

The failed constitutional reform of the Italian Senate♦

by Nicola Lupo

Abstract: La mancata riforma costituzionale del Senato italiano – The essay aims at analysing the main features of the constitutional reform of the Italian bicameral Parliament that was proposed by the Renzi Government, approved by the two Houses but then rejected by a referendum on the 4th December 2016. It contains some reflections on the difficulty of reforming bicameral legislatures, especially “while business is ongoing”, and on the possible futures improvements of parliamentary procedures, after the failure of the constitutional reform and without amending the Constitution.

Keywords: Parliament; Bicameralism; Constitutional Reform; Referendum; Senate.

1. The dissatisfaction with bicameral legislatures and the difficulty of reforming them

Bicameral parliamentary systems are the subject of criticism almost everywhere and there are proposals for their reform or drastic simplification, particularly by means of redesigning or abolishing the upper House. However, when one considers the processes that have actually reached completion, it becomes immediately obvious that it is extremely difficult to achieve any kind of simplification or reform. The actual experiences of reforming a parliamentary assembly which have had positive outcomes have been far from frequent, especially when they have not coincided with the adoption of a new Constitution, “naturally” accompanied by the establishment of a new Parliament.¹

The reform or abolition of the upper House² has not only, understandably, been hindered more or less explicitly by the assembly in question but, on more

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¹ The reform of a parliamentary assembly is “a major exercise”, which generally takes place when a completely new Constitution is written or otherwise “in times of crisis”. See M. Russell, *Reforming the House of Lords. Lessons from Overseas*, Oxford, 2000, spec. 339 ff. and M. Russell, M. Sandford, *Why are Second Chambers so Difficult to Reform?*, in *Journal of Legislative Studies*, 2002, no. 3, 79-89. On this point see also A.A. Preece, *Bicameralism at the end of the Second Millennium*, in *University of Queensland Law Journal*, 2000, no. 1, 76 ff., as well as, with ample bibliographical references, E. Griglio, *La (auto) riforma in senso territoriale della seconda Camera, un paradosso che si può risolvere (a determinate condizioni). A margine della riforma costituzionale del bicameralismo italiano*, in *federalismi.it*, 2016, no. 1, espec. 10 ff.

² For a list of the suppressions of the upper Houses which have taken place from 1950 up until today, see F. Palermo, M. Nicolini, *Il bicameralismo. Pluralismo e limiti della rappresentanza in prospettiva comparata. In ricordo di Giancarlo Doria*, Napoli, 2013, 228. The

than one occasion, these changes have also been rejected by the electorate. For example, in the Irish referendum that took place in October 2013, the Irish citizens rather surprisingly rejected the abolition of the Seanad.³ Furthermore, the French referendum in April 1969 on a constitutional revision that set out to drastically reduce the powers of the Sénat was also rejected, and resulted in the well-known resignation of General De Gaulle.⁴

The reform of Italian bicameralism proposed by the Renzi Government represents a further confirmation of this hypothesis. By the referendum of 4 December 2016, a large majority of Italian citizens voted against the constitutional reform (59.12% against and 40.88% in favour, with a turnout equal to 65.47%). The dominant factor in producing this result was the determination of the opposition, both from inside and outside the majority, to defeat Matteo Renzi's leadership.⁵ The referendum did in fact offer a valuable opportunity for uniting all the adversaries of the then President of the Council and secretary of the Democratic Party, in the name of a noble battle – the defence of the Constitution in force – and the exploitation of a social malcontent arising from years of negative or quite low economic growth. However, there are further, deeper reasons behind this referendum result, which can be linked to the many failed attempts at constitutional reform that had occurred in Italy throughout the previous thirty years, up to this stage.⁶

The same activity of the Advisory Committee for institutional reforms in 2013, established by the Letta Government – from which the bill then submitted to the Houses derived, substantially even if not formally, as it was presented by a different Government – shows that it is not at all simple to advance a reform of symmetrical bicameralism. This is particularly so at a moment in which the very foundations which are usually identified as being at the core of upper Houses tend to be called into question,⁷ and in which the experiences of territorial representation diverge with regard to both its articulation and the results that

abolition of the Senate in Mauritania, which occurred through a referendum in 2017, must be added to this list. See also P. Passaglia, *Unicameralism, Bicameralism, Multicameralism: Evolution and Trends in Europe*, in *Perspectives on Federalism*, 2018, no. 2, 25 ff. (who spots a trend in Europe towards simplification).

³ See, among others, M. MacCarthaigh, S. Martin, *Bicameralism in the Republic of Ireland: The Seanad Abolition Referendum*, in *Irish Political Studies*, 2015, no. 1, 121 ff. and P. Pisicchio, *Seanad 2013: l'abrogazione che non ci fu. Anatomia del referendum irlandese sull'abrogazione del Senato*, in *Rassegna parlamentare*, 2016, no. 2, 374 ff.

⁴ See, for all, G. Quagliariello, *De Gaulle e il gollismo*, Bologna, 2003, 673 ff.

⁵ For a political science analysis, see D. Di Mauro, V. Memoli, *Targeting the government in the referendum: the aborted 2016 Italian constitutional reform*, in *Italian Political Science Review*, 2018, 1 ff.

⁶ Addressed by, among others, S. Bonfiglio, *Il Senato in Italia. Riforma del bicameralismo e modelli di rappresentanza*, Roma-Bari, 2006, spec. 57 ff. and by F. Sgrò, *Il Senato e il principio della separazione dei poteri*, Milano, 2012, espec. 135 ff.

⁷ On the bases of bicameralism see, for all, J. Uhr, *Bicameralism*, in *The Oxford Handbook of Political Institutions*, edited by R.A.W. Rhodes, S.A. Binder, B.A. Rothman. Oxford, 2008, 474 ff. For an updated re-reading of the debate, see M. Romaniello, *Bicameralism: a concept in search of a theory*, in www.amministrazioneincammino.luiss.it. 28 September 2016.

are actually produced.⁸ On this occasion, particularly in the initial phases, a wide consensus was recorded in the Advisory Committee in favour of the reform, in the light of the stalemate following the 2013 elections, on the *pars destruens*: that is, on the need to overcome symmetrical bicameralism, excluding the Senate from the relationship of confidence with the Government. By contrast, the opinions of the Committee's members diverged considerably, as to the *pars construens*: both regarding the composition and the powers of the upper House.⁹ The scale of this divergence was such that the unicameral option came to the fore again during the second part of the work. It was a proposal supported only by a minority of the Committee's members but was authoritatively and solidly argued.¹⁰

Moreover, any possible transformation from bicameralism to unicameralism would have given rise to a definite anomaly in the case of Italy, at least in the continental context, considering the size of the Italian Republic, which has just over 60 million inhabitants. All European Union Member States with over ten million inhabitants have a bicameral parliament, with the only exceptions being Greece and Portugal (States which furthermore exceed this threshold by about one million inhabitants each). These exceptions are, however, more than balanced out by States, like Austria, Ireland and even Slovenia in particular, which are characterised by bicameral systems, even though their inhabitants number less than the threshold of ten million.¹¹ The creation of an Italian departure from symmetrical bicameralism via the abolition of the Senate would have therefore resulted in an even more significant anomaly from the European comparative perspective.

⁸ See this extensively dealt with by G. Doria, *Bicameralismo e federalismo. Analisi dei modelli di relazione*, Roma, 2013, espec. 75, who compares two theoretical models (the representative and the guarantor models) and two structural models (the ambassadorial and the senatorial models). See also the A. Gamper (Ed.), *Representing Regions, Challenging Bicameralism*, special issue of *Perspectives on Federalism*, 2018, no. 2 (on-federalism.eu/attachments/004_Volume%2010%20-%20issue%202%20-%202018.pdf).

⁹ The works of the Letta-Quagliariello Advisory Committee are presented in a volume published by the Presidency of the Council of Ministers for constitutional reforms, *Per una democrazia migliore. Relazione finale e documentazione*, Roma, 2013 (also available at: presidenza.governo.it/DIE/attivita/publicazioni/Per%20una%20democrazia%20migliore.pdf). A critical analysis of its activity is in A. Manzella, *La riforma del bicameralismo*, in *Rivista AIC*, 2013, no. 13 (in the name of a Senate directly elected and able to take part in the swearing-in of the government in a common parliamentary sitting). For the proposal in question see P. Ciarlo, G. Pitruzzella, *Monocameralismo: unificare le due Camere in un unico Parlamento della Repubblica*, in www.osservatorioaic.it, October 2013.

¹⁰ For a criticism of the unicameral hypothesis, see the solid arguments advanced by R. Bifulco, *Le proposte della commissione per le riforme costituzionali sulla riforma del bicameralismo e la 'scorciatoia' monocamerale*, in *Rivista AIC*, 2014, no. 1, and M. Luciani, *La riforma del bicameralismo oggi*, *ivi*, 2014, no. 2.

¹¹ The element regarding the size of the country is often overlooked in comparative analyses of bicameralisms: for instance, see P. Passaglia, *Unicameralism, Bicameralism, Multicameralism: Evolution and Trends in Europe*, *cit.*, 1 ff.

Also, other than the European Union, the picture remains basically the same. For example, see D. Shell, *The History of Bicameralism*, in N.D.J. Baldwin, D. Shell (Eds), *Second Chambers*, London-Portland, 2001, according to whom the comparative panorama sees a prevalence of unicameral systems (but at the same time highlighting how Portugal was, at the time, the only western democracy with a unicameral system to exceed ten million inhabitants).

It has obviously been very easy to criticise the text approved by Parliament, which was the result of a two-year process,¹² and then rejected by the referendum, and to outline alternative options, on paper and during the referendum campaign. However, it is not at all easy to formulate a real reform proposal that can work and be approved in the modalities and procedures prescribed, for any constitutional revision, by art. 138 Const. This provision requires two distinct votes by each House and on the second, to be held at least three months after the first one, the obtainment of a higher majority: if this majority, in both Houses, is greater than 2/3 of the members, the constitutional revision is promulgated and enters into force, without any other requirement; otherwise, and provided that the revision obtained at least the absolute majority of the members, the possibility of a referendum is envisaged, upon request by parliamentary minorities (at least 1/5 of the members of each House), the citizens (500,000 voters) or the Regions (five Regional Councils). If no referendum is requested, the constitutional revision is promulgated and enters into force.

2. The difficulty of approving a reform while business is ongoing and the need to allow a potential re-election of the Parliament at any time

A further hurdle for the reform of a bicameral Parliament is the need to realise the reform while business is ongoing: that is, without having to rule out the possibility of electing a new parliament at any time and approving it in very close coordination with the rewriting of the electoral law. In Italy, then, the difficulty has been increased by the fact that many relevant sections of electoral law No. 270 of 2005 (the so-called “Porcellum”) were declared constitutionally invalid by the Constitutional Court in its judgement No. 1 of 2014.¹³ The reformers addressed this difficulty by deciding not to reduce the number of members of the Chamber of Deputies, which would have remained 630, and designing an electoral law uniquely for the Chamber of Deputies (No. 52 of 2015, the so-called “Italicum”), applicable, at least in theory, either in the event of approval of the constitutional reform or in the event of its rejection.

The case law of the Italian Constitutional Court had in fact affirmed a principle according to which it is mandatory to guarantee the “necessary, constant functioning” of the constitutional bodies, permitting their “renewal, at any time”. The Court has until now applied this principle with reference to the abrogative referendums (aimed at repealing, either partially or entirely, pieces of

¹² Text of the constitutional bill published in the Official Gazette no. 88 of 15 April 2016.

¹³ See V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, New York, 2016, 90 ff. and, more specifically, E. Longo, A. Pin, *Don't Waste Your Vote (Again!)*. *The Italian Constitutional Court's Decision on Election Laws: An Episode of Strict Comparative Scrutiny*, in *ICON'S Working Paper*, 2015, no. 10, and, referring also to judgement no. 35/2017, A. Baraggia, L.P. Vanoni, *The Italian Electoral Law Saga: Judicial Activism or Judicial Subsidiarity?*, in *STALS research paper*, 2017, no. 2.

ordinary legislation):¹⁴ the referendums' questions were thus declared inadmissible by the Court when, proposing the total abrogation of electoral laws, or seeking repeals inconsistent with their future application, risked making it impracticable to proceed to the new elections in case of early dissolution of the Houses. This is a principle which, again according to the Court, "takes on particular importance for the Parliament, that is 'the characterising institute of the legal system' (judgement No. 154 of 1985) and is the privileged place of political representation (cfr. judgement No. 379 of 1996), such that even only the temporary paralysis of the juridical mechanisms for the renewal of the parliamentary assemblies would clash with the fundamental needs of representative democracy."¹⁵

The same Court also applied this principle to itself, preventing its decision as to the unconstitutionality of electoral legislation from having a similar effect. So, in the judgement No. 1 of 2014 the Court took care to specify that the legislation that remains in force following the above declaration of unconstitutionality of Act No. 270 of 2005 is "on the whole suitable to guarantee the renewal, at any time, of the elective constitutional organ", just as required by the constant jurisprudence of this Court (judgement No. 13 of 2012)¹⁶.

The next logical step might be to argue that such a principle applies as a 'supreme principle', thereby limiting constitutional reforms. The consequence of this would be that a constitutional bill seeking to reduce the number of the Chamber's components would have had to contain a transitory constitutional provision capable of guaranteeing its election, should the entry into force of a new electoral law be delayed: a constitutional provision that should to some extent also take care of the necessary redefinition of the electoral constituencies. Having kept the number of MPs at 630 has instead allowed the constitutional bill to tackle the election of just a new Senate, albeit with a somewhat artificial transitory provision¹⁷.

As already remarked, the new electoral law for the Chamber, Act No. 52 of 2015 (the so-called "Italicum"), would have been applicable for the election of 630

¹⁴ See, for the expressions in inverted commas, judgement no. 26 of 1997 of the Constitutional Court, whereby those referendum requests, which were aimed at suppressing the proportional quota in the electoral laws then in force for the Chamber of Deputies and the Senate, were declared inadmissible. See also for the indication of further decisions in which that same principle, originally conceived for the Supreme Council of the Judiciary, was affirmed, M. Luciani, *Commento all'art. 75. Il referendum abrogativo*, in G. Branca, A. Pizzorusso (Dir.), *Commentario della Costituzione*, Bologna-Roma, 2005, espec. p. 475 ff., and A. Gigliotti, *L'ammissibilità del referendum in materia elettorale*, Milano, 2009, espec. p. 122 ff.

¹⁵ Thus again judgement no. 26 of 1997 of the Constitutional Court.

¹⁶ The expressions in inverted commas in the text are taken from judgement no. 1 of 2014, that reads as follows: "The electoral laws are, in fact, "constitutionally necessary", insofar as "indispensable in ensuring the functioning and continuity of the constitutional organs" (judgement no. 13 of 2012; analogously, judgements no. 15 and no. 16 of 2008, no. 13 of 1999, no. 26 of 1997, no. 5 of 1995, no. 32 of 1993, no. 47 of 1991, no. 29 of 1987), having to furthermore avert the possibility of "freezing the dissolution power of the President of the Republic foreseen by art. 88 Const." (judgement no. 13 of 2012)" (para. 6). The following judgement no. 35 of 2015 confirmed these affirmations (paras. 9.2 and 12.2).

¹⁷ See art. 39 of the constitutional revision bill.

deputies, either in the event of the success of the constitutional reform or, with some further difficulty, in the case of its failure. In fact, a couple of months after the referendum, the new electoral law was partially affected by the declaration of unconstitutionality by judgement No. 35 of 2017, on the basis of the same principles as had already been established in judgement No. 1 of 2014.¹⁸ And then, in compliance with a statement of the judgement No. 35/2017, rather promptly substituted by a different electoral law, substantially the same for the two Houses, Act No. 165 of 2017, according to which the 2018 parliamentary elections were eventually held.

3. A slightly weaker Senate

The fact that the Italian Senate voted and accepted its own comprehensive self-reform on three separate occasions is conspicuous from a comparative perspective, piquing interest and surprise in non-Italian observers. Furthermore, the approval of a new electoral law for the Chamber during the same period of time, undoubtedly devised for the new and reformed Parliament, although designed in such a way as to also be applicable to the present one, can be deemed a significant political and parliamentary success, also considering the slender margin available to the centre-left majority in the Senate.¹⁹

With respect to the functions of the new Senate proposed by the constitutional reform, it is not possible to share the critical view, which is totally and *a priori* depreciatory regarding the weight that such an institution would have been able to exercise. Undoubtedly, the reformed Senate would have been weaker than the current one, but the removal of symmetrical bicameralism was precisely one of the objectives of the reform process, aimed at eliminating an Italian peculiarity in the context of other countries with parliamentary governments.²⁰

It is indeed possible that the new Senate would actually have ended up being marginalised.²¹ Nevertheless, this consequence does not seem to be

¹⁸ For a first illustration of judgement no. 35 of 2017 see C. Caruso, M. Goldoni, *Halving the "Italicum": The Italian Constitutional Court and the Reform of the Electoral System*, in www.verfassungsblog.de, 28 February 2017.

¹⁹ On the main procedural profiles see the collection of contributions in N. Lupo, G. Piccirilli (Eds), *Legge elettorale e riforma costituzionale: procedure parlamentari "sotto stress"*, Bologna, 2016. For detailed reports of the parliamentary scrutiny see F. Fabbrizzi, G. Piccirilli, *Osservatorio parlamentare sulla riforma costituzionale*, in federalismi.it. In the sense that the constitutional reform process, with the millions of amendments presented by Senator Calderoli alone, would constitute the umpteenth confirmation of the need to reform the Italian bicameralism, see R. Bin, *Perché votare sì alla riforma*, in www.forumcostituzionale.it, 1, 15 June 2016.

²⁰ See, clearly, the contribution by C. Pinelli, *Criteri di designazione e di composizione del Senato*, in *Studi parlamentari e di politica costituzionale*, 2015, 187-188, 2015, 9 ff. For the highlighting of such an anomaly see, for example, M. Gallagher, M. Laver, P. Mair, *Representative Government in Modern Europe*, New York, 2011, 61 ff., according to whom the present structure of Italian bicameralism would appear to have come out of the textbook on "how not to design a political system".

²¹ This is, for example, the option pointed to as being most probable by G. Piccirilli, *Prospettive di organizzazione del "nuovo" Senato*, in *Rivista AIC*, 2016, no. 3, espec. 2 ff. *Contra*,

directly derived from the text of the constitutional bill, which on the other hand, potentially, seemed able to introduce considerable latitude for the action of the reformed Senate. This is all the more so if one considers the tendency according to which the Upper Houses acquire substantial authority markedly beyond their formal powers.²²

Besides the participation in the legislative function, the constitutional reform bill from its first article paid great attention to identifying and attributing a series of functions of considerable importance to the Senate. It thereby made a courageous and significant, if not easy, attempt to isolate the functions that all too often end up being incorporated into a single category, namely under labels such as “direction and scrutiny function”,²³ when not actually in a melting pot that can only be defined negatively through recourse to the label “non-legislative functions”.²⁴

In this respect, some authors have stated that there is no substantial power underpinning many of these categories, as they comprise functions that until now have basically remained “ownerless”²⁵. Others, instead, have envisaged that, by developing them, the Senate could take on a leading role in political oversight;²⁶ and, in any case, they have grasped the sense of the challenge that has been posed, “that a new Senate which is not resigned to being immediately demoted to a ‘dead chamber’ should be able to assemble until the end”²⁷ and have highlighted the potential that this constitutional provision offers.²⁸

4. The Senate in the legislative process: the distribution of the legislative function between the two Houses

When limiting the analysis to the legislative functions of the Senate, as will be done in the following part of this contribution, the evaluation made above does

see N. Lupo, *La composizione del nuovo Senato e la sua (ancora) incerta natura*, in *Le autonomie territoriali nella riforma costituzionale*, Roma, 2016, 227 ff.

²² This is what some political science studies have defined as “Cicero’s puzzle”: “why does the upper house have ‘authority’ even when the lower house is granted the power of decision?”. See J. Money, G. Tsebelis. *Cicero’s Puzzle: Upper House Power in Comparative Perspective*, in *International Political Science Review*, 1992, no. 1, 25 ff.

²³ For a critical analysis of the textbooks see N. Lupo, *La classificazione delle funzioni del parlamento tra storicità e attualità del pensiero di Walter Bagehot*, in G. Di Gaspare (Ed.), *Walter Bagehot e la Costituzione inglese*, Milano, 2001, 101 ff.

²⁴ See, for example, R. Dickmann, S. Staiano (Eds), *Funzioni parlamentari non legislative e forma di governo: l’esperienza dell’Italia*, Milano, 2008, and R. Dickmann, S. Staiano (Eds), *Le funzioni parlamentari non legislative. Studi di diritto comparato*, Milano, 2009.

²⁵ See R. Zaccaria, *Alcune note critiche sulla riforma costituzionale dopo la prima lettura*, in www.osservatoriosullefonti.it, 2014, no. 3, espec. 4.

²⁶ See on this E. Griglio, *La (auto) riforma in senso territoriale della seconda Camera, un paradosso che si può risolvere (a determinate condizioni)*, cit., espec. 21 ff.

²⁷ For this quote, see C. Pinelli, *Le funzioni del Senato in ordine all’adesione della Repubblica all’Unione europea*, in www.italiadecide.it, December 2015, espec. 4 ff.

²⁸ See M. Luciani, *Funzione di controllo e riforma del Senato*, in www.italiadecide.it, December 2015, 7, who speaks in particular of “valuable instruments”, although he points out that it is up to the political dynamics to tell us if and how much these instruments would have any effects on the actual life of the institutions.

not seem to change much at all. In fact, an assessment of the Senate's powers in the legislative process reveals that the instruments whereby the Senate exercised a far from negligible influence in the law-making process existed, at least potentially, in the constitutional reform.

A number of criticisms have focussed on the lengthening and the increased difficulty of interpreting the regulation of the legislative function outlined in art. 70 Const. (by contrast with the current wording, which is extremely short and clear: "The legislative function is exercised collectively by both Houses"). It was argued that, far from guaranteeing a simplification of the legislative process, the asymmetry thus introduced between the Chamber of Deputies and the Senate would, on the contrary, make it more structured and complex.²⁹

Indeed, it is easy to remark that these criticisms are rather superficial. It is in fact evident that in order to attribute the legislative function symmetrically to both Houses, there is no need for particularly detailed regulation. At the point at which the Constitution sets out to distribute this function asymmetrically between the two branches of Parliament, the regulation inevitably becomes very complicated. A constitutional comparison, referring, *inter alia*, to the French (arts. 39-47) and German (arts. 76-77-78) Constitutions,³⁰ quite clearly confirms this.

In terms of a systematic interpretation of the Italian Constitution, it can therefore be noted that Art. 70 Const. would have changed its role and impact quite considerably. In the current Constitution, it is a provision of marginal importance and to some extent is even superfluous, owing to the presence of Arts. 55 and 72 Const. These two provisions, in fact, repeat and itemise its contents (also due to the underestimation of the meaning of the adverb "collectively", at least at an institutional level).³¹ Thus, Art. 70 Const. would have become not only a "long", but also a crucial provision. The reformed art. 70 Const., rather than the successive art. 72 Const., should have been referred to in order to outline the role of the Senate in the different legislative procedures.

This change in the role and significance of art. 70 Const. should also have been reflected in practice in the interpretation of the constitutional text. A series of problems of interpretation originating from other reformed constitutional provisions could be solved by taking into consideration the basic principles established by the reformed art. 70 Const.

²⁹ For example, Michele Ainis, who, in commenting on the bill following the second reading in the Chamber, pointed out that Article 70 – which sets out the legislative function – is expressed in 9 words, while after this restorative injection it will have 430 (M. Ainis, *Il potere senza contrappesi*, in *Il Corriere della Sera*, 11 March 2015). See alternatively Armando Spataro, who invited anyone who had doubts regarding the evaluation on the constitutional reform to compare the old and new art. 70 Const.: the first, one line; the second, one page (A. Spataro, *I magistrati e il diritto-dovere di schierarsi sul referendum*, in *La Repubblica*, 8 May 2016).

³⁰ See, among others, C. Fusaro, *Le ragioni della riforma costituzionale. Una guida*, in www.carlofusaro.it, 15 May 2016, 32 and M. Olivetti, *Non è questione di semplicità*, in *L'Avvenire*, 22 May 2016.

³¹ For a study of both profiles, see N. Lupo, *L'art. 70 della Costituzione: una disposizione poco valorizzata*, in M. Ruotolo (Ed.), *La funzione legislativa, oggi*, Napoli, 2007, 211 ff.

In particular, according to this article, the procedure outlined by art. 70, third para., Const. – for the “prevalently approved by the Chamber” laws, with the intervention of the Senate upon request – would have represented the basic model with respect to which the other provisions, in the following paragraphs or in other articles, would have had to be related: they all contain exceptions and additions to a procedure that, for the aspects not expressly regulated by the Constitution, should have followed those rules of a general-residual nature.

The “equal bicameral” laws, instead, foreseen for a series of matters identified by art. 70, first para., Const., would have concerned a bunch of limited subjects, differently defined, but all relating to laws pertaining to the institutional system, with the exclusion, thus, of laws necessary to implement public policies: a *closed number* of matters, never corresponding to real subjects, but to just as many “types” of laws, already outlined in their contents and often also in their formation process, by the Constitution and therefore to be interpreted restrictively.

5. The two basic features of the reform of the Senate

The basic “architectonic” line followed by the constitutional reform can essentially be identified in two features. The first is the decision not to link the distinction of the legislative procedures in any way whatsoever to the separation of the matters between State and Regions. The second is to permit an intervention (mandatory or possible) by the Senate on all bills, foreseeing as a minimum outcome of the Senate’s intervention the need for a new reading by the Chamber, in order for the law to be passed.

Both choices also appear consistent with many of the guidelines advanced by the legal scholarship. In particular, this assessment can be made from the comparison with other constitutional reform bills. By contrast, the solution adopted by the constitutional reform rejected by the 2006 referendum was rightly criticised in rather severe terms,³² and even the supporters of the reform considered there was room for improvement.³³ Or, this time similarly, the solution approved by the “Violante draft”,³⁴ which can be considered the most direct “forerunner” of the constitutional bill with respect to many structural and functional aspects, and which was the subject of a widespread positive evaluation by the constitutionalists.³⁵

³² See, for example, L. Castelli, *Il cosiddetto Senato federale nel disegno di legge di riforma della parte II della Costituzione*, in F. Bassanini (Ed.), *Costituzione. Una riforma sbagliata. Il parere di sessantatré costituzionalisti*, Firenze, 2004, 460.

³³ See also the document drafted by the “Fondazione Magna Carta” in which the cumbersome nature of the legislative process was highlighted and it was pointed out that the so-called “federal Senate” would have had decision-making powers that would have jeopardised the steering effect of the Government.

³⁴ A.C. 553 and abb.-A, approved on 17 October 2007 by the Constitutional Affairs Committee of the Chamber.

³⁵ See, among others, P. Caretti, *Bicameralismo e autonomie: un'altra ipotesi all'esame del Parlamento*, in *Le regioni*, 2007, no. 5, 657 ff.; A. D'Atena, *Un Senato "federale". A proposito di*

The first feature is consistent with what a large portion of constitutional law scholarship has been highlighting for a long time, along with an express indication contained in the conclusive document of the advisory Committee for institutional reforms set up by the Letta Government.³⁶ The anchoring of the legislative function of the Senate to the matters of regional competence, even though seeming to be abstractly rational and coherent with a Senate representative and guarantor of territorial autonomies, would have inevitably brought with it all the uncertainties characterising any “vertical” allocation of legislative competences, transferring them onto the legislative procedure, and which were rather conspicuous in the interpretations of art. 117 Const., in its various drafts. Furthermore, such a solution was to some extent facilitated by the choice, probably also due to reasons of pretence,³⁷ to suppress, at least formally, the category of the concurrent legislative power. In this way, it was made more simple to not foresee the Senate’s strengthened powers in the state laws containing “fundamental principles” destined to be developed in the regional laws, according to a scheme which, as is well known, was quite sporadic and difficult in its application.

The second feature is aimed at preventing the Senate, and thus the territorial autonomies that this institution represents, from being radically and prejudicially excluded from the possibility of intervening on any category of bills at all, independently of its scope. Besides the category of equal bicameral bills for which the approval of the Senate is necessary, an intervention by the Senate is always possible, albeit requested by quite a high quorum, namely one third of the senators. The Senate’s intervention can fully qualify as an involvement in the legislative function,³⁸ because it produces a minimum procedural effect, which consists in obliging the Chamber to vote again on a bill in the event that it intends to complete its passage: acknowledging or, on the contrary, rejecting the changes proposed by the Senate.

In the light of this second feature in particular, and on the assumption that the reformed Senate was actually able to represent the territorial institutions, there would no longer be “leggi dello Stato” (“State laws”), but “leggi della Repubblica” (“Republican laws”) in their own right, as including all the constitutive elements of the Republic defined in art. 114 Const. Undoubtedly, this would have been a somewhat emphatic but not incorrect form, considering

una recente proposta parlamentare, in *Rassegna parlamentare*, 2008, no. 1, 243 ff.; S. Mangiameli, *Il Senato federale nella prospettiva italiana*, ivi, 2010, no. 1, 167 ff.

³⁶ See *Per una democrazia migliore*, cit., p. 41, where it is expressly declared that “in the discipline of legislative procedure the Committee did not adopt the criterion of the division by subject matters between Chamber and Senate, which would have given rise to uncertainties and conflicts, in contrast with the criteria of simplicity, rapidity and immediacy of understanding that the Committee set out to follow”.

³⁷ The point is moreover the subject of critical evaluations: see, for all, D. Morana, *Il riparto delle funzioni legislative: la fine della competenza concorrente? (art. 117 Cost.)*, in F.S. Marini, G. Scaccia (Eds), *Commentario alla riforma costituzionale del 2016*, Napoli, 2016, 241 ff.

³⁸ Doubtfully, on the point, M. Cavino, *Corte costituzionale e potenziale sviluppo del contenzioso sui vizi formali degli atti legislativi*, in www.gruppodipisa.it/wp-content/uploads/2015/11/Cavino-vizi-formali.pdf, 2015, 1 ff.

that the territorial institutions would also have had the opportunity to contribute through the Senate, at least potentially, to the exercise of the legislative function. The fact that, in most cases, the last word would be with the Chamber of Deputies, did not seem in itself a suitable element to refute such denomination. It would have been a perfectly appropriate option, in line with the widely prevalent choice in the comparative framework, not to attribute a “power of veto” to the territorial autonomies or the body representing them, except in some limited cases.

6. The debate on the number of legislative processes

Lastly, and in this case inconsistently with widespread commentary, it is not true that the text of the constitutional reform would outline a particularly high number of legislative processes and would therefore result in just as many categories of “bills”, while the Constitution currently in force foresees only one.³⁹

On the contrary, as far as the relations between the Chamber of Deputies and Senate are concerned, there would essentially have been two categories of legislative processes, then divided internally into a number of varieties. One category comprises the “equal bicameral laws”, which would also include, with the peculiarities already present in the current text of art. 138 Const., the laws amending the Constitution and other constitutional laws. On the other hand, the category of “prevalently approved by the Chamber laws” comprises the great majority of laws, including (with some variants, not all easily identifiable) both the laws of implementation to the supremacy clause and the laws for the approval of budgets and financial statements. The latter were identified by a number of constitutional provisions as laws passed by the Chamber of Deputies alone, but, in reality, these would always have been included in the general-residual category of the “prevalently approved by the Chamber laws”.⁴⁰

Therefore, there would have been a bipartition of the “type” of State law (or better referred to as “Republican law”), considering that the category of equal bicameral laws (as distinct from the constitutional laws) would have presented, as per the text of art. 70 Const., almost all the features of a distinct category of legal sources.⁴¹

³⁹ For example, M. Cavino (*Corte costituzionale e potenziale sviluppo del contenzioso sui vizi formali degli atti legislativi*, cit., 3) lists eight prospective legislative processes; E. Rossi (*Una Costituzione migliore? Contenuti e limiti della riforma costituzionale*. Pisa, 2016, 83 ff.) instead lists nine, despite pointing out that it is an operation that has “high margins of discretionary power”; G. Zagrebelsky, F. Pallante (*Loro diranno, noi diciamo. Vademecum sulle riforme istituzionali*, Roma-Bari, 2016) count ten of them.

⁴⁰ This can include in particular the laws for amnesty and pardon, with the additional feature, in accordance with art. 79 Const., of the majority of 2/3 of the members, in every article of the final voting; and the law for the implementation of art. 81, sixth para., Const., in this case with the added burden of the absolute majority of deputies. In conformity with this, see P. Zuddas, *La produzione legislativa: tra creatività e complessità*, in *Giurisprudenza italiana*, 2016, 20 ff., espec. 38 ff.

⁴¹ On this point see G. Brunelli, *La funzione legislativa bicamerale nel testo di revisione costituzionale: profili problematici*, in *Rassegna parlamentare*, 2015, no. 4, 765 ff.; G. Piccirilli, “Oggetto proprio” delle leggi previste dal “nuovo” articolo 70 della Costituzione in via di revisione,

Moreover, a series of constitutional provisions would act in various ways on the law-making process, mostly in order to make it faster, but they do not appear to give rise to new “types” of law-making processes, nor to new categories of laws. In fact, the variations introduced in the legislative procedure would not be reflected in the active force of the legislative act thus approved.

Indeed, most of these procedures are already foreseen by the Constitution currently in force. It suffices to think in particular of the bills approved by the deliberative or legislative parliamentary standing committees, which, despite a number of motivated objections advanced during the preparatory works,⁴² would have remained, both for the equal bicameral bills and the “prevalently approved by the Chamber laws”. Something only slightly different must be said for the conversion law of the decree-laws and for the authorisation laws for the ratification of international treaties. For both these categories, there could have been either “equal bicameral laws” and “prevalently approved by the Chamber” ones. In the first case, this depends on the matters dealt with, which in any event would have been, as far as can be assumed, almost always such as to come within those “prevalently approved by the Chamber”. In the second case, the “laws that authorise the ratification of international treaties relative to the belonging of Italy to the European Union” would have been exclusively equally bicameral.⁴³

The constitutional reform would have added a single new form of accelerated procedure for the “priority” or “fixed term” bills, now regulated by art. 72, sixth para., Const. This is a procedure that has been long debated at institutional and doctrinal levels,⁴⁴ and which was explicitly aimed at reducing the recourse to decree-laws, and relates only to the matters on which “prevalently approved by the Chamber laws” can intervene. The laws in electoral matters would have been expressly excluded along with those for the

in *Rassegna parlamentare*. 2016, no. 1, espec. 69 ff.; P. Carnevale, *Brevi considerazioni in tema di 'oggetto proprio', clausola di 'sola abrogazione espressa' e 'riserva di procedimento' per le leggi bicamerali*, in federalismi.it, 2016, no. 7, espec. p. 7 ff.; M. Olivetti, *I procedimenti legislativi (arts. 70-74 Cost.)*, in *Commentario alla riforma costituzionale del 2016*, cit., 67 ff., espec. 80 ff.

⁴² See the hearing of Professor Marco Olivetti in front of the Constitutional Affairs Committee of the Chamber of Deputies in A.C., XVII legislatura, 16 October 2014, res. sten., p. 5 ff. (also published as M. Olivetti, *Alcune osservazioni sulla riforma del Senato e del Titolo V nel disegno di legge costituzionale no. 1429, approvato dal Senato l'8 agosto 2014*, in www.amministrazioneincammino.luiss.it, December 2014, 11 ff.), and N. Lupo, *Sulla riforma del bicameralismo in Italia: un'opinione a favore (con qualche osservazione a margine)*, in G.C. De Martin, Z. Witkowski, P. Gambale (Eds), *Parlamenti, politiche pubbliche e forme di governo: esperienze e prospettive in Italia e Polonia*, Padova, 2016, 215 ff., espec. 219 ff.

⁴³ For a wide interpretation of this latter category, see C. Pinelli, *Le funzioni del Senato in ordine all'adesione della Repubblica all'Unione europea*, cit.

⁴⁴ For a detailed summary of the proposals advanced in this field in the last two decades, also in the light of the report by the Letta-Quagliariello Advisory Committee, see E. Longo, *Procedure legislative abbreviate e voto a data fissa*, in A. Cardone (Ed.) *Le proposte di riforma della Costituzione*, Napoli, 2014, 301 ff. For its previous proposals, dating back to the “Spadolini decalogue”, see V. Lippolis, *Il problema della tempestività del procedimento legislativo: la cosiddetta corsia preferenziale, i procedimenti di urgenza ex art. 72 Const., il contingentamento dei tempi di intervento*, in *Il Parlamento della Repubblica. Organi, procedure, apparati*. 1, Roma, Camera dei deputati, 1987, 269 ff. and A. Manzella, *Sui “dieci punti” del II governo Spadolini*, in *Nuova Antologia*. no. 2223, July-September 2002, 56 ff. (also including the text of the decalogue).

authorisation of the ratification of treaties, amnesty and pardon laws and those on budget. The provision in question, even though immediately applicable,⁴⁵ also appeared to contain elements of ambiguity, the resolution of which would have been referred, with a choice that has been the subject of numerous criticisms, to parliamentary rules of procedure (also called upon, in accordance with art. 72, third para., Const. to establish shorter procedures for bills declared urgent).⁴⁶

More generally, it must be remembered that the division of the ordinary law category into various subtypes appears consistent with a tendency that has been found for some time now in contemporary constitutionalism. This tendency has been effectively highlighted by Alberto Predieri, drawing inspiration from the provision of the “organic laws” in the Spanish constitution of 1978 (as well as in the French Constitution of 1958), when he used the metaphor of the “karyokinesis”: the reproduction and differentiation process of cells, while nevertheless maintaining the number of chromosomes constant. Likewise, the “State law”, once a unitary and supreme category, tends not only to lose that supremacy in contemporary states with a rigid constitution, but also to be subdivided according to the specialisations.⁴⁷ This is thus more a feature of contemporary constitutionalism than a defect or an oddity of the constitutional reform analysed herein.

7. Conclusions. Some reforms of the Italian Parliament without changing the Constitution?

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The negative outcome of the constitutional referendum of 4 December 2016 and the resultant failed reform of symmetrical bicameralism marked an important moment in the evolution of the Italian institutions. The process aimed at reforming the second part of the Constitution on the institutional framework, which was started in the mid-80s, is destined to undergo a rather long setback. This means that there will no longer be an excuse or an alibi for not achieving small-scale and sub-constitutional self-reforms of the two Houses.⁴⁸

⁴⁵ It can be inferred from the transitory provision set down in art. 39, para. 9, of the constitutional bill in question, according to which “until the compliance of the regulatory provision of the Chamber of Deputies”, in any case the deferment of the term established by art. 72, seventh para., Const. can be no fewer than ten days.

⁴⁶ See, among others, T. Guarnier, *Rischi e aporie del procedimento legislativo a data certa*, in *federalismi.it*, 2016, no. 5, 3; R. Dickmann, *Alcune considerazioni sull’istituto del “voto a data certa”*, *ivi*, 2016, no. 6.; F.S. Marini, *Il voto a data certa*, in *Commentario alla riforma costituzionale del 2016*, cit., 121 ff.

⁴⁷ A. Predieri, *Le fonti del diritto nella Costituzione spagnola del 1978*, in E. Garcia de Enterría, A. Predieri (Eds), *La Costituzione spagnola del 1978*, Milano, 1982, 133 ff., espec. 136 ff. and 186 ff. See also, more specifically, J. García Roca, *La “decostruzione” della legge del Parlamento*, in G. Rolla, E. Ceccherini (Eds), *Profili di diritto parlamentare in Italia e in Spagna*, Torino, 1997, 127, espec. 149 ff.

⁴⁸ M. Russell (*Attempts to change the British House of Lords into a second chamber of the nations and regions: explaining a history of failed reforms*, in *Perspectives on Federalism*, 2018, no. 2, 268, espec. 293) shows, in light of the UK experience of the House of Lords, that successful reforms of bicameralism are occasional and incremental, rather than decisive and large-scale. A similar conclusion is also drawn from the Italian case: M. Russell, *The failed Senate reform in Italy: international lessons on why bicameral reforms so often (but not quite always) fail*, in

The difficulties encountered in the rethinking of symmetrical bicameralism – which has been viewed with almost unanimous dissatisfaction for some time now, but no adequate consensus has been found as to the terms of a constitutional revision – have represented an objective hurdle with respect to the coherent and balanced courses of reform of other constitutional issues which are inextricably linked (the system of territorial autonomies; the form of government) and with respect to other institutional innovations relating to the Parliament (the rules of procedure of the Chamber of Deputies and the Senate; the electoral laws).

This alibi has now fallen away, so the conditions are right to make a number of innovations to the Italian Parliament, with an unvaried Constitution. Although a specific constitutional amendment should at least be made to equate the voting ages for the two Houses of the Parliament, which at the moment are differentiated by 7 years.

On the one hand, a series of rewritings of the rules of procedure of the Chamber and the Senate could make the parliamentary procedures more efficient and functional, starting with those whereby they exercise their “European powers”, and remedy some of the critical issues arising over recent decades (parliamentary cross-party-migration, “transfughismo” and the crisis of the ordinary legislative procedure). On the other hand, a new electoral law in conformity with the Constitution (as interpreted by judgements No. 1 of 2014 and No. 35 of 2017) should give the party system a reference framework that is stable and successful in enabling it to reconnect with the electors, following the losses incurred by the repeated approval of electoral laws only wanted by the ruling majority and then declared for many aspects incompatible with the Constitution. The most critical point has been the creation of majority bonuses, which make a somewhat more artificial use of the majority logic than what happens when the same logic is applied to single-member constituencies.⁴⁹

constitution-unit.com/2018/07/20/the-failed-senate-reform-in-italy-international-lessons-on-why-bicameral-reforms-so-often-but-not-quite-always-fail/, 20 July 2018 (noting that “it’s very difficult to get agreement on large-scale second chamber reform: around the world, it rarely happens” and that „it’s hence more realistic to think about small, gradual changes”).

⁴⁹ In the last months of 2017 the Parliament has indeed moved along the indicated direction, by approving, with a rather wide consensus, a new electoral law (Act no. 165/2017) and reforming almost one third of the articles of the Senate’s rules of procedure (although the parallel reform of the Chamber’s rules of procedure was not successful). For a comment, see N. Lupo, *Verso un’auspicabile stabilizzazione della legislazione elettorale italiana. Alcuni spunti sulla legge n. 165 del 2017, in rapporto alla Costituzione*, in *federalismi.it*, 2017, no. 22 and Id., *La riforma del (solo) regolamento del Senato alla fine della XVII legislatura*, in www.forumcostituzionale.it, 2018, no. 1.