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# The Italian Republic

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1. This chapter reflects the state of affairs in March 2012. Only occasionally are more recent developments mentioned.



# I. The foundations of constitutional law

## I. POLITICAL AND HISTORICAL CONTEXT

### 1.1. *The formation of the Italian State*

In the course of history, certainly in Europe, the borders of a state – territorial and demographic – turn out to be changeable, and this has also been the case on the Italian peninsula and its contiguous areas and islands. A state has, however, a symbolic core which determines its identity; that core can be composed of people, perhaps a royal family, shared memories, certain areas, and cities. For Italy, it can be said that the city of Rome – despite all criticism of centralist tendencies – is a part of that core. For Italian unity, it was not Italy's establishment as a Kingdom in 1861, but the conquering of Rome in 1870 that was decisive.

The emergence of Italian political unity was the result of the cooperated efforts of a liberal political elite in the whole of Italy – including Count Camillo Benso di Cavour, Prime Minister from 1852-1861 – and the military leadership, in particular of Giuseppe Garibaldi; and this all under the authority of Vittorio Emanuele II, who became King of Sardinia in 1849.

The Kingdom of Sardinia had been granted a liberal constitution (*Statuto Albertino*) in 1848 under the father of Vittorio Emanuele, King Carlo Alberto. In the course of the period from 1859 to 1870, all the other independent Italian states and mini-states (except the Republic of San Marino), as well as the areas Lombardy and Veneto, which had previously belonged to Austria, united with Sardinia. On 17 March 1861, Vittorio Emanuele proclaimed the Kingdom of Italy, and Count Cavour became its first Prime Minister. In 1870, after the French troops which had been defending the Papal States had withdrawn, the city of Rome came into the hands of the Italian army. Following a plebiscite, Rome became in 1871 part of the Kingdom of Italy and – of course – its capital. The *Statuto Albertino* remained in force as the constitution of the Kingdom of Italy. Some important elements it contained were the recognition of fundamental rights and ministerial responsibility towards parliament. The latter was composed of a Senate, appointed by the King, and an elected Chamber of Deputies. In 1919, universal suffrage was introduced.

In 1922 and the following few years, the fascist party managed to take control of the state using violence and intimidation. Benito Mussolini became Prime Minister, later given the title “il Duce del Fascismo” (the Leader of Fascism). While the *Statuto* was left untouched, the altered power relations were laid down in special laws, concerning amongst other things the electoral system, the establishment in 1928 of the *Gran Consiglio del fascismo* (Grand Council of Fascism), and the replacement in 1939 of the Chamber of Deputies by the *Camera dei fasci e delle corporazioni* (Chamber of Fasces and Corporations).

On 25 July 1943, the Grand Council of Fascism turned against Mussolini, and the King dismissed him. The fascist organizations were dissolved and fundamental rights were

restored. Most of Italy was occupied by German troops, though, and under German protection Mussolini established the *Repubblica Sociale Italiana* (Italian Social Republic). In the liberated part of the country, the (re-established) political parties had united in a committee, the *Comitato di Liberazione Nazionale*, which – after the liberation of Rome in June 1944 – played a decisive role as a representative body. Pending a decision on the future of the monarchy, Crown Prince Umberto was appointed Prince-regent by his father. It was decided that once the liberation of Italy was complete, an *Assemblea Costituente* (constituent assembly) would draw up a new constitution. In June 1946, a referendum was held about the form of government and elections were held for the *Assemblea Costituente*. In the referendum, 54.3 percent of the votes were in favour of a republican form of government; in the north of the country, the majority voted for the republic, and in the south the majority was in favour of the monarchy.

If one looks at the political history of Italy, it seems as if up to the second half of the nineteenth century, the relationship between “rulers” and “subjects” was to a large extent determined by historical accident. A political authority which “belonged” to the people existed for short periods only regionally or locally. In these circumstances, it is hardly surprising that a habit grew up of selectivity when it came to accepting rules made by the authorities. The limited authority of the government in fact goes hand in hand with the incontestable talent many people have of finding solutions to their problems without having regard to the rules. The relative value of the law in Italy is sometimes summed up in the saying that there are two Italies: *il paese legale* and *il paese reale*, the legal country and the real country.

Nevertheless, and partly also as a reaction to this, there was a strong movement in Italy which favoured an authoritarian structure of government, that is *fascismo*. This movement took its name from the fasces, a bundle of rods bound around a projecting axe-head, which ancient Roman authorities used two thousand years ago as a symbol to express their dignity and their authority to impose corporal punishment and execution. An important characteristic was the authoritarian view of state power, which had little consideration for alternative voices, and appealed to the need to impose order on the often chaotic public life of Italy. The character of fascism differed from that of national socialism in a number of important ways, although the two cooperated extensively. As a result of both military aggression against countries in Africa and south-east Europe and the collaboration – especially in the last phase – in the persecution of the Jews (despite the fact that the latter was initially rejected by Mussolini), fascism showed itself to be one of the manifestations of evil in the 20th century.

### 1.2. *Crisis and reforms*

The Italian Republic, as it had proclaimed itself in 1946, made a dramatic effort to break with its authoritarian past. The recognition of fundamental rights, a firmly anchored role for the courts, and a combination of parliamentary democracy (based on proportional representation) and direct democracy were supposed to ensure that Italy would acquire a democratic political structure.

Nonetheless, the political system of Italy in the first four decades of the Republic was not in very good shape. The implementation of the Constitution was slow on important points. The establishment of the Constitutional Court (*Corte costituzionale*) and the arrangements for the regions (*regioni*) took years to get off the ground. Some of the

legislation the Constitution called for, was never passed, such as the legislation on religious liberty (Art. 8 *Cost.*) and on the registration of trade unions (Art. 39 *Cost.*).

The political and constitutional situation was made complicated by the so-called *conventio ad excludendum*, by which the large communist party (PCI), and initially also the socialist party (PSI) was excluded from taking part in government. As a consequence there was *de facto* a lack of any alternative for the cooperation of Christian Democrats with smaller parties in ever changing combinations. One cabinet crisis followed another at high speed, leading to a situation characterized as stable instability. Only in the 1980s was a non-Christian Democrat appointed as prime minister – first the Republican Spadolini, and after him also the socialist prime ministers Amato and Craxi. There was a very large number of governments succeeding each other, but the number of early parliamentary elections was not nearly as large. Moreover, at a personal level there was little change. Italians have long political careers. An extreme example is the Christian Democrat Andreotti, who was already member of the provisional parliament established in April 1945 and has remained a member ever since; he was a member of 33 governments of which seven times as prime minister; in 1991 he was appointed senator for life (see below section III.3.3)

Although the country enjoyed decades of enormous growth and increased welfare, inflation was rampant by the 1970s, to which automatic compensation of price rises in wages combined with a lack of fiscal discipline contributed. At the beginning of the 1990s, a number of magistrates (among which Antonio Di Pietro who later became a politician himself) dedicated themselves to cleaning up politics, government and business circles from widespread practices of accepting bribes for the party coffers or one's own pocket across all levels of the political system. This practice became known as *Tangentopoli*, bribesville, while the operation to do away with it was called *Mani pulite*, clean hands. Widespread popular indignation made the need for constitutional reform ever more pressing. These reforms were both in part achieved and in part restricted through a series of referendums, of which those of 1993, on the Electoral Law, and those of 2001 and 2006 on constitutional amendment deserve to be mentioned.

Already in the 1980s several proposals for an overall revision of the Constitution were developed. The proposals of a bicameral committee named after its chair, the liberal MP Bozzi (1983-1985), included the modernization of the fundamental rights provisions, legislative procedure, a reduction of the number of members of parliament, the introduction of a core-cabinet within the government, and the strengthening of office of prime minister. They received the support of a political minority only.

A subsequent bicameral committee – led by *De Mita* (Christian Democrat) and *Iotti* (former Communist) – on institutional reform, which was active in 1993, coincided with *Tangentopoli* and the ensuing crisis of the political system, but was still the work of the “old parties”. The subsequent dissolution of parliament entailed the automatic dissolution of the committee. The new parliament was elected on the basis of a new electoral system, aimed at producing majorities. At the time, the change was thought so drastic as to speak of the new political situation as the “Second Republic”.

The constitutional reform proposals of the bicameral committee led by the former communist leader D'Alema seemed to have a broad basis, as they were formulated in close consultation with the leader of the opposition, Berlusconi, the businessman and media tycoon who had entered the political scene. The proposals followed the model of the French Fifth Republic, with a directly elected president and the introduction of strong regions (the other new player in the political theatre after *Tangentopoli* was the *Lega Nord* led by Umberto Bossi). For political reasons, however, Berlusconi unexpectedly withdrew all support for the work of the committee, which was soon abolished. The overall aim of

the proposal was to reinforce and consolidate the “bipolar” political system that had begun to take shape in practice, mainly due to the majoritarian electoral system of 1993. Some of the proposals have indeed been introduced in partial constitutional amendments in subsequent years, such as the provision on fair trial in Article 111 (1999) and the equal treatment of men and women (2003), and not least the amendments on the regions, referred to by some as the federalization (2001), which was pursued by a centre-left simple majority, which – for lack of a two thirds majority in both houses – was ratified in a constitutional referendum (turnout 34%, majority of 64%).

A far-reaching revision was that proposed by the centre-right government of Berlusconi in 2005. It proposed to introduce a form of prime-ministerial government, with a directly elected prime minister with a strong position in relation to parliament, including his own political coalition supporters in parliament. Only a so-called constructive vote of censure would be allowed, that is to say, a vote of no-confidence which also provides the name of the new prime minister to replace the present one; this could only be adopted by the governing majority. If the motion of censure were to be rejected due to support from the opposition (i.e. the coalition itself cannot produce a majority to reject the motion of censure), this would lead to early parliamentary elections – something which under the present system happens only rarely. These proposals were adopted by a simple majority supporting the Berlusconi government of the day, so required a constitutional referendum. The proposals were strongly opposed by the opposition, but also by a broader political spectrum outside Berlusconi’s own supporters. Former presidents of the Republic and of the Constitutional Court turned sharply against the proposals. The referendum of 2006 rejected them with a fairly large majority of 61 percent at a turnout of 52 percent of the voters.

Apart from the constitutional amendments of 1999, 2001 and 2003, Constitutional Act No. 1 of 23 October 2002 put an end to the exclusion of the members and descendants of the House of Savoy from the territory of the Republic and from the right to vote and stand for election, which had been provided for in Transitory Article XIII of the Constitution.

Finally, we must mention a recent amendment which introduces the principle of a balanced budget for the state, the regions and other local entities which has been adopted in 2012. This proposal dates from March 2011, following the “Europlus” package of the EU of the same month, and was adopted by the fourth Berlusconi government in the summer, when the sovereign debt crisis expanded from Greece to Spain and Portugal and began to get Italy in its grip as well, eventually forcing Berlusconi to resign.

Although fundamental constitutional reform – regionalization apart – did not occur to the extent expected at some points in the past, the political system underwent considerable change.

The referendum of 18 April 1993 sparked off a radical change in the electoral system of proportional representation for which the Constitutional Assembly had opted in 1948, without however enshrining this explicitly in the Constitution. In the course of 1993, two laws were enacted which introduced a mixed electoral system. As a result, approximately three quarters of the members of the Chamber of Deputies (*Camera dei deputati*) and of the Senate of the Republic were chosen according to a majoritarian system, and the remaining members on the basis of proportional representation.

In 2005 this system was abandoned to return to a system of proportional representation, albeit with a majority premium for the relatively largest coalition which has not reached an absolute majority, in combination with a series of electoral thresholds. This return to proportional representation is not uncontroversial. The debate over the electoral system continues as before, but a majority cannot be found for any of the alternatives.

Importantly, *Mani pulite* caused a radical change in the political landscape, which coincided with the fall of the Iron Curtain, the Berlin Wall and the subsequent demise of the Communist Party. All parties, though ironically less so the Communist Party, were found to be entangled in *Tangentopoli*. With the disintegration of the *Democrazia Cristiana* (DC), there came an end to a long Christian Democrat domination in Italian politics. The Italian communist party (PCI) transformed itself into a social-democratic party, *Democristiani di Sinistra* (DS). The appearance on the stage of Berlusconi in 1993 and the landslide victory of his *Forza Italia* in the elections of 1994 changed the political landscape completely.

Two rivalling coalitions of parties came into existence which have alternated in power. On the left, this was the coalition called *L'Ulivo* (the Olive tree), which combined the DS with the left wing of the former Christian Democrats and smaller groups of the *Margherita* party as well socialists and social democrats. On the right, there was the *Polo per la Libertà* (also known under very similar names), later rechristened *Casa delle libertà*. Berlusconi combined his *Forza Italia* with the new right *Alleanza nazionale* and the *Lega Nord* and some right wing remainders of Christian Democracy. In October 2007, the *Ulivo* transformed itself into a new political party, the *Partito democratico*, which united various left wing parties and movements; its party secretary (in Italy the most prominent party official) was elected in open primaries. This led Berlusconi, in turn, to weld his *Forza Italia* and Fini's *Alleanza nazionale* and some smaller political groups into a political party named *Il Popolo della Libertà* (March 2009), the same name under which his coalition had participated in the elections of 2008.

It would, however, be wrong to characterize Italy's political landscape as a political Mesopotamia, with two political streams only. The coalitions revolve around these two political parties, but in reality they are still dependent on the other coalition partners. The electorally successful Berlusconi coalitions – which have been in power over 10 years since 1994 – have always been dependent on at least the *Lega Nord*. This party (officially called: *Lega del Nord per l'Indipendenza della Padania*, also referred to as *il carroccio*) was established in 1991 and is now the oldest party represented in parliament (!). This is exemplary for the volatility of political parties in Italy since the 1990s. Also the centre-left coalition, which was in power from 2006 to 2008 with a very small majority in the Senate, under the leadership of Mario Prodi as prime minister, was very dependent on the whims of its smallest coalition partners.

Moreover, the two political parties themselves are still precarious. Both the *Partito democratico* and the *Popolo della Libertà* have prominent defectors. Gianfranco Fini, had merged his *Alleanza nazionale* into the *Popolo della Libertà*, of which he was co-founder together with Berlusconi. While Speaker of the Chamber of Deputies, he gradually distanced himself from Berlusconi in the course of 2009, which led to his formal expulsion from the party in 2010, and the forming of his own group in the Chamber. Earlier a politician of christian democratic stamp Pier Fernando Casini had already left Berlusconi's camp. The *Partito democratico* had a prominent defector in Francesco Rutelli, previously a minister and once a very popular mayor of Rome, who found the party had become too traditionally leftist. Since these various defections there seemed to be a tendency towards a *Terzo Polo*, a third stream reformist and centrist party with which both Rutelli and Casini have associated themselves. The future of this movement is at the time of writing very uncertain. Instead, a strong anti-political *Movimento 5 Stelle* ("five star movement") movement of comedian Beppe Grillo rose to a peak. Its fundamental programme is that of a radical anti-political establishment and anti-European stance. It refused to make use of radio, television, newspaper or other traditional platforms of



political communication. In the elections of 2013 it became the largest political party after the Democratic Party.

### 1.3. *Church and state*

The political history of Italy is to a great extent – and for more than 25 centuries – the history of centripetal and centrifugal forces with Rome as its centre. From the decline and fall of the Roman Empire until the last half of the 19<sup>th</sup> century, Italy consisted of a plurality of monarchies, city-states and the Papal State. This last was an exceptional political structure in which the Pope also acted as a source of worldly authority; at its peak it occupied a large part of central Italy.

With the fall of Rome in 1870, there came an end to the Papal State, and a tough conflict arose between the Pope and the Italian State, the so-called Roman Question, which was only solved in 1929 with the Lateran Pacts. These agreements included a treaty with four annexes, and a concordat.

The treaty regulated the relations between the Holy See and Italy under public international law. The Holy See is recognized in these agreements as a sovereign subject of international law, with its own, tiny territory within the city of Rome (*Città del Vaticano*). A number of other localities (including certain basilicas and the pope's summer residence) are accorded extraterritorial status as belonging to the Holy See. However, it is not this mini-state, but the Holy See (*Santa Sede*) as such, i.e. the leadership of the world catholic community, which maintains diplomatic relations with states and sends a special sort of ambassadors, the papal nuncios. That was what the Holy See did between 1870 and 1929 as well, when there was no Papal State at all. Many journalists, administrators and politicians become confused about these distinctions and seem to feel they should measure the authority of a nuncio (ambassador of the Holy See) in relation to the size of the population of Vatican City. It is also not clear to everyone why many states have two embassies in Rome, one for the Italian Republic and one for the Holy See.

The Concordat concerns the position of the Roman Catholic Church in Italy. It contains, amongst other things, provisions on religious education, on civil law validity of church weddings and their annulment. The special arrangements laid down in the Lateran Pacts seem at first sight to conflict with the principle of the separation of church and state (this is true as far as Vatican City is concerned, but in fact no one is resident there except for employees and officials of the church), but in fact serves precisely to effect a separation of the catholic church from any political community at all. The shortcomings of the Lateran Pacts concerned precisely the other side of the coin, i.e. the lack of a systematic separation of the Italian State with regard to the church in accordance with the principle of equal treatment. The Italian Constitutional Court declared this in 1982 (Decision 18), and in 1985 the Concordat was brought into conformity with this.

Article 7 of the current Constitution provides that the State and the Catholic Church are independent and sovereign, each within its own order, and that their relations are governed by the Lateran Pacts; changes to the Pacts which are accepted by both parties do not need to follow the procedure for constitutional amendment. This provision of the Constitution does not mean – as some people have assumed – that the Lateran Pacts have been raised to the level of constitutional norms, but merely that a unilateral alteration of

the relations between church and state by ordinary law is not possible. The Constitutional Court ruled in 1971 (Decisions 30 and 32) that review of the Lateran Pacts or laws implementing them against the highest principles of the Constitution is possible.

The relations between church and state came under strain in the last decades of the twentieth century. A decisive moment in this process was the introduction of the possibility for a church marriage to be dissolved by the civil courts, by Law 898/1970. The Constitutional Court ruled in 1971 (Decision 169) that the Law was not in conflict with the Constitution on that point. A proposal to repeal this law, which was supported by the church, was put to referendum in 1974, but was rejected.

After seventeen years of preparation, an agreement was signed on 18 February 1984 by Cardinal Agostino Casaroli, Secretary of State for the Holy See, and the Prime Minister, Bettino Craxi, modifying the Concordat and the supplementary protocol (*Accordo di Villa Madama*). A committee in which the church and the state were equally represented subsequently drafted a protocol on the regulation of ecclesiastical institutions and goods, which was signed in November. Article 13 of the agreement modifying the Concordat provides that the provisions of the old Concordat which were not included in the new agreement lapse. This means that the agreement of 18 February 1984 is in fact a new Concordat. The choice was made to do this in the form of a revision of the old Concordat, however, in order to maintain the application of Article 7 of the Constitution, mentioned above, which refers to the Lateran Pacts. After the necessary laws of ratification were enacted (Laws of 25 March 1985, No. 121, and of 20 May 1985, No. 206), the instruments of ratification were exchanged on 3 June 1985, and the agreements entered into force.

The arrangements in the revised Concordat give both state and church more freedom. For instance the prohibition on apostate priests, or those subject to censure, of holding certain public positions, such as teacher, is dropped, and on the other hand also the requirement to consult the Italian government about bishops' appointments. The "sanctified character of the Eternal City" (Rome) – which under the terms of the 1929 Concordat was to be protected by the Italian government – is no longer mentioned. In the new Concordat, the state does no more than acknowledge "the particular significance that Rome, the Episcopal See of the Supreme Pontiff, has to Catholicism" (Art. 2(4)). While previously civil effect was automatically granted to a church marriage, a new obligation was introduced to enter the marriage in the registry of births, marriages and deaths, and it is now this registering of the marriage which is the constitutive condition for the recognition of civil effects (Art. 8(1)).

In practical terms, perhaps the most important change is that it is no longer obligatory for everyone attending state schools in Italy to receive catholic religious instruction. The constitutionality of this obligation had been contested for a long time already. Under the new arrangements, the state is still obliged to provide such education, but those who do not wish to receive it may not be subject to any form of discrimination (Art. 9(2)). The details of this religious teaching are elaborated in a covenant concluded on 14 December 1985 between the minister for education and the chair of the Italian synod (*Gazzetta Ufficiale* 1985, 229). Nevertheless, a heated conflict arose later as to whether pupils who did not follow catholic religious instruction should follow a general course of study of beliefs. The Constitutional Court interpreted the Law of 25 March 1985, which ratified and implemented the agreement of 18 February 1984, as meaning that pupils who had decided not to receive religious education, may not be obliged to receive other education in the place of the religious education. Otherwise, according to the Constitutional Court, this choice, which is part of the freedom of religion, is made conditional (Decision 203/1989).

No necessity was felt to revise the Lateran Treaty under public international law. Point I of the protocol to the agreement of 1984, however, provides that the principle expressed in that treaty – in accordance with the *Statuto Albertino* – that Roman Catholicism is the state religion is no longer effective. This already followed from the fundamental principles of the currently effective Constitution.

## II. Sources of constitutional law

Italian constitutional law belongs to the continental European tradition according to which all law requires state recognition. At the apex of the hierarchy of norms stands the national Constitution on which the effectiveness and validity of all other law depends. The legal doctrine on sources of law is itself considered part of constitutional law.

The *Costituzione* is itself primary source of constitutional law, but the so-called constitutional laws (*leggi costituzionali*) share its primary rank. There are also normal acts of parliament (*leggi*, referred to in this chapter as “laws”) which implement the Constitution and are therefore source of constitutional law, which is also the case with decrees, standing orders of the two chambers of parliament which have internal effect and are therefore not justiciable either in regular courts or in the Constitutional Court. The Italian literature in general considers customary law as a supplementary source of law. It takes a less prominent role in constitutional law than in some other systems, although certain customs are considered to be facilitating constitutional law practice and assist the interpretation of written constitutional norms. There is, however, a body of literature which speculates on some of the customs and habits which surround the forming of the government. A clear exception is made for customary international law, which is considered to have constitutional rank on the basis of Article 10 *Cost.*, although its effectiveness is considered to be subject to Constitution or at least the fundamental principles thereof. We now proceed to make a few brief remarks on the most important legal sources.

### I. THE CONSTITUTION

The 1947 Constitution (*Costituzione della Repubblica Italiana*, promulgated on 27 December 1947, and which entered into force 1 January 1948 (abbreviated in this chapter as “*Cost.*”) reflects the aim to found the Italian Republic on the basis of the principles of a democratic and social state based on the rule of law. This already appears from the structure of the Constitution, which opens with a series of ambitiously formulated “fundamental principles” (Arts. 1-12).

The opening articles reflect the political climate in the constituent assembly (*Assemblea costituente*). The Christian Democrats – more than a third of the members – valued the principles of subsidiarity and solidarity developed in catholic social teaching alongside the classic guarantees of the democratic state based on the rule of law. Socialists and communists – together making up an almost equally strong current – were determined to support the position of the working class. The Italian Constitution and Italian politics in the first four decades of the republic were strongly marked by the relations between these two main streams. The two streams also provided a certain counterweight to one another, and their destinies were linked – as could be seen from the conflicts and the compromises between them.

Italy identifies itself in the first paragraph of the first Article as a democratic republic based on labour. The aim of this provision was to express the idea that the dignity of the citizens of the Republic is based on what they themselves contribute to society.

The core constitutional principle of fundamental rights protection is laid down in Article 2, which says that the Republic “recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed”, and requests the fulfilment of the “duties of political, economic and social solidarity”. The guarantee of inviolable human rights is recognized in the case law of the Constitutional Court as an implicit limitation to the power of the constitutional legislature to amend the Constitution’s provisions: it may not violate this principle.

Article 3 expresses the two sides of the principle of equality. The first paragraph guarantees that all citizens are equal before the law. The second paragraph states that it is the duty of the Republic to remove economic and social obstacles to the realization of freedom and equality of all citizens, and also to enable the full development of the human being and the real participation of all workers in the political, economic and social organization of the country. Article 4 expresses the right to work, which according to the Constitutional Court (Decision 248/1986) means that the State must carry out a policy aimed at full employment.

The guarantee of fundamental rights is supported in the Constitution by the establishment of the Constitutional Court (see section IV.5 below). The review of laws and legislative decrees against the Constitution by this Court is important for the guarantee of fundamental rights, in particular the classic fundamental rights. The Court decided in its very first decision (1/1956) that even legislation enacted before the Constitution entered into force may be reviewed against the Constitution. On the basis of its competence thus interpreted, the Court has declared numerous old legislative provisions, in particular dating from the period of fascism, to be unconstitutional on the grounds of infringement of one of the fundamental rights.

Insofar as the Constitution reserves further rules concerning fundamental rights to statutory regulation, a distinction may be made between “*riserva di legge*” (for example Art. 13(2) *Cost.* on personal liberty), in which case delegation is not permitted, and “*riserva della legge*” (for example, Art. 23 *Cost.* on obligations of a personal or a financial nature), in which case delegation is allowed. In the academic literature, the wording of Article 2 – “inviolable human rights” – has been used to derive an argument for the recognition of horizontal effects of classic fundamental rights.

Italy is a party to all the main treaties for the protection of human rights, including the ECHR (European Convention for Protection of Human Rights and Fundamental Freedoms) and the revised European Social Charter of 3 May 1996, ratified by Law 30/1999. As we will discuss below, they acquired supra-legislative status only in 2007, which explains why national constitutional rights were more prominent than the ECHR. We briefly sketch these constitutional rights as protected by the Constitution.

## 2. CONSTITUTIONAL LAWS

A constitutional law (*legge costituzionale*) is a special type of statute. With a constitutional law, the Constitution can be amended, and other matters may be regulated for which this form of legislation is required by the Constitution, or whose regulation at constitutional level either supplementing or diverging from the Constitution is considered necessary.

According to Article 138 *Cost.*, these constitutional laws, referred to as such, require a special legislative procedure, with extra guarantees. A constitutional law is required for amendments to the Constitution (Art. 138(1) *Cost.*), and for other matters for which this requirement is laid down in the Constitution, these being: the conferral of the power of legislative initiative (Art. 71(1) *Cost.*), the adoption of special regional charters (Art. 116 *Cost.*), alteration of regional borders (Art. 132 *Cost.*), and the main aspects of the arrangements for constitutional adjudication (Art. 137(1) *Cost.*). Article 139 *Cost.* provides that the republican form of government may not be subject to constitutional amendment.

A bill for a constitutional law must be adopted by each chamber in two readings, and must be approved by an absolute majority of the members of each chamber during the second vote (Art. 138(1) *Cost.*). The Rules of procedure of the Chamber of Deputies and of the Senate provide that the bill must be passed in first reading by both chambers before it may be introduced in second reading (Arts. 97 and 121, respectively). The constitutionally fixed period of three months between the first and second readings is calculated in each chamber from the moment at which the bill is passed in first reading in that chamber (Arts. 98 and 122, respectively). Amendment of the bill is not permitted during the second reading and there is no vote on separate articles (Arts. 99 and 123, respectively). If the bill is passed in both chambers in second reading with a two-thirds majority, then the president promulgates the constitutional law (Art. 138(3) *Cost.* and Art. 2 of the Law 352/1970 on referendums).

The legislative procedure is not yet completed, however, if the bill was passed in second reading in one or both chambers by an absolute majority, but not by a majority of two-thirds of the members. In that case, the bill is published by the minister of justice in the *Gazzetta Ufficiale*, with the notice that within three months of publication, a request for a referendum on the bill may be made by one-fifth of the members of one of the chambers or five thousand voters or five regional councils (Art. 138(2) *Cost.*, and Art. 3, Law on referendums). The request must be lodged with the registry of the Court of Cassation (Art. 4, Law on referendums). If such a request is not lodged within the period set, or if the Central office for referendums attached to the Court of Cassation declares the request for a referendum unlawful, then the President of the Republic promulgates the constitutional law (Arts. 5, 13 and 14). In other cases, the president calls the referendum (Art. 87(6) *Cost.* and Art. 15 of the previously mentioned Law). All citizens entitled to vote for parliament may vote in such referendums (Art. 17, Law on referendums). If the Central office for referendums establishes that a majority of the votes validly cast is in favour of the constitutional law which was the subject of the referendum, then the president promulgates the constitutional law (Arts. 24 and 25). The minister of justice ensures that a negative result is published in the *Gazzetta Ufficiale* (Art. 26).

### 3. EUROPEAN AND INTERNATIONAL LAW

From the very beginning, the constitution of the Italian Republic has been open to the integration of the Italian legal order within the international legal order, and it accepts limitations of sovereignty on a basis of reciprocity (Art. 10(1) and 11, second clause of the sentence). The relationship between the national and international legal order, however, has traditionally been firmly based on the principles of dualism. Since 2001, the relationship with the law of the European Union has explicitly been regulated in the revised Article 117 *Cost.*, which grants a special position to European Union law by specifying that legislative powers must be exercised in compliance with “the obligations

resulting from the Community legal order". With this exception, however, the traditional, dualist doctrine has been maintained as regards treaties and even reflects on how European law been accepted into the national legal order.

Article 10(1) *Cost.* provides that the Italian legal order conforms to generally recognized norms of international law, which according to standing case law is identified with customary international law. While customary international law as a consequence forms automatically part of the national legal order, and therefore has a "monist" status, treaties are considered from a dualist point of view. Neither the mere ratification of a treaty (Art. 87(8) *Cost.*) which creates bindingness under public international law, nor the mere parliamentary approval of a treaty (Art. 80 *Cost.*) turns the norms contained in that treaty into legally valid and effective norms within the national legal order. They become part of the national legal order by reception (*recezione*), which is usually effected in the second article of the law containing the authorization for ratification in its first article. The usual formula for reception is: "Full and integral execution is given to ... (*Piena ed intera esecuzione è data a ...*)" followed by the name, date and place of the relevant treaty. To the extent that the treaty provisions are not self-executing, such reception of course does not obviate the need for further implementing legislation or acts.

Pursuant to Article 80, authorization by law is required before the President of the Republic may ratify a treaty in cases of treaties that are of a political nature, or that provide for arbitration or legal settlements, or involve changes to the territory or financial burdens or changes in the law. On the basis of the principle of dualism the norm received into the national legal order takes the rank of the act by which it was so received. As is the case in other dualist countries, in Italy treaty norms takes the rank of an act of parliament. This would normally mean that later laws have priority over earlier laws. We shall presently see, however, that this *lex posterior* rule suffers an exception as regards European Union law and under recent constitutional case law also for other treaty law, the European Convention on Human Rights in particular.

In Article 11 of the Constitution, Italy rejects war both as an instrument of aggression against the liberties of other peoples and as a means of resolving international conflicts, and allows restrictions to sovereignty which are necessary for an order which ensures peace and justice among nations, and promotes and favours international organizations furthering such ends.

According to the case law of the Constitutional Court, the decisions of institutions of the European Union occupy a special position, given that these are based on a limitation of Italian sovereignty under Article 11 *Cost.* These decisions belong to an independent legal order and are binding in Italy without any further act of the Italian organs of state, also for matters which, according to the Constitution, must be regulated by statute (Decisions Nos. 98/1965 and 183/1973 of the Constitutional Court). Having initially taken the view that an infringement of EU law constitutes an infringement of Article 11 *Cost.* and is therefore a matter that can be decided by the Constitutional Court alone, It has eventually accepted that every regular court can decide whether a legal provision infringes EU law (Decisions Nos. 170/1984, 133/1985, *Granital*). In cases of such infringements, the normal court can "disapply" the national provision (he cannot declare it "invalid", which remains the monopoly of the Constitutional Court). This precedence of EU law was constructed by the Constitutional Court on the reasoning that the effect of Union law is solely a matter of EU law. Usually – but not all authors agree on this – this has kept the EU legal order in a quasi-dualist manner juxtaposed to the national legal order. The resolution of a conflict between Union law and national law is therefore not a matter of the "validity" of national law on the basis of a hierarchically superior position, nor can it be based on the equality between national laws and Union law which is based on the approval and

“reception” by national laws (and therefore the *lex posterior* principle). This is different for Union law that is not directly effective as it requires implementation by national law anyhow.

An exception to this priority of EU law consists of Union law which infringes “fundamental principles of the Constitution”. The Constitutional Court has held that, although unlikely, it is not totally impossible that such principles may comprise fundamental rights which are not protected by the European Court of Justice. In this case the Constitutional Court considers itself competent to review Union law against such “fundamental principles of the Constitution”, and should it conclude that there is a conflict then the relevant provision of Union law will have no effect in Italy (Decision 232/1989, *Fragd*).

The new Article 117(1) *Cost.* mentions the principles underpinning the division of legislative competences between the state and the regions: “Legislative power shall be exercised by the State and the Regions, with respect for the Constitution as well as the obligations deriving from the Community legal order and international law.”

In two parallel cases, the Constitutional Court has held that the juxtaposition of European law and international law implies their separate status in the Italian legal order. European Union law concerns a new legal order, while international law (including the European Convention of Human Rights) does not lead to a restriction of internal sovereignty in the sense of Article 11 *Cost.* The judgments of the Constitutional Court concerned Italian acts of parliament expropriating land the compensation for which had regularly been declared by the European Court of Human Rights to constitute an infringement of the right to property under the first Protocol to the ECHR (Decisions 348 and 349/2007). The Constitutional Court held Article 117(1) to imply a new regulation of both European and treaty law in relation to laws: they have a higher rank than laws because the state and regional legislatures are bound to observe the obligations flowing from them, but have a rank below the Constitution. Treaty obligations under the ECHR therefore have a rank “in between” the Constitution and parliamentary laws; they are “intermediate norms” (*norme interposte*). The Court also specified that ordinary courts are obliged to interpret laws as far as possible in a manner consistent with treaty law, and as regards the ECHR is bound by the interpretation thereof by the European Court of Human Rights. If a law cannot be interpreted in a manner so as to render it consistent with treaty provisions, the question of its compatibility becomes a question under Article 117(1) *Cost.* and its resolution is a power reserved to the Constitutional Court.

On the division of competences between the state and the regions, Article 117(2) *Cost.* provides that the relations between Italy and the European Union are a competence of central government; however, according to the third paragraph of this Article, there are “concurrent” powers of the state and regions as far as relations between the regions and the European Union are concerned. Finally, the fifth paragraph provides that within their sphere of competence the regions shall participate in treaties and in the formation of European normative acts, and shall provide for their implementation. Article 120 *Cost.* extends the rules in cases of failure of the regions or local authorities to fulfil their duties to cover also the failure to take Union legal norms into account.

The Law of 4 February 2005, No. 11 (replacing the famous *legge La Pergola*, of 9 March 1989, No. 86) lays down further rules on the role of the regions in the making and implementation of Union law. It is, however, a much more encompassing law on “Europe”. It gives provisions on the role of the Council of Ministers, the provision of information to and involvement of the Italian parliament (Art. 3), the regions and autonomous provinces (Art. 5), local authorities (Art. 6) and social partners (Art. 7) in relation to European legislation in preparation, as well as its implementation and



enforcement. Among other things, it provides for a reservation which the government has to make in the EU Council so that parliament can scrutinize draft decisions within a period of 20 days (Art. 4), and provides for a twice yearly government report on pending matters and an annual general report to parliament (Art. 3(6)). Also, it provides that the bill for a *legge comunitaria* has to be introduced in parliament before 31 January each year, which contains all legislative amendments required by Union law, and provides for interim amendments (Arts. 10-14).

#### 4. OTHER “INTERMEDIATE” NORMS

The new provision on the “balanced budget”, introduced in 2012 in Article 81 *Cost.* (Constitutional Law of 20 April 2012, No. 1) has introduced an act of parliament which has a higher rank than regular parliamentary laws, as it aims to bind the legislature passing the budget by a law. It concerns a law which contains rules and principles concerning the balanced budget and the tenability of public debt that binds parliament when it passes the yearly budget by a normal law. The law containing such rules and principles can only be passed in one reading with an absolute majority of the members of each chamber. Although in Italian constitutional law “organic laws”, i.e. laws that are an implementation of the Constitution, do not usually have a higher rank than normal laws, this is evidently precisely the rank which has been given to the legislation on the balanced budget.

### III. The system of government

Sovereignty belongs to the people, which exercises it in the forms and within the limits determined by the Constitution, so Article 1(2) of the Constitution provides. Both this provision and the order of the Italian Constitution necessitate that we first treat the position of parliament and elements of direct democracy before we describe the position of the president and government in their relation to parliament. We also succinctly describe the legislative powers and very briefly some other bodies mentioned in the Constitution.

#### I. PARLIAMENT

The policy-making organs (*organi di indirizzo politico*) are the parliament and the government, the latter being dependent on the confidence of parliament, under Article 94 *Cost.* From the point of view of constitutional law, the Italian parliament is an example of so-called “perfect bicameralism”: the two chambers of the parliament, i.e. the Chamber of Deputies (*Camera dei deputati*) and the Senate (*Senato della Repubblica*), are constitutionally of equal rank and have identical powers. This is true both of their role in the legislative process and of their relation with the government, which needs the confidence of both chambers. The political emphasis lies with the Chamber of Deputies, however. The leaders of the political parties have seats in this chamber.

Parliament meets in joint session under the chairmanship of the president of the Chamber of Deputies (Art. 63(2) *Cost.*) in the following cases: the election and swearing in of the President of the Republic (Arts. 83 and 91 *Cost.*), the impeachment of the President of the Republic and members of government (Art. 90 and 96 *Cost.*); election of one third of the members of the Supreme Council of the Judiciary (Art. 104(4) *Cost.*), the appointment of one third of the members of the Constitutional Court (Art. 135(1) *Cost.*); the drafting of a list from which extraordinary members of the Constitutional Court are chosen by lot for the trial of the President of the Republic and members of government (Art. 135(7) *Cost.*). Since 1963, the chambers are each chosen for a period of five years (Art. 60 *Cost.*). As a result, it was possible to make it established practice for the parliamentary terms and the elections for the two chambers to coincide. They remain in function – even in cases of dissolution of one of the chambers – until the newly elected chambers meet. Only in the case of war can the duration be extended, by law (Arts. 60 and 61 *Cost.*). The President of the Republic may dissolve one or both chambers of parliament; in the last six months of his term of office, he only has this power if the chambers themselves are also in the last six months of their term (Art. 88 *Cost.*). The right to dissolve the chambers is used to put an end to a political impasse, such as the impossibility of forming a stable new government after a government crisis, or too great a discrepancy in the composition of the two chambers. However, in most cases, government crises do not entail elections, as is the practice in some other European countries.

The decisions of the chambers are only valid if the majority of the members is present (Art. 64(3) *Cost.*). As long as the opposite is not proved, it is assumed that the majority is present (Art. 46(4), respectively Art. 107(2), of the Rules of procedure of the Chamber of Deputies and of the Senate). Unless a qualified majority is required, an absolute majority of the votes of the members present is required for a decision to be adopted (Art. 64(3) *Cost.*). In order to establish whether this condition is met, for the Chamber of Deputies only those who vote for or against the motion are considered to be members present (Art. 48(2), Rules of procedure of the Chamber of Deputies); for the Senate this is different. The members of the government are entitled, or – when so requested – obliged to attend meetings of the chambers. They must be heard every time they so request (Art. 64(4) *Cost.*).

Each chamber chooses its own president, decides its own working methods and verifies the credentials (*titoli di ammissione*) of its members (Arts. 64 and 66 *Cost.*). Each member of parliament represents the Italian nation and must exercise his or her duties without being bound by any mandate (Art. 67 *Cost.*). The parliamentary immunity for anything said by members of parliament in the performance of their functions may be lifted by the relevant chamber. Since the amendment of 1993, the same protection applies to any interception of the conversations or communications of members of parliament (Art. 68 *Cost.*).

According to Article 68(1) *Cost.*, members of parliament may not be held accountable for the opinions expressed and the votes cast in the performance of their functions. Such immunity remains in force even after the membership of parliament has terminated. Under the second paragraph of the old version of Article 68, members of parliament were immune from all criminal liability. Partly as a result of some controversial judicial investigations (in which two former prime ministers were involved), parliament adopted with a large majority a constitutional law (Constitutional Law of 29 October 1993, No. 3) which abolished the criminal law immunity of members of parliament. The public prosecution service and the courts may these days initiate criminal investigations and bring charges against them on the basis of the same rules which apply to ordinary citizens. The amended second paragraph of Article 68 *Cost.* does still protect the members of parliament from any form of detention, personal or home searches without prior authorization by the relevant chamber, except on an irrevocable conviction, or if they are caught in the act of a crime for which arrest is mandatory. Under the third paragraph, any form of surveillance of conversations or communications and the seizure of correspondence is also subject to prior authorization by the chamber.

The issue of the immunity of politicians remained a matter of controversy during the years that Berlusconi was prime minister. It is not total coincidence that during his period in government a statute of limitations was enacted to reduce the time limits for a number of criminal offences of which he himself was a suspect, such that he could no longer be prosecuted. Also, a law was enacted introducing a legal privilege for members of government waiving their obligation to appear in court, but in part this was declared unconstitutional by the Constitutional Court, and for the remainder it was abolished in a referendum in 2011.

According to Article 69 *Cost.*, the members of parliament receive an emolument set by law (Law of 31 October 1965, No. 1261). Italian members of parliament were among the best paid in Europe, but since a series of limitations and a reduction in January 2012, the net income of an MP is approximately € 5000, after deduction of taxes and health insurance premium, but excluding an allowance on declaration basis for travel and accommodation in Rome for non-residential MPs.

The Law of 5 July 1982, No. 441, lays down the duty for members of parliament to make a declaration to the president of their own Chamber regarding their personal financial assets and the financing of their electoral campaign.

### 1.1. *The electoral system*

The amendments to the electoral system were a crucial element of the *riforme* of the last decade of the twentieth century, mentioned above (see section I.1.2 below). A successful *referendum abrogativo* held on 18 April 1993, made the reform of electoral law unavoidable. Initially, for both chambers an electoral system was introduced in which three quarters of the members are chosen in constituencies by (relative) majority, and a quarter on the basis of proportional representation. As a result, parties are stimulated to form coalitions already before the elections, which was intended to create a “bi-polar” political party landscape. The election contest focused on the local candidates, but at the same time also on the national contest between the competing coalitions and their leaders, whose names must appear on the ballot paper and are regarded the candidates for the post of prime minister. In this way, the strengthening of the parliamentary system has also led to a certain tendency towards “prime ministerial government” in the government system. As we mentioned above, in 2005 the electoral system was revised again and a nearly complete return to proportional representation was inaugurated. Nevertheless, some important elements for the creation of parliamentary majorities and leadership were retained in the form of a “majority premium” for the party coalition which gained the largest number of votes: the bi-polar ideal was not abandoned.<sup>2</sup>

Related to democracy and the electoral system are the public financing of and subsidies for political parties. This takes the form of a restitution of certain eligible cost of the electoral campaign (Law No. 157 1999) on the basis of a threshold of having gained 1 percent of the vote (Law 156/2002; it was previously 4%). Political parties also profit from the possibility for tax payers to designate 4 pro mille of their tax contribution as being for political parties.

### 1.2. *The composition of the Chamber of Deputies*

The Chamber of Deputies meets in Palazzo Montecitorio in Rome, and has 630 members (Art. 56(2) *Cost.*). Of these, 617 are elected in proportion to the number of votes cast on a list of candidates in the 26 electoral districts. One member of parliament is elected for the autonomous region of *Valle d’Aosta* as a uninominal constituency on the basis of the majority rule. The remaining twelve are chosen in a constituency for Italians outside the national territory (the “Constituency Abroad”).

For the Chamber of Deputies, Italian citizens may be elected who are at least twenty-five years of age. Citizens who have attained their majority, i.e. eighteen years, may vote in elections for the Chamber of Deputies. As we shall see in the next section, these are lower ages than for elections of the Senate (compare Arts. 48(1), 56(3) and 58(1) and (2) *Cost.*).

Since the amendments to the Constitution in 2000 and 2001, Italians living abroad are also eligible to vote (Constitutional Laws of 1/2000, No. 1, and 1/2001). With this in

2. The legislative amendments to the electoral system for the Chamber of Deputies were consolidated in the amended Presidential Decree of 30 March 1957, No. 361, while those for the Senate are consolidated in the amended *decreto legislativo* of 20 December 1993, No. 553.

view, a constituency has been formed for citizens who are outside the country, in which twelve members of the Chamber of Deputies and six members of the Senate are elected (Art. 48(3), 56(2) and 57(2) *Cost.*). These seats are allocated to that part of the chambers which is chosen by proportional representation.<sup>3</sup>

Political parties determine the order in which candidates appear on their list. These lists are “blocked”. This means that the elector cannot alter the order of the candidates on the list by casting a vote on a particular candidate. Parties can link their lists of candidates into a coalition. Party coalitions (or parties depositing a list independently) must deposit their electoral programme as well as the name of the coalition leader (party leader) who is regarded as their candidate prime minister; these names appear on the ballot paper. An elector can only cast one single vote on a list and cannot show his preference for a particular candidate on the list. Parliamentary elections are therefore also understood as elections concerning the intended prime minister.

The allocation of seats after elections is along the following general principles. The seats are allocated in proportion to the number of votes for coalitions of lists and independent lists if they have reached the legal threshold. For coalitions the threshold is 10 percent of the total number of validly cast votes, while at least one of the lists within a coalition must have passed the threshold of 2 percent of the vote. For independent lists the threshold is 4 percent. For political parties who expect to win less than 4 percent of the vote, there is a stimulus to enter into a coalition with another party. For political parties who represent an official language minority within a region with a special charter (see below section V.1) the threshold is 20 percent of the vote within the relevant district. The allocation of seats to coalitions, within coalitions and lists within districts is on the basis of quota the number of votes cast for a coalition (or list respectively) divided by the number of seats available (or allocated). As on the basis of such a quota not all seats will be allocated, the remaining seats are allocated on the basis of the largest remainder of votes cast on a coalition or list.

As we mentioned, since 2005 there is a “majority premium” for the coalition (or, should the case arise, independent list) which has won the largest number of votes but less than 340 seats: this coalition (or independent list) will be allocated 340 seats (which is about 55% of the seats in the Chamber of Deputies). In this case the remaining 277 seats are allocated proportional to the electoral quota and the then remaining seats in accordance with the number of remaining votes.

### 1.3. *The composition of the Senate*

The Senate sits in the Palazzo Madama in Rome, and has 315 elected members (Art. 57(2) *Cost.*), including six senators chosen by Italians abroad. Over and above these 315 senators, former Presidents of the Republic are senators for life, except if they had renounced their office. Moreover, a maximum of five persons who have rendered important services can be appointed by the president as senators for life (Art. 59 *Cost.*; see also section III.3.3 below).

For the Senate, Italian citizens may be elected who are at least forty years of age. Citizens who have attained the age of twenty-five years may vote in elections for the Senate (Arts. 56(3) and 58 (2) *Cost.*). The Constitution provides in Article 57(1) that the Senate is chosen on a regional basis, which means that senators are elected within

3. Further rules on the exercise of the right to vote by citizens abroad have been established by Law of 27 December 2001, No. 459, and the implementing decree of 2 April 2003, No. 104.

the regions. The distribution of the seats between the regions is in proportion to the number of inhabitants. No region has less than seven senators, though, except the small regions Molise and Valle d'Aosta, which have two senators and one senator respectively (Art. 57(3) *Cost.*). In addition, there are six senators for the Constituency Abroad, their number being subtracted from the total before distribution between the regions (Art. 57(2) and (4) *Cost.*).

For the elections to the Senate, each elector casts only one vote, without the possibility of expression preference for a particular candidate on the list. Except for the regions Molise, Valle d'Aosta and Trentino-Alto Adige, seats within a region are allocated to coalitions and independent lists who have passed the threshold, in proportion to the number of votes. A "majority premium" is awarded to the coalition or independent list which won most seats but less than 55 percent of the vote. The thresholds are 20 percent of the vote for a coalition, while within a coalition at least one party must have won 3 percent, while for independent lists as well as for lists within coalitions that have not passed the 20 percent threshold, there is a threshold of 8 percent.

For the two seats in Molise the majority premium does not apply, while Valle d'Aosta is a uninominal district for which the relative majority of the votes determines who will be Senator for this region. For elections to the Senate, Trentino-Alto Adige is divided into six uninominal districts in which the candidate with the largest number of votes is elected, while the seventh seat for Trentino-Alto Adige is based on the list with the largest average of remaining votes.

#### 1.4. *Parliamentary supervision of the government*

The Rules of procedure of the two chambers provide for three ways of requesting information from the government. First, there are questions, aimed at obtaining information of a factual nature concerning events or the existence of certain intentions on the part of the government (*interrogazioni*). The questions are presented in writing to the president of the chamber, and are answered by the government either orally, in the plenary assembly or in a committee meeting, or in writing, according to the wish of the person putting the question (Arts. 128-134, respectively Arts. 145-153; in the Senate, a request to answer a question in a committee meeting should be made by the president of the chamber in agreement with the person putting the question). For written answers, there is a term of twenty days. If this term has elapsed, the government must answer the questions orally (Art. 134, respectively Art. 153).

Secondly, the Rules of procedure allow for interpellation (*interpellanze*). These are weightier questions, which are intended to obtain information about government policy, already being followed or future. They may be presented to the president of the chamber by any member, and are answered orally by the government in the plenary assembly (Arts. 136-138, respectively Arts. 154-156).

In the third place, the possibility exists for committees to request information from the government directly (Art. 143 respectively Arts. 46-47).

The Rules of procedure provide for special procedures for debate on new legislation of the European Union and other subjects of European and international policy (Arts. 125-127ter, respectively Arts. 142-144).

The chambers have three ways in which to make pronouncements about the policy to be pursued by the government. Firstly, the Rules of procedure allow for motions introduced

during the debates on a bill and concerning the implementation by the government of the law to be enacted (Art. 88, respectively Art. 95, so-called *ordini del giorno*). Secondly, there are motions (*mozioni*) in which the Chamber determines its point of view on a certain issue (Arts. 110-114, respectively Arts. 157-160). Thirdly, there are resolutions (*risoluzioni*), in which a committee or the Chamber, expresses its opinion about the line of policy which ought to be followed by the government with respect to a certain issue (Arts. 117-118, respectively Art. 50(2) and (3)). The resolutions carry less weight than the other opinions concerning policy.

Each of the chambers may, pursuant to Article 82(1) *Cost.*, institute an inquiry (*inchiesta*) into a subject of public interest. For that purpose, it appoints a committee, reflecting the composition of the Chamber, which in its inquiry has the same powers and limitations as a judicial body (Art. 82(2) *Cost.*). This implies that the provisions of the Code of Criminal Procedure apply as appropriate to the inquiries of these committees. If an inquiry is set up within the framework of parliament's powers of scrutiny, then it is called an *inchiesta politica*. If on the other hand the inquiry concerns the assembling of information for the purposes of the legislative work of the Chamber, then it is called an *inchiesta legislativa*. The Rules of procedure of the two chambers contain some further provisions (Arts. 140-142, respectively Arts. 162-163).

Occasionally, parliamentary committees of inquiry are set up by law, composed of members of both chambers, and carry out investigations in relation to a certain matter, with the power to override official secrecy, bank secrecy etc., and may make recommendations – even proposals for legislation. Bicameral committees can also be instituted for other purposes by the Constitution itself (e.g. one on matters concerning regions on the basis of Art. 126 *Cost.*, or a constitutional law, or by law. We mentioned in section I.1.2 the bicameral committees for constitutional revision, while there is, for instance, a bicameral parliamentary committee supervising public broadcasting established by act of parliament.

### 1.5. Statutes

According to Article 70 *Cost.*, the legislative powers are exercised by the two chambers jointly. The government is thus not a co-legislative organ: it does have the right to initiate legislation. The president is not a co-legislative organ either, even though the right to promulgate laws is reserved to him under Article 87(5) of the Constitution. The legislative process may be divided into three phases: initiative, enactment and promulgation.

According to Article 71(1) *Cost.* legislative initiative belongs to the government (authorized by the president), to all members of parliament, and to the bodies and entities so empowered by a constitutional law. Thus far, no use has been made of the last possibility. Article 99(3) *Cost.* also grants the right to initiate legislation to the National Council for Economics and Labour (*Consiglio nazionale dell'economia e del lavoro*, abbreviated CNEL; see section III.5.1 below) within the limitations established by law. Article 10 of the Law of 5 January 1957, No. 33, on the National Council for Economics and Labour limits this power to economic and social legislation, and excludes initiatives concerning constitutional legislation, tax and budgetary laws, delegation of legislation and ratification of treaties. Regional councils may, under Article 121(2) *Cost.*, propose bills before the chambers of parliament. In all cases, the further procedure is a matter for the chambers themselves.

In addition, Article 71(2) *Cost.* introduces the possibility of legislative initiative by the people, by means of a bill proposed by at least fifty thousand voters. Articles 48 and 49 of the Law of 25 May 1970, No. 352, on referendums contain further rules on this.

The term *disegno di legge* (bill; literally: draft law) is usually reserved for government bills; other proposals are referred to with the term: *proposta di legge* (proposal for a law). Article 72 *Cost.* however uses the term *disegno di legge* in a general sense, and therefore in this text we will use the term “bill” generally as well.

The CNEL, the regions and the people as such make only very occasional use of their right to propose bills. In approximately three quarters of the cases, a legislative initiative comes from one or more members of parliament, and in a about a quarter from the government. Nevertheless, qualitatively, and as regards content, the government initiative is much more important than parliamentary initiative. The government has at its disposal expertise and political support which enable it to introduce bills with a good chance that these will be adopted. Budgetary laws and laws establishing the accounts for current expenditure may only be initiated by the government (Art. 81(1) *Cost.*). Whoever introduces a bill may also withdraw it.

Whether the bill is debated first in the Chamber of Deputies or first in the Senate depends on which chamber it originated in or in which chamber it was introduced. Both chambers have the right of amendment. If a bill passed in one chamber is amended in the other, then it has to be dealt with again in the chamber where it was already passed, and so on, until the same text is passed in both chambers. However, when a bill is reintroduced in this way, then the chamber only considers and votes on the amendments made by the other chamber, and the bill as a whole (Art. 70, Rules of procedure of the Chamber of Deputies, and Art. 104, Rules of procedure of the Senate). There is no special provision for cases where the chambers continue to disagree.

Both chambers follow mainly the same procedure. A decision on a bill may be taken in a plenary sitting, or in a standing committee. The former is the ordinary procedure. Before a bill is debated in plenary, it is examined in one of the committees (*in sede referente*; Art. 72(1) *Cost.*). According to this provision of the Constitution, the rest of the procedure is regulated by the Rules of procedure of the chambers. These Rules of procedure provide for an expedited procedure for urgent bills (Art. 72(2) *Cost.*). The ordinary procedure is compulsory for constitutional legislation, for electoral legislation, for enabling legislation, for legislation granting the authorization to ratify international treaties, and for legislation on the approval of budgets and accounts (Art. 72(4) *Cost.*). The Rules of procedure of the Chamber of Deputies and of the Senate (Arts. 71(2) and 35(1), respectively) add that the ordinary procedure must be followed for renewed consideration of a bill which has been sent back by the President of the Republic. The Rules of procedure of the Senate (Art. 35(1)) also contain such a provision concerning the conversion of (provisional) decree-laws into statutes.

A variant of the ordinary procedure is that the plenary meeting instructs the competent standing committee, or a special committee, to draft the articles of a bill; the plenary can establish the basic points which must be taken into consideration thereby (Art. 96, and Art. 36 respectively of the rules of procedure of the two chambers). The committee then acts “*in sede redigente*”.

Article 72(3) *Cost.* creates the possibility for the legislative powers of the chambers to be exercised by committees, composed so as to reflect the balance of the parliamentary groups. The consideration of the bill then takes place in one of the standing committees or a special committee “*in sede legislativa*” (in the Chamber of Deputies), or “*in sede deliberante*” (in the Senate). About three quarters of statutes are enacted by means of this procedure. Under the same provision of the Constitution the (further) consideration of the bill, or at least the final vote, must be carried out in plenary session if the government, a tenth of the members of the chamber, or a fifth of the members of the relevant committee so desires, before the final vote has been taken.



A law which has been approved by parliament must be promulgated by the President of the Republic within one month (Art. 73(1), and Art. 87(5) *Cost.*). The chambers may fix a shorter term within which the promulgation must take place (Art. 73(2) *Cost.*). The Law is dated according to the date of the promulgation act. (For the power of the president to send back a law approved by parliament, see section III.3.3 below.)

Article 73(3) *Cost.* prescribes that laws are published “immediately after promulgation”, and provides that laws enter into force on the fifteenth day following publication, unless the laws themselves establish a different deadline. Article 25(2) *Cost.* excludes the possibility of retroactive effect being given to a provision of criminal law. Article 2 of the Penal Code (*codice penale*) contains a similar provision. Pursuant to Article 11(1) of the General provisions concerning legislation (*Disposizioni sulla legge in generale*, so-called *preleggi*), which are the opening provisions of the Civil Code, statutes may not have retroactive effect. However, a separate statute may deviate from these provisions, as the Constitutional Court explicitly ruled in a decision of 1957, No. 118, albeit that the Constitutional Court added that the legislature should only do this “in cases of extreme need”.

Bills which have not been passed by both chambers of parliament lapse at the end of the *legislatura*, the parliamentary term (i.e. the period for which parliament is elected). The Rules of procedure of the Chamber of Deputies and of the Senate (Arts. 107 and 81, respectively) create the possibility, however, of using an expedited procedure if within six months of the start of a new *legislatura* a bill is introduced which is identical to a bill which the chamber in question has approved in the previous *legislatura*.

#### 1.6. *The Budget*

Since April 2012 the constitutional provision on the budget opens by providing that the state shall ensure an equilibrium between income and expenditure in its budget, taking into account the adverse and favourable phases of the economic cycle (Art. 81(1) *Cost.*). Indebtedness shall only be resorted to considering the cyclical economic effects and, with the approval of the absolute majority of the members of each house, when exceptional situations occur (Art. 81(2) *Cost.*). Each statute that entails new or higher expenditure shall provide for the means to cover them (Art. 81(3) *Cost.*).

Article 81(4) *Cost.* provides that the chambers approve the budgets and accounts presented by the government each year. This approval is by normal majority of the votes cast – a lower threshold, therefore than that in Art. 81(2), which we mentioned above, and in 81(6) which is mentioned immediately below. The Court of Auditors draws up the balance of the accounts and reports on the accounts, this report being presented with the accounts themselves to parliament (Art. 79, and Arts. 38-43 of the consolidated text of 12 July 1934, No. 1214, on the Court of Auditors). If the budget is not approved in time, the implementation of the proposed budget may be provisionally authorized by law for a maximum of four months (Art. 81(5) *Cost.*).

Article 81(6) *Cost.* provides that the rules concerning the content of the budget, the fundamental norms and criteria aimed at a balanced budget and the sustainability of overall public indebtedness of the public administration, shall be adopted by statute approved by an absolute majority of the members of each chamber of parliament, and in accordance with the principles defined by constitutional act. The latter principles are contained in Constitutional Act of 20 April 2012, by which Article 81 *Cost.* was amended in order to introduce the principle of the balanced budget.

## 2. DIRECT DEMOCRACY

The referendum – one of the counterweights which the 1947 Constitution wished to introduce, in order to prevent a new derailment of representative democracy – was only regulated by law after two decades of delay. Italian constitutional law includes two types of national referendum, the constitutional referendum and the abrogative referendum – in addition to the referendums at regional and local level provided for by Article 123 *Cost.*, and further elaborated in the regional charters, and the referendums under Article 132 *Cost.* concerning any changes to the division of the country into regions (see section V.1 below). Moreover, on one occasion a consultative referendum was held on the basis of a special constitutional law. This was in 1989, when a referendum was held on the question whether the European Parliament should be given the constitutional mandate to adopt a European Constitution establishing a European Union which provides for a European government which is held accountable to a parliament. Some 88 percent of the voters, with a turnout of more than 80 percent of the electorate, was in favour. This referendum was never followed up within the European Communities. The Treaty establishing a Constitution for Europe of 2004, which never entered into force as result of the negative referendum outcomes in France and the Netherlands, did not follow the model proposed by the 1989 Italian referendum because it was not adopted on the basis of a mandate for the European Parliament; although the Treaty establishing a Constitution for Europe was ratified by Italy, it was not submitted to a referendum there.

The normal constitutional referendum takes place if a proposal to amend the Constitution or a bill proposing a constitutional law is not adopted with a two-thirds majority in second reading (see section II.2 above). Under Article 75(1) *Cost.* a referendum on the repeal of legislative provisions (*referendum abrogativo*) must be held to deliberate the total or partial abrogation of a law (i.e. a statute) or a measure having the force of law, when requested by five hundred thousand voters or five regional councils. Referendums are not permitted for tax, budget, amnesty and pardon laws, or laws for the authorization and ratification of international treaties. All citizens entitled to vote for the Chamber of Deputies may vote in referendums (Art. 75(3) *Cost.*). The abrogation of the legislative provision subjected to a referendum is approved if the majority of those with voting rights have participated in the vote and a majority of votes validly cast was in favour of abrogation (Art. 75(4) *Cost.*).

The Law on referendums of 25 May 1970, No. 352, establishes the further procedures. Requests for a *referendum abrogativo* may be lodged with the registry of the Court of Cassation each year between 1 January and 1 October – barring certain limitations when general elections are approaching (Art. 31). The Central office for referendums, attached to the Court of Cassation, checks and coordinates the requests received (Art. 32). Then the Constitutional Court decides on the constitutional admissibility (Art. 33). After receiving the decision of the Constitutional Court, the President of the Republic calls for the referendum which is held – where the request was successful – between 15 April and 15 June of the year following that in which the request was submitted (Art. 87(6) *Cost.* and Art. 34 Law on referendums).

After the referendum has taken place, the Central office establishes the result (Art. 36). If the proposal to repeal the legislative provision is approved, then the President of the Republic declares the law or decree in question, or where appropriate the parts thereof, to be repealed (Art. 37(1)). The legal effects take force as of the day after publication in the *Gazzetta Ufficiale* (the official gazette), unless the president, on a proposal of the Council of Ministers, fixes another date, in which case this must be no more than sixty days after

publication (Art. 37(3)). If the repeal proposal is rejected, then no referendum over the same proposal may be held for the following five years (Art. 38).

Up to 1985, only nine referendums for the repeal of legislative provisions were held, and none of them received the required majority. Between 1987 and 1997, completely the opposite picture emerged: five referendums held in 1987 were successful, and 24 referendums were held in the years 1990-1995, fourteen of which led to the repeal of the provisions which were the subject of the referendum. Since 1997, the Italian electors seemed to be tired of referendums: until 2011, in none of the six abrogative referendums was the required turnout percentage obtained. In June 2011, however, four sets of legislative measures (on privatization of municipal public services, the provision of water, nuclear energy, and the privilege of members of government not to appear in court) were abrogated with overwhelming majorities of 94 to 95 percent with a turnout of almost 55 percent of the electorate. If there is a real objection to legislation, citizens can be mobilized on a large scale also these days.

### 3. THE PRESIDENT OF THE REPUBLIC

#### 3.1. *The office of President of the Republic*

The President of the Republic (*Presidente della Repubblica*) represents national unity, says Article 87(1) *Cost.* Unlike heads of state in presidential systems, the functions of the president in the Italian state system – partly as a continuation of the monarchy – are related to the composition of the other organs of state, including the supreme bodies, to be discussed in section III.3.3 below. The head of state ensures that, in case of conflicts and stalemates, the constitutional balance between parliament, government and judiciary, and between the central government and the regions or local authorities, is maintained or restored.

The President of the Republic is assumed not to be party-oriented in exercising his duties. It is a custom – though this is not always followed – for the newly elected president to cancel his party membership.

Various competences of the president are aimed at ensuring that decisions should be taken or confirmed which are of essential importance for the correct constitutional progress of the political process. In this context, his own position is obviously involved. The question of what influence the president himself may exert on the official actions which, at least formally, emanate from him, cannot be answered in the same way for all official actions, as will be shown below.

Article 90 provides that the president is not responsible for the acts performed in the exercise of his functions, except in the case of high treason or a so-called “attempt against the Constitution” (the Italian criminal code provides that this concerns “a fact aimed at a change of the Constitution of the state or its system of government with means which are not allowed by the constitutional order of the State”). This rule on irresponsibility of the president means two things.

First, the president is not politically responsible to any organ or body. Article 89 *Cost.*, which is discussed below, means that any official act of the president must be countersigned by the prime minister, or a minister, even if it is not necessarily the result of any decision-making by the government. The responsibility towards parliament for any such act is borne by the person who countersigns it.

The second point is that the president is not legally responsible for acts performed in the exercise of his functions (with the abovementioned exceptions). This means that he is not civilly or criminally liable for these acts. The inability to bear criminal charges ends when the presidency ends. Thus, to the extent that the facts have not become extinguished by limitation, an ex-president could still be charged with a criminal offence. The inability to bear charges does not apply, as was said above, to high treason or for attempts against the Constitution. For these offences committed in office, the president may be charged before the Constitutional Court following a decision by parliament in joint session with an absolute majority of its members (Art. 90(2) and Art. 134 *Cost.*). The Court may relieve the president of his duties (Art. 15, Constitutional Law of 11 March 1953, No. 1, and Art. 45(2), Law of 11 March 1963, No. 87, concerning the Constitutional Court).

### 3.2. *The election of the president*

Article 83 *Cost.* entrusts the task of electing the president to parliament. Two special provisions aim to prevent the president being simply an instrument of the parliamentary majority:

- three representatives from each region (except Valle d'Aosta, which has only one representative) take part in the election, which is the task of the two chambers of parliament in joint session;
- the vote requires a two-thirds majority of the members of this special assembly, up to and including the third round; thereafter, an absolute majority is sufficient.

According to Article 84(1) *Cost.* any Italian citizen who has reached fifty years of age and enjoys civil and political rights may be elected President of the Republic. The election is for seven years (Art. 85(1) *Cost.*). Re-election is not excluded by the Constitution, but is generally considered undesirable and has not so far occurred.

If the president is temporarily unable to perform his functions, and in cases where the presidency comes to an end other than due to the expiry of the term, the functions of the president are assumed by the President of the Senate (Art. 86(1) *Cost.*).

The presidency ends as a result of expiry of the term, death or permanent incapacity, when the president is relieved of his duties after being impeached, or on the president's resignation (see also Art. 86(2) *Cost.*). All former presidents are *ex officio* life senators, unless they decline this position (Art. 59(1) *Cost.*). Under Article 84(2) *Cost.* the office of president is incompatible with any other function.

### 3.3. *Powers of the president*

The powers of the president include the appointment of the prime minister and the ministers (Art. 92(2) *Cost.*). Since the government must enjoy the explicitly expressed confidence of both chambers of parliament (Art. 94 *Cost.*), and moreover because since the reform of the electoral system in 1993 the election results usually make it obvious which coalition and which prime minister are desired, the personal influence of the president on this point is restricted to situations of political crisis or stalemate.

Other functions of the president with respect to the composition of the organs of state are the following. The president calls elections for both chambers of parliament and convenes the first meeting of the newly elected chambers (Art. 87(3) *Cost.*; see also Art. 61(1) *Cost.*). He

or she may also – without any government proposal to that effect – dissolve one or both chambers of parliament (Art. 88 *Cost.*), which may provide a solution if the existing chambers are no longer able to produce a stable government. Nevertheless, in Italian constitutional law, there is nothing to prevent a change in the composition of the government and the governing coalition without new elections being held, which often meant that – prior to the 1993 *reform* – five or six governments might be formed one after the other on the basis of the same election results (see section III.4.2 below).

The president appoints, on his own authority, a maximum of five life senators, chosen from “citizens who have honoured the Nation through their outstanding achievements in the social, scientific, artistic and literary fields” (Art. 59(2) *Cost.*). The senators for life have included the poet Montale, the musician Arturo Toscanini, the political and legal philosopher Norberto Bobbio, Nobel Prize winner Rita Levi Montalcini (appointed at the age of 92 and still for ten years senator), the industrial designer Pininfarina, and among the politicians Giulio Andreotti (who always attended except when he was too ill, and even cast the vote which meant the end of the Prodi cabinet in 2008). An exceptional appointment was that by President Napolitano of Mario Monti on 9 November 2011 for reason of his “services to the sciences and society”, a day after accounts over 2009 were rejected in the Chamber of Deputies, signalling the lack of confidence in the fourth Berlusconi government, whereupon Berlusconi announced his resignation. This government was succeeded a week later by a “technocratic” cabinet led by the new senator Monti. His appointment as life senator expressed the confidence the president placed in him and moreover guaranteed that the prospective leader of government was member of parliament, which is not a formal constitutional requirement but is nevertheless considered a matter of course.

A third of the members of the Constitutional Court are appointed by the president (Art. 135(1) *Cost.*). He also appoints, on a proposal of the government, other state officials where this is provided for by law (Art. 87(7) *Cost.*), including high-ranking civil servants.

The authorization of the president is needed for a government bill to be introduced in parliament (Art. 87(4) *Cost.*). The president promulgates laws once they have been passed by both chambers of parliament, within one month thereof (Art. 73(1) and 87(5) *Cost.*), except where he makes use of the possibility granted him in Article 74 *Cost.* to send the law back to the chambers with a reasoned message for them to deliberate again. It is assumed that the president may do this on the basis of constitutional objections and also for other reasons, although the president is not expected to enter into policy choices. This reasoned message must also be countersigned by a minister, although it may be against his wishes, as the case must have been when Gasparri, Minister for Communication, had to countersign the presidential message of 15 December 2003 by which the *legge Gasparri* was sent back for renewed deliberation (see section III.1.5 above). If the chambers pass the bill again, even after it has been sent back for renewed deliberation, the president is compelled to promulgate it (Art. 74(2) *Cost.*). The president “promulgates” (*promulga*) laws (Arts. 87(5), 73 and 74 *Cost.*), and “issues” (*emana*) decrees having force of law, and government regulations (Art. 87(5) *Cost.*; see section III.4.4 below); for the significance and the rank within the hierarchy of norms of the legislative decree (*decreto legislativo*), see section III.4.4 below. The president is also involved in the procedures for referendums on legislation: the president “calls” (*indice*) a referendum under Article 87(6) *Cost.*

Treaties – both those which must be approved by law beforehand and other treaties – are ratified by presidential decree (Art. 87(8) *Cost.*). In addition, the president fulfils a number of other functions in the area of international relations: he accredits Italian diplomatic

representatives, and receives the credentials of those of other states (Art. 87(8) *Cost.*). He is the person who declares – should this situation ever again occur, and after deliberation in both chambers of parliament (Art. 78 *Cost.*) – that the country is in a state of war (Art. 87 (9) *Cost.*).

The president confers honorary distinctions (Art. 87(12) *Cost.*) and carries out a number of other legal acts for which previously a royal decree was needed. These include naturalization (Art. 9 of the Law of 5 February 1992, No. 91, concerning Italian citizenship, and the Decree of the President of the Republic of 12 October 1993, No. 572). In addition, the president has the power to grant pardon in individual cases (Art. 87(11) *Cost.*). The power which was previously enjoyed by the president to grant amnesty and collective pardons (*indulto*) by means of a special law has since 1992 no longer resided with the president but has been granted to parliament, in which case both chambers must approve the law by a two-thirds majority.

Article 89 *Cost.* sets the procedures for ministerial countersignature. No act of the president is valid if it is not countersigned by the minister who makes the proposal and accepts the responsibility for the act in question, or – in cases of decrees with legislative force and in some other cases fixed by law – by the prime minister. Certain acts of the president are performed in his function not as an independent organ, but as president of another organ (Supreme Council of the Judiciary and the Supreme Council of Defence, see section III.5.1 below); these acts do not fall under Article 89 *Cost.* The act nominating the prime minister is countersigned by the nominee himself.

In legal commentary, the acts of the president are distinguished according to whether it is the government (or the prime minister, or the minister, depending on the specific case) which determines their content, or the president himself, or the two organs in consultation. The relation between the president and the government in the determination of the content of an act depends on the purpose of the presidential involvement. If it involves functions which the president must exercise in order to preserve the constitutional balance, in particular between the government and parliament, then the president may himself influence the content. With respect to the nomination of the prime minister and the dissolution of parliament, it depends on the balance between the political parties to what extent the president can exert influence personally; since the reform of the electoral system in 1993 the need for presidential intervention has diminished considerably.

The president exercises his own judgement entirely with respect to his messages to the chambers of parliament, the promulgation or return to parliament of laws, the appointment of life senators, the appointment of judges in the Constitutional Court, and decisions taken in accordance with the opinion of the Supreme Council of the Judiciary. In these cases, the responsibility of the person who places his or her countersignature is limited to the formal lawfulness of the act; these acts and decisions are not based on a proposal. The content of the remaining presidential acts is determined by the government (or the prime minister, or a minister): the president is then obliged, possibly after further consultation, to take a decision in conformity with the proposal, unless the act is unlawful. This third category includes the nomination of ministers on a proposal of the prime minister.

## 4. THE GOVERNMENT

### 4.1. Prime minister, Council of Ministers, and ministries

According to Article 92(1) *Cost.* the government is composed of three organs: the prime minister (*Presidente del Consiglio*, literally President of the Council), the ministers (*ministri*), and the Council of Ministers (*Consiglio dei ministri*). The ministers are assisted by junior ministers (*sottosegretari di stato*), but this function is not mentioned in the Constitution.

The office of prime minister, minister or junior minister is not compatible with that of President of the Republic, member of the Council of State, or of the Court of Auditors, member of the judiciary or the Constitutional Court. Usually the members of the government and the junior ministers are at the same time members of one of the chambers of parliament, as a result of which other incompatibilities must be taken into account. The relevant Law of 15 February 1953, No. 60, provides in addition that members of the government may not receive any income as managers of an enterprise coming within the scope of application of their ministry (Art. 5), and that those persons who have fulfilled government functions may not accept any of the other functions mentioned in that Law for the first year after they have relinquished their government function (Art. 6). In recent years, it has become obvious that these legislative provisions are not sufficient to solve the issue of conflicts of interest, in particular with respect to the appointment as prime minister in 1994, and again in 2001 of the businessman and media tycoon Silvio Berlusconi. Legal arrangements at statutory level were passed during the second Berlusconi government (Law of 20 July 2004, No. 215). According to this law members of government shall exclusively act in the general interest and will refrain from acts or from participation in decision-making concerning acts which entail a conflict of interests. It prohibits members of government from having relations aimed at economic profit or carrying business responsibilities. Entrepreneurs must transfer their business interests to one or more fiduciary caretakers in the sense of the Italian civil code. The Antitrust authority (Autorità Garante della Concorrenza e del Mercato) supervises compliance with this law and can – amongst various sanctions in case a conflict of interests is established – remove the office holder from his office, and remove the advantages enjoyed by business enterprises as a consequence of a conflict of interest by imposing fines.

The prime minister is nominated by the president and presents an oath before the president (Arts. 92(2) and 93 *Cost.*). Since a prime ministerial decree of 1 October 2008, the presidency of the Council of Ministers (*Presidenza del Consiglio*) is composed of twelve services (*uffici*) and seventeen departments (*dipartimenti*) which assist the prime minister. In addition to the services of the general secretariat and the secretariat for the Council of Ministers, there are specialized divisions for amongst others budgetary affairs, honorary distinctions, and relations with the churches, as well as divisions for legal and legislative affairs, economic affairs and matters of protocol.

The ministers without portfolio are responsible for the specialized divisions attached to the presidency – such as European affairs and regional affairs. The minister without portfolio responsible for relations with parliament also has such a division at his disposition.

The composition and functions of the Council of Ministers are regulated in the internal rules of procedure for this body, adopted on 10 November 1993. The secretary of the council has the rank of junior minister, and is replaced by the youngest minister in

case of absence. The ministers are appointed by the president on the proposal of the prime minister, and are sworn in by the president (Arts. 92(2) and 93 *Cost.*). The ministers bear collective responsibility for the acts of the Council of Ministers, and are individually responsible for the fulfilment of their own duties (Art. 95(2) *Cost.*).

According to Article 95(3) *Cost.*, the number, competence and organization of the ministries should be established by law (see Legislative Decree of 30 July 1999, No. 300, based on the Law of 15 March 1997, No. 59). The number of ministries mentioned in the relevant legislative decree has varied. Over the past few years the number of ministries has been approximately 12, while the maximum number of all members of government was 60.

Outside the structure of the ministries, but nevertheless under the supervision of the minister, are the agencies (*agenzie*) which carry out “implementing tasks of a technical nature” in the service of the national, regional or local authorities (Art. 8 of the Decree). This article also describes in what manner, and in relation to what points, the agencies are subject to ministerial supervision. The Decree itself contains further regulations for a number of agencies, including the tax offices (Arts. 61-72) and the agency for professional training (Art. 88). The prefectures (*prefetture*), which were set up as deconcentrated services of the central government, along the lines of the French model, are replaced in accordance with Article 11 by a structure of local services of the government (*Uffici territoriali del governo*) with a more service-oriented profile.

The Constitution seems to assume that each minister is head of a ministry. Article 9 of the Law of 23 August 1988, No. 400 provided a basis in law for the practice which had existed for a long time of appointing ministers without portfolio. Their role and number has, however, been reduced by the Legislative Decree of 30 July 2000, No. 303, concerning the reorganization of the presidency of the Council of Ministers. With a couple of exceptions, Article 12(3) of this Decree has transferred the relevant responsibilities to the presidency of the Council of Ministers, so that the remaining ministers without portfolio in fact come under the prime minister.

A minister may be granted one or more junior ministers (*sottosegretari di stato*). A junior minister assists “his” minister (or the prime minister), and exercises his powers to the extent that they are delegated to him. The abovementioned Law of 23 August 1988, No. 400, also laid down rules concerning the office of junior minister. According to Article 10(1) of this Law, the junior ministers are appointed by presidential decree, on the proposal of the prime minister and in agreement with the minister in question. The Council of Ministers must be consulted about the appointment of junior ministers. The duties of the junior minister are set by ministerial decree (Art. 10(3)). The junior minister may address parliament, in accordance with the indications of the minister (Art. 10(4)). Since 2001, the possibility has been created in the amended paragraphs 3 and 4 of Article 10 for a maximum of ten junior ministers to be granted the title of vice-minister (*vice ministro*). A part of the duties of the minister may be delegated to them. The prime minister may also request their presence at meetings of the Council of Ministers, where they nevertheless do not have a vote.

“The President of the Council of Ministers [i.e. the prime minister] conducts and is responsible for the general policy of the Government. He ensures the coherence of political and administrative objectives by promoting and coordinating the activity of the Ministers”, says Article 95(1) *Cost.* The prime minister settles disagreements between ministers.



The formation and coordination of government policy takes place, primarily, in the Council of Ministers, as is provided by Article 2(1) of the Law of 23 August 1988, No. 400. This Law also lists the matters subject to decision-making in the Council of Ministers. These include all bills which are to be submitted to parliament, as well as the withdrawal of such bills, draft treaties, subordinate legislation, disputes between ministers concerning competence, and the appointments of various senior officials. In addition, certain special laws and orders provide for consideration in the Council of Ministers.

#### 4.2. *The formation of governments*

The formation of a new government is conducted by the President of the Republic. He is bound thereby by the balance between the political parties in parliament, since the government formed must gain – according to Article 94 *Cost.* – the confidence of a majority in both chambers. Since the introduction of a procedure for parliamentary elections which is predominantly based on a majoritarian system, the formation of the government may be relatively uncomplicated – even though the procedure still follows the old pattern from before the introduction of the majoritarian principle. With the new system, after all, the chance is considerably increased that a coalition which was presented when the parliamentary candidates were announced and during the election campaign will win an absolute majority in both chambers (see section III.1.2 above). The election result determines in that case both the coalition and the candidate for the post of prime minister. The President of the Republic usually consults the presidents of both chambers, the leaders of the coalitions which have been presented during the elections campaign, and the leaders of the other parliamentary groups, before appointing someone either to form a government or to investigate the possibilities for forming a government.

If it seems that it will be difficult to form a government, the President of the Republic – after these consultations – appoints someone to investigate the various possibilities. The instructions in such cases may be of two kinds. If further investigation of the relationships between the parties is involved, then one speaks of a “*mandato esplorativo*” (explorative mandate). If there is already some indication of who might be asked to form a government, a politician may be asked to conclude the phase of gathering information; in that case one speaks of a “*preincarico*” (pre-mandate). As soon as there is sufficient indication of the possibility of forming a government, the president then grants the intended prime minister a mandate to form a government (*incarico*). The person thus invited to form a government usually takes the mandate into consideration, without formally accepting it, until he knows whether or not he will be successful. He attempts to reach agreement with the parties involved about the government programme and to draw up a list of ministers. If the formation succeeds, then the president goes on to appoint the prime minister and the ministers.

Italy has had a long tradition of unstable governments. If it is not possible to form a government with a political programme which has the confidence of parliament, then – until such time as elections are held, or until it is possible to form a government with a normal political basis – a “caretaker government” (*governo di affari, governo amministrativo*) is formed.

The government is in a special position once it has presented its resignation to the president. The president can then dissolve one or both chambers of parliament – in practice usually both chambers – or can aim at the formation of a new government, or can refuse to accept the resignation. He may even refuse to accept the old government's resignation after an unsuccessful attempt to form a new government. A government

which has presented its resignation restricts itself to dealing with matters which cannot be delayed.

If it becomes apparent that a government does not have, or no longer has, the confidence of one of the chambers, it is obliged to tender its resignation (a so-called parliamentary crisis). Other causes for tendering a government's resignation are conflicts within the government, or between the parties supporting the government. Conflicts within one government party may lead the government, or the president of the Council of Ministers, to come to the conclusion that there is an insufficient basis of confidence for carrying on the activities of government. Sometimes a government which is only composed of parties representing a minority in parliament – whether or not it has the character of a “caretaker government” – voluntarily tenders its resignation in order to enable the formation of a government with a broader basis. The government always tenders its resignation when there are general elections.

According to Article 28 *Cost.*, the prime minister and the ministers – like other officials and employees of the State – are directly liable under the criminal, civil and administrative laws for any unlawful conduct. Civil liability in such cases extends to the state.

Up until 1989, there was a special regime for criminal liability. The members of government could be impeached for criminal acts committed while in office by the parliament in joint session, and could be tried before the Constitutional Court (Arts. 96 and 134 *Cost.*). By Constitutional Law of 16 January 1989, No. 1, Articles 96 and 134 were amended. The amended Article 96 provides that the prime minister and the ministers are subject to ordinary criminal jurisdiction after prior authorization by either the Chamber of Deputies or the Senate. The authorization is given by the Chamber of Deputies if the accused is a member of parliament, and by the Senate if the accused is not a member of parliament, or if members of both chambers of parliament are involved (Arts. 5, 8, 9 and 10 of the Constitutional Law of 16 January 1989, No. 1).

The Law of 20 June 2003, No. 140 introduced special arrangements for a limited number of the highest servants of the state, temporarily shielding them from criminal charges being brought against them. These arrangements apply to the President of the Republic, the presidents of the two chambers of parliament, the prime minister and the president of the Constitutional Court. Exceptions were made however for the situations under Article 90 (high treason and attempt against the Constitution on the part of the president) and Article 96 (possibility of bringing charges against the prime minister, described above) of the Constitution. The suspension of all criminal investigations as a result of this Law was of importance in order to prevent the prime minister, Silvio Berlusconi, from being hindered in the exercise of his office by criminal cases being brought – according to him, for political motives – concerning his former activities as entrepreneur; a special argument was also found in the fact that in the second half of 2003 he would be president of the European Council. In its decision of 20 January 2004, No. 24, the Constitutional Court pronounced that the core provisions of this Law were unconstitutional, on grounds of conflict with Articles 3 (principle of equality) and 24 (the fundamental right of access to the courts, on account of the effects of suspension of criminal proceedings for the injured party) of the Constitution.

#### 4.3. *Parliamentary system of government and political responsibility*

The relation between the government and parliament enshrined in the Constitution is that of a parliamentary system. Under Article 94(1) *Cost.* the government must have the confidence of both chambers of parliament. This confidence in the government must be explicitly expressed when a new government is formed (Art. 94(2) and (3) *Cost.*). If the government fails to obtain the confidence of one of the chambers, or if a chamber withdraws its confidence from a government in office, the government is obliged to resign. The ministers are collectively responsible for the acts of the Council of Ministers and individually responsible for the performance of their own duties (Art. 95(2) *Cost.*). The *riforme* have, however, given the prime minister who emerges from the winning coalition a stronger political position than previously. *De facto*, he enjoys direct legitimacy, and this bears the marks of a presidential position within a parliamentary democracy.

Parliament participates in the determination of policy in a number of ways: first, via legislation – including budgetary legislation; second, by means of motions of confidence (or no confidence) based on the assessment of the government programme; third, by requesting the government to provide information about policies followed, and policies to be followed; and finally by making its own policy pronouncements (motions etc.).

Within ten days of a government being formed (that is to say, of the day it has been sworn in), it must come before the chambers of parliament in order to obtain their confidence (Art. 94(3) *Cost.*). The prime minister makes a declaration on behalf of the government in each of the chambers, after which this is debated. According to Article 94(2), the motion of confidence must be reasoned, and the vote is taken by roll-call. In practice, the reasoning of the motion consists of a mere reference to the government's declaration. Since the promulgation of the Constitution of the Republic, there have been three occasions on which a new government has failed to obtain the confidence of one of the chambers: in 1953, the eighth (and last) De Gasperi Government; in 1958, the first Fanfani Government; in 1972, the first Andreotti Government.

Article 94(4) *Cost.* provides that the rejection of a government bill by one of the chambers does not entail an obligation to resign. The government may nevertheless make the vote on a particular issue – particularly a bill, or part of a bill, or a motion – a question of confidence; the result of such a vote has in the past repeatedly led to government crises. Making the adoption of (part of) a bill a question of confidence (the so-called *fiducia tecnica*) was once upon a time a method to prevent filibustering by the opposition. In recent years, it has become a very frequent instrument for the government to close ranks within the coalition. Under the Rules of procedure of the Chamber of Deputies (Art. 116), attaching the question of confidence to a bill has the special legal consequence that no amendments are put to the vote, so that the bill is voted upon as it stands. This rule also exists in the Senate, but apart from a footnote to Article 161 of its Rules of procedure it is not codified.

Some figures serve to illustrate the scale on which the *fiducia tecnica* is used. The second Prodi government (2006-2008) enjoyed only a small majority in the Chamber of Deputies and the smallest possible majority in the Senate. It attached the question of confidence 10 times to a bill in the Senate, and 12 times in the Chamber of Deputies. The fourth Berlusconi government (May 2008 – November 2011) enjoyed a comfortable majority in both houses at least until the summer of 2010. But spread out over the whole period of its government, it attached the question of confidence to a bill 10 times in the Senate and no less than 31 times in the Chamber of Deputies.

The Rules of procedure of the Chamber of Deputies require vote by roll-call when a question of confidence or no-confidence is at stake (Art. 116(3)). They prohibit the question of confidence being linked to decisions on the holding of a parliamentary inquiry or a number of, listed, matters concerning the internal affairs of the chamber (Art. 116(4)). The Rules of procedure of the Senate contain similar provisions.

A motion of no-confidence must be signed by at least one tenth of the members of the chamber in question; it may not be debated earlier than three days after it is presented (Art. 94(5) *Cost.*). It must be reasoned, and voted on by a roll-call (Art. 94(2) *Cost.*).

With an amendment to the Rules of procedure of the Chamber of Deputies passed in 1986, the possibility was introduced for a motion of no confidence to be directed at an individual minister (the so-called “individual” motion) obliging that minister to resign (Art. 115(3)). In the Senate the matter is regulated by a footnote to Article 161 of the Rules of procedure.

#### 4.4. *The legislative powers of the government*

The government is competent to enact legislation of three kinds: (provisional) decree-laws (*decreti-leggi*), if it is not possible or desirable to wait for statutes to be enacted; legislative decrees (*decreti legislativi*), which are based on delegation; government regulations (*regolamenti*). A special category of legislative decree consists of the *testi unici* (consolidated texts; literally “single texts”); such consolidated texts bring together – pursuant to a mandate from the legislature – the provisions of various statutes and decrees which have already been enacted earlier, sometimes also revising them. This method has also been used for an ambitious “deregulation” exercise, set out in the so-called Simplification Law 1998, *Legge di semplificazione* 1998 (Law of 8 March 1999, No. 50, as amended by the Laws of 6 July 2002, No. 137 and 24 November 2000, No. 340). Article 7 provides that in certain areas of legislation simplified rules should be enacted in consolidated texts, the drafts of which are to be established by the Council of Ministers, after consulting the Council of State (which must give its advisory opinion within thirty days). There are, however, also *testi unici* decreed by a minister without a specific legal basis. These are more than consolidations or compilations of existing legislation, and are comparable to a white paper or ministerial memorandum; different from the aforementioned *testi unici*, these do not have the force of law.

According to the Constitution, provisional decree-laws and legislative decrees have force of law and are issued by presidential decree (*Decreto del Presidente della Repubblica*; Art. 87(5) *Cost.*). Countersignature, promulgation of laws and issuance of decrees with force of law, inclusion in the official collection (*Raccolta ufficiale delle leggi e dei decreti della Repubblica italiana*), and publication in the first part of the official gazette (*Gazzetta Ufficiale*), are all presently regulated in the consolidated text of 28 December 1985, No. 1096. Article 10 of this consolidated text, as amended by the Laws of 15 May 1997, No. 127, 24 April 1998, No. 128, and 21 December 1999, No. 526, prescribes that explanatory notices and comments – such as facts from the legislative history, provisions referred to, and a brief indication of the content of the provisions – should also be included in the official gazette. European legislation is, according to Article 20, published in the first part of the Italian official gazette (as are also, according to Art. 21, decisions of the Constitutional Court).

Pursuant to Article 77(2) *Cost.*, the government has the power to adopt provisional measures having the force of law in extraordinary cases of necessity and urgency; these measures must be presented to the chambers of parliament that same day for conversion

into law and the chambers must convene within five days for the purpose. Article 77(3) *Cost.* provides that such a decree-law (*decreto-legge*) loses its effect retroactively if it has not been converted into a law within sixty days of its publication; it is possible, however, to regulate by law any legal relationships that have arisen out of decree-laws that have not been converted. Provisional decree-laws are a powerful instrument that is often used. Recently, the question of confidence has fairly often been attached to the bill which converts the decree into a law. As we explained above, attaching the question of confidence to the bill has the consequence that amendments are not voted on (section III.4.3 above), which gives the government an extra legislative preponderance over parliament for bills converting a *decreto-legge* into statute law.

Article 76 *Cost.* provides for the possibility of delegating the exercise of the legislative function to the government, by statute, providing that the delegating statute determines the principles and criteria for the exercise of this power, sets a limited time for the exercise of this power and defines the subject in detail. The decrees issued pursuant to such delegation have the force of law (Art. 77(1) *Cost.*). The description of the principles and criteria in the delegating statute can be extremely detailed. Sometimes the government is placed under an obligation to consult with a parliamentary committee when drafting the legislative decree. Moreover, on some occasions the delegating statute formulates certain articles which must be included in the legislative decree. This manner of legislating is used if the content of the rules is very complex or of an extremely technical nature (see Arts. 14 and 15 of the Law of 1988, No. 400). It is normally used for the drafting of legal codes like the civil or penal law codifications. Another important area of application is that of the already mentioned consolidated texts (*test unici*).

Government regulations are generally binding rules which are of a lower rank than statutes and legislative decrees (which have force of law, see above). They are only mentioned in passing in the Constitution (Art. 87(5) *Cost.*). Government regulations are presently subject to Article 17 of the Law of 23 August 1988, No. 400, which replaced Article 1 of the Law of 31 January 1926, No. 100, which had been enacted under the fascist government but which had carried on applying until then. The first paragraph of Article 17 has added two cases in which the government may enact rules, after review of lawfulness by the Court of Auditors and having consulted the Council of State. Altogether this means that the government, in addition to rules concerning [a] the implementation of laws and legislative decrees, [b] the use of powers attributed to the executive, and [c] the organization and functioning of the public administration, is also authorized to enact rules concerning [d] the organization of employment and the legal status of civil servants, on the basis of agreements concluded by the trade unions, and [e] the execution and supplementing of laws and legislative decrees, with the exclusion of subjects coming within the competence of the regions.

Rules concerning the implementation and execution of the laws include, for instance, detailed elaboration and concrete application of the norms contained in the laws. The possibility for the enactment of independent government regulations concerning the organization and functioning of the public administration is more or less completely excluded by Article 95(3) and Article 97 *Cost.*, which states that "the law" (i.e. statute) must set provisions organizing these matters.

## 5. SUPREME AND AUXILIARY BODIES OF THE REPUBLIC

### 5.1. *Constitutional advisory bodies and other supreme bodies*

The Constitution mentions five supreme bodies which, independent of the government, play an important part in the functioning of the state. According to the Constitution, the President of the Republic presides over two of these. Article 87(9) *Cost.* names the president as commander-in-chief of the armed forces and as president of the Supreme Council of Defence (*Consiglio supremo di difesa*). The intention of this was to avoid the armed forces becoming involved in politics (the principle of “*apoliticità*” of the armed forces). The duties and composition of the Supreme Council of Defence are elaborated in the Law of 28 July 1950, No. 624. This body determines the main lines of policy in the area of organization and coordination of defence. This task is thus taken out of the hands of the government. The Council consists of the President of the Republic, the prime minister, the ministers for foreign affairs, for internal affairs, for finance, for defence, and for trade and industry, and the chief of the general staff.

The president is, according to Article 104(2) *Cost.*, also president of the Supreme Council of the Judiciary (*Consiglio superiore della Magistratura*; see further on this council section IV.6 below). In this role, the president is involved in the appointments and the promotions of judges (Art. 105 *Cost.*) and in certain circumstances in their dismissal (Art. 107(1) *Cost.*).

Three bodies are mentioned as auxiliary organs (*organi ausiliari*) in the title of the Constitution concerning the government, i.e. the National Council for Economics and Labour (*Consiglio nazionale dell'economia e del lavoro*, abbreviated CNEL; Art. 99 *Cost.*), the Council of State (*Consiglio di Stato*; Art. 100(1) and (3) *Cost.*), and the Court of Auditors (*Corte dei conti*; Art. 100(2) and (3) *Cost.*).

The National Council for Economics and Labour consists of experts and representatives of the categories of production (*delle categorie produttive*; Art. 99 *Cost.*). According to the same provision of the Constitution, the Council has the right to propose legislation to parliament, but more important is its task to report and advise on economic and social legislation and policy. These tasks as well as the composition of the Council are presently regulated in the Law of 30 December 1986, No. 936. The Council has 121 members, who are appointed for six years, with the possibility of reappointment. Twelve members are appointed as experts by the President of the Republic, of whom four on the proposal of the prime minister. Of the 109 other members, 99 come from business circles: 44 representing the trade unions, 18 representing the self-employed, and 37 the employers. A new element in the Council, since the Law of 7 December 2000, No. 383, consists of ten representatives of the non-profit making organizations of civil society. These include five representatives of organizations of social solidarity, and another five of voluntary work. The ten members are appointed by the two umbrella organizations set up by the government: the national observatory for organizations of civil society (*Osservatorio nazionale dell'associazionismo*), established by the Law just mentioned; and the national observatory for voluntary work (*Osservatorio nazionale per il volontariato*), established by the Law of 11 August 1991, No. 266. These two organizations are presided by the minister for labour and social policy. The duties of these two organizations include the representation of the interests and the coordination of subsidies for professional organizations and voluntary groups whose work aims to help people with a handicap or with a social disadvantage.

### 5.2. *The Council of State*

According to Article 100(1) *Cost.*, the Council of State (*Consiglio di Stato*) is a legal-administrative, consultative body and an organ of administrative law jurisdiction. The third paragraph of Article 100 requires the legislature to guarantee the independence of the Council of State (and of the Court of Auditors) *vis-à-vis* the government.

The legislative provisions concerning the Council of State are contained in the consolidated text of 26 June 1924, No. 1054, as later amended and supplemented. Both the advisory opinions and the judicial decisions are considered to be pronouncements of the Council, which sits *in sede consultativa* or *in sede giurisdizionale*, and with that in view is divided into seven sections (*sezioni*): four of these have an advisory role, and three have a judicial role. Article 103(1) *Cost.*, which is contained in the Title on *la Magistratura* (the Judiciary), concerns the judicial capacity of the Council.

The special administrative appeal (*ricorso straordinario al Presidente della Repubblica*) is not a true judicial remedy, but is an alternative for that. It developed out of the older appeal to the Crown in administrative disputes. In this procedure, the Council of State has an advisory role which is in fact decisive (Art. 34 of the consolidated text of 26 June 1924, No. 1054, of the laws on the Council of State and Arts. 8-15 of the Presidential Decree of 24 November 1971, No. 1199). These tasks of the Council are discussed further below in section IV.3.

Pursuant to the Law of 27 April 1982, No. 186, as amended by the law of 21 July 2000, No. 205, the Council is linked, from an organizational point of view, with the *Tribunali amministrativi* (the administrative courts), through the *Consiglio di presidenza*. This Council consists of the president of the Council of State, four members chosen by the Council of State, six members chosen by the *Tribunali*, and four professors or holders of a degree in law, chosen in pairs by the two chambers of parliament. This Council has a management and supervisory duty with respect to the relevant judicial bodies.

The members of the Council of State hold sessions, robed, and hand down decisions in panels of five members. The members of the administrative courts have panels of three judges. The defence on behalf of the organs of the state is in the hands of the *avvocatura dello Stato*, which is established in each locality where there is a Court of Appeal.

In addition to the special administrative appeal to the president, the advisory task of the Council of State concerns mainly legislative measures and the extraordinary administrative appeal to the President of the Republic (cf. section IV.3 below). A request to the Council for an advisory opinion concerning a statute is unusual. Advisory opinions must be sought for government regulations and drafts of (standard) agreements with ministries; an advisory opinion may also be sought on proposals for European legislation (Art. 17 (25), (25bis) and (26) of the Law 127/ 1997). Occasionally, the Council holds a general sitting (*adunanza generale*) in order to adopt a position with respect to affairs on matters of principle, or of a general nature. In addition, the President of the Council of State is authorized to call a plenary sitting (*adunanza plenaria*) of the Council in its judicial capacity when an opinion must be given on questions (of law) of particular significance. This *adunanza plenaria* consists of the president and four members of each of the three judicial sections.

The Council for Administrative Justice (*Consiglio di giustizia amministrativa*) of the Region of Sicily has a consultative section and a judicial section, which count as sections of the Council of State (Legislative decree of 24 December 2003, no. 373 and Art. 23 of the Charter of the Region of Sicily). In addition to its judicial duties, this Council also fulfils the function of legal-administrative, consultative body for the regional authorities.

5.3. *The Court of Auditors*

The Court of Auditors is similarly an independent organ (Art. 100(3) *Cost.*). It has duties in the area of financial supervision (Art. 100(2) *Cost.*) and has special judicial tasks (Art. 103(2) *Cost.*). In 1994 the regional sections of the Court of Auditors (*sezioni regionali della Corte*) were established, and the principle of two instances of jurisdiction was introduced.

The Constitution lists the following tasks, which are further elaborated in legislation (the consolidated text of 12 July 1934, No. 1214 and the laws of 14 January 1994, Nos. 19 and 20):

- a. The Court of Auditors carries out preventive (*ex ante*) review of the lawfulness of government acts (Art. 100(2) *Cost.*). Article 3 of the Law of 1994, No. 20, already mentioned, lists exhaustively the acts which may be subject to this preventive review. Under the strictest form of such review, the act in question must be declared to have been “seen” by the Court of Auditors and must be registered with the Court before it can be executed. If the member, or section, of the Court which was charged with the examination of the act is of the opinion that it is unlawful – and the examination involves review for compatibility with the budget as well as other generally binding rules – then the relevant minister is informed accordingly. If the Council of Ministers decides that the act should nevertheless be retained, then the Court of Auditors sits in plenary session to decide whether it maintains the refusal to declare the act as having been “seen” and registered. Providing this does not involve an “absolute” ground of refusal, the Court of Auditors cooperates conditionally (Art. 25). Every two weeks, the Court of Auditors informs the parliament of the cases in which it has agreed to cooperate conditionally (Art. 26), so that the chambers can call the government to account with respect to these acts.
- b. The Court of Auditors supervises the correct implementation (*ex post*) of the budget (Art. 100(2) *Cost.*). This supervision comprises the checking of the collection of receipts (Art. 34 of the consolidated text already mentioned), and the establishment of the accounts.
- c. The Court of Auditors participates in the financial management of bodies which receive part of their funding from the state on a regular basis (Art. 100(2) *Cost.*)
- d. The Court of Auditors has jurisdiction in matters of public accounting and in other areas as specified by ~~the~~ law (Art. 103(2) *Cost.*), such as pensions for civil servants.

Pursuant to the Law of 1994, No. 20 (Arts. 3(4) and (5) and 6), a new form of *ex ante* supervision has been added, which relates to the budget and management of the capital of the public administration (*amministrazioni pubbliche*), including the regional administrations.

The Court of Auditors can report directly to the chambers regarding its findings during audits performed (Art. 100(2) *Cost.*).



## IV. Administration of justice

### I. THE DUTIES OF THE COURTS

The guarantees for the independence of the ordinary judiciary are enshrined in the Constitution itself: the judiciary is an autonomous organization and is independent from all other powers (Art. 104(1)); its management is in the hands of the Supreme Council of the Judiciary (Arts. 104-105). The Constitution also includes a number of provisions concerning the appointment and the legal status of the members of the ordinary judiciary. In principle, it provides that *magistrati* (members of the judiciary) are appointed through comparative examination of the candidates (*per concorso*). The members of the judiciary cannot be removed from office; they can only be dismissed, suspended from office or transferred to another court by decision of the Supreme Council of the Judiciary (Art. 107(1)). The minister for justice may initiate disciplinary action against a member of the judiciary before the Supreme Council (Art. 107(2)).

### 2. THE ORGANIZATION OF THE JUDICIARY

The administration of justice is regulated in the Constitution in Articles 101-113 and 134-137. First and foremost, it is stated that justice is administered in the name of the people and judges are subject only to the law (Art. 101). Article 102 contains the basic principles for the organization of the judiciary: justice is administered by ordinary members of the judiciary (*magistrati*); extraordinary courts or specialized courts cannot be established; specialized sections for specific matters may be instituted within the ordinary judicial bodies, possibly with the participation of qualified citizens from outside the judiciary; the law regulates the cases and the forms of direct participation of the people in the administration of justice.

The basic constitutional principle is thus that the judiciary is organized as one unified whole. The Constitution itself provides for a limited number of judicial bodies which are not part of the ordinary judiciary, i.e. the Council of State and other bodies, established in the regions, concerned with administrative justice (Art. 103(1) and 125(2)), as well as the Court of Auditors (Art. 103(2)), the military courts (Art. 103(3)) and the Constitutional Court (Arts. 134-137).

As far as the judges who are not members of the ordinary judiciary are concerned, the Constitution merely gives the legislature the task of regulating their position and in particular their independence; the independence of third parties that participate in the administration of justice is also to be guaranteed by law (Art. 108; cf. Art. 100(3)).

The judicial police is directly subordinated to the judicial authorities, i.e. the judges and the public prosecutors (Art. 109). Article 111 is also relevant for the judiciary in general. This article provides firstly the guarantee of equal rights in due process before an impartial judge in a third party position, based in principle on adversarial proceedings within the limits established by statute. It furthermore provides that all judicial decisions

must include a statement of reasons, and that appeal to the Court of Cassation for violation of the law is always allowed against sentences and decisions affecting personal liberty. An exception to this can be made for judgments by military tribunals in times of war.

The organization of the ordinary judiciary is laid down in the Royal Decree of 30 January 1941, No. 12, on the judiciary, *Ordinamento giudiziario*, as amended. The judicial apparatus is faced with serious delays and backlogs, and its organization is – also for that reason – subject to discussion. It includes six bodies: justices of the peace (*giudici di pace*), who have replaced the *giudici conciliatori* since 1991 (Law of 21 November 1991, No. 374), the first instance courts (*tribunali*), the first instance supervisory courts (*tribunali di sorveglianza*), the juvenile courts (*tribunali per i minorenni*), the appeal courts (*corti d'appello*) and the Court of Cassation (*Corte di cassazione*). In each municipality – and in the larger municipalities, in each district – there is a *giudice di pace*, who mediates or decides in civil and criminal cases of minor importance. The office of justice of the peace, or substitute justice of the peace, is an honorary function, which can also be exercised by non-lawyers. An important change was the abolition, by Legislative Decree of 19 February 1998, No. 51, of the *pretori*, who previously heard appeals against decisions of justices of the peace. There are approximately 150 first instance courts, which hear – in panels of three judges – appeals against decisions of justices of the peace, and which decide in first instance on more serious civil or penal cases (Art. 43 of the *Ordinamento giudiziario*). The 23 appeal courts hear cases, in panels of three judges, on appeal against decisions of the courts of first instance (Art. 53, 56 *Ordinamento*). The Court of Cassation in Rome guarantees, as supreme court, the precise observance and uniform interpretation of the law, the unity of national law and the respect for the boundaries of competence between the separate judicial bodies (Art. 65 *Ordinamento*); it settles disputes on competence between judicial bodies, and fulfils other duties imposed by law. The Court of Cassation sits in panels of five judges, or in *sezioni unite* (joined panels) of nine members (Art. 67 *Ordinamento*). In each provincial capital there is a specialized court (*tribunale di sorveglianza*) which judges the lawfulness of detention measures.

The ordinary judiciary also includes a number of specialized bodies and sections in which experts who are not members of the judiciary may participate, namely the first instance juvenile courts and sections of the appeal courts for juveniles, and the regional tribunals for public waters (*Tribunali regionali delle acque pubbliche*) which have jurisdiction in disputes about rights concerning public water courses, springs and rivers, with its own appeal body: the *Tribunale superiore delle acque pubbliche*, or High Court for public waters.

The Courts of assizes (*Corti di assise*) and Appeal courts of assizes (*Corti di assise di appello*) are considered to be specialized parts of the ordinary judiciary (cf. Art. 54(3) of the *Ordinamento giudiziario*). These courts have jurisdiction for very serious crimes. In every locality where there is a court of appeal, there must be at least one Court of assizes and one Appeal court of assizes (Arts. 1 and 2 of the Law of 10 April 1951, No. 287). These bodies consist of two members of the judiciary and six lay judges; the lay judges are sworn in as such, and their votes have the same weight as those of the professional magistrates.

### 3. ADMINISTRATIVE JUSTICE

Before 1865, disputes concerning acts of the public authorities – insofar as they were not legal acts under civil law – were excluded from judicial review. In that year the law provided that all conflicts with the public authorities which concerned civil and political rights of interested citizens came under the jurisdiction of the ordinary courts (Art. 2 of the Law of 20 March 1865, No. 2248). What is at stake here is thus the judicial protection of individual rights (*tutela dei diritti soggettivi*). This provision is still valid. Other disputes could only be settled in administrative appeal, according to Article 3 of that Law. The Law of 31 March 1889, No. 5982, brought about a change, whereby a section of the Council of State was given jurisdiction in cases of infringement of legitimate interests by acts of the public administration (*tutela degli interessi legittimi*). This two pronged system of legal protection is enshrined in the Constitution in Article 113, although this provision does not exclude in fact both kinds of protection being entrusted to the same court. It provides that appeal against acts of the administration before ordinary and administrative judicial bodies may always be lodged, without being limited to particular remedies or for particular categories of acts, for the protection of both rights and legitimate interests.

The distinction between individual rights (*diritti soggettivi*) and legitimate interests (*interessi legittimi*) is connected to the distinction between private and public law. For over a century there has been controversy over these distinctions. We explain the controversy in simple terms as follows. Firstly, if an individual requests a decision of a public authority, this individual does not have a right to that decision but a legitimate interest in the decision. Secondly, in Italian law the assumption is that if a public authority has discretionary powers, this always implies that an individual can only have a legitimate interest and never a right; this is even the case when the matter would concern a right when viewed from the private law perspective. For instance, in expropriation proceedings, a landowner can only have a legitimate interest vis-a-vis a public authority, independent from the fact that from a civil law perspective it concerns his right to private property.

The judicial protection of individual rights is sought in a civil proceeding before the ordinary court – with the exception of the so-called exclusive jurisdiction of the administrative court. Since the entry into force in 1974 of the Law of 6 December 1971, the judicial protection of legitimate interests is ensured by general administrative courts in two instances, except in those areas where a specialized administrative court has jurisdiction. This Law introduced regional administrative courts (*tribunali amministrativi regionali*, in Italian texts always abbreviated as *TAR*) in each regional capital, which sit in chambers of three members to adjudicate appeals against decisions of public authorities and municipal, provincial and regional elections. Appeal against their judgments lies with the Council of State.

The Italian system of administrative justice described here concerns acts and official decisions (*atti*) of the public administration, as Article 113 *Cost.* provides. This covers all public law acts of an administrative nature which could affect the interests of citizens; private law acts fall under the exclusive jurisdiction of the ordinary courts. Also decisions of a general character can be subject to review by administrative courts, although only incidentally. Here the distinction between *atti* and *provvedimenti* enters in. *Provvedimenti* are a special type of *atti*, namely those decisions that concretely and materially change the legal situation for one or more legal subjects. Individuals can only appeal against an act which is a *provvedimento*. In the review of a *provvedimento*, however, also all acts (*atti*) which are relevant to determination of the *provvedimento* are considered.

As a rule, the administrative courts review whether an act is lawful. Articles 2 and 3 of the 1971 Law list three grounds of appeal: lack of competence, excess of powers (which may, for example, cover manifestly insufficient care, manifest unreasonableness, and the absence of a proper factual basis), or infringement of the law (*incompetenza, eccesso di potere o violazione di legge*). For certain categories of act, the task of the administrative court is different. First, there are acts which are exclusively subject to review by the administrative courts (*giurisdizione esclusiva*); the ordinary courts then lack jurisdiction (Art. 5 and Art. 7(2) and (3) of the Law of 1971, read with Art. 29 of the consolidated text of 26 June 1924, No. 1054, and Art. 4 of the consolidated text of the same date, No. 1058, concerning appeal to the provincial administrative juntas). In these cases (which include disputes relating to members of the armed forces, the police and the highest civil servants, spatial planning and the public service) the administrative courts also judge whether individual rights have been infringed. Secondly, there are categories of acts where the administrative courts judge not only the lawfulness, but also the expediency of the act (*giurisdizione di merito*; Art. 7(1) and (4) of the Law of 1971 read with Art. 27 and Art. 1 respectively of the consolidated texts just mentioned). As a result of the legislative reforms effected in the period 1998-2000 (Legislative decree of 31 March 2000, No. 80, replaced by the Law of 21 July 2000, No. 205), claims for financial compensation can be put before the administrative courts in annulment procedures for infringement of *interessi legittimi*, and in the case of *giurisdizione esclusiva*, also for reason of an infringement of individual rights (*diritti soggettivi*).

The law of 21 July 2000, No. 205, introduced an accelerated process in certain sectors and a simplified procedure concerning appeal from administrative inaction (Article 2: *Ricorso avverso il silenzio dell'amministrazione*).

In some cases there is the possibility of a review by the administration prior to review by an administrative court. We only mention the three forms in which such administrative review exists: administrative appeal to a higher administrative level (*ricorso gerarchico*), an administrative objections procedure to the same organ which originally issued the contested act (*ricorso in opposizione*), and extraordinary administrative appeal to the president (*ricorso straordinario al Presidente della Repubblica*).

#### 4. SPECIAL JUDICIAL BODIES

The following jurisdictional bodies – in addition to the administrative courts and the Constitutional Court – do not belong to the ordinary judiciary:

- a. The Court of Auditors, whose jurisdictional powers are based on Article 103(2) *Cost.*
- b. The military judicial organization, which consists of military courts of first instance (*tribunali militari*), military supervisory courts (on matters of detention) (*tribunali militari di sorveglianza*), and military courts of appeal (*Corti militari di appello*). There is also provision for a separate military section of the public prosecution service at the Court of Cassation, and for the possibility of cassation. There is an organ of self-regulation for military courts, which is the Council for the military judiciary (*Consiglio della Magistratura Militare*).
- c. The provincial and regional tax commissions (*commissioni tributarie provinciali e regionali*), established in the capital of each province and region, respectively, have jurisdiction in tax cases, with as an appeals Court the *Commissione tributaria centrale*.

## 5. THE CONSTITUTIONAL COURT

The provisions on the Constitutional Court (*Corte costituzionale*) in the Constitution are contained in Title VI, on constitutional guarantees. Article 134 sets out three tasks of the Court. It adjudicates controversies regarding the constitutional legitimacy of laws and acts having the force of law issued by the state and the regions; it decides on conflicts on the allocation of powers between organs of the state, and between the state and the regions and between the regions; and it adjudicates accusations brought against the President of the Republic. In Article 2 of Constitutional Law of 11 March 1953, No. 1, the Court was also entrusted with the task of deciding on the admissibility of a “*referendum abrogativo*”. Article 135 *Cost.* which was amended in 1967, establishes the composition of the Court. Five members are nominated by the President of the Republic, five members by the parliament in joint session, and five by the highest administrative and ordinary courts (first paragraph). The nomination is for nine years; re-appointment is not possible (third paragraph). The Court chooses one of its members as president, for three years at a time (fifth paragraph). In proceedings against the President of the Republic, the Court has an additional sixteen members, not professional judges, chosen randomly from a list of citizens compiled by parliament (seventh paragraph). Article 136 provides that any norm declared unconstitutional by the Court ceases to have effect as of the day after the publication of the decision.

It was only in 1953 that the further legislation required under Article 137 was completed. The procedure for submitting laws and decrees to judgment on their constitutional legitimacy, and the guarantees of the independence of judges of the Court must be established by constitutional laws (Constitutional Laws of 9 February 1948, No. 1, and 11 March 1953, No. 1); other elements of the further rules may be established by ordinary statute (Laws of 11 March 1953, No. 87, and 18 March, No. 265). The Court was also affected by Constitutional Law of 22 November 1967, No. 2. This Constitutional Law changed the content of Article 135 *Cost.*, and a number of new rules concerning the nomination of the members of the Court were laid down.

The Constitutional Court reviews legislative provisions on the basis of the Constitution and of other Constitutional laws. Such review may concern defects of a formal (procedural) or substantive nature. As is apparent from the Court’s Decision No. 9 of 1959, the Court does not check whether the provisions of the Rules of procedure of the chambers of parliament have been observed. Substantive defects occur not just when a constitutional rule on allocation of powers or a substantive norm of the Constitution is infringed, but also in cases of excess of powers (*eccesso di potere*). The criterion *eccesso di potere* is however given a more limited application than in the administrative courts. Article 28 of the Law of 1953 does, after all, instruct the Court to refrain from any judgement of a political nature, and from any review of the use made by parliament of its discretionary powers. The Court does consider that it has the power to rule that, for instance, a totally illogical and arbitrary legislative provision is contrary to the Constitution.

One of the tasks of the Constitutional Court listed in Article 134 is the adjudication of “controversies regarding the constitutional legitimacy of laws and acts having the force of law issued by the state and the regions”. A decision of the Court that a law or legislative decree is unconstitutional entails the provision in question being set aside as of the next day, according to Article 30(3) of the Law of 1953.

Laws are to be understood as including statutes enacted at national level and also regional laws; according to Article 97 of the special charter for the region Trentino-Alto Adige/Südtirol, the provincial laws of the provinces of Trento and Bolzano-Alto Adige/Bozen-Südtirol may also be reviewed by the Constitutional Court in certain cases. The national statutes which are susceptible to review by the Constitutional Court also include, in principle, constitutional laws; however, as far as substantive defects are concerned, the review of the latter must be restricted to possible conflict with those constitutional norms which may not be altered by new constitutional laws. In this context one may think of the Republican form of government, which Article 139 explicitly states may not be subject to constitutional amendment, and the “inviolable rights of the person” in Article 2 *Cost.*, which must be considered the “implicit limits”, *limiti impliciti*, of the constitution making power. The acts having the force of law which may be reviewed by the Court are the decree-laws – to the extent that their limited period of validity makes them susceptible to review – and the legislative decrees.

The Rules of procedure of the chambers of the parliament may not be reviewed by the Court (Decision of 6 May 1985, No. 154).

A judgment of the Court on the constitutional legitimacy of a law or a decree can be obtained either incidentally, in the framework of proceedings before another court (*in via incidentale*), or as a remedy in its own right unconnected with any concrete dispute (*in via principale*).

The proceedings *in via incidentale* are based on Article 1 of the Constitutional Law of 9 February 1948, No. 1 (required by Art. 137 *Cost.*), and are further regulated in Articles 23-27 of the Law of 11 March 1953, No. 87, which established the Court. The question of whether a law or a decree is constitutionally legitimate can be raised during proceedings before a court (including the special judicial bodies), by one of the parties, by the public prosecutor, or *ex officio* by the judge. The judge is then obliged to make an order requesting a decision of the Constitutional Court, unless he is of the opinion that the question is irrelevant for the solution of the dispute before him, or that it is manifestly unfounded (Art. 23 of the same Law). This order is notified to the Constitutional Court, to parties involved in the court proceedings, and to the government and parliament, or the regional junta and the regional council where appropriate, and its publication is ensured by the president of the Constitutional Court (Art. 23(4) and 25(1)). This type of proceedings before the Constitutional Court is also sometimes called “*in via d’eccezione*”, derived from the fact that the proceedings at the Constitutional Court result from an exception of unconstitutionality being raised.

The proceedings *in via principale* are based on Article 127 *Cost.*, Article 2 of the Constitutional Law of 9 February 1948, No. 1 (required by Art. 137 *Cost.*) and Articles 56, 97 and 98 of the special charter of the region of Trentino-Alto Adige/Südtirol. Article 127 *Cost.* concerns preventive review of regional legislation at the request of the (national) government. Article 31 of the abovementioned Law of 1953 concerns the procedure: the government asks the Constitutional Court for a decision on the constitutional legitimacy of a regional law which has been passed in two readings by the regional council, but has not yet been promulgated. Article 2 of the Constitutional Law of 1948 provides for an *ex post* review of a law or decree of the state which, according to a regional council, infringes its constitutionally guaranteed powers, and of a regional law which according to another regional council infringes the latter’s powers. The procedures are further regulated in Articles 32 and 33 of the Law of 1953. Article 36(1) refers further to Articles 82 and 83 of the special charter of the region of Trentino-Alto Adige/Südtirol applicable at the time. Currently, Articles 56, 97 and 98 of the special charter, as established anew in a consolidated text in 1972, provide for review by the Constitutional Court of laws and

decrees of the state, the region and the two provinces of which that region is composed – in certain cases, such review may also be directed at conformity with the principle of equal treatment for citizens of the separate linguistic groups. The provincial councils and the linguistic groups in the regional council and the provincial council of Bolzano-Alto Adige/Bozen-Südtirol may in certain cases request a decision from the Constitutional Court. The proceedings *in via principale* may be started quite separately from any other dispute; for that reason these proceedings are also sometimes called proceedings “*in via d’azione*”.

If the Constitutional Court considers the claim that a law or decree is unconstitutional to be manifestly unfounded, it may – according to Article 26 or 34(2) read with Article 26 of the Law of 1953, No. 87 – decide the case by order *in camera*. In other cases, the Constitutional Court pronounces that the question of constitutional legitimacy raised concerning one or more provisions of a law or a decree in relation to one or more provisions of the Constitution or a constitutional law is well-founded (*sentenza di accoglimento*) or unfounded (*sentenza di rigetto*), insofar as the constitutional legitimacy was examined in the relevant proceedings (cf. Art. 27). Decisions of the Court – both those finding a claim of unconstitutionality well-founded, and those finding it unfounded – can be important for the interpretation of the provisions subjected to review in the light of constitutional norms.

No appeal lies to decisions of the Constitutional Court (Art. 137(3) *Cost.*). Where the decision concerns a provision of a law or a decree which has already entered into force – which is always the case for review *in via incidentale*, but only in certain cases for review *in via principale* – then Article 30(3) of the Law of 1953 (based on Art. 136(1) *Cost.*) is important: “The norms which have been found to be unconstitutional may no longer be applied as of the day after publication of the decision”. This means the following. If a decision concerning a legal relation has been taken at the highest instance, or if no further remedy lies, then a decision of the Constitutional Court which finds a claim of unconstitutionality to be well-founded does not alter this. If appeal to a court is still pending or is possible, then, as of the day after publication, all courts and other organs must take account of the decision of the Constitutional Court, even if this refers to a factual situation dating from before the decision of the Court. The fourth paragraph of Article 30 makes an exception to the main rule insofar as irrevocable criminal sentences are concerned. If in such a case a person has been convicted on the basis of a norm which has later been declared to be unconstitutional, then the right to execute the sentence and all other penal law consequences lapse. A decision whereby a law or a decree has been declared unconstitutional in proceedings *in via incidentale* must be sent both to the court which had requested the decision of the Constitutional Court (Art. 29), and also to the minister for justice, or where appropriate the regional council concerned (Art. 30(1) and (2)). Publication of the decision of the Constitutional Court must be carried out in the same manner as is laid down for the publication of the provision which was declared unconstitutional. The Rules of procedure of the Chamber of Deputies and of the Senate contain provisions concerning the consideration of new legislation to provide for the hiatus which may result from a decision of the Constitutional Court (Arts. 108 and 139, respectively).

## 6. THE SUPREME COUNCIL OF THE JUDICIARY

As was already indicated above, the judiciary is – according to the norm laid down in Article 104(1) *Cost.* – an autonomous organization, whose management is in the hands of the Supreme Council of the Judiciary (*Consiglio superiore della Magistratura*; see also Law of 24 March 1958, No. 195). It is presided by the President of the Republic (Art. 104(2) *Cost.*) and consists further of the first president and the general prosecutor of the Court of Cassation (Art. 104(3)), twenty members chosen from and by the judiciary, and ten members chosen by parliament in joint session from among qualified and experienced lawyers (Art. 104(4) and (5) *Cost.* and the Law of 22 December 1975, No. 695, in which the composition and the election rules were revised). The members chosen from the judiciary are elected directly by all magistrates according to a system of lists.

The duties of the Council – and of the committees which it should appoint – include the appointment, transfer and promotion of members of the judiciary, and disciplinary provisions regarding magistrates (Art. 105 *Cost.*) and the appointment of other persons who may sit on the benches of bodies of the ordinary judiciary (Art. 106 *Cost.*).

The liability of judges under civil law for unlawful actions, and compensation for damages caused by them in the exercise of their functions was regulated anew (Law of 13 April 1988, No. 117), after a referendum proposing the abolition of the rules existing at that time was successful. The action for damages is directed at the state, which may subsequently withhold up to a maximum of one third of the annual salary of the judge in question. The Constitutional Court has held that this law is not unconstitutional (Decisions Nos. 18 and 243/89).

## 7. THE PUBLIC PROSECUTION SERVICE

The public prosecution service (*pubblico ministero*) has the obligation, according to Article 112 *Cost.*, to institute criminal proceedings. Further, the Constitution limits itself to entrusting the legislature with the task of establishing the guarantees in the prosecutor's favour, by means of the provisions on the organization of the judiciary (Art. 107(4)), and guaranteeing the independence of the public prosecutors working in special courts (i. e. those not belonging to the ordinary judicial organization; Art. 108(2) *Cost.*).

Originally, Article 69 of the *Ordinamento giudiziario* of 1941 on the judiciary provided that the public prosecution service came under the authority of the minister of justice. This provision was altered in 1946 to read that the public prosecutor carries out the tasks assigned to him by law, under the supervision of this minister. The public prosecutor has thus acquired a more independent position. The organization of the public prosecution service is parallel with that of the ordinary judicial organization. There is an office (*ufficio*) at the Court of Cassation, at each Court of appeal, and at each court of first instance, headed by a prosecutor-general of the Republic (*Procuratore generale della Repubblica*) at the Courts of appeal, and a prosecutor of the Republic (*Procuratore della Repubblica*) at the courts of first instance (Art. 70, *Ordinamento giudiziario* read with Art. 1 of the Legislative decree of 2 August 1946, No. 72). The other members of the public prosecution service are subordinate to these prosecutors and prosecutors-general. In 1991, a new organ of the public prosecution service was established at the *Procura Generale* of the Court of Cassation, the National Anti-mafia Directorate (*Direzione Nazionale Antimafia, Dna*), led by the National Anti-mafia Public Prosecutor. The latter's main task consists of the



coordination of the investigations concerning crimes by the mafia. At district level, anti-mafia district offices of the public prosecutor (*procure distrettuali antimafia*) have been set up.

Article 73 of the *Ordinamento giudiziario* contains a general description of the tasks of the public prosecutor, which comes down to saying that the public prosecutor supervises the enforcement of the legal order. The specific tasks of the public prosecutor include prosecution of criminal offences (Art. 74(1)) and the execution of criminal sentences (Art. 78(1)).

Outside the sphere of criminal law, the public prosecutor also has tasks: he presents opinions in employment law cases (Art. 75(3), for instance. The judicial police are under the authority of the prosecutors-general at the Courts of appeal and – subordinate to these – the prosecutors of the Republic at the courts of first instance (Art. 83).

## V. A non-centralized state

### I. THE DEVELOPMENT OF REGIONAL AUTONOMY

A regional administrative level was absent in the Kingdom of Italy. At the end of the Second World War, the debate as to the desirability of a federal state structure – a debate which had been going on even before the establishment of the united Italian state – was reopened. Sometimes there is even a plea for separation: in the earlier period this came from Sicily and Sardinia; now it comes from the prosperous north of the country. The *Lega Nord*, which pleads for the separation of northern Italy and the establishment of a sovereign state *Padania* (the “country of the Po basin”), won 10.1 percent of the votes for the Chamber of Deputies in 1996, but dropped back to 3.9 percent in 2001, only then to return to 8.3 percent in the general elections of 2008 (at the local elections in 2012 their support again went down considerably after criminal investigations had started concerning embezzlement of public funds for the party by family members of Bossi, who subsequently resigned as party secretary).

In the constituent assembly, the establishment of regions was accepted as a compromise between the existing centralized structure and the federal structure which was argued for by some people. The Constitution makes a distinction between two types of regional autonomy. Under Article 116 *Cost.*, Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige/Südtirol and Valle d’Aosta/Vallée d’Aoste were granted special forms and conditions of autonomy, in accordance with the respective special charters adopted by means of constitutional laws. These five regions are quite distinguishable from the rest of Italy on account of cultural and social-economic factors. Sicily and the Valle d’Aosta received provisional autonomous status in 1944 and 1945 respectively. The charter for Friuli-Venezia Giulia only got off the ground in 1963; one problem was the integration of Trieste, which was a “Free Area” after the Second World War until 1954, under a special international legal regime.

As far as the regions with a “special charter” were concerned, which have exclusive powers in some areas, the relation between the central authorities and the regional authorities already demonstrated the characteristics of a federal organization of the state as of the promulgation of the Constitution. The rest of Italy was divided into regions with an “ordinary” charter. The introduction of regions, provided for by the 1947 Constitution – and only completed in 1972 – radically changed the administrative organization of the country, compared with the centralist system which had existed since the establishment of Italian unity.

The division of the country into regions accords with the traditional geographical division into areas. As well as the regions with a special charter, mentioned above, Article 131 *Cost.* mentions the following regions: Piemonte, Lombardia, Veneto, Liguria, Emilia-Romagna, Toscana, Umbria, Marche, Lazio, Abruzzi, Molise, Campania, Puglia, Basilicata and Calabria. Article 132 sets the procedures for fusion, separation or changes in the borders of the regions. The procedure includes a referendum held among the relevant populations.

The detailed implementation of regional autonomy has not gone smoothly. Before the regions with ordinary charters could in fact be established, legislation had to be adopted concerning the administrative and financial relations between the central and regional authorities, the elections for the regional councils, the organization of regional authorities in the period between the creation of the first regional councils and the approval of the charters to be drawn up by these councils, as well as the transfer of duties from the central authorities to the regions. True, some of these issues were dealt with already in 1953, but the remaining necessary statutory provisions took another fifteen years. The first elections for the regional councils for regions with ordinary charters were held on 7 and 8 June 1970.

The Trentino-Alto Adige Region experienced years of tensions between the German-speaking and Italian-speaking groups, and as a result between Austria and Italy. In 1971, a revision of the Constitution and of the Region's Charter was achieved which divided the region into two provinces, each of which exercises a large part of the regional powers separately, and which are organized along the same lines as the regions (Art. 116(2) *Cost.* and the consolidated text of the constitutional laws concerning this region of 31 August 1972, No. 670). The complete implementation of the special charter stagnated however for a number of years. On 19 June 1992, the dispute between Italy and Austria about the status of the German-speaking and Rhaeto-Romanic Ladin-speaking minorities was officially ended, after agreement was reached on further strengthening the autonomy of the two provinces. They are the Italian-speaking province of Trento and the (for the most part: nearly 70% of the population) German-speaking province of Bolzano-Alto Adige/Bozen-Südtirol. The representative body of the latter province is also called the *Landtag*, just like in the Austrian *Länder* (regions), and the chairman has the title *Landeshauptmann*. In this province, and in the whole region, German is also an official language, alongside Italian. In both provinces there are also arrangements for the protection of the small minority whose native language is Ladin (a Rhaeto-Romanic dialect).

Since the constitutional amendment of 2001, the bilingual regions of Trentino-Alto Adige and Valle d'Aosta also have an official name in German (Südtirol) and French (Vallée d'Aoste) respectively, which are mentioned in Article 116 *Cost.*

After the *riforme* of 1993, one of the most controversial political issues was the extent to which the Italian state structure should shift its centre of gravity from national to regional level. A draft revised constitution, proposed by a committee chaired by Massimo D'Alema, in November 1997, provided for the transformation of Italy into a federal state. Because of frequent dependence on the participation of the *Lega Nord* in government coalitions, sometimes together with its southern counterpart the (mainly Sicilian) *Movimento per l'Autonomia*, the discussion on further federalization flares up regularly. The far-reaching revision in 2001 of Title V of Part II of the Constitution ("Regions, Provinces, Municipalities") can be viewed as a first step towards a more fully-fledged federalization, which incorporated a number of the provisions proposed by the D'Alema committee.

The public debt crisis, triggered by the international banking crisis since 2008, has influenced the debate on the streamlining of the public administration, *pubblica amministrazione*, which encompasses the relations between the central state and decentralized bodies, in order to reduce the cost of politics and administration.

## 2. THE REGIONS SINCE THE CONSTITUTIONAL AMENDMENT OF 2001

By Constitutional Law of 18 October 2001, No. 3, Title V of Part II of the Constitution was drastically revised. This is the most radical revision of the Constitution since its promulgation. The Law of 5 June 2003, No. 131 (the *legge La Loggia*, named after the minister for regional affairs, who was its godfather) – which is also referred to as being “historic” – elaborates this constitutional amendment. With this, the federal characteristics of the organization of the state are considerably strengthened, even though an unequivocal choice has not been made – despite many pleas. This is apparent from the fact that the principle of the decentralized state laid down in Article 5 has not been reformulated, while the entirely revised Article 114 puts the central state authorities on the same level as the decentralized public bodies.

Article 5 *Cost.* reads:

“The Republic, one and indivisible, recognizes and promotes local autonomies; it implements the broadest administrative decentralization in those services that are subordinate to the State; it adjusts the principles and methods of its legislation to the needs of autonomy and decentralization.”

The new text of Article 114 *Cost.* reads:

“The Republic is constituted by Municipalities, Provinces, metropolitan Cities, Regions and the State.

Municipalities, Provinces, metropolitan Cities and Regions are autonomous bodies, having their own charters, powers, and functions, according to the principles established by the Constitution.

Rome is the capital of the Republic. National law shall govern its legal organization.”

The co-existence of these provisions of the Constitution – which are rather different in their choice of formulation and in their intentions – is often seen as an indication that the Italian government system is somewhere in the middle between a unitary state and a federal state. Perhaps it is preferable to say that with the state structure adopted in 2001/2003 Italy has left this traditional dichotomy behind. The summing up in Article 114(1) of a variety of bodies – a list in which the (national) state is mentioned last, not first! – which together form the Republic, is significant. The Italian Republic neither organizes itself as a classic state, which attributes powers from the centre to the “lower” authorities, nor as a federal state built up of federated states or provinces, by whatever name, in which these individual “states” are themselves unitary states *vis-à-vis* the federation. It is not only the regions, as a kind of federated states, but also other bodies which have a constitutionally established independent identity. According to the constant case law of the Constitutional Court, ever since the early 1980s, the central and regional authorities are under the obligation to cooperate faithfully (*principio di leale collaborazione*).

The present constitutional structure has reduced the differences between the regions with a special charter and the other regions. The charter of a region has been attributed the meaning of a regional constitution. The Constitutional Court has, however, explicitly denied that these are “constitutional charters”, *carte costituzionali*. It established explicitly

that the bills of rights and principles in the regional charters can only be regarded as “cultural” and “political” expressions without any legal force (Decision 378/2004).

The special charters are still adopted by means of constitutional laws (Art. 116(1) *Cost.*). This means that these charters are of higher rank than ordinary statutes. The other charters are adopted, according to Article 123(1) *Cost.*, “in harmony with the Constitution” by the regional council (*Consiglio regionale*, the representative body of the region). Unlike the situation before 2001, there is no longer a requirement that the regional charter should be endorsed by national law. The approval by the regional council takes place by absolute majority of its members, by means of two consecutive resolutions. The central supervision of the regional charters is limited to the possibility for the government of the Republic to challenge their constitutionality before the Constitutional Court within thirty days of their publication (Art. 123(2) *Cost.*). One fiftieth of the electorate of a region or one-fifth of the members of its regional council may request that the charter be submitted for approval by popular referendum (Art. 123(3) *Cost.*). In this way, the regional charters have acquired a place in the constitutional hierarchy of norms directly below the Constitution itself, and no longer subordinate to ordinary national statutes.

The organs of the regions are, according to Article 121 *Cost.*, the abovementioned regional council, the regional junta (*Giunta regionale*) as executive, and the regional president, who is chairman of this body (*Presidente della Giunta regionale*). The representative body of the region of Sicily is called the “regional assembly” (*Assemblea regionale*, see Art. 2 *Statuto della “Regione siciliana”*) and proudly mentions that – with a history dating back to 1130 – it is the oldest parliament in Europe.

The regional council exercises the legislative powers and is entitled to propose a bill to the national parliament (Art. 121(2) *Cost.*). The council is elected for five years on the basis of universal suffrage by the eligible citizens resident in that region. All those eligible to vote are also eligible to be elected. In a number of regions with special charters, there is also a requirement that one must have been resident in the region a certain number of years (or have been born there) in order to be eligible to vote or to be elected. The number of members of the council is between 30 and 80 for the regions with ordinary charters. After the reform of electoral law at national level, the Law of 23 February 1995, No. 43 also introduced a new system of elections for these regional representative bodies. The changes thus introduced mean that  $\frac{4}{5}$  of the members are chosen according to proportional representation, and  $\frac{1}{5}$  with a majoritarian system. These rules apply as long as the regions have not made their own arrangements in their charters. In 2012, only the regions of Toscana, Marche, Puglia and Calabria have made use of this option.

The regional junta is the executive organ (Art. 121(3) *Cost.*). It must have the confidence of the council; the relation between the two organs bears the characteristics of a parliamentary system.

The constitutional amendment of 1999 has given the position of regional president a much stronger profile. According to the new Article 122(5) *Cost.*, he is no longer chosen by the regional council, but is elected by direct, universal suffrage within the region, unless the regional charter provides otherwise. All normal regions and some of the regions with a special charter have opted for a directly elected president; only Valle d’Aosta and Trentino-Alto Adige have their president elected by the regional council.

The president nominates and dismisses the members of the junta. According to Article 121(4) *Cost.* he or she is responsible for and directs the junta’s policies, promulgates the regional laws and issues the regulations, and manages the administrative functions delegated by the central government to the region. In this last function, he or she is bound by the instructions from the central government. Under Article 126(2) *Cost.* the regional council may express a vote of no-confidence with respect to a junta president;

where the president was directly elected this will entail the dissolution of the council (Art. 126(3) *Cost.*) and new elections.

The core of the constitutional revision of 2001 consists of the re-ordering of the legislative powers. The regional legislature is, as a result, competent in all areas which the Constitution does not reserve to the national legislature, while previously the situation was the reverse. The regional laws (*leggi regionali*) are as source of law subordinate in rank to national statutes.

Article 117(2) *Cost.* now contains an exhaustive list of the nineteen fields for which the national legislature is exclusively competent: these include external relations and relations with the European Union, immigration and asylum policy, defence, state security, arms and weapons, currency and financial markets, monetary affairs, public order and security, citizenship, jurisdiction, electoral law and environmental protection.

The third paragraph of Article 117 lists the areas for which the national and regional legislatures have concurrent competence, such as the regions' international relations and relations with the European Union, education, labour protection, sport, cultural and natural heritage. National laws can have the character of framework laws in these areas.

For other areas of legislation, the regional legislatures have exclusive competence (Art. 117(4) *Cost.*).

The regions are therefore responsible for the implementation of European legislation insofar as this does not concern fields for which the national legislature has exclusive or concurrent legislative competence. Since the constitutional revision of 2001, the supervision over the regions is limited. It consists, first of all, under Article 120(2) *Cost.* of a competence to regulate a matter instead of the region (*potere sostitutivo*) if a region – and the same applies to provinces and municipalities – fails to respect international or European law, or in the case of a serious danger to safety and public security, or for the protection of the unity of the state, or the guarantee of fundamental rights. Furthermore, according to the new Article 127 *Cost.*, both the national government and a region may raise the question of constitutional legitimacy of legislation in cases of claimed transgression of powers – in whichever direction – before the Constitutional Court within sixty days of the publication of the contested legislation. The Constitutional Court also has jurisdiction in conflicts concerning the allocation of competence between the state and a region, or between the regions, under Article 134 *Cost.* read with Articles 39-42 of the Law of 11 March 1953, No. 87.

Article 119 *Cost.* provides in its first paragraph that the regions have financial autonomy with respect to revenues and expenditures. The second paragraph provides that the municipalities, provinces, metropolitan cities and regions have their own autonomous sources of income. The state has, pursuant to the third, fourth and fifth paragraphs, the task of supporting areas with a lower level of development and resources, and of promoting economic development, social cohesion and solidarity, by the use of an equalization fund and also by making available supplementary financing. These provisions replace the earlier financial arrangements for the development of the Mezzogiorno (southern Italy) and the islands, which had become extremely controversial. Legislation implementing Article 119 *Cost.* is being awaited. As the Constitutional Court has stated, the financial autonomy – which is now circumscribed also by the new constitutional provisions on the “balanced budget” introduced in 2012 – cannot be substantiated without an adequate legal basis (decisions 370/2003 and 241/2004).

### 3. PROVINCES AND MUNICIPALITIES

The internal administration of the regions is decentralized, with the provinces and municipalities being the most important elements. The Constitutional Law of 18 October 2001, No. 3, repealed the special provisions of the Constitution concerning the provinces and municipalities, Articles 128 and 129. The autonomy of the provinces and municipalities is less significant than that of the regions, but is – as was mentioned in section V.2 above – provided for in Article 114 of the Constitution. Article 123(4) *Cost.* requires that each region must have a council of Autonomous Localities, which functions as a link between the regional administration and the provinces and municipalities located in the region. The provinces and municipalities have specific powers which, together with the duties of the other forms of local administration, are regulated in the consolidated text of the laws concerning the organization of local government of 18 August 2000, No. 267 (*Testo unico delle leggi sull'ordinamento degli enti locali*, abbreviated as TUEL).

The boundaries between provinces may be altered, and new provinces may be created within the regions, by national law, after the municipalities concerned have proposed this and the region has been consulted (Art. 133(1) *Cost.*) The organs of the provinces are the council (*Consiglio provinciale*) as elected representative body, the provincial junta (*Giunta provinciale*) and the directly elected president (*Presidente della provincia*). According to Articles 19-20 TUEL, the duties of the provinces are mainly in the areas of the economy, spatial planning and environmental management, including care for the infrastructure, with the most important policy framework being the planning in these areas (*programmazione economica, territoriale ed ambientale*). The reform of provinces was part of a series of measures starting in December 2011, following the financial crisis which threatened the financial sustainability of Italy's public debt (D.L. 201/2011; and D.L. 95/2012 (*Legge* 135/2012)). Their functions will be limited to the coordination of tasks of municipalities. The provincial councils are no longer to be directly elected but their maximum number of 10 members will be elected by the municipal councils under rules to be established before the end of 2013; the provincial junta is eventually to be abolished. Also it is the intention to reduce the number of ordinary provinces significantly from 86 (in 2011) to 51 (in 2014).

The policy-making organs of the municipalities are the municipal council (*Consiglio comunale*) as elected representative body, the municipal junta (*Giunta municipale*) and the mayor (*Sindaco*). The mayor is directly elected. He is nevertheless both a municipal organ and an organ of the government (*il sindaco, quale ufficiale del Governo*; Art. 54, TUEL) and as such also responsible for the supervision of the registry of births, marriages and deaths, the implementation of the electoral laws, statistics, and public order. The TUEL makes certain specific arrangements for the purpose of inter-municipal cooperation. These concern the metropolitan areas (*aree metropolitane*) of Turin, Milan, Venice, Bologna, Florence, Rome, Bari and Naples, the mountain municipalities (*comunità montane*), and forms of cooperation between local authorities.

The *Legge La Loggia* of 5 June 2003, No. 131, mentioned in section V.2 above, aimed amongst other things to increase the financial freedom of local authorities. According to Article 7(2) of this Law, there should be administrative agreements between the regions and the local authorities before finance is assigned. However, the now constitutionalized balanced budget rule has also restricted the financial possibilities of non-central state authorities and hence their ability to engage in (semi-)autonomous policies.

## VI. Fundamental principles, rights and obligations

### I. CLASSIC FUNDAMENTAL RIGHTS

The freedom of religion is guaranteed in Articles 8, 19 and 20. Article 8(1) says that all religious denominations are equally free before the law. Article 19 recognizes everyone's right to profess their religion freely, individually or with others, and to disseminate it. Article 20 forbids rules or taxes which impose special burdens on religious associations and institutions.

The special relations between the state and the catholic church, and Article 7 of the Constitution relating to this, were dealt with in section I.3 above. Article 8(2) acknowledges the right of non-catholic religious denominations to associate according to their own charters, as long as this is not in conflict with the Italian legal system. Their relations with the state are regulated, according to Article 8(3), by law on the basis of agreements with their representatives. Although since 1996 several attempts have been made to reform it, the legislation is mainly contained in Law 1929/1159.

Agreements in implementation of Article 8(3) were concluded with a number of bodies in succession. On 21 February 1984 – a few days after the signature of the agreement modifying the Concordat – there was already an agreement under Article 8(3) with the federation of the protestant churches (the Waldensian Table), which was ratified by Law of 11 August 1984, No. 449 (amended in 1993 and 2007). Agreements with other protestant churches have also been concluded and approved by law since 1984, some of which have been approved by act of parliament (Adventists, Evangelicals, Lutherans and Baptists) and others still await legislative approval (Apostolic Pentecostal, Jehova's Witnesses, Mormons – agreements concluded on 4 April 2007). Also agreements have been concluded with the Union of the Jewish Communities in Italy (on 27 February 1987, approved by Law No. 101 of 8 March 1989, revised by an agreement of 6 November 1996, approved by Law No. 638 of 20 December 1996), the Orthodox Archpatriarchate in Italy under the Patriarch of Constantinople, the Italian Buddhist Union and the Italian Hindu Union (agreements of 4 April 2007, approval pending). The agreements regulate the civil law conclusion of marriage in a manner which is comparable to that in the Concordat, and also include provisions on spiritual care in the army, hospitals and nursing homes.

Article 13 *Cost.* guarantees personal liberty, and indicates the conditions under which detention is permitted. Article 14 declares the home to be inviolable, except in the cases and in the manner provided for by or pursuant to a statute. Article 15 provides that liberty and confidentiality of correspondence and any other form of communication are inviolable and may only be limited by order of a judicial authority in accordance with the law. Article 16 guarantees the freedom of movement within the national territory, except for limitations that the law establishes for reasons of health and safety, and also guarantees citizens the right freely to leave and re-enter the territory. Article 17 recognizes the right to assemble peacefully and unarmed; meetings in public places require prior notification, but may only be prohibited for reasons of public safety. Article 18 recognizes the right freely to associate for goals that are not prohibited to individuals by the criminal



laws; however, secret associations and those which pursue, even indirectly, political objectives by means of organizations with a military character, are prohibited. Article 39 recognizes a particular form of the right of association, viz. the right to organize trade unions. This article requires legislation concerning official registration of trade unions, on condition that their internal organization is on a democratic basis; in fact, this legislation has so far not been enacted. That such registered trade union organizations are authorized to enter into collective labour agreements (Art. 39(4) *Cost.*) that have a mandatory effect even for non-members, has remained a dead letter. Under the present circumstances, the trade union organizations may, pursuant to the fifth book of the Civil Code (*Codice Civile*, Arts. 2067-2079), concerning labour, conclude collective employment agreements which in law are only binding on their members, but *de facto* also establish the employment conditions for those not belonging to the organization. In this context, Article 40 *Cost.* should also be mentioned, which recognizes the right to strike.

Article 21 *Cost.* deals with freedom of expression. The first paragraph guarantees this freedom for expression in words, writing and any other means of communication. The next four paragraphs concern the freedom of the press. The second paragraph prohibits any form of censorship.

Article 21(6) provides that printed matter, public performances and other events contrary to public morality are forbidden; the law must provide for appropriate measures to repress or prevent them. It is generally assumed that this paragraph does not permit exceptions to the prohibition on preventive (i.e. *ex ante*) censorship contained in Article 21(2). There is an *ex ante* assessment of films, according to Law of 21 April 1962, No. 161, in connection with which the screening of films can be prohibited on the advice of the film certification committee, or can be permitted solely for persons above 14 or 18 years of age. Article 11 of the Law creates the possibility for the minister to prohibit access to certain performances for persons below the age of 18 years.

Article 21(3) limits the possibility of seizure of printed matter to offences expressly determined by the law on the press or to cases of violation of the obligation to identify the persons responsible. The Law on the press was established by Law No. 47 of 8 February 1948, as amended by Law No. 416 of 5 August 1981. This Law does not itself create offences which can lead to confiscation, but Royal decree 561/1946 does so; it allows confiscation of obscene publications or which offend public morals. The provisions in this decree on propaganda conflicting with natural propagation (contraceptives and abortion) were declared unconstitutional in 1972 (*sentenza* 4/1972, in accordance with an earlier judgment on similar provisions in the Criminal Code, *sentenza* 49/1971). The *legge Scelba* (645/1952), which prohibits the re-establishment of the fascist party, provides for the seizure of printed matter within the scope of the offence of apology of fascism. The Law on the press provides also for the compulsory mention in daily newspapers and periodicals of the name of the printer, publisher and director who is criminally liable for the prevention of press delicts; it also provides for the right to respond and to rectification.

The fifth paragraph of Article 21 *Cost.* creates the possibility that the law may require the financial resources of the periodical press to be disclosed. The Law of 5 August 1981, No. 416, lays down rules for the supervision of the economic structure of the press. According to this Law an independent supervisory authority is established, which function was later merged with that of the supervisory authority for broadcasting (*Garante per la radiodiffusione e l'editoria*; see Law of 6 August 1990, No. 223), and subsequently integrated in the Italian Communications Authority (*Autorità per le garanzie nelle*

*comunicazioni*; see Law of 31 July 1997, No. 249, on which see further below). By Law of 7 March 2001, No. 62, new statutory rules on subsidies and fiscal facilities for the press were established.

A particular aspect of the freedom of expression concerns the arrangements for broadcasting. Law of 6 August 1990, No. 223, put an end to the state broadcasting monopoly of the RAI (*Radiotelevisione Italiana*). This Law confirmed a mixed – private and public – broadcasting system, which had in practice been introduced by a [decreto legge](#) (converted by Law No. 10 of 4 February 1985) which is referred to as the “decreto Berlusconi”, then not yet politician but media magnate in the making. The system comprises on the one hand a public limited company, the RAI (whose shares are held by the state) as concessionaire of the public radio and television broadcasting services, and on the other hand private concessionaires. Article 1 of the Law of 1990 states that “the broadcasting of radio and television programmes is a major general interest”, and that the “pluriformity, objectiveness, completeness and independence of the information provided, as well as the fact of being open to the various opinions, political, social, cultural and religious views, which should occur while respecting constitutional rights and liberties, are fundamental principles of the radio and television system, which is operated by public and private organs.” The Constitutional Court ruled in 1994 (Decision No. 420) that this Law, by making it possible for three television channels to be in economic terms in the hands of one agent, was unconstitutional. The abovementioned Law of 31 July 1997, No. 249, established a supervisory authority, which consists of a chairman appointed by presidential decree following nomination by the prime minister, and eight commissioners half of whom are chosen by the Senate and half by the Chamber of Deputies. This authority supervises the infrastructure and the working of the broadcasting system. The Law of 31 July 1997, No. 249, sets restrictions on the participation in broadcasting channels and income from individual enterprises.

This legislation has limited to some extent the dominance within the media of *Fininvest*, the holding company of the Berlusconi family, its broadcasting company *Mediaset* and its publishing company *Mondadori*, but has certainly not put an end to it. The period for limiting dominant positions has been prolonged a number of times, by making this dependent on a plan for the distribution of broadcasting rights and frequencies. The Constitutional Court put a check on this with its ruling of 20 November 2002, No. 466, by ruling that 31 December 2003 must be the latest date for the transitional period under the Law of 1997.

After the President of the Republic had refused to promulgate an adopted bill and returned it to parliament, a *decreto-legge* was issued on 24 December 2003 (transposed and amended by Law No. 43 of 24 February 2004) allowing broadcasters to continue broadcasting, their too large market share notwithstanding, until the adoption of a national plan for frequency distribution for digital broadcasting. Also, on 3 May 2004 a bill proposed by the minister for communication, Maurizio Gasparri (*Alleanza Nazionale*), was passed which allowed existing broadcasters to broadcast both digital and analog signals at existent frequencies, while the maximum market share was established at 20 percent of the total of digital and analog broadcasts (Law No. 112/2004, consolidated in the *testo unico* of *decreto legislativo* No. 117, 2005 (the “TV Code”), Arts. 23 and 25). This did not solve access to the media of newcomers definitively. The European Court of Justice rules that such legislation infringed the free movement of services and secondary EU legislation, in as much as a private broadcaster which had been granted rights to broadcast had not actually been allotted frequencies, and had been unable in actual fact to broadcast (ECJ 31 January 2008, C-380/05, *Centro Europa 7*). The EU Commission started infringement proceedings against Italy, which were interrupted when the government

(Berlusconi-IV) began allotting digital frequencies to the new competitor, which however initially gave access only to part of the Italian territory and public; on 7 June 2012 the European Court of Human Rights determined that the failure to provide adequate access to frequencies to one of the broadcasters amounted to an infringement of Article 10 ECHR (ECtHR, Application no. 38433/09, *Centro Europa 7 and others v Italy*). Only after further controversies and legal proceedings were adequate frequencies allotted on the basis of legislative decree 44/2010, which could terminate the conflict in this particular case. The division of some frequencies through public auctions and others on the basis of qualitative criteria (a “beauty contest”), provided for by the last mentioned decree, however remains controversial.

A parliamentary committee (*Commissione parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi*) composed of forty members supervises the political, social and cultural independence and objectiveness of broadcasting services. This committee may lay down rules concerning the access of different groups of society to the media.

Special guarantees for the legal position of the individual are contained in Articles 22 and 23 *Cost.* Article 22 provides that no one may be deprived of legal capacity, of citizenship or name for political reasons. Article 23 provides that no obligations of a personal or financial nature may be imposed except by law.

The next four articles concern the administration of justice. The first paragraph of Article 24 guarantees everyone access to the courts; the second paragraph describes the right of defence as an inviolable right. The third paragraph grants the possibility of legal aid for the indigent. According to the fourth paragraph, arrangements must be made by law for redress in cases of errors of the judiciary. Article 25(1) provides that no one may be deprived of the judge (*giudice naturale*) which a prior law gives him access to. The second paragraph contains the principle “*nulla poena sine praevia lege poenali*”, to which the third paragraph adds that no one may be subject to security measures except in cases provided for by law.

Article 26 forbids the extradition of citizens except in cases required by international agreements, and prohibits all extradition for political offences. The EU Framework Decision concerning the European Arrest Warrant of 13 June 2002 is supposed to be in accordance with this provision as regards the treaty basis, while the implementing act makes an exception for political offences (Art. 18(f), Law 69 of 22 April 2005). This exception is directly related to Article 10(3) and 10(4) *Cost.*, which prohibits the extradition for political offences also of foreigners, and grants the right to asylum under the conditions specified by law to foreigners who in their own country are denied the actual exercise of the democratic freedoms guaranteed by the Italian Constitution. Constitutional Law 1 of 1967 provides that Article 26 *Cost.* does not apply to the criminal offence of genocide.

Article 27 establishes in its first paragraph that criminal responsibility is personal. According to a Decision of the Constitutional Court dating from 1957 (No. 107), this means that a person may not be held responsible for an action committed by someone else. This does not detract from the possibility of a strict criminal liability, without intention or blame. The second paragraph entails that a defendant is not considered guilty until a final judgment is handed down. The third paragraph prohibits inhuman punishments and requires that punishment must aim at the rehabilitation of the convicted person. The death penalty is prohibited in peacetime.

Elsewhere in the Constitution, a few other provisions may be found which could be characterized as fundamental rights concerning the administration of justice. The first five paragraphs were added in 1999 and concern due process, trial on the basis of adversarial proceedings with equal rights between parties before an independent and neutral court within a reasonable time, the right to be informed of the suspicion of having committed a criminal offence, rights of defence, and a number of guarantees concerning the evidence in criminal prosecutions.

Article 111(6) provides that all judicial decisions have to state their reasons. Article 111(7) provides that appeals to the Court of Cassation are always allowed against sentences and decisions affecting personal liberty, except for limitations in relation to decisions of military tribunals in times of war. Article 113(1) and (2) guarantees access to the courts for the protection of rights and legitimate interests against acts by the public administration.

Article 32(2) *Cost.* prohibits compulsory medical treatment, except in cases provided for by law.

Article 33(1) recognizes the freedom of the arts and sciences, and the right freely to teach them. According to paragraph 3 of this article, schools and educational institutions may be freely established but may not burden the State. The latter provision has widely been understood to prohibit state financing of private schools. Yet, for years a lively debate has been conducted on the scope of that prohibition. The Constitutional court has held that the free provision of schoolbooks only to pupils of public schools is in conflict with the prohibition of discrimination contained in Article 3 *Cost.*, and that providing free schoolbooks to pupils of private schools does not conflict with the prohibition of public financing of private schools under Article 33 (*sentenza* 454/1994).

In conformity with the constitutional principle of the republic as a social state based on the rule of law, the constitutional protection of private property leaves very explicitly room for its social function. This is apparent already in the first introductory paragraph of Article 42: property is either publicly or privately owned. The means of production (*beni economici*, or economic assets) belong to the State, to entities or to private persons. According to the second paragraph, private property must be guaranteed by the law. The law must also make arrangements for the limitation of the right to property, so as to ensure its social function and render it accessible to all. The third paragraph permits expropriation in the public interest, and with compensation. In the fourth paragraph, the possibility is opened for the law to grant rights to the State in matters of inheritance.

Article 43 contains further provision for collective or public ownership: either from the moment of their creation or by later expropriation, certain enterprises or categories of enterprises that are related to essential public services, or to energy resources or to monopoly situations, and which are of significant public interest, may be transferred to the State, or to public entities or cooperatives of workers or users. Article 44(1) provides the basis for land reform in order to combat large-scale agricultural ownership. Such reforms were implemented by Laws of 15 May and 21 October 1950, Nos. 230 and 841.

Articles 48-51 *Cost.* deal with political fundamental rights of citizens. Article 48 guarantees universal suffrage, which should be exercised freely and secretly. Article 49 acknowledges the right freely to form political parties. Article 50 enshrines the right of petition. Finally, Article 51(1) deals with equal access to public functions for men and women. In 2003 it was added that “to this end, the Republic shall adopt specific measures to promote equal opportunities between women and men”. With regard to the regions, Article 117(7) provided since 2001 that “regional laws shall remove any hindrances to the full equality of men and women in social, cultural and economic life and promote equal access to elected offices for men and women.” For the regions with special charters (see section V.1) Constitutional Law No. 2 of 2001 provides that that with a view to a balanced

representation of men and women the charters must create “equal conditions for access to elections”. The Law on the Elections for the European Parliament (Law No. 90 of 2004) provides that on the lists of candidates none of the sexes may be represented by more than two thirds of the candidates. Similar provisions for the Chamber of Deputies and Senate have so far been rejected in parliament.

The third paragraph of that article adds that anyone who is elected to a public body is entitled to the time needed to perform their function and to retain his or her employment.

The Italian Constitution also mentions the political obligations of citizens, to wit the duty to defend the country (Art. 52), to pay taxes in accordance with a system of progressive taxation (Art. 53), the duty of loyalty of citizens to the Republic, and to uphold its Constitution and laws, as well as the duty of the incumbents of public office to fulfil such function “with discipline and honour, taking an oath in the cases established by law” (Art. 54; *Cost.*).

## 2. FUNDAMENTAL SOCIAL RIGHTS

The provisions concerning fundamental social rights are programmatic in character. They make the protection or realization of a particular right a duty of the authorities, or they formulate a principle for statutory legislation.

Article 4(1) *Cost.* recognizes the right to work, and directs the government to promote the conditions in which this right will be effective. Three articles (35-37), split up into a number of paragraphs, provide the basis for the statutory regulation of protection of labour. In this context, particular attention is paid to the position of women and juvenile workers, and of Italian workers abroad. Article 38 recognizes the right to social security, with particular mention of illness, disability, old age and involuntary unemployment. In Articles 30 and 31, the Constitution requires assistance for families and – in Article 30(3) – for illegitimate children. Article 32(1) requires the government authorities to pay particular care to public health, and to ensure free care for the indigent.

The following fundamental social rights concern cultural life. Article 6 *Cost.* requires special rules for the protection of cultural (linguistic) minorities. This provision has been implemented by the Law of 15 December 1999, No. 482, concerning the numerous (but mainly numerically limited) “historical linguistic minorities”. These concern not just the German, Ladino and French speaking inhabitants of the Regions of Trentino-Alto Adige/Südtirol and Valle d’Aosta/Vallée d’Aoste (see section V.1 above), but also the language rights of indigenous groups who speak (for instance) Albanian, Catalan, Greek, Sardinian or Slovenian. Article 9 *Cost.* states that the Republic promotes the development of culture and technical and scientific research, and that it protects the landscape and the historical and artistic heritage of the nation. Following on Article 33 *Cost.*, which deals with the legal regime for educational establishments, Article 34 provides that school is open to everyone, and that at least eight years of education is compulsory and free; capable students, even if without means, must be enabled to reach the highest levels of education.

## VII. Sources for further study

### *Websites*

<http://www.normattiva.it>

Via this website the Italian legislation dating back to 1946 has been made accessible in exemplary fashion for the general public and for use by public authorities. In 2014 all legislation passed since the unification of Italy in 1861 will become available.

<http://www.quirinale.it/>  
President of the Republic

<http://www.governo.it/>  
Government

<http://www.parlamento.it/>  
Senate and Chamber of Representatives

<http://www.cortecostituzionale.it/>  
Constitutional Court

<http://www.giustizia-amministrativa.it>  
Council of State and administrative courts

<http://www.giustizia.it/>  
Ministry of Justice, with many links which are useful for Legal research

<http://www.costituzionalismo.it/>  
Internet-periodical on constitutional law

<http://www.giust.it/>  
The public law internet periodical "*Rivista Internet di diritto pubblico*"

<http://www.altalex.com/>  
Juridical internet-daily

### *Manuals and textbooks on Italian constitutional law and public law*

There are a large number of manuals in the field of constitutional law, which is a subject that is studied under various angles in three academic sub-disciplines: Diritto costituzionale (constitutional law), Diritto pubblico (public law), and Istituzioni di diritto pubblico (institutional public law).

The following are classics or much used books:

- G. Amato/A. Barbera (ed.), *Manuale di diritto pubblico*. three volumes, 5th ed., Bologna: Il Mulino 1997.
- Luigi Arcidiacono, Antonio Carullo, *Diritto costituzionale*. Nuova ed., Padova: CEDAM 2011; first ed. 2005 by Monduzzi, now updated.
- Paolo Barile/Enzo Cheli/Stefano Grassi, *Istituzioni di diritto pubblico*. 13th ed., Padova: Cedam, 2011.
- Roberto Bin/Giovanni Pitruzella, *Diritto costituzionale*, 12nd ed., Torino: Giappichelli 2011.
- Stefano Battini/Claudio Franchini/Rita Perez/Guilio Vesperini/Sabino Cassese, *Manuale di diritto pubblico*. 3e ed., Milano: Giuffrè 2005.
- Augusto Cerri, *Istituzioni di Diritto Pubblico, Casi e materiali*. 3e ed., Milano: Giuffrè 2006.
- Achille Chiappetti, *La costituzione vivente italiana*, Torino: Giappichelli 2011 (a short introduction).
- Giuseppe De Vergottini, *Diritto costituzionale*. 7e ed., s.l. [Padova]: Cedam, 2010.
- Giandomenico Falcon, *Lineamenti di diritto pubblico*. 12nd ed., Padova: Cedam, 2011.
- Carlo Fusaro/Lucio Pegoraro/Antonio Reposo, *Istituzioni di diritto pubblico e diritto costituzionale*. Torino: Giappichelli, 5e ed. 2008.
- Temistocle Martines/Gaetano Silvestro, *Diritto Costituzionale, per i nuovi corsi universitari aggiornata al settembre 2003*. Milano: Giuffrè 2003 (a new version of the next title but adapted to the new size of law courses).
- Temistocle Martines/Gaetano Silvestro, *Diritto Costituzionale*. Totally revised 12nd ed, Milano: Giuffrè, 2010.
- Temistocle Martines/Luigi Ventura, *Diritto Pubblico*. 6e ed., Milano: Giuffrè 2005.
- M. Mazziotti di Celso/G.M. Salerno, *Manuale di Diritto Costituzionale*. 5e ed., Padova: CEDAM 2010
- Livio Paladin, *Diritto costituzionale*. 3e ed., Padova: Cedam, 1998; with an update by Mazarolli Ludovico A., Tosi Rosanna, *Schede di aggiornamento di Diritto Costituzionale (1998-2008)*, Padova: Cedam Anno: 2009.
- Giuseppe Ugo Rescigno, *Corso di diritto pubblico*. 11th ed., 2007-2008, Bologna: Zanichelli, 2007.

*Article by article commentaries:*

- Giuseppe Branca, continued by Alessandro Pizzorusso (ed.), *Commentario della Costituzione*. Rome/Bologna: Società ed. del Foro italiano/ Zanichelli, 1975-2006, 34 volumes. Very voluminous but an indispensable tool for an in-depth study of Italian constitutional law.
- Raffaele Bifulco/ Alfonso Celotto/ Marco Olivetti, *Commentario alla Costituzione*. Torino: Utet, 2006, 3 volumes.
- Released on DVD as *Commentario alla Costituzione: banca dati ipertestuale*. Torino: Utet, 2008.
- Written by a younger generation of constitutional lawyers, still quite voluminous (2852 pp.) but due to a shorter production time frame more up to date than the previous title.
- Veziro Crisafulli/Livio Paladin/Sergio Bartole/Roberto Bin (ed.), *Commentario breve alla Costituzione*. 2nd ed., Padova: Cedam, 2008.
- Half the size of the previous title.

Guido Neppi Modona (ed.), *Stato della costituzione*. Nuova ed., Milano: Il Saggiatore, 1998.  
Very accessibly written, but unfortunately no longer up to date.

The debates on institutional reform which have been intensive since the 1980s and even more vehemently in the 1990s, have produced a vast literature written both from a political science and a constitutional law perspective. In part it takes the form of polemical pamphlets, but in part it is scholarly in nature, with much in between. At the apex of a strongly polarized discussion on the constitutional reform proposed in 2005 and rejected by referendum, for instance appeared Leopoldo Elia (former president of the Corte costituzionale), *La costituzione aggredita: Forma di governo e devolution al tempo della destra*. (The Constitution under Attack: the form of government and devolution during the right wing government) Il Mulino/ AREL, Bologna/Roma, 2006.

The *Associazione per gli Studi e le ricerche sulla Riforma delle Istituzioni Democratiche e sull'innovazione nelle amministrazioni pubbliche*, ASTRID, is an important forum of constitutional law and political science debate. An important publication, strongly rejecting the proposals for reform by the Berlusconi governments was Franco Bassanini (ed.), *Costituzione, una riforma sbagliata: il parere di sessantatre costituzionalisti*, ASTRID, Firenze: Passigli, 2004.

For those interested in following the Italian debate and constitutional practice through official and unofficial documents, ASTRID has an interesting website with many documents, background studies and interventions in the debate: <http://www.astrid-online.it/>.

Its counterpart is the group which organized itself around the Fondazione Magna Carta. Internet site: <http://www.magna-carta.it/home>.

Their defence of the proposals of 2005 is: Peppino Calderisi/Fabio Cintioli/Giovanni Pitruzella, *La Costituzione promessa*, autori vari, Fondazione Magna Carta, ed. Rubbettino, 2004.

An overview of the constitutional amendments over the period 1998-2008 is given in:

Franco Modugno, Alfons Celotto, Marco Ruotolo, *Aggiornamenti sulle riforme costituzionali (1998-2008)*. Torino: Giappichelli, 2008.

*Reference books and textbooks on special subjects:*

Antonio Ruggeri/Antonino Spadaro, *Lineamenti di giustizia costituzionale*, 4th ed., Torino: Giappichelli 2009.

Sergio Bartole/Roberto Bin/Giandomenico Falcon/Rosanna Tosi, *Diritto regionale*. Bologna: Il Mulino, 2005

Paolo Caretti/Giovanni Tarli Barbieri, *Diritto regionale*. Torino: Giappichelli, 2007.

Francesca Migliarese Caputi, *Diritto regionale e degli enti locali*. Torino: Giappichelli, 2008.

Fabio Merusi/Michele Passaro, *Le autorità indipendenti*. Bologna: Il Mulino, new (second) edition 2011.

Marco Cuniberti, *Autorità indipendenti e libertà costituzionali*. Milano: Giuffré, 2007.

*Literature in other modern languages on Italian constitutional law or selected topics:*

Mario Dogliani/Cesare Pinelli, *Italien. Handbuch Ius Publicum Europaeum*, Von Bogdandy/Cruz Villalón/Huber (ed.), Band I, *Grundlagen und Grundzüge staatlichen Verfassungsrechts*, p. 273-326, Heidelberg: C.F. Müller Verlag, 2007.



- Carlo Panara, *Italien, Handbuch Ius Publicum Europaeum*, Von Bogdandy/Cruz Villalón/Huber (ed.), Band II, Erster Teil, Offene Staatslichkeit, p. 143-176, Heidelberg: C.F. Müller Verlag, 2007.
- Maurizio Fioravanti, *Italien, Handbuch Ius Publicum Europaeum*, Band II, Zweiter Teil, Wissenschaft vom Verfassungsrecht, p. 585-612, Heidelberg: C.F. Müller Verlag, 2007.
- Introduction to Italian Public Law*, Edited by Giuseppe Franco Ferrari, 276 pp., Milano: Giuffrè, 2008.
- P.P. van der Lee, *Legitimititeit en onpartijdigheid bij vervolging: een vergelijking van de verhouding tussen openbaar ministerie en de minister van Justitie in Frankrijk, Italië en Nederland*, Den Haag: Sdu uitgevers, 2003.
- Jan van Schagen, Henk Kummeling, L.F.M. Besselink, *Discontinuïteit in het wetgevingsproces: een rechtsvergelijkend onderzoek naar de procedure van het vervallen van aanhangige wetgeving in de landen van de Europese Unie*. Den Haag: Ministerie van Justitie, 1996, 159 pp.

*Journals and law reports*

- L'amministrazione Italiana*, Edizioni Barbieri, Noccioli & C., Empoli, contains article and case law of the *Corte Costituzionale*, *Corte di Cassazione* and *Consiglio di Stato*.
- Quaderni costituzionali (Rivista Italiana di Diritto costituzionale)*, [http://www.mulino.it/html/riviste/quaderni\\_costituzionali](http://www.mulino.it/html/riviste/quaderni_costituzionali); direttore Augusto Barbera, uitg. Il Mulino.
- Rivista trimestrale di diritto pubblico*, direttore Sabino Cassese, uitg. Giuffrè.
- Il Consiglio di Stato, Rassegna di Giurisprudenza e dottrina (Organo ufficiale del Centro Italiana di Studi Amministrativi)*, appears on a monthly basis in approximately 300 pages and contains case law and advisory opinions of the *Consiglio di Stato*, the case law of the Constitutional Court, Court of Cassation, the Courts of Justice of the European Union, literature and book reviews (published by Italedi).
- Diritto Pubblico*, CEDAM.
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