

THE POLITICAL TRANSITION IN ITALY

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Abstract: *Italy is in a transitional phase to a new party system, which will probably lead to a different method of institutional functioning. This essay illustrates the transition from the Berlusconi Government to Monti Government and after to the “Grand coalition” Government. This step opens an unprecedented phase of the Italian democracy which seems to mark a break with the characteristics that the political and institutional life had taken in recent years. Although it is too early to describe the characteristics of the new phase, we can highlight some points which justify the assessment of the discontinuity. Among the main features of institutional life in the era of Berlusconiism, can be mentioned the charismatic leadership, the context of heightened corporatism of the political class, the mortification of the Parliament and the transfer of its legislative powers to the Government, the constant aggression against Constitution and Fundamental Rights, the attempt to impose ethical views by the majority*

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1. Stalemate

As a result of the last general election in Italy, no coalition held an outright majority in the new legislature. The election in February produced a hung parliament. The two coalitions that competed for the leadership of the Country in recent years basically achieved the same result, around 30% of votes. More precisely, the center-left coalition had more support than the center-right and won the majority premium in one of the two legislative bodies, the Chamber of Deputies. However, thanks to the current electoral law, no coalition alone possesses the absolute majority of seats in the Senate, where the premium is applied regionally. Despite having fewer votes the center-

right prevailed in some important regions such as Lombardy, Sicily and Campania to which are assigned a consistent number of senators.

This situation led to the impossibility of forming a new Government (since the Constitution requires the confidence of both chambers to form a government). A contribution to the stalemate was given by the success of a new party, the Five Star Movement (Movimento5stelle), which topped the election with 25% of votes and refused to ally with any of the traditional parties, because it considers very negative the experience of the so-called bipolarism dominated by competition between centre-right and centre-left.

Ultimately, after the elections, the three major players, the two coalitions and the

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new political movement, did not have the sufficient votes to support the government alone, but did not want to form alliances.

2. A “Grand Coalition”

The stalemate lasted for two months. The turning point came at the election of the President of the Republic. After some voting, during which excellent candidates (such as former European Commission President Romano Prodi) were burnt and rejected, on 20th April 2013 Parliament re-elected Giorgio Napolitano as President. The Italian Constitution does not prohibit a further term, but the re-election of an outgoing President never happened before. So it is an exceptional event, caused by the institutional crisis resulting in the described stalemate and by the inability of the political forces to agree on a mutually-accepted candidate.

In this context of uncertainty, some political forces considered necessary that a prestigious and authoritative leader as Napolitano served a second term as President of the Republic. Above all, the re-election settled an unprecedented agreement between the two opponent parties, the Democratic Party (center-left) and Berlusconi's People of Freedom party (center-right). The result is an exceptional government, the “grand coalition”, led by Enrico Letta.

After the phase of the bipolar system that began in the mid-'90s, characterized by alternating between center-right and center-left Governments, a new political and institutional phase is now opening, whose characteristics are still confused, but in which the largest center-right party and the largest center-left party are governing together. Among other things, the program of the new Government provides significant institutional reforms, such as the transformation of the bicameral system and the reform of the electoral law.

3. Personalization of political life and political corporate interests

After the 2008 election, Berlusconi's party has monopolized political life. But after, in the last phase of the legislature, the center-right majority dissolved for political contrasts and the government was led by Mario Monti, a personality that does not come from political parties, which took very severe measures to tackle the financial and economic crisis. Now, the situation is further changed.

Italy is in a new phase between what was seen as a specific concept of politics and institutions (the Berlusconi years) and a new party system, which will probably lead to a different method of institutional functioning. If it is still too early to tell what the outcome of this process will be, something can be said about the season that has ended (although, as in all stages of transition, coexistence of the old and new characteristics exists).

The first characteristic of the Berlusconi era is the enhanced personalization of political life, in the sense that certain people monopolized and dominated the political parties (M. Calise, *The Party Staff*, 2010). The emphasis on the charismatic element, in turn, helped spark a populist drift, fortunately counterbalanced by a firm reaction from part of the public opinion and important sectors of the institutions, such as the Constitutional Court and the judiciary. These degenerative aspects concern, in particular, the figure of Berlusconi, who extensively used his own television and newspapers to consolidate a direct relationship with the electorate, especially the middle and working classes. All this in a clear conflict of interests: a rich and powerful owner of mass communication tools became – thanks to the action of these well-orchestrated media – head of Government, a position in which he

continuously took decisions that had economic effects on his enterprises.

The second characteristic of the Berlusconi era is a marked political class, very attentive to its own corporate interests and essentially deaf to social needs, especially to the most needy among the population. The most obvious example is the law regarding immunity for institutional holders of important positions “Schifani Agreement” (Lodo Schifani), “Alfano Agreement” (Lodo Alfano), the law on legitimate impediment), a series of legislative measures designed to focus on the plight of politicians (one in particular), rather than on other citizens, measures the Constitutional Court has repeatedly censored in the name of the principle of equality. This context of heightened corporatism of the political class also includes a number of economic privileges that the politicians have been granted over time: from high-allowance charges, to the annuities.

The theme of self of the political class can also be compared to the electoral law of 2005, which due to the mechanism of the closed list, allows party leaders to decide who will be elected to Parliament simply by determining the order of candidates on the list (and therefore MPs are not really “elected”, but “appointed” by party leaders). This mechanism has additional adverse effects: in particular, it has led to deterioration in the quality of the elected/appointed as the party leaders have in many cases chosen people prone to be subservient to their will. A return of transformation derives from this, which is the practice for which the parliamentary move from one political party to another for reasons of personal interest.

4. The distortion of the parliamentary system and the Constitutional reformism

Another characteristic is the prevalence of the Berlusconi Government over Parliament, which is manifest particularly in terms of the production of rules, where the legislation of the Government (decree laws and delegate legislation) are more numerous and often more politically relevant than parliamentary laws. This characteristic emerged some time ago, but has certainly increased in recent years, causing the distortion of the features of the parliamentary form of government outlined by the Republican Constitution.

Another cause of the prevalence of the Government is the practice of presenting amendments which completely rewrite all the text under discussion in Parliament (the so-called maxi-amendment), and to put the question of confidence on the approval of these amendments, with the result that a legislative text which comes entirely from the Government is approved.

In the Berlusconi era, criticism against the Constitution went far beyond the measure of physiological tension between law and politics. This veritable siege of the Constitution is the result of two deviant factors. On the one hand, due to a generalized deficiency of constitutional culture among politicians, it is possible to change parts of the Constitution, without changing the overall structure. In particular, the need to modernize the part on powers emerged without touching the part on rights, as if the discipline of form of government, even in the minutest details which ensure the rule of separation of powers, was not functional to the form of state and ultimately the protection of rights. On the other hand, a serious misunderstanding on the function of constitutions (and the ultimate meaning of constitutionalism), for which rights are not

perceived as the norm and the limit set in power, but rather as means to solve problems that affect the political system. Although the problem of Italian politics is a highly fragmented party system, whose coalitions are not at all cohesive and argumentative, the solution cannot be in strengthening the powers of the President of the Council – which has been continuously sustained.

Proof of the assault on the Constitution is the large number of bills pending in the Constitutional Parliament: the first three years of the current legislature, 329 proposed constitutional amendments were counted, an average of 2 per week, a slight decrease from the previous term, which had counted 238 in two years (N. Cottone, *Il sole* 24 ore, 26/4/2011). In most cases, these are proposals of parliamentary initiative, as if an uncontrollable instinct of the greatest reformer systems had taken control of the legislatures, who were however unable to make major reforms on a legislative level, and had sparked the fantasies of individual MPs and Senators.

The Council of Ministers approved at fast-pace proposals of constitutional law, qualitatively very significant: in the last month alone, for example, after the Constitutional “Alfano Agreement”, the government launched the reform of the Articles. 41, 97 and 118, the reform of Title IV of justice, the Calderoli draft on the institutional architecture of the State, the abolition of the Provinces and the introduction of the balanced budget constraint. Reforms sometimes unscrupulous both in the statement of principles – often inconsistent with the culture of modern constitutionalism – as deprived of the instrumentation necessary to become effective.

The siege of the Constitution by the Government became particularly insistent with reckless constitutional reform of the entire Part II of the Constitution (that on

powers) blocked by the referendum of 2006. With this reform, Italy would have found the way out of the constitutional state of law (R. Bin, www.astridonline.it, 2004): the idea was simply to change the rules of the organization of constitutional powers, abandoning the form of parliamentary government, without however turning to a different model; to increase in the powers of some organs, in particular those of the President of the Council of Ministers, as well as to weaken the organs of control and warranty, thereby jeopardizing the separation of powers and the logic of checks and balances typical of contemporary constitutionalism.

If the reform of the entire Part II of the Constitution was rejected by the citizens, other changes come about with the consent of a wide Parliament arc (for example, the reform of article 51 in terms of equal opportunities between men and women, largely ineffective for the purpose, or the introduction of the foreign jurisdiction, or the questionable grant of the right to vote to Italians residing abroad, who do not pay taxes in Italy). Behind this constitutional reform which permeated the Berlusconi era, lies a paradox, since the objectives, proclaimed and remained unfulfilled in many cases, could be achieved, rather than through the medium of the constitutional amendment, through the adoption of ordinary laws, reform of parliamentary regulations or even only in practice. For example, the much-reviled perfect bicameralism, in which the two chambers have exactly the same powers, is not a constitutionally required solution; the Chambers could well differentiate their functions by virtue of modest regulatory and conventional changes, for example, by simplifying approval procedures in the second Chamber, the proclaimed promotion of federalism could be consistently pursued by less centralist government policies, more effective

protection of competition could be reached by giving the Antitrust greater powers, instead of taking into consideration amendment to art. 41 of the Constitution.

In short, there was a symbolic use of the constitutional reforms, not supported by the political will to really address the critical issues. The constitutional reforms made it possible to play the “strong decision-maker” in the face of problems that nobody wanted to or could resolve, due also to the lack of political unity in the government majority. The insistence on constitutional reforms has had, among its most deleterious consequences, the daily de-legitimization – no less risky than the reckless reforms previously mentioned – of Fundamental Law, which has come to be perceived more often as an “antique”, rather than as a defence of fundamental rights which are alive and kicking and effectively functioning. The loss of credibility of constitutional rules is not only a cultural problem of sociological significance, but also a legal problem, because it is the consensus that holds the key to the whole system: the Constitutional Court, as we know, does not issue rulings performed with the use of force.

5. Constitutional case-law on fundamental rights

Even the attack on fundamental rights characterized mainly the most recent years is. This emerges clearly from the most recent constitutional jurisprudence, which has often touched the heart of the political culture of the Berlusconi era. Firstly, the Court has spoken on public safety – one of the areas on which there were several norms scrutinized by the Court – for example with the rulings on the illegality of the automatic application of the precautionary measures of preventive detention, introduced with the cd. “security package” of 2009, with reference to certain

crimes against sexual freedom and voluntary homicide. However a ruling in 2011 operates on another cornerstone of security policy, namely the expansion of the power of the ordinances by Mayors (the provision contested by the Court allows the Mayors, as government officials, to take measures of indefinite normative content and effectiveness in order to prevent and eliminate serious threats to urban safety, even outside the cases of force and urgency).

Those profiles of the regulation on security which have affected the legal status of foreigners are constitutionally highly critical. In 2010, the Court ruled against the punishment of a foreigner for the non-fulfilment of the order of deportation, whenever a “justification” exists, for example, “an extreme state of poverty”. The state of clandestine immigrant as an aggravation has also been found unconstitutional, a state which was introduced with the cd. “security package” in 2008 (judgment n. 245/2001). The prosecution of illegal aliens in the Italian legislation has also interested the EU Court of Justice in the El Dridi judgment of April 27, 2011. The Court of Justice rejected the imprisonment as dysfunctional compared to deportation and ill-suited to the objective ensuring the efficiency of the policy of regulating migratory flows, which instead should be governed by rational rules and with respect for fundamental rights.

An attempt of discrimination towards foreigners in the provision of social welfare services emerges from constitutional jurisprudence. In 2008, the Constitutional Court declared unconstitutional two provisions which exclude that care allowance can be attributed to non-EU foreigners just because they do not meet the income requirements set by the resident permit: the Court declared it is manifestly

unreasonable to subordinate the attribution of the provision of care to the possession of a certificate of entitlement to the permanence of stay in Italy, which requires, among other things, that the applicant be in possession of an income. This incongruence affects the right to health care, intended as the right to possible and partial remedies to impairments produced by more serious pathologies.

With reference to the issue of financial needs as a cause of justification of the horizontal and indiscriminate “cuts”, we must mention the intervention of the Court on the right to education of the disabled, set forth again by the sentence n. 80, 2010, which censured the “cut” of support teachers contained in the financial budget of 2008 because it violated constitutional and international legal framework: the discretion of the legislature in tracing the thresholds for the protection of fundamental rights, the Court said, “is not absolute and is limited by the unfailing respect of a nucleus of guarantees for the persons concerned”.

Finally, on the international front, the European Court of Human Rights repeatedly turns a spotlight on a dramatic issue - the conditions of imprisonment -, almost completely removed from public debate.

A final area in which there has been an alarming level of aggression to freedom is that of “ethically sensitive issues”, which affect the effectiveness of protection of fundamental rights.

A prime example is the 2004 law on medically assisted procreation, which sought to impose a certain view of ethics and contains many prohibitions and requirements. The event culminated with the ruling which declared the legislation unconstitutional, which prohibited the creation of a number of embryos superior to three, as provided by law. The Constitutional Court struck the provision in so far as it does not provide that the transfer of embryos should be carried out without affecting women’s health.

However, it is probably the “Englaro” case and the subsequent story of the parliamentary bill on the regulation of giving prior consent to treatment which marks the darkest and most illiberal page of history of the Italian Parliament. With reference to this tragic story, concerning a young woman in a state of permanent unconsciousness, whose father asked permission to interrupt force-feeding considering it an aggressive therapy, the House and Senate even intended to raise a jurisdictional dispute in the Constitutional Court, against the ruling of the Supreme Court which had permitted the termination of medical treatment, which ended with the inevitable decision of inadmissibility of the appeal. In the following legislative history, the Senate debated and approved a bill containing the prohibition to refuse artificial nutritional and hydration treatment in advance directives, so that – if one were to conclude legislative process positively – they should be legally compulsory, even with individual dissent.