LUISS

Dipartimento
Di Scienze Politiche

Cattedra di Public Law

The unchallengeability of parliamentary opinions and votes on the light of the judgement 59/2018 of the Italian Constitutional Court (the so called "*Calderoli case").*

Chiar.mo Prof. Nicola Lupo

RELATORE

William Signorelli mat. 082072

CANDIDATO

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INTRODUCTION

The discussion about parliamentary immunities and their constitutional and juridical implications finds it origins in a context of historical and political transformations of the Nation States. The constitutional path of modern Europe passed through remarkable cleavages between the monarchies or the executive power from one side and the parliament from the other, with the latter claiming its role of political representation. Within this historical struggle the legislative power through dramatic events such as the English Glorious Revolution, the French Revolution and the 1848 riots imposed itself over the despotism, gaining different forms of protection for their belonging members: the so-called parliamentary immunities.

In the Italian context, thanks to the *Statuto Albertino* the Parliament was granted with important guarantees mainly concerning the unchallengeability for the opinions expressed by the respective belonging members during the performance of their office, in order to protect the parliamentary minorities and to safeguard the representative role of the elected.

This provision inspired the original codification of the art. 68 of the Constitution of the Italian Republic after the WWII, according to which it was recognized the unchallengeability for opinions and votes and the criminal immunity of the Members of the Parliament.

Clearly the concept of opinions expressed and the deriving unchallengeability, experienced different interpretative and procedural transformation due to crucial judicial scandals such as 1992 *Tangentopoli*, constitutional reforms and mainly due to the outstanding clash between the Parliament from one side aiming at gaining always more freedom and power and the judicial authority form the other, with the latter complaining about the invasion of its constitutional prerogatives by the hand of the legislative power.

Importantly, during the last thirty years the Italian Constitutional Court has been called in many different situations to solve the above-mentioned cleavage during the raised conflict of attributions, - a constitutional arrangement that will be deeply

analyzed within this paper – and to draw the applicative framework of the guarantee provision that was mainly debated: the unchallengeability.

This constitutional provision – whom interpretation is affected by the jurisprudence outlined by the Judges of the Laws - has been the object of different pivotal judgements of the Italian Constitutional Court that since the first case in 1988 until now had ruled its applicative boarders not without some contradictions.

The effort performed by the Constitutional Judge in this sense is crucially remarkable, because it had to foster the coexistence between two different autonomous constitutional powers – the Parliament and the judicial authority - but taking into account the thrusts dictated by the modernization of the political debate.

Since the beginning of the twenty first century the constitutional jurisprudence followed a precisely dictated decisional parameter very often ignored by the two colliding powers, but mainly by the Parliament which continuously claims that the unchallengeability guarantees may be applied with respect of the continuous changes of the political debate.

Crucially in 2018 within one of the last judgements regarding a conflict of attribution raised with respect of the unchallengeability – as it will deeply be analyzed in the final chapter of this paper – the Constitutional Court has laid the bases for a further development of the interpretative and applicative framework of this historically debated constitutional guarantee.

CHAPTER 1 – ART. 68 CONST: A SAFE HAVEN FOR THE EXERCISE OF THE PARLIAMENTARY FUNCTIONS AND DUTIES

1. Art. 68 Const: A functional analysis

1.1 Genesis and grounds of parliamentary immunities

The common definition of certain Parliamentary prerogatives in terms of immunities reveals a particular need to create specific forms of protection conferred to the Members of the Chambers regarding any possible judicial interference in the exercise of their duties.

The foundation of this complex set of prerogatives is to be attributed to Constitutional norms, integrated by specific provisions of the national law and particularly by Parliamentary regulations. These attributions intended as legal situations strictly connected with the Parliamentary function constitute the *status:* the judicial condition of each Member of the Parliament.

The several legal arrangements traditionally known as *Parliamentary immunities* have their origins in the very beginning of the English constitutionalism. At the end of the XIV century the Deputy Thomas Haxey submitted to the House of Commons a bill in which he criticized the excessive expenditures of the Royal House, for this reason was sentenced to death on charges of betrayal by the King. This specific event marked the outbreak of a crucial political dispute between the Parliament and the Crown, which ended with the annulment of the sentence by the King. The Monarch was also forced to recognize the freedom of speech and of expression within the Parliament [1].

[1] Concerning the bill approved by the Parliament during the House session 22 January – 13 February 1397 and concerning the personal events of the deputy Haxey: Stubbs (1906) *The Constitutional History of England*, Oxford: Caredon, *Vol II, p. 515-ff.*

During the following centuries, the relationship between the King and the Parliament faced a slow but deep evolution, characterized by the growing importance of the Chamber (defined as the expression of a collective will) at the expense of the Monarch. Considering the inevitable tensions arose by these political and institutional transformations and taking into account the existence of a unilateral judicial power firmly in the hand of the Monarch, the parliamentary unchallengeability represented the essential instrument for the consolidation of the legislative power of the lower Chamber.

At the end of the Glorious Revolution in 1688, the parliamentary unchallengeability lost any residual nature of a Royal concession and found its definitive normative consecration within the previsions of the art. 9 of the Bill of Rights crowing a centuries-old political struggle. The text of the above-mentioned article stated that the freedom of speech, of expression, of debate, of procedure and of action within the Parliament could not be resisted or tried before any court [2].

The British experience is hardly different from the French one, in which the Monarchy by divine right has been overwhelmed by Parliament's claim, an assembly remained, since that moment, without any significant political prerogative [3].

In the revolutionary context, the immunity prerogative claimed by the representatives of the Third State does not represent a mere guarantee instrument but, in a more complex manner, it assumes the role of a proper recognition of supremacy. The French National Assembly, proclaiming its independence from the Monarch, in addition to the unchallengeability introduced a more procedural parliamentary guarantee: the inviolability of each Deputy without the consent of his or her own belonging Chamber. Substantially, French Members of the Parliament enjoyed two main prerogatives: on one hand the unchallengeability of their opinions and votes cast during the exercise of their duties and, on the other hand, the prohibition of arbitrary arrest and detention without the authorization of the Assembly. The arrest of a Deputy is only permitted in two cases: when arrest *flagrante delicto* is mandatory or in presence of an arrest warrant "validated" by the legislative body. (tit. III, chapter 1, section V, art. 7 and 8 of the 1791 Constitution).

[2] According to the modern calculation, the drafting of the Bill of Rights happened in 1689, but the original text is historically in 1688 because at that time the years begun the 25 March.

[3] Campagna F. (2012) *Illecito penale ed insindaabilità parlamentare*, Napoli: Jovene, P. 6

In this context, the personal inviolability of each representative of the Nation represent, from one side a hardly demanded constitutional haven, from the other an essential element for the performance of the institutional cleavage. [4]

The French version of the Parliamentary immunities represent an historical and political paradox: they are substantial and procedural prerogatives that must be protected with the use of the "*bayonet*". The *Assemblèe National* for the purpose to defend these much-desired Parliamentary rights, contextually introduced the death sentence for any individual, private citizens or even a member of the judiciary, who have attempted to persecute a Member of the Assembly for his or her opinions given during the parliamentary activities.

Nevertheless, the following years experienced another interruption of the democratic principles (including parliamentary prerogatives for the political dissidents) by the hand of Robespierre and his regime of terror [5].

From this time on, the matter concerning parliamentary immunities is part of a more theoretical framework strictly connected with the nature and with the shape of the constitutional actors exercising the legislative, executive and judicial power.

Generally, in the mid-1800, the majority of the European States experienced the concretization of the institutional path which aimed at establishing different constitutional monarchies. In almost all Constitutional charters granted by their Sovereigns, the prerogative of the parliamentary immunity gained a significant institutional centrality representing a tangible proof of the Parliament's political freedom.

After the revolutions of 1848, the *Statuto Albertino* following the guidelines of the 1814 and 1848 French Charters, recognized the unchallengeability and the inviolability as fundamental parliamentary prerogatives.

In this respect, concerning the inviolability, art. 37 stated "*No Senator could be arrested without an order of the Senate, except when they were apprehended in flagrante delicto",* and art. 45 stated "*No Deputy could be arrested while the Chamber is in session, except when apprehended in flagrante delicto, nor could he be brought before a court in a criminal proceeding without the prior consent of the Chamber".*

[4] Zagrebelsky G. (1979) *Le immunità parlamentari,* Torino: Einaudi, P. 7.19

[5] Campagna F. (2012) *Illecito penale ed insindaabilità parlamentare*, Napoli: Jovene, P. 8

Equally important is the provision of the art. 51 concerning the unchallengeability of both Senators and Deputies: "*They could not be held accountable for opinions expressed and votes given in the Chambers".*

With the subsequent growth of the institutional importance of the Chambers, the parliamentary immunities witnessed the widening of their sphere of application. Primarily, with the intensification of the parliamentary debate and with the tightening of the relationships between the majority and the minority within the parliament, these prerogatives played a key role in safeguarding the freedom of the debate inside the Chambers.

This political and constitutional development experienced a significative deterioration with the rise of the Fascist party that radically marked the first step of a new institutional path. During the first years of his government, Mussolini in order to maintain a partial constitutional continuity with the previous liberal governments, decided not to undermine the parliamentary prerogatives recognized by the Statute.

In January 1925, the unsustainable parliamentary situation that arose from the *Matteotti affair,* led to a direct intervention of the Government over the constitutional structure. Mussolini, in order to tackle the *Secessione dell'Aventino,* decided to remove any possible reference to the previous parliamentary equilibrium: on 9 November 1926, the regime declared the disqualification of all Members of the Parliament that took part in the secession, depriving them of any form of immunity.

With the 1930 issuance of the *Codice Rocco*, the political role of the parliamentary prerogatives drastically changed its nature: only the members of the Parliamentary majority could benefit from the protection given by the unchallengeability, but only in the cases in which votes, and opinions were firmly anchored to the Government's political and administrative guidelines. [6]

The subsequent dissolution of the fascism and election for the Constitutional Assembly represented a unique opportunity to restore the traditional political order and to reaffirm the essentiality of the parliamentary immunities.

The Constituent, pushed by the central role assumed by the parliament within the constitutional provisions and by the will of restoring a wide political pluralism, decided to strengthen the traditional parliamentary immunities (with very minor

[6] Chimienti P. (1933) *Manuale di diritto costituzionale Fascista*, Torino: Utet, p. 318-ff.

changes), either in terms of unchallengeability of opinions and votes either in terms of the personal inviolability of the elected representatives.

During the drafting of the art. 68 Const, the debate concerning the unchallengeability took place without any particular dissent, and it ended with the codification of the first paragraph of this constitutional provision in which the Constituent stated that every Member of the Parliament could not be persecuted for their opinions and votes cast in the exercise of their duties.

The original version of the unchallengeability, on the light of the previous fascist experience, granted each parliamentary representative with an absolute degree of impunity connected with the performance of his or her public office; in this sense, the judiciary was totally unable to initiate a judicial proceeding against the opinions gave by the Member of the Parliament.

The debate regarding the inviolability (second and third paragraph of art. 68 Const.) proved to be more complex, since the criminal matters involved played both a procedural and a substantial role. The Constituent Fathers, at the outcome of the discussion, decided to extend the inviolability guarantee for the whole legislature, overcoming the traditional anchoring to the parliamentary session.

In addition, firstly, they decided to impose an authorization to proceed also in the enforcement of a final court sentence. Secondly, the Constituent Assembly preferred to circumscribe the arrest *flagrante delicto* only for the offences for which the arrest warrant was mandatory. Thirdly, they extended the necessity of the authorization to proceed also in the case of a house search.

Within the system outlined by the Title V of the Constitution which, between all the western democracies constitute the most predominant model of the self-government of the judiciary, the original codification of the art. 68 Const. sought to ensure that the measures adopted by the judges could not interfere with the institutional life of the Country. Moreover, it also sought to preclude any possible political characterization of the judiciary. Within the decades following the entry into force of the Constitution, due to historic and judicial manner, the Country experienced an ever-greater fracture between the political class and the judiciary, both characterized by strongly different political and constitutional approaches.

At the beginning of the ninety nineties, the discovery of the Italian political parties' illegal funding provided the judiciary with an extraordinary visibility, which

contributed in developing a new ideological orientation: the judiciary must not play a secondary role with respect to the parliamentary decisions.

The 1992 judicial investigation, kwon as *Mani Pulite* or *Tangentopoli,* drastically mined the constitutional interpretation and the role of the parliamentary prerogatives. During this dramatic phase of the Italian political history, the immunities of the members of the Parliament appeared as judicial injustice designed to hinder the moralization of the public sphere. The *Tangentopoli* context experienced a massive recourse to the provisions of the art. 68 Const.: from one side, it represented and unfair safeguard of the personal freedom of many different Deputies involved in the criminal proceedings, but from the other side it represented the "swan song" of the traditional political parties, unable to preserve the constitution values and torn by systematic and unmanageable forms of corruption.

This series of events forced the parliament to intervene in the sphere of the parliamentary immunities: the 29 October 1993, the Chamber approved the constitutional law n.3, modifying the substantial and procedural nature of art. 68 of the Constitution[7].

Mainly, this reform modified from one hand the disposition of the first and second paragraph of art. 68 Const. concerning the unchallengeability and the inviolability and, on the other hand, introduced within the third paragraph the need of a parliamentary authorization in order to monitor Deputies' and Senators' conversation and introduced the same need in order to size member' mail.

[7] Grisolia M. (2000) *Immunità parlamentari e Costituzione,* Padova: CEDAM, p. 12-ff.

1.2 *Art 68 Paragraph 1, the parliamentary unchallengeability*

"*Members of the Parliament cannot be held accountable for the opinions expressed or votes cast in the performance of their function."*

The first paragraph of the article 68 Const. ruled, as above mentioned, the parliamentary unchallengeability of opinions and votes. This constitutional principle is placed in the context of the autonomy of the Chambers in terms of regulatory control (art. 64 Const). Additionally, the first paragraph of the art. 68 Const represents a necessary specification of the prohibition on a binding mandate (as prescribed by art. 67 Const.), introducing the right of criticism, and eventually the parliamentary right to change the belonging political group.

The article provides the existence of an individual who is the holder of a specific prerogative (the Member of the Parliament), a verb which gives legal and practical substance to the prerogative (cannot be held accountable) and the sphere of application of the prerogative (the opinions expressed and the votes cast). The observed sphere of application is composed by two different conceptual sides. From on hand, it is identified by those conducts defined as "opinions expressed" and "vote cast"; from the other side it is circumscribed by the exercise of specific functions. Both these elements ask to be deeper analyzed.

It is important to stress, within the Italian legal system, that this constitutional provision produces its own effects over each judicial proceeding arose at the moment of the subsistence of the parliamentary *status* and also when the proper parliamentary *status* is terminated, obviously only in the cases in which the possible dispute regards the opinions expressed and the votes cast during the existence of the parliamentary *status* and in performance of the parliamentary functions [8].

Both Deputies and Senators are holder of this prerogative.

Importantly, Members of the Parliaments that are also Member of the Government are not precluded from the enjoyment of the unchallengeability guarantee apart from the

[8] Paragraph 4 of the Art. 4, law n. 140/2003: *"In case of dissolution of the Chamber, the authorization request loses the effect of the legislature and can be renewed*".

safeguards the Government mandate [9]; also, the parliamentarians elected abroad (art. 56 Const.) are protected by this prerogative.

In a more concrete terms, the unchallengeability, namely the fact that, as above mentioned, Members of the Parliament cannot be held accountable for their opinions and vote associated with the performance of their duties, means that the Parliamentarians cannot suffer the persecution of his or her own responsibilities by the hands of other public powers different from the sole Parliament.

The Member of the Parliament, if he or she had pronounced improper comments or insults, could be reproached by the President of the belonging Chamber or, eventually, disciplinarily sanctioned after a decision of the Presidency Bureau.
In this scenario, no other power could attribute him or her any responsibility. Originally the personal accountability was due towards the executive, now is due towards the danger of a judicial proceeding.

Generally, this dualism is correct: more frequent are the cases in which the unchallengeability is applied in respect of criminal or civil proceedings than when is applied in respect of administrative proceedings. In principle this dualism is incorrect: the executive and its organs have the faculty and the power to settle disciplinary and sanction-oriented proceedings.

At this stage of the discussion, it follows that the unchallengeability protects Member of the Parliament from all other public powers (in particular from the judiciary), but not only: this prerogative represents a protection also from private powers.

Starting from the prohibition of a binding mandate ruled by art. 67 Const., it is clear that a Member of the Parliament has to be free also from private bounds. In case a Parliamentarian is affected by a sanction given by his or her own party, regarding the performance of his or her functions, he or she can apply the appropriate judicial authority for the annulment (no subjected to appeal).

The unchallengeability does not protect the members of the parliament from the political responsibility: trivially he or she could lose the respective popular or party-political consensus, or eventually, in the case of Ministers, they could individually lose the vote of confidence.

[9] "*Atti della Camera dei deputati", XIV legislature, doc. IV-quarter n.114.*

In order to apply the principle of the unchallengeability, there is the necessity that the subject of the liability is a behavior qualified as an expressed opinion or a vote cast.

As "vote cast" is intended the participation of a member of the parliamentary organ in a deliberation, tacit or not, by a show of hands, electronic or not, through a ballot or through a roll-call vote.

More structured is the definition of the "expressed opinions": the term "opinion" defines the expression of a thought and not necessary a simple spoken or written word. In this sense, the first paragraph of the art. 68 Const., does not seem to have met the literal formulation of the English term "word" contained within the art. 6 of the Bill of Rights and with the art. 1 of the American Constitution.

Indeed, already the art. 21 Const. – providing the freedom of expression - refers to the thought expressed "*in speech, writing, or any other form of communication".*
It then concludes that the opinion, also for this specific purpose, can be expressed in many different forms: verbal and material. Part of the last two forms are the whistle, the silence, the voluntary removal from a parliamentary meeting, the occupation of Parliament's room (as during the *Secessione dell'Aventino)* and the attempt to delay a parliamentary vote slowly walking to ballot box (classic form of obstructionism mainly common in extreme east side of the world).

Few years ago, within Chamber of Deputies, the concept according to which an opinion is a verbal declination of thought, of analysis and of critique has been accepted. Contextually are not part of the parliamentarian qualification of an opinion mere insults or epithets[10].

The problem concerning the definition of the concept of opinion, arises in particular for the behaviors adopted outside the traditional contest of the Parliament. Although, the Chamber of Deputies has always showed a wide degree of lenience in respect of actions qualified by the Public Persecutors as material conducts, such as the slender (art. 368 crim. cod.), considering them ascribable to the notion of "expressed opinion" in the performance of the parliamentary functions. However, the

[10] Judgement 379/2003 of the Italian Constitutional Court.

Constitutional Court tends to support the thesis according to which the material behaviors are not "expressed opinions". [11]

If the definition of "*expressed opinions and votes cast*" poses interpretative problems, the definition of "parliamentary functions" represents the proper "battlefield" that the application of the art. 68 Const. has to face. On this problematic issue both the Parliament and the Constitutional Court have developed and are continuously developing different institutional thesis, which continuously produce interpretative conflicts. Neither the law n. 140/2003, which refers to activities connected with the parliamentary functions – as we will deeply analyze in the next chapter – has been able to mitigate these conflicts.

According to the Chamber of Deputies' line of interpretation, the connection between the parliamentary functions and the judicially challenged activities is represented by the general political "color" of the given statements. The first paragraph of the art. 68 Const. would guarantee a particular right of criticism and political condemnation to the Member of the Parliament greater than the one guaranteed to the common citizens [12].

On the field of public interest matters, the Member of the Parliament would have the right and the duty to give a voice to the all the political critiques both collegial and personal. Given the necessities arose from the modern political communicative channels, both Senators and Deputies claim their right to be protected by the means of the unchallengeability even during their television, radiophonic a journalistic appearance and even in the performance of the above-mentioned material conducts.

In conclusion, the Chambers claim, for their respective members, the use of communicative channels designed for any form of political competition and placed within the borders of the parliamentary mandate.

Prior to the 1993 abrogation, the guarantee that exclusively characterized the parliamentary office was the authorization to proceed. This key element was also able to distinguish the scope of unchallengeability with respect to other important

[11] Judgement 137/2001 of the Italian Constitutional Court.

[12] Cerase M. (2012) *Anatomia critica delle immunità parlamentari italiana.* .Soveria Mannelli: Rubettino, P. 71.

institutional actors (such as the Constitutional Judges)[13]: under this perspective this parliamentary functional immunity enjoyed a greater sphere of application.

Generally, the unchallengeability is inspired by a precise need to delimit the powers of the judiciary in respect of those powers granted to other constitutional actors. This prerogative can merely adopt its own conceptual autonomy only if it is characterized by an application sphere greater than the simply general freedom of expression in the performance of a public office and, at the institutional level, if it is characterized by express recognition of a safe haven protected from any possible assessment of the judiciary.

In the absence of the above-mentioned elements, the provisions regarding the unchallengeability and the free expression of votes and opinions could be translated in the mere specification of individual rights, already inferable from the legal arrangement.

On the light of this kind of matters, it is possible to deduce the first peculiarity of the guarantee provisions concerning the Members of the Parliament: they are provided by an higher source than the ordinary law, and able to support the eventual appeal to a conflict of attribution by the organ eventually afflicted by an injury of its own institutional prerogatives.

Moreover, the Members of the Parliament are granted with the important prerogative of the political representation. This constitutional profile gives to the two hypotheses of the unchallengeability ruled by the Constitution a meaning not simply related to recognition of the freedom of expression, recognizing within these two assumptions a precise separation between the judicial sphere and the expression of the power of political representation.

At the same time, the centrality of the Parliament recognized by the current republican Constitutional, grants the first paragraph of art. 68 Const. with an importance incomparable with no other provisions (neither those related with art. 122 Const.), considering the peculiar representative function of the Chambers and the importance attributed to the Parliament as an arena of democratic discussion.

Within a legal system which rises the political freedom as the leading principle of all the constitutional architecture, the parliamentary unchallengeability is meant to

[13] Art. 5, Constitutional law 1/1953.

ensure the wider pluralism possible within the political dialectic, in which any judgement or evaluation – even if unreasonable or dangerous – should have its own adequate space without any obstacle placed by the judiciary.

1.3 *Art 68 Paragraph 2, the criminal immunity*

"In default of authorization of His House, no Member of Parliament may be submitted to personal or home search, nor may be arrested or otherwise deprived of his personal freedom, nor held in detention, except when a final court sentence is enforced, or when the Member is apprehended in the act of committing an offence for which arrest flagrante delicto is mandatory".

Abrogated in 1993 the necessity of the parliamentary authorization in order to conduct investigations designed to exercise the criminal action toward Members of the Parliament, as mentioned above, it is still a requirement the authorization of the belonging Chamber to arrest the Senator or the Deputy (with the exception of the arrest which execute a final court sentence or in the existence of a *flagrante delicto)*. This procedural authorization is also required to undertake relevant actions concerning the initial phase of a preliminary inquiry and to obtain evidences. These actions, such as personal and home search, are intended to be invasive of the personal sphere of a Member of the Parliament.

The first case provided by art. 68 Const., is then the personal search. These consist in the research of things on the body of an individual through a manual examination of the cloths the person is wearing.

The Chamber of Deputies and the Senate has never received any authorization request in this respect: in fact, a personal search is considered an unannounced measure, and generally it takes place forthwith. A possible authorization request would seriously compromise the *ratio* of this provision[14].

[14] Cerase M. (2012) *Anatomia critica delle immunità parlamentari italiana,* Soveria Mannelli: Rubettino, P. 121.

The other case prescribed by the second paragraph of art. 68 Const. is the home search. These consist in the research of things within the locations defined as domicile of the individual: these inspections are performed also without the explicit consent of the person involved.

With respect of the Members of the Parliament, there is the impossibility to unequivocally define the notion of parliamentary domicile. The doctrine has suggested different interpretations.

Firstly, the first possible thesis takes into account the definition resulting from the civil code: "*Domicile is the place where a person has established the main seat of her/his business and interests as opposed to residence defined by the same article as the place where a person has her/his abode*". [art. 43 civil code]

This specific notion is not easily compatible with the *ratio* of the parliamentary immunities, which are designed to safeguard the independence of the mandate and of the separation of powers. According to this thesis, a member of the parliament would – for the purposes of the second paragraph of art. 68 Const. – elect his or her domicile in a specific place and then reside in an-other. In this way the Member of the Parliament could easily abuse of the above-mentioned constitutional guarantee.

The second possible thesis, characterized by a more criminal oriented perspective, is the more plausible. The notion of domicile has its basis in the article 614 of the criminal code, which – in providing the burglary as a criminal offence – intends the domicile as the house or other forms of personal residence.[15] This definition enjoy a wide degree of literal clarity. The habitation and the other locations of personal domicile are surely also the habitual residence and the hotel room.

The art. 614 criminal code basically has an individualistic dimension, protective of the serenity and the security of the classical family moments. Since the ninety seventies, the jurisprudence has also included into this notion the working places: professional firms, commercial establishment open to the public and significantly the party offices.

The third thesis, that could be defined as constitutional, is too broad. It has the fundament of its notion in an interpretative way from the systematic collocation and from the *ratio* of the article 14 of the Constitution, which states "*The home in*

[15] The art. 614 of the Italian criminal code prescribe the aggravated breaking and entering violation.

inviolable. Home inspection, searches or seizures shall not be admissible save in the cases and manners complying with measures to safeguard personal liberty […]".

In reality, for the purposes of the article 68 Const., the domicile is defined as such if it contextually met two specific aspect: a *structural* one and a *finalistic* one.

The structural aspect arises from the domicile definition of the most judicious jurisprudence of the Cassation Court[16]. It is the place generally excluded by the others sight or whatever in respect of which the holder enjoys the prerogative to exclude other individuals and over which the owner has such an interest to harbor that prerogative also during his or her absence.

The finalistic one consists in the relation with the parliamentary mandate, which led to interpretative problems concerning some judicial home and office search that involved Members of the Parliament. In relationship with the event that involved the Deputy Roberto Maroni and the inspection of his office for an investigation concerning the hypothetical illegal activities of an organization known as "*camicie verdi*", the Constitutional Court intervened to solve the conflict raised by the Chamber of Deputies.[17].

Within the judgment n. 58/2004, the Constitutional Court stated that: *"[…] the second paragraph of the article 68 of the Constitution provides that, without the authorization of the belonging chamber, none Member of the Parliament may be submitted to personal or home search. According to the latter profile, the norm aims to guarantee to the Member of the Parliament the inviolability of his personal residence and also additional spaces recognizable as domicile, for the purpose of preserving the interest of the Parliament in the exercise of its own autonomy, which is translated in the free exercise of the parliamentary mandate with respect to other powers of the State. And a party office can – as, in this case – host the domicile of a Member of the Parliament"*

Substantially, the judgement marked that the *ratio* of the inviolability of the Members of the Parliament' domicile is the guarantee of the autonomy of the Chambers. To ensure protection to the latter, the need of the authorization is devoted

[16] Judgement n.26795, 26 March 2006, Italian Cassation Court https://www.ilsole24ore.com/art/SoleOnLine4/Speciali/2006/documenti_lunedi/14agosto2006/CASS_PEN_26795_2006.pdf?cmd%3Dart

[17] Within "*Cass. Pen.*", 2004, p. 1556

not only to the residence of their members but also to other locations available to them in the performance of their duties.

The third and final case prescribed by the second paragraph of the article 68 of the Constitution, concerns the arrest of a Member of the Parliament.

According to this constitutional provision, to arrest a Deputy or a Senator is required the authorization from his or her belonging Chamber.

The disposition is rereferred to the arrest intended as a coercive precautionary measure: if the arrest is in execution of a final court sentence is undermined the need for such authorization (when the Constitution refers to the arrest, it means both jail detention and house arrest).

The practice has clarified that the authorization refers to executive moment of the arrest, which must already be approved by the competent authority (the Judge in charge of the Preliminary Investigation). The approval of the arrest is the *condition sine qua non* for the referral to the Parliament.

In the past, the question concerning the authorization was raised through the Ministry of Justice. The practice and subsequently the law 140/2003 have configured a direct request power in the hand of the authority which has issued the executing measure.

The authorization request for the arrest has a procedural nature: it is valid for one legislature or for a specific moment of the criminal proceeding. It may be repeated in front of a new Chamber to which the Member of the Parliament may belong in that moment and it may be renewed in relation to different moments of the investigation.

The immunity from the arrest is valid for the entire parliamentary term. If the Member of the Parliament – which has enjoyed the denying of the authorization – is not reelected, the judicial authority has the faculty to dispose his or her arrest.

The general provision of the art. 68 Const. concerning the authorization request for the arrest has two derogations: the arrest *flagrante delicto* (in the cases provided by

the criminal procedure code)[18] and the arrest in execution of a final court sentence, namely no longer subjected to the ordinary means of redress.[19]

1.4 Art 68 as a limit to the judicial power

As previously explained, the parliamentary immunities represent an important and crucial part of the constitutional draw also with respect of the historical moment of their institutional restoration. In order to understand the systematic means and role of these prerogatives within the constitutional frame is important to observe the aims of the Constituent fathers.

The On. Leone (one of the most influent Member of the Constituent Assembly) argued – with respect to the art. 68 Const. - that "*the proposed articles have aim at avoiding that an act of the judicial authority or of the police could be inspired by an evaluation or by a political orientation with the scope of make impossible for a Deputy the free exercise of his parliamentary mandate"*[20]. Apart from this statement, within the preliminary discussions around the art. 68 Const., there is not a deep and true deepening concerning the funding arguments of the parliamentary immunities.

Surely, the guarantees granted to both Deputies and Senators allow the free performance of their duties. The reasons of them are not to be fund in the pretended sovereign character of the parliamentary function, concept discredited by other explicit constituent choices, such as the provisions of the art. 1 of the Constitution[21].

The parliamentary unchallengeability and inviolability are instead functional guarantees connected to and deriving from the principle of the full independence of the

[18] The Art. 382 of the Italian criminal procedure code rules: "*The person caught in the act of committing the crime or who, immediately after the crime, is pursued by the judicial police, the injured person or other persons or is verified with things or traces from which the crime appears immediately (1).*
2. In the permanent crime [158] the state of flagrante lasts until the permanent has ceased."

[19] Art 324 of the Italian civil procedure code rules: […] The sentence that is no longer subject to jurisdiction regulation, to appeal, or to appeal by cassation, nor to revocation for the reasons referred to in numbers 4 and 5 of article 395.

[20] "*Atti assemblea costituente",* II sub-commission. 19 September 1946, Vol n. II, p. 1043.

[21] Zagrebelsky G. (1979) *Le immunità parlamentari*, Torino: Einaudi, P. 29.

Parliament, intended as the highest guarantee of the exercising of the functions attributed to the Chambers. For such reasons, the purposes of the special *status* granted to the Members of the Chambers seem to be connected with practical needs similar to those have marked the rise of the Representative Chamber (the House of Commons) within the English constitutional organization.

The crucial change in the institutional frame relevant to the discussion concerning the role of the parliamentary immunities, is represented by the establishment of the independence of the judiciary from the Government, and by the subsequent attraction within the prerogative of the latter of those powers to which – in case of arbitrariness – the parliamentary guarantees are addressed.

In this sense it is possible to argue that the parliamentary immunities represent a defense instrument against those interventions hypothetically "disruptors" of the autonomy and liberty of the highest representative organs.

The impact of the parliamentary guarantees directly touches the relationship between the political representation and the parliamentary bodies from one side, and the existence of other institutional subjects (government and judiciary) from the other side.

However, the consequences of the special parliamentary *status* – as previously expressed by authoritative doctrine - go beyond the – albeit important – mutual independence of the constitutional bodies: they touch the relationship between the political representation and the society, leaving the purely internal sphere of the institutional structures of the state. Actually, the judiciary – in particular – is not only a constitutional subject which enjoys autonomy and the right of initiative, but it is also – from an institutional point of view – the intermediary through which the civil society can promote its own initiatives. The magistrate has the duty to institute a proceeding when he receives specific instances from the single individual, such as complaints. Within some limits, the action of the judiciary can be the instrument and eventually be manipulated by specific interests external to the judiciary itself, particularly in cases of widespread illegality[22].

Returning to the problem of the parliamentary guarantees, is important to underline that the immunities have the role of subtracting the Member of the Parliament

[22] Zagrebelsky G. (1979) *Le immunità parlamentari.* Turin: Einaudi, P. 37.

from an instrumental use of the criminal proceeding, promoted from inside the judiciary but also by external forces and individuals which are interested in investing the Member of the Chambers with a specific political responsibility in order to disturb the free exercise of the parliamentary functions.

From this point of view is clear the linkage between the parliamentary guarantees and the position attributed – within our constitutional system – to the parliamentary representation. In this sense there is no doubt that the parliamentary actions covered by the immunities must be anchored to the concept of parliamentary functions even if it is difficult to unilaterally define.

The unchallengeability can only cover acts performed in the exercise of parliamentary activities, while the criminal immunity has its value only when prevent the interferences indirectly which could be determined over the regularity of the parliamentary functions, in the case in which the interference has the aim of diverting the Member of the Parliament from his or her functions.

This strict interpretation of the parliamentary immunities is the only one which appears compatible with the principle of the equality before the law, key assumption of the rule of law.

In conclusion, in the actual context, the performance of the formal and substantial control functions designed to personally involve the democratically elected representative cannot not emphasize the need to define the limits of such a control, which has its consequences in the political dialectic through the judiciary-media channel.

The paradox that the institutional immunities are intended to solve, within the modern western democracy, is that to guarantee *a priori* delimitation of the jurisdictional space, in order to match the "apolitical" kind of legitimation – that should identifies it – with the new functions concretely granted to it due to legitimacy crisis of the representative organs.

In any case, If the ultimate scope of the immunities should be "*to avoid the unsustainable conflicts between the political power and the judiciary which results in the exercise – pretentious or not – of the control of legality by the hand of the latter"*[23]*,*

[23] Palazzo F. (2012) *Il giudice penale tra esigenze di tutela sociale e dinamica dei poteri pubblici*, Rome, in "Cassazione Penale", p. 1622.

there is the need to guarantee to the judicial organs an autonomous space in order to avoid the raise – as it will be analyzed in the next chapter – of any conflict of attribution between the above mentioned and the Chambers.

The limited theoretical basis attributed – especially in the last years – to the parliamentary immunities is affected by the widespread mistrust in respect of the political *elite* and of the instrumentalization of these prerogatives by the hand Chambers[24], often unable to exercise its prerogative in a reasonable way and in full compliance with the principle of the fair cooperation between the power of the State.

[24] Martinelli C. (2008) *Le immunità costituzionali nell'ordinamento italiano e nel diritto comparato.* Milan: Giuffrè, p. 95, according to which "*in the view carried by the Chambers, the unchallengeability is an instrument of distinction between their components and the whole citizens, an enclosure within which everything is allowed […]. It is evident how in this way there is the risk to delate a functional prerogative in order to ensure a stable privilege".*

CHAPTER 2 – THE CONFLICT OF ATTRIBUTION BETWEEN STATE'S POWERS AND ITS USAGE ON PARLIAMENTARY IMMUNITIES.

1. The parliament as a State's power

As explained in the previous chapter, the application and the interpretations of the provisions concerning the parliamentary immunities – by the hand of the Chambers - represent one of the main institutional causes for the rise of a conflict of attribution between different powers of the state.

By the concept of "conflict of attribution" it is possible to define those situations in which a constitutional actor invades the prerogative of another constitutional actor. According to the art. 134 of the Constitution[25], the above-mentioned conflicts – over which the Constitutional Court has jurisdiction – can have two shapes: they can arise between State's powers and between the State and the Regions. In both cases the judgement before the Constitutional Court is contentious and remitted to the initiative of the two contracting parts [26]. The judgment arises following an action brought by the subject which considers the attribution granted to it by the constitutional norms infringed by a competitive conduct committed by another power of the State.

The Courts intervention aims at restoring the correct exercise of the constitutional attributions, in order to maintain the "*checks and balance*" equilibrium

[25] Art. 134 Const. rules the following*: "The Constitutional Court shall pass judgement on: 1. Controversies on the constitutional legitimacy and enactments having force of law issued by the State and Regions;*

2. conflict arising from allocation of powers of the state and those powers allocated to State and Regions and between Regions; 3. charges brought against the President of the Republic, according to the provisions of the Constitution.

[26] The subject which has raised the conflict can decide not to proceed in with judgement for the entire duration of the constitutional proceedings.

between the institutional actors which represent the guarantee of freedom and good functioning of the democratic state. [27]

Generally, any possible theory on to the conflict of attributions between the powers of the State is affected by the difficulties to provide an abstract notion of power of the State able to proper identify a specific category of subjects entitled to rise or resist the conflict. In this direction – as underlined by the doctrine[28] - the textual constitutional arguments provided by the Constitution and by the ordinary legislation do not guarantee a true support to this interpretative path. On the light of the coordinates outlined by the Constitution and the Legislator, the provisions aimed at regulating the conflicts of attributions are limited, and most likely to be interpreted not in a univocal means requiring further jurisprudential integrations [29].

Within this dilemma, relevant has been the innovative contribute given by M. Mazziotti, which identified within the structure of the Constitution a system of centers of power which assures the collaboration and control between powers through mechanism of "*checks and balance*". Here resides – according to the author – the validity of the theory of the division of powers, which through the provision of the conflict of attribution is hired in his "true and full meaning"[30].

This interpretation led to the determination of the powers as elements of the system of "*checks and balance"* created by the Constitution. They are intended as a group of organs which operate as "*checks and balance",* each of which are granted with supreme functions, namely able to influence the formation of the State's will, to arrest or to limit the action of other powers.[31] Even if not explicitly admitted by Mazzotti, that thought represent a pivotal corollary of the notion of power.

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[27] The conflicts of attribution solved by the Constitutional Court on this matter are strongly different from the conflicts of jurisdiction and attribution over which the competent authority is the Court of Cassation.

[28] Rivosecchi G. (2003) *Il Parlamento nei conflitti di attribuzione,* Padova: CEDAM. P. 13.

[29] In this sense, Bin R. (1996) *L'ultima fortezza. Teoria della Costituzione e conflitti di attribuzione*, Milan: Giuffrè. The Autor stated that "T*he constituent itself have renounced - due to important difficulties - to more precisely define the subjects entitled to rise the conflict and the functions defensible during it, preferring instead to leave the constitutional jurisprudence with the task of shaping – within the concrete experience – all the necessary categories.*

[30] M. Mazzotti (1972) *I conflitti di attribuzione fra i poteri dello stato vol.1.* Milan*: Giuffrè.*

[31] Rivosecchi G. (2003) *Il Parlamento nei conflitti di attribuzione.* Padova: CEDAM, P. 50.

The expression "separation of powers" in Italy accordingly refers then to a cooperative constitutional structure focused on the Parliament as the core of the legal and constitutional architecture. More than a clear-cut separation of the constitutional powers, there is a constitutionally regulated relation among the, with the constitution defining their reciprocal competences and limitations[32].

Focusing on the Parliament, it can be defined – following the jurisprudential path of the Constitutional Court[33] - as a complex power[34], entitled to rise the conflict of attribution according to its internal articulations. This interpretation has been supported by different judgements of the Constitutional Court.

The constitutional ordinance n. 228/1975 referring to the judicial and to the legislative power, appears to indicate a plurality of organs which shares the exercise of a common function.

The subsequent judgement n. 406/1989 has conferment such approach. In legitimizing the legislative power as a part into the proceeding, the Constitutional Court defined it as "a complex of organs which exercise the legislative function".

Such conclusions - supporting the interpretation according to which the Parliament is a "complex power" which performs different constitutional functions - have overcome the traditional doctrine of the tripartition of powers which described the legislative as a "*monolithic*" power and favored the concept of the decomposition of functions.

This jurisprudential and doctrinal evolution contributed to define the functional nature of the Parliament, which due to its constitutional attribution and its internal balance has to be seen as a proper power of the State.

In this sense it is appropriate to point out the subjective profiles of the Parliament, seen in its complex articulation as a legitimate power entitled to rise the conflict.

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[32] Barsotti, V., Carozza, P.G., Cartabia M. and Simoncini A. (2017) *Italian Constitutional Justice in Global Context*, New York: Oxford Press, pp. 156-157.

[33] Crisafulli V. (1974) *Lezioni di diritto costituzionale – Vol. 2.* Padova: Cedam, p. 425 ff.

[34] Ferrara G. (1965) *Il Presidente di assemblea parlamentare.* Milan: Giuffrè, p. 287-ff, The author defines the Parliament as a complex organ composed by two organic components, functionally and subjectively autonomous.

Firstly, is evident the legitimation of each Chamber and not only of the Parliament seen as "one-dimensional power"[35]. Actually when a parliamentary Assembly rises a conflict of attribution considering a specific act perpetrated by another power namely against an unlawful omission by an-other power, it wants to protect an attribution that is exclusively in its hand, to the point that, the other Chamber, when not directly involved does not rise the conflict.

Considering – as above mentioned – the "complex" nature of the Parliament defined as polyfunctional and articulated, it is evident the presence of different "organs-power", namely powers on their own and lawfully entitled to be part of the conflicts of attribution: the principle are the Committees of inquiry and the Rai supervisory commission.

The newest constitutional jurisprudence outlined by the ordinance 17/2019 following the above-mentioned interpretative path, clearly dispelled the doubt concerning the legitimation of some specific parliamentary organs to rise a conflict of attribution.

The Court for the very first time expressly recognizes under a subjective profile to each Member of the Parliament the title of "Power of the State", and therefore entitled to rise conflicts of attribution. Under the objective profile the Constitutional Court believes that the admissibility has to be recognized only for those actions which complain (and can prove) a substantial denial or an evident impairment of the parliamentary constitutional prerogatives.

The ordinance indeed, definitely denies the admissibility of an action brought by parliamentary minorities (therefore not recognizing to them the title of power of the State), since this qualified quota of the Member of the Parliament is exclusively granted with the prerogative to propose the vote of no confidence. Lastly the court sets the legal bases for a future attribution of this title also to the parliamentary groups.

Crucial for the continue of this discussion are the conflicts of attribution which see the Parliament as the applicant or as the resistant during a constitutional proceeding

[35] Rossano C. (1978) *Problemi di struttura dello Stato sociale contemporaneo,* Napoli: Jovene Editore, p. 101-ff. The author notes that is impossible to find convergence between the notion and the legislation in an objective sense (admitting a plurality of legislative powers). In this sense also Balladore Pallieri G. (1976) *Diritto Costituzionale,* Milan: Giuffrè, p.217-ff.

concerning the prerogatives of the Chambers and of their members, in particular with respect of the provisions of the art. 68 Const.

1.1 Conflict of attribution between parliament and the judicial authority on the first and second paragraph of Art. 68 Const.

The relationships between the legislative power and the judiciary are often conflictual because – since both are powers of the State – is not unusual that the respective mutual constitutional attributions may overlap generating a conflict of attribution.

Generally, is the judiciary which claims the unilateral and independent exercise of its powers "usurped" by the Parliament. The main "battlefield" is represented by the art. 68 Const. of the Constitution and, in particular, by the outcome of the unchallengeability resolutions given by the competent parliamentary organ, – as prescribed by the Constitution and by the regulations of the Chambers – situation in which the Parliament is more likely to invade the prerogative of the judicial authority.

When this "potestative" abuse occurs, the judiciary, in order to restore the equilibrium between the colluding powers and between the mutual attributions, rise the conflict before the Court claiming a direct intervention by the Judges of the Laws.

In particular, the Parliament has the prerogative to decide if the opinion express by the Member of the Parliament could be or not functionally linked with the performance of the parliamentary functions: this decision represents the judicial parameter of the admissibility of the criminal or civil proceeding.

However, even though the unchallengeability is a provision which instrumentally protects the Members of the Parliament aiming at safeguarding the constitutional role and function of the Chambers, often this provision is used by the representative of the citizenry as a defense instrument against civil and criminal proceedings caused by their unlawful respective acts and opinions expressed outside the Parliament without any link with the parliamentary function.

In those cases, in which the unchallengeability prerogative is applied by the Chambers fearing the will of subtracting the belonging Member from a lawful

proceeding, the Judiciary or specifically the competent Judge rises the conflict of attribution to the Constitutional Court by virtue of the "*vendicatio potetestatis"* principle, complaining the unlawful use of the arrangement and asking the Court to annul the Parliament's act.

As expressed by authoritative doctrine, it is possible to assume that the use of guarantee instruments provided by art. 68 Const. has often been abusive, since it has mostly been applied as a form of parliamentary impunity [36] .

This is more evident with respect of the provisions of the second paragraph of art. 68 Const. concerning the immunity from those criminal proceeding which may imply a restriction of the personal freedom of the Member of the Parliament.

The history of the republican Parliament experienced a systematic praxis of denial of the arrest requests, which suffered only few exceptions and mainly in respect of "bloody events". The last circumstance in this sense dates back to 2011 (XVI Legislative term 2008-2013), in which the request for the pre-trial detention of the Deputy Alfonso Papa has been authorized.

Concerning the denials, the above-mentioned praxis is supported by the evidences provided by the data: during the XIII Legislative term (1996-2001) there were five denials, during the XIV legislative term (2001-2006) seven, during the XV legislative term (2006-2008) three and during the XVI legislative term (2008-2013) seven[37].

It also important to remark - according to the judgment 1150/1988 that will be deeply analyzed in the next subparagraph - that the conflict of attribution is also a chance in the hand of the Chambers in those situation in which the judicial authority in trying to block the parliamentary resolution or in disregarding the effect of it, violates – only under the judicial procedural aspect – the parliamentary prerogatives.

The cleavages between the Parliament and the Judiciary are intensified - with respect to the provisions of the first paragraph of art. 68 Const. - by the different interpretations of the concept of parliamentary functions. The first on one hand, has

[36] Zanon, N. (1988) La corte e la "Giurisprudenza" parlamentare in tema di immunità: affermazioni di principio o regola del caso concreto? Giurisprudenza Costituzionale, N.1. pp. 5595-5605.

[37] Cerase M. (2012) Anatomia critica delle immunità parlamentari italiana., Soveria Mannelli: Rubettino P. 184.

always adopted an extensive interpretation, including within the field of the parliamentary functions all those actions conducted outside the doors of the Parliament, in which it could be possible to identify even a vague "functional nexus", such as: public rallies, opinions express during television broadcasts or during written or oral interviews. On the other hand, the judiciary has always adopted a restrictive view, remaining anchored with the traditional parliamentary activities such as: speeches during the parliamentary discussion and parliamentary questions.

It is evident that such an interpretative distance could generate situation of strong disagreement. However, the Constitutional Court, as the constitutional actor called to solve the dispute according to art. 134 Const., during the last decades has produces different jurisprudential paths: a partial and limited opening to the extensive interpretation, is strongly counterbalanced by the traditional constitutional interpretation that guarantees a wide autonomy to the judiciary, creating sometimes a median position.

On one hand through different pivotal judgements the Constitutional Court revitalized the unchallengeability principle of the *interna corporis acta* that is not always automatically applied to those internal acts which produce an external effect (relevant for a third part), confirming in this way the supremacy tendency, and broadly the expansion of the constitutional law over the political law[38].

In particular the Court ruled that, in order to apply the guarantee of the unchallengeability, between to those opinions expressed by the Member of the Parliament in the performance of his or her duties and outside themselves there is the need to "*find a substantial correspondence of content with the parliamentary act, not being sufficient in this sense a mere thematic commonality"*[39]. More precisely, the Member of the Parliament will be protected by the unchallengeability if *ex ante* foresees to the belonging Chamber or even reproduces[40] *ex post* - for example, through a parliamentary question – the content of political declaration yielded *extra moenia.*

On the other hand, the latest data - in particular related to the period 2009-2017 – confirm the Constitutional Court's tendency to limit the discretionary powers of the

[38] Ruggeri A, Spataro A, (2014) *Lineamenti di Giustizia Costitutizionale,* Turin: Giappichelli, p. 283.

[39] Judgement 82/2000 of the Italian Constitutional Court

[40] Judgement 289/1998 of the Italian Constitutional Court

Parliament, leaving important "rooms for manoeuvre" to the common judges: the Court mainly limits itself in determining whether or not exists "the functional nexus" between the opinions expressed and the parliamentary function. In addiction this tendency reserve to the judges the criminal or civil evaluation of the behaviors of the Member of the Parliament. Is almost rare the Judges of the Laws decide in favor of the Parliament, is in fact more frequent that the Constitutional Court annuls the unchallengeability resolution and recognizes the judges' right to persecute the Members of the Parliaments who abuse of the unchallengeability.

1.2 Judgement n. 1150/1988: the external checks of the Constitutional Court on the exercise of the parliamentary prerogatives

As above mentioned, one of the most historically relevant controversy between the Chamber and the Judicial authority is the parliamentary application of the prerogative provided by art. 68 Const., and in particular the extensive interpretation of the unchallengeability arrangement. The current resolutive pattern – explained in the previous subparagraph - is the product of an historical jurisprudential evolution that must be taken into consideration.

During the 1980's, in order to prevent the Parliament from an abusive use of this prerogative, the doctrine wondered whether or not it could be possible to challenge the contestability of the application. The prevalent thesis confirmed that this specific challengeability was only possible though a conflict of attribution between the judiciary and the Parliament before the Constitutional Court, the only actor able to define the burdens between a legitimate and an illegitimate claim[41].

The justiciability of the unlawful use of the parliamentary immunities before the Court is strengthened by the fact that nowadays the conflict of attribution is not only described by the classical terms of the *vindicatio potestatis* but, in terms of "impairment" or "interference", becoming in this way a polyvalent instrument able to challenge the unconstitutional use of some prerogatives depleting the sphere of

[41] Zagrebelsky G. (1979) *Le immunità parlamentari.* Turin: Einaudi p. 95.

competences of another constitutional body. From this perspective, the Constitutional Court should be empowered to oversee these attributions, in order to ensure an external check over the Chambers' powers.

Nevertheless, the first constitutional judgements[42] seemed to reject this judicial interpretation. By virtue of the recognition of the "political" nature of the parliamentary resolutions, the Constitutional Court – in this first phase - denied the possibility to question the decisions of the Parliament concerning the use of the immunities.

The overcoming of this first leaning happened with the judgement 1150/1988, the first decision yielded in a conflict of attribution between the Parliament and the judicial authority. This event represented an "archetype" which have provided the resolution scheme of the dispute between these two conflicting powers.

During the VIII Legislative term (1979-1983), the Senate denied the authorization to proceed with respect to a criminal proceeding established against the Sen. Marchio, charged of defamation by means of the press due to an article published on "Il *Secolo d'Italia*". On account of the denial, the appellants started a civil proceeding against the Senator, inauguring an important praxis which in the next decades will be used as a guarantee instrument for all the individuals harmed by defamatory declaration yielded by a Member of the Parliament. At the end of the civil proceeding, the Sen. Marchio was sentence in first instance to pay a compensation to the recurrent part.

During the IX legislature, with respect of the reassertion of the authorization request, the Senate, instead of confirming the previous denial, following the proposal of the Committee for Elections and Parliamentary Immunity deliberated that the challenged behavior lied within the sphere of application of the unchallengeability prerogative and that the pending civil proceeding against the Senator would be absorbed by that declaration[43]. In this manner, the Senate provided the first transformation of the above-mentioned indirect unchallengeability into a proper absolute immunity[44], because from the declaration of unchallengeability it was possible to deduce the automatic recognition of the civil, criminal and administrative impunity.

[42] Judgement 9/1970 and Judgement 148/1975

[43] SENATO DELLA REPUBBLICA, "*Resoconto della seduta del 5 Marzo 1986, n. 421"*

The Rome Court of Appeal, inauguring a recurrent praxis raised the conflict of attribution against the Senate, calling into question to the Constitutional Judge concerning the competences over the evaluation of the applicability preconditions of the prerogative. The recurrent complained the absolute incompetence of the Chambers, assuming that the only organ entitled to check the subsistence of the applicability preconditions of the first paragraph of art. 68 Const. was the judiciary.

The Constitutional Court with the judgement n. 1150/1988 firstly rejected the recur rent's claims, affirming that the belonging Chamber is fully empowered to evaluate if the behavior of the Member of the Parliament is connected with the performance of the parliamentary duties, because "*the parliamentary prerogatives cannot not imply a power of the organ to whom they are designed to safeguard"*[45]. Importantly is pointed out that the evaluative power of the Parliament is not arbitrary and only subjected to the internal rule of self-restraint.

Secondly, the Constitutional Court ruled that such an evaluation inhibits any possible different pronounce of the judiciary.

However, thirdly, the Judges of the Laws recognized that if the judicial authority believes that the Chamber's resolution is the result of an unlawful use of its power, it can rise the conflict of attribution before the Constitutional Court.

In solving for the very first time such a conflict between the Parliament and the Judiciary, the Court outlined its competences to operate a form of external checks over the activities of the Parliament concerning the application of the prerogative of art. 68 Const., declined into an evaluation of a possible compression of judiciary's constitutional attributions.

This judgement marked the three cornerstones of the resolutive scheme of those conflicts: the competence of the belonging Chamber to evaluate the applicability preconditions of the first paragraph of art. 68 Const.; the inhibiting effects over any parliamentary resolution of the judicial authority; the possibility to challenge the preconditions and the application of that prerogative through the conflict of attribution.

However, the Constitutional Court specified that object of the conflict could never be the legitimacy of the evaluative power granted to the Parliament (concretely it could never be a "*vindicatio potestatis").* In addition, the Judges of the Laws admitted

[45] Point n. 2 of the "*Considerato in diritto",* judgement n. 1150/1988

the possibility for them to exercise a supervisory function but only over the purposes and the procedural requirement of the unchallengeability resolution.

Although subject of some criticism, the judgment n. 1150/1988 has a cardinal value within the jurisprudence of the Constitutional Court, either in terms of configurability of the Parliament as power of the State either with respect of the parliamentary immunities' arrangement focusing on the legitimation of the challengeability of the Chamber's resolutions. In this perspective the constitutional Judge seems to under some outlines the autonomy of the Parliament. Of course, such autonomy is not questioned, but it is reconducted within the field of the constitutional attributions so that it could be exercised without adversely affecting the equilibrium between the power of the State coherently with the principles of the Constitutions. Importantly this judgement posed the bases for further jurisprudential development but not only: is now evident the need for a deep rearrangement of the parliamentary regulations concerning the applicability of the unchallengeability procedure.

1.3 The "functional nexus": the judgements n. 10/2000 and 11/2000 of the Italian Constitutional Court

Judgement n. 1150/1988 represented - until the beginning of the XIX century - a pivotal turning point for the procedural check of the Constitutional Court over the application of the unchallengeability provisions by the hand of the Chambers. The next constitutional jurisprudence confirmed what previously decided guaranteeing in this sense an important external check power in the hand of the Judges of the Laws.

Despite this interpretative path, in 1997 with the judgement n. 265, the Constitutional Court encountered in an extensive evaluation of its challenging judgement configuring itself as assimilated to the role of the administrative judge called to evaluate an act in which an excess of power is inscribed.

This interpretative impasse did not last long: the first judgements of the year 2000 represented for the Court the opportunity "*to precise and correct what affirmed*

by the previous jurisprudence, concerning the control criteria of this Court over the unchallengeability resolutions adopted by the Chambers"[46].

With judgements n. 10/2000 and 11/2000, the Constitutional Court was involved in two important conflicts of attribution between the Parliament and the judiciary concerning the judicial value and impact of two different unchallengeability resolutions. The "*causus belli*" of the original proceedings were the same: On. Vittorio Sgarbi was charged by two different criminal Tribunals of defamation by means of the press due to two different defamatory expressions given firstly though a journalistic article and secondly during a tv program. In both situations, the Chamber of Deputies (the belonging Chamber of On. Sgarbi) voted in favor of the unchallengeability resolution affirming that the above-mentioned expressions were covered by the means of art. 68 Const., underling the nexus with his parliamentary activities.

The involved criminal courts raised the conflict of attribution before the Constitutional Court complaining the impairment of their respective constitutional attributions. In both cases the Constitutional judges solved the conflict in favor of the tribunals, invalidating the two unchallengeability resolutions.

Relevant are the reasonings and the jurisprudential evolutions deriving from these two judgements.

The first, n.10/2000 surely represent a decisive change in the interpretative path, marking a strict discontinuity from judgement n. 265/1997. Here the Court sought not only to precise and correct what previously stated, but more importantly redesign the principles "*concerning the characters of the Court's check over the unchallengeability resolutions adopted by the Chambers"*[47].

Regarding the first point, the judgement clearly rejects the previously supported thesis according to which the verdict provided during a conflict of attribution could be declined into a mere external check of the non-arbitraries and of the plausibility reasons behind the parliamentary unchallengeability. The constitutional judgement must concretely verify the legitimacy of the resolution itself. In this manner the Court underlined that the Judges of the Laws are directly entitled to check if the challenged

[46] Judgement n. 10/2000 of the Italian Constitutional Court.

[47] Point n. 3 of the "*Considerato in diritto"* of the judgement n. 10/2000 of the Italian Constitutional Court

opinion has been expressed in the exercise of their duties, without limiting their control over the mere unchallengeability resolutions and the arguments behind it.

In this respect, important is the clarification made by the Constitutional Court that the conflict of attribution between powers it is not a mere judgement over the unchallengeability, but indeed a judgement concerning the relationship between the Parliament and the judiciary. The nature of the Court's control gains a new meaning: it passes from an "external check" to a "concrete check" of the exercised power.

In the concrete case the Constitutional Court alludes to the necessity to radically change the meaning of the prerogatives of art. 68.1 Const., pointing out that the heart (and also the limit) of the above-mentioned constitutional prerogative is provided by a specific mean given to the clause "*in the performance of their duties",* granting the Judges with the prerogative to firstly verify if exist a nexus between the expressed opinion and the activities performed by the Member of the Parliament.

In general terms, apart from the traditional parliamentary activities the Court analyzed the case in which the opinion has been expressed outside the "doors" of the Parliament, where it is crucial to verify the existence of the above-mentioned functional nexus. According to the judgement, it is not sufficient a mere commonality of argument between the challenged opinions and the ones expressed within the Parliament. The Constitutional Judge specifies that, the necessary functional nexus according to which an opinion could be interpreted as unchallengeable, is to be found into the identifiability of the declaration as an expression of the parliamentary activity, verifiable only when the disputed statement is substantially reproductive of opinion express within the parliamentary office. Concretely the Court shall concretely verify the subsistence of such nexus while examining any unchallengeability resolution.

In this respect, the Constitutional Judges could exclude the unchallengeability of the statement expressed only when they had verified that the activity and the acts of the On. Vittorio Sgarbi (particularly three parliamentary questions proposed by himself) - although they partially recognized some commonalities – were not substantially coinciding with the opinions expressed outside the Parliament.

Is now important to analyze the judgement n. 11/2000[48] in which the Court confirmed what previously decided, and again annulled an unchallengeability resolution. Even though this principles' parallel between the latter and the former judgement, is here relevant to analyze the reasoning provided by the parliamentary Committee while declaring the unchallengeability for opinions expressed by its belonging member, and additionally is important to stress the clarifications made by the Court.

The declarations for which was pendent a criminal proceeding for defamation, have been provided during a television program, and the Committee for the Authorizations of the Chambers of Deputies argued that irrelevant was the context in which the opinions were expressed, because the unchallengeability should be applied to all parliamentary behaviors ascribable to the political activity.

Concerning the Committees explanations, the Constitutional Court argued that its duty is that to concretely check if the expression could be linked with the performance of a parliamentary activity. Is up to the Court to define the functional context, during a judgement that does not involve the intrinsic act but analyze the relationship between the constitutional attribution of the two conflicting powers.

Proceeding with this check, the Constitutional Judges have firstly confronted the reasons of the unchallengeability resolution concerning the irrelevance of the situation. This did not appear relevant in the annulment of such resolution, considering obsolete – with respect of the developments of the political communication – the traditional interpretation that considered performed in the exercise of the parliamentary duties only those acts carried out within the bodies of the Parliament.

What appeared relevant for the renewal or not to the art. 68.1 Const. of the opinions express outside the Parliament, during that television program, is not the fact that all the behaviors of the Members of the Parliament are ascribable to the political activity, but rather has been used by the Court the essential argument, that those declarations have not been expressed during typical parliamentary initiatives, neither they could be considered as linked with the performance of any parliamentary activity.

[48] Judgements 10/2000 and 11/2000 have been discussed during the same public hearing, and published on the same day: they are clearly been conceived as twin judgements, developed to strengthen the expressed principles.

Substantially the Court reiterated that the unchallengeability for opinions expressed outside the Parliament can only be admitted only in those cases in which it is possible to identify a substantial correspondence of arguments and not a mere thematic commonality.

1.4 From the Judgement n. 379/2003 to the law n. 140/2003: the relevance of the distinction between "intra et extra moenia" opinions

The previously analyzed judgements represent the decision-making standard of the Constitutional Court with respect of all the conflict of attribution between the Parliament and the judicial authority. Despite the Court's historical tendency to modify or updates its jurisprudential path, it seems that the line outlined by the two twin judgments grants the Judges with a strongly effective methods to solve such conflicts.

In making a clear a strong separation between the *intra et extra moenia* opinions and the subsequent linkage between the two, the Court have provided both the actors involved into an attribution dispute with valuable standards and guidelines to which both the contracting parts have to refer during the preparatory phase of the conflict.

Important is the concept according to which the parliamentary opinion expressed *extra moenia* must necessary be - in order to be covered by the prerogative of the unchallengeability – connected to a previous *intra moenia* expression and in particular a strict reproduction of it.

This matter is the heart of the constitutional judgement n. 379/2003, in which despite of the previous tradition, the Judges solved a conflict of attribution in favor of the Parliament, rejecting the claims of the tribunal.

During a civil proceeding concerning a compensation for defamation damage regarding opinions expressed by the On. Gramazio, the tribunal of Rome rose the conflict of attributions before the Constitutional Court against the Chamber of Deputies with respect of the unchallengeability resolutions voted by the lower Chamber.

On. Gramazio, three years before the proceeding, have present to the Presidency of its belonging Chamber the text of a parliamentary questions in which he denounced the collusion between the managements of the Rai and Extra (a private society which

provided specific services to the State's television) with respect of specific contracts conclude by the two by the hand of the a Rai's board member and his wife, a consultant of Extra.

The Presidency of the Chamber of Deputies, considering the tones and the content of that parliamentary questions, decided according to the art. 139-*bis* of the Chamber's regulation to declare it inadmissible because not coincident with the aims of the parliamentary activities. Despite this declaration, On. Gramazio issued a press communication in which he announced his parliamentary initiative incurring in this way into a complaint for defamation.

The Chamber of Deputies, exercising its prerogative, voted in favor of the unchallengeability following the proposal of the ad hoc Committee, which in its report stated that the challenged expressions represented - independently from the previous submission of the parliamentary question – an activity of criticism, inspection and denounce, perfectly in line with the classical parliamentary activities. Apart from this, the Committee – concerning the gravity of the offense – sustained that the declarations of the Member of the Parliament were part of a strictly political context and contained politically important evaluations[49].

The civil tribunal of Rome rose the conflict of attribution before the Constitutional Court claiming that the Chamber of Deputies have unlawfully exercised its powers, since the unchallengeability prerogative does not cover all the opinions expressed by Deputies and Senators in the performance of the duties, but only those tied by the functional nexus with the activities conducted as Members of the Parliament. Crucial in this sense should be the find the identifiability of the expressed opinion as expression of a parliamentary activity.

The challenged events, according to tribunal's interpretation, have not to be considered reproductive of a Chambers' activity by the fact that the above-mentioned parliamentary question "*is tainted under the functional profile"*[50] and then inexistent for the purposes of this decision.

[49] First point of the "*Ritenuto in fatto"* of the Judgement 379/2003 of the Italian Constitutional Court.

[50] Seventh paragraph, first poin of the "*ritenuto in diritto"* cit. 27

In the text of the judgment, the Constitutional Court in solving the conflict of attribution provided crucial and relevant arguments, which strongly confirmed its previous jurisprudence.

Firstly, the Judges of the Laws rejected the reasons of the Chamber of Deputies Committee' concerning the interpretation of the unchallengeability prerogative, shifting the focus on the inadmissible declared parliamentary question. The heart of the judgement must be to comprehend whether or not it could be considered as part of the typical parliamentary activity even if rejected by the Presidency of the House.

According to the Constitutional Court, the power to present questions addressed to the Government - on the light of the art. 128 of the Chamber of Deputies regulation -is part of the traditionally parliamentary attribution, and this prerogative could not be denied even though in presence of a declaration of inadmissibility by the Presidency. The latter is simple part of the self-regulation process of the Chamber: the eventual declaration of inadmissibility should not be taken into consideration for the examined situation. The parliamentary question presented by On. Gramazio were lawfully effective, and perfectly represented the typical inspective activity in the hand of all Members of the Parliament.

Considering these reasons, the Constitutional Court rejected the claims of the civil tribunal of Rome, affirming that the Chamber of Deputies lawfully exercise is power in terms of the unchallengeability because the challenged expression has to be interpreted as reproductive of the – even if criticized – parliamentary questions.

This judgement represents an important step within the interpretative path undertook by the Constitutional Court only three year before, and concretely confirmed the fees capable to identify when an *extra moenia* opinion has to be covered by the unchallengeability prerogative exactly as an *intra moenia* expression.

If from on one side the Constitutional Court with the last analyzed judgments unveiled a clear and efficient decisional ground, from the other side in 2003 the Parliament accomplished an institutional path designed to clarify the application process of the provisions prescribed by art. 68 Const.

In the aftermath of the entry into force of the 1993 constitutional reform, the Government issued a law decree (l.d. 15th November 1993, 445) containing procedural norms for the application of the prerogative. The measure, not converted, have been reiterated, sometimes with relevant changes, for eighteenth times until the l.d. 23th

November 1996 n. 555, that in turn not converted, has been stopped by the judgement 360/1996, with which the Constitutional Court put the end to the praxis of the reiteration [51].

In the June 2003, the Parliament finally closed the tormented matter of the implementing normative of the constitutional reform n. 3/1993. At the end of this cumbersome iter, the Chambers produced a law that within the art. 3.1 aimed at precisely identifying which are the act covered by the unchallengeability.

The law n. 140/2003 "*Disposition for the implementation of the art. 68 of the Constitution […]"* filled the normative gasp opened ten year later. By the end of the 1993, the constitutional asset of the parliamentary immunities could be described in the following way: a) the maintenance of the traditional unchallengeability prerogative (art. 68.1 Const.). This paragraph as previously explained guarantees the unchallengeability not only in criminal proceedings, but also civil and administrative.
b) without authorization of the belonging Chamber the Member of the Parliament could not be submitted to any act restrictive of his or her personal freedom.
c) the same authorization is required also to submit any Member of the Parliament to personal or home search.

The art. 3 of the law is devoted to the unchallengeability, defining in the first paragraph the sphere of application, namely what has to be intended with the expression "*performance of their duties*". After a long listing of the typical acts of the parliamentary functions as for example, the presentation of amendments, parliamentary questions, is ensured the hedge also for "*every inspective activity, disclosure, criticism and political denounce, connected with the parliamentary functions, executed also outside the Parliament."*[52] .

As largely remarked, since the judgements n. 10/2000 and 11/2000, the Constitutional Court have fixed a very restrictive interpretative key for the acts covered by the unchallengeability: this jurisprudential interpretation asks a deep connection between a parliamentary act and the expression that has to reproduce what previously stated within the doors of the Parliament.

[51] For a clear and precise reconstruction of the principle characteristics of this long normative chain, M. Montagna (1999) *Autorizzazione a procedere e autorizzazione ad acta,* Padova: CEDAM, p. 143-ff.

[52] Art. 3 of the Law 140/2003

Is quite evident the presence of a compatibility problem between art. 3.1 of the Law n. 140/2003 and the jurisprudence of the Constitutional Court[53], because the Parliament fearing a restriction of its discretionary capacities tried to enlarge the acts covered by the unchallengeability provisions without taking into account what previously clarified by the Constitutional Judges.

The other eight paragraphs of the art. 3 provides the procedural laws for the application of the unchallengeability. The system envisaged is articulated in the following procedure.

When the judge before who is pending a judicial proceeding considers that there are the preconditions for the application of the parliamentary immunity ex art. 68.1 Const. pronounce the necessary measures for an immediate definition of the proceeding.

When instead he considers not to apply the prerogative is called to transmit all the act to the belonging Chamber with a not appealable decree. Than the Parliament has ninety days to decide in favor or not of the unchallengeability, and meanwhile the judicial proceeding is temporally suspended.

The Chamber then transmits to the competent judge its own resolution and, if this is favorable to the Member of the Parliament, the judge adopts the appropriate measure to conclude the proceeding. Crucial is the fact that this specific *iter* appear to be close to the previously abrogated arrangement of the authorization to proceed.

If eventually the judge fills that the Chambers have unlawfully exercise is constitutional prerogative concerning the unchallengeability resolution, can rise the conflict of attribution before the Constitutional Court.

The art. 3 of the Law n. 140/2003 despite is objectives, strengthened the need and the role of the Judges of the Laws called to reorganize and to safeguard the constitutional attribution to both Parliament and the judiciary, which despite of various constitutional attempts, keep struggling in identifying a common interpretative line even if the Constitutional Court has in many cases clarified the procedural application of the unchallengeability provision.

[53] E. Malfatti (2005) *Le immunità parlamentari tra elusione e violazione del disposto costituzionale,* Turin: Giappichelli, p- 197-208.

Specifically, the art. 3 of the law n. 140/2003 and its practical and textual interpretation has been the subject of the judgement n. 120/2004 of the Constitutional Court, with which ruled about an unconstitutionality question raised by different courts concerning the above-mentioned law.

The criminal court of Rome, the Judge for the preliminary investigation of the Milan's Court raised the unconstitutionality question concerning art. 3 of the law n. 140/2003 claiming that such article sensibly modified the nature of the art. 68 Const., betraying the jurisprudence of the Constitutional Court marked by judgments n. 10/2000 and 11/2000, since the unchallengeability provision pointed out by the above-mentioned article would extend the boarders of such guarantee.

The Constitutional Court reject the question arguing that the law n. 140/2003 and in particular the art. 3 of that law aimed at procedurally applying the new text of art. 68 Const. Despite of the broad lexical drafting, the listed parliamentary activities cannot be exhaustive of the concept of parliamentary functions, but at least it represents an important attempt to specify them.

Importantly with the challenged draft, the legislator did not renew the mentioned constitutional provision, but limited itself in specifying – in order to correctly apply the provisions of the first paragraph of art. 68 Const. – the typical parliamentary acts. With respect of those intended as non-typical, in order to be covered by the provision's guarantee, they have to meet all the requirements ruled by the constitutional jurisprudence.

Within this judgement, the Constitutional Court once again confirmed the cruciality of the so called "functional nexus", according to which a parliamentary expression given outside the parliament (important is not the mere localization) in order to be covered by the unchallengeability has to be linked with the performance of the parliamentary duties or reproductive of an opinion previously expressed during the parliamentary activities as marked in the previous judgements. Specifically, the clause of art. 3 of the law n. 140/2003 stating "*every inspective activity, disclosure, criticism and political denounce"* must be applied in respect of the constitutional jurisprudence.

Even if within this judgement the Constitutional Court ruled in a very direct manner the boarders of the applicability of the unchallengeability provision, the Judges of the Laws during the subsequent years and until now had solve many different conflicts of attributions raised because the interpretation of the above-mentioned

“functional nexus” provided by the judiciary from one side and mainly by the Parliament from the other side, had often been distorting of the clear constitutional jurisprudence.

The judgement subject of the next chapter is a clear example of this historical interpretative cleavage.

CHAPTER 3 – "THE CALDEROLI CASE" BEFORE THE CONSTITUTIONAL COURT: THE JUDGMENT N. 59/2018

1. The reason of the dispute and the beginning of the criminal proceeding before the Ordinary Tribunal of Bergamo

1.1 Reconstruction of events

In March 2013 at the very beginning of the legislative term 2013-2018, Senator Roberto Calderoli – on of most renewed member of the Italian party *Lega Nord* – was reelected as vice-president of the Senate, while contextually the 28 April 2013 On. Cécile Kyenge (born in Congo, but Italian citizen since 1994) swearing before the President of the Republic become Minister for Integration. Her ministerial appointment due to her stance concerning immigration gave rise to a serious parliamentary opposition and discontent by the hand of the members of the *Lega Nord* party, strongly contrary to the immigration phenomenon.

In May 2013 and in June 2013, this climate of tension between different *Lega Nord's* Members of the Parliament among which Sen. Calderoli and the Minister Kyenge grew because of two different parliamentary questions addressed to the Minister challenging her stances concerning two crimes committed by two immigrants.

Within this widespread contestation situation, different were the direct verbal attacks against On. Kyenge, among which the most debated one was done by the hand of the Vice-Presidente of the Senate Calderoli.

The 13 July 2013, during a festival convened by *Lega Nord* in Treviglio, a town in the Province of Bergamo, in front of 1.500 supporters pronounced two statements referring to Minister Kyenge that had an important media exposure "*She would be an excellent Minister, […] but in Congo and not in Italy, because if theirs is the need […] of a Minister for Integration […] the need is there, because if they see a white person*

passing, they will shoot him[54]*"* and in addiction he said "*When I see Cécile Kyenge I cannot help thinking to an orangutan".*

Given the incredible high media coverage that these two statements had, resulting in a widespread outrage and condemnation, the Minister Kyenge denounced Roberto Calderoli. The competent public persecutor heard the *notitia criminis* began with the necessary investigation to verify if the challenged events were provided by law as a criminal offence.

At the end of the preliminary investigations, the criminal Tribunal of Bergamo inquired Sen. Calderoli charging him with defamation with two additional aggravating circumstances: to have committed the fact by means of a particular publicity instrument, the political rally (art. 595, third paragraph of the Italian criminal code) and for the purpose of racial discrimination (art. 3 of the law-decree 16 April 1993, n. 122 entitled "Urgent measures on racial discrimination, ethnic and religious", converted, with modification, in law 25 June 1993, n. 205).

The tribunal of Bergamo having not identified any evidences of the functional link between the opinions expressed by the defendant and his political activity, disposed the immediate transmission of the processual acts to the Senate of the Republic according to art. 3.4 of the law n. 140/2003.

1.2 The stance of the Senate and the dispute with the judicial authority

The transmission of the processual acts made by the court – a crucial procedural requirement – caused an important dissent on the defendant, because Sen. Calderoli complained to have promptly proposed the unchallengeability exception concerning his expressed opinions[55], and under his view the judicial authority in not immediately accepting it have delayed the enactment of the ordinance with which the belonging Chamber was invested with the proceeding.

[54] Point 1 of the *Ritenuto in fatto* of the judgement 59/2018 of the Italian Constitutional Court.

[55] While the Member of the Parliament can waive to plead the unchallengeability, for these reasons defined "improper", the judge must resort to the belonging Chamber following the exception raised by the defendant.

The 29 June 2014 during the first hearing, the competent judge rejected the request to submit the acts to the Senate proposed by the defendant lawyers and even though proposed also by the public persecutor. The transmission of the acts occurred only at the end of the second hearing the 30 September 2014, after the court took notice of the absence of consent of the defending lawyers to acquire the transcription of the challenged expression made by the attorney, ruling in this sense the rejection of the unchallengeability exception.

After the transmission of the acts to the Senate, in compliance with the law n. 140/2003 the criminal proceeding has been suspended. It has to be stressed that as general rule the Commission for Elections and Parliamentary Immunity, once invested with the question, have ninety days (extendible to other thirty days) to decide. Importantly the proceeding has to be suspended during the commencement of this term. According to the law n. 140/2003 after this period the proceeding can resume.

Concerning the examined lawsuit, Sen. Calderoli during a speech in his belonging Chamber underlined the suspension of the prescription terms concerning the crime alleged against him for a period of one year and a half. According to Calderoli's view, the judges should have waited until the conclusion of the parliamentary works, and particularly after a favorable opinion in respect of the unchallengeability from the Commission for Elections and Parliamentary Immunity waiting for a resolutive vote in the Chamber.

It is evident that it would be unreasonable to impose to the judge to wait for the definitive parliamentary decision for all the period of suspension of the prescription terms. Taking into consideration the current arrangement, the judge is subject to the law (art. 101.2 Const.) and that clearly rules that the proceeding cannot be interrupted no later than ninety days after the reception of the acts by the belonging Chamber.

The Commission for Elections and Parliamentary Immunity of the Senate, acting by simple majority voted in favor of the unchallengeability of the opinions expressed by Sen. Calderoli[56]. Even though the opinion of the Senator-Speaker Crimi (member of the Five Stars Movements) was contrary to the unchallengeability, the

[56] It is important to remark that the interested Member of the Parliament has the faculty to provide clarifications to the Commission for Elections and Parliamentary Immunity, while the Commission does not have the faculty to hear external subjects even if directly interested by the events.

unchallengeability passed thanks to the favorable opinion of the members of *Forza Italia, Democratic Party* and *Lega Nord.*

Sen. Malan (FI) reported in the Senate the discussion happened within the Commission for Elections and Parliamentary Immunity and suggested how to set the vote in the Chamber even if the suggested course was problematic under a judicial perspective. He proposed to separately vote on the resolution of the Commission. The first vote should have been concerned with the defamation aggravated for the purposes or racial discrimination and the second vote should have been concerned with the aggravated defamation under art. 595.3 of the Italian criminal code.

With respect of the request to postpone the votes in order – proposed by the leader of the PD's parliamentary group Sen. Zanda – to allow a deep analysis of the question, the Chambers voted negatively. Is important to stress that the debate was poisoned by the controversies related to the ongoing constitutional reform attempt and to the statements of the President of the Council of Minister concerning the hypothetical abolition of the Senate.

Sen. Stefano, member of the *Left Ecology Freedom* group expressly pronounced a negative opinion over the possibility to vote separately, arguing that the in this specific case the Chamber was called to judge on a single specific event and not on two distinct opinions. Importantly he remarked that the purpose of the parliamentary resolution concerning the unchallengeability prerogative is to evaluate if a specific event is covered or not by the provision, namely if it is linked by a functional nexus with the typical parliamentary activity, hereafter the multiple and differentiated juridical consequences.

Rejected such objection, the Senate decided to vote separately on this matter and embracing the report of the Commission for Elections and Parliamentary Immunity concerning the aggravating circumstance of the racial discrimination and voting contrary to the other aggravating circumstance. Following the outcome of the vote, the judicial authority could have configured the offence as aggravated defamation but not by the means of the racial discrimination.

This outcome generated the indignation of the Minister Kyenge who commenting the parliamentary vote affirmed "*it is a decision that casts a heavy shadow over the fight against racism, at the very moment when populism and xenophobia grow because of the refugee emergency. I have already granted my forgiveness to Calderoli,*

but it is no longer a personal fact. Now it is an issue of principle, because the message that arrives from the institutions to the youngest generations is devastating.[57]*".*

Hereafter the indignation of the directly involved part, the nature and the structure of the Senate's resolution, created an important and deep cleavage once again between the Parliament and the judicial authority, outlawed by the behavior of the Higher Chamber.

The tribunal of Bergamo observing that under a procedural perspective the resolution of the Senate was legitimate decided to rise the conflict of attribution before the Constitutional Court under two distinct profiles

According to the first the tribunal affirmed that prerogative of the Chambers is -according to art. 68 Const. and art. 4 of the law n. 140/2003 – exclusively that to evaluate the subsistence or not of the functional nexus between the opinions expressed by the Member of the Parliament and the exercise of his parliamentary function, while is exclusive prerogative of the judge the judicial qualification of the fact. The Senate voting in the above-mentioned way would have invaded a space reserved to the jurisdiction having considered the judicial qualification of the fact and not is entirety.

According to the second profile, the tribunal of Bergamo assumed that the challenged declarations would not have been covered by the unchallengeability provision as claimed by the Senate because the content of them is not equivalent to the previously mentioned parliamentary question in which Sen. Calderoli have been involved.

According to the tribunal's stance, there would be either the subjective prerequisites – being the tribunal the competent organ entitled to decide over the unlawful nature of a challenged event – and either the object prerequisites considering the violation of constitutionally guaranteed attributions.

With the ordinance n. 139/2016 of the 18 May 2016 the Constitutional Court declared the conflict admissible.

After a contestation by the hand of the Senate which raised the exception of no further proceedings due to procedural lacks, the Constitutional Court with the

[57]https://www.repubblica.it/politica/2015/09/16/news/calderoli_offese_kyenge_senato_lo_salva_da_processo_ex_ministro_ricorrero_a_corte_ue_-123021302/

ordinance n. 101/2016 renewed the admissibility of the conflict against which the Senate decided to enter into the proceeding.

According to the Senate's stances, the conflict should be inadmissible with respect of the two profiles remarked by the judicial authority.

The recurrent assumed that according to the first claims made by the competent judge, the tribunal of Bergamo in this specific case would be in a situation not different than the one in which every single judicial authority is when the Chamber decides to apply the unchallengeability. According to the Senate's view, here the judicial authority can only treat the expressed opinion as aggravated by the means of art. 595.3 of the Italian criminal code.

According to the second profile the Senate challenged the way in which the tribunal of Bergamo reported the disputed expression (a simple slavish transcription, which did not underlined the situation in which those opinion has been expressed) , depriving the Constitutional Court of the possibility to correctly evaluate if the *estra moenia* opinion should be or not covered by the unchallengeability.

Particularly the Senate with a pleading lodged the 18 December 2017, insisted for the acceptance of the second inadmissibility exception, underlined that, considering the means of art. 67 Const., the parliamentary function has an ambivalent nature already protected by the constitutional jurisprudence which would have avoided that acts contemplated by the parliamentary law could have a judicial responsibility. According to this view also non-typical acts have to be covered by the unchallengeability previsions, considering that the evaluation of the subsistence of the functional nexus should be focused on the matter of the expressed opinion, appraising if these could be connected with the performance of the parliamentary functions.

Such evaluation according to the recurrent is here precluded due to the transcription made by the attorney lacking the object and the contest of the contested public speech pronounced by Sen. Calderoli, causing the inadmissibility of the entire proceeding.

The Constitutional Court heard the different stances of the involved parts, one year later, the 10 January 2018 pronounced the Judgement n. 59/2019 with which solved the analyzed conflict of attribution.

2 The judgement before the Constitutional Court

2.1 The analysis of the Judgement and the decision of the Constitutional Court

The Constitutional Court, analyzing the different claims of both Tribunal of Bergamo and the Senate affirmed within the judgement that the admissibility of the conflict must be renewed for the subsistence of the subjective and objective prerequisites as previously ruled with the ordinance n. 139/2016.

With respect of the exceptions proposed by the Senate, clearly the Constitutional Court declared their groundlessness.

Concerning the first claim, related to the possibility for the tribunal of Bergamo to persecute On. Calderoli only for defamation aggravated by the means of art. 595.3 of the Italian criminal code and not for defamation aggravated by means of racial discrimination, the Constitutional Court remarked that the questioned unchallengeability resolution have the peculiarity of referring not to the expressed opinions as such, but to the declarations as subsumed by a specific punitive paradigm, which is the aggravating circumstance of the racial discrimination. On this ground is evident the invasion of the judicial authority's attributions, having the Senate applied an extensive interpretation of the guarantees provided by art. 68 Const.

Concerning the second claim, aimed at contesting the identity of content between the challenged opinions and the typical parliamentary acts, integrated by the subsequent pledge according to which the court lacked in correctly transcribing the questioned expressions, the Constitutional Court once again remarked that the interpretation provided by the Senate affirmed an erroneous extension of the constitutional guarantees' provisions.

The Judges of the Laws have here confirmed the previous jurisprudence, according to which the opinions expressed *extra moenia* are covered by the unchallengeability only if informative of the parliamentary activity. This requires that their content has to be substantially correspondent to those opinions expressed *intra moenia*, not being sufficient a simple thematic or even partial content link. Importantly,

a different interpretation would extend the constitutionally outlined boarders of the prerogative, creating a personal and not a functional immunity.

The Constitutional Court in addiction within the judgement remarked that in addressing the theme of the unchallengeability of the expressed opinions, the European Court of Human Rights (known in Italy as CEDU) operated a strict distinction between the opinion expressed *intra moenia,* namely expressed in the performance of the parliamentary duties, and those expressed *extra moenia,* namely in absence of an evident link with the parliamentary activity. In different situation the European Court of Human Rights affirmed the necessity of a strict interpretation of the reasonable proportionality requirement between the employed means and the pursued aim, to whom are subject the limitation of the right to access to a tribunal according to art. 6 paragraph 1 of the European Convention on Human Rights[58]. This is particularly valuable in those cases in which such limitations derive -as in this case- from a unchallengeability resolution voted by the Chamber to which the Member of the Parliament belong to, which denies the judge the possibility to exercise his own function within the case due to it from the subject that exercise his own right[59].

Reaffirmed the correct interpretation of the unchallengeability provision, the Constitutional Court stressed that the tribunal of Bergamo did not failed to reproduce the challenged opinions expressed by Sen. Calderoli, because as previously expressed by the Court itself, the qualification of the criminal offence is enough to satisfy the burden of proof.

From the point of view of the Tribunal of Bergamo, the conflict is grounded under both profiles for which it has been raised.

According to the first the Court remarked that the Parliament is only called to deliberate over the unchallengeability over opinions expresses, only evaluating if they

[58] Art. 6.1 of the ECHR says that *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and the public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.*

[59] Judgment 6 April 2010, C.I.G.L. and Cofferati vs Italy, European Court of Human Rights

are ascribable to the parliamentary functions. The qualification of the fact is up to the judicial authority.

Crucially the Constitutional Court underlined that the Senate replaced the judicial authority in deciding about the qualification of the nature of the offence, invading a constitutional sphere granted to the judicial power. In addition, the Senate have also unlawfully exercised its constitutionally granted attribution, because it did not vote considering the event as such but tacking into account the two aggravating circumstances.

Concerning the functional nexus, the Judges of the Laws stressed that it was not present a link between the expressed opinions and the parliamentary activity declined in the two parliamentary questions quoted by the Commission for Elections and Parliamentary Immunity because the content of the latter was incredibly distant with the content of the former.

Is important to observe that the sentences pronounced by Sen. Calderoli on which is pending a criminal proceeding are not *ex se* ascribable to opinions expressed in the performance of parliamentary functions. The unchallengeability provisions, according to the Constitutional Court, cannot be extended "*till including insults – whose is still questionable the qualification as opinions – only because linked with the battles conducted by parliamentary exponent"*[60] . Following this interpretation is seems that the Judges of the Laws are willing to feed an important opening over the possibility to limit the *intra moenia* opinions aiming at safeguarding the fundamental rights of the people subject of those delcarations[61]

Finally, the Constitutional Court underlined that under both profiles for which the tribunal of Bergamo raised the conflict of attribution, the conduct of the Senate has been detrimental of the constitutional attributions granted to the recurrent, and consequently annulled the unchallengeability resolution adopted by the Senate during the session of the 16 September 2015, confirming that the qualification of the fact as a criminal offence aggravated by the means of the law n. 205/1993 was only up to the court.

[60] Jugement n. 137/2001 of the Italian Constitutional Court

[61] Gullo, A. (2007) *Le immunità come limite alla tutela penale? Una riflessione sull'insindacabilità nel quadro della sistematica del reato,* Rivista italia di diritto e procedura penale, pp. 202.

2.2 The referral to the Criminal Court of Bergamo and the conviction at first instance

With the annulment of the unchallengeability resolution the 10 January 2018, the court of Bergamo has been able to resume the proceeding pending since the 2013.

Sen. Calderoli, therefore, has been tried charged with defamation with the two orginal aggravating circumstance: to have committed the fact by means of a particular publicity instrument, the political rally (art. 595, third paragraph of the Italian criminal code) and for the purpose of racial discrimination (art. 3 of the law-decree 16 April 1993, n. 122 entitled "Urgent measures on racial discrimination, ethnic and religious", converted, with modification, in law 25 June 1993, n. 205).

After a criminal proceeding lasted about one year, the competent judge recognizing the subsistence of the racial discrimination, the 14 January 2019, Sen. Calderoli – absent during the pronouncement of the judgement – was sentenced in first instance with eighteen months of imprisonment with suspended sentence.

The former Minister Kyenge decided not to join a civil action during the proceeding against Sen. Calderoli, who with the judgement has not been additionally sentenced with a pecuniary compensation for damages.

CONCLUSIONS

The arguments with which the Constitutional Court within the judgement 59/2018 solved the conflict of attribution in favor of the tribunal of Bergamo namely the judicial authority, are perfectly in line with the previous jurisprudence outlined by the Court itself since judgements 10 and 11 of year 2000 and 120/2004.

The benchmark for the evaluation of the unchallengeability resolutions is still the well known "functional nexus", according to which the opinion expressed *extra moenia* can only be covered by the prevision provided by art. 68 Const. if and only if reproductive of an opinion expressed *intra moenia* or of a typical parliamentary act such as a speech during a debate or a parliamentary question (even if declared inadmissible by the Presidency of the belonging Chamber).

Importantly the doctrine of the "functional nexus" has often been criticized because with the above-mentioned interpretation it would be possible to narrow the scope of the guarantee. According to the writer's opinion which recalls authoritative doctrine[62], even if it is undesirable to experience a modification of the Court's framework, the critiques moved against it are so remarkable that must be taken into consideration.

The prevalent framework has authoritatively been defined as "formalist"[63] and aiming at substantially reintroducing the surpassed distinction based on the place where the opinion has been expressed. The doctrine of the "functional nexus" would eventually lead to an excessive reduction of the protective sphere of the parliamentary function.

Firstly, this interpretation may refer the definition of the unchallengeability parameter to the Member of the Parliament. Secondly, the questioned doctrine would therefore fail to create a well-balanced equilibrium between all the involved interests, granting protection to some expressed opinions widely detached from the exercise of

[62] Arena, A. I. (2018) *L'insindacabilità delle opinioni rese dal parlamentare (minime riflessioni a partire dalla lettura della sent. N. 59 del 2018)* Osservatorio costituzionale AIC, n.3.

[63] Scaccia, G. (2014) *Spunti per una redifinizione del "nesso funzionale" in tema di insidacabilità parlamentare*. Rivista AIC, n.4

the parliamentary functions (with the subsequent prejudice of the interests of eventually offended people) and leaving without a fair safeguard those - for nature and content - ascribable to the parliamentary representative function[64].

The "functional nexus" doctrine may be subjected to even more criticism taking into consideration the transformation of the forms with which the political debate is developed. From this derives the tendency of the two Chambers to justify the behaviors of their respective members by virtue of the necessities deriving from the modern political communication.

The majority of the performance of the elective mandate during modern years resides into a direct and immediate interaction with the public sphere, by virtue of which is demanded an extensive comprehension of the harshness of some declarations.

The doctrine of the "functional nexus", anchoring the guarantee to the acts of the parliamentary circuit, and then - according to authoritative doctrine - to the place of the first expression of the opinion, would be "*unable to catch the modified reality of the political representation, as how it is developed within the modern audience democracies"* and it would be "*fatally destined to a further progressive wear of the internet society […]"*[65].

The critical arguments against the doctrine of the "functional nexus' have their own pin on the "architectonic principle" on which all the modern democracies are based. The Constitutional Court would perform a substantial scrutiny over the expressed opinions, considering as unchallengeable those reasonably ascribable to the parliamentary office. Duty of the Constitutional Judges would be that to evaluate the proportionality between the protection of the expressed declaration as instrument, and the independent exercise of the parliamentary functions as purpose: the expression pronounced outside the Parliament should be considered as challengeable if they do not respect the proportionality principle, otherwise as unchallengeable if they respect it and even if deprived of an informative nature[66].

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[64] Rivosecchi G. (2018) L'autonomia *parlamentare dopo la decisione sull'autodichia.* Quaderni Costituzionali n. 2, p. 43-ff, according to which the Constitutional Court reserved itself "*A strict control, case by case, anchored to sure parameter, even if not always able to consent the free exercise of the political representation."*

[65] Scaccia, G. (2014) cit. 63

[66] Scaccia, G. (2014) cit. 63

This thesis would find its support within the jurisprudence of the European Court of Justice and of the European Court of Human Rights.

The former since art. 8 of the Protocol n.7 attached to the Treaties, rules as unchallengeable the declarations expressed *extra moenia* if provided to have a "direct" nexus with the parliamentary functions and an "evident" nexus, namely not deniable by a reasonable individual[67].

The latter does not consider as sufficient the link with a parliamentary act, but expressly requires verifying, case by case, the connection between opinion expressed and performed function. It has to be evident a proportionality relationship between the purpose pursued and the instrument used to guarantee it (as importantly evident during the *De Iorio case[68]).* The European Court crucially shares the idea of the irrelevance of the place: stance derived from the progressive approach to the jurisprudence of the Italian Constitutional Court.

Importantly the Strasbourg's judges consider not sufficient the formal individuation of a nexus with a parliamentary act, asking for a further scrutiny over the reasonableness of the unchallengeability of the expressed opinion.

Is important to remark that according to this interpretation, the discretionary margins during the judgement of the Constitutional Court will be implemented. Thus, especially if would be held to extend the scrutiny over the reasonableness also over the acts performed *intra moenia* within the Parliament.

The Constitutional Court within the arguments of the judgement 59/2018 seem to be attached to the above-mentioned concept: the hypothetical future challengeability of the *intra moenia* opinions. Importantly the Judges of the Laws affirmed that the unchallengeability provisions cannot be extended "*till including insults – whose is still questionable the qualification as opinions – only because linked with the battles conducted by parliamentary exponent".*

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[67]Ambroselli D.A. (2013) *Corte Costituzionale e Corte di Strasburgo in tema di insindacabilità parlamentare con particolare riferimento al diritto di accesso al giudice,* dirittifondamentali.it n.2, p.13-ff

[68] Palombino, F.M. (2005) *Il diritto di accesso ad un tribunale secondo la Corte di Strasburgo e l'insindacabilità parlamentare prevista dall'art. 68, comma 1, della Costituzione italiana.* Giurisprudenza Costituzionale, N. 3. pp 2242-ff.

This aspect taking into consideration the nature and the shades of the modern political communication within the Chambers seems to be crucial.

Ideally this could be realized applying a strict distinction between the opinion expressed *intra moenia* by a Member of the Parliament in animated tones against the performance of the parliamentary duty of another Member of the Parliament and between the mere insults.

According to an extensive view of the decisional criteria outlined by the Constitutional Court, the former should be considered protected by the unchallengeability, and the latter should be considered as challengeable and the subjected to a judgement of the judicial authority.

What is clearly evident at the end of this discussion is that the unchallengeability arrangement is subject to constant interpretative and applicative transformations by the hand of the Constitutional Court and is not unreasonable to assume a further jurisprudential elaboration within forthcoming judgements.

ABSTRACT

Le immunità parlamentari traggono la loro origine e fondamento nella storica necessità di garantire ai membri del Parlamento una forma di protezione che li tutelasse, nell'esercizio delle loro funzioni, da interferenze illecite da parte potere giudiziario.

Gli istituti che oggi sono noti come immunità parlamentari hanno le proprie radici nei bagliori del costituzionalismo inglese e nella costante ricerca di garanzie da parte dei parlamentari nei confronti di una monarchia autoritaria unilateralmente detentrice del potere giudiziario.

Le crescenti richieste del parlamento affinché gli fosse riconosciuta una maggiore autonomia e protezione giuridica nell'esercizio del proprio mandato rappresentativo condussero, durante la *Glorious Revolution* del 1688, all'apice di uno scontro istituzionale che vide come protagonisti la *House of Commons* ed il monarca *James II*.

L'ascesa al trono di un nuovo sovrano della dinastia d'Orange ha prodotto la codificazione del primo documento costituzionale europeo: la cd. "*Bill of Rights*" che, all'articolo 9, sancisce la libera espressione di dibattito all'interno del parlamento, gettando le basi per quella che oggi conosciamo come "insindacabilità".

Un secolo dopo gli avvenimenti oltremanica, anche nel continente iniziarono a farsi strada le richieste dei parlamentari nei confronti delle monarchie. Nello specifico, degni di nota sono i fatti avvenuti nella Francia rivoluzionaria. Le pressioni avanzate dal terzo stato, al fine di vedersi riconosciute garanzie a livello rappresentativo, possono essere considerate tra le più importanti cause del conflitto rivoluzionario; l'Assemblea nazionale francese, nel dichiararsi unilateralmente indipendente dalla monarchia, dispose l'insindacabilità delle opinioni espresse dai membri dell'assemblea e l'inviolabilità degli stessi, imponendo la necessità di un'autorizzazione camerale per procedere all'arresto di un membro.

Sulla scia dell'esperienza francese, durante i moti del 1848, anche in Italia vennero riconosciute le garanzie parlamentari già affermatesi in altri stati; con lo Statuto Albertino l'insindacabilità delle opinioni espresse e il divieto di arresto in assenza di un'autorizzazione della camera di appartenenza furono concessi ai propri membri del parlamento anche dalla monarchia italiana.

Il percorso delle prerogative parlamentari ha successivamente sperimentato una battuta d'arresto durante il ventennio fascista. Nonostante tutti i membri del parlamento formalmente non fossero perseguibili, non di rado si è potuto constatare l'effettiva tutela esclusivamente in capo alla maggioranza fascista.

La parentesi autoritaria, conclusasi con la fine del secondo conflitto mondiale nel 1945, condusse verso una sempre crescente necessità di vedere inequivocabilmente riconosciuti i diritti legati allo status di parlamentare. Successivamente al referendum costituzionale, che diede voce alla volontà del popolo italiano circa la forma di stato repubblicana, si provvide ad eleggere un'assemblea costituente con il compito di redigere la costituzione italiana.

La nuova costituzione della neonata Repubblica italiana, entrata in vigore nel 1948, sancì le prerogative parlamentari all'interno dell'art. 68.

Nello specifico, il primo comma garantisce ai parlamentari l'insindacabilità dei voti dati e delle opinioni espresse nell'esercizio delle proprie funzioni.

La previsione dell'art. 68 Cost. rappresenta una tutela per i membri delle Camere, non solo in occasione di procedimenti penali, garantendoli anche nell'evenienza di giudizi civili.

Tuttavia, appare necessario delimitare i confini di ciò che il legislatore ha inteso comprendere nell'ambito delle "opinioni espresse": in tal senso è considerata tale, conformemente a quanto affermato dalla Camera dei Deputati, qualsiasi declinazione verbale di pensiero, di analisi e di critica, eccetto meri epiteti e insulti.

Alla luce di quanto sopra esposto, risulta essere indispensabile chiarire l'espressione intrinseca di funzione parlamentare. Peraltro, nonostante appaia con chiarezza l'esigenza di specificare cosa possa essere qualificato come funzione parlamentare, il cammino per giungere alla nozione odierna è stato impervio. Per oltre mezzo secolo dottrina e giurisprudenza tentarono di pervenire ad una soluzione che formalmente arrivò con l'art. 3 della l. n. 140/2003 – in attuazione della riforma costituzionale del 1993.

Tuttavia la lunga attesa non produsse i risultati sperati non giungendo ad una definizione puntuale di ciò che può essere qualificato come funzione parlamentare, l'art. 3 della l. n. 140/2003 si limita a fornire un elenco meramente esemplificativo delle funzioni parlamentari, non delineando in modo chiaro i confini di una eventuale

interpretazione analogica e rimettendo alla Corte Costituzionale il compito di stabilire caso per caso la qualificazione di una determinata fattispecie.

Innanzi alle spietate critiche della dottrina circa la vaghezza della norma è intervenuta la Corte Costituzionale con la sentenza n. 120/2004 che – investita della questione di costituzionalità della legge n. 140/2003 – ha scagliato una lancia in favore del legislatore apprezzandone gli intenti di tracciare una linea guida volta a definire la nozione di funzione parlamentare.

A completamento della previsione del primo comma dell'art. 68 Cost., il legislatore ha disposto al secondo comma l'autorizzazione della Camera di appartenenza per sottoporre un membro del parlamento a perquisizione personale o domiciliare, per procede al suo arresto o a qualunque altra privazione della libertà personale – salvo che questa avvenga in esecuzione di una sentenza irrevocabile di condanna ovvero in flagranza di reato. Analoga autorizzazione è richiesta per sottoporre i membri del Parlamento ad intercettazioni, in qualsiasi forma, di conversazioni o comunicazioni e a sequestro di corrispondenza.

Storicamente, gli intenti dell'Assemblea Costituente si riferiscono ad una volontà di ovviare eventuali problematiche inerenti la possibilità di sottoporre a giudizio un parlamentare circa quanto svolto nell'esercizio delle proprie funzioni.

Di conseguenza non è stato infrequente assistere a dispute tra le Camere e il potere giudiziario che reciprocamente reclamavano una lesione della propria sfera di attribuzione.

La problematica tra i due poteri trae origine dalla previsione normativa secondo cui è necessario richiedere il *placet* della Camera di appartenenza al fine di poter sindacare all'interno di un processo un'opinione espressa o di un voto dato da un parlamentare nell'esercizio delle proprie funzioni. Nello specifico, il giudice competente, qualora si trovi nella circostanza sopra delineata, è tenuto a trasmettere gli atti alla Camera di appartenenza affinché questa si esprima circa la sindacabilità o meno dell'opinione o del voto oggetto del processo, con la conseguenza che in mancanza di un parere favorevole non è possibile proseguire il procedimento, dovendosi disporre l'archiviazione.

Stante il quadro sopra delineato è facilmente intuibile come nella prassi molto spesso le attribuzioni costituzionali dei due poteri collidano e, in ossequio all'art. 134 Cost., sia sollevato il conflitto di attribuzione innanzi alla Corte Costituzionale.

In presenza di un conflitto di attribuzione tra poteri dello Stato la Corte Costituzionale riveste il ruolo di arbitro ed ha il compito di riequilibrare i rapporti tra i poteri, stabilendo di volta di volta quale sia stato il potere menomato e provvedendo a riavvicinare i contendenti alla volontà legislatore costituzionale.

Nel corso dei decenni, tuttavia, la Corte Costituzionale in veste arbitro ha giocato un ruolo fondamentale chiarendo le proprie prerogative nei giudizi sui conflitti di attribuzione tra i poteri dello Stato aventi ad oggetto le immunità parlamentari e fornendo una linea interpretativa in tema di insindacabilità.

In merito al primo punto, la risposta della Corte circa i dubbi riguardo le sue attribuzioni in questo tipo di giudizi è racchiusa nella sentenza n. 1150/1988 con cui i Giudici delle Leggi hanno chiarito la necessità per il giudice *a quo* di adire la Corte, sollevando conflitto di attribuzione, qualora questo ravvisi la necessità di sindacare nel merito una fattispecie coperta da insindacabilità. Inoltre, la stessa ha appurato la natura del proprio controllo nei sopracitati casi definendolo come un "controllo esterno" sulle attività parlamentari volto a verificare la correttezza di quanto si è svolto all'interno delle aule.

La corte ha ritenuto di sottolineare come il potere sulla valutazione circa la sindacabilità di un'opinione o un voto spetti solo ed esclusivamente alla Camera a cui il parlamentare appartiene e come le uniche restrizioni in tal senso sono quelle previste dai regolamenti interni delle Camere, non lasciando alcun tipo di spiraglio per un intervento del potere giudiziario in tal senso.

A un decennio di distanza dalla pronuncia chiave del 1988, la Corte Costituzionale è nuovamente intervenuta sul dibattito circa le insindacabilità con c.d. sentenze gemelle del 2001. In questa occasione si è per la prima volta giunti a delineare il discrimine tra opinioni e voti sindacabili e non, fornendo agli interpreti una chiara chiave di lettura. Preliminarmente giova ricordare la differenza tra opinioni *intra moenia* ed *extra moenia* intendendosi con le prime quelle espresse all'interno dell'attività di aula – garantite dalla previsione di cui all'art. 68 Cost. - e con le seconde quante non ne facciano parte. Con le sentenze gemelle la Corte ha recepito la tesi del c.d. "nesso funzionale" estendendo alle opinioni *extra moenia* la garanzia già prevista per quelle *intra moenia,* qualora siano riproduttive di queste ultime ovvero siano divulgative di una funzione tipica dell'attività parlamentare (quale un'interrogazione). In tal maniera è stato chiaramente tracciato il cammino interpretativo da seguire,

dovendosi disporre per l'insindacabilità solo qualora sia ravvisabile un nesso funzionale, non essendo sufficiente una mera comunanza tematica

In questo contesto al Parlamento è affidato il compito circa la valutazione sulla sussistenza del nesso funzionale e, di conseguenza, sulla sindacabilità dell'opinione o del voto.

Nelle successive pronunce la Corte Costituzionale non ha mai tradito il proprio orientamento, riaffermando la validità della tesi del nesso funzionale anche qualora l'atto interno a cui si fa riferimento sia stato dichiarato inammissibile. In particolare, con la sentenza n. 379/2003 ha ribadito la sussistenza del nesso nel caso in cui l'opinione resa *extra moenia* fosse riproduttiva di un'interrogazione parlamentare dichiarata inammissibile.

Appare dunque necessario osservare come la sussistenza del nesso funzionale in tema di insindacabilità parlamentare costituisca ormai il metodo univoco di giudizio della Corte che, in tempi recentissimi, ha nuovamente posto l'accento in materia.
La sentenza n. 59/2018 ha ad oggetto i fatti avvenuti tra il Sen. Calderoli e l'*ex* Ministro per l'integrazione Kyenge, assimilata ad un orango dal vicepresidente del Senato nel corso di un comizio nella bergamasca. All'interno della vicenda la corte ha nuovamente ribadito che "le opinioni espresse *extra moenia* sono coperte da insindacabilità solo ove assumano una finalità divulgativa dell'attività parlamentare" e la prerogativa dell'insindacabilità "non può essere estesa sino a ricomprendere gli insulti".

Tuttavia, ciò che vale la pena sottolineare è l'atteggiamento adottato dalla Corte nei confronti di una futura eventuale possibilità di sottoporre a sindacabilità le opinioni espresse *intra moenia* qualora siano qualificabili come insulti o epiteti ovvero possano ledere l'onore o il decoro del soggetto interessato dall'opinione.

A tal proposito, a parere dello scrivente, sarebbe opportuno prevedere la sindacabilità delle opinioni solo qualora contestualmente si sancisse la netta distinzione tra ciò che integra un insulto e ciò che può essere ricompreso tra le opinioni legittimamente espresse da un parlamentare nell'esercizio delle proprie funzioni. È evidente come una previsione nel senso della sindacabilità delle opinioni possa facilmente essere lesiva delle attribuzioni delle camere, svuotando di fatto le stesse del proprio potere decisorio in materia – da sempre garantitogli – e rischiando di ledere l'indipendenza della funzione parlamentare.

Ad ogni modo la dottrina del nesso funzionale ad oggi potrebbe lasciare adito a incertezze circa la propria capacità di adattarsi al continuo mutare del contesto e della rappresentanza politica, non dimostrandosi all'altezza di andare pari passo con le costanti trasformazioni sociali e tecnologiche.

Finanche la Corte di Strasburgo, avvicinandosi alla posizione della Corte Costituzionale italiana in materia, ha ritenuto non essere sufficiente un nesso funzionale al fine di poter considerare insindacabile un'opinione, essendo necessario un ulteriore scrutinio circa ragionevolezza dell'insindacabilità.

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