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INFLUENCING THE PUBLIC OPINION OR GIVING EFFECTIVE ANSWERS TO THE CRISIS? THE EU PERSPECTIVE AND THE ITALIAN WAY*

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Summary: 1. EU, member States constitutional systems and different reactions to the crisis. – 2. European integration, internal constitutional developments and the representation versus representativeness problem. – 3. The Italian answer to the crisis: "reforms" by urgent decrees. - 4. Public discourse, populism and decision making in public spending and Welfare State reform bills. – 5. Judicial review of legislation and the crisis: limitation of financial effects of the rulings by the Constitutional Court. – 6. EU, single market or single minded?

1. *EU, member States constitutional systems and different reactions to the crisis.*

A recent statement by the head of the eurozone's finance ministers concerning crisis-hit European countries, saying they had wasted their money on "drinks and women", and the ensuing refusal to apologize[2] seems apt to bring new life (and folklore) to a weary debate on EU financial stability standards, anticrisis measures ineffectiveness and the future of European integration.

In the last few years a huge debate has developed in the social sciences over the impact of the international financial crisis on the European Union and the cohesion among members States. This debate was part of a wider discussion over the neoliberal theory

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2 Claiming that "if you want to maintain public and political support throughout the EU for solidarity you must always also talk about what commitments and what efforts must be made by everyone to maintain that solidarity.", as reported in the Financial Times, March 21, 2017, "*Dijsselbloem under fire after saying eurozone countries wasted money on 'alcohol and women*', by M. Khan and P. McClean.

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dominance in the western political and economic arena, and especially in the European integration process[3]. The legal profile of this debate concerns mainly the impact of the crisis on EU institutional framework and on member States constitutional systems, together with the peculiar aspects of anti-crisis measures adopted, on both levels, as a reaction[4]. The aim of this paper is to offer a small contribution to this debate from the Italian constitutional law point of view, by looking at it in the perspective of a representativeness versus representation dichotomy.

One of the main questions I would like to address concerns the impact of EU decisions concerning the crisis on the functioning of the Italian frame of Government. In approaching to this issue I will try to focus on the correspondence between what is being communicated to the public and the type and contents of measures approved by the Italian Government.

Constitutional law scholars have been studying for decades the difficulties and fragmentation of the Italian constitutional and political system, widely considered way too inefficient and unstable in comparison to other western democracies[5]. This structural weakness of the Italian political system, as could be quite easily predicted, has made Italy a sitting target for international financial speculation. Since 2011, this element has been influencing its democratic process, which is being compelled by the constant threat of an infringement procedure due to excessive public debt. This aspect could not but deepen the gap existing among Italy (not to talk of Greece and Portugal) and other larger and richer EU member States, generating since 2009 a strong international pressure on the Italian Government regarding the level of public debt and the urgent need of "reforms". At the end of 2011, as it is well known, this pressure led to the resignation of the Italian Prime Minister and its Government and the birth of a new Government guided by a former EU commissioner.

Since then, political developments not only in Italy, but also in Greece, Portugal and Spain, and lately in other EU Member States, seem to show the international financial crisis role in a thorough regression concerning not only the functioning of the

[3] The issues at stake are notorious: they could be summarized efficaciously with the words of S. FABBRINI, *The euro crisis and the constitutional disorder of the European Union*, Paper presented at the 21st International Conference of the Council for European Studies, Panel on "*The Political and Economic Dynamics of the Eurozone Crisis*", Washington D.C., 15 March 2014, regarding "…an economic compromise based on the necessity to conciliate contrasting economic principles, as the centralization of monetary policy in the ECB and the decentralization of economic, fiscal and budgetary policies in the member states of the euro-area. It was this latter compromise to reflect the economic constitution's theory of German ordo-liberalism. In fact, the compromise consisted, on one side, in recognizing national discretion in economic, fiscal and budgetary policies and, on the other side, in delimiting national discretion through a pre-established legal framework ordering the management of those discrete policies. The Lisbon Treaty is the outcome of these multiple constitutional compromises. It has formalized a dual constitutional regime, expression of two different political views of the Union; it has accommodated a separation of interests between EMU countries and the economic and monetary regimes of other EU member states; it has combined centralization and voluntarism within EMU", p. 2.

[4] Among others, see E. CHITI and P. G. TEIXEIRA, *The Constitutional implications of the European responses to the financial and public debt crisis*, in *CMLR* 2013, 50, 683

[5] M. COTTA, *Italy: a fragmented Government, in "Cabinets in western Europe"*, ed. By J. Blondell and F. Muller-Rommel, Palgrave Mc Millan, Uk, 1997, 136ss.

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constitutional framework in European democracies, but the effectiveness of fundamental principles of the EU Treaty as well.

Several interesting EU law issues have been raised concerning the EU reaction to the crisis, the EU institutional actors involved, and the derogation to some important rules of the Treaty. From the internal point of view, the compliance with some fundamental rules of the Italian Constitution of 1948 was put at stake.

Unexpectedly, other important members of the Union (that could be considered above suspicion up to recent years) are also being affected by a similar process, as shown by elections in Austria, the British referendum on EU membership (Brexit) and the rise of Euroscepticism throughout Europe. Communication about all these processes rarely represents to the public opinion precisely what is actually happening in the public sphere and how the EU decisions concerning the crisis are affecting the decision-making procedures. The sensation of something going wrong in the EU integration process anyway gets to the public opinion.

2. *European integration, internal constitutional developments and the representation versus representativeness problem.*

Most scholars and observers converge on the idea that Government stability has been a serious problem about the functioning of the Italian frame of Government since the birth of the Republic. Nevertheless, many seem to forget the fact that throughout the first fifty years of the Republic, the Parliamentary majority and the Government have been firmly held by one party - Christian democrats – and the following period has seen the predominance of a single party led by the notorious tycoon, Silvio Berlusconi. Thus, the frequent changes of Government seem to depend mainly on the nature and character of Italian parties, their internal conflicts and the dialectic among different factions. This issue however hardly appears in the discussion on Governmental stability, which often shifts to finding the perfect solution, a sort of *panacea*, in a comprehensive Constitutional amendment procedure.

The "Big Constitutional Reform" has then become some kind of utopia, being discussed and pursued for over the last three decades, while the highly fragmented political system and the loss of political parties' legitimacy after the huge *Tangentopoli* bribery scandal, affecting the political system as a whole, hardly led to some remarkable legislative reforms. Above all, the 1993 bill, transforming the electoral system into a plurality/majority model, abolishing voting preferences (introducing single member constituencies) started a major development with a spillover effect on the Constitutional system of Government as a whole. The system was intended to bring to important developments in terms of cohesiveness and stability, due to the major tasks assigned by the Italian Constitution to Parliamentary majority. Nonetheless, the expected evolution concerning Governmental stability never happened, political fragmentation being hard to

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do away with, and the electoral formula was changed again in 2005 and in 2015, in a reckless succession of reforms. The main visible effect, due to the evolution in the media world, was a growing personalization of politics, and the increase of a populistic approach in the political debate, an inevitable though inappropriate answer to the increasing malaise of the public opinion.

This process, together with the increasing transfer of competences to the EU, that had started since the Maastricht Treaty, involving more and more national Governments rather than Parliaments, further impoverished the role of the Italian Parliament, which, in the Constitutional architecture was intended to be major.

Since the nineties, the abuse of Governmental legislative powers regulated by art. 76 and 77 Const. was one of the main symptoms of the marginalization of Parliamentary legislation in Italy, a problem renewed in 2011-2016, throughout the economic crisis.

In a wider perspective, it is well known how the increasing Ue competences and rules set in the Maastricht TEU and the following Treaties brought towards an ever-stronger role for national Governments in the European Union[6]. This trend has been moving the center of Member States constitutional systems all in the same direction. Italy is one of the clearest examples of this process, the Government being the only actor deeply involved in legislative procedures in the EU, also due to a certain national underestimation of regional and Parliamentary powers in the EU decision making procedures.

Paradoxically, while this process emerged, the EU institutional framework was evolving towards a greater role for the European Parliament, together with an increasing transfer of powers to the European Union due to the changes in EU Treaties. As it's already been said, the transfer inevitably ledto a loss in the role of representative bodies –at both local and national level - inside members States constitutional systems.

In addition to this, to introduce the following remarks, it ought to be recalled that the EU, through the last few decades, used to privilege intergovernmental cooperation, even in cases in which the Treaty architecture would have allowed "democratically accountable" decisions making procedures (ie codecision). A similar trend has been recently confirmed by EU anti-crisis measures[7]. All these elements brought to an inevitable disequilibrium in the respective roles of constitutional institutions on a state level, in other words to the marginalization of national Parliaments.

[6] On this subject the German *Bundesverfassungsgericht* often focused its attention; see especially its ruling on the Maastricht Treaty in 1993 (Brunner v The European Union Treaty, 2 BvR 2134/92 & 2159/92, BVerfGE 89, 155 [1994].

[7] See P. CRAIG, *Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance*, in *European Constitutional Law Review*, 9, 2013, 263 ss. Main instruments referred to in the text are the EFSF (European Financial Stability Facility), agreed by the Council of the European Union on 9 May 2010, with the objective of preserving financial stability in Europe, and the ESM (European Stability Mechanism) intergovernmental treaty established on 2 February 2012.

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A certain lack of transparency is another notorious consequence of this process. The EU Council discussions, as a rule, not being public, unless when it discusses or votes on a proposal for a legislative act[8]. Due to this character of the EU decision making process, it was inevitable to notice, in the last few years, an increase of the tendency of national governments to engage in a blind shift game, charging "Brussels" for all the unpopular EU austerity choices they contributed to deliberate.

As European integration affects in several different ways all aspects of national constitutional systems, the EU reaction to the crisis was capable to affect deeply internal legal sources, as well as judicial protection of constitutional rights, or public services, and many other issues is an unexpected phenomenon spreading from the economic to the institutional level. It shows the inherent weakness of the EU architecture which was hidden by prosperity and economic growth during the golden era of the integration process.

In such a scenery, with the fast spread of populist parties in Europe, reaching its highest point in the European Parliament elections of 2014[9], the main difficulty for national Governments seemed to be a matter of communication with an impoverished and angry electorate.

Imitating sirens of populism has become a big temptation for traditional '900 parties, and part of this game passes through public statements, social media and a "representation" of political decisions not always corresponding to their actual content. Some clear examples of this tendency can be found in the Italian experience, where provisions adopted with legislative measures are often foretold to the media in a desperate attempt to conquer public appraisal. For instance, it happens often that urgent decrees are deliberated by approving the cover only, and then communicated to the press, while the content ot the act itself is written and then published on the official journal only several weeks later.

The constitutional reform bill, soundly rejected by the December 2016 referendum, can be considered another remarkable example of this kind of practice. The title of the question posed to voters in referendums implies delicate choices, as it was clear in the "leave-remain" British option. In the Italian constitutional referendum, the title chosen clearly meant to emphasize uniquely a few of the many controversial aspects of the reform ("Reduction of the costs of politics and the number of members of Parliament"), even though the legislative discipline of constitutional referendum, set in art. 16, L. n. 352/1970, would have required a so-called "dumb title", only recalling the articles amended. The 2016 constitutional referendum title, clearly designed to put a "good gloss"

[8] In these cases, the meeting agenda includes a 'legislative deliberation' part.

[9] Since that election, the French Front national and the British UKIP are the most represented French and British parties in the European Parliament, and the M5S movement is the second largest Italian party. This tendency has since then continued, and Front National seems ready to contest the Presidency of the Fifth Republic, while the Italian M5S is set to challenge the Democratic Party primacy in the next 2018 political elections.

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on the set of measures gathered in 47 articles, seemed apt to offer just another example of a communicative technique unsuitable to fill the gap between politics and the electorate, as the 60% of voters against it have shown[10].

The previous constitutional amendment was approved in 2012, when art. 81 Const., concerning the rule on balanced budget, was reformed after quite a hasty debate by the Parliament. This was meant to be a turning point of the Italian sovereign debt crisis, and the high majority reached on this deliberation prevented the opposition's right to promote a constitutional referendum, art. 138 Const. allowing it only when a 2/3 majority has not been reached[11].

3. The Italian answer to the crisis: "reforms" by urgent decrees

Urgent decrees disciplined in art. 77 of the Italian Constitution offer a very good example of the impact produced by the financial crisis on the representativeness versus representation under discussion.

Because of the difficulties arising from the crisis and the serious threat of an attack on the Italian public debt on financial markets, as it was previously mentioned, Prime Minister Berlusconi was brought to resignation during the XVI Legislature and a new Government was appointed. The appointment of an economist and former European Commissioner as President of the Council, quite clearly on the basis of his technical competence and Brussels' appreciation of his name, as he was not member of any political party, was quite an innovation in the context of the traditional "Westminster system", and sidelined some of its basic rules.[12]

When the new Government took office in November 2011, it presented to the Houses of the Italian Parliament a political program entirely focused on a series of measures related to the economic situation. The main instrument in this phase, since then largely prevailing over regular legislation, despite three rotations to the Government guidance, was urgent decree, disciplined in art. 77 Const. While the use and abuse of the instrument had steadily grown in previous legislatures, since 2011 and onwards, the number of urgent decrees increased even further. The content of these measures show distinctive features that it is useful to try to shortly analyze.

One aspect of these legislative acts deserves to be pointed out in the first place. The contents of these measures corresponds, to a large extent, to those detailed in the letter sent in august of 2011 by the outgoing and the incoming governor of the ECB to the

[10] Participation to the referendum of December 4, 2016, reached the record of 68,49% of the electorate in Italy.
[11] See more on reform of art. 81 in section 4
[12] Sen. Monti had been appointed "senatore a vita" only a few days before his new task as the chief of the Executive.

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Italian premier Berlusconi dictating an economic policy agenda.[13] Momentarily leaving aside the constitutional (and smashing) issue of the real political source of legislative acts in this phase, we have to linger on the vehicle used to marshal them in the Italian legal order, the instrument already mentioned, urgent decrees.

The preambles of these acts must state the reasons of necessity and urgency functioning as their constitutional legal basis (art. 77 Const. allows these acts only if on "casi straordinari di necessità e urgenza"). It ought to be underlined on this subject that, especially during the first two years of this period, these circumstances are assumed to be constantly standing because of the crisis, as if it the crisis itself could permanently legitimize Governmental legislation. A legislation going often outside of its constitutional limits, and overflowing the normal scope of a Government competence, both in quantity and quality one could say.

In fact, not only the number of decrees approved was remarkable, but also their scale (the number of the provisions they contain)[14] and object, their content relating to matters requiring a stable regulation over time, so as to be necessarily approved after an appropriate Parliamentary debate among all political parties.

In addition, it should be underlined that these measures often have a highly inhomogeneous content. Among other examples one might recall decree (so-called IMU – Banca d'Italia decree, no. 133/2013, not only introducing rules about the proprietorship of the treasure of the Italian Central Bank, but also home property taxes). The hasty approval of the bill of the Parliament confirming it, through the so called "guillotine" clause, aroused sharp indignation among the Parliamentary minority.

Beyond the question of the content of such urgent decrees, which raised substantial and procedural issues at the same time, certain rules requesting the legislative procedure guarantees, (art. 72 c. 6 and 77 Const.), whereas the way the Parliament interpreted its task to convert them into statutes provoked other constitutional complaints[15].

The frequency a precise sequence occurs at this stage does not seem to show significant exceptions. The deliberation of the decree by the Government is followed by the presentation of a maxi-amendment to the conversion bill proposal by the Government, presenting at the same time a "questione di fiducia". Such "questioni di fiducia" are instruments disciplined by the Italian Parliamentary regulations, involving the Government's commitment to resign in case of rejection of a bill, with a blackmail effect of the Parliamentary majority.

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[13] The letter is reported in the *Financial times* by G. Dinmore and R. Atkins's article "*ECB letter shows pressure on Berlusconi* " September 29, 2011; full text of the letter can be read in Italian on the website of *Corriere della sera*, September 29, 2011 with the title *«C'è l'esigenza di misure significative per accrescere il potenziale di crescita»*, *Corriere.it*.

[14] Interesting analysis were developed in relation with the number of columns in the official journal, compared to the past. See on this, data by B. CIMINO, S. MORETTINI, G. PICCIRILLI, *La decretazione d'urgenza in Parlamento*, in *Politica della legislazione, oltre la crisi*, Bologna, 2013, ed. by L. Duilio, 59ss. Since 2006-2010, when 95% of spending Parliamentary decisions was deliberated by urgent decree, data have grown worse. V. LIPPOLIS, *La centralità del Governo nel sistema politico. Le specificità del caso italiano*, in *Il Filangieri- Quaderno 2010*, Napoli, 2011, 22.

[15] See especially rulings no. 171/2007, 22/2012 and 220/2013 and following section.

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This way, the role of the Parliamentary debate is diminished, to the point that any chance of amending the measures taken is avoided and the voice of the representative institution *par excellence* is nullified.

Another aspect of this legislation deserves to be underlined as it contributes to compromising its quality and efficacy. The role of Parliamentary commissions involved in converting urgent decrees into Parliamentary statutes has been diminished by the fact that, as anti-crisis measures, they were assigned mainly to the budget commission, other competent Parliamentary commissions being only consulted. Due to the heterogeneous content of the decrees, up to ten commissions have been involved each time. The inevitable consequence is a merely superficial examination of the measures of the disciplines being approved. Whereas these decrees were meant to produce an impact on the economic situation. Because of the poor quality of the technical elaboration of these acts, this effect could not always be assured.

An interesting feature of these governmental activity deserves a few additional remarks. At the beginning of the XVII legislature the Government took account of the huge backlog consisting of the implementing measures of urgent decrees overdue (those regarding decrees that had been approved by Mr. Monti Government amounted to 832). A majority of the provisions adopted urgently because of the crisis, forcing constitutional limits concerning the legislative process, were not self-executing, and needed a regulation to allow them to be implemented.

On December 2013 the percentage of Governmental acts already implemented was 38% (more than 50% of them by Mr. Monti Government, 12% by the following Government chaired by Mr. Letta). In that same month, the budget act referred to 117 implementing measures.[16]

The intent to portray what was unfolding as an incisive action against the crisis, and perhaps the wish to reassure markets, appeared to be at the basis of the work of the Government, and seemed to prevail over its efficacity. All this, however, seems to have triggered phenomena detrimental to political representativeness. A decision-making process increasingly secluded from public debate and influenced by international financial markets, in which, however, an inability to meet the economic challenges of the emergency prevailed.

4. Public discourse, populism and decision making in public spending and Welfare State reform bills

A particularly interesting area in which a similar trend can be detected is the discipline of party funding adopted by decree-law no. 149 of 2013, whose conversion into law was signed by Prime minister Letta on February 21, 2014, on the last day of his tenure. Not

[16] See G. PITRUZZELLA, *Crisi economica e decisioni di governo*, paper presented at the XXVIII congress of the Italian association of constitutional law scholars (AIC), in *Rivista AIC*, 4/2013, 7. R. CALVANO, *La decretazione d'urgenza nella stagione delle larghe intese,* in *www. Rivistaaic.it*, 2/2014.

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only its contents, but also the formal procedures followed are interesting in this case, considering what has been briefly reported regarding the practices of Parliamentary proceedings during the XVI legislature. This case provides a further opportunity for reflection on the distortion suffered by the constitutional system in relation to the crisis. Public perception of the crisis seems to have produced the need to give visible –more than effective- answers to problems.

The regulation in question had been initially presented as an ordinary bill, and had already been passed in the House. Then, during the examination by the constitutional affairs committee of the Senate, the Government suddenly withdrew the bill approving an urgent decree with the same content, out of any extraordinary emergency justifying the use of art. 77 Const. The unexpected removal of the measure from the Senate, and the will to circumvent the Parliamentary debate was evident in this case and seems highly significant, especially in light of the content of the decree then approved.

The decree, approved in 2013, is headed "Abolishment of parties direct public funding", quite an appealing title in a time of "austerity" and spreading anti-parties and anti-politics movements. Far from any urgency, and from abolishing public funding, the decree introduced a discipline which would fully apply only from 2017, based on the matching of two forms of indirect public funding. These funding systems will be accessible for parties obtaining to be included in a public registry by respecting certain formal requirements in parties' internal regulation. It is therefore required that parties organization respects a minimum regulation aimed at promoting the democratic processes as set out art. 49 Const., as a condition for access to the indirect financing tools, which will therefore continue to burden the State budget. The bill allowed public financing for the first four financial years, providing for a gradual reduction thereafter[17].

The preamble of the decree states the constitutional urgency basis thereof, motivated by the need to respond to the "demands of austerity at a time of crisis" with reference to the political customs[18]. The convenience of this discipline could be discussed, not only in relation with the need to implement the democratic method the Constitution requests for parties, but most of all as a means to revitalize the role of political mediation between the electorate and the representative institutions. A role seeming rather tarnished, especially in the Italian constitutional and political experience of the last three decades.

The crisis is then, in the Italian set, not only an economic phenomenon, but also a regime crisis. A crisis of representativeness and a crisis of the political party system.

[17] Since 2017 and on the new discipline allows parties to be eligible under the terms provided by law, to get 2‰ of income tax from those citizens who will choose to address in their favor. In addition, donations by individuals, permitted up to a maximum of one hundred thousand euros per year, will be encouraged by the deduction of 26% from the income tax, provided the donations are kept within a maximum of thirty thousand euro a year.

[18] See R. DICKMANN, *La contribuzione su base volontaria ai partiti politici prevista dal decreto legge n.149 del 2013. Molte novità ed alcuni dubbi di costituzionalità*, in *Federalismi.it*, 5/2014.

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One may wonder then if the answer to this state of affairs can be found in stiffening financial budget standards and going on with austerity measures and compression of democratic legal procedures and social rights, as in the last few years institutional practice, instead of stimulating a renewal of the democratic circuit[19].

As it is well known, the relationship between what has been defined as "sovereign debt crisis", and the increasing welfare state cuts already taking place in Europe, had one of its main turning points in the Greek crisis[20]. The first raft of measures imposed by the European Commission, the ECB and the IMF in 2012 had triggered the objections of workers and pensioners unions. The European Committee of social rights of the Council of Europe thus condemned those measures as illegitimate in relation to their purpose, having unnecessarily compressed the right to wages, retirement and study. In this regard, it must be held that the imposition of conditions for access to international financial aid for States in difficulty cannot justify any kind of restrictive measure of social rights. The EU Treaty dispositions on social rights, in fact, request its institutions to comply with democratic procedures when they set procedural obligations to take such measures, and to show the proportionality of measures and the absence of better alternatives for the protection of social rights.[21]

Although the contrast between social rights and welfare reforms introduced in Italy has not yet reached the dramatic levels seen in Greece or in Portugal, the Italian experience of the last few years shows a series of Governmental actions developing in the same direction, in accordance with new article 81 Const., approved in 2012 in execution of the (noncompulsory) rule set in art. 3 of the Treaty on stability, coordination and governance, the so called "Fiscal compact", introducing the golden rule requiring a strictly balanced budget. Even in this context, the Government seems to have replaced the representative democratic process with its own representation, using mechanism and marketing techniques that have been referred to in previous pages and that this article tries to describe.

Thirty billion Euros of national health budget cuts in five years is the first chapter in this story,[22] but the "linear cuts" approved in these years also concern education, assistance to the disabled, social security and the University system.

In this framework, the six years' salary freeze in the public sector was a measure enabling the State to recover a large amount of resources, requiring a major financial sacrifice to civil servants. This sacrifice was not "represented" in the sphere of public discourse, whereas media often devalue civil servants.

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[20] On which see T. SKOURAS, The euro crisis and its lessons from a Greek perspective, in Society and economy, 35, 2013, 51 ss.

[21] Decisions by the European Committee can be read at http://hudoc.esc.coe.int. On the European Social Charter see D. RUSSO, *I vincoli internazionali in materia di tutela dei diritti sociali: alcuni spunti dalla giurisprudenza recente sulle misure di "austerità"*, in *Osservatorio sulle fonti*, 2/2013.

[22] These are the data collected by CGIL (Italian largest syndicate).

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In such a social and political scenario, the mantra "Europe asks for it" was consistently cited, not only in front of the public opinion, but even in hearings at the Constitutional Court, called to review the constitutional compatibility of the salary freeze of academics. The contested provision was defined before the Court as one of the "cooling mechanisms in the public sector wage growth, demanded of the Italian State directly by the EU"[23], thus recalling not a directive or the EU Treaty, but the letter by Mr. Trichet and Mr. Draghi, referred to above, concerning the need to reduce the ratio of GDP and public deficit in Italy.

On the subject of communication techniques (in place of democratic procedures) another interesting example can be found in the field of education. The creation by the Ministry of Education on its website, of a "listening procedure" involving the world of education (teachers, school administrators, families, students) through the dialogue process activated online is worth mentioning[24]. This can be considered quite a good case study in which the representative process seems to have been twisted to the needs of political communication. The democratic debate in Parliament has been eluded, as the discussion and deliberation of the bill concerning the school system (the so called "buona scuola" approved with L. no. 107/2015), was cut off by the Government calling on its majority to approve a "questione di fiducia" (involving the Government commitment to resign in case of rejection) on a single article consisting of 212 subparagraphs, with no heading, and was thus illegible.

The reflection on representation vs representativeness finds a very good case study in this bill. In fact, its immediate consequences already show what awful results such techniques in legislation can produce. The bill delegates to future legislation (according to art. 76 Const.) the solution of some of the urgent problems, such as teachers' recruitment, while its hastily approved regulation is already failing its objectives, as many applicative difficulties are arising and hundreds of disputes are already pending in courtrooms.

Despite endless application issues raised by the teachers' recruitment procedures, (due to the abuse of successive fixed-term employment contracts in violation of EU law, notwithstanding the connected infringement procedure and ECJ ruling in the Mascolo case[25]), the bill is now being spoken of as a commendable stabilization of tens of

[23] This sentence is part of the pleading by the State defense in the case for judicial review by the Constitutional Court ruled with decision n. 310/2013

[24] The website labuonascuola.gov.it can still be visited online.

[25] European Court of justice, judgment of November 26 2014, in C-22/13, ECLI:EU:C:2014:2401; the infringement procedure 2010/20124, was repealed on November 19, 2015 by the Commission, claiming the Italian authorities had presented a reform of the school sector (the '*Buona Scuola*' reform) aimed at bringing Italian national legislation into line with Directive 1999/70/EC and adopting measures to prevent the types of abuse described above. Lately the European Parliament re-opened the discussion on the topic, questioning that "while Article 131 of the new law prohibits these abusive practices, it contains no specific clauses preventing the use of such practices. In other words, the law fails to comply with the directive", asking the Commission to open a fresh infringement procedure against Italy (question for written answer, December 8, 2015.

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thousands of temporary teachers. Less publicity was given to the fact that teachers recruitment procedures in Italy were compulsory due to the judgment rendered by the Court of Justice on November 2014.

The dichotomy of representativeness vs representation in connection with welfare reforms in Italy is quite remarkably evident in the labor market reform too. A harsh debate has raged between the Government, INPS (National Social Security Institute) and ISTAT (National Institute of Statistics) since summer 2015, concerning unemployment data after entry into force of the so-called *job's act* (a 2015 bill reforming the labor market), is the flagship measure and reforming action required by the European institutions to the Italian Government since 2011 aimed at rendering more flexible the workers guarantees in order to stimulate new employment.

Unlike the data published by the Ministry of Labor and INPS, those disclosed by the National Institute of Statistics in fact showed a decline in employment, and a progressive deterioration of the quality of wage labor in our country in terms of salary levels and guarantees of stability.[26] Figures are not improving, and no amazing effect seems to be developing as a consequence of a measure whose efficacy, according to labor law scholars, cannot be evaluated only on a short term basis, whereas OECD says that "La plupart des études empiriques examinant les effets à moyen/long terme des réformes en faveur de l'assouplissement de la LPE (Lois protection des emplois) suggèrent qu'elles ont, dans le pire des cas, aucun impact ou un impact positif limité sur les niveaux d'emploi à long terme[27].

It does not seem incorrect to say that, with regard to problems of labor law, we are witnessing a predominance of the "representation" of the responses to the crisis, while political representation seems to have been ousted from the scenario of the most crucial decisions of this phase.

5. Judicial review of legislation and the crisis: limitation of financial effects of the rulings by the Constitutional Court

The crisis of political representation and the inertia of national legislators confronted to the need for protection of fundamental rights has shifted the emphasis onto the role of the courts in the first place, and especially the constitutional courts. To many, they seem to be in the best position to be entrusted with a rebirth of rights in Europe. Those who do not share this optimistic "Court-centered" view highlight the necessity to emphasize that only a revitalization of the political representation circuits might be able to bring pluralistic democracies back to their task of safeguarding fundamental (and especially social) rights, even at a time of economic crisis.

[26] Worrying figures by Istat can be found on ww.istat.it
[27] OCDE, *Perspectives de l'emploi de l'OCDE 2016*, pag. 146.

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The preservation of the heritage of European constitutionalism, in which theoretical reflection leads us to prefer political representativeness to the mere representation of it, is not the only issue involved. Though, in the last decade the tendency of many scholars to endow Courts with a messianic role has spread widely. However, from a more pragmatic point of view, it has to be said that an attitude attentive to the effectiveness of the instruments of protection, paired with the knowledge of the Italian Constitutional Court case law, as well as that of supranational courts, does not allow us to indulge in enthusiasm. It gets hard then to support the widespread and continued advocacy for judicial creativity and multilevel constitutionalism[28].

The Italian Constitutional Court has, in recent years, developed a case law quite critical of Governmental abuse of the legislative sources which was censored above[29]. It finally handed down a true "condemnation" in judgment n. 32 of 2014. In that case, the court was called to rule on the legality of provisions introduced in a conversion law, without any correlation to those posed in the urgent decree, "aimed at implementing a radical and comprehensive reform of the Statute on Narcotic Drugs"[30]. The Court blamed the inhomogeneous maxi-amendment practice and its impact on legislative procedures and the role of Parliament. According to the Constitutional Court, "due to the 'locked' vote effect that the 'questione di fiducia' produces, under current Parliamentary procedures produces, any possible intervention on the text presented by the Government was prevented". It then remarked on the importance of "keeping within the constitutional framework the institutional relations between the Government, Parliament and President of the Republic in the performance of the legislative".

With similar harshness it ruled on the electoral system in decision no. 1 of 2014 (despite numerous procedural obstacles that could have led it to rule the question as inadmissible) as if to unblock a system jammed by the party crisis.

Despite the courage shown by the Constitutional Court in these areas, its case law does not seem to have produced any change in the practice of the constitutional organs on these issues. Actually, mechanisms provided for in the electoral system already declared unconstitutional in 2014 were widely reproduced in the discipline approved in 2015, and the new law was declared void in 2017[31].

However, in the field of fundamental rights, the attitude of the Constitutional Court case law was quite different as compared to what we found in the area of constitutional adjudication on the configuration of constitutional organs and procedures. The Court's courage in fact seems to fade away in the numerous cases regarding the protection of

[28] A critical overview of this problem in the Italian debate about the role of Courts, among the European and the nationale level is in M. LUCIANI, *Il brusco risveglio. I controlimiti e la fine mancata della storia costituzionale*, in *Rivista aic*, 2/2016.
[29] See among others, especially rulings nn. 171/2007, 22/2012 and 220/2013.
[30] Whereas the measure disciplined the financing and security measures for Winter Olympics of that year.
[31] Constitutional court, ruling n. 35 of 2017.

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social rights, with rulings in the last few years concerning the compliance with the golden rule set out in new art. 81 Const[32].

It seems that the Constitutional Court's self-perception has changed during these years of crisis. It no longer seems to see its role as one of Constitutional guarantee of social rights, as the case law of the Court in 2015 shows. Several were the cases in which declaring a legislative act void would have a significant impact on public finance. Among other examples, it is worth recalling controversial ruling no. 10 of 2015 concerning the so-called "Robin tax", in which the Constitutional Court made an almost unprecedented choice, limiting the retroactive effects of its ruling of unconstitutionality. Such a judicial technique is not explicitly allowed in the regulation of the effects of constitutional judgments. The Court has chosen to produce this result contra or *praeter legem* in order to limit the financial impact of the decision, by operating a balance with art. 81 Cost., and the constitutional principles involved in the judgement.

A gradual implementation of constitutional values in a case requiring considerable expenses to the State budget, as the Court pointed out, was necessary "a fortiori after the introduction of the principle of a balanced budget in the Constitution, which reaffirmed the need to respect the principles of balancing of the budget and public debt sustainability". For this reason it ruled to stop the "effects of the provisions declared unlawful from the day of publication of this decision in the Official journal." This is not the place to fully examine the content of the question of constitutionality, but only to note the technique used for the first time. The ruling in fact elevated the role of the constitutional norm of budget balancing to that of a kind of super-principle, a new *grundnorm*, laying the groundwork, or at least that is the outcome to be feared, for a negative evolution in terms of protection of social rights[33].

It should however be remarked that the obligation not to apply the rule declared void following a decision on the constitutionality of the Court does not ensue from a principle, but from a precise constitutional rule and, as such, is not liable to balancing operations with other constitutional principles.

Even more remarkable, the "sequel" of ruling no. 70 of 2015 of the Constitutional Court, censuring the freeze of pensions re-evaluation. The "courage" of the Court in declaring this measure unconstitutional, with a decision that could have a significant financial impact on the State budget, did not give the expected result. The Government approved an urgent decree in order to execute the ruling, actually implementing only partly the ruling, citing reasons arising from EU law and the possible financial impact of the decision. Again, the exceptional nature of the crisis cancelled the basic rules concerning the functioning of the constitutional system, as to the Government's

[32] We have already mentioned one of the many decisions rejecting constitutional issues related to the wage freeze in the public sector.

[33] More recently, in a different direction goes constitutional court decision n. 275/2016, on the subject of public transport of disabled students, ruling that social rights cannot be altogether sacrificed in view of art. 81.

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intervention in implementing constitutional case law, and graduating the protection of individual fundamental rights.

Finally, with ruling no. 178 of 2015, concerning the suspension of the Unions' collective bargaining system, the constitutional court again established limits to the retroactive effects of a ruling. This time it judged that these effects should not begin from the publication of the ruling but later, on January 1 2015, due to the occurrence of the censored vice[34].

The quick exam of this case law helps to underline, once again, how much a return to political decisions taken in the proper representative institutions is needed. Thus, decision making could be accompanied by a public debate and all other procedural safeguards making them more reliable. In other words, the "old way" seems to be the only way out for issues that the crisis has raised in representative democracies.

6. Eu, single market or single minded?

After this short excursus, it can be said that while the economic crisis has put to the test the EU, and even more some feeble points of the Italian constitutional system, political communication has given its contribution to make the Italian crisis difficult, but not…serious.

A wider perspective shows that communication techniques sometimes use the name of the Parliaments even when there is hardly any chance of expressing forms of democratic representation, as understood in constitutional law. Then, if Parliamentary representation is not capable anymore of making visible the political existence of the people, and States are without a people, this game of mirrors has little to do with "public" and "democracy".

Borrowing marketing techniques, and the predominance of the economic paradigm, risks to bring European democracies to the result of a privatization of the State and "the public", where citizens won't buy the good of political representation, in its most pregnant sense (as figures concerning the vertical drop in participation to the elections in Italy clearly show). And not being buyers, why should they "pay", coping with austerity measures?

It has already been said many times and everywhere, that the EU has been probably caught unprepared by the crisis, notwithstanding the economic policy coordination competence disciplined in the EU Treaty was meant to face highs and lows of the single market. The main, if not the only, EU answer were hard budget constraints established in the Fiscal compact and in several previous acts, together with a quite feeble political leadership, which concurred to strangle the economies of some Member States. Such a

[34] The question as to why this effect did not produce itself at the time of the entry into force of the Budget act, but since January 2015 shows the Court's concern about the financial impact of its rulings, and also how it is certainly more appropriate to keep the courts away from such concerns, as from those involving too high a discretionary and political evaluation, which is likely to undermine the legitimacy of the Constitutional Court.

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reaction only succeeded in bringing the European integration process to lose in a few years the legitimacy it had taken several decades to conquer.

In this context, as it was said earlier, the national Governments were encouraged to non-responsible and non-transparent attitudes by the opacity of supranational decision-making process allowing them to charge "Brussels" for the unpopular measures resulting from decisions taken by the EU, to which they may have contributed decisively. At the same time, at the national level, as the Italian example shows, legislators were sometimes pretending they were doing the homework requested, but in the end they did not know how to give effective answers to the crisis.

On both those levels, some crucial matters should be solved if we want to go back to a more sincere representation corresponding to a system of representative institutions[35]. Analyzing these issues would require much longer, but at this stage let it be sufficient to say that this is probably the only way to counteract the rising wave of populism.

In the last three years only, parties such as UKIP and Front National came to be the first British and French party in the European Parliament and the Brexit referendum risked to undermine long decades of European integration. Such phenomena, as well as the rise of extreme right xenophobic parties, as in Austrian and German elections in 2016 and 2017 raise important worries on the future of EU democracy. Many wonder whether a more transparent and democratic functioning of EU institutions will ever be seriously pursued and attained. A result to be obtained only by hard, silent work, from now and on.

[35] See S. Fabbrini, The euro crisis and the constitutional disorder of the European Union, in C. PINELLI, *The Formation of a Constitutional Tradition in Continental Europe since World War,* in European public law 2016, 2, 256.

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