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Evolution of the President of the Council of Ministers role: history, functions, variations and possible developments

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INTRODUCTION

From the striving for greater recognition during the monarchical period, to Mussolini's authoritarian regime, to the most recent attempts of reform, the figure and functions of the President of the Council have always been the subject of intense debate.

The following work, therefore, aims to analyze the figure and role of the President of the Council of Ministers from the time of the Albertine Statute to the present days.

The thesis is structured in four main chapters, each of them focusing on clearly identified issues, thus analyzing transversally the relevant aspects of the fourth highest Office of State.

The first chapter enshrines the historical evolution of the role.

The figure of the President of the Council, in fact, was created during the monarchical period without, however, having a recognition within the Albertine Statute. It was, therefore, an office that already existed during the Kingdom of Sardinia and that was later extended, with the Unification, to the new Kingdom of Italy. In this first phase, the office of President of the Council was entrusted to one of the ministers, usually that of the interior or foreign affairs, who had to gain the confidence of the Chamber of Deputies in order to govern. However, this lack of independence and recognition was felt especially at the end of the liberal period, with attempts to accentuate the autonomy of the government and limit royal interference.

With the March on Rome and Mussolini's seizure of power, all the constitutional balances of the time were swept away. Focal points in the rise were the Acerbo Law, an electoral law that guaranteed Mussolini a majority in Parliament, and the Law n.2263 of 24 December 1925 defining the power and prerogatives of the Head of the Executive.

The new regime that emerged was essentially authoritarian, characterized by repeated and continuous violence against the population

and political opponents. Therefore, the new “Head of the Government Prime Minister Secretary of State”, as he wanted to be called, soon became a *de facto* dictator.

The last part of the first chapter will be devoted to the current characteristics of the President of the Council, as expressed in Title III of the second part of the 1948 Constitution. In fact, after the referendum of the 2nd of June 1946, which decreed the end of the Monarchy, a Constituent Assembly was convened to draft the new Constitution. There were many proposals concerning the form of government and Head of the Executive, however, to prevent a new dictatorial takeover, a constitutional arrangement was chosen whose central organ was Parliament (perfect bicameralism).

Moreover, I will examine the figure of the President of the Council in the European and international context. It will be seen, therefore, how, if on one hand Italy's entry into the European Union has strengthened the role of the Head of Government, on the other it is the same constitutional norms and the pronouncements of the Constitutional Court that envisage for the premier to be the 'representative' of the voice of the government and thus the impossibility of his emancipation.

The second chapter will be devoted to deviations from constitutional dictates.

These include the disproportionate number of government decrees that have characterized Italian lawmaking since the 1970s, and the technocratic governments.

In addition, it will be examined the state of emergency and the one arisen due to the Covid-19 pandemic. It will be seen the centrality of the role and functions of the President of the Council during that period.

The third chapter will, instead, deal with the constitutional reforms attempted since the late 1970s. Article 138, in fact, provides for the possibility of amending the Constitution through an aggravated procedure. This path was followed during the 2001 and 2016 constitutional reforms, which were passed in Parliament and later subject to popular referendum.

In reality, the first proposals for constitution amendments dated back earlier. In fact, already in 1983, the Parliamentary Commission for

Institutional Reforms was established in the Chamber of Deputies and the Senate with the aim of formulating proposals for constitutional reforms, which, however, remained substantially unused.

However, this Commission was reconstituted again in 1993 (the "De Mita-Iotti Bicameral"), and in 1997 (the "D'Alema Bicameral"). Even in the latter two cases, no reforms were implemented.

Finally, as a continuation of the topics discussed in the second and third chapters, I will try to outline some possibilities for the future. It will be examined, in the fourth chapter, the possibility to establish an italian semi-presidentialism. The debate on this topic began as early as the 1980s, it intensified after the Tangentopoli scandal, and it is still a recurring theme today.

CHAPTER I: HISTORIC ANALYSIS

SUMMARY: 1. The Kingdom of Italy. – 2. The rising of Mussolini: Legge Acerbo and Law of December 24, 1925 – 3. The Constitution (1 January 1948) – 3.1. Functions – 3.2. Instruments. – 3.3. Fiduciary relationship between the Government and the Parliament – 3.4. Governmental crisis. – 4. Role inside the European Union. – 5. International Summits: G7 and G20.

1. The Kingdom of Italy

Italy, in the sense of becoming a united country, was established with the law 17th March 1861 n.4761. From that date to today Italy has had different forms of government: a constitutional monarchy, which gradually became a parliamentary monarchy, a dictatorship, and a parliamentary republic.

When the Italian Kingdom was founded in 1861, the Albertine Statute became the first Italian constitution. This Constitution was first granted by King Charles Albert to the Kingdom of Sardinia in 1848 and later extended to the Kingdom of Italy. It was a flexible Constitution, in fact it could be modified by ordinary law, and it was *octroyèe*, bestowed upon the population directly by the King and not created by a constitutional assembly nor deliberated by the parliament.

As written in the second article, Italy had a representative monarchical government with the king participating in the main functions of the State[1]. In fact, the legislative power was collectively exercised by the king and the two Chambers, the Senate and the Deputy Chamber[2], while the executive power belonged exclusively to the Monarch[3].

[1] D. Gallo, *Da sudditi a cittadini. il percorso della democrazia,* Torino, Edizioni Gruppo Abele, 2013, p.31

[2] art 3, Statuto Albertino, March 4, 1848

[3] art 5, Statuto Albertino, March 4, 1848

«*The king nominates all the State Offices: he makes the necessary decrees and regulations for the execution of the laws*»[4], including the designation, and the eventual withdrawal, of the Ministers[5].

Concerning the judicial power, the justice was issued by the King, and the judges, appointed by the Monarch[6], operated in His name[7].

On the other hand, in the Albertine Statute few rights were granted to the "regnicoli": the equality in front of the law ex Article 24, the individual freedom in the Article 25, the freedom of domicile ex Article 27, freedom of the press, the right of ownership ex Article 29, and the right to assemble peacefully and unarmed among others.

All the rights granted were "weak" because they could be modified or removed just with ordinary law[8].

Probably the most important right denied to a large amount of the population was the right to vote. In fact, from 1861 to 1862, the Italians who could exercise active electoral rights, to vote the Deputy Chamber, were just 2% of the population, later extended to 7-8% until 1913[9]. Therefore, that wing of the Parliament was elected by an elite, composed of male citizens over 25 years of age who were able to read and write, and who paid an annual fee of at least 40 lire[10]. The elected ones in 1861, instead, were 85 Princes, Marquises and Duques, 28 high officials, 72 lawyers and 42 university professors[11].

With the law 24th of September 1882, n. 999, the age limit for exercising the right to vote was lowered from 25 to 21, and the annual fee was halved. With this reform, the number of the active electorate changed from 621.896 to 2.017.829[12].

[4] art.5, Statuto Albertino, March 4, 1848

[5] art.65, Statuto Albertino, March 4, 1848

[6] art.69, Statuto Albertino, March 4, 1848

[7] art.68, Statuto Albertino, March 4, 1848

[8] D, Gallo, *op.cit.*, p.32

[9] A. Barbera, C. Fusaro, *Corso di Diritto Pubblico*, Bologna, Il Mulino, 2006, p.280

[10] D. Gallo, *op.cit.*, p.35

[11] Ibid.

[12] Ibid.

After 30 years, the law 30th of June 1912, n. 666, made the number of the electorate body further increasing, from the 8,3% to 23,2% of the population, with the first universal male suffrage.

The requirement to be able to vote was being 30 or more years of age, without considering the census nor the education of the voter[13].

For the males under the age of 30, the requirements were the condition of census, the performance of military service, or the degrees already required previously. The electoral body changed from 3.300.000 to 8.443.205, including 2.500.000 illiterates. The same law also changed the voting system, from uninominal to proportional[14]

Although the reforms to increase the active electorate were made long after the creation of the Kingdom of Italy, the first President of the Council of Minister, Camillo Benso Earl of Cavour, already perceived the importance of the elective Chamber as it represented «the legitimate and regular intervention of the country in the government of its own affairs»[15].

The Senators, instead, were firstly chosen and elected directly by the King within the categories contained in the article 33 of the Statute, and their mandate was *ad vitam*. After a while, however, it was the Government, in the figure of the President of the Council of Ministers, who suggested to the King, and therefore choose, the candidates to nominate, in order to have the persons that they trusted. That mechanism made the prospected equal bicameralism of the Statute vain. In fact, although it was foreseen in the Constitution an equal and differentiate bicameralism, with the two wings of the Parliament having different functions but same rank, the Governments always addressed the elective Chamber in order to obtain political support[16]

In this frame, iconic was the speech of Agostino Depretis in 1876 who said that «the Senate doesn't make the crisis»[17], meaning that just the elective Chamber was entitled to put an end to the Government.

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[13] *Il suffragio universale*, Camera dei Deputati, https://www.camera.it/leg18/512?conoscerelacamera=353

[14] Ibid.

[15] *La legge elettorale*, II, "Il Risorgimento", 19th february 1848, n.46 (*Gli scritti* cit., pp.47-48)

[16] A. Barbera, C. Fusaro, *op,cit.*, p.280

[17] Ibid. p. 484

The figure of the President of the Council of Ministers was modelled on the head of the government in the Kingdom of Sardinia.

In this period the President also held the office of Minister of the Interior, like Giovanni Giolitti, Sydney Sonnino and Antonio Salandra, or Minister of Foreign Affairs like Camillo Benso and Bettino Ricasoli.

During the whole Kingdom, from 1861 to 1946, there had been 30 Presidents of the Council of Ministers and 65 governments. If we take away Benito Mussolini's period in power – since he was more a dictator rather than a president - we can see that in 64 years there have been 64 governments.

This precariousness of the mandate, which is certainly a similarity to the republican era, was mainly due to the scarcity of parties and therefore to the fact that the governments could not rely on a solid majority[18] Moreover, the activity of the President often meant ingratiating the support of the Deputies Chamber, sometimes even by changing from opposition to majority to obtain benefits[19]

In this era, the Presidents - and in general, the Governments - made much recourse to the administrative powers, in order to consolidate their mandate. An example of this mechanism was the enactment, by the Government Lamarmora, of the law 20th May 1865, n. 2245, about the administrative unification of the Kingdom, which many political figures of the time decried as conflicting with Article 55 of the Statute[20]

In addition, in the Albertine Statute just a few norms were dedicated to the Government and the Ministers. In particular, Article 66 specified that Ministers could enter the Parliament without having the right to vote in it. Article 67, on the other hand, sanctioned the ministerial responsibility without specifying whether the government would be held accountable in front of the King, of the Parliament, or both of them[21]. The circumstance that the Constitution mentioned the responsibility of the ministers meant that

[18] Ibid.

[19] Ibid.

[20] C. Ghisalberti, *Storia Costituzionale d'Italia 1848/1994,* Bari, Laterza, 2002, p.114

[21] F. Modugno, *Diritto Pubblico,* Torino, Giappichelli, 2015, p. 363

it was recognized a juridical power to the Government. They should not be considered as officers of the King.

Furthermore, in the same Article was written that all «*the Laws and the Governmental Acts would not entry into force if not equipped with the minister's signature*[22]».

From the earliest stages of the Kingdom, it was certain that the Government would endeavour to obtain the Chamber of Deputies' trust, in order to remain in power. The Parliament's confidence came into life spontaneously already at the beginning of the Kingdom of Sardinia: probably the first trust vote to a government took place on the 30th of July 1848[23].

In these circumstances, although it was clear that the fiduciary relationship between the elective Chamber and the Government was a necessity, we could not define the form of government as a parliamentary monarchy. In fact, the Crown was strong enough to impose its will over the other bodies. It is enough to think that sometimes it was the King who chaired the government sessions. He was also very much involved in foreign affairs, without forgetting the Monarch was the commander of the armed forces.

At a later stage, instead, the broadening of the electorate and the relationship of trust between the Chamber of Deputies and the Ministers determined a gradual shift in the form of government. From a purely constitutional monarchy, the Kingdom of Italy became a parliamentary monarchy, with the role of the President of the Council of Ministers gaining more and more influence.

The first steps in this direction were made by Ricasoli in 1867 and by Depretis in 1876, who both tried to downsize the interference of the Crown[24] by accentuating the autonomy of the Government, and reinforcing the juridic and constitutional basis of the figure[25]. With their decrees they also

[22] art.67, Statuto Albertino, March 4, 1848

[23] R. Ferrari Zumbini, *Tra norma e vita: come si forma una Costituzione tra diritto e sentire comune*, Roma, Luiss University Press, 2019, p.169

[24] F. Modugno, *Diritto Pubblico*, Torino, Giappichelli, 2015, p. 364

[25] C. Ghisalberti, *Storia Costituzionale d'Italia 1848/1994,* Bari, Laterza, 2002, p.167-168

aimed at reaching a constitutional primacy over the other ministers. In other words, they no longer wanted to be considered as *primus inter pares*[26].

Both attempts failed, clearly hindered by the rest of the ministers, who did not want to be regarded as subordinate to the President of the Council.

Other presidents took recourse to other ways in reinforcing their figures. In particular, we should mention the peculiar method of informing the Parliament of the Government's program during the Crispi first mandate in 1887.

In fact, instead of personally delivering himself the speech, as his the predecessors had done, he preferred to let the King speak in front of the Chambers about the political direction that was to be undertaken by the Government[27]. Crispi hoped to surround his mandate with the major prestige by involving the highest office of the State. Successively, he searched for the support of the King on many other occasions as an attempt to centralize the power and reduce the prerogatives of the Parliament[28].

To conclude, the Government had also an extensive power over the judiciary, as Giovanni Giolitti described in a speech in 1897: «the Government disposes, freely and without a guarantee, of the praetors. Magistrates are all appointed by the Government; their promotions depend entirely on the blessing of the Government; the Government can deny them any transfer; it is the Government that determines the functions to which each magistrate is to be assigned[29]».

We can say that the Statute, in the Articles 68 and 69, did not grant the full independence of the judiciary. In particular, the external independence, which is the ability of the judicial authority to exercise freely their activities without any pression, was not taking place, as their careers were set to be decided by the Government.

[26] Ibid.
[27] Ibid. p. p. 208-209
[28] Ibid.
[29] G. Giolitti, *Discorsi extraparlamentari*, Torino, Einaudi, 1952, p.195

After a few years, a change happened when the General Association of magistrates was created, and on the Congress of the 16th of March 1919, the necessity of a new judicial system and the creation of a Superior Council of the Judiciary, were placed on the agenda[30]. The purpose was to create an organ able to govern over the careers of the judges.

[30] D. Gallo, *op.cit.*, p.39

2. The rising of Mussolini: Legge Acerbo and Law of December 24, 1925

Benito Mussolini was a political figure who rose to fame during the second decade of the 20th century. During this period, Italy was in deep crisis due to World War I. There were many riots and agitations, aimed especially at the demand for the promised land reform.

It is within this context that Benito Mussolini became a strong figure.

On the 23rd of March 1919 the "Fasci di combattimento" was created. It was a political movement established by Mussolini, organized in armed squads whose purpose was to raise uprisings especially in rural areas against parties and cooperatives.

On the same day, it was exposed the so called "Programma di San Sepolcro", the political program which included the lowering of the age limit to vote, the abolition of the Senate, the minimum salary, the enactment of a law providing for a maximum 8-hour workday and the creation of an extraordinary progressive capital tax. Furthermore, a few programmatic points were dedicated also to the establishment of a national militia and «a national foreign policy intended to enhance, in the peaceful competitions of civilization, the Italian nation in the world[31]».

This political movement, which in 1921 turned into the Fascist National Party, was supported - also financially - by some new social groups, like the agrarians.

On the 15th of April 1919, a few squadrists assaulted the headquarter of the journal "Avanti!". This episode has remained in history as an emblem of the violence perpetrated by the fascists, with 4 dead and 39 injured, as well as the inability of the State to stem fascist subversions. In fact, the people who participated in the assault were categorized as "volunteer policemen" and remained substantially unpunished[32].

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[31] Fasci italiani di combattimento, *Manifesto dei Fasci italiani di combattimento, "Il Popolo d'Italia*", 6 giugno 1919

[32] D. Gallo, *op.cit.*, p. 56

Moreover, the connivance of the National Institutions and the supply of weapons by the police and the royal army was reported in some similar events.

In the 1919 elections, after the Law 15th of August, n.1401, an increase in the number of voters and the creation of new political parties was registered. In particular, the Socialist Party gained 1.834.792 votes and 156 seats in the Deputy Chamber, with a raise of 104 seats compared with the 1913 election[33]. Also, the newly formed Popular Party made an *exploit* by receiving 1.167.354 votes and 100 seats[34]. In decrease, instead, were the liberals, who ran the election in cartel with the democrats and the radicals.

It is, however, in the 1921 election that we see for the first time the entering of the Fascists, including Mussolini, in the Chamber of Deputies, with the gain of 39 seats. The Socialists obtained 123 seats, against the 108 of the Popular Party, confirming itself as the first party in Italy[35].

On the night between the 27th and the 28th of October 1922, a group of 25-30.000 militant, led by Mussolini, descended on Rome to take the power, in what it will then go down in history as the "Marcia di Roma", a veritable *coup d'etat.*

On the next day, the President of the Council Facta had the state of siege decreed by the Council of Ministers. He then addressed the King Vittorio Emanuele III, who instead preferred not to enact on it and to force the resignation of Facta.

The same day, the Monarch gave a mandate to Mussolini to form the Government.

The King conceded the power to a man who was not representing the majority of the Country, as his political party only obtained a minority of the seats of the elective Chamber. It was an act of "capitulation to violence"[36].

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[33] *Statistica delle elezioni generali politiche per la XXV legislatura*, Roma, 1920

[34] Ibid.

[35] *Statistica delle elezioni generali politiche per la XXVI legislatura*, Roma, 1924

[36] D. Gallo, *op.cit.*, p. 58.

In this event there was a visible breach of the custom of choosing the Head of the Government based on the result of the elections.

The first Government of Mussolini was in coalition with the Nationalists, Liberals and Demo-Liberals. The elective Chamber voted confidence with 306 in favour and 116 against.

Already in his first speech in front of the Parliament, on the 16th of November 1922, Mussolini declared his intentions to change the current electoral system and to call for a new election. From his words, it could be perceived a clear aversion and the confidence of being able to transform the representative parliamentary system at any time he wished to: «*potevo fare di questa Aula sorda e grigia un bivacco di manipoli: potevo sprangare il Parlamento e costituire un Governo esclusivamente di fascisti. Potevo: ma non ho, almeno in questo primo tempo, voluto*[37]».

1923 was a turning point for Mussolini. He knew that, in order to remain in power for a long period, he needed to control all the main national institutions.

He needed State Bodies, composed of people close to him, that could be easily controlled and manipulated. In fact, he established the "Voluntary Militia for National Security", the so called "Blackshirts", institutionalizing the fascist "army" created four years before.

He also established the "Great Council of Fascism", which shortly became the organ dictating the political strategy of Italy instead of the customary national institutions. And finally, a new electoral law, that could allow him to have an Elective Chamber with a fascist majority.

The Law 18th of November 1923, n.2444, also called "Legge Acerbo" followed the normal procedure for the creation of a law, although Mussolini hoped firstly to obtain a blanked proxy and secondly to enact the reform by royal decree. He received for both requests a rejection from the King.

The program of the reform was expounded by the Secretary of the National Fascist Party Bianchi in an interview for the journal "Popolo

[37] *Discorso B. Mussolini,* Camera dei Deputati, Roma, 16 Novembre 1922

d'Italia" on the 13th of November 1922: «*majoritarian system with two thirds of the seats to the list that will have the majority*[38]».

The other lists, instead, should follow the proportionate system for the remaining seats in the Parliament.

The iter for the approval was not easy, since part of the Government - in particular the Popular Party - was against the returning of the uninominal system. On the contrary, there were some fascists, as for example Farinacci, who wanted to eliminate the part of the reform concerning the proportionate system.

In order to seek an agreement between the factions, the "Grand Council of Fascism" nominated a commission to define the contents of the reform. At the end, with 21 in favour, 2 against and 2 abstaining, the commission approved the electoral law with all the characteristics exposed by Bianchi[39].

This created a break with the Popular Party, who from then on will no longer be part of the Government.

The task of drafting the bill was given to Giacomo Acerbo, who completed it by June 1923 and submitted to the Council of Ministers. The latter approved the draft unanimously[40].

At the end, the text presented to the Deputy Chamber on the 9th of June 1923 had two substantial novelties compared to the proposals so far: two different mechanisms for counting votes, and the quorum to gain the majority bonus.

Regarding the first aspect, it was expected a calculation of votes in a single national constituency for the party that arrived first, while for the minority the calculation would have been regionally. Moreover, the quorum to receive the bonus was set at 25% of the votes, with a clear disproportion between the number of votes requested and the bonus itself.

[38] G. Sabbatucci, *Il Parlamento italiano: 1861-1988*, Milano, Nuova CEI, 1988-1991, v.11, p. 60

[39] Ibid. p. 60

[40] Ibid.

In the same period, it was created inside the Elective Chamber the "Commission of 18", which included representatives of the parliamentary groups, prominent parliamentarians and four former Presidents of the Council of Ministers (Giolitti, Orlando, Salandra and Bonomi)[41].

On one side we could find the Left and the Populars, in favour of the proportional system; on the other the Fascists, Conservators and Demo-Liberals, whose purpose was to get the reform text approved without changes being made.

In the end, the bill passed with small amendments, but the difficult part was yet to come. In fact, without the support of the Popular Party, who were the second party inside the Chamber and had been dismissed by the Government, the approval of the reform in the courtroom was not easily reacheable.

Fundamental, at this juncture, was Mussolini's skill as an orator.

He made a speech before the vote for the order of the day Larussa, that made the Popular Party change their minds.

The vote of confidence in the Government was 303 in favour, 140 against and 7 abstained; while the vote for the passage of articles was 235 in favour, 139 against and 77 abstaining[42]. Lastly, with the final vote in the Chamber, the Law passed, with 223 votes in favour[43], and from that moment on all the preconditions for the establishment of the dictatorship were fulfilled. The approval from the Senate was a mere formality.

The 1924 Election was a success for the Fascists, as their so-called "Listone" won 375 seats and took more than 64% of the votes[44]. In comparison, the second Party per number of seats won was the Popular Party with just 39, which represented the 9% of the total votes.

This striking win was also due to a campaign full of violence and threats carried out by fascists. The intimidations were mainly directed towards individuals, in many cases located in the suburbs.

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[41] G. Sabbatucci, *op.cit.*, p. 62

[42] G. Sabbatucci, *op.cit.*, p. 67

[43] Ibid. p. 68

[44] Ibid. p. 75

Two famous examples of personal aggressions perpetrated by the fascists are the one involving the liberal Giovanni Amendola, who was bludgeoned and wounded in the head on the 26th of December 1923, and the other regarding Antonio Piccinini, who was taken from his house and brutally killed on the 28February 1924. Mussolini denied being the instigator of the murders of the two politicians, but it was clear that these acts of violence were a mode of behavior since the creation of the "Fasci di combattimento".

He, in order to consolidate his power as head of the Government, was ready to use any means, legal or illegal, be it an electoral law or the physical elimination of opponents.

With the rise of Mussolini came the definitive end of the liberal State, a State where it was possible to run for public offices freely, without repercussions. A State that guaranteed the freedom of expression of its citizens.

On the 30 May 1924 Giacomo Matteotti, the Secretary of the Socialist Party, gave an iconic speech inside the Chamber of Deputies to denounce the electoral fraud and the violence perpetrated by the fascists. He also called for the invalidation of the election.

He later said to his colleagues: *«Io, il mio discorso l'ho fatto. Ora voi preparate il discorso funebre per me*[45]*»*. He was murdered on the 10th of June 1924 by eight men of the Fascist Police.

Another turning point, after the "Legge Acerbo", was the speech made by Mussolini on the 3 January 1925, in which he took the responsibility for the Matteotti murder, after denying it for many months.

Before the Chamber of Deputies, he declared: «*Ebbene, dichiaro qui, al cospetto di questa Assemblea e al cospetto di tutto il popolo italiano, che io assumo, io solo, la responsabilità politica, morale, storica di tutto quanto è avvenuto. Se le frasi più o meno storpiate bastano per impiccare un uomo, fuori il palo e fuori la corda! Se il fascismo non è stato che olio di ricino e manganello, e non invece una passione superba della migliore gioventù*

[45] *"Il Delitto Matteotti, il punto di non ritorno",* Treccani, 12 Giugno 2017, Il delitto Matteotti, il punto di non ritorno | Cultura, ATLANTE | Treccani, il portale del sapere

italiana, a me la colpa! Se il fascismo è stato un'associazione a delinquere, io sono il capo di questa associazione a delinquere!»[46]

This address came after the Matteotti murder that caused enormous discontent among the Italians and put the regime in trouble, not only towards its citizens, but also with other countries.

This is the day when the dictatorship is deemed to have begun.

In fact, from this moment on, Mussolini took legislative and administrative measures, the so called "Leggi fascistissime", typical of authoritarian regimes.

The first was the Law 24th of December 1925, n.2263 regarding the powers and prerogatives of the President of the Council, whose appellation changed to "Head of the Government Prime Minister Secretary of State".

From *primus inter pares* during the Kingdom, despite having a privileged role in policymaking and interactions with the King and the Parliament, the figure of the President became superordinate to the other Ministers.

In derogation of Article n. 5 of the Albertine Statute, the first Article of the Law stated that the executive power was exercised by the King through his Government. The Prime Minister was accountable only to the King for his political address, while the Ministers were responsible also to the Head of the Government.

Within this framework, the liability of Mussolini and his Ministers against the Parliament was excluded, therefore eliminating the institution of parliamentary confidence.

According to Article 2, the Prime Minister was appointed and dismissed by the King, while the Ministers and the Undersecretaries of State, as well as their number and prerogatives, were nominated by the Monarch on a proposal by the Head of the Government. Furthermore, as stated in Article 4, the direction of one or more ministries may be assumed by the Prime Minister by royal decree.

[46] Discorso di B Mussolini, Camera dei Deputati, Roma, 3 gennaio 1925

The two key Articles of the Law, however, are the number 6 and 9. In fact, from this moment on anyone who, with words or acts, offended the Prime Minister could be punished with imprisonment up to thirty months.

This norm has been interpreted very broadly by the fascists, to the point of covering any act not sympathetic to the regime, and served as a legal basis for imprisoning the opponents or simply those who didn't conform to the new laws.

Interesting to mention is the prospect from those who were accused: the Government was the lawmaker, since the Parliament had been completely emptied of its functions, and the political guidance of the State, but on the same time, also the judiciary was subjugated to the executive power.

Therefore, the citizens could not rely on an independent process and once they were accused, it was difficult for them to be exonerated from the charges.

In addition, as it was stated in Article 6, the Prime Minister had to confirm the agenda of both Chambers. He could, therefore, remove some items that, in his opinion, didn't fall within the prerogatives of the Parliament. With this norm, Mussolini had the power to decide what the Parliament would dwell on and debate.

Moreover, in the same Article it was provided that a bill, rejected by either Chamber, could be put to a vote, without prior discussion, when three months had passed, or could be transmitted in any case to the other Chamber, and be examined and debated by it.

If the Government had presented amendments to the proposal, together with the request for a renewal of a vote, the examination and the discussion of the bill is limited to modified issues.

The same mechanism was used when the bill had been accepted by one Chamber, while the other proposed amendments. In any of these cases, the Law required a secret ballot.

Lastly, the Head of the Government sits on the Council for the Protection of the Royal Family and acts as notary for the Crown[47].

This law was only the first of a long series. In fact, on the same day it followed the Law 24th of December 1925, n.2300, that provided the power to the Government to dispense any civil servant that «*per ragioni di manifestazioni compiute in ufficio o fuori di ufficio, non diano piena garanzia di un fedele adempimento dei loro doveri o si pongano in condizioni di incompatibilità con le generali direttive politiche del Governo*»[48].

Nearly one year later, with the Article 4 of the Law of the 25 November 1926, n.2008, which is defined as "provisions for the defense of the State", Mussolini provided again a legal basis for punishing his opponents, this time with imprisonment or perpetual disqualification from public office for those whose political or intellectual activities did not conform with the regime.

In the same Law, the Article n.1 stated: «*Chiunque commette un fatto diretto contro la vita, l'integrità o la libertà personale del Re o del Reggente è punito con la morte. La stessa pena si applica, se il fatto sia diretto contro la vita, l'integrità o la libertà personale della Regina, del Principe ereditario o del Capo del Governo*»[49].

[47] Art. 5, Law 24th of December 1925, n.2263

[48] GU n. 2, 4 Gennaio 1926, p.11

[49] GU n.281, 6 Dicembre 1926, p. 5314

3. The Italian constitution

3.1. Historical background

1943 was the year in which the fall of fascism began.

On the 10th of July the "Allies" landed in Italy and in a few months they "conquered" the southern part of the peninsula. Mussolini refused to come to terms with the Anglo-Americans and to conclude peace agreements. At this point, the King and some fascist hierarchs, including the son-in-law of Mussolini Galeazzo Ciano, decided to overthrow the regime.

On the 25th of July the Great Council of Fascism decided to depose the Duce, and, on the same day, the Monarch had him arrested. In his place Pietro Badoglio was nominated.

Shortly after, it followed the closing of the XXX legislature and the dissolution of the Chamber of Fascists and Corporations, as well as the Grand Council of Fascism. In September, the King and the Prime Minister fled to Apulia, a land under Anglo-American rule and declared war on Germany, which was defined as a co-belligerent State.

Contextually, Mussolini was freed by the Nazis, and, with their support, he founded the Italian Social Republic, also called the Republic of Salò, which ruled over the territories of northern and central Italy.

With the fall of the authoritarian regime, the public debate on the monarch's responsibility for the rise of Mussolini began. In a desperate move to save the monarchy, King Vittorio Emanuele III appointed his son Umberto as Lieutenant General of the Kingdom in 1944, an institutional figure not provided in the Albertine Statute.

Simultaneously, the National Liberation Committee, an aggregation of parties and antifascist movements, was founded and from this moment on the Resistance began.

It was that Committee that acted as a representative body at a time when it was not possible to hold elections to form a parliament.

Moreover, the Government established on the 18th of June 1944 was made up of Ministers nominated by six parties of the NLC, headed by Ivanoe Bonomi. It was the Government that exercised, through measures with the force of law, also the legislative power, while the war was still on[50]. It was then the Lieutenant General who had the duty to promulgate them.

The 25th of April 1945 was the day of the general insurrection of the partisans' groups in all territories still occupied by the Nazi-Fascists and still now it represents the anniversary of the Liberation.

After two days Mussolini was captured and executed. The surrender was officially signed on the 7th of May 1945 by the Germans.

Already in 1944 came the idea of establishing a Constituent Assembly. In fact, in the Article 1 of the Lieutenancy Decree of the 25th of June, n. 151 it was specified that: «*Dopo la liberazione del territorio nazionale, le forme istituzionali saranno scelte dal popolo italiano che a tal fine eleggera', a suffragio universale diretto e segreto, una Assemblea Costituente per deliberare la nuova costituzione della Stato*»[51].

Later, in 1945, the Minister for the Constituency was created by the Parri Government, in order to speed up the convocation of the Constitutional Assembly and the creation of the Constitution.

The electoral norms for voting the Deputies of the Constituent Assembly could be found in the Law of the 10th of March 1946, n.74: «*L'Assemblea Costituente è eletta a suffragio universale con voto diretto, libero e segreto, attribuito a liste di candidate concorrenti. La rappresentanza è proporzionale*»[52]

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[50] *Assemblea Costituente (02.06.1946 – 07.05.1948),* Archivio storico della Camera dei Deputati, Assemblea Costituente - L'Archivio storico della Camera dei deputati

[51] Art.1, Decreto luogotenenziale 25 luglio 1944

[52] Ibid.

Moreover, with the Lieutenancy Decree 16th of March 1946, n.98, the citizens were also called to vote for the institutional form of the State.

In particular, it was announced that the Italians, through a referendum, had to decide whether to keep the monarchy or to permanently dismiss the King, choosing to become a republic.

The King Vittorio Emanuele III, at this point, implemented a strategic manoeuvre in order to encourage the votes for the monarchy: his abdication in favour of his son, Umberto II.

The same Decree stated that, if the majority of the votes were for the republic, then the first act of the new Assembly would have been the selection of a provisional Head of State, which indeed resulted in the election of Enrico De Nicola in 1946.

Furthermore, the main functions of the Assembly were the drafting of the new Constitution, as well as voting confidence in the Governments, ratifying international treaties and approving laws on constitutional matters and electoral laws[53].

The Government was formally the assignee of the legislative function during this period; however it preferred to refer the most important acts to the Assembly.

During the referendum of the 2nd of June 1946, as we know, the Republic won, with 12.717.923 votes against the 10.719.284 for the monarchy[54].

Women voted on both occasions - the referendum and the election of the Constituent Assembly - since their right was finally provided in the Lieutenancy Decree of the 1st of February 1945, n.23.

The Constituent Assembly functioned from the 25th of June 1946 to the 31st of January 1948, thanks to the extensions granted to it. The Constitution, instead, was approved on the 22nd of December 1947 and came into force on the 1st of January 1948.

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[53] *Assemblea Costituente (02.06.1946 – 07.05.1948),* Archivio storico della Camera dei Deputati, Assemblea Costituente - L'Archivio storico della Camera dei deputati

[54] D. Gallo, *op.cit.*, p. 119

With the creation of a new Constitution, the political representatives of the time moved as far away as possible from the ideologies of the previous two decades: the basis was the separation of powers as enshrined by Montesquieu.

Their goal was to establish a caesura between Mussolini's period and the future, as well as to ensure that there would no longer be a centralization of power in the hand of a President.

In order to do so, the authors created a document that could not be easily changed, hence the rigidity of our Constitutional Charter, and with a strong democratic content.

Fascist norms were completely overturned: when the freedom of press was abolished, with the Law of the 31st of December 1925 n.2307, Article 21 was created, when the one-party system was enshrined, the constitution gave life to Article 49.

For what concerns the norms over the Government, there has been a debate on whether the principle of collegiality of the Body should be preferred, or the monocratic principle, whereby the political responsibility for the entire government should lie with the President.

As we know, during the statutory era, the principle of collegiality was used, and very often the presidents "jostled" for formal recognition of their office. Clearly, during the Fascist Era, Mussolini had made sure to set himself up as superior to the other ministers, with the Rocco Law of 1925, thus preferring the monocratic principle.

Eventually they opted for an intermediate solution. In fact, Article 92 refers to three organs: the President of the Council, the Ministers and the Council of Ministers.

3.2. Functions

The functions of the Head of the Government are stated in the Article 95 of the Constitution. He controls and is accountable for the Government's overall policy. He promotes and coordinates the actions of Ministers while maintaining the coherence of the political and administrative orientation.

The President therefore carries out administrative and normative functions as well as being the political guidance of our State. However, in any of these cases he is entitled solely to perform it. In fact, the Constitution does not provide any “reservation”.

The political guidance, in particular, consists of 3 stages: the goal setting, which begins with the programmatic speech before the Chambers followed by the vote of confidence approving the Government's orientation; the means-finding; and the final implementation.

The goals are realized through acts of political guidance. The most relevant aspects of a government’s policy are definitely economic and financial.

Every year, the Executive has the duty to adopt the budget maneuver, by which state resources are allocated. The Government also determines the direction of foreign affairs, as well as the military and defense policy.

Concerning the final stage, the implementation of measures is devolved to the central and peripheral administrative organization of the State.

As we know, Ministers are not only part of the Council, and thus helping determine Government policies, but are located at the apex of the administrations.

In fact, each Minister is in charge of directing an administrative sector and, consequently, implementing in it the policy direction of the Executive.

Therefore, the Government also holds administrative functions, which, however, have experienced a downsizing caused firstly by the reforms of the 1990s that increased the autonomy of public management, as

well as by the devolution of these functions to territorial autonomies, and finally by the creation of new administrative bodies detached from ministries, the so-called new administrations.

The normative function, instead, is regulated by Articles 76 and 77 of the Constitution.

As will be seen in the following paragraph, a clear distinction between powers is delineated in the Constitutional Charter, resulting in the Government being able to enact legislative instruments only with a parliamentary delegation.

Furthermore, the third paragraph of the Article 95 states that the organization and the attributions of the Presidency are shaped by the law.

The implementation of this Article did not occur until Law 400/88, 40 years after the creation of the Constitution.

The Government De Mita, finally, made a step forward on the establishment of proper norms regarding the Office of the President, which, until then, was still based on the "Zanardelli Decree" of 1901.

3.3. Instruments

The Article 70 of the Italian Constitution enshrines the general rule of the belonging of legislative power to the Parliament. The exception is the power attributed to the Government to carry out acts having the force of an ordinary law instead of the Parliament.

We can refer to the Articles 76 and 77 of the Constitution. Those norms are the foundation for the recourse of decree-laws and legislative decrees, certainly two of the most widely used legislative instruments.

In particular, in our legal system the governmental acts having force of law have to be correlated to an ordinary law legitimizing them.

In the case of a legislative decree, that law must be prior, must contain guidelines dictated by the Chambers, and takes the form of a delegation of authority.

The delegation law must be approved by the Plenary Assembly of both Chambers, and it should contain, under penalty of invalidity of the act, the objects, the deadline for exercising it and the principles and criteria that must be respected[55].

Moreover, such an act can be revoked by the Parliament before the issuance of the legislative decree, either with its abrogation or by passing laws regulating the same subject[56].

Once the delegation law is issued, the Government has the power, following the limits set by the legislator, to create an act with force of law: the so-called, legislative decree.

Needless to say, the latter must then be enacted by the President of the Republic and is subject to the validity of the delegation of authority.

Finally, on that matter, under Article 14 of Law 400/1988, where the delegation law refers to a plurality of defined objects, the Government may regulate them by several successive legislative decrees.

Decree laws, on the other hand, precisely because they are dictated by "extraordinary cases of necessity and urgency," do not need a previous law, but a subsequent one that ratifies and crystallizes their effects.

The conversion law, according to Article 77 of the Constitution, must be issued, under penalty of ineffectiveness, within 60 days from the publication of the decree law.

Moreover, the Government must present the decree laws on the same day of its creation to the Chambers, which must meet within 5 days to ratify it.

According to article 15 of law 400/1988, all provisions of the decree law must be inspired by a unified guiding principle. As later confirmed by the Constitutional Court in ruling no. 22/2012, the entire content must be

[55] Art.76, Italian Constitution, 1948
[56] F. Modugno, *op.cit.*, p.139

related to the specific urgent case that prompted the government to make use of this instrument.

The main characteristic of this instrument, and the *conditio sine qua non*, therefore, is the circumstance of urgency and necessity, thus requiring the enactment of a measure.

A necessary consequence of this is the categorization of the decree-law among the exceptional and extraordinary measures, which, as such, should therefore not be subject to wide use. As can be seen in the next chapter, from the 1970s it has been increasingly used, thus becoming an ordinary tool of regulation.

Other governmental instruments of the primary level in the hierarchy of sources are the acts adopted in case of war and the legislative decrees implementing special Statutes.

As for the former, these are grounded in Article 78 of the Constitution, which provides that the Parliament shall decide on a state of war and grant the government the necessary powers[57].

The Article 78 of the Constitution is of vital importance, because while the declaration of the state of war legitimizes the suspension of the freedoms and rights enshrined in our Constitutional Charter, the latter also takes care to provide that is the Parliament to confer powers on the Government.

This article, therefore, specifies once again the supremacy of the legislative body over the executive[58].

In addition, the nature of these acts is debated; while some doctrine traces them to legislative decrees, issued after a delegation from the Parliament, there are, however, those who believe that they can be assimilated to decree-laws[59], precisely because of the circumstances of necessity and urgency that characterizes them.

Concerning the legislative decrees implementing Statutes of the Regions with special autonomy, the delegation to the Government to

[57] Art 78, Italian Constitution, 1948

[58] F. Modugno, *op.cit.*, p.154

[59] Ibid.

regulate the matter is provided already by the Constitution and therefore is permanent.

Unlike ordinary laws or other measures equated to them, the legislative decrees implementing Statutes are unable to amend, repeal and derogate acts of the same rank, except in cases expressly provided for, and reserved for them.

Under penalty of illegitimacy, such implementing decrees must necessarily be linked to statutory provisions.

Moreover, according to Constitutional Court ruling 7/1977, if Statutes are amended or replaced with new ones, the implementing decrees will become invalid only if they conflict with the new rules or are not incorporated into the new Statute. If there is no conflict, the norms will still be valid and effective.

Regarding the secondary level of sources, the Government can apply the so-called Governmental Regulations. From a formal standpoint, these are administrative acts, but are also able to produce objective law, as enunciated in the Article 14 of the Decree of the President of the Republic 24th of November 1971, n.1199.

This type of measure has raised not a few problems with regard to the review of legitimacy. In fact, being administrative acts, these can only be annulled in case of violation of the law by an administrative court, while the ordinary court can only disapply it *inter-partes*. The Constitutional Court also lacks the authority to annul it; instead, it may only examine whether the rule of law that such a regulation has been authorized by and is lawfully based on is constitutional.

Furthermore, these acts are classified in the "secondary level" because the Government is not entitled to carry out the legislative function independently: for that, there is Parliament.

In fact, as explained in the previous lines, the governmental instruments classified in the primary level are based either on a proxy law, as the Legislative Decrees, or a subsequent conversion made by the Parliament.

Additionally, with the reform of Title V of the Constitution, the Article 117, paragraph 6, stipulates that the Government can regulate only those matters where the State has exclusive legislative power, leaving the other topics to be decided by the Regions.

The governmental regulations can be of different types depending on their intended purpose.

There are the executive ones that perform primarily an "interpretative" function of the laws, national or communitarian, to which they refer.

There are also regulations, the so-called independent regulations, that intervene where there is a gap in the legal system. Nevertheless, there is a prohibition to provide by such an instrument matters covered by reservation of law, whether absolute or relative.

As a result, where the legislator is not required by the constitution to act, the issue may also be addressed by regulation.

If a presumption of compulsory regulatory competence of the Parliament would be established in the future, the prerequisite for issuing such measures would cease to exist[60].

The "regulation in delegification", which is probably the most controversial instrument, is disciplined by Article 17 paragraph 2 of Law 400/88 which states that regulations are issued, by Decree of the President of the Republic, for "*the discipline of matters, not covered by the absolute reservation of law, for which the laws determine the general rules governing the matter and provide for the repeal of existing rules*.[61]" A prior deliberation by the Council of Ministers, and a consultation with the Council of State and the parliamentary committees competent in the matter, is required.

Thus, such regulations may be issued only upon the enactment of a law authorizing the Government to exercise regulatory power over such

[60] F. Modugno, *op.cit.*, p.187

[61] Art.17, par. 2, Law 400/88.

matters, establishing the general rules governing the subject and providing for the repeal of existing rules.

In the extract it is understood how the only matters that the subjects of such regulations can be the ones not covered by the absolute reservation of law. Likewise, it is understood how through this rule a transfer of regulatory power from Parliament to the Government occurs.

In fact, the Legislator not only authorizes the executive to issue new general rules, but also the abrogation of existing primary norms by a secondary regulation.

Moreover, Article 17 paragraph 3 of Law 400/88 refers also to another type of regulations: the ministerial and inter-ministerial regulations.

Such measures shall be taken for matters in which the law confers jurisdiction upon a minister or authorities subordinate to him. They need to be communicated to the President of the Council and they may not contain rules contrary to government regulations.

The category of ministerial regulations includes the decrees of the President of the Council. In the next chapter I will expound in more detail the decree of the state of emergency and on the instruments adopted to curb the Covid-19 pandemic.

For now, I will just mention briefly the characterizing elements of this instrument and the controversies surrounding it.

The decrees of the President of the Council became particularly famous during the 2020 Coronavirus pandemic, since the provisions made to contain its spread, and rules of conduct for citizens were implemented with this instrument.

As written in the sentence 8/1956 of the Constitutional Court, the decrees of the President are compatible with the Constitution, but they need to have a time-limited effectiveness and they must be well motivated.

The main feature that made these legal tools perfect for the urgent situation was their immediate effectiveness.

It was necessary in that time to take quick decisions to curb the increase in Covid-19 cases. Nonetheless, such frequent use in a narrow timeframe has aroused considerable controversy.

There has been debate over the legitimacy of such instruments to restrict constitutionally guaranteed rights of citizens so drastically.

In that period the Italians experienced, for example, a limitation in the freedom of movement, a constitutionally recognized right, caused by secondary norms.

Concluding this section on the legal tools that can be used by the President of the Council, we must certainly mention the regulations implementing EU directives.

They are based on Article 35 of law no. 234/2012 that states in the first paragraph: *«Nelle materie di cui all'articolo 117, secondo comma, della Costituzione, già disciplinate con legge, ma non coperte da riserva assoluta di legge, le direttive dell'Unione europea possono essere recepite mediante regolamento se così dispone la legge di delegazione europea»*[62].

The matters to which the law refers are those of exclusive state legislation. The Government shall present to the Parliament a list of the directives it requests approval for the transposition.

Moreover, the same Article, at paragraph 3, explains that ministerial regulations can, just in matters where the State has exclusive legislation and whenever there is not an exclusive reservation of law, be used to transpose EU directives.

However, in this case, there should not be a previous law or regulation implementing EU directives already disciplining the matter.

3.4 Fiduciary relationship between the Government and the Parliament

The fiduciary relationship between the Government and the Parliament dates back to the Kingdom of Sardinia. In fact, the first case of

[62] Art.35, par. 1, Law n.234/2012

vote of confidence occurred in the Senate of the Kingdom on July 30, 1848, for the President Gabrio Casati[63].

The subsequent Government, headed by Alfieri, delivered his policy address in the Senate, which was followed by a debate. In that context there was again a vote[64].

On the same period, while the Albertine Statute was in effect, on the 5th of July 1848, happened the first case of parliamentary confidence granted *in itinere.* In particular, the Minister Sclopis put a "question of the cabinet" on an Article, which was later amended, therefore the Government resigned[65]. That case signed the first parliamentary crisis that occured within the Chamber [66].

Moreover, there has been cases of confidence to a single Minister, in particular, we can mention, the one to the Minister of Finance Revel on the 26th of October 1848[67].

From the Kingdom of Italy to our days, the vote of confidence has become a constant practice for the new Governments. In particular, before receiving the vote it is customary to present the manifesto speech in front of the Parliament.

Clearly, in the early stages of the Kingdom of Italy, it was the Chamber of Deputies that corresponded the vote, precisely because it was elected by the people, while later on, during the Republican Era, it became mandatory to establish a fiduciary relationship also with the Senate.

This 'approval' given by the Chamber to the Government also sanctions the transition from a constitutional to a parliamentary Monarchy. In fact, in the Albertine Statute, ex Article 65, the appointment of the Government by the King was foreseen.

In addition, article 67 specified that the Ministers were responsible, but without stating to whom.

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[63] R. Ferrari Zumbini, *op.cit.*, p.226

[64] Ibid.

[65] R. Ferrari Zumbini, *op.cit*, p.231

[66] Ibid.

[67] Ibid. p. 23

The responsibility of the Ministers to the King was certain, and subsequently, using the established practice of the vote of confidence in the House, we can assume, also to the Elective Chamber.

Another important aspect mentioned in the same Article was the ministerial countersignature, as a way to attribute the responsibility of every act to a Minister, and, since then, continued during the Republican era.

Moreover, the Article 89 of the Italian Constitution specifies the need for the acts adopted by the President of the Republic, and proposed by Ministers or the Prime Minister, to be countersigned.

In the Italian Constitution, instead, the fiduciary relationship is enshrined in the Article 94. It is envisaged a prior investiture vote required from both Chambers.

Therefore, within ten days from its formation, the Government shall appear in front of the Parliament. The vote is taken by roll call and a simple majority of those present is sufficient to pass the motion of confidence.

The confidence can also be withdrawn by a motion that must be signed by at least one-tenth of the members of the House. The mistrust invests the entire Government and not the single Ministers as in other foreign constitutional experiences.

Article 94, therefore, provides the motion of confidence, which allows the government to remain in office, and takes the form of an advance vote.

On the other hand, however, there is a provision for the Parliament, through a motion of no confidence, to bring the relationship to an end.

Moreover, there is a third option, not provided in the Constitution, called “matter of confidence”.

This one is “usable” just by the Government as a way to underline the importance of a certain matter of the governmental agenda, and it compels the executive to resign in the event of a negative parliamentary vote.

On that topic, the Article 116 of the Rules of the Chamber of Deputies provides the limits for the use of this instrument: «*La questione di fiducia non può essere posta su proposte di inchieste parlamentari,*

modificazioni del Regolamento e relative interpretazioni o richiami, autorizzazioni a procedere e verifica delle elezioni, nomine, fatti personali, sanzioni disciplinari ed in generale su quanto attenga alle condizioni di funzionamento interno della Camera e su tutti quegli argomenti per i quali il Regolamento prescrive votazioni per alzata di mano o per scrutinio segreto»[68].

Moreover, the same Article provides that the vote shall be taken by roll call not earlier than 24 hours.

Furthermore, all the aspects of the fiduciary relationship, motion of confidence, no confidence and "matter of confidence", are regulated by the Article 161 of the Rules of the Senate.

Finally, the Law 400/1988, in the Article 3, provides that the matters on which the Government wishes to seek the confidence of the Parliament should be submitted firstly for deliberation by the Council of Ministers.

3.5. Governmental crisis

The situation where a government resigns because of the loss of its trust-based relationship with Parliament, it is said to be a "government crisis."

As mentioned in the previous paragraph, the fiduciary relationship between government and parliament, and the relative failure of it, determined the turn of the monarchical form of government from constitutional to parliamentary.

A valuable indicator of this transition proved to be the governmental crises. The first country in Europe to witness this change has been the United Kingdom in 1688. It is in the same State that the first governmental

[68] Art.116, par.4, Rules of the Chamber of Deputies, 1971

crisis happened with the resignation of Robert Walpole on 11 February 1742. Then followed the second crisis caused by a motion of no confidence to halt the war of aggression in America, that determined the resignation of the Government led by Lord North, on 22 March 1782.

In Italy, instead, the first government crisis we experienced was in 1848, when Minister Sclopis placed a "Cabinet question" on article 6 of the Subalpine Constitution, which, however, was amended at the request of Revel70. This caused the fall of the Balbo Government[69].

Later on, another crisis broke out in 1855 during the First Cavour Government. The so-called "Crisi Calabiana" was caused by the presentation of an anticlerical law to the Parliament, which both the Subalpine Senate and the King refused to approve.

However, although Cavour tendered his resignation, after a short time he was able to return to the governmental leadership and pass that law.

Needless to say, this measure shook relations between the Kingdom and the Vatican so much that, as a consequence, Pope Pius IX excommunicated Cavour, the King, the Ministers and the favorable Members of Parliament.

It is customary to distinguish between two types of crises: the first, parliamentary, is caused by a motion of no confidence by either House, by an unfavorable vote on the initial confidence, or, finally, after a negative vote by one Chamber on a "question of confidence".

The first two hypotheses are regulated in Article 94 para. 4 and 5, while the third in Article 161, para. 4 of the Senate regulations and Article 116 of the Chamber of Deputies regulations.

When, on the other hand, the failure of a parliamentary majority causes the government to resign, an extra parliamentary crisis will occur.

In the Republican Era there have been only two parliamentary crises after a negative vote by one Chamber on a "question of confidence": the Prodi I and II Governments, in 1998 and 2008, respectively[70].

[69] R. Ferrari Zumbini, *op.cit*, p.231

[70] F. Modugno, *op.cit.*, p. 377

A failed initial favorable vote occurred during De Gasperi Government VIII in 1953, Fanfani Government I in 1954, and Andreotti Governments I and V in 1972 and 1979[71]. No Executive, instead, has fallen because of a no-confidence motion.

Therefore, the vast majority of governmental downfalls have been recorded as extra parliamentary, with the Government or the President of the Council's spontaneous resignation.

The latter can resign both for political or personal matters; however his choices affect the entire Executive.

Moreover, this backward step is dictated mostly by a desire not to reach a vote of no confidence that could adversely affect a possible reappointment.

This mechanism can be defined as a "distortion" of the fiduciary relationship envisaged in the Constitution, precisely because it makes the Parliament powerless in front of the affairs of the majority coalition.

Therefore, the President of the Council, by just giving his resignation, prevents a debate from being opened within the Chambers that could have reverberations on public opinion[72]. There is probably a lack of party responsibility, one may say.

In order to avoid this, from the Pertini Presidency[73], the Presidents of the Republic tried to "parliamentarise" crises by asking the executive to appear before the Houses of Parliament.

Discussion before the Chambers concerning the causes of the crisis would make governments and the political parties held accountable for the situation.

On the contrary, a government may well remain standing with the replacement of one or more Ministers. During the so-called "government reshuffles", in which there is no crisis of the entire Government, the Head of the executive has only the obligation to notify the change to the Parliament, based on Article 5 of Law 400/1988.

[71] Ibid. p. 376

[72] F. Modugno, *op.cit.*, p. 377

[73] Ibid.

Notwithstanding, the question arises as to whether, in cases of a conspicuous number of resigning ministers, a debate should perhaps be opened in parliament, or whether the resignation of the entire government should not be preferred to such a “reshuffle”, since such a change could still affect the tenure of the entire executive.

During the First Republic, an expression coined to delineate the political period from 1946 to 1994, the governmental structure was formed by the union of four parties: Christian Democracy, Italian Socialist Party, Italian Democratic Socialist Party and Italian Republican Party.

With the addition of the Italian Liberal Party to the coalition in 1981, the term “Pentapartito” was created. The paradoxical feature of this era is the static political compositions within the parliament correlated by incredibly unstable governments.

During this period, many crises, such as in the Cossiga II, Spadolini I and Craxi I Governments, were caused by the *conventio ad excludendum*, the refusal of the “Pentapartite” to include the Communist Party in the coalition due to the latter's link with the Soviet Union.

Therefore, the Socialist Party, which was a minority, could not find an ally in the Communist Party and had always come to terms with the Christian Democracy in order to remain inside the Government.

In 1994, after the “Tangentopoli scandal” and the 1993 referendum, the “Pentapartite” fell and a new political season began, in which the centre-right and centre-left alignments were more clearly perceived.

Thus, if on one hand during the First Republic we witnessed the succession of governments composed by the same 'actors', during the Second Republic, with the bipolar system, with the loss of a majority in the Parliament supporting the Executive, it could follow the takeover of power by the opposition.

The advent of tripolarism has occurred, instead, since 2018, with the succession of centre-right and centre-left governments with the 5 Star Movement always present. It is therefore the innovative and cohesive role of the Movement that has eliminated the possibility of elections, with the consequent rise of the opposition.

Finally, as detailed in the next section, our Republic has suffered, from the very beginning of its existence, rather precarious governmental mandates. The instability of the coalitions and the internal party problems have led to the passage of 68 governments in just 78 years.

The consequences of government crises can be manifold, many of them assisted by the President of the Republic. As we pointed out earlier, there can be resignation of the Head of the Executive with consequent fall of the Government.

The resigning Government, however, stays in office until a new one is formed, but is entitled to carry out only acts of ordinary administration. This situation is thus comparable to that of a newly formed Government before receiving the initial vote of confidence from Parliament.

The first hypothesis is the "government-bis" with new ministers headed by the resigning President of the Council. Clearly, the new members of the Executive are the expression of a new parliamentary majority.

Other times, however, it is necessary to appoint a new head of government. In this case there can be either a change of ministers or the reappointment of old ones, depends on the balances of the coalitions.

When is not possible to create a government able to receive the vote of confidence, it is necessary to call for new elections.

It will be the voters' preferences that will decide which parties and coalitions will ascend to Palazzo Chigi. Since Italy is not a presidential or semi-presidential Republic, the elections will only concern the parliamentarians. It will be the President of the Republic who will decide who will be given the mandate according to the results of the elections.

Moreover, the mandate in this case can be exploratory - in the case in which the elections did not result in clear victories for parties or coalitions - or full, when one party has a significantly higher result than the others.

The final hypothesis is the technocratic government, an executive without a political identity, and thus not reflecting any party within parliament.

The choice of ministers and of the President of the Council is made on the basis of the high level of knowledge and offices held previously by the candidates considered.

4. The role inside the European Union

As mentioned previously, the role of the President of the Council is shaped by the Law 400/88. In particular, Article 5, paragraph 3 of that Law states that: «*Il Presidente del Consiglio dei ministri, direttamente o conferendone delega ad un ministro:*

a) promuove e coordina l'azione del Governo relativa alle politiche comunitarie e assicura la coerenza e la tempestività dell'azione di Governo e della pubblica amministrazione nell'attuazione delle politiche comunitarie, riferendone periodicamente alle Camere; promuovere gli adempimenti di competenza governativa conseguenti alle pronunce della Corte di giustizia delle Comunità europee; cura la tempestiva comunicazione alle Camere dei procedimenti normativi in corso nelle Comunità europee, informando il Parlamento delle iniziative e posizioni assunte dal Governo nelle specifiche materie».

From that abstract we can assume that the Law formally attributes a decisive role in relations between Italy and the European Union to the Head of the Government[74]. However, it is emphasized also the role of the President as a coordinator rather than a policy-maker.

In fact, the position of Italy in Europe has been influenced by the presence of an ongoing debate on the interpretation on the collegial or monocratic nature of our Government.

This debate is almost as old as the unity of our territory. For years during the liberal period the Heads of Government tried to distance

[74] L. Tedoldi, *Il Presidente del Consiglio dei ministri dallo Stato liberale all'Unione Europea,* Milano, Biblion Edizioni, 2020, p.439

themselves from the image of "primus inter pares" that the Statute envisaged.

And let us remember that even during the creation of our Constitution, the Constituent Assembly had some difficulties in finding an adequate definition of the head of government.

Finally, in recent times, the Constitutional Court has twice stated, in the Sentences n. 262/2009 and n.23/2011, that the President of the Council does not hold a position of supremacy over the other ministers, and even denies the President having a policy-making function.

In fact, according to the Court, the President has the duty to coordinate the Government, but in the end, it is the latter that is legitimized to decide in which political direction to go.

This view rendered by the Constitutional Court was not shared by the entirety of jurisprudence and doctrine, and still, after many years, a peaceful interpretation of this debate has not been reached[75].

In addition, for some time now, member Countries have witnessed an increasing Europeanization, understood as the changes caused by European standards, consolidated at the EU level and subsequently incorporated into the single States[76].

Moreover, the way that European institution function, pushes a propensity for the domestic system of governance to become presidential.

Those who are able to represent the national interests in the European Council, are the ones who will be more likely to influence the European policy.

In fact, the EU system favors countries that have a chief executive with a great deal of decision-making autonomy. Our country unfortunately can boast neither a form of government nor a party system that guarantees stability.

That which concerns the impact of the Head of the Government's decisions in Europe and any decision-making autonomy, depends on many

[75] Leonida Tedoldi, *op.cit.*, pp. 436-437

[76] R. Ibrido; N. Lupo, *Dinamiche della forma di governo tra Unione europea e Stati membri*, Bologna, Il Mulino, 2018, p.177

factors. Two of them are undoubtely the electoral laws and the unity and compactness of coalitions.

In fact, over the years we have seen a different evolution of the role of the President of the Council in Europe when changing from the majoritarian to the proportional electoral system.

The majoritarian electoral system favours greater stability in the role of the head of government, resulting in a greater decision-making autonomy than in the proportional system.

Another key factor that defines the position of the various Heads of State and Government in Europe is the economic importance of the country they represent.

Despite the fact that the entire European system is based on the equality of its members, it is almost utopian to think that countries with a very small GDP can really impose their will if the European G8 Nations do not share it.

However, probably one exception to this reasoning is our country.

Italy, mainly due to our inability to have stable leaders in power, is not a strong country in European politics. Many times, we find ourselves having to accept conditions that are unfavorable to our national interests.

The fact that from 1946 to 2022, in 76 years, our State has seen 68 Governments headed by 31 Presidents of the Council, has very much to say about our political instability.

The situation of precariousness necessarily reverberates in our ability to be 'heard' in the European context.

It is no coincidence that, even allowing for differences in forms of government, the two most important countries in Europe, namely Germany and France, had significantly fewer leaders and Governments than we did.

Moreover, we could argue that they are ranked in the top two places in terms of GDP, but that would not be entirely straightforward, since now that Great Britain has left, Italy is in third place and yet we have very often the impression to be 'worth' less than that.

Considering 3 European countries, with different forms of Government and election methods, from 1946 to our time: Germany has had

9 Chancellors and 25 government mandates; while France has had 8 Presidents of the Republic with a total of 12 governments; and finally, the Netherlands has had 15 Minister-Presidents with 30 mandates. Furthermore, Spain, from the establishment of the Kingdom in 1975 has had 8 Prime Ministers and 17 Governments.

In comparison, in the same amount of time, Italy had 21 Presidents of the Council and 38 presidential mandates.

On the other hand, it should, also, be taken into account that some States have a fixed term mandate, like France, nonetheless we can see a huge difference between our situation and the other States'.

Probably what pays the most in the European framework is the monocratic conception of the leader, a person who is capable of unambiguously indicating the policy of our Country, not the "primus inter pares" view that we have in Italy.

This argument is supported by the abrupt manner in which decisions are taken in the European Council and the Council of the Union.

Lastly, in 1987 was created a dedicated ministry without portfolio. As a result, to date, many of the presidential functions in EU matters are not carried out directly by the President but are delegated to the Minister for European Affairs.

The two main activities of the new department are the coordination and political steering, as well as facilitating a smooth transposition of EU regulations.

On this matter the Legislative Decree n. 303/99, Article 3 pronounces: *«Il Presidente promuove e coordina l'azione del Governo diretta ad assicurare la piena partecipazione dell'Italia all'Unione europea e lo sviluppo del processo di integrazione europea.*

2. Compete al Presidente del Consiglio la responsabilità per l'attuazione degli impegni assunti nell'ambito dell'Unione europea. A tal fine, il Presidente si avvale di un apposito Dipartimento della Presidenza del Consiglio. Di tale struttura si avvale, altresì, per il coordinamento, nella fase di predisposizione della normativa comunitaria, delle amministrazioni dello Stato competenti per settore, delle regioni, degli operatori privati e

delle parti sociali interessate, ai fini della definizione della posizione italiana da sostenere, di intesa con il Ministero degli affari esteri, in sede di Unione europea.

3. Restano ferme le attribuzioni regionali in materia di attuazione delle norme comunitarie e in materia di relazioni con le istituzioni comunitarie».

In conclusion, we can certainly say that being part of the European union has strengthened the role and figure of the Premier and, especially thanks to the intergovernability of the organs, has given him the opportunity to 'emancipate' himself from the rest of the Government.

However, we cannot deny that there is also a long way to go to improve our credibility both at European and international level, and that only through changing our domestic policies, electoral laws, coalitions, parties' systems or even our form of government to the semi-presidentialism, we can achieve that.

5. International Summits: G7 and G20.

The relevance of the figure of the President of the Council is also given by the possibility of Italy to sit at the G7 and G20's table.

Those are informal meetings between Heads of Government and State of the most industrialized Countries.

In particular, the inception and creation of the G7 dates back, almost spontaneously, when the US Secretary of the Treasury, George Schulzt, called a meeting with the economics ministers of France, Germany and the United Kingdom to discuss the economic and financial crisis following the collapse of the Bretton Woods system.

Three years later, in 1976, it became the G7, with the joining of Japan, Italy, invited by the French Minister Giscard d'Estaing, and Canada. Finally, in 1997, Russia became the 8th Country participating, but, this

association only lasted until 2014, the year of the Russian invasion of Crimea.

The G7 in some parts of the world has always had a negative conception. In fact, in the public eye was conceived as an elitist group, made up of Countries with a rather dark recent history, mainly due to colonialism and world wars.

If we consider the fact that one of the requirements to be part of the group was GDP, we can also understand the criticism coming from the colonized countries, whose resources had been largely utilized and had contributed to increasing the wealth of the colonizers.

At the beginning of the 21st century, the invitations to attend a global Summit was extended to other 12 Countries, namely Saudi Arabia, Argentina, Australia, Brazil, China, South Korea, India, Indonesia, Mexico, South Africa, Turkey and European Union, the latter representing all the Member States.

Therefore, in 2008, the first G20 took place with the aim to achieve a greater representativeness.

Moreover, inter-ministerial G7s were also created, where ministers from various sectors met to discuss topics of their competence.

These meetings, which initially meant to solve economic and finance-related issues, have come to cover other important topics concerning the international community such as sustainable energy, climate change, gender equality and food security. Moreover, the members of the G7 are the countries which, every year, donate more than 70% of public aid for global development[77].

Consequently, one can see how the decisions taken within the G7 and the G20, even if they are not binding, have a major bearing on global governance.

It is very interesting to mention that all the system of the G7 and G20 is customary: there is no law, internationally or nationally, that obliged this countries to take part and there aren't stable infrastructures or organs. In

[77] *G7,* Ministero degli Affari Esteri e della Cooperazione Internazionale

fact, there isn't an headquarter, since every year the country holding the presidency has the "honor" of hosting the Summit.

Although it is an informal type of meeting, the G7 has, over time, gained increasing relevance, mainly due to the non-binding agreements made during the meetings, which nevertheless affect the credibility of the country and the Head of Government concluding them.

Indeed, this informality and the non bindingness of the G7 acts, meant that this meeting format could help to find an agreement shared by several countries.

As in the case of the European Union, thanks to the International Summits, the figure of our Prime Minister has gained greater emancipation as well as greater visibility. Indeed, at these junctures, he is the only representative voice of Italy.

We can also say, however, that the players in the international panorama have changed a great deal in the past century, therefore we must reflect on the conception of the group of seven and its representativeness of the countries with the greatest economic weight in the world.

We can assume that, at the moment of the creation of the G7, the countries that took part, were certainly those who "counted".

Can we say the same now?

China and India, for example, have surpassed our country per GDP[78].

Since the role that Italy plays in the international stage affects the relevance of our Head of Government, can we assume that our country will still be one of those influential in world decision making?

In order to answer these questions, some reflections need to be made.

The first one should focus on the prominence and importance of various countries as compared to others. Indeed, not all countries are equally important on a global level[79].

The G7 countries have dominated the world for hundreds of years, yet recently there has been a rise of new players on the world stage.

[78] *GDP*, World Bank, 2021

[79] S. Cassese, *Chi governa il mondo?*, Bologna, Il Mulino, 2013, p.28

The most relevant ones are the BRICS, also called “Rising Countries”, namely Brazil, Russia, India, China and South Africa. They have definitely more common features than the G7 States: huge demographic growth (in fact, these 5 can boast 40% of the world’s population), as well as great economic growth, raw material production and leading roles in manufacturing.

Those, together with other countries who can boast large raw material reserves, are definitely ousting the “Old Continent”, especially in our current energy crisis situation.

They have, in parallel with the G20, created their own discussion format, as well as the creation of a common bank - the New Development Bank - and the conclusion of bilateral agreements aimed at strengthening their relationship.

It is normal to think that, if at first our President's participation in these summits had benefited him and his role, with the decline of Europe and the cooperation between emerging economies, Italy and its Head of Government will not have the same relevance as in the past.

Therefore, it is difficult to think that in the context of the crisis and recession we are going through now, Italy will still be recognized worldwide as a relevant player.

The second reason is the tightening of pacts and alliances, the creation of several international and regional organizations, that led to a limitation of our country's decision-making power and sovereignty.

In that regard we can find military alliances, such as the NATO, regional bodies, as the European Council, inter-governative bodies, for example the UN, and nonprofit organizations - to name few.

The context that emerges is quite complex and fragmented. States have always been primary participants at the international level, but in recent times, with the emergence of these supranational bodies, there has probably been a setback.

In fact, the more we have wanted to be part of alliances or international entities, the more we have realized that part of our country's decision-making autonomy has been devolved to other bodies.

The most glaring example is the European Union.

By joining it, with the signing of the Rome Treaty, we have certainly gained advantages: free movement throughout Europe with a European passport, a single currency (even if not all states have adopted it), and student exchange programmes, to name but a few.

However, our having to adapt to EU regulations, which as we know affect numerous fields and subjects, from the economy to immigration policy, and from agriculture to privacy regulations, has led to the impossibility of our state making autonomous decisions.

If we then add to this the fact that our representatives very often fail to assert national interests in the European context, we find ourselves in the position of having to accept disadvantageous EU regulations.

Moreover, another clear example of limitation of autonomy is NATO. The first pact was concluded on the 4th of April 1949, and consisted in the mutual military assistance, especially in the event of an attack against one of the member States.

This Pact was finalized just a few years after the end of the World War II and the liberation of our territory by the partisans and the Anglo-Americans. When signing this Pact, the Western Bloc was created, which very soon became the antagonist of the Soviet Union.

Most of our politicians of the time believed in this project: in particular, it was seen not just a military alliance, but also as a way to forge future cooperation agreements of an economic nature.

In recent days, however, some criticism about our presence in the NATO has been raised: the United States, in fact, was seen as the puppeteer of the organization, and therefore the other States' opinions were irrelevant.

Finally, it happened that our country, in order to honour the Pact, has been "forced" to accept positions that conflict with our democratic order: a clear example of that is the Gladio affair and the secret agreements to grant military bases[80].

[80] D.Gallo, op,cit., pp. 194-196

CHAPTER II: THE DEVIATIONS FROM THE GUIDELINES OF CONSTITUENT ASSEMBLY

SUMMARY: 1. Technocratic Governments. – 1.1. The Pella Government. – 1.2. The Ciampi Government. – 1.3. The Dini Government. – 1.4. The Monti Government. – 1.5. The Draghi Government – 2. State of exception and state of emergency, the Covid-19 emergency. – 2.1. Notions on the State of exception – 2.2 the State of emergency and normative acts in times of pandemic. 3. Use and abuse of governmental instruments: the decree-laws – 3.1. Quantitative limit – 3.2. Qualitative limit

1. Technocratic Governments

This chapter will deal with instances where a practice, that was not expressly contemplated by the Constitution, was created, or where there was a (possible) improper use of legally provided instruments.

In the first category it will be found the technocratic governments, executives composed of individuals outside the political forces and endowed with specific knowledge in various fields.

In that case, therefore, the members of the executive do not belong to any political party and, for this very reason, are governments without a political identity.

In the Italian legal system, the President of the Council is generally the result of coalitions that received most votes in the elections. Executives are, therefore, the indirect consequence of the will of the people.

Technical governments, however, are appointed by the President of the Republic in situation of political and economic crisis, when an exclusively political executive is not feasible.

It is, therefore, an alternative and residual path, viable only in cases of political emergency.

We can certainly say that constitutional norms concerning the government, and in particular its formation and the necessary fiduciary relationship, are extremely meagre.

This has meant that in some cases there has been a reference to a subsequent law, as in the case of law 400/88 implementing Article 95, or in others an extensive and flexible interpretation of the constitutional dictates, as in the case of technical governments.

This narrowness has also led to an extension of the President of the Republic's powers in cases of political, economic and financial crisis.

As we can see later in the paragraph, the choice of whether to opt for a technical government, and in particular who to appoint as Head of the Executive, inevitably falls into the hands of the Head of State.

On this very issue, Giuliano Amato stated that «*the potential for 'anti-crisis' interventions (by the Head of State) has increased*»[81].

In addition, the dictates of Article 95, not insofar as they relate the institute of the parliamentary confidence, but rather to the creation of executives that truly reflect the will of the people, leave no room for the creation of technical governments appointed 'more or less arbitrarily' by the Head of State[82].

However, due to the fact that the Constitutional Charter only devotes a small number of Articles to the government, the majority of the institutions and regulations that apply to this body are the product of practice or of law.

Furthermore, the technocratic government, like any other executive, has the ‘right’ to exercise its office only after receiving the confidence by the Parliament, and it steps back every time it loses the majority.

Moreover, they put in place, as we shall see later, also political measures. Therefore, precisely for these two reasons, these governments must in any case be included among the political bodies.

[81] G. Amato; A. Barbera, *Manuale di diritto pubblico*, Bologna, Il Mulino, 1991, p. 65

[82] M. S. Giannini, Prefazione a G. Burdeau, *Il regime parlamentare nelle costituzioni europee del dopoguerra*, tr. it. a cura di S. Cotta, Milano, Edizioni di Comunità, 1950, pp. 18 ss

In fact, the technicality lies in the fact of not being part of a party, although it is not always granted as we will see.

1.1. The Pella Government

The first technical government, the Pella Government, lasted 155 days, from the 17th of August 1953 to the 19th of January 1954. Already during this period, those characteristics typical of technical executives were apparent: impossibility to form a political government due to the crisis of the party system, severe economic crisis, fundamental role played by the President of the Republic.

With regard to this latter point, Giuseppe Pella was appointed by President Einaudi, without prior consultation, after the relative majority party had received a dismal electoral outcome and had fallen short of the quorum required to win the majority bonus envisaged by the so-called 'fraud law'[83].

Therefore, the choice of the President of the Republic fell on Giuseppe Pella since both De Gasperi's and Attilio Piccioni's attempts to form a government had failed[84]. Einaudi was also the one who directly suggested to Pella Costantino Bresciani Turroni and Modesto Panetti for the positions of Minister of Foreign Trade and Minister of Posts[85].

Pella, at the time of his appointment, was an illustrious name, holding the position of deputy in the Chamber and previously sitting in the Constituent Assembly.

An economics graduate, Pella, served also as undersecretary in De Gasperi's second and third terms of government and as Minister of Finance.

[83] Law No. 148 of 31 March 1953, wanted by De Gasperi, provided for the allocation of a majority bonus (65 per cent of the Chamber's seats) to the list that had obtained more than 50 per cent of the votes in the elections.

[84] F. Fabbrizzi, *La cronaca di oggi e la cronaca di ieri. Il Governo Pella ed i "governi del Presidente"*, in Federalismi, n. 22/2011, p.2

[85] Ibid. p. 2-3

Indeed, due to his expertise in economic matters, he was an ideal candidate to carry out the only prerogative assigned to the Goverment: the approval of the State Budget[86].

This Government, however, was not called 'technical' but 'administrative' by Pella's own admission[87]. The Dini Government was the first one defined as such.

Despite the different denomination, this Executive has to fall under the category of technocratic governments since the ministerial team was composed of figures from outside the political world such as State Advocate Scoca and magistrate Azara, as well as the aforementioned engineer Panetti and economist Bresciani Turroni[88].

On 5 January 1954, after five months of mandate, Pella resigned as President of the Council after the Christian Democrat parliamentarians voted against his list of new ministerial "reshuffles"[89].

1.2. The Ciampi Government

The second technical government was that of Carlo Azeglio Ciampi, which lasted from 28 April 1993 to 11 May 1994. In this case, the Head of State Scalfaro proceeded with the consultations on 26 April 1993 and already two days later Ciampi accepted the appointment.

The assumptions for the appointment were quite specular to those of the previous technical Government. Italy at that time was going through probably the toughest political crisis ever registered, with the 'Mani Pulite' judicial enquiry and the dismemberment of the "*Pentapartito*", and some economic difficulties, with the devaluation of the lira, as well as issues

[86] Ibid. p. 2

[87] Atti parlamentari, Camera dei deputati, Legislatura II, Discussioni, seduta del 19 agosto 1953.

[88] *Governo Pella*, su Presidenza del Consiglio dei Ministri, Governo Pella | www.governo.it

[89] *Governo Pella, 17 agosto 1953-18 gennaio 1954*, su *dellarepubblica.it*, Associazione «dellaRepubblica»

regarding national security. Shortly before, in fact, there had been the Capaci and Via d'Amelio massacres.

To deal with the serious situation, the President of the Republic Scalfaro appointed a professional with extensive economics experience, as well as a Governor of the Bank of Italy. Ciampi was indeed the first non-parlamentarian President of the Council[90].

Particular attention in the Ciampi nomination process must be paid to the figure of President of the Republic Scalfaro. Carlo Fusaro wrote about this juncture of *'double trust of the government, towards Parliament and towards the Head of State'*[91].

It is precisely in this context that an expansion of the powers of the Head of State was seen, who, twice if we also count Dini's appointment, made the choice of appointing a "technical" as President of the Council of Ministers.

This choice was necessary in a context of malfunctioning of the political system.

However, his government, rather than a technical one, should be classified as a 'transitional government'[92] with a 'ferryman'[93] as he used to call himself.

In fact, the ministerial team was indeed composed of technicians, including Sabino Cassese at the Civil Service and Paolo Savona at the Ministry of Industry, as well as 14 members holding previously political office and not totally disconnected from the parties[94].

At the beginning of the mandate the Executive obtained the confidence of all those parties that had supported the previous government Amato: DC, PSI, PSDI, PLI and the Greens[95].

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[90] M. Troisi, *Il Governo Ciampi: un esecutivo di transizione*, in Federalismi, n. 14/2013, p. 2

[91] C. Fusaro, *Il Presidente della Repubblica*, Bologna, il Mulino, 2003, p.78

[92] M. Volpi, *Governi tecnici e tecnici al governo*, Torino, Giappichelli Editore, 2017, cit., p. 63.

[93] S. Messina, *Carlo Azeglio Il traghettatore*, in La Repubblica, 7 ottobre 1997

[94] N. Lupo, *I "governi tecnici" nell'esperienza repubblicana italiana*, in Ventunesimo Secolo, Vol. 14, No. 36, p. 11

[95] S. Colarizi, *Storia politica della repubblica. 1943-2006*, Roma-Bari, Laterza, 2016.

As was the case with the Pella government, this Executive was also bound to implement certain necessary measures.

These included a new electoral law, given the results of the referendum of 18 April 1953, and the economic measures concerning the defense of monetary stability and the reduction of inflation, which had reached 20%.

Moreover, it was in 1993 that the new electoral law for the Chamber of Deputies and the Senate, law no. 277/1993, was passed[96].

On 21 December 1953, the parliamentarian Marco Pannella presented a motion of no-confidence, later withdrawn, with the request to re-establish a political government, specifying that the measures that legitimized the presence of a technical Executive had been implemented.

On 13 January 1954, Ciampi tendered his resignation. Three days later Scalfaro, following pressure to re-establish a political executive, dissolved the Chambers and called new elections.

1.3 The Dini Government

However, it was the Dini Government the first executive with which the term 'technical government' was associated, mostly because it was composed entirely of non-parliamentarians nor politicians[97].

Lamberto Dini was appointed President of the Council on the 17th of January 1995 by Oscar Luigi Scalfaro, the same Head of State who gave the office to Ciampi. This appointment operation will later be referred to as an 'overturn'[98].

In reality, President Scalfaro made it clear that the Constitution forbids Chambers from being dissolved if they are still able to express a

[96] M. Volpi, *op.cit.*, cit., p.64.

[97] F. Fabrizzi, op.cit, p.5

[98] M. L. Salvadori, *Storia d'Italia. Il cammino tormentato di una nazione*, Torino, Einaudi, 2018, cit., p. 474.

majority. As a result, Berlusconi's desire for new elections and an early dissolution of parliament was turned down.

The circumstances that led the Head of State to choose a new Head of the Executive was the fall of the Berlusconi Government due to the Lega Nord exit from the coalition.

It is important to recall that Berlusconi ascended to Palazzo Chigi on 11 May 1994, after the creation of Forza Italia a few months earlier. The Berlusconi Executive is first Government elected with the mainly majoritarian electoral system.

Scalfaro, once again, seeing the serious economic situation in which the State found itself, decided to appoint a high-ranking member of the economic community, so as to avoid further international pressure and implement measures to consolidate the public debt.

Dini, held the offices of Minister of the Treasury during the previous Berlusconi Government, executive director for the International Monetary Fund and of director general of the Bank of Italy.

Moreover, in this case the Ministers were totally unrelated to holding political office and to the Parliament, unlike the previous Ciampi Government. We can therefore speak in this case of 'full technocratic government'.

He gained the confidence of the Parliament with 302 votes for, 39 against and 270 abstentions[99] in the Chamber of Deputies and 191 in favour, 17 against and 2 abstentions in the Senate[100].

Dini's mandate was linked to the implementation of four issues: the economic and financial reform to restore the public debt, the reform of the welfare system, the regulation of par condicio and the approval of the regional electoral law.

His term of office was inextricably linked to the completion of the 4-point program, to the extent that he himself declared in the Senate that as

[99] Camera dei Deputati, XII Legislatura, Seduta n. 127, Mozione di fiducia al Governo (Esito della votazione nominale), pp. 7666-7673

[100] Senato della Repubblica, XII Legislatura, Seduta n. 113, Votazione nominale con appello, pp. 61-63.

head of a technical government he had been called upon to perform this function in exceptional circumstances and only temporarily[101].

Once the activities envisaged in the 4-point programme had been completed, even against the wishes of the President of the Republic who hoped for a continuation of the technical government, on 11 January 1996 President Dini confirmed his resignation before Parliament.

However, on the following 1 February, Scalfaro gave the task of forming a government to Antonio Maccanico, former Minister and Undersecretary of State. The latter presented a plan to overcome the telecommunications problem, hoping to reach an agreement with the right and left to set up his technical government[102]. Realising that there was no agreement between the political forces that would guarantee him a majority in Parliament, he told the President of the Republic that he would resign his mandate[103]. The Head of State then announced the early dissolution of Parliament.

1.4 The Monti Government

The Monti Government also came into being after Silvio Berlusconi's resignation, which followed the loss of the majority. Berlusconi realized he could not rely on a stable parliamentary majority with the 8 November 2011 vote on the General State Accounts[104].

After the resignation of the 'cavaliere', Monti was entrusted with the task of forming a government by the then President of the Republic Giorgio

[101] Resoconto Stenografico n.108, Seduta di lunedì 23 gennaio 1995, Senato della Repubblica, XII Legislatura, p.8 ss.

[102] F. Stefanoni, *Governo*: *cos'è il mandato esplorativo?E il preincarico? Gli esempi del passato*, in Corriere della Sera, 17 Aprile 2018

[103] R. Padovani, *In ricordo di Antonio Maccanico*, Rivista *economica del Mezzogiorno: trimestrale*

[104] F. Marone, *Prime riflessioni sul governo tecnico nella democrazia maggioritaria italiana*, in www.gruppodipisa.it, in part. p. 9.

Napolitano, the same man who had shortly before appointed him Senator for life[105].

Until then, Monti had held many positions of an economic nature at European level, most notably, he was European Commissioner for the Internal Market from 1995 to 1999 and European Commissioner for Competition from 1999 to 2004.

It was precisely because of his experience in the institutional and economic sector that Napolitano chose him to take on the delicate role of Head of Government at a time of serious sovereign debt crisis.

The priority was to avoid a financial meltdown. In fact, not long before there had been the great American sub-prime mortgage crisis, which then spread throughout the world.

On the 17th of November 2011, the Monti Government gained confidence in the Senate with 281 votes in favour, 25 against and no abstentions[106]. In the Chamber of Deputies, on the 18th of November, it obtained 556 votes in favour, 61 against and still no abstained[107].

This Government remained in office from 16 November 2011 until 28 April 2013[108] and had a large number of technicians with a total absence of political figures, like during the Dini's Government[109].

Throughout this time period it had the support of the Partito Democratico and the Popolo delle Libertà, until the latter broke away from the coalition at the end of 2012 due to the highly unpopular measures taken by Monti.

The Head of the Executive therefore had no choice but to submit his resignation to the President of the Republic, who proceeded to dissolve the Chambers and call new elections.

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[105] P. Baldini, G. Fragonara, A. Ribaudo, *Dieci giorni dalle dimissioni del Governo Berlusconi al Governo Monti, Cronaca analisi e segreti*, Corriere della Sera, Milano, 2011.

[106] Giovedì 17 novembre 2011, 673 Seduta pubblica (Antimeridiana), Senato della Repubblica.

[107] Seduta n. 551 di venerdì 18 novembre 2011, Senato della Repubblica, p. 58

[108] M Volpi, *Governi tecnici e tecnici al governo*, Torino, Giappichelli Editore, 2017, cit., p.69.

[109] M Volpi, *op.* cit., p.74

Regarding the Government's priorities, it would necessarily have to take, Monti himself declared before the Senate that the executive's program will be divided into two parts: on the one hand, economic-financial measures to deal with the emergency, and initiatives to modernize the country and create job opportunities[110].

Among the measures we can recall the 'Save Italy' decree, converted into Law No. 214/2011[111], the tax on the first house, the VAT increase, the Severino reform and, finally, the Fornero law. Non-economic measures include the 'empty prisons' law and the anti-corruption law of 15 October 2011.

1.5. The Draghi Government

The last technical Government in timeline is that of Mario Draghi, which received the confidence of the Senate on 17 February 2021 with 262 yes votes[112] (82% of the plenum) and 545 in favour at the Chamber of Deputies on the 18th of February (87% of the total votes)[113], with almost all parties in agreement, apart from Fratelli d'Italia and part of the 5 Star Movement[114]. The ministry team consisted of 23 ministers, 15 of whom represent the major parties and only 8 of whom are independent, through this structure one cannot therefore speak of a “pure” technical government.

[110] M. Monti, *Dichiarazioni programmatiche del Presidente del Consiglio Monti al Senato della Repubblica*, 17 novembre 2011, in http://www.governo.it/Presidente/Interventi/testo_int.asp?d=66019.

[111] M Volpi, *op.* cit., p.72.

[112] V. Forgnone, *Governo, ok del Senato alla fiducia a Draghi con 262 sì. "Grazie per la stima, andrà validata dai fatti". Nel M5S 15 votano contro*, in «La Repubblica», 17 febbraio 2021.

[113] V. Forgnone, L. Mari, *Governo, ok della Camera alla fiducia con 535 sì, 56 no e 5 astenuti. Voto contrario di un leghista che passa a Fdi. Dissenso leghista a quota 30. Draghi: "Lotta alla corruzione e alle mafie"*, in «La Repubblica», 18 febbraio 2021

[114] C. Fusaro, *Da Ciampi a Draghi (passando per Dini e Monti): verso una forma di governo parlamentare sotto tutela*, in Quaderni costituzionali: rivista italiana di diritto costituzionale., 2*021, p.173-176*

Nevertheless, remains in the category of technical governments since there was an endorsement by the Head of State without a predefined majority inside the Chambers.

The summoning of Mario Draghi to the Quirinale took place after Conte's resignation on 26 January 2021 and after the failure of Chamber of Deputies President Fico's exploratory mandate.

In fact, as the latter was able to ascertain, there was no solid majority.

The President Mattarella called for the creation of a «*government that would not identify itself with any political formula*»[115], that would be able to solve the problems related to the pandemic and meet all the deadlines of the National Recovery and Resilience Plan[116].

In this frame he chooses the former Governor of the Bank of Italy and President of the European Central Bank, Mario Draghi.

Since 1993, there have been seven governments led by non-parliamentarians (Ciampi, Dini, Monti, Renzi, Conte I, and Conte II), making this one the fifth in the last ten years[117].

Summarising the track record of our technical governments, we can say that: «*the Ciampi government came into being to support the adoption of a new electoral law under referendum dictation; the Dini government to ensure the par condicio, make regional electoral law, address the pension imbalance; the Monti government to avoid the risk of default and tackle the financial crisis*»[118]

Precisely because the Presidents of the Republic have very often used the 'wild card' of technical governments in situations of serious economic and financial crisis, almost all the governments I have mentioned in this paragraph have directly or indirectly implemented manoeuvres of an economic nature: Ciampi's fight against inflation and privatisation, Dini's reforms of the pension system, the constitutional amendment containing the

[115] C.Fusaro, *op.cit.* p. 173
[116] Ibid.
[117] Ibid.
[118] C.Fusaro, *op.cit.*, p. 174

principle of a balanced budget constraint, among many other economic reforms introduced by Monti.

And it was precisely this last principle introduced by Monti that led to the only amendment of the Constitutional Text made by a 'technician', specifically of Article 81.

Moreover, as we can see from the following abstact, even the role of this type of executive has changed over the years.

Whereas the first technocratic governments were supposed to carry out very specific duties and once they had been concluded, there was no need for that government to remain in power, the most recent ones are called upon to resolve a multiplicity of issues and take countless decisions in the most diverse fields[119].

2. State of exception and state of emergency; the Covid-19 emergency.

2.1. The State of exception

First of all, in order to be able to refer of a state of emergency, it is necessary to make a prior reference to the state of exception. In fact, the latter is defined as the suspension of the typical characteristics of a state under the rule of law due to particular internal situations.

With the state of exception, therefore, the Executive can go as far as to suspend ordinary laws in order to deal with the serious and exceptional situations that have arisen.

On the other hand, there may also be the creation of new special measures propaedeutic to solving the situation of gravity.

[119] S. Talini, *La forma di governo alla prova delle trasformazioni della (classe) politica. Riflessioni a seguito della formazione del governo Draghi*, in www.costituzionalismo.it , Fascicolo 1 2021.

One of the first to theorize a type of state of exception was Machiavelli.[120] According to him, in fact, during ordinary administration generally used standards had to be applied, while in times of emergency and danger a different order was needed[121].

Therefore, the ordinary rules were not adequate to resolve sudden situations and precisely because the ordinary means were not able to stem the problem, there had to be a suspension of the constitutional order, so that appropriate strategies could be put in place for a prompt resolution.[122]

According to Rousseau, it was precisely in times of emergency and necessity that a dictatorial figure should stand out. In fact, as has often been the case and as we shall see in the continuation of this paragraph, democratic systems have time frames that are ill-suited to solving issues immediately.

However, the state of exception has not always been used in good faith to get out of situations of necessity. Very often, in fact, political figures have used it as an instrument to irrevocably change the form of state, in most cases in an anti-democratic sense.

The best-known episode of a state of exception that favored the rise of a dictatorial regime is surely the order adopted by the Reich President on 28 February 1933 after the Reichstag fire.[123] To this day, we know that the Reichstag fire was nothing more than a pretext for Hitler to suspend constitutional guarantees and completely overturn the form of government to dictatorship.

In the Weimar constitution, the legal basis for taking all necessary measures to restoring security and public order, including the use of armed forces, was Article 48. In the same Article, explicit reference was made to the temporary suspension of Article 114 (inviolability of persons), 115 (inviolability of the home), 117 (inviolability of correspondence), 118 (freedom of expression), 123 (freedom of speech), 124 (freedom of

[120] P. P. Portinaro, *Dittatura. Il potere nello stato di eccezione*, in OpenEdition Journals, 09/2019

[121] Ibid.

[122] Ibid.

[123] M. von Lüpke-Schwarz, *Parliament Lost*, in Deutsche Welle, 23 March 2013

association) and 153 (guarantee of private property and prohibition of expropriation).

In this case, the suspension of the aforementioned rights from temporary became permanent.

Also, the Napoleonic Constitution of the Year VIII (December 24,1799) provided some norms in regard to the state of siege: *«in the event of an armed revolt, or agitation threatening the security of the State»*[124] there can be a total or partial suspension of the constitutional provisions.

In the Italian experience, on the other hand, the use of the state of siege in cases concerning national security was already refrained from during the Kingdom of Italy.

This occurred despite the fact that Article 6 of the Albertine Statute prohibited the King from suspending the execution of laws. This mechanism was possible due to the flexibility of the constitutional Charter and thus the consolidation of a custom.

The declaration of a state of siege was therefore possible through the instrument of the decree-law that had to be converted into law by the Parliament. The latter, however, approved the state of siege only once, with the Law 17 July 1898 n. 297 and only with regard to some provinces.

However, it was with Law No. 273 of 21 March 1915 and the Law No. 671 of 22 May 1915 that extraordinary powers were conferred on the King's Government in the event of war. There was thus a dispensation from Parliament to let the Executive also exercise legislative powers.

Emblematic in those years was the 1908 Messina and Reggio Calabria earthquake from which the still-existing emergency institutions were formed and from which Santi Romano drew the basis of his theory the "emergency as a source of law.[125]"

It was precisely with the First World War that we saw a significant increase in the number of decree-laws issued, some of which had very long

[124] P. Bonetti, *Terrorismo, emergenza e Costituzioni democratiche*, Bologna, Il Mulino, 2006, pp. 155-156

[125] E.C Raffiotta, Sulla legittimità dei provvedimenti del governo a contrasto dell'emergenza virale da coronavirus, in "BioDiritto, OnLine first" n.3 /2020, p.4

terms, an oxymoron considering that one characteristic of such instruments is their temporariness.

In the Italian Constitution of the 1948 there is no direct provision of the state of exception. However, the Article 78 enshrines that: *«The Parliament decides on the state of war and give the Government the necessary powers»*.[126]

Even if the declaration of the state of war, according to Article 87, is up to the President of the Republic, it is still the Government that has a central role in times of need and urgency. The instrument by which the executive acts promptly and temporarily is certainly the decree-law.

However, it can be assumed that governments are tempted to use the decree law as a non-emergency tool, so as to regulate with it the broader issues[127].

What has been denounced for some years now is precisely the abuse of this instrument to regulate even absolutely ordinary problems, thereby distorting the institution provided for in Article 77 of the Constitution.

The latter provision refers only to situations of necessity and urgency. On the other hand, however, it also becomes extremely difficult to predict all the situations in which an emergency or a need may arise and then specify in which individual cases the decree-law can be used.

This disproportionate use has raised concerns about the role of the legislative Assembly: it is true that the decree-law needs, in order to last, the input of the Chambers, but this should never come to erode and almost usurp Parliament's legislative power since the Montesquieu's principle of the separation of powers applies in our legal system.

One of the most critical exponents of the state of exception is certainly Giorgio Agamben. He traces the state of exception's beginnings to the Roman iustitium, a legal institution.

In times of danger (tumultus), the senate would issue *a senatus consultum ultimum,* advising the consuls to take all necessary precautions

[126] Article 78, Italian Constitution, 1948

[127] C. Mortati, Atti dell'Assemblea Costituente, seduta pomeridiana di giovedì 18 settembre 1947, in La Costituzione della Repubblica nei lavori dell'Assemblea Costituente, IV, pag. 2928

to protect the state. The announcement of iustitium, which is Latinfor "arrest/suspension," followed. As a result, the statute was completely suspended, leaving a legal void[128].

From the Roman Empire to the present day, the state of exception has remained an instrument in use. Indeed, the same philosopher declared that *«the voluntary creation of a permanent state of emergency has become one of the essential practices of contemporary states, even the so-called democratic ones»*[129].

Taking our cue from these statements, we can see how in recent times have been taken measures, even quite popular ones, that, justified by the national emergency situation, have led to a curtailment of the freedoms of all or some citizens.

We can cite, for example, the US 'Patriot Act' (26 October 2001) and the 'Military Order' (13 November 2001) which, after the Twin Towers attack, respectively restricted the rights of persons merely suspected of terrorism and to place under custody any foreigner who might cause harm to national security.

In our experience, on the other hand, we can cite the 'Moro law' converting, not by chance, the Decree-Law against terrorism of 28 March 1978. Once again it is the instrument of the decree-law that is suited to emergency situations, also of a political nature as in this case.

2.2. The State of emergency and normative acts in times of pandemic

The state of emergency can be defined as a serious situation, such as war, pandemic, natural disaster, economic crisis, that justifies the enactment of regulations and restrictions imposed by the public power.

[128] G. Agamben, *Stato di eccezione*, Torino, Bollati Boringhieri, 2003, p. 55

[129] G. Agamben, *op.cit.*, p. 11

The individual cases in which a state of emergency can be declared, as these are innumerable, are not expressly provided for in any regulation.

However, Article 7 of Legislative Decree no. 1 of 2 January 2018 provides for some general categories to which many types of emergency situations can be attributed.

During the emergency, therefore, the ordinary rules must be inadequate to deal with the crisis[130] and new ones must be quickly put in place, even including limitations on constitutional guarantees.

This requires the a priori existence of guarantees to prevent the continuation of the state of emergency or a sudden change to the undemocratic form of government.

An example of a guarantee is the one provided for in Legislative Decree No. 1 of 2 January 2018, art 24 paragraph 3, on the duration of the state of emergency at national level, which cannot exceed 12 months and can only be subject to extension for a further 12.

In our legal system, the state of emergency is not explicitly provided in any constitutional norm. However, articles 77 and 78 of the Constitution refer to some particularly similar cases.

Article 77, in fact, refers to decree-laws that can be issued by the government in cases of necessity and urgency. These, however, must then be converted into law. In fact, those are temporary instruments, provided to deal with serious and unexpected situations.

While Article 78 refers to the deliberations by the Parliament on the state of war. In this case, there is a transfer of powers from the legislative to the executive body, emphasizing, therefore, the leading role of the Government in implementing quick strategies applicable to the concrete case.

The most serious emergency situation that has happened in recent years has certainly been the Covid-19 pandemic. The state of emergency in this case was declared on 31 January 2020.

[130] P. Bonetti, *Terrorismo, emergenza e Costituzioni democratiche*, Bologna, Il Mulino, 2006, pp. 61

This declaration was based on the rules laid down in Legislative Decree no. 1 of 2 January 2018, which, in Article 7, lists the types of emergency events. It is therefore in letter C of Article 7(1) that we find: *«emergencies of national importance connected with calamitous events of natural origin or resulting from human activity which, by reason of their intensity or extent, must, with immediacy of intervention, be tackled with extraordinary means and powers to be deployed during limited and predefined periods of time pursuant to Article 24»*[131]

Article 24 of the same decree lays down the modalities and characteristics of the deliberation of the state of emergency.

According to this Article, when emergencies arise that are classifiable among the cases of letter C of Article 7(1), the Council of Ministers, under the request of the President of the Council, the President of the Region or autonomous province, deliberates the state of emergency at a national level.

Moreover, it must be the resolution must contain the duration, that cannot exceed the 12 months, the territorial extension, the financial resources to assign to the activities connected to the emergency.

In the Resolution of the Council of Ministers on the 31st of January was provided the allocation of 5,000,000 euros in the Fund for national emergencies.

Additional resources may be allocated after the disaster impact assessment by the Head of the Civil Protection Department. Moreover, these kinds of resolutions are not subject to prior review by the Corte dei Conti.

Civil protection ordinances play a central role in this area. In fact, by means of these, the implementation of the interventions to be carried out is regulated and *«may be adopted in derogation from any provision in force, within the limits and in the manner indicated in the resolution of the state of emergency»*[132].

These are issued by the Head of the Civil Protection Department.

[131] Article 7, Paragraph 1 letter C, Legislative Decree no. 1 of 2 January 2018

[132] Article 25, Paragraph 1, Legislative Decree no. 1 of 2 January 2018

In the context of the pandemic of Covid-19, these ordinances were intended primarily to help organize and carry out relief and assistance to the population affected by the event as well as to restore the functionality of public services and infrastructure[133].

In addition, Article 15 of Legislative Decree 1/2018, in order to ensure a unified course of action grants the President of the Council the power to issue directives[134].

The constitutional principles applicable to the pandemic case were above all situated in the Article 5, Unity of the Republic, and Article 32, the Right to health.

Following the declaration of a state of emergency on 31 January 2020, the exponential increase in contagions led the then President of the Council Giuseppe Conte to announce the first lockdown on the 9 March. Since 11 March 2020, all Italian citizens have been obliged to stay at home, only being able to leave for health or work reasons.

The Decree-Laws Nos. 6/2020 on 23 February 2020 and No. 19/2020 on 25 March 2020 allowed DPCMs to participate in the implementation of viral containment and emergency management measures[135].

From this moment on, the pivotal instrument with which decisions concerning the pandemic were taken was the Prime Ministerial Decree (DPCM). In fact, it is precisely with this instrument that the movement of people would be prohibited in the region of Lombardy (Prime Ministerial Decree of 8 March) and throughout the Country (Prime Ministerial Decree of 9 March). In D.P.C.M.s dated March 11 and March 23, respectively, all retail activities and all activities deemed unnecessary were to cease operations.

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[133] Delibera del Consiglio dei Ministri, 31 gennaio 2020, GU Serie Generale n.26 del 1° febbraio 2020, pp.7-8

[134] F. Bilancia, *Le conseguenze giuridico-istituzionali della pandemia sul rapporto Stato/Regioni*, in Diritto Pubblico, Fascicolo 2, 2020, p.335

[135] *2. I DPCM, LA LEGISLAZIONE TRA STATO, REGIONI E UNIONE EUROPEA* - RAPPORTO 2019-2020, Camera dei deputati - Osservatorio sulla legislazione, p.221, cap1 (camera.it)

This type of decrees was used because it has the quality of being quick and agile with no further sectoral intervention constraints beyond those stated in the basic sources.

It is, however, an instrument that is hierarchically inferior to the Constitution, to ordinary laws and to all sources that can be equated to ordinary laws, hence also to decree-laws and legislative decrees.

With regard to the procedure for the adoption of the Prime Minister's decrees, the power of proposal lies with the Minister of Health but, under Decree-Law No. 6/2020, it is necessary to acquire the simultaneous opinions of the other Ministers and Regional Authorities.

Decree-Law No. 19, on the other hand, establishes two alternative procedures: the first is the same as the one above, while in the second the power of proposal lies with the Regional Authorities, which must wait for the view of the ministers[136]. In both processes, the Prime Ministerial Decrees to be adopted are previewed to Parliament by the President of the Council of Ministers or a Minister to whom he has delegated that responsibility[137].

According to Order No. 630 of the Head of the Civil Protection Department of 3 February 2020, it is also necessary for the Scientific Technical Committee to express its opinion on the technical-scientific profiles[138].

The use of these instruments has given rise to many perplexities. First and foremost, the adequacy of Prime Ministerial decrees to limit fundamental rights.

In fact, during the lockdown, the Italians experienced a major restriction of their constitutionally recognized freedoms and rights. Therefore, the secondary legal means used, the Prime Ministerial Decree, did not seem adequate to affect a limitation of constitutional guarantees.

[136] Ibid.

[137] Ibid.

[138] "*2. I DPCM*", LA LEGISLAZIONE TRA STATO, REGIONI E UNIONE EUROPEA - RAPPORTO 2019-2020, Camera dei deputati - Osservatorio sulla legislazione, pp.221-222, cap1 (camera.it)

This issue was the subject of two sessions of the Chamber of Deputies, no. 337 of 11 May and no. 342 of 19 May 2020[139]. The Government in these sittings undertook to *«privilege the instrument of the decree-law when it comes to introducing limits to fundamental rights and in any case to promptly notify Parliament of any type of action taken to protect public health, in deference to the centrality of the elected assembly and with a view to promoting its constant involvement»*[140].

On the other hand, Prime Minister Conte reiterated, before the Parliament on 30 April, that the legitimizing bases of the Prime Ministerial Decrees adopted were the declaration of the State of Emergency of 31 January 2020 and Decree-Laws No. 6 and No. 19 of 2020[141].

Thus, from the date of those measures, the DPCMs were issued on the basis of these decree-laws, therefore ensuring compliance with the principle of legality.

This gave rise to further criticism as this move seemed almost like a self-granting of powers.

The principle of legality, in turn, is expressed in Articles 23 and 97 of the Constitution, which express the obligation of the administration to act in accordance with the law.

This means that all activities carried out by the government must be authorized by law.

The constitutional legitimacy of the DPCMs can be traced back to the Constitutional Court Judgment No. 8 of 1956[142] but they still need to fulfill some requirements: *«time-limited effectiveness time in relation to the requirements of necessity and urgency; adequate reasoning; effective*

[139] Ibid.
[140] Ibid.
[141] E.C Raffiotta, op.cit., p.4
[142] Corte cost. sent. n. 26 del 1961

publication in cases where the measure is not of an individual nature; conformity of the measure with the principles of the legal system»[143].

The DPCM of 26 April 2020 was classified by the Regional Administrative Court, Judgment No. 841/2020 as a "generic administrative act," with the exception of its regulatory nature.

According to this conception, therefore, the Government was acting in the full extent of its powers of coordinating and promoting relations with the regions and autonomous provinces expressed in Article 5 of Law 400/88[144].

The thesis that sees the Government in this circumstance acting by creating regulations through the instruments provided by Article 7 of the same law should therefore be set aside[145]

In fact, this Article has not been mentioned since there is no reference to the ordinary regulatory discipline of the Executive here.[142]

On closer examination, Decree-Law No. 6 of 23 February 2020, converted into Law No. 13 of 5 March 2020, allows the Government to handle emergency situations[146] by using its exception-making authority, even to deviate from the law and restrict rights. In actuality, the administrative power of emergency is based on the legality principle and is designed in the Italian system, also on the basis of the aforementioned constitutional jurisprudence[147].

The DPCM has the appearance of an administrative act that nevertheless contains a purely regulatory content.

On the other hand, however, it could be countered that the government had put in place decree-laws, one of which was Decree-Law no. 6 of 23 February 2020, which specified the use of decrees of the President of the Council of Ministers.

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[143] *2. I DPCM, LA LEGISLAZIONE TRA STATO, REGIONI E UNIONE EUROPEA* - RAPPORTO 2019-2020, Camera dei deputati - Osservatorio sulla legislazione, p. 223, cap1 (camera.it)

[144] Ibid.

[145] Dossier 'Urgent measures to deal with the epidemiological emergency by COVID-19 Decree Law 19/2020', by of the Study Services of the Chamber of Deputies and Senate, pp. 48 and 49.

[146] Corte cost. sent. n. 115 del 2011

[147] Corte cost. sent. n. 115 del 2011

3. Use and abuse of government instruments: the drecree-laws

First of all, by governmental instruments it is meant above all decree-laws and legislative decrees, which are part of the primary sector of sources insofar as they are comparable to ordinary law.

The two types of decrees, on the other hand, require input from Parliament, since they are normative instruments and are capable of invading the sphere of competence of the legislative body. The Parliament is therefore entrusted with the primary regulatory function.

In order to reflect on how these instruments are currently used, we must make a historical consideration from the period before the creation of the Constitution.

In fact, when the Founding Fathers were called upon to decide what the fundamental rules of our state would be, they inevitably had to process on what Italy had gone through during the twenty years of Mussolini's rule.

Their idea was to clearly separate the State powers as in the previous two decades they had been united in the hands of a dictator. Articles 76 and 77 were created with this scope in mind.

They were to serve as a guarantee against any anti-democratic degeneration. According to these Articles, the legislative function belongs only to Parliament. The government can enact normative acts only by delegation of Parliament and respecting certain requirements, or by issuing emergency decrees then converted into law.

Therefore, from these considerations it can be inferred that the Founding Fathers wanted a moderate use to be made of legislative decrees and, even more, the decree-laws. In their mind the Parliament had to have an absolutely central role in the newly formed Italian Republic.

As we shall see in the following pages, the number of such instruments has increased more and more, making decree-laws seem almost like ordinary instruments of regulation.

In fact, the decree-law was envisaged as a means of resolving situations of necessity and emergency.

The circumstances in which the Article 77 rule can be applied are not expressly provided for. Therefore, very often, governments are able to apply such an extensive interpretation to this rule that they use the decree

law even in situations that we would call ordinary, thus exacerbating the constitutional dictates and the ratio of the institution.

Therefore, in the following paragraph I will try to expose the incidence of government acts on the entire national legislative production, so as to see whether the legislative function is actually performed almost entirely by Parliament.

To do so, I will begin by analyzing the main characteristic of decree-laws: the exceptionality, understood as both a quantitative and qualitative limit.

3.1. Quantitative limit

From the very reading of the articles of the Constitution on governmental decrees, it is clear that there can be no performance by the government of the legislative function except by means of delegation and with a fixed timeframe, as well as the issuance of decree-laws only in cases of necessity and urgency.

Indeed, in the first twenty years of the newly formed Republic, the constitutional dictates were taken to the letter: the monthly average was around one decree-law per month[148].

From the 1970s onwards, on the other hand, the number of decree-laws increased exponentially, so that 124 were recorded in the four-year

[148] F. Musella, *Governare senza il Parlamento? L'uso dei decreti legge nella lunga transizione italiana (1996-2012)*, in Rivista italiana di scienza politica, Fascicolo 3, dicembre 2012, pp. 463.

period 1972-1976[149]. The trend in the number of decree-laws issued from the sixth legislature onwards has only continued to grow exponentially.

The Tenth Legislative term, 2 July 1987 to 22 April 1992, saw the succession of four governments: Goria (1987-1988), De Mita (1988-1989), Andreotti VI (1989-1991), Andreotti VII (1991-1992). During that term, Parliament converted 185 decree-laws, accounting for approximately 17% of the total number of measures adopted by the Chambers[150]. It is thus estimated that slightly more than 3 decree-laws were converted every month[151].

It was during the eleventh Term that was perceivable the inordinate use of emergency decrees, where conversions weighed 37.6% of parliamentary business[152]. In just two years, 118 decree-laws were issued, with an average of almost five decrees per month. Also, during the 14th legislative term where, with two successive Berlusconi government terms, almost half of the total normative output consisted of government acts such as decree-laws (20,95%), legislative decrees (16,36%) and delegating regulations (10,17%)[153]. It became then clear that decree laws, from an exceptional means of regulation, became ordinary.

Thus, while the use of decree-laws has increased, there has been a trend reversal in the number of ordinary laws.

And so next to the primary activity par excellence of Parliament, that of enacting ordinary laws, there is that of delegation.

The legislative body thus delegates the regulation of multiple and vast sectors to the executive either by means of delegated laws, sometimes even blank ones, or by 'accepting' of converting countless decree-laws.

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[149] Ibid,

[150] *I decreti-legge nella XIV Legislatura,* Camera dei deputati - Osservatorio sulla legislazione, p. 4

[151] Ibid.

[152] Ibid.

[153] Appunti del Comitato per la legislazione , *La produzione normativa nella XIV Legislatura*, Camera dei deputati - Osservatorio sulla legislazione, p.3

This tendency to delegate, as well as thus de facto extending the government's regulatory powers, has been seen by many as a derogation from the principle of separation of powers[154], the backbone of all modern democratic systems.

3.2. Qualitative limit

Decree-laws, understood in the sense of constitutional rules, should also be instruments used during circumstances of necessity and urgency. However, the government has increasingly used them as a means of realizing its objectives instead of regulating sporadic situations of need.

According to the report on the work of the Committee for Legislation, *'a peculiar use of urgent decrees has emerged, which does not seem entirely attributable to the nature of the instrument under consideration*'[155]. The decree-law thus proves to be a versatile and easily usable instrument, which is also applied in cases that do not meet the requirements of Article 77.

There are many and varied topics regulated by the government by decree-law: university and public education expenditure, financial manoeuvres, electoral discipline, social security and even euthanasia.

In the latter case, the so-called 'Englaro Decree'[156] was the subject of a presidential referral during promulgation because, according to the then President of the Republic Napolitano, it lacked the requirements of necessity and urgency.

The disciplines dealt within the individual decree-laws, moreover, is far from homogeneous. Thus, the most varied and disconnected topics are regulated within the individual acts.

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[154] F. Musella, op,cit., p.477

[155] Rapporto sull'attività svolta dal Comitato per la legislazione durante il terzo turno di presidenza della XIV legislatura, Bollettino delle Giunte e delle Commissioni parlamentari del 1° aprile 2004, p. 13.

[156] Decree-Law of 6 February 2009

This, therefore, is interpreted by some as a strategic move to get measures approved that, if presented independently, would have no hope of being approved[157]. Such decrees classifiable as mixed therefore lack the qualitative requirement of urgent decrees.

A further critical aspect is the repetition of the content of a decree-law that has been rejected by Parliament. Reiteration means reformulation, partial elimination or simple modification of the content. An example is the reiteration of decree-law no 158 of 2003 within decree-law no 239 of 2003[158].

This practice is not only unfair because it is aimed at getting previously rejected measures approved at any cost, thus the government's desire to impose itself on the legislative body, but also because it created an aggravation and flooding of parliamentary activities.

A peculiar case was that of the reiteration of the content of a decree law that had been rejected 29 times[159]. It is understood that in this way there is a slowing down of legislative activities.

However, the most negative implication of this distorting tactic occurs when previously deemed unconstitutional measures are proposed again. In fact, the government cannot use a decree-law to reinstate the legality of measures that the Constitutional Court has ruled.

Finally, it was the Constitutional Court itself, in Ruling 360/1996, that condemned this practice as unfair and as capable of altering constitutional balances.

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[157] Lupo, N. (2009), *Recenti tendenze in tema di decreti-legge e decreti legislativi*, in «Quaderni dell'Associazione per gli studi e ricerche parlamentari», 19, pp. 101

[158] *I decreti-legge nella XIV Legislatura*, Camera dei deputati - Osservatorio sulla legislazione, p. 11, *Microsoft Word - OR0014.doc (camera.it)

[159] F. Musella, op,cit., p.464

CHAPTER III: CONSTITUTIONAL AMENDMENTS AND ATTEMPTS TO REFORM THE STATE BODIES.

SUMMARY: 1. Articles 138 and 139 – 2. The first revision proposals: Craxi's 'Great Reform' and the Bozzi Bicameral – 3. Group of Milan – 4. De Mita Iotti Bicameral – 5. D'Alema Commission, the third Bicameral – 6. 2005 Constitutional Reform and 2006 Referendum – 6.1. The Referendum – 6.2. Content of the reform – 7. Renzi-Boschi Reform

1. Articles 138 and 139

It seems appropriate to start this chapter on reforms by mentioning Article 138 of the constitution.

First of all, constitutional laws and laws to revise the Constitution are subject to Article 138. This, together with Article 139, which prohibits the amendment of the republican form, constitutes the guarantee against the arbitrary amendment of the constitutional text.

The Constituent Assembly, having seen what happened when the Albertine Statute was in force, decided to create a constitution that could not be easily amended.

It is therefore in Article 138 that the procedure that the Parliament must put in place to amend the content of the constitution is explained. In this sense, the aggravated procedure provides for a double parliamentary approval, with two deliberations by both chambers at intervals of no less than three months.

For a revision law or constitutional law to be passed, an absolute majority of the members of each Chamber must be reached in the second vote.

These can also be subject to popular referendum when a fifth of the members of a Chamber, 500,000 electors or five regional councils request

it, provided that it has not been approved in a second vote by a two-thirds majority.

The request must be received within three months of the publication of the laws in question.

On the other hand, in addition to the limits provided for in Article 138, the last article of the Constitution provides for an absolute and irrevocable limit on the modification of the Republican institutional form.

The concept of (democratic) republic is not alterable even by a constitutional revision, by virtue of Art. 139[160].

It therefore contains non written limits, which are not norms but values[156] that cannot be overturned, not even by a change requiring an a-posteriori consensus.

This interpretation of the revision limit, however, is far from unanimous: the doctrine is divided in qualifying it, and these divisions represent different conceptions of the power of revision, in terms of the possibility of changing the choice of the constituent power[161].

Those who argue for *pari ordinis* acknowledge the relative value of Art. 139's limit, which could thus be overcome by an aggravated procedure[162].

Overcoming the republican form could be accomplished in a variety of ways: the first group of jurists argued that the Constitution could be made monarchical by first removing the prohibition, which would constitute a self-binding of the constituent legislature, and then amending to that effect once it was removed[163].

Moreover, there were also those, in the Constituent Assembly, who proposed that the clause be amended to state that the republic could not be subject to 'normal' revision proceedings, implying that there could be

[160] The Constitutional Court, in Judgment No.1146 of 1988, refers to the supreme principles not as a norm, but as "supreme values on which the Constitution is based"

[161] S.Gambino, *Sui limiti alla revision della Costituzionenell'ordinamento italiano,* in Revista de Dereitos e Grantias Fundamentais, n.8/2010, pp.61-66.

[162] Ibid.

[163] S.M. Cicconetti, *Le fonti del diritto italiano,* Torino, Giappichelli, 2017, pp.101-103

'special' revision proceedings through which the form of government could be changed[164].

In addition, the violation of the Article 139 is an illegitimate exercise of the power of revision, and if it occurs, the act of revision would actually be constituent[165].

Furthermore, the experience of the last fifty years has taught us that the mechanism for revising the constitution is generally more than simple.

Indeed, as we shall see in the course of this chapter, not many attempts at constitutional revision have been successful.

In some cases, popular referendums were held on certain reforms that affected the structure and prerogatives of the main institutional bodies.

Precisely during these referendums that it could be realised that the perception of a possible constitutional reform is not well seen by the population.

Somehow, the thoughts and wishes expressed by the Constituent Assembly remained in the public perception as unchangeable by any political figure or party.

In fact, the majority of the reform proposals submitted so far have in fact been the expression of only one part of the political spectrum that clearly does not reflect the will of the nation as a whole.

On the other hand, and especially in view of the results of the referendums on constitutional reforms, the Constituent Assembly's desire to use the parliamentary republic as a form of government is still alive in our culture.

And it was precisely the Constituent Assembly in the Perassi motion that excluded other forms of government: '*The Second Subcommittee considered that neither the type of presidential government nor that of directorial government would respond to the conditions of Italian society.'*[166]

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[164] The Moro amendment was approved in the Second Subcommitee but was not adopted by the Assembly.

[165] M. Ruini, *Il referendum popolare e la revisione della Costituzione*, Milano, Giuffrè, 1953, p. 76

[166] cfr. Commissione per la Costituzione, seconda Sottocommissione, 4 settembre 1946

Instead, the Parliamentary Republic was preferred on the basis of its ability to '*safeguard the requirements of stability of government action and to avoid the degeneration of parliamentarism*'[167].

These are the words located in the well-known Perassi motion, approved by a large majority[168] in 1946 during a session of the Commission responsible for creating the Constitution.

However, this commitment of the constituents remained substantially unfulfilled: the Italian form of government designed by the Constitution is very weak and gives very little weight to the executive.

This idea is supported by the fact that discussions about amending specific provisions of the Constitution began just some decades after it was written.

Therefore, the indications of the motion were not taken on board, not even by adopting the proposals to rationalize the trust made by the members of the Commission: Mortati proposed a fixed two-year term, Tosato the constructive no-confidence, and Fabbri the resignation of the Chamber that challenges the government[169].

Thus, one has the impression that the parliamentary system established was purposefully created to give as little power as possible to those in power, to guarantee the loser, and to do so in the ambiguity of the results of the first electoral consultations: a constitution that was "deliberately weak", to mend the political system's cracks[170].

This failure to substantially implement the Perassi motion is most likely linked to a sudden change in the political context of the Constituent Assembly, which resulted in the disintegration of the forces that comprised the National Liberation Committee.

In fact, the De Gasperi III government came to an end on May 13, 1947, when the Prime Minister decided to resign.

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[167] Ibid.

[168] Ibid.

[169] A. Pace, *Disegno costituzionale e mutamenti della forma di governo*, in Giur. cost., 1975, p. 1136

[170] G. Amato, *Il PSI e la riforma delle istituzioni*, in AA.VV. La «grande riforma» di Craxi, a cura di G. Acquaviva e L.Covatta, Venezia, 2010, p.40

Moreover, Dogliani divides the phases of constitutional history into five clearly delimited periods delimited thus: 1. fragile armistice (1943-1955), characterised by the implementation of the Constitution only in its skeleton; 2. consolidated armistice (1955-1968), where the opposing forces began to accept the Constitution definitively and consolidate the social pact; 3. thaw (1969-1978), where the Constitution was finally implemented as the bearer of a comprehensive social development design; 4. new thaw (1979-1993), with the entrenchment of majoritarianism and new conventions *ad excludendum* that make the path of reform difficult; and 5. struggle for the Constitution (1994 onwards), where there is a conflict over the validity or abandonment of the constitutional charter, with a net weakening of the strength of the constituent political culture[171].

2. The first revision proposals: Craxi's 'Great Reform' and the Bozzi Bicameral

As early as the 1960s, only a few years after the entry into force, a willingness to change some of the rules of the Constitution had already transpired. Some currents hoped to make changes while remaining within the limits of the republican form of government.

Others, on the other hand, believed that a form of government closer to presidentialism would be desirable.

The issue of revising the form of government began to intensify as a recurring theme from the late 1970s[172].

Bettino Craxi, in particular, advocated for a profound institutional renewal, referred to as the "great reform": a unitary reform involving the

[171] M. Dogliani, Revisioni della costituzione e conservazione: perché perpetuare l'equivoco?, in Democrazia e diritto, I, 2005.

[172] G. Amato, op. cit., p.41.

exercise of legislative power, the stability and effectiveness of government action, and possibly also with a view to presidentialism[173].

The hypotheses that were supported in the following decade oscillated between strengthening the government and changing the form of government in a presidential sense, but without ever having a clear idea of the president's role and powers[174].

It was Giuliano Amato, on his return from the United States, who strongly supported the presidential solution in 1982, which was taken up by Craxi in 1989 and then abandoned with the collapse of the early republican institutions.

The neo-parliamentary solution was instead derived from the so-called "Decalogo Spadolini", included in the programme of the Craxi I government.

It is no coincidence that the Bozzi Commission was established a few months after the Craxi I government took office, the first of three bicameral commissions that followed in tackling institutional reform.

On January 29,1985, the commission presented its final report, which included a proposal for the revision of forty-four articles of the Constitution, on which there was broad agreement.

The Parliamentary Committee for Constitutional Reforms is a type of bicameral commission established several times in the history of the Republic to propose amendments to the Constitution. In this sense, an attempt was made to use this instrument to update the Constitutional Charter where it was thought it needed a renewal.

The Commission begins with the assumption that there is a need for institutional reform aimed at achieving a strengthening of the instruments of direct democracy, including those of popular participation, and of the decision-making functions and organs of representative bodies[175].

[173] B. Craxi, La grande riforma, in in AA.VV. La «grande riforma» di Craxi, a cura di G. Acquaviva e L. Covatta, Venezia, 2010, pp. 186-187

[174] G. Amato, op. cit., pp. 42-43

[175] Scheda di relazione conclusiva di Aldo Bozzi (25 ottobre 1984- 29 gennaio 1985), p. 2

With the Bozzi Bicameral can be found, for the first time, debates within Parliament on topics that will also recur in the future.

First of all, the cutting of the number of parliamentarians, which was also discussed within the next two Bicameral meetings, as well as in the Violante Draft and the 2005 Reform. Two main proposals were formulated on this issue: the first saw an election of 1 deputy for every 110,000 inhabitants and 1 senator for every 200,000, while the second envisaged a numerical determination based on the average parliamentary composition of other European countries.

The revision proposed changing the government's structure, institutionalizing the cabinet council and ministerial committees, and strengthening the Prime Minister's position and function[176]; it also partially rationalized the confidence, attempting to limit extra-parliamentary crises.

Mention is made of the creation of a direct fiduciary link between Parliament and the President of the Council, and the attribution to the latter of the power to appoint and dismiss ministers[177].

The Commission also considers a possible amendment of Article 77 of the Constitution with regard to urgent decrees. These instruments, it is argued, must necessarily be used in the sense envisaged by the Constituent Assembly.

If anything, in order to curb the phenomenon of the disproportionate use of decree-laws, provision could be made for a final deadline and a tightening of the discussion timeframe for those legislative acts that the government determines are necessary for the fulfilment of its programme.

Once the time limit has expired without a pronouncement by Parliament, such acts would acquire the force of law.

Finally, the creation of permanent or ad hoc delegations to the government and the regions for detailed legislation were also promoted.

However, the approval of this proposals was not accompanied by an adequate commitment from political forces, who neglected the issues and

[176] Ibid. p.4
[177] Ibid.

pushed them to the margins of parliamentary work, ultimately leading to its shelving.

The government was, in any case, strengthened to some extent as a result of regulatory reforms on the restriction of the secret ballot and the approval of the law on the Council Presidency[178]; however, it was achieved above all through the new practice that began to take place on the approval of confidence questions on bills converting decree-laws.

The institutional situation, which was also degenerating due to the detachment of the material constitution from the formal one, i.e. the effect of the crisis of the parties on which the system itself rested, resulted in an exacerbation of the dialectic between political forces, which is well summarized in Cossiga's harsh presidential message to the Chambers on 26 June 1991[179].

The message contained a number of programmatic indications, both in terms of content and method: in order to restore people's trust in democratic and representative institutions, the Republic's atavistic ills, namely instability, inefficiency, and poor decision-making, must be addressed[180]. In light of the positions that had emerged over the previous decade, Cossiga proposed strengthening executive power, re-thinking bicameralism, and rationalizing the trust mechanism in order to favor full and direct legitimization of the executive[181].

One of the most prominent critics of Cossiga's proposed reforms was Franco Modugno, as according to the latter they violated the logical limit of the revision rules[182].

The three proposals formulated by Cossiga were as follows: revision by means of the procedure laid down in the Constitution, affixing

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[178] Law No. 400 of 23 August 1988, 'Discipline of Government activity and organization of the Presidency of the Council of Ministers'.

[179] Message to the Chambers of the President of the Republic, pursuant to Article 87, paragraph 2 of the Constitution, On institutional reforms due to the inadequacy of the institutional apparatus institutional apparatus, see Stenographic Record No. 649, 26 June 1991, 84877 ff.

[180] Message to the Chambers of the President of the Republic, pursuant to Article 87, paragraph 2

[181] Messaggio, §2.2.5, §3.0

[182] F. Modugno, «*Il problema dei limiti alla revisione costituzionale (in occasione di un commento al messaggio alle Camere del Presidente della Repubblica del 26 giugno 1991*)», in Giur. cost., 1992, pp. 1680-1689

simplification correctives to the procedure, and the election of a new Constituent Assembly[183]. Needless to say, according to Modugno only the first hypothesis was feasible and above all legal[184].

In any case, both the proposals put forward by Cossiga and the demands for reform of the constitutional system did not receive much response.

3. Group of Milan

It is in this context of new proposals that the "Group of Milan" 1983 program appears. The Group consisted of Serio Galeotti, Giovanni Bognetti, Franco Pizzetti, Giuseppe Petroni and Gianfranco Miglio, the latter also acting as his deputy[185].

Anticipating future considerations, central to the Group's project was the strengthening of the role of the head of government, who was no longer to be conceived as a primus inter pares, but as an entity capable in itself of outlining the strategies of the executive.

Their search began primarily with ascertaining the unsatisfactory functioning of the legal system to be blamed on the rules of the Constitution.[181] In a second step, they focused instead on the search for a form of government that would fix the system's dysfunctions[186].

The aim therefore was not to draw up a new constitution, but to ascertain the serious problems of the existing one and possibly seek a solution so that these would no longer arise[187]. Among the anomalies encountered were those of an economic nature such as the undermining of the consumerist and market economy principles that guarantee a shield for

[183] Ibid.

[184] Ibid.

[185] A. Spallino, *Verso una nuova Costituzione: Gianfranco Miglio e la riforma costituzionale del Gruppo di Milano,* in Rivista di Politica: trimestrale di studi, analisi e commenti, 2019, 2, p. 83

[186] Ibid.

[187] A. Spallino, *op.cit.*, p. 84

citizens against the subjugation perpetrated by the powerful, or the pursuit, by the politicians, of degenerative practices such as indebtedness[188].

The role of the executive that transpired from the studies of these Professors was greatly weakened and destabilized by the constitutional provisions.

In fact, among the strictly political considerations was the inadequacy of the proportional electoral law to guarantee a stable and homogeneous majority in Parliament.

According to Miglio, the governments up to that point were backed by a diverse coalition that resulted in the adoption of incongruous policies, as they originated from various political groups.

The group also raged against bicameralism. The slowness of the legislative process and the difficult relationship between the legislative and executive organs was attributed to the existence of two chambers performing the same functions and having the same duties.

The most worrying aspect, however, according to Miglio, was the electoral consensus that had to be constantly present in order to pass reforms. Each electoral test had in itself the function of verifying the consent of the government.

Therefore, due to the lack of a direct election of the President of the Council, governments found themselves in a state of 'fear' of being delegitimized at any moment. In this situation, the Group defines the state as being 'in a perpetual pre-electoral climate'[189].

In order to overcome all these problems, the Milan Group hoped for a general reorganisation and revision of the constitutional rules. Their vision of "the best Republic for all Italians"[190] was given by the strengthening the role of the executive, with direct election of the President of the Council according to a two-round majority system with a runoff ballot[191].

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[188] Ibid. p. 85

[189] G.Miglio, *Introduzion*e, in Gruppo di Milano, Verso una nuova Costituzione, vol. I, cit, pp.11-12

[190] G.Miglio, *Una Repubblica migliore per gli Italiani (Verso una nuova Costituzione)*, Giuffrè, Milano 1983.

[191] B.Pezzini, *Un progetto di riforma istituzionale (a proposito delle tesi del « Gruppo di Milano »)*, in Il Politico, 1984, Vol. 49, n.1, p.159

The draft also provided for the simultaneous creation and termination of the government and the chambers. When a motion of no-confidence was successful, this would necessarily lead to a call to the polls[192]. However, those who would present the motion, would also have the duty to indicate an alternative Prime Minister.

It was also essential to draw a clear line between politicians who were deputed to the legislative function, and - as such - bearers of the people's interests, and those who acted as politicians-governors[193]. Therefore, they planned the so-called “incompatibility mechanism”, which consisted of the impossibility for those who had held the office of parliamentarian to be elected as prime minister or a member of the executive, and viceversa[194].

While this group of professors undoubtedly drew inspiration from presidential governments, they kept their distance from that “pure” form of government, as they believed that such a system of governance would be detrimental if applied in our country. However, in addition to the expansion of the executive's authority, the Group was in favor of strengthening the Parliament, the Constitutional Court, and the role of the President of the Republic, as the Constitution's guarantor, bodies that would nonetheless be tasked with monitoring the performance of the executive. It was therefore necessary for the 'Legislature Government'[195], as they used to call it, to go hand in hand with the Legislature and the Parliament.

The clear difference with the presidential system is therefore the strong parliament-government relationship that is not lost. The legislative body is still able to challenge the executive as in parliamentary systems.

Therefore, as Galeotti, a member of the Milan Group, will say, this institutional imprinting can be defined as neo-parliamentarism.

An element of commonality with the US system, on the other hand, would have been the presentation of the prime ministerial candidate and his deputy at the ballot box.

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[192] Ibid.
[193] G.Miglio, *Introduzione*, pp.41-42
[194] Ibid.
[195] G.Miglio, *Introduzione*, cit., p. 37-38

In the event of victory or defeat, they would have had to 'compete' for the presidency together, and the deputy prime minister would also have taken over as president of the second Chamber[196]. Moreover, the latter was also supposed to deputize for the president and take his place in the event of his death.

The reform of the legislature body, instead, envisaged the existence of two chambers. The first one, the Legislative Assembly, was composed of three hundred members of parliament, as opposed to six hundred and thirty at the time, and had a five-year term, just like the government[197].

It had two functions: legislative and government control. This approach was therefore intended to meet those currents of thought that wanted both a modification of perfect bicameralism and a reduction in the number of parliamentarians.

The second chamber, on the other hand, was to follow the German Bundesrat model and thus be the representative body of the regions. 4 to 9 members of the regional councils would have participated, in proportion to the population, for a total of almost one hundred people[198].

The “Chamber of Regions” would therefore no longer be elected. Among the organ’s functions we can mention the scrutiny of laws of the Legislative Assembly, thus being able to reject or amend them, the initiation of the legislative initiative and participation in the constitutional review process[199].

To conclude, alongside the two chambers was the creation of the 'Council of the Productive Economy', a body made up of 250 people representing their category of work[200].

In the group's view, it was important to create a body of socio-economic forces that could effectively ensure a balance between the private economy and the public sector[201].

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[196] Ibid. p.40
[197] A. Spallino, *op.cit.*, pp. 91-92
[198] Ibid.
[199] Ibid.
[200] Ibid. p. 93
[201] Ibid.

In other words, it was, in a sense, a matter of elevating the National Economic and Labour Council, which is still conceived as an auxiliary advisory body, to a top-level body alongside the two Chambers.

4. De Mita-Iotti Bicameral

The early 1990s party system crisis (1992–1993) revealed all the system's shortcomings and made the parliamentary crisis worse. The Italian form of government, which was already dysfunctional because of the executive's ongoing weakness, saw an increase in the weight of the guaranteed bodies and an expansion of the President of the Republic's powers, to the point where it was possible to refer to "de facto semi-presidentialism" that was still within the bounds of political intermediation and did not interfere with political address[202].

On 23 July 1992, two single-chamber resolutions were passed to establish a bicameral commission to examine the constitutional revision of the second part of the Constitution, except Title VI on constitutional guarantees. Therefore, the De Mita-Iotti Commission was established to form a revision project of the second part of the Constitution, with the exception of section II of Title VI, and to discuss proposals for electoral reform.

It was formally established by Constitutional Law 6th August 1993, n.1, through the introduction of a procedure partially derogating from Article 138 of the Constitution with the power to examine in referral the draft constitutional laws submitted before it came into operation.

A draft modification was approved at the conclusion of the project and delivered to the Chambers on January 11th, 1994. The draft's significant changes to the structure of government made the Italian system into a neo-parliamentary one, with the Prime Minister being directly appointed by the

[202] M. Volpi, *Forma di governo e revisione della costituzione*, Torino, 1998, pp.109-111

Parliament, the head of the executive branch having the authority to name and remove ministers, and the introduction of constructive no-confidence motions[203].

Because of the early dissolution of the Chambers in the 12th legislature, the initiative was never even taken into consideration. As can be seen from President Iotti's report, the biggest problem was finding solutions that were acceptable to the majority of the political forces.

Again one of the very aspects on which most parties agreed was the reduction in the number of MPs (from 630 to 400 for the Chamber and from 315 to 200 for the Senate)[204].

The topic of reform was shelved as a result of the fundamental transformation of the political and party structure, which had become majoritarian and in which the parties that had been at the center of it for the previous 45 years had vanished.

The Democratic Party, Forza Italia, and National Alliance, the three major parliamentary forces, attempted to form a Große koalition agreement in 1996, at the conclusion of the 13th legislature, for a government led by Maccanico, in charge of a semi-presidential institutional reform based on the so-called Fisichella draft[205].

5 D'Alema Commission, the third Bicameral

The De Mita-Iotti Commission's demise did not, however, result in the topic being dropped from discussion.

With the advent of the new 14th legislature, it became clear which of the two main tendencies within the third Bicameral, the so-called D'Alema

[203] *Report of the President of the Commission Nilde Iotti*, Communiqué of the Presidency of the Chamber of Deputies and the Presidency of the Senate, 11 January 1994, p.5

[204] Ibid. M. Volpi, op.cit., p.100

[205] M. Volpi, op.cit., p.100

Commission, established by Constitutional Law No. 1/1997, was in favor of the preservation of the parliamentary form while also advocating for a clear primacy for the President of the Council and a majoritarian functioning, achieved through either the strengthening of the political address, or the transfusion of the German model of the chancellorship or the so-called Westminster model[206].

The second trend instead pushed for the direct election of the chief executive, following instead the models of the French Fifth Republic, the "Premierato" or neo-parliamentarism, with a substantial marginalization of the American presidentialism hypothesis.

The Commission therefore formulated two proposals along the lines described above. Between the proposal of a possible semi-presidentialism and one of a parliamentary republic 'with a prime minister's government', the former won out.

After its approval by the Bicameral, it went to the Chambers for consideration.

For the second proposal the models to be followed were the United Kingdom, Germany, Spain, and Sweden; however, they all shared the intention to strengthen the position of the President of the Council and the government before Parliament, to provide for a single-chamber trust, and to establish differentiated itinera legis for the government initiative.

The one on semi-presidentialism, which the committee endorsed, is based on the common misconception that the semi-presidential form of government should be modeled after the French Fifth Republic type of government. However, because it tended to scale back the presidential powers, the idea was referred to as "Italian-style tempered semi-presidentialism"[207]because it differed from the transalpine one in a number of ways. The President of the Republic holds a reserve power that is expanded when the legislative government cannot perform as intended; as a result, he serves in an unclear and contradictory capacity.

[206] Ibid.

[207] M. Volpi, op.cit., p.137

The proposal for tempered semi-presidentialism in the Italian model, however, was gradually reduced to the simple direct election of the President during parliamentary action, restoring the premiership under cover of a semi-presidential framework after it had been abandoned.

With the potential to turn the president's position into one of opposition to the parties, direct election exposed the Italian political system to a significant risk of plebiscitarism[208].

Additionally, constitutionalists and political scientists universally decried the Bicameral proposal as being incapable of clearly addressing reform needs, leaving the relationship between the President and Prime Minister ambiguous, and putting Italian democracy at risk of conflict and authoritarianism[209].

The initiative ended up becoming the subject of political controversy despite the Chambers' review and amendment of the proposal.

This was primarily because the political forces were unwilling to take on such a challenging reform. political forces to shoulder the weight of such an intricate change.

6. 2005 Constitutional Reform and 2006 Referendum.

6.1. The Referendum

It was the second confirmatory referendum in the history of the Republic, and it took place on 25 and 26 June 2006. It concerned the reform passed in 2005 on several aspects of Part II of the Constitution.

[208] M. Volpi, op.cit., p. 140
[209] M. Volpi, op.cit., p.158

In particular, Constitutional Law 2544 of 16 November 2005 was approved in the Chamber of Deputies on 20 October 2005 by a majority of its components. On 16 November, hence, this text was also approved in the Senate in a second vote and by a majority of its components.

The method used, therefore, to bring the reform into force was that provided for in Article 138 of the Constitution. For many, this was a controversial move[210], as with just two parliamentary approval, a large part of the Constitutional Charter would be modified.

It was thus that the center-left opposition decided to push for the institution of a confirmatory referendum, so that Italians could decide on the future of the Country's constitutional and institutional set-up.

A popular referendum requires the request of one fifth of the members of a chamber, or 500,000 voters, or five regional councils.

In this case, all three methods were used, resulting in the request from one fifth of the members of both chambers, 16 regional councils and 800,000 signatories[211].

As can be seen, the law advocated by Berlusconi aimed to amend no less than 50 of the 139 Articles of the Constitution[212]. This law had to do with a multitude of issues: the role of Parliament and the parliamentary structure, the role of the Government and the Prime Minister, the composition of the Superior Council of the Magistracy, as well as the division of matters between State, Regions and Provinces.

Approximately 26 million Italians participated in this referendum, with a turnout of 52.46%[213].Of these, 25,753,782 ballot papers were actually valid[214]. In the end, 61.29% of voters (15,783,269 people) voted no, against 38.71% (9,970,513 citizens) who voted yes[215].

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[210] Martin J. Bull, *The Constitutional Referendum of June 2006: End of the "Great Reform" but Not of Reform Itself*, in Italian Politics, 2006, Vol. 22, The Center-Left's Poisoned Victory (2006), p. 101.

[211] Ibid.

[212] Martin J. Bull, *op.cit.*p. 100.

[213] Ministero dell'Interno, Archivio storico delle elezioni, Eligendo Archivio - Ministero dell'Interno DAIT

[214] Ibid.

[215] Ibid.

6.2. Content of the Reform

The constitutional reform, elaborated by Calderoli, D'Onofrio, Nania and Pastore[216] in 2003, was later presented to the Parliament as a constitutional bill by the then President of the Council Berlusconi.

It was therefore presented as an act of political policy of the government. The amendments of the constitutional text were therefore an integral part of the government's political program and as such the responsibility for the amendments to the constitutional text was attributable to the President of the Council and the entire Executive.

Moreover, the reform was also signed, in addition to Berlusconi, by the Minister for Institutional Reforms Bossi and Vice-President Fini.

The reform proposes to amend no less than 50 Articles of the Constitutional Charter. Therefore, it is a reform that cuts across many institutional bodies.

The first theme regards the new role of the Prime Minster, as it is called in the text of the constitutional law 2544 of 16 November 2005. In fact, the Article 30 of the same Law specifies the composition of the Government: The Council of Ministers thus consists of the Prime Minister and the Ministers[217]. Unlike in the Constitution of 1948, the President of the Republic appoints only the Prime Minister[218]. It is then the latter who appoints the Ministers[219]. The whole Council of Ministers will then begin his term of office with the oath before the Head of State[220].

Pivotal role has the Article 33 on explaining the powers of the Prime Minister: «*The Prime Minister determines the general policy of the government and is responsible for it. He guarantees the unity of political*

[216] F.Angeli, *Riforma Renzi e Riforma Berlusconi: così lontane: così vicine*, in Democrazia e Diritto, LIII, 2, 2016, p.120

[217] G.U, Serie Generale n.269 del 18-11-2005, pp.13-14

[218] G.U, Serie Generale n.269 del 18-11-2005, p.14

[219] Ibid.

[220] Ibid.

and administrative governance, directing, promoting and coordinating the work of the ministers»[221].

As enshrined in the Constitution, the reform also envisages that the number, attributions and organization of the ministries are to be regulated by ordinary law. Therefore, only at a later date will the regulation of the organization of the Prime Minister's Office take place.

Let us remember that this provision within the Constitutional Charter created a sort of lacuna within the system for forty years, which was filled with the law 400/88.

Therefore, a similar provision within the reform could once again create a stalemate if an ordinary law to replace law 400/88 is not promptly enacted.

The same article specifies that the responsibility for acts undertaken by the Council of Ministers is that of the collegiate body, whereas the responsibility for acts of the ministries is that of the individual ministers.

Central to the text of this constitutional law is also the change in the composition of Parliament. In fact, the first Article of the Law already states that the legislative body is composed of the Chamber of Deputies and the Federal Senate.

The latter, whose name could refer to the German experience of the Bundesrat, is however elected on a regional basis at the same time as the election of the respective Regional Council or Regional Assembly.

The distribution of seats shall be in proportion to the number of the population. In any case, each Region has at least 6 seats, except for Molise and Valle d'Aosta, which have respectively 2 and 1.

The Chamber of Deputies has a five-year term, while the Senate changes with the proclamation of new senators of the same Region or Autonomous Province.

This reform therefore aimed to eliminate the so-called perfect bicameralism, i.e. the presence of two Chambers performing the same

[221] cfr.,G.U, Serie Generale n.269 del 18-11-2005, pp.14-15

functions. The Federal Senate, in fact, could not grant or withdraw confidence to the Government[222].

With the reform, there is also a change to the controversial Article 117 on the distribution of legislative power between the State and the Regions. In fact, the Chamber, according to the reform, is only competent for matters attributed to the exclusive state legislature. In contrast, in matters where there was concurrent competence between state and regions, these were devolved to the Senate.

In addition, a new configuration of Article 117 of the Constitution had been created, with a massive decentralisation of powers in vast areas of national interest such as the organisation of healthcare, every aspect related to education, from the definition of school curricula to the organisation of institutes, as well as regional and local police. it was therefore a major devolution to the regions of matters that until then had been regulated at the national level through ministries.

However, as a counterbalance, the reform provided that regional laws detrimental to national interests could be removed by the regions when there was a specific request by the government. If the regions did not comply with the government order, the executive could refer the matter to the joint Parliament. the latter, by an absolute majority of its members, could annul the regional law[223].

In the new Article 118, paragraph 3 elevated the State-Regions Conference to a constitutional body, relevant for cooperation between the two entities and necessary for successful national development[224].

7. Renzi-Boschi Reform

[222] F.Angeli, *op.cit.*, p.124
[223] Art.45, G.U, Serie Generale n.269 del 18-11-2005, p. 19
[224] Art 40, G.U, Serie Generale n.269 del 18-11-2005, p.18

On 4 December 2016, Italians were called upon to vote on the Renzi-Boschi constitutional reform that was definitively approved on 12 April in the Chamber of Deputies. The reform, named after the two signatories Renzi, President of the Council, and Elena Boschi, Minister for Institutional Reforms, was presented in the form of a bill before the chambers on 8 April 2014.

This proposal, since it was not approved by two-thirds of the members of the Chamber, a quorum provided for in Article 138 of the Constitution, was subject to popular referendum through the collection of signatures.

The turnout for the referendum was 65.5%, with 59.1% (approximately 19,419,507 votes) voting against the reform.

Also in this reform, as in Berlusconi's, there is a heterogeneous treatment of topics. In fact, the number of articles to be amended amounted to 47.

The composition of the Parliament also is subject to alteration: the reform proposes to modify the perfect bicameralism by creating a Senate that is the 'representative of territorial institutions'[225], endowed with different powers and functions from those of the Chamber. However, if we take into account that at this juncture the regional councilors and mayors elected by the regional councils are those who sit in the Senate, we can also deduce a lesser representativeness of the people compared to the 2005 constitutional reform that instead provided for the direct election of senators.

Moreover, the difference between the Senate and the Chamber also crops up with regard to the amendment of Article 117. In fact, Renzi envisages the abolition of the classification of matters of competence, held responsible for causing tensions between decentralized bodies and the state administration.

In fact, from what is clear from the text of the reform, the matters of competing competence with the Regions are redistributed to the State. On

[225] F.Angeli, *op.cit.*, p.124

the other hand, matters not expressly under the exclusive competence of the State can be regulated by the Regions. In addition, the Chamber of Deputies enacts laws that dictate general provisions in matters of definite regional interest, thus excluding the involvement of the Senate, the representative body of the Regions.

Furthermore, Article 117(3) of the reform enunciates the possibility for the Government, when it is necessary to 'protect the national interest and the legal and economic unity of the Republic', to have Parliament intervene to regulate matters that do not fall within the exclusive competence of the State[226].

By comparing the two reforms, that of 2005 and that of 2016, we can see that the state-region relationship and the distribution of competence follow radically different trends[227]. The one aims at further decentralization, while the other tends to grant the state more functions.

The Senate is only guaranteed the right to propose amendments to laws, although the Chamber of Deputies may decide not to accept them.

Furthermore, Article 15 of the aforementioned law establishes a change in the fiduciary relationship between Parliament and the Government. In fact, according to the reform, it is only the Chamber of Deputies that is empowered to grant or withdraw confidence[228].

Therefore, the Senate takes a back seat during the installation of the new Executive.

From this description, one deduces an inferiority of rank accorded by the reform to the Senate, with a concomitant change also in the order of importance of the principal state offices:

The President of the Senate will thus cede the second office to the President of the Chamber of Deputies, with the consequent possibility for the latter to perform the functions of Head of State when the President of the Republic cannot fulfil them.[229]

[226] Art 31, G.U. Serie Generale n.88 del 15-04-2016, p.11

[227] F.Angeli, *op.cit.*, p.134

[228] G.U. Serie Generale n.88 del 15-04-2016, p.8

[229] Ibid.

Concluding with the changes concerning Parliament, the only Chamber that the President of the Republic can dissolve is the Chamber of Deputies[230].

Only in the Chamber that authorization should have been sought for the submission to ordinary jurisdiction of offences committed by the Executive during the exercise of its functions.

Continuing to list the changes to the institutional set-up envisaged by the reform, it is worth mentioning that Article 28 sanctions the abolition of the National Economic and Labour Council, a mainly consultative body at the disposal of Parliament and the Government.

As far as government power is concerned, there are no direct changes to the legislation concerning the President of the Council, however, the figure of the latter emerges on the whole strengthened thanks to the creation of government bills with a certain date.

Another aspect that should not be overlooked is the approval in the same period of the electoral law of 6 May 2015, No. 52, so called "*Italicum"*, which provides for, among other aspects, a majority prize for the party that obtains 40 per cent in the elections, obtaining approximately 55 per cent of the total number of seats (approximately 340 seats). If this threshold is not reached by any party, then the two parties with the best result will compete in a runoff.

Thus, the government appointed after the entry into force of this law will be able to rely on a solid majority in Parliament, something that rarely happens in recent times. In addition, the party leader will almost find the appointment as Prime Minister secure, as legitimized by the voters.

While this mechanism increases the stability of the governing body, it also undermines a key principle of our form of parliamentary government: namely, the lack of a necessary dissolution of the Chambers in the event of the fall of the Government[231].

[230] Ibid.

[231] V. M. Volpi, *Le riforme e la forma di governo*, in www.rivistaaic, n. 2/2015

CHAPTER IV: POSSIBLE DEVELOPMENTS

SUMMARY: 1. Changes in our current form of government: from the parliamentary to the semi-presidential republic – 2. Reinstatement of the role of Parliament

1. Changes in our current form of government: from the parliamentary to the semi-presidential republic

In this last chapter, summing up the topics discussed in the thesis, I will attempt to outline some possible developments.

A probable reform in a semi-presidentialist direction has been discussed several times over the decades. Already thirty years after the Constitution came into force, the first criticisms and observations of the system's weaknesses began. The figure of the President of the Council of Ministers, conceived in the Constitution, has been one of the most debated and discussed issues. And it is mainly to strengthen this figure that many have proposed a change in the form of government.

Semi-presidentialism can be understood, according to Maurice Duverger, as the "*coexistence of a parliamentary-type Government and a presidential-type Head of State*"[232].

The semi-presidentialism, therefore, holds a presidential element (a directly elected Head of the Government who participates in the executive power) and a parliamentary one (the political accountability of the government to the parliament, due to the need for the confidence of both the President of the Republic and the representatives of the Nation). The executive is thus dualistic, in that it is characterized by the President-Prime Minister diarchy and the co-presence of presidential and parliamentary legitimacy of the government[233].

[232] M. Duverger, *Echec au roi,* Parigi, Albin Michel, 1978, p.18

[233] M. Volpi, op. cit., pp. 158-159.

The President of the Republic holds a stable mandate and is directly elected by the people. He is the head of the government and elects (and removes) the Prime Minister. Among the most important powers vested in the President of the Republic, however, is to dissolve the Parliament in order to call new elections[234].

From the possibility of there being a contrasting majority in the legitimation of the two top echelons of the executive follows the possibility of the government functioning in a regime of "cohabitation', in which case the concrete functioning of the institutions is different from that which would be the case with two homogeneous majorities. It is very effective the definition that semi-presidentialism (French) is a 'variable geometry form of government'[235].

However, in order to avoid cohabitation, two fundamental reforms to the French form of government were then passed between 2000 and 2001: the presidential term was reduced from seven years to five years[236], finally following up on the intention already manifested by Pompidou and Mitterrand to pair the terms of office of the president and the National Assembly[237]; to ensure a carry-over effect of presidential elections on parliamentary elections, the time gap between legislative and presidential elections was reduced.

Semi-presidentialism is therefore a middle way between the Presidential system, which has always been considered an unfeasible hypothesis in Italy, including during the Constituent Assembly debates, and the Parliamentary Republic.

[234] F. Modugno, *Diritto Pubblico*, Torino, Giappichelli, 2015, p.69

[235] S. Gambino, op. cit., p. 427

[236] Présentation générale du référendum du 24 septembre 2000 sur le quinquennat

[237] F.Cuocolo, *Bicamerale: atto primo; il progetto di revisione costituzionale*, Milano, Giuffrè, 1997, p.90

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One of the first countries to establish this form of government was Germany with the Weimar Constitution of 1919. However, the semi-presidential model par excellence is undoubtedly the French one, created with the 1958 Constitution and the 1962 revision.[242] In France, semi-presidentialism was in fact created as a remedy to the instability of the parliamentary form of government of the Fourth Republic. And, if Georges Burdeau's evocation that 'constitutions are made to measure'[243] is true, then

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[238] S. Gambino, op. cit., p. 427

[239] *Présentation générale du référendum du 24 septembre 2000 sur le quinquennat*, Conseil Constitutionell

[240] R. Casella, Il monarca repubblicano. *La figura del capo dello Stato nell'evoluzione costituzionale francese dalla grande révolution alla Quinta repubblica*, Napoli, 2009, p. 396

[241] Loi constitutionnelle n° 2000-964 du 2 octobre 2000 relative à la durée du mandat du Président de la République

[242] F. Modugno, *Diritto Pubblico,* Torino, Giappichelli, 2015, p.68

[243] F.Cuocolo, *Bicamerale: atto primo; il progetto di revisione costituzionale*, Milano, Giuffrè, 1997, p.90

there is no doubt that the one of 1958 was made on purpose and had its peak with General De Gaulle's government.

Other countries adopting this form of government include Finland (1919 Constitution) and Portugal (1976 Constitution).

In particular, Finland's semipresidentialism dates back to the second decade of the 1900s. In fact, once the civil war ended in 1918, a new Constitution was passed that provided for election of the President, by popular representatives[244]. From 1925 to 1988 a procedure of election through electoral colleges of 301 members[245] was in force[246].

The terms of presidential and parliamentary mandates provided for, and still in effect, are six and four years, respectively. The Finnish Constitution of 1919 included, among the powers exercisable by the President, those inherent in foreign policy (Article 33)[247].

Moreover, in a context of great party fragmentation and governmental precariousness, the president plays the role of "arbiter" and regulator in the process of forming new executives[248].

On the other hand, Portugal's 1976 Constitution, establishing the semi-presidential republican form of government, was the result of the military revolution that ousted the Salazar regime. Strong military and socialist features were found within that Charter.

Certainly, the choice to establish a semi-presidential regime, with a directly elected president owning strong powers, came from the armed movement[249]. In that Charter, a five-year term and direct election with a two-round election process was provided for the President.

Finally, this Constitution has been amended 7 times. To date, Article 133 provides the powers pertaining to the President. These include the right to preside over the Council of State and to call extraordinary sittings of the Assembly of the Republic, the power to appoint and discharge the Prime

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[244] S. Ceccanti, O. Massari, G. Pasquino, *Semipresidenzialismo; Analisi delle esperienze europee*, Bologna, Il Mulino, 1996, p.25

[245] The components were elected throgh a proportional system, on the basis of party lists

[246] S. Ceccanti, O. Massari, G. Pasquino, op.cit. p.25

[247] Ibid.

[248] S. Ceccanti, O. Massari, G. Pasquino, op.cit. p.27

[249] Ibid. p.30

Minister, and, most importantly, the power to dissolve the Legislative Assemblies prior consultation with the State Council and the parties.

In Italy, on the other hand, it is the governmental instability that has very often led to a discussion of the adoptability of such a system. That instability in many cases have been a flaw that has not only been reflected internally, but has also reverberated in Italy's relations with foreign countries and the European Community.

Probably the focal point of semi-presidentialism lies above all in the direct election of the President of the Republic. A leader chosen by the people and thus the bearer of an unambiguous voice.

A leader elected by means of a majoritarian electoral system who, for the first time, would find himself above the other parties in the ministerial structure.

Furthermore, another argument in favour of semi- presidentialism in Italy lies in the fact that, as we pointed out in the second chapter of this work, the provisions of the Constitution are not always adhered to in a timely manner.

Indeed, it could be observed that at certain junctures the powers of the Head of Government overflow from those granted to him by the Constituent Assembly.

An example of this is the regulatory power exercised by the Government. In fact, parliamentary activity, especially since the legislative terms of the last 25 years, has been predominantly governmental. Legislative initiative laws are on average a minority of approximately 20% of total parliamentary activity.

Needless to point out again the influence of government decrees within these statistics.

There is therefore an emptying out of Parliament's functions, from a body delegated to the legislative function to an organ of control and ratification of the government's actions.

Therefore, while governmental interference has been noted, it is the Parliament itself that over time has begun to delegate more and more to the Executive.

Thus, while the figure of the President of the Council within the Constitution is delineated almost as a *primus inter pares*, we see how over time he is gaining more and more power, while the other main organ, Parliament, is losing it[250].

Therefore, the characteristics and activities of the President of the Council of Ministers are not only outlined by the Constitution or laws (such as Law 400/88), but practice and the actual arrangement of powers have also gained significance[251].

Such practices, however, must necessarily fall within the limits set forth by the Constitution. In fact, as expressed by the Constitutional Court, in Judgment 262/2009, there is an unsuitability of the ordinary law to derogate the rules provided by the Constitution. The only appropriate instrument is constitutional law.

Moreover, supporters of semi-presidentialism call for a reform that would regularize the current de facto imbalance of power, thus opting for an institutional set-up that would pivot on governmental rather than legislative power[252].

Coming instead to the discussion of the feasibility of such a reform, it must be noted that there have already been proposals of this kind in the past (notably in the first and third Berlusconi Governments, in the D'alema Bicameral and more recently by the leader of Fratelli d'Italia Giorgia Meloni) and they have all foundered.

The truth is that changing constitutional norms is not a simple matter, and that is precisely how the Constituents wanted it. In the past there have been changes, even consistent ones, to the text, example of it is the reform of Title V in 2001.

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[250] C. Galli, *Perché mai il semipresidenzialismo?,* in Democrazia e diritto, 2013, 1/ 2, p. 280

[251] C. Galli, *op.cit.*, p. 277

[252] C. Galli, op. cit., p. 280

However, modifying the form of government, also by remaining within the framework of the republican forms, is not believed to be feasible via the two parliamentary approval of the Article 138.

In fact, if we take into account the past attempts of reform, they were approved just by gaining the votes of the majority. Moreover, the Renzi-Boschi Reform wasn't even approved by a striking majority of votes.

The question on the fairness of such a great modification of the State layout without the involvement of the citizens was raised. It is believed that, in order to change the form of government the only adequate instruments would be the referendum or a new Constituent Assembly.

2. Reinstatement of the role of Parliament

On the other hand, there are those who nevertheless trust the approach envisaged by the Constituent Assembly, complaining instead, that the current problems are not the result of an unsuitable form of government, but of the increasing impoverishment of the political class[253]. Semi-presidentialism, seen by right-wing parties as 'the promised land' in the after-Tangentopoli[254], is not entirely free of defects.

In fact, the most worrying aspect to be found in French semi-presidentialism is the role of Parliament. With the entry into force of the 1958 Constitution, there has been a reduction in both legislative and supervisory powers of this body.

In the first sense, in fact, this new constitutional set-up resulted in the marginalization of the opposition. Today, in fact, the parliamentary agenda

[253] F.Cuocolo, *Bicamerale: atto primo; il progetto di revisione costituzionale*, Milano, Giuffrè, 1997, pp.83-84

[254] G. Crispo, *Semipresidenzialismo, l'eterna suggestione italiana,* in LUMSA, 2 novembre 2021, Semipresidenzialismo, l'eterna suggestione italiana - Lumsanews

is decided by the government and its majority, thus making it difficult to debate opposition proposals[255].

On the other side, Constitutional Law No. 2008-724, dated July 23, 2008, intervened on this issue. First, it established the possibility for any french parliamentarian to submit resolutions, with no numerical limit, but acquainting the government of that proposal[256]. The motions with an injunctive content against the Executive or that assume the government's responsibility should be declared inadmissible[257].

In addition, the procedure for submitting government bills has also been changed. Indeed, the Executive will have to fill out a regulatory impact analysis and, most importantly, specify the reasons, characteristics and related interests of the proposal[258].

Therefore, the fact that in our constitutional experience, even the monarchical one with the Abertine Statute, it has always been Parliament the central organ of the whole structure, raises many doubts about the application of this model in Italy.

Furthermore, the adoption of semi-presidentialism would also mean giving up the neutral figure of the President of the Republic. From 1948 to the present day, the Head of State has not only been the representative of national unity, but also the one to rely on in times of crisis, especially when Parliament failed to express confidence in new cabinets.

Therefore, rather than a radical change in the form of government, corrective measures in the vein of rationalised parliamentarianism could be applied to the current one, in order to make the governmental mandate more stable, but, at the same time, preserve the central role of the Assembly. The notion of rationalized parliamentarism was first proposed by the constitutionalist Markine- Guetzevitch in his 1931 work *'Les nouvelles tendances du droit constitutionnel'*[259].

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[255] F. Cuocolo, op.cit., pp.90-91

[256] S. Boccalatte, G. Piccirilli, *La funzione legislativa tra Governo e Parlamento dopo la riforma costituzionale francese del 2008*, in Osservatorio sulle fonti, fasc.n. 2/2009, p.2

[257] Ibid.

[258] S. Boccalatte, G. Piccirilli, op.cit., pp. 3-5

[259] M. Frau, *L'attualità del parlamentarismo razionalizzato*, in NOMOS, 3, 2016, p. 13

The latter started from the concept of parliamentarism, very present in post-war constitutions, i.e. the principle of dependence of the members of the government on the parliamentary majority, and thus of the necessary investiture of the government of the confidence.

Therefore, the manifestation of rationalism lies in the normative obligation of the distrusted minister to resign or, in other words, in the power of Parliament to cause the resignation of the executive[260]. He found tendencies of rationalization in the early legal rules of some constitutions, such as the Czech and the Austrian Constitutions of 1920. Among these can be found, in order to avoid too abrupt changes of government, the procedural aggravation of the no-confidence vote[261].

Finally, it could also be considered to grant the Prime Minister the power to appoint and dismiss the ministerial team.

Moreover, there are those who believe that the weakness does not lie in the form of government, but in the political system[262]. In fact, the parties play an essential role in the institutional balance.

With the crisis of the parties, especially after the 'Mani Pulite' investigation, anti-political and anti-party sentiment has been growing. Parties and politicians were held responsible of misgovernment as they were too preoccupied with pursuing their utilitarian goals[263]. The total distrust of the political system led to a loss of legitimacy of the governing parties[264].

In addition, during the same period, while the formerly existing political structure collapsed, new parties emerged and consolidated.

Forza Italia and Lega Nord were the main revolutionary actors during this period. Their being anti-political parties, in that they were truly outsiders from the world of politics led them immediately to victory in the 1994 elections.

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[260] Ibid. p. 15-16

[261] Ibid. p. 17

[262] C. Galli, *op.cit.*, p. 282

[263] F. Cuocolo, op.cit., pp.83-84

[264] P. Ignazi, *La crisi della politica in Italia*, in Treccani, 2009, LA CRISI DELLA POLITICA IN ITALIA in "XXI Secolo" (treccani.it)

In particular, Forza Italia was founded out of Silvio Berlusconi's idea to create a party, representative of the productive class, without the established organizational structure and model, where he himself could be the functional and directive center[265]. Lega Nord, on the other hand, was founded as a representative party of the working class, especially of northern Italy.

However, the Christian Democracy (DC), a central figure in the corrupt establishment, thanks to a metamorphosis consisting of a change of name (PPI) and symbol, a strategy used by all pre-existing parties, and the leadership of Mino Martinazzoli, managed to garner 11.1% of the vote in the 1994 elections.

The third anti-political party, which was initially a movement created around a blog, was founded by Beppe Grillo in 2005: Movimento 5 Stelle. It characterized by not embodying any ideology, unlike the other parties, and by abolishing parliamentary representation and political government.

The emergence of new anti-political parties, and the support of citizens for these, shows the disaffection for the political caste that has been present for years. However, it should also be pointed out that voter turnut is regularly declining.

Therefore, the unwillingness of citizens to particpate in political life is a symptom of general discomfort and rejection of the potical system, and it creates, as a consequence, the diminishing representativeness of parties and elected politicians.

In addition, the latter not infrequently become actors in unpleasant and illicit activities, thus confirming their bad reputation and the need for a stricter regulation.

To conclude, rather than thinking of ways to change the institutional set-up, to regain the trust of citizens both in public institutions, directly damaged by the past scandals, and in the political class, it is the latter that should take responsibility for its action and to truly commit for the public good.

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[265] Ibid.

CONCLUSIONS:

The governmental role of the President of the Council, from the Unification of Italy to today, has undergone a slow evolution, through three different forms of government.

As Leonida Tedoldi pointed out, the President of the Council has always fulfilled an "anomalous" and often undefined role[266].

However, there seems to be one common feature that unites the role of the head of government in all three epochs: the constant pursuit of strengthening the executive and of emancipation of the President from the other Ministers.

During the liberal period the role and functions were not covered by the then Fundamental Charter, the Statuto Albertino. Crispi, Zanardelli and Giolitti were probably the presidents of the Liberal era who most of all, pushed for formal recognition and beyond emancipation from the Crown.

The fundamental importance of understanding the constitutional structure chosen by the Constituent Assembly, was also the period of the Mussolini regime, characterized by a progressive centralization of powers and the connivance of the Monarch.

In fact, in order to avoid a new degeneration into an authoritarian regime, the Constituent Assembly opted for a system in which Parliament would have played a central position.

The President of the Council, instead, would be responsible for directing government policy, and for the promotion and coordination of the activities of ministers.

Moreover, on that occasion, it was preferred to defer the regulation of the government's activities and prerogatives to a later stage. Such regulation did not occur until forty years later, with Law 23 August 1988, n. 400.

[266] L.Tedoldi, op.cit., p.5

In addition, there have been many attempts to change the institutional set-up since 1948: the “Bicamerali”, the Berlusconi reform of 2005, and the Renzi-Boschi reform of 2016. Despite the negative outcome of these attempts, the configuration of the Italian form of government appears to have contributed to a decline in the efficiency of institutions in recent years, which heightens the urgency of a constitutional change.

Moreover, even though the proposals were not free from objections to the content, in reality, the greatest perplexities arose on the formal and procedural level, derogating from the constitutional review process.

Conventions, the election process, and the party system — three key components of the system — all fell short. Despite unsuccessful reform efforts, there has been a change, yet not formalized in the Constitution. Therefore, a discrepancy between the latter and socio-political reality is occurring.

Furthermore, the past 30 years have seen a general strengthening of the President of the Republic role, especially in the case of political crisis resolution and in the establishment of technical governments, which creates a distortion from his natural function.

To Conclude, the Constitution simply stands at the base of civil society. And precisely for this reason, it is needed for a constitution to be expression of current culture and times.

The organization of the state powers is one of the cornerstones on which constitutional law revolves and forms the hard shell of the Constitution, which, despite its rigidity needs to be actualized.

While such modernization could be implemented through semi-presidential reform, it is important to consider the possibility that it may be a mistake to believe that direct election of the Head of state is a cure-all for the flaws of our institutions and society imperfections. In fact, even modifying the form of government, the issue of party crisis would remain unchanged.

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