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ILARIA DE CESARE

**CONSTITUTIONAL DEGRADATION AND THE ITALIAN PARLIAMENT
HOW CAN THE CENTRALITY OF THE REPRESENTATIVE BODY IN THE
ITALIAN LEGAL SYSTEM BE PRESERVED?**

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IDEATORE E DIRETTORE RESPONSABILE: PROF. PASQUALE COSTANZO

Ilaria De Cesare
Constitutional Degradation and the Italian Parliament* **
How can the centrality of the representative body in the Italian legal system be preserved?

ABSTRACT: *The essay focuses on the Italian Parliament and the process that may undermine its centrality in the exercise of the legislative function. The paper investigates whether the representative body has lost its role and suggests some legal interventions to correct this phenomenon. So, it analyses the legal tools (and their effects) used by the Government to impose itself on the Parliament. Though the actual functioning of Italian legal system could still be considered as belonging to the area of what Constitution established, it does not seem possible to postpone a reform to ensure the centrality of Parliament. It appears that the best tool would be an amendment of parliamentary rules of procedure. In particular, the main solution proposed is a reform of the law-making process, to guarantee an evolution - not a transformation - of the Italian legal system.*

SOMMARIO: 1. Constitutional degradation and the transformation of the legal system: a first step toward breaking? - 2. The imposition of government. Legal tools and problematic elements - 3. Suggestions to ensure the legislative function ownership

1. Constitutional degradation and the transformation of the legal system: a first step toward breaking?

In recent years, there has been much talk about transformation in representative democracies. In many legal systems, a re-alignment of functions among public institutions has been observed, which has apparently been driven by the interaction between legal systems and social evolutions. In this context, the concept of “constitutional degradation” has arisen.

In examining this phenomenon, we decided to focus our attention on the equilibria between Government and Parliament, which are – in parliamentary legal systems such as the one in Italy – linked by a vote of confidence and share a number of functions. Thus, the problem of constitutional degradation will be analysed with special reference to the legislative function.

The proposed analysis will be developed from a diachronic perspective, encompassing a timeframe which, according to many, has marked a period of sweeping change in our representative democracy, with a special focus on noteworthy events that have marked our institutional experience in the last 25 years¹.

This temporal context is very useful since it consents us to highlight and link social and institutional dynamics, denoting the way in which society and State (in all of its bodies) have been influenced by each other. Furthermore, the same temporal context seems to delineate, more or less explicitly, the concept of “transformation” too, or, in other words, of heterogeneous phenomena consisting of mutations, deviations and re-adjustments as compared to a starting model that results from a combination of normative (primarily constitutional provisions) and factual elements (especially political ones).

The equilibria in the exercise of functions allocated among constitutional bodies, especially with regard to shared functions, can change when there is a modification in a constitutional system’s

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** This article builds upon a paper presented during the workshop «Framing and Diagnosing Constitutional Degradation: a Comparative Perspective», organized by DIPEC – University of Siena, that took place in Pontignano, June 2021, the 21st and 22nd. The paper has been submitted for publication in the conference proceedings

¹ On the period between 1993 and the new elections in 2013, *ex multis*, S. Sicardi, M. Cavino, L. Imarisio (eds), *Vent'anni di Costituzione (1993-2013). Dibattiti e riforme nell'Italia tra due secoli*, Bologna, 2015, where they point out the distinction between the First, Second and Third Republic. See, in any case, the critical observation by U. ALLEGRETTI, *Storia costituzionale italiana*, Bologna, 2014, 185.

components, but this does not always happen in line with the Constitution. Consequently, we must understand what kind of transformation we are talking about². To do this seems useful referring to some scientific concepts. On the one hand, the physical phenomenon of transformation (physical change) is the reversible transition of matter from one state to another. On the other hand, chemical transformation (chemical change) is the irreversible mutation of matter into a different one altogether, through a reaction that severs the pre-existent chemical bonds.

In juridical science³ the “body” subjected to the process of change is the constitutional system. But which kind of transformation is it? Is it possible to imagine two kinds of this phenomenon, one that would be reversible, that may fall within the controversial universe of *costituzione materiale*⁴, and another that would be irreversible, that may pertain to the notion of written constitution and may cause a breakdown⁵ in the constitutional bonds?

What we just outlined leads to another question: what kind of change amounts to constitutional degradation? Degradation of constitutional matter represents a step toward a sweeping legal transformation, since it is a process that impacts institutional behaviours. If it were a structural change, if it were a breakdown in constitutional bonds between bodies (a sort of “constitutional” chemical change), it could cause a breakdown in the Constitution: i.e., an irreversible transformation of our legal system. This is the reason why it is incumbent upon us to reflect on the equilibria affected by this phenomenon: by understanding origins and modalities, it will be possible to make the necessary decisions to prevent an eventual breakdown.

In trying to answer to these questions, the benchmark will be the relationship between Parliament and Government. From this perspective, we will verify whether the juridical instruments and practices which have affected the exercise of the legislative function, have also affected its ownership. In doing so, we will attempt to detect eventual deviations from the constitutional text and from the legal system prescribed in it.

Moreover, the very notion of form of Government is not merely descriptive. Even if classifications are ideated to help the researchers’ studies⁶, form of Government also has a prescriptive meaning⁷. Indeed, the Constitutional Court used this expression to evaluate the power of Parliament to vote on a motion of individual no-confidence for a Minister, in the absence of any reference to that power in the constitutional text⁸. Therefore, following the most recent theories on this point, the commonly understood notion of form of Government is that linked with normative-constitutional elements⁹, without involving other elements even where useful to its functioning.

² We may collect suggestions from a recent paper by R. BIN, *Mutamenti costituzionali: un’analisi concettuale*, in *Dir. Cost.*, no. 1/2020, 23-45, in which the Author underlines how the use of the expression legal system leads the interpreter to talk about change, without considering that what change actually is lies in the description of “being” (how Italy is governed), but doing so while honouring the constitutional “need to be”.

³ N. BOBBIO, *Scienza del diritto e analisi del linguaggio*, in *Riv. trim. dir. e proc. civ.*, 1950, 342-367, on the modern conception of science and, specifically, on juridical science firstly as a rigorous language that allows us to transform subjective knowledge into objective knowledge.

⁴ On the controversy over the admissibility of the concept, elaborated by Constantino Mortati, and on its uses, see A. BARBERA, *Ordinamento costituzionale e carte costituzionali*, in *Quad. Cost.*, no. 2/2010, 311-358. We must stress that we are deeply convinced that the only possible order is the one prescribed by a written Constitution, which – if it exists – represents the insuperable limit for evaluating all institutional behaviour.

⁵ R. BIN, *Mutamenti costituzionali*, cit., 31.

⁶ On the indissoluble relationship between forms of State and forms of Government C. MORTATI, *Le forme di Governo. Lezioni*, Padua, 1973.

⁷ L. ELIA, *Governo (forme di)*, in *Enc. dir.*, XIX, 1970, 634-675.

⁸ As recalled by G. SOBRINO, *La forma di Governo*, in S. Siccardi, M. Cavino, L. Imarisio (eds.), *Vent’anni di Costituzione*, cit., 65. Before, L. ELIA, *Forme di Stato e forme di Governo*, in S. Cassese (ed.), *Diz. dir. pubbl.*, Milan, 2006, 2600-2601, that underlines the use of expressions such as «logica del governo parlamentare», «sviluppo storico del governo parlamentare» and «regola fondamentale del regime parlamentare». On Form of Government construed with a prescriptive meaning, read points 7-8 «considerato in diritto», decision no. [7/1996](#), Constitutional Court.

⁹ M. LUCIANI, *Governo (forme di)*, in *Enc. dir.*, *Annali*, III, 2010, 538-596, who separates the political-institutional system – to lead even the parties system – from the normative-constitutional one. The Author also excludes from the Form of Government the rules on «le fonti di produzione normativa, perché la regola del rapporto fra gli organi, in questo

Having regard to the above, let us give a brief description of what seems to be the equilibria described in the Constitution between Parliament and Government, with regard to the legislative function. In the constitutional text, this function is outlined not as an exclusive prerogative of the Parliament.

However, by observing all of the constitutional provisions referring to the law-making process and to other acts having the force of the law, we may discern a position of prominence (*lordship*) of the Parliament. This prominence can expand or diminish, but can never completely disappear, because the Chamber of Deputies and the Senate are and remain the holders of the legislative function at the state level¹⁰, where that function can be “delegated” to the Government only if the provisions of the Constitution are honoured.

After all, the Parliament is the body that is most deeply, even genetically, linked with the representative principle, since it is the only place in which seated representatives of the citizens. The legislative function is the paradigmatic way of applying this constitutional principle: thanks to this function, the elected majority can translate its political guidance into positive laws, subject to compliance with the Constitution.

Notwithstanding the foregoing, over time we have witnessed a gradual reduction in the exercise of this function by the Chamber of Deputies and Senate, with a shift toward the Government. This has led the doctrine to support at the very least an enhancement of Parliamentary instruments of control, when Government is seen as becoming, through the decree-law procedure or the legislative delegation procedure, the protagonist in the legislative decision-making process.

In relation to the questions posed above, these considerations introduce a new (and last) question: is it enough to enhance the control function in order to ensure respect for legislative *ownership*?

Now that the aims of our analysis have been defined, we can proceed to examine instruments that seem to characterize this phenomenon that is impacting our Parliament: after all, it is within the opaque folds of the system’s rules and institutions that constitutional degradation is creeping in.

2. *The imposition of Government. Legal tools and problematic elements*

When Bagehot enumerated the functions of the House of Commons, he did not consider the legislative function « as important as the executive management of the whole state, or the political education given by Parliament to the whole nation»¹¹. In the Italian legal system as well, the legislative function is not (any longer) considered as the function that displays the prominence of Parliament¹², even if Parliament formally holds ownership of such function¹³.

Regarding the legislative function, we observe a number of distortive practices in the use of the instruments of governmental co-participation, that could be defined as signs of Italian constitutional degradation.

We may discern the first degenerative practice as consisting in the procedure for the adoption and confirmation of decree-laws¹⁴. This has caused three constitutional cases to “come back to the

caso, è mediata dalla regola del rapporto fra gli atti e i (fatti)normativi», which in this analysis are considered as an element necessary to define the relationship between Parliament and Government. ID., *Governo*, cit., 586.

¹⁰ On this see art. 70 Const., that identify the institutional body “delegated” to the legislative function. N. LUPO, *Art. 70*, in R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario alla Costituzione*, Turin, 2006, 1337.

¹¹ W. BAGEHOT, *The English Constitution*, [1867], M. Taylor (ed.), New York, 2001, 100-102. These observations are the result of a change that affected the Parliament, attaining the sharing of the political direction function. See S. SICARDI, *Il parlamento e il suo futuro*, in M. Cavino, L. Conte (eds.), *Le trasformazioni dell’istituzione parlamentare. Da luogo di compromesso politico a strumento tecnico della divisione del lavoro*, 25 November 2016, Naples, 2017, 12-13.

¹² G. BRUNELLI, *Il Parlamento*, in *Rivista AIC*, no. 2/2018, 7, who linked the prominence of Parliament in the legal system to the circumstance that it is the centre of popular sovereignty.

¹³ Discussions on a «production machine» of laws G. BRUNELLI, *Il Parlamento*, cit., 14.

¹⁴ The origins of certain institutional behaviours date very far back in time, but it is just since the 90s that the Constitutional Court has started its interpretational orientation. See N. LUPO, *Il Governo italiano*, 173.

Constitution”¹⁵: the possibility of declaring the unconstitutionality of decree-laws adopted in the absence of conditions imposed by art. 77 Const.¹⁶; the censure of the reiteration¹⁷; finally, the necessary homogeneity of the substance of the confirmation law with respect to the law-decree¹⁸.

The 2017-2018 report¹⁹ from the *Osservatorio sulla legislazione*²⁰ shows relatively few decree-laws adopted during the XVI and XVII legislatures (respectively, 14.37% and 12.92% out of all normative acts)²¹. But the most interesting result is that related to the confirmation: out of all laws (almost 50% of all normative acts), 28% and 22%, respectively, are confirmation laws, and just a few are the non-confirmed decree-laws, mainly because their contents are merged into other decree-laws²².

To the numerical result, we must add a “substantive” one: decree-laws are increasingly showing heterogeneous content²³, despite the constitutional case law on this point, which has declared the unconstitutionality of this kind of provision, even if *ab origine* included in the confirmed decree-law²⁴.

The numerical data on the confirmation of decree-laws suggest that this procedure is becoming a sort of *de facto* ratification. This suggestion is confirmed by the difficulties faced by the competent Commissions in reviewing, in contingent times, heterogeneous contents and in ensuring an in-depth discussion about them, even though numerous decree-laws are confirmed with modifications²⁵.

Moving onward to the legislative delegation and its use, we find our second distortive practice. It may be noted that over time, there have been more problematic cases concerning the correspondence between delegation laws and legislative decrees²⁶, than cases concerning how this delegation is enacted²⁷. But the problem with the exercise of the legislative function by the Parliament, in the delegation law, lies specifically in the latter ones²⁸.

¹⁵ G. D’AMICO, D. TEGA, 1993-2013: *la Corte costituzionale tra giurisprudenza e politica*, in *Vent’anni di Costituzione*, cit., 560.

¹⁶ Decision no. [29/1995](#) Constitutional Court, and then decisions nos. [171/2007](#) and [128/2008](#).

¹⁷ Decision no. [360/1996](#) Constitutional Court.

¹⁸ Decisions no. [22/2012](#), [34/2013](#) and [32/2014](#) Constitutional Court.

¹⁹ *La legislazione tra Stato, Regioni e Unione Europea, Rapporto 2017-2018*. On July 2020, the 28th the [2019-2020](#) report was presented. The last [Report](#) analyses the first two years of XVIII legislature (March 2018, the 23rd – July 2020, the 23rd) and refers to the state legislation as «linee ormai consolidate», 23.

²⁰ Established within the Chamber of Deputies.

²¹ [Report 2017-2018](#), 17.

²² [Report 2017-2018](#), 18 and 21. The report underlines that during the XVII legislature just two law-decrees were effectively not confirmed. Notice that the report on the first two years of XVIII legislature shows a slight decrease in confirmation laws, with 34% on the total laws, down from 39% for the first two years of XVII legislature. See [Report 2019-2020](#), 26.

²³ On this point, and for a specific analysis of the Report 2017-2018, see E. AURELI, *L’uso dei decreti legge nella XVII legislatura*, in *Rivista AIC*, no. 1/2019, 302-333.

²⁴ Decision no. [128/2008](#) and, previously, decision no. [171/2007](#) Constitutional Court. Furthermore, in decision no. [22/2012](#), the Constitutional Court declares for the first time the unconstitutionality of a provision introduced with the confirmation of the law-decree, due to its clear extraneousness with respect to the original content of the law-decree. Even earlier on this point, Q. CAMERLENGO, *Il decreto legge e le disposizioni “eccentriche” introdotte in sede di conversione*, in *Rass. Parl.*, 2011, 91-120.

²⁵ [Report 2017-2018](#), 8, confirmed by [Report 2019-2020](#), 23. This data was considered an element leading to doubts on the theory that see in the governmental use of emergency decrees an attempt to get around parliamentary discussions. But the extremely heterogeneous content of decree-laws, the limited timeframes for discussing and approving them, and the subdivision into many commissions are still all elements that hinder a serious parliamentary discussion. See E. AURELI, *L’uso del decreto legge*, cit., 306-314.

²⁶ *Ex plurimis*, Decision no. [80/2012](#) Constitutional Court.

²⁷ We note, from the opposite perspective, decision no. [251/2016](#) Constitutional Court, which declared the unconstitutionality of the content of a delegation law, involving a number of legislative decrees as well. On this point, see N. LUPO, *Il Governo italiano, settanta anni dopo*, in *Rivista AIC*, no. 3/2018, 189.

²⁸ Take, for example, the practice of introducing other restrictions, such as the advice given by parliamentary Commissions in order to overcome the absence of criteria required under art. 76 Const. R. BIN – G. PITRUZZELLA, *Diritto costituzionale*, XXI ed., 385-386.

In particular, a phenomenon has been observed, defined as “law *with* delegation”²⁹. In fact, very often the delegation is meant to hold onto laws with a more extensive content, or laws adopted for different reasons, as is the case of the delegation *in* a confirmation law of a decree-law. This procedure risks hindering a serious discussion in Parliament on the delegation, and the discussion risks completely disappearing when the confirmation law is “protected” by a vote of confidence³⁰. So, in this manner, the Parliament rids itself (temporarily, of course) of the legislative function, without a real will to do so.

The last «problematic practice»³¹ that affects the parliamentary exercise of legislative function is that of the vote of confidence on the maxi-amendments. For some time, the doctrine has underlined that these kinds of amendments are rarely compatible with the constitutional architecture of the law-making process, which envisages that parliamentarian will should be «as free as possible»³². Often the approval is locked by the vote of confidence, an instrument which relegates parliamentary discussion (and its will) to the back burner.

Furthermore, we must highlight that starting from the XVII legislature, the practice of institutional *fair play* in which the Government refrained from proposing maxi amendments having content differing from that of the text examined by Parliament³³, was interrupted. This interruption has deteriorated parliamentary discussion even further.

The most evident shift in maxi-amendment praxis took place during the discussions of the budget law for 2019, that is the focus of a case arising out of the separation of powers, that ended with Decision no. [17/2019](#) Constitutional court. The recurring Parliamentarians had complained of a «inaccettabile totale compressione del ruolo delle Camera»³⁴, due to the impossibility, in the Commission and in the Assembly, of examining the content of proposed maxi-amendment, because a vote of confidence had been imposed on it³⁵.

The Court has perhaps demonstrated a cautious approach³⁶, declaring the issue inadmissible, since a violation of parliamentary prerogatives, which must be *very* clear, has not been found³⁷. Moreover, this case law seems to retrace the others on decree-laws, in which the Court has chosen to declare their unconstitutionality only in the face of violations of the Constitution that are «*evidenti*», «*manifeste*», «*palesi*», leaving significant room in the relationship between the Parliament and the Government. But in decision no. [17/2019](#), the Court also emphasised the importance of reducing practices that undermine the role of law as a place for public and democratic conciliation of various different interests at stake³⁸.

²⁹ M. CAVINO, *Le fonti del diritto*, in *Vent'anni di Costituzione*, cit., 336.

³⁰ See M. CAVINO, *Le fonti del diritto*, cit., 336-337, analysing decision no. [237/2013](#) Constitutional Court; on this topic, see also A. RUGGERI, *La impossibile “omogeneità” di decreti-legge e leggi di conversione, per effetto della immissione in queste ultime di norme di delega (a prima lettura di Corte cost. n. 237 del 2013)*, in *Forum di Quaderni costituzionali*, *Rassegna*, no. 11/2013, 1-9.

³¹ ¶ 5 «considerato in diritto», decision no. [251/2014](#) Constitutional Court, as recalled by N. LUPO, *I maxi-emenamenti e la Corte costituzionale (dopo l'ordinanza n. 17 del 2019)*, in *Osservatorio delle fonti*, no. 1/2019, 6.

³² On this point, see the extensive discussions by A. RUGGERI, *In tema di norme intrusive e questioni di fiducia, ovverosia della disomogeneità dei testi di legge e dei suoi possibili rimedi*, in *Federalismi.it*, n. 19/2009, 1-11.

³³ N. LUPO, *I maxi-emendamenti*, cit., 4.

³⁴ ¶ 8 «ritenuto in fatto», decision no. [17/2019](#) Constitutional Court.

³⁵ On the budget session 2020 and on the repetition of practices seen before – except for the government maxi-amendment – see C. BERGONZINI, *La sessione di bilancio 2020, tra pandemia e conferma delle peggiori prassi*, in *Oss. Cost.*, no. 1/2021, 215-232.

³⁶ It is very difficult to imagine a more severe violation than the one that happened in this procedure. See A. ANZON DEMMIG, *Conflitto tra poteri dello Stato o ricorso individuale a tutela dei diritti?* in *Giur. Cost.*, no. 1/2019, 189, and M. MANETTI, *La tutela delle minoranze parlamentari si perde nel labirinto degli interna corporis acta*, *ibid.*, 193. This case-law was recently confirmed by decisions nos. [274-275/2019](#) and no. [60/2020](#) Constitutional Court.

³⁷ On the reasons given by the Court see the «considerato in diritto». Critical, *ex multis*, A. RUGGERI, *Il “giusto” procedimento legislativo in attesa di garanzie non meramente promesse da parte della Consulta*, in *Rivista AIC*, no. 2/2019, 597-610.

³⁸ ¶ 4.3 «considerato in diritto», decision no. [17/2019](#) Constitutional Court.

We must stress that a new institutional behaviour, that impacts on the role of Parliament, has arisen in the context of the emergency caused by the pandemic of Covid-19, especially in the initial period of the emergency. The Government, instead of using numerous decree-laws, imposed in decree-law no. 9/2020 the conditions aimed at facing (partially) the emergency using a different act: Prime Minister Decree (D.P.C.M.)³⁹. As this practice of few decree-laws and many D.P.C.M.s continued, later we observe that there has been a partial reaffirmation of the Parliament through the confirmation of decree-law no. 19/2020, which included an amendment that imposes on the Government an obligation to illustrate Prime Minister decrees to the Chambers before their adoption. In this manner, it is possible for Parliament at least to elaborate suggestions⁴⁰.

Even if this last institutional behaviour is non-structural, since it is linked with the management of the pandemic⁴¹, the other described practices relegated the Parliament to a secondary role, since not only did it lose its prominence in the exercise of its legislative function, but it also walks in the shadow of the Government, retaining a merely formal, if not ancillary, role.

Given the annihilation of parliamentary discussion⁴², it seems very difficult to consider this a reorganization of the exercise of legislative function. And this holds true regardless of recognition of the Parliament's ownership of such function. In these circumstances, the ownership of the legislative function seems impaired since it is devoid of substance if there is no genuine and aware exercise of such function.

Therefore, the spread of practices that reduce or eliminate discussions on the content of normative acts, which seriously impairs the will of each Parliamentarian, *also* causes deterioration in the ownership of the legislative function, and not merely its exercise.

This degradation could ultimately lead to a "chemical" transformation of the Italian form of Government. We are facing practices that appear divergent with respect to the Constitution and, if they become consolidated⁴³, they could lead to a different legal system and not just to a new layout of institutional equilibria.

In addition, the progressive removal of discussions on laws prevents Parliament from reaching a reconciliation of requests coming from society⁴⁴, which is the heart of the legislative function. Increasingly often we are witnessing the affirmation of a binary "yes/no" approach, which is genetically extraneous to the notion of parliamentary discussion⁴⁵, but very common today and its political parties.

This circumstance must be kept in consideration since the solutions proposed to save the parliamentary ownership of the legislative function will not be totally effective, if there is no resurrection of the concept of representation, which continues to foster discussions and conciliation among differing interests.

³⁹ Among the first analyses see M. CAVINO, *Covid-19. Una prima lettura dei provvedimenti adottati dal Governo*, in [Federalismi.it](#), no. 1/Osservatorio emergenza Covid, 1-9, M. LUCIANI, *Il sistema delle fonti del diritto alla prova dell'emergenza*, in M. LUCIANI, *Il sistema delle fonti del diritto alla prova dell'emergenza*, in [Il diritto pubblico della pandemia](#), in *Liber Amicorum per Pasquale Costanzo*, II, Genova, 2020, 9.

⁴⁰ For a reconstruction of the steps that led to a *parliamentarisation* of the management of the pandemic, see V. LIPPOLIS, *Il Rapporto Parlamento-Governo nel tempo della pandemia*, in [Rivista AIC](#), no. 1/2021, 268-277.

⁴¹ For future, we should collect suggestions from M. LUCIANI, *Il Sistema*, cit., 120 and 141, and control that the extraordinary do not become ordinary.

⁴² Even at the beginning of the XVIII legislature, we see this phenomenon, with the formation of the Conte I Cabinet. A return to the centrality of Parliament took place during the formation of Conte II Cabinet. See Q. CAMERLENGO, *La forma di governo parlamentare nella transizione dal primo al secondo esecutivo Conte: verso un ritorno alla normalità costituzionale?*, in [Osservatorio costituzionale](#), no. 5/2019, 13-24. An analysis of parliamentary discussion at the beginning of the XVIII legislature is offered by C. F. FERRAJOLI, *Le Camere non discutono più. Crisi del dibattito parlamentare e irresponsabilità politica degli organi rappresentativi*, in *Lo Stato*, no. 13/2019, 29-45.

⁴³ If these practices had the strength to become full-fledged constitutional conventions, this would be a problematic hypothesis that would need to be studied. On this point, see the studies collected in A. BARBERA, T. F. GIUPPONI, *La prassi degli organi costituzionali*, Bologna, 2008.

⁴⁴ See G. AZZARITI, *Le trasformazioni dell'istituzione parlamentare: da luogo del compromesso a strumento tecnico della divisione del lavoro. Considerazioni conclusive*, in *Le trasformazioni*, cit., 112.

⁴⁵ A. D'ATENA, *Tensioni e sfide della democrazia*, in [Rivista AIC](#), no. 1/2018, 13-15.

3. Suggestions to ensure the legislative function ownership

Among many possible solutions for correcting the described practices, the one that seems – for now – the most adequate is a reform of Parliamentary Rules, moving in the direction of restoring the constitutional equilibria of the legislative function⁴⁶.

In the doctrine, there have been recent debates on the reduction of the role of the Chambers – not just a quantitative reduction, but also a qualitative one. The solution often proposed is to enhance the parliamentary control function.

The assumption underlying such theory, even if there are various points of view on several different versions of the theory, seems to be the acceptance of one circumstance: outside the legal system, we are witnessing so many transformations that a overhaul of the role of Parliament is necessary, even without a modification of the Constitution⁴⁷.

Even if this assumption were incontrovertible, we ask ourselves whether the overhaul of the Parliament must entail the acceptance of loss of ownership of the legislative function, to be balanced with an enhancement of the control function.

First of all, it is worthwhile to clarify that the control function is inherent in the parliamentary legal system, since the action of the Government is always subject to evaluation and confirmation by the political representation body, which can express a vote of no confidence on the Government⁴⁸, causing its resignation, without its concomitant fall⁴⁹. In this manner, the function would extend itself to all functions exercised by the Parliament over the Government and would consist in verifying the controlled institutional action. As a result, the control function would be transversal⁵⁰.

Focusing specific attention on the relationship with the normative function, the proposals would recommend a much more specific «legislative control»⁵¹. In particular, what is proposed is to enhance the parliamentary inquiry, as implicitly provided under art. 72 Const.⁵² – to be read in conjunction with art. 70 Const. on the parliamentary ownership of the legislative function⁵³ – which had been provided only under art. 79 Chamber Rules, from 1997.

Without doubt, inquiry is an important step in the law-making process since it allows the law to perform its function of regulating society with «full cognition»⁵⁴. We certainly can affirm that an in-depth and adequate inquiry is a necessary condition, but still not enough to save the Chambers' effective ownership of the legislative function. Indeed, the inquiry may be sacrificed by the practices analysed⁵⁵: take, for example, how it vanishes due to the vote of confidence on a maxi-amendment

⁴⁶ See N. LUPO, *Funzioni, organizzazione e procedimenti parlamentari: quali spazi per una riforma (coordinata) dei regolamenti parlamentari?*, in [Federalismi.it](#), special no. 1/2018, 14-16.

⁴⁷ *Ex multis*, F. DAL CANTO, *Tendenze della normazione, crisi del Parlamento e possibili prospettive*, in [Federalismi.it](#), special n. 3/2019, 41-43; P. PICCIACCHIA, *La funzione del controllo parlamentare in trasformazione*, *ibidem*, 134-137; A. MANZELLA, *L'opposizione in regime di parlamentarismo assoluto*, [Federalismi.it](#), *ibidem*, 279-283. More in general, the studies collected in a volume M. Cavino, L. Conte (edited by), *Le trasformazioni*, cit.

⁴⁸ We may note as part of the relationship of confidence the «procedimentalizzazione più compiuta» of the control function, but this is not the only one, A. MANZELLA, *Il parlamento come organo costituzionale di controllo*, in [Nomos](#), n. 1/2017, 6.

⁴⁹ A. D'ANDREA, *Le funzioni di controllo: dal Parlamento controllore al Parlamento controllato*, in *Le trasformazioni*, cit., 91-96.

⁵⁰ N. LUPO, *La funzione di controllo parlamentare nell'ordinamento italiano*, in [Amministrazione in cammino](#), 2009, 3-4. On the difficulties in restricting notions and effects of parliamentary control, see P. PICCIACCHIA, *La funzione di controllo*, cit., 137-140.

⁵¹ A. MANZELLA, *L'opposizione*, cit., 282.

⁵² F. DAL CANTO, *Tendenze della normazione*, cit., 50.

⁵³ Q. CAMERLENGO, *L'istruttoria legislativa ed il sindacato di costituzionalità*, in *Giur. Cost.*, n. 3/2012, 2457-2481, especially 2460-2461.

⁵⁴ Q. CAMERLENGO, *L'istruttoria legislativa*, cit., 2462.

⁵⁵ See A. D'ANDREA, *Le funzioni di controllo*, cit., 101-102.

on a confirmation law⁵⁶. Therefore, it is necessary to restore the identification of ownership and exercise of the legislative function, and after that, to enhance the inquiry phase.

In addition to the foregoing, we need to add another consideration: Parliament, because it is the place of national political representation, *cannot* give up the legislative function because the electoral game is played in it⁵⁷. A technical control over government acts cannot be enough since Parliament must participate effectively in the normative procedures. Moreover, the consequence of the exercise of the control function is to bolster the responsibility of Government. On closer look, this does not allow for a real parliamentary impact on interests affected by a normative act, even if the preventive control is strengthened⁵⁸. At the same time, however, it is on the representative level that we encounter the greatest difficulties, since the examined practices are just the most evident aspect of a more profound degradation that is affecting the Parliament *as* the centre of political representation. This degradation impacts the representative concept itself and shows up through the elimination of dialogue between opposing parties, in favour of a binary approach, that is typical of direct democracy and not of representative democracy.

For this reason, as we face this degradation, the real question is whether we want to save the Parliament's *ownership* of the legislative function. If the answer is affirmative, it will not be enough the enhance of control function⁵⁹, but it will be necessary also to streamline the practices analysed⁶⁰, and to achieve a decisive restoration of the representative branch⁶¹.

This is the real challenge we face. To win, the proposed amendment to the Chambers Rules should restore the exercise and the ownership of the legislative function, without forgetting the circumstances that have led the Government to assume a more decisive role in the exercise of the normative function.

Maybe it is necessary to think of the legislative function as a *genus*, which encompasses two *species*: a "technical" one, exercised also with the Government, and a "political" one, without any sharing. In the first type, we can imagine that the political aspect of legislative function is mixed with a technical aspect. This type encompasses the practices analysed and must be regulated to reflect more constitutional procedures where the technical aspect does not prevail on the political aspect. In the second type, the Chambers must exercise the more traditional legislative function, which rendered them the centre of political representation.

Parliament must not retreat in the face of high political choices which qualified the nature of a State and, at the same time, it must effectively participate in the adoption of normative acts deriving from a legislative function that is shared with the Government. This could be a (partial) solution to reverse the current trend toward constitutional degradation and to avoid the risk of an irreversible constitutional break.

⁵⁶ A practice which had serious adverse effects on the inquiry procedure pursuant to art. 79, Chamber Rules, together with that of referring the discussion of projects to the Assembly even when the preliminary investigation has not been completed or has not even begun. See N. LUPO, *La funzione di controllo*, cit., 12-13. On art. 79 Chamber Rules, discusses the «occasione mancata» F. DAL CANTO, *Tendenze della normazione*, cit., 48.

⁵⁷ V. LIPPOLIS, *Un parlamento sotto attacco e in crisi di identità*, in Federalismi.it, special no. 3/2019, 253.

⁵⁸ On this point, P. PICIACCHIA, *La funzione di controllo*, cit., 142-144.

⁵⁹ The constitutional reform of 2016 had attempted to move in this direction and seemed to be inspired by the French constitutional reform of 2008, which had bolstered parliamentary control. See N. LUPO, *Funzioni, organizzazione, procedimenti*, cit., 20. But in France, we have a different form of Government, i.e., a semi-presidential one, where the relationship between Government-Parliament-citizens is partially different from that seen in the parliamentary form of government.

⁶⁰ One scholar defines as «problemi non risolti delle due Camere» those concerning the legislative function: G. BRUNELLI, *Il Parlamento*, cit., 14. Note that during the XVII legislature, a process to reform the Chambers Rules had begun, but only ended in the Senate and without the expected results, as evidenced by the content of decision no. [17/2019](#) Constitutional Court.

⁶¹ G. AZZARITI, *Le trasformazioni*, cit.