family relationships in various articles. Specifically in Article 29, which qualifies the family 'as a natural society founded on marriage'; in Article 30, which governs the relationship between parents and children, 'even if born out of a marriage'; in Article 31, which gives the public authorities responsible for promoting 'economic measures and other provisions the formation of the family and the fulfilment of its duties', and to protect motherhood, childhood and youth, promoting the institutions necessary that purpose. In addition, the term 'family' is used in other articles: Article 36 of the Constitution, providing that the salary of the employee must provide for himself and his family an existence free and dignified life, or even Article 34, c. 4 of the Constitution, evoking families as recipients of checks to ensure the right to education, and Article 37 of the Constitution, providing protection to 'essential role in the family' of the woman worker.

The text of Articles 29 and 30 of the Constitution has an objective character of compromise, due to the harsh contrast between the secular and Catholic cultural trends that characterized the debate in the Constituent Assembly on many issues, such as the indissolubility of marriage and the status of children born out of the marriage. The signs of this compromise between the two parties in the constitutional text are found, for example, in the presence of specific restrictive clauses regarding equality between spouses, which can be established by law 'to ensure the family unit' (Article 29, c. 2 of the Constitution) and equality between legitimate children and children born to unmarried parents among them, to which the law must ensure

every legal and social protection, as long as 'compatible with the rights of members of the legitimate family' (Article 30, pargraph 3 of the Constitution).

These constitutional provisions have never been the subject of constitutional reform, but over the past sixty years they have been interpreted in very creative ways, which have yielded many away from the letter of the Constitution. These interpretations, on the one hand, take account of the changes in the Italian society while, on the other hand, take the moves by proper systematic interpretation of the rules governing family relations in the light of Articles 2 and 3 Const.

In particular, the provisions limiting equality between spouses and equality among children have been understood, both by the Constitutional Court that the legislature since the reform of parts of the Civil Code concerning family law (Law No. 151/1975), as having less strength with respect to the proclamation of the equal dignity of all individuals and the general principle of formal equality without distinction of sex and personal and social conditions in Article 3, c. 1 of the Constitution.

As for the spouses, the reform of family law and some judgments of the Constitutional Court have declared unconstitutional all the numerous rules that differentiated the position of the wife from that of the husband, the first of which proclaimed that the husband 'head of family'.

As for the children, legislative reforms and ruling of the Constitutional Court have eliminated all the discriminations between legitimate children and illegitimate children in personal and property relations with parents. Despite these, still some differences in treatment exists: for example, on the non-recognition of the so-called natural kinship in the regime succession (on which see Decision No. 532/2000) and due to the existence, in the text of the Constitution and the Civil Code, of two categories of children: a distinction unknown to most European legal systems and deemed inadmissible by the European Court of Human Rights.

Furthermore, the constitutional provision stating that 'it is the duty and right of parents to support and educate their children, even if born out of the marriage' (Article 30, pargraph 1 of the Constitution), has been subject to systematic interpretation in the light of Articles 2 and 3 Constitution, and has acquired an autonomous meaning from the context in which it is located. Moreover, from the beginning the matter of filiation has progressively become a base for the construction of a system of constitutional guarantees in favour of minors (the so-called status of the constitutional rights of the child). Again, a coordinated reading of the rules laid down in Articles 2, 3, 30 and 31 of the Constitution has given rise to constitutional rulings in accordance with the instructions from the numerous international conventions to which Italy is a member, the so-called principle of the best interests of the child. Finally, with respect to any substantive or procedural legal relationship in which a minor is involved, the legislature and the interpreter, each in its own area, operate a balance of interests such that the real interest of the latter is ensured in preference to that of any other subject.

More problematic, however, are the results that you receive an evolutionary and systematic reading of Articles 29 and 30 of the Constitution in the light of the recognition and guarantee of fundamental human rights also 'in the social groups where he expresses his personality' in Article 2 of the Constitution. In this regard, the judgment of the Constitutional Court declared unconstitutional the provision of

the Civil Code which prohibited incestuous children to act for the judicial declaration of paternity and maternity (Decision No. 494/2002) stated that the general provision recognizing the rights of the family as a natural society founded on marriage (Article 29, c. 1 of the Constitution) 'does not justify a conception of the family enemy of the people and their rights', as the provision of Article 2 of the Constitution 'proclaims, in accordance with what has been called the personalistic principle, that the value of social formations, including prominently the family, is in the end a way to allow and even encourage the development of the personality of human beings'.

If these claims are commonly shared, very controversial is the relationship between Article 2 and Article 29 of the Constitution in relation to the issues raised in the constitutional protection of the de facto family and same-sex marriage.

As to the first problem, the Article 2 seems also to protect a de facto family characterized by a degree of stability found, although such protection would be difficult to define in its exact content and is still less extended than the legitimate family, to which the Constitution confers a dignity superior because of the characters stability and predictability and reciprocity of rights and duties arising only from marriage (as C. cost. no. 310/1989). The constitutional jurisprudence differ depending on the subjects that are part of is most sensitive to the rights of children born to de facto unions, in accordance with the already mentioned constitutional imperative of equality for all children (see, e.g., Decision No. 394/2005), and tend to deny an equivalence between de facto family and legitimate family when they mention only the positions of the partners (except in some special cases: cf., e.g., Decisions No. 404/1988 and no. 559/1989, in which the Constitutional Court upheld the right of the cohabiting partner to succeed in the right to lease the house and the apartment in the allocation of public housing).

As for the other issue of same-sex marriage, the Constitutional Court has made clear that the idea of family protected by Article 29 of the Italian Constitution is the traditional one, based on the marriage of a man and a woman; however, the concept of 'social formation' as protected by Article 2 of the Constitution refers also to homosexual unions, seen as stable coexistence between two people of the same-sex. At the same time, the aspiration for such a legal recognition of same-sex couple cannot be obtained by a judicial ruling. It is for Parliament instead, in the exercise of its sole discretion, to determine the forms of assurance and recognition (as Decision No. 138/2010, but in the same vein ruled just two months later ECHR, sentance 24 June 2010, Schalk and Kopf c. Austria).

§12. Health Safeguards

464.1. The Constitution recognizes and guarantees health as a 'fundamental human right' and the protection of both as a right of the individual and as a collective interest (Article 32, c. 1 of the Constitution).

The right to health, the prevention of the disease and not to be harmed in his/her own health is therefore a real absolute individual right, operated not only in the vertical direction, i.e., towards the public authorities, but also horizontally, towards other individuals. Hence, the right to compensation for biological damage in the

event that a third party had wrongfully caused damage to physical and mental health of others is a non-pecuniary damage (Article 2059 civil code) that can be compensated along with other pecuniary damages (Article 2043 cc) (Decision No. 233/2003).

The Constitution guarantees free medical care only to the 'poor' (Article 32, c. 1 of the Constitution), but the legislature, by establishing the National Health Service (with Law No. 833/1978 and subsequent amendments) is committed to ensuring 'maintenance' and 'recovery of physical and mental health of the entire population, regardless of social and individual backgrounds'. In this respect, the right to health is a right which creates a positive burden to public authorities and, as such, is subject to budgetary reasons. Consequently, the health care may therefore vary depending on the economic circumstances. However, the level of health care can never fall below a minimum level, which guarantees the essential content of the right to health. In this regard, according to the constitutional text, resulting after the reform of Title V of Part II of the Constitution, which assigned the matter of 'health' to the concurrent legislative powers between the State and the Regions (Article 117, c. 3 of the Constitution), the central State still retains the exclusive legislative power in relation to the 'determination of essential levels of services concerning the rights … social entitlements to be guaranteed throughout the national territory' (Article 117, c. 2, letter. m) of the Constitution).

Health as a collective interest has led to guarantee of a healthy environment, too. A healthy environment is, however, the subject of a real individual right only when the health of the individual comes into play in a direct and timely manner.

The need to protect health as a collective interest may also require people to submit to certain medical treatments such as, for example, mandatory vaccinations. In this regard, however, the Constitution stipulates that health care can only be imposed by the law and that in any case cannot violate 'the limits imposed by the respect for the human person' (Article 32, c. 2 of the Constitution). The constitutional case law has also affirmed the right to compensation from the State when, following compulsory vaccination, the individual has suffered personal damages (Decisions No. 307/1990, 28/1998, 423/2000 and others, up to 342/2006).

Currently the most discussed topics on health care and on their obligation regarding end-of-life problems the thin line between aggressive treatment and euthanasia. It is believed that Article 32 of the Constitution while protecting the right to health care, protects the freedom to refuse medical treatment, even when such a refusal can result in a premature end-of-life. The problem has arisen in particularly dramatic cases where patients, for the clinical conditions in which they are found (e.g., in vegetative state), are unable to express their will. As part of a very complex and discussed case of Eluana Englaro, the Supreme Court of Cassation ruled that in the case of patients unable to understand and express their will, if they are in a permanent vegetative state, hydration and artificial feeding may be interrupted if the following conditions are fulfilled when: (a) after a rigorous clinical appreciation, the vegetative state is irreversible (b) the choice of interrupting the treatment is expressed on the basis of evidence that is clear, unequivocal and convincing, which means that the patient's voice can also come from her previous statements, her personality and lifestyle. If one of the conditions is missing, the court must deny the discontinuation of medical treatment (Court of Cassation, sez. Civ I., no. 21748/

2007). As the Eluana has been much discussed and disputed, a bill on the so-called living wills/advance directive is currently under discussion in Parliament.

§13. The Right to Education

465. The right to education is a social right based on the right to educate, including freedom to teach and freedom to set up and run schools, and the right to education, including the freedom to choose the school and the right to be educated.

The right of instruction, laid down in Article 33, paragraph 1 of the Constitution, is one of the aspects of the freedom of expression and is therefore an inviolable right, which can only be limited for the purpose of protecting other interests provided for by the Constitution, through the usual balancing of values. However, since teaching, unlike the other forms of expression, is aimed at protecting the social interest of instruction, provision was made for State controls, as laid down by law, with the aim of verifying both the suitability and preparation of teachers (see Constitutional Court, Decision No. 77/1964), and ensuring that teaching is imparted according to precise programmes in compliance with the constitutional values of cultural, artistic and scientific pluralism.

Parallel and complementary to the freedom of instruction is the freedom to found and run schools by organizations and private citizens. Besides public schools which, according to Article 33, paragraph 2, must cover all types and grades of schooling, organizations and private citizens can set up and run schools not funded by the State (Article 33, paragraph 3). Although it is not subject to discretionary authorizations, the freedom to found and run schools is conditional on the need to ensure that education is correctly given. The Republic, first of all, lays down general rules for education (Article 33, paragraph 2) with the aim of establishing some basic conditions for all kinds of schools. Furthermore, the law ensures the pupils of 'private schools which apply for official recognition' must enjoy conditions equivalent to those of pupils attending public schools (Article 33, paragraph 4).

Regarding the right to education, school pluralism is guaranteed by the freedom of access to the school, which is 'available to everyone' (Article 34).

In any case, the right and duty to attend compulsory and free elementary education for at least eight years is provided for by the Constitution (Article 34, paragraph 2). To be more precise, teaching services, premises and facilities necessary to the organization of the school are all free while the same does not always apply to books, means of transport, school lunches, etc. At the end of compulsory education, only 'capable and deserving' pupils, even though without financial resource, can attain the highest grades of learning by means of the contributions that the Republic guarantees within the limits allowed by law and special budget appropriation.

§14. Rights of Workers

466. In the section entitled, 'Basic Principles', the Constitution 'guarantees the right of all citizens to work' and binds the Republic to promote such conditions as will make this right effective (Article 4, of the Constitution). The right to work is

not intended as a right to find and keep an occupation, since the State does not exert full control over the global economic situation, including places of work, in a system dominated by free market principles (with the exception of State interventions for social purposes). Article 4, on the contrary, is aimed at affirming a fundamental constitutional value which represents an interpretative principle of all the other economic and social constitutional provisions. Such a value is also a programme and a commitment to be respected by the legislator and the other public authorities in order to implement a policy of full employment, albeit with the inevitable accommodation of other rights and interests laid down in the Constitution.

The above-mentioned instructions and commitments for public authorities must be completed with Article 35 of the Constitution, in which the Republic undertakes to safeguard labour in all its forms and the professional training of workers. Article 4, however, also contains some other individual rights, such as the freedom to choose an activity or a profession (see, among many others, Decisions No. 45/1965 and 248/1986 of the Constitutional Court), the freedom from unreasonable obstacles to admission to the chosen field of work (see, among many others, Decisions Nos 61/1965 and 207/1976 of the Constitutional Court), such as corporate-like privileges and discriminations based on sex. Article 4 also enshrines the right to carry out a working activity of one's own choice and according to the professional qualifications for which a person is employed (Decisions No. 3/1957 and 194/1976 of the Constitutional Court), the right not to be arbitrarily and unfairly dismissed (see Decisions No. 176/1986 and 97/1987), and so on.

Employed persons are also entitled to wages in proportion to the quantity and quality of their work and in any case sufficient to provide them and their families with a free and dignified existence (Article 36, paragraph 1, the Constitution). This right is immediately enforceable before a court of law. The standards laid down in collective agreements are usually considered by the courts as the basis for judging whether wages are sufficient and proportional. Collective agreements therefore take up de facto general enforceability in the Italian system, at least as far as decisions about the economic rights of workers are concerned. The right to daily and weekly rest and to paid annual holidays (Article 36, paragraph 2) are immediately enforceable and cannot be relinquished.

Working women and minors are particularly protected by the Constitution. Women are entitled to equal conditions of work and the same wages for the same work as male labour. It is worth mentioning that the Constitution also provides for the right to equal access to public office, without distinction of sex (Article 51). The only possible exceptions to equality between men and women are those which allow women to 'fulfil their essential family duties and provide for the adequate protection of mothers and children' (Article 37, paragraph 1).

The protection of work also consists in the above-mentioned freedom in the organization of trade unions (Article 39), and freedom of emigration (Article 35). We should instead concentrate on the right to strike which, 'is exercised within the sphere of the laws concerning the subject' (Article 40).

Providing for the right to strike in the Constitution consisted in a reversal of the previous legislative situation, in which striking was considered a crime. Today striking is a constitutional right which can directly be enforced before a judge and freely exercised without any civil or criminal punishment. According to the Constitution,

the procedures governing the exercise of this right may be set by law. Indeed, a special law provides that workers in the public utilities can strike without preventing the interruption of the public provision of such utilities (Law No. 146 of 1990, amended by Law No. 83 of 2000). At the same time, the right to strike can be restricted when it is necessary to guarantee other rights laid down by the Constitution (see Constitutional Court, Decisions No. 124/1962, 31/1969, 220/1975, 290/1974 and 4/1977).

§15. Right to Social Security and Assistance

467. The right to social assistance and the right to social security can be distinguished according to the groups of individuals who are supposed to enjoy them. The right to social assistance is aimed at guaranteeing every citizen unable to work and lacking the resources necessary for existence the basic financial resources allowing them to lead a dignified existence. Article 38 explicitly states that the right to social assistance is guaranteed to citizens unable to work and lacking the resources necessary for existence. This is a fundamental provision. The Constitution, however, also states that the main objective of the assistance for the disabled is to allow them to integrate themselves into the various fields of work. This is why the disabled and persons incapable of employment are entitled to education and vocational training by means of programmes and special facilities provided for by law.

On the contrary, the right to social security is guaranteed to workers, namely individuals who practise a profession or have practised it in the past, and is aimed at giving them adequate insurance for their requirements in case of accident, illness, disability, old age and involuntary unemployment. Both rights are immediately enforceable before a judge and oblige the State to guarantee certain services (see Constitutional Court, Decisions No. 103/1981 and 349/1983). It is therefore up to the State to create a system of social assistance and security allowing individuals to enjoy these fundamental rights. The law must balance out, under the supervision of the Constitutional Court, the requirements of social assistance and security and those connected to the enjoyment of other constitutional rights and the pursue of other general interests. The precise amount of the services supplied to citizens by virtue of the right to social assistance and security must be set by law, taking into account, of course, available financial resources.

The fact that these rights must be first of all guaranteed by the State does not prevent, however, spontaneous displays of solidarity, as laid down by Article 38, last clause which states that, ‘the freedom of private assistance is affirmed’.

§16. Economic Freedoms (Cross Reference)

468. In the section dealing with economic relations, the Constitution also guarantees some economic rights and freedoms, including freedom of economic initiative and property. For an analysis of these rights, see Part V, Chapter 2.

Chapter 4. The Protection of Linguistic Minorities

by Marta Cartabia

§1. Constitutional Provisions Protecting Linguistic Minorities

469. There are a number of linguistic minorities living in Italy. The largest are the German speakers and Ladin minority of the Trentino-Alto Adige region; the French speakers of the Valle d'Aosta region; and the Slovene speakers in parts of Friuli-Venezia Giulia. The other linguistic groups living in Italy are the small Greek, Albanian, Catalan, Provençal and Croatian minorities.

In accordance with the principles of social pluralism enshrined in Article 2, the Italian Constitution explicitly mentions linguistic minorities and guarantees their negative and positive protection.

The negative protection consists in the prohibition of discrimination against linguistic and cultural minorities living in Italy as set out in Article 3 which, after proclaiming the general principle of equality before the law, explicitly forbids any discrimination on the basis of language and race. All forms of discriminatory policies against ethnic, cultural and linguistic minorities are thus prohibited, in stark contrast to the past. In the fascist period, for example, in order to denationalize and forcedly assimilate minorities, the use of languages other than Italian was forbidden, names and surnames were forcibly Italianized, the settlement of Italian speakers in areas inhabited by linguistic minorities was encouraged, and, in the case of the German speakers of Tyrol, their emigration was encouraged.

The principle of equality is not exclusively or specifically aimed at protecting minorities but forbids any form of discrimination against cultural or linguistic minorities. Article 3, pargraph 2 and Article 6 of the Constitution also provide for a positive protection of minorities living in Italy in order to preserve their cultural and linguistic identity.

Article 6, in particular, states that, 'the Republic safeguards linguistic minorities by means of special provisions'. This constitutional rule was implemented by means of few general laws applying to all minorities living in the country, as well as by a greater number of laws protecting specific minorities such as the German and Ladin speakers in Alto-Adige, the French speakers in the Valle d'Aosta and the Slovene speakers of Friuli-Venezia Giulia.

§2. General Laws for the Protection of Minorities

470. As a general application of Article 6 of the Constitution, the Italian Parliament has recently passed Law No. 482/1999, which provides some guarantees for a specific number of linguistic minorities, namely the Albanian, Catalan, German, Greek, Slovene, Croatian, French, Provençal, Friulan, Ladin, Provençal and Sardinian speaking minorities (Article 2, Law No. 482/1999). Before this general law, only fragmentary rules could be found in the legal system, such as the first law on the broadcasting system (Law No. 103/1975) which grants ethnic-linguistic minorities

the right to produce and broadcast their own programmes and Law No. 935/1966 that abolished the prohibition on foreign names for Italian citizens. Today, these and other guarantees are provided in the general law on the protection of minorities. This law has opted for a system of guarantees based on the territorial settlement of the linguistic and cultural minorities, so that it applies only in those municipalities where one or more linguistic minorities reside. However, the application of this law is subject to a decision taken by the Provincial Council, after following a procedure that involves the citizens and municipalities involved.

The guarantees provided by the law comprise the opportunity to use and teach languages other than Italian in pre-school, primary and secondary schools, to use the language of the minority in contacts with the public administration, in official documents of local authorities, and in public broadcasting. Moreover, the law contains an invitation to the central and regional government, as well as to universities – to promote courses, research programmes, and other cultural activities aimed at fostering the knowledge and diffusion of minority languages and culture throughout the country.

Last, but not least, the general law on the protection of minorities contains a specific provision to compensate for the offence caused to individual identity by the forced Italianization of names under fascist legislation, and allows the citizen to keep their present names and surnames, or to restore their original form (Article 11, Law No. 482/1999).

§3. Special Rules Protecting the German and Ladin Speakers in Trentino-Alto Adige

471. Starting from the De Gasperi–Gruber agreement of 5 September 1946, many national and international norms have been enacted in order to ensure special positive protection for the German and Ladin minorities in Trentino-Alto Adige. The nature of these rules depend on the special form of territorial autonomy of the Provinces of Trento and Bolzano, as set out in the 1948 Constitution of Trentino-Alto Adige, subsequently amended in 1971. These two Provinces are entitled to an important role in the protection of the linguistic minorities living in their territories. For example, each of them is entitled to challenge laws passed by the State, Region or Province before the Constitutional Court, for breach of 'the principle of protection of the German or Ladin minorities' (see above, Part II, Chapter 9 on the Constitutional Court).

Other rules of procedure explicitly protect minorities: for example, according to Article 56 of the Special Regional Statute, when a law is deemed prejudicial to the equality of the rights of linguistic minorities, the majority of the councillors belonging to a particular linguistic group may request that the matter be put to the vote of each linguistic group. If the request is rejected or if the law is adopted even though two-thirds of the linguistic group which made the request vote against it, this group may challenge the law directly before the Constitutional Court within thirty days of its publication. This method has only been used in a few cases, both concerning electoral matters (see Decisions No. 261/1995 and 356/1998 of the Constitutional Court).

Moreover, regional, provincial and communal councillors of the Province of Bolzano can challenge administrative measures considered prejudicial to the principle of equality of all citizens before the Regional Administrative Court of Bolzano (Article 92 of the Special Regional Statute). The positive protection of minorities is also guaranteed by the principle of 'proportional ethnic allocation' (Article 89), thanks to which civil positions in the public administration, including the judiciary, in the Province of Bolzano, are distributed among citizens of the three linguistic groups according to the size of each group, as reported in the official population census. This method is compatible with Article 6 of the Constitution but seems to contradict other constitutional provisions, such as Article 51, providing that all citizens are eligible for public office on conditions of equality. The 'ethnic proportion' method has raised some doubts, especially concerning the respect of the privacy of the individuals who declare that they do not belong to any of the three linguistic groups. This is why the Constitutional Court ruled that it should only be applied on very special occasions.

There are many rules protecting minorities from a linguistic point of view, thus contributing to a regime of linguistic separatism. In the Trentino-Alto Adige region, German enjoys the same status as Italian, so much so that many administrative documents are written in both languages (Articles 99–102, Special Regional Statute). Citizens in this region may speak either German or Italian without distinction with public officials, including the judiciary.

Education must be in the mother tongue of students, while the other language is always taught as the second language (Article 19).

It must be stressed that these provisions are only applied on a territorial basis – i.e. in Trentino-Alto Adige – and not on a personal basis: they do not protect the individuals belonging to a particular linguistic minority irrespective of where they live (Decision No. 213/1998 of the Constitutional Court), but only within Trentino-Alto Adige.

§4. French Speakers in the Valle d'Aosta

472. French speakers in the Valle d'Aosta are protected first of all by the fact that they live in a 'Special Statute Region'.

Many rules protect the use of Italian and French according to a bilingual system which favours exchanges between the two linguistic groups.

According to Article 38, paragraph 1, of the Special Regional Statute of the Valle d'Aosta, French is officially equal to Italian, so that official documents may be written in either of the two languages without distinction, with no obligation to write a bilingual text. Accordingly, the State administration in the Valle d'Aosta is obliged to hire officials born in this region or speaking French (Article 38 of the Special Regional Statute of the Valle d'Aosta.).

As regards education, regional schools must provide for the same number of French and Italian classes and teaching of some subjects in French is allowed (Article 39 of the Special Statute of the Valle d'Aosta).

§5. Slovene Speakers in Friuli-Venezia Giulia

473. In Friuli-Venezia Giulia the presence of a linguistic minority justified the institution of a 'Special Statute Region'. However, because of the international problems concerning the area of Trieste, this region was not created until 1963 (Constitutional Law No. 1/1963).

The protection of Slovene speakers in Friuli-Venezia Giulia is less complex than that of the minorities of Trentino-Alto Adige and the Valle d'Aosta, as recognized by the Constitutional Court, which declared that:

> respect of provisions of Article 6 of the State Constitution and Article 3 of the Special Regional Statute – closely linked to Article 3 of the State Constitution – does not imply that the Slovene minority in the Province of Trieste must of necessity be protected by rules similar to those adopted in Trentino-Alto Adige or the Valle d'Aosta. The Italian legislator is allowed to choose manner and form used to guarantee the protection of the Slovene minority (Decision No. 28/1982).

Indeed, with the exception of some organizational rules, the most important provisions in favour of linguistic minorities in Friuli-Venezia Giulia are contained in Article 3 of the Special Regional Statute. They guarantee equality of rights and treatment to all citizens, regardless of their linguistic group, and the protection of all their ethnic and cultural characteristics. Some rules also concern education. The teaching language is Slovene in some regional schools, even though in primary and secondary schools (though not in pre-schools) teaching the Italian language is compulsory, although it must be done by bilingual Italian-Slovene teachers.

Part V. Specific Issues

Chapter 1. Relations Between the State and Religious Denominations

by Marta Cartabia

§1. Equality of Religious Denominations and Their Different Relations with the State

474. The decisions of the Constituent Assembly dealing with the relations between the State and religious denominations were inspired by the principle of equality of legal treatment. The situation existing under the pre-1945 legal system was heavily conditioned by the Concordat signed in 1929 between the State under Mussolini and the Roman Catholic Church headed by Pope Pius XI. The Lateran Treaties (*Patti Lateranensi*), as they were known, recognized the independent sovereignty of the Vatican and contained a Concordat which established Roman Catholicism as the official religion of the Italian State. This effectively penalized all other religious denominations which were only allowed to operate after the government had certified that their basic principles were not in conflict with those of public order (Law 1159/1929). The Italian Constitution often stresses equality of religious denominations (see Part IV, Chapter 3, §8, on freedom of religion) even though the Roman Catholic Church enjoys a privileged position as illustrated by Articles 7 and 8, which regulate respectively the relations between the State and the Church, and between the State and other religious denominations.

Although Article 8(1) states that, 'all religious denominations are equally free before the law' the Constitutional Court did not interpret this as meaning that all other religious denominations should enjoy parity of legal treatment with that afforded the Roman Catholic Church. The consequent legal disparities between the treatment of the Roman Catholic Church and other religions were not considered discriminatory given the 'ancient and uninterrupted tradition of the Italian people' vis-à-vis the Catholic religion (Decisions No. 125/1957, 79/1958, 39/1965 and 86/1985). In recent years, however, the orientation of the Constitutional Court in such matters has tended to shift towards a more secular interpretation of the State's role as that of an impartial legal guarantor of all religious denominations (Decision 329/1997; 149/1995, and 203/1989; see also, Part IV, Chapter 3, §8 on freedom of religion), especially after the Concordat with the Church in 1984, which established that the Catholic religion was no longer the official religion of the Italian State.

Indeed, the Constitutional Court has consistently reaffirmed that the principle of the secular State, on the basis of Articles 2, 3, 7, 8, 19, 20 of the Italian Constitution, does not mean that it is indifferent to the existence and operation of religious denominations, but that it is instead committed to guaranteeing freedom of religion, within a context of cultural and confessional pluralism (see Decision 203/1989).

However, the fact that the Constitution provides for agreements with all religious denominations – i.e. a Concordat with the Roman Catholic Church and a series of 'understandings' with other religions (the latest entered into force have been the those with Mormons; Sacra Arcidiocesi Ortodossa d'Italia; Esarcato Europa meridionale; Apostolic Church) – does not mean that the theoretical equality enjoyed by all religions will lead to a unique legal treatment of the relations between the State and different religious denominations, but simply implies the adoption of rules which will vary in accordance with ad hoc bilateral agreements. Thus, it is rather a question of how to limit such 'inequality'.

§2. Relations between the State and the Catholic Church

475. Article 7 of the Constitution declares that the State and the Church are both 'independent' and 'sovereign', each within its own specific sphere of activity; jurisdiction over temporal matters in the first case, and spiritual matters in the second, with matters of mutual interest, the so-called mixed matters, governed by Concordats.

Prior to the adoption of the 1948 Constitution, relations between the Italian State and the Roman Catholic Church were already based on Concordats in the form of the Lateran Treaties of 1929. The Constitution accepts, and makes explicit reference to, the regulation of relations with the Catholic Church in accordance with the Lateran Treaties which were subsequently amended so that today relations between the State and the Church are regulated by the amended Concordat, or Villa Madama agreements as they are known, in 1984.

Most scholars agree that the regulation of State–Church relations via the Lateran Treaties as stipulated in the Constitution does not mean that these Treaties (or any subsequent amendments to them) are part of the Constitution or enjoy the status of constitutional laws. Nevertheless, the provisions of Concordats do enjoy a special legal regime.

First, as per Article 7 of the Constitution, the Lateran Treaties may be amended by subsequent reciprocally acceptable agreements between the State and the Church implemented by Act of Parliament. If the State decides to make unilateral changes to the provisions by which the Treaties are implemented, it must carry out the procedure of constitutional amendment (see also, Part I, Chapter 4).

As far as contents are concerned, besides the matters regulated by the Concordat, which include respect for religious holidays, the legal status of buildings used for religious purposes, the regulation of ecclesiastical bodies and Roman Catholic universities, mention should be made of the special status of religious marriage (Article 8 of the Concordat of 18 February 1984) and Roman Catholic religious instruction in State schools (*ibid.*, Article 9).

As regards the former, the Lateran Treaties recognize the civil validity of marriage celebrated according to Roman canon law on condition that the bans of marriage be published, that the priest officiating explain the civil effects of marriage to the married couple by reading them the relevant sections of the Civil Code, and that the act be registered in the public register of marriages. Italian law also recognizes the validity of religious decrees annulling marriages issued by ecclesiastical courts after a civil Court of Appeal has certified that this has been done in compliance with Italian civil law.

The second key aspect of the relations between the Italian State and the Church is Roman Catholic religious instruction in State schools. In addition to guaranteeing the Roman Catholic Church, together with other organizations and citizens, the right to establish private non-State schools, subject to private school regulation (see, Article 33 of the Constitution and Part IV, Chapter 3, §13), and given 'the value of religious culture and the fact that Catholic principles are part of the historical heritage of the Italian people', the Italian Republic provides Catholic religious instruction in all State primary and secondary schools. School students are entitled to choose whether or not to take religious instruction: parents choose for primary and secondary school students and high-school students decide for themselves. After the new Concordat came into force in 1984, however, the problem arose as to whether students opting out of religion instruction should be obliged to chose another subject to substitute it. The Constitutional Court eventually ruled that those not wishing to attend Roman Catholic religious instruction to be in a condition of 'non-obligation' and therefore not legally obliged to attend other classes (Decision No. 203/1989).

The financial side of the relations between the State and the Church was reformed by the 1984 Villa Madama agreements, which provide, pursuant to Law 222/1985, the assignment of a percentage of personal income tax to the Church. More precisely, taxpayers may allocate the so-called eight per thousand of their tax yield to finance social or humanitarian projects run by the State and for religious purposes such as financial support of the clergy, charity activities directly carried out by the Catholic Church and other religious denominations. Taxpayers must specify their choice in their annual tax return and, if they prefer not to express any preference, the 'eight per thousand' is automatically allocated according to the highest proportion of the total preferences expressed. The law also provides tax relief for those making donations to religious non-profit-making associations or bodies.

§3. Relations between the State and Other Religious Denominations

476. The main aspects of the legal status of religious denominations in Italy are their freedom of organization (Article 8(2)), and the power to enter into agreement with the State.

Article 8 allows religious denominations to regulate their internal organization by means of legal provisions provided these are in compliance with the fundamental principles of the Italian legal system. In turn, the State is debarred from regulating in matters relating to the operation or existence of religious denominations. This was confirmed in a 1988 ruling by the Constitutional Court, which ruled that a part

of the State provisions governing the eligibility requirements for members of the Councils of Jewish Communities were unconstitutional (Decision No. 43/1988).

Relations between the State and religious denominations are regulated by State laws on the basis of agreements with the representatives of those denominations. When the negotiations between a religious denomination and Government are successful, an agreement is signed. At this point if Parliament decides to pass a law, its content must conform to the aforementioned agreement.

Thus, the provisions are included in an atypical law, preceded by an agreement with the religious denomination. It should be noted that Article 8 provides for a system of sources of law similar to the laws implementing agreements with the Catholic Church, even though they cannot depart from constitutional principles, as is the case for the rules of the Concordat with the Roman Catholic Church. Since 1984, the year of the amendment of the Concordat with the Catholic Church, there has been a sharp rise in the number of agreements with other religious denominations. To date, agreements have been signed with the representatives of the Waldesian communities, the Jewish community, the Assemblies of God in Italy, the Seventh Day Adventist Church, the Baptist Church and the Lutheran Church.

The content of these agreements, though it varies to some extent in accordance with the specific needs of different religious denominations, is very similar to part of the 1929 Concordat with the Catholic Church.

Such agreements include, for example, rules on spiritual assistance in barracks, hospitals, nursing homes, rest-homes and prisons; rules governing religious instruction in schools, marriage, buildings used for religious purposes, religious holidays (especially for Judaism in order to avoid possible conflicts in the workplace) and rules regulating financial relations with the State. With regard to this last point, it should be stressed that most of the religious denominations which signed an agreement with the State are entitled to be allocated the so-called eight per thousand of taxable personal income, as established for the Catholic Church.

Chapter 2. The Economic Constitution

by Marta Cartabia

§1. The Italian Way to a Mixed Economy

477. The choice of an economic model as the basis for the Italian Constitution was a very difficult and controversial choice for the Constituent Assembly. Members of different cultural and political tendencies – i.e. Liberals, Catholics and the Left – were to struggle dramatically on this matter. Their economic models were different: the Liberals were oriented towards a market economy, the Left was inspired by the idea of a collectivist economy, and the Catholics were ready to accept free market economy but only if properly controlled, in order to pursue social justice aims. A compromise was reached also thanks to the fact that, on the one hand, the Liberals were not absolutely firm on a pure form of market economy and were ready to accept some degree of public intervention in private and free competition. On the other hand, the Left did not consider that the means of production could be rendered collective, at least in the short term, and were therefore ready to accept that, for the time being, private individuals would play a prominent role, provided that a different development of the economic system was not to be absolutely excluded in the future. Therefore, in economic matters, the choice of the Constituent Assembly was a compromise accepted by everyone and made possible by the will of all political parties to avoid freezing the economic model on a particular form in order to allow for system change in the future. Therefore, only some fundamental elements of the economic system were set out in the Constitution, so that different possibilities of development were left open for the future. The agreement outlined an economic system based principally on private enterprise, without excluding the idea of an actual State economy and above all without leaving the country's economic life to the whims of the market. On the contrary, the Constitution states that freedom of private enterprise is controlled by the State which is responsible for correcting the market in order to direct free economic activity towards the ends of social justice. In fact, all rights and freedoms accorded to private individuals in the economy are precisely limited and conditioned by social rights and interests, strongly protected by the Italian Constitution. Thus, private economic enterprise 'cannot be in conflict with social utility' and the law prescribes such planning and controls as may be advisable for 'directing and coordinating public and private economic activities towards social aims' (Article 41 of the Constitution). Private property can be limited in order to 'ensure its social function' (Article 42). Collectivization and nationalization are possible in order to pursue 'purposes of general utility' concerning economic activities with 'a character of general interest' (Article 43). Regulation governing the ownership of land must be aimed at 'equitable social relations' (Article 44). Cooperation is recognized and guaranteed for its 'social function' (Article 45).

Employee involvement in company management, set out in Article 46 of the Constitution, is aimed at the 'economic and social progress of labour'. The Constitution constantly reaffirms the importance of social interests in the economic field, thus

underlining, on the one hand, the choice of a mixed economy, a social market economy, where public and private actors coexist; on the other, it specifies the kind of mixed economy shaped by the Constitutional Assembly: State intervention in a capitalist economy aims at pursuing social justice. To be more precise, it aims at the social purposes described in other parts of the Constitution, starting from Article 2 which, after stating the inviolability of constitutional rights, underlines the 'unalterable duties of economic, political and social nature', and from Article 3(2), which states that 'it is the responsibility of the Republic to remove all economic and social obstacles which […] prevent the full development of the individual'. Mention should also be made of social rights, recognized and guaranteed by Title II of Part I of the Constitution: the right to health services, education, social assistance and security and so on. Therefore, the Constituent Assembly, as it included the Italian Republic among the mixed economy countries, also established precise and peculiar features of the economic and social system, that is, the inclusion of social aims in the configuration of economic activities.

Therefore, these were the fundamental choices of the Constituent Assembly as far as the economy was concerned. As to the actual relations between State-owned and private companies, and between private enterprise and State intervention in the economic sector, the Constitution left much room for manoeuvre to future legislators, who were allowed to change the shape of the Italian economic system and to transform it over time, always within the limits mentioned above. In fact, social aims for which the legislator can limit and control the free market economy are stated in the Constitution by means of basic principles which acquire a particular meaning when placed in their historical context. They change in history as they are characterized by a great dynamism: The meanings of social interest, social aims, public interests, social function – all expressions used in the Constitution – cannot be determined previously and in the abstract, they change according to the concrete historical situation. The Constitution stipulates that various rules should be established by law, thus giving legislators the opportunity to monitor and directing economy towards social aims, according to the needs of society and to the political tendency of the majority in a given historical moment.

Hence, even though they are supposed to respect the limits of a controlled market economy system – which accepts the coexistence of private, public and social factors and excludes collectivism, for example legislators have had the opportunity to adapt economic and social relations to political transformations. This is why, during the last fifty years the Italian Republic has gone through different phases in which economic and social relations have changed deeply. It is evident that, from the creation of the Italian Republic to the end of the 1980s, State intervention in economic and social matters has grown continuously, with a peak at the end of the 1980s. In that period the State became an economic agent or entrepreneur, in a more or less direct form as the main agent of the welfare system with public health services and social security, although financial or other contributions to private companies have not been completely eliminated.

Obviously, this raised public expenditure to very high levels, to a point where it was impossible to control, which, together with other factors, led to a reversal of the trend, starting from the beginning of the 1990s, also due to changes in the European legal system, starting from the Maastricht Treaty.

478. The Italian legal system is currently characterized by a decrease in State intervention in the economic sector, thus favouring the sort of market expansion which needs greater control. This tendency is clearly shown, on the one hand, by the privatization of economic activities previously carried out by the State and, on the other, by the regulation of private competition. As far as privatization is concerned, it must be stressed that this consists of two different phases: in the first, State-owned companies become joint-stock companies; in the second, their shares are sold to private companies or individuals. (As regards the privatization of major groups such as IRI, ENI, INA and ENEL, see Decree-Law No. 333/1992, converted into Law No. 359/1992, followed by Decree-Law No. 332/1994, converted into Law No. 474/1994).

As to provisions on competition, Law No. 287/1990, which is modelled on the corresponding European laws, is based on three main principles: the prohibition of a dominant position of a unique enterprise in its own market; the prohibition of agreements among groups of companies working in the same sector aimed at, or having the effect of, preventing, tightening or heavily distorting competition; and the control of mergers. An ad hoc independent authority was set up in order to monitor compliance with correct market behaviour and competition law. It is modelled on independent administrative authorities, which are increasingly common in the Italian and other European legal systems. This organ is in charge of monitoring the market by carrying out investigations in specific economic sectors aimed at ascertaining and punishing violations of competition law.

§2. The Two Fundamental Principles of the Economic Constitution: Freedom of Economic Enterprise and Property

479. In a narrow sense, economic rights, guaranteed by Title II, Part I of the Constitution, are based on two fundamental principles: freedom of economic enterprise and property. Actually, the Constitution includes a high number of provisions concerning economy: nationalization (Article 43), agricultural ownership (Article 44), cooperation (Article 45), the right of workers to participate in management (Article 46), savings, issuing of credit and purchase of homes (Article 47), to cite the main ones. Nevertheless, they can all be unified under the two elements of economic enterprise and property: all other provisions in this field are only specifications or applications of the same principles. In fact, nationalization, the exclusive presence of the State in some economic activities and worker involvement in management derive from constitutional principles governing the freedom of economic enterprise (Article 41), while laws concerning agricultural ownership, savings and housing policies are a natural effect of the general principles established for property (Article 42). This is why special attention should be paid to Articles 41 and 42 of the Constitution, which set out the basic principles of economic relations applying to the laws of the various sectors.

To be more precise, it is not possible to make a clear distinction between provisions on economic activities and those relating to property. This is clearly demonstrated by the decisions of the Constitutional Court, which do not distinguish the

scope of Articles 41 and 42 of the Constitution, also because regulation of economic activity implies similar laws for property, at least concerning the means of production and products deriving from economic activities. In fact, the Constitution implies the coexistence of public and private economic activities and ownership with strong limitations on the rights of private companies aimed at guaranteeing the social function of the Italian model of mixed economy or social market economy provided for by the Constitution.

Recently, a revision proposal of the 'Economic Constitution' and of its most representative Article 41, to which the principle of liberalization of economic activities was added, has been advanced. According to this principle, the private economic initiative and activity are free and everything not expressly forbidden by law is allowed. At the moment the project is still waiting in Parliament. Among the reasons of this stalemate it is worth recalling especially the 'openness' of Article 41 which, over the years, allowed the legislator to draw different economic trends, according to the different historical and economic periods, and to face also the present financial and economic crisis.

As a matter of fact this provision, as already underlined, constitutes one of the fundamental constitutional bases for free competition together with Article 117(1), which implements the binding character of the principle of protection of competition, already stated in Community law. Compared to Article 41, this provision preserves, nevertheless, more ductility and it is prone to a balance of 'social utility needs'. Moreover, it allows regulatory intervention in order to reconcile 'further relevant constitutional interests', following what is established by the Constitutional Court.

As a matter of fact, through the different interpretation of Article 41, the constitutional recent jurisprudence has emphasized the several principles encompassed within the provision: on one side the right of private economic initiative, which valorizes the adoption of 'promotional' measures to protect competition and imposes the abolition of all the restrictions to markets, on the other side opportunity of bolstering interventions that derogate the principle of free markets in order to protect the rules on essential public services, needed in the actual context of financial and economic crisis. (Alitalia case, C. Cost. No. 270/2010).

The principle of liberalization of economic activities has been however inserted also within the ordinary legislation (Article 4, Decree 13 August 2011, n. 138, modified and converted by Law 14 September 2011, n. 148; Article 34(2), decree 6 December 2011 n. 201, modified and converted by Law 22 December 2011, n. 214; Article 1, decree 24 January 2012, n. 1, converted by Law 24 March 2012 n. 27). The Constitutional Court has recently pronounced itself on Article 4 Decree No. 138, declaring the constitutional illegitimacy of the provision (Decision No. 199/2012).

As far as local public services of economic relevance are concerned, their legislation has been subjected to important reforms during the last decade: from a legislation focused mainly on public administration to a different regime based on the economic relevance of the service itself, in the light of the openness of the market and liberalization.

The main liberalization was introduced by Article 23*bis* of the Decree of 25 June 2008 No. 112 and reduced drastically, compared to Community law, the forms of

public administration of the territorial bodies. In particular, it defined the hypothesis of direct award of public services (in particular *in house*) of local public services, such as exceptions to the usual procedures for public tender.

Article 23*bis* was abrogated by the popular referendum of June 2011. The referendum was declared inadmissible by the Constitutional Court, also in the light of the community rules on competition relating to public services of economic relevance (Decision No. 24/2011).

In order to fill the normative gap, the Government intervened with a new discipline (Article 4 Decree 13 August 2011, No. 138, modified and converted by Law 14 September 2011, No. 148), which has been more than once modified. Article 4 of the decree reproduces the substance of the 2011 abrogated discipline on public services of economic relevance, violating the prohibition of Article 75 Cost of replacing the abrogated legislation. For this reason, the Constitutional Court declared the constitutional illegitimacy of this provision (Decision No. 199/2012).

§3. Private and Public Agents in Economic Production

480. The provision which most of all places the Italian 'Economic Constitution' among mixed-economy models is Article 41 which, after stating that 'private economic enterprise is open to all', specifies that 'it cannot be in conflict with social utility or be prejudicial to security, freedom or human dignity', and that 'law establish suitable plans and controls in order to direct and coordinate public and private economic activity towards social aims'.

First of all, this rule implies the existence of economic activities carried out by public agents in addition to private individuals. Article 43 also confirms that the State can participate directly in economic life by stipulating that some economic sectors can be reserved or transferred to the State, public bodies or workers' or consumer communities (Article 43). Reserving or transferring companies to the State (nationalization), the Regions (regionalization), the Communes (municipalization), or workers (socialization) is an extraordinary intervention as it can only involve companies or groups of companies which provide essential public services or monopolies; it must also involve companies with a 'general interest' character. Collectivization must pursue the public utility and if it derives from expropriation, compensation must be paid to private individuals or enterprises formerly carrying out the economic activity. If we consider how the right of collectivization is limited by the Constitution, it is clear that the Italian legal system chose to prevent the State from taking over part, or the majority of, the means of production. As a result, collectivization has always been rare in Italy. Since the Constitution came into force, Article 43 has only been applied twice, when ENI (*Ente Nazionale Idrocarburi*, National Hydrocarbon Agency) was given the sole right to carry out research and produce hydrocarbons in some geographical areas (Law No. 6/1957), and the nationalization of companies producing electricity, which led to the creation of ENEL (*Ente Nazionale dell'Energia Elettrica*, National Electricity Agency) by Law No. 1643/1962.

It must be noted that, in order to respect Article 41, economic activities carried out by the State must comply with profitability rules: were this not the case, State-owned companies would be privileged compared to private companies and would, in the last instance, jeopardize the freedom of private enterprise thus conflicting with Article 41.

State participation in the economy reached extremely high levels, especially with the system of *partecipazioni statali*, based on a network of joint-stock companies operated by a private regime but whose shares were State-owned, mostly by finance holding companies run by Government. This system has now been reformed by an extensive programme of privatization, in order to reduce the levels of State participation.

§4. Freedom of Private Economic Enterprise

481. As stated above, Article 41(2), establishes *limitations* to the freedom of private economic enterprise, by specifying that 'it cannot be in conflict with social utility or prejudicial to security, freedom or human dignity', while Article 41(3) specifies the *means* to condition economic activities officially: 'the law prescribes such planning and controls as may be advisable for directing and coordinating public and private economic activities towards social objectives'.

Article 41 provides for two kinds of State participation in private economic activity: it establishes negative limitations, leaving private entrepreneurs the opportunity to operate freely but with limits which can be resumed in the prohibition of putting profit before human dignity and social objectives (Article 41(2)), and positive limitations by which public authorities can regulate economic activity: economic planning which can be developed by the State, and relative advisable controls.

Economic planning, its limits and its being more or less binding, caused much debate, maybe more than anything else, both within the Constituent Assembly and, afterwards, in the political world. In fact, while drafting the Constitution, legislators were involved in a controversy because of an amendment which suggested the introduction in the Constitution of a law establishing that: 'in order to guarantee the right to work of all citizens, the State will coordinate and regulate production activities, according to a plan ensuring the best profitability to the community'. This suggestion caused much alarm and the fear that it would legitimize the sort of economic planning, typical of a State-controlled economy, precisely when the Constituent Assembly was heading towards a form of market economy, albeit a controlled one. Therefore, the Assembly decided to avoid any other reference to economic planning by the State, in favour of more neutral interventions aimed simply at directing, without constraining free private activity by introducing too strict rules.

This form of planning is not in conflict with private economic enterprise, as set out in Article 41(1), also because, as asserted by most academic commentators and by some judgments of the Constitutional Court, it is not the economic activity which is free, but the economic enterprise. This means that even though a private individual is free to start and carry out an activity, this does not mean that they be allowed to do so unconditionally. Economic activity is limited by Article 41 (1)(2), so that if a private individual does not think it suitable or profitable to carry out an

activity on State conditions, they can renounce it, but if the activity is continued, the entrepreneur cannot ignore such limitations.

Public intervention in the economic sector has been of different kinds, such as determining official prices, which limits freedom of contract is one of its most significant aspects. More often, these measures consisted in favouring or discouraging entrepreneurial decisions by making them profitable or disadvantageous. One example was granting tax relief or financial facilities to those who took socially useful decisions, such as investing funds in the disadvantaged *Mezzogiorno* or creating new jobs.

On the contrary, the controversial total economic planning, although included in the Constitution, was never put into practice.

§5. Cooperative Societies, Handicraft and Small Industries

482. Article 45 of the Constitution lists two particular kinds of economic activities: cooperation on a basis of reciprocity and artisan trades. Both are very much encouraged because they allow a greater participation of workers in the economic organization of the country, according to the fundamental principles set out in Article 3(2). The Constitution favours these forms of production by providing that promotion of cooperation on a basis of reciprocity, as well as protection and development of artisan trades guaranteed by law.

The main characteristic of *cooperative societies* is that they are non-profit-making, but instead provide benefits to their members. Usually, these benefits are not financial, but in goods or services, or even jobs or preferential conditions. The Civil Code also distinguishes them from associations and foundations on the one hand, and business societies on the other, because of their special purposes.

Cooperative societies are basically governed by section 2551 and following sections of the Civil Code, as amended by Law No. 59/1992. Article 45 of the Constitution stipulates that the special features and objectives of these societies must be subjected to proper controls, and that they must be recorded in special prefect's registers and submitted for ministerial supervision. In recent years, means of supporting and providing incentives to cooperative societies were established by law, in accordance with the Constitution. Special mention should be made of Law No. 59/1992, generally providing for cooperative societies, and Law No. 381/1991 on associations providing educational, social and health care services or carrying out activities to help the disabled find employment.

Artisan trades, frequently characterized by owner-employees (see Law No. 845/1985) are protected and have less administrative and accounting burdens than those usually imposed on other companies. The task to provide economic incentives for artisan trades is now left to regions, except for State and regional co-financing and for the particular development of craftsmanship and support plans of a national scope (Article12 and following sections of Law No. 50/1997).

§6. Worker Participation in Management

483. Article 46 of the Constitution recognizes the right of workers to participate in management, in accordance with Article 3(2), which promotes workers' participation in economic organization. The fundamental purpose of this article is to favour all forms of cooperation between work and capital 'with a view to economic and social progress of labour'. The forms of participation are not defined in the Constitution which leaves the legislators the task to establish their manner and limits. In any case, worker involvement in company management is subject to production requirements.

The most important applications of Article 46 are to be found in the Workers' Statute (Law No. 300/1970, especially Articles 9 and 19), which accords powers of cooperation, control and influence on company management to trade union delegates, rather than to workers directly. There is no provision for forms of joint-management such as those found in Germany.

§7. Ownership in the Italian Constitution

484. The Italian Constitution accepts different kinds of ownership: first, Article 42 guarantees both State and private ownership. Second, as private ownership is not regulated directly by Article 42 but by ordinary laws, property regulation varies according to the kind of goods taken into account. This is why there is not a unique set of rules governing ownership, but rather a multiplicity of laws which can vary considerably. Since the social value of a country estate is very different from that of a work of art, a quarry, a car, or a building, legislators valued property interests and social requirements differently, so that different kinds of goods are governed by different property regulations. However, albeit within limits, it is the Constitution which allows differential property regulation beside Article 42, other laws explicitly provide for and promote land ownership, especially small or medium-sized holdings (Article 44), and the purchase of homes and holdings directly farmed by the owners (Article 47).

§8. Public Ownership

485. As far as public ownership is concerned, the owners are the State, local public bodies (Regions, Provinces and Communes), and other public bodies. They can all own moveables and land according to rules very similar to provisions on private ownership. From this point of view, public ownership only differs from private property in that the owners are public bodies. Nevertheless, some public bodies, such as the State, Regions, Provinces and Communes can own a special kind of public property, having a particular legal status (Article 1 of Royal Decree No. 3440/1923 and Article 822 and following sections of the Civil Code). This public property is part of the public domain and the patrimony of the State.

The public domain consists in land ownership and some moveables such as libraries and museums, explicitly listed in the Civil Code. These properties can be natural or artificial. The former are at the service of the community (the sea-shore, rivers, lakes, etc.), and the property belongs, of necessity, to the State.

The latter are created to satisfy community needs and are part of the public domain only if they belong to one of the above-mentioned public bodies: this is the case for roads and motorways, waterworks, historical interest buildings, etc. The public domain is inalienable, it cannot be subjected to *usucapione* (a means of acquiring ownership by possession of a thing for a given length of time) nor expropriated. It can be transferred from one public body to another (e.g., from the State to a Region).

The properties of the patrimony of the State are listed in the Civil Code (Article 826) and include forests, mines, quarries, public buildings, etc. Their purpose must be public even when they are transferred.

§9. Private Ownership

486. As stated above, the Constitution recognizes private as well as public ownership insofar as, '[O]wnership is public or private'.

The Constitution does not describe private property as an inviolable right, as was the case in the previous legal system. The legislator can limit and regulate its acquisition and enjoyment in order to ensure its social function and render it accessible to all (Article 42). Nevertheless, this does not mean that private property regulation is only a legislator's duty, first because it cannot be abolished by the legislator as the Constitution guarantees the existence of both public and private ownership.

Second, the Constitution states that private ownership should be limited to guaranteeing its social function or to render it more accessible. From a legal perspective, the concept of social function is obviously an indefinite one; it is a kind of valve whose meaning is determined mostly by the legislator. Nevertheless, laws which limit private property can be submitted to the review of the Constitutional Court which verifies the legislator's decisions, also in terms of the principle of reasonableness. Lastly, limitations on private ownership must have an objective and general character, i.e. they must establish the general legal regime of the properties or of certain category of properties. If this is not the case, that is, if the limitation concerns a single and particular property, the constitutional principles on expropriation must be applied.

§10. Expropriation and Partial Expropriation

487. The Constitution explicitly provides for expropriation (Article 42(3)), i.e. actions to deprive an individual of the ownership of a particular property in cases prescribed by law, in the general interest, with provision for compensation.

As stated above, expropriation – provided for by Article 42(3) – does not consist only in the total deprivation of property or of another right, but also in the so-called partial expropriation: measures which strongly affect the ownership of a particular

property, such as the imposition of military requisition or restraints in the field of town planning to an indefinite time (see Decisions No. 6/1966 and 138/1993 of the Constitutional Court). This kind of expropriation must comply with Article 43, i.e. be prescribed by law, be of general interest, and be compensated. Partial expropriations hence differ to a great extent from the general limitations imposed on private ownership set out in Article 42. According to the Constitutional Court, the fundamental difference between non-compensated limitations and partial expropriations is the fact that the former are general and the latter particular (see Decision No. 328/1990 of the Constitutional Court): limitations imposed on an individual must be compensated, whilst limitations imposed on entire categories of properties are intended to ensure the social function of the property, according to law.

Compensation for expropriation does not necessarily correspond to the property's market value: the Constitutional Court too concluded that compensation does not always mean the total refund of the value of the expropriated property. In any case, compensation must be serious, it cannot be purely symbolic, insignificant or apparent, or completely ignore the characteristics of the property. At the moment, according to the Constitutional Court, compensation should correspond to a percentage of the commercial value of the property. Hence, the refund is calculated on the basis of the market value of the property (see Decision No. 130/1993). It has to be intended as a 'fair compensation' (the phraseology used by the Court is *serio ristoro*): see for example the Decision No. 148/2008 that, considering the case law of the European Court of Human Rights, considered some provisions regarding housing legislation as unlawful in the part in which they provided 'still and undifferentiated counting criteria'.

§11. Land Ownership

488. Agriculture is given special attention in the Italian Constitution, both to land ownership and to economic agricultural activities. This is not surprising, given that Italy had an agriculture-based economy at the time in which the Constitution was written.

Article 44 describes the main objectives and instruments to carry out a far-reaching agricultural reform. The objectives of the reform are the: 'rational utilization of the land' and the establishment of equitable social relations, i.e. better production efficiency and more social equity, which should be obtained by promoting the purchase of holdings directly farmed by the owners. If we consider these two objectives in the historical context of the Constitution, it is clear that the main target was large land estates. The possession of land by a few owners was considered one of the main social injustices in an agriculture-based country. Moreover, it was not a productive economic system since it promoted extensive farming without encouraging agricultural transformation. Article 44 clearly opposes large estates when it calls for their transformation, the imposition of limits to private land ownership, the institution of productive units, and suggests incentives for small and medium-sized holdings. Likewise, Article 47 states that 'the Republic … encourages … the purchase of … holdings directly farmed by the owners'.

In the 1950s, all legislation on agricultural reform applied in some regions went in the same direction. At the same time agricultural contracts were reformed and uncultivated lands assigned.

§12. Private Savings and the Purchase of Homes

489. Article 47(2), favours private savings, especially when allocated for the purchase of homes, holdings directly farmed by the owners, or invested in large productive national enterprises. Article 47 both commits the legislator to implement the objectives therein and forbids all other provisions in conflict with them. It aims at protecting modest and long-term private savings from inflation: this law has been interpreted as a prohibition for the State from carrying out inflationary monetary policies likely to have negative repercussions on private savings.

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Chapter 3. International Relations

by Giovanni Guiglia

§1. Drafting Treaties

490. With regard to international relations, the fundamental provisions are contained in the basic principles of the Constitution of Italy (Articles 10 and 11) and in the constitutional reform of Title V.

This reform introduced important innovative elements (in particular as regards Articles 117 and 120 Constitution), rationalized praxis and unsatisfactory legislative dispositions.

Above all and without analysing the relations between the Italian legal system and the EU in this context, the innovations concern:

- the assertion of the constraints deriving from international obligations for all legislative, national and regional acts (Article 117, paragraph 1, Constitution);
- the subjection to the exclusive national legislation of 'foreign policy', but also of 'the international relations of the State' (Article 117, paragraph 2, letter *a*, Constitution);
- the concurrent legislation of the 'international relations with Regions' (Article 117, paragraph 3, Constitution);
- the recognition of Regions' competence to implement international agreements concerning subjects of regional competence 'in accordance with the procedural rules set out in State law' (Article 117, paragraph 5, Constitution);
- the external power of Regions: 'in the subjects in which the Region has competence Regions may enter into agreements with foreign States and local authorities of other States in the cases and according to the forms laid down by State legislation' (Article 117, paragraph 9, Constitution);
- the substitutive power of the State, that can act 'for bodies of the regions, … in case of failure to comply with international rules and treaties or EU-legislation' (Article 120, paragraph 2, Constitution).

Article 117, paragraph 1, Constitution, states that 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU-legislation and international obligations.'

This article introduces a new disposition, which is innovative for the State but not for the Regions and that is original as regards obligations based on agreements. In fact, the obligations connected with general custom were already provided for by Article 10, paragraph 1, Constitution. This disposition represents a principle of juridical civilization aimed at avoiding that the State, while infringing obligations freely accepted towards other States, may commit international crimes – although in a legal way at national level.

At the same time, Article 1, paragraph 1, of the Law No. 131/2003, that implements the above-mentioned Title V Constitution, specifies that the Italian legal system, which includes State and Regions, conforms to the generally recognized

principles of International Law (Article 10 Constitution) and agrees to the limitations of sovereignty deriving from *international treaties* and other agreements (Article 11). By using the expression '*international treaties'* the article states that the Regional legal system must respect the treaties Italy stipulates with simplified statements, as afterwards explained.

491. As regards the powers of the constitutional bodies concerning the relations between Italy and other States, the Constitution only provides for, on one hand, that the President of the Republic has the authority to ratify international treaties upon authorization, where required, of the Parliament, to accredit and receive diplomatic representatives (Article 87, paragraph 8, Constitution) and to make declarations of war as have been agreed by Parliament (Article 87, paragraph 9, Constitution; see Part II, Chapter 2); on the other hand, that 'Parliament shall authorize by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation' (Article 80 Constitution; see Part II, Chapter 4).

The by law-authorization of the ratification is also specified in the latest paragraph of Article 72 Constitution, in which it is stated that 'the ordinary procedure for consideration and direct approval by the House is always followed in the case of (…) ratification of international treaties (…)'. In other words, the possibility that a Parliamentary Commission can authorize these kind of treaties is excluded.

Besides, under the Constitutional Court (sentence No. 16/1978) and as the legislative dispositions for the execution of the treaties, the law to authorize the ratification of the international treaties cannot be submitted to a popular abrogative *referendum* in accordance with Article 75 Constitution (see Part I, Chapter 5). As well as there is no other form of popular participation or involvement in the procedure to form treaties.

Therefore, the Italian Constitution just receives the ancient principle of the ratification of treaties by the President of the Republic, as solemn expression of the State's will to bind itself towards other States under the international law and to regulate the Parliament's role in forming some types of treaties. With reference to the powers and functions of the constitutional bodies, there is no mention at national level about *the initiative, the negotiation and the signature of international agreements.* Moreover, there was no related mention in the Constitution before the reform of Title V concerning the so-called external power of the Regions.

Now the new Article 117, paragraph 3, Constitution refers to the concurrent legislation the 'international relations' of the Regions and the Article 117, paragraph 9, Constitution, recognizes this role establishing that Regions can stipulate agreements with States and treaties with local territorial bodies.

492. With the exception of the limited regional above-mentioned powers and in accordance with the exclusive competence of the State as concerns the *foreign policy* and the *international relations* (Article 117, paragraph 2, letter *a*, Constitution; Constitutional Court, sentence No. 211/2006), the Government, even when not mentioned in the Constitution, undertakes all the necessary measures to form treaties. These measures are obviously different from the dispositions that the Constitution precisely provides for about the President of the Republic (*ratification*) and

the Chambers (*authorization to ratification*, when required). In praxis the Government is competent as concerns the *negotiation* and the *signature of the treaties*, as well as the initiative to *undertake the same negotiations*. The Ministers plenipotentiary have the power to negotiate and sign treaties' drafts: their powers are formally given by the Head of the State under Government's proposal, while the President of the Council and the Foreign Minister can sign an agreement without receiving full powers.

Furthermore, the Constitution does not provide for the Government any formal obligation of previous information to the Parliament, with the exception of the dispositions of Article 80 Constitution. On the other hand, the Government has information duties towards the President of the Republic. Therefore, Chambers are formally required to intervene only after the stipulation of the treaty, in order to accept or not the text on the whole during the stage of authorization of the ratification, but they cannot modify the content of the same treaty. Of course with the exception of the policy and control powers generally assigned the Chambers, also in accordance with the confidence relation between Parliament and Government and under the principles and the rules of the parliamentary system (Article 94 Constitution).

Besides, it is to be noticed that in the past the Government excluded several times the Parliament from the procedure of formation of political treaties, adopting the '*provisional execution of the treaties'* formula while waiting to obtain the specific authorization to ratification. In particular, this happened for the execution of agreements concerning the expedition of contingents in Sinai (1982), in Suez (1984) and in Beirut (1982, 1984).

Notwithstanding the silence of the Constitution, that seems to consider the ratification the only way for the State to undertake pactional international obligations, the republican praxis confirmed the pre-existing possibility to sign simplified treaties and agreements. Under Article 12 of the Vienna Convention 1969, these treaties and agreements are international acts that become effective by their signature or by a simple exchange of dispositions without ratification and, in other words, without the possibility to activate formal controls by the same President of the Republic. It is obvious that these treaties and agreements cannot include the content of the treaties for which Article 80 Constitution requires the previous parliamentary authorization for their ratification.

493. As regards the competences and the national procedures of the Government, it is to notice the since the entry into force of Law No. 400/1988 praxis admitted the prevailing competence of the Foreign Minister and of the President of the Council in this matter, but not of the Council of Ministers. This latest subject was usually excluded from the negotiation and signature phases concerning both international simplified treaties and agreements. In particular, in case of treaties, the Council of Ministers was only submitted the text of the draft for the authorization of the ratification for its required deliberation but without any previous information during negotiation and stipulation. In case of treaties and agreements in simplified form the signature of the Foreign Minister or of the President of the Council was required; therefore the Council of Ministers was completely excluded from their formation procedure.

Law No. 400/1988 provided for the essential deliberation of the Council of Ministers on 'the lines of international and EU policy' and on 'the drafts of international treaties and agreements, apart from their denomination, of political or military nature' (Article 2, paragraph 3, letter *h*, Law No. 400/1988). In this way the Council of Ministers recovers a collective liability for simplified treaties and agreements too.

§2. The Implementation of Treaties in the Italian Legal System

494. In order to become effective, international treaties must be implemented by means of internal provisions in compliance with the constitutional principle of legal sources. These provisions may be ordinary laws whenever the matter must be regulated by means of acts of Parliament or whenever it is necessary to amend legislation in force before the implementation of the treaty. Treaties may also be implemented either by means of hierarchically 'inferior' provisions or regional laws whenever the matter falls within the legislative competence of the regions under Article 117, paragraph 5, Constitution (see Part III, Chapter 1).

495. Treaties can be implemented directly by issuing the necessary provisions or – more often – through the so-called *ordine di esecuzione*: i.e. national provisions setting out that 'the treaty [agreement] between the Italian Republic and … is fully implemented' and attaching the text of the agreement. In this case, the content of the provisions implementing the agreement is provided *per relationem*, i.e. by reference to the text of the treaty itself. However, the provisions contained in the treaty (falling under international law) and the corresponding implementing provisions (falling under the national legal system, albeit their content can be derived from the text of the treaty) remain logically and legally separated.

In practice, though, one single law is passed for ratification of international treaties and also providing for their implementation. The fact remains, however, that the two legal contents, namely the one authorizing the ratification and the one providing for the implementation of the treaty must be kept separate.

With the entry into force of the new Article 117, paragraph 1, Constitution, experts underlined that this provision can determine the direct implementation of international treaties in our legal system and the non-possibility for the national legislator to amend them. Moreover, it was underlined that among the competences of Regions in executing international treaties concerning subjects they are assigned to under Article 117, paragraph 5, Constitution, is now included the power to adopt the execution order, even with reference to the agreements stipulated by the State.

On the whole and in current praxis, the same law allows the authorization to the ratification of the treaty and the issuing of an order to implement the same treaty. However, these two legislative procedures, that is the authorization to ratification and the implementation of duties deriving from agreements, must be kept separated.

496–498

Chapter 4. Constitutional Principles Relating to the Armed Forces

by Valerio Onida

§1. The Italian Constitution and the Deployment of the Armed Forces

496. The Constitution contains provisions dealing with – whilst not entirely regulating – the organization and activity of the armed forces in Italy.

497. The constitutional provisions relating to the participation of the Italian State in supranational organizations designed to establish an international order aimed to 'ensure peace and justice among nations' and the concomitant limitations of sovereignty are inspired by the general principle that 'Italy condemns war as an instrument of aggression against the freedom of other peoples and as a means for settling international controversies' (Article 11). These provisions were primarily formulated with a view to UN membership (reached by Italy in 1955), but were subsequently widely applied to justify 'assignments of sovereignty' with respect to the European Union and its organizations.

Thus, beyond the national territory, the system of the armed forces may be organized and deployed for the sole purposes of external defence or collaboration within the context of supranational institutions, for peace-keeping operations, and for humanitarian duties. In this respect, Italy's membership of NATO in 1949 has led to the strict integration of the Italian armed forces within the military system of the Atlantic organization and to the establishment of NATO bases within Italian territory. Whilst this is unlikely to lead to substantial constitutional objections so long as the actions of the NATO military system have the sole objective of defending the Member States, it becomes controversial in cases where NATO forces are engaged in non-defensive operations in foreign territory which have not been decided by the UN.

§2. Military Service

498. From a strictly national perspective, the Constitution's principal concern with respect to the armed forces is that – in specifying the 'unalterable duties of political, economic and social solidarity' (Article 2) – 'the defence of the country (*patria*) is sacred duty of citizens' (Article 52, paragraph 1) and that 'military service is compulsory within the limits and in the manner established by law' (Article 52, paragraph 2). Constitutional case law distinguishes between the generic yet universal duty of all citizens to defend – albeit not exclusively by participating with military organization and activities – and the specific obligation to perform military service, which can, and arguably must, be limited by the law: actually it only applies to male citizens deemed fit and not exempt for other reasons. Moreover, the law recognizes that male citizens who qualify for compulsory military service but have a conscientious objection with respect to the use of arms, may opt for a substitutive

civil service of equal duration. Law 64/2001 provided for the institution of a 'national civil service' as a voluntary alternative to compulsory military service.

However, compulsory military service has in fact disappeared insofar as Law 331/2000 and Legislative Decree 215/2001 provided that it has been 'suspended' by the 1 January 2007. Since that date, the armed forces are made up of professional or voluntary soldiers, both men and women, and compulsory recruitment will only take place in times of war or international crisis in order to supplement the professional and voluntary forces.

§3. The Organization of the Armed Forces

499. Article 52, paragraph 3, of the Constitution states that the organization of the armed forces 'is based on the democratic principles of the Republic'. This statement of principle is designed to avoid any likelihood of the armed forces becoming a separate body within the State based on principles which differ from, or are in conflict with, those governing civil society. This does not preclude the need for special rules, based *inter alia* on the demands of military discipline, applicable to the armed forces, but it does prevent the military system from remaining outside the application of constitutional principles and from affecting the enjoyment and exercise of basic constitutional rights on the part of its members, other than in the manner and to the extent deemed indispensable to safeguard the specific requirements peculiar to the armed forces. One such constitutional limitation prohibits 'professional soldiers in active service' (together with other categories of public officers) from belonging to political parties in order to safeguard the political 'neutrality' of the armed forces (Article 98, paragraph 3). These principles are implemented with Law 382/1978 which regulates the exercise of freedom rights on the part of soldiers and prohibits not only membership of political parties but also of trade unions, excludes the right to strike, but does provide for special elective representative bodies within the military corps.

500. The Constitution has maintained special military jurisdiction in criminal matters (military tribunals: Article 103, paragraph 3), but limits this legal competence to offences of an exclusively military nature committed by members of the armed forces, i.e. by soldiers on active duty (see Part II, Chapter 7, §§6–7). Thus the military penal codes which relate to both wartime and peacetime, and the legal military system in force prior to the Constitution of 1948 still apply under the Republican system.

However, the large number of cases brought before the Constitutional Court is a clear indication that the original military criminal system was not consistent with constitutional principles, and that a separation of the armed forces with respect to the general system is no longer justified, with the result that a great many provisions under the military codes not in line with the Constitution have been dropped.

§4. The Command Structure

501. In matters of organization and operation, the Italian armed forces are subject to the rule of law and come under political authority. This is implicit in their nature as State bodies, albeit with special duties, and implied by the relevant constitutional rules found in Article 87, paragraph 9, wherein it is stated that the President of the Republic 'commands the armed forces' and 'presides over the supreme defence council'.

There is a consensus that the command referred to in this norm is not the effective command, which – according to the rules of the parliamentary system adopted by the Italian Constitution – falls exclusively to the official organ of executive authority, i.e. Government, and in particular the Minister of Defence; nor is it the technical-operational command, which is exercised according to the procedures and hierarchies provided by law, and which come under the authority of the general defence staff and the general staffs of the various armed forces: instead, it is merely a high command, expressing the neutrality of the armed forces and their loyalty to the Italian State and its institutions. As the representative of national unity and the guarantor of the Constitution, the President of the Republic is bound to ensure that the armed forces are not exploited for the political aims of one party or even the political majority. The same meaning should apply to the presidency of the supreme defence council, entrusted to the Head of State, the composition and functions of which, however, are not indicated by the Constitution. Law 624/1950 configures the supreme defence council as a coordinating organ, including specific members of government (namely the Prime Minister, with the role of vice-president, the Ministers of Foreign Affairs, the Interior, Defence, Economy and Finance, and Productive Activities) and the head of the general defence staff: a Presidential Decree (No. 251/1990) regulates its functions.

Finally, during his term of office, President Cossiga raised the problem of a more accurate definition of competences and procedures of the armed forces in the event of emergency, but legislative rules on this point are still lacking (see General Introduction, Chapter 2).

§5. Parliamentary Control

502. The Constitution provides that the State of war must be duly deliberated by both Chambers, which must in turn assign the necessary powers to Government (Article 78) – although this provision has not as yet been given any specific legislative form – and declared by the President of the Republic (Article 87, paragraph 9).

The more current problems, however, derive from the fact that the deployment of the armed forces and recourse to war take place, as a matter of fact, in cases of urgency, outside any formal procedures implying deliberations and declarations of war. The deployment of the armed forces in foreign territories generally occurs within the framework of international agreements, previously authorized by Parliament (such as the NATO treaty), but which in turn then envisage decisional and operational procedures that are generally left to the discretion of the executive authority.

The normal practice is for Government to obtain the agreement of Parliament, at least *ex post facto*, as ratification, for all cases where the armed forces are deployed outside Italy, or even within Italy for duties not institutionally envisaged by the Constitution, as for example when soldiers are deployed to provide extraordinary reinforcement for reasons of public order in particular areas of the country.

Selected Bibliography

Commentaries on the Italian Constitution

Branca, G. (ed.). *Commentario alla Costituzione*. Bologna-Rome: Zanichelli, 1981 ff.
Calamandrei, P. & A. Levi (eds). *Commentario sistematico della Costituzione italiana*. Florence: Barbera, 1950.
Crisafulli, V. & L. Paladin (eds). *Commentario breve alla Costituzione italiana*. Padua: Cedam, 1990.

Historical Outline of Italian Constitutional Law

Allegretti, U. *Profilo di storia costituzionale italiana: individualismo e assolutismo nello Stato liberale.* Bologna: Il Mulino, 1989.
Bonini, F. *Storia costituzionale della Repubblica.* Rome: La nuova Italia Scientifica, 1993.
Ghisalberti, C. *Storia costituzionale d'Italia: 1848–1948.* Roma-Bari: Laterza, 2000.
Lepre, A. *Storia della prima Repubblica: l'Italia dal 1943 al 1998.* Bologna: Il Mulino, 1999.

The Features of the Republican Constitution

Barile, P., P. Caretti & F. Margiotta Broglio. *La Costituzione per tutti.* Florence: Sansoni, 1996.
Barile, P., E. Cheli & S. Grassi. *Istituzioni di Diritto Pubblico*. 12th edn. Padua: Cedam, 2009.
Bin, R. & G. Pitruzzella. *Diritto costituzionale.* Turin: Giappichelli, 2002.
Caretti, P. & U. De Siervo. *Istituzioni di diritto pubblico.* Turin: Giappichelli, 2002.
Cheli, E. *La riforma mancata*. Bologna: Il Mulino, 2000.
Neppi Modona G. (ed.). *Stato della Costituzione.* Milan: Il saggiatore, 1998.
Pasquino, G. *La rivoluzione promessa. Lettura della Costituzione italiana.* Milan-Turin: Mondadori, 2011.

Selected Bibliography

Onida, V. 'Costituzione italiana'. In *Digesto Discipline Pubblicistiche.* Turin: UTET, 1990.
Onida, V. *La Costituzione.* 2nd edn. Bologna: Il Mulino, 2007.
Pizzorusso, A. *La Costituzione.* Turin: Einaudi, 1996.

SOURCES OF LAW

Bin, R. & G. Pitruzzella. *Le fonti del diritto*. Turin: Giappichelli, 2009.
Cicconetti, S.M. *Le fonti del diritto*. Turin: Giappichelli, 1997.
Crisafulli, V. *Lezioni di diritto costituzionale*, II, 1, *L'ordinamento costituzionale italiano (Le fonti normative)*. 6th edn edited by F. Crisafulli. Padua: Cedam, 1993.
Giocoli Nacci, P. *Appunti sulle fonti normative (dalle lezioni).* Bari: Cacucci, 1992.
Guastini, R. *Le fonti del diritto. Fondamenti teorici.* In *Trattato di diritto civile e commerciale già diretto da A. Cicu e F. Messineo L. Mengoni e continuato da P. Schlesinger.* Milan: Giuffré, 2010.
Modugno, F. 'Le fonti del diritto (gerarchia delle)'. In *Enciclopedia del diritto,* Aggiornamento I, Milan: Giuffré, 1997.
Modugno, F. *Appunti dalle lezioni sulle Fonti del Diritto.* Turin: Giappichelli, 2005.
Paladin, L. *Le fonti del diritto italiano.* Bologna: Il Mulino, 1996.
Pedrazza Gorlero, M. *Le fonti dell'ordine repubblicano.* Milan: Giuffré, 2010.
Pizzorusso, A. *Delle fonti del diritto*, in *Commentario del codice civile*, edited by A. Scialoja & G. Branca. *Art. 1-9. Disposizioni sulla legge in generale*, Bononia-Rome: Zanichelli- Società Editrice del Foro Italiano, 2011.
Ruggeri, A. *Fonti*, *norme, criteri ordinatori. Lezioni.* 5th edn. Turin: Giappichelli, 2009.
Sorrentino, F. *Le fonti del diritto italiano.* Padua: Cedam, 2009.
Zagrebelsky, G. *Il sistema costituzionale delle fonti del diritto.* Turin: UTET, 1992.

FORMS OF DIRECT DEMOCRACY AND ABROGATIVE REFERENDA

Amato, G., M. Luciani & M. Volpi (eds). *Referendum.* Rome and Bari: Laterza, 1992.
Ambrosini, G. *Referendum.* Turin: Bollati Boringhieri, 1993.
Barbera, A. & Morrone, A. *La Repubblica dei Referendum*. Bologna: Il Mulino, 2003.
Cariola, A. *Referendum abrogativo e giudizio costituzionale.* Milan: Giuffrè, 1994.
Carnevale, P. *Il referendum abrogativo e i limiti alla sua ammissibilità nella giurisprudenza costituzionale.* Padua: Cedam, 1992.
Chiappetti, A. *L'ammissibilità del referendum abrogativo.* Milan: Giuffrè, 1974.
De Marco, E. *Contributo allo studio del referendum nel diritto pubblico italiano*. Padua: Cedam, 1974.
Gabriele, F. 'Referendum'. *Appendice al Novissimo digesto italiano*, VI. Turin: UTET, 1986, 429 ff.

Lojodice, A. 'Referendum'. *Enciclopedia giuridica italiana*, XXVI, Rome: Treccani, 1991.
Luciani, M. 'sub art. 75'. *La formazione delle leggi*, *Il referendum abrogativo*, *Commentario alla Costituzione.* Bologna-Rome: Zanichelli- Il Foro Italiano.
Pertici, A. *Il giudice delle leggi e il giudizio di ammissibilità del referendum abrogativo*. Turin: Giappichelli, 2010.
Raveraira, M. *Problemi di costituzionalità dell'abrogazione popolare.* Milan: Giuffrè, 1983.
Salerno, Giulio. *Il referendum.* Padua: Cedam, 1992.

Introduction to the Italian System of Government

Balboni E., et al. *La difficile alternanza: il sistema parlamentare italiano alla prova, 1985–1987.* Milan: Giuffrè, 1998.
Crisafulli, V. *Aspetti problematici del sistema parlamentare vigente in Italia*. In *Jus*, 1958, 151 et seq., and now in *Stato Popolo Governo.* Milan: Giuffrè, 1985, 147 et seq.
D'Andrea, A. (ed.). *Verso l'incerto bipolarismo. Il sistema parlamentare italiano nella transizione, 1987–1999.* Milan: Giuffrè, 1999.
Elia, L. 'Governo (forme di)'. In *Enciclopedia del diritto*, XIX. Milan: Giuffré, 1970.
Galli, G. *Il bipartitismo imperfetto.* Bologna: Il Mulino, 1967.
Mangiameli, S. *La forma di governo parlamentare.* Turin: Giappichelli, 1998.
Onida, V. *Recenti sviluppi della forma di governo in Italia: prime osservazioni*. In *Quaderni costituzionali*, 1981, 7 ff.
Pitruzzella, G. *Forme di governo e trasformazioni della politica.* Rome-Bari: Laterza, 1996.

The President of the Republic

Armaroli, P. *L'elezione del Presidente della Repubblica in Italia.* Padua: Cedam, 1977.
Baldassarre, A. *Capo dello Stato.* In *Digesto discipline pubblicistiche*, vol. II, Turin: UTET, 1987, 477 et seq.
Baldassarre, A. & C. Mezzanotte. *Gli uomini del Quirinale. Da De Nicola a Pertini.* Rome-Bari: Laterza, 1985.
Baldassarre, A. & G. Scaccia (a cura di). *Il Presidente della Repubblica nell'evoluzione della forma di governo* (Atti del convegno di Roma, 26 novembre 2010). Roma: Aracne, 2012.
Barile, P. *I poteri del Presidente della Repubblica*, in *Rivista trimestrale di diritto pubblico.*, 1958, 295 et seq.
Biscaretti di Ruffia, P. *Le attribuzioni del Presidente della Repubblica*, in *Rivista trimestrale di diritto pubblico*, 1963, 267 et seq.
Capotosti, P.A. *Presidente della Repubblica e formazione del Governo*, in *Scritti in onore di E Tosato*, vol. III, Milan: Giuffrè, 1984, 373 et seq.

Selected Bibliography

Carlassarre, L. *Governo, Parlamento, Presidente della Repubblica, in Annuario AIC, Atti del XVI convegno annuale della Associazione italiana dei costituzionalisti.* Padua: Cedam, 2002.

Cheli, E. *Poteri autonomi del Capo dello Stato e controfirma ministeriale: l'esperienza italiana*, in *Quaderni costitutzionali*, 1983, 361 et seq.

Chessa, O. *Il Presidente della Repubblica parlamentare. Un'interpretazione della forma di governo italiana.* Napoli: Jovene, 2010.

Cuocolo, F. *Imparzialitá e tutela della Costituzione nell'esercizio dei poteri del Presidente della Repubblica*, in *Rassegna di diritto pubblico*, 1959, 70 et seq.

Dimora, F. *Alla ricerca della responsabilità del Capo dello Stato.* Milan: Giuffrè, 1991.

Esposito, C. voce. *Capo dello Stato*, in *Enciclopedia del diritto*, vol. VI. Milan: Giuffrè, 1960, 224 et seq.

Esposito, C. voce. *Controfirma ministeriale*, in *Enciclopedia del diritto*, vol. X. Milan: Giuffré, 1962, 285 et seq.

Fusaro, C. *Il Presidente della Repubblica.* Bologna: Il Mulino, 2003.

Galeotti, S. *Il Presidente della Repubblica garante della Costituzione (la concezione garantistica del Capo dello Stato negli scritti dell'autore dal 1949 ad oggi).* Milan: Giuffré, 1992.

Galeotti, S. & B. Pezzini. *Il Presidente della Repubblica nella Costituzione italiana, Digesto discipline pubblicistiche.* Turin: UTET, 1996.

Grisolia, M.C. *Potere di messaggio ed esternazioni presidenziali.* Milan: Giuffré, 1986.

Guarino, G. *Il Presidente della Repubblica italiana*, in *Rivista trimestrale di diritto pubblico.*, 1951, 903 et seq.

Guiglia, G. *L'autorizzazione alla presentazione dei disegni di legge governativi.* Turin: Giappichelli, 1991.

Grisolia, M.C. *Potere di messaggio ed esternazioni presidenziali.* Milan: Giuffré, 1986.

Labriola, S. *Il Presidente della Repubblica.* Padova: Cedam, 1986.

Luciani, M. & M. Volpi (eds). *Il Presidente della Repubblica.* Bologna: Il Mulino, 1997.

Motzo, G. *Il potere presidenziale di esternazione e di messaggio*, in *Archivio giuridico.*, 1957, 19 et seq.

Occhiocupo, N. *Il Segretariato generale della Presidenza della Repubblica.* Milan: Giuffré, 1973.

Occhiocupo, N. voce. *Presidenza della Repubblica*, in *Enciclopedia giuridica italiana*, vol. XXIV. Rome: Treccani, 1991.

Pace, A. *Esternazioni presidenziali e forma di governo. Considerazioni critiche*, *Quaderni costituzionali*, 1992, 191 et seq.

Paladin, L. *La funzione presidenziale di controllo*, in *Quaderni costituzionali*, 1982, 309 et seq.

Paladin, L. voce. *Presidente della Repubblica*, in *Enciclopedia del diritto*, vol. XXXV, Milan: Giuffré, 1986, 165 et seq.

Rescigno, G.U. *La responsabilitá politica del Presidente della Repubblica. La prassi recente*, in *Studi parlamentari*, 1980, 3–4, p. 7 et seq.

Rizza, G. *Il Capo dello Stato nella forma di governo parlamentare: una rivisitazione,* in *Diritto e società*, 1992, 407 et seq.
Rossano, C. voce. *Presidente della Repubblica* (dir. cost.), in *Enciclopedia giuridica italiana*, vol. XXIV. Rome: Treccani, 1991.
Ruggeri, A. (ed.). *Evoluzione del sistema politico-istituzionale e ruolo del Presidente della Repubblica* (Atti di un incontro di studio, Messina-Siracusa, 19 e 20 novembre 2010). Turin: Giappichelli, 2011.
Sica, V. *La controfirma.* Naples: Jovene, 1953.
Silvestri, G. (ed.). *La figura e il ruolo del Presidente della Repubblica nel sistema costituzionale italiano* (atti del convegno svoltosi a Messina e Taormina dal 25 al 27 ottobre 1984). Milan: Giuffré, 1985.
Tebaldi, M. *Il Presidente della Repubblica.* Bologna: Il Mulino, 2005.
Valentini, A. *Gli atti del Presidente della Repubblica.* Milan: Giuffré, 1965.
Ventura, L. (ed.). *Le crisi di governo nell'ordinamento e nell'esperienza costituzionale* (atti di un convegno, Catanzaro 22 e 23 ottobre 1999). Turin: Giappichelli, 2001.

The Structure of Parliament

Parliament in General

Celotto, A. *Diritto parlamentare: casi e materiali.* Bologna: Zanichelli, 2005.
Cicconetti, S.M. *Diritto parlamentare.* 2nd edn. Turin: Giappichelli, 2010.
Di Ciolo, V. & R. Ciaurro. *Il diritto parlamentare nella teoria e nella pratica.* 4th edn, Milan: Giuffré, 2003.
Dickmann, R. *Il parlamento italiano*. Naples: Jovene, 2011.
Elia, L. *Costituzione, partiti istituzioni.* Bologna: Il Mulino, 2009.
Gianniti, L. & N. Lupo. *Corso di diritto parlamentare.* Bologna: Il Mulino, 2008.
Labriola, S. (ed.). *Il parlamento repubblicano (1948–1998).* Milan: Giuffré, 1999.
Mannino, A. *Diritto parlamentare.* Milan: Giuffré, 2010.
Marongiu, A. *Parlamento (storia)*, in *Enciclopedia del diritto*, XXXI; Milan: Giuffré.
Manzella, A. *Il Parlamento*. 3rd edn. Bologna: Il Mulino, 2003.
Martines, T. & G. Silvestri (eds). *Diritto parlamentare.* 2nd edn. Milan: Giuffré, 2011.
Mastroapaolo, A. & L. Verzichelli. *Il Parlamento: le assemblee legislative nelle democrazie contemporanee.* Rome-Bari: Laterza, 2006.
Mazziotti, M. *Parlamento (principi generali)*, in *Enciclopedia del diritto*, XXXI. Milan: Giuffré, 1981.
Mazzoni Honorati, M. *Ddiritto parlamentare.* 2nd edn. Turin: Giappichelli, 2005.
Tosi, S. *Diritto parlamentare.* Milan: Giuffré, 1974.
Tosi, S. & A. Mannino. *Diritto parlamentare.* 3rd edn. Milan: Giuffré, 1999.
Traversa, S. *Il Parlamento nella Costituzione e nella prassi.* Milan: Giuffré, 1989.
Ungari, P. *Profilo storico del diritto parlamentare in Italia*. Rome: Bulzoni, 1971.
Violante, L. (ed.). *Il parlamento*. Turin: Einaudi, 2001.

Selected Bibliography

The Bicameral System

Bonfiglio, S. *Il Senato in Italia: riforma del bicameralismo e modelli di rappresentanza.* Rome-Bari: Laterza, 2006.

Cheli, E. *Unità nazionale e prospettiva federale nelle ipotesi di riforma del bicameralismo italiano, in Scritti in onore di Lorenza Carlassare: il diritto costituzionale come regola e limite al potere.* Naples: Jovene, 2009.

Decaro, C. (ed.). *Il bicameralismo in discussione: Regno Unito, Francia, Italia: profili comparati.* Rome: Luiss University Press, 2008.

Manzella, A. & F. Bassanini (eds). *Per far funzionare il Parlamento: quarantaquattro modeste proposte.* Bologna: Il Mulino, 2007.

Paladin, L. *Bicameralismo*, in *Enciclopedia giuridica italiana*, V. Rome: Treccani, 1988.

The Electoral System of the Chambers

Aa. Vv. *La riforma elettorale*. Astrid: Firenze Passigli, 2007.

Barbera, A. & G. Guzzetta (eds). *Il governo dei cittadini: referendum elettorali e riforma della politica.* Soveria Mannelli (Cz): Rubbettino, 2007.

D'Alimonte, R. & A. Chiaramonte. *Proporzionale ma non solo: le elezioni politiche del 2006.* Bologna: Il Mulino, 2007.

D'alimonte, R. & C. Fusaro (eds). *La legislazione elettorale italiana: come migliorarla e perché.* Bologna: Il Mulino, 2008.

D'Andrea, A. *L'insostenibile ragionevolezza della nuova legge elettorale*, in *Quaderni costituzionali*, 2006.

De Fiores, C. (ed.). *Rappresentanza politica e legge elettorale.* Turin: Giappichelli, 2007.

Fusaro, C. *Le regole della transizione. La nuova legislazione elettorale italiana.* Bologna: Il Mulino, 1995.

Oliviero, M. & M. Volpi (eds). *Sistemi elettorali e democrazie.* Turin: Giappichelli, 2007.

Palici di Suni, E. *Parità di genere*, in *Digesto delle discipline pubblicistiche.* Turin: UTET, 2008.

Pasquino, G. *Una legge elettorale come si deve.* Bologna: Il Mulino, 2006.

Spadacini, L. *La manipolazione del sistema elettorale proporzionale e il declino della democrazia rappresentativa*, in *La rigidità bipolare del parlamentarismo italiano: cinque anni di centrodestra (2001–2006)*, edited by A. D'Andrea & L. Spadacini. Giussago (Brescia): Bibliofabbrica.

Parliamentary Privileges

D'Andrea, A. *Note sull'autorizzazione all'arresto dei membri del Parlamento.* Milan: Giuffré, 1985.

Giupponi, T.E. *Le immunità della politica.* Turin: Giappichelli, 2005.

Grisolia, M.C. *Immunità parlamentari e Costituzione.* Padua: Cedam, 2000.

Martinelli, C. *Le immunità costituzionali nell'ordinamento italiano e nel diritto comparato: recenti sviluppi e nuove prospettive.* Milan: Giuffré, 2008
Orlandi, R. & A. Pugiotto. *Immunità politiche e giustizia penale.* Turin: Giappichelli, 2005.
Sciannella, L.G. *Le immunità parlamentari. Profili storici e comparativi.* Turin: Giappichelli, 2010.
Traversa, S. *Immunità parlamentare*, in *Enciclopedia del diritto*, XX. Milan: Giuffré, 1970.
Zagrebelsky, G. *Le immunità parlamentari.* Turin: Einaudi, 1979.
Zanon, N. *Il libero mandato parlamentare.* Milan: Giuffré, 1991.

Standing Orders

Aa. Vv. *Il Parlamento del bipolarismo. Un decennio di riforme dei regolamenti delle Camere, Il Filangieri*. Naples: Jovene, 2007.
D'Andrea, A. *Autonomia costituzionale delle Camere e principio di legalità.* Milan: Giuffré, 2004.
Floridia, G.G. *Il regolamento parlamentare nel sistema delle fonti.* Milan: Giuffré, 1996.
Gianfrancesco, E. & N. Lupo (eds). *Le regole del diritto parlamentare nella dialettica tra maggioranza e opposizione.* Rome: Luiss University Press, 2007.
Lippolis, V. *Regolamenti parlamentari, forma di governo, innovazione istituzionale.* In *Quaderni costituzionali*, 2009.
Manetti, M. *La legittimazione del diritto parlamentare.* Milan: Giuffré, 1990.
Modugno, F. *Regolamenti parlamentari e autonomia della funzione delle Camere*, in *Scritti in onore di Lorenza Carlassare: il diritto costituzionale come regola e limite al potere.* Naples: Jovene, 2009.

The Organization of the Chambers

Caputo, M. *Giunta per il regolamento*, in *Rassegna parlamentare*, 2009.
Ciancio, A. *I gruppi parlamentari. Studio intorno a una manifestazione del pluralismo politico.* Milan: Giuffré, 2008.
Iacometti, M. *I Presidenti di Assemblea parlamentare*. Milan: Giuffré, 2001.
Longo, F. *Parlamento e politica estera. Il ruolo delle commissioni.* Bologna: Il Mulino, 2011.
Malinconico, G. *La Giunta per le elezioni*, in *Rassegna parlamentare*, 2001.
Merlini, S. *Rappresentanza politica, gruppi parlamentari, partiti politici: il contesto italiano,* II. Turin: Giappichelli, 2004.
Rossi, E. (ed.). *Maggioranza e opposizioni nelle procedure parlamentari.* Padua: Cedam, 2004.
Sicardi, S. *Parlamento (organizzazione e funzionamento)*, in *Digesto discipline pubblicistiche.* Turin: UTET, 1995.
Torre, A. *Presidente di assemblea parlamentare*, in *Dizionario di diritto pubblico diretto da Sabino Cassese*, V. Milan: Giuffré, 2006.

Selected Bibliography

PARLIAMENT: ITS ACTIVITIES

The Law Making Process

Ainis, M. *La legge oscura.* 2nd edn. Bari-Milan: Laterza, 2010.

Albanesi, E. *Pareri parlamentari e limiti della legge*. Milan: Giuffré, 2010.

Caretti, P. (ed.). *Osservatorio sulle fonti 2008: la legge parlamentare oggi.* Turin: Giappichelli, 2010.

Costanzo, P. (ed.). *La qualità della normazione nella dialettica Governo-Parlamento.* Naples: Jovene, 2011.

Cuocolo, F. *Legge*, in *Enciclopedia giuridica italiana*, XVIII. Rome: Treccani, 1990.

Di Ciolo, V. *Procedimento legislativo*, in *Enciclopedia del diritto*, XXXV. Milan: Giuffré, 1986.

Manetti, M. *Procedimenti, controlli costituzionali e conflitti nella formazione degli atti legislativi.* Relazione al convegno AIC su *Procedure costituzionali e sistema politico*, Parma 28-30 ottobre 2010, in www.associazionedeicostituzionalisti.it.

Piccirilli, G. *L'emendamento nel processo di decisione parlamentare.* Padua: Cedam, 2008.

Recchia, G. & R. Dickmann. *Istruttoria parlamentare e qualità della normazione*. Pauda: Cedam, 2002.

Decree-Laws

Concaro, A. *Il sindacato di costituzionalità sul decreto-legge.* Milan: Giuffré, 2000.

Costanzo, P. (ed.). *La decretazione d'urgenza (il caso dei c.d. decreti sicurezza)*, 2008, http://tecnichenormative.it/contributi/dossierdecretolegge.

Pitruzzella, G. *La legge di conversione dei decreti legge.* Padua: Cedam, 1989.

Simoncini, A. *Le funzioni del decreto legge.* Milan: Giuffré, 2003.

Zaccaria, R. (ed.). *Aspetti problematici nella evoluzione delle fonti normative*. Rome: Camera dei deputati, 2008.

Legislative Decrees

Aa. Vv. *La delega legislativa. Atti del Seminario svoltosi a Roma, Palazzo della Consulta il 24 ottobre 2008.* Milan: Giuffré, 2009.

Caretti, P. & A. Ruggeri (eds). *Le deleghe legislative: riflessioni sulla recente esperienza normativa e giurisprudenziale.* Milan: Giuffré, 2003.

Cervati, A.A. *La delega legislativa.* Milan: Giuffré, 1972.

De Fiores, C. *Trasformazioni della delega legislativa e crisi delle categorie normative.* Padova: Cedam, 2001

Maccabiani, N. *La legge delegata: vincoli costituzionali e discrezionalità del Governo.* Milan: Giuffré, 2005.

Rossi, E. (ed.). *Le trasformazioni della delega legislativa: contributo all'analisi delle deleghe legislative nella XIV e XV legislatura*. Padua: Cedam, 2009.

Parliamentary Control on the Government's Political Activities

Amato, G. *L'ispezione politica del Parlamento*. Milan: Giuffré, 1968.
Borrello, R. *Segreti pubblici e poteri giudiziari delle Commissioni d'inchiesta: profili costituzionalistici.* Milan: Giuffré, 2003.
Manzella, A. *I controlli parlamentari.* Milan: Giuffré, 1970.
Manzella, A. *Interrogazione e interpellanza parlamentare*, in *Enciclopedia del diritto*, XXII. Milan: Giuffré, 1972.
Pace, A. *Il potere di inchiesta delle Assemblee legislative.* Milan: Giuffré, 1973.
Links Between the Chambers, the European Communities and Other International Organizations.

The Executive

Government in General

Associazione Italiana dei Costituzionalisti. *Annuario 2001. Il Governo. Atti del XVI Convegno annuale (Palermo, 8-9-10 novembre 2001)*. Padua: Cedam, 2002.
Bartole, S. 'Governo italiano'. *Digesto Discipline Pubblicistiche*, vol. VIII. Turin: UTET, 1991.
Biscaretti di Ruffia, P. 'Governo'. *Novissimo Digesto Italiano*, vol. VII. Turin: UTET, 1961.
Calandra, P. *Il Governo della Repubblica.* Bologna: Il Mulino, 2001.
Capotosti, P.A. 'Governo'. *Enciclopedia giuridica*, vol. XV. Rome: Treccani, 1989.
Labriola, S. *Il Governo della Repubblica. Organi e poteri*, II edn. Rimini: Maggioli, 1997.
Merlini, S. & Tarli Barbieri. G. *Il governo parlamentare in Italia.* Turin: Giappichelli, 2011.
Niccolai, S. *Il governo*. Rome-Bari: Laterza, 2003.
Pajno, A. & Torchia. L. *La riforma del governo*. Bologna: Il Mulino, 2000.
Paladin, L. 'Governo italiano'. *Enciclopedia del Diritto*, vol. XIX. Milan: Giuffrè, 1970.
Spagna Musso E. (ed.). *Costituzione e struttura del Governo*, vol. 4. Padua: Cedam, 1979–1988.

The Council of Ministers

Barile, P. 'Consiglio dei Ministri'. *Enciclopedia Giuridica*, vol. VIII. Rome: Treccani, 1991.
Biscaretti di Ruffia, P. 'Consiglio dei Ministri'. *Novissimo Digesto Italiano*, vol. IV. Turin: UTET, 1959.
Cuocolo, F. 'Consiglio dei Ministri'. *Enciclopedia del Diritto*, vol. IX. Milan: Giuffrè, 1961.
Pitruzzella, G., et al. 'Il Consiglio dei Ministri: art. 92-96'. *Commentario della Costituzione*, edited by G. Branca. Bologna-Rome: Zanichelli-Il Foro Italiano, 1994.

Selected Bibliography

Ruggeri, A. *Il Consiglio dei ministri nella Costituzione italiana.* Milan: Giuffrè, 1981.

President of the Council of Ministers

Capotosti, P.A. 'Presidente del Consiglio dei Ministri'. *Enciclopedia del Diritto*, vol. XXXV. Milan: Giuffrè, 1986.
Gatta, E. 'Presidenza del Consiglio dei Ministri'. *Novissimo Digesto Italiano*, vol. XIII. Turin: UTET, 1966.
Labriola, S. 'Presidenza del Consiglio dei Ministri'. *Enciclopedia del Diritto, Aggiornamento*, vol. I. Milan: Giuffrè, 1997.
Pitruzzella, G. *Il Presidente del Consiglio dei Ministri e l'organizzazione del Governo.* Padua: Cedam, 1986.
Predieri, A. 'Presidente del Consiglio dei Ministri'. *Enciclopedia Giuridica*, vol. XXIV. Rome: Treccani, 1991.
Rizza, G. *Il Presidente del Consiglio dei Ministri.* Naples: Jovene, 1970.
Rotelli, E. *La Presidenza del Consiglio dei Ministri.* Milan: Giuffrè, 1970.
Severi, F.S. 'Presidenza del Consiglio' (organizzazione amministrativa). *Digesto Discipline Pubblicistiche*, vol. XI. Turin: UTET, 1996.

Ministers

Bertolini, F. 'Ministri e Vice Ministri'. *Enciclopedia Giuridica*, XVII Aggiornamento, 2009.
Carlassare, L. 'Ministeri'. *Enciclopedia del Diritto*, vol. XXVI. Milan: Giuffrè, 1976.
Ciaurro, G.F. 'Ministro'. *Enciclopedia del Diritto*, vol. XXVI. Milan: Giuffré, 1976.
Gatta, E. 'Ministeri e Ministri'. *Novissimo Digesto Italiano*, vol. X. Turin: UTET, 1964.
Sepe, O. 'Ministeri e Ministri'. *Novissimo Digesto Italiano, Appendice*, vol. V. Turin: UTET, 1984.
Severi, F.S. 'Ministro e Ministeri'. *Digesto Discipline Pubblicistiche*, vol. IX. Turin: UTET, 1994.
Stipo, M. 'Ministero'. *Enciclopedia Giuridica*, vol. XX. Rome: Treccani, 1990.
Romanelli Grimaldi, C. 'Ministro'. *Enciclopedia Giuridica*, vol. XX. Rome: Treccani, 1990.

Under Secretaries of State

Ciaurro, L. 'Sottosegretario di Stato'. *Enciclopedia del Diritto*, vol. XLIII. Milan: Giuffrè, 1990.
Cuocolo, F. *'Sottosegretari di Stato', Novissimo Digesto Italiano*, vol. XVII. Turin: UTET, 1976.

Cuocolo, F. 'Sottosegretari di Stato'. *Enciclopedia Giuridica*, vol. XXX. Rome: Treccani, 1993.

Government High Commissioners

Biscaretti di Ruffia, P. 'Alto Commissario'. *Enciclopedia del Diritto*, vol. II. Milan: Giuffrè, 1958.
Rizza, G. 'Commissario e Alto Commissario'. *Enciclopedia Giuridica*, vol. VII. Rome: Treccani, 1988.
Rizza, G. 'Commissario straordinario'. *Enciclopedia Giuridica*, vol. VII. Rome: Treccani, 1988.

Interministerial Committees and Committees of Ministers

Bachelet, V. 'Comitati interministeriali'. *Enciclopedia del Diritto*, vol. VII. Milan: Giuffrè, 1960.
Mattioni, A. 'Comitati interministeriali'. *Enciclopedia Giuridica*, vol. VI. Rome: Treccani, 1988.
Pizzetti, F. 'Comitati interministeriali'. *Novissimo Digesto Italiano, Appendice*, vol. II. Turin: UTET, 1981.
Quadri, G. *I Comitati di Ministri.* Milan: Giuffrè, 1997.
Treves, G. 'Comitato interministeriale'. *Novissimo Digesto Italiano*, vol. III. Turin: UTET, 1959.

The Cabinet Council

Rescigno, G.U. 'Consiglio di Gabinetto'. *Enciclopedia del Diritto, Aggiornamento*, vol. II. Milan: Giuffré, 1998.

Government Formation

Armaroli, P. 'Crisi di governo'. *Enciclopedia giuridica italiana*, vol. X. Rome: Treccani, 1988.
Galizia, M. 'Crisi di gabinetto'. *Enciclopedia del Diritto*, vol. XI. Milan: Giuffrè, 1962.
Romano, A.A. *La formazione del Governo.* Padua: Cedam, 1977.

The Status and Responsibility of Government Members

Caretti, P. 'Responsabilità politica'. *Enciclopedia Giuridica*, vol. XXVII. Rome: Treccani, 1991.
Ciancio, A. *Il reato ministeriale.* Milan: Giuffré, 2000.

Selected Bibliography

Di Raimo, G. '*Reati ministeriali e presidenziali*'. *Enciclopedia del Diritto*, vol. XXXVIII. Milan: Giuffrè, 1987.
Donati, F. *La responsabilità politica dei ministri nella forma di governo italiana.* Turin: Giappichelli, 1997.
Rescigno, G.U. 'Responsabilità'. *Enciclopedia del Diritto*, vol. XXXIX. Milan: Giuffrè, 1988.
Scarlato, G. 'Reati ministeriali'. *Enciclopedia Giuridica*, vol. XXVI. Rome: Treccani, 1991.

The Government in Parliament: The Relationship of Confidence

Confidence

Galizia, M. *Studi sui rapporti fra Parlamento e Governo*. Milan: Giuffré, 1972.
Giocoli Nacci, P. *Il rapporto Parlamento-Governo nella consuetudine e nella prassi.* Padua: Cedam, 1995.
Mannino, A. *Indirizzo politico e fiducia nei rapporti tra Governo e Parlamento*. Milan: Giuffré, 1973.

The No-confidence Motion Against a Single Member of Government

Chiola, C. *Uno strappo alla Costituzione: la sfiducia al singolo ministro*, 1986, *Giurisprudenza costituzionale*.
Mazzoni Honorati, M.L. *Sfiducia individuale e responsabilità governativa*, in 1988, *Diritto e società.*
Angiolini, V., et al. 'Sei domande ai costituzionalisti provocate dal "caso Mancuso"'. *Giurisprudenza costituzionale*, 1995.

The Question of Confidence

Rizza, G. *Questione di fiducia, regolamenti parlamentari e attribuzioni dell'Esecutivo. Diritto e società*, 1991.
Olivetti, M. *La questione di fiducia nel sistema parlamentare italiano.* Milan: Giuffré, 1996.

The Judicial Power

Bartole, S. *Autonomia e indipendenza dell'ordine giudiziario.* Milan: Giuffré, 1964.
Bartole, S. 'Materiali per un riesame della posizione del Consiglio Superiore della Magistratura', in *Scritti in onore di C. Mortati*, IV. Milan: Giuffré, 1977.
Bartole, S., et al. 'Il Consiglio Superiore della Magistratura', in *Quaderni costituzionali*, 1989, n. 3.

Onida, V. 'Giurisdizione e giudici nella giurisprudenza della Corte costituzionale'. In *Corte costituzionale e sviluppo della forma di governo in Italia*, edited by P. Barile, E. Cheli & S. Grassi. Bologna, 1982.
Cheli, E. *Il giudice delle leggi*. 2nd edn. Bologna: Il Mulino, 1999.
Pizzorusso, A., (ed.). *L'ordinamento giudiziario*. Bologna: Il Mulino, 1974.
Pizzorusso, A. *L'organizzazione della giustizia in Italia*. Turin: Einaudi, 1982.
Silvestri, A. 'Giudici ordinari, giudici speciali e unità della giurisdizione nella Costituzione italiana', in *Scritti Giannini*, III. Milan: Giuffré, 1988.
Romboli, R. & S. Panizza. *Ordinamento giudiziario e forense.* Pisa: Università di Pisa, 2003.
Teresi, F. *Il Consiglio Superiore della Magistratura.* Milan: Giuffré, 1985.
Verde, G. *L'amministrazione della giustizia fra Ministro e Consiglio Superiore.* Padua: Cedam, 1990.
Vigoriti, V., et al., 'Il giudice e l'organizzazione giudiziaria', in *Quaderni costituzionali,* 1983, n. 1.
Zanon, N. *Pubblico ministero e Costituzione.* Padua: Cedam, 1996.
Zanon, N. & F. Biondi. *Diritto costituzionale dell'ordine giudiziario.* Milan: Giuffré, 2002.

The Constitutional Court

Cappelletti, M. *Il controllo di costituzionalità delle leggi nel diritto italiano e comparato*. Milan: Giuffré, 1968.
Cerri, A. *La giustizia costituzionale.* Milan: Giuffré, 1998.
Crisafulli, V. *Lezioni di diritto costituzionale*, II. Padua: Cedam, 1984.
D'Amico, M. *Parti e processo nella giustizia costituzionale.* Turin: Giappichelli, 1991.
D'Amico, M. & G. D'Elia. *Diritto costituzionale*. Milan: Francoangeli, 2012.
D'Orazio, G. *La genesi della Corte costituzionale*. Milan: Giuffré, 1981.
Grassi, S. *I conflitti di attribuzione fra Stato e regioni e fra regioni.* Milan: Giuffré, 1984.
Mezzanotte, C. *La Corte costituzionale, I, Le ideologie del costituente.* Rome: Veneziana, 1979.
Onida, V. 'L'attuazione della Costituzione fra magistratura e Corte costituzionale'. In *Scritti in onore di C. Mortati*, IV. Milan: Giuffré, 1977.
Onida, V. & M. D'Amico. *Il giudizio di costituzionalità delle leggi. Materiali di giustizia costituzionale, I, Il giudizio in via incidentale*. Turin: Giappichelli, 1998.
Pisaneschi, A. *I conflitti di attribuzione fra Poteri dello Stato.* Milan: Giuffré, 1992.
Ruggeri, A. & V. Spadaro. *Lineamenti di giustizia costituzionale.* Turin: Giappichelli, 1998.
Tarchi, R. (a cura di). *Patrimonio costituzionale europeo e tutela dei diritti fondamentali. Il ricorso diretto di costituzionalità.* In *Quaderni del Dipartimento di Diritto Pubblico dell'Università di Pisa.* Turin: Giappichelli, 2012.
Zagrebelsky, G. & V. Marcenò. *Giustizia costituzionale.* Bologna: Il Mulino, 2012.

Selected Bibliography

Judicial Control of Administrative Action

Caringella, F. & M. Protto. *Manuale di diritto processuale amministrativo.* Dike giuridica ed, 2012.
Garofoli, R. & G. Ferrari. *Manuale di diritto amministrativo*, VI edn. Nel diritto ed, 2012.
Travi, A. *Lezioni di giustizia amministrativa.* Turin: Giappichelli, 2012.

The Administration in the Constitution

Cerulli Irelli, V. *Lineamenti di diritto amministrativo.* 3° ed., Turin: Giappichelli, 2012.
Torchia, L. *Il sistema amministrativo italiano.* Bologna: Il Mulino ed, 2009.
Pastori, G. *Scritti scelti*, 2 volumi. Napoli: Jovene ed, 2010.

The Budget Process

De Joanna, P. *Parlamento e spesa pubblica.* Bologna: Il Mulino, 1993.
Onida, V. *Le leggi di spesa nella Costituzione*. Milan: Giuffrè, 1969.
Pieroni, M. *Il ciclo dei documenti programmatici di consuntivo*, in *Rivista della Corte de conti*, n. 5, 2001.

The State and Its Subdivision

Barbera, A. & F. Bassanini. *I nuovi poteri delle regioni e degli enti locali. Commentario del decreto 616.* Bologna: Il Mulino, 1978.
Bartole, S. & F. Mastragostino. *Le Regioni.* Bologna: Il Mulino, 1997.
Berti, G. & De Martin. *Le autonomie territoriali: dalla riforma amministrativa alla riforma costituzionale.* Milan: Giuffré, 2001.
Caravita, B. *La Costituzione dopo la riforma del titolo V*. Turin: Giappichelli, 2002.
Cavaleri, P. *Diritto regionale*, 2nd edn. Padua: Cedam, 2003.
Camerlengo, Q. *Le fonti regionali del diritto in trasformazione.* Milan: Giuffré, 2000.
D'Atena, A. *Costituzione e Regioni.* Milan: Giuffrè, 1991.
Ferrara, M. *Verso una fase costituente delle Regioni?.* Milan: Giuffré, 2001.
Falcon, G., et al. *Governi locali, regioni e Stato nel nuovo titolo V della parte II della Costituzione*, in *Le Regioni*, n. 6, 2001.
Giarda, P. *Regioni and federalismo fiscale.* Bologna: Il Mulino, 1995.
Groppi, T. & M. Olivetti. *La Repubblica delle autonomie: Regioni ed enti locali nel nuovo titolo V*, 2nd edn. Turin: Giappichelli, 2003.
Martines, T., & A. Ruggeri & C. Salazar. *Lineamenti di diritto regionale*, 6th edn. Milan: Giuffrè, 2002.

Onida, V. 'Il regionalismo in Italia: origini, caratteri, prospettive'. In *Associazione per gli studi and le ricerche parlamentari*, Book 3, Seminar 1992, *Forma e sistema di governo nello stato prefederativo italiano.* Milan: Giuffrè, 1993, 79 ff.
Paladin, L. *Diritto regionale.* Padua: Cedam, 1997.
Pizzetti, F. *Il sistema costituzionale delle autonomie locali*. Milan: Giuffrè, 1979.
Pizzetti, F. *Il nuovo ordinamento italiano tra riforme amministrative e riforme costituzionali.* Turin: Giappichelli, 2002.
Romboli, R., et al. 'Le modifiche al titolo V della parte seconda della Costituzione'. In *Il Foro italiano*, V, 2001, 185 ff.
Rotelli, E. *Dal regionalismo alla Regione.* Bologna: Il Mulino, 1973.
Ruggeri, G. [or A.]. *Le fonti di diritto regionale: ieri, oggi, domani.* Turin: Giappichelli, 2001.
Tosi, A. 'I nuovi statuti delle Regioni ordinarie: procedimento and limiti'. *Le Regioni*, 2000, 527 ff.
Vandelli, L. *Ordinamento delle autonomie locali. Commento alla L. n. 142/1990.* Rimini: Maggioli, 1990.
Volpi, M. 'Considerazioni di metodo e di merito sulla legge costituzionale n. 1 del 1999'. *Politica del diritto*, 2000, 203 ff.

The Citizenship

Biscottini, G., voce. *Cittadinanza*, in *Enciclopedia del diritto*, VI. Milan: Giuffré, 1960.
Clerici, R. *La cittadinanza.* Milan: Giuffré, 1993.
Bariatti, S. *La disciplina giuridica della cittadinanza italiana.* Milan: Giuffré, 1996.
Castorina, E. *Introduzione allo studio della cittadinanza.* Milan: Giuffré, 1997.
Grosso, E. *Le vie della cittadinanza.* Milan: Giuffré, 1997.
Cuniberti, M. *La cittadinanza*. Padua: Cedam, 1997.
Nascimbene, B. (ed.), *Diritto degli stranieri*. Padua: Cedam, 2004.

The General Aspects of Fundamental Rights

Angiolini, V. (ed.). *Libertá e giurisprudenza costituzionale.* Turin: Giappichelli, 1992.
Angiolini, V. *Diritti Umani. Sette lezioni.* Turin: Giappichelli, 2012.
Baldassarre, A. *Diritti della persona e valori costituzionali.* Turin: Giappichelli, 1997.
Barile, P. *Il soggetto privato nella costituzione italiana*. Padua: Cedam, 1953.
Barile, P. *Diritti dell'uomo e libertà fondamentali.* Bologna: Il Mulino, 1984.
Bobbio, N. *L'Etá dei diritti.* Turin: Einaudi, 1992.
Caretti, P. *I diritti fondamentali*. Turin: Giappichelli, 2002.
Carlassare, L. (ed.). *Le garanzie giurisdizionali dei diritti fondamentali.* Padua: Cedam, 1988.
Grossi, P.F. *I dritti di libertà ad uso di lezioni.* Turin: Giappichelli, 1991.
Lombardi, G. *Contributo allo studio dei doveri costituzionali.* Milan: Giuffré, 1967.
Lombardi, G. *Potere privato e diritti fondamentali*. Milan: Giuffré, 1970.

Selected Bibliography

Modugno, F. *I nuovi diritti nella giurisprudenza costituzionale.* Turin: Giappichelli, 1995.
Nania, R. & P. Ridola (eds). *I diritti costituzionali*, vols I and II. Turin: Giappichelli, 2001.
Pace, A. *Problematica delle libertà costituzionali, Parte generale*, vol. I. Padua: Cedam, 1990.
Ponthoreau, M.C. *La reconnaissance des droits non ècrits par les Cours constitutionnelles italienne et française.* Paris: Economica, 1994.
Ridola, P. *Diritti di libertà e costituzionalismo*. Turin: Giappichelli, 1997.
Romboli, R. (ed.). *La tutela dei diritti fondamentali davanti alle Corti costituzionali.* Turin: Giappichelli, 1994.

Multilevel Protection of Fundamental Rights

Cartabia, M. (ed.). *I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti europee.* Bologna: Il Mulino, 2007.
Cartabia, M. *La Cedu e l'ordinamento italiano: rapporti fra fonti, rapporti fra giurisdizioni*, in *All'incrocio tra Costituzione e Cedu. Il rango delle norme della Convezione e l'efficacia interna delle sentenze di Strasburgo*, edited by R. Bin, G. Brunelli, A. Pugiotto & P. Veronesi. Turin: Giappichelli, 2007.
Randazzo, B. *Giustizia costituzionale sovranazionale. La Corte europea dei diritti dell'uomo.* Milan: Giuffré, 2012.
Tega, D. *I diritti in crisi. Tra corti nazionali e Corte europea dei diritti.* Milan: Giuffré, 2012.

Key Rights Enshrined in the Constitution

Rights of Freedom

Amato, G. 'Libertà', in *Enciclopedia del diritto*, vol. XXIV. Milan: Giuffré, 1974.
Baldassarre, A. 'Libertà', in *Enciclopedia giuridica italiana*, vol. XIX, Rome: Treccani, 1990.
Pace, A. *Problematica delle libertà costituzionali, parte speciale*, vol. II. Padua: Cedam, 1992.

Personal Liberty

Amato, G. *Individuo e autorità nella disciplina della libertà personale.* Milan: Giuffré, 1967.
Barbera, A. *I principi costituzionali della libertà personale.* Milan: Giuffré, 1967.
Caretti, P. *La libertà personale*, in *Trattato di diritto amministrativo*, edited by G. Santaniello, vol. XII. Padua: Cedam, 1990.
Cerri, A. *Libertà personale*, in *Enciclopedia giuridica italiana*, vol. XIX. Rome: Treccani, 1990.

Elia, L. *Libertà personale e misure di prevenzione.* Milan: Giuffré, 1962.
Galeotti, S. *La libertà personale.* Milan: Giuffré, 1953.
Nania, R. *La libertà individuale nell'esperienza costituzionale italiana.* Turin: Giappichelli, 1989.
Pace, A. *Libertà personale*, in *Enciclopedia del diritto*, vol. XXIV. Milan: Giuffré, 1974.

Inviolability of Personal Domicile

Barile, P. & E. Cheli. 'Domicilio', in *Enciclopedia del diritto*, vol. XIII. Milan: Giuffré, 1964.
Caretti, P. 'Domicilio', in *Digesto discipline pubblicistiche.* 4th edn, vol. V. Turin: UTET, 1990.
Chiarelli, A. 'Domicilio', in *Enciclopedia giuridica italiana*, vol. XII. Rome: Treccani, 1989.

Freedom of Movement, Residence, Expatriation and Emigration

De Siervo, U. *Soggiorno, circolazione, emigrazione*, in *Novissimo digesto italiano*, vol. XVIII. Turin: UTET, 1970.
Mazziotti, M. 'Circolazione', in *Enciclopedia del diritto*, vol. VII. Milan: Giuffré, 1960.
Mazziotti, M. 'Espatrio', in *Enciclopedia del diritto*, vol. XV. Milan: Giuffré, 1966.

Freedom of Assembly

Borrello, P. 'Riunione', in *Enciclopedia del diritto*, vol. XL. Milan: Giuffré, 1988.

Freedom of Association

Barile, P. 'Associazione', in *Enciclopedia del diritto*, vol. III. Milan: Giuffré, 1958.
Bartole, S. *Problemi costituzionali della libertà di associazione.* Milan: Giuffré, 1970.
Brunelli, G. *Struttura e limiti del diritto di associazione politica.* Milan: Giuffré, 1991.
De Siervo, U. Associazione, in *Digesto discipline pubblicistiche*, vol. I. Turin: UTET, 1987.
Ridola, P. 'Associazione', in *Enciclopedia Giuridica italiana*, vol. II. Rome: Treccani, 1988.
Ridola, P. *Democrazia pluralistica e libertà associative.* Milan: Giuffré, 1987.
Rigano, F. *La libertà assistita*. Padua: Cedam, 1995.

Selected Bibliography

Freedom of Communication

Barile, P. & Cheli, E. 'Corrispondenza', in *Enciclopedia del diritto*, vol. X. Milan: Giuffré, 1962.

Caretti, P. 'Corrispondenza', in *Digesto discipline pubblicistiche*, 4th edn, vol. IV. Turin: UTET, 1989.

Italia, V. *Libertà e segretezza della corrispondenza e delle comunicazioni.* Milan: Giuffré, 1963.

Freedom of Expression and Freedom of the Arts and Sciences

Barile, P. *La libertà di manifestazione del pensiero.* Milan: Giuffré, 1975.

Barile, P. & S. Grassi. 'Informazione', in *Novissimo digesto italiano*, Appendice, vol. IV. Turin: UTET, 1983.

Cerri, A. 'Arte e scienza', in *Enciclopedia giuridica italiana*, vol. III. Rome: Treccani, 1988.

Chiola, C. *L'informazione nella costituzione.* Padua: Cedam, 1973.

Chiola, C. *Informazione, pensiero, radiotelevisione.* Naples: Jovene, 1984.

Chiola, C. 'Manifestazione del pensiero', in *Enciclopedia giuridica italiana*, vol. XIX. Rome: Treccani, 1988.

Cuniberti, M., et al. *Percorsi di diritto dell'informazione.* Turin: Giappichelli, 2003.

Di Giovine, A. *I confini della libertà di manifestazione del pensiero.* Milan: Giuffré, 1988.

Esposito, C. *La libertà di manifestazione del pensiero nell'ordinamento italiano.* Milan: Giuffré, 1958.

Fois, S. *Principi costituzionali e libera manifestazione del pensiero.* Milan: Giuffré, 1957.

Loiodice, A. *Contributo allo studio sulla libertà di informazione.* Naples: Jovene, 1969.

Loiodice, A. *Informazione*, in *Enciclopedia del diritto*, vol. XXI. Milan: Giuffré, 1971.

Luciani, M. 'La libertà di informazione nella giurisprudenza costituzionale italiana', in *Politica del diritto*, 1989.

Pace, A. *Stampa, giornalismo, radiotelevisione.* Padua: Cedam, 1983.

Pedrazza Gorlero, M. *Giornalismo e costituzione.* Padua: Cedam, 1988.

Rimoli, F. *La libertà dell'arte nell'ordinamento italiano.* Padua: Cedam, 1991.

Social Rights

Baldassarre, A. *Diritti sociali*, in *Enciclopedia giuridica italiana*, vol. XI. Rome: Treccani, 1989.

Corso, A. 'I diritti sociali nella Costituzione italiana', in *Rivista trimestrale di diritto pubblico*, 1981.

Longo, E. *Le relazioni giuridiche nel sistema dei diritti sociali. Profili teorici e costituzionali.* Padua: Cedam, 2012.

Luciani, M. 'Sui diritti sociali', in *Studi in onore di M. Mazziotti*, vol. II. Padua: Cedam, 1995.
Mazziotti, M. 'Diritti sociali', in *Enciclopedia del diritto*, vol. XII. Milan: Giuffré, 1964.

Health Safeguards

Anzon, A. 'L'altra faccia del diritto alla salute', in *Giurisprudenza costituzionale*, 1988.
Balduzzi, R. (ed.). *La sanità italiana alla prova del federalismo fiscale.* Bologna: Il Mulino, 2012.
Bottari, C. *Principi costituzionali e assistenza sanitaria.* Milan: Giuffré, 1991.
Luciani, M. 'Il diritto costituzionale alla salute', in *Diritto e società*, 1980.
Luciani, M. 'Salute', in *Enciclopedia giuridica italiana.* Rome: Treccani, 1988.

The Rights of Workers

Cerri, A. 'Profili costituzionali del sistema pensionistico', in *Diritto e società*, 1983.
Fois, S. *Sindacati e sistema politico.* Milan: Giuffré, 1977.
Nania, R. *Sciopero e sistema costituzionale.* Turin: Giappichelli, 1995.
Villone, M. *Sciopero e solidarietà nella Costituzione italiana.* Naples: Jovene, 1980.

The Protection of Linguistic Minorities

Bartole, S. *Minoranze nazionali*, in *Novissimo digesto italiano*, Appendice, vol. V. Turin: UTET, 1985.
Pizzorusso, A. *Le minoranze nel diritto pubblico interno.* Milan: Giuffré, 1967.
Pizzorusso, A. *Minoranze e maggioranze.* Turin: Einaudi, 1993.

Relations between the State and Religious Denominations

Berlingò, S. 'Fonti del diritto ecclesiastico', in *Digesto Discipline Pubblicistiche*, vol. VI. Turin: UTET, 1991, 454 ff.
Cardia, C. *Il sistema pattizio.* Bologna: Il Mulino, 1985.
Cardia, C. *Stato e confessioni religiose.* Bologna: Il Mulino, 1990.
Colajanni, N. 'Stato e confessioni religiose diverse dalla cattolica', in *Enciclopedia del Diritto*, vol. XLIII. Milan: Giuffré, 1990, 924 ff.
Colajanni, N. 'Stato e Chiesa cattolica', in *Enciclopedia del Diritto*, vol. XLIII. Milan: Giuffré, 1990, 890 ff.
Finocchiaro, M. 'Concordato e Costituzione', in *Digesto discipline pubblicistiche*, vol. III. Turin: UTET, 1989, 319 ff.
Long, G. 'Intese con le confessioni religiose diverse dalla cattolica', in *Enciclopedia Giuridica italiana*, vol. XVII. Rome: Treccani, 1993.

Selected Bibliography

Margiotta Broglio, F. 'Chiesa cattolica e organizzazione internazionale', in *Digesto Discipline Pubblicistiche*, vol. III. Turin: UTET, 1989, 1 ff.

Peyrot. 'Confessioni religiose diverse dalla cattolica', in *Digesto Discipline Pubblicistiche*, vol. III. Turin: UTET, 1989, 355 ff.

Randazzo, B. *Diversi ed uguali. Le confessioni religiose davanti alla legge.* Milan: Giuffré, 2008.

THE ECONOMIC CONSTITUTION

Amato, G. *Il governo dell'industria in Italia.* Bologna: Il Mulino, 1972.

Amato, G. *Economia, politica e istituzioni in Italia.* Bologna: Il Mulino, 1976.

Bachelet, V. *L'attività di coordinamento nell'amministrazione pubblica dell'economia.* Milan: Giuffré, 1957.

Baldassarre, A. *Iniziativa economica privata*, in *Enciclopedia del Diritto*, vol. XXI. Milan: Giuffré, 1971, 582 ss.

Baldassarre A. & A. Cervati (ed.). *Critica dello stato sociale.* Rome-Bari: Laterza, 1982.

Bilancia, P. *Modello economico e quadro costituzionale.* Turin: Giappichelli, 1996.

Bognetti, G. *La Costituzione economica.* Milan: Giuffré, 1995.

Carabba, M. *Programmazione economica*, in *Enciclopedia del diritto*, vol. XXXVI. Milan: Giuffré, 1983, 1113 ss.

Carli, G. *Cinquant'anni di vita italiana.* Rome-Bari: Laterza, 1996.

Cassese, S. *La nuova costituzione economica.* Rome-Bari: Laterza, 1995.

Cassetti, L. *La cultura del mercato fra interpretazioni della Costituzione e principi comunitari.* Turin: Giappichelli, 1997.

Cavaleri, P. *Iniziativa economica privata e Costituzione vivente.* Padua: Cedam, 1978.

Esposito, C. *Gli artt. 3, 41 e 43 della Costituzione e le misure legislative in materia economica*, in *Giurisprudenza costituzionale*, 1962, 48 ss.

Guarino, G. *Scritti di diritto pubblico dell'economia e di diritto dell'energia*, vols. I e II. Milan: Giuffré, 1962 e 1970.

Luciani, M. *La produzione economica privata nel sistema costituzionale.* Padua: Cedam, 1983.

Luciani, M. *Economia nel diritto costituzionale*, in *Il Digesto Discipline Pubblicistiche*, IV edizione, vol. V. Turin: UTET, 1990, 372 ss.

Mangiameli, S. *La proprietà privata nella Costituzione.* Milan: Giuffré, 1986.

Mazziotti, M. *Il diritto al lavoro.* Milan: Giuffré, 1956.

Pace, A. *Iniziativa privata e governo pubblico dell'economia*, in *Scritti in onore Tosato.* Milan, Giuffré II, 1982, 527 ss.

Predieri, A. *Collettivizzazione*, in *Enciclopedia del diritto*, vol. VII. Milan: Giuffré, 1960, 393 ss.

Pugliatti, S. *La proprietà nel nuovo diritto.* Milan: Giuffré, 1964.

Rodotà, S. *Il terribile diritto.* Bologna: Il Mulino, 1981.

Rodotà, S. & G. Marramao (ed.). *Trasformazione e crisi del Welfare State.* 1983.

Rome-Bari, Laterza Spagnuolo Vigorita. *L'iniziativa economica privata nel diritto pubblico.* Naples: Jovene, 1959.

INTERNATIONAL RELATIONS

Bruno, F., *Il Parlamento italiano e i trattati internazionali*. Milan: Giuffrè, 1997.
Cannizzaro, E. *Trattati internazionali e giudizio di costituzionalità.* Milan: Giuffrè, 1991.
Cannizzaro, E. 'Trattato internazionale (adattamento al)'. *Enciclopedia del Diritto*, vol. XLIV. Milan: Giuffrè, 1992.
Cannone, A. 'Trattato internazionale (adattamento al)'. *Enciclopedia del Diritto, Annali*, vol. V. Milan: Giuffrè, 2012.
D'Atena, A. 'Adattamento del diritto interno al diritto internazionale'. *Enciclopedia Giuridica*, vol. I. Rome: Treccani, 1988.
Fabozzi, C. *L'attuazione dei trattati internazionali mediante ordine di esecuzione.* Milan: Giuffrè, 1961.
Franchini, M. *'I poteri del Governo nella conclusione di accordi internazionali'. Rivista trimestrale di diritto pubblico*, No. 1, 1980.
Labriola, S. 'Ratifica'. *Enciclopedia giuridica italiana*, vol. XXVI. Rome: Treccani, 1991.
La Pergola, A. *Costituzione ed adattamento dell' ordinamento interno al diritto internazionale*. Milan: Giuffrè, 1961.
Lippolis, V. *La Costituzione italiana e la formazione dei trattati internazionali.* Rimini: Maggioli, 1989.

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